

CONSTRUCTION ADJUDICATION PRACTICE GUIDELINE

**Jurisdiction of the UK
Construction Adjudicator**

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&
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TABLE OF CONTENTS

Acknowledgments	
A note to the reader	
1. Introduction	1
2. Threshold jurisdiction.....	3
Is there a conflict of interest preventing the adjudicator from acting?	6
Is there a contract?	7
When was the contract entered into?.....	7
Is the contract a construction contract?	7
Is the contract with a residential occupier and excluded by section 106 of the HGCRA?	10
Does it relate to construction operations within the territorial application of the HGCRA?	10
Does the contract need to be in writing?	11
Has the adjudicator’s appointment been made in accordance with the contract and/or the Scheme?	11
Is there a crystallised dispute?.....	12
Has the dispute arisen under the contract?	15
Is there more than one dispute?.....	15
Are the parties to the contract the same parties who are bringing the adjudication?	16

Does the contract expressly provide a right of adjudication in any event?	17
Is the dispute too complex to deal with within 28 days?.....	17
Does the adjudicator have the necessary expertise?.....	17
Has another adjudicator already made a binding decision on the matter?.....	18
3. Maintaining jurisdiction	18
Timing.....	19
Nature, scope and extent of the dispute referred	20
Has there been a previous adjudication(s) on the same dispute?.....	22
Errors of fact or law	22
Natural justice	22
4. How can the parties challenge an adjudicator’s jurisdiction?.....	27
5. Adjudicator’s power to decide whether or not he has jurisdiction	28
6. Dealing with jurisdictional challenges.....	28
7. Conclusion.....	30
Endnotes.....	32

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A NOTE TO THE READER

The Adjudication Society and the Chartered Institute of Arbitrators established a joint working group in April 2010 in order to produce a series of Guidelines dealing with adjudication. The purpose was to deal with adjudication in England, Wales and Scotland. Nicholas Gould, Partner, Fenwick Elliott LLP chaired the joint working group, which was established under the policy subcommittee of the Chartered Institute of Arbitrators and the executive committee of the Adjudication Society. The Guidelines are to assist not just adjudicators, but also parties and party representatives in respect of the key issues that they and adjudicators might encounter when dealing with adjudication under the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy Economic Development and Construction Act 2009 (the “LDEDCA”). The use of the acronym “HCGRA” in this Guideline refers to the HGCRA as amended unless otherwise stated to the contrary. The Guideline will take into account the Scheme, amendments to it and also pertinent case law. The Guideline does not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered. Instead, the Guideline tries to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish best practice, so that Guidelines will be provided from time to time. This is the Third Edition of the Guideline on jurisdiction. The first edition was published on 25 May 2011. Guidelines can be obtained from the website of the Adjudication Society (www.adjudication.org) or the Chartered Institute of Arbitrators (www.ciarb.org).

Nicholas Gould

**Jurisdiction of the UK
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Jurisdiction of the UK Construction Adjudicator

1. Introduction

1.1 Ensuring that an adjudicator has the jurisdiction to decide the dispute referred to him¹ is of utmost importance to the adjudication process. Without jurisdiction, an adjudicator's decision will be null and void and, ultimately, will not be enforced by the courts. In contrast, if an adjudicator has jurisdiction then, as the Technology and Construction Court (the "TCC") and the Court of Appeal have repeatedly made it plain, errors of law, fact or procedure will not, except in very limited circumstances, justify a failure to comply with it.

1.2 Mr Justice Jackson (as he then was) had the following to say in *Carillion Construction v Devonport Royal Dockyard Ltd*² on the issue of jurisdiction:

- i. *The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);*
- ii. *The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;*
- iii. *Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision;*
- iv. *Judges must be astute to examine technical defences with a degree of skepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of*

jurisdiction or serious breaches of the rules of natural justice.

- 1.3 Jurisdiction for the purposes of adjudication can be divided into two “stages”. The first of these is threshold jurisdiction, that is, can an adjudication be set in train at all? There are strict criteria which must be complied with in order to achieve threshold jurisdiction. Once the adjudicator has determined that he does have jurisdiction then care must be taken not to lose it or, once again, his decision will not be enforced.³ Care needs to be taken to see that the applicable rules or procedure for the adjudication are identified, which might be set out or referred to in the contract or, by implication, the statutory Scheme.⁴
- 1.4 The purpose of this Guideline is to provide practical guidance to adjudicators on:
 - 1.4.1 Examining whether they have jurisdiction to determine the dispute at the outset (i.e. threshold jurisdiction);
 - 1.4.2 Remaining within their jurisdiction;
 - 1.4.3 How the parties to an adjudication can challenge an adjudicator’s jurisdiction;
 - 1.4.4 An adjudicator’s power to decide whether he has jurisdiction; and
 - 1.4.5 Dealing with jurisdictional challenges.
- 1.5 Please note that this Guideline is not intended to provide chapter and verse on the law regarding these matters which is, in any event, subject to change. Any adjudicator who, as a result of this Guideline, has doubts as to his jurisdiction should consult the HGCRA as amended by the LDEDCA (or the old un-amended HGCRA as applicable), together

with the relevant case law and any relevant commentary.⁵

1.6 This Guideline should not be used as guidance by adjudicators in jurisdictions that also have adjudication provided for by statute such as New Zealand, Singapore and Australia. Unlike in the field of arbitration there are no international “standards” on an adjudicator’s jurisdiction that can be applied across the board. Adjudicators in other jurisdictions should refer to their own legislation, applicable case law and commentary.

