



# Improving Adjudication in the Construction Industry

Report of Consultation  
and Proposals

May 2004



SCOTTISH EXECUTIVE

# IMPROVING ADJUDICATION IN THE CONSTRUCTION INDUSTRY

## REPORT OF CONSULTATION AND PROPOSALS

In January 2003, *Improving Adjudication in the Construction Industry: a Consultation Document* was issued which set out proposals relating to the adjudication provisions in Part II of the Housing Grants, Construction and Regeneration Act 1996 (henceforth referred to as 'the Act') and The Scheme for Construction Contracts (Scotland) Regulations 1998 (henceforth referred to as 'the Scheme'). The document was sent to a broad range of construction industry organisations, client groups, professional bodies and adjudicator nominating bodies. It was also issued to those persons and organisations who had responded to a consultation paper that had been issued in 1997 by the Scottish Office, and to others who had a relevant interest.

Twenty-eight responses were received from a range of organisations and individuals (see Annex) including six construction industry organisations, seven professional bodies, five client organisations and five organisations in the legal profession.

Many responses contained positive comments on the operation of adjudication. They included statements that adjudication has been very successful; that it is now the primary means of dispute resolution in the construction industry; that its introduction has had a positive effect on the dispute process; and that the original aims must be maintained. The point was also made that the legislation has been largely effective regarding its stated objectives of providing a quick, low cost and impartial dispute resolution procedure; that it does not require a radical overhaul and that it would be premature to make major changes. One respondent considered, however, that the system was not operating entirely successfully and that the issues being considered in the consultation were merely the most serious difficulties. On the other hand, one respondent noted that adjudication suits the industry and protects firms against the abuse of power and intimidation; and three respondents wanted to extend the use of the Scheme to provide a single mandatory procedure for all contracts, to replace the many different adjudication schemes currently in use.

The Scottish Executive also had discussions, on a personal rather than any representational basis, with a number of practising adjudicators from the construction and legal professions in order to take soundings about the

operation of the current legislation in Scotland and about specific issues including the enforcement of adjudicator's decisions.

This paper sets out the Scottish Executive's proposals for improvement of the adjudication process. It might usefully be read in conjunction with *Improving Adjudication in the Construction Industry: a Consultation Document* <sup>[1]</sup> from which it has been developed after taking account of the responses received.

## **1. Unmanageable Documentation**

Consultees were invited to give their views on the issue of unmanageable documentation, and in particular, whether they considered that it would be appropriate to deal with this in guidance to adjudicators.

There was broad agreement that paragraphs 13 and 17 of the Scheme provide a reasonable balance of powers and duties between adjudicators on the one hand and the parties on the other and that no amendment to the legislation is necessary. A number of respondents mentioned that they had not encountered problems with unmanageable documentation. Other comments were that the problem was more imagined than real, and that use of the term "ambush" was exaggerated. One respondent noted that the present process works well with straightforward disputes but not so well with large complex ones.

There was broad agreement that adjudicators and users would benefit from guidance with regard to their powers, duties and rights provided in the Scheme. However, one respondent noted that no amount of guidance would alter the fact that an adjudicator must not ignore pertinent material that has been submitted. Several responses noted that guidance had already been published by the Adjudication Task Group.

One respondent suggested that as adjudication is increasingly being used in large disputes, the procedure should give the adjudicator sufficient time in which to study the information submitted by the parties, and that this should be enshrined in the legislation. Another noted that the legislation allows parties to agree to extend the time available to the adjudicator, but that if the adjudicator cannot deal with the dispute in the time allocated, then he/she must resign.

Taking account of the views expressed, it is proposed that guidance on how to deal with unmanageable documentation should be produced for adjudicators (see Section 9 below) and that the legislation should not be amended.

## **2. Natural Justice**

Consultees were invited to give their views on the issue of ensuring that the rules of natural justice are applied. In particular, views were invited on whether it would be appropriate to deal with this in guidance to adjudicators and if so, whether a description of “natural justice” would be helpful.

There was general agreement that parties and adjudicators would benefit from the provision of guidance, though more than one respondent registered their reservations about issuing guidance because the topic is complex and added that the only safe advice is for the adjudicator to seek legal advice. A number thought that the guidance should include a description of natural justice though the point was made that such a description could only be given in legal terms. No one suggested that a change was required to the legislation.

It is proposed, therefore, that guidance on conducting proceedings in accordance with the rules of natural justice should be produced for adjudicators (see Section 9 below). It is proposed that the legislation should not be amended.

## **3. Entitlement to submit a response**

Consultees were invited to indicate whether there is a need for clarification of the right to respond to a referral to adjudication, and if so, whether it would be appropriate to deal with this in guidance to adjudicators.

