Adjudication through the looking glass: what does the future hold?

by Jeremy Glover

Introduction

1 As the title suggests, the purpose underlying this paper is to look to see what the future may hold for adjudication. However, I should say straightaway, that this paper does not discuss the proposed reforms to the Housing Grants & Construction Act 1986 ("HGCRA") which are currently slowly wending their way through Parliament. Most people are familiar with those. If you are not, a summary is set out in Appendix 1. This sets out the position as at the summer of 2009, when the draft bill completed the Committee Stage in the House of Commons.

2 And when I say slowly, I mean slowly[1]. The Government commenced the consultations which lead to the current reforms back in 2005. The current Bill will be reprinted before coming back to the House of Commons for its remaining stages on 13 October 2009. Therefore it is now in its final stages of going through Parliament with the Report Stage and Third Reading to go before Royal Assent. However, the Government has indicated that there may need to be further consultations, and then there is the small question of the forthcoming election, so it is not an easy task to suggest when, or even if, the changes will become law and delegated legislation published.

3 What I intend to look at is the following:

(i) Set-off;

(ii) The Scheme;

(iii) Adjudication and Mediation;

(iv) International Adjudication; and

(v) Complex disputes.

(i) SET-OFF

4 One point that is worth mentioning is that there have been certain changes to the draft bill, from the first recommendations originally put forward. One of these changes relates to payment notices. This is potentially a significant one.

5 Section 111 of the 1996 Act currently provides that a party to a construction contract may not withhold payment after the "final date for payment" of a sum due under the contract unless that party has given a notice of the intention to do so.

6 Clause 139 of the Local Democracy Economic & Development Bill ("LDEDC") is said to do away with the problems caused by set-off. Those problems can be summarised as disputes about the meaning of the words "sum due".[2] Clause 139 states:

[1] Unlike a certain H Dumpty Esq who famously said in Alice Through The Looking Glass that "When I use a word *it means what I choose it to mean, neither more nor less.*"

[2] See for example, *Morgan v Jervis* [2003] EWCA Civ 1563

(2) A notice complies with this subsection if it specifies –

(a) in a case where the notice is given by the payer –

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment,

and

(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person –

(ii) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and

(iii) the basis on which that sum is calculated.

7 The Government has said[3] that:

> New section 110A(2) prescribes the contents of a "payment notice" given by the payer (or a "specified person") to the payee. Such a notice is to identify the sum which the payer (or the "specified person") believes is payable (by the payer) on the date that the payment concerned becomes payable (or, where some or all of that amount has been paid before the notice is given, the sum that would have been payable on such date). Such a notice is also to explain how that sum has been arrived at - for instance, by identifying any relevant moneys paid before the payment concerned actually became payable, or by identifying any set-off or abatement applied by the payer.

8 Clause 140 of the Local Democracy Economic and Development Bill substitutes a new Section 111 and, replaces "withholding notices" with a requirement on the part of the payer to pay the sum set out in such a notice. It also however, makes provision for the sum in such a notice to, in effect, be challenged or revised by the giving of a counter-notice.

9 It is worthy recording that Stewart Jackson, the Conservative MP for Peterborough said in the Committee Stage that:

> I would like to support the comments of the hon. Gentleman and to give a little perspective to the issues raised. In particular, clauses 139 and 140 have failed to win the support of significant parts of the construction industry, but also beyond it. Their effect will be to enable a payer to issue notices effectively telling the payee how much he is going to receive, which is a novel approach to cash flow. While that in itself is unusual, there is a further twist—the payer can reduce the amount of his original notice, as has been said.
>
> The provisions were described by the RICS as "extremely complicated" and "unlikely to be understood by users in the industry"— never mind Members of Parliament.

10 Many hold that view.

11 When (or if) the new amendments are finally passed, current case law on the

[3] Taken from the Explanatory Notes to the LDEDC Bill.

requirements for a withholding notice under section 111 would have limited use. The obvious result of this would be, especially given the complex drafting of the new version, to initially generate litigation about the issue of purported notices and how the payer shows the "basis" of its recalculation. No change there then and possibly an opportunity lost.

12 The potential difficulty is that in an earlier version of this draft legislation there were specific proposals to require a party to include details of any set-off or abatement in its notice. This specific reference has been deleted in the current draft. The consequence of this is that the situation about set-off arguably remains unclear and uncertain. This, in my view, represents an opportunity lost and it is particularly important as one of the recent trends in the enforcement hearings before the courts has been challenges involving withholding notices and set-off.

13 And even if the new section 111 does deal with abatement, set-off and any other deduction) it does not seem to have regard to the underlying contractual entitlement. What if there is no notified sum, does that mean that nothing is payable!

So what do the latest cases say?

14 It seems appropriate, as there does appear to have been an increase in the number of cases dealing with set-of and withholding notices, to review some of the more recent decisions from the TCC. It is convenient to separate them out into two:

(i) Disputes about withholding notices, and cross claims

(ii) Cases where parties have tried to set-off sums awarded in adjudication decisions against other amounts, usually but not always, other adjudication decisions.

(i) Withholding notices and cross claims

15 In *Windglass Windows Ltd v Capital Skyline Construction Ltd and another*[4] there were two purported withholding notices which stated as follows:

> We refer to the above valuation and attach hereto your original copy. Our financial director has returned this application and is not willing to process this amount due to insufficient supporting information. Please note that our company policy is such that each sub-contractor valuation must be presented in a standard format, copy attached, and authorised by the appropriate site manager before your application can be processed. Could you kindly re-present your application with the correct supporting information and our office will process it immediately.

16 The adjudicator found that these withholding notices were invalid because they did not seek to propose the grounds for withholding. On enforcement, it was alleged that the adjudicator exceeded his jurisdiction.

17 In relation to the withholding notices, the judge did not accept the suggestion that section 111 of the Act and the relevant part of the Scheme do not require a withholding notice which sets out valid grounds for withholding monies otherwise due. Neither did the judge agree that as long as there was something which

[4] [2009] EWHC 2022 (TCC)

purports to be a withholding notice, then that is sufficient to justify withholding, regardless of the content itself. This argument is contrary to section 111 which requires 'an effective notice of intention to withhold payment'. Sub-section (2) identifies what is required for a notice to be effective. If those requirements are not met, the notice is not effective.

18 The adjudicator held, and the court agreed that the letters were not effective withholding notices because they did not identify the amount proposed to be withheld or the ground for withholding payment.

19 Furthermore, the Act does not permit a party to put in an ineffective withholding notice and then, in subsequent adjudication, seek to make an entirely different justification for withholding payment. Such a 'foot-in-door' approach, as it was described by Mr Justice Coulson is contrary to the Act, which emphasises the obligation on the party paying to give good reasons, there and then and in advance of the date for payment, if any part of a sum otherwise due is not going to be paid. If that paying party does not do so, then, it has to pay now and argue later.

20 In *Letchworth Roofing Co v Sterling Building Co*[5] the application to enforce the adjudicator's decision was resisted by Sterling on two grounds. First it was said that the decision was issued by the adjudicator out of time, with the result that his decision was a nullity. Secondly, it was claimed that the adjudicator failed to deal properly or at all with the delay cross-claim and should have taken the £24,866.77 into account when awarding £46,807.14 to Letchworth.