2. Threshold jurisdiction

2.1 The very first question an adjudicator should ask himself, when deciding whether to accept an appointment, is “Do I have jurisdiction?” In other words, can the adjudication process be set in train at all? Whilst, an in-depth analysis is not necessarily required at this stage, an initial and proportional review to flag any issues should be undertaken.⁶ In order to determine this, an adjudicator should ask himself the key questions listed below.

2.1.1 Is there a conflict of interest preventing the adjudicator from acting?

2.1.2 Does there appear to be an obvious problem with any of the checklist jurisdiction issues listed below:

2.1.2.1 Is there a contract?

2.1.2.2 When was the contract entered into?⁷

2.1.2.3 Is the contract a construction contract within the definition of sections 104(1) and 105 of the HGCRA?

- 2.1.2.4 Is the contract with a residential occupier and excluded by section 106 of the HGCRA?
 - 2.1.2.5 Does it relate to construction operations within the territorial application of the HGCRA?
 - 2.1.2.6 If the contract is not a construction contract under the HGCRA, does the contract expressly provide a right of adjudication in any event?
 - 2.1.2.7 Has the adjudicator's appointment been made in accordance with the contract? Has the referral been validly made?
 - 2.1.2.8 Is there a crystallised dispute?
 - 2.1.2.9 Has the dispute arisen under the contract?
 - 2.1.2.10 Has more than one dispute been referred to the adjudicator?⁸
 - 2.1.2.11 Has there been a previous adjudication on the same dispute?
 - 2.1.2.12 Are the parties to the contract the same parties who are bringing the adjudication?
- 2.2 The adjudicator will have limited information at the very outset, but all of the key questions should be kept under review any further information becomes available. The adjudicator should consider whether requesting further information from the parties might assist in resolving some of these key questions, and this can be balanced against the fact that the parties might by their conduct just submit to the

Jurisdiction of the UK Construction Adjudicator

adjudication process.

2.3 Once an adjudicator has satisfied himself with the answers to these questions there are two further questions that are worth asking, as a matter of good practice, before the adjudication process commences.

These are:

2.3.1 Is the dispute too complex to be fairly determined within 28 days?

2.3.2 Do I have the necessary expertise?

2.4 Further, if there has been a previous adjudication an adjudicator should also consider whether he has been asked to decide a matter on which there is already a binding decision by another adjudicator.⁹

2.5 In addition, the adjudicator might wish to consider two further questions:

2.5.1 To what extent is there jurisdiction to deal with the costs of the adjudication; and

2.5.2 The jurisdiction to deal with slips, errors and mistakes in the decision.

2.6 The LDEDCA clarified the law in respect of these two areas. First, in respect of costs, the contract cannot state that one party will bear the costs of the adjudication prior to the notice of adjudication being issued unless the contract also confers power on the adjudicator to apportion his fees and expenses between the parties. Any agreement in respect of apportionment of the parties' cost reached after service of the notice must be in writing. The power of the adjudicator under LDEDCA to apportion his fees remains unchanged. However, there is a distinction

between the allocation of the fees and expenses of the adjudicator, and the allocation of the costs of the parties. The LDEDCA does not unequivocally make void a contract term from requiring a party to pay all of the other's costs; however, such a clause might be seen to fetter a party's right to adjudicate at any time.¹⁰

2.7 Second, the LDEDCA provides a power to correct clerical or typographical errors in the decision. This statutory power is consistent with the previous common law position.¹¹

Is there a conflict of interest preventing the adjudicator from acting?

2.8 An adjudicator should ensure that he does not have a conflict of interest before he accepts an appointment. Failure to do so could result in the courts refusing to enforce a decision on the grounds that there had been a breach of natural justice due to the bias of that adjudicator.

2.9 By way of guidance, the following have not been regarded as sufficient evidence of bias by the courts:

2.9.1 The fact that an adjudicator had, many years previously, been a colleague of one of the parties' representatives in circumstances where he did not depend on them for more than between 5 to 10 per cent of his work;¹²

2.9.2 The fact that an adjudicator had conducted a mediation with the referring party just days before he had been appointed in this dispute and had also been involved in an adjudication with the referring party some three years earlier in circumstances where the adjudicator in question had no personal knowledge of the

parties and had not been selected by them.¹³

2.10 If an adjudicator is in doubt as to whether he has a conflict of interest he should, as a matter of best practice, disclose the potential conflict of interest to both parties before proceeding further.

Is there a contract?

2.11 In order for there to be a binding contract between the parties there must be offer and acceptance, consideration and an intention to enter into legal relations. Those entering the contract must have had the capacity to do so.

When was the contract entered into?

2.12 A different regime applies after 1 October 2011 (the first regime under the HGCRA applying from 1 May 1998). As a result the date when the contract was entered into should be double checked.¹⁴ In particular, if the contract pre-dates 1 October 2011 then the issue of whether or not the contract is in writing should be considered by the adjudicator as, if it is not, the right to adjudicate will not arise. For further details on this increasingly rare issue please see the key textbooks recommended above.¹⁵

Is the contract a construction contract?

2.13 A statutory right to refer a dispute to adjudication will only arise if there is a construction contract within the definition laid down in sections 104 and 105 of the HGCRA.