Although some thought that clarification was not needed, the majority of responses suggested that it would be helpful to issue guidance on this issue.

Three respondents suggested that the Scheme should be amended to make it clear that a right to respond to a referral to adjudication existed. On the other hand, one respondent noted that they would be surprised if an adjudicator denied the other party the opportunity to respond, but thought that a problem lay instead in the ability of the referrer to reply to the responder’s defence. It was suggested that this leads those who refer disputes to adjudication to overload their original submission with rebuttals in anticipation of points that might be raised by the responder. The same respondent considered that the Scheme should be amended to provide rights for the referrer to submit a further case after the referral notice, for the respondent to respond to such a case and for the referring party to

submit a reply to that response. Another respondent suggested that the right of a party to submit a reply was inherent in the requirement on the adjudicator to apply natural justice to the conduct of an adjudication, and that it would be surprising if any adjudicator declined to offer a party the opportunity to respond.

It is proposed that the issue of the entitlement to submit a response, and the requirement that the adjudicator must give each party a reasonable opportunity to present its case, should be covered in guidance for adjudicators (see Section 9 below) and that the legislation should not be amended.

#### **4. Intimidatory tactics**

Consultees were invited to give their views on the issue of the perceived use of intimidatory tactics and in particular, whether it would be appropriate to deal with this in guidance to adjudicators.

This does not appear to have been an issue that has presented significant problems in practice. There was general agreement, however, that the provision of guidance would be helpful. However, some respondents considered that guidance was not needed, and it was suggested that competent adjudicators should be able to deal with any problems that arose, and that they could, if necessary, seek legal advice.

It is proposed that the topic of intimidatory tactics should be dealt with in guidance for adjudicators (see Section 9 below) and that the legislation should not be amended.

#### **5. Correction of Errors**

Consultees were invited to indicate whether there is a need to clarify adjudicators' powers to correct errors and in particular, whether it would be appropriate to deal with this in guidance to adjudicators.

If consultees thought that the legislation should be amended, they were invited to indicate what should be: (i) the extent and type of correction that should be permitted; (ii) the time limit that should be imposed on requests for corrections; (iii) the time that should be allowed for an adjudicator to correct his/her decision; and (iv) the extent to which any slip rule should reflect the position in England under the Arbitration Act and judicial decisions.

There was general agreement that there was a need to clarify adjudicators' powers to correct errors and that the Scheme should be amended accordingly. There was also general agreement that the provision of guidance would be helpful.

A range of views was provided on the extent and type of correction that should be permitted. Many respondents thought that corrections should be restricted to typographical and arithmetic errors arising from an accidental slip or omission. Reasons cited were that this would not affect the speed and simplicity of adjudication and would avoid extensive submissions and debates following decisions. They did not want it to extend further to making changes to matters of substance for fear that this could give rise to re-hearings of issues that had already been considered. Others wanted to extend the scope of corrections to cover clarification and the removal of any ambiguity. One wanted to include incorrect quotation of documentary evidence and inappropriate jurisdiction interpretation. Two respondents thought that adjudicators should be permitted to correct all types of errors. Several respondents wanted adjudicators to have powers to make corrections which would be similar to those available in England under the Arbitration Act 1996.

Consultees views also varied considerably on the time limit that should be imposed on requests for corrections to be made. They ranged from two days to one month (fourteen days for correction of typographical or arithmetical errors) from the date of the adjudicator's decision, the period most frequently proposed being five or seven days. Similarly, a range of views was expressed on the time that should be allowed for the adjudicator to correct his/her decision. They varied from two days to one month from the date of the request for a correction to be made, or from the date the adjudicator discovered the error; five or seven days was the most frequently cited period.

The Scottish Executive considers that there is a clear indication of the need to amend the Scheme to give adjudicators powers to correct errors in their decisions. In considering the extent to which correction of errors should be permitted, it will be important to ensure that the relative simplicity, speed and low cost of the adjudication process are not compromised and that the correction process should not be used for what could amount to re-hearings of issues already canvassed. Allowing adjudicators to correct errors in their decisions should reduce the likelihood of a dissatisfied party having to refer the original dispute to an arbiter or the courts and so it is necessary to achieve a reasonable balance when considering the extent to which errors should be corrected.

It is proposed that a “slip rule” should be introduced into the Scheme which would give adjudicators powers to correct their decisions so as to remove any clerical, or arithmetic, mistake or error that has arisen from an accidental slip or omission; and they should be permitted to do this at the request of any party to the adjudication, and where the adjudicator becomes aware of such an error. It is also proposed that adjudicators should be empowered to correct any other aspects of their decisions where the parties are in agreement that they should do so.