21 With regard to the second issue, the Judge discussed the relevant principles regarding the scope of the notice of adjudication. It has long since been accepted that if a responding party wishes to raise a cross-claim by way of a defence to a claim, a withholding notice is almost always required. Conversely, Sterling sought to argue that a responding party to an adjudication is entitled to raise any matter by way of defence which would amount in law or in fact to a defence to the claim being pursued.

22 The Judge held that while a defendant can raise whatever matters he likes by way of defence for the adjudicator to consider, that general principle does not permit a defendant to rely on a cross-claim which should have been the subject of a withholding notice, but was not.

23 At paragraph 33 of the judgment, Mr Justice Coulson states:

> Sometimes the interface between the adjudicator's jurisdiction and the scope and validity of withholding notices can be said to give rise to difficulties which, on a proper analysis are simply not there. In my judgment, the general position is clear. An adjudicator has to decide whether or not a withholding notice is required to permit a cross claim to be raised as a defence, and if so, whether or not there has been a valid notice. If he concludes that no notice was required, or that a notice was required and that there was a valid notice, then he must take the cross claim into account in arriving at his decision. If he concludes that a notice was required, and that either there was no notice or that the notice that had been served was invalid for any reason, then he is not entitled to take the cross claim into account when reaching his conclusion.

[5] [2009] EWHC 1119 (TCC)

24 The Judge held that although a defendant can seek to raise a cross-claim in circumstances such as these, if an adjudicator concludes that such a cross-claim required a valid withholding notice, and there was no such notice, then the adjudicator is acting entirely properly by not taking this into account when making an award to a claimant. Accordingly, summary judgment was granted in favour of Letchworth.

25 In *Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Limited*[6] the defendant company engaged the claimant company to carry out the design and construction of major works. The contract incorporated the terms of the JCT Standard Form of Building Contract with Contractor's Design. Clause 30.3.5 provided that where the employer does not give any notice pursuant to clause 30.3.3 and/or to clause 30.3.4, the employer shall pay the contractor the amount properly due in the application for interim payment. Disputes arose between the parties and the claimant referred to adjudication a dispute in respect of payment for extra works.

26 The adjudicator concluded that the claimant was entitled to such payment and made an award in favour of the claimant. The claimant commenced proceedings against the defendant seeking to enforce the adjudicator's decision by way of summary judgment; it also sought summary judgment in respect of a claim based on valuation. The defendant sought a stay of proceedings so that the disputes could be the subject of mediation or in the alternative, it sought to set off its counterclaim against any sums that would otherwise be due to the claimant and/or summary judgement on that counterclaim for liquidated damages. Particular interest was whether the defendant could set off a sum which it alleged was due under the counterclaim by way of liquidated damages against sums otherwise due to the claimant and whether the defendant was entitled to summary judgment on its counterclaim. The defendant denied that the claimant was entitled to summary judgment on the valuation claim on the basis that there was no withholding notice under clause 30.3.4.

27 It was held that the defendant's arguments in respect of the claim based on valuation would be rejected. Firstly clause 30.3.3 had required the defendant to give written notice specifying the amount of the proposed payment. That was precisely what the defendant had done. The defendant's agents had sent a certificate for payment identifying a sum as the amount that the defendant proposed to pay. Clause 30.3.5 only applied if there was no notice under clause 30.3.3. There plainly was such a notice. In those circumstances, clause 30.3.6 applies and the sum has therefore fallen due to be paid. The effect of the defendant's interpretation of the contract, and clause 30.3.5 in particular, would allow them to avoid the consequences of their failure to serve a withholding notice under clause 30.3.4.

28 On established law there could be no set off against the adjudicator's decision in the instance case. Moreover, as a matter of construction of the contract there could be no set off against the sum due by way of clause 30.3. The absence of a withholding notice was fatal to the alleged set off against that amount.

29 The submission that the payment of withholding notice provisions of this scheme had applied to clause 24 was rejected. Neither the Act nor the Scheme had applied to claims by employers for liquidated damages. It was also the view of the JCT

[6] [2008] EWHC 3029 (TCC)

because, although the standard form had been amended so as to ensure that the provisions dealing with interim and final payments to the contractor, withholding notices had complied with the Act and Scheme, there had been no similar amendments to clause 24.

(ii) Set-off against adjudicator's decisions

30 In the case of *Hart (t/a D.W Hart & Son) v Smith and Another before HHJ Toulmin*[7] CMG QC were two applications to enforce two decisions of an adjudicator. Each arose in respect of a contract between the claimant and defendant Employer in respect of a contract to convert three agricultural barns into four dwelling houses. The dispute which was referred to the court related to the claim by the defendant that the claimant was liable to pay LADs in relation to the declaration by the adjudicator and were entitled to certificates of non-completion and the subsequent issue of certificates of non-completion by the contract administrator, and to set off that sum against the sum awarded to Hart in the first adjudication.

31 It was held that the introduction of the Act required decisions of adjudicators to be enforced promptly pending the final determination of such disputes by litigation, arbitration and agreement. It follows that the intention of Parliament is that a decision of the adjudicator should be given effect in a way which is consistent with providing a quick and effective remedy on an interim basis and without consideration of arguments relating to other provisions in the contract. There are only very limited grounds for refusing to enforce immediately an adjudicator's award setting out sums which have been found by the adjudicator to be due to a party in an adjudication.

32 Section 111 of the Act provides a comprehensive code governing the right to set off against payments contractually due. The effect of the statutory provisions is generally to exclude a right of set off from an adjudicator's decision. The court referred to the case of *Interserve Industrial Services Limited v Cleveland Bridge (UK) Limited*[8] where Jackson J set out the following principles relating to set off in multiple adjudications:

> Where the parties to a construction contract engage in successive adjudications, each focussed upon the party's current rights and remedies, in my view the correct approach is as follows: at the end of each adjudication, absence special circumstances, the losing party must comply with the Adjudicator's decision. He cannot withhold payment on the grounds of his anticipated recovery in a future adjudication based on different issues.

33 In this particular case, the court concluded that the defendants could not enforce their claim to recover LADs. Section 108 of the Act gives the court jurisdiction to enforce the decision of the adjudicator. What follows logically from the adjudicator's decision is a declaration that the contract administrator ought to issue the certificates of non-completion and nothing more. He went on to say that if he had found in favour of the defendants on the primary issue he would not have set off the sum claimed at this hearing against the sum awarded in the first adjudication without hearing further argument. It seemed fundamental to the Judge in relation to the process of adjudication that in multiple adjudications each decision should be capable of enforcement separately.

[7] [2009] EWHC 2223 (TCC)
[8] [2006]EWHC 741 (TCC)

34 In *Work Space Management Limited v YJL London Limited*[9] Work Space engaged YJL to carry out construction works at the Clerkenwell workshops. Disputes had been referred to an adjudicator and subsequently an arbitrator. The arbitrator issued an award in respect of costs in Work Space's favour in the sum of £85,000. YJL paid £28,856.66 against that sum leaving unpaid an amount of £56,143.34. It is YJL's case that this further sum is not due by operation of a set off arising out of an adjudicator's decision which pre-dated the arbitrator's award.

35 The court concluded that there was a valid and therefore binding adjudicator's decision. The question before the court was whether that can be set off against arbitration award no. 2.