2.14 A construction contract is an agreement for:

2.14.1 The carrying out of construction operations (whether by one of

the parties or by a subcontractor);

2.14.2 Providing labour (either his own labour or others' labour) for the carrying out of construction operations.

2.15 References to a construction contract include an agreement to do architectural design or surveying works as well as to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape in relation to construction operations.¹⁶

2.16 The definition of construction operations in section 105(1) is broad and includes within it the construction, alteration, repair, maintenance, extension, demolition or dismantling of:

2.16.1 Buildings, or structures forming, or to form, part of the land, whether permanent or not;¹⁷

2.16.2 Any works forming, or to form, part of the land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;¹⁸

2.16.3 Installation in any building or structure of fittings forming part of the land, including systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;¹⁹

2.16.4 External or internal cleaning of buildings and structures, so far

Jurisdiction of the UK Construction Adjudicator

as carried out in the course of their construction, alteration, repair, extension or restoration;²⁰

2.16.5 Operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as have already been described in section 105(1), including site clearance, earth moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works.²¹

2.17 Section 105(2) provides for the following exceptions to construction operations:

2.17.1 Drilling for and extracting natural gas, oil and minerals (including the workings for this);²²

2.17.2 Supply-only contracts, that is, contracts for the delivery or manufacture of goods but not their installation;

2.17.3 Work on process plant where the primary activity is nuclear processing, power generation, water or effluent treatment, handling of chemicals, pharmaceuticals, oil, gas, steel or food and drink (but not warehousing) (the “Process Plant Exception”);²³

2.17.4 Artistic works.

2.18 An adjudicator should note that if an agreement relates both to construction operations and to other matters then the HGCRA only applies in so far as it relates to construction operations.²⁴

2.19 There are a number of other exceptions. For example, section 106 of the HGCRA excludes construction contracts with a residential occupier (as to which see below). In addition, the Secretary of State has issued an order which excludes agreements under the private finance initiative, certain finance agreements and developments agreements.²⁵ Once again an adjudicator should check the relevant case law and commentary if he is in any doubt as to whether these exclusions apply.

**Is the contract with a residential occupier and excluded by
section 106 of the HGCRA?**

2.20 Such a contract is one which principally relates to construction operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence. “Dwelling” for this purpose means a dwelling-house or flat but does not include a building containing a flat.²⁶ The residential occupier must be a real person and living in the premises in order for the exception to apply,²⁷ but the adjudicator should note that the parties may enter into a contractual agreement to adjudicate.²⁸

**Does it relate to construction operations within
the territorial application of the HGCRA?**

2.21 The HGCRA only applies to construction operations that are carried out in England, Wales or Scotland.²⁹ Conversely, parties cannot contract out of the HGCRA by choosing the law of another country.³⁰

Does the contract need to be in writing?

- 2.22 Under the amended HGCRA, construction contracts are no longer required to be “in writing”.³¹
- 2.23 An agreement entered into wholly orally or partly orally and partly in writing is sufficient for a party to refer a dispute arising under that construction contract to adjudication.
- 2.24 The adjudication provisions of the contract must still be in writing, otherwise the amended Scheme will apply.
- 2.25 This means that adjudicators may be called on to consider and determine if there is a contract and the applicable terms of that contract. Disputes as to fundamental terms of the contract could mean that no contract formed at all. Disputes as to oral terms may well require some form of witness statement as to what was said, done and agreed, and perhaps the opportunity for some form of cross-examination or questioning of those witnesses in order for the adjudicator to, fairly, reach a determination as to whether there is a contract, and if so on what terms.

Has the adjudicator’s appointment been made in accordance with the contract and/or the Scheme?

- 2.26 If there is a nomination procedure within the contract then an adjudicator must check that the procedure for his appointment has been followed. If the procedure has not been followed then the appointment is open to challenge.³²

2.27 In particular an adjudicator should check:

2.27.1 Is there a named adjudicator in the contract or, alternatively, a panel of named adjudicators? If there is, is my name on that list?

2.27.2 Is an adjudicator nominating body named in the contract? If yes, has the correct nominating body been used?

2.28 If there is no mechanism provided for within the contract (or the contractual mechanism does not work because, for example, the named adjudicator has died) then the Scheme for Construction Contracts (the “Scheme”) applies unless the contract is not a construction contract under the HGCRA.³³ The 1998 Scheme was replaced by a new 2011 Scheme for construction contracts governed by the LDEDCA.³⁴ There is a Scheme for England and Wales and a separate Scheme for Scotland.

Is there a crystallised dispute?

2.29 The HGCRA provides that “a dispute” which “includes any difference” may be referred to adjudication. A claim is not the same as a dispute between the parties. There must be a point of difference that has emerged between the parties which needs to be determined.

2.30 In the case of *Amec Civil Engineering Ltd v The Secretary of State for Transport*³⁵ Lord Justice Jackson set out seven propositions as to what does, or does not, constitute a dispute. These were later approved by the Court of Appeal and are set out below for convenience.

1. *The word ‘dispute’ which occurs in many arbitration clauses and*

Jurisdiction of the UK Construction Adjudicator

also in Section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

- 2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.*
- 3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.*
- 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.*
- 5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case*

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

- 6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.*
- 7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.*

2.31 It is open to a Referring Party to choose only one part of an overall dispute (for example, one part of a final account dispute) to refer to adjudication. The fact that the entire dispute has not been referred but certain parts “cherry-picked” does not mean that a dispute has not crystallised. Indeed cherry picking is viewed as a sensible course of action by the Courts.³⁶

2.32 If an adjudicator takes the view that no dispute has crystallised between the parties then he should follow the procedures discussed at Section 5 below.

Has the dispute arisen under the contract?

2.33 The dispute must arise under the construction contract in question. This will include questions as to whether a contract has been terminated and/or repudiated.³⁷ It had been thought that an adjudicator does not have jurisdiction to look at issues that relate to the contract negotiations (such as misrepresentation) or to matters arising outside of contract (e.g. a nuisance claim). However, following *Premium Nafta Products Ltd v Fili Shipping Co*³⁸ this is now uncertain. In that case, the House of Lords advocated a pragmatic and commercial approach to construing arbitration clauses when examining the meaning of phrases “arising under” and “arising out of” in the context of a charterparty arbitration clause. Following *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd*³⁹ it appears that such an approach may well be adopted by the courts when deciding whether to enforce adjudication decisions.

