
Chapter 8

Adjudicators' Agreements

General introduction

No-one with any sense who enters into any form of contract does so without having something in writing to record what has been agreed. They need a framework to govern the rights and obligations that they receive and undertake by entering into the contract. Memories can be very short when troubles arise and a written agreement will give them something to refer to if the nature or detail of the agreement is questioned and needs to be confirmed.

The parties to a construction contract who are involved in adjudication and the adjudicator himself are in a contract. The adjudicator agrees with the parties that he will adjudicate. The terms of that contract will ideally be recorded formally in order for the rights and obligations of the parties themselves and of the adjudicator to be readily ascertainable.

The best solution is for the parties to the construction contract and the adjudicator to enter into a formal adjudication agreement, which will define with precision what each party to that agreement has to do and can expect the other to do. The commonly used standard forms of contract provide such an agreement; the Scheme for Construction Contracts does not.

There are two types of agreement: one that envisages the agreement being entered into with a named adjudicator at the time that the construction contract is originally formed, and one that is entered into after the dispute has arisen. The Joint Contracts Tribunal (JCT) when it produced Amendment 18 in 1998 proposed two separate, albeit very similar, forms for these two situations, but when the 1998 editions of the various JCT contracts were published shortly after, they did not include the option to name the adjudicator in the contract. The other bodies that have produced formal agreements have only produced one and this can be used or adapted for either situation. The Institution of Civil Engineers (ICE) has two separate families of contract, the ICE Forms of Contract and the NEC Engineering and Construction Contract. In the NEC there are also two separate forms but the difference between these does not relate to the time of appointment of the adjudicator (see later in this chapter).

The realities of construction contracts are, however, that there will be a significant number of occasions when a formal adjudicator's agreement is not completed. The construction contract may not be in a standard form or the standard form of agreement that accompanies a standard form contract may not be completed. The appointment may result from a nomination under the Scheme that has no accompanying adjudicator's agreement. In these instances the parties and the adjudicator have to fall back upon what can be interpreted as being the contract between them. In the main these will be terms that are either implied by law or expressly applicable because of the way that the adjudicator's appointment has been procured.

This being the case, in this chapter we look first at what the parties and the adjudicator should be looking for in respect of the terms that will apply to the agreement (contract) between them. We then look at the terms that govern such an agreement where there is

nothing that sets out in any detail the agreement between the adjudicator and the parties to the construction contract. Finally, we consider the terms that apply to the agreement where the formal adjudication agreements published by contract writing bodies and others are utilised.

The terms of an adjudicator's agreement

As with most agreements there is a tension between the parties, each wanting to obtain terms that they see as being most favourable to themselves while accepting that there will have to be some element of compromise if agreement is to be reached. This is precisely the situation where the parties to a construction contract have decided that it is in their mutual interest to agree an adjudicator. They will see the agreement from their perspective, the adjudicator from his.

There are two principal matters that are most likely to be in the forefront of the minds of the parties to the construction contract. The first and most important will be 'can he do the job?' This will have a supplementary element, 'will he perform in the 28 days allowed?' The second question will be 'how much will it all cost?' and this will probably have two main supplementary points, 'what is the adjudicator's fee?' and 'what other matters will the adjudicator propose for inclusion in the terms of his agreement?' The parties may also wonder if a ceiling can be set to the amount that they will have to pay to the adjudicator.

The adjudicator will probably have much the same thoughts in his mind: 'can I do the job?', 'have I the time available?' and 'what terms should I seek?'

In respect of the third of these points the adjudicator will have an ideal set of terms that he will provide to the parties to the construction contract on receiving their enquiry. The parties will often seek to negotiate these terms and this then becomes the normal situation of a pre-contract negotiation. The principal difference from what might be described as 'normal' contractual negotiations is that there is a pressure, possibly from both parties and certainly from the party which sees the result of the adjudication as being the receipt of further payment, to get on with it and it is incumbent on all involved to reach agreement pretty quickly otherwise that party is likely to get fed up with the delay and go off to an ANB for a nomination. It will then probably be the case that the nominated adjudicator states his terms and proceeds with the adjudication without agreeing them. The parties then lose their opportunity to negotiate and their only fall back is to challenge the reasonableness of the adjudicator's charges if they consider them to be excessive.

The principal matter that the adjudicator will want to agree is his fee. Except in the case of adjudications where the issues are limited and clearly identifiable at this stage, the adjudicator is unlikely to be willing to accept a lump sum arrangement as this will put him totally at the mercy of the way that the parties conduct themselves during the course of the adjudication.

If the adjudicator is registered for VAT he will want to be sure that he can recover this on top of his basic fee.

He will also wish to see as many as possible of the following matters covered by his agreement with the parties:

- that he can recover any expenses (and probably the nature of those expenses such as a mileage rate for the use of his car for site visits for example) that he incurs while carrying out the adjudication, including the cost of any legal or other advice that he might take;
- that there is no dispute, if he has to travel to a meeting or a site, as to whether he can charge for his time spent travelling;

- whether he can, if he so wishes, apply a lien to his decision and refuse to release it until he gets paid;
- the nature of the liability of the parties to him in respect of his fee (is it joint and several?);
- the nature of his liability to the parties for his actions as adjudicator (his immunity);
- whether the parties are prepared to offer an indemnity against third party action in connection with his activities as adjudicator; and
- what obligations will be placed upon him by implication due to his acceptance of the position of adjudicator under the particular construction contract between the parties.

