ADR NEWS

Volume 4 Special "ADR DAY" Issue 7th May 2004

For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

ADR DAY

UNIVERSITY OF GLAMORGAN

School of Law and School of Technology

Wales Branch | In association with the | Law & Technology

CHARTERED INSTITUTE OF ARBITRATORS

"OPENING ADDRESS"

The theme for both this morning's session and this afternoon's CIArb Adjudication Forum is "Construction Disputes their avoidance and resolution". Various speakers throughout the day will review the various methods which are now being adopted to ***resolve*** construction disputes in the industry. Colin Jones (Project Manager at Caerphilly County Borough Council) will talk to us about his experiences of a partnering project at New Tredegar and whether he considers a collaborative approach to project procurement does indeed ***avoid*** disputes and more importantly the development of a claims and adversarial culture which has for so long been a feature of our industry both during the project and post project completion.

"ADR DAY"

A full day of papers, discussion and live demonstrations on aspects of ADR that impact upon the construction industry, by the University of Glamorgan, Schools of "Law" and "Technology (Built Environment)" in association with the Chartered Institute of Arbitrators (Wales Branch) held on the 7th May 2004. The morning session canvassed dispute avoidance, management and settlement, The afternoon "Adjudication Forum" session concentrated on construction adjudication under the Housing Grants, Construction and Regeneration Act 1996.

Contents

ADR – Alternative Dispute Resolution is itself a term which now needs some clarification as a plethora of definitions exist both within industry, academia and the legal profession. For the purposes of today's proceedings we will treat ADR as meaning key forms of dispute resolution alternative to established litigation/court based resolution and will include discussion of ADR methods such as Arbitration, Adjudication, Mediation/Conciliation, Mini Trial and Expert Determination. Geoffrey (Former Chairman of the Chartered Institute of Arbitrators) will focus his attention on arbitration and Corbett (senior lecturer in ADR in the Law School) will carry out a general review of ADR methods set out above.

So why has ADR been embraced so widely by our industry – the cynics amongst us would say because the Government via the Construction Act 1996, the Arbitration Act 1996 and the Woolf Reforms forced the industry to look beyond litigation and arbitration to more informal, speedier and inexpensive methods of dispute resolution. The courts too have played their part in giving effect to such legislation and increasing judicial opinion finds judges advising parties who have opted in contracts to resolve their disputes via e.g. mediation to go to mediation and stay out of the courts. See e.g. the case of ***Dunnett v Railtrack.***

The JCT, have in their most recent industry standard form of contract namely Major Projects Contract 2003 provided for mediation, adjudication and interestingly litigation if the dispute remains unresolved . Other industry standard form construction contracts such as the ECC (formerly NEC contract), PPC2000 Partnering Contract , ICE 7th etc all provide for detailed dispute resolution provisions to resolve disputes outside the court process.

ADR developed in this country because the litigation process, in short, was failing to meet the needs of an ever increasingly sophisticated and litigious construction industry – the courts had gained a reputation for being expensive, slow and providing judicial opinion from judges who sometimes lacked the technical skills to decide difficult and complex construction disputes. There was a need for a speedier response to resolving disputes handled by experts with the necessary technical skills. Arbitration too was perceived as equally not responding to the needs of the industry and was considered by many as nothing more or nothing less than litigation but with the added expense of having to pay for both the Arbitrator and the venue. Geoffrey may well take issue with this point! Mediation / Conciliation was slowly developing as an alternative to litigation and arbitration but critics in the industry considered such methods did not readily lend themselves to the resolution of construction disputes – a view very much open to discussion.

Coupled with this dissatisfaction of what was on offer in terms of resolving disputes the Government also recognised the need to address the difficulties of why disputes occur so frequently on construction projects which leads to a culture of blame. Further the Govt wished to discover why projects in the UK are frequently over budget , over time and are often of poor quality with an uneven allocation of risk and responsibility amongst Client and construction team. The result was the development and publication of two industry reports by Sir Michael Latham and Sir John Egan entitled "Constructing the Team" and "Rethinking Construction". Both Latham and Egan reported on an industry in need of more effective methods to resolve disputes and proposed **adjudication** as a speedy and effective dispute resolution method aimed at preserving the ever difficult cash flow crisis especially for those further down the supply chain. Corbett and various speakers at this afternoon's Forum will cover in detail what adjudication involves both generally and under the Housing Grants Construction and Regeneration Act 1996 but briefly it is a form of dispute resolution where an impartial third party is given approximately 28 days to reach a decision on the dispute referred to him by a party under a Construction contract (the latter being defined in the Act). What promised to be a simple process of dispute resolution to meet the needs of the industry has provided lawyers with the opportunity for much legal debate on the interpretation of the adjudication legislation and for my immediate purposes and the opening presentation – ***" What is a dispute"*** for the purposes of adjudication and arbitration.

Latham and Egan also recognised that the industry would be better served if the culture could change from focusing on blame allocation to avoiding disputes altogether – the latter would and will present the greater challenge for our industry as it will require much culture change from an industry which has been driven in the past by the old adversarial approach by Contractors of " tender low and claim high" to more collaborative based working where the project itself is the focus. Partnering philosophy and values such as working in mutual trust and confidence to ensure the project is delivered in accordance with 'Best Value', 'Best Time', 'Best Quality' and placing the risk on parties best able to manage the it are today's new buzz words and we look forward to Colin's views on the workings of the partnering arrangements and whether indeed partnering can help in the procurement of construction projects without adversarial disputes and claims.

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Chartered Institute of Arbitrators

Local Membership Inquiries :
Dennis Baldwin,
Chairman CIArb Wales Branch
C/O Soma Contract Services Ltd
17 Gold Tops, Newport, Gwent, NP20 4PH
Tel: 01633 246828

CENTRAL OFFICE
International Arbitration & Mediation Centre
12 Bloomsbury Square
London WC1A 2LP
Web: www.arbitrators.org

"AN OVERVIEW OF ARBITRATION"

by Geoffrey M Beresford Hartwell •

Introduction :

In my study I have several shelves of books on Arbitration and other methods of dispute resolution. One leading textbook [1] has 830 Pages, another is in two volumes.[2] I find that frustrating, because commercial arbitration is the simplest and most obvious of solutions to problems between traders and their customers; as old as trade itself.

I won't attempt to distil all those books, not even the 830 pages, in this short talk. What I will try to do is explain the nature of Arbitration and discuss its application in the construction industry world wide.

First, however, it is important to understand what arbitration is not. It is not a process at law. It is not a legal process, in the strict sense. Of course it not illegal, it is a legitimate process, a licit process, but not a process at Law. By that I mean that the authority of the state is not invoked, the authority of an arbitral tribuna, such as it is, is no more and no less than the authority the disputing parties agree to give it. Of course, the Courts of the Land, whatever land that is, are available to enforce the outcome of an arbitration, but only then as any contractual arrangements fall to be enforced when parties disregard them. Arbitration is a private process and not a derogation of any Sovereign power[3].

I say that because there is a lot of misunderstanding. People talk about 'taking someone to arbitration' even about 'threatening arbitration', in much the same way as they talk about threatening a Court action. But that is nonsense, especially in construction. Arbitration is built into most forms of contract. It is a natural way to resolve issues that arise and the parties to a construction contract must have in mind that arbitration, or something like it,[4] is how they will resolve matters.

Arbitration is a method whereby the parties to a contract, or any parties in dispute, resolve their differences themselves, with the help of a third party[5] they engage for the purpose.

For a stricter definition, I refer you to the Shorter Oxford English Dictionary. ***"Arbitration:*** *The settlement of a dispute by one to whom the parties agree to refer their claims in order to obtain an equitable decision".*[6]

In the note to that definition, the compilers refer to a definition by Blackstone: ***"Arbitration Bond*** *- a bond entered into by two or more parties to abide by the decision of an Arbitrator."*

That is all there is to it. Two definitions. The first a simple statement which defines the process, the second a statement of the means which gives binding effect to the result. As it happens, modern legislation has made it unnecessary, in most countries, for there to be a formal bond. Generally a written agreement will suffice and that may be an express agreement or an agreement by reference.

Let me look at that definition again: *"The settlement of a dispute by one to whom the parties agree to refer their claims in order to obtain an equitable decision."*

Note the emphasis on agreement. No Courts, no judges, just "one to whom the parties agree to refer". Note also the "equitable decision". That is reflected in the English Arbitration Act 1996 in Section 1 " the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" The key word is "fair" . Some restrictive lawyers may argue that the Act requires only a fair process, but the English is crystal clear. The Act requires a fair resolution, a fair outcome. And that must be right. The Act was purported to be a consolidating act and the ordinary meaning of the language is unchanged.

And, in case any one doubts the freedom from procedural restraints of all kinds, the English Act goes on to state that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". I should say that many countries include provisions for arbitration within codes of civil procedure, but the common feature is this essential freedom of the process.

The reason behind this approach is the arbitration is of prime importance in enabling disputed matters to

• Eur Ing Prof Geoffrey M Beresford Hartwell, Chairman CIArb 1997.

[1] *The Law and Practice of Commercial Arbitration in England*, Sir Michael J. Mustill and Stewart C. Boyd, Butterworths 1989, ISBN 0 406 31124 2.

[2] *Arbitration Law*, Robert Merkin, (looseleaf) Lloyd's of London Press, 1991 (first published) ISBN 1 85044 367 X.

[3] *Arbitration and the Sovereign Power*, Geoffrey M. Beresford Hartwell, Journal of International Arbitration 17(2) 11-18, 2000.

[4] In the United Kingdom, Adjudication, under the Housing Grants, Construction and Regeneration Act 1996, has become the principal means of determining disputes in construction.

[5] A Third Party who may be a group of three or some other number, but the principle remains the same.

[6] Shorter Oxford English Dictionary 1634

be resolved by private determination without Court intervention; that is to say without State intervention. Moreover, arbitration can be truly international. Neither party has to be subject to the Courts of any State, not even the State in which the transaction is made or where one or the other party is domiciled. The New York Convention[7] enjoins signatory states to observe arbitral award made in other countries and there are some 130 or so countries who have signed the Convention. The only grounds upon which such enforcement may be refused are the common-sense grounds that there was no arbitral agreement or that the arbitration was carried out unfairly, or that the subject matter either is not amenable to arbitration or is contrary to public policy in the place where enforcement is sought.

What is the background of this state of affairs, and how is it relevant for building and engineering, for construction?

As I said when we started, the history of arbitration is as old as the history of trade itself; probably older than Law, if by Law we mean the Laws of Nation States and the apparatus for imposing them. Its roots lie in the power of humankind to communicate and interact socially. Interacting socially involves making bargains, whether in trade or in more general relationships. Implicit in the idea of a bargain is that the parties to it may or may not comply with their bargain and that there may come times when it is not equally clear to both whether the bargain has been kept or not.

For example, I grow apples on some ground I have enclosed, and you grow peaches in a similar piece of ground. An apple orchard and a peach grove. In Arcadia.

You and I agree to exchange a bag of apples for a bag of peaches. Maybe we do that every year, I don't know. Let us assume this is the first time.

Now, peaches bruise more easily and ripen and decay more rapidly than apples, and I don't think you have given me the 100% quality of peaches that I had a right to expect, that would be customary, perhaps.

We aren't going to fight over it, and the nearest Court is miles away and a thousand years in the future.

What we will do is go to our neighbour and mutual friend, whom we trust, and ask him or her to help us to find a way to settle our differences. And we can agree, if it becomes necessary, that we will comply with whatever he or she decides.

And that is all it is, or was. Arbitration. And it worked. If either you or I failed to obey our friend and refused to honour the "Award", it would become known and others would not trade with us any more. No need for enforcement by a Court, no need for the decision maker to have any special authority, we gave him or her all the authority necessary.

Nowadays, Arbitration is recognised by the legal system of almost every country. And it is more or less integrated into the systems of nation states by legislation of various kinds. So, in England, we have the Arbitration Act 1996. If you study arbitration in England and Wales, that is where you will begin.

In construction, it has been the custom for a long time that standard form contracts should include arbitration clauses.[8] Some will provide that, before arbitration, a decision must be obtained from an Engineer, Architect or other supervising officer. The use of such a supervising officer has changed over the years, but it remains the first point of decision in many forms of contract.

The typical arbitration clause will provide that, if there is a dispute (and it remains after the supervising officer has made whatever decision he has to make) one party or the other must give notice of arbitration, usually, but not always, within a prescribed time. Sometimes, If there are to be three arbitrators for example (as in an international context) the party giving notice will nominate an arbitrator. Then it will be up to the other party to nominate another arbitrator and the process to find a third arbitrator or chairman will begin. If there is to be a sole arbitrator, he or she must be agreed.

On the face of it, you might think that the need for agreement could enable a reluctant party to avoid the arbitration altogether. However, the arbitration

[7] United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958). The Convention went into force on 7 June 1959

[8] But the Housing Grants Construction and Regeneration Act 1996 has made a provision for compulsory adjudication a part of every British domestic construction contract. Adjudication is also used extensively in international contracts such as those of FIDIC. Adjudication is very like a kind of rough and ready arbitration and is binding unless further steps (arbitration or litigation) are taken. A complete discussion is a necessary part of understanding the whole topic, but there is no time for it here.

clause will provide for an appointing authority - sometime a national technical institution, some times an arbitration centre, to appoint if there is default.

Moreover, legislation, such as the Arbitration Act 1996, provides powers for the Court to make an appointment if it becomes necessary.

So when we say arbitration is consensual, it is only consensual in the sense that the original agreement is made by consent. A bit like marriage, but any contract is a bit like a marriage. All that follows is based on that first agreement.

A good arbitrator will want to know something about the dispute before making any directions. That is so he or she can decide upon an appropriate process for the particular dispute. Some disputes, especially in construction, require the arbitrator to inspect the site. Some concern interpretation of clauses and can be done completely on examination of papers. Some (not many, if the truth be known) require the oral examination of witnesses.

The arbitrator or arbitrators will never deal privately with one party only. At every stage they will write to both (or to their representatives). Each party must know what the other is saying and what the arbitrator is saying. It is one of the fundamental principles of natural justice, and supported by legislation.

Often, if the amount in issue justifies it, the arbitrator will call a preliminary meeting. The purpose of that will be to meet the parties and any representatives they may have and discuss the case sufficiently to decide upon the best directions. The purpose must always be to control the process so that it is both efficient and fair. It is a way of finding a fair answer to the dispute, not a way for professionals to make money out of the misfortunes of others.

Sometimes, the other party may not respond at all. If that happens, the arbitrator may use his powers to warn that party that he will proceed without him. He may call a preliminary meeting, to discuss with you both, or with your representatives, how the arbitration should be conducted. If one party is not responding, the arbitrator may serve a peremptory notice, saying that he will hear representations at some time and place, proceeding whether or not all are present. The sanction of course, is that he may proceed *ex parte*, that is, hearing one side only. He must be very careful about that, of course, but if he has given every opportunity, he may go on to the next stage and even to the hearing. If there is any doubt about that, the Court may give him specific powers to enable him to proceed (Arbitration Act 1979, S5).

As he is bound to make his award on what is submitted to him in an argument or presented as evidence, it follows that any arbitrator is likely to issue an award against a wilfully absent party. If the proper procedure has been observed, and the arbitrator has clearly been as fair as could be in the circumstances, that award will be as binding as the judgement of a court of law.

An arbitrator may not use his own knowledge to supply evidence which the parties have not submitted; but he will, of course, use his own skill and knowledge in interpreting the facts and in reaching his conclusion, because that is why a commercial arbitrator is used at all. It will be seen, therefore, that the arbitrator can do little or nothing to assist a party who fails to appear before him or fails to produce any evidence.

However, let us assume that both parties come to the preliminary meeting, if there is one. The arbitrator will introduce himself and invite the parties to consider how to go about things. He may remind the parties that they are about to enter on a serious judicial proceeding to determine their dispute. He will want to know if there is only one claim of if there is to be a counterclaim. He will want an idea of how much preparation is needed by each side.

At the preliminary meeting, the arbitrator may issue an 'order for directions'. That will tell everyone what to do next, generally so that each side knows what the other side is going to allege at the hearing. Depending on the circumstances, there may be formal pleadings or he may invite each of the parties to state his case in a circumstantial letter. Nowadays, the claimant often is directed to submit a written statement of his case, accompanied by any documents on which he needs to rely. Then the respondent would give his statement in the same way. That may include a counterclaim if there is one, and the original Claimant will then have an opportunity to give his defence to that.

The directions may be given 'by consent', that is to say that the parties agree to the arrangements. In the absence of agreement, the arbitrator will decide what is to be done. He will be flexible, but his order

does bind the parties to do what he requires and sanctions are available if they fail to do so.

There really is no scope for a would-be Perry Mason in an arbitration, nor in a civil court for that matter. Every step is designed so that the parties know what is claimed against them, what is agreed and what is denied. Once the claim is made, and served on the other party, it cannot be changed without the arbitrator's permission, and he will hear the views of both sides before giving that permission. Not only is that necessary fairness to the parties, but also it helps to avoid time wasting and delay. Perhaps more important, when the parties see their differences clearly set out, they may find it easier to agree to some settlement, which will save them the expense of continuing to the hearing.

Formal pleadings will involve a claim, the defence and any counterclaim, a reply to the defence and a defence to the counterclaim and sometimes a final reply. Their function is to set out the issues which are to be tried. Often they give the parties an opportunity to see the matter more clearly, as a result of which some or all of the issues may be settled, a good arbitrator will always be glad to find himself redundant as the result of a settlement, even if his fees are thereby rather less. Then there will be the process of discovery and inspection, whereby each side tells the other what documents he has which relate in any way to the dispute. When disclosed, those documents must be shown to the other side, unless they are privileged, such as letters between the party and his solicitor in contemplation of the proceedings. Sometimes that stage may be unnecessary; sometimes it may be limited in some way.

When all the interlocutory exchanges are over, there sometimes, but not always, may be another meeting to prepare for the hearing. The arbitrator needs to know how long each side will need for presenting its arguments and examining its witnesses. Everyone needs to agree on when the hearing is to be and on the venue. The arbitrator may weigh up the relationship between the parties. If it is generally amicable, he may suggest an information venue, perhaps his own office or somewhere near the site in dispute. If relations are strained, he will suggest more formal impressive surroundings. There is a lot to be said for a table, at least a metre wide, to separate the two sides!

There may be, in exceptional cases, other things to do before the hearing, such as obtaining depositions from witnesses overseas. A technical dispute will often require an inspection by the arbitrator, or he may decide that operational tests are to be conducted, under his control and in the presence of both parties. Again, if anything needs to be done which requires the assistance of an order of the court, application may be made under the 1979 Act.

