CHAPTER ONE

BACKGROUND TO ADJUDICATION IN CONSTRUCTION CONTRACTS

Dispute Resolution

The choices open to the parties to a dispute, in order to a achieve a settlement include :-

- negotiation or abandonment
- litigation
- arbitration
- ADR (Alternative Dispute Resolution used here as a synonym for mediation)
- adjudication

Assuming a dispute is not capable of resolution by consent and the claimant is not persuaded by commercial constraints to abandon the matter, he has the right to litigate in the courts. Given the high standards of Official Referees, many, particularly lawyers, prefer litigation to arbitration. Both lead to an enforceable decision. Commercial men, however, have for centuries recognised the advantages of arbitration, a flexible private alternative to litigation. Since the 1970's a range of new alternatives including conciliation and mediation, commonly referred to as ADR have gained popularity. No form of ADR leads to a binding resolution of this dispute unless both parties agree to the proposed compromise. Where there is such agreement, then action can be taken for any breach of the terms of the compromise contract.

Negotiation

It has probably always been true that negotiation is the preferred method of dispute resolution in every commercial sector. It is certainly true in the modern construction industry with parties, being the client, contractor or sub-contractor, preferring to resolve their differences by dialogue between them if they can. A negotiated settlement of a difference is far more easily achieved if discussions take place very early in the dispute's life or alternatively if the subject matter of the dispute is not greatly significantly.

It is when matters are left un-addressed by the parties or at least unresolved or where the dispute in question is of significant size, then negotiation tends to falter and one party or the other will look to rely upon formal proceedings to achieve resolution. Whilst this is unfortunate since it should be possible for all disputes to be resolved by negotiations, it is nonetheless understandable since both parties to a dispute will believe their case to be the correct one and will feel confident that an independent person will find in their favour.

It is precisely because parties themselves are unable to resolve all their disputes that the necessity arose for formal dispute resolutions procedures to be put in place. The procedures available in UK construction vary in their degree of formality and, consequently, in the likely costs which might be incurred to achieve a third party determination. The major benefits of negotiations are of course the fact that the parties themselves resolve their disputes and are thus likely to preserve an ongoing commercial relationship, and that costs are held very significantly in check.

Litigation

Whilst alternative forms of formal dispute resolution have existed for hundreds of years, the fact remains that litigation has generally proven to be the most robust means of introducing a third party into a dispute in a manner which settles that dispute. State administered and funded dispute resolution, which is what litigation amounts to, is likely always to feature in commercial activity. The benefits of litigation arise primarily from the fact that a body of fully independent and expert practitioners, both advocates and judges, are available to the parties. This should inspire confidence in the protagonists that the result obtained from litigation will be, as nearly as it can be, the right result.

It would appear that civil litigants have in recent times considered that their interests have not been as well served by litigation as they might be. The time taken for a case to come to court and for judgment to be given is often far longer than participants would wish it to be. The costs of litigation are often enormous, in some cases even exceeding the sums in dispute between the parties. Such dissatisfaction, whilst not being accurately reflective of the whole of the civil litigation process, has nonetheless caused the process of civil litigation to be rethought. In recent times a number of recommendations have been made for improvement of the process in the UK, most notably the reforms introduced by Lord Woolf, which have given rise to the Civil Procedure Rules 1998 which have applied to Civil Courts since 23 July 1999. An attempt is made in the Rules to give a greater amount of case management control to the Judge and to require the parties and their representatives to give appropriate consideration to settling their dispute without drawing needlessly upon court time. Such is the demand made upon the courts in the civil arena that other forms of formal dispute resolution have generally met with favour by the Courts and this is particularly true of adjudication.

Arbitration

Arbitration could be said to be the first and primary alternative to litigation as a means of obtaining formal dispute resolutions. There are many similarities between the two processes, the dispute is heard by an independent third party (or parties) and a decision is handed down which is binding upon the parties (subject to certain rights of appeal). There are also dissimilarities: the parties between them pay for the arbitrator, whereas they do not pay for the Judge, parties may utilise lay representatives, the parties may select the arbitrator by agreement between them, the case may be heard at any venue agreed by the parties and may even be conducted by reference to documents only (that is without a formal hearing).

In yet other respects it has been said in recent times that arbitration has rather modeled itself upon litigation - often, so it is said, to the detriment of the process or to the parties' wishes. The formalities of presentation of case for example, with formal pleadings and with hearings which are virtually indistinguishable from trials in Court, are examples. The result has been that the relative informality which many believe should be the province of arbitration has been lost with consequential increase in the time taken for a case to be decided and increases in the costs which the parties must bear.

