THE TRIBUNAL IN THE DRIVING SEAT: INQUISITORIAL PROCEDURES IN ADJUDICATION AND ARBITRATION

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Introduction

An interesting, and perhaps unexpected, development in statutory adjudication under the framework of section 108 of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) is the impact of principles of natural justice, in particular procedural fairness, on how adjudications are conducted – despite the overriding requirement to render, subject to limited exceptions, a decision within 28 days of referral. Thus, in a number of cases the courts have held that procedural fairness requires each party to have a reasonable opportunity, within the applicable timescales, to present its case and know and be able to deal with its opponent's case (and, indeed, any case advanced by the tribunal!); the courts also require the tribunal to conduct the proceedings in an open and even-handed manner as between the parties.

The reasons for this development are complex, given that section 108 and many HGCRA-compliant procedures do not refer to procedural fairness. The reasons may be linked to the perception that adjudication has become the primary method of dispute resolution in the United Kingdom construction industry for all types of disputes and issues, not merely a method for an interim balancing of accounts prior to litigation or arbitration. They may reflect the concern of enforcing courts not to give effect to decisions that appear to flout basic principles of procedural fairness. But, whatever the explanation, one consequence has been to distance adjudication both from contract certification (such as by an architect or engineer) and from expert determination (where, unless the parties' agreement provides otherwise, the expert conducts a professional evaluation of a problem, not a determination of competing cases), and move it procedurally closer to arbitration. The short timescales in adjudication, the interim nature of the adjudicator's decision and the adjudicator's power, in rules that comply with section 108 HGCRA, to take the initiative in ascertaining the facts and the law, colloquially referred to as *acting inquisitorially*, have, however, encouraged and necessitated a procedural creativity not generally a characteristic of construction arbitrations where a commonly held view (once expressed by Lord Donaldson) was that arbitration is merely litigation in the private sector and thus should be conducted in a similar manner to litigation.

The purpose of this paper is to consider some of the techniques used by the author, when appointed as adjudicator, to investigate the facts and the law and test and understand the parties' cases, while observing the requirements of

procedural fairness within the required timescales; then to consider whether similar techniques can be adapted for use in arbitral proceedings to achieve some of the benefits of adjudication, in particular a more rapid and cost-effective process.

Case presentation and decision-making in adjudication

A principal uncertainty for parties involved in adjudication proceedings is to predict what will happen in the period after they exchange their written cases – generally a referral and a response to referral, as allowed for in the applicable adjudication rules – and before the adjudicator's decision. One approach, sometimes referred to as 'the black bag', is for the adjudicator to seek no further information from the parties and to render a decision, usually unreasoned or sparsely reasoned, based on his understanding of that material. Another approach is to allow the parties, in effect, to play ping-pong: exchanging further submissions before a silent adjudicator until one is exhausted or the adjudicator calls time shortly before reaching his decision. A variant of the latter approach is for the adjudicator to hold a hearing at which the parties engage in a parody of court procedure with speeches and cross-examination of witnesses, albeit in a totally unrealistic timescale, usually no more than a day.

Such hearings generally result in an uneven exploration of the parties' cases, of limited value to the adjudicator in formulating his decision. This is particularly so where the adjudicator fails to give the parties any advance indication of the topics on which he wishes to be addressed and why, since the parties can then do little more than repeat the arguments they have already advanced in their case statements – a costly waste of time.

The passive adjudicator

Those favouring such approaches stress that the adjudicator should not actively engage in the process, since the parties' cases may develop, in response to his comments or requests for information, in ways that go beyond what was provided in the referral or response or, indeed, what was in issue prior to the notice of adjudication. This, in turn, can result in challenges to the adjudicator's decision on the grounds that he has exceeded his jurisdiction by dealing with matters not encompassed by the notice of adjudication, or because the procedure was unfair since the adjudicator took account of material advanced by one party at a late stage in the adjudication on which the other had insufficient time to comment.

These are legitimate concerns, but they can be overstated; and by inducing excessive adjudicator timidity, they can result in a process that is dissatisfying for the parties. This is because there is no real exploration or testing of their respective positions, and the adjudicator's decision, when issued, may appear to be little more than a sophisticated, and expensive, form of coin tossing, evidencing no real understanding of the dispute or the issues relating to it and

giving no explanation of which of the parties' arguments found favour and which did not.

Moreover, the passive approach ignores the realities of case preparation in adjudication proceedings. When preparing their written statements, each party will make its own assessment of what it considers the adjudicator will need to know in reaching a decision. This material, other than perhaps the referral, is often prepared at considerable speed by persons who are familiar, possibly overly familiar, with the project to which the dispute relates and with the dispute itself. They may well have a shared history concerning that dispute, having been involved in extensive negotiations before the dispute is referred to adjudication. This can, on the one hand, mean that case statements take matters for granted and fail to include material, such as documents or parts of documents that, from the perspective of someone with no prior knowledge of the project or the dispute (the adjudicator), are necessary to understand the parties' cases, or to explain the information that is provided. It can, on the other hand, lead to the inclusion of material, such as notes of meetings and drawings, whose significance is not adequately explained or cross-referenced, or to the advancing of contentions which, while part of the shared history of the dispute, appear from the adjudicator's perspective to be of little relevance to its determination – a problem aggravated by the parties' natural tendency to argue on all fronts.

The speed at which these written statements are prepared and (sometimes) the limited legal knowledge of those preparing them, can also mean that issues that are material to a determination of the dispute are not clearly articulated, or the parties' contentions about those issues are confused and unfocussed. This makes them, from the perspective of the adjudicator who has no previous knowledge of the dispute, difficult to follow.

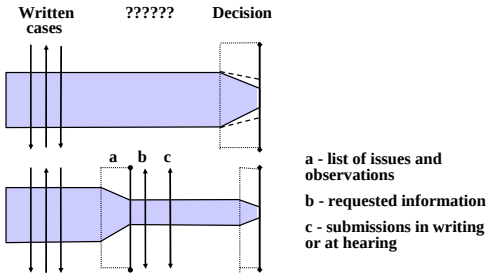
It is because the passive adjudicator has no tools for addressing these problems that the process and its outcome can be so dissatisfying for the parties. Faced with such problems, the passive adjudicator can do little more than take a punt at what seems to be the correct decision and, in order to avoid any suggestion that he has not considered or understood the parties' cases or submissions, provide as little in the way of reasons as possible; so that his, possibly limited, understanding of the dispute is not exposed.