I refer again to the advantages of an 'administered arbitration' and, particularly, to the role of the registrar and his staff. Such administered arbitrations are handled by the London Court of International Arbitration, by the Court of Arbitration of the ICC in Paris and by other bodies of the kind. The case will be decided at the hearing. Nevertheless, there is a great deal to be done in the interlocutory stages, and, particularly when the parties are not legally represented, they may find themselves arguing with the arbitrator about what can or cannot be done. Clearly, that is much easier when the parties deal not with the arbitrator, but with the registrar, because it is not the registrar who will have to decide on the case itself. In addition, the cost of administrative work is somewhat cheaper if the registrar and his team look after it. Also, most formal arbitration rules clarify a number of points on the arbitrator's powers, and that can lead to major simplification -- worth bearing in mind.

The Institution of Civil Engineers has devised and published its own rules of procedure. They include some interesting ideas, one of which is the examination of experts, one by the other, without lawyers, arbitration is much used in building and civil engineering and many building professionals become concerned with it. I do not propose, however, to concern myself with that aspect in this article.

The hearing : In the ordinary way, then, we now come to the hearing itself. Each party presents his case and examines his witnesses before the arbitrator. Not every arbitrator takes evidence on oath. It is probably best, except in the simplest of cases, that he should, not because people tell lies, but because like an examination paper, the oath has the advantage of concentrating the mind on the matter in hand. The general rules of evidence apply, although they can be dispensed with, but time can be saved, for example, if documents are agreed, rather than read aloud. Often, where the matter has a technical content, the arbitrator can understand

what a witness is saying, even though the lawyers may be having difficulty. He can save time by asking his own questions, but he must be careful not to introduce new arguments by doing so. There will be times when progress can be made by permitting leading questions; that is, questions which contain the information sought. It is important not to introduce, by leading, matters which are actually disputed, particularly if one of the parties is not represented by a lawyer, and thus may not know when to make an objection. It is not always obvious what is a leading question and what is not. However, little harm results from leading something already written in a statement.

During the hearing, the arbitrator takes notes of what is said. Some like to use a portable tape recorder as well, but only to help in the reading of those notes. If the parties require transcripts to be made, then a professional court shorthand writer is engaged. After all the evidence has been given, each party summarises his case and makes any points of law arising from it. Costs may be argued then or later. The arbitrator then closes the hearing. Within a reasonable time after the hearing -- a week or so, longer in complex cases -- the arbitrator prepares his award.

The award : In the past, a good award simply said what was the result -- who should pay and how much. Reasons were not given or, if they were, were given as part of a separate, informal document, not part of the award. That was to avoid, by a technicality, any scope for setting aside an award 'for an error of law on its face'. Clearly, the less said, the less chance of setting aside. Nowadays, things have changed. Under the 1996 Act, the appeal procedure first introduced in 1979 is developed. Effectively, if the parties have not agreed to dispense with reasons, even nominally separate reasons become part of the award and will be considered by the court when any application is made for leave to appeal. The reasons may not be all that detailed. They need only be sufficient to explain why the arbitrator had decided as he has. In many cases, like those of quality arbitrations, where the arbitrator takes a look and says 'That isn't coffee' or whatever, reasons are unnecessary and will not be given. For most cases in the construction industry, however, one can expect the arbitrator to give his reasons in some detail, if only to satisfy the parties that they have been heard and understood.

It is the right of an arbitrator to write his award and to leave it on the mantlepiece until someone pays for it. Usually, he will advise the parties (some only advise the successful party) of the arbitrator's fees, and often the parties will pay jointly. In major cases, it is likely that some arrangement will have been made to meet the arbitrator's fees as the case progresses. Of course, the payments will have to be adjusted afterwards, according to any order for costs, but the arbitrator os not concerned about that, because the parties are both jointly and severally liable to him for his own costs. There are circumstances in which the court may order him to deliver his award, but conditions may be attached to that. Again, when the arbitration is an 'administered' arbitration, the registrar will deal with the issue of the award once the arbitrator has prepared it.

An award almost always states who is to pay, what amount and to whom. That will include any damages, the balance of any account between the parties, the parties' legal costs (if any are to be awarded) and the arbitrator's own fees and expenses. It should also say when that sum is to be paid. There is an exception to that, in that the parties' costs may be 'to be taxed if not agreed', in which case it is for the parties or their lawyers to argue out the costs between them or, failing that, for the costs to be 'taxed', that is to say assumed as to what has been properly incurred in the conduct of the case, by the arbitrator or by a taxing master in the High Court. In either case, further delay and expense will result. Even if the award is to be the subject of an appeal, it becomes payable when it is issued. If the terms are not met, then the award may be entered as a judgement for execution, just as any judgement of the court. That means that the whole apparatus of the State is available to enforce the award, and similar facilities exist for foreign arbitrators or foreign parties. There is scope for declaratory awards which declare findings of fact or law, but they are not often sought.

What are the advantages of arbitration? Arbitration has some advantages over court proceedings. Perhaps the most obvious example is in an international dispute, where one party does not wish to submit his arguments to the jurisdiction of a foreign court. The reason may be political, or a party may be a government agency in a country where the judiciary is not independent of government. In one such case, one party was British and the other was an agency of an Eastern Bloc

government. The tribunal sat in Switzerland under a Swiss chairman. It was a proceeding under the rules of the International Chamber of Commerce Court of Arbitration. Moreover, as I said to begin with, The New York Convention ensures that awards are enforceable in most jurisdictions.

Another important reason, in domestic and foreign disputes, is that the proceedings are private. The outcome is private, any evidence remains confidential to the parties and the arbitrator, and thus arbitration is particularly useful where the parties do not want others to know their business. Conversely, the findings of one arbitration will not bind the courts or another arbitrator considering another case on similar facts; so arbitration may not be a good way of dealing with a 'test' case, although it could be a useful guide to what might happen in other, similar, cases.

The main practical advantage of arbitration, however, is that it can be conducted more or less to suit the parties involved. The hearing can be wherever suits everyone. There need not be a formal hearing if the parties and the arbitrator think that written submissions will do. The arbitrator can go to the site, if the dispute is about something fixed. Expert witnesses may not be needed.

Parties need not be represented by lawyers; they may appear themselves or they may be represented by lay advocates, a practice which is increasing in the area of building cases. A lay advocate is someone, not a lawyer but usually with some other expertise, who can present a case and question witnesses. Generally, though, I think anyone entering a modern arbitration should do so with legal advice.

If a substantial sum is involved, it is probably as well to engage the services of counsel. There is more to the conduct of a complex case than knowledge of the law, and few lay men have that combination of tactical experience and a touch of showmanship which may be required to present a case at its best. Counsel's role is more than a little like that of an orchestral conductor -- superficially easy, but all we see is the performance and not the legally skilled preparation and arrangement. Nevertheless, there are cases, usually straightforward, matters of fact, which parties may present themselves, and there are others which can be conducted perfectly well by experienced solicitors or lay advocates.

There are other ways in which an arbitration can be simplified. The arbitrator is said to be 'master of his own procedure', and he can cut across many of the usual formalities of court procedure, provided that he does so without restricting the parties' right to a fair hearing. If the parties make full use of this versatility of procedure, arbitration can be swift, effective and economical.

At a time when the courts are very busy, it often will be possible to have a matter settled by arbitration very much more quickly than could be done in the courts. That can be a major advantage, although it may not appeal to a party whose chances of success are not great. It is important that anyone concerned with appointing an arbitrator makes sure that his appointee is reasonably available.

Finally, there is one point which must be emphasised. Although the arbitrator has a great deal of freedom as to procedure, he must make his decision according to law. That means that he cannot just split the difference. It also means that he must listen to both sides and confine himself to considering what they put before him. Although he has been chosen for his general competence, if he proposes to use some special knowledge, he must let the parties know, so they cannot comment on it.

It is sometimes said that an arbitrator will produce a fair result, even if it is not strictly in accordance with law. I am afraid that is not true. If it were, then we would be living under two separate systems of law, with all the uncertainty that would result. Moreover, the courts would not be available to enforce the awards of such arbitrations, which would be of little value. There is an exception to that.

There are arbitration clauses which provide specifically that the arbitrator or arbitrators shall act as *amiable compositeur(s)* or that the award shall be made *ex aequo et bono*. They are more commonly used outside the Common Law jurisdictions. In rough terms, they do allow the arbitrator to achieve a fair result, not disregarding the law, but rather disregarding any palpably unjust effect of legal technicality. Proceedings under these terms will be directed towards the intentions of the parties, to the consequences of their conduct and to a fair result if external circumstances have intervened to cause the difficulties which led to the dispute. In many ways, the concepts adopted, when arbitrators act as *amiable compositeurs*, can be compared with the concepts of equity, linked with the so-called law merchant, the

private international law of traders' custom and practice, which is itself undefined in any strict legal sense.

In asking a tribunal to act in this capacity, the parties are effectively throwing themselves on the mercy of the tribunal in the hope that the tribunal will resolve matters to give a reasonably fair result. Even if it is not law, that result will be enforceable as the product of the parties' agreement. The procedure is rare and, in England, almost unknown. Indeed, one may argue that the fusion of equity and law, in the English system, means that any decision, made in accordance with English Law, should be both just and equitable.

Arbitration will not be the answer to every problem. Consideration should be given to the appointment of conciliators or investigating experts when there is some prospect of success in a less formal approach. Nevertheless, in engineering, submission to arbitration is very much a matter of trial by one's peers and has become an established and settled way of dealing with many kinds of disputes. It is to be hoped that is to the advantage of all.

hartwell@onechancerylane.com

"DISPUTE SETTLEMENT PROCESSES IN THE CONSTRUCTION INDUSTRY"

INTRODUCTION

Modern construction processes are complex and highly technical. The construction process is very fluid and unpredictable. Frequently unanticipated ground site conditions create problems ; designs which looked fine on paper prove to be impracticable ; designs often have to be altered to incorporate new requirements ; labour and material fluctuate in price and supply may be variable ; the intended use of the development may change due to market conditions or because of a change of intended user ; time scales and targets can be set back by inclement weather conditions ; accidents and mistakes can have serious and far reaching consequences, whether by architects, engineers or direct / subcontract constructors. These are the types of issue parties to a construction project need to take into account and allocate risk for in their contract.

Construction contracts can be neatly divided into two parts, the first technical describing the commissioned product and the second allocating risk and financial liability for the product, variations to the works and for other foreseeable though not necessarily anticipated events that might occur during the construction process. Most contracts also provide for contract administration and a mechanism for expert determination of facts likely to be contested by the parties. Contractual mechanisms for the allocation of risk and financial liability are essential but cannot completely prevent disputes arising. Large sums of money tend to be involved. The devil lies in the detail and complexity of contracts. Applying the contract rules to given facts and circumstances leads to contention. Accordingly most contracts contain dispute resolution provisions.

There are a wide range of standard form and in-house contracts used in the construction industry. Some are very basic - most are comprehensive. They vary in user friendliness and the degree of "fairness" achieved in allocating risk and financial responsibility. Whilst it is inevitable that the parties will seek to strike the best financial deal possible, imbalances in the allocation of risk and profit ratios will inevitably lead to disputes since there may be no margin of error and lee way for give and take. Parties frequently fight their corner vigorously because they feel they cannot afford to make concessions and do not have the means to pay.

The failure to resolve disputes promptly can have serious business implications. Disputes cause delay and cash flow problems. Often a party is not prepared to risk "***putting good money after bad***" until an issue is resolved. Projects put on hold suffer from decay and pilferage, exacerbating losses which are frequently irrecoverable. Unresolved disputes and concomitant payment failures are a significant contributor to corporate failures, both of clients, financiers and developers/constructors.

The best way to deal with problems is to anticipate them and work with partners to provide solutions. Communication is essential and partnering procedures which facilitate communication can do much to prevent disputes arising and to manage conflict if and when it does arise. The Resolex contracted mediation process and Dispute Review Boards play a useful role in dispute avoidance and conflict management.

Today I will concentrate only on the dispute resolution process commonly used in the UK construction industry with a view to evaluating their respective benefits and limitations. Sadly, it is often the case that insufficient thought is given to dispute resolution provisions at the contractual stage, the parties simply

selecting a standard form contract "off the shelf" instead of considering which process in the circumstances is most suitable for the project. Some forms offer a choice of dispute resolution process, which at least forces the parties to think about which to select. It is important to make informed choices.

Where a standard form contract does not include a dispute resolution clause the parties are advised to attach/incorporate a dispute resolution provision to prevent disputes arising about how to settle disputes. Even where a standard form contract contains a dispute resolution clause there is scope to amend / modify it. However where the standard form contract providers also operate an in-house dispute resolution service, governed by their own rules of conduct, these are likely to be displaced. Any new / replacement dispute resolution clause should therefore specify a proposed dispute resolution service provider and the rules / regulations / codes of practice that will apply. In particular it may be necessary to specify who will have the power to appoint the dispute resolution practitioner in the absence of agreement between the parties.

The principal processes examined today are expert determination by the contract administrator, judgment by adjudication, arbitration or litigation and negotiated settlement through mediation.

THIRD PARTY DETERMINATION

Whilst the courts (etc) must determine issues in dispute in accordance with "the law" this is no guarantor of "fair, just or reasonable" outcomes. The aim of the court is "***NOT***" to right any imbalance that might exist in the contract but rather to ensure that the duties under the contract are fulfilled and to provide compensation for consequential losses arising out of breaches of those duties. It is essential for the parties to get the contract terms right in the first place. It is not the job of the court to compensate for defects in the procurement process or to increase the price to assist a contractor who has under priced the works, even if the result is that a loss is inevitable. Negotiate appropriate terms in respect of price and other aspects of the performance of the contract. It will be too late to complain later if and when a problem arises.

Whilst the court will apply the law of the land, the principal rules and regulations governing relationships are contained in the contract. The contract is a source of personal law between the parties. There are a wide range of such standard form contracts available, developed over many years and amended in the light of experience to address issues and problems that have arisen, taking into account changes in the law. Theoretically each contract is designed to provide a manual for the efficient and effective operation of a construction project. With the exception of partnering contracts and some of the very recent standard form contract, most contracts favour one or other of the parties. They apportion risk for various aspects of the process and place control in the hands of one or other of the parties or their nominees.

A significant cause of disputes may be attributed to a lack of knowledge and understanding of the procedural requirements of construction contracts, particularly in respect of notices and applications and the payment provisions. It is important to chose your contract well, to know and understand its requirements and to ensure that relevant persons are aware of their responsibilities and rights under the contract.

EXPERT DETERMINATION

Because construction projects involve a wide range of variables and the right to payment depends upon the satisfactory completion of works or part works, which can involve answering highly technical issues, construction contracts often provide for an expert determinator / contract administrator to certify questions of fact that govern the right to payment. The role may be undertaken by an architect, surveyor or engineer, depending upon the form of contract adopted. Sometimes the administrator is directly accountable to the client but increasingly today, contracts such as the Institute of Chemical Engineers (IChemE) state that the administrator must be a wholly independent expert appointed jointly by both parties to the contract and often paid by both. By contrast under FIDIC 1999 the administrator is the employer's man, with the adjudicator providing the independent third party check on abuse.

A major distinction between the expert and the judge is that the expert determines mainly questions of fact, guided by the contract specifications, terms and conditions, not questions of law. The value of using an expert determinator is that many day to day issues that could potentially lead to disputes are dealt with automatically, quickly and inexpensively as a matter of course. However, there is considerable variation between the various contracts regarding the scope of power of determination of the expert, the effect of expert's decisions and finality of the decision and the inter-relationship between expert determinations and

dispute settlement. Contracts frequently make the issuing of a decision by an expert a pre-requisite to a dispute, preventing arbitration / litigation from commencing until after an expert has considered a matter and issued a decision.

Contracts which do not involve the use of an expert determinator often state that payments will only be made in respect of work certified by the site manager who is also required to authorise day works and variations. Such arrangements often lead to dissatisfaction and to disputes, particularly when the site manager, whose job after all is to look after employer's interests, makes his presence known whenever it comes to giving out instructions but becomes mysteriously hard to find whenever a written instruction or authorisation is needed. Often work is done without authorising paperwork, because without the work other essential work is held up, leading to disputes over payment which is not officially due in the absence of written authorisation. Independent expert determination provides a better alternative, but the parties to a contract need to be clear about the terms and conditions under which they operate and choosing the form of contract which provides an effective but fair and balanced mechanism is important.

LITIGATION

Default process : The courts are the principal mechanism for settling civil disputes. Judges are highly qualified, experienced and held in high regard but they tend to be legal experts with little empathy, knowledge or understanding of business/commercial practice and have to be advised by "Experts".

Enforcement powers : The courts have the power to enforce their decisions, so even if a party is no pleased with the outcome, apart from any scope for appeal or judicial review the decision has to be accepted. (Note that the court will also exercise enforcement powers in support of adjudication and arbitration.)

Where there is no dispute about the existence of an obligation to pay monies or about how much monies are due, recourse to a court with the power to enforce payment is the natural and obvious option for a claimant

Time – cost and commitment : The principal disadvantage of using the courts is the time it takes to get to court. Where a fast track process is available it is an attractive option for smaller claims. Most alternatives to litigation ***tend*** to be quicker than the courts, though some are quicker than others. Thus, adjudication and arbitration have a distinct advantage over litigation. Whilst the courts are needed for enforcement, because the court does not have to deal with questions of fact and law, merely issuing an enforcement order, this can normally be achieved relatively quickly.

The longer a dispute drags on the greater the expense for the parties. The failure to resolve problems quickly means that the parties have to allocate both time and money to the resolution process. The sooner a dispute is ended the sooner the involvement of lawyers can be brought to an end. The services of lawyers tends to be expensive so limiting the amount of input required by lawyers can result in significant savings for the parties. Whilst lawyers fees in support of ADR are broadly similar to those involved in litigation, the fact that most ADR processes take less time means legal costs are kept to a minimum.

Privacy : A significant advantage of ADR processes over litigation is that they are private, avoiding adverse publicity and keeping business secrets which could be useful to competitors out of the public domain.

Formality : The courts are very formal and have (despite the impact of the CPR and case management) rigid procedures.

Location : Whilst in the UK the TCC has been rolled out to the provinces, the parties have limited influence over location or the timing of trials which may not accord with business commitments.

ARBITRATION

Arbitration is the principal alternative to litigation for the settlement of construction disputes. In many ways the arbitration process resembles litigation. Arbitrators – "***judges in suits***" - act as private as opposed to a state appointed judges. The arbitrator will make determinations of both fact and law and apply these in order to produce a decision about who must bear legal responsibility and liability for losses arising out of a breach of duty, be it contractual or tortuous, as governed by the terms of any relevant governing contract and, having apportioned liability, will quantify the loss, award damages (if any) and costs.