Any corrections of clerical or arithmetic errors are likely to be relatively straightforward, and so the timescale for notifying the adjudicator, and for making corrections, need not be particularly lengthy, bearing in mind the need to achieve relatively quick resolution of disputes. It is proposed, therefore, to amend the Scheme to provide that adjudicators may make corrections as soon as possible and by not later than seven calendar days after the date of issue of their decisions or such longer period as the parties may agree. This should allow sufficient time for corrections to be made without unduly delaying the process.

Consideration has been given to whether there is a need to set a time limit for parties to request an error to be corrected. It is felt that by setting a time limit on the period allowed for correcting a decision, and giving adjudicators discretion on whether or not they make a correction, there should not be a need to set a time limit within which the error must be brought to the adjudicator’s attention. It is proposed that guidance for users could refer to the point that if such an application was not received within a very short period of time, that would be a valid reason for an adjudicator to refuse to correct an error.

## **6. Expenses (but not adjudicators’ fees)**

Consultees were invited to indicate whether there is a problem in Scotland with regard to the award of expenses and what the nature of that problem is, having regard to the current provisions of the Act and the Scheme and the general position on expenses in Scotland.

Consultees were also invited to indicate whether they knew of any contractual provisions used in Scotland which had required a referring party to pay all the expenses of an adjudication and, if so, to give examples of any contractual provisions to that effect. Their views were also invited on whether such provisions in contracts should be rendered unenforceable or illegal. More specifically consultees were asked whether it would be preferable to leave the primary legislation as it is, or whether an amendment should be made to the Act or the Scheme.

Where consultees considered that an amendment was necessary, they were invited to indicate whether: (a) provision should be made for the parties to bear their own legal and other expenses; or (b) the parties should be free to confer jurisdiction on the adjudicator to award expenses and, if so, what criteria and procedural circumstances should be applied, i.e. should this be at any time or only after the dispute has arisen.

A number of respondents said they were aware of the existence of conditions of contract that required a referring party to pay all the expenses of an adjudication, but no specific examples were provided. Most thought that the legislation should be amended to prevent such conditions being included in contracts and suggested that this would require an amendment to the primary legislation. However, one respondent thought that such clauses provide a useful deterrent to over-lightly going to adjudication or using adjudication frequently to harass the other party, and suggested that outlawing such conditions would be an unwarranted interference with freedom of contract. It was also suggested that if a party did not like such conditions, then they should have refrained from entering into the contract in the first place.

There was considerable support for the concept that parties should bear their own legal and other expenses and that adjudicators should not be given powers to award such expenses. Many suggested that the primary legislation should be amended to make it absolutely clear that parties should bear their own expenses and several respondents expressed the view that there should be consistency in the legislation in Scotland and England insofar as the different legal systems permit. The point was made that if adjudicators are given powers to award expenses, then that could act as a disincentive, particularly to smaller firms, to refer disputes to an adjudicator. However, a number of respondents thought that adjudicators should be empowered to deal with expenses, one of them noting that if a successful party has had to expend considerable sums in defending a spurious claim, then it should be reimbursed those expenses. Several respondents indicated that the legislation should remain unchanged.

It is unlikely that amending the Scheme alone would be effective in addressing the problems created when provisions are inserted in certain contracts requiring the referring party in an adjudication to pay both parties' expenses irrespective of the outcome of the adjudication. This is because the problem arises in 'bespoke' adjudication arrangements rather than in adjudications conducted under the Scheme. The problem could be addressed by adding to Section 108 of the Act, and to the Scheme, a requirement that the parties to an adjudication bear their own legal costs

associated with the process, however, it is unlikely that a legislative vehicle with which to do this to the Act will be available in the immediate future.

Under the Scheme, adjudicators presently do not have the power to award the parties' expenses (this reflects the original aim that adjudication should provide for relatively quick, and straightforward resolution of disputes) There does, however, appear to be some uncertainty amongst the users of adjudication about whether adjudicators can award expenses under the Scheme and so it is proposed that this should be clarified in guidance. This would provide some reassurance to firms (particularly smaller firms) which may be concerned that by referring a dispute under the Scheme to an adjudicator, they might incur significant expenditure on expenses run up by the other party and which are outwith their control. The risk that a firm may have to pay a large bill for expenses incurred by the other party, and which is therefore outwith its control, could serve as a significant deterrent to embarking on an adjudication under the Scheme.