The proactive adjudicator

These problems can be addressed, but only if the adjudicator is proactive in using his powers to investigate the facts and the law, giving focus and shape to the parties' dispute by identifying from the parties' written cases (a) those issues and arguments that appear to be relevant to the resolution of the dispute (not everything will be); and (b) the areas where further exploration will assist his understanding of the parties' cases. In short, the adjudicator can *add value to the process*. But, in order to minimise the risk of challenges on grounds of jurisdiction or procedural unfairness, thus must be done in a manner that seeks to narrow, not expand, the issues between the parties, and at a time when the parties can respond to the adjudicator's input (see Figure 1). It is too late,

from the parties' perspective, if the first indication they have about the adjudicator's views on such matters is when, or shortly before, they receive his decision.

Figure 1: Case presentation and decision making in Adjudication – Alternative approaches



For this reason, the author, in the light of the parties' case statements, referral, response and reply to response, prepares and sends the parties within a few days of receiving the reply a document entitled 'List of Issues and Observations'. This does three main things:

1. Sets out the background and context of the parties' dispute;
2. Summarises the issues whose resolution appears to be significant to the determination of the dispute and the parties' contentions on those issues; and
3. Identifies matters of comment or concern where further material, clarification or elaboration will assist the adjudicator in understanding the parties' cases and in reaching a decision.

The List of Issues, once sent out, sets the agenda for the second half of the adjudication (including any meeting) and for the decision, so any further material or representations from the parties can be directed towards that agenda.

Preparing a List of Issues

Since the List of Issues inevitably gives the parties an insight into how the adjudicator views their dispute and, in particular, the material advanced in support of their respective cases, it is important that the adjudicator does not give the impression that he has pre-judged or formed concluded views on the merits. This is done in two ways. First, and most importantly, by the manner in which any comments or questions are phrased. Secondly, by including introductory words to the effect that any views expressed are provisional and may change in the light of further material provided by the parties (see Figure 2).

Figure 2: Introductory words to a List of Issues and Observations

INTRODUCTION

The parties should note that any views expressed in this List of Issues, which is produced pursuant to my powers under s. 34(2)(g) of the Arbitration Act 1996, are provisional and are subject to re-consideration in the light of representations and material provided during the hearing.

If I have not, in this List of Issues, referred to a topic mentioned in material provided to me by either party, it is because I do not see its relevance to the matters I have to determine. If either party considers otherwise, it should draw the topic in question to my attention in accordance with my Directions.

To be effective, the List of Issues must identify the key issues and arguments. Thus, it is important to include an introductory note stating that if a matter is not referred to this is because the adjudicator does not see it as central to the issues to be determined, but that if either party considers otherwise the matter in question should be drawn to the adjudicator's attention (see Figure 2). This enables either party to draw apparent misunderstandings and omissions to the adjudicator's attention. Of the some forty adjudications that the author has conducted, he can only recollect a couple of instances where a party has taken up this opportunity, with the consequence that matters which might otherwise have been overlooked were addressed both at the subsequent meeting and in the decision.

The layout of a List of Issues

A List of Issues is laid out in a similar manner to a reasoned arbitral award, but in a more condensed form, omitting the recitals and the operative part, and with sections concerned with the adjudicator's observations on the various issues, rather than with his discussions and conclusions on these issues (see Figures 3 and 4).

Figure 3: List of Issues and Observations – Narrative section

Introduction
Parties, project and contractual arrangements.
Contract terms
Relevant terms relied on by each party.
Background to dispute
Course of project, relevant claims made and disputed.
Commencement of adjudication
Notice and appointment
Adjudicator's observations
Jurisdictional issues, if any
Jurisdictional matters, and how dealt with/to be dealt with
Adjudicator's observations

Figure 4: List of Issues and Observations – Issues section

Issue 1, 2, 3 etc.
Each issue is dealt with in turn and comprises
A brief description of the issue and its relevance
Parties' contentions
Adjudicator's observations
Sub issues, such as disputed items in an account or alleged delay events are considered separately, in the same way.
Remedies (including interest and VAT)
A brief description of the remedies sought
Parties' contentions
Adjudicator's observations
Costs and miscellaneous
Parties' contentions
Adjudicator's observations

Background to the dispute: This is a narrative section based largely on uncontested material in the parties' written statements. It identifies the parties, the project, the basis (usually a contract) of the parties' relationship and the contract documents and terms on which each party relies. It summarises the dealings between the parties, so far as relevant to the dispute, putting the

various issues and claims in context, for instance by identifying the disputed claims for payment or other contractual entitlements, when they were made and with what consequence. The narrative should be uncontroversial and as short as possible. Areas of dispute are simply noted, for consideration under the substantive issues.

Commencement of the adjudication and jurisdictional issues, if any: This short section describes how and when the adjudication was commenced and the adjudicator appointed, and summarises the dispute(s) to be determined. It identifies any jurisdictional objections raised at the outset, the steps taken by the adjudicator to enquire into his jurisdiction and, usually by reference to earlier correspondence with the parties, the adjudicator's conclusions after that enquiry. If jurisdictional objections are first raised in a party's written statement, these can be set out in the same manner as a substantive issue.

Substantive issues: Each issue is set out in a separate section. Issues can often be framed as questions, but in somewhat broad terms, such as 'What documents were incorporated into the contract?', 'What is the correct valuation of the variation account?', 'Has the Responding Party issued an effective notice of withholding?' It is important to identify and frame the issues in a way that focuses on the core areas of the dispute and to arrange them in a sequence that provides a logical framework for its resolution. A key skill for the adjudicator is to narrow, not expand, issues.

The layout for each issue is the same (see Figure 4). There is a brief description of the issue and, if not obvious, its relevance to the resolution of the dispute. Each party's submissions on that issue are then summarised in turn. Where an issue involves a number of discrete items, such as a valuation account or delay events in an extension of time claim, each item is identified separately, followed by the parties' contentions on that item.

Remedies: It is often useful to include a separate section, laid out in the same manner as a substantive issue, dealing with the remedies sought by the parties, since they may disagree about what relief flows from the substantive issues or about whether certain remedies claimed can be granted in adjudication proceedings. When preparing the decision, this section provides a convenient place to summarise the financial and other implications of the adjudicator's decisions under the various issues.

Ancillary matters: In most cases there are a number of ancillary matters, such as interest, VAT, allocation of the adjudicator's fees and, occasionally, costs, whose determination depends on the outcome of the substantive issues. These can often be grouped together in a single section followed by a précis of the parties' submissions. If, as is sometimes the case with an ancillary matter, one or other party has not advanced any submissions, this is noted.