The potential advantages of arbitration include :

1) Speed to get to the process and often quicker proceedings.

2) The cost of arbitration is often less than the cost of litigation.
3) Less formal than the courts.
4) The parties have control over the process, subject to any agreement to the contrary.
5) Choice of venue and potentially more convenient to the parties and witnesses.
6) Specialist arbitrators with industry experience and knowledge.
7) International awards are globally enforceable by virtue of the New York Convention on the Enforcement of Arbitral Awards.
8) More amenable than courts to choices of law and jurisdiction.

Speed : How long it takes to get to arbitration depends upon the system, if any, put in place by the arbitration service provider. Some arbitration clauses or rules require that the arbitration commences within a specified period of time or enables the parties to specify a time. A governing factor is the availability of a suitable arbitrator or arbitrators and the ability of the parties and the arbitrator to schedule a mutually acceptable time for the hearing. In complex disputes where both parties need a considerable amount of time to prepare for trial, the period lead in time to a court or arbitral hearing may be broadly the same. Because the parties have ultimate control over procedure arbitration can take longer than litigation.

Costs : The cost of arbitration is extremely variable. Fixed cost and fixed time, fast track arbitral processes are cost effective, particularly for small sub-contractors but they are not usually used for main contracts since the complex issues that tend to arise arguably do not lend themselves to limited proceedings.

Arbitrators are relatively expensive. There is no difference between legal representation rates for arbitration and litigation.

The parties will also have to pay the arbitrator(s)' accommodation and disbursements. The parties will have to pay for the venue, which unlike the courts will not be subsidised by the state.

The filing fees and administrative charges can be very expensive and may involve substantial deposits. Savings will only occur if the parties exercise restraint when controlling the arbitration process, keeping hearing within tight schedules.

If an arbitral award is appealed or subject to judicial review costs will escalate.

Judicial review provides a protective device against unfair and incompetent arbitrators and is thus valuable, but if the parties so wish the potential for review can be severely restricted by the parties agreeing to an award without reasons, which makes judicial review almost impossible.

Where the parties so require, an arbitration clause can exclude appeal.

Formality : Arbitral hearing are conducted in private rooms not courts, are less imposing and do not have court officials and strict codes of conduct for addressing the arbitrator. Rules of civil procedure do not apply. How formal the proceedings are depends very much on the personality of the tribunal. Arbitrators do no wear gowns and are normally addressed as Sir or by name. However, the broad functions of a tribunal and a court are the same, so parties can anticipate that the tribunal will control the proceedings with a firm hand and it is likely that witnesses and experts will be required to take an oath of some sort and be subject to cross questioning. Arbitration may be adversarial though it is more likely that the modern arbitrator will adopt an inquisitorial role and take the initiative in the discovery of facts and evidence.

The parties together (assuming they can agree) have considerable autonomy over arbitral procedure but often exercise this in advance at the contract stage. Autonomy covers issues such as the time allocated for each party to present their case, the extent to which witnesses and expert opinion is permitted and the time allocated for cross questioning. They may stipulate that only affidavit evidence is permitted, that expert opinion be limited to written reports or that a single expert be appointed to advise the tribunal.

The UNCITRAL MODEL LAW and the UNCITRAL ARBITRATION RULES have done much to ensure that modern international arbitral proceedings are cost effective, fair and efficient and modern arbitrators have considerable powers to keep the process on track, balancing the demands of the respective parties against the need for hearings which are proportionate to the size and value of the dispute at hand. Many countries have adopted the MODEL LAW or introduced reforms reflecting its aims and objectives. Thus the UK

introduced a new Arbitration Act in 1996. The Act also requires the courts to play a supportive role to the arbitration process and severely restricts the powers of the court to interfere with the process.

Convenience : The location of courts is fixed. Whilst some arbitration service providers have dedicated premises it is normally possible for a tribunal to convene at any location mutually acceptable to the arbitrator and the parties. The parties negotiate the time for the hearing whereas a court will allocate a time whether it suits the parties or not. However, availability of the arbitrator may result in hard choices and some degree of inconvenience.

Specialism : Judges are allocated to a trial by the state. The parties have little or no influence over the allocation and the grounds for objection to an appointment are limited. Arbitration regulatory bodies and arbitration service providing bodies set high standards for the qualifications of their listed arbitrators, many of whom become extremely well known in due course to the business community. Depending on the appointment mechanism for the tribunal the parties may appoint the tribunal by mutual agreement or alternatively select the panel from a list provided by an arbitral institution. Often in the case of three panel tribunals each party selects an arbitrator and the two selected arbitrators select a third as chairman or umpire. Where the parties are unable to agree, a court or arbitral institution may appoint the tribunal. Some contracts provide for direct institutional appointment. The contract or institutional rules may, in the case of international disputes, require that the tribunal is composed of overseas arbitrators or that the chairman is foreign to both parties. It is normally possible to request an alternative nomination if the parties do not consent to institutional appointment. To a very large extent the parties rely heavily on the expertise, reputation and integrity of the institutional body that is involved in the appointment of the tribunal and regulation of the arbitration proceedings.

International Enforceability : The international coverage of the New York Convention on the Enforceability of Arbitral Awards is very wide but not every state is a signatory. The result is that international arbitral awards are readily enforceable worldwide, with all major states enforcing the convention.

The Convention itself provides a mechanism for challenging enforceability on the grounds of breach of due process (judicial review), illegality, lack of and excess of jurisdiction by the arbitrator and for public policy reasons. This provides a valuable safeguard against abuse. Challenges are however restricted to the extent that often the governing procedural law will require a party to raise objections to breaches of due process and jurisdiction during the hearings, so that in practical terms only a person who has refused to participate or has not been given sufficient notice or opportunity to participate can rely on these grounds to prevent an award being enforced.

It should be noted that, rather than challenge the enforceability of an award, a party may either appeal against an arbitral decision or apply for judicial review, assuming the party can establish grounds for appeal or review and or that there is a right to appeal under the contract. A contract can state that an award is final and binding preventing appeal. This guarantees finality and protects the privacy of the arbitral process. As observed above, judicial review is severely restricted if, as is common in the US the award is made without reasons. Under the Arbitration Act 1996 in the UK and likewise under the UNCITRAL MODEL LAW reasoned awards are required unless the parties specifically otherwise agree.

Choice of Law : It is very important in international contracts to determine the substantive law that will govern a contract. Apart from the unifying effect of international conventions such as the Vienna Convention on the International Sales of Goods there is little global uniformity in commercial law. The statutory rights and duties of the parties to commercial contracts vary in many ways from country to country and rules governing offer, acceptance, rectification of contractual terms, frustration, mistake, undue influence, legality and remedies for breach contract vary in significant ways. Contracts tend to be written with the laws of a particular state in mind and different versions may exist for projects in different countries. Incorporating international conventions is one way of reducing the problem.

Choice of Jurisdiction : This is closely related to but distinct from the choice of arbitral seat. The parties may chose to have disputes settled by the courts of a particular state, which is a simple choice of jurisdiction clause. However, if the dispute is to be settled by arbitration, the courts will play a secondary rather than a primary role. The procedural law of the state where the seat of the arbitration is located will govern the

arbitral process. Thus an arbitration subject to English Law and Jurisdiction will be subject to the rules of arbitration procedure set out in the Arbitration Act 1996. The Act determines the powers of the court in support of the process, the default powers and duties of the arbitrator, and a number of mandatory statutory rules which cannot be overridden by the parties.

ADJUDICATION

A number of domestic standard form construction contracts[9] and international standard form construction contracts provide adjudication facilities.[10] The ICC[11] provides a pre-arbitral procedure for the settlement of all types of dispute be it construction or commercial. The process resembles adjudication.

Adjudication here is used in a specialist, technical sense, rather than the general meaning of the word which applies to what all judges and arbitrators do, which is "***to adjudicate***". What then is this thing called adjudication ? In essence it is a method of achieving a quick decision, using an inquisitorial / pro-active approach, with limited hearings, which is immediately binding upon the parties but is not a final resolution of the dispute because the parties can subsequently proceed to a full, start from scratch / "***de nouvo***" arbitral hearing, which may reach a completely different result to the adjudicator and require repayment of monies and a fresh award, turning winners into losers and vice versa. Apart from the temporary finality of the decision, adjudication closely resembles fast track arbitration, sharing many of its central features, such as peer review, privacy (unless challenged on enforcement) flexibility and informality.

The adjudication process so impressed the UK legislators that by virtue of **Part II Housing Grants Construction and Regeneration Act 1996**[12] they made it compulsory, at the option of either party to a UK construction dispute. However, overseas construction disputes are not subject to the provisions of the Act even where the law of England & Wales applies to the contract. Australia and New Zealand have introduced statutory adjudication processes. Adjudication provision, both voluntary as with FIDIC and statutory as with the HGCRA is likely to expand substantially world wide over the next decade, particularly with regard to the construction industry to which it is ideally suited.

What is it about adjudication that has impressed so much ? Where the process has been most successful, it is the low costs, speed, informality, use of industry experts, and general satisfaction with the quality of decisions that has led to it winning general approval from the industry, though it must be said that the process has its detractors. The statutory process in the UK has been thoroughly tested by the courts over the last five years. Attempts to evade the process by reluctant parties have proved by enlarge to be unsuccessful and rapid enforcement coupled with a very low percentage of challenges to adjudication decisions has effectively shown that despite the fact that the decision is not automatically final, the decisions of adjudicators have turned out to be final in over 98% of cases. The challenge process, rather than being routinely used has thus proved to be merely a safety net provision which has rarely been called into use.

Hearings are rarely used in adjudication, though they can be if the adjudicator or the parties consider that a hearing would be useful. Rather the process relies primarily on paper submissions. The statutory process runs to very tight schedules, namely 1 week from notice of dispute and appointment of the adjudicator to submission of claim and 4 weeks for the submission of defence, response to defence, hearings / site visits (if any) and the issue of the decision. The claimant can ask for a two week extension of time, resulting in a time scale of between 35 to 49 days in total. Whilst lawyers are frequently involved in client representation, there is little scope for the running up of vast legal costs. Hence, the overall cost of adjudication is quite modest. Adjudication is very affordable for the small contractor who might not otherwise be able to pursue a claim through arbitration or litigation because of the high costs involved.

Adjudicators are drawn from the ranks of established construction arbitrators reinforced by newly trained adjudicators mostly with experience as civil engineers, surveyors and architects. It is this expertise and understanding of the industry that has helped to ensure that the standard and quality of adjudication

[9] The DOM /1 introduced a limited form of adjudication in 1980 (now revised for the UK).

[10] For example the FIDIC 1999 Rainbow Suite adjudication and Dispute Adjudication Board processes. The FIDIC adjudication process differs substantially from the UK model both in time scales and procedures.

[11] The ICC pre-arbitral procedure has not yet been widely used so little comment can be made about its effectiveness or otherwise. Note that the ICC does not provide standard form construction contracts.

[12] Hereinafter referred to as the HGCRA.

decisions has been relatively high in the UK. The process has proved to be most valuable between the prime and the sub-contractor including suppliers of goods and services to the industry, though it has been used between employer and prime. The process has even been successfully used by civil engineers and architects.

The HGCRA also introduced payment rules including the issue of withholding notices which "***must***" be complied with if the employer wishes to withhold payments from the prime or if the prime wishes to withhold payment from subcontractors. However, the notice provisions are frequently ignored by the industry. The Act also banned "pay when paid" provisions. It is wise to adopt similar provisions as terms of the contract for non-HGCRA contracts.

Perhaps one of the greatest successes of adjudication is the least easily measurable, in that it deters parties from behaving unreasonably. Many disputes have come to an abrupt end upon issue of a statement of claim. The luxury of putting off the fateful day of payment is denied by this rapid process so there is no point in putting forward groundless defences to buy time.

The down side of adjudication is that some parties deliberately exploit the loopholes in the process, by for example not using written contracts. There are problems with cost provisions in contracts and the process is being used for very large and complex disputes, particularly in respect of final accounts, for which it is not best suited. Amending legislation is anticipated in the UK to fix some of the problems that have been exposed over the last few years.

MEDIATION

Mediation is an independent, third party assisted, negotiation process. The role of the mediator is to help the parties to find a "***mutually acceptable***" solution to their dispute. Unlike an arbitrator or judge, the mediator cannot impose a solution. Each party maintains control of the process. No solution is possible without the consent and cooperation of "***both***" parties. Mediation is thus deemed to be the most "***consensual***" of all the available alternatives to litigation. It is extensively used for the settlement of construction disputes in the US but its use by the UK construction industry is (whilst rising) very modest, perhaps because of the success of adjudication.

Mediation offers a valuable contribution to construction dispute resolution, because when it works, it is speedy and cost effective. Furthermore, unlike litigation, be it through the courts or arbitration, mediation tends to facilitate the maintenance of ongoing business relationships.

Mediation is not a magic "cure all". It does not render litigation and arbitration redundant. Each dispute resolution process has advantages and disadvantages. Ideally disputants should use the process most appropriate for the resolution of a given dispute. Let us now consider when mediation can be beneficially used to settle construction disputes, highlighting the conditions that need to exist in order for the parties to a dispute to avail themselves of the process, together with an examination of how and why the process works.

SOME OF THE PROCLAIMED ADVANTAGES OF MEDIATION

- Speed – days to weeks rather than months to years to commence the proceedings.
- Short hearings – one day is often sufficient – witnesses and experts are rarely called.
- Private – no press reports or adverse publicity – proceedings are privileged / not admissible in subsequent court proceedings and not recorded : all records and evidence are destroyed or returned to the parties apart from the written settlement agreement.
- Cost - relatively inexpensive – due to short hearings and absence of discovery processes and cross questioning.
- Convenient location- two rooms in a hotel or offices are all that is needed – in the country of choice of the parties and the mediator.
- Informal – no judges, robes, official recorders or court procedure.
- Lawyers are optional – though expert advice is very desirable. Self representation is permitted.
- The parties remain in control – there is no judge and no enforceable judicial award – so there is little to lose from taking part but potentially everything to gain.
- Works domestically and internationally – ideal for international trade and maritime disputes - and more sympathetic to multi-cultural issues.

- Linguistically flexible – can be conducted in the language of choice of the mediator and the parties.
- Not restricted to legal solutions and thus more flexible than going to law.
- Not restricted to the law of one country – so truly international solutions possible.
- More amenable to the preservation of business relations – less likely to result in winners and losers – enables the parties to retain "face" and where possible to continue trading after ending the dispute.
- Mediators are experts drawn from the industry and understand the issues and the business – whereas few judges have worked in commerce of in the maritime industry.
- Multi-party mediations are possible and can include interested parties such as banks, financiers and insurers and inter-related business partners – particularly useful in international chain sales involving transportation

THE NATURE OF THE MEDIATION PROCESS

Business is about cost effective contracting, management and delivery. The "***art***" of business lies in striking the right balance between profitability and the risks inherent in any given ventures. It is usual for construction contracts to identify a number of different foreseeable factors that could go wrong during the course of the venture and allocate the risks of those factors occurring to one or other of the parties. Business disputes tend to arise because one party perceives that some loss causing event has occurred, which in his opinion is contractually the responsibility of the other party, whereas the other party refuses to accept that the problem is his responsibility or, even if he does accept responsibility, is not prepared to do everything that the complainant demands to put the problem right. Alternatively disputes often arise as to how to deal with an unusual problem that is not governed by or anticipated by the terms of the contract. It is the failure by the parties, despite their negotiating experience and expertise, to find or negotiate an agreeable solution to such problems that gives rise to the disputes.

"***How can mediation, which relies on mutual consent and cooperation, solve a dispute when negotiations between the parties has already failed to do so - why might a mediator succeed where they have failed ?***"
The answer lies in the fact that frequently the parties to a dispute develop tunnel vision. The longer a dispute goes on the harder it becomes for the parties to separate themselves from their view as to who is responsible, what the contract requires them to do and most significantly of all, what will happen if a solution is nor found. As an independent outside observer the mediator is able to take a fresh, objective view of the situation and help the parties to re-evaluate the risks that they will be exposed to.

A mediator cannot make the parties agree and cannot impose a solution. The mediator's skill lies in the art of communication and to help the parties to explore solutions which are in their best commercial interests. Disputes generate a climate of animosity where parties will frequently chose to take a course of action which is commercially detrimental to their organisation simply to prevent the other party gaining an advantage. If a party can prove that the chances of success at litigation are high and that it will produce the greatest advantage to their organisation, mediation is unlikely to succeed. However, where the chances of success are evenly spread between the parties and the likely outcome is less advantageous than settlement, an experienced mediator should be able to guide the parties towards a settlement.

There is an added value to mediation, in that mediated settlements are frequently more evenly balanced than party negotiated settlements. Often the stronger party is able to force the weaker party to compromise without any genuine negotiation taking place and without a meaningful evaluation of their respective commercial rights and duties. Mediation can address this problem.

MEDIATION = WIN/WIN : LITIGATION = WIN/LOSE : What does this mean and why ?
Arbiters are asked to decide a specific question, namely which of the parties is responsible for a loss causing event. Once this is determined the arbiter assesses how much money, if any at all, is due to be paid by the person responsible to the other party. Often costs follow the event. Litigation results in a "WINNER" and a "LOSER". There is no middle ground. Contributory negligence and mitigation apart, there is no scope for the arbiter to share the costs of the problem between the parties. He cannot slice the cake. One party gets the whole cake, the other gets nothing. There is no requirement that the decision be either "fair" or "just". A judge once famously observed "This is not a court of justice. It is a court of law."

The arbiter makes a determination of fact, applies the applicable law to the facts and circumstances of the case, as proved before him in the court or tribunal and thereby produces a decision or ruling. The scope for decision making by the arbiter is limited by the law. If the law is just and fair then there is a chance that the decision will be but that is not always the case and where it is not it is unlikely to be the arbiter's fault. Why might it be that the law cannot guarantee a fair or just outcome ? Consider the following :-

Wining on a technicality : The circumstances when an arbiter can apportion responsibility under the law are severely limited and restricted. However, frequently neither party has acted in a particularly irresponsible manner and the loss causing event is simply the result of a combination of unfortunate circumstances. In the absence of a clear contractual allocation of risk for the loss neither party is likely to be prepared to shoulder responsibility and frequently comes to believe that the loss must be due to some form of failure or wrong doing by the other party, often fuelled by hindsight. In effect the allegation becomes "If he had done X the problem would have been avoided, so it is his fault." Foreseeing the need to do X at the time may not have appeared prudent, though clearly after the event it is easy to see why it would have been a good thing to do. The decision of the arbiter in such circumstances is likely to appear to be an arbitrary decision based on legal technicalities. Whilst a fair result might be to share the responsibility evenly between the parties, as discussed above, this option is not available to the arbiter.