## **7. Timing of Requests for Reasons**

Consultees were invited to give their views on a suitable timescale for asking adjudicators to give parties the reasons that underpin their decisions. In particular, they were asked to indicate at what stage in the process reasons should be requested, and whether there should be a timescale for the response. Views were also invited on whether it would be appropriate to deal with this in guidance to adjudicators.

A broad range of views was put forward, the majority of which suggested that it was sufficient to issue guidance. It was suggested that, using the powers already provided in paragraph 13 of the Scheme, adjudicators could determine at the outset, the timetable for submitting requests and providing reasons.

A number of respondents thought that the legislation should be amended though views differed on when requests should be made; some thought this should be at the time of the initial referral/response, others that it should be: within seven days of the referral date; at any time up to the date of issue of the adjudicator's decision; at least five days before the date of issuing the decision; and within fourteen days of the adjudicator's appointment. The point was made by one respondent that parties should be given time to consider the adjudicator's decision before seeking reasons and a period of one week was suggested. Similarly, a broad range of views was expressed regarding the time that should be allowed for the adjudicator to respond. These ranged from: within three to fourteen days of

the date of the decision, to within four weeks of the date of the request for reasons.

The right to request the reasons underpinning an adjudicator's decision already exists in the Scheme; an adjudicator must provide reasons for his decision if requested to do so by any of the parties to the dispute. It is proposed, therefore, that adjudicators be given guidance that they can use their existing powers, under paragraph 13 of the Scheme, to specify a timetable for submitting requests for reasons (see Section 9 below).

## **8. Enforcement of Adjudicators' Decisions**

With regard to the delays which can occur in the enforcement of adjudicators' decisions when the matter is referred to Court, consultees' views were sought on whether the scheme should be amended to speed up the process of enforcement.

Opinions were divided on this. Many thought that present arrangements were perfectly satisfactory and that enforcement is being dealt with effectively through the courts. It was noted that enforcement through the courts is a fairly quick procedure which allows an opportunity for objections to be raised and it was suggested that introducing compulsory consent would mean that such an opportunity would be bypassed. One respondent considered that introducing compulsory registration would have the effect of preventing legitimate challenges to jurisdiction at the enforcement stage. However, those that were in favour of amending the legislation, suggested that making registration compulsory would help to restrict legal argument and would be of benefit in terms of both time and cost, compared with the procedure of obtaining a decree conform. One respondent thought that legislation should be introduced to provide that adjudicators' awards might be enforced by grant of decree conform by a court and that the decree should not prevent a review of an adjudicator's decision nor the granting of an order contrary to the terms of any enforcement decree. Others suggested that registration is rarely used, possibly because of the difficulty in securing the written consent of both parties.

The Scottish Executive considers that it is unlikely that amending the legislation will resolve the issue of the delays that can occur in the enforcement of adjudicators' decisions. In certain circumstances, parties are entitled to challenge in the courts the decisions of adjudicators, and amending the Act and/or the Scheme will not prevent such an entitlement occurring. Accordingly, it is proposed that the legislation should remain unchanged at present.

One factor that could be considered is the procedure for dealing in the courts with construction adjudication cases. Cases have generally been dealt with fairly quickly by the courts, however, a review is presently underway of the operation of the Commercial Court with a view to introducing a protocol or statement of practice and possibly recommending some rule changes. The application of these rules to construction disputes will be considered as part of the review and the Scottish Executive will consider this issue in the light of the conclusions of that review.

## **9. Guidance for Adjudicators**

Consultees were invited to comment on whether the guidance produced by the Adjudication Task Group should be republished as a Scottish, or joint, edition with appropriate amendments, or whether it would be more appropriate to produce independently a separate Scottish guidance document. Views were also invited on which industry/professional bodies, or Adjudicator Nominating Bodies, were considered capable of producing, and would be willing to produce, or provide an input to, such guidance.

Only one respondent suggested that guidance should not be produced, pointing out that the only guidance upon which an adjudicator can rely is the guidance of the courts.

Responses varied on the type, and format, of guidance that would be appropriate for use in Scotland. Opinions were fairly equally divided on whether there should be an independently produced Scottish version; or a Scottish, or joint, version of the Adjudication Task Group's guidance. More than one respondent noted that much of the guidance is as applicable to Scotland as it is to England, that the Scottish and English Schemes are broadly harmonious, and that adjudicators in England may be called on to decide matters under Scots law and vice versa.

Useful guidance has already been produced by a number of organisations primarily for the use of their members. A small number of organisations were suggested as being capable of producing separate guidance and some respondents offered their assistance in drafting guidance. The point was made by one respondent that guidance of this type should not be produced by any body that carries out the role of an Adjudicator Nominating Body as it may be perceived to be a marketing exercise for that organisation.

