

**INSTITUTION OF CIVIL ENGINEERS - CONCILIATION AND ADJUDICATION
ADVISORY PANEL**

ADJUDICATORS' COURSE

WRITING THE DECISION

Reaching the Decision

The basis upon which the decision is reached must accord with the requirements of the procedure under which the adjudication is conducted. Adjudication is considered to be a judicial process, and therefore must be decided upon the basis of the contractual rights of the parties.

The Adjudicator must therefore approach his task by:

- (a) Ascertaining and deciding the relevant facts.
- (b) Establishing and deciding the relevant law, and
- (c) Applying the decided law to the decided facts.

The Adjudicator, after receiving the statements from the parties, must set about establishing the facts and the law. He may do this by either by asking the parties for further information or by using his own initiative or expertise.

Because of the time restraints involved the depth of probing that is possible may fall considerably short of what many practitioners will feel comfortable with.

The standard of proof in civil actions is the **balance of probabilities**. It is not beyond all reasonable doubt, which is the criminal standard. Balance of probabilities, in reality, often means "which party's evidence do you prefer".

In considering the evidence there are established principles which assist judges and arbitrators to arrive at a conclusion and they are equally applicable to adjudication.

These principles include:

- (a) The person who makes an allegation has the burden of proving that allegation, on the basis of the balance of probability. If he fails to satisfy you then you find against him. You should therefore always ask yourself who has the burden of proof for each issue.
- (b) A statement made by one party which is not denied by the other party is accepted as being correct.
- (c) Implications may be drawn from the conduct of the parties. For instance, if one party refuses to bring a staff member conversant with the contract to a meeting, or denies you an extension of time for making the decision which you clearly need, you can ask yourself why your request was rejected.

Reaching a decision will be assisted by starting to write the decision as early as possible. The Adjudicator should set out the sequence of events, the evidence of both parties, and the relevant law to be resolved. This will highlight any gaps there may be in the evidence, or the law. When gaps are identified it is a simple task then to obtain the necessary information. Such a process will avoid requesting unnecessary information, and limit the chance of being lead into additional problems.

Proof

The basic principles concerning proof also apply to adjudications.

The maxim *He who alleges must prove* applies. The person making the allegation is said to have *the burden of proof*. That is that he had to prove his allegation on the basis of the balance of probabilities.

Where the weight of evidence is evenly divided, that is simply that one party alleges one thing and the other parties denies it and there is no further evidence. The alleging party must lose not because what is say has proved to be wrong but because he has not discharge the *burden of proof*.

Where an allegation is made it must always be denied because the adjudicator will assume if an allegation is not denied it is accepted. Every point in the referral must be considered by the responding party.

Writing the Decision

There is no standard way of writing the adjudicator's decision.

However, when writing the Adjudication it is necessary to bear in mind the purposes for which the written decision may be required:

- (a) immediate implementation of the decision by the parties, and
- (b) enforcement by the courts if either party fails to implement it.

There are in addition four other points that need to be borne in mind:

- (c) the possibility of an application to the court to set it aside;
- (d) the use that may be made of it during the remaining contract period;
- (e) the use that may be made of it in any future arbitration or litigation; and
- (f) possible liabilities that might accrue to the Adjudicator.

The extent of reasons to be given with an adjudication is a matter which has provoked considerable debate.

The NEC, for instance, requires the Adjudicator to give reasons with his decision. The reasons must therefore be included in the written decision. Other procedures, such as the Scheme for Construction Contract, only require the adjudicator to give reasons if requested by either party.

Other contracts and procedures do not require the Adjudicator to give reasons. The ICE Adjudication Procedure says "He shall not be required to give reasons" [paragraph 6.1]. In that case it is up to the Adjudicator to decide how much of his reasoning he wishes to include in the written decision, if any.

If the adjudication is under the Scheme parties should ask the adjudicator to give reasons early in the procedure. Paragraph 22 of the Scheme states: *If requested by one of the parties to the dispute the adjudicator shall provide reasons for his decision.*

An adjudicator may refuse to give reasons if the request is not made prior to reaching the decision because after he has made it the adjudicator is *functus*.

The argument in favour of giving reasons is that if the losing party knows how the decision was reached and that it was made on a logical basis, taking his submissions into account, he is then more likely to accept the decision.

The argument against giving reasons is that it is the decision which has either to be accepted or rejected and reasons merely give grounds for further argument and may provide ammunition for the losing party to contest the decision.

On balance, 'reasons' in the arbitral sense are not normally desirable. It is necessary to include the background to the dispute and some explanation. The decision must be clear and concise and must define precisely the scope of the dispute and how the issues have been decided. It must not include unnecessary material, which will either confuse the reader, or is intended to demonstrate the skills of the author.

However, whether reasons are given or not it will generally be necessary for the Adjudicator to draft for his own benefit his reasons in order to check that he has reached a logical decision.

The Adjudicator when writing the Decision must be mindful of what it will be used for and that is:

- (a) What the parties have to do. It must be written so that they can act upon it, and
- (b) if a party fails to act then the Court can act. The Court will want to know:
 - (i) What the debt is
 - (ii) How it came into being, and
 - (iii) That the Adjudicator had jurisdiction to order it.

The Adjudicator can only do his best on the limited information that is available to him. There must be no duty to enquire into matters that the parties choose not to tell him.

The Adjudicator's Decision

In order to reach a decision the Adjudicator must address all the points raised in the submissions of the parties, and either accept or reject them.

In order to do this the Adjudicator in addition to making a final decision may first have to make decisions concerning:

- (i) Facts when the evidence in the submissions of the parties is contradictory.
- (ii) Interpretation of the contract.
- (iii) Other points of law that may be at issue.