Adjudicator's observations: At the end of the background narrative and following on from the summary of the parties' submissions on each issue, the adjudicator's comments, initial views, proposals and requests for information are set out under a section 'Adjudicator's observations' (see Figures 5 to 9).

Figure 5: Observations following the narrative section - some examples

Introductory question

Is the above an accurate summary of the background to this dispute.

Assumptions

I have assumed that Drawing No 98/----/05 was a Contract Document, but that the drainage to the basement perimeter was added by amendment P, dated 20th December 2001, after the Contract was concluded.

There is, as I understand it, no dispute between the parties as to the terms of the Contract or the documents incorporated into it.

I do not understand XXX to be disputing that it paid £----.-- (plus VAT?) to YYY pursuant to Interim Payment Certificates Nos.16 and 17.

Figure 6: Adjudicator's observations following the narrative section - some examples

Incomplete documents

The copy of CCCC's Certificate of Partial Completion included in my papers, does not include the Schedule of incomplete work referred to in the Certificate. XXX should provide a copy.

Uncertainties

Each party should clarify their case on whether the items in the Schedule of incomplete work attached to CCCC's Certificate of Partial Completion were undertaken by YYY and, If so, when?

The status of CCCC's Certificate of Partial Completion is somewhat difficult to fathom. One possibility is that suggested by YYY, in its Reply, that it was issued pursuant to clause 18.1 of the Contract and is, in effect, a written statement for the purpose of that clause?

Figure 7: Adjudicator's observations following the narrative section - some examples

Eliminating the irrelevant

The parties disagree about when the snagging list at page --- of the Referral, marked with the QS's valuation of those items, was first sent to YY I find it difficult, however, to see how this is relevant to the issues I have to decide. It is, as I understand it, common ground that the full document, and PP's letter of the --- November 20-- to the Architect with enclosures (-/----, Referral), was provided to YY well before the start of this Adjudication. In any case, it is common ground that the QS's valuation formed the basis of the gross valuation in Interim Certificate Nr. ---.

If either party considers that the disagreement referred to in the above paragraph is relevant to my Decision or that I am incorrect in my understanding of when the documents referred to in that paragraph were first seen by YY, it should advise, explaining why.

Figure 8: Adjudicator's observations on specific issues - some examples

Introductory question

Is the above an adequate summary of this Issue and the parties' contentions concerning it.

Sampling procedures

I propose to view no more than---- of the above items on site, ---- to be selected by myself and up to ---- by each of the parties and determine, in the light of the items viewed and the parties' representations on the viewed items, all the items under this heading.

Persons to be questioned

The circumstances at the time of issue of WWW's letter of the 13th March 2003 are, arguably, relevant to its interpretation. Thus I shall wish to question Mr pppp and Mr qqqq about their conversation on the 13th March 2003.

Figure 9: Adjudicator's observations on specific issues - some examples

Focussing questions

Determination pursuant to clause 27 of JCT 98

As noted above, I find it difficult to read paragraph 10 of WWWW's letter of the 8th January 200- as sufficient to incorporate the determination provisions in clause 27.2 of JCT 98 into the Contract. Even if clause 27.2 of JCT 98 was incorporated, did it no require a notice of default by the Architect followed, if the default is continued for 14 days, by a notice of determination from the Employer, to effect a determination of the Contractor's employment. Why does WWWW say its letter of the 13th March 2003 was a sufficient compliance with these procedures to determine AAA's employment under the Contract?

Determination by notice of default under paragraph 10 of WWW's letter of the 8th January 200-

WWWW should provide a copy of Hathaway Roofing v. Sweatfield Ltd [???] with the passages on which it relies highlighted.

Adjudicator's observations

Adjudicator's observations usually start with a question asking, in the case of the background section, whether the adjudicator has adequately summarised the background to the parties' dispute and, in the case of an issue, whether the adjudicator has adequately identified that issue and summarised the parties' cases on it. This gives the parties a further opportunity to correct misunderstandings and omissions and to have an input into the shape of the decision. Other observations will generally fall into one of the following three categories.

***Requests by the adjudicator for additional documents or materials*:** The author highlights such requests in bold so that they can be readily identified by the parties. In deciding what, if anything, should be asked for, a balance must

be struck between, on the one hand, the adjudicator's need for material that is necessary to clarify or explain a party's case on the issue in question and, on the other, the need to ensure that requests are proportionate to the issue and its importance to the outcome of the dispute, and do not lead to the introduction of large amounts of new material that the other party will be unable to deal with in the limited time available. In practice there will only be a limited period, possibly two or three days, to produce requested material: this itself limits what can be provided.

***Topics on which the adjudicator wishes to question a particular person*:** The author highlights such requests by underlining so that they can be readily identified by the parties. In practice, requests of this type seldom arise, other than where one or both parties have served witness statements or expert reports from named persons, which deal with key issues in dispute. If such material is not adduced, and if there is no need for a response from a named individual, the topic can usually be dealt with by a general observation.

***General observations*:** These include questions or comments that identify common ground; narrow issues; identify the irrelevant or the marginally relevant; seek to clarify a party's case on an issue; and set out what, on the adjudicator's understanding of the parties' cases, must be established and by whom for a particular claim to succeed or fail. In deciding what to ask, it is important to achieve a balance between asking too few and too many questions and to frame questions in a way that, while forcing the parties to focus on the core issues and any difficulties they face in their respective cases, is not perceived as prejudging the case or making a case for a party.

***Procedural suggestions*:** In long accounts or snagging lists it is, seldom, if ever, practical or cost effective to consider each item. Thus it may be appropriate to make suggestions as to how items on the list are to be sampled (for instance by each party, and the adjudicator, selecting a limited number on which attention will focus) with the adjudicator's decisions on those items being extrapolated to the whole list.

Conducting the adjudication after the List of Issues

Once the List of Issues is prepared, it is sent to the parties together with directions for the further conduct of the adjudication, whether on documents only or by way of a meeting. In most cases, other than those where the expense cannot be justified – because, for instance the parties have to travel from different parts of the country or the amounts in dispute are small – a meeting is likely to be more productive and cost-effective than proceeding on documents only. This is because, under appropriate questioning from the adjudicator, a greater degree of focus is possible at a meeting than is usually the case in written submissions; and the parties may well make concessions that would never be forthcoming in written submissions, thus reducing the areas of dispute.