The unhelpful business partner : Many loss causing events are the result of a combination of actions and events which both parties have to a greater or lesser extent contributed to. Often one party could have done something to assist the other party but had no legal duty to do so. The failure to assist may have been due to an oversight, self protection or because it would have involved financial loss or inconvenience, albeit perhaps relatively minor compared to the problem it would cause the other party. Whilst perhaps harsh or callous it may well have been perfectly lawful to fail to provide assistance. In the absence of wrong doing the law cannot apportion loss between the parties to take account for such harsh or careless conduct. The law will limit itself to apportioning loss on the basis of proven wrong doing alone.

Proving facts : The ability to establish in court what actually occurred is fraught with difficulties. The tribunal decides on the basis of what is presented to it what in the opinion of the court occurred. There is no guarantee that this will be what actually occurred. The tribunal draws a conclusion on the basis of the credibility of the witnesses and their ability to recall and describe the events. A witness with a poor reputation for reliability may not be believed by the tribunal even if telling the truth. Witnesses frequently have a distorted view of events which they portray to the tribunal in a very convincing and compelling manner. Time has a tendency to play tricks on memory. The party who has kept the best records or events and perhaps engaged in the most written communication has a distinct advantage in court.

Quantifying loss : Establishing the amount of loss that has been sustained as a result of the wrong doing of the other party is a question of fact for the tribunal. Evaluating the loss is more of an art than a science and the outcome is often far from predictable. The failure to recover sufficient damages in court to cover the winning party's perceived losses because of problems in proving the losses often leads to dissatisfaction with the judicial process.

Interpretation of contracts : The precise meaning of the terms of contract is a question of fact for the tribunal. Both parties may be convinced that they know what the contract meant and assert that the contract provides in their favour. However, the contract can only have one meaning and hence, even though the decision may appear arbitrary and based on a technicality, one party will inevitably lose. The loser is unlikely to derive a sense of justice or fairness out of the decision.

Causation : Many of the follow on consequences of loss making events are not legally recoverable. The law only allows a party to recover losses directly arising out of an event. Indirect losses can however frequently be far more significant for one or even both path parties and can outweigh the costs to either party of solving the problem quickly at minimal cost at the outset.

MEDIATION AND THE LAW

Courts apply the law. Much time is spent proving facts to the satisfaction of the court. Counsel is expensive. Court proceedings involve protracted legal argument. Going to law for the settlement of construction disputes is by common agreement an expensive business.

In a mediation the parties do not have to prove any facts to the mediator. Nor do the parties have to prove what the law says they are entitled to. This is because the mediator does not make a decision. A mediation settlement is based on what each party is prepared to agree. A party may pay more than he believes he is strictly required to pay under the law or settle for less than he believes he is legally entitled to. Unlike a court judgement, a mediated settlement represents what each party considers is fair, just or practicable and amounts to what they consider to be the best deal that can be achieved in the circumstances. Where the wrong doer is in severe financial difficulties an award may lead to bankruptcy. Apart from some sense of justice, the winner will reap little or no commercial benefit. A settlement agreement however could include joint financial measures or even the terms of a take over, of mutual benefit to both parties.

The fact that mediation is not a judicial process does not mean that law has no role to play in the negotiation settlement. In fact law is crucial to the effectiveness of the process. The legal alternative to mediated settlement is the principal reason for reaching a settlement and the legal requirements that would be enforced at law set the framework for shaping the actual settlement itself. The courts are essential for the enforcement of mediation settlements.

Any mediated settlement, whilst inevitably not a mirror or what a court would award, is likely to be shaped by the legal rights and obligations of the parties, subject to concessions financed out of the avoided cost of litigation, rapid cash flow benefits and uncertainty as to exactly how much might be recovered from a court or tribunal. The primary instrument of persuasion for the commercial mediator is the "***REALITY CHECK***" where the mediator forces the parties to consider likely judicial outcomes if a settlement is not forthcoming, including the costs (recoverable and non recoverable) from litigation and interim cash flow implications.

It is only by having a reasonable understanding of the relevant law as it would be applied in a court seized with jurisdiction over the dispute that the parties can assess the legal implications of the claim and defence. Whilst the degree of legal knowledge and expertise required to litigate is far higher than in mediation, a lack of legal understanding during the mediation process can result in undue optimism or excessive pessimism, leading either to a failure to make realistic concessions or alternatively to uncalled for generosity.

ENFORCEMENT OF MEDIATION SETTLEMENTS

The enforcement of mediation settlements differs radically from court and tribunal award enforcement. A mediated settlement is the equivalent of a new contract which replaces the original contract. The agreement is enforceable as a simple contract under the normal law of the land of the state where enforcement is sought. Mediated settlements tend to be in the nature of a debt and are more easily enforceable than general contract terms since there is no need for the court to determine the meaning of the terms of the contract. Most national courts will enforce mediation agreements. Often a settlement can be lodged with a court and any failure to comply will be a treated as contempt of court. Alternatively, it may be advisable to sign a deed of settlement to ensure enforcement. Frequently payment is made immediately after the settlement agreement is signed and before the parties leave, which renders enforcement unnecessary unless the payment proves to be defective. Immediate direct electronic cash transfers are one way of ensuring payment.

GETTING INTO MEDIATION

If Mediation is such a useful process, how can a party to a dispute ensure that the dispute is submitted to mediation ? The answer is that unless the contract provides for mediation it may be very difficult to do so. It is impossible to make a party actively engage in mediation, though in some countries the law may impose financial penalties on defendants who refuse to use the process and may even prevent claimants from going to court unless an attempt at brokering a mediated settlement is attempted. However, the law cannot force parties to agree. At the best it can encourage active participation but no more because by nature agreement is a purely voluntary process. In the absence of a mediation clause it is possible for parties to agree after a dispute has arisen to submit to mediation but such agreements are rare because relationships have often deteriorated to such an extent that the parties are no longer capable of agreeing on anything at all at that late stage, ensuring that litigation is then the only way of ending the dispute.

AVOIDING MEDIATION

Can a party to a contract with a mediation provision go to court or arbitration and over-ride a mediation provision ? The answer is YES if the other party agrees to over-ride the provision or takes an active part in

litigation, providing the courts or the arbitrator do not object. The UK the courts will often object and insist that the parties attempt mediation and will only go ahead with a trial if the defendant refuses to mediate or if the mediation has failed to settle the dispute. The same will apply to the whole of the EU if the current mediation proposals of the European Commission Report on ADR are adopted. However, it is essential that the mediation process be over-ridden at the request of a claimant if a defendant refuses to take part in a mediation, since otherwise the claimant would be denied justice.

In the UK, a party who fails to take an active part in mediation when it is specified in the contract or is recommended by the courts may suffer financial cost penalties in that even if they prevail in litigation the court may refuse to award costs and even order payment of the costs of the other party if the court feels it is justified in the circumstances of the case. Thus the rule that "***costs follow the event***" is overturned in such circumstances.

EVALUATION OF MEDIATION

There are rarely any real winners in conflict. No one ever recovers all their costs and expenses from litigation, which is also emotionally draining and time consuming. Furthermore, litigation is disruptive and detracts from the real business of making money. Where it is clear that a party is in the wrong and cannot win, all that litigation achieves is to postpone the time when they will have to account. An early settlement, even at full cost will save on legal expenses. The other party may well be prepared to accept a lesser sum in order to avoid the costs and risks of litigation and view the discount as beneficial particularly where it maximises cash flow at an early date. The mediator, by outlining the advantages of settlement to both parties, can often bring about a settlement in the most difficult cases and unlikely circumstances.

This is not to say that litigation is never necessary. Where the rights and wrongs of a situation are not clear the parties may only be prepared to accept the decision of a judge, particularly if the decision will help establish guidelines for future relationships. A loss resulting from a court judgment may be easier to justify to stake/shareholders or to superiors than a negotiated settlement on terms that might otherwise be open to criticism, and so a judgement is needed. Finally, where a wrongdoer is totally unwilling to take responsibility for their actions the other party may be left with no option but to go to court.

Mediation shares many of the benefits of arbitration in that it is private, quick and relatively inexpensive. However, the parties themselves maintain control over the decision making process rather than handing it over to a third party. There is an obligation to participate in the process but no obligation to reach a settlement. If no settlement is achieved the parties are free to proceed to litigation. However, having canvassed the issues thoroughly in advance during the mediation process pre-trial preparation will be at an advanced stage and many side issues will have been resolved resulting in a quicker and more efficient trial.

At a mediation, the mediator acts as a go-between, exploring issues with each of the parties in turn, facilitating them to find a way to broker a settlement. The process has much to offer where the parties realise that a settlement is necessary and are prepared to broker a settlement. Many court cases settle on the steps of the court. Mediation achieves a similar result but involves the parties directly and leads to far more satisfactory settlements than are brokered by the hands off approach of settlement through the auspices of lawyers. Mediation settlements frequently include agreements for the future conduct of business rather than a mere settlement of the dispute at hand.

Mediation has less to offer where a party adamantly refuses to recognise any liability whatsoever, to pay or perform services or put something right. Even here, participation in the process can result in the recalcitrant party realising that their stance is unrealistic, paving the way for a settlement.

by Corbett Haselgrove Spurin

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"ADJUDICATION FORUM KEYNOTE ADDRESS by Geoffrey Beresford Hartell**"**

Mr Chairman, Ladies and Gentlemen.

A keynote speech.

That is what I am scheduled to give you this afternoon. I have often wondered precisely what that means.

Is it the tuning note often heard as an orchestra, perhaps assembled from around the world, perhaps just off the bus, seeks to tune its instruments so that there are no discordant notes in what follows?

Maybe it is no more than an opportunity for something to be seen to be happening during a period of grace for late arrival - a bit like the pappadums served in Indian Restaurants. Even if they are tasty in themselves, the main meal soon supervenes in the mind. And so it should.

We have, I hope, an interesting programme ahead. Given this opportunity, I will sound a keynote. A keynote that I hope will sound in your minds throughout the entire opera which follows.

And it is in one word "Service". On brief reflection, as I drafted this, I realised that there must be two words: "Service" and "Justice".

First, the question of Service.
Dispute Resolution Practitioners, to adopt one of our grand titles, seem to enjoy making a meal of the job. This morning, in another talk, I mentioned Mustill and Boyd's "Commercial Arbitration" which runs to 830 pages.

My office is engaged in an arbitration which has been running for ten years, during which one arbitrator has died and another retired. Costs are in millions of dollars.

Arbitration is now so complex that you must be a professional arbitrator to cope with it. Not just an engineer, however ingenious, not just a lawyer, however learned, but a professional arbitrator (who has to pay a lot for his qualification, by the way).

So atrocious was the position in modern Arbitration that the United Kingdom legislature was persuaded to introduce, in 1996, statutory adjudication for the construction industry, arguably the worst offender in aggravated arbitration.

We, not just in England and Wales, not even just in the United Kingdom at large or in the common law countries, but the arbitral community world wide, have destroyed the tradition of mercantile arbitration and replaced it with a beast of our own creation which is so expensive no ordinary user dare embark on it.

And we have destroyed the spirit of service with it.

The Arbitration Act 1996 did not succeed in correcting the trend, save in some domestic cases. The international trend to arbitral aggrandisement was too strong for Britain and anyway, our practitioners were unwilling to relinquish the milch-cow upon which they had come to rely.

It was intriguing that, instead of the perhaps obvious opportunity to introduce an alternative under Section 39 of the Arbitration Act 1996 (which deals with provisional orders which have the effect of provisional awards), Parliament decided that the construction industry needed its own new system - a rough and ready system for temporary decisions, which might become permanent, if left in place - Similar to that of the FIDIC series of contract.

And now, in the wake of many cases decided in the Courts, we are making Adjudication, more complex. I remember once, about 35 years ago, one party turning up with his lawyer to a meting with the Engineer. It was thought a bad show. Now, few in this country would go to an adjudication without some representation. Fortunately, they are of sterner stuff abroad, but that isn't the point. The point is that we - yes we, you and I, are driving adjudication down the same path.

So - back to my Keynote, or Keynotes.
"**Service":** Everyone in ADR owes their primary duty- to the parties - or rather to the joint purpose of the parties. And that purpose is not and cannot be to hand over the profit or benefit of a project to outsiders like us. An expensive drawn out procedure is unjust. Our duty is to keep it simple. If that means humbling ourselves, so much the better. ADR practitioners are servants of the parties or their processes are no more than tales told by an idiot, full of sound and fury and signifying nothing.

"**Justice":** the joint purpose of the parties cannot be that one may win against the proper rights of the other. It can only be that they are entitled to a fair outcome. I cannot anticipate what Mr Atkinson may say later, but I will say that every decision maker, be he adjudicator, arbitrator, expert, or even the project manager or director of a party, has a moral duty to make his decision fairly - and to me that is what a judicial decision implies.

Mr Chairman, when I wrote my notes, I had no intention to be quite so pious. Now, if there is a discordant note, it seems to be mine. On reflection, however, those are the Keynotes I wish to sound. Service and Justice. Keynotes and a challenge.

Thank you.

hartwell OneChanceryLane.com

PAYMENT PROVISIONS OF THE HGCRA 1996

Introduction

Construction is big business. It is an entrepreneurial venture, engaged in for profit. It is a cut-throat business where profit margins are very tight. The client wants best value at best price – the penny and the bun. Cash flow is essential to the success of the industry. The contractor wants prompt payment for work done. The client only wants to pay for what has been properly done. In order to maximise cash flow the contractor needs to ensure that the construction contract provides a mechanism for payments. The client will often seek to maximise cash flow by paying as late as possible (if at all). Furthermore, the client will seek to ensure that any contract payment mechanism safeguards against payment for work not successfully completed. Cashflow and timely payment were central to the considerations of the Latham Report. Consequently, the Housing Grants Construction and Regeneration Act 1996 (hereinafter referred to as the HGCRA) directly addresses and seeks to provide solutions to the problem of ensuring cash flow in the industry. Sections 114 to 117 provide for the Scheme, giving of notices, periods of time and Crown application. The remaining 5 sections, 109 to 113, deal solely with payment provisions. These provisions apply generally. They are not restricted to adjudication and are thus equally applicable to litigation and arbitration.

Cash flow is also affected on a broader level by disputes under the contract. Indeed the amounts involved in claims for damages for breach of contract may well exceed the monies due for work done under the contract. Prompt settlement of claims and prompt payment are also essential to the industry and to facilitate this the HGCRA introduced adjudication by virtue of Section 108. The adjudication process of course, is available for the settlement of disputes in respect of payment, but has wider application. Finally, to put all of Part II HGCRA into context, Sections 104 to 107 deals generally with Construction Contracts, Construction Operations, exemption of general consumers and contracts in writing.

Sections 109 to 113 mandate the provision of payment terms in construction contracts regardless of the parties wishes, and in default of party provision in the contract will impose conditions set out in the Act and/or the scheme for construction contracts. Although both the provisions for adjudication and the payment process are contained in the same Act there are some differences in the manner in which they are introduced. If a contract's adjudication provisions do not strictly comply with the requirements of section 108 (1) to (4) then, as per s108 (5), the Scheme for Construction Contracts applies. In the event that a contract's payment provisions fail to comply with the relevant sections of 109 to 113 then it is only the particular provisions, which fail to comply that are superseded by the Scheme. If some provisions are compliant they remain valid with the Scheme replacing the invalid ones only.[13]

S 109 - The right to periodic payments

Traditionally, with the exception of perhaps a true turnkey contract, all standard forms of construction contract make provision for regular on account payments for ongoing works. Section 109 of the Act clarifies the entitlement of parties to regular payments.

109(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless –

(a) it is specified in the contract that the duration of the work is to be less than 45 days, or

(b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

The Act is clear in establishing a party's rights to regular payment.[14] The only exception is for projects that are either stipulated to last no longer than 45 days or it is agreed by the parties that the work is estimated to last no longer than 45 days. The 45 day qualification rule is really a pragmatic one, as it is normal practice that payments are made monthly. In the event that a contract is for less than 45 days, the absence of an interim payment is not likely to be a heavy burden for a party to bear.

[13] See **EXPLANATORY NOTE TO THE SCHEME** *(This note is not part of the Order) :* Part II of the Housing Grants Act 1996 makes provision in relation to construction contracts. S114 empowers the Secretary of State to make the Scheme for Construction Contracts. Where a construction contract does not comply with the requirements of s108 to 111 (adjudication of disputes and payment provisions), and s113 (prohibition of conditional payment provisions), the relevant provisions of the Scheme for Construction Contracts have effect.

[14] The devil however lies in the detail. See **Maxi Construction Management Ltd v Mortons Rolls Ltd** [2001] Outer Ct of Session The court held that a failure to deal with an application for evaluation of interim payments does not automatically lead to a dispute : Clause 12 of the Scheme requires submission of the full basis of a demand.

The Act does not clarify any differences between payments by instalments, payments by stage or periodic payments and it is assumed that the terms are generally intended to mean the same thing. The Act is also silent on the definition of duration.

109(2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

There is no specific requirement that a party must be paid monthly or four weekly. The Act only seeks to provide for the making of an interim payment. The parties are free to agree any arrangements / terms for interim payments, even to the extent whereby interim payments are either infrequent or of minor monetary value. It should be noted however that monthly payments are still the norm and dominant parties in construction contracts have generally not abused the flexibility of the system.

109(3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply

If a contract does not make the necessary provision for interim payments then the relevant sections of the Scheme are imposed on the parties. These provisions are contained in Part II of the Scheme. Paragraphs 1 to 8 deal with both entitlement to and the amount of payment and also when payments become due under the Scheme.

S 110 Dates for payment

Whilst section 109 states that a party to a construction contract is entitled to payment by instalments or on an interim basis, the details of the required mechanisms are provided in section 110.

110(1) Every construction contract shall-

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

It is necessary, as per section 110 (1) (a), that a construction contract provides a mechanism, both enabling the parties to establish the value of due payment and when the payment is due. However in **Shimuzi Europe Ltd v LNJ Fabrications Ltd.**[15] some potential for manipulating the system was identified. Shimizu made it a condition precedent of a contract that payment did not become due until a VAT invoice was issued. Shimizu then declined to advise their sub contractor as to the value of monies to be paid, effectively preventing the issue of an accurate VAT invoice. The Court held that this was acceptable and that payment did not become due until a VAT invoice was issued.