Both the parties and the adjudicator will, if they think about it, also probably want to know what happens if the adjudicator fails to perform.

The agreement between the adjudicator and the parties

The agreement between the adjudicator and the parties will preferably be in writing. It may be, however, where there is no reference to any published adjudicator's agreement that the time pressures are such that the adjudicator has to proceed without anything in writing from the parties other than the nomination and the referral notice. In this situation the provisions of the contract between the parties will govern the adjudicator's own agreement with the parties either as implied or express terms. If the contract does not comply with the Act, the Scheme will apply and the requirements of the Scheme will govern the agreement between the adjudicator and the parties. The contract may, however, have been drafted to do no more than comply with the Act. In that event the requirements placed on the adjudicator are those in the Act, which are set out in the compliant construction contract.

There is a certain difficulty here in that the construction contract will, either specifically or statutorily, include certain provisions that relate to the adjudicator but to which the adjudicator is not a party. The construction contract may also include other terms that seek to place further requirements upon the appointed adjudicator. How do the parties ensure that the adjudicator complies? The answer is of course that they should enter into a written agreement.

But this will not always be the case. No adjudicator should, however, ever agree to adjudicate without a sight of the construction contract, if for no other reason than to identify whether he is adjudicating under the terms of the contract or the Scheme. Having been made aware of the terms of the construction contract it is our view that such provisions must, at the very least, be implied into the adjudicator's agreement with the parties. If it is the Scheme that applies, the provisions of the Scheme will equally, as a minimum, be implied.

It is also quite possible that the terms will in fact be express terms on the basis that the adjudicator will have seen the contract or be aware that his appointment as adjudicator arises under the Scheme and he will be deemed to have accepted the task of adjudicator in the full knowledge of those requirements.

The most likely situation where there will be no standard adjudicator's agreement will be in the case of a construction contract that does not comply with the Act. It may be, in that situation, that the parties have agreed to go to adjudication, have thrashed out a form of adjudicator's agreement between themselves and possibly with an agreed adjudicator, but it is more than likely that nothing of the sort will have happened.

It is far more likely that the adjudicator will have been put in place by a unilateral application by a party to an adjudicator nominating body (ANB) and his subsequent nomination by that ANB. In that case the terms of the agreement between the adjudicator

and the parties are likely to be those implied as a result of the nomination of the adjudicator by the ANB and those that are either impliedly or expressly incorporated from the contract between the parties or, as in all likelihood where the Scheme will apply, from the Scheme itself.

Before we look at the terms that the adjudicator's agreement will include as a result of the Scheme, it is worth looking at the rights and duties of the parties and the adjudicator in the situation where the contract complies with the Act but includes nothing more concerning adjudication.

On the principles discussed above, the requirements of the Act will govern the adjudicator's agreement. These terms will be:

- The parties have a right to a decision within 28 days.
- The adjudicator has a duty to reach that decision within 28 days.
- The parties have a right to extend that period by agreement (after the dispute has been referred).
- The adjudicator has a right to extend the period by up to 14 days with the consent of the referring party.
- The adjudicator has a duty to act impartially.
- The parties cannot hold the adjudicator liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator save in the case of bad faith. Any employee or agent of the adjudicator is similarly protected.

The above list relates only to the rights and duties set out in the agreement between the adjudicator and the parties, not to the contract between the parties themselves.

It must be noted that the Act is silent on fees and the adjudicator's right to payment will arise in common law as an implied term that he has a right to a reasonable fee.

For the purpose of comparison, the subject of a reasonable fee for arbitrators is discussed in *Commercial Arbitration*¹ (Mustill & Boyd). The parameters set out there are as follows:

- The arbitrator starts out by setting a daily or hourly rate that takes into account his skill, qualifications and status.
- He then multiplies this rate by the length of time involved.
- The arbitrator then considers if the resulting figure needs adjustment in respect of any of the following factors:
 - the complexity of the dispute and the difficulty or novelty of the questions involved;
 - the skill, specialised knowledge and responsibility required of him;
 - the number and importance of the documents studied;
 - the importance of the dispute to the parties; and
 - the value of the property involved or the amount of the sum in issue.

There is no reason why similar parameters should not apply to adjudicators but, and it is a big but, the adjudicator should always bear in mind that he will generally be utilising the skills that he uses in his general day-to-day practice. We can see no reason for any adjudicator to seek to take advantage of the system. We are strongly of the view that the rates for adjudicating should not be set at a level that is significantly different from the usual hourly rates attained by an individual of the adjudicator's position and status within his profession.

One general point on adjudicators' fees relates to the liability of the parties for that fee. Many adjudication agreements, contractual adjudication clauses, adjudication rules and the

¹ *Commercial Arbitration*, 2nd Edition, Mustill & Boyd, Butterworths, 1989, at p. 237.

Scheme, generally clarify this position by stating that the liability for the adjudicator's fee is joint and several. This means that each party is liable for the whole fee in the event that the other party fails to pay part or the whole fee. It is worth noting that even where the procedure for the adjudication requires that the adjudicator sets out in his decision who is responsible for paying his fee, until that fee is paid there is still a joint and several liability to the adjudicator until the fee is paid in full.

Where there is nothing in the adjudication agreement, contract or rules concerning the liability of the parties for the adjudicator's fees and expenses, the situation can only be governed by the common law (that is the law created by the courts). The problem is that there is as yet little common law relating to this aspect of adjudication.