36 Generally a defendant cannot endeavour to raise a counterclaim as a means of defeating a claim to enforce an adverse arbitral award. First, both decisions are, binding on the other side. One does not have greater status than the other. They are both capable of being subject of the judgment of the court. The award is described on its face as both provisional and interim because the arbitrator was still tasked with the exercise of assessing the detailed costs. Thirdly, it would be artificial to allow Work Space to ring fence the award simply because it is not subject to potential challenge, which an adjudicator's decision might be (in circumstances where, for reasons best known to themselves, the parties are conducting simultaneous arbitration and adjudication proceedings). Work Space cannot now ask the court to ignore the outcome of those proceedings merely because the result was not to its liking.

37 In the court's view these mutual debts do arise out of the same transaction and do give rise to an equitable estoppel. They arise, as is common ground, out of the same building contract. They also arise out of the same underlying disputes. Those disputes are concerned with the delay. The only difference between them is that one is in respect of direct costs, that is to say the loss and expense suffered by YJL in respect of the delay, and the other is in respect of indirect costs, namely the costs of arguing unsuccessfully about one aspect of the delay disputes in the arbitration.

38 The court referred to *Federal Commerce and Navigation Co Limited v Molena Alpha Inc*[10] where Lord Denning MR said:

> It is not every cross claim which can be deducted. It is only cross claims that arise out of the same transaction or are closely connected with it. It is only cross claims which go directly to impeach the Plaintiff's demands, that is, so closely connected with his demand that it would be manifestly unjust to allow him to enforce payment without taking into account the cross claim.

39 The Court concluded that it would be manifestly unjust to allow Work Space to enforce payment without taking into account the cross claim based on the adjudication. The principles of equitable set off are triggered in the present case.

40 In *JPA Design and Build Limited v Sentosa (UK) Limited*[11], Sentosa (UK) Limited v JPA Design and Build Limited JPA sought to enforce an adjudicator's decision in their favour for £300,000. By a separate claim, Sentosa sought to enforce an adjudicator's decision, this time in their favour for £180,000. Sentosa argued that should be entitled to set-off the claim for £180,000 against JPA's claim for £300,000. In

[9] [2009] EWHC 2017 (TCC)
[10] [1978] 1 QB 927
[11] [2009] EWHC 2312 (TCC)

addition, Sentosa claimed that, whether the sum due to JPA is £300,000 or, on their case, £120,000, enforcement of any such judgment should be stayed pursuant to RSC Order 47.

41 The contract was in the JCT Design and Build Form, 2005 edition, 2007 revision and provided that Sentosa would make an Advance Payment to JPA of £300,000. The contract provided that the sum would be reimbursed to the Employer at the time of the agreement of the Final Account.

42 JPA were asked to provide a breakdown of their start up costs for the purposes of the Advance Payment. The breakdown of costs was for a sum of £252,000 which was less than the sum of £300,000 identified in the contract. The sum of £252,000 was paid by Sentosa but contrary to the contract, the QS then deducted the £252,000 from JPA's Interim Valuation 2. JPA did not complain about this at the time.

43 Out of the blue, JPA claimed the sum of £300,000 in accordance with the contract. Three separate disputes were referred to adjudication: the claim for the Advance Payment, a dispute about Interim Valuation 12 which the QS valued at £0 (these were dealt with by Mr Bingham) and a dispute as to extensions of time, liquidated damages and the like (this was dealt with by Mr Always).

44 Mr Bingham decided that JPA was entitled to the Advance Payment but not entitled to any recovery under Interim Valuation 12 in the context of an interim application for payment. Mr Alway determined that while JPA was entitled to an extension of time under the contract, it was substantially less than the delay incurred to the project and Sentosa was entitled to claim the sum of £180,000 as liquidated damages but had no right to deduct this sum from JPA because no valid withholding notice had been served.

45 Mr Justice Coulson noted that the vast majority of the cases dealing with set off against an adjudicator's decision concern the situation where the adjudicator has awarded one side a sum of money but where it is said logically to follow from his decision that the other side would be entitled to a separate sum, often by way of liquidated damages. He referred to Balfour Beatty Construction Limited v Serco Limited where Jackson J (as he then was) identified the relevant principles as follows:

> a) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided the employer has given proper notice (in so far as required).
>
> b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set-off liquidated and ascertained damages against sum awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

46 Mr Justice Coulson held that on the face of it, this case was even stronger than the position postulated at alternative (a) by Jackson J. Not only did it follow logically

from an adjudicator's decision that the Employer is entitled to recover a specific sum by way of liquidated and ascertained damages, but Mr Alway, decided that there was an entitlement in clear and unequivocal terms. Thus, Mr Justice Coulson's conclusion was that Sentosa could set off the £180,000 against the £300,000 found due by Mr Bingham.

47 RSC Order 47, preserved in section A of the Civil Procedure Rules 1998, grants the court a wide discretion where there are "special circumstances" which render it inexpedient to enforce that judgment. In this case Sentosa argued that a stay should be granted because JPA are not in a position to repay the sum of £300,000 when the Final Account becomes finalised.

48 JPA is a shell company. The court rejected the argument that JPA's financial position had not significantly altered over the last 2 years. The court also rejected the claim that Sentosa was responsible for JPA's poor financial position. If JPA received the £300,000 from Sentosa, then they could reduce their indebtedness to £400,000. But that would not significantly affect their underlying problem: they are and would remain in debt for very large sums. That means that, notwithstanding the various principles relating to the enforcement of adjudicator's decisions, the financial position of JPA would justify a stay.

49 Mr Justice Coulson concluded that even if he was wrong to allow Sentosa to set-off the £180,000, Sentosa would have an overwhelming case that the £180,000 ought to be taken into account in the exercise of the court's discretion under RSC Order 47. Their entitlement to that sum was the subject of an adjudicator's decision which considered all of the relevant arguments. It would be contrary to common sense for the court to refuse a stay in relation to the £300,000 because it is the subject of an adjudicator's decision, without also having regard to the fact that the £180,000 is itself the subject of a separate adjudicator's decision. If the judgment sum ought to have been £369,784.48, the court would have concluded that the £180,000 itself justified a stay of execution, at least up to that sum, regardless of JPA's financial position.

50 The court accepted that clause 4.6 (Advance Payment) made this a very different case. The £300,000 found due to JPA, following an adjudication not made until after the contract had come to an end, is a sum which JPA are required to pay back to Sentosa when the Final Account is considered and resolved. It is not a claim which may or may not succeed at some point in the future; it is an unquestionable entitlement that Sentosa have and have always had.

51 Responsibility for the delay in the Final Account process rested with JPA. In those circumstances, the £300,000 must be treated as being imminently repayable to Sentosa in any event. Certainly, JPA cannot rely on their own delays in making a Final Account claim in order to put themselves in a better position in respect of the £300,000.

52 In Mr Justice Coulson's opinion, it would be wholly unjust and inequitable for Sentosa to pay the £300,000 plus interest in circumstances where there is an overwhelming risk that they will not be reimbursed that sum by JPA in accordance with clause 4.6 of the contract.

(ii) THE SCHEME: ALL FOR ONE AND ONE FOR ALL?

53 Of course, one aspect of the HGCRA does not currently form part of the Government's proposed reforms - and that is the Scheme for Construction Contracts (England & Wales) Regulations 1998 ("The Scheme").

54 Certain consequential amendments will need to be made to the Scheme to ensure that this provisions fall in line with the proposed amendments to the HGCRA. This is especially the case with the payment issues. However, it does not appear that steps are being taken to carry out any significant amendments to the Scheme and certainly there does not appear to be any impetus for all the various different adjudication rules to be swept away so that we are left with one all-embracing set of rules.