2.34 If the dispute referred does not arise under the contract then the adjudicator does not have jurisdiction unless the parties both agree to extend his jurisdiction to cover such matters.

Is there more than one dispute?

2.35 Under the Scheme the adjudicator only has jurisdiction to consider one dispute at a time. If the Scheme applies, and more than one dispute

has been referred to adjudication, then the parties will need to extend the adjudicator's jurisdiction if they wish the adjudicator to consider more than one dispute.⁴⁰

2.36 However, the courts will generally take a broad view of what constitutes a dispute for these purposes. In *Fastrack Contractors Ltd v Morrison Construction Ltd*⁴¹ a single dispute was defined as:

During the course of a construction contract, many claims, heads of claim, issues, contentions and causes of action will arise ... A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is what was actually referred? That involves a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the underlying factual background from which it springs and which will be known to both parties.

**Are the parties to the contract the same parties
who are bringing the adjudication?**

2.37 An adjudicator should check that the parties to the contract under which the adjudication is brought are the same as those bringing the adjudication. It is not unknown for the wrong party to start an adjudication, especially where, for example, there are a large number of companies in the same company group.⁴²

**Does the contract expressly provide
a right of adjudication in any event?**

2.38 Adjudicators should note that, even if the contract in question is not a construction contract under the HGCRA, the contract may still expressly provide for contractual adjudication. If this is the case then an adjudicator may still have jurisdiction provided he has been appointed in accordance with the contract.⁴³

Is the dispute too complex to deal with within 28 days?

2.39 There will be disputes that may be too complex or extensive to deal with within the 28-day period.⁴⁴ An adjudicator should decide whether or not he is capable of arriving at a fair conclusion within the limited period available to him. If he is not, then he should either decline the reference,⁴⁵ or (as is frequently done in practice) accept the reference subject to receiving what appears to be an appropriate extension of time from the parties (both parties if the extension of time required is more than 14 days) at the beginning of the process. Adjudicators should also keep the timetable under review in order to ensure they can continue to conduct the adjudication fairly in the time available.⁴⁶

2.40 It should be noted that no decision has yet failed at the enforcement hurdle on the basis that it was too complex to be dealt with within 28 days.⁴⁷

Does the adjudicator have the necessary expertise?

2.41 It is worth an adjudicator asking himself at the outset whether he has the necessary expertise to determine the dispute fairly. This does not

mean that an adjudicator must have a detailed specialist understanding of the underlying issues, which can often, in reality, be more of a hindrance than a help.⁴⁸ What it does mean is that an adjudicator has the experience, background knowledge and general ability to deal with the issues in dispute within the time period available. If having considered this, an adjudicator decides he does not, then he should resign.

**Has another adjudicator already made
a binding decision on the matter?**

- 2.42 As a matter of practice, an adjudicator should consider whether he is being asked to decide a matter on which there is already a binding decision by another adjudicator. If so, he should decline to decide the matter or, if that is the only matter which he is asked to decide, he should resign.⁴⁹
- 2.43 The courts have held that in these circumstances an adjudicator should be proactive in assessing his jurisdiction.⁵⁰ An adjudicator should therefore ask for submissions from both parties and/or confirmation that none of the matters he has been asked to deal with are the subject of a previous decision. It may also be sensible to request copies of any previous decisions.

3. Maintaining jurisdiction

- 3.1 Once an adjudicator has checked he has the necessary threshold jurisdiction to conduct the adjudication it goes without saying that it is important to remain within it. The next section of this Guideline

provides assistance on how to avoid the most common pitfalls. In particular it looks at:

- 3.1.1 Timing;
- 3.1.2 Extent and scope of the dispute referred;
- 3.1.3 Previous adjudication(s) on the same dispute;
- 3.1.4 Errors of fact or law; and
- 3.1.5 Failure to follow the rules of natural justice.

Timing

- 3.2 The referral notice should be served on the adjudicator within seven days of the notice of adjudication.⁵¹ Adjudicators should note that the referral notice should also be served on the other party but the statutory requirement only provides for service on the adjudicator within that time period.⁵²
- 3.3 The decision must be reached within 28 days of the referral unless the parties agree to a longer period. (The party who referred the dispute can extend the time period by up to 14 days.) It should be noted that there are legal difficulties over whether the date of referral is the date on the referral notice, the date it is sent or the date it is received. As a matter of good practice, the adjudicator should confirm the date of referral to both parties, so that everyone is counting from the same date. This also allows anyone who disagrees to say so straightaway.
- 3.4 If an adjudicator requires an extension of time in order to finalise his decision, beyond the 14 days which can be granted by the referring party, the adjudicator should ask for the express consent of both parties

to the extended period.

3.5 Where an adjudicator fails to issue his decision within the 28-day period or any agreed extension the decision will not be enforceable.⁵³ There may be some very limited exceptions to this rule,⁵⁴ but best practice dictates that a decision must be communicated on time.

3.6 Care needs to be taken when “issuing” a decision to see that it is effective. Unless the adjudication clause in the contract calls for a particular form of delivery, an adjudicator’s decision can be delivered by hand, by fax, by email and, when time allows, by post. This common sense approach was confirmed in the case of *Lee v Chartered Properties*⁵⁵ where Akenhead J suggested that if the adjudicator is unable to deliver his decision within the time allowed because it is written in longhand, it would be appropriate to fax, scan or email the longhand script to the parties.

