Effective implementation of NEC3
Adjudication procedures and practices

WHAT IS ADJUDICATION?
Adjudication may be defined as ‘an ac-
celerated and cost-effective form of dispute
resolution that, unlike other means of
resolving disputes involving a third party
intermediary, the outcome is a decision by
a third party which is binding on the par-
ties in dispute and is final unless and until
reviewed by either arbitration of litigation’.

Adjudication is not arbitration or
litigation. Arbitration is a method of
resolving disputes between two or more
parties by reference to one or more
persons appointed for that purpose, typi-
cally in accordance with procedures laid
down in the Arbitration Act 42 of 1965.

Litigation is the system by which the
advocates representing each side adduce
arguments in a court of law to persuade
the tribunal (judge, jury or assessors) that
they have the better legal case

(All the standard forms of contract
supported by the Construction Industry
Development Board contain adjudication
procedures – see CIDB Best Practice
Guideline #3 Adjudication on www.cidb.
org.za.)

NEC3 ADJUDICATION PROCEDURE
Each NEC form of contract requires that
the party notifying a dispute refers it to an
adjudicator for a decision. The decision is
binding on the parties unless and until it
may be changed by subsequent reference
to the tribunal (arbitration or litigation
as selected by the parties in the contract
data) and is final and binding if a party
does not notify the other party of his in-
tention to refer the matter to the tribunal
within four weeks of the adjudicator’s
decision. Such reference to the tribunal is
not permitted if the matter has not first
been referred to the adjudicator.

The adjudication procedure in the
NEC3 family of contracts is included
either in Section 9 of the Core Clauses or
under Option W1 (Dispute Resolution).
(Option W2 is only applicable in the UK.)
The adjudicator has jurisdiction from the
NEC3 Adjudicator’s Contract entered be-
tween him and both of the parties and has
duties arising from a combination of that
contract and the contract between the
parties from which the dispute referred to
him has arisen.

Resolution of a dispute by adjudica-
tion is mandatory in all NEC3 contracts.
There are strict time bars for the notifica-
tion of a dispute and implementation of
the adjudication process which, if not
observed, would not only deny the parties
their rights to adjudication, but also to
any possible further reference to either
arbitration or litigation. The adjudicator’s
fees, based on an agreed hourly rate, and
expenses are shared equally between the
parties irrespective of the outcome.

APPOINTMENT OF AN ADJUDICATOR
The NEC contracts require that notifica-
tion of a dispute and submission of informa-
tion to the adjudicator be done within
tight time frames.

If an adjudicator has not already been
appointed or cannot be appointed very
quickly when a dispute is notified, the
time frames will probably not be met.

An adjudicator should ideally be ap-
pointed at the same time as the contract
between the parties is awarded. If this is
not done and the parties cannot subse-
quent agree after award on the person
to be appointed or cannot agree on a new
adjudicator should one be required, there
is a fall back reference to an adjudicat-
nominating body to select an adjudicator,

The JCD Panel of NEC Adjudicators
has been established to facilitate the
timely appointment of adjudicators using
one of two methods.

The standard payment option provided
in the NEC3 Adjudicator’s Contract is for
the parties referring the matter to dispute
to pay the adjudicator an advance payment
that is stated in the contract data and to
share any amount due in equal proportions.

To enable consolidation of related
disputes across the whole project it may
be appropriate for the main contract to
specify that the subcontract terms should
name the same adjudicator as also acting
in subcontract disputes.

JOINT CIVILS DIVISION PANEL
OF NEC ADJUDICATORS

Overview
The JCD Panel of NEC Adjudicators has
been established to facilitate the timely
appointment of adjudicators using one of
two methods by incorporating specific
data in the contract data in a procurement
document.

Any person registered with a local or
international built environment council and
who has suitable experience and expertise
may apply to the JCD secretary to be ad-
mitted to the panel by e-mailing (news@
jointcivils.co.za) or posting (PO Box 119,
Parklands, 2121) a completed application for
admission and paying an application fee.

Persons who are admitted to the panel
will remain on the panel until 1 July. They
need to apply to the JCD secretary to re-
main on the list until 1 July of the following
year by completing an annual return and
paying an annual fee. Adjudicators who,
in the opinion of the JCD, compromise
themselves through conflicts of interest
or who perform adjudications in a sub-
standard manner or not in accordance
with the Adjudicator’s Contract will not be
readmitted to the list.