Clearly, when producing guidance for use in Scotland there will be a need to ensure that it reflects Scottish law and procedures. However, much of the guidance will apply equally to adjudicators and users located across the United Kingdom, and adjudicators are not confined to dealing with adjudications arising solely in their particular locality.

The Scottish Executive considers it important that an input to the drafting of guidance is obtained from a range of construction industry sectors. The Construction Umbrella Bodies Adjudication Task Group, which comprises representatives of a broad range of industry organisations representing interests in Scotland and the rest of the United Kingdom, has already published, in conjunction with the Department of Trade and Industry, very useful guidance for adjudicators and users; their *Guidance for Adjudicators* was published in July 2002 and *Users' Guide to Adjudication* was issued in April 2003. The Task Group had indicated in its response a willingness to discuss the production of guidance for use in Scotland. The Scottish Executive has explored with the Group the feasibility of revising the Group's existing guidance to take account of Scottish procedures and case law, and of re-publishing it for use in Scotland as well as the rest of the United Kingdom. The Task Group is now taking this forward as part of its work of producing a second edition of its *Guidance for Adjudicators*.

## **10. Other significant points made by respondents**

### *Minimising divergence*

A number of respondents thought that it was important that the Scottish procedures should differ as little as possible from those in England in order to avoid confusion among end users. The Scottish Executive shares this view; indeed, this was one of the objectives when drafting the existing legislation.

### *Withholding decision pending payment*

The point was made by one respondent that adjudicators should not be allowed to withhold their reasons or their decisions pending payment of their fees or expenses. It was noted that there has been uncertainty about whether adjudicators are entitled to withhold the delivery of their decisions until their fees have been paid; many seek to impose terms within their adjudication contract whilst others think that this is contrary to the aims of the adjudication process. However, in the case of *St. Andrews Bay Development Ltd. v HBG Management Ltd.* in the Court of Session, it was made clear that the adjudicator was not entitled to delay communication of

the decision until the adjudicator's fee was paid as there was nothing in the statutory Scheme or contract that allowed this.

### *Training*

A number of respondents mentioned either their concern about the quality of some adjudicators nominated by Adjudicator Nominating Bodies, or the need to ensure that adjudicators are properly trained and have the requisite expertise to carry out their role properly. It was noted that the behaviour and conduct of adjudicators is paramount to the effectiveness of the process. One respondent mentioned that although it was outwith the scope of the present review, they would welcome a review of the training carried out by Adjudicator Nominating Bodies.

As a result of comments in the Construction Industry Board's review of the Scheme for Construction Contracts about the need for proper training of adjudicators, the Construction Umbrella Bodies' Adjudication Task Group has over a number of years been considering matters relating to training. The Task Group has consulted a significant number of Adjudicator Nominating Bodies several of which offer training. A number of Scottish ANBs have been among those consulted. The Group is continuing its review and in particular will be considering: minimum training requirements; the skills and knowledge that should be acquired; the assessment and selection of prospective adjudicators, and their future re-assessment; and continuing professional development.

Scottish Executive  
Building Division & Civil Justice Division  
May 2004

---

#### Note:

[1] "Improving Adjudication in the Construction Industry: A Consultation Document" (ISBN 0 7559 0653 5) <http://www.scotland.gov.uk/consultations/industry/iaci-00.asp>

## **ANNEX**

### **LIST OF THOSE WHO RESPONDED TO “IMPROVING ADJUDICATION IN THE CONSTRUCTION INDUSTRY: A CONSULTATION DOCUMENT”**

Anderson Strathern  
Mr Richard Anderson  
Mr M Brooks-Rooney  
Chartered Institute of Arbitrators Scottish Branch  
Chartered Institute of Building in Scotland  
Civil Engineering Contractors Association (Scotland) Ltd.  
Communities Scotland  
Construction Umbrella Bodies Adjudication Task Group  
DLA  
Dundas & Wilson  
Faculty of Advocates  
Mr D Fiddes  
Homes for Scotland  
Mr W Imlach  
Institution of Civil Engineers  
Institution of Civil Engineers (Scotland)  
Institution of Chemical Engineers  
Joint Contracts Tribunal Ltd.  
The Law Society of Scotland  
National Specialist Contractors Council  
Mr B G Porter  
Royal Incorporation of Architects in Scotland  
Royal Institution of Chartered Surveyors in Scotland  
Scottish Building  
Scottish Parliament, Office of Clerk/Chief Executive  
Scottish Prison Service  
Specialist Engineering Contractors' Group  
Mr John Spencely

May 2004

© Crown Copyright

ISBN 0 7559 4177 2