Section 110 (1) (b) requires that a final date for payment must be stipulated.

It is normal for a period of time measured in days to be used as the basis for calculating a final date for payment. For example, as we will discuss below, paragraph 8 of the Scheme stipulates that the final date for payment is 17 days after the due date. The final sentence of section 110 (1) makes it clear, that subject to compliance with the mechanism's requirements, the parties are at liberty to decide on how long the period is between the due date and the final date for payment. Despite the obvious potential for abuse there does not appear to have been a significant trend for dominant parties to impose unusually long time periods from due date to final payment.

Section 110 (3) states that if a contract does not comply with the requirements in 110 (1) then the relevant provisions of the Scheme apply[16]. It would generally be in the interests of the parties to ensure that any construction contract complies with the requirements of s110 (1). In particular a main contractor should seek to ensure that the payment provisions in their sub contract agreements mirror the main contract with the employer[17]. Failure to do so could result in the main contractor being liable to make payment to their sub

[15] **Shimuzi Europe Ltd v LNJ Fabrications Ltd** [2003] EWHC 1229 (TCC). The relevant form of the DOM/1 permitted an adjudicator's payment decision to be set off against a subsequent claim and further gave the adjudicator power to rule on his own jurisdiction

[16] **Hills Electrical & Mechanical plc v Dawn Construction Ltd** [2003] Ct of Session CA 98/02. Default scheme's payment provisions only apply to aspects where a contract fails to provide for payment.

[17] **Karl Construction (Scotland) Ltd v Palisade Properties Plc**. [2002] SLT 312 P/872/00. Parties to a Construction Contract cannot agree that their provisions are in accordance with the Act's payment provisions. It is an adjudicator or other authorised third party who is

contractor before they are due to receive payment from the employer. This is particularly important now since, as discussed in Section 113 below, "pay when paid" provisions have been largely outlawed.

If a construction contract fails to comply with the requirements of s110 (1) then the relevant paragraphs of the Scheme are imported into the contract. As stated above the relevant paragraphs dealing with payment, are contained in Part II of the Scheme. Rules 1 to 8 are those, which deal with the issues of calculating payment entitlements, when they are due and the final date for making payment of any monies due.

Rule 4 Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later –

(a) the expiry of 7 days following the relevant period mentioned in paragraph 2 (1) above, or

(b) ***the making of a claim by the payee.***

Rule 12 defines *"relevant period"* as being 28 days[18]. In order to simplify the dates when interim applications may be made it is quite common for parties to agree to submit monthly applications rather than adopting the 28 day period. It is important to note that paragraph 4 provides two alternatives.

If an application is submitted promptly then that payment becomes due 7 days after it's receipt. For example if the relevant period ended on the 1st of March, and assuming that an interim application was received that day, then payment would become due on the 8th March. The establishment of the due date is critical, as the final date for payment is calculated from the due date.

If however an application is submitted later than at the end of the relevant period, it is necessary to consider whether 4 (a) or (b) applies in determining the due date for payment. Generally if the submission date is later than 7 days after the last day of the relevant period then option (b) viz, "upon the making of a claim by the payee", will apply.

Rule 8 provides the mechanism for determining the final date for payment. In essence if the contract fails to stipulate a final date for payment then in accordance with paragraph 8 (2) the final date for payment shall be 17 days from the date that payment becomes due.

In order to avoid any misunderstanding it is necessary that the terminology of the Scheme relating to payment is clearly understood. There are two important dates in the payment process. The payment "**due date**" is the date upon which the payment process really begins. It should be remembered that if the timescales are properly complied with the payment due date does not occur until 7 days after receipt of the application (paragraph 4 a). The second important date is the "**final date for payment**", whereby all money due must be paid.

Whilst sections 109 and 110 (1) deal with the entitlement to interim payments, calculation of payment due and the establishment of and or calculation of dates for payments, section 110 (2) requires that all construction contracts "**must provide**" a facility for the giving of a payment notice.

110 (2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if-

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

This section strives to ensure clarity in the payment process. The paying party has a clear obligation to provide details of both the amount due for payment and also to provide details of the calculations used in determining the amount due. This need not be an onerous obligation for the paying party in that the information does not have to be set out in an extensive or cumbersome document. Frequently the paying party will simply, but clearly, annotate a copy of the application for payment, which had been submitted by

able to make that decision. Obviously the parties do not need to refer a dispute regarding payment terms and therefore prevent the intervention of a third party.

[18] However if the contract actually provides necessary information relating to payment periods then the relevant period will be in accordance with the contract.

the party claiming payment. The annotations will comprise calculations used and any comments necessary to detail differences between the application and the actual payment ascertained as being due. Perhaps the most onerous element of section 110 (2) is the requirement to issue the payment notice within five days of the due date for payment, particularly if paragraph 4(b) applies since the responding party only has five days to both consider what could be a very detailed or complex application for payment prior to issue of the payment notice.

The Act places an obligation on the part of the paying party in a construction contract in that they must issue a payment notice. Most people would agree that the provision of such a notice should prevent disputes that might otherwise arise because of poor communications which lead to misunderstandings about what is to be paid and when and can even lead a party to falsely believe that their requests for payment are being ignored.

Even though problems may arise where a party fails to comply with their obligation to issue a notice, the Act makes no express provision to deal with a failure to issue a notice. It is for these reasons that the failure to issue a payment notice is regarded as being a minor breach of contract.

Section 110 (3) states that in the event that a contract does not include provisions which satisfy the requirements of section 110 (2) then the relevant parts of the Scheme apply.

Rule 9 : A party to a construction contract shall, not later than 5 days after the date on which any payment–
(a) becomes due from him, or
(b) would have become due, if -
(i) the other party had carried out his obligations under the contract, and
(j) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,
give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.

Rule 9 is very similar in it's wording to section 110 (2). It is important to ensure when preparing a payment notice that all the necessary information has been included. Typically the notice should state the payment that the payee considers is due and sufficient detail demonstrating the basis upon which the due sum has been calculated. A simple means of testing whether the level of information satisfies the requirements of 110 (2) and/or paragraph 9 is to consider if a third party could determine the sum due by referring to the notice and application (an objective test).

Section 111 Notice of intention to withhold payment

If the paying party does not intend to make full payment of a sum due under the contract, section 111 requires that they issue a withholding notice, advising the other party of the sums to be withheld.

111 (1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. The notice mentioned in section 110 (2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

111 (2) To be effective such a notice must specify –
(a) the amount proposed to be withheld and the ground for withholding payment, or
(b) if there is more than one ground, each ground and the amount attributable to it,
and must be given not later than the prescribed period before the final date for payment.

111 (3) The Parties are free to agree what that prescribed period is to be. In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.
111 (4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than –
(a) seven days from the date of the decision, or
(b) the date which apart from the notice would have been the final date for payment,
whichever is the later.

The requirement to issue a notice of withholding is only a mandatory requirement if the paying party did not intend to pay all monies due under the contract. Section 111 (1) is clear; a paying party is not allowed to

withhold payment if a withholding notice has not been issued[19]. If monies due are withheld without a notice then a dispute has arisen which can be referred to adjudication[20].

It must however be noted that section 111 (1) only applies to a sum due under the contract. If there is any dispute as to the validity of sums claimed, then it is the claimant's responsibility to satisfy the burden of proof. [21] An exception arises where a contract states that payment is due once a payment certificate has been issued. Normally a certificate can be challenged but if the contract makes it final then once issued payment becomes due and a withholding notice will be of no avail.[22]

The failure to issue a withholding notice will however prevent a party from using contra charges as a means of justifying a failure to make payment. Providing that the claimant is able to substantiate entitlement for money claimed, the paying party by failing to issue the notice loses the right to withhold against that particular payment[23]. The loss of right is only temporary. If there are valid reasons to withhold payment then, subject to a compliant notice, the paying party can withhold monies during any future payment process.

The actual terms of a contract must be considered carefully. The Act only requires that a notice of withholding be issued if monies are to be withheld and that the contract must state what the prescribed period is for issuing the notice. There is no requirement with regards to the wording of any contractual clause in relation to the sum being due. In the UK a commonly used standard form for design and build contracts, the JCT 98 With Contractors Design, actually states that in the absence of a withholding notice the amount claimed shall be paid. Therefore even if the amount claimed is incorrect and not actually due under the contract the paying party will become liable for that amount. Many other contracts do not contain this type of provision. Furthermore, many consultants amend the contract as a matter of course, to remove this provision, placing it back in line with the default provisions of the Scheme.

A notice must deal with each item of withholding separately. Any attempt at wrapping up all of the withheld items into a lump sum withholding notice, which therefore fails to identify and explain why and how much is being withheld from each item, will render the notice invalid.

The parties are free to decide on the time requirements of any withholding notice. It would be acceptable for the parties to agree on any time from and between the submission of application to 1 day before the final date for payment. If a contract does not provide a prescribed period as required by section 111, Paragraph 10 of the Scheme states that any withholding notice must be issued not later than 7 days before the final date for payment.

Set off against adjudication decision and monies otherwise due.

It is one thing for the adjudicator to decide that money is due, but if the other party can set off that sum against other sums allegedly due, the value of the decision is undermined from the claimant's perspective, but provides protection for the payer where the sums due to the payer from the payee exceed what the adjudicator has ordered him to pay, particularly if there are question marks over the payee's financial status and thus over the ability to recover payment and guards against the potential of any sum paid disappearing into a black hold.

[19] **Palmers Ltd v ABB Power Construction Ltd** [1999] BLR 426. **:** No effective withholding notice had been issued. The court also held that a scaffolding is a construction operation and further that a court can deliver a declaration as to jurisdiction.

[20] **Strathmore Building Services Ltd v Colin Scott Greig t/a Hestia Fireside Design CA** [2000] Outer Ct of Session CA 19/00. Withholding notice must be issued after an application for payment to be valid.

[21] **S L Timber Systems Ltd v Carillion Construction Ltd** [2001] BLR 516 : Payment ordered by adjudicator because of absence of withholding notice. The court held that the claimant must still prove entitlement. In the event even thought the adjudicator wrong in his determinations on entitlement, still the decision would be enforced, forcing the party to move to final determination in order to recover any payment made in compliance with the decision.

[22] **London Borough of Barking & Deagenham v Terrapin Construction Ltd :** [2000] CA QB ENF 99/0756Pre-1998 JCT Clause 30.8.11 Design & Build : Led to amendments to later contracts.

[23] **Rupert Morgan Building Services Ltd v David Jervis & Harriett Jervis**, [2003] EWCA Civ 1563. A sum incorrectly certified by an Architect was not paid by the Employer as he was aware of the error in the certificate. However no withholding notice had been issued. It was held that the sum had to be paid in compliance with the adjudicator's decision. It was then open to the payer to commence a separate action for subsequent recovery of the payment.

However, the courts have developed rules to withhold enforcement if a payee is in liquidation. Where an enforcing party is in receivership the court is entitled to stay enforcement.[24] Furthermore, where a defendant is in administration it is unlikely under s11 Insolvency Act that permission will be granted for an adjudication.[25] However, less specific allegations of the payee being in a poor financial state are more difficult to sustain.[26] The permission of the court is required to commence adjudication once a firm enters into administration.[27] Conversely the court needs to be robust when it is the payer who is in financial difficulty[28] and an adjudicator's decision can be the subject matter of a statutory demand.[29]

It is clear that set off is not allowed to provide funds to settle undetermined claims some time in the future, but is available against liquid debts and concurrent judgements.[30] The question that therefore is whether or not an adjudication decision may be set off against liquidated damages claims during enforcement proceedings. In **Solland** the court held that it could not. [31] An unsuccessful attempt was made in **Riverbrae**[32] to set of payment against other sums due. Any withholding notice must be issued before an adjudication and the validity of the notice and the grounds for withholding can be ruled upon by the adjudicator, but if the withholding notice is issued to late no set off is permitted.[33] Further more, in order to be effective, a withholding notice must be in writing.[34] Note that the withholding notice provisions are of general application including applications for summary judgment and not restricted to adjudication.[35] The terms of a contract that stated that on termination no further sums would be payable was called into play in an attempt to defeat an adjudication decision in **Levolux**. [36] The termination was issued after the decision was delivered and the court refused to countenance the attempt. An attempt to issue a withholding notice against an adjudicator's decision was recently frustrated in Conor. [37]

If at first you don't succeed, try, try and try again. If a party does not like an instruction to pay, can he go back and have a fresh adjudication to recoup the monies as opposed to moving on to arbitration or

[24] **Rainford House Ltd (in Administrative Receivership) v Cadogan Ltd** [2001] HT 01/014 :

[25] **Canary Riverside Development v Timtec International** [2000] R.Ct of Justice 69/2000 :. See also **George Parke v The Fenton Gretton Partnership** [2001] CILL 1712 : Bankruptcy loomed for a party with a valid claim against the claimant seeking to enforce adjudication via a statutory demand : Stay ordered. Compare **Guardi Shoes Ltd v Datum Contracts :** [2002] 5816 OF 2002 : Lock out – non-payment : Adjudication : non-payment : Statutory demand issued. The other party asserted a counterclaim. Notwithstanding, the Statutory demand was enforced by the court.

[26] **Harwood v Lantrode** [2001] TCC. Challenging evidence of decision and equitable set off not grounds to resist enforcement. Since however an Insolvency hearing was pending the court ordered that the award be paid into court. See also **Isovel Contracts Ltd v ABB Technologies Ltd** [2001] CH.Div : Court ordered enforcement despite the fact that business was in administration and asserted set off claims.

[27] **Straume (A) (UK) Ltd v Bradlor Developments Ltd** [1999] CILL 1520.

[28] **Re A Company (number 1299 of 2001)** [2001] : Thee claimant had a payment certifies. There had been no withholding notice. The court held that the claimant had the right to assert debt and proceed to motion for winding up. Applications for set off and counterclaim were refused by the court.

[29] **Jamil Mohammed v Dr Michael Bowles** [2002] 394 SD 2002

[30] **Bovis Lend Lease Ltd v Triangle Development Ltd** [2003] BLR 31 HT 02/0375

[31] **Solland International v Daraydan Holdings Ltd** [2002] EWHC 220 HT 01/481 ; See however **C & B Scene Concept Design Ltd v Isobars Ltd** [2002] EWCA Civ 46, [2002] BLR 93. The Court of Appeal decision was however confirmed and followed in **Dumarc Building Services Ltd v Mr Salvador Rico** [2003] KT203081 Epsom C.C.

[32] **Allied London & Scottish Properties Plc v Riverbrae Construction Ltd** [1999] BLR 346

[33] **Hart Builders (Edinburg) Ltd v St.Andrews Ltd** [2002] A69/02 **:** No after the event set off permitted against decision where issue not put to adjudicator and no withholding notice had been issued : see also **Construction Centre Group Ltd v Highland Council : Highland Council v Construction Centre Group Ltd** [2002] BLR 476 CA 127/02 XA 123/02 : Liquidated damages formed the subject matter of a withholding notice issued after adjudicator's decision . Held issued too late to prevent enforcement. See also **VHE Construction PLC v RBSTB Trust Co Ltd** [2000] BLR 187 HT 99/241.

[34] **Strathmore Building Services Ltd v Colin Scott Greig t/a Hestia Fireside Design** [2000] Outer Ct of Session CA 19/00

[35] **Millers Specialist Joinery Company Ltd v Nobles Construction Ltd** [2001] TCC 64/00

[36] **Levolux A.T. Ltd v Ferson Contractors Ltd** [2002] BLR 341; [2002]EWCACiv 11

[37] **Conor Engineering Limited v Les Constructions Industrielles de la Mèditerranèe (CNIM)** [2004] EWHC 899 : The court had first to decide whether or not the **p**rimary purpose of the site was power generation or waste disposal in order to apply the provisions of s105 HGCRA. In the circumstances the court held that it was waste and so the HGCRA applied. Following on from that the court found that a withholding notice issued against the decision was not effective because in the circumstances it was out of time. Time counted from the date of drafting the decision. This opens up the possibility that if the contract is appropriately worded to allow withholding against monies due consequent upon the decision of an adjudicator and the notice is issued in time, then enforcement of the decision could be prevented.

adjudication? The rules on double jeopardy, it has been held, apply to adjudication so the answer is no.[38] The appropriate course of action is to advise the adjudicator of a lack of jurisdiction. If the adjudicator goes ahead then enforcement may be resisted on the grounds of double jeopardy. A stay will not be issued against the second adjudication.[39] Perhaps the best way of dealing with this is to seek a declaration to prevent further waste of time and monies.[40]

However, where the second dispute is deemed to be a separate dispute and not a re-submission of the same dispute there is no infringement of the double jeopardy rule. Thus a sequence of disputes in relation to separate interim orders may be submitted to separate adjudications.[41] A consequence of this is that if a party is over-paid on an interim payment the monies may be recovered or deducted from subsequent payments.[42]

A question has arisen as to whether an adjudication decision stands or falls in its entirety. If correct elements of the decision can stand the claimant can seek enforcement of part of a decision. If not, the entire claim will fail. Cherry picking or dissecting a decision will not usually be permitted, particularly if the wrong doing of the adjudicator goes to the root of the matter.[43] By contrast, there is scope for an adjudicator to amend minor mistakes under the slip rule.

Final Accounts

A number of cases have dealt with aspects of payment in respect of final accounts. Recovery of retainers is always a highly contested matter. In **Cook (F.W.) Ltd v Shimizu (UK) Ltd**.[44] the court held that a decision on entitlement on final account does not override contractual retainer provisions, and thus payment would occur in due course as per the contract provisions. Similarly in Buxton the court recently held that retention money should not be released until claims have been addressed.[45]

Some employers regard retainers as a windfall profit rather than as a fund to guard against defects. Small contractors have great difficulty recovering retainers and the small sums involved mean that they often fail to pursue recovery. A major hurdle to triggering repayment of retainers is the issue of a final certificate. Often they are not issued or delayed for inordinate periods of time, thereby wearing the other party down by attrition. Whilst repayment is not normally due until the certificate is issued, nonetheless, if there has been undue delay and the employer has prevented issue of the certificate, repayment may be ordered. [46]

An attempt to turn an interim payment into a final settlement which could not be opened up was defeated in **Hurst Stores and Interiors Ltd v M.L.Europe Property Ltd.**[47] The standard wording of an interim account was changed to make the account final. The project manager signed it off without noticing the change of wording. A claim for £2M was met with the response that the amount due was final, agreed and signed off so no further claim would be accepted. The court held that the project manager had no contractual capacity to alter the terms of the contract so the additional claim could be put forward.