Procedure on documents only

If the matter is to proceed on documents only (with or without a site visit), the directions identify the period in which any material requested by the List of Issues is to be provided (usually two or three working days) and a timetable for the exchange of submissions on that material and on the matters referred to in the List of Issues and Observations. The usual order is for there to be an exchange of initial submissions, say, five working days after the date by which requested material is to be provided, with reply submissions a couple of working days thereafter. Other than in exceptional circumstances, no further submissions are allowed.

Procedure if there is to be a meeting

If there is to be a meeting, the directions identify the period in which any requested material is to be provided and set the date or window for the meeting. This is usually a minimum of two or three working days after the date for receipt of any requested material, to allow sufficient time for it, and the List of Issues, to be considered before the meeting. It is the author's practice to permit, but not require, the parties to exchange speaking notes for the meeting. Indeed, it is not unusual for parties to provide, at the same time as any requested material, comments on other matters raised in the List of Issues, which can lead to a saving of meeting time.

Requests for further information

It is the author's practice of requesting further information from the parties that appears to cause most consternation to those who favour the passive adjudicator. But because the parties are required to produce such material before the meeting or written submissions on the List of Issues, they generally have sufficient time to consider and respond to what is produced, and the risk of unexpected documents emerging at a late stage of the adjudication is minimised.

If excessive material is produced in response to a request (or, indeed, in response to a general observation, such as a comment concerning the absence of documents on a particular matter) objections on grounds of procedural fairness can usually be overcome by establishing the period which the other party reasonably needs to review that material, then inviting the party who has produced it to agree the appropriate extension to the period of the adjudication, on pain of having the material disregarded if it does not do so. If the other party's consent to that extension is necessary, this can usually be obtained by pointing out the inconsistency of contending that more time is needed to review the material, while refusing to agree an extension to the period of the adjudication that will enable it to have this extra time.

If, as is occasionally the case, there are jurisdictional objections to such material, these must be considered in the same manner as any other jurisdictional objections. In the author's experience, such jurisdictional

objections are often a make weight to the more fundamental procedural objection.

The meeting

If there is a meeting, it is chaired by the adjudicator using the List of Issues as the agenda. After introductions, the first item considered is the narrative section. Then each issue is taken in turn, unless either party has a reason, such as the limited availability of particular individuals, to deal with specific matters out of sequence.

The first question in respect of the narrative section is, generally, whether both parties accept it to be an adequate summary of the background to their dispute. If not, their comments are noted and incorporated; it not being the purpose of the narrative to decide disputed matters. The adjudicator then invites comments and submissions from persons attending with relevant information on his observations concerning the narrative and on any requested material provided by the parties. If there are topics to be addressed by specific individuals, they are questioned by the adjudicator either in person or by telephone, with the parties' representatives being given an opportunity to ask supplementary questions if necessary.

A similar procedure is followed when considering each substantive issue. The adjudicator seeks confirmation that the issue and the parties' submissions concerning it are adequately summarised, and makes any necessary alterations, then invites comments and submissions on his observations relating to the issue or questioning those attending on specific topics. Later issues often proceed more quickly than earlier issues, since by the time they are reached many of the adjudicator's comments on these will already have been addressed on earlier issues.

The process has much in common with a board meeting or a joint session in a mediation, at which participants explain and discuss their positions on the agenda items in dialogue with the adjudicator or, under the control of the adjudicator, with each other. It is the author's experience that, properly managed, the process can provide the adjudicator with a significantly greater insight into the parties' cases and the merits than is the case where the meeting is conducted like a truncated court hearing, with party examination of witnesses and opening and closing submissions.

Using the List of Issues as the agenda for the meeting also enables time to be managed effectively, since the likely length of the meeting can be estimated from the length of the List, and progress monitored against that estimate. If there are delays, the List of Issues can be used to identify matters that need not be dealt with at the meeting, but in writing afterwards, or to identify groups of related issues that, because they involve similar questions of fact or law, need only be considered once.

The parties' cases are closed at the end of the meeting, except for specific matters which they have been unable to deal with adequately during the

meeting, for instance because of shortage of time or late adduced material. If so, specific directions are given at the end of the meeting for the exchange of written submissions on those matters.

It is the author's practice to conclude any meeting by asking the parties whether they consider that they have had, in the context of adjudication proceedings, a fair opportunity to present their cases. As yet, albeit on occasion subject to a jurisdictional reservation, he has not received a negative reply to this question.

Advantages and disadvantages of the List of Issues approach

The principal advantages of preparing and issuing a List of Issues during the course of adjudication proceedings are:

- It forces the adjudicator to give proper consideration to the parties' cases during the proceedings, rather than just at the end when making his decision. It also provides an aide-mémoire and record of that consideration, thus minimising the need for re-reading of material, for example when preparing for a meeting or writing the decision.
- It provides a structure and focus to the second half of the adjudication by identifying the key issues and contentions, and their implications for the claims and defences advanced.
- It gives shape to the parties' dispute, a shape that may at best be implicit or imperfectly revealed in their written statements, and aids comprehension of and resolution of the dispute.
- It gives the parties an insight into the adjudicator's understanding and assessment of the dispute and their respective cases at a time when misunderstandings and mistakes can be corrected. Occasionally, it may facilitate settlement.
- It is a vehicle for the adjudicator to identify, in an orderly and structured manner, his understanding of the issues and parties' cases on the issues, potential common ground, uncertainties, concerns or difficulties he has with the parties' cases, matters for clarification and further material that he wishes to see. Where the parties have served witness statements or expert reports, the List of Issues can also be used to identify those whom the adjudicator wishes to question, and the topics of that questioning.
- It provides an agenda for any meeting and/or further exchange of written submissions, reducing uncertainty about the process and minimising the risk of 'ping-pong' exchanges and of focussing on the marginally relevant.
- It provides a structure for the adjudicator's decision and, by allowing the parties an input into that structure, minimises the risk of the form or content of the decision being a surprise to them, thus facilitating the giving of fully reasoned decisions.