As far as the liability for fees is concerned it is our view that the courts may well draw a parallel with arbitration before the 1996 Arbitration Act was brought into force. The 1950 and 1979 Arbitration Acts were silent on the nature of the parties' liability to the arbitrator and the courts had found that they were jointly liable. Mustill & Boyd cite *Crampton and Holt v. Ridley*² and *Brown v. Llandoverly*³, in support of joint liability. They go on to suggest that this liability is not only joint but joint and several.

There is some indication that the courts will approach liability for adjudicators' fees in accordance with the views set out in *Commercial Arbitration* even where there is no formal written agreement between the parties. It is the authors' experience that parties generally pay adjudicators' fees and the occasions when recourse to the courts has been necessary are thankfully few in proportion to the number of adjudications that have taken place, albeit almost every practising adjudicator will have his own story of difficulty in recovering fees. One of the authors has himself had experience of an action in the court to recover fees from a recalcitrant responding party where the losing referring party had gone bust and had failed to pay the adjudicator. In this case the court was prepared to accept the adjudicator's terms, which contained a statement that liability was joint and several, even though neither party had indicated acceptance of those terms.

Two matters relating to the fees of adjudicators have resulted in judgments: *Paul Jensen v. Staveley Industries*⁴ and *Stubbs Rich v. Tolley*⁵. In the former, the adjudicator found that he did not have jurisdiction and had to seek the court's aid in recovering his fee for the time he spent in reaching the conclusion that he had no jurisdiction. The second again related to the recovery of fees and the principal issue related to the amount that the adjudicator had charged. In this case the court considered an allegation that the hours charged were unreasonably excessive. Initially, when the adjudicator's fee was challenged on this basis, the adjudicator was required to pay them back. On appeal it was however found that the adjudicator's fees were something that did fall within the provision that 'The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his function as adjudicator unless the act or omission is in bad faith'. On this basis unless it can be shown that the adjudicator had acted in bad faith his fees are payable in full.

In most normal circumstances however the parties honour their commitment to the adjudicator and pay his fees within a reasonable time of the decision.

² *Crampton and Holt v. Ridley & Co* (1887) 20 QBD 48.

³ *Brown v. Llandoverly Terra Cotta etc. Co Ltd* (1909) 25 TLR 625.

⁴ *Paul Jensen Ltd v. Staveley Industries Plc* (27 September 2001).

⁵ *Stubbs Rich Architects v. W.H. Tolley & Son Limited* (8 August 2001).

Terms where the Scheme applies

There is no adjudicator's agreement produced to accompany the Scheme. The terms of the agreement between the parties and the adjudicator must, as discussed above, be those that are required of him by the Scheme. The rights and duties of the parties and of the adjudicator in respect of such an agreement are as follows:

- The adjudicator, if he is named in the contract, has the duty to indicate whether or not he is willing to act within two days of receiving a request to act. (If he is nominated by an ANB this duty will be a requirement placed upon him by the ANB in consideration of his being on their list. This arises from the implied undertaking of the ANB, when appointing under the Scheme, to only nominate adjudicators who will comply with the Scheme.)
- The adjudicator has the duty to operate as a natural person in his personal capacity.
- The adjudicator has the duty not to be an employee of any of the parties to the dispute.
- The adjudicator has the duty to declare any interest, financial or otherwise, in any matter relating to the dispute.
- The referring party has the duty to refer the dispute in writing (the 'referral notice') to the adjudicator within seven days of the date of the notice of adjudication and to send copies to every other party to the dispute.
- The adjudicator may, by agreement, adjudicate at the same time on one or more disputes under the same contract.
- The adjudicator may, by agreement, adjudicate at the same time on related disputes on different contracts.
- The adjudicator may resign at any time on notice to the parties.
- The adjudicator has the duty to resign when the dispute to which he is appointed is the same or substantially the same as one that has been previously referred to adjudication and a decision has been taken in that adjudication.
- The adjudicator may resign where he is not competent to decide the dispute because it varies significantly from the dispute that was referred to him. (Note that this relates only to the relationship between the actual dispute and the referral notice. If the dispute in the referral notice is significantly different from that described in the notice of adjudication there is no jurisdiction save in respect of that part of the referral that clearly relates to the notice of adjudication.) It is a matter of interpretation of individual circumstances as to what the term 'varies significantly' means.
- Where the adjudicator resigns because the dispute has already been adjudicated or it varies significantly from that described in the referral notice, he is entitled to reasonable fees and expenses.
- The parties have the right to agree to revoke the appointment of the adjudicator.
- Where the adjudicator's appointment is revoked, he is entitled to reasonable fees and expenses save where such revocation is due to the adjudicator's default or misconduct.
- The adjudicator has the duty to act impartially.
- The adjudicator has the duty to act in accordance with any relevant terms of the contract between the parties.
- The adjudicator has the duty to reach his decision in accordance with the applicable law in relation to the contract.
- The adjudicator has the duty to avoid incurring unnecessary expense.
- The parties have the duty to comply with any request or direction of the adjudicator in relation to the adjudication.
- The adjudicator has the duty to reach his decision not later than 28 days after the date of

the referral notice or 42 days after the date of the referral notice if the referring party so consents or in such longer period as both parties may agree.

