COURSE FOR BPP PROFESSIONAL EDUCATION

PAYMENT AND ADJUDICATION UNDER "THE CONSTRUCTION ACT"

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TIME TABLE

9.30 – 9.35:	Introduction.
9.35 – 10.15:	The Construction Act - Context and Application.
10.15 – 11.00:	The Construction Act – Payment.
11.00 – 11.15:	Coffee.
11.15 – 12.00:	The Construction Act – Adjudication.
12.00 – 12.45:	Adjudication Rules – A comparison.
12.45 – 1.45:	Lunch.
1.45 – 3.15:	Beginning and Prosecuting and Adjudication.
3.15 – 3.30:	Coffee.
3.30 – 5.00:	Enforcing and Challenging an Adjudicator's Decision.

INTRODUCTION

The purpose of this one day course is to provide, in the morning, a review of the statutory regime for Construction Contracts created by Part II of the Housing Grants, Construction and Regeneration Act 1996, as amended by Section 8 of the Local Democracy, Economic Development and Construction Act 2009 and the related Statutory Instruments and, in the afternoon, and in death consideration of Statutory Adjudication pursuant to that legislation. The course also reviews recent case law and government initiatives concerning this legislation and considers the court's approach to adjudication and the enforcement of adjudicator's decisions.

The Housing Grants, Construction and Regeneration Act 1996 and the Local Democracy, Economic Development and Construction Act 2009 are concerned with various matters other than the regulation of payment and dispute resolution in Construction Contracts. It is only Part II of the 1996 Act, ss. 104 to 117 (colloquially referred to as "The Construction Act") and Section 8 of the 2009 Act, and the statutory instruments made pursuant to provisions, that are considered in this course.

Further material relevant to the topics covered by these notes can be found at www.aeberli.com.

It is assumed that those attending this course will have a basic knowledge of construction law and the workings of the construction industry. Many of the cases referred to in these notes will be found at www.adjudication.co.uk or Lawtel.

A PRACTICAL EXERCISE

By the end of the course, you should be able to answer the following questions.

1. What contracts are subject to the Construction Act?

2. What were the principal concerns in the construction industry that the Construction Act sought to address and how has it addressed these concerns?

3. What is the regime for payment created by s.109, 110 and 111 of the Construction Act?

4. What sanctions, if any, are provided in the Construction Act for failing to issue an employer's notice as provided for in s. 110(2) or a notice of withholding as provided for in s. 111(1) of the Construction Act?

5. What are minimum requirements for an adjudication procedure are required by s. 108 of the Construction Act?

6. If a party to a contract has a statutory right to adjudicate a dispute with the other party to that contract under what procedures is that adjudication conducted?

7. How is an adjudication begun and why is it important that the correct procedure is followed?

8. If a party obtains an adjudication decision in its favour, how can that decision be enforced if it is ignored by the other party?

9. What are the grounds on which a party can resist enforcement of an adjudicator's decision that is adverse to its interests?

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SESSION 1: THE CONSTRUCTION ACT - CONTEXT AND APPLICATION

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SECTION A: INTRODUCTION

1. Characteristics of the construction industry

The construction industry has a (well-deserved?) reputation for being disputatious. There are a number of reasons for this. The project to be supplied is variable until finished, and price is usually fluid until completion, creating uncertainty and opportunity for argument. There is a long delivery period, thus the possibility of changing circumstances. Projects are complex and need detailed planning, with the attendant possibility of error and incompleteness. There are an unusual number and range of participants, giving scope for misunderstanding and buck-passing. The large amounts of money at stake can make costly dispute resolution seem worthwhile. Contract documentation is generally complex and not project specific. There is a claims culture and, often, a gross inequality of commercial power. There is a tendency to plan for claims (Lord Bingham; 1996 Kings College Centre of Construction Law Conference).

2. Types of dispute

Construction disputes generally concern claims for payment, claims for damages due to defects in the works or services provided and, usually under contract provisions, for additional time for completion and/or for loss and expense due to delay or disruption during design and/or construction. Such claims are normally framed in contract, but may sometimes be framed in negligence or in restitution. Claims in misrepresentation for damages or recession may also arise.

Until the late 1990s the principal methods of determining such disputes, including disputes over contractual entitlements where one party was dissatisfied with the ascertainment made (ordinarily but a contract administrator) under the contract, were arbitration or litigation.[1]

Some contacts, particularly those that did not provide for a contract administrator, also provided for interim third party determination, often referred to as Adjudication. This was originally limited to, and coupled with contract provisions controlling rights of set

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[1] The standard arbitration clause encompasses disputes arising under or in connection with the contract, was wide enough to encompass all such claims.

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off but, by the early 1990s, Adjudication was being adopted for a wider range of disputes.[2]

In the few cases where such provisions were considered by the court, adjudication was generally regarded as a form on expert determination leading to a decision which gave rights in contract but which could not be summarily enforced like an arbitral award;A Cameron Ltd v. John Mowlem & Co (1990) 53 BLR 24.[3] But, at least where the adjudicator's decision provided for money to be paid to a trustee stakeholder, it might be enforced by mandatory injunction, even in the face of an arbitration agreement, Drake & Skull v. McLaughlin & Harvey (1992) 60 BLR 102.[4]

As with expert determination, the adjudicator's jurisdiction was regarded as being defined by the contractual provisions under which he was appointed. The decision could not be overturned in the absence of fraud, bias or lack of jurisdiction.[5]

SECTION B: PRESSURES FOR REFORM

The disputatious nature of the industry, coupled with the high cost and delays associated with traditional systems of dispute resolution (principally litigation[6] and arbitration) lead to concerns, particularly amongst sub-contractors and specialists, but also from contractors, about payment and cash flow, and, in the case of contractors, about the quality of decision making of those administering building contracts.

1. The Government response

In response to such pressures the Government ordered a Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry. The result of this review was the 1994 report by Sir Michael Latham "Constructing the Team" ("the Latham Report"). The Report contained recommendations on many aspects of

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2 JCTWCD supplementary provisions, NEC.

3 **Cameron**: Adjudicator appointed under clause 24 of DOM/1. Did not have power to determine how much was due, concerned only with merits of set off notified in time. Adjudication was not arbitration, it was ephemeral and subordinate; therefore the decision could not be enforced under s. 26 AA1950.

4 **Drake**: The injunction was conditional pending arbitration and was subject to discharge or variation of the adjudicator's decision by the arbitrator.

5 See **Drake & Skull v. McLaughlin & Harvey** on the jurisdiction point. Note also **Nikko Hotels v. MEPC** [1991] 2EGLR 103. An expert's determination is not open to review as a nullity for error of fact or law, unless shown that the expert answered the wrong question. If he answers the right question in the wrong way, the decision is binding.

6 **Wolfe Report 1996**. Annex 3 considered Official Referee proceedings. 205 actions, average duration about 30 months, taxed costs awarded to the successful party, as a percentage of claim, averaged 158% in claims less than £12,500, 96% in claims of £12,500 to £25,000. John Redmond, in "Adjudication in Construction Contracts" assesses, from information in this appendix, that that the actual costs of a two party action involving a £200,000 dispute would total at least £165,000.

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the construction industry, most of which have fallen by the wayside.[7] A few recommendations did, however, find favour with the Government, most of these being contained within that part of the Latham Report which set out 13 requirements for a modern construction contract.

- Provision for a speedy system of dispute resolution by an impartial adjudicator, referee or expert, with adjudication being the normal method of dispute resolution.

- Regulation, through the giving of advance notice, of rights of set off.

- A right to suspend work for non-payment.

- Abolition of pay when paid clauses.

- Legislation to be introduced prohibiting the amendment of those provisions that should be included in a modern construction contract.

It is these recommendations to which Parliament sought to give effect in Part II of the Housing Grants, Construction and Regeneration Act 1996 (ss. 104-117), brought into force on the 1st May 1998 with the enactment of the supporting statutory instruments, The Exclusion Order for England and Wales 1998 and the Scheme for Construction Contracts (England and Wales) 1998.[8] The Act also applies in Scotland and, by 1997 Order, to Northern Ireland, but with different statutory instruments.

SECTION C: FUTURE DIRECTIONS IN ADJUDICATION

As at the end of 2010, there had in excess of 20,000 Adjudications conducted pursuant to appointments by Adjudicator Nominating Bodies. Allowing for adjudications before an agreed adjudicator, the total number of adjudication may be significantly higher. There have been, at most, a few hundred court cases concerned with adjudication. Adjudication has resulted in a significant decline in the litigation, mediation and arbitration of construction disputes.

The Government has undertaken various reviews of The Construction Act 1996. Initially it expressed particular concern over the problem of ambushes, the giving of reasons, the possible need for a slip rule and unfair agreements as to costs. Various proposals for legislative change have been floated but it has been difficult to get construction industry consensus. The Government's proposals for improved guidance and training of adjudicators has, however been taken up by bodies such as the Construction Umbrellas Bodies Adjudication Task Group, which publishes guidance.

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[7] **The Latham Report**: Such as changes to training in the industry and of professionals, research into technical issues, latent defects insurance, trust funds, new procurement methods and legislation prohibiting the amendment of government approved standard form contracts (based on the NEC).

[8] **The Act** also applies to Scotland, were there are different Statutory Instruments, and by Order to Northern Ireland.

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The guidance covers a number of areas, principally natural justice, challenges to jurisdiction, unmanageable documentation, intimidatory tactics; giving reasons, party costs and clerical errors in decisions.

Various amendments to the Construction Act, principally concerned with payment, but also abolishing the requirement for construction contracts to be in writing, have been enacted in Part 8 of the Local Democracy, Economic Development and Construction Act 2009 with corresponding amendments to the Scheme being enacted by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (similar amendments are being enacted in Wales and Scotland and NI). These amendments came into force on the 1st October 2011 and are not retrospective.

There are suggestions that the government is sufficiently impressed with the impact of addiction on construction disputes, that it is considering introducing similar systems in other areas of the law. The Government has recently instigated a further review of the legislation under the Chairmanship of Sir Michael Latham and consultation is continuing on his recommendations.

SECTION D: CONTRACTS REGULATED BY THE CONSTRUCTION ACT

The Construction Actonly applies to certain types of agreement; those that come within the definition of a construction contract and are not, nevertheless, excluded from its operation (see ss. 104 – 107 of the Act and in the Exclusion Order for England and Wales 1998). Section 107 is now repealed.

1. What is a construction contract?

Section 104(1): A construction contract is an agreement with a person for any of the following:

(a) The carrying out of construction operations;

(b) Arranging for the carrying out of construction operations by others, whether by sub-contract to him or otherwise;

(c) Providing his own labour, or the labour of others, for the carrying out of construction operations. Consider Baldwins v. Barr Ltd [2003] BLR 177 (hire of crane with driver to work on a construction site).[9]

Section 104(2): A construction contract includes an agreement (a) to do architectural, design, or surveying work or (b) to provide advice on building, engineering, interior or

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[9] **Baldwins**: Held: Contract was for the supply of plant and labour (the fact that the contract says that the driver will be regarded as the hirer's servant or agent did not affect this) to be used to lift concrete planks into place. These works formed an integral part of or were preparatory to or were for rending complete Barr's works of construction. Thus, not within the supply of plant exceptions in s. 105(2). It was a construction contract.

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exterior decoration or on the laying out of landscape, in relation to construction operations.[10]

- Providing litigation support or expert evidence, in respect of a construction dispute is not encompassed by these words, Fence Gate v. James R Knowles, 31st May 2001, unreported.[11]

- Administration of a construction contract is encompassed by these words, Gillies Ramsay v. PJW Enterprise [2003] BLR 48 (Scotland).[12]

Section 104(5): A contract of employment (that is, a contract of service or apprenticeship) is not a construction contract.

An agreement that relates to construction operations and to other matters is only subject to the Act in so far is it relates to construction operations (s. 104(5)). Such contracts are not unusual, for instance a contract to supply and install equipment may include an obligation to provide spares for use by a maintenance department.

It is unclear whether work done at request, for instance pursuant to a (non-contractual) letter of intent, could give rise to a construction contract. The possibility is left open because the definition refers to an agreement, not to a "contract".

Construction operations

Construction operations are defined in s. 105 of the Act, which is drawn from the Income and Corporation Taxes Act 1988.[13]

Section 105(1) describes various operations that are construction operations. The list is extremely wide and is largely self explanatory. But the following points are worth noting.

The definitions are principally concerned with the construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, structures (whether permanent or not) and other works, forming or to form part of land. Also included are fixtures, including services, installed in such buildings or structures.

- The "forming or to form part of the land" requirement in ss. 105(1)(a), (b) and (c) is a significant limit on the width of the definitions. Consider Gibson Lea v. Marko

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10 The design of a bridge is included, the design of a boat is not.

11 **Fence Gate**: Purported adjudicator's decision concerning a dispute under a contract for providing evidence and assisting in an arbitration. The work provided was not construction operations but was it services of the specified type carried out in relation to construction operations? Note: The giving of factual evidence is not doing design or surveying work, nor is litigation support the same as proving advice on building or engineering. Furthermore, such work is not in relation to construction operations but in relation to litigation support. It is unclear whether a contract with a planning supervisor is covered.

12 **Gillies**: The argument was that it was not because of the quasi judicial functions involved.

13 Section 567 of that Act contains a similar, but not identical, definition.

Self-Service, 24 July 2001,[14] unreported (shop fitting items were not fixtures), and Palmers v. ABB Power Construction [1999] BLR 426 (fabrication of plant on site, but not in its final position, included).[15]

- The reference to structures is wide enough to include anything that is constructed, in the sense of being put together or consisting of a number of things which are put or built together to make one whole, Hobday v. Nash [1944] 1 All ER 302. This clearly includes a building.

- The separate definition concerning the installation of fittings, including services, is in narrower terms than the definitions related to buildings, structures and work. But this does not preclude the maintenance and repair of such fittings being a construction operation, Nottingham Community v. Powermaster, [2000] BLR 309.[16]

The definitions include cleaning of buildings and structures, in so far as carried out in the course of their construction, alteration, repair, extension or restoration and the painting and decorating of the internal or external surfaces of any building or structure.

- The "forming part of the land" requirement is not present in the definitions that relate to the cleaning of buildings and structures and to painting and decorating of buildings or structures.[17]

The definitions include operations that form an integral part of, or are preparatory to, or are for rendering complete, certain of the operations listed in s. 105(1) (for example, not painting or decorating), such as scaffolding, access works and landscape.

- The list of operations in s. 105(1)(e) is linked to operations (rather than construction operations) that are previously described in s. 105(1). See Palmers v. ABB Power Construction [1999] BLR 426 [18] (work preparatory to an operation in s. 105(1)(c) that was not a construction operation was a construction operation).

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[14] **Gibson Lea**: Section 105(1)(a) was intended to introduce into the Construction Act the existing law on what constituted a fixture. Applying that law, the items being supplied were not fixtures, thus the shopfitting works were not construction operations. Shop fitting could be construction operations if it consisted of structures forming or to form part of the land (whether permanent or not) or installation in any building or structure of fittings forming part of the land. Gibson's items were not fixtures in this sense.

[15] **Palmer**: Fabrication or erection on site of item of plant, so it can be later moved to its final position, is within s 105(1)(b).

[16] **Nottingham**: Contract to carry out annual service on gas appliances in Nottingham's properties, and provide a repair and breakdown service, a construction contract.

[17] This might suggest that the construction of a boat is not included, but the painting of a boat is??

[18] **Palmers**: Work (assembly of generator on a site for power generation) although an operation within ss. 105(1)(b), (c) was not a construction operation by operation of s. 105(2)(c). Nevertheless, scaffolding preparatory to such an operation was, by s. 105(1)(e), a construction operation.

Operations that are not construction operations

Section 105(2) identifies a number of operations that are not construction operations. These exclusions are principally concerned with mineral and oil extraction, and the provision of plant or machinery (and supporting or access steelwork for such plant or machinery) on a site where the primary activity is what can be loosely described as "process engineering". Manufacture or delivery of most types of building products and materials, other than under a contract for their installation, is also excluded, as are operations relating to artistic works.

- Establishing the principal activity on a site can create difficulties where a number of different activities are being carried out, see for example Mitsui Babcock Energy Services Ltd, unreported, 13 June 2001 (Scotland),[19] or where the site is under construction. This, rather strange, exemption was introduced because of lobbying from the process engineering industry.

- The exclusion of supply contracts provides scope for avoiding the Act. Off-site fabrication for installation by others, although an operation under s. 105(1), would come within the s. 105(2)(d) exception; ABB Power v. Norwest Holst (2000) 77 ConstLR 20.

- The list of exclusions may be interpreted narrowly and is likely to give rise to anomalies. Contrast Palmers Ltd v. ABB Power [1999] BLR 426[20] with ABB Power v. Norwest Holst (2000) 77 Cost LR 20 (intention of s. 105(2) was that the regimes in the Act would, or would not apply to all the contracts on a project).[21] In North Midland Construction Plc v A E & E Lentjes [2009] EWHC 1371 (TCC), the Palmers v ABB approach of construing the exclusions narrowly was followed(concrete siloswas within s. 105(1) and not within the s. 105(2)(c) exclusion. The contrary argument being that, without them, the plant could not operate.). Note Cleveland Bridge v. Whessoe-Volker [2010] EWHC 1076 (TCC), s. 105(2)(c)(iii) to be construed narrowly. Erection of steelwork for the

[19] **Mitsui**: Part of the Grangemouth site was leased to a separate company constructing a plant for steam generation. Was the primary activity the processing of chemicals, within the s. 105(2)(c) exclusion or the supply of steam for which there was no exclusion. The court concluded that the installation of the boiler plant was to further the primary activity of the site as a whole, the processing of chemicals and the oil and petrochemical complex. These were within the exclusion.

[20] **Palmers**: Was provision of scaffolding by a sub-contractor, Palmer, to main contractor, ABB, a construction operation even though it was to be used by ABB in connection with the assembly and erection of a steam generator at the Esso Fawley site. ABB's works were clearly within s. 105(2)(c) and were not a construction operation despite also being encompassed by s. 105(1)(b). But Palmer's works were within s. 105(1)(e) which referred to operations described in s. 105(1)(b) and were not within the strict reading of the exclusion. Thus its works were construction operations.

[21] **ABB**: Provision of insulation is an integral part of plant, such as pipes and boilers, it performs a "plant like" function, because boilers would not operate properly, as designed, without it. In respect of the exceptions, the question was whether the object of the construction operation was to further the activities described in s. 105(2)(a)-(c)?

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piperacks and pipebridgeswas a significant andsubstantial part of the works that fell within the exclusionwere excluded, but prior activities of fabrication drawings, off-site fabrication and delivery to side of the fabricated steelwork not excluded.

Section 105(3) provides for the Secretary of State to amend or repeal, by order, the provisions of ss. 105(1) and 105(2). No such orders have been made, at present.

2. What construction contracts are covered?

The Construction Act does not apply to all construction contracts: The principal limits of applicability relate to the time of "contracting", the place of the work, the need for writing and the exclusion of certain consumer contracts.

Time and place

By s. 104(6), the construction contact must have been entered into after the commencement of Part II of the Construction Act, that is May 1st 1998, and must relate to the carrying out of construction operations in England, Wales or Scotland (or Northern Ireland).[22] The proper law of the contract is irrelevant, see s. 104(7).

- The date on which a construction contract is entered into has been considered in Christiani& Nielson v. The Lowry Centre, 16 June 2000, unreported, (contract superseded earlier letter of intent)[23] and Atlas Ceiling v. Crowngate Estates (2000) CILL 1639 (contract stated to be retrospective, did not mean it was concluded at an earlier date).[24]

- The requirement for the construction contract to relate to the carrying out of construction operations in England, Wales or Scotland (or Northern Ireland) has been considered in Staveley Industries v. Odebrecht Oil, 28 February 2001, unreported (structures below low water mark).[25]

Writing (pre 1st October 2011)

The Construction Act, in its un-amended form, only applies where the construction contract is in writing (s. 107). The definition of writing, which derives from the Arbitration Act 1996, s. 5, is extremely wide. It includes, apart from agreements made in writing or by exchange of written communications, agreements evidenced in writing, that is recorded by one of the parties or by a third party with the authority of the parties, and agreements made otherwise than in writing by reference to terms that are in writing.

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22 Construction Contracts (Northern Ireland) Order 1997.

23 **Christiani**: Work started on basis of letter of intent, August 1997, contract executed by deed, December 1998. Latter superseded former, contract subject to the Act.

24 **Atlas**: Contract stated that it was to take effect from date of earlier letter of intent. Did not mean entered into at the earlier date, Act applied.

25 **Staveley:** Sub-contract for the supply and installation of electrical and telecommunications equipment in modules intended as living quarters on an oil rig to be towed to the Gulf of Mexico on completion. Modules did not form part of land at place of construction, Teeside, since were movable and intended to be moved. Thus did not form part of the land of England and Wales or Scotland.

- An agreement in writing can also arise by exchange of written submissions in adjudication, arbitral or legal proceedings, in which an agreement otherwise than in writing is alleged and not denied. But not, apparently, if the exchange is in the adjudication proceedings where that question first arises, Grovedeck Ltd. v. Capital [2000] BLR 181.[26]

- The requirement for writing applies to the terms of the contract, not merely the fact of agreement, the parties to it and the nature of the work and price, RJT Consulting Engineers v. DM Engineering [2002] BLR 217 (CA).[27] This is a significant, and somewhat controversial, limit on the operation of the Contraction Act. See also Thomas-Frederick's v. Wilson [2003] 91 Cost LR 161 (CA) (no evidence in writing that Wilson was a party to the contract).[28]

- But note Total M&E Services v. ABB Building Technologies Ltd, 26th February 2002, (2002) CILL 1857, where it was held that a contract does not cease to be an agreement in writing merely because it is subject to oral variations. Contrast Carrillion v. Devonport Royal Dockyard [2003] BLR 79.[29]

- A contract is evidenced in writing if its terms are set out in a written document, even of the person recording those terms is not authorised by all the parties to make that record, s. 107(4) does not restrict the meaning of s. 107(2); Millers v. Nobles Construction, 3rd August 2001, unreported.[30] Consider also Connex v.

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26 **Grovedeck**: This decision was achieved by reading the word "other" before "adjudication proceedings".

27 **RJT**: The majority view was that it was the whole agreement that had to be evidenced in writing. Minority view, only the terms material to the dispute had to be evidenced in writing. All agreed that it was not sufficient for only the fact of agreement to be evidenced in writing.

28 **Thomas-Frederick's**: Adjudication commenced against Wilson, principal shareholder and company secretary of Gowersand Ltd, on basis that the construction contract concluded with him, not Gowersand. Disputed. Adjudicator said he had jurisdiction. Court of Appeal allowed appeal from judge ordering enforcement. Held, construction contract was signed by Wilson, on behalf of Gowersand, no evidence in writing that Wilson a party. Wilson would be bound if had agreed to accept adjudicator's ruling on the jurisdiction issue, but hadn't.

29 **Carrillion**: Construction contract (note, a Scheme adjudication) alleged to be subject to later agreement that project would become cost reimbursable. Adjudicator found this was the case and ordered payment on that basis. Court refused enforcement. Held the alleged agreement was not evidenced in writing within the meaning of s. 107(2)(c). All the documents did was evidence that there had been a discussion as to whether the contract should become cost-reimbursable; RJT applied. Section 107(3) did not provide for adjudication in relation to an alleged fundamental variation of a construction contract that had been made orally and without writing.

30 **Millers**: the words "evidenced in writing" in s. 107 (2) (c) are used in their ordinary sense as referring to a written document which sets out or refers to the relevant terms of the agreement. Section 107 (4) does not restrict the application of s. 107(2) (c). Section 107 (4), like sub-sections (3) and (5), rather widens or extends the ambit of what is to be regarded as an agreement in writing for the purposes of the 1996 Act. It is probably directed to the situation where at or

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MJBuilding Services [2004] BLR 333 (TTC),[31] not appealed on this point, see [2005] BLR 201 (CA).

If the parties have included adjudication rules in their contract, access to adjudication under those rules is not affected by the contract being subject to a later oral variation (or, by implication,to the contract being partly oral): Treasure & Son Ltd v. Dawes[2007] EWHC 2420 (TCC); [2008] BLR 24.[32]

Writing (1st October 2011)
Section 107 is repealed. Thus a construction contract entered into or after the 1st October 2011 need not be in writing.

Residential occupiers
The Construction Act does not apply to construction contracts with residential occupiers (s. 106). That is, a construction contract that principally relates to operations on a dwelling (a house or flat) that one of the parties occupies or intends to occupy as his residence.

- Consider Absolute Rentals v. Gencore, 16 July 2001, unreported, (company cannot be a residential occupier);[33]Samual Thomas v. Bick and Bick, 28th January 2000, unreported,[34] (conversion of a barn to a dwelling could come within this exception).