3.7 Further, in the case of *Treasure & Son Ltd v Martin Dawes*⁵⁶ the court held that no signature was necessary to make the decision a valid one; rather, the issue revolved around the wording of the contract. If the parties have not expressly provided that a decision has to be signed to be effective, then accordingly there is no reason to imply such a term.

Nature, scope and extent of the dispute referred

3.8 An adjudicator should take note of the nature, scope and extent of the dispute within the notice of adjudication. The authorities make it clear that any jurisdictional issues will be considered by reference to the nature, scope and extent of the dispute within the notice. Unless there is

Jurisdiction of the UK Construction Adjudicator

an express agreement by the parties, and an adjudicator, either to widen or to narrow the extent of the dispute in the adjudication, it is that dispute alone that an adjudicator has jurisdiction to decide.⁵⁷ If an adjudicator strays beyond those confines then (unless it is possible to sever the decision in some way) his decision will not be enforceable.

3.9 Having said this, following *Cantillon Ltd v Urvasco Ltd*,⁵⁸ it is clear that while an adjudicator needs to determine in broad terms what the disputed claim being referred is, that dispute is not necessarily limited or defined by the evidence or arguments submitted by either party to each other before referral to adjudication.

3.10 An adjudicator should also be careful to exhaust his jurisdiction, that is, to decide all the issues put in front of him or legitimately raised in defence. If he does not do so then his decision will not be enforced.⁵⁹

3.11 Although an adjudicator's jurisdiction derives from the wording of the notice of adjudication, an adjudicator must be aware that his jurisdiction extends to defences to the claim even though it is unlikely that such defences will be mentioned in the notice of adjudication.

3.12 A particularly common issue arises where the referring party claims a sum of money from the responding party which the responding party seeks to reduce by way of a counterclaim. The counterclaim will fall within the adjudicator's jurisdiction provided it satisfies the legal requirements of set-off, which it generally will if it arises out of the same project. A failure to consider the counterclaim may render the decision unenforceable.

3.13 If an adjudicator has broken down his decision into parts then it may be possible to sever the good parts of the decision (i.e. those parts in respect of which the adjudicator did have jurisdiction) from the bad parts (in respect of which the adjudicator had no jurisdiction) provided there are two or more disputes. Obviously an adjudicator would want to avoid these circumstances arising in the first place but, from the parties' point of view, it may prevent the need to start again on at least some of the issues in dispute.

Has there been a previous adjudication on the same dispute?

3.14 See paragraphs 2.41 and 2.42 above for guidance in respect of this issue.

Errors of fact or law

3.15 Whilst it is of course best not to make them, errors of fact or law do not necessarily invalidate an adjudicator's decision unless they go to his jurisdiction or give rise to a plain case of a breach of natural justice.⁶⁰

Natural justice

3.16 It is now beyond doubt that an adjudicator is under a duty to comply with the rules of natural justice and to abide by procedural fairness.⁶¹ Where an adjudicator acts in serious breach of natural justice his decision will not be enforced. The application of the duty to adjudication is, however, qualified due to: (1) the constraints inherent in the tight timescales under which the legislation expects the adjudicator to conduct the adjudication; and (2) the provisional nature

Jurisdiction of the UK Construction Adjudicator

of an adjudicator's decision.

3.17 Breaches of justice may include:

3.17.1 Bias;

3.17.2 Failure to act impartially; and

3.17.3 Procedural irregularity.

3.18 In order to avoid allegations that an adjudicator has breached the rules of natural justice the following basic principles of procedural fairness should be adhered to:

3.18.1 Act fairly and impartially between the parties;

3.18.2 Give each party an equal and reasonable opportunity to present its case and to deal with its opponent's case;

3.18.3 Ensure each party is fully apprised of any arguments against it, and is given a reasonable opportunity to comment, whether those arguments are raised by the other party or by the adjudicator;

3.18.4 Follow the adjudication procedure agreed in the contract;

3.18.5 Adopt procedures appropriate to the case.⁶²

3.19 An adjudicator should at all times keep the test for bias in the back of his mind. This is:

*whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude there was a real possibility that he was biased.*⁶³

3.20 The case of *Jacques & Anor (t/a C&E Jacques Partnership) v Ensign Contractors Ltd*⁶⁴ provides useful guidance on how to deal with

defences and evidence put forward by the parties:

3.20.1 An adjudicator must consider defences properly put forward by a defending party;

3.20.2 It is within an adjudicator's jurisdiction to decide what evidence is admissible and, indeed, what evidence is helpful and unhelpful in the determination of the dispute(s) referred to that adjudicator. If, within his jurisdiction, an adjudicator decides that certain evidence is inadmissible, that will rarely (if ever) amount to a breach of the rules of natural justice;⁶⁵

3.20.3 Even if an adjudicator's decision (within jurisdiction) to disregard evidence as inadmissible or of little or no weight was wrong in fact or in law, that decision is not in consequence impugnable as a breach of the rules of natural justice;

3.20.4 It is important to distinguish between a failure by an adjudicator in the decision to consider and address substantive (factual or legal) defence and an actual or apparent failure or omission to address all aspects of the evidence which go to support that defence. It is not practicable usually for every aspect of the evidence to be meticulously considered, weighed up and rejected or accepted in whole or in part. Primarily, an adjudicator needs to address the substantive issues, whether factual or legal, but does not need (as a matter of fairness) to address each and every aspect of the evidence.

3.21 Taking into account the general guidance outlined above on breaches

Jurisdiction of the UK Construction Adjudicator

of natural justice, some practical pointers on how to avoid some of the most obvious pitfalls are set out below.