The chairman of the JCD may be
called upon to nominate an adjudicator
where an adjudicator resigns or becomes
unable to act and the parties cannot agree
on a replacement. A form for this purpose
is available on the division’s website (see
www.jointcivils.co.za)

Using the panel
Parties to an NEC contract can use the
JCD Panel of NEC Adjudicators in one of
two ways:

Option 1 The employer selects a listed
person and inserts his name in the
contract data provided by the employer. The contractor then either accepts the person chosen or may suggest another listed person. The parties agree on the person chosen prior to award of the contract between them.

Option 2 Make reference to the JCD Panel of NEC Adjudicators in the contract data provided by the employer and after contract award, the party intending to refer the first dispute to adjudication selects two listed persons who have confirmed their availability to act as an adjudicator, the other party selects one of these two persons to be the adjudicator and the parties make the necessary arrangements for his immediate appointment.

The facility for an external adjudicator nominating body to make a selection is still available in the event any of the two options should fail, for example the adjudicator resigns or becomes unable to act and the parties cannot agree on a replacement.

Preparation of contract data

The following data should be inserted into the contract data provided by the employer for an ECC3 contract. Other contracts in the NEC3 family will be similar.

<table>
<thead>
<tr>
<th>Table 1 Choosing the adjudicator before contract award</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Data for Option W1</strong></td>
</tr>
<tr>
<td><strong>The adjudicator is</strong></td>
</tr>
<tr>
<td>Name</td>
</tr>
<tr>
<td>Address</td>
</tr>
<tr>
<td>Tel No</td>
</tr>
<tr>
<td>Fax No</td>
</tr>
<tr>
<td>E-mail</td>
</tr>
</tbody>
</table>

**The adjudicator nominating body is:**
The Chairman of the Joint Civils Divisions of the Institution of Civil Engineering and the South African Institution of Civil Engineering (see www.jointcivills.co.za)

**The tribunal is**
Insert either ‘arbitration’ or ‘a South African court of law’

If the tribunal is arbitration, add the following:

<table>
<thead>
<tr>
<th><strong>The arbitration procedure is</strong></th>
<th>Guidance notes</th>
</tr>
</thead>
</table>

**The place where arbitration is to be held is**
Insert town or city where arbitration is to be held

**The person or organisation who will choose an arbitrator**
- if the parties cannot agree a choice or
- if the arbitration procedure does not state who selects an arbitrator, is

The Chairman of the Association of Arbitrators (Southern Africa)

Alternatively state: The Chairman of the Arbitration Foundation of Southern Africa.
(2) have suitable work experience:
(a) as a built environment professional on construction projects at a senior level; and
(b) in the development of contract documentation, contract administration or disputes involving one or more contracts in the NEC family of contracts; and
(3) demonstrate the following three outcomes to peers through an interview, a written examination, the submission of a portfolio of work, attendance of courses or a combination thereof, as required by the JCD:

**Outcome 1:**
Communicate the manner in which any one of the NEC3 family of contracts operate.

1. The risk management and project management procedures are described
2. The compensation event procedure is communicated
3. The payment procedures of the main options are communicated
4. The adjudication process is communicated

**Guideline:** Extensive experience in drafting contract data, works information and pricing data or the administration of a contract as a project manager is essential.

**Outcome 2:**
Communicate with experts in other professions regarding dispute assessment criteria.

1. Factual and technical information regarding the contract is communicated to members of other professions, including the legal profession.

**Guideline:** Registration as a professional engineer or architect, or equivalent in another construction profession of at least ten years’ standing and contacts with recognised experts, particularly on legal issues, is a recommendation.