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after a meeting it has been agreed that someone should prepare minutes of what had been agreed and the effect of the provision is to make clear that the minutes themselves are to be treated as written evidence of the agreement even if it cannot be shown that the minutes have actually been assented to by all the parties.

31 **Connex**: Oral acceptance of written terms did not preclude contract being in writing, since did not seek to introduce new terms. In any case a brief reference to Connex instructing the project to be carried out in minutes of 15th September 2000 meeting, since written with authority of the parties, the constituted evidence, within s. 107(4) of acceptance. Judge also expressed approval of parties' view that presence of implied terms did not mean contract was not in writing.

32 The same point was made obiter in Linnett v. Halliwells [2009] EWHC 319 (TCC); [2009] BLR 312.

33 **Absolute**: Contract by company for construction of dwelling for director/employee. Company cannot be a residential occupier.

34 **Thomas:** Contract for conversion of two barns to dwellings. One barn B, was to be occupied by the employer as his residence. The other, barn A, was be to be sold. The contract was also for conversion of certain other buildings to a garage block for these two dwellings, plus two other barns yet to be converted, plus works to a courtyard. About 65% of the contract sum related to barn B. Disputes arose, referred to adjudication, jurisdiction disputed. Held, since a residential occupier did not need to be in residence at time of the Contract to come within Section 106 of the Construction Act, the fact that the barn was not a "dwelling" when work began was not relevant, since during construction it ceased to be a barn and became a partially constructed dwelling. The question to ask was not whether it was a dwelling at the commencement of operations but did the operations as a whole principally relate to operations on a dwelling. This was clearly the case looking at barn B in isolation. But barn A, in isolation, fails this test. As for the block of buildings to be converted to garages only part of this work could be described as

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Exclusion by statutory instrument
Further exclusions are set out in the Exclusion Order for England and Wales 1998, made under Section 106(1)(b) of the Act. These exclusions are concerned with specific agreements under statute; head contracts entered into under the private finance initiative, finance agreements, bonds (but not warranties) and development agreements.[35] The development agreement exception was considered in Captiva Estates v. Rybarn [2005] EWHC 2744; [2006] BLR 66 (TCC)[36] (The agreement granted Rybarnoptions for leases. The effect was that, on exercise, the estate or interest would be taken away without Capitva's consent, thus within paragraph 6.2 of the Exclusion Order).

By amendment, s. 106A gives the power to make such regulations for their country is devolved to the Welsh Assembly and Scottish parliament.

3. Crown Application

The Construction Act applies to construction contracts entered into by or on behalf of the Crown and the Duchy of Cornwall. It does not apply to contracts entered into by the Queen in her private capacity (s. 117).

4. Mechanics of the Construction Act

Other than in a few instances, the Construction Act does not directly curtail freedom of contract or invalidate contract terms. Rather it identifies various matters that must be included in a construction contact and provides that the parties may agree terms dealing with such matters in their contract. If the parties do so they are bound, as a matter of contract law, by the agreements they have made. If and the extent that the contract does not satisfy these requirements then, by s. 114(4) of the Act, the applicable provisions in the Scheme for Construction Contracts have effect as implied terms of the contract. The implication of such terms does not appear to invalidate terms that have been agreed by the parties and there is, in consequence, much scope for confusion. Note, Cleveland Bridge v. Whessoe-Volker [2010] EWHC 1076 (TCC), the implied terms only apply to construction operations, and if contract relates in part to these and in part to non-construction operations, can only adjudicate in respect of the former.

ancillary to work on a dwelling. Thus, taken as a whole, it could not be said that the contract principally related to work on barn B. It related to barn A, barn B, the garage block for all four barns as well as a courtyard and drainage (principally relevant to barn B). Thus the adjudicator had jurisdiction.

35 Exclusions: for example agreements under statue to adopt highways and sewerage works, contracts of insurance, of loan, bonds. Development agreements are contracts including for the grant or disposal of freehold or certain leasehold interests (those expiring not earlier than 12 months after the completion of construction) in land on which take place the principal construction operations to which the contract relates. The relevant private finance initiative contracts are, in effect, head contracts between the public body client and the provider.

36 **Captiva**: the option provisions satisfied s. 2 of the Law of Property Miscellaneous Provisions Act 1989.

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SECTION E: RECKONING TIME AND SERVICE OF DOCUMENTS

The Construction Act includes provisions dealing with the service of documents and the reckoning of periods of time.

1. Service of documents

Section 115 provides that the parties are free to agree on the manner of service of notices or documents but, to the extent that there is no such agreement, notices or documents may be served on a person by any effective means, including by post in accordance with the provisions of that section.

2. Reckoning periods of time

Where the Construction Act requires an act to be done within a specified period after or from a specified date, the period begins immediately after that date, and excludes Christmas Day, Good Friday and Bank Holidays (s. 116).

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COURSE FOR BPP PROFESSIONAL EDUCATION

PAYMENT AND ADJUDICATION UNDER "THE CONSTRUCTION ACT"

SESSION 2: THE CONSTRUCTION ACT – PAYMENT

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SECTION A: PAYMENT PROVISIONS

The Construction Act includes a number of provisions concerned with payments under construction contracts. The principal purpose of these provisions is to improve cash flow in the construction industry by controlling rights of withholding and to eradicate what were considered to be unacceptable practices for delaying or avoiding payment to those providing work or services. These provisions, particularly the controls over set off, have implications for the resolution of construction disputes, including by Adjudication.

1. Rights of withholding at common law

Prior to the Construction Act, a claim for payment was ordinarily met by defence of abatement, set off or counterclaim, such contentions usually being sufficient to defeat an application for summary judgement (see now CPR Part 24) in court proceedings and, where the parties' contract provided for arbitration, to obtain a stay "pending arbitration" under s. 9 of the Arbitration Act 1996.

Abatement, set-off and counterclaim at common law

The difference between these concepts has its roots in pre 1875 Judicature Act procedure. Put briefly:

- An abatement is an allegation that, because of defects, the services or work supplied are not worth the contract price and that, in consequence, less, or nothing should be payable for those services. Loss caused by delay in the work does not amount to an abatement, consider Mellows v. Bell Projects (1998) 87 Build LR 26.

- A set off is an allegation that the claimant is itself in breach of some obligation under the contract, causing damage to the defendant, and that it is only just that in equity both the claimant's and the defendant's cross-claim should be considered in the same proceedings, their being one judgement to the net winner, see Hanak v. Green [1958] 2 QB 9.

- A counter-claim is an allegation that the claimant is in breach of some obligation to the defendant that can, under the rules of court, be brought in the same proceedings as the claimant's claim. Many counterclaims can be relied on as a set-off or abatement, but this is not always the case. For example a claim under a separate contract with the claimant, or an allegation of breach of contract relied on to resist a claim on a cheque, do not give rise to a set off.

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These concepts are not referred to in the Housing Grants Act. It is a matter of some debate whether all the above or, indeed, a simple denial of entitlement, are caught by the restrictions on withholding provided for in that Act.

2. Controls over withholding under the Construction Act (prior to 1st October 2011)

The Government, adopting Sir Michael Latham's recommendations, was concerned to curtail the abuse of such defences to resist or delay payment to those providing work. It did so by providing, in ss. 109 to 111 of the Construction Act, what is, in effect, a code governing payment provisions in construction contracts. If the parties' contract does not comply with this code, the relevant provisions in Part II of the Scheme for Construction Contracts are implied to make good any deficiencies.

Entitlement to periodic payments (s. 109)

A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work done under a Construction Contract (from 1st October 2011 "work provided for in the contract") unless the contract specifies that the duration of the work is to be less than 45 days or it is agreed by the parties that the duration of the work is estimated to be less than 45 days.

The parties are free to agree the amounts of the payments and the intervals at which, or the circumstances in which they become due but, in the absence of such an agreement, the relevant provisions of the Scheme for Construction Contracts apply.

- The Scheme, Part II, paragraphs 1 and 2 and 12, provides a somewhat rudimentary machinery for calculating the amount of periodic payments. The machinery adopts the usual principle that such a payment should comprise the value (that is cost plus overheads and profit) of all the work completed at the end of the period to which the instalment relates and, if relevant, the value of materials on site at that date, less sums due or paid in respect of previous instalments. The payment is not to exceed the difference between the contract price and the sums already due or paid.

- The instalment period provided for in the Scheme, Part II, paragraph 12, is 28 days starting from the "commencement of the contract".

There is, given the wording of s. 109, much scope for avoiding the obligation to pay instalments. But such methods of payment have, outside consumer contracts, been generally accepted by the industry and most construction contracts continue to comply with the spirit of these requirements.

Dates for payment (s. 110before 1stOctober 2011)

Every construction contract must provide the following.

- An adequate mechanism for determining what payments become due and when and a final day for payment in relation to any sum that becomes due, s. 110(1).

- For the giving of a notice by the paying party (colloquially referred to as an "employer's notice") specifying the amount of payment, if any, made or to be

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made, and the basis on which the amount was calculated, s. 110(2). This notice must be given not later than 5 days after the date on which a payment becomes due, or would have become due, had the receiving party had carried out his obligations and no set-off or abatement was permitted. The purpose of the notice is to enable the payee to understand what it is being paid and why. There are, however, no sanctions for not providing the notice;[37] consider SL Timber Systems Ltd v. Carillion Construction Ltd [2001] BLR 516 (Scotland).[38]

Part II of the Scheme (before 1st October 2011)
If the contract does not contain such provisions, the relevant provisions of the Scheme for Construction Contracts apply, see Part II, paragraphs 4 to 9.

- Paragraphs 4 to 7 provide that instalment payments, and any other payments provided for in the contract other than final payments, become due on the expiry of 7 days following the end of the period to which they relate, or on the making of a claim by the payee, if later, and that final payments, irrespective of whether or not instalments are required, become due on the expiry of 30 days following completion of the work or the making of a claim by the payee, if later. A claim by the payee means a written notice to the other party specifying the amount of any payment or payments which it considers to be due and the basis on which it is, or they are calculated (paragraph 12).

- Paragraph 8 provides that the final date for payment is 17 days after the due date of the payment in question.

- Paragraph 9 sets out similar requirements for the giving of an employer's notice of payment to those in s.110(2) of the Act.

Triggering an entitlement to payment
If the Scheme is relied on, the claim for payment must comply with Part II, paragraph 12; if the contract, the claim for payment must comply with the requirements of the contract. This can cause problems were the Contract provides for applications to be made for valuations rather than for payments; consider Maxi Construction v. Mortons' Rolls, 7th August 2001 (Scotland).[39]

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37 Does failure to issue such a notice make the payee's claim, if any, conclusive. This is expressly stated in some contracts, JCTWCD 1998. It is probably not the case otherwise.

38 **Carillion**: Section 110(2) and 111(1) have different effects and the notices they refer to different purposes. There are no sanctions specified for failing to issue a s. 110(2) notice and failure to issue a s. 111(1) notice did not preclude an argument about what was actually due under the relevant contract. Sum due did not mean sum claimed.

39 **Maxi:** A claim based on an application for payment did not constitute a clam by the payee within paragraph 12. It was an application for agreement to the valuation under the express terms of the contract and, because it did not give the basis of the calculation, it did not comply with paragraph 12 under which amount had to be specified and the basis on which it was calculated. Nor did it meet the specific contractual requirements for an application for payment.

What is an adequate mechanism?
A contract that allows payment to be delayed indefinitely is not an adequate mechanism under s. 110(1)(a); Maxi Construction v Mortons Rolls, 7 August 2001 (Scotland).[40]

Dates for payment (s. 110 from 1st October 2011)
Four new sub-sections, 1A, 1B, 1C and 1D, are added to s. 110(1) and sub-section 110(2) is omitted, along with the reference to in in sub-section 110(3).

An adequate mechanism for determining when payment become due
The effect of sub-sections 1A and 1B is, by stating that such arrangements do not satisfy the requirement for an adequate mechanism, to bar (other than, sub-section 1C, in the case of case of construction contracts for the carrying out of construction operations by another person and the obligations are those of that person to carry out those operations – whether this will be effective to take PFI contracts out of the net remains to be seen) clauses that make payment conditional on either the performance of obligations, other than obligations to make payment, under another contract, or on the decision of any person as to whether such obligations have been performed (the intention of the second limb is to ban pay when certified clauses).

The effect of sub-section 1Dis, by stating that such arrangements do not satisfy the requirement for an adequate mechanism, to barclauses that provide for the due date for payment to be determined by reference to the giving by the payee of a notice of a notice which relates to what paymentsare due under the contract.

Payment notices
Section 110(2) is repealed and replaced by ss. 110A and 110B.

Under s. 110A(1)-(4), a construction contract must, in relation to every payment provided for by it, and irrespective of whether the sum is zero, provide for either (a) the payer or a specified person (s. 110A(6), a person specified in or determined in accordance with the contract) to give a notice to the payee not later that five days after the payment due date (s. 110A(2)) specifying the sum that the payer, or if given by a specified person, the payer or that person considers due at the payment due date and the basis of its calculation or (b) the payee to give a notice to the payer or a specified person not later than five days after the payment due date (S. 110A(3)) specifying the sum that the payee considers due at the payment due date and the basis of its calculation. If not, clause 110A(5), the relevant provisions of the Scheme apply.

Section 110B is concerned with what happens if the payee or a specified person is required to give the requisite payment notice, and fails to do so (It applies by statute, not by implied term).

- 110B(4): If the contract permits or requires the payee, before the date on which the payer or specified person is required to issue the payment notice, to notify the

[40] **Maxi**: The contract required the employer's agent to agree the valuation with the contractor before it could make a claim for payment. The employer's agent was not obliged to agree a valuation within a clear timescale. In effect, the claim for payment could be delayed indefinitely. Held: this was an inadequate mechanism.

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payer orspecified person of the sum which the payee considers will be due on the payment due date and the basis of its calculation, then that notification is regarded as a payee's notice complying with s. 110A(3) and the payee cannot give another such notice (in effect, the payee's application for payment is its default payment notice)

- 110B(2): Otherwise, the payee may give to the payer (note: not the specified person) a notice (in effect, a default payment notice) complying with s. 110A(3), that is a notice specifying the sum that the payee considers due at the payment due date and the basis of its calculation.

- 110B(3): If the payee gives a s. 110B(2) notice, the final date for payment is postponed by the period in days between the date on which the payer or specified person should have issued the payer's notice and the date on which the payee issued its payee notice. Note, if s. 110B(4) applies the final date for payment is not postponed.

<u>Part II of the Scheme (from 1st October 2011)</u>
Paragraphs 4 to 8are not amended, apart from a typographical correction to paragraph 5; the words "the expiry of" being moved to where they belong, the start of the second paragraph (a).

Paragraph 9 is replaced by a new paragraph 9 giving effect to the amendments to the Act introduced by s. 110A, by including provisions that apply if the construction contract fails to provide for the issue of a payment notice pursuant to s. 110A(1).

- The payer must, not later than five days after the payment due date, give a notice to the payee specifying the sum (it can be zero) that the payer considers to be due or to have been due at the payment due date and the basis on which that sum is calculated.

- A payment provided for by the contract includes any payment of the kind mentioned in paragraph 2, 5, 6, or 7.

The scheme does not provide for payee applications or a payee payment notice. Default payee notices are addressed in s. 110B, which applies by statute, not implied term.

<u>Notice of withholding (s. 111) (before 1st October 2011)</u>
Section 111(1) provides that a party to a construction contract may not withhold payment after the final date for payment **of a sum due under the contract** unless it has given an effective notice of intention to withhold payment.

To be effective the notice must specify the amount proposed to be withheld and the grounds for withholding payment or, if more than one ground, each ground and the amount attributable to it, s. 111(2). Arguably, the notice must be in writing and be given

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after the application for payment to which it is intended to apply; Strathmore Building Services v. Colin Scott, 18 May 2000, unreported[41] (Scotland).

There are two ways such a notice ("a withholding notice") can be given.

- An employer's notice can be effective for this purpose if it satisfies these requirements.

- A separate notice of withholding will be effective if it satisfies these requirements and is given not later than the period before the final date for payment agreed by the parties or, if there is no such agreement, as provided for in the Scheme. The period under the Scheme (paragraph 10) is not later than 7 days before the final date for payment.

If an effective notice of withholding is given, and the matter is referred to adjudication in which it is decided that the whole or part of the amount should be paid, that decision is construed as requiring payment not later than 7 days from the date of that decision or on the date which, apart from the notice, would have been the final date for payment, if later (s. 111(4)).

Other than in respect of the date by which a withholding notice must be given (if not agreed, paragraph 10 of the Scheme says this must be not later than seven days before the final date for payment) the provisions of s. 111 apply automatically. They need not be stated in the parties' agreement or implied from the Scheme for Construction Contracts. Section 111 applies to all proceedings, not just in adjudication. Thus, it can be relied on to bar what would otherwise be a good defence to summary judgement proceedings; Millers v. Nobles Construction, 3rd August 2001, unreported .[42]

What is due

The better view is that, unless otherwise agreed (see JCTWCD 98, considered in VHE Construction plc v RBSTB Trust [2000]BLR 187),[43] the sum claimed may be challenged on the grounds that it is not **contractually** due even if no employer's notice and no notice of withholding is given. But, otherwise, must be paid without deduction.

In deciding what is due, the terms of the contract are of paramount importance, not general principles of law, such as abatement; Rupert Morgan v. Jervis (2003) 91 ConstLR 81 (CA);[44] considering cases such as Whiteways Contractors v.

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41 **Strathmore:** The notice must be in writing and given after the application for the payment, to which it is intended to apply, is made.

42 **Millers Specialist Joinery**: Section 111 prevents the paying party exercising his right to retain or withhold monies otherwise due and payable where no effective withholding notice is given. Thus, in the absence of such a notice, summary judgement should be given.

43 **VHE**: Clause 30.3.5, WCD 81, as amended: "Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4, the Employer shall pay the contractor the amount stated in the application for interim payment".

44 **Rupert**: ASI contract "employer to pay the amounts certified"/ "payment to be made ..only in accordance with the Architect's certificate". Thus the sum due is determined by the certificate.

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ImpressaCastelli(2000) 75 Con LR 92[45] and SL Timber Systems v Carillion [2001] BLR 516 (Scotland),[46] where it was said that "sums due" does not equate with sums claimed). The Claimant must show that the sum claimed is **contractually** due, and failure to give an Employer's notice (s. 110) does not preclude there being a dispute about what is contractually due.

- If a contract links the due amount to a certified sum (not directly to work done), then the issue of the certificate creates the obligation to pay (allegations of incomplete/defective work must be the subject of a withholding notice). Consider also the usual mechanism for payment under consultants' agreements (fixed proportions of total/work stage fees become due on invoicing for them).

- If a contract links the due amount to the work done (see Part II of the Scheme, and many sub-contract forms), the due sum can be disputed on the basis of work not done or done inadequately (the account must be valued) even if a withholding notice is not issued, but not defences based on set off or counterclaim.

This machinery is not concerned with monetary claims that are not claims for sums due under the contract, eg claims in damages. Such claims can be disputed whether by defence or set-off without having issued withholding notice: Urang Commercial Ltd v Century Investments Ltd [2011] EWHC 1561 (TCC).

Payless Notice (s. 111 from 1st October 2011)

Section 111 is omitted and substituted by the following (this, like the old s. 111 also applying by statue, not implied term).

The payee's obligation to pay "the notified sum"

Section 111(1): Where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

Section 111 is about cash flow, it does not make any certificate, interim or final, conclusive. In SL Timber Systems v. Carillion (2000) Con LR 51, there was no system of certificates. The contractor's bill did not, of itself, make any sums due. What made sums due was the work being done.

45 **Whiteways**: If the dispute is about valuation no 10, the adjudicator can make his own valuation of the matters referred to in that valuation irrespective of whether expressly referred to in the notice of adjudication or mentioned in a withholding notice.

46 **SL Timber**: Lord MacFadyen: "In my opinion, the absence of a timeous notice of intention to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims. It remains incumbent on the claimant to demonstrate, if the point is disputed, that the sum claimed is contractually due. If he can do that, he is protected, by the absence of a section 111 notice, from any attempt on the part of the other party to withhold all or part of the sum which is due on the basis that some separate ground justifying that course exists."

Section 111(2): The notified sum isthe amount specified in the payer's or specified person's, s. 110A(2) notice, the amountspecified the payee's s. 110A(3) notice, in either case where this notice is given pursuant to and in accordance with a requirement of the contract, or the amount specified in the payee's s. 110(3) notice given pursuant to and in accordance with s. 110B(2).

Exceptions
Section 111(6): Where the payer or specified person gives the payee a valid "payless notice" the s. 111(1) obligation to pay applies only to the sum specified in that notice as "the sum that the payer consider to be due on the date the notice is served".

Section 111(10): Section 111 (1) does not apply where:(a) the contract provides that if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and (b)the payee has become insolvent (defined in ss. 113(2) to (5)) after the prescribed period for giving a pay less notice.

Points to note
Under the new machinery it is no longer possible for the payee to dispute payment of the notified sum on the grounds that it was not "due". The only way payment can be disputed is by issuing a valid "payless notice".

If the payee becomes insolvent before the end of the prescribed period a payless notice must be issued, ss. 111(10) does not apply!!

The "payless notice": Content and timing
Section 111(3): The payer or a specified person may give to the payee a notice of the payer's intention to pay less than the notified sum (this is the "payless notice").

The "payless notice" must (s. 111(4)) specify (a)the sum (this can be zero) that the payer considers to be due on the date the notice is served, and(b)the basis on which that sum is calculated; and (s. 111(5)) (a)must be given not later than the prescribed period before the final date for payment, and(b) where the notified sum is specified in a payee payment notice, whether that notice is required by the contract or is given default of a payer or specified person notice may not be given before the payment notice by reference to which the notified sum is determined. The prescribed period is (s. 111(7) either a period agreed by the parties, otherwise the period provided in the Scheme for Construction Contracts.

Points to note
It appears that were the notified sum is specified in a payee or specified person notice, than the payless notice can be given before the date of that payment notice!

The payless notice is concerned with what is due on the date of that notice. This may create complications if it is issued during a later valuation period than that of the payment notice which it concerns.

The prescribed period is linked to final date for payment and this, in turn, will, in cases where the payer or specified person fails to issue a payment notice, but the contract provides for payer application for payment and where it does not. For in the latter case

the final date for payment is extended by reference to the date on which the payee issues its default payment notice, in the former case it is not because the payee application is, in effect, the default payment notice.

Disputes about the notified sum in a payment notice or in a pay less notice
Sub-sections 111(8) and (9) address the adjudication of disputes where the claim is that the notified sum, be it in an payer's or specified person's payment notice (s. 110A(2)) or pay less notice (s. 111(3)), is too low.

If the adjudicator decides that more than the sum specified in the notice should be paid, adjudicator's decision is construed as requiring payment of the additional amount 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.

Part II of the Scheme (from 1st October 2011)
Paragraph 10 of Part II of the Scheme is substituted by a provision that states that, in the absence of agreement, the prescribed periodseven days before the final date for payment.

2. The statutory right to suspend (before 1st October 2011)

Section 112 gives the payee a statutory right to suspend, without prejudice to any other rights or remedies, performance of its obligations under a construction contract where sums due under that contract are not paid in full by the final date for payment and no effective notice to withhold payment has been given.

- The right to suspend performance is dependant upon giving the paying party in default at least 7 days notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

- The right to spend performance ceases when the party in default makes payment in full of the amount due.

- Periods during which performance is suspended by the payee are disregarded in computing, for the purpose of contractual time limits, the time taken by that party or any third party (person?), to complete work directly or indirectly affected by the exercise of that right

The exercise of this right raises serious difficulties. There is no statutory recognition, either in time or money, of the disruption and delay likely to be caused by ceasing and, if payment is made, re-commencing work; although a claim in damages may be possible. The position if the sum is later found not to have been due is also unclear.

Re-commencement of work after a period of suspension may be difficult, if not impossible, particularly for contractors.

The statutory right to suspend(s. 112 from 1st October 2011)

Sections 112(1) and (3) are amended such that non-compliance with the requirements of s. 111(1) triggers, subject to the seven day notice, the right to suspend and to allow for "any or all of" a party's obligations to be suspended.

A new section 112(3A) is added and s. 112(4) is amended to provide that where the right to suspend is exercised, the defaulting party is liable to pay the suspending party reasonable amount in respect of costs and expenses reasonably incurred by the latter a result of the exercise of the right to suspend, and to provide that the period duringwhich performance is suspended in pursuance*or in consequence of* the exercise of the right to suspend is disregarded for the purpose of any contractual time limit.

3. Statutory controls over "pay when paid" clauses (before 1st October 2011)

Section 113 invalidates provisions making payment under a construction contract conditional on the paying party receiving payment from a third person, unless that third person, "or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that person", is insolvent (insolvency is defined in ss. 113(2) – 113(5)), as amended following the Enterprise Act 2002 to include self certifying options for a company going into administration.