[38] See also **Ron Jones (Burton-on-Trent) Ltd v Mrs JS & Mrs JD Hall** [1998] EWCH 328. An attempt was made to keep items out of jurisdiction of arbitrator and submit them to a separate arbitration. The court held that this was not permitted in the circumstance of the case and that the first arbitrator's decision ruling out the items was final.

[39] **William Naylor t/a Powerfloated Concrete Floors v Greenacres Curling Ltd** [2001] Outer Ct of Session P514/01

[40] **John Mowlem & Co plc v Hydra-Tight Ltd** [2000] HT 184

[41] **Skanska Construction UK Ltd v ERDC Group Ltd** [2002] Ct of Session P1193/02 **:** Application to stay adjudication on grounds of trying same dispute : Court held, whilst same contract, issues concerned different stages of contract.

[42] **Holt Insulation Ltd v Colt International Ltd** [2001] LV01 5929 TCC : Following an adjudication a 2nd dispute was referred to adjudication. Court held that it was not the same dispute. It involved different issues so the adjudicator had jurisdiction. Similarly in **Mivan Ltd v Lighting Technology Projects Ltd** [2001] an interim payment was enforced because no withholding notice had been issued. In a 2nd adjudication a counterclaim was successfully put forward. There was no double jeopardy since this was a separate issue.

[43] **Barr Ltd v Law Mining Ltd** [2002] 80 Con LR A single dispute can have several parts : the court can uphold valid decisions and order stay ultra vires part. However compare **Sherwood & Casson Ltd v Mackenzie** [2000] CILL 1577where the court opposed cherry picking elements of a decision, since the matter went to jurisdiction. **KNS Industrial Services (Birmingham) Ltd v Sindall Ltd** [2000] HT 00/164 **: Farebrother Building Services Ltd v Frogmore Investments Ltd** [2001] CILL 1762.

[44] [2000] BLR 199 ; HT 99/289

[45] **Buxton Building Contractors Limited v Governors of Durand Primary School** [2004] EWHC 733

[46] **Pitchmastic v Birse No1 (DysonJ)** [2000] 19981 TCC 159 Q per Dyson J.

[47] [2003] EWHC 1650 : [2004] EWCA 490

Section 112 Right to suspend performance for non-payment

Traditionally construction companies have used the threat of suspending works when problems with payment occur. To do so has previously been risky, as to suspend the works would itself be classed as a breach of contract.

112 (1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made ("the party in default").

112 (2) The right may not be exercised without first giving to the party in default at least seven days notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

112 (3) The right to suspend ceases when the party in default makes payment in full of the amount due.

This section introduces a clear right for parties experiencing payment problems in respect of sums which have "**become due**", to suspend their works. In order to suspend the works it is essential that they provide a written notice, giving details of the grounds upon which performance is to be suspended. The defaulting party then has 7 days in which to remedy the breach. If after 7 days the breach has not been remedied the contractor may suspend the works.

Contractors in the UK are gradually beginning to employ their right to suspend the works more frequently. If there is a significant amount of work still to be completed on a project, the use of this section can produce remarkable results. The last thing which an employer or contractor would want to be faced with halfway through a project is an unnecessary delay. Even if they disagree with the grounds upon which section 112 has been employed, what can they do, other than make payment, to force the other party to recommence work? A referral to adjudication is likely to take in excess of 4 weeks and that would normally be the quickest option available. A realistic interim settlement is about as good an option as any available to the alleged debtor.

112 (4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.
Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

It is not just the works, which are suspended. Section 112 (4) provides for the contract completion date to be extended in exact proportion to time lost during a valid suspension of the works. For example if a contract was suspended for 10 days due to a late payment and the contract was originally intended to be complete on 10 March, then the new completion date would be the 20 March. The contract has been extended by the 10 days suspension.

The Act provides no automatic right for claiming additional costs resulting from a suspension of the works under section 112. Some standard forms in the UK have dealt with this matter and facilitate the recovery of loss and expense. It is also possible for a party who validly suspended the works to seek the recovery of any damages, resulting from the breach of contract by the defaulting party.

Section 113 Prohibition of conditional payment provisions

Conditional payment provisions, which are commonly referred to as back-to-back payments, have been almost entirely quashed by this section[48]. It was quite common in the UK for main contractors to stipulate that the sub contractor would only be paid after the main contractor had received his money. Thus, a standard defence used by the main contractor's quantity surveyor would be that they had not had their money yet.

113 (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

[48] **Durabella Ltd v Jarvis.J & Sons Ltd** 1998 ORB 33 –This concerned a pre-HGCRA contract with a pay when paid provision. In the circumstances the court held that insufficient evidence had been adduces to establish non-payment by the client. Since the contractor had been paid he was therefore order to pay up.

This clause is badly drafted and grammatically incorrect. It is very difficult to read and understand. It is commonly understood to mean that a clause making payment conditional upon payment being first made by a third party will only be valid if that third party becomes insolvent.

The only exception to the rule that back to back payments are invalid is whereby a payment is conditional on payment being first received by a third party who has subsequently become insolvent. Whilst it appears inequitable that a contractor may lose his right to payment as a result of the insolvency of a third party, with whom they have no contractual relationship, the Act has at least gone a long way towards the removal of the back-to-back payment.

Corbett Haselgrove Spurin & Nick Turner

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ADJUDICATION - "THE CHANGED MODEL"

It is almost exactly six years ago that "new" adjudication began. It was two years before that when the ICE, CIArb, ACA and others began training for what eventually became the panels of construction adjudicators. I was one of those trainers.

In those early days the emphasis or model was that the adjudicator was brought in to make an independent re-cap of an engineer's decision or an architect's certificate or QS valuation and as between contractor and subcontractor the adjudicator was merely an outside independent QS/architect/engineer/consultant making a quasi certificate (A Decision). So the process or procedure was only as "formal" as the industry expected from any certifier. In other words the adjudicator was an even handed person from construction who was a busy QS/engineer/architect/consultant with a side line of adjudicating as a stranger on other building and civil engineering projects when invited. Quite how this person adjudicated wasn't in point at all. He just got stuck-in! It was refreshing, even exciting.

It wasn't long before someone disagreed with the Adjudicator's Decision; and refused to play ball. Nor was it long before the Other Party asked the Court to enforce the Adjudicator's Decision; after-all it is supposed to be a binding decision by the adjudicator. On the face of it enforcement is simply an order of the Court to obey the adjudicator. In reality enforcement is the starting gun, which unleashes all the powers of the state to ensure that people obey what the High Court says it will do. Can you see a snag here?

Enforcement is the converting of an informal certification process of an adjudicator into a Judgment of the High Court. If the informal process (the adjudication) has been conducted in a fashion which is embarrassing to the English legal system, how can Her Majesty's Judges approve that repugnant process? If Parliament is supreme it did not intend through this somewhat low key Act of Parliament (HGCRA 1996) to sweep away the English notions of fair play in a dispute deciding process. Put shortly, if a Judge was asked to enforce unfairness according to the English Law system he would not do so. Parliament didn't invent an unfair dispute management system.

Quite what is "unfair" could be answered plainly. If you need a Judge to support an adjudicator's "due process" the adjudicator has to be seen to be fair in a Judge's eyes. Nobody argued for the Judge to test fairness through the construction industry's eyes but truth to tell none of us in the construction process thought we had to apply a judicial procedure. And, there you have the shift. The Judge is part of adjudication and Parliament meant that to happen via enforcement. It therefore meant the Court to have a roll, but none of this meant that the adjudicator could not do his job in an informal way. He is not an ad-hoc junior Judge. It simply means that if he administers or manages the process he must either have the express consent to do it this or that way or he must observe the notions of due process, *which the English Legal system has traditionally operated*. An early upsetting example was in ***Discain v.Opecprime*.** Here the adjudicator received commentary from one side only. That was too dangerous for the enforcement judge. It was *unfair* process and was set aside: -

"I find it distasteful and I cannot bring myself to enforce an adjudication, which has been arrived at in that way" . . . "he should have made sure that the other party was involved in the discussions . . ."

The message was plain and with respect quite correct. Those of us in at the beginning of this whole idea in truth overlooked the important role of the Judges. We soon realised that when asking ourselves "how" to

adjudicate we had to have a system recognisable to and have the nod of the High Court. That would not be difficult.

Another thing soon happened. There was a shift in power from the payer in commerce to a more balanced position. In 1996, Lord Woolf and colleagues had published *"Access to Justice"*. It openly explained that litigation was not working. Some said the same about arbitration. In other words, the man with the money said to-be-owed to another, could sit on his hands and take advantage of the slow expensive court system. But now there was a 28-day device (an experiment) in construction, which could and did decide who would have the money pro-tem. It followed that it was important to "win" this new first round in the dispute business. So industry called for help with its adjudications. Lawyers, consultants and "commercial managers" began more expertly exploring their legal rights under the construction contract. They did that to be on top of things when adjudication came along. The effect sometimes is to make the dispute go away. If not, the emphasis in the adjudication is now not merely revising a certificate or re-valuing the works or re-visiting an engineer's decision. Instead the adjudication is heaving with evidence, facts, and legal argument, procedural niceties. Moreover there is a real endeavour to use the adjudication to decide the matter for good.

Balfour Beatty v. Lambeth [12 April 2002] H H Judge Lloyd Q.C. : -
"It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed."

May I say this: -
The process of adjudication has at its heart speed, economy, arbitral principles. The adjudicator's task is to: -

- Ascertain the facts and the law;
- Without disproportionate expense;
- Within the constraints of the 28-day process as extended
- Having regard to the contractual rules;
- Having regard to the provisional and binding nature of the Decision

AND

- (a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

THE NEW MODEL

(1) There are differing types of dispute. It seems important to make better attempts to match the dispute with the adjudicator.
"Users" can help here.

(2) Matching the demands of the dispute with the right adjudicator is important.
Adjudicator Nominating Bodies ("ANB's") can help here.

(3) Given the timescale and procedural demands, the task of adjudicating may be made that much easier and outcome more predictable if the model was limited to deciding (Refereeing) the case put, rather than adding the burden of being the investigator as well.
Adjudicators can help here.

USERS INPUT

Ordinarily the "User" serves a 'Notice of Intention to Adjudicate' and then calls for an ANB to appoint. It would be useful to also provide a précis of the dispute and an indication of the degree of complexity in the Issues. The idea is to indicate to the ANB the qualities required in the adjudicator. 300-400 words ought be enough. An attempt to grade complexity on a scale 1 – 5 (5 being the most complex) would help.

"Users" might also reflect on the desirability of having pre-canvassed their arguments. This is the use of a "Position Statement", which indicates inter-parties arguments well before the adjudication: 'A' puts his

views to 'B' and seeks the views of 'B'. There is a resemblance here of Pre-Action Protocol. But the intention is to thoroughly explain 'A' and 'B's points of view to each other without the adjudicator being involved. By the way, this is one way of helping to avoid "new" argument in the subsequent Referral and/or Response.

ADJUDICATING NOMINATING BODIES ("ANB's")

If the "User" has indicated the Nature of the Dispute and degree of complexity, none of that is in point unless the ANB's have examined and graded its panel members. It may well be that now is the time to re-assess the adjudicator panellists. It need not follow that adjudicator's be dismissed, rather they are classified for differing qualities and obtain appropriate certificates.

THE ADJUDICATOR

I have asked myself about 'Standards' for conducting the adjudication qua adjudicator. Here are some ***"Blue Standards"*** for due process. They are merely my ideas: -

Blue Standard: Find and apply the applicable "Rules".

Blue Standard:
(a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
(b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Blue Standard: Act with proportionality

Blue Standard: Decide the case *put*.

Blue Standard: Ascertain the law from the submissions *put*.
Ascertain the facts: -
- Allocating burden of proof
- Weighing the evidence adduced
- Using the balance of probabilities
- Without the benefit of exploration by trial.

Blue Standard: Remind yourself: -
- You are a summary dispute decided not an advocate;
- Decide between 'A' and 'B' on *their* arguments;
- On their taken positions;
- On the weight of evidence and burden of proof, and
- Do so given absent exploration by trial.

Blue Standard: Do not (absent express agreement) become a certifier. Instead you are to summarily decide *between 'A' and 'B's arguments* who is right about a certificate. Decide upon *their* taken position on the weight of evidence and burden of proof given the absent exploration by trial.

Blue Standard: Do not (absent express agreement) become a detective. Instead you are a summary dispute decider on what 'A' and 'B' says about the facts.
Decide upon their taken positions on the weight of evidence and burden of proof given the absent exploration by trial.

Blue Standard: Do not (absent express agreement) become a forensic scientist. Instead you are a summary dispute decider on what 'A' and 'B' says about their case. Do not become a programmer or expert witness or witness of opinion. Bring your ordinary construction knowledge and apply it to 'A' and 'B's case but do not become an expert super-man know all**.**

Blue Standard: Do not (absent express agreement) become a valuer. Instead you are a summary dispute decider on what 'A' and 'B' says about value. Evaluate *their* taken positions on the weight of evidence and burden of proof given absent exploration by trial.

Blue Standard: Do not (absent express agreement) be a mediator. Instead decide the *rights* of 'A' and 'B' on the cases advanced by 'A' and 'B'.

Blue Standard: Do not become a *smart-alec,* a show-off by putting up bright ideas of your own.
By doing so there is a real possibility that you are helping 'A' or 'B' at the expense of his opponent.
By all means ask questions about 'A's case or 'B's case *but* only so as to understand what 'A' or 'B' is trying to say. The interfering busybody adjudicator is easily perceived as having lost his independent role. The real worry is that a notion or line of argument or point of law or finding a right or duty, which is then put to the parties is not only dangerous but becomes a life boat for 'A' or 'B'. There is nothing better than clinging to an argument (even milking) advanced by the Decision-Maker himself.

Knowing the Law or knowing the technical aspects of the dispute is enormously welcome so that you recognise the elephant when you see it. But you are not asked to deploy that knowledge when 'A' or 'B' hasn't. Merely appreciate the information for all it is worth. You are a Referee or an Umpire . . . better not to tell the bowler how to achieve a better result.

"USERS"

You might see that if the adjudicator operates a model whereby he decides between "Team A" and "Team B" he/she is very much dependent on what 'A' or 'B' has to say via its case. He is not there to investigate *despite* 'A' and 'B'. The adjudicator is there to read/hear with great care every word. It follows that the presentation of the case must be thorough. An adjudicator with limited knowledge of the law who finds himself faced with legal argument will need help from 'A' or 'B' or both. Be careful and patient in giving that help. The novice to law as adjudicator should be taken to basic principles and slowly signposted to cases and materials, which will help. Coax the adjudicator to obtain help but don't bank on him doing so. Rather better to give considerable help.

Another area of help is to be circumspect about piling-in umpteen lever arch files. There is a real chance that even if the adjudicator reads-in, not much will sink-in. Better to sign post. When a submission makes a point, refer it to a bundle number or better still copy and paste (if possible) part of a document into the submission.

Remember that the adjudicator is trying to decide the Issues and Sub-issues. Consider pulling issues into a schedule so that each can be seen at a glance and see where argued.

THE BINGHAM ADJUDICATION SCHEDULE				
ITEM No	ISSUES/SUB-ISSUES WITHIN ISSUE Including £ difference	Burden On Claimant? Respondent?	Argued where in Referral's Bundle?	Argued where in Respondent's Bundle?

This would be done once the inter-party exchanges are finished.
When compiling a Reply it is very helpful to paste the Reply commentary into the document that is being replied to. So if 'A' says in his Referral it happened on a Tuesday, let us see 'B's Reply to that below 'A's claim.

As for the Referral the whole idea is to refer the whole dispute. Frequently and wrongly 'A' refers only to his side of the dispute. The correct approach in the writer's view is to refer what 'B' has also previously said to 'A'. (You might now see the value and use of the "Position Statement".)

On occasions the Respondent thinks of arguments not previously advanced and puts them into his Response document. It is tempting for the Referring Party to object, saying that the new arguments/evidence turn the dispute referred into a different dispute. Sometimes that will be true and the new argument or evidence inadmissible. But if that is the case, if it forms a new dispute the remedy for 'B' is to serve a 'Notice of

Intention to Adjudicate' of his own and come with this further dispute. If it is as easy as this, don't persist with an empty quarrel in the first adjudication trying to get it in. Start another matter instead.

If new argument/evidence in the Response is in fact part and parcel of the first referred dispute, the test for letting it in is fairness. It should come into this dispute because it is relevant and if arrangements are agreed to provide the surprised party time to answer the new material. Time really is the answer. If the party with the new material will not agree to extend time for his opponent to answer it may be quite correct to reject the new material. The test is one of "fair play". You might begin to see how important it is to be on the alert to answer emerging disputes, so that the answer is at least on the table and is not an ambush answer *in* the adjudication. In short, the adjudication is not the time to find out what the other fellows argument is. The arguing is *over* when the adjudication *begins.*

The arguments are in the sack and the sack tied at the neck and handed to the adjudicator. In truth, new arguments do go into that sack during the adjudication but not if they create an unfair advantage, which causes or may cause substantial injustice.

ANB's (Adjudicating Nominating Bodies)

One of the most dangerous positions for "Users" is the ANB, which becomes an outside influence on adjudicators. It is unlawful to have adjudicators *"looking over their shoulders"* when conducting and deciding a dispute. My concern is the use made, and effect of, complaints to ANB's about adjudicators. Judicial decision makers are not there to win friends. Judges, arbitrators, adjudicators and tribunals of all sorts attract criticism about their process or outcome. The common law of England and Article 6 of Human Rights Act forbids the imposition of "outside pressure" on any tribunal. If that is happening or happened the Decision has no effect in law. The reason is that the Decision maker may, only may, trim and tailor his decision to avoid a complaint. There need only be a mere possibility of that.

The real intention behind harbouring complaints is to monitor performance. If that is what happens (and if complaints especially from a loser can be trusted) then no real difficulty arises until the effect of a complaint is analysed. If the effect, might, only might, lead to some disadvantage suffered by the adjudicator then the well-intended idea becomes unlawful and divert the true course of justice. Even if there is a one in one hundred chance of that happening, the pressure must stop. Far better to continually train and continually examine the Decision makers, this is objective assessment and does not offend independence nor impartiality.

ADJUDICATORS One or two other **Blue Standards**: -

1. **TAKING THE APPOINTMENT**

- Am I available?
  - 24/7 task
  - 42 days and more besides
  - Too busy
- Do I have the expertise
  - Familiar
    - Technically
    - Legally
- Is there any conflict?
  - **Recuse**
    - Bias actual
    - Bias apparent
    - Independence
    - Prejudice
    - Impartial

Discussion: Bias

The test as to bias was stated by Lord Hope in ***Porter v. Magill*** [2002] 2AC 375 @ paragraph 103: -

"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

That is the test, which an adjudicator is required to apply when deciding whether the adjudicator should recuse himself for bias.