- 3.21.1 An adjudicator should address the timetable for the adjudication at the beginning of the process and consider how much time he is likely to need given the complexity of the issues. If 28 days is not long enough, given the complexity of the issues at stake, he should inform the parties of this as early on in the process as possible and secure a sufficient extension of time to satisfy himself that he can deal with the dispute fully in the time available. An adjudicator should keep this under review throughout the process;
- 3.21.2 If a party has contacted an adjudicator before he is appointed to check on his availability and/or whether there is a conflict it is good practice for that adjudicator to inform the other side upon appointment;⁶⁶
- 3.21.3 When an adjudicator first contacts the parties following his appointment he should make it clear that he requires the parties to copy all correspondence to each other as well as to him and remind the parties of this at once if they fail to do so (copied to the other side);
- 3.21.4 An adjudicator should avoid speaking to parties individually on the telephone. If phone calls are made to an adjudicator by the parties following his appointment then ideally his administrator should deal with them and, if the point is material, ask for them

to be dealt with in writing. If it is not possible to avoid the call then an adjudicator should decline to speak about any of the details of the case, make a detailed file note of the call and disclose the file note to the other side as soon as possible;

3.21.5 Likewise, if a party has contacted the organisation to which the adjudicator belongs this should be disclosed and a written note made of the call. Conversations beyond purely administrative issues should be avoided wherever possible;⁶⁸

3.21.6 An adjudicator should ensure both parties are given an equal and effective opportunity to respond to pleadings and seek to persuade the referring party to agree to an appropriate extension of time for the decision to be delivered if necessary;⁶⁹

3.21.7 An adjudicator should give the parties to the adjudication the chance to comment on any material or evidence, from whatever source, including knowledge or experience of the adjudicator himself or documents created by him or his appointed advisors, if he is minded to attach significance to it in reaching his decision;⁷⁰

3.21.8 If a particular point is either decisive or of considerable importance to the outcome of the adjudication (and is not irrelevant or peripheral) an adjudicator should ensure that it is put to the parties, although the adjudicator must be careful not to make a case for either of the parties when doing so.

3.22 Having examined the questions an adjudicator should ask in order to

determine whether he has threshold jurisdiction, and the most common ways an adjudicator loses his jurisdiction once the process is under way, this Guideline will now examine:

3.22.1 How the parties to an adjudication can challenge an adjudicator's jurisdiction;

3.22.2 An adjudicator's power to decide whether he has jurisdiction;

3.22.3 Dealing with jurisdictional challenges.

4. How can the parties challenge an adjudicator's jurisdiction?

4.1 A party who does not believe an adjudicator has jurisdiction to determine a dispute has five options:

4.1.1 Agree to widen the adjudicator's jurisdiction;

4.1.2 Refer the jurisdictional dispute to another adjudicator;⁷¹

4.1.3 Refer the jurisdictional dispute to the courts;

4.1.4 Proceed with the adjudication whilst reserving the right to challenge the adjudicator's decision on the grounds of jurisdiction at later enforcement proceedings;⁷²

4.1.5 Refuse to participate.

4.2 Each of these options has advantages and disadvantages for the parties (which are beyond the scope of this Guideline). The suggestion that the jurisdictional dispute should be referred to another adjudicator would, it is suggested, be difficult in practice and is rarely, if ever, used. The question of how best an adjudicator should deal with a challenge to his jurisdiction (and indeed the extent to which he is empowered to do so) is dealt with below.

5. Adjudicator's power to decide whether or not he has jurisdiction

- 5.1 The general rule is that, in the absence of agreement to the contrary, an adjudicator does not have the power to make a binding ruling on his own jurisdiction. Whilst it has been said that there is an exception where “substance and jurisdiction overlap”, this is doubtful.⁷³
- 5.2 Whilst an adjudicator does not generally have the power to make a binding ruling on his own jurisdiction, the courts have confirmed that it is not appropriate for an adjudicator to refuse to deal with a jurisdictional challenge on the basis that the adjudicator cannot make a binding decision.⁷⁴ It is therefore best practice to deal expressly with any jurisdictional challenge.⁷⁵

6. Dealing with jurisdictional challenges

- 6.1 An adjudicator should not be entirely passive when it comes to determining his jurisdiction and should satisfy himself that he appears to have jurisdiction at the beginning of the process by asking himself the questions outlined in the section on threshold jurisdiction above. However, the failure by a responding party at the outset to reserve its right to challenge the adjudicator's jurisdiction can lead to the result that an adjudicator, who might not otherwise have had jurisdiction, will be found to have been given jurisdiction by the parties, and it is too late for the responding party to complain at the enforcement stage.⁷⁶
- 6.2 Adjudicators should note that, where there is a question as to whether a matter has been determined in a previous adjudication, the courts have mandated a more proactive investigation. An adjudicator should

therefore actively raise questions in order to determine he has jurisdiction in such cases where he thinks there may be a problem.⁷⁷

- 6.3 If a challenge to an adjudicator's jurisdiction is made by one of the parties (typically the respondent) then he should investigate the matter as soon as possible. An adjudicator should ensure he avoids becoming too jaundiced as a result of the challenge and should apply common sense when dealing with it.⁷⁸ Depending on the nature of the objection, such an investigation could involve asking for written submissions, holding a meeting or holding a teleconference.
- 6.4 If an adjudicator concludes that the challenge is well-founded, he must decline to act. Alternatively, if he finds that the challenge is weak, he must continue with the substance of the adjudication. The courts have approved of adjudicators continuing to act if they believe it is at least arguable they have jurisdiction on the basis that to do otherwise would undermine the objective of the HGCRA.⁷⁹ As outlined above, whilst an adjudicator should continue with the adjudication, his decision as regards his jurisdiction will not be binding on the parties unless the parties agree to be bound by it.
- 6.5 If one of the parties chooses to refer the matter of an adjudicator's jurisdiction to the courts⁸⁰ then that adjudicator should continue with the main body of the adjudication in any event until a decision is reached in those proceedings unless the parties have agreed to a stay. Similarly, an adjudicator should continue as normal if the party challenging his jurisdiction participates while reserving its rights to

challenge his jurisdiction.

