



A practical approach

by Nicholas Gould and Claire King

Ensuring that an adjudicator has the jurisdiction to decide the dispute referred to him is of utmost importance to the whole 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 and the Court of Appeal have repeatedly made plain, errors of law, fact or procedure will not, without more, justify a failure to comply with it.

To help provide guidance in this area, the Adjudication Society and the Chartered Institute of Arbitrators (CI Arb) published the first in a planned series of adjudication guidance notes in May 2011 covering topics such as jurisdiction, natural justice, the Scheme and adjudicator's lien. These are a free, publically available resource that we hope will prove useful not only to adjudicators but also to the parties and their representatives.

The first guidance note, Jurisdiction of the UK Construction Adjudicator was drafted with comments and assistance from the Guidance Note Committee of the Adjudication Society and the Sub-committee of the CI Arb. The other documents are being drafted by members of these two groups.

The Jurisdiction of the UK Construction Adjudicator guidance note does not debate all of the legal issues surrounding an adjudicator's jurisdiction and is not intended to replace consulting the relevant case law and commentary. Instead, it identifies a sensible and practical approach to the issues, and attempts to summarise what best practice should be. The guidance note is divided into two main sections. The first of these examines threshold jurisdiction and provides a list of 14 questions that the adjudicator may wish to consider when deciding whether to accept an appointment (to the extent that the information he has before him allows him to do so). These include:

- is there a conflict of interest preventing the adjudicator from acting?
- is there a construction contract?
- has the adjudicator's appointment been made in accordance with the contract?
- has there been a previous adjudication on the same dispute?
- are the parties to the contract the same parties who are bringing the adjudication?

The guidance note then provides a brief overview of the law behind these questions and the issues raised by them. The second part of the guidance note looks at maintaining jurisdiction and covers timing, the extent and scope of the dispute referred, previous adjudications on the same dispute, errors of fact and law, and failure to follow the laws of natural justice.

The guidance on natural justice not only outlines what is meant by that term but also seeks to draw together the practical pointers on how to avoid some of the most obvious pitfalls. It also highlights that the application of the duty is qualified due to:

1. the constraints inherent in the tight timescales under which the legislation expects the adjudicator to conduct the adjudication
2. the provisional nature of an adjudicator's decision

These practical pointers discuss that:

- 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. An extension of time, if needed, should be secured as early on in the process as possible and kept under review throughout
- 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 the adjudicator to inform the other side upon appointment
- 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, of course)
- 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 office administrator should deal with them and, if the point is material, ask for it 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
- 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
- an adjudicator should give the parties 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 these in reaching his decision
- if a particular point is either decisive or of considerable importance to the outcome of the adjudication, 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).

Finally, the guidance note focuses on how to deal with jurisdictional challenges. The key principle being that 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.

If a challenge is made, then the adjudicator should investigate the matter as soon as possible while ensuring he doesn't become too jaundiced as a result of the challenge and applying common sense when dealing with it. If an adjudicator concludes that the challenge is well founded then he must decline to act. Alternatively, if he finds that the challenge is weak he must continue with the substance of the adjudication.

The impact of the new Construction Act

As the Local Democracy, Economic Development and Construction Act came into force on 1 October 2011, some of sections within the guidance note will need to be updated. Perhaps the most important change will be to reflect the abolition of the requirement that the contract is in writing before it can be adjudicated (Section 107 of the old Act has been deleted).

This change is, in itself, likely to result in an increase in jurisdictional challenges as its impact begins to kick in. These challenges include:

- arguments based on the fact one party claims that there was never a contract in the first place
- that the party to the adjudication is the wrong party (likely to be much more of a problem where the contract is purely oral)
- that the oral contract was concluded prior to 1 October 2011 and is therefore not capable of being adjudicated
- that the adjudicator did not adopt suitable procedures to ensure the parties were able to fully rehearse their arguments as to the terms and/or existence of the contract, resulting in a breach of natural justice.

As yet, there is no case law on these points and the extent to which the issues are raised remains to be seen. In the meantime, Jurisdiction of the UK Construction Adjudicator provides a practical and useful source of guidance for adjudicators, parties and their representatives on how to deal with the contentious issue of jurisdiction.

Further information

Guidance Note: Jurisdiction of the UK Construction Adjudicator is available from www.adjudication.org/adjudicator-guidance-jurisdiction

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