There are, of course, a number of disadvantages in using a List of Issues in adjudication proceedings, the principal ones being:

- Its preparation is a skilled task, requiring analytic and linguistic skills as well as an understanding of the areas of law and practice relevant to the parties' dispute.
- It exposes to the parties' scrutiny any inadequacies in the adjudicator's legal or practical knowledge and analytic skills.
- If the narrative and issues are not properly framed, it will at best merely reflect and embody any lack of clarity in the parties' cases and at worst increase confusion and uncertainty about their cases and about what must be addressed to determine the dispute.
- A poorly framed and worded List of Issues may give the impression that the adjudicator has pre-judged the dispute, is making a case for a party or worse still is biased.
- If not prepared by the adjudicator concurrently with his reading of the parties' written statements and supporting material, it may increase the adjudicator's – and thus the parties' – costs.
- The need to review and respond to the adjudicator's observations may lead to increased party costs.

In the author's experience, the advantages of providing a List of Issues for both the adjudicator and the parties significantly outweigh the disadvantages. Indeed, he has successfully used the approach both on small disputes, where his fee, excluding VAT, was in the region of £1,000, and on large multi-million pound disputes where the parties were represented by City solicitors and leading counsel.

Can similar procedures be used in arbitral proceedings?

Similar principles of procedural fairness and impartiality to those governing adjudications also apply to arbitral proceedings. As Lord Scarman put it in the *Bremer Vulkan* case:

> '… arbitration is … an adversarial process. There is a dispute, the parties having failed to settle their difference by negotiation. Though they choose a tribunal, agree its procedure and agree to accept its award as final, the process is adversarial. Embedded in the adversarial process is a right that each party shall have a fair hearing, that each should have a fair opportunity of presenting and developing his case. In this respect, there is a comparability between litigation and arbitration. In each delay can mean justice denied. And the analogy is not falsified because of the wide variation of types of arbitration. Whether the arbitration be 'look-sniff' or a full-scale hearing with Counsel and solicitors, the right to a fair arbitration remains. An unfair arbitral process makes no sense either in law or in fact. It is a contradiction which it is inconceivable that the law would tolerate or the parties select.'[1]

1 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, HL, at page 999E.

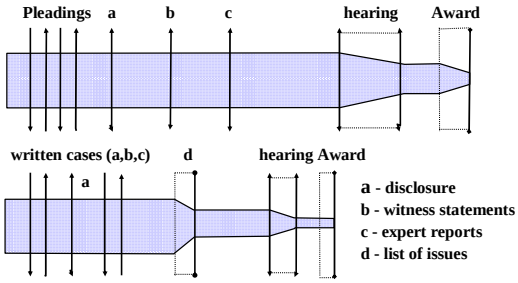
Moreover, unless excluded by agreement of the parties, under section 32(2)(g) of the Arbitration Act 1996 an arbitrator has a similar power to an adjudicator to take the initiative in ascertaining the facts and the law.

There are, however, significant differences between adjudication and arbitration. These should be born in mind when deciding whether inquisitorial procedures of the type outlined earlier in this paper can be used in arbitral proceedings and, if so, how they should be adapted. In general, arbitral proceedings are not subject to the extremely restrictive time scales that apply in adjudication. Most arbitral awards are final, not merely binding on an interim basis. Thus, it will usually be appropriate to allow the parties longer periods to prepare and present their cases than is done in adjudication. Furthermore, the principle that arbitral proceedings are adversarial in nature may, despite the wording of section 32(2)(g) of the 1996 Act, suggest a similarity between arbitration and litigation that limits the extent to which procedures used in arbitration can, without the agreement of the parties, depart significantly from court procedure; particularly so since arbitration is subject to greater court supervision than adjudication, and a supervising court may find it difficult to accept procedures that differ radically from its own. But, before addressing that question, it is useful to consider how the procedures discussed earlier in this paper might, with party agreement, be adapted for use in arbitral proceedings.

Case presentation and decision making in arbitration

In domestic construction arbitration there is a tendency to mirror court procedure in the procedural stages before the hearing, when the parties exchange information about their respective cases and the evidence on which they propose to rely. Thus, the parties to an arbitration will ordinarily exchange pleadings, disclose documents (voluntarily or under compulsion) and exchange witness statements and expert reports; each of these steps occurring one after the other, rather than the parties, as in adjudication, providing all the material on which they wish to rely with their case statements. The result is a much longer period between commencement of proceedings and the hearing of the merits than in adjudication. Moreover, at each stage there is a risk of slippage if there are any delays in completing that stage, and the more stages, the more opportunity for delay. Another disadvantage with this conventional approach is that, other than in the case of expert evidence, where a joint statement of points of agreement and disagreement is usually ordered, it is not usually conducive to any significant focussing or narrowing of issues prior to the hearing (see Figure 10).

Figure 10: Case presentation and decision making in Arbitration



There is a similar tendency in domestic construction arbitration to mirror court procedure during the hearing itself, with witnesses and experts giving their evidence and being cross-examined by the other party's representative sequentially. The giving of evidence is preceded and followed by an exchange of oral or, in construction cases, usually written submissions. Throughout the process, the tribunal remains relatively passive and has little input into how each party presents its case and evidence.

This mirroring of court procedure has advantages, such as familiarity to the parties' legal representatives, if lawyers are involved, and some assurance that the parties' cases will be presented and heard in an orderly manner. It is doubtful however, whether such procedures, with the expense and time they necessarily involve, make best use of the inherent flexibility of the arbitral process or make it a viable alternative to court proceedings. Other than on international projects it is difficult to see why, if court procedure is to be followed unthinkingly, parties based in the United Kingdom should choose arbitration at all since, at any rate until proposals to increase court fees to a commercial rate are implemented, the cost of court time is subsidised by the State.

It is to address these concerns, and with a view to making arbitration a viable alternative to court proceedings, that the author has on a number of occasions, with the consent of the parties, given directions for the conduct of arbitral proceedings that (while allowing longer timescales than are usual in adjudication proceedings) adopt procedures akin to those used by him in adjudication.

Truncating the pre-hearing stages

The first of these procedures is to require the parties to exchange Written Cases, which not only set out a summary of the legal and factual case being advanced but also include in appendices all documents and (usually in the form of witness statements) all evidence relied on. This can shorten the pre-hearing stage of the arbitration significantly. This is because, even though such Written Cases may take longer to produce than conventional pleadings, since more material has to be prepared, there are fewer procedural steps between the commencement of the proceedings and the hearing, thus less opportunity for delay though slippage at each step (see Figure 10).

Furthermore, because each party has to provide its full documentary and evidential case 'up front', their Written Cases tend to be more carefully researched and more focused on what can actually be established by evidence than conventional pleadings.

In order to give both parties and their witnesses the opportunity to comment on the other's case, it is usually necessary to allow a double exchange of Written Cases. But if the dispute is relatively simple and there is no counterclaim, the conventional claim-defence-reply structure may be sufficient.