55 In practice, the content of the Scheme has stood up well. The majority of problems have arisen due to 'bespoke' adjudication processes, i.e. those which do not adopt the Scheme and instead amend or ignore its wording and seek to comply with the requirements of the Act in other ways. Another problem arises due to unfamiliarity with a particular set of rules.

56 Now, one way to bring certainty to the adjudication process would be to have one set of Rules. That is only achievable if there is consensus within the Industry. Sadly at present that is unlikely, but there are sound reasons for suggesting that such a vision is not so far-fetched. [Attached at Appendix 2 is a list of the clauses from the other sets of Adjudication rules which are not to be found in the current version of the Scheme.]

57 In June 2005 the new suite of JCT contracts dropped the JCT's adjudication rules and opted for the statutory Scheme for Construction Contracts. Maybe that is a sign of things to come. If the Scheme is being reviewed to make it compliant with LDEDC, why shouldn't those carrying out that review, take a look to see what else could be changed. The advantages of certainty and familiarity are obvious to everyone.

58 Some of the most interesting are listed below:

(i) TeCSA Adjudication Rules 2002, Version 2.0

By rule 13 – there is express provision allowing the adjudicator to determine matters he considers must be included to make the adjudication "meaningful" and "effective." Judge Gilliland in case of *Farebrother Building Services Ltd v Frogmore Investments Ltd*[12], case had cause to comment upon Rule. He said this:

> Now, it seems to me on the face of paragraph 11 and 12 [an old form of the TeCSA rules applied, but the effect was the same] that it is a matter entirely for the adjudicator to decide which of the matters he will decide in the course of the adjudication. He has a complete discretion over the scope of the adjudication and can make a decision as to what is within the scope of the adjudication. He has obviously to have regard to the notice, but his decision as to what is comprised within the notice is a matter which is by contract given to him to decide.

This rule is an example of where the ideas and ideals of the original drafters of the

[12] [2001] CILL 1589

TeCSA Rules have parted company with the courts, as the enforcement cases today focus heavily on the adjudication notice as defining the scope of the adjudication. The reason the courts have done this is again to promote a high degree of certainty. If an adjudicator can determine that other matters must be included to make the adjudication "effective" or "meaningful" then that certainty is lost. For example, would this Rule go as far as to allow consideration of a counterclaim? Quite possibly?

However, there is no case law on this particular point, which suggests that actually it does not cause anyone any problem at all. So maybe it is not something that is needed.

(ii) TeCSA Adjudication Rules 2002, Version 2.0

By rule 27 - There is an express provision (27) restricting the adjudicator's recoverable fees to £1,250 per day plus expenses and VAT.

Little needs to be said about this. Obviously given the current review of costs being carried out by Lord Justice Jackson, it is very topical. The advantages to the parties of a degree of cost certainty are obvious, although many may say that the current capped figure is perhaps a little on the low side. It is undoubtedly an idea, that you can see featuring in a unified Scheme.

(iii) TeCSA Adjudication Rules 2002, Version 2.0

By rule 30 - the adjudicator can direct the payment of interest in such amount as may be *"commercially reasonable."*

It may be thought that such a clause, in light of the Late Payment of Commercial Debts (Interest) Act is not really necessary. However, the clause stands in contrast to the equivalent clause 20(c) in the Scheme which merely refers to the need to have *"regard to any term of the contract relating to the payment of interest"*. The Court of Appeal in *Carillion Construction v Devonport* [2005] EWHC 778 (TCC) held that there was no free standing power under the Scheme to award interest. The TeCSA Rules seem different. As most adjudications are about payment, many would agree that a party should be entitled to interest if payment is wrongly withheld or made late. Any provisions which increases the certainty of a party being entitled to interest is surely to be encouraged.

(iv) The NEC3 Option W2 Dispute Resolution Procedure

There is express provision by rule W2.4(5) effectively time-barring the determination of the adjudicator's decision by legal or arbitral proceedings, unless the dissatisfied party notifies the other party within 4 weeks following the notification of the adjudicator's decision.

Now that sounds like a good idea as it could create certainty as disputes decided by adjudicators through the elapse of time could not be opened up.

On the other hand it might promote disputes, as a party felt it had not choice but to take a dispute one step further just to preserve its rights. So maybe not such a good idea after all?

(v) The JCT 1998, Clause 41A Adjudication Provisions

There is express provision under clause 41A.4.2 stating the valid methods of delivery of the referral and supporting documentation.

How simple is that idea. Should the unified Scheme, not set out in a clear way how and where notices of adjudication are to be delivered? That would be one way of reducing the scope for a dispute.[13] And that must be the key consideration.

59 One final point. Rule 19(xiii) of the TeCSA rules give the adjudicator express power to attempt to facilitate an agreement. Is that a rule that would be followed in a unified scheme?

(iii) MEDIATION AND ADJUDICATION

60 In the course of the adjudication process, it is not altogether unknown for adjudicators to inquire as to whether the whole or part of the dispute is susceptible of agreement. Some adjudication rules, as noted above give the adjudicator express power to attempt to facilitate an agreement and parties sometimes invite the adjudicator during the course of the adjudication to act as a mediator. This process can be very efficient if there is a will on both sides to resolve the dispute, but real disagreement as to the appropriate terms of settlement. Where this process might work is where an adjudicator is asked part way through the process to mediate. The mediation, even if it does not succeed might close a very large gap such that the original adjudicator can then carry out a much shorter and cheaper adjudication over the balance. This flexibility allows both parties to retain as much control as possible over the outcome and would also mean that there is a greater opportunity for the parties would be able to maintain their commercial relationships.

61 Of course, if the adjudicator takes this course he should, however, obtain the clear agreement of the parties that this will not disqualify him, if it is intended that he should resume the adjudication if the mediation process fails. The case of *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors)*[14], is well known to everyone. In short, Glencot was engaged by Barrett as a sub-sub-contractor in relation to a development in Docklands, London. The contract between the parties made no express provision for adjudication and accordingly the Scheme applied. On 15th August 2000, Glencot notified Barrett of a dispute about payment which was referred to adjudication. On 30th August, Mr Peter J Talbot agreed to act as the adjudicator on the joint application of the parties. A meeting was held between the parties on 29th September 2000. At this meeting senior representatives from the parties met on an informal basis and reached some measure of agreement in relation to the dispute but a number of issues remained outstanding. Mr Talbot was asked by both parties to mediate in order to try and finalise an agreement.

62 Following a day long mediation complete agreement on all outstanding issues was not reached and Mr Talbot therefore confirmed that the adjudication would have to continue with another appointment for the adjudication meeting. Mr Talbot saw Glencot in the morning and intended to see Barrett in the afternoon. In the afternoon Barrett informed Mr Talbot that they wished him to withdraw as adjudicator on the grounds that he had been compromised by being involved in the mediation and negotiations. Mr Talbot took Counsel's advice and then informed the parties that

[13] Witness the problems in *Primus Build Ltd v Pompey Centre Ltd & Anor* [2009] EWHC 1487 (TCC)
[14] HHJ LLoyd Q.C. (2001) CILL. 1721

he was not going to withdraw. Mr Talbot then proceeded to make his Decision ordering that Barrett had to pay Glencot the sum of £160,016.10 including VAT. Barrett refused to pay and Glencot issued enforcement proceedings.