6.6 If the party challenging an adjudicator's jurisdiction simply refuses to participate in the proceedings then that adjudicator should continue, at the request of the referring party, at the referring party's risk as to costs.

6.7 It is good practice to record the nature of any jurisdictional challenges made in the decision and the adjudicator's conclusion in relation to that challenge(s). This will then be readily available for the courts to see should one of the parties resist enforcement on that basis.

7. Conclusion

7.1 Adjudicators should not adopt an entirely passive approach to jurisdictional issues (especially where the question is one as to whether a matter was dealt with in a previous adjudication) but should satisfy themselves that they do have jurisdiction as soon as the adjudication begins. If a party then challenges the adjudicator's jurisdiction the adjudicator should determine the matter as soon as possible by reference to the parties. An adjudicator should not abdicate the responsibility for providing an answer, even where the decision is not binding on the parties.

7.2 If the challenge is clearly well-founded then an adjudicator should decline to act. This will save everyone a lot of time, money and effort. If, on the other hand, the challenge is less clear then an adjudicator should continue with the adjudication at the referring party's risk.

7.3 If neither party challenges an adjudicator's jurisdiction (despite the adjudicator's identification to himself of a potential problem at the

Jurisdiction of the UK Construction Adjudicator

beginning of the process) and they continue to participate fully in the process, then the authorities support the fact that the parties will have given that adjudicator jurisdiction in any event and will be stopped from denying it subsequently.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 1 January 2016

Endnotes

1. Reference to the masculine within this Guideline includes the feminine.
2. [2005] BLR 310.
3. It is now a while since the introduction of the LDEDCA on 1 October 2011. Part 8 of LDEDCA changed the regime in respect of contracts in writing, costs, and errors by amending the Housing Grants, Construction and Regeneration Act 1996 with accompanying amendments to the Scheme.
4. The old Scheme will apply for contracts pre-dating 1 October 2011.
5. Adjudicators are referred to *Coulson on Construction Adjudication* by Peter Coulson (Oxford: Oxford University Press, 3rd Edition (“Coulson”)); *Keating on Construction Contracts* by Stephen Furst and Vivian Ramsey (London: Thomson, Sweet & Maxwell, 9th Edition); *Hudson’s Building and Engineering Contracts* by Atkin Chambers (London: Sweet & Maxwell, 12th Edition); and *Emden’s Construction Law* by Andrew Bartlett (London: Butterworth-Tolley) which together constitute the key practitioner text books on adjudication law.
6. Coulson notes on page 486 “Should the adjudicator consider, of his own volition, and regardless of the points that may or may not be made by the parties, whether or not he has the necessary jurisdiction? It is thought that he should. If the adjudicator does not have the necessary jurisdiction, then, prima facie, his decision is a nullity,

Jurisdiction of the UK Construction Adjudicator

regardless of the lack of an objection at the time.... It is much wiser for the adjudicator to address himself to the question of jurisdiction at the outset of the adjudication...”. See also *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC).

7. If the contract pre-dates 1 October 2011 (which is increasingly rare) then the adjudicator may need to consider whether the contract is in writing as to which see the key textbooks outlined above for further guidance. In the unlikely event that the contract pre-dates 1 May 1998 then the statutory right to adjudication will not arise.
8. The adjudicator should also check the applicable adjudication rules which may provide more than one dispute can be referred in any event. See *Willmott Dixon Housing Ltd v Newlon Housing Trust* [2013] EWHC 798 (TCC) for discussion on this point by Ramsey J.
9. *HG Construction Ltd* (n 6).
10. See *Yuanda (UK) Ltd v WW Gear Construction Ltd* [2010] BLR 435.
11. In *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314 it was held that an adjudicator has power to correct clerical mistakes within a reasonable time after issuing the decision.
12. *Fileturn Ltd v Royal Garden Hotel Ltd* [2010] EWHC 1736 (TCC).
13. *Andrew Wallace v Noon* [2009] BLR 158 (TCC).
14. If a contract has been entered into before that date, but is then novated after 1 October 2011, the HGRCA as amended will apply.
15. The HGCRA (unamended) only applied to construction contracts in writing. There is a detailed definition of what constitutes “in writing”

within the unamended HGCRA. Adjudicators should note in particular: (a) An oral agreement referring to or incorporating one of the standard forms would be within that definition; (b) An agreement may be evidenced in writing but this applies to the whole agreement not merely part of it; (c) Where parties make amendments to an agreement partly evidenced in writing, but partly formed by or inferred by conduct, then there is not a contract in writing; (d) If during the adjudication one party alleges the existence of an oral agreement and the other party does not deny it then an agreement will be found to be in writing.

16. Sections 104(1) and (2) of the HGCRA.
17. Section 105(1)(a) of the HGCRA.
18. Section 105(1)(b) of the HGCRA.
19. Section 105(1)(c) of the HGCRA.
20. Section 105(1)(d) of the HGCRA.
21. Section 105(1)(e) of the HGCRA.
22. Sections 105(2)(a) and (b) of the HGCRA.
23. The Process Plant exception has generated a fair amount of case law as to whether the particular works in question are an integral part of the process in question or separate from it. See, for example, *Palmers Limited v ABB Power Construction Ltd* [1999] BLR 426. If an adjudicator has any doubts as to whether the exception applies he should consult the relevant case law and commentary.
24. Unless otherwise agreed by the parties, the adjudicator only has

Jurisdiction of the UK Construction Adjudicator

jurisdiction over a dispute so far as it concerns construction operations within the meaning of the HGCRA. If the dispute relates partly to construction operations and partly to operations which are outside the HGCRA, and the adjudicator makes a decision on the whole dispute, it will not be enforceable. See *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC).