Blue standard : IF IN DOUBT RECUSE

For a detailed exploration of bias and adjudication, read ***Glencot v. Ben Barrett & Son***. Note the cases therein especially ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451 CA (Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor) said at pages 471-472 (paragraphs 2-3): -

"2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affections or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

3. Any judge (for convenience, we shall in this judgment use the term 'judge' to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgement given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

These observations, although directed to impartiality, would apply equally to independence*

AND Lord Prosser in ***Starrs v. Ruxton*** [2000] JC 208: -
"As regards the actual words 'independent' and 'impartial', the latter appears to me to be of the essence of the judicial process. I would regard the concept of a partial judge as a contradiction in terms. But I am inclined to see independence – the need for a judge not to be dependent on others – as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether in the executive, or indeed in the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him. The requirement of independence seems to me to have an importance, which runs even wider than that of impartiality. The two concepts appear to me to be inextricably interlinked, and I do no myself find it useful to try to separate the one from the other (page 232)."

Blue standard : The Adjudicator must have complete independence. If in doubt recuse.

UNEQUAL REPRESENTATION

The Adjudicator must always remain independent of the Parties. Helping the unrepresented Party may easily create the impression of bias. The limit of assistance is in the matter of not allowing one party to take advantage of the weaker party.

Blue standard : Do not make a case for an unrepresented party. Safeguard the party from unfair advantage only.

THRESHOLD JURISDICTION

A Respondent may contend: -

- No right for the Referring Party to adjudicate at all;
- No right for you to be the Adjudicator: -
  - Wrong appointing body;
  - Procedurally improper appointment.

* Lord Bingham in ***Miller v. Procurator Fiscal*** [July 2001] Privy Council

Blue standard: **Treat a Jurisdictional challenge by way of full analysis (**Whether binding or not**): -**

- Consider facts and law;
- Consider own self interest;
- Consider risk of wasted resource by pressing on;
- Consider disadvantage/prejudice suffered by pressing on;
- Consider "balance of convenience" in stopping;
- If in doubt stop.

TAKING POINTS

Beware temptation to "take a point" of your own. Unless there is gross unfairness *avoid* taking a point to assist one party. Retain independence. Remember, if the parties continue with the adjudication without making an objection forthwith it may not raise that objection later before a court unless he shows that at the time he took part or continued to take part in the proceedings he did not know and could not with reasonable diligence have discovered the grounds for objection.

Read Dyson J. in ***Project Consulting v. Trustees of the Grey Group*** (Case No 7 Adjudication Decisions) and read too Devlin J. in ***Westminster v. Eicholz*** *WLR [1954].*

Blue standard: **Do no take points yourself unless a serious injustice might arise.**

INTERNAL JURISDICTION

Essentially this is to do with what the Adjudicator is empowered to do. An example is to ask: "What dispute is the Adjudicator seized?"

Carter v, Nuttall [April 2002] H H Judge Bowsher: -

"It was accepted before me that the jurisdiction of an adjudicator derives, at least in a case like the present, from the Notice of Adjudication. Put simply, the adjudicator has jurisdiction to decide a "dispute" which is the subject of a Notice of Adjudication, but he has no jurisdiction to decide something, which is not covered by the relevant Notice of Adjudication. It seems to me that what is or is not the subject of a Notice of Adjudication depends upon proper construction of the relevant notice in accordance with the principles of construction enunciated by Lord Hoffman in ***Investors Compensation Scheme Ltd v. West Bromwich Building Society*** *[1998] 1 WLR 896 at pages 912H to 913F."*

Sometimes a Respondent will respond with a defence to which the Referring Party will object, saying that all or part is outwith the "dispute" in the Notice of Intention: -

Fastrack

"Thus the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the Referring party first intimates an adjudication reference. In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the Referring Party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties."

AND

KNS v. Sindall [17 July 2000] H H J Humphrey Lloyd Q.C.

"As Judge Thornton said in Fastrack, "the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference." A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought. It takes the risk that its bluff may be called in an unexpected manner[*]*. The further documents which come into existence following the notice of adjudication (such as "the referral" which is defined in clause 38A.4.1 of DOM/1) do not cut down or, indeed enlarge, the dispute (unless they contain an agreement to do so). The adjudicator is appointed to decide the dispute, which is the subject of the notice and that notice determines his jurisdiction. The adjudicator's*

[*] It must be doubted that the learned Judge was indicating that it was open to the Responding Party to reverse ambush the Referring Party. It is the timescale of 28-days, which precludes "trying-out" brand new substantive issues in the Defence.

jurisdiction does not therefore derive from the further documents, although those documents are likely to help the adjudicator to find out what needs to be decided in order to arrive at a conclusion on the dispute."

In ***Griffin v, Midas*** [21 July 2000] H H Judge Humphrey Lloyd, Q.C. explains: -
"That means that not only has there to be time to consider the claim or assertion but also, in an appropriate case, time to discuss and to resolve it by agreement, for only if that fails will there be a dispute, as I set out at the beginning of this judgment. Adjudication is not a substitute for discussion and negotiation nor is it to be used to provide the agenda for discussion and negotiation where no dispute had truly existed. The Defendant had obviously not time properly to consider the invoices before 3 May and it had no means of investigating the general claim. It was not in a position at that date to state what its position was. Moreover even if it had had the opportunity of doing so and had done so no dispute would have arisen until the Claimants had responded. A dispute will not exist if the claiming party accepts or has no real answer to a justified criticism of the whole or part of a claim. Only when the stages of discussion or negotiation are at an end may there be a dispute which could be referred to adjudication."

It is humbly submitted that what is good for the (Claimant) goose is good for the (Respondent) gander. Adjudication is a Decision about the discussions and negotiations which are all done but not resolved and are now before an Adjudicator to adjudicate upon that now closed container (the sack tied at the neck and handed over) and subject only to the adjudicator seeking clarification about facts and matters *already in* the container.

And if the Respondent advances a defence to which the Referring Party cries foul (inadmissible) then the adjudicator has to now decide whether the Defence is new/not previously discussed/ not an addition to the closed agenda. If it is new and substantial then it must be outwith the current adjudication and brought as a new and separate adjudication by the Respondent once crystallised. If on the other hand it is not new at all then the Referral was defective since it only referred the Claimant's side of the dispute. In this latter circumstance, the Referral was flawed from the outset.

Blue standard: **Interpret the Notice of Adjudication (in the context set by the Referral) to identify the issues.**

Blue standard: **The Referral is intended to refer the whole dispute as previously rehearsed. It cannot be an ambush.**

Blue standard: **The Response is not a vehicle for a substantive surprise defence. It cannot contain an ambush.**

NOTE: ***Buxton Building v. Durand School*** [March 2004] H H Judge Thornton Q.C. is instructive.

RULES FOR THE ADJUDICATION

BLUE STANDARD: **At the outset search for the Rules applicable to the Adjudication: -**

- **Contractual Express Terms (*e.g.* JCT/ ICE or ANB Rules: *e.g.* TeCSA)**
- **Implied *i.e.* "The Scheme"**

NOTE: It will be the contract, which indicates the Rules for Adjudication. An appointment by any particular ANB does not indicate the Rules of that ANB apply to the Adjudication, absent express agreement.

FINALLY :
Keep up with the Cases. Read every Judgment in full, not just my column in Building.

Anthony Bingham
3 Paper Buildings, May 2004

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"Decision Making – Can it be Judicial? "

Judicial?

1. The term "Judicial" has several meanings, including
"*decreed by or proceeding from a court of justice*"
and
"*established by or founded upon law or official or accepted rules*"
and
"*characterized by careful evaluation and judgment*".

2. The decision of an Adjudicator is not the decision of a judge in Court of Justice and therefore in that narrow sense is not a judicial decision.

3. The Housing Grants, Construction and Regeneration Act 1996 does not expressly state that an Adjudicator shall decide the dispute referred by careful evaluation and judgment and based upon the applicable law. Nonetheless, it is difficult to avoid the conclusion that a "judicial" decision in that wider sense was clearly intended:
   3.1 Section 108(e) of the Act requires contracts to impose a duty on the Adjudicator to act impartially. The meaning of the term "impartially" has been fleshed out in a number of cases[49] to mean not only that there should be no apparent bias, but also that the Adjudicator should act fairly and conduct proceedings to comply as far as the timetable allows with natural justice.
   3.2 Section 108(f) of the Act requires contracts to enable the adjudicator to take the initiative in ascertaining the facts and the law. There is little point in such a requirement unless establishing and applying the law to the facts is required to be an inherent part of the decision process.

4 The Scheme for Construction Contracts (England and Wales) Regulations 1998 provides further guidance on the intention of Parliament. The Scheme confirms that the decision making process is required to be judicial in the wider meaning of that term:
   4.1 Paragraph 4 of the Scheme requires that a person requested or selected to act as an adjudicator is not to be an employee of one of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute.
   4.2 Paragraph 12(a) of the Scheme requires the Adjudicator to act impartially in carrying out his duties. The Adjudicator is required to act in accordance with any relevant terms of the contract and reach his decision in accordance with the applicable law in relation to the contract.
   4.3 Paragraph 13 of the Scheme allows the Adjudicator to take the initiative in ascertaining the facts and the law "*necessary to determine the dispute*". Paragraph 13 provides a list of powers that the Adjudicator may use.
   4.4 Paragraph 15 (b) allows the Adjudicator to "*draw such inferences ….. as circumstances may, in the adjudicator's opinion, be justified*" from a failure to comply with any request, direction or timetable of the Adjudicator made in accordance with his powers or any failure to produce any document or written statement requested by the Adjudicator.
   4.5 Paragraph 15(c) of the Scheme allows the Adjudicator to make a decision on the information before him "*attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed*".
   4.6 Paragraph 17 of the Scheme requires the Adjudicator to consider any relevant information submitted to him by any of the parties.

5 Recent cases show that judges will not enforce a decision if some aspect of the adjudication proceedings is repugnant to them. This is the ultimate test of an adjudicator's decision and whether it can be considered judicial (adopting the wider meaning). Three aspects of adjudication proceedings are considered below in the context of recent cases, namely:
   5.1 Appointment
   5.2 Conduct of proceedings
   5.3 Deciding the Issues

[49] **Discain Project Services v Opecprime Limited (No 1)** [2000] BLR 402 is one of the first cases.

6 Before doing so, it is relevant to reflect on the how adjudication has matured into a sophisticated means of dispute resolution, despite its essential provisional status in law[50].

7 Adjudication has been adopted by the construction industry as an intervening provisional stage in the dispute resolution process, even when the contract had ended. Adjudicators now decide very complex disputes, involving substantial sums, often years after the relevant events.

8 The timetable for adjudication prevents the development of the full case during the adjudication process itself. As a result particularly in complex cases, the Referral may be voluminous including witness statements, expert opinions and extensive documentary evidence. Legal costs can be considerable.

9 In recent adjudications in which the writer was involved the parties were represented by Counsel on both sides, one day hearings were held with full transcript with cross examination of witnesses and experts and the initial 28 day period was extended in one case to 3 months.

10 It is perhaps because of this development, that the Courts have insisted that adjudicators act judicially.

The Appointment

11 The Parties must carefully select the adjudicator since the adjudication will have been a waste of money if the Court does not enforce the decision. Even in the tight timeframe of adjudication, the parties may spend considerable sums. A wrong selection, possibly to obtain a tactical advantage, may prove costly in the end.

12 The prospective adjudicator must carefully consider if he should accept an appointment. At present, as far as I am aware, only the Institution of Civil Engineers requires their adjudicators to comply with a code of conduct that addresses such matters. In making a decision whether to accept appointment, the prospective adjudicator must carefully consider whether:

12.1 he has the competence and the capability to deal with the issues referred to him;
12.2 he has the time to conduct the adjudication;
12.3 there are any conflicts of interest with the parties or their representatives;
12.4 the prospective adjudicator has a financial or other interest in the issues to be decided;
12.5 there are any circumstances which may give the impression of bias.

13 Two recent cases show the circumstances that adjudicators will wish to avoid by refusing an appointment.

Case 1: Pring & St. Hill Ltd –v- C.J. Hafner (2002)

14 The first case ***Pring & St. Hill Ltd –v- C.J. Hafner*** *(2002)* decided by Judge Humphrey Lloyd demonstrates the problems faced by adjudicators when acting in multiple adjudication with different parties, whether sequential or in parallel. The essential facts and the involvement of the Adjudicator were as follows:

14.1 The Adjudicator had acted in two previous adjudications between Sir Robert McAlpine Ltd and Pring subcontracted to install glazing in a new building. A large portion of the panes of glass were damaged and McAlpine had to replace them. There were four firms, including Pring, who might have caused or contributed to the damage.
14.2 Pring commenced two adjudications against its sub-sub-contractors, Hafner and Howell, in order to pass on the costs for repair to glazing awarded in the previous Adjudication with McAlpine.
14.3 The same Adjudicator in the McAlpine adjudications was appointed in the Hafner and Howell adjudications, which proceeded concurrently.

15 The situation created by the Adjudicator accepting the appointments, was that the Adjudicator had available a great deal of relevant information by different parties. Not all of that information was

[50] If the dispute is referred to arbitration or litigation following adjudication, it is decided anew and the whole process needs to be repeated. There is provision in the Housing Grants Construction and Regeneration Act 1996 at Section 108(3) for the parties to agree to accept the decision of the adjudicator as finally determining the dispute, but this is rarely adopted in practice. Nonetheless, largely by inaction, many adjudicator's decisions are the last word on the dispute and no further steps are taken either to court or to arbitration.

available to each of the parties. That situation presented significant obstacles to a judicial and enforceable decision on a number of different grounds.

16 The circumstances met the test of apparent bias (Ground 1) and on that basis the Adjudicator's decision was not enforced:

16.1 The Adjudicator's involvement in the previous adjudication may create a very real risk that the Adjudicator would carry forward his judgments and opinions previously reached.

16.2 The Adjudicator might be pre-disposed to a particular view of the evidence, in this case the evaluation of costs which Pring wished to pass on. He might conclude that the sum was the correct measure of McAlpine's damages recoverable from Pring.

16.3 The Adjudicator had not reconsidered his previous evaluation.

17 The circumstances were also a breach of the principles of natural justice as they applied to adjudication (Ground 2) and on that basis the decision was unenforceable:

17.1 The adjudicator had not made available for scrutiny by Hafner the basis for his earlier factual conclusions in the adjudication between McAlpine and Pring.

17.2 Reasons of confidentiality the adjudicator may not have allowed the Adjudicator to make available information.

17.3 In the circumstances, Hafner was deprived of the opportunity to challenge the correctness or relevance of the earlier decision.

17.4 Hafner was not given the opportunity to know the legal and factual roots of the case it had to meet.

18 The circumstances showed that the Adjudicator had not obtained consent for concurrent proceedings as required by Paragraph 18(2) of the Scheme which applied (Ground 3), and on that basis the decision was unenforceable through lack of jurisdiction:

18.1 Judge Humphrey Lloyd recognised that there would be circumstances where it would be valuable for the parties to have the same adjudicator in parallel adjudication to make best use of his knowledge, time and effort.

18.2 Judge Lloyd also recognised that a party would wish to know that it could protect its interests by having information in the parallel adjudication made available to it. A party might also wish to protect its interests by ensuring privacy and confidentiality, which would be jeopardised by parallel proceedings.

18.3 The party itself was best placed to reach a decision about its own interests and these conflicting considerations.

18.4 Hafner had refused to give consent to concurrent proceedings, but the adjudicator proceeded nonetheless with the adjudication.

18.5 Without consent, the adjudicator had no jurisdiction.

Case 2: Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004]

19 The second case ***Amec Capital Projects Limited v Whitefriars City Estates Limited*** *[2004]* decided by Judge Toulmin further develops the principle of overall apparent bias in adjudication. It emphasises the need for prospective adjudicators to carefully consider their previous involvement with the parties and the issues, at the time of appointment. The essential facts and the involvement of the Adjudicator were as follows:

19.1 There had been two adjudications on the same issues, with the same parties.

19.2 The adjudicator made his decision in the first adjudication in favour of Amec. He ordered Whitefriars to pay Amec the sum of £597,371.78. The Court declined to enforce the first decision on the basis that the adjudicator was not the designated adjudicator under the contract and therefore he did not have jurisdiction[51].

19.3 Amec started the second adjudication on the same issue and requested the appointing body to appoint the same adjudicator, which they did.

[51] Whitefriars raised that issue before Judge Toulmin in relation to the appointment in the second adjudication, but on the additional facts presented, he decided for Amec on this point.

19.4 The Adjudicator accepted the appointment on the second adjudication.

20 The situation of the Adjudicator accepting the second appointment created potential difficulties for the Adjudicator attempting to consider afresh those matters that he had already decided. It was often not possible at the outset to foresee problems and the difficulties might only become apparent in the course of the second adjudication. As observed by Judge Toulmin it was very often better when the same or similar issues needed to be considered afresh that a different adjudicator should consider them.

21 Judge Toulmin applied to adjudication, the test for overall bias stated by the House of Lords in ***Porter v Magill*** *[2002]* for judicial proceedings. It is an objective test. It is enough that a fair minded observer who knew the facts would have considered that there was a real possibility that the adjudicator was biased.

22 It was not enough, on its own, that an adjudicator is re-appointed to decide a dispute on the same or similar facts between the same parties. In this case there were three crucial factors that together led Judge Toulmin to the conclusion that there was a real possibility of bias and that prevented enforcement of the decision.

22.1 The adjudicator had obtained legal advice in the first adjudication, which he did not disclose to the parties. He did not obtain legal advice on this point in the second adjudication. There was a real risk that the adjudicator carried forward into the second adjudication the legal advice in relation to one of the issues and that it influenced the judgments which he formed. This was not only a breach of natural justice but also one of the factors that supported a finding of overall bias.

22.2 The telephone conversation between the adjudicator and Amec leading to his appointment in the second adjudication, went beyond the original enquiry as to where to send the papers. Amec discussed the judgment in relation to enforcement of the first decision. Amec told the adjudicator that since the matter was now open again it was referring the matter back to the adjudicator. The conversation in these circumstances was unwise, although on its own it might not have warranted a conclusion of a real possibility of bias. Added to other factors, the conversation carried the risk that a fair minded and informed person might have concluded it might have led the adjudicator to the biased conclusion that he could simply reach the same conclusion as in the first adjudication.