63 However HHJ LLoyd QC said that the conduct of the adjudicator mean that he lacked impartiality? In his view, the he circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the adjudicator was biased.

64 It was easy to see that having sought the parties' consent to continue with the adjudication following the aborted mediation and having taken counsel's advice the adjudicator no doubt understandably he was on reasonably sure ground in continuing the adjudication. However the difficulty was that in any mediation process a mediator will be privy to commercial and other considerations of the parties. A mediator is there to facilitate a settlement. This role is clearly incompatible with that of an adjudicator who is there to decide upon the parties' legal rights and obligations. Here the adjudicator was privy to a number of without prejudice offers and it would seem he was also privy to some rather heated discussions.[15]

65 Today, as an alternative, the CEDR Adjudication Rules (issued in September 2008) make specific provision for mediation. Rule 28 states that:

> When the Adjudicator communicates to the parties under paragraph 16 that a decision is ready for publication, the parties may agree to refer the dispute to mediation. In that case each party shall notify the Adjudicator in writing and CEDR Solve will appoint the Adjudicator as Mediator. The Adjudicator will thereupon withhold the Decision (sealed) until the parties end the mediation or upon request of either party since that request will end the mediation.

66 This, of course deals with the position that the adjudicator in the Glencot case found himself in. The rules have only been in force for just over a year and CEDR has not yet issued any statistics as to whether anyone has actually taken up the offer of mediation.

67 However, it seems unlikely that any party, having already incurred the expense of an adjudication, and having been caught up in the momentum every adjudication has, will suddenly want to stop, just before the Decision is released and then negotiate.

68 I am not so sure. The mediation comes along too late in the process. The parties have already gone too far along the adjudication road. However both adjudication and mediation have a valuable role as forms of alternative dispute resolution – just not together.

(iv) INTERNATIONAL ADJUDICATION

69 So, looking further afield, where does the future if adjudication really lie. It is firmly established in the UK and many other jurisdictions around the globe. It is not going away. But one place where it has not really taken off is in the context of international projects.

70 It is there in the new FIDIC form, albeit in the modified longer form – 84-day Dispute

[15] It is important to remember that this case was not all bad news for Glencot. Notwithstanding the refusal of the Judge to enforce, ultimately he did order substantial interim payment to the claimants. The Judge held that notwithstanding Barrett's victory on the enforceability of the Decision Glencot's claim still existed and Barrett still had to show that it had real prospects of success in defeating the claim. The Judge effectively therefore invited Glencot to make an application for an interim payment which was heard one week later.

Adjudication Board ("DAB"). And talking of FIDIC the latest FIDIC form does think that the DAB and some form of mediation process can work together. Clause 20.5 states that:

> If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. Such informal assistance may take place during any meeting, site visit or otherwise. However, unless the Parties agree otherwise, both Parties must be present at such discussions. The Parties are not bound to act upon any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute Resolution process and decision by any views given during the informal assistance process, whether provided orally or in writing.
>
> If a dispute of any kind whatsoever arises between the Parties, whether or not any informal discussions have been held under this Sub-clause, either Party may refer the dispute in writing to the DAB according to the provisions of Sub-Clause 20.5...

71 The key here is that unless the parties agree otherwise, the DAB cannot meet the parties individually. This should get round the Glencot difficulty.

72 But there are two key problems with DAB's. First many Employers are reluctant to say the least to incorporate them within the contract and second, how do you actually enforce the decision of a DAB? What happens where a DAB decision is made in your favour but the losing party fails to comply with it? Is the decision binding and can it be enforced?

73 A DAB decision itself is not an arbitral award and is not enforceable internationally like such an award. Under sub-clause 20.7 of the Red, Yellow and Silver Books, you are only entitled to refer to arbitration the losing party's failure to comply with the DAB decision provided that the DAB decision has become final and binding i.e. if no party has given a notice of dissatisfaction within 28 days after the receipt of the DAB decision. The problem occurs when a valid notice of dissatisfaction has been served meaning that the DAB decision is binding but not final. What happens then? What value, if any is to be given to the binding decision of an Engineer or DAB?

74 While it is clear from the wording that the decision should be complied with promptly, there is no sanction if the losing party refuses to do so. In this situation what should the winning party do? It seems there are four options[16]:

(i) Include the amount of a decision in an interim payment application – the problem with this option is that if the employer has given notice of its dissatisfaction with the DAB decision, the engineer may consider that no amount is in fact due. The Gold Book 2008 has recognised this problem and requires the employer's representative to include in the interim payment certificate any sums awarded by the DAB. This position however is not reflected in the Red, Yellow or Silver Books and therefore a dispute would then arise as to whether the Engineer ought to have certified the sum awarded.

(ii) Refer to arbitration the losing party's non-compliance with the DAB decision

[16] The four options are identified and discussed in *'How Easily Can A DAB Decision Be Enforced?'* Frederic Gillion Shadbolt LLP 22 July 2009

– is this possible? This is questionable because the losing party's failure to comply with the DAB decision gives rise to a fresh cause of action, namely a breach of sub-clause 20.4 which requires the decision to be given effect promptly. Any dispute would therefore have to be referred first to the DAB for its decision, and following the giving of a notice of dissatisfaction, the parties will have to comply with the amicable settlement procedure before the dispute can be referred to arbitration.

(iii) Commence another DAB proceeding in respect of the losing party's failure to comply with the first DAB decision and refer that dispute to arbitration – this will have time and cost consequences but will minimise the risks of jurisdictional objections at a later stage. The losing party will no doubt ask the tribunal to open up, review and revise the first decision to prevent the winning party from enforcing the first DAB decision.

(iv) Proceed with a second DAB proceeding and then refer to arbitration both the original dispute and the losing party's failure to comply with the first DAB decision – the winning party could then request at an early stage of the proceedings, an interim or provisional award in respect of the failure to comply with the first DAB decision.

75 There has also been a reported decision where a merely binding but not final engineer's decision has been enforced by an arbitral award (see ICC Case No 10619).[17]

76 The interim and final awards in this case relate to the binding nature of an engineer's decision given in respect of clauses 11 and 67 of the FIDIC Red Book, 4th Edition (1987). The claimant contractor commenced arbitration for damages, claiming payment of the engineer's decisions under the contract. The claimant was seeking an interim award for immediate payment of that decision regardless of the pending arbitration of the merits of the underlying dispute.

77 The starting point for the tribunal was the procedure envisaged under clause 67.1 of the FIDIC Red Book. This, in summary, comprises:

(i) If any dispute arises out of or in connection with the Contract the matter shall in the first place be referred in writing to the Engineer.

(ii) The engineer is to notify the parties of its decision within 84 days of the application. The engineer must expressly refer to clause 67 in order to make it clear that it is a decision under that clause of the contract.

(iii) If the engineer fails to notify its decision within 84 days then either party, within a further period of 70 days, may notify the other of its intention to commence arbitration in respect of the matter in dispute.

(iv) If the Engineer notifies its decision within 84 days then either party can, within 70 days, serve a notice of his intention to challenge the decision by way of arbitration.

(v) If a notice of intention to challenge has not been served within 70 days then the engineer's decision shall become "final and binding on both parties", and

[17] *ICC International Court of Arbitration Bulletin*, Vol. 19, No. 2, 2008, pp. 85-90.

cannot be challenged in arbitration.

(vi) If the party serves a notice of dissatisfaction within the 70-day period the engineer's decision is not final. However, it is still binding on both parties and they shall comply with it. The second paragraph of clause 67.1 specifically states:

> The Contractor and Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as herein after provided, in an amicable settlement or an arbitral award.

78 The tribunal paid specific attention to the deadlines, and therefore the dates on which a decision and notice of dissatisfaction were issued. The engineer's decisions of 5 May 1999 were late, in that they had been issued more than 84 days after the Contractor's request for a decision. The tribunal decided that those decisions could not bind the parties. This meant that the first two decisions were not binding.

79 Nonetheless, the tribunal then went on to consider the further decisions of 17 November 1998. They held that as the 5 May decisions were ineffective, those of November 1998 survived. They had been made within the 84-day period and so were valid decisions.

80 The claimant had filed a notice of dissatisfaction within the 70-day period. The tribunal held that, regardless of whether the decision had been subject to a notice of dissatisfaction or not, the contract required the engineer's decision to have an immediate binding effect on the parties, notwithstanding that either or both of the parties have given a notice to commence arbitration. The parties should therefore have complied with it. If the employer failed to pay money in accordance with that decision then the Employer was in breach of contract. More importantly, the tribunal took the view that the possibility that the decision may end up being opened up, reviewed, revised or set aside in the arbitration should not stop the tribunal from giving immediate effect to the decision.

81 There were, however, several other issues which needed to be considered before the tribunal could issue an award to that effect. First, the award would not be one of a conservatory or interim measure, but would give full and immediate effect to the decision. Neither the provisions of Article 23 of the ICC Rules nor the *référé provision* of the Rules of the French NCPC were, in the tribunal's view, relevant.

82 Second, sub-clause 2.1(b) of the FIDIC Contract required the employer to give specific approval in circumstances where the Engineer was certifying additional costs before payment. The Employer had given no such approval for payment of these decisions. The tribunal did not accept that this provided a defence to the Employer for two reasons.

83 First, sub-clause 2.1(b) of Part II of the FIDIC Conditions did not apply to decisions of the Engineer. The fact that the Engineer had mistakenly believed that consent was required did not invalidate the Engineer's decision. The Engineer was required under clause 67.1 to make a decision and this was regardless of any prior approval of the Employer.

84 Alternatively, if the tribunal was wrong and the engineer's decision did require

approval then that would only affect the validity of the payment certificate. It would not affect the validity of the Engineer's decision and the substance of it. The Employer was required under the Contract to give immediate effect to that decision and so by refusing to approve a certificate for payment the Employer was simply in further breach of Contract.

85 This is the first example of a published award where a tribunal has ordered payment by an interim award of the amount of the Engineer's decision which is binding but not final.

86 Clause 20.6 of the Gold Book (2008) now provides that a DAB decision is binding and the parties have to comply with it notwithstanding that a party gives a notice of dissatisfaction with such a decision.

87 Accordingly, even if one or both parties have given notice of dissatisfaction (which is the equivalent to the notice of intention to commence arbitration under the fourth edition of the FIDIC Conditions) with respect to a decision of the DAB, each party is bound to give effect to it.

88 There is no reason what final and binding or binding but not final DAB decisions could not be enforced by an arbitral award where appropriate. This is evidenced in FIDIC's Design, Build and Operate form of contract (2008) at sub-clause 20.9. In the event that a party fails to comply with any DAB decision, whether biding or final and binding, then the other party may refer the failure itself to arbitration for summary or other expedited relief.

89 So it looks like there are ways to enforce a DAB decision. But going back to the first of the two problems we identified, will this actually lead to a reduction in the use of DAB's, as Employers become even less likely to favour them?

90 Now, adjudication is a quick form of dispute resolution. 28 days is of course too short a time period to deal with disputes on a major project. FIDIC recognises that giving the DAB of 4 days to decide the dispute is the scope for the future for a simple change to be made to the HGCRA.

(v) COMPLEX ADJUDICATION

91 The HGCRA was drafted on the basis that one size fits all, therefore allowing relatively simple or complex disputes to be referred to adjudication.

92 Questions have been raised as to the suitability of adjudication for large complex final account claims and professional negligence claims. The increasing view is that to attempt to squeeze a complex 'quart' of a case into a 'pint pot' of the adjudication procedure gives a result that is unfair and therefore unenforceable.[18]

93 In particular, HHJ Peter Coulson QC in the case of *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd*[19] raised concerns over the suitability of adjudication for complex matters. HHJ Peter Coulson described the adjudication as:

> It was to use the vernacular, a 'kitchen sink' final account adjudication.

[18] See *'The Future of Adjudication: Is it all it is cracked up to be?'* Kim Franklin Crown Office Chambers December 2005
[19] [2005] EWHC 138 (TCC)

94 He comments:

> Whilst such adjudications are not expressly prohibited by the Housing Grants, Construction and Regeneration Act 1996 as it presently stands, there is little doubt that composite and complex disputes, such as this, cannot be accommodated within the summary procedure of adjudication.

95 It has also been suggested that there may be a conflict between the principles of natural justice and the rough and ready nature of adjudication for example, HHJ Wilcox in *London Amsterdam Properties Ltd v Waterman Partnership Ltd*.[20] In this case, HHJ Wilcox raised the issue of natural justice explaining that even where an adjudicator was prepared firmly to impartially exercise the powers vested in him, there may be some cases in which the complexity of the case and/or conduct of a claimant prevent a case from being adjudicated fairly and impartially given the timetable and other constraints.

96 Judge Toulmin supported HHJ Wilcox's comments in *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd*.[21] He suggested that there may be a conflict between the principles of natural justice and the rough and ready nature of the adjudication procedure. Judge Toulmin did not consider a challenge to an adjudicator's decision would succeed if the case referred was described as too complicated however a challenge on the basis of a breach of natural justice through time constraints due to the complexity of the case may carry more credibility.[22]

97 Adjudication now involves higher value claims and more complex factual matters. This results in an extended timetable for the decision and expensive adjudicators. It therefore seems for those who want to refer complex 'kitchen sink' type cases to adjudication face two choices, either squeeze a quart into a pint pot and end up with an adjudication that is potentially unfair and enforceable or extend time and incur further costs for a decision that is enforceable but costly and only temporarily binding.[23]

98 At the moment the parties are reliant on the adjudicator. If he says that the matter is too complex and more time is required, you have two choices agree or accept and he will resign.

99 So maybe adjudication in the future will reflect this dilemma. Maybe one size does not truly fit all. Maybe, in time, the onus will shift from the reliance on the adjudicator and, maybe the one-top scheme will provide for a category of disputes which must be resolved in a maximum time period of, say, 86 says as per the FIDIC form.

Conclusion

100 The reality is there is likely to be little change in adjudication in the immediate future. The changes to the HGCRA are not guaranteed to make it through Parliament for a while, if at all.