### Table 2 Choosing an adjudicator after contract award

<table>
<thead>
<tr>
<th>Data for Option W1</th>
<th>Guidance notes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The adjudicator is</strong></td>
<td>The person selected by the parties in terms of the relevant Z Clause from the Panel of NEC Adjudicators set up by the Joint Civils Division of the Institution of Civil Engineers and the South African Institution of Civil Engineering (see <a href="http://www.jointcivils.co.za">www.jointcivils.co.za</a>)</td>
</tr>
<tr>
<td><strong>The adjudicator nominating body is</strong></td>
<td>The Chairman of the Joint Civils Divisions of the Institution of Civil Engineering and the South African Institution of Civil Engineering (see <a href="http://www.jointcivils.co.za">www.jointcivils.co.za</a>)</td>
</tr>
<tr>
<td><strong>The tribunal is</strong></td>
<td>Insert ‘arbitration’ or a ‘South African court of law’</td>
</tr>
<tr>
<td><strong>If the tribunal is arbitration add:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>The arbitration procedure is</strong></td>
<td>As set out in the Rules for the Conduct of Arbitrations Fifth Edition 2005 published by the Association of Arbitrators (Southern Africa)</td>
</tr>
<tr>
<td><strong>The place where arbitration is to be held is</strong></td>
<td>Insert town or city where arbitration is to be held</td>
</tr>
<tr>
<td><strong>The person or organisation who will choose an arbitrator</strong></td>
<td>The Chairman of the Association of Arbitrators (Southern Africa)</td>
</tr>
</tbody>
</table>

| The adjudicator nominating body is | The Chairman of the Joint Civils Divisions of the Institution of Civil Engineering and the South African Institution of Civil Engineering (see www.jointcivils.co.za) |

### Table 3 Z Clause

<table>
<thead>
<tr>
<th>Z</th>
<th>Additional conditions of contract</th>
<th>Z1 Selection and appointment of the adjudicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>The additional conditions of contract are:</td>
<td>A party may at any time notify the other party of the names of two persons he has chosen from the Panel of NEC Adjudicators set up by the Joint Civils Division of the Institution of Civil Engineers and the South African Institution of Civil Engineering (see <a href="http://www.jointcivils.co.za">www.jointcivils.co.za</a>) and whose availability he has confirmed to act as the adjudicator. The other party selects one of the two nominees to be the adjudicator within four days, failing which the person chosen by the first party will be the adjudicator. The parties appoint the selected adjudicator under the NEC3 Adjudicator’s Contract, June 2005, within seven days of this notice</td>
<td></td>
</tr>
</tbody>
</table>
Outcome 3:
Adjudicate a dispute in a contract.

Assessment criteria
1  The contractual position of the parties to a dispute is ascertained
2  Correct procedures in accordance with the provisions of an NEC contract are identified
3  The inquisitorial process associated with an adjudication is communicated
4  The rules of natural justice, not as an arbitrator or legal assessor, with due regard to contract law, common law principles, legal precedent and statutory legislation, are applied to a dispute
5  The amount of money and/or time that either party may be due calculated in accordance with the NEC compensation procedures
6  Fair and independent judgment is presented in written arguments and decisions in a clear understandable form capable of in depth scrutiny

Guidelines:
- Attendance and passing of courses associated with aspects of NEC adjudication is a recommendation
- Attendance of NEC3 training events, workshop and user group events
- Age and maturity of candidate – most likely over the age of 45 but normally under 70 at the date of application to be placed on the JCD Panel of NEC Adjudicators
- The qualities of an adjudicator for an ECC contract should, as a minimum, include:
  1  Knowledge of the procedures in the ECC
  2  A full understanding of the roles of the project manager and the supervisor
  3  A full understanding of how construction costs arise and how they are affected by changes to plan
  4  Knowledge of construction planning and of how plans are affected by changes
  5  The ability to obtain technical assistance when his own technical knowledge does not cover the matter in dispute
  6  The ability to obtain up-to-date information about construction costs when he does not have access to relevant cost data
7  An appreciation of construction risks and how allowances for them should be set

In addition to these qualities, a sound knowledge of the law as it affects engineering and construction contracts is essential.

Applicants are required to complete the application for admission (see www.jointcivils.co.za) and follow the procedures contained on the division’s website www.jointcivils.co.za. Applicants who do not satisfy all the abovementioned requirements are nevertheless invited to apply and to motivate to the reviewers why any of the requirements should be waived.

Adjudicator’s contract
The parties to the dispute are required to appoint an adjudicator in terms of the NEC3 adjudicator’s contract. This can be readily done by completing the template for the adjudicator’s contract which is available on the division’s website (www.jointcivils.co.za) or the CIDB website (www.cidb.org.za).