It has long been the case that certain lawyers have advised their clients to dispense with arbitration clauses in their contracts so as to compel disputes to go to litigation for formal dispute resolution. Indeed, even the drafting bodies of standard forms of contracts have moved somewhat in that direction with provisions which enable the parties to select (when they are getting into a contract) whether they wish arbitration or litigation to be the process for resolving their disputes.

It should be noted that since the introduction of the Arbitration Act 1996, arbitration is re-establishing itself as a significant and valuable process for the resolution of construction disputes in England and Wales. It is however, a remarkable fact, that the pressures that led to the introduction of the Arbitration Act 1996 and the Housing Grants Act 1996, whilst virtually identical, resulted in two separate and distinct development bodies, which did not consult with each other. This has led to anomalies which may require further legislation to ensure that the two Acts compliment each other at all times.

Nonetheless, it was this climate of relative dissatisfaction with arbitration, coupled with the delay and costliness of litigation that caused interest to be generated in alternative forms of dispute resolutions.

ADR

Though some would argue that arbitration itself is a form of ADR, the common usage of the term makes it clear that these processes are alternative not only to litigation but also to arbitration. There are many ADR processes. Indeed there would be nothing to prevent two parties inventing their own alternative process of dispute resolution.

Whilst there are distinct advantages of ADR, as is the case with negotiation, such as the preservation of commercial relationships and the working out of a compromise solution acceptable to both parties, they generally have pitfalls as well. Primarily these are that ADR will not work without two willing participants - one party being plainly unable to impose it upon the other. Further, the rest of the ADR process is not a decision which automatically binds the parties - they will only be banned if they chose to be banned. This could

give rise to a situation where an ADR process is completed but no result arises through the parties being unable to accept a compromise solution.

When ADR first appeared on the UK construction scene it was generally accepted that adjudication fell within that broad remit. In those times Adjudication appeared in construction contracts in an ad-hoc fashion without any consistency between one contract and another. There was no statutory force behind the adjudication process. The result was that there were question marks over the binding nature of the adjudicator's decision and there were a number of cases brought in connection with enforcement of the adjudicator's decision.

Whilst ADR generally, that is mediation, conciliation, mini-trials, private judging, has had a chequered history in the UK construction industry, nonetheless from a practical commercial prospective there are good reasons to wish for its success, particularly mediation.

Mediation is central to the way that Dispute Review Boards (DRB) operate. Some organisations such as **RESOLEX** limit their role to project planning assistance, identifying potential problems and negotiating the resolution of any disputes that materialise. However, there is scope for DRBs to turn into Dispute Adjudication or Arbitration Boards (DABs) and to then resolve the dispute. Great care however is required when setting up such an arrangement as demonstrated by **Glencot v Barret** [[2001]. The court held that summary judgment would not be automatically given where an adjudicator had also acted in a mediation role between the parties as there could be an arguable case of perceived bias of the adjudicator. The Judge considered at length the current position of the law in respect of bias. In particular, the judge was concerned that the adjudicator may have gained privileged knowledge during a mediation session held in between adjudication sessions which might have prejudiced one of the parties. However, it would appear that provided both parties are formally warned in clear terms of the implications of mediation then use of the process may be acceptable.

Adjudication

Prior to the Housing Grants Construction and Regeneration Act 1996 ("the Act") coming into force, adjudication (like arbitration or ADR) was only available if agreed to by both contracting parties (normally by means of a set of adjudication clauses in the construction contract). Thus, resolution procedures by a third party appointed under the contract as an adjudicator with powers in respect of defined disputes existed in a number of standard forms of contract including standard JCT forms of building subcontract DOM/l and DOM/2, and standard forms of main contract JCT 81; NEC; PSA/l; and GC/Wks/1, which will all be the subject of detailed discussion later.

There is no legal definition of the term adjudication although adjudicators appointed by the Lord Chancellor sit in various capacities e.g. as Immigration Adjudicator to hear appeals from inferior tribunals.

The Shorter Oxford English Dictionary defines adjudication as *"To try and determine judicially"*. On this basis, judges and arbitrators and other may be generically described as adjudicators. "Judicially" connotes acting fairly in arriving at a decision, but one thing construction adjudication under the Act and the Scheme is not, is arbitration, and is therefore not subject to the Arbitration Acts unless any of its provisions are incorporated in the adjudication procedures. Some might therefore use the hybrid expression 'quasi-judicial', suggesting that the adjudicator whilst exercising a judicial function has not been appointed an arbitrator under the Arbitration Acts.