22.3 The advice obtained by the adjudicator in deciding whether he had jurisdiction in the second adjudication was disclosed to the parties but only after he had decided that matter. Whitefriars therefore had no opportunity to comment on the advice before the adjudicator made his decision. It might be considered that since the issue of jurisdiction was not directly concerned with the substantive case, that this would not be a factor in relation to bias. That is not so. Judge Toulmin was not prepared to enforce a decision reached in this way.

23 The third factor emphasises how important it is that adjudicators act judicially on all matters related to the adjudication.

Conclusions

24 The conclusions that may be drawn are:

24.1 If adjudication is not to be a waste of money, the Parties, appointing bodies and adjudicators must carefully consider whether the circumstance of appointment properly reflect the judicial nature of the appointment.

24.2 The ultimate safeguard is the adjudicators themselves and robustness to refuse appointments.

24.3 The pressure of the adjudication timetable will not excuse an adjudicator from the requirement to comply with judicial standards of conduct.

24.4 The remedy will usually be in the hands of the adjudicator – he can refuse an appointment if he does not consider he can carry out his duty properly or if he cannot ensure the due process of adjudication.

Conduct of Proceedings

25 The Courts have encouraged the expansion of adjudication by developing a jurisprudence that recognises the short timetable. Concepts of fairness of the proceedings, natural justice, bias and impartiality tailored to the short timetable, have been developed. It is clear that adjudication is a legal process and the adjudicator must act judicially in managing the process.

26 In the very first decision on this new process in ***Macob Civil Engineering -v- Morrison Construction*** *(1999)* Mr Justice Dyson (as he then was) recognised that the timetable for adjudication is very tight. He stated that so far as procedure is concerned, the adjudicator is given a fairly free hand. He may, therefore, conduct an entirely inquisitorial process, or he may invite representations from the parties. Crucially Dyson recognised that Parliament intended that adjudication should be conducted in a manner

"*which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept*".

Those words provided the launch pad for the Adjudication process.

27 The reasons for challenging an Adjudicator's decision are now well settled and provide adjudicators with the standard of conduct required of them.

28 I suggest that an adjudicator must conduct the adjudication proceedings with the aim of securing sufficient information and understanding about the case to allow him to do substantial justice between the Parties by his decision[52].

29 There are a number of techniques the adjudicator can used to manage the case and the investigation, either separately or in combination to further that aim. He can for instance:

29.1 rely solely on the submissions made to him and decide without investigation beyond the submissions – this would be unusual,

29.2 issue Preliminary Findings of Fact and Views and invite comment before making his final decision – useful to draw together the arguments and comments,

29.3 identify the issues early in the process and direct the Parties to make submissions on each of the issues including identifying evidence or caselaw – the most usual course,

29.4 direct the re-presentation of evidence by the Parties in a manner that allows easy analysis and comparison, such as in electronic schedule form – useful in large quantum cases,

29.5 obtain the agreement of the parties to the appointment of legal advisers and technical assessors to speed up the process – unusual except in highly technical cases,

29.6 arrange meetings or hearings to have matters explained or hear witnesses or experts - more usual than not.

30 Adjudications involving complex issues and extensive evidence will require a particular approach. The case ***London & Amsterdam Properties Limited –v- Waterman Partnership Limited*** *[2003]* decided by Judge David Wilcox shows that particularly in those situations adjudicators must ensure that the rules of natural justice are observed if necessary by active intervention by the adjudicator. The essential facts were as follows:

30.1 LAP appointed Waterman as its Structural and Civil Engineers and Traffic Consultants and disputes arose.

30.2 The dispute was referred to adjudication and LAP served its Referral. A timetable was agreed. Waterman was to serve its response and LAP its reply.

30.3 When LAP served its reply, it contained a supplemental statement by a witness which included considerable evidence on quantum. The evidence was available at the time of the referral notice but had not been served. It was not made available to Waterman before.

30.4 Waterman requested an extension of time to deal with new evidence. Waterman asked that the adjudication decision should be put back to allow Waterman to obtain the assistance of its professional advisor who was not immediately available.

[52] I examine how the Adjudicator should proceed if that aim is not achieved in the next section "Deciding the Issues".

30.5 Instead of sensibly agreeing to an extension, LAP insisted on a strict adherence to the existing timetable.

31 Waterman objected to the additional evidence on the basis that it had been available to LAP at the time of the referral and that they had then chosen not to rely upon it. Waterman argued that the information had been requested long ago and there was not adequate time to deal with it by way of expert analysis.

32 The Adjudicator gave his decision and ordered Waterman to pay LAP £708,796.95 including interest. It was clear from the Adjudicator's decision that part of his reasoning depended upon the additional material belatedly produced in the final stages of the adjudication. This was the very evidence about which Waterman complained.

33 Judge Wilcox found that the additional evidence was introduced very late in the adjudication process, so that it could not have been taken account of in Waterman's response. It was not made available until after Waterman's response when their quantum expert drew attention to the lack of substantiation. There clearly was an evidential ambush. The decision to withhold the quantum evidence requested in 2002 was clearly deliberate. The decision to serve the considerable body of detailed evidence at the time of the referral was deliberate. Judge Wilcox generously observed that the omission to serve the necessary additional evidence may have been merely oversight or neglect.

34 Judge Wilcox held however that an evidential ambush, however unattractive, did not necessarily amount to procedural unfairness. It depended upon the case. It could be an important part of the context in which the Adjudicator is required to operate and in which his conduct may fall to be judged in the light of the fundamental requirement of impartiality.

35 In this case, Judge Wilcox decided that Waterman had demonstrated a substantial live and triable issue as to the Adjudicator's jurisdiction to make the decision, based upon the Adjudicator's failure to act impartially. He refused summary judgment:

35.1 Judge Wilcox held that in accordance with the rules of natural justice, the Adjudicator should either have excluded the supplemental witness statement, or should have given Waterman a reasonable opportunity of dealing with it.

35.2 Under the applicable adjudication rules the Adjudicator was preventing from extending time because LAP declined to agree to the necessary extension of time. The Adjudicator should therefore have excluded the evidence. He ought to have complied with the requirement of natural justice but did not do so.

35.3 In fact the Adjudicator avoided a decision as to whether or not the evidence should be admitted and then based his decision upon the additional evidence without giving Waterman a proper opportunity to deal with it. Judge Wilcox held that this amounted to a substantial and relevant breach of natural justice.

36 The decision emphasises the need for Adjudicators to manage the adjudication process so as to ensure fairness and impartiality. This may prove difficult but is an essential part of an adjudicator's judicial duty to the parties and the process.

37 Adjudicators are chosen because of their knowledge of the construction industry and their knowledge of adjudication and construction law. If the adjudicator merely applies his own knowledge and experience in assessing the contentions, factual and legal, made by the parties, there will be no requirement to obtain further comment from the parties. If, however, the adjudicator uses his own knowledge and experience in such a way as to advance and apply propositions of fact or law that have not been canvassed by the parties, it will normally be appropriate to make those propositions known to the parties and call for their comments[53].

Deciding the Issues

38 There has been little useful guidance from the Courts on how an adjudicator should decide matters referred to him. The decision in ***Bouygues v Dahl-Jensen*** *[2000] BLR 522* appears to suggest that an adjudicator has great latitude:

[53] Opinion of Lord Drummond Young in ***Costain Limited v Strathclyde Builders Limited*** *[December 2003] Outer Court of Session*

"*If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.*"

39 The question whether an adjudicator should make a decision in particularly complex cases was raised by Judge Wilcox in ***London & Amsterdam Properties Limited v Waterman Partnership Limited*** *[2003].*

39.1 Judge Wilcox warned that there may be limits to the types of cases that could be decided by the process of adjudication. He gave as an example a complex dispute, involving the evaluation of the activities of a number of parties over a long period of time, involving issues of professional negligence and where the project was substantially complete.

39.2 He then expressed the view that even where an adjudicator is prepared to firmly and impartially exercise the powers given to him to investigate, control and manage the dispute, there may well be cases which because of their complexity and/or the conduct of the Claimant are not susceptible of being adjudicated fairly and thus impartially.
"*The scheme does not envisage that there should be a provisional resolution of a dispute by an adjudicator at all costs.*
This would be far greater an injustice and mischief than that which the HGCR Act was enacted to remedy."

40 It appears that Judge Wilcox was concerned whether in all cases an adjudicator could do substantial justice between the Parties.

41 It is a novel view that somehow adjudication should be restricted to only certain types of disputes. There is no such restriction on the Housing Grants Construction Regeneration Act 1996.

42 It is a remarkable suggestion that in some cases, an adjudicator who has accepted the appointment to decide matters referred to him, should not do so. An adjudicator is bound to determine the dispute referred to him, provided it falls within his jurisdiction. Any decision made by an adjudicator otherwise, would be no decision at all.

43 In the Scottish decision **Ballast plc v The Burrell Company Limited [2001]** Lord Reed was required to deal with such a decision. The adjudicator had apparently formed the view that because the parties had departed from the terms of the pre-printed contract that he was unable to determine the matter referred to him. Lord Reed described the character of the adjudicator's decision as "*ephemeral and subordinate"* and that it *"should be an expeditious procedure rooted in common sense*". He decided that the adjudicator was bound to determine the dispute referred to him, provided it fell within his jurisdiction. By refusing to decide, the Adjudicator had failed to exercise his jurisdiction to determine the dispute. His decision was therefore a nullity.

44 Lord Reed's characterisation of the adjudicator's decision and the decision in *Bouygues* suggests that (at least at present) the Courts are reluctant to review the details of adjudicator's decisions and the process of reasoning adopted[54]. This does not mean that the final stage of the adjudication decision-making process is not required to be judicial in the wider sense.

45 The process of judicial reasoning is complex. A simple description in construction cases is that a judge answers a question by reference to necessary facts. Each party will have competing propositions for the answer to the question, each supported by some facts. Examples of such questions and propositions are:

45.1 <u>Was the completion of the works delayed by late design by the Employer</u>?

45.1.01 The Employer did not complete the design by July 2003 but only by October 2003 and thereby caused delay to completion of the works.

45.1.02 The Employer completed the design in October 2003, but the design was not late and even if the design was completed earlier the works would still have been delayed by matters the responsibility of the Contractor.

[54] The Court will examine the adjudicator's decision only to the extent necessary to ensure it has been made within jurisdiction.

45.2 Was the work an instructed variation under the Contract?

45.2.01 The Architect instructed a change to the works in July 2003 which is a change to the specification and is a variation to the contract.

45.2.02 The work was not a change to the specification. The Architect did not give an instruction. In any event there was no instruction in writing which is a requirement for the instruction to give rise to a variation under the Contract.

46 Propositions will usually involve the reconstruction of past events that cannot be proved with absolute certainty[55]. Each party will have a different version, explanation or hypothesis of the past events, each supported by allegations of facts. The alleged facts must be proved by evidence. The methods and mode of proof are many and varied.

47 Essentially the judge must decide which hypothesis is more probable than the other. The judge must decide which facts are proved and whether or not the proven facts support the hypothesis. Even when the judge prefers the hypothesis of the Claimant, that is not enough to win the case if the threshold of proof has not been reached.

48 In the House of Lords ***Rhesa Shipping Co SA v Edmunds and Another (The Popi M)*** *[1985] 2 All ER 712* the issue was whether the shipowners were entitled to claim under an insurance policy for the total loss of a ship. The shipowners commenced the action against the underwriters. The competing propositions were:

48.1 Shipowner: The loss of the ship was caused by collision with a submerged submarine.

48.2 Underwriters: The loss of the ship was the prolonged wear and tear of the ship's hull over many years, resulting in the shell-plating opening up under the ordinary action of wind and waves without collision with an external object.

49 The judge at first instance ruled out the underwriter's proposition and considered that the shipowner's explanation of a submerged submarine extremely improbable. Nonetheless he decided that the shipowner's explanation on the balance of probabilities was the cause of loss.

50 Lord Brandon stated the approaches to be taken in deciding an issue:

50.1 A defendant could suggest and seek to prove some other cause of loss, but there was no obligation to do so. Even if they choose to do so, there is no obligation on them to prove, even on the balance of probabilities, the truth of their alternative case.

50.2 The legal concept of proof of a case on a balance of probabilities must be applied with common sense. A finding that an event is more likely to have occurred than not, does not accord with common sense if a judge also finds that the occurrence of an event is extremely improbable,

50.3 It is always open to a court, even after prolonged inquiry, to conclude at the end of the day that the cause of loss, even on the balance of probabilities, remains in doubt with the consequence that the claimant has failed to discharge the burden of proof which lay on them.

50.4 The judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases however in which owing to the unsatisfactory state of the evidence, deciding on the burden of proof is the only **just** course for him to take.

It was held that the judge at first instance had adopted an erroneous approach by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. In these circumstances the Judge should have found that the true cause of loss was in doubt and that the shipowners had failed to discharge the burden of proof.

51 The above decision shows that the judicial process is not intended primarily to obtain the best available approximation to past events. If that was the purpose, then all evidence would be admissible without restriction and judicial reasoning would simply involve giving weight to each item of evidence on a

[55] There may be self evident presumptions that may be accepted but even these are rebuttable.

logical enquiry. Instead, the law of evidence prevents some evidence being admissible for a variety of reasons. The existence of the burden of proof and the law of evidence shows that the primary purpose of judicial enquiry is to administer justice between the parties. The approximation of past events is subordinate to that purpose. That explains why the conduct of the parties themselves may prevent evidence being admissible.

52 The decided cases, the Act and the Scheme show that the above judicial process is expected of adjudicators, deciding on the basis of evidence. Paragraph 15 of the Scheme does suggest that the adjudicator is entitled to decide what weight is to be given to evidence, depending on the conduct of the parties. There appears to be only one overriding rule of exclusion of evidence in adjudication. The Courts have repeatedly declined to enforce an adjudicator's decision because it was based on evidence on which the losing party has not had the opportunity to make submissions.

53 The decision in ***London & Amsterdam*** above suggests that an adjudicator is entitled to exclude evidence in circumstances which would make the process unfair, when a party would not have the opportunity to make submissions.

54 Excluding evidence which leads the adjudicator not to consider all the issues referred to him may be unfair and make the decision unenforceable. In ***Buxton Building Contractors Ltd v Governors of Durand Primary School*** *[March 2004]* Judge Thornton QC held that it was for the adjudicator to identify fully all the issues that had arisen that he had to decide and then to decide them, particularly where one of the parties was not legally represented. The judgment by Judge Thornton questions the boundaries of the Court of Appeal judgment in *Bouygues*.

55 In ***Buxton*** the issue was the release of the last tranche of retention which required a Final Certificate from the Supervising Officer under the JCT IFC 98 form. The certificate issued was stated to be an Interim Certificate even though issued after Practical Completion. The School had remedied outstanding defects and sought payment in damages as a cross-claim. The adjudicator decided that the School had not issued a withholding notice. As a consequence the adjudicator:

55.1 did not consider at all the nature, content, validity or quantification of the School's cross-claim;

55.2 did not investigate the material provided to him by the School;

55.3 did not decide whether the School's cross-claim had in fact been taken into account by the Supervising Officer when certifying but made an erroneous assumption that it had been;

55.4 did not consider whether the certificate was issued with contractual validity and instead wrongly assumed that the certificate was one that was duly authorised by the contract conditions and that its payment was provided for by those conditions;

55.5 did not take into account or consider the validity of the correspondence from the School which amounted, or arguably amounted, to a valid withholding notice that had been served timeously.

56 Judge Thornton held that the adjudicator had erroneously concluded that the sum certified represented part of the value of the work which had not previously been certified. The adjudicator did not consider at all the possibility that the sum was partial release of retention that had been previously certified and then validly retained. Crucially this meant that the adjudicator did not consider one of the School's principal arguments namely that one of the purposes of the retention fund was to provide a fund to reimburse the School for the kind of loss that made up its cross-claim. The cross-claim should have been set against the retention release in question.

57 Judge Thornton held that the adjudicator's decision was unenforceable on the following grounds:

57.1 failure of the statutory duty to decide the entirety of the dispute as required by Section 108(2)(c) of the Act;

57.2 serious irregularities in the adjudication procedure by not conforming to paragraphs 17 and 20 of the Scheme (which applied) which require the adjudicator to consider all relevant information submitted to him by any of the parties to the dispute and to decide all matters in dispute. The adjudicator had not considered or decided upon the contents of the submissions, documents and issues referred to him by the School;

57.3 arriving at a decision which was intrinsically unfair by failing to consider or decide core issues that were and remained in dispute and was arrived at following a failure to take into account relevant material and information that had previously been placed before the adjudicator.

58 I suggest that the adjudicator's decision must be based on the evidence and argument presented. The decision is to be made is on the merits of the case as presented and not the best approximation of events. The adjudicator:

58.1 cannot assume that a party's case could be "improved" if more time was available. He cannot decide that something must be due, even if it has not been shown to be due.

58.2 cannot arbitrarily "split the difference". There must be some logic to his decision.

58.3 can decide on the basis of which party's proposition he prefers provided that if it is the Referring Party's proposition that it accords with common sense as having occurred on the balance of probabilities.

58.4 cannot refuse to decide because of the possible consequences of the decision.

59 Ultimately, if the adjudicator fails to understand or be convinced of the case in the time available and he is not allowed the additional time he requires, then he must decide against the referring party and refuse the remedy sought. That failure may be due either to the inadequacy of the case as presented, or to the inadequacy of the time required to consider the case.

Can Adjudicator's Decision Making be Judicial?

60 In conclusion, adjudicator's decision-making is required to be judicial in the wider sense and can be if the primary purpose of adjudication is recognized:

60.1 The adjudicator can act judicially in accepting his appointment and in the conduct of proceedings.

60.2 The primary purpose of adjudication is to administer justice (albeit rough justice) between the parties, and the approximation of past events is subordinate to that purpose. The adjudicator can act judicially to achieve that objective, applying common sense.

60.3 The adjudicator must conduct the adjudication proceedings with the aim of securing sufficient information and understanding about the case to allow him to do substantial justice between the Parties by his decision.

60.4 The decision is to be made is on the merits of the case as presented.

60.5 The adjudicator must consider all relevant information submitted to him by any of the parties to the dispute and to decide all matters in dispute.

60.6 The adjudicator must take into account the conduct of the parties in responding to his requests for evidence, and exclude evidence if the process or timetable does not allow a party the opportunity to make submissions on it.

60.7 The adjudicator must decide against the referring party and refuse the remedy sought, if the adjudicator fails to understand or be convinced of the case.

By Daniel Atkinson

Daniel Atkinson Limited

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Tel : 0044 (0)1443 486122 : Fax : 0044 (0)1443 404171 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk