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## Chapter 6

# Adjudication Clauses, Rules and Procedures

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### *Adjudication clauses*

All the standard forms of contract include adjudication provisions that comply with the Act. There are two distinct ways in which the contract drafting bodies have approached the content of the adjudication clause included in their contract forms. One approach is to do little more than cover the matters that must be included in order to comply with the Act and to set out procedures in a separate set of rules. The other approach is to do away with any separate rules and include all procedural matters in the adjudication clause itself.

The drafting bodies that have decided to avoid the use of separate rules are the Joint Contracts Tribunal and the Property Advisers to the Civil Estate (PACE) which is responsible for the government contracts (GC/Works/1 and its fellows). The Construction Confederation (previously the BEC) contracts, DOM/1 and its fellows, which follow JCT very closely, likewise have no separate adjudication rules. The adjudication clauses in the contracts produced by these bodies provide the procedure which governs the conduct of the adjudication.

The forms of contract produced by the Institution of Civil Engineers, apart from, interestingly, the Engineering and Construction Contract (ECC), refer to the Adjudication Procedure that the ICE also publishes. The adjudication provision of the ECC has the strange omission of not referring to the ICE Adjudicator's Contract. The Institution of Chemical Engineers also produces separate rules. The Association of Consulting Engineers has a minimalist approach to its adjudication provisions complying with the Act by an express incorporation of, and relying entirely upon, the Construction Industry Council Model Adjudication Procedure.

The approach to the adjudication provision in each 'family' of contracts is the same throughout all the contracts encompassed in it and we review the following as examples:

- JCT 98 Private Edition
- DOM/1 (this has now been superseded by the JCT DSC/C)
- ICE 6th Edition
- GC/Works/1 (1998)
- ACE Conditions of Engagement
- The IChemE contracts.

### **Joint Contracts Tribunal**

Part 4 of JCT 98 includes clauses 41A, 41B and 41C covering adjudication, arbitration and legal proceedings. Clause 41A, Adjudication, comprises eight sub-clauses, many of which have sub-sub-clauses, a natural result of the JCT's decision that there should be no accompanying adjudication rules.

Clause 41A.1 confirms that clause 41A as a whole applies where either party refers a dispute or difference to adjudication. It uses the words 'arising under this Contract', which echoes the provisions of section 108 of the Act and excludes disputes which arise other than under the contract. This clause does not however limit the adjudicable matters to those set out in the Act. If parties include work that is not defined as a 'construction contract' by the Act within the works governed by this contract, the adjudication provisions will apply as a term of the contract rather than as a statutory right.

Clause 41A.2 allows the adjudicator to be either an individual agreed by the parties or, on application by a party, an individual to be nominated by the person named in the appendix to the contract. There are two provisos to this provision in sub-sub-clauses 41A.2.1 and 41A.4.2. The first of these is to the effect that no adjudicator shall be agreed or nominated who will not execute the JCT Adjudication Agreement. The second is that any agreement between the parties on the appointment of the adjudicator must be reached, or any application to the nominator must be made, with the object of securing the appointment of, and the referral of the dispute to, the adjudicator within seven days of the date of the notice of intention to refer. This all echoes the objectives of the Act. Clause 41A.2.3 requires the parties to execute the JCT Adjudication Agreement with the adjudicator upon his nomination or appointment but failure to do this is of no consequence – see clause 41A.5.6.

Clause 41A.3 deals with the situation if the adjudicator dies, becomes ill or is otherwise unavailable, allowing the parties to agree a replacement or to seek the nomination of another adjudicator from the named person in the contract.

Clause 41A.4.1 deals with the notice of intention to refer the dispute to adjudication and the notice of referral. In each case it sets out how the notice is to be structured, which is necessary in the absence of rules. This sub-clause requires the notice of referral to deal with the particulars of the dispute, a summary of the referring party's contentions, a statement of the relief or remedy sought and any material that the party wishes the adjudicator to consider. The court has made it clear that it is only a crystallised dispute that can be referred to adjudication and, unless the parties agree otherwise, the referring party has to put its complete case in the referral.

Clause 41A.4.2 deals in detail with the mechanics of delivering the notice of referral, citing requirements relating to fax transmission and postal delivery. This procedure relates to the applicant's referral, similar requirements being contained in clause 41A.5.2 in respect of the initial response of the party not making the referral. It is of note that the detail of this procedure is not extended to cover any other exchange of information or documents during the subsequent course of the adjudication. Customarily this is done by fax and increasingly by e-mail.

Clause 41A.5.1 requires the adjudicator to confirm the date that he receives the referral and its accompanying documentation to the parties immediately on its receipt. This requirement relates to clause 41A.5.3, which sets the 28-day period for the completion of the decision from the date of that receipt.

The JCT have decided to provide for a formal response by the party not making the referral as a standard requirement in clause 41A.5.2. This is to be sent to the adjudicator and to the referring party within seven days of the date of the referral. Note that this is not seven days from the date that the referral is received, it is seven days from the date it is sent. It is, as a result, conceivable that if the referral is sent by post the response may have to be produced in no more than five days. This response is required to be in the form of a written statement of the contentions relied on and any material that the party not making the referral wants the adjudicator to consider. There are, as mentioned previously, specific requirements as to delivery of this statement.

Clause 41A.5.2 does, however, create what may be seen as a conflict with the provision set out in Clause 41A.5.5, of which more later, to the effect that the adjudicator may set his own procedure. It is entirely possible that the adjudicator may consider that the time allowed for the written response should be more than seven days. Clause 41A.5.2 provides that the responding party 'may' send a written statement within seven days; there is nothing to suggest that it must do this and it is our view that there is nothing to prevent the adjudicator from allowing a greater time than that stated in the contract.

In addition to defining the 28-day period as starting from the receipt of the referral, clause 41A.5.3 requires the adjudicator to act as 'an Adjudicator for the purposes of section 108 of the Act and not as an expert or an arbitrator'. It does not, however, define what the JCT means by 'an Adjudicator' and how this differs from an expert or an arbitrator. The authors understand that it is the intention of the JCT in using these words to do no more than accentuate that adjudication is a different process from arbitration and expert determination.

There is, however, one possible problem that arises from the words used. It is not the intention of the JCT to limit the adjudication matters under any JCT contract. For example, any dispute arising under any contract let under the JCT Minor Works form is intended to be adjudicable. In particular this will mean that a contract in this form with a residential occupier will include full adjudication provisions. It is possible to argue that the use of the specific words '...and acting as an Adjudicator for the purposes of section 108 of the Housing Grants, Construction and Regeneration Act 1996' in clause 41A.5.3 restricts the adjudicator to dealing only with the precise matters that are the subject of the statutory right to adjudication under the Act. As noted above, we understand that this is not the intention of the JCT and we are not aware that this has been taken as an issue to resist enforcement of a decision that deals with matters not within those adjudicable under the Act.

It is noteworthy in this respect that the drafters of GC/Works/1 have also sought to define how the adjudicator is to act by making a similar comparison, but they chose not to refer to section 108 when doing so.

Clause 41A.5.3 also requires the adjudicator to reach his decision within 28 days and forthwith send it to the parties. This clause also deals with the extension of the 28-day period in compliance with the requirements of the Act.

Clause 41A.5.4 states that the adjudicator shall not be obliged to give reasons for his decision but this does not of course prevent him from doing so if he so chooses, subject of course to any agreement otherwise by the parties.

Clause 41A.5.5 requires the adjudicator to act impartially, to set his own procedure and at his own discretion take the initiative in ascertaining the facts and the law. This clause then sets out eight particular actions that the adjudicator may utilise. It is noteworthy that this list, which appears at first glance to be along similar lines to lists of powers enjoyed by the adjudicator that appear in other adjudication procedures, relates to the making of this ascertainment only and does not include general procedural matters. These are entirely at the discretion of the adjudicator, as they are in other adjudication procedures, but the JCT has decided not to delve into this area.

Clause 41A.5.6 states that a failure of a party to complete the JCT Adjudication Agreement or to comply with any requirement of the adjudicator or the adjudication provisions of JCT clause 41A does not invalidate the adjudicator's decision.

Clause 41A.5.7 requires that the parties meet their own costs of the adjudication except that the adjudicator may direct how costs fall in respect of any test or opening up that he may have required.

Clause 41A.6.1 allows the adjudicator to direct how his fee and expenses are to be apportioned but does not require him to do so. Should he not do so these costs fall equally

between the parties. Clause 41A.6.2 confirms that the parties have joint and several liability for the adjudicator's fees and expenses.

Clause 41A.7.1 covers the Act's requirement relating to the binding nature of the decision.

Clauses 41A.7.2 and 41A.7.3 are drafted to formalise the effect of the binding nature of the decision and require that the adjudicator's decision is complied with and that legal proceedings can be taken to ensure such compliance pending final determination of the dispute.

Clause 41A.8 provides the adjudicator and employees and agents with the immunity required by the Act.

### **Construction Confederation**

The Construction Confederation produced the suite of contracts which included DOM/1 and DOM/2. The JCT has now produced the DSC/C contract and its fellows and the Construction Confederation is now to stop producing its own forms. DOM/1 will no doubt however remain in use for a considerable time to come.

These contracts are aimed specifically at sub-contracts formed in respect of works being carried out under the Joint Contracts Tribunal contracts. This being so the provisions are identical to those in the main contracts.

The drafting includes reference to the JCT Adjudication Agreement and has the same requirement on the parties and the adjudicator to complete this Agreement and also the provision that failure to complete it will not invalidate the adjudicator's decision.

### **Institution of Civil Engineers Conditions 6th Edition**

The ICE 6th edition is still much in use and there are no changes of any significance in the 7th edition other than the incorporation of the adjudication provisions within the contract, rather than as a supplement as is the case with the 6th edition. These contracts introduce the concept of a 'matter of dissatisfaction' – in the 6th edition this is clause 66(2) – in an endeavour to avoid the issue of a notice to refer a dispute to adjudication before the engineer or employer's representative has had the opportunity to address the problem that is identified by the matter of dissatisfaction. We consider this in detail elsewhere. At the time of writing we understand that the ICE is considering modifying this to reflect the recent clarifications set out by the court regarding the existence of a dispute by the use of an 'advance warning' procedure.

Clause 66 also includes a provision for conciliation in clause 66(5), which allows the dispute to be considered under the Institution of Civil Engineers' Conciliation Procedure at any time before service of a notice to refer to arbitration. This clause is in no way obligatory but does offer an alternative way of resolving the dispute. Note that this procedure will, if it is successful, resolve the dispute and will be deemed to have done so unless a notice of adjudication or arbitration is issued within one month. The statutory right to adjudication is in no way interfered with by this provision.

This contract then proceeds to deal with adjudication. It does no more than repeat the eight compliance points that a contract is required to include in order to avoid the Scheme for Construction Contracts coming into play. This contract, as with the JCT, does not limit the matters that are adjudicable; anything that forms a part of the contract works is subject to adjudication even if it is not within those matters covered by the statutory right to adjudication.

### Institution of Civil Engineers – NEC Engineering and Construction Contract

It is of interest that this form of contract approaches the adjudication provisions in a significantly different way from that used in the ICE 6th edition. There is an adjudicator's contract, which we consider in Chapter 8, but surprisingly this is not mentioned in the main contract adjudication clauses although it does appear in respect of the appointment of a replacement adjudicator. There are no rules. The ICE Adjudication Procedure is not referred to. This form of contract, as a result, contains all procedural matters that the drafters considered necessary for the conduct of an adjudication.

In the same way as the ICE 6th edition, a procedure relating to a notice of dissatisfaction is interposed between the event that might otherwise create a dispute and be immediately adjudicable and the commencement of the adjudication process itself. Consequently, as with the 6th edition, a 'dispute' is defined as a matter of dissatisfaction that has not been resolved within four weeks. In this contract it is a requirement of the notice of dissatisfaction procedure that the notice is issued within four weeks of the party that is dissatisfied becoming aware of the matter of dissatisfaction. Taking the contract literally there is no dispute if this procedure is not followed. It is, of course, as discussed elsewhere, arguable that in defining a dispute in this way by agreement the parties have side-stepped the requirement of the Act that there be a statutory right to have a dispute adjudicated at any time.

There is no provision for the optional conciliation procedure in this form of contract.

The procedure for referring the dispute is in accordance with the Act, requiring a notice of intent to refer and a referral of the dispute to the adjudicator within seven days thereof. The referring party includes with the referral the information that he wishes the adjudicator to consider. Each party is then allowed 14 days to provide the adjudicator with any further information. The adjudicator then makes his decision.

This form of contract differs from all others, except GC/Works, in one particular aspect. In most adjudication clauses, or the rules associated with them, there is a provision that empowers the adjudicator to set the procedure for the adjudication, which is accompanied by a non-exhaustive list of actions that he may take. The ECC adjudication does none of this. All it does is to include the basic Act requirement that he may use his initiative in ascertaining the facts and the law. This would appear to put the procedure into a total strait-jacket. The referral notice with accompanying information is sent to the adjudicator, and presumably, although the contract does not spell this out in detail, to the other party as well. Both parties then have 14 days to make further submissions and it is down to the adjudicator, if he so wishes, to investigate the facts and the law. There is no provision for anything else and whilst undoubtedly the adjudicator will be able to bring in many of the procedural matters that are spelt out in other forms of contract under the heading 'ascertaining the facts and the law', there may well be occasions where a little more flexibility might assist.

We note in particular in this respect that the adjudication provisions in other forms of contract include such matters as the adjudicator being allowed to use his own knowledge and/or experience, and that he may obtain legal and technical advice. In the absence of confirmation of such matters it is conceivable that a challenge might arise should the adjudicator proceed along these lines. We are sure that adjudicators will on occasion have done just this, if only to make the process work, but we are not aware of any challenge to the enforcement of a decision that has been based upon allegations of excess of jurisdiction or procedural unfairness for this reason.

One useful piece of guidance for the parties in this contract at clause 90.7 is as follows: 'Unless and until the *Adjudicator* has given his decision on the dispute, the Parties proceed as if the action, failure to take action or other matters were not disputed' (italics in original).

This makes the requirements on the parties clear in a situation that could cause problems. What do the parties do while awaiting an adjudicator's decision? The subject matter of the dispute might be covered up by later activities on site. The initial reaction might be to stop doing anything that might affect the subject matter of the adjudication or that might be affected by it. There is certainly no intention to allow extensions of time for the period of an adjudication. This contract makes it quite clear that the work proceeds as the adjudication progresses.

There is one possible downside to this wording. It is arguable that if the parties must proceed as if there were no dispute until the adjudicator has given his decision, there is an absolute requirement to go through the adjudication process before any other dispute resolution procedure can be entered into. Does this mean that a party cannot go directly to arbitration or the courts in respect of a dispute? We await any testing of this situation with interest.

The remaining provisions of this adjudication agreement cover the compliance points required by statute.

### **The Government Contracts**

GC/Works/1 has a Model Form of Adjudicator's Appointment attached to it, as considered in Chapter 8. There are no equivalent rules so, as with JCT, the whole procedure is contained in the contract clauses, which are called 'Conditions' in this contract.

The adjudication provisions in this contract (in condition 59) include many aspects that are rather different from those included in other contracts and it is worth setting them out in full and commenting on each provision:

#### ***Condition 59: Adjudication***

- (1) The Employer or the Contractor may at any time notify the other of intention to refer a dispute, difference or question arising under, out of, or relating to, the Contract to adjudication. Within 7 Days of such notice, the dispute may by further notice be referred to the adjudicator specified in the Abstract of Particulars.

This wording not only covers the notice of intent to refer the dispute to adjudication, but also allows 'a dispute, difference or question arising under, out of, or relating to the Contract' to be referred to adjudication. This immediately widens the adjudication provision beyond that required by statute, which does, of course, only require disputes arising under the contract to be referred. This is in fact far wider than even the JCT and ICE contracts.

- (2) The notice of referral shall set out the principal facts and arguments relating to the dispute. Copies of all relevant documents in the possession of the party giving the notice of referral shall be enclosed with the notice. A copy of the notice and enclosures shall at the same time be sent by the party giving the notice to the PM, the QS and the other party.

This contract, as does the ECC, brings in the project manager (PM) and the quantity surveyor (QS) as having a detailed involvement in the adjudication.

- (3) (a) If the person named as the adjudicator in the Abstract of Particulars is unable to act, or ceases to be independent of the Employer, the Contractor, the PM and the QS, he shall be substituted as provided in the Abstract of Particulars.

This provision sets a procedure for the replacement of an adjudicator who is unable to act or

ceases to be independent of the parties or their agents. As noted in Chapter 8 where the Adjudicator's Agreement is discussed relating to this contract, there is a requirement that the adjudicator be independent of the parties. There is of course no requirement of independence in the Act, only impartiality.

- (b) It shall be a condition precedent to the appointment of an adjudicator that he shall notify both parties that he will comply with this Condition and its time limits.

This notification is done automatically by completion of the Model Form of Adjudicator's Appointment, which includes this provision, but, as there is no requirement that the Model Form be completed, this needs to be in the adjudication clause as well.

It is of note that there is no fall-back provision to cover the status of the decision if the adjudicator does not do this; note how the JCT deals with a failure to enter into the JCT Adjudicator's Agreement as a comparison. The authors are sure that failure to give this notice could not be held to be any bar to the validity of a decision.

- (c) The adjudicator, unless already appointed, shall be appointed within 7 Days of the giving of a notice of intention to refer a dispute to adjudication under paragraph (1). The Employer and the Contractor shall jointly proceed to use all reasonable endeavours to complete the appointment of the adjudicator and named substitute adjudicator. If either or both such joint appointments has not been completed within 28 Days of the acceptance of the tender, either the Employer or the Contractor alone may proceed to complete such appointments. If it becomes necessary to substitute as adjudicator a person not named as adjudicator or substitute adjudicator in the Abstract of Particulars, the Employer and Contractor shall jointly proceed to use all reasonable endeavours to appoint the substitute adjudicator. If such joint appointment has not been made within 28 Days of the selection of the substitute adjudicator, either the Employer or Contractor alone may proceed to make such appointment. For all such appointments, the form of adjudicator's appointment prescribed by the Contract shall be used, so far as is reasonably practicable. A copy of each such appointment shall be supplied too [sic] each party. No such appointment shall be amended or replaced without the consent of both parties.

This contract requires the adjudicator and a named substitute adjudicator to be appointed within 28 days of the acceptance of the tender for the contract. If this is not done either party may proceed to do this unilaterally. There is also provision for appointing a replacement for the adjudicator or for the substitute adjudicator in a similar way. All things being equal these provisions ought to mean that there will always be an adjudicator available, but as there is no obligation on the parties to complete the appointments unilaterally, only an option, there has to be a provision for the adjudicator to be appointed within seven days of the giving of a notice of intention to refer a dispute to adjudication in order to comply with the Act.

- (4) The PM, the QS and the other party may submit representations to the adjudicator not later than 7 Days from the receipt of the notice of referral.

This adjudication provision approaches the submissions to the adjudicator in the same way as the ECC, making specific provision for the project manager and quantity surveyor to make submissions.

- (5) The adjudicator shall notify his decision to the PM, the QS, the Employer and the Contractor not earlier than 10 and not later than 28 Days from receipt of the notice of referral, or such longer period as is agreed by the Employer and the Contractor after the dispute has been referred. The adjudicator may extend the period of 28 Days by up to 14 Days, with the consent of the party by whom the dispute was referred. The adjudicator's decision shall nevertheless be valid if issued after the time allowed. The adjudicator's decision shall state how the cost of the adjudicator's

fee or salary (including overheads) shall be apportioned between the parties, and whether one party is to bear the whole or part of the reasonable legal and other costs and expenses of the other, relating to the adjudication.

There are a number of interesting and unique provisions in this clause. The adjudicator cannot notify his decision earlier than ten days from the notice of referral. This seems to us to create unnecessary difficulties if the matter is one that would be best thrashed out very quickly on site so that the contract works can proceed in the knowledge of the adjudicator's decision. To have to wait ten days for a decision on the quality of works whilst those works proceed could mean that at least a week's worth of work could be done that is of the same standard as the earlier work, which may be found to be inadequate. An immediate decision would mean that, at the very least, this further work would not have been done to the standard found to be unacceptable by the adjudicator. This problem might be addressed by the adjudicator issuing a preliminary provisional decision and a formal ratification being issued on the tenth day.

Another matter of specific note is that the adjudicator's decision is still valid if it is issued after the time allowed. Unfortunately, there is no indication of any time restriction on this and one wonders where this leaves the parties if the adjudicator still has not produced his decision weeks after the original due date. It must be noted that there is no requirement that the adjudicator performs within the timescales in the appointment associated with this form.

The last of the matters covered by this clause relates to the allocation of not only the adjudicator's fees and expenses as between the parties but also the costs of the parties themselves. This is unusual as it is generally the case that the parties to an adjudication bear their own costs whatever the result. If there is such an agreement the court will enforce it but this more usually occurs where both parties have claimed their own costs during the course of the adjudication, and an agreement that such costs are recoverable is deemed to have been reached.

- (6) The adjudicator may take the initiative in ascertaining the facts and the law, and the Employer and the Contractor shall enable him to do so. In coming to a decision the adjudicator shall have regard to how far the parties have complied with any procedures in the Contract relevant to the matter in dispute and to what extent each of them has acted promptly, reasonably and in good faith. The adjudicator shall act independently and impartially, as an expert adjudicator and not as an arbitrator. The adjudicator shall have all the powers of an arbitrator acting in accordance with Condition 60 (Arbitration and choice of law), and the fullest possible powers to assess and award damages and legal and other costs and expenses; and, in addition to, and notwithstanding the terms of, Condition 47 (Finance charges), to award interest. In particular, without limitation, the adjudicator may award simple or compound interest from such dates, at such rates and with such rests as he considers meet the justice of the case –
  - (a) on the whole or part of any amount awarded by him, in respect of any period up to the date of the award;
  - (b) on the whole or part of any amount claimed in the adjudication proceedings and outstanding at the commencement of the adjudication proceedings but paid before the award was made, in respect of any period up to the date of payment;and may award such interest from the date of the award (or any later date) until payment, on the outstanding amount of any award (including any award of interest and any award of damages and legal and other costs and expenses).

This sub-clause adds some notable points to the required provision that the adjudicator may take the initiative in ascertaining the facts and the law. It uses the term 'expert adjudicator' and identifies the powers that the adjudicator enjoys. One small criticism is the use of the



word 'award' in the final paragraph. This should in the authors' view be 'decision' for the sake of consistency.

- (7) Subject to the proviso to Condition 60(1) (Arbitration and choice of law), the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the Contract provides for arbitration, or the parties otherwise agree to arbitration), or by agreement: and the parties do not agree to accept the decision of the adjudicator as finally determining the dispute.
- (8) In addition to his other powers, the adjudicator shall have power to vary or overrule any decision previously made under the Contract by the Employer, the PM or the QS, other than decisions in respect of the following matters—
  - (a) decisions by or on behalf of the Employer under Condition 26 (Site admittance);
  - (b) decisions by or on behalf of the Employer under Condition 27 (Passes) (if applicable);
  - (c) provided that the circumstances mentioned in Condition 56(1)(a) or (b) (Determination by Employer) have arisen, and have not been waived by the Employer, decisions of the Employer to give notice under Condition 56(1)(a), or to give notice of determination under Condition 56(1);
  - (d) decisions or deemed decisions of the Employer to determine the Contract under Condition 56(8) (Determination by Employer);
  - (e) provided that the circumstances mentioned in Condition 58A(1) (Determination following suspension of Works) have arisen, and have not been waived by the Employer, decisions of the Employer to give notice of determination under Condition 58A(1); and
  - (f) decisions of the Employer under Condition 61 (Assignment).

In relation to decisions in respect of those matters, the Contractors's [sic] only remedy against the Employer shall be financial compensation.

The exclusions in this sub-clause appear to run in the face of the statutory requirement that any dispute is adjudicable. It will however be noted that all the matters covered by this clause relate to decisions of the Employer, the PM or the QS that are expressed by the contract as being final and in those terms these exclusions would be the same if the Scheme applied. The Scheme by paragraph 20(a) precludes the opening up of a decision or certificate which the contract states is final and conclusive. It does not however prevent a dispute of this nature from being adjudicated, merely restricting the remedy to financial compensation should the adjudicator be persuaded that the matter has adversely affected the contractor.

- (9) Notwithstanding Condition 90 (Arbitration and choice of law), the Employer and the Contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgment and enforcement in respect of all such decisions.

The immediate compliance term of this sub-clause clarifies the binding nature of the decision, and the points on summary judgment and enforcement clarify any possible misapprehensions that may exist about these matters.

- (10) If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision. Such requests may only be made within 14 Days of the decision being notified to the requesting party.

This is a unique method of approaching reasons and may well cause some confusion. The adjudicator notifies the parties of his decision. A party may request reasons for 14 days thereafter. It seems that this clause prevents any earlier request for reasons but common sense suggests that if an earlier request is made there is no prejudice of any sort and the procedure must be eased if this is done. Should reasons be requested for the first time after the decision has been notified the adjudicator will be embarrassed unless he has them to

hand already. If he does not do this, he may find that the request comes at an inconvenient time and the reasons take a considerable time to produce. This is not really a problem for the adjudicator as it is only the request that has to be made within the 14 day period, not the giving of the reasons.

If this provision is drafted in the hope of reducing the adjudicator's fee we do not believe that it works. We suggest that an adjudicator proceeding under this provision should enquire of the parties as to whether they want reasons at an early stage or, alternatively, if he is so minded, tell them that he intends to provide reasons unless they both agree that he should not.

- (11) 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. Any employee or agent of the adjudicator is similarly protected from liability.

This is the standard immunity provision.

### **Association of Consulting Engineers**

The Association of Consulting Engineers (ACE) has published the 2nd edition (1998) of the ACE Conditions of Engagement 1995.

The ACE is extremely economical in its use of words, with no more than two clauses within the section entitled 'Disputes and Differences'. The first of these, clause 9.1, relates to an encouragement to mediate. The second, clause 9.2, provides for the express incorporation of the Construction Industry Council Model Adjudication Procedure into the Consulting Engineer's Agreement. The CIC Procedure, which is considered in detail elsewhere, itself contains all the requirements of the Act and by this incorporation the Engineer's Agreement is compliant with the Act.

Having achieved compliance with the Act in this way there is no need for anything else.

### **The Institution of Chemical Engineers Forms of Contract 2001**

The IChemE publishes the following forms of contract: the Red Book for lump sum contracts; the Green Book for reimburseable contracts; the Yellow Book for subcontracts; the Brown Book for subcontracts for civil engineering works; and the Orange Book for minor works. Each of these contracts includes adjudication provisions which are prefaced as follows:

This Clause 46 shall only apply to disputes under a construction contract as defined in the Housing Grants, Construction and Regeneration Act 1996 or any amendment or re-enactment thereof.

Clause 46 must be put into the context of the submissions made by the IChemE and others involved in the process industries when the Act was under consideration, that their contracts were of a nature that made adjudication an unsuitable procedure and that those industries should be exempted from the statutory right to adjudication. The success of this lobbying is reflected in section 105 of the Act. It is also of interest to note the preface to the IChemE Adjudication Rules, the Grey Book, which includes what appears to be an apology for adjudication. This sets out a brief history of the development of the process and puts forward the suggestion that adjudication is only suitable for disputes of a relatively minor nature. This preface also identifies the fact that works relating to specific activities in the

'process industries' are excluded from the definition of construction contracts, the main thrust of this point being set out in the preface in terms that 'most disputes will be complex, firstly because of the sheer size of potential disputes (possibly involving massive quantities of information/documentation) and secondly because of the multi-disciplinary nature of the process industries'.

This clause states very clearly that the adjudication procedures apply only to contracts to which the Act applies and confirms that there is no unilateral right to adjudication under the IChemE forms unless the work from which the dispute arises comes within the provisions of the Act. This does not of course mean that the parties cannot by agreement adjudicate a dispute over matters otherwise excluded by section 105 if they so wish but it does prevent the use of a unilateral application for the appointment of an adjudicator as a tactical ploy to move a dispute forward quickly. Our experience in the construction industry suggests that the use of such tactical ploys has been one of the great successes of adjudication and that perhaps parts of the process industries have missed out as a result of section 105 but we understand that this is not perceived to be a problem. That said, in our view the IChemE has made a superb job of addressing the procedural aspects of adjudication in these rules.

### *Adjudication rules and procedures*

The Act does no more than require that the contract includes the eight compliance points that have been discussed in earlier chapters. It requires nothing more. As far as the procedure for the adjudication is concerned, provided that the contract includes these points, all the adjudicator has to do is to reach his decision within 28 days of referral or any extended period and act impartially.

In such a case the Scheme would not apply and the procedure for the adjudication will be totally at the discretion of the adjudicator. In practice, however, this is unlikely to happen. There are two common scenarios. The first is that the parties may know nothing about, or decide to ignore, the statutory requirement for adjudication, in which case their contract will not comply with the requirements of the Act and the Scheme will apply. Alternatively, they will use some standard form or write their own ad hoc contract which will have compliant adjudication provisions within it. These may have pet 'bolt-ons' included by the party who originally drafts the contract terms (which will need agreement by the other) or it will include the Scheme as the procedure for any adjudication.

The adjudicator will naturally have to comply with the requirements of the contract and any rules in order to fulfil the obligations that he takes on when accepting the position of adjudicator.

At the time of writing the following bodies have published adjudication rules:

- The Technology and Construction Solicitors Association (2002 Version 2.0 Procedural Rules for Adjudication)
- The Construction Industry Council (Model Adjudication Procedure Third Edition)
- The Centre for Dispute Resolution (2002 edition)
- The Institution of Civil Engineers (ICE Adjudication Procedure 1997)
- The Institution of Chemical Engineers (Adjudication rules Second edition 2001).

The JCT has decided that it will not produce any adjudication rules, nor will it adopt any of the rules produced by other bodies. Instead it has produced clause 41A in JCT 80, with similar clauses in its other forms, which deal with adjudication and include all procedural matters, running to nearly three pages of closely spaced type. There is some indication at the

time of writing that the JCT may be considering moving to the position of using the Scheme as the adjudication rules for its contracts.

The Government Construction Contracts (GC/Works 1998), which comprise ten separate publications, do not include any rules.

The Engineering and Construction Contract (ECC) also includes all the procedural matters that the drafters consider to be necessary in the contract clauses.

The Scheme has been looked at in detail elsewhere. The Scheme is itself a set of rules for the conduct of adjudication for parties to contracts, for ANBs and for adjudicators. The principles of the Scheme and of the various rules are very similar. There are certain differences, however, and set out below in tabular form is a comparison of the points of similarity and difference between the Scheme and the various rules in respect of those areas that the authors consider to be of particular interest. The reader should refer to the text of the various rules in order to make a full comparison of all the provisions. The nature of similar provisions, if any, in the contracts that do not rely on rules is also noted.

### ***Comparison of the provisions***

(The DSC/C and DOM/1&2 follow the procedures in the JCT forms)

#### **The notice of adjudication**

The Scheme	The nature and a brief description of the dispute and of the parties involved. Details of when and where the dispute has arisen. The nature of the redress which is sought. The names and addresses of the parties.
The CIC Procedure 3rd edition	A brief statement of the issue or issues which it is desired to refer and the redress sought.
The TeCSA Rules 2002 version 2.0	A written notice identifying in general terms the dispute in respect of which adjudication is required.
The ICE Procedure	The details and date of the contract between the parties. The issues which the adjudicator is being asked to decide. Details of the nature and extent of redress sought.
The CEDR Rules (2002)	The names and addresses and full contact details of the parties and any representatives. A copy of the relevant provisions of the contract providing for adjudication. Brief details of the dispute. Details of the remedy sought.
JCT Standard Forms	Notice must briefly identify the dispute or difference.
GC Works	No requirements.
Engineering and Construction Contract	No requirement as to the nature of the notice.
The IChemE Rules	Give notice with details of the matter in dispute.

#### **The nomination of the adjudicator**

The various adjudication rules, the contractual adjudication procedures and the Scheme comply with the requirements of the Act by including a timetable with the intention of referring the dispute to the adjudicator within seven days of the notice of adjudication being given.

**The referral notice**

The Scheme	A reference in writing to be accompanied by copies of or relevant extracts from the construction contract. Such other documents as the referring party intends to rely upon.
The CIC Procedure 3rd edition	A statement of case. A copy of the notice of adjudication. The contract. Details of the circumstances giving rise to the dispute. The reasons why it is entitled to the redress sought. The evidence upon which it relies. The statement of case shall be confined to the issues in the Notice (of adjudication). (The parties can agree to include additional matters subsequently)
The TeCSA Rules 2002 version 2.0	No requirements as to a referral notice.
The ICE Procedure	A copy of the notice of adjudication. A copy of the adjudication provision in the contract. The information upon which the referring party relies including supporting documents.
The CEDR Rules (2002)	A concise statement of case including a copy of the notice of adjudication. A copy of the conditions of contract and other provisions in the contract on which the referring party intends to rely. Details of the circumstances giving rise to the dispute. The reasons for entitlement to the remedy sought. The evidence, including relevant documentation, in support of its case.
JCT Standard Forms	Particulars of the dispute or difference. Summary of the contentions on which the referring party relies. A statement of the relief or remedy which is sought. Any material the referring party wishes the adjudicator to consider.
GC Works	Principal facts and arguments relating to the dispute. Copies of all relevant documents in the possession of the party giving the notice.
Engineering and Construction Contract	Information to be considered by the adjudicator.
The IChemE Rules	Adjudicator directs the parties each to provide a statement within a specified time of his appointment which shall be reasonable. A view of the dispute in summary and detail, with supporting documentary evidence and a copy of the contract. Names and organisational position of representatives at any meeting. Address of any place which the adjudicator may need to visit. The name and address etc. of anyone the party intends shall present any evidence or opinion and the subject to be covered by each.

**The date of referral**

The Scheme	Not later than seven days after the notice of adjudication.
The CIC Procedure 3rd edition	The date the adjudicator receives the statement of case.
The TeCSA Rules 2002 version 2.0	The date the adjudicator receives the Referral Notice.
The ICE Procedure	The date the adjudicator receives the documents.
The CEDR Rules (2002)	The date on which both the adjudicator and the other party receive the concise statement of case
JCT Standard Forms	Upon the adjudicator receiving the referral. Specific provisions as to this receipt are given and as far as postal delivery is concerned this is deemed to have taken place two days after posting, Sundays and public holidays excepted, subject to proof to the contrary.
GC Works	The date the adjudicator receives the referral notice.
Engineering and Construction Contract	Within seven days of notice of adjudication.
The IChemE Rules	Not specified.

**Adjudicator's agreement**

The Scheme	No agreement form.
The CIC Procedure 3rd edition	Includes agreement form.
The TeCSA Rules 2002 version 2.0	No agreement form.
The ICE Procedure	Includes agreement form.
The CEDR Rules (2002)	No agreement form.
JCT Standard Forms	Two forms, for use either on letting the contract or when the dispute arises.
GC Works	Form intended for use at time of letting contract.
Engineering and Construction Contract	Adjudicator's contract. One for use when Scheme applies, the other for when it does not.
The IChemE Rules	Draft letter provided.

**Adjudicator's fees**

The Scheme	Adjudicator may determine and apportion between the parties.
The CIC Procedure 3rd edition	Allowed reasonable fees and expenses. Adjudicator may direct who pays. (If he does not – equal shares.) Not entitled to fees and expenses if decision late and replacement adjudicator appointed. (Other than the cost of legal or technical advice – if the parties have received that advice.)
The TeCSA Rules 2002 version 2.0	Adjudicator may not require advance payment or security. Adjudicator may direct who pays. Not to exceed £1,250.00 per day plus expenses plus VAT.
The ICE Procedure	Adjudicator may direct who pays. If no direction parties pay in equal shares.
The CEDR Rules (2002)	Adjudicator has discretion to apportion liability.
JCT Standard Forms	Adjudicator directs how apportioned.
GC Works	Adjudicator directs how apportioned.
Engineering and Construction Contract	Equal shares unless otherwise agreed (if adjudicator's contract applies).
The IChemE Rules	Payable in equal parts.



**Adjudicator's jurisdiction**

The Scheme	No provision for adjudicator to determine own jurisdiction. Adjudicator may, with consent of all parties, adjudicate at the same time on one or more disputes under the same contract. Adjudicator may, with consent of all parties, adjudicate at the same time on related disputes under the different contracts.
The CIC Procedure 3rd edition	No provision for adjudicator to determine own jurisdiction.
The TeCSA Rules 2002 version 2.0	Adjudicator may decide upon his own substantive jurisdiction. More than one notice of adjudication may be given in respect of disputes arising out of the same contract.
The ICE Procedure	No provision for adjudicator to determine own jurisdiction.
The CEDR Rules (2002)	No provision for adjudicator to determine own jurisdiction.
JCT Standard Forms	No provision for adjudicator to determine own jurisdiction.
GC Works	No provision for adjudicator to determine own jurisdiction.
Engineering and Construction Contract	No provision for adjudicator to determine own jurisdiction.
The IChemE Rules	No provision for adjudicator to determine own jurisdiction.

**The parties' costs**

The Scheme	Silent.
The CIC Procedure 3rd edition	Parties bear own costs.
The TeCSA Rules 2002 version 2.0	Adjudicator can award costs to the successful party if the parties so agree. Notwithstanding anything in the contract to the contrary the adjudicator has no jurisdiction to require a party which referred the dispute to adjudication to pay the costs of any other party solely by reason of having referred the dispute to adjudication.
The ICE Procedure	Parties bear own costs.
The CEDR Rules (2002)	Parties bear own costs.
JCT Standard Forms	Parties bear own costs save that the adjudicator may direct who should pay the cost of any test or opening up procedure.
GC Works	Adjudicator can award costs against a party.
Engineering and Construction Contract	Silent.
The IChemE Rules	Parties bear own costs.

**Adjudicator's ability to resign**

The Scheme	At any time. Must resign where dispute has already been referred to adjudication and decision 'taken'.
The CIC Procedure 3rd edition	At any time upon giving notice.
The TeCSA Rules 2002 version 2.0	Silent.
The ICE Procedure	Silent.
The CEDR Rules (2002)	Adjudicator must resign if: The dispute already referred to adjudication and a decision made. The adjudicator is not competent to decide because the nature of the dispute is significantly different to that in the notice of adjudication. The adjudicator becomes unable to give a decision by the due date.
JCT Standard Forms	Silent.
GC Works	Silent.
Engineering and Construction Contract	If adjudicator's contract completed, may terminate if conflict of interest, unable to act, not been paid within five weeks of date by which payment should have been made.
The IChemE Rules	Silent.

**Termination by parties**

The Scheme	At any time by agreement.
The CIC Procedure 3rd edition	Silent.
The TeCSA Rules 2002 version 2.0	Silent, but Chairman of TeCSA may replace one adjudicator with another if and when it appears necessary for him to do so.
The ICE Procedure	Silent.
The CEDR Rules (2002)	Silent.
JCT Standard Forms	By agreement at any time.
GC Works	Silent.
Engineering and Construction Contract	If adjudicator's contract completed, by agreement at any time.
The IChemE Rules	Silent.

**Joinder provisions**

The Scheme	Adjudicator may, with consent of all parties.
The CIC Procedure 3rd edition	Subject to agreement of adjudicator and existing and additional parties.
The TeCSA Rules 2002 version 2.0	No joinder provisions.
The ICE Procedure	Subject to agreement of adjudicator and existing and additional parties.
The CEDR Rules (2002)	Subject to agreement of adjudicator and existing and additional parties.
JCT Standard Forms	No joinder provisions.
GC Works	No joinder provisions.
Engineering and Construction Contract	No joinder provisions.
The IChemE Rules	No joinder provisions.

**Procedure and timetable (all within the 28-day limit)**

The Scheme	Adjudicator decides.
The CIC Procedure 3rd edition	Adjudicator decides. Subject to any limitation of the contract or the Act.
The TeCSA Rules 2002 version 2.0	Adjudicator decides.
The ICE Procedure	Adjudicator decides.
The CEDR Rules (2002)	Adjudicator decides timetable and procedure. Adjudicator may not take into consideration any statement unless it has been made available to the parties for consideration.
JCT Standard Forms	Adjudicator decides. Responding party may respond within seven days
GC Works	Procedure set. PM, QS and other party may make submissions within seven days of notice of referral. Other than the required provision that the adjudicator may take initiative to ascertain the facts and the law, there are no other provisions.
Engineering and Construction Contract	Procedure set. Both parties have 14 days after referral to provide further information. Other than the required provision that the adjudicator may take initiative to ascertain the facts and the law there are no other provisions.
The IChemE Rules	Adjudicator decides subject to any limitation on the timetable in the contract or the Act.

**Power of adjudicator to open up, review and revise**

The Scheme	Any decision or certificate unless stated to be final and conclusive.
The CIC Procedure 3rd edition	Any certificate, decision, direction, instruction, notice, opinion, requirement or valuation made in relation to the contract.
The TeCSA Rules 2002 version 2.0	Any certificate or other things issued or made pursuant to the contract as would an arbitrator and/or a court.
The ICE Procedure	Any decision, opinion, instruction, direction, certificate or valuation made under or in connection with the contract and which is relevant to the dispute.
The CEDR Rules (2002)	Any certificate, decision, direction, instruction, notice, requirement or valuation made under the contract except where the contract precludes this.
JCT Standard Forms	Any certificate, opinion, decision, requirement or notice as if no such had been issued, given or made.
GC Works	Adjudicator has all the powers of an arbitrator. In certain defined areas the adjudicator cannot vary or overrule decisions made by the employer, project manager or quantity surveyor, the contractor's only remedy being financial compensation.
Engineering and Construction Contract	Silent.
The IChemE Rules	Adjudicator may open up, review and revise any decision taken (other than that of an adjudicator unless agreed by both parties) or certificate given under or in connection with the contract and which is relevant to the dispute unless the contract states that the decision or certificate is final and conclusive.

**Expert assistance**

The Scheme	The parties must agree.
The CIC Procedure 3rd edition	At discretion of the adjudicator provided he notifies the parties first.
The TeCSA Rules 2002 version 2.0	One party must consent or request.
The ICE Procedure	At discretion of adjudicator provided he notifies the parties.
The CEDR Rules (2002)	Parties must be informed beforehand with reasons.
JCT Standard Forms	On prior notice to parties.
GC Works	No prior notice needed.
Engineering and Construction Contract	If adjudicator's contract completed. Adjudicator may obtain help. No notice needed.
The IChemE Rules	After prior notice and where possible an indication of likely costs.

**Matters for decision**

The Scheme	The matters in dispute and any other matters that the parties agree should be within the scope of the adjudication or which are matters that the adjudicator considers are necessarily connected with the dispute.
The CIC Procedure 3rd edition	The matters in the notice of adjudication and other matters which the parties and the adjudicator agree. (But the statement of case must be limited to the matters included in the notice.)
The TeCSA Rules 2002 version 2.0	The matters identified in the notice of adjudication, any further matters which all parties agree should be within the scope of the adjudication and any further matters that the adjudicator determines must be included to make the adjudication effective and/or meaningful.
The ICE Procedure	The matters in the notice of adjudication and any other matters which the parties and the adjudicator agree shall be within the scope.
The CEDR Rules (2002)	The adjudicator shall decide the dispute and any other matters which the adjudicator determines should be taken into account in deciding the dispute.
JCT Standard Forms	The dispute.
GC Works	The dispute.
Engineering and Construction Contract	The dispute
The IChemE Rules	The matters in the notice of adjudication together with any other matters which the parties and the adjudicator agree should be within the scope of the adjudication.

**Method of decision**

The Scheme	In accordance with the applicable law in relation to the contract.
The CIC Procedure 3rd edition	In accordance with the law of the contract.
The TeCSA Rules 2002 version 2.0	Wherever possible to reflect the parties' legal entitlements. Where this is not possible the decision shall represent a fair and reasonable view in light of the facts and law insofar as they have been ascertained by the adjudicator.
The ICE Procedure	Silent.
The CEDR Rules (2002)	The Rules are governed by English Law.
JCT Standard Forms	Silent.
GC Works	The law of the contract is in the adjudicator's agreement. Official Secrets Act applies. Atomic Energy Act may apply.
Engineering and Construction Contract	If adjudicator's contract completed. In accordance with the law of the contract. Contract itself is silent.
The IChemE Rules	Silent.

**Reasons**

The Scheme	If required by the parties.
The CIC Procedure 3rd edition	Adjudicator required to give reasons unless parties agree otherwise.
The TeCSA Rules 2002 version 2.0	If any or all parties so request within seven days of the Referral. If requested by one party reasons shall be delivered to all parties.
The ICE Procedure	Adjudicator shall not be required to give reasons.
The CEDR Rules (2002)	Adjudicator shall give reasons unless the parties agree to the contrary.
JCT Standard Forms	Adjudicator not obliged to give reasons.
GC Works	If requested by a party.
Engineering and Construction Contract	Reasons to be given.
The IChemE Rules	Reasons to be given unless otherwise agreed by the parties.



**Status of decision if not reached in 28 days or any extended period**

The Scheme	Silent.
The CIC Procedure 3rd edition	Effective if reached before the referral of the dispute to any replacement adjudicator but not otherwise.
The TeCSA Rules 2002 version 2.0	Silent.
The ICE Procedure	Effective if reached before the referral of the dispute to any replacement adjudicator.
The CEDR Rules (2002)	Silent.
JCT Standard Forms	Silent.
GC Works	Valid if issued late. No time limit.
Engineering and Construction Contract	Silent.
The IChemE Rules	A party may give adjudicator and other party seven days' notice of intention to refer the dispute to another adjudicator. Adjudicator's decision valid if given within the seven-day notice period. If decision notified after expiry of seven-day notice period it is not valid.

**Adjudicator's lien**

The Scheme	Adjudicator must deliver decision as soon as possible after it is reached.
The CIC Procedure 3rd edition	Adjudicator shall reach his decision within the time limits in paragraph 16. (The 2nd edition provision that the adjudicator is not required to release decision until paid is now deleted but has not been replaced with any requirement for delivery of the decision.)
The TeCSA Rules 2002 version 2.0	Silent. Adjudicator not required to do any more than reach a decision in 28 days.
The ICE Procedure	Adjudicator need not release decision until paid if advance notice given.
The CEDR Rules (2002)	Adjudicator shall communicate the decision in writing to the parties by the 28th day or any extended date.
JCT Standard Forms	No lien. Adjudicator must send decision to parties.
GC Works	No lien. Adjudicator must notify decision to parties not later than 28 days from receipt of referral.
Engineering and Construction Contract	No lien but no requirement to do more than reach a decision in 28 days.
The IChemE Rules	Adjudicator may apply a lien if he so notifies the parties up to seven days before the decision is due.

**Correction of decision**

The Scheme	Silent.
The CIC Procedure 3rd edition	Correction of any error arising from an accidental error or omission or to clarify or remove any ambiguity. The adjudicator has five days after the delivery of his decision to the parties to correct errors.
The TeCSA Rules 2002 version 2.0	The adjudicator may on his own initiative or on application by a party, correct his decision. Parties have up to five days to apply for a correction Adjudicator to make correction as soon after application received as possible or, if made on the adjudicator's own initiative, as soon as possible after he becomes aware of the need to make a correction.
The ICE Procedure	The adjudicator may correct any clerical mistake, error or ambiguity. Adjudicator has up to 14 days to correct his decision on his own initiative. Parties have 14 days to request a correction, adjudicator then has seven days to make the correction.
The CEDR Rules (2002)	The adjudicator has five days after the communication of his decision to the parties to correct errors.
JCT Standard Forms	Silent.
GC Works	Silent.
Engineering and Construction Contract	Silent.
The IChemE Rules	Silent.

**Destruction of documents**

The Scheme	Silent.
The CIC Procedure 3rd edition	The adjudicator may destroy the documents after six months provided that he enquires beforehand as to whether the parties want them returned.
The TeCSA Rules 2002 version 2.0	Silent.
The ICE Procedure	The adjudicator shall inform the parties if he intends to destroy the documents which have been sent to him in relation to the adjudication and he is required to retain the documents for a further (unspecified) period at the request of either party.
The CEDR Rules (2002)	Silent.
JCT Standard Forms	Silent.
GC Works	Silent.
Engineering and Construction Contract	Adjudicator keeps documents until termination.
The IChemE Rules	Silent.