There are, however, a number of matters that require particular care in directing the exchange of Written Cases of this type if the pre-hearing stage is to run smoothly:

- If the process by which documents are disclosed, and its relationship to the exchange of evidence between the parties, is mismanaged, there may have to be a further round of witness statements after disclosure of documents so that these can be commented on, resulting in unnecessary costs and delay. The author has used two systems to overcome this problem, both predicated on an initial order that each party disclose documents on which it relies by annexing copies to its initial Written Case.

  One approach is to give both parties a period in which to apply for specific disclosure of documents after exchange of each party's initial Written Case, such applications to be formulated by reference to particular documents or categories of documents believed to be in the possession or control of the other party and specific pleaded issues in dispute. Following such applications and the resulting disclosure, there is a second exchange of Written Cases, giving the parties and their witnesses the opportunity to comment on the disclosed documents.

  An alternative approach is to give each party a period in which to apply for specific disclosure of documents following receipt of its opponent's initial Written Case. Documents disclosed as a result of such applications can be taken into account by the other party and its witness in preparing the next Written Case. Documents must be properly managed, whether they are disclosed voluntarily by each party with its Written Case or as a result of orders for specific disclosure. To do this it is desirable to put in place at the outset a system for ordering documents, for example by reference to headings such as contract documents, notes of meetings, general correspondence, drawings and the like. The claimant is then required to provide with its Written Case paginated common bundles in accordance with this system. Documents subsequently disclosed by either party are interleaved into the common bundles, appropriately paginated. This has the further advantage that document references in Written Cases and witness statements are to a common paginated bundle and little extra work is needed to provide hearing bundles.

- There may be circumstances in which it is preferable for certain evidence to be provided *after* Written Cases are exchanged, rather than

with Written Cases, for instance where the witnesses concerned are to comment on both parties' cases. This is often the case with expert evidence.

Narrowing issues and truncating the hearing

The second of these procedures is to provide that, after exchange of Case Statements and evidence (usually, but not necessarily Written Cases in the form discussed above), the tribunal shall produce, well before the hearing of the merits, a List of Issues. This provides the agenda for that hearing, in particular for any witness conferencing or questioning of witnesses by the tribunal, and for the tribunal's award.

The production of a List of Issues assists in focussing on and narrowing issues – whether of fact, opinion, or law – before the hearing: something that may not happen, if the proceedings are conducted on conventional lines, until the start of or during the hearing or even until the award is written (see Figure 10). Its production also means that the tribunal has not only read, but is seen to have understood, the parties' cases prior to the hearing, giving the parties an insight into how the tribunal perceives the issues in dispute and their cases on those issues, and providing a framework for the eventual award. This can result in more informed decisions being made about possible settlement and about the matters that will have to be addressed during the hearing. Another consequence is that extensive opening submissions can usually be dispensed with.

If used as a vehicle for witness conferencing and tribunal questioning of witnesses, a List of Issues can result in a shorter hearing than where witnesses are questioned sequentially by the parties' representatives. The questioning is less discursive and more closely focussed on the issues that are necessary for the tribunal's decision; and where witness conferencing is used, differences between witnesses are explored directly between them, not indirectly with each witness giving their recollections in isolation and sometimes at many days remove from each other.

Once the hearing is concluded the tribunal can, using the List of Issues as a framework, produce its award more quickly than would otherwise be the case. Furthermore, because this framework has been provided to the parties in advance of the hearing, the risk that the structure or scope of the award will not reflect either party's understanding of what the case was about or their expectations of what the award should contain is minimised.

Form and content of a List of Issues in arbitral proceedings

The form of the List of Issues is similar to that used in adjudication proceedings. There is a narrative section setting out the context of the parties' relationship and the dispute that has arisen between them. This is followed by sections identifying each substantive issue that must be decided to determine that dispute, in turn, with a summary of the parties' submission on that issue.

The List of Issues concludes with sections concerning the remedies sought and ancillary matters such as interest, VAT and costs.

Each section concludes with the Arbitrator's Observations. It is here that, like in an adjudication, the author seeks to clarify and narrow the areas of dispute between the parties, identifies areas of uncertainty and matters on which he would welcome clarification and the topics on which he would expect a witness to be questioned or, if he is conducting the questioning, the topics and principal documents on which he will wish to question specific witnesses. Unlike in adjudication proceedings, it is not usually necessary or appropriate to request further documents from a party, disclosure of documents having been completed at an earlier stage of the proceedings. Furthermore, the author is generally more cautious in the wording of observations (particularly those that concern the merits of a party's case) in arbitral proceedings than in adjudication. Examples of such observations are included in Figures 11 to 14.

Figure 11: Arbitrator's observations (some examples)

Clarification and narrowing issues

Certificate No 11 suggests that the Works are zero rated for VAT. Is this common ground between the parties?

PPP's letter of the 26th March 20-- "Management Costs" identifies a £19,500.00 sum against "OOOO". I assume that this is another project and, as such is not encompassed by this Arbitration.

Has the retention of £2,956.50 referred to in Certificate No 11, been paid to XXX? If not, is this not available to set against any sums that I find due to PPP in respect of defects in XXX's work?

Figure 12: Arbitrator's identification of and observations on a sub-issue (some examples)

Carpentry

PPP says that it is entitled to recover the sums identified in WWW's invoice dated 18th November 20-- as costs incurred in remedying defects in the Works. XXX disputes this claim.

Arbitrator's comments

I find it difficult to understand PPP's case in respect of the WWW invoice dated 18th November 2000. This invoice is addressed to Mr and Mrs S (the owners of the existing house) and I have seen nothing to suggest it was paid by PPP. Furthermore, I have seen nothing to identify the work to which it relates, or to link it to any alleged default by XXX.

Figure 13: Arbitrator's identification of and observations on a sub-issue (an alternative approach)

Supply Sanitary ware: Claim £15,---, more than provisional sum.

Respondent's deduction for unjustified costs: £8,---. Respondent's Defence, paragraphs --, Claimant's Reply, paragraphs --, Respondent's Post Disclosure Statement, paragraphs ---. The difference between the parties concerns whether the Claimant has invoices to support the sums claimed and if not how, if at all, this should affect the item's valuation.

Arbitrator's comments

Is the above a sufficient summary of this issue and the parties' contentions on it.

I wish to inspect all the sanitary ware encompassed by this claim during the site visit.