In summary, there are three forms of adjudicator

i) Statutory Adjudication governed by Statute, and carried out by Government appointed and salaried personnel, who are in effect specialist judges, e.g. CPR Fast Tract Procedures, Traffic and Immigration Adjudication.
ii) Contract Adjudication, akin to private arbitration but with distinct remedies and processes.
iii) Housing Grants Act adjudication with statutorily prescribed minimum requirements.

Arbitration or Adjudication?

The mere use of a label describing a process as arbitration or adjudication cannot decide the legal status of such a process. The courts has examined this matter in several cases, including ***Cape Durasteel Ltd v Rosser and Russell Building Services.***[1] In ***Durasteel*** the court held:

(1) The use of the word "adjudication" was not of itself decisive as to whether or not the procedure could in fact constitute a binding agreement.

(2) The test to be applied was - whether the agreement to refer the dispute had or had not the essential feature of an arbitration agreement. In applying the test the courts will look at both the dispute clauses and their context in the contract as a whole.

The Official Referee went on to state: *"It is clear on the authorities that the test to be applied is the customary one of ascertaining the presumed intention of the parties from their contract and its circumstances. It is plain that 'adjudication' taken by itself means a process by which a dispute is resolved in a judicial manner. It is equally clear that 'adjudication' has yet no settled special meaning in the construction industry (which is not surprising since it is a creature of contract and contractual procedures utilising an 'adjudicator' vary as do forms of contract). Even if it were to have the special meaning accorded to it in some sections of the construction industry where it describes the initial determination of certain classes of dispute in a summary manner, the force of which is tempered by its ephemeral status as there are concomitant provisions for the decision to be reviewed and if necessary reversed by an arbitrator, I would see no reason why it should have that meaning in this contract .....*

Both arbitration and adjudication may be fast track or extended processes depending on the statutory or in house regime that governs the process. Whilst arbitration and adjudication may be entirely voluntary process UK Statutes requires certain classes of dispute to be submitted either to arbitration e.g. Agriculture Disputes under the Arbitration Act 1996 or to adjudication e.g. construction disputes under the HGCRA 1996. Arbitration and adjudication are private processes. None of the above therefore can provide the basis of a distinction between the two processes. If an agreement to submit a dispute to adjudication is to lead to a binding agreement and should have the essential features of an arbitration agreement, what then is the difference between arbitration and adjudication ? The major distinction lies in the nature of the outcome, namely that arbitration leads to a **binding enforceable award**, whereas adjudication leads to a **decision which whilst temporarily final** is nonetheless **immediately enforceable**, until by agreement or due to lapse of time, which might be an express provision of the agreement to adjudicate or implied by Limitation Statute, it becomes final or is alternatively deprived of its binding nature where the dispute is finally determined in another place, namely by arbitration or the court.

Dispute Resolution in the construction industry prior to 1976.

Before 1976 no standard forms of construction contract contained adjudication provisions relying normally on arbitration as the preferred settlement process. Parties to a valid arbitration agreement can normally insist that this chosen mechanism is used to settle any disputes within the ambit of the agreement. A mere refusal to pay in the absence of a dispute as to entitlement will be dealt with by summary judgment without a trial before a court, not by arbitration.

Should matters go wrong during a reference there were provisions of the Arbitration Acts to ensure that the parties' intentions to settle their differences by arbitration were not defeated. A valid arbitrator's award can be enforced as a judgment of the court, and thus provides the parties with a binding decision. Appeal procedures on the grounds of misconduct (serious irregularity in the 1996 Act), and points of law, exist to enable a party to challenge an award - a more restricted regime to litigation. Parties invariably ask for the arbitrator to state reasons to enable a challenge to be made on a disputed point of law arising out of the award.

The disadvantages of arbitration are that all the players and facilities have to be paid for and legal aid is not available. Potentially arbitration offers a choice of arbitrator, flexible procedures, privacy of the hearing /

[1] ***Cape Durasteel Ltd v Rosser and Russell Building Services*** (1995) 46 Con LR 75

award, and relative informality. It can be quicker and cheaper than litigation, though flexibility can become a disadvantage in the hands of an inexperienced arbitrator.

Arbitration is a judicial process and in England and Wales the proceedings are normally conducted in an adversarial way, i.e. the arbitrator makes his decision on the basis of the facts, evidence, witnesses and points of law adduced before him by the parties. A valid arbitrator's award can, with the leave of the court, be enforced as a judgment.

Set Off. Just like today disputes between main contractors and subcontractors were common in the post war era. In ***Dawnays v Minter*** [2] the Court of Appeal held *'that a main contractor under a standard form of building subcontract could only set off (or deduct) from monies otherwise due to the subcontractor those sums which were liquidated and ascertained and which were established or admitted as being due.'* Thus in ***Dawnays*** the nominated subcontractors were able to defeat a set off attempt by the main contractors for alleged defects and/or delays. The main contractor was obliged to pay subcontractor the amount certified in the architect's certificate. Lord Denning famously declared :

"That is the ordinary understanding in these matters. The interim certificate is regarded as the equivalent of cash. The subcontractor needs the money so as to get on with the rest of his work. On principle, and in practice, once a certificate is issued, it must be paid, save only for permitted deductions..... Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that the subcontractor can have the money in hand to get on with his work and the further work he has to do ..... an interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad - except so far as the contract specially provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross-claims."

Parties truly believed that cash flow was the lifeblood of the industry. All that changed when the House of Lords made its judgment in the case of ***Gilbert Ash v Modeni.***[3] Some still regard the ***Gilbert Ash*** decision as being restricted firstly to the particular form of "one-off" subcontract used and, secondly, as a statement that the law of set off in a construction contract was no different from any other contract. However, as far as the standard forms of building subcontracts were concerned (NSC/4 and 4a, NSC/1, DOM/l and 2 etc) the decision had a profound effect, and caused the issuing bodies to redraft some of the provisions to ensure that subcontractors did have a measure of protection from contractors' cross claims.

Adjudication after 1976

In 1976 the NFBTE standard forms of subcontract ("blue" for domestic and "green" for nominated subcontractors) introduced obligatory "adjudication" provisions in respect of the contractor's ability to set off sums, not agreed, from monies otherwise due to a subcontractor. The DOM/l and DOM/2 contracts, published by BEC/FASS/CASEC) contained similar provisions.

The essential feature of this new adjudication 'code' was that their scope was strictly limited. They were limited to claims in relation to loss and/or expense or damage alleged to have been suffered or incurred by the contractor resulting from a breach of the subcontract by the subcontractor. They did not apply, for instance, to alleged underpayments or under-valuation of work.

This form of adjudication worked fairly well but was subject to at least one serious drawback exposed in ***Cameron v Mowlem.***[4] The court held that the adjudicator had an extremely limited power. He was only able to make a decision as to where the proposed set off monies should go but such a decision was of no value if the amount against which the set off was to be made, was itself in dispute. Thus, in ***Cameron*** the adjudicator, Roger Knowles, fulfilled his function properly under the subcontract but Mowlem refused to pay over the set off monies on the basis that the amount otherwise due to Cameron was insufficient.

Furthermore, the court refused to uphold the **Adjudication Decision** as an **Arbitrator's award** it clearly not being so. The Court of Appeal in giving its judgment described the adjudicator's decision as having an *"ephemeral and subordinate character which in our view makes it impossible for a decision to be described as an award on an arbitration agreement."* In fairness, the adjudicator's powers were extremely tightly prescribed whereas

[2] ***Dawnays Ltd v F G Minter and Trollope and Coles Ltd*** [1971] 1 WLR 1205,

[3] ***Gilbert Ash (Northern) Ltd v Modeni Engineering (Bristol) Ltd*** [1973] AC 689 : see various articles by Duncan Wallace

[4] ***A Cameron v Mowlem*** (1989) 52 BLR 25,

those under the HGCRA do not suffer such limitations. Nonetheless, even now, unless the contract provides otherwise, as per the Scheme, the decision of an adjudicator does not have the status of an arbitrator's award.

Where however there was no dispute as to the valuation of the subcontractor's work and the set off procedure was validly invoked, the courts were prepared to grant an injunction enforcing the adjudication's decision.[5] Similarly, in ***Channel Tunnel Group v Balfour Beatty***,[6] the House of Lords stated that they would not intervene in a contract where the parties had established their own dispute resolution machinery, which included an arrangement by which disputes had first to be referred to a Dispute Panel (which is analogous to adjudication) and only then could it be referred to arbitration.

Arbitration, adjudication and the decisions of contract administrators

In ***Beaufort v Gilbert Ash*** [7] the House of Lords distinguished between contractual provisions such as final certificates which were stated to be conclusive and those which were not. The latter category, which comprises the majority of decisions, certificates etc, given by architects and engineers, is capable of being investigated by the courts using their inherent jurisdiction. The courts unlike arbitrators do not need to be given specific powers to enforce the contractual rights of the parties. The court's jurisdiction to open up, review and revise architects' decisions and certificates, following a dispute over a building contract, was not removed by the powers conferred on an arbitrator by clause 41.4 of the JCT standard form building contract. Therefore, the Court of Appeal decision in ***Northern Regional Health Authority v Derek Crouch*** [8] was wrong and accordingly overruled. This was a very important decision for the industry.

The House of Lords allowed an appeal by ***Beaufort Developments***, the employers, from a decision of the Court of Appeal in Northern Ireland which, in reliance on ***Crouch***, had dismissed the employers' appeal from Mr Justice Pringle's (QBD, High Court of Northern Ireland) decision upholding an order of Master Wilson granting application contractors, Gilbert-Ash, a stay of the employer's action against Parker & Scott, contractors and architects.

In May 1994, Beaufort had entered into an agreement in the standard JCT form, 1980 edition: private without quantities, with the contractors for the construction of a nine-storey office block in Belfast. By a separate contract the employers appointed the architects for the project. When the works were not completed on time, the contractors blamed the architects and the employers blamed them both. In August 1995 the contractors issued a writ against the employers claiming payment for work for which architects' interim certificates had been issued. The employers denied liability and alleged that they were entitled to set off a larger amount than that claimed by the contractors. In November 1995 the contractors served a notice to refer and concur in the appointment of an arbitrator pursuant to the arbitration clause, clause 41.4 of the contract. In December 1995 the employers issued a writ against both the contractors and the architects claiming damages for negligence and breach of contract. In February l996 the contractors successfully applied for a stay of the employers action pursuant to s4 Arbitration Act (NI) 1937

Clause 41 4 of the JCT standard form building contract states: "... the arbitrator shall ... have power to rectify the contract so that it accurately reflects the true agreement made by the employer and the contractor... and to open up, review and revise any certificate, opinion, decision ... requirement or notice and to determine all matters in dispute ... as if no such certificate, opinion, decision, requirement or notice had been given."

LORD HOFFMANN said that the Court of Appeal in ***Crouch*** had ruled that "*to open up, review and revise"* were special powers conferred exclusively on the arbitrator and that the court's jurisdiction was limited to deciding whether or not the certificate or opinion was invalid for bad faith or excess of power. The language and practical background of the JCT contract did not suggest that any certificates other than the final certificate were intended to have conclusive effect. In addition to the power to open up, review and revise, clause 41.4 also conferred express powers to rectify the contract and to direct measurements and valuations. It was plain that the reason for the inclusion of those powers in clause 41.4 was to confer upon the arbitrator

[5] see ***Drake and Scull Engineering Ltd v McLaughlin and Harvey plc.*** where the Official Referee enforced the Decision as a legitimate part of the contractual machinery between the parties.

[6] ***Channel Tunnel Group v Balfour Beatty and ors*** [1993] 2 WLR 262,

[7] ***Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd and others*** The Times, 1998

[8] ***Northern Regional Health Authority v Derek Crouch Construction Co Ltd*** [1984] QB 644

the plenitude of power to determine the rights of the parties, which would be possessed by a court. If the power to open up. review and revise was intended to be peculiar to the arbitrator, it would at any rate be different in its purpose from the other powers.

Robins v Goddard,[9] concerning clause 17 of the RIBA form of contract, was an important case because it told what the Court of Appeal, nearly a century ago when the *"open up, review and revise"* formula seemed to have been relatively new, thought that it was intended to do: not, as the Court of Appeal had said in ***Crouch***, to enable certificates otherwise conclusive to be revised by an arbitrator, and no one else, but to make it clear that such certificates were not conclusive at all. The court in the former case clearly took the view that the draftsman had seen no need to confer an express power on the court in the same terms as the arbitration clause. The court's jurisdiction was unlimited. It was the arbitrator's powers which needed to be spelt out. On that view the power to open up, review and revise fell into place alongside the other powers conferred by clause 41.4 which a court would in any event possess. During the 80 years between ***Robins v Goddard*** and ***Crouch,*** one could find no authority in which a construction inconsistent with the earlier case was adopted.

In his Lordship's opinion ***Robins v Goddard*** was binding upon the Court of Appeal in **Crouch** and should have been determinative of the question. The cases since ***Crouch*** showed that it had caused such uncertainty and even injustice that its dicta should be disapproved. In the present appeal, Mr Justice Pringle had affirmed Master Wilson's grant of a stay with reluctance but had felt bound by ***Crouch.*** Since in his Lordship's opinion **Crouch** was wrongly decided, the discretion should be exercised as Mr Justice Pringle would have done if he had felt free to do so. Therefore the appeal was allowed.

Sir Michael Latham's initiative

Sir Michael Latham's now well known suggestions as to possible reforms are set out in his final report *Constructing the Team,* and one of them recommends that "a *system of adjudication should be introduced within all the Standard Forms of Contract"* with the express exception of contracts which already contain *"comparable arrangements for mediation or conciliation"* (see Appendix F). His desire that his proposal *"should be underpinned by legislation"* has now been honoured, hence clause 108 of the HGCRA 1996.

Latham made three principal stipulations, viz:-

(i) there should be no restrictions on the issues capable of being referred to adjudication;

(ii) the adjudicator's award to be implemented immediately and the use of a trustee stakeholder (often regarded as a 'cop-out' under DOM/l) was to be restricted;

(iii) appeals were to be permitted but generally only after implementation of the decision and only after practical completion. Latham did recognise there might be exceptional issues for the courts to decide which could delay implementation.

The result was the creation, by virtue of the Housing Grants Construction and Regeneration Act 1996, of the concept of construction adjudication. Reflecting Latham's major stipulations, the first is largely fulfilled in that all aspects of relevant construction activity are embraced by the process but certain categories of construction work are excluded. The immediate implementation requirement is likewise fulfilled. The question of appeals was dealt with in a somewhat more sophisticated manner, introducing the concept of temporary finality. Finally, the requirement that the process be incorporated into all standard forms of contract, underpinned by legislation is fulfilled by the passing of the Act which makes the process compulsory at the behest of either party to a dispute. It is possible for the process to be ignored if neither party chooses to invoke it, in which case the dispute can be settled in court or through arbitration.

The process will run despite the commencement of legal proceedings and due to its speedy nature will be concluded and enforced long before the dispute gets to court or arbitration. It is clear that once a party has made a reference to adjudication the process may proceed with or without the co-operation and participation of the other party.

Jurisdiction of the Adjudicator

Like arbitration, once the adjudicator is seized of the dispute, the other party may choose not to participate but cannot choose not to be bound by its outcome, so they might as well participate and put up the best

[9] ***Robins v Goddard*** [1905] KB 294

possible defence. Unlike arbitration which is purely voluntary in that the parties chose to make an arbitration agreement or to agree to an ad hoc reference, one party alone can chose to go to adjudication and effectively force the other to participate.

The Act gives the adjudicator no power to decide on his jurisdiction, though he should carefully consider whether or not he has jurisdiction, since to continue without it would be a waste of time and money for the parties. It is common for one party to assert that he has no jurisdiction and to invite the adjudicator to consider his position. If an adjudicator concludes that he does not have jurisdiction the most appropriate course of action is for him to resign.

Express power to rule on adjudication and validity of the decision.

It has now become clear however that the parties can give the adjudicator the power to rule on his jurisdiction. If the adjudicator makes a wrong decision in law, in that the contract is outside the remit of the Act, any order for payment subsequently given by the adjudicator will not be enforceable. It was held in ***Project Consultancy Group v Trustees of The Gray Trust***.[10] in proceedings to enforce a decision of an Adjudicator, that a defendant may challenge the decision on the grounds that the Adjudicator had no jurisdiction to determine the dispute. On the facts, the Defendant was not precluded from making such a challenge to jurisdiction simply because it had agreed that the Adjudicator should determine the question of his jurisdiction On the facts, the Defendant has a real prospect of defending the claim on the grounds that the Adjudicator's decision was wrong because the contract was concluded before 1 May 1998 or alternatively because no contract was ever concluded between the parties. The significant factor was that the defendant took part under protest and made it clear that there was no intention to abide by the adjudicators view as to whether or not he had jurisdiction thereby reserving the right to resist the decision as to payments due in court on the grounds of no jurisdiction.

However, in ***Tim Butler v Merewood Homes***,[11] it was held that only a court can finally determine whether or not a contract is a construction contract even though in a different context an adjudicator can determine terms of the contract.

In the early days questions arose as to jurisdiction based on whether the dispute pre-dated the coming into force of the Act. Such questions whilst relevant are unlikely to arise in the future, though even now, the impact of variations in respect of ongoing projects that commenced before the Act have caused problems. It was held in **Earls Terrace and Waterloo** [12] that a minor variation in respect of fees did not turn a pre-HGCRA contract into a relevant Construction Contract

The major on-going issue for litigation purposes is whether or not a dispute involved a relevant construction operation covered by the Act[13] and compliance with the requirement that a construction contract be in writing,[14] though the bulk of the questionable areas have by now received clarification by the courts. If an adjudicator mistakenly carries out an adjudication which is not within the ambit of the Act, the losing party may successfully resist judicial enforcement on the basis that the adjudicator had no jurisdiction, providing the loosing party played no part in the process, or participated subject to an objection to jurisdiction and having made it clear that he would not be bound by the outcome, i.e. by participating "without prejudice."

Thus in ***Nordot Engineering v Siemens***,[15] which concerned a Gas turbine generating plant project, the defendant submitted to the adjudicator, with reasons, that the contract did not concern a construction operation governed by the HGCRA, but subsequently agreed that the decision of the adjudicator would be complied with. Gilliland QC rejected a suggestion that just as parties cannot contract out of the HGCRA, they cannot contract in and so confer jurisdiction on an adjudicator if that is what the parties agree. On the

[10] ***Project Consultancy Group -v- The Trustees of The Gray Trust*** [1999] BLR 377 ; see also ***Workplace Technologies -v- E Squared Ltd*** **and Mr J L Riches** [2000] CILL 1607, HT 01/228, 16.02.2000

[11] ***Tim Butler Contractors Ltd -v- Merewood Homes Ltd*** 12.04.2000 TCC 10/00

[12] ***Earls Terrace Properties Ltd & Waterloo Investments Ltd*** 14.02.2002 HT 02/237

[13] s104-105 HGCRA 1996 excluded categories .

[14] s106 HGCRA 1996. see ***Debeck Ductworth Installations Ltd v T&E Engineering Ltd*** 14.10.2002 BM250063 : see also ***Joinery Plus Ltd (in administration) v Laing Ltd*** 15.01.2003 HT 02/323 ; ***Oakley (William) v Airclear Environmental Limited*** 04.11.2001 ; ***Pegram Shopfitters Ltd v Tally Weijl*** *UK Ltd* HT 03/25 14.02.2003 / 21.11.2003 but see **Patrick** ***PA Birchall (T/a Pier 1 Metalworks) v West Morland Car Sales Ltd*** 02.11.2001 where a written contract through correspondence complied with Act.

[15] ***Nordot Engineering Services Limited -v- Siemens plc*** (14 April 2000) HHJ

facts here there was a clear and unequivocal statement that the defendant would accept and be bound by the adjudicator's decision as to whether the contract was a construction contract within the meaning of s104 & 5 of the HGCRA.

There is clearly scope to contract in to the Act and submit excluded categories of building dispute to adjudication. However, there must be limits to this and the extent to which the Act and the Scheme apply. Parties to a dispute not covered by the scheme are unlikely to have complied with terms and conditions in the scheme for withholding and therefore they could not be applied. The process is clearly geared towards the construction industry and disputes that have nothing whatsoever to do with construction would not therefore benefit from the process without considerable amendment to its terms.

We have now had a number of cases where the courts have had to consider whether or not a construction contract is within the provisions of the HGCRA 1996.[16]

It was held in ***Palmers v ABB Power.***[17] which concerned the meaning of "Construction Contract" and "Construction Operation" and discussed a notice of withholding, that the Court may use its discretion to grant a declaration of law as to the jurisdiction of an adjudicator and accordingly the court did so. In the event scaffolding operations were held to be within the scope of the Act. Similarly in ***Zantingh v Zedal Building Services***[18] the court asked in respect of work for the installation of standby generators whether or not the primary purpose of the site was for the generation of power. Since on the facts it was held that it was not, the court determined that the HGCRA applied to the contract.

By contrast, it was held in ***Homer Burgess v Chirex*** [19] that the installation of pipework was an operation which fell within the scope of the exception in s105(2)(c)(ii) of the Act, and was accordingly not a construction operation. The disputes relating to that work were therefore not disputes on which the adjudicator had power to make a decision. If an adjudicator falls into error of law as to the scope of his jurisdiction it is open to the court in proceedings to set aside the decision, or at least to decline to give it the temporary binding effect which statute gives to a valid decision of an adjudicator. While the adjudicator's decision could not stand to its full extent, the whole of the adjudicator's decision was not beyond the proper scope of his jurisdiction. Similarly, land below watermark is not land within England, Wales or Scotland, so sea-bed construction work is outside HGCRA.[20]

According to ***Cowlin Construction Ltd v CFW Architects,***[21] architectural design work can be the subject matter of a construction contract. However it was made clear in ***Gibson Lea Retail Interiors Ltd v Makro***[22] that shopfittings which did not become fixtures are outside the scope of the HGCRA. Similarly, boiler plant installation works at a chemical works are by virtue of s105 outside scope of HGCRA[23]

It was held in ***Samuel Thomas Construction v Bick & Bick***[24] that conversion of a barn to a residence is nonetheless a residential occupier contract even though occupation will not be possible until completion of the works and is thus outside the scope of the HGCRA by virtue of s106. By contrast, the Maintenance of gas appliance in community owned residential properties is within HGCRA, according to ***Nottingham Community Housing Association v Powerminster*** .[25]

Globalisation of adjudication and dispute review boards.

The value of the adjudication process has not been lost on other countries who have consequently incorporated their own versions of process.[26] Even where this has not occurred the concept has started to spread through adoption by standard form construction contract providers such as FIDIC. One problem that

16 It should however be noted that for voluntary construction adjudication outside the scope of the HGCRA, that jurisdiction is entirely a contractual matter and subject to the scope provisions of the contract.

17 ***Palmers Limited -v- ABB Power Construction Limited*** [1999] BLR 426

18 ***Zantingh (ABB)Ltd -v- Zedal Building Services Ltd*** [2001] BLR 66, TCC 00/400, 12.12.2000

19 ***Homer Burgess Limited -v- Chirex (Annan) Limited*** (10 November 1999)

20 ***Staveley Industries Plc (t/a EI.WHS) -v- Odebrecht Oil & Gas Services Ltd*** 28.02.2001

21 ***Cowlin Construction Ltd v CFW Architects*** [2003] EWHC 60, 15.11.2002

22 ***Gibson Lea Retail Interiors Ltd -v- Makro Self-Service Wholesalers Ltd*** [2001] BLR 407, 15.11.2002

23 ***Mitsui Babcock Energy Services Ltd*** P780/00 13.06.2001

24 ***Samuel Thomas Construction Ltd -v- Bick & Bick*** *[aka J & B Developments]* 28.01.2000

25 ***Nottingham Community Housing Association Ltd -v- Powerminster Ltd*** [2000] BLR 309 HT 00/206 30.06.2000

26 e.g. Australia and New-Zealand. See further Chapter 10 below.

may be encountered here is that the country in which a FIDIC or similar contract is to be enforced may have laws which do not complement or sit easy side by side with the standard terms of the contract. A second problem lies in the fact that the model of adjudication adopted by the standard form contract may bear little or no resemblance to the model mandated by the HGCRA 1996 in England. Indeed, some of the models adopted would be found not to comply with the Act. This is particularly so of the role of the standing dispute review board, as operated in the United States. Even in the UK the relationship between the dispute resolution processes that forms an integral part of the partnering process and the HGCRA 1996 is far from settled where a stepped, incremental approach is mandated in contradiction to the right of the parties under the Act to make a reference to adjudication at any time. The most common applications of the dispute review board process in the UK to date have been to PFI contracts, which by virtue of s105 HGCRA are outside the scope of the Act.

The value, importance and significance of the provisions of English law to global construction contracts incorporating adjudication provisions is on the one hand considerable but on the other very limited. To the extent that the case law provides very illuminating illustrations of the problems that may be encountered in construction contracts and provides useful guidance on how to address such issues which may be adopted by foreign courts it is invaluable. However, to the extent that the governing law may be formulated in very different terms it may be very misleading and thus unhelpful in the extreme.

FURTHER REFORM PROPOSALS AND MONITORING OF THE PROCESSS

The Department of Trade and Industry is monitoring the effectiveness of construction adjudication. The DETR consulted the Construction Industry Board and a similar exercise has been conducted in Scotland. Whilst the CIB Report identifies areas of concern, in particular in respect of costs, ambush / excessive legalistic documentation and a question mark over the competence of adjudicators, the DETR determined to take no action at that time, but to conduct a further review later. It is likely that some of the minor shortcomings of the Act and the Scheme will eventually be remedied. Note that most of the criticisms have been addressed by the New Zealand version of the Act.

The full texts of the following are set out in the companion Cases and Materials Text, which accompanies this book.

- **DETR Proposals for reform of the HGCRA 1996 Scheme**
- **DETR Consultation Paper 2001**
- **CIB Report**
- **The Scottish Consultation Paper.**