- The adjudicator has the duty to decide the matters in dispute. He may take into account any other matters that the parties to the dispute agree should be within the scope of the adjudication.
- The adjudicator has the duty to give reasons if one party so requests.
- The adjudicator is entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him.
- The parties are jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
- The adjudicator shall not be 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 any employee or agent of the adjudicator is similarly protected.

It can be seen from the above that a very comprehensive and detailed set of terms and conditions govern the agreement between the parties and the adjudicator when the Scheme applies.

We have excluded procedural matters here although these may quite easily be considered to be matters that could form a part of the adjudicator's agreement with the parties.

Even with this lengthy list of matters governing the adjudicator, he will probably still want to ensure that all the points that we have discussed earlier, particularly his hourly rate, are covered somewhere.

Published adjudicators' agreements

We review the following commonly used adjudicators' agreements:

- The Joint Contracts Tribunal (JCT)
- The Construction Industry Council (CIC)
- The Institution of Civil Engineers (ICE) (also the Adjudicator's Contract for use with the NEC Engineering and Construction Contract (NEC))
- GC/Works/1
- The Institution of Chemical Engineers (IChemE)
- The Centre for Dispute Resolution (CEDR).

The Technology and Construction Solicitor's Association (TeCSA) does not publish a form of agreement.

The JCT adjudication agreement

The JCT has two forms of adjudicator's agreement, one for where the adjudicator is named in the contract, notwithstanding the fact that the contract itself does not include the amendments to allow for this that were included in Amendment 18, and one for where the adjudicator is agreed or nominated at the time that the dispute arises.

These forms of agreement apply to the JCT main and sub-contract forms and to the Construction Confederation forms DOM/1 and DOM/2.

The provisions of these two forms are essentially the same. The contracting parties are named, as is the adjudicator. There is no provision for more than two parties other than the

adjudicator. Next comes the description of the works and details of the main contract. This last has to include all amendments. Only three lines are allowed. Given the extensive amendments that are commonly seen in contracts, there is almost certainly going to be rather more than just the title of the form itself if the full extent of the amendments are to be shown.

There then follow five clauses and a Schedule, as follows.

Appointment and acceptance

The appointment is by both parties. They are both required to execute the JCT Adjudication Agreement with the adjudicator by clause 41A.2.3 of the contract. The adjudicator is also required to execute the agreement by clause 41A.2.3. A party who does not want the adjudication for any reason is therefore in breach of contract if it does not sign the agreement. The JCT obviously anticipates that a party may not sign the agreement by including in clause 41A.5.6 the provision that failure to enter into the JCT Adjudication Agreement does not invalidate the decision of the adjudicator. (See also below in relation to the adjudicator's fees.)

Adjudication provisions

The adjudication provisions of the main contract are expressly incorporated into the adjudicator's agreement by this clause. There is as a result no need for any debate as to whether they are express or implied terms.

For the avoidance of needless repetition we do not set out the full detail of the terms expressly incorporated into the Adjudication Agreement here (see Chapter 10, which deals with adjudication clauses). It is worth noting, however, that the JCT has decided that the adjudicator's immunity remains in the adjudication clause in the main contract and this does not appear in the Agreement. The timescales are also only mentioned in the adjudication clause as is the impartiality requirement. There is also a specific requirement that the adjudicator should allocate responsibility for his fee as between the parties and if he should fail to do this they bear it in equal shares.

It is worth mentioning specifically that the question of a lien for the adjudicator on his decision is not dealt with and also that there is no requirement that reasons be given.

Adjudicator's fee and reasonable expenses

The parties are jointly and severally liable for the adjudicator's fee and for all expenses reasonably incurred. Note that there is no provision for the fee to be reasonable. The level of fee is set in the Schedule appended to the Agreement as a lump sum or an hourly rate. There is, however, no requirement for the number of hours that he charges to be reasonable. We would suggest, however, that there must be an implied term of reasonableness but note the decision in *Stubbs Rich v. Tolley* relating to unreasonableness to bad faith, discussed above.

A possible problem arises as a result of these provisions and that is where there has been a nomination by a named body and the parties and the adjudicator cannot agree a fee. The parties are, as noted above, required to execute the adjudication agreement by the contract and the adjudicator has to undertake to execute it as a condition of being named in the nominating body's list. It is to be hoped that all concerned will be reasonable in such circumstances but it is always possible that a party who has not instigated the adjudication will be unenthusiastic about the whole idea and just refuse to agree a fee for the sake of it. This is clearly a breach of contract and can ultimately be dealt with by the provisions of that

contract. The adjudicator will, in these circumstances, have to proceed in the absence of any agreement as to his fees.

Unavailability of the adjudicator to act on the referral

The adjudicator is required to give immediate notice to the parties if he is unable to complete the adjudication if he becomes ill or unavailable. Interestingly, in the form of agreement for an adjudicator named in the contract, there is no requirement to notify the parties in the event that this occurs before he adjudicates or between two adjudications. Such a notification might possibly avoid delay in the commencement of an adjudication as the parties could then go immediately to a substitute adjudicator who was already in place at the time that the dispute arises.

Termination

The parties can terminate the adjudicator's agreement or an adjudication at any time on written notice to him. This cannot be done unilaterally. The adjudicator is entitled to his fee in these circumstances save where the termination arises because of his failure to give his decision within the required timescales or at all.

The Schedule

This includes no more than a blank into which must be inserted the adjudicator's lump sum fee or hourly rate. It is not unusual for an adjudicator to seek to include additional matters relating to his terms in the Schedule.

The agreement has provision for the parties and the adjudicator to append their signatures and a witness is required to each signature.

The CIC adjudicator's agreement

The basic premise of this agreement is that the dispute has been referred to adjudication under the CIC Model Adjudication Procedure.

As with the JCT agreement discussed above, this agreement is short and there are matters expressly incorporated into the agreement by the reference to the adjudication procedure.

The agreement itself is laid out in similar fashion to the JCT agreement, with the parties and the adjudicator being named and a provision being included for the date of the contract between the disputing parties to be inserted. The agreement also provides a space following the words 'in connection with' and it is to be presumed that the intention here is to insert not only the nature of the contract but also the details of the dispute.

There then follow six clauses and a Schedule as follows:

1. The rights and obligations of the Adjudicator and the Parties shall be as set out in this Agreement.
2. The Adjudicator agrees to adjudicate the dispute in accordance with the Procedure.
3. The Parties agree jointly and severally to pay the Adjudicator's fees and expenses as set out in the attached schedule and in accordance with the Procedure.
4. The Adjudicator and the Parties shall keep the adjudication confidential, except so far as is necessary to enable a party to implement or enforce the Adjudicator's decision.

5. The Parties acknowledge that the Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator (whether in negligence or otherwise) unless the act or omission is in bad faith, and any employee or agent of the Adjudicator shall be similarly protected from liability.
6. This Agreement shall be interpreted in accordance with the law of England and Wales.

The second clause, as with the JCT agreement, is an express inclusion of the provisions of the Procedure into the Adjudicator's Agreement. Again, we shall not set out these terms in detail save that it is worth mentioning that such things as impartiality and timescales are dealt with in the Procedure rather than in the Adjudicator's Agreement. This Procedure deals with the allocation of the adjudicator's fees in a similar fashion to the JCT. This Procedure used to specifically provide the adjudicator with a lien on his decision. This is now deleted in the Third Edition. The original First Edition of this Procedure did not require the adjudicator to give reasons but this is changed in the Second Edition 'unless the parties agree at any time that he shall not be required to give reasons'.

The CIC Procedure confirms that the adjudicator has the right to charge for any legal or technical adviser. The adjudicator may direct a party to pay all or part of his fees. If no such direction is made the parties shall pay them in equal shares. The party requesting adjudication is liable for the adjudicator's fees and expenses if the adjudication does not proceed.

The Third Edition includes a further paragraph numbered 4 as follows:

The Adjudicator may destroy all documents received during the course of the adjudication six months after the delivery of his decision provided that he shall give the parties 14 days notice of his intention to do so and that he shall return the documents to the parties if they so request.

An adjudicator will generally have to keep all the documents for at least six years. Adjudicators accumulate a vast number of files after dealing with a number of adjudications and storage can become a tremendous problem. Many adjudicators instigate a system whereby, once the adjudication is complete, the parties are allowed the opportunity to collect all documents submitted within a limited time, failing which he will destroy them. This is generally not recognised formally other than by the ICE and now the CIC. Where an adjudication is a one-off, many adjudicators allow a very limited time between completion of the decision and informing the parties that the documents provided will be destroyed unless collected. In the case of an adjudicator named in the contract this would, of course, not be until the expiry of all possibility of his being asked to act in respect of further disputes. Correspondence files should be kept.

The provision for the destruction of documents in the ICE Adjudication Procedure does not set a time limit for retention. The similar provision in the NEC Adjudicator's Contract requires a date for the termination of the adjudicator's appointment to be inserted and the adjudicator is not required to retain the documents after that date.

The CIC now requires retention of documents for six months. This seems to be an unnecessarily long time where the adjudication is not going to be one of a series. Once the adjudicator has produced his decision his duties are complete. He has nothing to do with any enforcement proceedings or settlement negotiations on a personal basis. If either or both parties think that the documents will be needed in the future they can just as easily request their retention or return after four weeks as six months.

These provisions are followed by a Schedule which covers the adjudicator's hourly rate (in respect of all time spent on the adjudication including travelling time) and sets a maximum charge per day. It also sets out reasonable expenses and allows for 'other extraordinary expenses necessarily incurred'. The Schedule also deals with VAT.

There is then provision for the agreement to be signed by the parties and the adjudicator. There is no requirement for these signatures to be witnessed.

The ICE adjudication agreement

This form of agreement is very similar to that produced by the CIC. There are, however, a few differences.

This agreement is set up to cover both the appointment of the adjudicator at an early stage and after a dispute has arisen. The confidentiality clause is similar to that of the CIC Agreement save that there is provision for this to be waived with the consent of the other parties, which consent shall not be unreasonably refused. The immunity clause is included in the adjudication procedure but it is worth mentioning here that, as distinct from the other agreements, the NEC Adjudicator's Contract excepted, this immunity is extended to an indemnity against the actions of third parties.

The adjudicator is, by this agreement, required to inform the parties if he intends to destroy documents.

This agreement includes an extensive schedule dealing with the adjudicator's terms. It covers his hourly rate and that he is entitled to be paid at this rate for his travelling time. It gives a non-exclusive list of disbursements that may be charged. These are specifically cited as examples and there is no restriction on other expenses being charged. It includes provision for an appointment fee which is to be paid in equal amounts by each party within 14 days of the adjudicator's appointment. If the appointment fee exceeds the final amount payable to the adjudicator, the balance is returnable. It deals with VAT. One further inclusion is a provision for interest at 5% per annum above the Bank of England base rate on fees and expenses that remain unpaid after the expiry of seven days from receipt of invoice. The period between sending out the invoice and receipt is not defined. As a general rule the adjudicator will send his invoices by first class post and provided that this is done, if there is any problem in this respect, their receipt would as a general principle be deemed to have occurred two days after the date of posting, Saturdays and Sundays excluded.

The Adjudicator's Contract for the NEC Engineering and Construction Contract

This book is not the place to indulge in a consideration of the approach adopted as to the form of words used in the NEC. Suffice it to say that the use of the present tense throughout can, initially, be disconcerting.

The approach adopted by the ICE committee that was charged with the drafting of this adjudicator's contract is quite different from that adopted by the other contract-writing bodies whose forms of agreement are considered in this book. This difference is just as marked when comparison is made with the ICE Adjudication Procedure, designed for use with all the ICE forms of contract other than the NEC.

All the other forms of adjudicator's agreement run to no more than three pages in total. The NEC Adjudicator's Contract has two alternative forms of agreement which are followed by two and a half pages of conditions and a further half page of 'contract data'. With the introductory pages and index the document runs to a total of 12 pages. This is not all. The Adjudicator's Contract itself is accompanied by a separate document entitled *Guidance Notes and Flow Charts*, which runs to a total of 19 pages.

As noted above there are two forms of agreement, one of which is stated to be

inappropriate where a 'United Kingdom Scheme for Construction Contracts applies', and the other is to be used only where such a Scheme does apply. The guidance notes make it clear that this wording is used to cover both the England and Wales and the Scotland Schemes.

These two agreements are very simple in form. They both name the parties and the adjudicator and have provision for their signatures. They each then have clauses which do no more than state that the adjudicator is appointed by the parties and that the adjudicator accepts the appointment and undertakes to carry out the adjudicator's duties as described in the conditions of contract. The form that applies to the Scheme adds the words 'and the Scheme for Construction Contracts' in certain places. The Scheme version also places a requirement on the adjudicator to apportion his fee and expenses between the parties.

These simple forms of agreement are followed by detailed conditions of contract, which are worth considering in some detail as they include a number of provisions that do not appear in other forms of adjudicator's agreement.

The provisions worthy of note for this reason are as follows:

- There is an obligation on the adjudicator to notify the parties as soon as he becomes aware of a conflict of interest or that he is unable to act.
- The conditions identify in considerable detail the expenses that an adjudicator can charge. The list is not, as in other forms of agreement, non-exhaustive. If the adjudicator is involved in an expense not covered in the list we would suggest that he cannot insist upon it being reimbursed without having obtained prior agreement.
- There is a priority clause between the contract between the parties and the adjudicator's contract, the latter prevailing in the case of conflict – a pragmatic move by the authors of the adjudicator's contract in the anticipation of this contract being used in cases where the NEC itself is not being used.
- There is a detailed communications clause. It specifies that communications required by the contract must be in a form that can be 'read, copied and recorded'. It also states that a communication has effect when received at the last address notified by the recipient or, if none is notified, at the address of the recipient stated in the Form of Agreement.
- The adjudicator under this contract does not receive 'advice'; he may 'obtain from others help that he considers necessary'.
- There is a confidentiality clause.
- The adjudicator is required to keep the documents provided to him until 'termination' (see below).
- The adjudicator's fees are payable in equal shares unless otherwise agreed. He is allowed to claim for time spent travelling and the adjudicator is required to invoice each party its share of his fee and expenses after he has communicated his decision to the parties. There is no lien on his decision.
- The parties are required to pay the adjudicator within three weeks of invoice unless another period is agreed. If a payment is late, interest is payable. Interest is compounded annually.
- If one party fails to pay the adjudicator, the other has to pay him and this payment has to include any interest due to the adjudicator because of the late payment. That party then has to seek recovery of both the original fee and the interest from the other party.
- This contract has the required immunity clause but also includes an indemnity in respect of claims, compensation and costs arising out of the adjudicator's decision.
- The parties may agree to terminate the adjudicator's agreement at any time.
- The adjudicator himself can terminate his appointment because of a conflict or if he is

unable to act. More interestingly, he can terminate if he is not paid within five weeks of a payment becoming due, albeit this will, of course, only apply where the adjudicator is appointed for the duration of the contract and is still in post five weeks after he has made a decision.

- There is also provision for the insertion of a termination date in the contract.

The schedule in this form of contract is called the 'Contract Data'. In addition to the adjudicator's fee and certain items required by the NEC format, such as the nature of the contract between the parties and the law, language and currency of that contract, it contains provision for the interest rate to be set at a certain percentage above the rate of a chosen bank. It also includes the termination date of the adjudicator's appointment.

The detail of this Adjudicator's Contract means that the contract adjudication clause is very simple, covering little more than the requirements of the Act (see Chapter 6). A point of interest is that there is no cross reference to the Adjudicator's Contract in the NEC itself.

GC/Works/1 Model Form 8 Adjudicator's Appointment (Condition 59)

This form is drafted on the presumption that it will be completed at the time the contract for the works is let. There is as a result no provision for a description of the dispute in the preamble to the form. The preamble, in common with other adjudicators' agreements, names the parties and the adjudicator. It also provides for the situation if the adjudicator is a 'named substitute adjudicator'. This is a useful provision, not seen in other standard forms of adjudicator's agreement, to cover the situation where the original adjudicator is not available for any reason. Under this contract it is therefore possible to have the principal adjudicator and one or more substitutes in place at the outset of the contract works. This is most useful in overcoming the delays that are likely to occur where the adjudicator who is named in the contract proves not to be available and there is no provision for a substitute.

This agreement has eight clauses and a schedule that are sufficiently different from the other agreements to be worth setting out in detail. They are as follows:

1. The adjudicator shall, as and when required, act as [adjudicator] OR [named substitute adjudicator] in accordance with the Contract, except when unable so to act because of facts or circumstances beyond his reasonable control.

This makes it quite clear that in taking up the position of named adjudicator, the person so named must make himself available at all reasonable times to adjudicate.

2. The Adjudicator confirms that he is independent of the Employer, the Contractor, and the Project Manager and Quantity Surveyor under the Contract, and undertakes to use reasonable endeavours to remain so, and that he shall exercise his task in an impartial manner. He shall promptly inform the Employer and the Contractor of any facts or circumstances which may cause him to cease to be so independent.

This provision introduces the concept of independence. It is not something that is spelt out in other forms of adjudicator's agreement or in the contracts upon which they are based. It may be that it has been introduced because there have historically been forms of adjudication in the public sector in which the adjudicator has specifically been an officer of the authority. It is a useful provision and will prevent the abuse of the system that may occur in commercial contracts where the architect or engineer is appointed as adjudicator in order to 'avoid his power being eroded'. This is to be deprecated. It is almost inevitable in such a

situation that the contract administrator, however well meaning, will be seen by the contractor to be lacking in impartiality if, as adjudicator, he confirms a decision that he has made as contract administrator. The end result will be a continuance rather than a resolution of the dispute.

3. The Adjudicator hereby notifies the Employer and the Contractor that he will comply with Condition 59 (Adjudication) of the Contract, and its time limits.

This is an important provision as Condition 59(8) prevents the adjudicator from varying or overruling 'any decision previously made under the Contract by the Employer, the PM or the QS' in respect of certain matters where the remedy is limited to financial compensation.

4. The Adjudicator shall be entitled to take independent legal and other professional advice as reasonably necessary in connection with the performance of his duties as adjudicator. The reasonable net cost to the Adjudicator of such advice shall constitute expenses recoverable by the Adjudicator under this Agreement.

In all the other contracts, save for the NEC, this provision is covered as a procedural matter in the adjudication clause rather than in the adjudicator's agreement.

5. The Adjudicator shall comply, and shall take all reasonable steps to ensure that any persons advising or aiding him shall comply, with the Official Secrets Act 1989 and, where appropriate, with the provisions of Section 11 of the Atomic Energy Act 1946. Any information concerning the Contract obtained either by the Adjudicator or any person advising or aiding him is confidential, and shall not be used or disclosed by the Adjudicator or any such person except for the purposes of this Agreement.

The matters set out in the first sentence of this provision are not covered by any other form of contract and relate to the nature of the works likely to be carried out under the GC/Works form of contract.

6. The Employer and the Contractor shall pay the Adjudicator fees, expenses and other sums (if any) in accordance with the Contract and the Schedule, plus applicable Value Added Tax.
7. 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 agreement follows the normal trend in including this provision in the adjudicator's agreement.

8. The proper law of this Agreement shall be the same as that of the Contract. Where the proper law of this Agreement is Scots law, the parties prorogate the non-exclusive jurisdiction of the Scottish courts.

The schedule that follows is left completely blank save for the provision that it is to cover the adjudicator's 'Fees, Expenses, etc.'. It is therefore up to the adjudicator and the parties to agree what goes in here.

The IChemE adjudicator's agreement

The adjudicator's agreement in this contract is an interesting departure from all other forms in that it is set out in the form of a draft letter to the parties from the adjudicator.

It starts with a statement that the adjudicator has been nominated by (agreement between

the parties/the IChemE) as adjudicator in accordance with the contract and that he requires the parties' agreement to matters that follow.

The use of the words 'require your agreement' seems a bit draconian. As has been discussed elsewhere, either or both the parties may be reluctant to agree to the adjudicator's proposals and a more sensible approach might be to say 'seek your agreement'. Then at least there is no question as to the adjudicator not proceeding as soon as the referral arrives on his desk.

There then follow eleven paragraphs, as follows.

- The matter to be determined.
- Appointment shall be made and investigation shall be carried out in accordance with the IChemE's Adjudication Rules.

The use of the word 'investigation' is interesting. At first glance there seems to be a presumption and possibly even a requirement that the adjudicator will investigate the facts and the law but this is modified by paragraphs 5 and 6.

- Particulars of the contract.
- The representatives of the parties to be contacted in connection with the adjudicator's investigation are as follows: ... (if known...).

This appears to presume that the adjudicator and the parties will have been in contact before the nomination is received but this is modified by the words 'if known'. It is of course possible that this will have happened but in the case of a unilateral application for the nomination of an adjudicator direct to the ANB, this is unlikely.

- The adjudicator will decide the method of adjudication.
- This adjudication will not be an arbitration and the adjudicator may reach a decision by:
 - using his personal knowledge and expertise and that of others, if required;
 - requesting information from the parties and considering the responses;
 - conducting an investigation which may include the examination of documents, inspection of the relevant parts of any premises, site or engineering works and listening to oral submissions by the parties.
- The adjudicator will be allowed free and timely access to all records, information, persons and premises under the parties' control that the adjudicator may deem necessary to determine the matters in dispute.

These three items state pretty clearly what is expected of the parties and the adjudicator. The sub-paragraphs make it clear that the adjudicator may use his own expertise and conduct his own investigations, but this should be tempered by the requirement that has now been made clear by the court that the outcome of the use of his own expertise and the results of any investigation should be put to the parties before the adjudicator makes his decision⁶.

The requirements on the parties are pretty clear with regard to the provision of access to documents and the like for the adjudicator. This may create some difficulty as an adjudicator should not use information that he obtains without the other party being made aware of it, and some might say that the third point in particular might result in the release of commercially sensitive information that might be disclosable in arbitration or court proceedings but that a party would not normally be prepared to disclose in an adjudication.

⁶ *RSL (South West) Ltd v. Stansell Ltd* (16 June 2003).

- The adjudicator shall give reasons for his decision.
- The adjudicator's fees and expenses shall be in accordance with Annex D.

Annex D requires the adjudicator to provide appropriate details for the calculation of his fees, as explained below.

- Payment of fees and expenses will be due not later than 15 days after the date of the relevant invoice and the adjudicator reserves the right to charge interest at the daily rate of ...% per day on unpaid amounts with interest on late payments chargeable from the due date for payment of the relevant invoice.
- The adjudicator, his firm and IChemE shall not be liable for anything done or omitted in the discharge or purported discharge of the adjudicator's functions unless that act or omission is in bad faith and any employee or agent thereof shall similarly be protected from liability. The parties shall save harmless and indemnify the adjudicator, his firm and IChemE and any employee or agent thereof against all claims by third parties in respect of the adjudication and in respect of this the parties shall be jointly and severally liable.

It is worthy of note that the IChemE takes the view that joint and several liability is important in respect of the matters covered by this last point, but that there is no mention of the joint and several liability which most adjudicators would expect to apply to their fees and expenses in order that the adjudicator can seek the whole of his fee from one party where the other party, who may have been found liable, fails to pay. Any adjudicator sending a letter on the basis of the IChemE's draft would be well advised to consider this point and make a suitable amendment.

The letter then finishes with a request that an enclosed copy be signed and returned within seven days.

There is then an addendum entitled 'Agreement to these terms' which only provides for signature by one party. If each party does this on their copy the adjudicator will presumably have to take a copy of each copy himself and send it to the parties in order to complete the agreement.

Annex D, which deals with the method of calculation of the adjudicator's fees, follows the format of the rest of the IChemE contract in that it is very detailed. It is headed 'a suitable format might be as follows'. A summary of the provisions is as follows:

- A detailed, non exclusive, note of what would be included as 'time spent in connection with the adjudication'.
- Confirmation that the adjudicator's hourly rate includes overhead costs.
- A provision for increasing the hourly rate on 1 January on the basis of the Retail Price Index.
- A 'disruption fee' in the event of cancellation of the adjudication.
- A statement that a day is 8 hours.
- Travelling time is regarded as working time up to a limit of 8 hours per 24 hour period for any one journey.
- Expenses reimbursed at cost.
- Invoices payable within 15 days.
- Fee payable in equal part by each party.

Centre for Effective Dispute Resolution

Prior to 2002 CEDR had a very complicated arrangement which required a four-party agreement that included CEDR as well. This has now been swept aside and all that CEDR produces is a set of 'Rules for Adjudication' which do not include any form of agreement.

Technology and Construction Solicitors' Association

TeCSA does not include an adjudicator's agreement with its Rules.

Conclusion

There is a wide selection of adjudicators' agreements available. All of them cover the basic requirements of a set of terms and conditions under which the adjudicator will operate either as an express term in the agreement itself or by the implication of terms from the adjudication clause in the construction contract into the agreement. In most instances the adjudicator and the parties will be faced with a nomination at the time that the dispute arises and they will have to use the standard agreement that applies to their particular form of contract.

Where the Scheme applies or there is a compliant contract without an agreement incorporated, there is nothing to stop the parties using any of the standard forms of agreement but reality suggests that the urgency of the situation will often mean no formal agreement being signed. In those instances the adjudicator will put in writing to the parties the terms that he intends to apply as adjudicator at the earliest time possible after he gets involved. In all normal circumstances these will include the level of his fee and the expenses that he will charge. His agreement with the parties will include those matters that are implied by the HGCRA and/or the Scheme but he may consider it prudent to set them out in writing at this stage. There will no doubt be other matters that it would be appropriate to include to cover the specific circumstances of the case.

At the end of the day, provided that the fee he charges is not seen by the parties to be unreasonable, it will be paid. Even if he has to recourse to an action in the court to recover his fees, there is precedent in the case of *Stubbs Rich v. Tolley* where the court found that the measure of unreasonableness was equated with bad faith.

Where the appointment occurs at the outset of the contract, the adjudicator and the parties should consider whether it is appropriate to enter into a standard form agreement or whether to formulate an ad hoc agreement to cover the particular contract involved. In the latter event there are a wide range of situations already covered by the various forms of agreement and the adjudicator and the parties should have no difficulty in finding appropriate wording already prepared.