Figure 14: Arbitrator's identification of and observations on a sub-issue (an alternative approach)

Supply Sanitary ware: Claim £15,---, more than provisional sum.(continued)

I propose to ask AA, BB and CC about these matters having regard to what can be seen on site, what was specified in respect of sanitary ware in Item 9.01 of the of the Contract Specification, identified as provisional sum work, and what was actually provided and/or has been substantiated by invoices in part F of the Respondent's Disclosure. Item 9 of the 25th November --- Contract Price update appears to be relevant.

I welcome submissions at the hearing on how this item should be valued if, as the Respondent says, the claimed cost is not fully supported by invoices, having regard to whether or not, it appears from my site inspection, that sanitary ware, for which invoices are not available, was supplied.

Conduct of the arbitration where a List of Issues is directed

Since the List of Issues provides the agenda for the hearing and the tribunal's award, it is important that the parties have an opportunity to comment on the arbitrator's draft List before it is finalised, including, where the tribunal will conduct the questioning, the proposed topics and documents to which such questioning is to be directed. This can be achieved by directions such as the following:

‘1. If either party considers that the Arbitrator’s List of Issues omits to identify an Issue that must be determined in this Arbitration, it shall, on or before [time] on [date]:

1.1 Advise, in no more than --- words, what that issue is and its relevance to the claims and defences in the proceedings.

1.2 Identify, by paragraph number, where that issue is referred to in the parties’ Written Cases.

2. If either party considers that, the Arbitrator has, under his comments on a particular issue, failed to identify a matter concerning that issue on which a witness should be questioned it shall, on or before [time] on [date], identify the witness, the matter and, by paragraph number, references to that matter in the witness statements.

3. If either party considers that, the Arbitrator has, under his comments on a particular issue, not identified a document on which a specific witness should be questioned, it shall, on or before [time] on [date], advise the date of that document, where it is located in the hearing bundles, and the matter which it concerns.’

The List of Issues is finalised in the light of any comments received. If the arbitrator has understood the parties’ cases, the comments should not be extensive. It sometimes happens that in responding to such directions, a party raises matters that appear to be of little relevance. In such a case, the author’s practice is to refer to them in the List of Issues, but include a comment to the effect that he will be inviting submissions on their relevance at the hearing.

As for the hearing itself, the author has used the following directions in a case where he, as tribunal, conducted the questioning of witnesses, using witness conferencing and a List of Issues as the agenda:

‘1. The hearing, which shall be timetabled to conclude within the available period, shall be conducted, with evidence taken by witness conferencing, as follows:

1.1 The parties’ representatives shall be Mr yyy, for the Claimant, and Mr zzz, for the Respondent.

1.2 There shall be no opening submissions, other than in respect of specific matters, if any, raised by the Arbitrator at the outset of the hearing or when beginning consideration of any issue identified in the List of Issues.

1.3 All witnesses shall be sworn before any evidence is given.

1.4 Each issue identified in the Arbitrator’s List of Issues shall be considered in turn, as follows:

(i) The Arbitrator shall question the witnesses in respect of the matters he has identified as a subject for questioning under Arbitrator’s comments relating to the issue.

(ii) The Arbitrator shall give each party's representative a reasonable opportunity to ask the witnesses supplementary questions concerning the issue.

(iii) Once questioning of witnesses is complete, each party's representatives shall be given a reasonable opportunity to make closing submissions in respect of the issue and respond to questions from the Arbitrator about their case on it.

(iv) There shall be no closing submissions, other than as provided for above or in respect of specific matters, if any, raised by the Arbitrator at the end of the hearing.'

There is no need for opening submissions, since the parties will be able to satisfy themselves that the arbitrator understands their respective cases by reviewing the List of Issues when its first version is given to them and by their input into it at that time. Nor is there any need for closing submissions at the end of the hearing, since submissions will be invited after the questioning of witnesses on an issue-by-issue basis. This, coupled with the time saved through hearing evidence in witness conferencing (likewise on an issue-by-issue basis), means that the hearing can be concluded much more rapidly than under the traditional pattern.

The changed role of the parties' representatives

The procedures outlined above have a significant impact on the role of the parties' representatives, both prior to and at the hearing.

Prior to the hearing, they have responsibility for reviewing the List of Issues to ensure that the relevant issues are identified and their respective cases properly summarised, and, where the arbitrator is to question the witnesses, that the matters on which witnesses should be questioned are sufficiently identified, along with the documents relevant to those matters. If there are errors or misunderstandings, these should be drawn to the arbitrator's attention, so that they can be rectified before the List of Issues is finalised.

Since the List of Issues gives an insight into the arbitrator's understanding of the dispute and his initial thoughts on it, the representatives should review the merits of their respective cases with a view to making more informed attempts to settle than would otherwise be possible.

At the hearing, the role of the parties' representatives is to monitor the arbitrator's questioning of the witnesses to ensure that it is even-handed and deals with the relevant matters and material documents. Matters and documents overlooked by the arbitrator should be drawn to his attention so that the appropriate questions can be asked, or dealt with in supplementary questions by the representative concerned.

Are inquisitorial procedures compatible with the adversarial principle?

While procedures such as those discussed above can be adopted with the party's agreement, their adoption without agreement raises the question of whether the adversarial principle imposes limits on an arbitrator's inquisitorial powers under section 34(2)(g) of the Arbitration Act 1996. To answer this involves considering the various inquisitorial techniques involved in those procedures and asking whether each is compatible with arbitration law:

- The arbitrator questions the parties' representatives and the witnesses to clarify, understand and test the cases presented;
- The arbitrator uses his/her own general expertise in assessing and evaluating the parties' cases and evidence;
- The arbitrator identifies the issues that s/he considers determinative and suggesting that the parties focus on those issues in evidence and argument; or
- The arbitrator takes the conduct of the hearing, in particular the questioning of witnesses, out of the parties' hands.

There is also the possibility, not discussed previously, of the arbitrator acting like an investigating magistrate and seeking evidence that the parties have not put before him, for instance from persons other than those on whose evidence the parties rely.