25. Construction Contracts (England and Wales) Exclusion Order 1998 (SI 1998/648) amended by SI 2004/696.
26. Section 106 of the HGCRA.
27. *Edenbooth Ltd v Cre8 Development Ltd* [2008] EWHC 570 (TCC).
28. *Steve Domsalla t/a Domsalla Building Services v Kenneth Dyason* [2007] EWHC 1174 (TCC), in which HHJ Thornton QC upheld the provision of the JCT Minor Works Contract which provided for adjudication.
29. See section 104(7) of the HGCRA.
30. *Comsite Projects Ltd v Andritz AG* [2003] EWHC 958 (TCC).
31. Section 107 of the HGCRA was repealed by Part 8 of the LDEDCA.
32. *Vision Homes Ltd v Lancs ville Construction Ltd* [2009] BLR 525.
33. See sections 2(1) and (2) of the Scheme.
34. For the purposes of this Guideline on jurisdiction the generic term Scheme is used. The applicable Scheme, if any, should be identified in each case.
35. [2004] EWHC 2339 (TCC).

36. See *St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd* [2015] EWHC 96 (TCC) at para 26 in which Mr Justice Coulson notes that: “a claimant is entitled to prune his original claim for the purposes of his reference to adjudication”.
37. *Connex South Eastern Limited v MJ Building Services Group Plc* [2005] BLR 201.
38. [2007] UKHL 40.
39. [2008] EWHC 3047.
40. See paragraph 8(1) of the Scheme.
41. [2000] BLR 168.
42. For example, see *Connex South Eastern Limited v MJ Building Services Group Plc* [2004] EWHC 1518.
43. See *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC).
44. See the comments of Judge Toulmin in *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC).
45. This is the procedure put forward by Coulson at section 2.92.
46. *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70.
47. See Coulson at page 52, footnote 112.
48. See Coulson, Section 18.03, page 480.
49. See Section 38(3) of Mr Justice Ramsey’s Judgment in *HG Construction Ltd* (n 6).
50. *ibid.*
51. See section 108(2)(b) of the HGCRA.
52. Adjudicators should note that the late service of the referral note may

Jurisdiction of the UK Construction Adjudicator

- in some limited circumstances not be fatal. See *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC).
53. *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2005] BLR 384.
 54. See, for example, *Cubitt Building & Interiors Ltd v Fleetglade Ltd* [2006] 110 Con LR 37 where a decision that was reached within the agreed extended period but not communicated until after the expiry of the period was valid provided it could be shown that the decision was communicated forthwith.
 55. [2010] EWHC 1540 (TCC).
 56. [2007] EWHC 2420 (TCC).
 57. See Coulson at Section 7.49.
 58. [2008] EWHC 282 (TCC).
 59. See *Quietfield Ltd v Vascroft Contractors Ltd* [2006] CILL 2335 at first instance and also *RBG Limited v SGL Carbon Fibers Limited* [2010] Scots CS SCOH 77.
 60. *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWHC 778 (TCC).
 61. *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWHC 393 (TCC).
 62. See PLC's Practice Note, *Adjudication: duty of natural justice*, by Lynne McCafferty of 4 Pump Court.
 63. *Amec Capital Projects Ltd* (n 61).
 64. [2009] EWHC 3383 (TCC).

65. Adjudicators should note, however, that in *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWHC CW 1751 the Court of Appeal held that there had been a breach of natural justice where the adjudicator had made an incorrect ruling that a matter had been previously decided and, as a result, disregarded relevant evidence.
66. *Makers UK Ltd v The Mayor and Burgesses of the London Borough of Camden* [2008] EWHC 1836 TCC.
67. *Discaim Project Services Ltd v Opecprime Development Ltd* [2001] EWHC 435 (TCC).
68. *Paice and another v MJ Harding (t/a MJ Harding Contractors)* [2015] EWHC 661 (TCC).
69. This is in the referring party's best interests as, following *Carillion Construction Ltd* (n 60), it seems likely that the court will enforce any decision made in the time available on grounds of policy as long as both parties were given an equal and effective opportunity to make representations. If the referring party denies the respondent this opportunity by refusing to extend the relevant time limits then that party runs the risk that any decision will be challenged on the grounds of a breach of natural justice.
70. *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC); and *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC).
71. This option is rarely, if ever, used in practice.
72. See *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000]

Jurisdiction of the UK Construction Adjudicator

EWHC 177 (TCC) which suggests the first four options.

73. See commentary on the findings in *Air Design (Kent) Limited v Deerglen Limited* [2008] EWHC 3047 (TCC) and in *Camillin Denny Architects (Jersey) Ltd v Adelaide Jones & Company Ltd* [2009] EWHC 2110 (TCC).
74. *Enterprise Managed Service Ltd v McFadden Utilities* [2009] EWHC 3222.
75. See Coulson, Section 18.04(2).
76. See discussion in Coulson at Section 6.11.
77. See *HG Construction Ltd* (n 6).
78. See Coulson, Section 18.04.
79. *ABB Power Construction Ltd v Norwest Holst Engineering Ltd* [2000] EWHC 68.
80. As noted above, the possibility of referring the question of jurisdiction to another adjudication is rarely, if ever, used in practice.