101 However, that is not to say that change will not happen:

> Alice laughed: "There's no use trying," she said; "one can't believe impossible things."[24]

[20] (2003) EWHC 3059 (TCC)
[21] (2003) EWHC 888 (TCC)
[22] See *'One Stop Shop – Complex Disputes and Adjudication'* Robert Davis Construction Law Review 2005
[23] See *'The Future of Adjudication: Is it all it is cracked up to be?'* Kim Franklin Crown Office Chambers December 2005
[24] Lewis Carroll: Alice's Adventures in Wonderland

"I daresay you haven't had much practice," said the Queen. "When I was younger, I always did it for half an hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."[24]

APPENDIX 1

The new draft Construction Contracts Bill: changes to the HGCRA

The Housing Grants, Construction & Regeneration Act ("HGCRA") came into force in May 1998. Now, after many seeming false starts the Government has finally published its Construction Contracts Bill the purpose of which is to amend key provisions of the HGCRA. This Bill follows the draft proposals revealed by the Government in June 2007. Many had questioned whether these proposals were ever going to be put into action. However, the Government has put the Bill before Parliament in December 2008 having asked for comments on the draft by 12 September 2008.

The Government has said the reason for the Bill was that:

> Extensive consultation with the construction industry has identified that while the Construction Act has improved cash flow and dispute resolution under construction contracts it is ineffective in certain key regards.

The key policy objectives are to improve the existing regulatory framework in order to:

(i) Increase transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow;

(ii) Encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and

(iii) Improve the right to suspend performance under the contract.

Accordingly, the Construction Contract Bill proposes the following:

Contracts in writing:

As widely anticipated, the first part of the draft Bill repeals section 107 of the HGCRA which required that for the purposes of the HGCRA contracts had to be in writing or evidenced in writing. This means that adjudication will apply to all construction contracts which are either agreed in writing or orally. In order to encourage parties to resolve disputes by adjudication, the Government has acknowledged the difficulties caused by the Court of Appeal decision in the RJT case as noted by, amongst others, HHJ Wilcox who in the case of Bennett (Electrical) Services Ltd v Inviron Ltd [2007] EWHC 49 (TCC) decided that a letter of intent failed to comply with the requirements of section 107. In commenting on the difference of opinion of the Court of Appeal in the RJT case he noted that:

> ... The reasoning of Auld LJ is attractive because at the subcontractor level and where cash flow difficulties are likely to be encountered in the smaller projects, the paperwork is rarely comprehensive. The extent of the requirement for recording contractual terms for an agreement to qualify under section 107 laid down by majority could have the effect of excluding from the scheme a significant number of those whom the Act was perhaps intended to assist.

The new proposals are intended to limit the number who are excluded from the right to adjudicate by ensuring the right to adjudicate applies to contracts which are oral, partly

oral and not just those which are evidenced in writing.

The writing requirement has not totally disappeared. Any contractual provisions relating to adjudication must be "in writing" as defined in amendments to sections 108(2), (3) and (4). Presumably if they are, then the Scheme will apply.

Adjudication costs

With a similar eye on making adjudication more accessible to everyone, the Construction Contracts Bill sets out certain controls on adjudication costs. A new clause, section 108A makes it clear that any attempt to allocate the costs of adjudication between the parties, will be invalid unless that agreement is made in writing after the adjudicator is appointed. This would include, for example, agreements that one party should pay the whole or part of the costs of the adjudication or agreements that the adjudicator may make a decision that a party should pay the whole or part of the costs of the adjudication

Adjudicator's power to make corrections

The draft bill includes a new clause which has the effect of requiring the parties to a construction contract to provide in their contract that the adjudicator has the power to correct a clerical or typographical error in his decision arising by accident or omission. The provision concerned must be in writing.

Withholding Notices

The old payment and withholding notice system has been abandoned and is to be replaced with a new payment structure. Given the Government's stated aim of achieving an increase transparency and clarity, this is not surprising. The new system, by section 110A provides for "payment notices" which set out the sum the payer or payee consider to be due and the basis upon which that sum is calculated. It also provides for "payee notices", under section 110B which can be given in default of the payment notice. If the payer does nothing, the payee can serve their own "payee notice" which will set out the sum the payee considers to be due and the basis upon which that sum has been calculated.

The sum set out in the "payment notice" or the "payee notice" will become the "notified sum". And a party can only withhold payment from the notified sum in accordance with the new section 111 which replaces the old version. The new section 111 states that the payer must pay the notified sum unless the payee is given a notice of the payer's intention to pay less than the notified sum. That notice must specify the sum the payer considers to be due and the basis upon which that sum has been calculated.

There were proposals which are now not part of the Bill to include provisions where a paying party was required to include details of any set-off or abatement in the notice. The absence of such provisions is likely to result in the continuation of the series of cases about the meaning of "sum due" (see, for example, *Rupert Morgan Building Services (LLC) Ltd v David Jervis and Harriet Jervis* [2003] EWCA Civ 1563).

Payment notices are seen by the government as an important tool in achieving transparency and communicating details of payments which are made or are proposed to be made.

The government's message is clear. By simplifying the payment provisions, there is now unlikely to be any recourse for a failure to serve a section 111 notice. As the Government

has made clear, this requirement to pay the "notified sum" is intended further to facilitate "cash flow" by determining what is provisionally payable. What is properly and ultimately payable, as a matter of the parties' contract, is of course unaffected.

The new section 111 at subsection (10) makes reference to the House of Lords decision in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others* [2007] UKHL 18. Here the House of Lords decided that the payer could legitimately withhold moneys, notwithstanding that no "withholding notice" under current section 111 of the HGCRA had been given. The reason was because the contract had provided that moneys need not be paid in the event of the payee's insolvency. As the insolvency had occurred after the period for giving a "withholding notice" had expired, it was simply not possible for the payer to have given such a notice beforehand. Sub-section 10 confirms that the *Melville Dundas* decision remains but remains confined to insolvency situations alone.

Conditional Payment Clauses

A new subsection 1A, in section 110, extends the ban on pay-when-paid clauses to include requirements which make payment conditional:

(i) "on the performance of obligations under another contract", or

(ii) "a decision by any person as to whether obligations under another contract have been performed".

The right to suspend

The problem with the right to suspend under section 112 of the HGCRA is that the compensation to which the suspending party is entitled under the legislation in the event of a legitimate suspension was not generous. The suspending party was merely entitled to an extension of time for completion of the works covering the period during which performance is suspended. That extension would not necessarily extend to the 7-day notice period prior to the right to suspend becoming operative, nor would it apply to the time which it takes to re-mobilise following the suspension. This is important since the right to suspend ceases on payment of the amount "due" in full.

There was nothing to prevent the parties from conferring more extensive rights through the terms of the contract than the legislation provides. By way of example, clauses 25.4.17 and 26.2.9 of the JCT With Contractor's Design '98 entitle the contractor to apply for both extensions of time in respect of *"delay arising from a suspension…"* and for *"loss and expense where appropriate, provided the suspension was not frivolous or vexatious."* However there was nothing to insist that the parties did this.

The new draft section 112(3A) clarifies this by making the defaulting payer liable to pay the suspending party *"a reasonable amount in respect of costs and expenses reasonably incurred"* as a result of suspending.

This should help the Government to achieve its aim of making the right to suspend performance a more effective remedy.

Conclusion

As can be seen from the very short review period, the Government does not intended for there to be a full blown consultation of the draft Bill. They are seeking comments on the technical aspects of the drafting not looking for any further full discussion of a range of policy options. This should mean that there is every chance that these changes will find their way onto the statue books sometime during next year.