The first two of these techniques are generally regarded as uncontroversial, but, the latter two appear to contravene the adversarial principle as it is generally understood, for instance in the following passages from Mustill and Boyd:

> 'It is not possible to extract from the reported cases any clear guidance on the shape which the reference [to arbitration] should take … [ie in the absence of party agreement as to procedure]. Two propositions can, however, be stated with reasonable confidence.
>
> First, the procedure must be of an adversarial nature. That is to say, the function of the arbitrator is not to exercise his own initiative by carrying out an enquiry into the factual and legal issues, but instead to act as the passive recipient of evidence and argument presented by the parties, and to arrive at his decision by choosing between them.
>
> Second, the arbitrator is not required to follow minutely the procedures of a High Court action, but can exercise a broad discretion, so long as he adopts a procedure which complies with the essential features of the English adversarial procedure. We suggest that the most important of these are as follows –
>
> 1. There must be a hearing at which the parties or their representatives have an opportunity to adduce evidence and address argument.
> 2. The arbitrator must not receive evidence or argument from one party in the absence of the other.

3. The arbitrator must act only upon evidence which would be admissible in a court of law.

4. Where there is more than one arbitrator, they must all act judicially throughout; they must not assume the roles of arbitrator-advocate, or representatives of the parties.

5. The arbitrator should not carry out his own investigations into the issues without the prior consent of the parties. If he obtains such consent, he must disclose the results of his investigation and give the parties an opportunity to comment, and to adduce their own evidence upon the issues.

6. He must, if called upon to do so, exercise a judicial discretion on whether to order discovery of documents, although it does not necessarily follow that he need order full discovery, or any discovery at all.'[2]

'Where there is to be a full oral hearing, the following conditions must be observed –

1. Each party must have notice that the hearing is to take place.

2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.

3. Each party must have the opportunity to be present throughout the hearing.

4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.

5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.

6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.'[3]

While most of these principles remain uncontroversial, some no longer reflect the realities of current arbitration (or even court) practice. Thus by section 34(2)(f) of the Arbitration Act 1996, the arbitrator is expressly empowered to disapply the rules of evidence. More importantly in the context of this paper, the notion that it is part of the adversarial principle that a tribunal must be merely the passive witness to a battle fought out before it by the parties, their witnesses and representatives, is no longer sustainable. It is contradicted in court proceedings by the CPR Rule 32.1, which gives the court wide powers to identify issues and control evidence; and in arbitral proceedings by section 32(2)(g) of the 1996 Act which, as noted previously, enables the tribunal to take the initiative in ascertaining the facts and the law. Thus, there can be no objection in principle to an arbitral tribunal formulating the issues which it

2 Sir Michael J Mustill and Stewart C Boyd, *Commercial Arbitration,* 2nd edition 1989, Butterworths, London, at pages 288-289.

3 See note 2, at page 302.

regards as determinative of the parties' dispute,[4] as the author does by his List of Issues, and inviting the parties to focus their cases on those issues – provided of course that the parties have, as outlined earlier, a reasonable opportunity to persuade the tribunal that issues other than those identified by the tribunal should be addressed.

As for the testing of evidence at hearings, Mustill and Boyd provide no authority in support of their proposition that cross-examination by one party of another party's witnesses is an essential attribute of the adversarial principle or, indeed, of procedural natural justice. In other jurisdictions that adhere to these principles, such as France (see extracts from the French Code of Civil Procedure, Figures 15 and 16), it is the court that questions the parties' witnesses, not the parties. Thus, while taking the conduct of the hearing, in particular the questioning of witnesses, out of the parties' hands remains controversial, it is doubtful whether an arbitrator contravenes any mandatory principles by doing so – provided of course that the parties are given, as outlined earlier, the opportunity to influence the line of questioning and to ask supplementary questions where the tribunal has not dealt adequately with a topic.

Figure 15: The adversarial principle in civilian jurisdictions

France NCCP, Book 1, Articles 4ff.

"Article 4 - The subject matter of the dispute is defined by the respective claims of the parties. These claims are contained in the statements of claim and of defense. The definition of the subject matter of the dispute may be modified by further claims, provided they are sufficiently linked to the original claims

Article 5 - The judge shall decide on everything that is claimed, but not on more than is claimed.

Article 6 - The parties shall provide sufficient factual basis for their claims.

Article 7- The judge may not base his decision on facts that are not part of the case. Within the framework of the case, the judge may also take into account facts that have not been specifically invoked by the parties in support of their claims.

Article 8 - The judge may invite the parties to provide such factual explanations as he deems necessary to resolve the case.

Figure 16: The Adversarial principle in civilian jurisdictions (continued)

France NCCP, Book 1, Articles 4ff (continued)

Article 9 - Each party shall prove in accordance with the law such facts as are necessary for their claims to succeed

...

Article 13 - The judge may invite the parties to provide such legal explanations as he deems necessary to resolve the case.

....

Article 16 - The judge shall in all circumstances assure that the adversarial process is respected and shall respect it himself. He may base his decision on arguments, explanations or documents invoked or produced by a party only if the other party has had the opportunity to contest these. He may not base his decision on legal grounds he has considered at his own initiative unless he has first invited the parties to comment."

Note: Article 214. Only the judge questions the witnesses in civil proceedings, possibly at request of the other party

Finally there is the question of whether the tribunal can adopt the role of an enquiring magistrate. Even in today's more procedurally liberal climate, few (if any) arbitrators or even adjudicators would disagree with Mustill and Boyd's proposition that this should only be done with the prior consent of the parties. If such consent is obtained, the results of the investigation should be disclosed to the parties, so that they have an opportunity to comment and – although this might be more contentious – adduce their own evidence upon the issues. This is a procedure that, subject to such restrictions, the author has used occasionally in his capacity both as arbitrator and adjudicator, but it does not form part of those advocated in this paper.

4 Support for this view can be found in *RC Pillar v Edwards* (2001) CILL 1799, TCC and *Sinclair v Woods of Winchester Ltd* [2005] EWHC 1631, TCC.

Conclusions

The purpose of this paper and the author's talks to the Society of Construction Law on this topic, is to stimulate interest in the creative use of procedures in both adjudication and arbitration; and to encourage those involved in arbitral proceedings to consider how they can be conducted in a manner which makes arbitration something more than merely 'litigation in the private sector'. A particular area where such procedures could be useful is where the parties have agreed to conduct an arbitration under the Society of Construction Arbitrators' 100-Day Arbitration Procedure but are concerned that the traditional court-inspired pre-hearing and hearing procedures would be unworkable or incompatible with the truncated timescales.

If those reading this paper are stimulated to adopt some or the suggested procedures or, indeed, to devise other procedures for achieving cost-effective and fair justice in adjudication and arbitration, rather than slavishly following court procedure, the purpose of this paper will have been achieved.

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'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

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