- The intention appears to be to invalidate pay when paid, but not "pay when certified" or similar provisions.

- It is arguable that the insolvency exception applies even where the insolvent person is further up the contractual chain from the paying party.

- This section was considered in Durabella Limited v J Jarvis, 19 September 2001 where it was said that it meant that the contractor was not guaranteeing the employer's solvency and allowed the risk of such insolvency to be shared.[47]

Section 113(6) provides that the parties may agree other terms of payment where a provision is rendered ineffective by s. 113(1) but that, otherwise, the relevant provisions of the Scheme for Construction Contracts (discussed previously) apply. Such clauses will, however, be construed as exemption clauses, thus *contra proferentem*, William Hare v. Shepherd Construction [2010] EWCA (Civ) 283.[48]

Statutory controls over "pay when paid" clauses (from 1st October 2011)

Most "pay when certified" clauses are now voided by amendments to s. 110 concerned with what is an adequate mechanism for determining when payments become due. These have been considered, above.

4. Complaint terms in contracts that fall outside Part II of the Act

Contract terms complying with ss. 110 to 113 will, if the contract is not a construction contract and one of the parties is a consumer, be subject to control under the Unfair Contrasts Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999; see Domsalla v. Dyason[2007] EWHC 1174 (TCC);[49] [2007] BLR 348.

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47 **Durabella**: This suggests that the exception for insolvency applies at the date of the relevant payment.

48 **Hare**: In that case the clause did not expressly refer to self certifying administration, thus did not entitle Shepherd to withhold payment from Hare, who had gone into self certified administration.

49 **Domsalla**: Compliant terms as regards notices and withholding in JCTMWA entered into on behalf of a consumer for insurance work on his house and a builder unfair within the meaning of the Regulations. Given the unusual facts of the case, in particular that the builder

and contract were selected by insurers with little involvement of Mr Domsalla,

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COURSE FOR BPP PROFESSIONAL EDUCATION

PAYMENT AND ADJUDICATION UNDER "THE CONSTRUCTION ACT"

SESSION 3: THE CONSTRUCTION ACT - ADJUDICATION

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SECTION A: INTRODUCTION

Although the Latham Report identified Adjudication as the preferred method of dispute resolution, it said little about the envisaged process. Rather than attempt a definition, it is best to regard the process as defined both positively, by reference to the legislative framework creating it, and negatively by reference to other methods of dispute resolution, particularly litigation, arbitration and mediation.

1. Adjudication and litigation

Adjudication is not litigation. Although the process involves an investigation of the facts and the law, an adjudicator's decision cannot be challenged merely because it is factually or legally wrong. Unlike a court judgement, the adjudicator's decision is not final and does not create an estoppel, other than in adjudication, in respect of the dispute. But an adjudicator's decision is binding, and will, ordinarily, be given effect to by the court, unless and until the underlying dispute has been finally determined by litigation or arbitration.

2. Adjudication and arbitration

Adjudication is not arbitration since the decision is not final; consider Cameron Ltd v. John Mowlem & Co (1990) 53 BLR 24.[50]But, like an arbitrator's award, an adjudicator's decision can be challenged on jurisdictional grounds, for want of impartiality by the adjudicator or because the process adopted by the adjudicator did not comply with the requirements of procedural natural justice; but note the variable nature of this concept, Ridge v. Baldwin [1964] AC 40.[51] Arbitration is ordinarily consensual, being based on the parties' agreement. The right to adjudicate disputes under construction contracts is enshrined in the Construction Act. Arbitration is governed by a detailed code in the Arbitration Act 1996, which provides the court with a range of supportive and supervisory powers. The code for adjudication provided by the Construction Act is rudimentary.

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[50] **Cameron**: Adjudicator appointed under clause 24 of DOM/1. Did not have power to determine how much was due, concerned only with merits of set off notified in time. Adjudication was not arbitration, it was ephemeral and subordinate; therefore the decision could not be enforced under s. 26 AA1950.

[51] **Ridge**: Procedural fairness is a flexible concept imposing different requirements depending on the nature of the decision making body, judicial, quasi-judicial or administrative, the interests or issues at stake, and whether the decision to be made will be final or provisional.

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3. Adjudication and mediation

Adjudication is not mediation. The adjudicator makes a decision, and does not merely facilitate an agreement between the parties. Furthermore, because an adjudicator is, apparently, bound by the requirements of procedural natural justice, an adjudicator should not have confidential discussions with a party or others concerning the dispute, Glencot Developments v. Ben Barrett (2001) 80 Cost LR 14.[52]

4. Adjudication and expert determination

Adjudication has much in common with expert determination. The principal ground of challenge to the decision is, in both cases, want of jurisdictional and bias. But, unlike in adjudication the expert's decision is, unless the contract states otherwise, final and binding and, unlike a statutory adjudicator the expert is not immune from suit. Furthermore, there is no implied requirement for procedural natural justice in expert determination, thus, the parties' agreement provides for this, an expert is not restricted to reaching a conclusion based on evidence and submissions provided by the parties. It may also be the case that an expert cannot be challenged for apparent bias, only actual bias;Bernhard Schulte v. Nile Holdings Ltd [2004] EWHC 977(Comm); [2004] 2 Lloyd's Rep 352.[53]

5. Adjudication and certification

At the time that the Construction Act was being drafted, there was a view that the role of the adjudicator was akin to that of a contract administrator certifying entitlements under a construction contact. But, unlike a certifier, an adjudicator is bound, in so far as attainable within the time scales, to comply with the principles of procedural natural justice: Amec v. S of S for Transport [2005] BLR 227 (CA).[54]

6. The doctrine of seperability

In arbitration law an arbitration clause is a conceptually distinct agreement from the contract in which it is found, thus can survive to govern dispute resolution even if that contract is discharged for breach or frustration, or is said to be void or voidable (s. 7 AA1996, It is unclear to what extent this principle applies to other dispute

[52] **Glencot**: Adjudicator mediated in private caucuses. This gave rise to a possibly of apparent bias.

[53] **Schulte**: As a matter of law, apparent or unconscious bias or unfairness was, in any case, of no assistance to N in the absence of actual bias, fraud, collusion, or material departure from instructions. The court followed, in this respect, Macro v. Thompson (1996) BCC 707 CA. It saw expert determination as having affinities with contract certification, thus the concept of apparent bias had no place, since architects or engineers are often employed by one of the parties and cannot be challenged on that basis.

[54] **Amec**: In exercising their certification functions (including if exercising a review function, eg under ICE, clause 66) contract administrators have to act independently and honestly and fairly, but what is fair is flexible and tempered to the particular facts and occasion. A certifier's decision does not have to be reached by a judicial process (in accordance with the dictates of natural justice, hearing both sides); There was no difference in these respects between an Engineer's certification functions under the ICE conditions and his review functions under clause 66. Also his position was not the same as an adjudicator.

resolutionclauses, such as an adjudication agreement. It has, at any rate as regards discharge for breach accepted in cases such as Northern Developments v. J & J Nichol [2000] BLR 158 (applying Heyman v. Darwins Ltd [1942] AC 356(HL));[55]but was suggested not to be applicable to a contract voidable for duress, in Capital Structures v. Time & Tide Construction[2006] EWHC 591;(2006) BLR 226 (TCC).[56] (Thereasoning is based on a misunderstanding of the doctrine of seperability as it applies in arbitral law, see s. 7 Arbitration Act 1996 and Fiona Trust v. Yuri Privalov[2008] UKHL 40; [2008] 1 Lloyd's Rep 254.

7. Who is bound by the decision?

In arbitration law the parties and those claiming under or through them (egassignees) are bound by an award.[57] The position is probably the same in respect of an adjudicator's decision. Unless the wording of the guarantee provides otherwise, a guarantor is not bound by an adjudicator's decision (or arbitral award); Beck Interiors v. Russo [2009] EWHC B32 (TCC).

SECTION B: ADJUDICATION – THE LEGISLATIVE FRAMEWORK

The Housing Grants Act creates a right to adjudication, defines the process and, if the parties do not agree compliant procedures, implies a set of adjudication rules into their contract.

1. The statutory right to adjudication

The statutory right to adjudication is enshrined in s. 108 of the Construction Act. This provides that a party to a construction contact has the right (note: not an obligation) to refer a dispute (including any difference) arising under that contract for adjudication under a procedure that:

- 108(2)(a): enables a party to give notice at any time of its intention to refer a dispute to adjudication;

- 108(2)(b): provides a time table with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

- 108(2)(c): requires the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

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55 **Haymans**: Words referring to disputes or differences "under" or "arising under" a contract are generally interpreted as narrower in meaning than those referring to disputes or differences "in respect of", "in relation to" or "in connection with" or "arising out of" a contract. AA Mutual: Words such as "in respect of", "in relation to" or "in connection with" or "arising out of" a contract are generally regarded as synonymous, and as having wide meaning.

56 **Capital**: The judge (and possibly council) do not appear to have fully understood the scope of the doctrine in arbitral law. A more interesting question concerns whether allegation of duress voiding a contract arise "under" the contract and if no, how such a defence can be raised.

57 Section 58, AA 1996.

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- 108(2)(d): allows the adjudicator to extend the period of 28 days by up to 14 days with the consent of the referring party;

- 108(2)(e): imposes a duty on the adjudicator to act impartially;

- 108(2)(f): enables the adjudicator to take the initiative in ascertaining the facts and the law;

- 108(3): provides that the adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration (if applicable) or by agreement; and

- 108(4): provides that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith and that any employee or agent of the adjudicator is similarly protected from liability.

<u>Additional statutory requirements from 1st October 2011</u>

- By amendment to ss. 108(2), (3) and (4), the provisions required by those sections must be in writing.

- By new section 108(3A), the contract must include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission. (there is no period stated for this).

- New section 108A entitled Adjudication Costs: effectiveness of provision, provides (no one being sure what it means):

  > "(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.
  >
  > (2) The contractual provision referred to in subsection (1) is ineffective unless—
  > (a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
  > (b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication."

If the parties' contract fails to provide for adjudication or provides a procedure that does not comply with the requirements in ss. 108(1) to (4), the adjudication procedures in Part I of the Scheme for Construction Contracts are implied into the contract (s. 114(4)).

- If the parties accept that they have concluded a construction contract, but the provisions for adjudication are not readily ascertainable, it may be that the

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scheme applies; consider PegramShopfitters v. Tally Wiejl (UK) Ltd [2004] BLR 65 (TCC and CA).[58]

- Given the statutory basis for adjudication, the concept of repudiatory breach of an adjudication agreement has no application; Lanes Group Plc v Galliford Try Infrastructure Ltd [2011] EWCACiv 1617.

2. Are the agreed procedures Act compliant?

If the parties' contract includes adjudication rules, these should be checked for compliance with the s. 108 requirements.

Under the contract

Does the contract provide for the adjudication of disputes under that contract? The words "disputes arising under ..." are generally regarded as having a narrower meaning than "disputes in connection with ..." or "disputes arising out of …"; Heyman v. Darwins Ltd [1942] AC 356(HL),[59] applied in Northern Developments v. J & J

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[58] **Pegram**: The CA held that it was an over simplification to hold that there was a construction contract of some kind. It was possible that there was no contract at all (the judge was wrong to preclude the defendant from arguing this). If the defendant was right, then adjudication was not possible. The CA also noted that the test on summary judgement was whether the defendant's contentions as to the contract had no real prospect of success. This test was not satisfied thus there was no entitlement to summary judgement. **At first instance**, the judge concluded that a contract, which both parties accepted was a construction contract, was formed during negotiations by series of offers and counteroffers. The parties were in dispute about what the terms were. "If the parties enter into their construction contract in such a way that its terms are not clearly and unquestionably capable of being identified, because, as here, the negotiations consisted of a series of offers and counter-offers and no complete and composite set of contract documents was ever identified and signed, the parties have not produced a construction contract whose terms enable a party to give notice at any time of his intention to refer a dispute to adjudication nor have they provided a contractual timetable with the object of securing the appointment of an adjudicator within 7 days of such a notice. Indeed, without an adjudication, the manner of giving notice to refer a dispute to adjudication and the means of appointing, and the timetable for the appointment of, the adjudicator that are provided for in the contract cannot be ascertained. … In those circumstances, section 108 of the HGCRA provides that the Scheme shall apply. … This is so even if it subsequently emerges from the decision of the adjudicator that the terms of the construction contract did, in fact, comply with the requirements of section 108 (1). Unless this extended construction of section 108 is applied by a court, effect cannot be given to the underlying mandatory requirement that a party has the right to refer all disputes arising under the construction contract to adjudication."

[59] **Haymans**: Words referring to disputes or differences "under" or "arising under" a contract are generally interpreted as narrower in meaning than those referring to disputes or differences "in respect of", "in relation to" or "in connection with" or "arising out of" a contract. AA Mutual: Words such as "in respect of", "in relation to" or "in connection with" or "arising out of" a contract are generally regarded as synonymous, and as having wide meaning.

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Nichol[2000] BLR 158. Disputes arising under a contract include claims for payment, damages, repudiatory breach, frustration, and the like, but not claims in misrepresentation or for rectification or in negligence. The latter type of claims may arise in connection with a contract; they do not arise under it.

- But note, Fiona Trust v. Yuri Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep 254, where, in the context of an international commercial contract, the HL has held that the words "arising under a contract" should no longer be given a narrower meaning than the words "arising out of a contract.

- Note also, Spaymill Contracts v. Baskind [2010] EWCACiv 120; fraud and deceit can be raised as a defence in adjudications provided it is a real defence to the claims made.

- There is nothing in the Act that precludes professional negligence claims being adjudicated. See observations in Gillies Ramsay v. PJW Enterprises [2003] BLR 48 (Scotland);[60]London and Amsterdam v. Waterman Partnership [2004] BLR 179.[61]
- Note also Enterprise Managed Services v. Tony McFadden Utilities [2009] EWHC 3222, an assigned claim for an account and payment of the net balance under rule 4.90 of the Insolvency Rules 1986 could not be pursued by adjudicationbecause, *inter alia*, without agreement, an adjudicator could only deal with one dispute under one contract and rule 4.90 envisaged that the account would be taken and the balance decided in one set of proceedings where the result would be final and binding. Here the account required consideration of claims and cross claims under a number of different contracts.

Compromise agreements and variations can cause problems.

- Disputes concerning settlement agreements may not be regarded as arising under the construction contact which they concern; consider Latham Construction v. Cross (2000) CILL 1568;[62]Shepherd Construction v. Mecright[2000] BLR 489.[63]

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60 **Gillies**: (also note commentary). Lady Paton: "There is nothing in the 1996 Act...in precedent or principle, to suggest that an adjudicator seeking to resolve a dispute...is not entitled to reach conclusions about the manner in which a professional person has carried out his or her duties in the course of the construction contract - and that includes conclusions as to whether there might have been any professional negligence. ...While therefore, it may on one view seem startling that a professional person acting as an adjudicator should be invited to rule within 28 days on the important and often difficult and delicate question as to whether a fellow professional has failed in his or her duty to such extent that there has been professional negligence, yet it seems that a proper construction of the statutory language...permits this very result - although importantly, a "provisional interim" result."

61 **London**: Judge expressed concern about whether disputes of this nature and complex matters were suitable for adjudication.

62 **Latham:** A dispute about terms of a compromise is not a dispute under the contract to which it relates.

63 **Shepherd**: The claimant sought to set aside a settlement agreement relied on to resist its claim. It was held that the adjudicator's

- See also Melville Dundas v. Hotel Corp [2006] BLR 464 (Scotland: OH Court of Session), Lord Drummond Young, page 487:

  > ".. it is important … to draw a distinction between settlement agreements that are independent of the underlying construction contract and agreements, which might in some circumstances be described as settlement agreements, which merely determine sums that are due under the construction contract. An example of the former category is an agreement to accept payment of a specified sum in full and final settlement of all claims arising out of a construction contract. An example of the latter category is an agreement that the amount of the contractual retention under a construction contract should be fixed at a specified sum. In the latter type of case all that the parties have done is to agree a particular sum that is relevant for the purposes of their construction contract; that agreement will be given effect through the mechanisms available under the construction contract. An agreement of that nature must in my opinion be considered part of the underlying construction contract, because it has no existence independent of that contract. It is only settlement or compromise agreements that can properly be regarded as independent of the construction contract that escape the provisions of section 111 [of the HGCRA 1996] …".

- If the contract is varied, that variation becomes part of the contract and disputes concerning it arise under that contract; Westminster Building Co v. Beckingham [2004] BLR 163.[64]

Dispute or disputes

Some rules, such as the Scheme, require that only a single dispute can be referred to adjudication, others do not have this restriction;[65]Consider Bothma v Mayhaven Healthcare Limited[2007] EWCACiv 527[66] (the Scheme). But there is nothing objectionable in rules that provide for disputes, rather than a dispute, to be referable; Barr Ltd v. Law Mining Ltd (2001) 80 Con LR 134 (SC),[67]Allied P&L v. Paradigm

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jurisdiction did not extend to a dispute, such as this, which was in connection or arising out of a contract. The setting aside of the settlement was matter for the court to decide.

64 **Westminster**: The capping agreement was not a settlement agreement settling all disputes or a stand-alone agreement. It was intended to vary the terms of the contract by providing a new contract sum or cap. Thus a dispute as to whether it was enforceable arose under the contract since its terms were to be read with the contract. Note, it was not in dispute that the capping agreement had been signed by both parties, its legal validity was challenged, successfully in adjudication, on the ground that there was no consideration for it.

65 See discussion in Durtnell v. Kaduna [2003] BLR 225 (TCC).

66 **Bothma**: Notice of adjudication referred to dispute about Valuation 9 and about date of completion. Court held, two un-related disputes, thus adjudicator had no jurisdiction. The would have been related if Valuation 9 claim included prolongation costs.

67 **Barr**: While paragraph 8(1) of the Scheme may suggest that only a single dispute (albeit including several matters) can be referred, the

Housing [2009] EWHC 2890, at para. 34, as do the JCT(1998) Standard Forms, see Durtnell v. Kaduna [2003] BLR 22.

At any time

Do the rules restrict a party's right to give a notice of adjudication "at any time"? See Carter v. Edmund Nuttal, 21 June 2000, unreported (mediation before adjudication, non-compliant).[68]John Mowlem v. Hydra-Tight (2000) CILL 1650 (contract providing for "notice of dissatisfaction" not Act compliant).[69]Connex v. MJ Building Services [2005] BLR201 (CA) (nothing to prevent a party commencing adjudication some 15 months after an alleged acceptance of a repudiation). Note also DGT Steel and Cladding Limited v Cubitt Building and Interiors Limited [2007] EWHC 1584 (TCC); [2007] BLR 371, where the court, considering a provision in the parties contract "Any dispute, question or differencearising under or in connection with the sub-contract shall, in the first instance, be submitted to adjudication …", exercised its inherit power to stay proceedings, pending the outcome of an adjudication. But, note, s. 108 of the Construction Act does not make adjudication mandatory, it is discretionary. Thus, in an ordinarily worded adjudication agreement (one that merely gives effect to s. 108, there is no basis for a stay of legitimately constituted proceedings, whether arbitration or litigation in favour of adjudication; Cubitt Building v. Richardson Roofing [2008] EWHC 1020; [2008] BLR 354 (TCC).

Time table

Do the rules provide the required time table (7 days between notice and referral, 28 day from referral to decision, unless agreement or (up to 14 days) with consent of referring party)? In William Verry v. NW London Communal Mikvah [2004] BLR 308 (TTC),[70] it was held that the wording of s. 108(2)(b) did not preclude rules being drafted which enabled the adjudicator to extend the time for service of the Referral beyond the seven days.

Impartiality and taking the initiative

Do the rules require the adjudicator to act impartially and enable the adjudicator to take the initiative in ascertaining the facts and the law? There is no separate requirement of independence, contrast Article 6(1) of the European Convention on Human Rights.[71]

Binding decision

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word dispute in s. 108(1) includes, by operation of the Interpretation Act 1978, s. 6, disputes.

68 **Carter**: A contract provided that the parties should attempt mediation before adjudication. Carter contended that since mediation was not attempted, the adjudicator's appointment was invalid. No, because the bar on adjudication conflicted with s. 108.

69 **Mowlam:** *Obiter* comments on the NEC procedure, which was similar to that in ICE 7th, in that a notice of dispute could only be issued after the Engineer has reviewed the matter following a notice of dissatisfaction, suggesting that it was non-compliant.

70 **Verry**: Considering clause 41A of the JCT Rules, which gives this flexibility.

71 **Article 6(1)** provides that, in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

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Do the rules provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if applicable) or by agreement?

Restriction of liability
Does the contract provide the required protection from liability for the adjudicator?

Additional procedures
Provisions in agreed rules that go beyond these requirements need not necessarily conflict with them so as to make those rules non-compliant: John Mowlem v. Hydra-Tight, (2000) CILL 1650 (adjudicator to be selected from a named list);[72]John Roberts v. Parkcare Homes [2006] BLR 106 (CA) (power to direct payment of party costs); Nordert Engineering v. Siemens, 14 April 2000, unreported (extending the adjudicator's jurisdiction);[73]Bridgeway Construction v. Tolent Construction, 11 April 2001, unreported (agreement as to how costs are to be allocated).[74]

Note the decision inNorthern Developments v. J& J Nichol [2000] BLR 158 (parties gave adjudicator power to decide costs by joining issue on costs in an adjudication)[75] was doubted in John Roberts v. Parkcare Homes [2006] BLR 106 (CA).

3. What rules govern the adjudication?

If agreed adjudication rules comply with the s. 108 requirements, they govern the adjudication. If the agreed rules do not comply, in any respect, with these requirements, it may be that the party initiating adjudication has a choice. That is to adjudicate under the agreed rules or to adjudicate under the rules in Part I of the Scheme for Construction Contracts (see s. 114(4)). But, note Epping Electrical v. Briggs [2007] BLR 127 (TCC)[76] where it was held that non compliant rules are invalid and the Scheme applies instead. A similar conclusion was reached inAveat Heating Ltd v. JerramFalkus Construction Ltd[2007] EWHC 131 (TCC).[77]

If there is a choice, consider factors such as whether the agreed rules contain objectionable procedures, whether the additional enforcement powers in the Scheme are important, whether the non-compliant procedures are, nevertheless, appropriate.

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72 **Mowlam:** A requirement for the adjudicator to be a barrister in Atkin Chambers was acceptable. The court observed that that if any of the contract provisions were not compliant, the scheme applied as a whole.

73 **Nordert**: In this case the adjudicator was validly given jurisdiction to determine whether there was a construction contract. See also the TeCSA Rules, which give the Adjudicator power to rule on his own jurisdiction; considered in Fairbrother v. Frogmore, 20th April 2001, unreported.

74 **Bridgeway**: The rules provided that the referring party was to be responsible for all costs and expenses of the adjudication (party and adjudicator's costs).

75 **Northern:***Ad hoc* agreement between the parties to give the adjudicator power to determine his own jurisdiction was validly concluded during the adjudication.

76 **Epping**: The judge, ignoring s. 114(4) which provides that the Scheme applies by implied term, held, on the wording of s. 108(5), that Parliament must have intended the Scheme to replace non-compliant rules.

77 **Aveat**: Adjudication Rules in GC/Works contract invalid, because allowed for adjudicator to reach decision out of time.

SECTION C: ADJUDICATION OUTSIDE THE STATUTE

Contracts that are not governed by the Construction Act may, nevertheless, be governed by adjudication provisions, for instance because the parties have used a Standard Form Contract that was drafted so as to comply with that Act. But, in such a case, the agreed procedures will not have the support of the legislative framework.

> The requirement for writing, s. 107, Construction Act, does not affect the validity of a contractual adjudication; Treasure & Son Ltd v. Dawes [2007] EWHC 2420; [2008] BLR 24 (TCC).[78]
>
> The provisions may fall foul of the Unfair Terms in Consumer Contract Regulations 1999 or UCTA 1977, where part of the supplier's standard terms, but are unlikely to do so where, as in the case of a standard form main contract, they are chosen by the employer. Contrast Lovell Projects v. Legg [2003] BLR 452 [79] and Bryen&Langly v. Boston [2005] BLR 508 (CA)[80]with Picardi v. Cunberti [2003] BLR 487.[81]

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78 Treasure: JCT Prime Cost Contract, included express adjudication agreement. Alleged oral variation of contract did not invalidate the adjudication.

79 **Lovell**: Adjudication provisions in MWA (imposed by defendant, house owners (consumer) on claimant, builder). Sought to resist enforcement of a subsequent adjudication award in builder's favour on basis that the adjudication rules were unfair under reg 5(1) of 1999 Regulations and Sch. 2: a term not individually negotiated is unfair, if contrary to the requirement of good faith it causes a significant imbalance in the parties' rights to the consumer's determent. Held: no significant imbalance since no limit to what can be adjudicated, could have been a dispute going in the defendant's favour. No breach of good faith, provisions clearly set out. No contravention of the requirement of fair dealing or the other factors in schedule 2 to the 1999 Regulations. The MWA was insisted upon by the architect on behalf of the defendants. They were knowledgeable business people who had engaged an architect and contract administrator and had solicitors they could have consulted and may have done so. Note: the claimant conceded that the adjudication provisions had not been individually negotiated (Why? Could have used another form). This line of reasoning adopted in Westminster Building v. Beckingham [2004] BLR 163.

80 **Bryen**: In deciding whether a term was unfair within the meaning of the Regulations, it was necessary to consider whether it was imposed, not just its effect. Here Mr Boston by his agent has imposed the JCT terms upon B&L, they were not imposed on him. To suggest that there was any lack of good faith or fair dealing with regard to the incorporation of those terms is repugnant to common sense.

81 **Picardi**: Adjudication provisions were in the Architect's standard terms (SFA). Never explained to the consumer, or relevant terms drawn to its attention. Not surprisingly, held to be invalid under the 1999 Regulations (distinguished in Lovell as different from a case where terms insisted on by the consumer and had available advice).

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There may be difficulties with enforcement, since s. 111 of the Act does not apply. Consider Parsons Plastics v. Puvac (2001) CILL 1868 (CA).[82]

It may be that errors by an adjudicator within his jurisdiction are grounds to refuse enforcement: Domsalla v. Dyason[2007] EWHC 1174 (TCC).[83]

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82 **Parsons**: *Ad hoc* adjudication agreement, did not preclude, on enforcement proceedings, set off of claims, not decided in that adjudication, against that decision.

83 **Domsalla**: The court held that the doctrine of unreviewable error of an adjudicator within jurisdiction was only applicable to statutory adjudications and, having concluded that the adjudicator was arguably wrong, despite the absence of withholding notices, not to consider a defence of set-off and abatement, gave leave to defend.

COURSE FOR BPP PROFESSIONAL EDUCATION

PAYMENT AND ADJUDICATION UNDER "THE CONSTRUCTION ACT"

SESSION 4: ADJUDICATION RULES – A COMPARISON

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SECTION A: INTRODUCTION

If a party exercises its right to adjudication, that adjudication is not conducted under s. 108 of the Housing Grants Act. It is conducted either under the rules that the parties have expressly agreed by their contract or, if applicable, the rules in Part I of the Scheme for Construction Contracts 1998 ("the Scheme Adjudication Rules")

Most standard form construction contracts and many bespoke contracts used by major developers or contractors include adjudication rules that are intended, more or less, to comply with the s. 108 requirements. Various construction industry bodies publish standard adjudication rules. The ones most commonly encountered are:

- The JCT Adjudication Rules, used in JCT98 series of standard form building contracts.The JCT2005 series incorporates the Scheme.
- The ICE Adjudication Rules, used in ICE standard form engineering contracts.
- The CIC Adjudication Rules, used in many professional services contracts.
- The TecSA Adjudication Rules, sometimes used in bespoke construction contracts, particularly those prepared by solicitors.

SECTION B: PRINCIPAL PROVISIONS IN ADJUDICATION RULES

Since both the Scheme Adjudication Rules and published Adjudication Rules are drafted to comply with the requirements of s. 108 of the Construction Act, they have many similarities. But, there are differences, and these should not be overlooked.

1. The notice of intention to adjudicate (the notice of adjudication)

Adjudication is invariably initiated by one party "the referring party" giving a written notice of adjudication to the "other party", the "responding party", identifying the dispute (note, not claim) to be adjudicated.

The Scheme: The notice must be given to all other parties to the contract. It must set out briefly, the nature and a brief description of the dispute and the parties involved, details of where and when it arose, the nature of the redress sought, and the name and address of the parties.

JCT: The notice, which must briefly identify the dispute, must be given to the other party.

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ICE: The notice must be given to the other party. It must include details and date of the contract, the issues the Adjudicator is to decide and details of the redress sought.

CIC: The notice must be given to the other party and the adjudicator, if named. It must include a brief statement of the issue or issues to be referred and the redress sought.

TecSA: The notice must be served on the other party and identify the dispute in general terms.

2. Nominating and appointing the adjudicator

After the notice is given, the referring party approaches the agreed adjudicator or adjudicator nominating body for a nomination. The approached adjudicator must advise their willingness to act. All rules provide a short timetable, less than seven days from the notice of adjudication, for the nomination. In some cases, see the ICE Rules for example, the wording appears to invalidate appointments made out of time.

The Scheme: Once the notice of adjudication is given, the referring party requests the adjudicator named in the contract to act or, of none named or they won't act, approaches the named adjudicator nominating body or, if none named, any adjudicator nominating body. The person requested to act, to indicate their willingness to do so within two days of the request.

JCT: Once the notice of adjudication is given an adjudicator should be agreed or an application made to the agreed nominating body. The adjudicator should sign the JCT adjudication agreement on accepting the appointment.

ICE: Once the notice of adjudication is given, the referring party requests the named adjudicator to act or, if none named, may include proposed names in the notice. If none of the proposed names is accepted, then an application can be made to the ICE. The notice must be accompanied by a copy of the notice of adjudication and the fee. The adjudicator and parties should execute the ICE adjudication agreement.

CIC: Once the notice of adjudication is given, the referring party requests the adjudicator named in the contract to act or, of none named or they won't act, approaches the named adjudicator nominating body or, if none named, the CIC, for an appointment which, in either case must be made within 5 days of the request. The notice must be accompanied by a copy of the notice of adjudication and the fee. The adjudicator is appointed on the terms of the CIC adjudicator's agreement.

TecSA: Once the notice of adjudication is given, the referring party requests the adjudicator named in the contract to act or, of none named or

they won't act, approaches TecSA for a nomination. The nomination must be accompanied by a copy of the Contract (sic), the notice of arbitration and the fee.

3. Referring the dispute and the period for the adjudication

Once the adjudicator is appointed, the referring party refers the dispute to the adjudicator by Referral Notice. All rules provide for this to be done within seven days of the notice of adjudication. Some, see the JCT Rules, allow referral outside this period if the adjudicator is not in place in seven days. In all cases, the 28-day period runs from when the adjudicator receives the referral. Provisions for extending this period all mirror those in ss. 108(2)(c) and (d) of the Construction Act.

The Scheme: When an adjudicator is selected, the dispute shall be referred to that adjudicator, with a copy to the other parties, within seven days of the notice of adjudication by referral notice accompanied by copies of or extracts for the contract and other documents to be relied on (from 1st October 2011, the adjudicator must inform the parties of the date that the Referral was received).

JCT: Once advised of the adjudicator, the dispute should be referred by sending the referral to the adjudicator, with a copy the other party, including particulars of the dispute and a summary of the referring party's contentions, a statement of the relief sought and any material it wishes the adjudicator to consider.

ICE: Within two days of being advised of the adjudicator's willingness to act or selection, the referring party sends the adjudicator, with a copy to the other party, its full statement of case, including a copy of the notice of adjudication, the adjudication provisions in the contract and any information relied on, including supporting documents. The date of receipt by the adjudicator is the referral.

CIC: Within seven days of the notice of adjudication or after the adjudicator is appointed, the Referring party sends its statement of case to the adjudicator, with a copy to the other party, including with that statement a copy of the notice of adjudication, the contract, details of the circumstances giving rise to the dispute, the reason why it is entitled to the redress sought and the evidence relied on.

TecSA: Within seven days of the notice of adjudication, the Referring party sends the Referral Notice to the adjudicator, with a copy to the other party.

4. Resignation and revocation of authority

Most adjudication rules, but not the JCT, provide procedures for the resignation and replacement of the adjudicator. (From 1st October 2011, the Scheme, paragraph 9(4), includes a somewhat confusing reference to s. 108A(2) of the Act as a proviso to the adjudicator's power to allocate payment of the adjudicator's fees). The scheme includes

provision for the parties to revoke the adjudicator'sappointment and for there to be no liability for the adjudicator's fees if the reason for the revocation is the default or misconduct of the adjudicator. There is nothing similar in the other Rules.

5. Exchange of written statements

Most adjudication rules, but not the Scheme or TecSA, state a period within which the responding party is to submit a response. The period allowed for this is, usually, seven or 14 days. None of the rules provide a right of reply.

6. Other procedures

All adjudication rules give the adjudicator express power to take the initiative in ascertaining the facts and the law. All published rules provide the adjudicator with a range of other powers to assist in this task. For example, the power to request further information, to open up and review certificates, decisions in the like, to meet and question the parties and their representatives, to make site visits, inspections and tests, to appoint experts or assessors and to continue with the adjudication and make a decision in the absence of or non-cooperation of a party. All rules include a power to order simple interest; some allow the possibility of compound interest. All adjudication rules require the adjudicator to act impartially some, such as TecSA impose an additional requirement of fairness.

Exceptionally, TecSA provides that the Adjudicator may decide its own jurisdiction and the scope of the adjudication.

7. The decision and power to correct errors

All published rules require the adjudicator to reach their decision within 28 days, or 42 days with the consent of the referring party or such longer period as is agreed by the parties (from 1st October 2011, the Scheme has clarified that this runs from the date of receipt of the Referral). Published rules do not adopt a consistent approach to the giving of reasons. Some expressly provide for what is to happen if the decision is out of time..

The Scheme: Reasons for the decision to be provided if requested by a party. If the decision is not reached in time, either party may request a new adjudicator to act. (From 1st October 2011, the Scheme, paragraph 22A includes a time limited power to correct clerical or typographical errors).

JCT: The adjudicator is not obliged to give reasons of the decision.

ICE: The adjudicator is not obliged to give reasons of the decision. Post 1st October 2011 rules provide a time limited power to correct errors.

CIC: The adjudicator to give reasons for his decision, unless the parties agree otherwise.Post 1st October 2011 rules provide a time limited power to correct errors.

TecSA:	Reasons for the decision to be provided if requested by a party.Post 1st October 2011 rules provide a time limited power to correct errors.

8. Fees and costs

The Act is silent on this question. Most, but not all, rules provide that the parties' liability for the adjudicator's reasonable fees and expenses is joint and several and, either expressly, or by implication, that the parties are to bear their own costs and that only the adjudicator's fees and expenses can be allocated between the parties.

The Scheme:	The adjudicator may allocate his fees and expenses between the parties. The parties are jointly and severally liable the adjudicator's reasonable fees and expenses (apparently). (From 1st October 2011, the Scheme, paragraph 25, includes a somewhat confusing reference to s. 108A(2) of the Act as a proviso to the adjudicator's power to allocate payment of the adjudicator's fees).
JCT:	The adjudicator may allocate his fees and expenses between the parties. The parties are jointly and severally liable the adjudicator's reasonable fees and expenses.
ICE:	The parties to bear their own costs. The adjudicator may allocate his fees and expenses between the parties. The parties are jointly and severally liable the adjudicator's reasonable fees and expenses.
CIC:	The parties to bear their own costs. The adjudicator may allocate his fees and expenses between the parties. The parties are jointly and severally liable the adjudicator's reasonable fees and expenses.
TecSA:	The adjudicator to have power to award costs if the parties agree. The adjudicator may allocate his fees and expenses between the parties. The parties are jointly and severally liable the adjudicator's reasonable fees and expenses. The adjudicator's fees not to exceed the specified daily rates plus expenses and VAT.

9. Adjudicator's immunity

All published rules mirror the wording of s. 108(4) in according the adjudicator immunity from proceedings by the parties.

10. The effect of the adjudicator's decision on the parties

Most rules mirror the requirements of s. 108(3) in stating the effect of the adjudicator's decision on the parties. Some contracts include additional enforcement procedures or seek to further entrench an adjudicator's decision. The Scheme provides that the decision, if expressed in peremptory terms, may be enforced under a regime modelled on s. 42 of the Arbitration Act 1996, as amended (from 1st October 2011, this power, paragraphs 23(1) and 24, has been removed).

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COURSE FOR BPP PROFESSIONAL EDUCATION

PAYMENT AND ADJUDICATION UNDER "THE CONSTRUCTION ACT"

SESSION 5: BEGINNING AND PROSECUTING AN ADJUDICATION

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SECTION A: INTRODUCTION

Once the claims have been properly identified, analysed and advised to the other party so as to be in dispute, adjudication proceedings are begun by giving notice of adjudication in respect of that dispute, obtaining the appointment of an adjudicator and referring the dispute to that adjudicator. The adjudication is then prosecuted in accordance with the rules and the adjudicator's procedural directions.

SECTION B: IS A DISPUTE SUITABLE FOR ADJUDICATION?

In deciding whether dispute is suitable for adjudication, consideration should be given to the following matters.

- Is adjudication available as a means for determining the dispute? This may not be the case if the adjudication agreement is in the statutory form and the dispute involves claims that do not "arise under the contract" such as claims in misrepresentation or tort. Letters of intent give rise to a number of difficulties. First, do they give rise to a contract at all; the starting point is the analysis in British Steel v. Cleveland Bridge [1984] 1 All ER 504.[84] If so, do they incorporate terms that include an adjudication agreement and rules and, if not, does the Scheme apply, consider the view of the TCC judge in Bryen&Langly v. Boston [2004] EWHC 2450; [2005] BLR 28 (TCC),[85] overruled on the incorporation point, on Appeal [2005] BLR 508 (CA).

[84] **British Steel** Letter of intent asked for work to proceed immediately, pending preparation and issue of a form of sub-contract which at the time still in negotiation. So no "if contract" either, terms to uncertain. Hence entitled to reasonable price, and no possibility of a counterclaim for delay. Note also **Monk Construction v. Norwich Union** (1992) Build LR 107 (CA). Letter authorised maximum sum to be expended on enabling works pending conclusion of contract, whole job built. Entitled to quantum *meruit* on work done outside terms of letter. Note: **Jarvis v. Galliard** [2000] BLR 33 (CA), even if the letter of intent looks as though it could give rise to a contract, words such as "subject to concluding a formal contract" read in the context of a preliminaries clause that require the contract to be by deed may operate in a similar manner to the words "subject to contract". But contrast **Stent Foundations v. Tarmac Construction**, (1999) 78 ConstLR 188 (CA) "until final documents available" not construed in this way.

[85] **Bryen**: The letter of intent did not incorporate the JCT form referred to. It was only looking forward to the making of another contract

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- Has the dispute already been adjudicated? If so, the decision cannot be re-adjudicated.

- Is there a statutory bar to the commencement of adjudication proceedings? For instance, leave will be required to commence adjudication against a company in administration, Straume (UK) Ltd v. Bradlor Developments (1999) CILL 1592.[86]

- If the dispute concerns a debt and it can readily be shown that the sums claimed are due and that no notice of withholding was issued, it may be possible to obtain summary judgement; see Millers Specialist Joinery v. Nobles Construction, 3rd August 2001, unreported (s. 111 apples in court proceedings).[87] If there is an arbitration agreement, then this may not be possible; Collins v. Baltic Quay [2005] BLR 53 (CA) (proceedings were stayed to arbitration). It may, however, be possible to limit the arbitration to the same issues as would pertain in court, albeit the arbitrator will, in the absence of s. 39, AA1996 powers, have to deal with them on the merits, CPR part 24 being irrelevant in arbitration.

- Alternatively, it may be possible to proceed by way of statutory demand. But the court will, on an application to set aside the demand (or to restrain advertising of the petition, as the case may be), give priority to the insolvency legislation, for instance, Rule 6.5(4) of the Insolvency Rules,[88]over s. 111 of the Construction Act. See for example Re A Company, 12th May 2001, unreported.[89] But note Gardi Shoes v. Datum (2003) CILL 1934.[90]

- Can adjudication be effectively used as a summary process in the context of an ongoing arbitral or court proceedings? The fact that legal, or arbitral proceedings have been

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anticipated to be on those terms. Since the works were on Mr Boston's home, it was not a Construction Contract either, so the Scheme did not apply.

86 **Straume**: Adjudication is "other proceedings" within the meaning of s. 11(3)(d) of the Insolvency Act 1996.

87 **Miller**: The court concluded that the claimant would not have been entitled to summary judgement on the merits if the allegations in the counterclaim were taken into account. But gave summary judgement because the allegations in the counterclaim were not the subject of a valid notice of withholding given under s. 111.

88 **Section 6.5(4)**: The court may, on application, set aside the demand where the debtor appears to have a set off for counterclaim that exceeds the debt, the debt is disputed on grounds that appear to be substantial, or it is satisfied on other grounds that the demand ought to be set aside.

89 **Re A Company**: The main contractor's surveyor had certified the sums as due and the main contractor had failed to take any steps to peruse its cross-claim whether by adjudication or otherwise.

90 **Gardi**: Since the applicant (application to restrain advertisement of petition) had had the opportunity to issue a s. 111 notice, but failed to do so, it could not be said that the presentation of the petition was an abuse. Neither could it be said that the petition was bound to be dismissed if it proceeded. Judge was not impressed with the draft pleading in proposed proceedings, but was not prepared to say it was obviously without substance and accepted that the counterclaim might be made good in respect of a substantial sum.

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commenced in respect of the dispute does not preclude it being adjudicated, Herschel Engineering v. Breen Properties, [2000] BLR 272.[91]

- Is adjudication cost effective? Party costs are not normally recoverable. If representatives are retained, are costs proportionate to the possible outcomes.[92] Is there any way, for instance by agreeing a name with the other party, of ensuring that the adjudicator has the skills to understand and evaluate the arguments advanced?

- In the case of complex disputes should the whole matter be brought forward in a single adjudication or should it be broken down into a number of separate adjudications. If the latter what is a sensible/cost effective division. For a consideration of what can go wrong see AWG v Rockingham Motor Speedway (2004) EWHC 888.[93]

- Is the dispute readily manageable within a 28-day dispute resolution procedure and by a single adjudicator? If there are concerns about this, can these be sensibly addressed between the parties, their advisors and the adjudicator, for instance to arrive at agreed amendments to the time scales. If this is not done, the adjudicator may conclude that he is unable to reach a decision fairly, or his decision may be invalidated because the responding party can contend it had insufficient time to deal with the case against it; see discussion on these matters in CIB Properties v. Birse [2005] BLR 173 (TCC).[94] Is there merit in converting the process into, for instance, a fast track arbitration (see, for instance the Society of Construction Arbitrators, 100 day procedure).

- What will be the significance of the adjudicator's decision once made, will it be of any use to either party, will it merely lead to further proceedings whether in adjudication, litigation or arbitration.

- If responding to an adjudication is it preferable to run defences in that adjudication, with the resulting time pressures, or cross adjudicate the responding party's case?

SECTION C: GIVING NOTICE OF ADJUDICATION

The notice of adjudication is important. It is this, not the subsequent referral that defines the adjudicator's jurisdiction; KNS Industrial Services v. Sindall (2001) 74 Con LR 71.

1. The need for a pre-existing dispute or difference

Before a notice of adjudication can be given there must be a dispute or difference between the parties (s. 108(1).

91 **Hershel**: A party that commences legal proceedings has not waived or repudiated the benefit of the adjudication procedure.

92 Note: Some view the costs of adjudication as equivalent to the irrecoverable cost component of arbitration/litigation.

93 **AWG**: Costs of the adjudication amounted to several hundred (£600k) thousand pounds. Much of the adjudicator's decision was unenforceable as based on a late change of case with which the Responding party had insufficient time to deal.

94 **CIB**: Claim was in the region of £11 million, extended period was just over 3 months. Court refused to accept that some disputes too complex for adjudication, or, given the extended period, that the process was unfair.

- In arbitration law a dispute occurs not merely when a claim is disputed, but when a claim is raised and ignored or met with prevarication sufficient to show that it is not accepted. There can be a dispute or difference even though it can readily be demonstrated which party is right; Hayter v. Nelson and Home Insurance [1990] 2 Lloyd's Rep 265.

- A dispute is not crystallised merely by stating that a claim must be accepted in seven days; Sindall v. Solland [2001] 80 Con LR 152.[95]

- Claims that are first made by notice of adjudication, or later, are not in dispute at the date of that notice, Edmund Nuttall Ltd v. RG Carter Ltd [2002] BLR 312 (appeal abandoned).[96] But if a dispute is characterised in general terms, any ground that exists which justifies the conduct complained of is encompassed, Sindall v. Solland [2001] 80 Con LR 152;[97]WilliamVerry v. Furling Homes [2005] EWHC 138 (TCC); (2005) CILL 2205 (where a claim made in adjudication proceedings, the responding party can deploy all available defences, and is not restricted to those of which it has previously advised and which have

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95 **Sindall**: It must be clear that a point has emerged during the process of negotiations, or the negotiations have ended, and something needs to be decided. One cannot crystallise disputes merely by stating that a claim must be accepted in seven days.

96 **Nuttall**: Notice of adjudication referred to certain claims that had been previously made and remained unresolved. During the course of the adjudication the referring party relied on a report which characterised these claims differently, with different, lower, losses under different heads. The court decided that the adjudicator had no jurisdiction to consider this report as the claims it referred to were not encompassed by the notice of adjudication. The court considered that the concept of adjudication is that the parties have exchanged views and put their arguments before a notice of adjudication is issued. For there to be a dispute there must be an opportunity for a party to consider the other party's case and formulate arguments in relation to its position. The court said (although this had not been accepted in subsequent cases) that a dispute is not merely a claim rejected, but the whole package of arguments advanced by each side. The court accepted that arguments could be refined and unmeritorious points abandoned after a notice of adjudication was issued. But considered that this could not be done wholesale, contending that the adjudicator has jurisdiction because the claim is the same. Without the opportunity for an open exchange of views, a party would be at risk of being presented with new argument that it had not had sufficient time to consider. In this case the heads of claim had been changed and quantum altered from the claim advanced prior to the notice of adjudication.

97 **Sindall**: In that case it was held that a dispute about whether a notice of determination had been validly issued on the grounds of failing to proceed regularly and diligently with the works, encompassed the question of whether the contract period should be extended, even though the time for the Architect to consider the Contractor's claim for an extension of time had not expired at the date of the notice of adjudication.

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thereby generated the dispute).[98] A similar view is expressed in Cantillon Ltd v. Urvasco Ltd[2008] EWHC 282 (TCC), para 54.

- However characterised in the notice of adjudication, the dispute will concern the contractual basis of any remedy sought and the adjudicator must consider this; Ballast Plc v. The Burrell Co, 17th December 2002 (Scotland).[99]

- If the contract provides that the other party or a contract administrator is entitled to time in which to consider a claim before advising its decision, there cannot be a dispute until that period has elapsed, or a decision is given, if earlier, Durtnell v. Kaduna [2003] BLR 225 (TCC).[100]

- There is no dispute if a claim is met by a statement that there is a need to consult with other parties before responding. Neither can a dispute be engendered merely by stating that it will be deemed to exist if a claim is not accepted in within a short time, Sindall v. Solland [2001] 80 Con LR 152.[101]

- If the matter in question as already been the subject matter of a decision in adjudication, there is no dispute in respect of that matter capable of being referred to adjudication, Walker Jones v. Lidl (UK) Ltd (2002) CILL 1847.[102] But an adjudication on the final account is not necessarily precluded by a

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98 It is clear that Jackson J agreed with this in Quietfield Ltd v. Vascroft Contractors Ltd [2006] EWHC174, para. 41.

99 **Ballast**: "the powers of the adjudicator, if categorised as a question of jurisdiction, are focussed by the dispute set out in the notice of adjudication and subsequently "amplified", to use counsel's own expression, by the referral notice … [here the claims] … are essentially for valuation in respect of work done. However, the validity of the claims made may well depend upon the terms of the contract or at least the basis upon which they are contractually asserted. As regards jurisdiction, …the adjudicator, while restricted to issues focused in the dispute, has nevertheless both the power and duty to determine whether or not a claim that is put forward in respect of valuation of work done is validly asserted under the contract. He must answer that question either in the affirmative or the negative. He cannot decline to address it."

100 **Durtnall**: The adjudicator had no jurisdiction to award an extension of time, as the period available for the architect to consider such an extension under the contract, JCT 80, as amended, had not elapsed. Note: such provisions are not the same as those that seek to define a dispute as being something else, such as a "dissatisfaction". Rather they define the period in which silence is not to be regarded as rejection.

101 **Sindall**: It must be clear that a point has emerged during the process of negotiations, or the negotiations have ended, and something needs to be decided. One cannot crystallise disputes merely by stating that a claim must be accepted in seven days.

102 **Walker Jones:** First adjudication concerned entitlement to payment under certificate 11. A subsequently appointed adjudicator had no power to determine the proper valuation of the work included in that certificate. Applying Sindall v. Solland (2001) 80 Con LR 152, if a dispute is characterised in general terms any ground that exists that may justify the action complained of is encompassed by that dispute. Thus, valuation was encompassed by first adjudication.

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previous adjudication on an interim payment; Skanska v. ERDC, 28th November 2002 (Scotland).[103] See also paragraph 9(2) of the Scheme for Construction Contracts (the adjudicator must resign were the dispute is the same or substantially the same as one previously referred to adjudication and a decision given in that adjudication.)[104]

This may depend on how the earlier dispute was characterised and whether it, and the later dispute, both arise under the same contract machinery. See Quietfield Ltd v. Vascroft Contractors Ltd [2007] BLR 67 (CA), approving Jackson J, EWHC174, paragraph 42

> "… four principles apply when there are successive adjudications about extension of time and/or the deduction of damages for delay:
>
> (i) Where the contract permits the contractor to make successive applications for extension of time on different grounds, either party, if dissatisfied with the decisions made, can refer those matters to successive adjudications. In each casethe difference between the contentions of the aggrieved party and the decision of the architect or contract administrator will constitute the "dispute" within the meaning of section 108 of the 1996 Act.
>
> (ii) If the contractor makes successive applications for extension of time on the same grounds, the architect or contract administrator will, no doubt, reiterate his original decision. The aggrieved party cannot refer this matter to successive adjudications. He is debarred from doing so by paragraphs 9 and 23 of the Scheme and section 108(3) of the 1996 Act.
>
> (iii) Subject to paragraph (iv) below, where the contractor is resisting a claim for liquidated and ascertained damages in respect of delay, pursued in adjudication proceedings, the contractor may rely by way of defence upon his entitlement to an extension of time.
>
> (iv) However, the contractor cannot rely by way of defence in adjudication proceedings upon an alleged entitlement to extension of time which has been considered and rejected in a previous adjudication."

- There can be two or more pending adjudications on the same dispute at once Paragraph 9 (2) of the Scheme only prevents that, and requires an adjudicator to resign where there is a decision in one of them; Vision Homes Ltd v. Lancsville Construction Ltd [2009] EWHC 2042 (TCC).

2. Is there a need for dialogue before there can be a dispute?

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[103] **Skanska**: A DOM/1 variant. Both adjudications concerned loss and expense, but since different provisions governed the claim in the Final Account, the second adjudicator had jurisdiction.

[104] In HG Construction Ltd v. Ashwell Homes [2007] BLR 175 (TCC), the court held that the binding nature of adjudication expressed in clause 39A.7.1 of the JCT Rules implied similar principles. It was for the adjudicator to consider this matter and in appropriate cases resign.

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In Edmund Nuttall Ltd v. RG Carter Ltd [2002] BLR 312 the court suggested that, for there to be a dispute, there must have been an opportunity for both protagonists to consider the position adopted by the other and formulate arguments of a reasoned kind.[105]

This suggested a departure from arbitration law, which took a much more robust view on what constitutes a dispute. See, for example, Halki Shipping Corporation v. Sopex Oils Ltd [1998] 1 WLR 727, 761 (CA) "there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable"; citing TemplemanLJ in Ellerine Bros Pty Ltd v Klinger [1982] 1 WLR 1375 (CA) "It is not necessary, for a dispute to arise, that the defendant should write back and say "I don't agree." If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation." But note the slight gloss on this in Cruden Construction Ltd v. Commission for New Towns [1995] 2 Lloyd's Rep 387.[106]

In Cowlin v. CFW Architects [2003] BLR 241[107] the court preferred the reasoning in the arbitration case law to that in cases such as Nuttall v. Carter, observing that most

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105 **Nuttall**: "This being a matter of practical policy since the … whole concept underlying adjudication is that the parties to an adjudication should first themselves have attempted to resolve their differences by open exchange of views and, if they are unable to, they should submit to an independent third party for decision the facts and arguments they have previously rehearsed among themselves. If adjudication does not work in that way, there is a risk of premature and unnecessary adjudications in cases in which, if only one party had had a proper opportunity to consider the arguments of the other, accommodation might have been possible." See also Sindall v. Solland "for there to be a dispute for the purposes of exercising the statutory right of adjudication, it must be clear that a point has emerged from the process of discussion or negotiation has ended and that there is something which needs to be decided."

106 **Cruden**: Words dispute or difference are ordinary English words. A dispute exists where a claim in respect of some identified or specific matter has been made and either informed or met with prevarication. But there should be an opportunity for agreement to be reached and, if a person not told or is unaware of the respects in which he is said to be in breach, how can it be said that the matter is one on which agreement has not been reached, at least where further information has been sought. Note in Ellerine Bros v. Klinger [1982] 1 WLR 1375, 1381 (CA) it was suggested that there is a dispute until the defendant admits that the sum is due and payable. It was also said that, if what the plaintiff is demanding involves a matter on which agreement has not been reached, then he can insist on arbitration.

107 **Cowlin**: "Cowlin had made a claim. The nature of the claim had been outlined so that, although CFW did not know the detail, they were aware of the bare bones of it. Although CFW had not expressly rejected the claim, Cowlin had made it clear that, unless CFW made their position clear by 17 May, Cowlin would have to assume that CFW did not accept the claim. In the absence of an acceptance of Cowlin's claim, CFW must be taken to have rejected it, so that a dispute had arisen. By the time the deadline passed, there was undoubtedly a dispute." Note, the Halki test is becoming orthodoxy, see commentary to Orange

disputes stem from claims but the existence of a detailed claim is not necessary to give rise to a dispute. Many court and arbitral proceedings are begun before the nature of the dispute or difference between the parties has been explicitly set out. Absence of a reply gives rise to the inference that there is a dispute. The court preferred the approach taken in Halki v. Sopex as providing a straightforward analysis of what constitutes a dispute and did not consider that the dispute should be construed more narrowly in adjudication because of the short timescales and the risk of ambush.[108] A similar approach has been adopted in a number of other cases; for example Beck Peppiatt v. Norwest Holst [2003] BLR 316; London&Amsterdam v. Waterman Partnership [2004] BLR 179.

3. The end of *Edmund Nuttall Ltd v. RG Carter Ltd* [2002] BLR 312

In AMEC Civil Engineering Ltd v The Secretary of State for Transport [2004] EWHC 2339 (an arbitration case), Jackson J, after a full review of the cases, continued, at paragraph 68.

> "1. The word 'dispute' which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
>
> 2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.
>
> 3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
>
> 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

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v. ABB Ltd [2003] BLR 323, also Beck Peppiatt v. Norwest Holst [2003] BLR 316.

[108] **Cowlin**: "While I accept that the adjudication process involves short timescales, and that there is a risk that a responding party may be ambushed, those are not in my judgement reasons to construe the word dispute more narrowly in the context of adjudications than in other contexts. I bear in mind the practical difficulties faced by an adjudicator whose jurisdiction is challenged on the ground that there is no dispute. The court should not add unnecessarily to those difficulties by giving a narrow meaning to the word dispute which would in turn permit a responding party to introduce uncertainties which might be difficult for an adjudicator to deal with. Otherwise, there is a risk that the purpose of HGCRA may be defeated."

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

These paragraphs were considered by the CA in Collins (Contractors) Ltd v. Baltic Quay Management (1994) Limited[2005]BLR 63 and, subsequently, on the appeal in AMEC[2005] EWCACiv 291, reported at [2005] BLR 227 (CA). May LJ, with whom Hooper LJ agreed, stated:

"30. In Collins (Contractors) Ltd v. Baltic Quay Management (1994) Limited(2005) BLR 63, Clarke LJ at paragraph 68 quoted Jackson J's seven propositions and said of them:

'63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that a dispute should not be lightly inferred. In my opinion he was right not to do so.

64. It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J.'

31. Each of the parties has accepted in this court that the judge's propositions correctly state the law. I am broadly content to do so also, but with certain further observations, as follows:

> 1. Clause 66 refers, not only to a "dispute", but also to a. "difference". "Dispute or difference" seems to me to be less hard-edged than "dispute" alone. This accords with the view of DanckwertsLJ in F & G Sykes v. Fine Fare [1967] 1 LLR 53 at 60 where he contrasted a difference, being a failure to agree, with a dispute. …".

Rix, LJ added some thoughts of his own:

> "63. Like Lord Justice Clarke in Collins (Contractors) v. Baltic Quay Management (1994) Limited and Lord Justice May in the present case, I am broadly content to accept the propositions set out by Jackson J in para 68 of his judgment below. I would also agree with Lord Justice Clarke's and Lord Justice May's further observations, and would hazard these remarks of my own.
>
> 64. First, I would wish to be somewhat cautious about the concept of "a reasonable time to respond" to a claim. The facts of the present case demonstrate to my mind the difficulty of that test. In many ways Amec were not left with a reasonable time to respond. They were effectively given a period of one day in circumstances where they had been previously told (in the Highways Agency's letter to them dated 2 October 2002) that a "formal response" would be appreciated "once you have received the factual report referred to earlier". That factual report was never sent to them. It was true that the limitation period was expiring, but that was not Amec' s fault.
>
> 65. The words "dispute" and "difference" are ordinary words of the English language. They are not terms of art. It may be useful in many circumstances to determine the existence of a dispute by reference to a claim which has not been admitted within a reasonable time to respond; but it would be a mistake in my judgment to gloss the word "dispute" in such a way. I would be very cautious about accepting that either a "claim" or a "reasonable time to respond" was in either case a condition precedent to the establishment of a dispute.
>
> 66. Secondly, however, like most words, "dispute" takes its flavour from its context. Where arbitration clauses are concerned, the word has on the whole caused little trouble. If arbitration has been claimed and it emerges that there is after all no dispute because the claim is admitted, there is unlikely to be any dispute about the question of whether there had been any dispute to take to arbitration. And if the claim is disputed, any argument that the arbitration had not been justified because at the time it was invoked there had not been any dispute is, it seems to me, unlikely to find a receptive audience (although it appears that it did in Cruden Construction v. Commission for the New Towns [1995] 2 Lloyd's Rep 37). So it is that in this arbitration context the real challenge to the existence of a "dispute" has arisen where a party seeking summary judgment in the courts has been met by a request for a stay to arbitration and the claimant has wanted to argue that an unanswerable claim cannot be a real dispute. In that

context it was held in Hayter v. Nelson and Home Insurance [1990]2 Lloyd's Rep 265 that for the purposes of section 1 of the Arbitration Act 1975 "there is not in fact any dispute" where a claim is unanswerable, even if disputed. However, for the purposes of section 9 of the Arbitration Act 1996, from which that particular language had been dropped, this court held, applying Ellerine Brothers (Pty) Ltd v. Klinger [1982] 1 WLR 1375, that an unadmitted claim gave rise to a dispute, however unanswerable such a claim might be: Halki Shipping Corporation v. Sopex Oils Ltd [1998] 1 WLR 726.

67. It follows that in the arbitration context it is possible and sensible to give to the word "dispute" a broad meaning in the sense that a dispute may readily be found or inferred in the absence of an acceptance of liability, a fortiori because the arbitration process itself is the best place to determine whether or not the claim is admitted or not.

68. Thirdly, and significantly, the problem over "dispute" has only really arisen in recent years in the context of adjudication for the purposes of Part II of the Housing Grants Construction and Regeneration Act 1996. Jackson J referred below to some of the burgeoning jurisprudence to which the need for a "dispute" in order to trigger adjudication has given rise. In this new context, where adjudication is an additional provisional layer of dispute resolution, pending final litigation or arbitration, there is, as it seems to me, a legitimate concern to ensure that the point at which this additional complexity has been properly reached should not be too readily anticipated. Unlike the arbitration context, adjudication is likely to occur at an early stage, when in any event there is no limitation problem, but there is the different concern that parties may be plunged into an expensive contest, the timing provisions of which are tightly drawn, before they. and particularly the respondent, are ready for it. In this context there has been an understandable concern that the respondent should have a reasonable time in which to respond to any claim.

69. Fourthly, the question might arise as to whether the prior existence of a dispute is a condition precedent to a reference. The parties are agreed in this case that it is. Since they are agreed, I am content to assume that that is so. Ultimately. it would be a question of construction of any particular clause."

The rejection of the Nuttall v. Carter approach, often referred to as the black bag approach, also gives greater flexibility to the Referring Party in developing its case, Cantillon Ltd v. Urvasco Ltd[2008] EWHC 282 (TCC), Atkinhead J, para 56.

"In my view, one should look at the essential claim which has been made and the factthat it has been challenged as opposed to the precise grounds upon which that it hasbeen rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it is referred to adjudication or arbitration. Similarly, the claimingparty is not limited to the arguments, contentions and evidence put forward by it before the dispute crystallised. The adjudicator or arbitrator must then resolve the referred dispute, which is essentially the challenged claim or assertion but can consider any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute."

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4. Preparing and giving notice of adjudication

When preparing a notice of adjudication the following matters should be born in mind.

- The notice should comply with the requirements in the contract or, if relevant, the Scheme (Part I, paragraph 1). Consider Jerome Engineering v. Lloyd (2001) CILL 1827.[109] This, and the application for a nomination form, may be the only documents provided to a potential adjudicator when approached by a nominating body. Read together, they should at the very least identify the parties and their addresses, representatives, if any, contact telephone and fax numbers, the contract and any incorporated standard forms, the applicable adjudication rules, and, of course, the dispute.

- It is possible to include several different elements (types of claim) in the same notice, Balfour Kilpatrick v. Glauser International, 27th July 2000, unreported;[110]David Mclean Housing Contractors Ltd v. Swansea Housing Association Ltd [2002] BLR 125.[111] But note see Bothma v Mayhaven Healthcare Limited[2007] EWCACiv 527[112] (the elements must be related in some way, a case on the Scheme); see also Witney TC v. Beam Construction [2011] EWHC 2332, para 38 for a good summary of how to decide if all one dispute. In particular, avoid over-legalistic analysis, consider Notice and Referral and background facts, a useful rule of thumb being that if one disputed claim cannot be decided without deciding all or parts of another disputed claim, they are part of the same dispute.

- A dispute encompasses all the claims, issues and causes of action that the referring party has chosen to crystallise in the notice of adjudication. In order to decide what these are, the notice of adjudication should be construed against the background from which it springs, Fastrack v. Morrison [2002] BLR 168.

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109 **Jerome**: The DOM/2 adjudication rules did not stipulate that relief had to identified in the notice of adjudication. Thus, the adjudicator had jurisdiction to grant relief first referred to in the Referral. The position would have been different under the Scheme, since it required the relief to be identified in the notice of adjudication.

110 **Balfour:** TeCSA Rule 11 provides that the dispute relates to the matters identified in the notice. There may be several such matters. The reference in the TeCSA Rules to a dispute did not confine the notice to a single matter. Neither the number nor the complexity of the matters made them unsuitable for adjudication. This reasoning is to be preferred to the contrary remarks in Grovedeck v. Capital Demolition [2000] BLR 181, suggesting that paragraph 8 of the Scheme precludes this.

111 **David Mclean**: A single dispute could consist, as in this notice of adjudication, of several discrete elements. Here a dispute encompassed elements concerning the amount due, the appropriate extension of time and whether liquidated damages were deductible.

112 **Bothma**: Notice of adjudication referred to dispute about Valuation 9 and about date of completion. Court held, two un-related disputes, thus adjudicator had no jurisdiction. They would have been related if Valuation 9 claim included prolongation costs.

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- Care should be taken over how the dispute is identified in the notice, since this defines the adjudicator's jurisdiction. Although earlier correspondence can be looked at to identify the dispute, this may be too uncertain in meaning to identify the matters in dispute, Ken Griffin v. Midas Homes (2000) 78 Con LR 152.[113]

- It may be preferable to characterise the dispute in somewhat general (not vague) terms rather than being too specific. The dispute can be framed in the form of a question "what sum is due"; Fastrack v. Morrison [2000] BLR 168.[114] The dispute should not be framed by reference to a specific amount unless words such as "or such other amount as the adjudicator may decide" are added.

- If the dispute concerns an allegation that sums are payable, this should be stated, and it made clear that the adjudicator is being asked to order payment. If this is not done, there may be nothing to enforce; consider FW Cook v. Shimizu, (2000) CILL 1613,[115]

- A mis-description of one of the parties need not be fatal, provided that the parties have not been misled, Total M&E Services Ltd v. ABB Building Technologies Ltd (2002) CILL 1857;[116] see also Gibson v. Imperial Homes [2003] EWHC 676 (QBD).[117]

Unless the contract provides otherwise, a notice of adjudication can be given by service in accordance with s. 115 of the Construction Act. This provides expressly for postal service, but also allows service "by any effective means". Fax is the usual method of service, to avoid disputes about whether and when the notice was received. If there are any contractual requirements for giving notice, these should be complied with as failure to do so may invalidate the notice and the adjudicator's jurisdiction, Primus Build v. Pompey Centre [2009] EWHC 1487 (TCC). "Shall be delivered personally": Meant actual delivery by an appropriate individual within Primus to a similarly appropriate individual within Pompey.

Some rules, such as the Scheme, make clear that the notice must be given before the nomination process commences, others do appear to not require this. Compare

[113] **Ken Griffin (R&D Contractors):** A solicitor drafted a notice of adjudication referring to various letters and invoices but failed to describe the disputes to be referred. Only one had been suitably defined by the correspondence referred to, so only that part of adjudicator's decision was enforceable.

[114] **Fastrack:** This is preferable since it means that the adjudicator's jurisdiction relates to the general issue, rather than specific allegations of quantum, which might limit the dispute to those figures.

[115] **Cook**: The dispute referred concerned valuation; therefore the adjudicator was right not to order payment. The effect of the decision was to decide how the disputed items were to be treated under the terms of the sub-contract.

[116] **Total**: In this case both parties had, at all times, been well aware of the true identity of the contracting parties and no one was misled.

[117] **Gibson**: Adjudicator had jurisdiction despite alleged differences between the parties to the contract and parties to the adjudication.

IDEContracting v. Carter [2004] EWHC 34 (TCC)[118] with Palmac Contracting V Park Lane [2005] BLR 301 (TCC).[119]

5. Withdrawing a claim from adjudication

A party who has sought and obtained the nomination of an adjudicator from a nominating body can allow the matter to lapse by not serving the Referral without affecting its right to commence a further adjudication in respect of the same matter; Lanes Group Plc v Galliford Try Infrastructure Ltd [2011] EWCACiv 1617.

In the absence of express words in the Adjudication Rules to the contrary, a party can withdraw claims made in adjudication; Midland Expressway v. Carillion [2006] BLR 325 (TCC), 342; see also John Roberts v. Parkcare Homes [2006] BLR 106 (CA), at 109.

SECTION D: NOMINATING AND APPOINTING THE ADJUDICATOR

The parties may agree a named individual as adjudicator, or may name a body that is to make a nomination. Such agreements will prevail even if the Scheme for Construction Contracts applies (see Part I, paragraph 2). If the contract does not provide for how the adjudicator is to be nominated then the Scheme for Construction Contracts will apply, and the referring party may approach any Adjudicator Nominating Body for a nomination (Part I, paragraph 2).

- It is important that the correct procedures are adopted when seeking an adjudicator nomination. If not, the appointed adjudicator may not have jurisdiction; IDE Contracting v. RG Carter [2004] BLR 172.[120] ConsiderAmec v. Whitefriars [2005]BLR 1 (CA)(named adjudicator and nominator died, thus contract adjudication rules broke down, and Scheme applied).[121] Under the Scheme, paragraph 2(1)(b), the notice must be given before the nominating body is requested to nominate an adjudicator. If done the other way around, the

[118] **ID Contracting**: Scheme adjudication: Held: on its wording, the Scheme required the notice of adjudication to be served before an approach could be made to the named adjudicator or to a nominating body. If approach made before notice, the adjudicator had not jurisdiction. It was irrelevant that no prejudice was caused.

[119] **Palmac**: JCT Rules did not preclude the nominating body being approached and the adjudicator nominated before the notice was served, and nothing in s. 108 of the Construction Act precluded rules allowing this.

[120] **IDE**: Under the Scheme, paragraph 2, an adjudicator specified in the contact must be requested to act following the giving of a notice of adjudication, and then has two days to advise whether he is willing to act. Only if not, can an approach be made to the specified nominating body. Here the named adjudicator advised his unwillingness to act following contact from the intended referring party before the notice of adjudication was issued. Once the notice was issued, the referring party sought a nomination from the CIArb, the named nominating body. Person nominated had no jurisdiction. It was irrelevant whether or not Carter suffered prejudice because IDE failed to comply with this procedure.

[121] **Amec**: Named adjudicator in contract, error in first name a misnomer which could be corrected. But since had died and no alternative provided for, as he was also nominator if could not act, the Scheme applied. Firm, of which a deceased a member, could not nominate.

adjudicator will lack jurisdiction; Vision Homes Ltd v. Lancsville Construction Ltd [2009] EWHC 2042 (TCC) (Application to RICS for nomination on minute after Notice served (both by fax), then, a few minutes later, notice amended and re-served).

- It is generally for the referring party to seek, and thus bear the cost of a nomination. Different nominating bodies have different procedures for how this is done, and the relevant body should be asked for guidance before an approach is made.

- Most appointing bodies nominate adjudicators. The appointment comes into effect when the adjudicator receives the Referral and the adjudicator has now powers until then; Hart Investments v. Fidler [2007] BLR 30 (TCC); approved in Lanes Group Plc v Galliford Try Infrastructure Ltd [2011] EWCACiv 1617.

- The rules invariably provide a 7-day period between notice of adjudication and referral. In some rules this is a mandatory period, in others not.Consider the pre 2005 JCT Adjudication Rules:William Verry v. NW London Communal Mikvah [2004] BLR 308 (TTC)[122] (the wording of s. 108(2)(b) does not preclude rules being drafted that enabled the adjudicator to extend the time for service of the Referral beyond the seven days). . Failure to serve accompanying documents within the seven day period stipulated in the 1998 JCT Adjudication Rules does not invalidate a Referral served in time (obiter); Linnett v. Halliwells [2009] EWHC 319 (TCC); [2009] BLR 312. Contrast the Scheme Hart Investments v. Fidler [2007] BLR 30 (TCC): under the Scheme, the obligation to provide the Referral within seven days of the notice of adjudication was mandatory. If provided out of time, the referral is invalid and the adjudicator has no jurisdiction.

- Names can be suggested to nominating bodies but unilateral oral contacts with possible adjudicators are best avoided; Makers UK Ltd v. Camden London Borough Council[2008] EWHC 1836 (TCC);[123] [2008] BLR 470.

Quality of adjudicators

There is concern about the variable quality of those included on the many of the panels maintained by construction industry bodies. Many of those listed have little understanding of the law and, other than those with a legal qualification, only those with FCIArb are likely to have undertaken any significant legal training. Although the position is now improving, it was, in the early years, possible to be included on such

[122] **Verry**: Considering clause 41A of the JCT Rules, which gives this flexibility.

[123] **Makers**: Firstly, it was better for all concerned if parties limited their unilateral contacts with adjudicators both before, during and after an adjudication. Such contacts, even if innocent, could be misconstrued by the losing party. Secondly, if any such contact had to be made, it was better done in writing so that there would be a full record of the communication. Thirdly, nominating institutions might sensibly consider their rules as to nominations and, in particular, they might wish to consider whether notice of the suggestions should be given to the other party.

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panels with only a rudimentary understanding of how to manage a formalised method of dispute resolution, how to evaluate evidence and submissions and now to write a reasoned decision.

If possible, the parties should agree an adjudicator with the appropriate legal and industry knowledge, a good reputation and availability, particularly if the dispute is of any magnitude. A mutual exchange of three names can be used to avoid the risk that any name proposed by one party will, on principle, be opposed by the other.

SECTION E: CONDUCTING AN ADJUDICATION

Once the notice of adjudication is given and an adjudicator nominated, a typical adjudication will proceed along the following lines.

1. Acceptance of nomination by the adjudicator

Before accepting the nomination, the adjudicator should consider whether there are any grounds on which his impartiality could be questioned; such as relationships with a party, the dispute or, if significant, with a party's representative. The obligation to do so continues throughout the adjudication. Consider Specialist Ceiling Services v. ZFI Construction [2004] BLR 403 (TTC) (receipt of without prejudice communication).[124]

Upon nomination, the adjudicator may write to the parties calling for sufficient information, such as the notice of adjudication, if not already provided, and details of the contract, to establish whether there are likely to be disputes as to his jurisdiction.

It is important that the Adjudicator establishes communication with the responding party; Rohde v. Markham-David [2006] BLR 291 (TCC) (If established that referring party took deliberate decision which deprived the responding party of the opportunity to make representations, the court would decline to enforce adjudicator's decision for breach of natural justice).

The adjudicator will also, either at the same time or once provided with the called for information, write to the parties advising his terms and fees and providing an executed copy of the adjudication agreement if required by the adjudication rules. The adjudicator will also for the referral and may set out the time scale for exchange of written submissions. He may seek agreement to his terms, and this may or may not be forthcoming. He will, in most cases, be entitled to reasonable fees and expenses under the applicable rules.

2. Jurisdictional objections

There are four options available to a party who wishes to challenge an adjudicator's jurisdiction. Agree to give the adjudicator jurisdiction to decide this question, refer the

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[124] **Specialist**: Adjudicator must decide whether, on an objective appraisal, the material facts, in this case seeing the without prejudice document, give rise to a legitimate fear that the he might not have been impartial. Here the court found that adjudicator had applied this test in deciding to proceed, and had, in effect brushed that material aside and ignored it in deciding the issues before him.

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jurisdiction dispute to a different adjudicator, seek a declaration from the court on the question or reserve its position and challenge any attempt to enforce the decision, Fastrack v. Morrison [2000] BLR 168. See also Palmers Ltd v. ABB Power[1999] BLR 426 (court rapidly heard and gave a declaration on the jurisdictional question).

In practice, the fourth option is usually adopted with jurisdictional objections be taken soon after the referral is issued, if not before, and then maintained throughout the proceedings. The third option may be preferable if the costs of the adjudication are likely to be high.[125]

- The adjudicator can inquire into his jurisdiction and decide whether or not to continue, but his decision on a jurisdictional objection is not binding on the parties, unless, as in Fairbrother v. Frogmore, 20th April 2001, unreported, the rules provide otherwise. In doing so, it is good practice, but not essential to invite representations from the parties; Amec v. Whitefriars [2005] BLR 1 (CA).[126]

- Unless the jurisdictional objection is indisputable and undermines the whole proceedings, most adjudicators will continue with the proceedings. To accept the objection and terminate the reference deprives the referring party of the possibility of adjudication. In complex/expensive matters, it may be appropriate for the adjudicator to allow the party contesting jurisdiction a brief opportunity to seek a declaration from the court. Consider ABB Zantingh v. Zedal Building Services [2001] BLR 66 (adjudicator adjourned proceedings to allow such an application) ABB Power v. Norwest Holst(2000) 77 ConstLR 20 (adjudicator advised would continue unless and until the court found that his view on jurisdiction was wrong).

- Some adjudicators will seek to hold a meeting or telephone conference to deal separately with the jurisdictional objection but setting this up may seriously curtail the time available to deal with the substantive dispute, unless dealt with before the adjudicator accepts the nomination and calls for the referral, or the referring party agrees an extension to the period for the adjudication.

[125] **ABB Zantingh v. Zedal Building Services** [2001] BLR 66.The court approved the adjudicator's decision to adjourn the proceedings pending the court's decision on his jurisdiction. The costs of the adjudication would be high and the jurisdiction question would, in any case, come before the court. In **ABB Power v. Norwest Holst**(2000) 77 ConstLR 20, the adjudicator decided he would continue unless and until the court found that his view on jurisdiction was incorrect. This course of action also approved by the court, which found, in proceedings for a declaration, that the adjudicator had no jurisdiction and that NW Host should not continue with the adjudication.

[126] **Amec**: The principles of natural justice did not require that parties have the right to make representations in relation to decisions, such as an adjudicator's enquiry into jurisdiction, that did not affect their rights; although adjudicators would be well advised to do so.

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- If jurisdictional objections are taken to part of the referral, these may be dealt with in a separate letter from the adjudicator or will be dealt with in the adjudicator's decision.

- What is not acceptable is for the adjudicator to ignore jurisdictional objections on the grounds that he cannot decide his own jurisdiction. The adjudicator should consider and express a view on his jurisdiction at an early stage eve if only in outline; Enterprise Managed Services v. Tony McFadden Utilities [2009] EWHC 3222 (TCC), para 98..

A party can raise specific jurisdictional objection or raise a general reservation to the jurisdiction of the adjudicator although, because neither the other party nor the adjudicator can address the objection, this raises practical difficulties, it was held in GPS v. Ridgeway Infrastructure [2010] EWHC 283 (TCC), that such a reservation was effective to allow a jurisdictional objection to be taken on enforcement that had not been specifically raised before the adjudicator.

If a party makes jurisdictional objections to an adjudicator, it should make clear whether or not it is willing to be bound by the Adjudicator's decision on that question. If not, it should clearly reserve its position by stating that it is not willing to be bound by the Adjudicator's decision on that question; Harris CalnanConstruction v. Ridgewood (Kensington) Ltd [2007] EWHC 2738 (TCC); [2008] BLR 132.

If a party has jurisdictional objections to a decision, it should take care that it does not waive its objections by participating in the process, for example by inviting the adjudicator to correct his decision under the slip rule or honouring the decision in part; consider Shimizu Europe Ltd v. Automajor Ltd [2002] BLR 113.[127] But note Durtnell v. Kaduna [2003] BLR 225 (TCC).[128]

3. The referral

The referral is the referring party's statement of case. It should be prepared on the assumption that the adjudication will be conducted on documents only and should

[127] **Shimizu**: A party cannot both approbate and reprobate an adjudicator's decision. Automajor contested part of an adjudicator's decision as to "what money was due" on the basis that he had no jurisdiction to deal with a particular issue, to which a significant part of the sum awarded. It unsuccessfully asked the adjudicator to correct his decision and paid the balance. Its jurisdictional contention failed before the court (if there was a mistake it did not go to jurisdiction). But the court said, obiter, that Automajor waived its objection to the decision by inviting the adjudicator to correct and honouring it in part. The position on waiver might been different if the adjudicator's decision on payment had been honoured, but a jurisdictional objection concerned a separate matter dealt with in the decision, such as an extension of time claim.

[128] **Durtnall**: A jurisdictional objection is not waived unless a party with knowledge of the availability of the argument does not raise it. Note also, in this case, the principle of approbation and reprobation was not applicable. The part of the decision honoured related to different disputes to those where the adjudicator's jurisdiction was disputed.

include all the information and documents that the referring part wishes the adjudicator to consider.

- The referral cannot widen the dispute from that encompassed by the notice of adjudication, KNS Industrial Services v. Sindall (2001) 75 Con LR 71.

- The referral should comply with the requirements in the relevant rules. It should include all the documents and information on which reliance is placed.

Preparing a referral

The referral should be as concise and clear as possible with supporting documentation clearly correlated to the issues to which it relates. The adjudicator, never mind the other party, has little time in which to absorb and understand a party's case. The usual form is to prepare a core document, providing a background and overview of the dispute and the Referring Party's contentions, with supporting schedules, documents and, if appropriate, witness statements and reports. It is important that (parts of) documents are clearly cross-referenced to the contentions/claims they support. If this is not done, they or their significance may be overlooked. Careful consideration should be given to whether witness statements are necessary, and, if so, why.

If documents are required to support the case, these should be included. Do not assume that there will be an opportunity to add further documents. Some adjudicators will simply not allow it, others will only do so if concerns about procedural natural justice are addressed.

4. Written statements after the referral

Most adjudication rules, but not the Scheme for Construction Contracts, expressly provide for the other party to submit a response. The period allowed for this is, usually, 7 or 14 days. In general nothing is said about a right of reply. Even if these time scales appear to be mandatory the adjudicator invariably has power to set the procedure and take the initiative to ascertain the facts and law, thus has a general discretion to admit late responses; CJP Builders Ltd v. William Verry Ltd[2008] EWHC 2025 (TCC); [2008] BLR 545.

Preparing a response to referral

The response should, like the referral, be prepared on the assumption that there will be no further opportunity to present material to the adjudicator and should include all the material on which reliance is placed. As with a Referral, it will, ordinarily comprise a core narrative with supporting schedules, documents and statements. As with a Referral, (parts of) supporting documents should be cross-referenced to the contentions they support. The need, or otherwise, for witness statements should be considered. If witness statements are included in the Referral, response statements are likely to be appropriate.

It is sometimes suggested that adjudicators have no power to alter time scales provided for in the rules under which they are appointed. But written statements submitted out of time can be admitted under the adjudicator's general power to investigate the facts and the law.

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Reply to response

Many, but not all, adjudicators will allow the referring party to submit reply to response, but the period for this will be short, often two or three working days, at most.

5. **The adjudicator's powers**

The adjudicator has power to take the initiative in ascertaining the facts and the law. Most rules also provide the adjudicator with a range of other powers to assist in this task, such as the power to request further information, to meet and question the parties and their representatives, to make site visits, inspections and tests, to appoint experts or assessors and to continue with the adjudication and make a decision in the absence of or non co-operation of a party.

- Although many rules are, as is s. 108 of the Construction Act, silent on questions of procedural natural justice (but note paragraph 17 of the Scheme for Construction Contracts) most adjudicators accept that they should observe these requirements, in so far as possible within a 28-day period. Indeed, the adjudicator must decide at the outset if he can dischargehis duty to reach a decisionimpartially and fairly within the time limit prescribed by the Act. If he cannot, he should resign, CIBProperties v. Birse [2004] EWHC 2365 (TCC), at any rate where appropriate extension is not agreed at the outset.

- There are a number of schools of thought about how adjudication should be conducted. The minimalist view is that the adjudicator should simply review the material in the Referral, the Response and reach a decision on the basis of that material. The inevitable consequence of this approach is that the parties will engage in "ping pong" in the hope that they will have the last word before the adjudicator makes his decision and if extension of time are granted this is on an *ad hoc*and piecemeal basis, an approach which has been criticised by the court; Enterprise Managed Services v. Tony McFadden Utilities [2009] EWHC3222 (TCC), para 91ff. If meetings are held, the adjudicator provides little guidance on what is to be discussed.

- The more activist school says that it is for the adjudicator to take control of the proceedings by defining issues, identifying matters on which he wishes clarification, and requesting further documents and information where necessary to understand or test the contentions being advanced, even expressing preliminary views. This approach is, often, to be preferred.

- It is important that any investigation by the adjudicator only concerns the dispute encompassed by the notice of adjudication and, even then, that if significant new material is adduced, the responding party is given an adequate opportunity to deal with it. Consider McAlpine v. Transco Plc[2004] BLR 352 (TTC) (new material adduced broadened the dispute from what had been referred and, because not served with the Referral, but by Reply, meant responding party did not have sufficient time to consider it). On the other hand, the adjudicator is entitled to limit the number of submissions. Thus, in GPS v. RingwayInfrastructure [2010] EWHC 283, the court held that since the referring party's reply only responded to matters risked in the response, as directed by the adjudicator, the adjudicator had been

entitled to refuse to consider material in a rejoinder two days before the end of the adjudication period.

- It is important that care is taken over how preliminary views are expressed: Lanes Group Plc v Galliford Try Infrastructure Ltd [2011] EWCACiv 1617, para. 56:

> "There is nothing objectionable in a judge setting out his or her provisional view at an early stage of proceedings, so that the parties have an opportunity to correct any errors in the judge's thinking or to concentrate on matters which appear to be influencing the judge. Of course, it is unacceptable if the judge reaches a final decision before he is in possession of all relevant evidence and arguments which the parties wish to put before him. There is, however, a clear distinction between (a) reaching a final decision prematurely and (b) reaching a provisional view which is disclosed for the assistance of the parties."

- A principal issue for the adjudicator is whether to meet the parties and their representatives or to deal with the dispute on documents only. If a meeting is held, most adjudicators will conduct this along inquisitorial lines, by questioning the parties and those attending. Time or money seldom permits the luxury of opening presentations and party examination of witnesses. It is important, to avoid confusion and wasted costs, that meetings are conducted to a clear agenda, but not all adjudicators seem to appreciate this.

- Because of concerns about procedural fairness, few adjudicators will make independent inquiries (like an investigating magistrate) to acquire information that they consider to be relevant; for instance by conducting tests and contacting and interviewing persons involved in the project who the adjudicator considers might have relevant evidence. If an adjudicator intends to conduct his own investigations or interviews, he should advise the parties of this, and give them an opportunity comment on what he has done, and take care not to make a party's case for it. If an adjudicator fails to take these precautions, he does not act impartially, Balfour Beatty v. Lambeth LB [2002] BLR 288.[129] Contrast Try Construction v. Eton [2003] BLR 286.[130]

- An adjudicator who reaches a decision based on material that both parties have agreed is not relevant, the decision may be invalid on jurisdictional grounds as well as being challengeable for breach of natural justice; Primus Build v. Pompey Centre [2009] EWHC 1487 (TCC) (adjudicator assessed profit margin

[129] **Balfour Beatty**: An adjudicator took raw data provided by party and produced as built programmes and critical path analysis. Then awarded an extension of time based on that information. The court refused to order enforcement, it being arguable that the Adjudicator had failed to act impartially. He also failed to give parties an opportunity to comment on what he had done.

[130] **Try**: Parties agreed to a programming assistant being engaged and court was satisfied that he had not gone outside the arguments advanced by the parties in performing his task. If had, would have had to invite submissions on what he was doing.

on a basis for which neither party contended and using information which both said was irrelevant). See alsoShimizu Europe v. LBJFabrications [2003] BLR 381 (adjudicator disregarded agreement between parties that relationship was governed by a letter of intent). But contrast the arbitration case JD Weatherspoon v. Jay Mar Estates [2007] BLR 285 (TCC),[131] which suggests that doing so raises issues or procedural fairness, not jurisdiction.

- It is unwise for the adjudicator to have separate discussions about the merits of the dispute with each party. If this is unavoidable, the adjudicator must ensure that the substance of what is discussed is recorded and made available to the other party for comment.

- If an adjudicator is seeking advice from a third party it is good practice to inform the parties in advance, and disclose the substance of the advice to the parties and give them an opportunity to comment on it before he reaches his decision. But failure to do so may not be fatal if the advice does not raise arguments that the parties have not already addressed. ConsiderAmec v. Whitefriars [2005] BLR1(CA).[132]

- Particular care must be taken with material adduced a late stage in an adjudication. If the other party will not have sufficient time to consider it, the material should not be admitted; London and Amsterdam v. Waterman Partnership [2004] BLR 179.[133]

Most rules provide a power to award interest in similar terms to the Scheme. It is not clear whether the exercise of such powers is dependanton their being a contractual or other right to interest. But it is necessary that a dispute about interest is referred to the Adjudicator; Carillion Construction v. Devonport[2005] EWCACiv 1358 (CA).

6. The decision

Subject to allowable extensions, the adjudicator must reach his decision within 28 days of the referral and most rules require the decision to be issued to the parties forthwith.

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131 **Weatherspoon**: In this case the rent review arbitrator had, using the comparables contended for by the experts, valued fittings at a figure between those contended for by each expert. The court held that this was within the arena being considered, and based on the parties' submissions, it was not something new, thus the s. 68 application failed.

132 **Amec**: CA reversed the first instance judge on this. It was sufficient that Whitefriars was given the opportunity to make representations on the issue in question, and did not suggest that there was any line of argument in the legal advice that they had not foreseen. CA also held that the principles of natural justice did not require that parties have the right to make representations in relation to decisions, such as an adjudicator's enquiry into jurisdiction, that did not affect their rights; although adjudicators would be well advised to do so.

133 **London**: Adjudicator should not have allowed a late supplementary statement on quantum. To do so was a substantial and relevant breach of natural justice. Thus there was substantial, live and triable issue as to the adjudicator's jurisdiction to make the decision the claimant seeks to enforce based on the adjudicator's failure to act impartially.

Some rules are silent on the question of whether the adjudicator should give reasons for the decision, others require reasons to be given or enable either party to request reasons.

- The operative part of the adjudicator's decision should decide the dispute referred to in the adjudication, no more, no less. Interest may be ordered if the rules or the contract provides for this.Hyder Consulting (UK) Ltd v Carillion Construction Ltd [2011] EWHC 1810 (TCC), para. 38 "an adjudicator's decision consists of (a) the actual award (ie that A is to pay £X to B) and (b) any other finding in relation to the rights of the parties that forms an essential component of or basis for that award (for example, in a decision awarding prolongation costs arising out of particular events, the amount of the extension of time to which the referring party was entitled in respect of those events)".

- The adjudicator may have express or implied power to correct errors arising from accidental errors or omissions or to clarify or remove any ambiguity in the decision, provided this is done within a reasonable time; Bloor v. Bowmer& Kirkland [2000]BLR 314. Only patent errors can be corrected under this implied terms, and it cannot be used to enable an adjudicator to have second thoughts and intentions. The time for correcting the decision is what is reasonable in all the circumstances, rarely more than a few days. If the adjudicator goes beyond this in correcting a decision, the revised decision is a nullity; YMCS v. Grabiner [2009] EWHC 127 (TCC); [2009] BLR 211.

- In general, a reasoned decision is easier to live with than an unreasoned decision. Nevertheless, the giving of reasons or, more usually, a written explanation for the decision reached, is a skilled activity, particularly in the tight time scales required. Hence, many adjudication rules do not require reasons to be given. If reasons are required, it is good practice to summarise the parties' submissions on each issue to avoid the suggestion that points have not been taken into account. If the reasons are totally incomprehensible, this may give grounds for disputing enforcement; Gillies Ramsey v. PJW Enterprises [2004] BLR 131 (Scotland).

- "An adjudicator is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what it is that the adjudicator has decided and why"; Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd [2009] EWHC 408 (TCC).

- Some adjudicators give claused (confidential) reasons, which are issued to the parties a few days after they are notified of the decision.

- The requirement to issue a decision forthwith means it must be issued as soon as reasonably practicable. Liens are not allowed; Epping Electrical v Briggs & Forrester [2007] EWHC 4.[134]

[134] The RICS has indicated that those who hold liens will be removed from its panel.

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- It may be that if an adjudicator refuses to make a decision on a matter referred to him, he acts without jurisdiction: see Ballast Plc v. The Burrell Co, 17th December 2002 (Scotland).[135]

- The Decision should be signed and dated by the Adjudicator, but unless expressly required by the rules, failing to sign may not be fatal to its enforcement; Treasure & Son Ltd v. Dawes [2007] EWHC 2420 (TCC); [2008] BLR 24.

Late decisions

There has been uncertainty about the status of a decision reached outside the allowable period. Some rules, for example the Scheme, provide for what is to happen in such a case. Usually such problems can be avoided by the adjudicator asking for and obtaining a limited extension of time from the referring party.

Until recently, it was not clear if a decision reached and/or issued out of time is automatically invalidated.

- One view is that it is a slip that can be corrected (if done quickly). The other view is that, if reached out of time, it is a repudiatory breach that must be accepted before the decision is issued. For the former approach see St Andrews Bay v. HBG Management [2003] Scot CS 103[136] (Scotland) (short delay does not render it a nullity); Barnes & Elliott Ltd v. Taylor Woodrow Holdings [2004] BLR 111 (decision must be reached in time but short delay in issuing due to mistake does not invalidate).[137] For the latter approach see Simons v Aardvark [2004] BLR 117.[138]

- The settled position is now that a late decision is automatically invalidated Ritchie Bros (PWC) Limited v David Philp (Commercials) Limited, (IHCS, Scotland)[139] [2005] BLR384. Followed in Epping Electrical v. Briggs [2007]

135 **Ballast**: Adjudicator erroneously considered that he was only concerned with value, not the contractual basis of claims made. "As a result of that error the adjudicator misconstrued his powers and in consequence failed to exercise his jurisdiction to determine the dispute. His decision is therefore a nullity."

136 **St Andrews**: A failure to produce a decision within the time limits is a serious matter but not of sufficient significance to render the decision a nullity. Production of decision two days out of time does not nullify.

137 **Barnes**: HHJ Humphrey Lloyd, Considering JCT 98 Rules, in particular clause 39A.5.3, said that the adjudicator must reach a decision and forthwith send it in writing to the parties within the 28 days.

138 **Simons**: HHJ Seymour, Considering the JCTWCD Rules, but also clause 5 of the JCT Adjudication Agreement. Failure to produce a decision within the relevant time scale. Decision was binding provided the adjudication agreement, if any, had not been terminated because of that failure before the decision was made (the judge appears to consider that issuing a fresh notice of adjudication would do this).

139 **Ritchie**: Considering the Scheme and reversing the first instance decision which is reported at [2004] BLR 379. There was a strong dissenting judgment. Majority also considered that rules which did

BLR 127 (TCC). Rules which allow a decision to be reached or issued out of time are invalid; Epping Electrical v. Briggs [2007] BLR 127 (TCC) (CIC rules invalid because they allowed for adjudicator to hold lien, thus issue decision late); Aveat Heating Ltd v. JerramFalkus Construction Ltd[2007] EWHC 131 (TCC) (Adjudication Rules in GC/Works contract invalid because they allowed for adjudicator to reach decision out of time).

- Since the decision has to be reached in time and forthwith provided to the parties, a short delay in providing a decision reached in time will not invalidate it. Note Lee v. Chartered Properties [2010] EWHC 1540 (TCC). Decision reached in time on Friday 13th November 2009, delivered late on 16th November 2009, not delivered as soon as possible after decision reached, thus unenforceable.

- There is no implied term that time should not run in an adjudication between the date of issue of proceedings challenging an adjudication and the date of resolution of those proceedings. If the Adjudicator awaits, without an agreed extension, the outcome of those proceedings before issuing a decision it will be out of time and invalid; Vision Homes Ltd v. Lancsville Construction Ltd [2009] EWHC 2042 (TCC).

7. Extending the period of the Adjudication

Extensions should be to the period for the Adjudication, not to the date for, say, issuing the Decision. Such words, and words such as "to the end of the working day/business hours" just create confusion. See, for example, Epping Electrical v. Briggs [2007] BLR 127 (TCC). A party may be estopped or waive its right to contend that an extension was not granted, AC Yule v. Speedwell Roofing & Cladding [2007] BLR 499 (TCC) (acquiescing in the adjudicator's request for an extension to the 5th April by not identifying that it did not agree and/or by representing, by exchanging further material late on the last un-extended day, the 3rd April, that the adjudicator had the extended period to reach his decision).

8. Fees and costs

The Act is silent on this question, most rules provide that the parties' liability for the adjudicator's reasonable fees is joint and several and, either expressly or by implication, that the parties are to bear their own costs and that only the adjudicator's fees and expenses can be allocated between the parties. Some rules used by major contractors provide that the referring party must pay all the costs, whatever the outcome.

- Although most rules require the adjudicator to be a natural person, he need not sue for he fees in that capacity, Faithful & Gould v. Arcal, 25th May 2001, unreported.[140]

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not provide for this were not compliant with s. 108 of the Construction Act.

140 **Faithful**: Claim by adjudicator for fees, indemnity costs awarded against defendants. Fees agreed by agent with authority or estopped from denying authority.

- If an adjudicator is found not to have jurisdiction, the referring party will be liable for his fees, Ken Griffin v. Midas Homes [2000] 78 Con LR 152.[141] But if the party objecting to jurisdiction participates, even subject to that objecting, in the adjudication, then, particularly after asking the adjudicator to rule, albeit not binding, on his jurisdiction, it is requesting the adjudicator to act and a contract with him comes into existence by conduct. But if the objecting party did not participate there would be no basis for such a contract; Linnett v. Halliwells [20009] EWHC 319 (TCC); [2009 BLR 312. The judge considered, *obiter*, that the implied terms of this contract were joint and several liability for the adjudicator's fees and that he would act in accordance with the parties' Adjudication Agreement.

- Since an adjudicator's assessment of his fees fall within the words of his immunity "anything done or omitted in the discharge of his functions as adjudicator", it has been held that they can only be challenged on the grounds of bad faith. Nevertheless, it may be that the reasonableness of hours expended can be challenged; Stubbs Rich Architects v. WHTolley& Son Ltd, 18th August 2001, unreported.[142]

- The costs of an adjudication are not recoverable as damages on enforcement proceedings, Total M&E Services v. ABB Building Technologies Ltd (2002) CILL 1857[143]

- If the parties have agreed to the adjudicator having power to allocate their costs, then consideration should be given to how the allocated costs are to be assessed (who by, and when?). Consider DekoScotland v. Edinburgh Royal (2003) CILL 1999 (Scotland).[144]

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141 **Ken Griffin:** Since matters were improperly referred, the referring party was liable for all the adjudicator's fees and expenses other than those in respect of the part of his decision that was within jurisdiction.

142 **Stubbs**: The adjudicator stated the amount of his fees in his decision. The court considered that, like an arbitrator settling his fees by award, the adjudicator's decision on his fees would be difficult to overturn other than on grounds of misconduct (This is a misunderstanding of the difference between an award and an adjudicator's decision). It is difficult to see why an adjudicator's determination of his fee account is part of his functions as adjudicator, but see paragraph 25 of the Scheme. It is also difficult to see why his decision on his fees should be final, not just binding on an interim basis?
The judge also considered that the reasonableness of the adjudicator's hours was not to be assessed against the criterion of the reasonably competent solicitor, since the adjudicator was acting as judge and investigator not preparing a one sided brief. If the reasonableness of the hours was to be challenged, expert evidence as to what was reasonable would be required from another adjudicator.

143 **Total**: A Scheme adjudication. There was no provision in the Construction Act or elsewhere for the recovery of the costs of an adjudication, and these could not be recovered as damages.

144 **Deko**: Clause 21A of the applicable rules said that the adjudicator could require a party to pay the legal costs of another party arising in the adjudication. The court considered that the power to award

9. Adjudicator's immunity

Most rules mirror the wording of s. 108(4) in according the adjudicator immunity from proceedings by the parties.

- It is unclear how such a limitation of liability assists the adjudicator since he is not a party to the construction contract. It may be that the adjudicator can take the benefit of such a provision under the Contract (Rights of Third Parties) Act 1998.

- Unlike a statutory immunity, such as that accorded to arbitrators, the contractual immunity would not protect the adjudicator from claims, for instance in tort, by third persons. Adjudicators generally carry insurance.

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expenses in adjudication should be construed as meaning expenses analogous to "judicial expenses" unless there are clear words to the contrary, ie reasonable expense. Legal costs, here, mean costs properly incurred in the adjudication according to established legal standards. Taxation is, thus, available for determining these (applying Scottish arbitral law). Only when taxed or agreed can an account for these be issued pursuant to the adjudicator's decision. Not usually desirable to have the account taxed before the adjudicator's decision is issued (Why not, the adjudicator could do it with his decision).

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COURSE FOR BPP PROFESSIONAL EDUCATION

PAYMENT AND ADJUDICATION UNDER "THE CONSTRUCTION ACT"

SESSION 6: ENFORCING AND CHALLENGING AN ADJUDICATOR'S DECISION

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SECTION A: INTRODUCTION

Once the adjudicator has reached and issued his decision, it is for the parties to consider whether and, if so, how it is to be enforced or challenged. In practice, most decisions are either honoured or form the basis of further negotiations between the parties.

Few disputes that are adjudicated are subsequently the subject of arbitral proceedings or litigation.

SECTION B: COURT SUPERVISION OVER ADJUDICATION

The court has power to make declarations in respect of natural justice, where appropriate, while an adjudication is underway but will only do so rarely and in clear cut cases. But refusal to grant a declaration during the adjudication did not mean that enforcement of the decision could not be resisted, as the court would then be in a better position to state whether real prejudice had been caused; Dorchester Hotel v. Vivid Interiors [2009] EWHC 70 (TCC); [2009] BLR135.[145]

It has been held that the court has no inherent power to prevent a party from prosecuting an adjudication, eg because any decision in his favour might not, because of insolvency, be enforceable or because there were concurrent court proceedings on the same dispute Mayor & Burgesses Of Camden LBC v Makers UK Ltd [2009] EWHC 605 (TCC).[146] But contrast Mentmore Towers v. Packman Lucas [2010] EWHC 457 (TCC), where the court, Makers not being cited, held it had jurisdiction unders. 37 of the SCA1981 injuncta party from perusing adjudications in circumstanceswhere it had failed to honour decision in earlier adjudications

[145] **Dorchester**: The circumstances that the court considered in not granting the declaration were: The adjudicator believe he could conduct the adjudication fairly within the time table (the most important factor); although the time table was tight it could not be said, at this stage that it was incapable of giving rise to a fair result; the defendant's use of new material, witness statements and expert reports, could not be said at this stage to definitely lead to a breach of natural justice.

[146] **Camden**. In that case the court had such power under its power to impose conditions when setting aside judgment in default, but did not exercise it, as adjudication was a statutory right and the court should not interfere in the parties commercial relationship.

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and subsequent judgments of the court.[147]Not also the related case Anglo Swiss Holdings v. Packman Lucas [2009] EWHC 3212 (TCC) where the court stayed proceedings before itself on the grounds that there was unreasonable and oppressive behaviour by the claimant in ignoring the contractual and statutory requirements top honour adjudicator's decisions and putting forward claims that they either knew were significantly exaggerated or had no knowledge of whether and if so to what extent the were good claims.

SECTION C: ENFORCING OR CHALLENGING AN ADJUDICATOR'S DECISION

Most rules mirror the requirements of s. 108(3) in providing that the adjudicator's decision in binding on the parties but not final. Some expressly require the parties and any contract administrator to give effect to the decision. Others may render the adjudicator's decision final as well as binding if the underlying dispute is not arbitrated/litigated in a stated period (see JCT sub-contracts).Few rules, apart from the Scheme for Construction Contracts, paragraph 24, which provides that the decision, if expressed in peremptory terms, may be enforced under a provision similar to s. 42 of the Arbitration Act 1996, say anything about enforcement.

1. Methods for enforcing an adjudicator's decision

The availability of procedures for enforcing an adjudicator's decision will depend on the rules pursuant to which that decision is made, and the form of the decision itself.

Enforcement through the contract machinery

If the decision is in the form of a declaration of entitlement, such as might be the case in a valuation or time dispute, the decision should be given effect to by the party or contract administrator operating the contract machinery affected by that decision.

Where the consequence of operating the machinery in the light of the adjudicator's decision is an entitlement to payment, it may be that the adjudicator's decision can be relied on in subsequent proceedings (such as a further adjudication) to enforce that entitlement.

Enforcement by court proceedings

If the decision provides for the payment of money then enforcement by action in court, generally leading to an application for summary judgement should be possible, provided that the dispute about enforcement is not subject to arbitration.[148] If the decision is in respect of a debt, Section 111 of the Construction Act will severely limit the availability of defences, whether of abatement, set-off or counterclaim, to resist the application,[149]VHE Construction v. RBSTB Trust, [2000] BLR 187.[150] Such matters

[147] It is unclear how this decision relates to the principle, see BrremerVulcan [1981] AC 909, that injunction will only be issued to project a legal or equitable right. See commentary on Mentmore at [2010] BLR 393.

[148] In Macob v. Morrison [1999] BLR 93, it was said that enforcement of adjudicator's decisions did not fall within an arbitration clause but, unless expressly excluded, this is difficult to accept. Consider Collins v. Baltic Quay [2005] BLR 53 (CA).

[149] **Section 111(1):** A party cannot withhold payment after the final date for payment of a sum due if an effective notice of withholding has not been given. **Section 111(4):** Where an effective notice of withholding is given, and the matter is referred to adjudication in which it is

may, however, be effective to resist enforcement of other adjudication decisions, such as a decision concerning a claim in damages, or where the contract that the decision concerns is not governed by the Construction Act.

- Ringway Infrastructure Services Ltd v. Vauxhall Motors Ltd [2007] EWHC 2507 (TCC); (2007) 115 Con LR 149; the cause of action to enforce an adjudicator's award is contractual, and arises when the defendant failed to honour the adjudicator's decision. This is also the date from which the court can award interest under the Supreme Court Act 1981 s.35A.

Enforcement by injunction

The alternative method of enforcement, available under the Scheme for Construction Contracts, seeking an order from the court that the adjudicator's peremptory order be complied with, is not appropriate for a money claim; see Macob v. Morrison Construction [1999] BLR 93.[151]

Enforcement by statutory demand

If the decision concerns payment, enforcement by statutory demand may be possible, but the existence of a cross claim can be considered under the insolvency rules even if it does not, because of s. 111 of the Act, amount to a defence to summary judgement, George Parke v. The Fenton Gretton Partnership, 2 August 2000, unreported.[152] But the court must be satisfied as to the seriousness of the cross claim and of the intent to pursue it, Re A Company, 12th May 2001, unreported.[153] The demand will also be set

decided that the whole or part of the amount should be paid, that decision is construed as requiring payment not later than 7 days from the date of that decision, or the date which, apart from the notice would have been the final date, if later (s. 111(4)).

150 **VHE**: The decision has to be complied with without recourse to defences or cross claims not referred to in the adjudication. Thus, an attempt to set off liquidated damages against the adjudicator's decision in enforcement proceedings failed. Section 111 is a comprehensive code governing the right of set off against payments contractually due. But note, two adjudicator's decisions were set off against each other, in this case.

151 **Macob:** The court will not give an injunction to enforce payment of a debt.

152 **George Park:** The existence of cross claim was a matter to be considered under rule 6.4 of the 1986 Insolvency rules even if not an acceptable defence to summary judgement. Not right that an employer can be made bankrupt were it is known that there are proceedings on foot that might result in a payment to him. Statutory demand set aside. Note: Under Insolvency Rules 6.5(4) a statutory demand can be set aside where the debtor appears to have a set-off or counterclaim that exceeds the debt, the debt is disputed on grounds that appear to be substantial, the court is satisfied on other grounds that the demand ought to be set aside.

153 **Re A Company**: The main contractor's surveyor had certified the sums as due and the main contractor had failed to take any steps to peruse its cross-claim whether by adjudication or otherwise.

aside if the adjudicator lacked jurisdiction to create the debt, Oakley v. Airclear Environmental Ltd (2002) CILL 1824.[154]

Enforcement by arbitration
It is unclear whether adjudication enforcement proceedings are liable, in the face of a suitably worded arbitration agreement, to be stayed to arbitration (in most standard form contract such proceedings are excluded from the arbitration agreement. In Collins v. Baltic Quay Management[2005] BLR 63 (CA), at paragraphs 25 and 39ff, it was suggested that this was so. However, in MBE Electrical Contractors v.Honywell Control Systems [2010] EWHC 224 (TCC), the court refused a stay to arbitration on the grounds that, even in the absence of an express exclusion, adjudication enforcement proceedings fell outside the scope of the arbitration agreement (this is probably wrong).

The issues on enforcement proceedings
On enforcement proceedings what needs be established (and thus pleaded) is a construction contract, a dispute under it, the appointment of an adjudicator with jurisdiction over that dispute, the giving of by the tribunal of the requisite decision. The court's judgement in such proceedings does not create an issue estoppel beyond this; Elanay Contracts v. The Vestry [2001] BLR 33. See also the commentary to David McLean v. Swansea Housing Association Ltd [2002] BLR 125.[155]

If summary judgement is sought the test for objections to enforcement is: can it be said that the defendant's contentions have no real prospect of success; PegramShopfitters v. Tally Wiejl (UK) Ltd [2004]BLR 65 (CA).[156] If there is a risk that a decision, clearly right on the merits, may not be enforced on technical grounds, it may be appropriate to accompany an application for summary judgement under CPR, Rule 24 with an application for an interim payment under CPR Rule 25.[157]

Execution
Execution of the court's judgment for enforcement of an adjudicator's decision by way of charging order followed by sale of the charged property should be possible. The existence of pending arbitration proceedings is no a ground to resist this; Harlow & Milner Ltd v. Teasdale [2006] BLR 359.

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154 **Oakley**: The court concluded that there was no contract between the parties, thus no basis for the adjudication and no debt created by the adjudicator's decision.

155 **David McLean**: SeeCommentary: Does the adjudicator's decision create a cause of action? Does it crystallise quantum in respect of a cause of action under the contract? If the adjudicator's decision of no legal effect until given effect to by a certificate issued under the contract? If the adjudicator's decision chrysalises a previous entitlement, there is no basis on which liquidated damages can be set of against it.

156 **Pegram**: The CA held that it was an over simplification to hold that there was a construction contract of some kind. It was possible that there was no contract at all (and judge wrong to preclude the defendant from arguing this) and it could not be said that such a contention had no real prospect of success.

157 **Glencott**: Summary judgement refused, but judge considered that Glencott was likely to achieve a similar sum on judgement, so gave opportunity to apply for an interim payment in excess of £100,000.

2. Challenging an adjudicator's decision

In most cases it is unnecessary to challenge an adjudicator's decision unless and until the successful party seeks to enforce that decision by court proceedings. Since enforcement will seldom proceed beyond an attempt to obtain summary judgement, under CPR Rule 24.2, a successful challenge will be one in which the court is not satisfied that there is no real prospect of successfully defending the claim for enforcement. If the party resisting enforcement knew or ought to have known that it had no defence, indemnity costs may be awarded against it as was done in Harris Calnan Construction v. Ridgewood (Kensington) Ltd [2007] EWHC 2738 (TCC); [2008] BLR 132. If permission to defend is given, this can be made conditional on the defendant paying a sum into court; Estor Ltd v. Multifit (UK) Ltd [2009] EWHC 2108 (TCC).[158]

Errors of law and fact

The general view is that a decision challenged for factual or legal error or as to procedural error remains a decision that is enforceable and should be enforced, even if the error is disclosed by the reasons. Errors (even admitted mistakes) of fact or law (giving the wrong answer to the right question) do not, generally provide grounds for resisting an adjudicator's decision; Bouygues v. Dahl-Jensen [2000] BLR 522 (CA).

- Since the process is intended to be speedy, mistakes will inevitably occur and the court should guard against characterising a mistaken answer to a question within the adjudicator's jurisdiction as being a an excess of jurisdiction, Sherwood v. McKenzie (2000) CILL 1577.

- The administrative law principle, that an error of law or fact may amount to an excess of jurisdiction has found some favour in Scotland; see for example SL Timber Systems v Carillion [2001] BLR 516, Lord MacFadyen: "Error of fact or law on the part of the adjudicator will not afford ground for refusal of enforcement, unless the error was of such a nature that the adjudicator's decision was, as a result, one which he had no jurisdiction to make".

- This reasoning was rejected by the Court of Appeal in C&B Scene Concept v. Isobars [2002] BLR 93 (CA).[159] The court applied the test developed in respect of expert determination, Nikko Hotels v. MEPC [1991] 2 EGLR 103. "If he answered the right question in the wrong way, his decision will be binding. If he had answered the wrong question, his decision will be a nullity". The court concluded that the adjudicator had been asked to decide the amount of a particular interim application. Even if, along the way to deciding that question,

[158] **Estor:** In that case half the sum claimed to reflect the Court's concern at the merits of the defence.

[159] **C&B Scene**: Recorder Moxton held that an error of law by an adjudicator amounted to an excess of jurisdiction since applied clause 30.3.5 of WCD 1998 when in law, if no election made between payment alternatives A and B of Appendix 2 of this form, entirety of clause 30 fell away and the Scheme applied. Thus the Adjudicator had answered the wrong question. The Court of Appeal held that if there was such an error, it did not go to the adjudicator's jurisdiction. In consequence Concept was entitled to summary judgement.

the adjudicator had made some errors of law, he had not exceeded his jurisdiction. Attempts to argue, from administrative law decisions such as Ansminic v. Foreign Compensation Commission [1969] 2 AC 147 (HL), that an mistake as to the law applicable to the facts found by the adjudicator, goes to jurisdiction, are doomed to failure; see for example London & Amsterdam v. Waterman Partnership [2004] BLR 179.

- But note, Joinery Plus Ltd v. Laing Ltd [2003] BLR 184. The adjudicator referred throughout his decision to the wrong contract terms, JCT Works, not DOM/2. This was held to be an error that went to his jurisdiction, thus the decision was a nullity.

- Note also Costain Ltd v. Strathclyde Builders Ltd (2003) 100 Con LR 41 where a Scottish court (CS(OH)) held that in Scots law an adjudicator is a species of arbiter and is basically subject to the same rules of judicial control as an arbiter and the following comments in a paper *"Adjudication Enforcement"* given by HHJ Thornton at the recent Conference to launch the 2nd Edition of the TTC Guide:

> "2. Two general matters [concerned with enforcement of Adjudicator's decisions]should always be borne in mind:
>
> (1) A judge asked to enforce an adjudicator's decision starts with no predisposition either to enforce or not to enforce. The court must scrutinise any decision and satisfy itself that the decision is both regular in appearance and enforceable at law since a judgment involves the grant of the compulsory powers of enforcement provided by the state to successful litigants and these cannot be provided without due process of law. The HGCRA provides for mandatory adjudication so that the party against whom enforcement is sought is usually being subjected to the decision of a tribunal that it, he or she has not consented to being involved with; and
>
> (2) Current doctrine relating to adjudication enforcement is based on the premise that an adjudicator's decision is not final and is always subject to subsequent arbitration or litigation but that an error of law or fact within jurisdiction provides no grounds for declining to enforce. Practitioners, in scrutinising adjudicators' decisions and in their involvement in enforcement proceedings, should be aware that the current trend within the adjudication community is towards theadjudicator's decision being accepted as final since the cost oflitigation has become prohibitive for many and an adjudicator's decision will inevitably shift the balance of power in favour of the winner and thus make subsequent litigation that much harder for the loser to undertake. This trend may require a gradual albeit imperceptible need for the temporary finality doctrine to be refined.
>
> 3. These considerations will continue to affect court enforcement proceedings which are inevitably largely confined to two issues: jurisdiction and fairness. There will be a trend in future cases to explore the very difficult territory where jurisdiction and error of law merge - the

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area of law known to Public Law practitioners as Anisminic territory. This may arise in a "10-minute" application at short notice when only small sums are at stake with inexperienced practitioners involved on the other side."

Grounds for challenge

The principal grounds for challenge are as follows.

- Lack of jurisdiction. An arguable contention that the adjudicator did not have jurisdiction will ordinarily be effective to resist enforcement. Lack of jurisdiction can occur if the adjudicator's appointment is defective, if the decision is not in respect of the dispute identified in the notice of adjudication (answering the wrong question), if, in the case of an adjudication under the Scheme for Construction Contracts, that the dispute does not arise under a Construction Contract, or if the dispute has already been decided in adjudication.

  If the jurisdictional challenge concerns the issue of whether there is a Construction Contract, this must be decided by the court on balance of probabilities, with evidence, Northern Developments v. J&J Nichol [2000] BLR 158, 162.[160]

  If the parties have given the adjudicator power to determine his own jurisdiction, his conclusion on jurisdiction cannot be challenged on an application to summarily enforce his decision, Farebrother Building Services Ltd v. Frogmore Investments Ltd, 20th April 2001, unreported.[161]

- Want of impartiality. This encompasses both actual and apparent bias, the modern test being whether all the circumstances that have a bearing on the suggestion that the tribunal was biased (as found by the court) would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased, Magill v. Porter [2002] 2WLR 37 (HL). The manner in which the proceedings are conducted may lead to such a conclusion; A&S Enterprises v. Kema Holdings [2005] BLR 76 (TCC).[162]

  Want of impartiality may be the ground on which breaches of procedural natural justice can undermine an adjudicator's decision; Glencott Development v. Ben Barrett (2001) 80 Con LR 14;[163]London and Amsterdam v. Waterman

[160] **Northern Developments**: Obiter, approved by CA in C&B Scene Concept v. Isobars [2002] BLR 93 (CA).

[161] **Farebrother**: Considering the TecSA rules.

[162] **A&S**: Adjudicator made unjustified criticisms, in his Decision, of a person who did not appear at a hearing.

[163] **Glencott:** The adjudicator attempted mediation by caucusing in confidential sessions with each party. The impartiality test was the same as for judges and arbitrators. Not necessary to show actual bias. The test applied was whether objectively considered, the circumstances would lead a fair minded and informed observer to conclude that there was a real possibly or a real danger (the same thing) that the tribunal was biased. Adjudicator must conduct the proceedings in accordance with the rules of natural justice as fairly as the limitations imposed by parliament permit. See also **Woods v.**

Partnership [2004] BLR 179.[164] The appointment of an adjudicator who has previously adjudicated a dispute on the same project, Pring v. Harper [2003] EWHC 1775 (between one party and a third party) may give rise to a real possibility of bias.[165] But note Amec v. Whitefriars [2005]BLR 1 (CA) where CA did not consider that a previous appointment in dispute between the same parties was relevant to the question of bias. It seems from this case that the CA is seeking to curtail the scope of such challenges.

- Independence. Although there is no statutory requirement for the adjudicator to be independent, independence is a requirement of Article 6(1) of the ECHR. It may be that a court, as a public body, will not enforce a decision reached by an adjudicator who is not independent.[166]

- Substantial breach of procedural fairness (natural justice). Is this a separate ground of challenge? Consider Discain v. Opecprime Developments No 1 [2000] BLR 402, and No 2 (2001) 80 Con LR 95.[167]Balfour Beatty v. Lambeth

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Chiltern Air Conditioning [2001] BLR 23, the adjudicator acted in a way that appeared not to be impartial, such conduct suggested he was no longer neutral. The adjudicator had to use a procedure which gave each party a fair opportunity to make its case and to make representations on views on the merits taken by the adjudicator early in the procedure. The adjudicator had not done this. He approached one side without informing the other and also obtained information from third parties leaving one party in ignorance. There were also breaches of paragraph 17 of the Scheme and the court would not enforce the decision. The adjudicator also made a witness statement in the enforcement proceedings which showed a want of impartiality.

164 **London**: Adjudicator should not have allowed a late supplementary statement on quantum. To do so was a substantial and relevant breach of natural justice, thus there was substantial, live and triable issue as to the adjudicator's jurisdiction to make the decision the claimant seeks to enforce based on the adjudicator's failure to act impartially.

165 **Pring**: There is a real risk that an adjudicator may carry forward from an earlier adjudication not merely what he has seen and been told, but also the judgements he formed and the opinions he reached in that adjudication. **Amec**: Adjudicator's first decision was held to be a nullity At first instance, the judge said that it would have been better had the RIBA not appointed him again in the same dispute, once his re-appointment objected to. The CA disagreed. The mere fact he had been previously been appointed and held not to have jurisdiction was irrelevant to the question of bias.

166 The concept of independence was considered in Magill v. Porter (2002) 2 WLR 37 (HL). In deciding whether a tribunal is independent regard must be had to, inter alia, the manner of its appointment, the term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence. Independence and impartiality are closely linked but a tribunal must satisfy both these requirements subjectively and objectively.

167 **Discain No 2:** The adjudicator failed to consult with one party on an important submission made by the other party that might have affected the outcome. Test for bias, as for arbitrators and the court, was, having regard to all the circumstances that bear on the question, whether these circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real

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BC (2002) CILL 1873;[168] London and Amsterdam v. Waterman Partnership [2004] BLR 179.[169] The breach must be material. In the case of an alleged failure to bring a point or issue to the parties' attention, it must be one that is decisive or of considerable potential importance to the outcome of the resolution of the dispute; Cantillion Ltd v. Urvasco Ltd [2008] EWHC 282; [2008] BLR 250 (TCC).

- An adjudicator who, on jurisdictional grounds, wrongly refuses to consider a defence is acting in breach of natural justice (Note it would be different if the adjudicator, while accepting he had jurisdiction to consider it, wrongly concluded that the defence was not available on the merits; Quartzelec v. Honeywell [2009] EWHC 3315; [2009] BLR 328). The authorities were reviewed in Pilon Ltd v. Breyer Group Plc [2010] EWHC 837 (TCC) and summarised as follows:

> "22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.
>
> 22.2 If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast*, *Broadwell*, and *Thermal Energy*.
>
> 22.3 However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.

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danger (which meant the same thing) that the tribunal was biased. This was the case here. Also in considering such questions, the principles of serious irregularity set out in the Arbitration Act 1996, in particular the need to show substantial injustice, could apply by analogy. The fact that the decision was contractually agreed to be binding did not mean the court had to enforce it, just as illegality could be a ground not to enforce, so could substantial and material breaches of natural justice.

[168] **Balfour Beatty**: Adjudicator provided his own delay analysis due to inadequacy of material provided by contractor. Did not advise the parties that he was doing this, or invite representations on what he had done. The decision was not enforced. Where matters are of considerable or decisive importance, the same principles (as regards procedural natural justice) apply in adjudication as in arbitration; but having regard to the provisional nature of the process.

[169] **London**: The adjudicator allowed a late supplementary statement from one of the parties on quantum without ensuring that the other party had a reasonable opportunity to deal with it.

22.4 It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Limited v William Verry Limited* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd v City and General (Holborn) Ltd* [2006] EWHC 848 (TCC).

22.5 A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party."

But if the Adjudicator fails to consider a defence becausehe errs in law in concluding that it is not available to the Respondent Party, this does amount to a serious breach of procedural fairness and his decision is enforceable; Urang Commercial Ltd v Century Investments Ltd [2011] EWHC 1561 (TCC).

- Unintelligibility of reasons (is this an aspect of procedural fairness). "It will only be in extreme circumstances, … that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice"; Carillion Construction Ltd v. Devonport [2005] EWCACiv 1358; [2006] BLR 15 (CA). Applied in Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd [2009] EWHC 408 (TCC).[170]

- Fraud and deceit: These can be raised as ground to resist enforcement or to supportan applicationor stay executionof the enforcement judgement if supported by clear and unambiguous evidence and argument, and those grounds could not have been raised in the adjudication, Spaymill Contracts v. Baskind [2010] EWCACiv 120.[171]

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[170] Thermal Energy: The Respondent had raised a set off defence in adjudication. Adjudicator did not expressly mention it in the Decision or any indication that he considered that it was a matter he had to decide. Thus the adjudicator had failed in his duty to give reasons. There was prejudice because it was unclear whether or not the adjudicator had considered the set-off defence on its merits. Thus the Responding party had lost the opportunity of having that defence dealt with, and had lost the prospect of the adjudicator deciding that point in its favour. If it started a further adjudication to seek to recover its losses, first it would have had to comply with this decision and second there was a risk that a second adjudicator might decline to act on the basis that the point had already been decided. Therefore there was substantial injustice and the decision would not be enforced.

[171] **Spaymill**: In this case the allegation of theft could have been and was raised in the adjudication. It was not a case of a fraud coming to light after that decision, thus it was enforced. See also GPS v.

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- Uncertainty. An adjudicator's decision which is uncertain on its face is unenforceable Vision Homes Ltd v. Lancsville Construction Ltd [2009] EWHC 2042 (TCC).

- Serious irregularity (?)/ failure to fulfil the statutory duty. Is this a separate ground of challenge; Consider Buxton Building Contractors v. Durand Primary School [2004]BLR 374;[172]William Verry v. NW London CommunalMikvah [2004] BLR 308 (TCC).[173] Probably not, see Carillion Construction Ltd v. Devonport Royal Dockyard[2005] EWCACiv 1358; [2006] BLR 15 (CA) (Buxton doubted on this); Kier Regional Ltd v. City & General (Holborn) Ltd [2006] BLR 315 (TCC) (adjudicator deciding not to take into account two relevant expert reports, an error of law. not such as to invalidate his Decision).

  But note Quietfield Ltd v. Vascroft Contractors Ltd [2007] BLR 67 (CA), (dismissing an appeal from Jackson J, EWHC174) at paragraph 17:

  > "… the judge said uncontroversially in para. 29 of his judgment:
  >
  > > '… That issue may be formulated as follows: Was the adjudicator correct in treating his own decision in the first adjudication as conclusive in relation to extension of time? If the answer to this question is "Yes", then the adjudicator's decision dated 7 December 2005 must be enforced. If the answer to this question is "No", then it follows that the adjudicator has expressly refused to consider both the written submissions and the evidence which constitute Vascroft's only substantive defence in the adjudication. In that event there has been a breach of the rules of natural justice and the adjudicator's decision cannot be enforced.'"

Severance

It a decision that deals with several discrete heads of claim or issues is successfully challenged in part, it may be possible to sever the good from the bad; consider Ken

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Ringway [2010] EWHC 283 (TCC) where a similar conclusion was reached on the basis that the responding party was aware of the inconsistencies in the referring party's evidence during the adjudication thus could not reformulate that concern as fraud to resist enforcement.

172 **Buxton**: Adjudicator failed to consider issues, submissions and documents properly put before him by Durand. Thus had not fulfilled the statutory duty to consider all the matters in dispute, also a serious irregularity not to do so.Decision unenforceable.

173 **Verry**: Court held that adjudicator had erred in law by not taking into account responding party's allegations of defects as defence to a claim on a certificate, the dispute referred including the correctness of that certificate. Held that, nevertheless, the decision was enforceable, but said would not draw up judgment for six weeks (is this done pursuant to CPR Rule 40.7(1)) to enable an adjunction to take place about the defects, with permission to apply so that if that adjudication went in the defendant's favour, effect could be given to that decision by setting it against the earlier decision.

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Griffin v. Midas Homes (2002) 78 Con LR 152; Cantillion Ltd v. Urvasco Ltd [2008]EWHC 282; [2008] BLR 250 (TCC); Allied P&L v. Paradigm Housing [2009] EWHC 2890, at para. 34.

Implications of the ECHR

Attempts have been made to argue that statutory adjudication pursuant to the Construction Act is incompatible with the right to a fair hearing enshrined in Article 6 of the European Convention on Human Rights, see the Human Rights Act 1998. Such arguments have, so far, been rejected on the grounds either that adjudication is not legal proceedings or that an adjudicator is not a public body within the HRA definition or that the decision was not a final determination of the parties' rights, Austin Hall v. Buckland [2001] BLR 272; Elanay Contracts v. The Vestry [2001] BLR 33.[174]

Withholding from an adjudicator's decision

Attempts have been made to argue that, since an adjudicator's decision creates a debt, a notice of withholding can be issued in respect of sums that become due by that decision or that the party can rely on any provisions of the contract, such as a determination clause, that postpones or avoids the payment of sums due.

- Bovis Lend Lease v. Triangle Developments [2003] BLR 31,[175] payment of an adjudicator's decision could not ordinarily be resisted by issuing a notice of

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[174] **Austin Hall**: Natural justice applies within the limitations imposed by parliament. In this case the Adjudicator's time limits were not unlawful in the context of the Act and the JCT Scheme. As for the ECHR point, proceedings before an adjudicator were not legal proceedings, they did not result in a judgement that could be enforced of itself (this is, arguably, a bad point). Also the adjudicator was not a public body so was not bound by the HRA (but the enforcing court is?) Even if the adjudicator was a public body, the requirement for a public hearing could be waived. In any case, taking the proceedings as a whole, including the court proceedings, they complied with the Act. In any case s. 6(1) and 6(2) of the HRA 1998 were not a knockout blow. If the requirements of statutory adjudication meant the convention could not be complied with, the Convention was inapplicable. The correct way to mount a challenge was to seek a declaration of incompatibility between s. 108 and the Convention, under s. 4 of the HRA. ***Elanay***: Article 6 ECHR would not apply because, although the adjudicator decides questions of civil rights, his decision is not in any sense final. It was not like a judgement than could be appealed since the decision was provisional and the matter can be re-opened in arbitration or litigation. (There is nothing in the HRA or the Convention to support this distinction).

[175] **Bovis:** The Judge also considered clause 9A.7.2 (JCT Adjudication Rules) which said that the parties shall, without prejudice to their rights, comply with the adjudicator's decision. He said that "without prejudice to" made it clear that the obligation to pay was not be cut back or diminished by any withholding that would not have been allowed in relation to the underlying obligation to pay and which had not been subject to a s. 111 notice. The judge also said that where there pre-existed some other contractual right to avoid payment, not governed by s. 111 or the terms of the Adjudicator's decision, these were unaffected by the Adjudicator's payment decision and that such rights will prevail and could be relied on to resist enforcement, as here where the contention was that the contractor's employment had been determined and clause 7.2.4.1 of the JCT Management Form meant no

withholding in respect of that decision. A similar view is taken in Scotland. See Construction Centre Group v. Highland Council [2002] BLR 476 (Scotland).[176] Note also David McLean v Swansea Housing Association [2002] BLR 125.[177]

- Ferson Contractors v. Levolux [2003] BLR 118 (CA).[178] Clauses that purport to defeat the intention of parliament that adjudicator's decision should be honoured immediately, should be struck down. But now see Melville Dundas v. George Wimpey[2007] BLR 257 (HL); [2007] UKHL 18 (Scotland).[179] By a majority, the HL held that the purpose of s. 111(1) was to let the contractor know immediately and with clarity why a payment was being withheld. It was not to take away the parties' freedom of contract by invalidating provisionsthat stipulated that no further payments wererequired to be made following determination.

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further monies payable. But this part of the judgement, cannot was doubted by the Court of Appeal in Ferson Contractors v. Levolux [2002] BLR 118 (CA).

176 **Construction**: Section 111(1) does not permit the giving of a withholding notice in respect of an adjudicator's decision. Matters of withholding had to be the subject of a s. 111 notice before the adjudication and dealt with in the adjudication. They could not be raised after the decision to resist enforcement.

177 **David Mclean**: An adjudicator's decision does did not create a cause of action or debt into which the underlying cause of action merges. An action to enforce an adjudicator's decision is an action to enforce the right or the liability upheld by the adjudicator in the adjudicator's decision, a decision with which the parties have agreed to abide, it is the contractual agreement to abide by the decision which is enforced, not the decision itself. The implications of this is that the enforcing party can still claim entitlement to summary judgement or an interim payment based on the underlying cause of action.

178 **Levolux**: A GC Works Sub-contract, but material provisions were similar to JCT wording, thus clause 29.8, stated that no further payment was to be made to the contractor on determination of its employment. The employer resisted enforcement of an adjudicator's decision on the grounds that it had determined the contractor's employment, thus the sum ordered by the adjudicator was not payable. The court's decision was based on a finding that a provision of the contract requiring the parties to honour the adjudicator's decision took priority. But, in the absence of such a clause, the provision providing that no further sums were to be paid following determination by the contractor would be struck down as contrary to the intention of the Housing Grants Act: "The intended purpose of s. 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. ... The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision." The contrary view expressed in Bovis Lend Lease v- Triangle Developments [2003] BLR 31, was doubted.

179 The case concerned the interrelationship between s. 111 HGCRA 1996 and clause 27.6.5.1 of JCTSFBC 98).

3. Principal cases summarising the current state of the law on resisting enforcement

A summary of applicable principles was given by Rupert Jackson J in Carillion Construction Ltd v. Devonport Royal Dockyard[2005] EWHC 778 (TCC), with which, on appeal, the CA expressed broad agreement, while doubting whether Buxton v. Durand could be reconciled with the first of those propositions; [2005] EWCACiv 1358; [2006] BLR 15 (CA).

> "In my view it is helpful to state or restate four basic principles.
>
> 1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
>
> 2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see Bouygues, C&B Scene and Levolux;
>
> 3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see Discain, Balfour Beattv and PegramShopfitters.
>
> 4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see PegramShopfitters and Amec.
>
> May I now turn from general principles to five propositions which bear upon this case:
>
> 1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on Wednesbury grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. I reach this conclusion on the basis of the Court of Appeal decisions mentioned earlier. This conclusion is also supported by the reasoning of Mr Justice Steyn in the context of arbitration in Bill Biakh v Hvundai Corporation [1988] 1 Lloyds Reports 187.
>
> 2. On a careful reading of His Honour Judge Thornton's judgment in Buxton Building Contractors Limited v Governors of DurandPrimary School[2004] 1 BLR 474, I do not think that this judgment is inconsistent with proposition 1. If, however, Mr Furst is right and if Buxton is inconsistent with proposition 1, then I consider that Buxton was wrongly decided and I decline to follow it.
>
> 3. It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions

will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as Balfour Beatty v the London Borough of Lambeth that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision.

4. During argument, my attention has been drawn to certain decisions on the duty to give reasons in a planning context. See in particular Save Britain's Heritage v. No 1 Poultry Limited [1991] 1 WLR 153 and South Bucks DC and another v Porter (No 2) [2004] 1 WLR 1953. In my view, the principles stated in these cases are only of limited relevance to adjudicators' decisions. I reach this conclusion for three reasons:

(a) Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).

(b) If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.

(c) Adjudicators often are not required to give reasons at all.

5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by Lord Justice Clerk in Gillies Ramsay, that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice."

Chadwick LJ, at paragraphs 85 ff of Carillion v Devonportcommented:

"85. The objective, which underlies the Act and the Statutory Scheme requires the courts to respect and enforce the adjudicator's decision, unless it is plain that the question which he has decided, was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach [of] "simply scrabbling around to find some argument, however tenuous, to resist payment".

86. It is only too easy in a complex case, for a party who is dissatisfied with the decision of an adjudicator, to comb through the adjudicator's reason and identify points upon which to present a challenge under the labels, "excessive jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which

he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution, which meets the needs of the case. Parliament may be taken to have recognised that in the absence of an interim solution the contractor (or subcontractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The Statutory Scheme provided a means of meeting the legitimate cash and flow requirements of contractors and their subordinates. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The Scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the Statutory Scheme; or whether such disputes are suitable for adjudication under the Scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the Scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense, as we suspect the costs incurred in the present case will demonstrate only too clearly."

4. Resisting enforcement of an adjudicator's decision

In addition to challenging an adjudicator's decision, it may be possible to resist enforcement of an otherwise valid decision.

- Setting off judgements. For instance, by obtaining a favourable adjudication decision on other disputes under the contract and seeking to have the enforcement of that decision heard concurrently with the enforcement proceedings relating to the decision being resisted, see Northern Developments v. J&J Nichol [2000] BLR 158.[180] This was also done in HS Works v. Enterprise Managed Services [2009] EWHC 729. See para. 65, where it was said that the power to set off judgements was discretionary,

- A related principle is where a decision includes money awards in favour of each party. The court will not allow one to be enforced without taking account of the other even if the adjudicator has not made the set off; David McLean v. Swansea Housing Association Ltd [2002] BLR 125.[181] The court will also allow a set off against an adjudicator's decision where it follows logically form that decision

[180] This was, in effect, what was done in VHE Construction v. RBSTB Trust [2000] BLR 187.

[181] **David Mclean**: The adjudicator's decision dealt both with the referring party's claim for payment and the other party's claim for liquidated damages, but did not provide for set off. The sums awarded paid less the liquidated damages. The referring party was not entitled to summary judgement on the unpaid balance, since it could not disregard the liquidated damages.

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the paying party is entitled to a specific sum, eg in liquidated damages; Balfour Beatty v. Serco [2004] EWHC 3336 (TCC). Applied in JPA Design & Build Ltd v Sentosa (UK) Ltd [2009] EWHC 2312 (TCC) where two adjudication decisions were set off against each other by the court.[182]

5. Obtaining a stay of enforcement the court's decision or a stay of execution

It may be possible to obtain a stay of judgement or execution (possibly with an order for the sum concerned to be paid into court) if there are special circumstances that render it inexpedient to enforce judgement or the applicant for the stay is unable to pay the money; CPR, Schedule 1, RSC Order 47(1).

- Special circumstances might include a patent error in the decision in circumstances where the court is persuaded that it would not be just to enforce the judgement, for instance, if there is cogent evidence that the party seeking to enforce the adjudicator's decision would be unable to repay the sums recovered, not at the date of judgement, but at the time that repayment might be required (at the date of the decision was reversed in subsequent proceedings); looking at whether there had been a fundamental change in the enforcing party's financial circumstances since the contract was made; Herschel Engineering v. Breen Property [2000] BLR 272.[183] For an example where a stay was granted, see Baldwins v. Barr Ltd [2003] BLR 176.[184] For an example where a stay was not granted seeWimbledon Construction Co v. Vago[2005] EWHC 1086 (TCC).[185][2005] BLR 374 and where it wasJPA Design & Build Ltd v Sentosa (UK) Ltd [2009] EWHC 2312 (TCC).[186]

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182 Workspace Management Ltd v YJL London Ltd [2009] EWHC 2017 (TCC) and adjudicator's decision was set off against an arbitral award as both arose out of the same transaction.

183 **Herschel**: The conduct of the parties and lapse of time since the dispute, the effect of payment/non payment on the project and the parties, are also relevant. The test concerning inability to repay is similar to that on an application for security for costs. It is for the paying party to prove this. In this case, the paying party knew of the financially uncertain position of the other party at time of contract, so no stay of judgement. Note, in Rainsford House v. Cadogan, 13 February 2001) the court said that the relevant date for considering inability to pay was at the date of the application for a stay.

184 **Baldwins**: Applied principles in Herschel. Stay granted because an intention to take the underlying dispute to litigation and a strong possibility that recipient (here in administrative receivership, poor asset position) would be unable to repay any monies found to have been wrongly paid. But stay conditional of payment of amount of decision into court and commencement of proceedings on underlying dispute within a month. No stay of judgement in respect of costs of adjudication.

185 **Wimbledon**: Consideration of Order 47 discretion to stay the execution of summary judgment arising out of an adjudicator's decision. The court had to exercise its discretion bearing in mind that: (i) adjudication was designed to be a quick and inexpensive method of arriving at a temporary result and adjudicators' decisions were intended to be enforced summarily; (ii) probable inability of the claimant to repay the sum awarded by the adjudicator and enforced by summary judgment at the end of subsequent proceedings could be special circumstances within the meaning of O.47 r.1(1)(a) making a stay

- A stay of judgement or execution should ordinarily be granted where the party seeking enforcement is in liquidation or bankrupt (see s. 323 of the Insolvency Act 1998 and Rule 9.40 of the Insolvency Rules 1996, considered in Bouygues UK Ltd v. Dahl-Jensen [2000] BLR 522 (CA)).[187]

- In Total M&E Services Ltd v. ABB Building Technologies Ltd (2002) CILL 1857, the court ordered that a sum equivalent to a set off that had not been the subject of an effective notice of withholding, and thus not the subject to the adjudicator's decision, be paid into court pending the hearing of the action in respect of that set off, or further order, not to the referring party.[188]

6. A summary of the principles that apply where the enforcing party is insolvent or close to insolvency

In Straw Realisations (No 1) Ltd v Shaftsbury House (Developments) Ltd[2010] EWHC 2597 (TCC), paragraphs 89ff, Edwards-Stuart J, after a review of relevant case law, summarised the principles that apply where the enforcing party is insolvent or close to insolvency as follows:

> "[89] … I consider that the following principles are established or can be derived:
>
> (1) A clause in a contract that purports to supersede the obligation to comply with an adjudicator's decision, in this case the provision for a mutual setting off of the accounts between the parties on the happening of certain events … and an obligation only to pay the balance and the restriction on any further payments, cannot prevail over an obligation to comply with the decision of an adjudicator: see the *Levolux AT* case (2003) 86 ConLR 98 and the *William Verry* case.
>
> (2) If, at the date of the hearing of the application to enforce an adjudicator's decision, the successful party is in liquidation, then the adjudicator's decision will not be enforced by way of summary judgment: see the *Bouygues* (*UK*) and

appropriate; (iii) if the claimant was insolvent then a stay of execution would usually be granted; (iv) if the evidence of the claimant's financial position suggested that it was probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if the claimant's financial position was the same or similar to that at the time that the relevant contract was made or the claimant's financial position was due, either wholly, or in significant part, to the defendant's failure to pay the sums awarded by the adjudicator.

186 **JPA Design**: J's financial position had significantly worsened since the start of the contract, and it was clear from the company accounts that S's failure to pay J the advance payment was not responsible for the financial situation. Thus, there were no exceptions to granting the stay, Vago applied. Even if it was wrong to set-off the liquidated damages against the advance payment, regardless of J's financial position, the liquidated damages justified a stay of execution up to that amount.

187 See also the principles discussed in Rainford House v. Codogan, 13 February 2001.

188 **Total**: This seems to conflict with the wording of s. 111.

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Melville Dundas cases. The same result follows if a party is the subject of the appointment of administrative receivers: see the *Melville Dundas* case.

(3) For the same reasons, I consider that if a party is in administration and a notice of distribution has been given, an adjudicator's decision will not be enforced.

(4) If a party is in administration, but no notice of distribution has been given, an adjudicator's decision which has not become final will not be enforced by way of summary judgment. In my view, this follows from the decision in the *Melville Dundas* case as well as being consistent with the reasoning in the *Integrated Building Services Engineering Consultants* case.

(5) If the circumstances are as in para (4) above but the adjudicator's decision has, by agreement of the parties or operation of the contract, become final, the decision may be enforced by way of summary judgment (subject to the imposition of a stay). I reach this conclusion because I do not consider that the reasoning of the majority in the *Melville Dundas* case extends to this situation.

…

(7) If a party is insolvent in a real sense, or its financial circumstances are such that if an adjudicator's decision is complied with the paying party is unlikely to recover its money, or at least a substantial part of it, the court may grant summary judgment but stay the enforcement of that judgment.

[90] In relation to point (7) above, the factors affecting the discretion of the court when considering whether or not to grant a stay where it appears that the successful party would be unable to repay an award if it was subsequently held to be wrong are clearly set out in the judgments of Coulson J in *Wimbledon Construction Co 2000 Ltd v Vago* [2005] EWHC 1086 (TCC) … . Broadly speaking, Coulson J said that where a party is in insolvent liquidation or there is no dispute on the evidence that it is insolvent (or unlikely to be able to repay the sum awarded by the adjudicator), a stay of execution will usually be granted unless either that party's financial situation was the same or similar to its financial situation at the time when the relevant contract was made or its insolvency is due, either wholly or in significant part, to the other party's failure to pay the sums awarded by the adjudicator … .

[91] By way of explanation of points (4) and (5) above, I have reached the conclusion that the approach of the House of Lords in the *Melville Dundas* case should be adopted in a case where the adjudicator's decision is still provisional, has not been complied with and the company that was successful in the adjudication has become the subject of an administrationorder. However, if the adjudicator's decision has become final, so that it is no longer capable of being reconsidered by the court, then I consider that the approach of the House of Lords in the *Melville Dundas* case ceases to be appropriate because of the emphasis placed by Lord Hoffmann on the provisional nature of the interim payment that was the subject of the dispute in that case. It seems to me that his reasoning cannot be applied where the obligation in question is final and binding. …".

7. Taking the underlying dispute to arbitration or litigation

Since an adjudicator's decision is not final it is possible to take the underlying dispute to litigation or, if applicable, arbitration. Once the court or arbitrator has determined the dispute, the adjudicator's decision is of no further effect. Nevertheless, it is usual to include a claim for the return of money paid under that decision. It may be appropriate to make the underlying claimant plead first, not the party who commenced proceedings.

- For a case where, faced with an application to enforce an adjudicator's decision, the court gave directions for and determined the underlying dispute and, having concluded that issue in a way contrary to the adjudicator, declined to enforcethe decision, see Alstom Signalling v. Jarvis Facilities[2004] EWHC 1285 (TCC).

- The possibility of finallydeterminingissues of law, that are not fact dependant, in the context of enforcement proceedings was noted with approval in HS Works v. Enterprise [2009] EWHC 729 (TCC), para. 68ff. See also Dalkia Energy v. Bell Group Ltd [2009] EWHC 73 (TCC) where a question concerning what documents were incorporated into a contract, decided by an adjudicator, was, following that decision, the subject of a rapid court determination under the Part 8 procedure, thus the court was not bound by the adjudicator's decision on that point on enforcement proceedings.[189] For another example, see Geoffrey Osborne v. Atkins Rail [2010] EWHC 2425 (TCC), where on a Part 8 application the court concluded that the adjudicator erred in law in not deducting sums previously paid when, after valuing work, he ordered payment to the referring party. In reality, after taking account of those sums, there was a sum payable to the responding party. The court did, however, enforce the adjudicator's costs order, there being no basis for challenging this. But note Pilon Ltd v. Breyer Group Plc [2010] EWHC 837 (TCC), were the contract contained an arbitration agreement, the court had no jurisdiction to consider Part 8 proceedings.

- If the contract includes provisions that make certain steps a condition precedent to such proceedings being initiated, those provisions must be compiled with even if the proceedings concern a dispute that has been the subject of adjudication. Consider Mackley v. Gosport Marina [2002] EWHC 1315.[190]

It is an implied term of an adjudication agreement that money paid following an adjudicator's decision can be recovered in later legal proceedings, should those proceedings reach a different result to the adjudicator's decision, the cause of action on that implied term accruing when the losing party complied with the adjudicator's decision and paid the monies pursuant to that decision. Thus the losing party would have six years from the date of payment to bring those legal proceedings; HS Works Limited v Enterprise Managed Services Limited [2009] EWHC 1906.[191]

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189 For another example of how this can work in practice, even where there are factual issues, see Walter Lilly v. DMW Developments Ltd [2008] EWHC 3139 (TCC).

190 **Mackley**: ICE terms, required an engineer's decision before arbitration. Such a decision had to be obtained ever where the dispute to be arbitrated concerned a matter dealt with in adjudication.

191 **HS Works**. The adjudication was brought right at the end of the limitation period. When the losing party commenced legal proceedings,

If the underlying dispute is taken to arbitration or litigation, it is probable that the burden of proof remains with the claimant in that dispute, not the party who has initiated the proceedings to reverse the adjudicator's decision. See A Nissen, *The Format for Litigation and Arbitration after Adjudication,* (2003) 19 ConstLJ 179; E Quigg, *The Effect of Adjudicators' Decisions in Subsequent or Concurrent Arbitration or Litigation*, (2005) 71 Arbitration 211.

SECTION D: A PRACTICAL EXERCISE

Having completed the course, can you answer the following questions?

1. What contracts are subject to the Construction Act?

2. What were the principal concerns in the construction industry that the Construction Act sought to address and how has it addressed these concerns?

3. What is the regime for payment created by s.109, 110 and 111 of the Construction Act?

4. What sanctions, if any, are provided in the Construction Act for failing to issue an employer's notice as provided for in s. 110(2) or a notice of withholding as provided for in s. 111(1) of the Construction Act?

5. What are minimum requirements for an adjudication procedure are required by s. 108 of the Construction Act?

6. If a party to a contract has a statutory right to adjudicate a dispute with the other party to that contract under what procedures is that adjudication conducted?

7. How is an adjudication begun and why is it important that the correct procedure is followed?

8. If a party obtains an adjudication decision in its favour, how can that decision be enforced if it is ignored by the other party?

9. What are the grounds on which a party can resist enforcement of an adjudicator's decision that is adverse to its interests?

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the winning party said it was statue barred. This implied term theory avoids the difficulty.

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