October 2009

APPENDIX 2

Additional provisions not contained in the Scheme

CEDR Solve Rules for Construction Adjudication – September 2008

- There is an express provision (12) that allows parties to be joined to the adjudication, subject to all parties' consent.
- There are provisions (16, 28, 29, 30) allowing for mediation following the adjudicator's decision, but prior to its release.
- There is an express provision (18) allowing the adjudicator to correct a typographical or arithmetical error within the decision within 5 days.
- There is an express provision (21) prohibiting set-off, abatement or counterclaim against the adjudicator's decision.
- There is an express provision (22) stating that each party shall bear its own costs.

TeCSA Adjudication Rules 2002, Version 2.0

- There is an express provision (8) allowing the Chairman of TeCSA, following a representation by either party, and upon written notice to both parties, to remove the adjudicator if he thinks it necessary to do so.
- There is an express provision (9) allowing the Chairman of TeCSA to appoint an adjudicator that has already been appointed in relation to another dispute arising out of the same contract.
- There is an express provision (10) allowing the adjudication to be started notwithstanding arbitral/legal proceedings on the same dispute.
- There is express provision (13) allowing the adjudicator to determine matters he considers must be included to make the adjudication "meaningful" and "effective".
- There is an express provision (14) allowing the adjudicator to decide his own substantive jurisdiction, and then on the scope of the adjudication.
- There is an express provision (23) restricting the adjudicator's powers. The adjudicator cannot require advance payment or security for his fees.
- There is an express provision (27) restricting the adjudicator's recoverable fees to £1,250 per day plus expenses and VAT.
- There is an express provision (28) giving the adjudicator jurisdiction to award costs to the successful party if the partiers agree.
- There is an express provision (29) prohibiting the adjudicator from requiring the referring party to pay the costs of another party simply by reason of having referred the adjudication.

- Rule 30 – the adjudicator may direct the payment of interest as may be "commercially reasonable";

- There is an express provision (32) allowing the adjudicator, on his own initiative or by application of one or other of the parties, to correct any clerical mistake or error arising from an accidental slip or omission.

- There is an express provision (33) allowing for summary enforcement of a decision, and prohibiting set-off, abatement or counterclaim in any such enforcement.

JCT 1998, Clause 41A Adjudication Provisions

- There is an express provision (41A.2.1) stating that no adjudicator shall be nominated, under the relevant procedures, who will not execute the JCT Adjudication Agreement.

- There is an express provision (41A.4.2) stating the valid methods of delivery of the referral and supporting information.

- There is an express provision (41A.5.7) requiring each party to bear their own costs, subject to the adjudicator directing that one party may be responsible for the costs of opening up or testing, if required.

- There are express provisions (41A.5.8.1 – 4) regarding a dispute or difference in relation to the reasonableness or otherwise of an architect's instruction.

Construction Industry Council, Model adjudication Procedure: Fourth Edition

- There is an express provision (12) relating to the adjudicator's terms and conditions. The requirement is only to sign up to TeCSA terms and conditions if the parties do not agree another set.

- There is an express provision (22) that allows parties to be joined to the adjudication, subject to all parties' consent.

- There is an express provision (28) that allows the adjudicator to correct any error arising from an accidental error or omission or to clarify or remove any ambiguity.

- There is an express provision (29) requiring each party to bear their own costs.

- There is an express provision (31) allowing for summary enforcement of a decision, and stating that no dispute can be subsequently referred for determination by another adjudicator, unless so agreed by the parties.

- There is an express provision (33) prohibiting the adjudicator from being called as arbitrator or as witness in legal/arbitral proceedings regarding the subject matter of the adjudication, without agreement of the parties.

- There is an express provision (35) prohibiting a third party from relying upon the adjudicator's decision, and to whom he shall owe no duty of care.

ICE Adjudication Procedure, 1997

- There is an express provision (3.4) stating that the adjudicator shall be appointed on the terms and conditions of the ICE Adjudicator's Agreement, to be signed by the parties within 7 days of being requested to do so.
- There is an express provision (5.7) that allows parties to be joined to the adjudication, subject to all parties' consent.
- There is an express provision (6.5) requiring each party to bear their own costs.
- There is an express provision (6.7) allowing for summary enforcement of a decision, and stating that no dispute can be subsequently referred for determination by another adjudicator, unless so agreed by the parties.
- There is an express provision (6.9) allowing the adjudicator, on his own initiative or by application of one or other of the parties, to correct any clerical mistake or error arising from an accidental slip or omission.
- There is an express provision (7.1) prohibiting the adjudicator from being called as arbitrator or as witness in legal/arbitral proceedings regarding the subject matter of the adjudication, without agreement of the parties.
- There is an express provision (7.4) stating the valid methods of delivery of notices, and that any agreement required by the procedure shall be evidenced in writing.

The IChemE Grey Book, 3rd Edition 2004

- There is an express provision (1.6) that states that the rules are to be interpreted in accordance with the rules of the country where the site is situated.
- There is an express provision (1.7) prohibiting the adjudicator from being called as arbitrator or as witness in legal/arbitral proceedings regarding the subject matter of the adjudication, without agreement of the parties.
- There is an express provision (4.4) stating that the adjudicator shall be appointed on the terms and conditions of the IChemE Form of Adjudicator's agreement, to be signed by the parties within 7 days of being requested to do so.
- There is an express provision (7.6) stating that if at any time after the appointment of an adjudicator the parties reach a settlement on all or part of the dispute, they must send a statement to that effect to the adjudicator.
- There is an express provision (8.9) that allows the adjudicator to correct any mistake or error arising from an accidental slip or omission, within 14 days.
- There is an express provision (8.10) entitling summary enforcement, and prohibiting set-off, abatement or counterclaim in such an enforcement hearing.
- There is an express provision (8.12) requiring the adjudicator to inform the parties if he intends to destroy the adjudication documents. Upon reasonable request from one or both of the parties, he shall retain the documents for a further period.

NEC3 Option W2 Dispute Resolution Procedure

- There is an express provision (W2.2(1)) stating that the adjudicator is to be appointed under the NEC Adjudicator's Contract.
- There is an express provision (W2.3(6)) stating that all communications between a party and the adjudicator must be copied to all other parties.
- There is an express provision (W2.3(7)) stating that if a decision is required on additional cost or delay in favour of the contractor, then this should be assessed in the same way as a compensation event under the contract.
- There is an express provision (W2.3(9)) requiring the project manager and supervisor under the contract to proceed as if the matter is not under dispute, until a decision is given by the adjudicator.
- There is an express provision (W2.3(12)) allowing the adjudicator to correct any clerical mistake or ambiguity, within 14 days.
- There is an express provision (W2.4(2)) effectively time-barring the determination of the adjudicator's decision by legal/arbitral proceedings, unless the dissatisfied party notifies the other party within 4 weeks following the notification of the adjudicator's decision.
- There is an express provision (W2.4(5)) prohibiting the adjudicator from being called as witness in legal/arbitral proceedings.

GC/Works/1 Without Quantities (1998), Clause 59

- There is an express provision (59(5)) allowing the adjudicator to apportion costs between the parties as he sees fit.
- There is an express provision (59(8)) which allows the adjudicator to vary or overrule decisions of employer, project manager or quantity surveyor, subject to a list of exceptions.
- There is an express provision (59(9)) entitling summary enforcement of the adjudicator's award.

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- There is an express provision (24.4) allowing the decision to be enforced in the English Courts, subject to the parties' choice on arbitration.