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# Improving Adjudication in the Construction Industry

A Consultation Document

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**Proposals relating to Part II of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts (Scotland) Regulations 1998, Part I, Adjudication.**

### **1. Introduction**

This paper seeks comments on proposals to improve the operation of adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996<sup>[1]</sup> (henceforth referred to as “the Act”) and Part I of the Scheme for Construction Contracts (Scotland) Regulations 1998<sup>[2]</sup> (henceforth referred to as “the Scheme”). A separate consultation exercise has been conducted by the Department of Trade and Industry (DTI) in respect of adjudication under the Act and the Scheme for Construction Contracts (England and Wales) Regulations 1998<sup>[3]</sup>.

The objective of incorporating into construction contracts a mandatory right to adjudication was to provide a quick, low-cost and impartial means of resolving disputes during projects. This was proposed by Sir Michael Latham in his report “Constructing the Team” which was published in 1994 and was welcomed by the industry. Construction contracts legislation comprising the Act and the Scheme came into force on 1 May 1998.

In June 2000, the Construction Industry Board was invited by Nick Raynsford, the then Minister for Construction in the Department of the Environment, Transport and the Regions (DETR), to undertake a review of the operation of adjudication under the legislation. The Scottish Executive, which has liaised closely with colleagues in DETR and DTI, asked the Construction Industry Board to have regard to the operation of adjudication in Scotland and to report on any issues that were of particular relevance to Scotland. The Construction Industry Board conducted their review in the second half of 2000 and issued their report in December 2000<sup>[4]</sup>. Although the Construction Industry Board was wound-up on 29 June 2001, the task of taking forward the review was handed over to the Construction Umbrella

Bodies' Adjudication Task Group chaired by Graham Watts of the Construction Industry Council. A further consultation exercise was undertaken jointly by the Adjudication Task Group and DTI in August 2001 and the issues discussed later in this paper take account of the results of that exercise and the subsequent views of the Adjudication Task Group and DTI.

The Scottish Executive has had informal 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 adjudicators' decisions.

The purpose of this consultation is to obtain the views of a broad range of individuals and organisations which have a relevant interest.

## **2. Construction Industry Board's Review and the Scottish Executive's Views**

The review by the Construction Industry Board concluded that the adjudication provisions of the Act and associated Scheme have proved generally to work well in meeting the original objectives. The Scottish Executive agrees that the impact of the Act and the Scheme has generally been positive and beneficial.

The Construction Industry Board expressed concern at the problems which had arisen due to 'bespoke' adjudication processes (i.e. those which do not adopt the Scheme and instead amend or ignore its wording and seek to comply with the requirements of the Act in other ways). The Construction Industry Board suggested that the motivation for this was often to avoid parties in the supply chain receiving the intended benefits of adjudication, and recommended the enshrinement of a single procedure in legislation. The Construction Industry Board proposed that only the adjudication procedure contained in the Scheme (incorporating the amendments proposed in the CIB report) should be available to the parties and also that the present exclusion of certain construction operations relating to process plant should be amended.

The Scottish Executive's view is that with only four and a half years practical experience of adjudication in construction it is premature to consider making major changes to the legislation. Any amendments to the legislation should be kept to a minimum and should aim to make the Act or Scheme as originally intended more effective, and should not reopen the important compromises that underlay its drafting. The legislative intention was to

provide flexibility by allowing parties to a construction contract to agree bespoke arrangements for adjudication providing these satisfied certain mandatory requirements (section 108 of the Act). It was not intended that the Scheme's adjudication provisions should be used on all contracts, but instead when a contract failed to comply with the requirements of the Act, taking effect as implied terms of contract (section 114(4) of the Act). It was also the intention to exclude from the operation of the Act certain construction operations, including those relating to process plant. Bespoke adjudication arrangements and the boundary of the exclusions are both areas that are still giving rise to litigation. The implications of the courts' rulings may take some time to be widely understood, and to be reflected in day-to-day practice. Other aspects may yet come before the courts and, as the Construction Industry Board report notes, it is possible that some of the bespoke adjudication procedures that are felt to be causing problems might, in due course, be found to be non-compliant. The Scottish Executive believes that it would be inappropriate to consider amending the Act at present to introduce a mandatory adjudication procedure or to alter the construction operations exclusions.

The Scottish Executive considers that the adjudication process can be improved by:

- i. the publication of guidance for adjudicators, so that they understand the full extent of, and the limitations on, the powers and duties given to them by the Scheme (guidance has recently been published by the Adjudication Task Group - see Section 3.9 below);
- ii. amending the legislation where the difficulties that have been encountered cannot be dealt with by better guidance and are not likely to be resolved by the courts, providing that there is a wide measure of agreement from the industry on the proposed amendments, and providing also that they do not risk detracting from the simplicity, speed or relatively low cost of adjudication.

The Scottish Executive proposes no changes at this stage to the Act or the Scheme other than those referred to in Section 3 below.

### **3. Proposals**

The following paragraphs set out the proposals which will give effect to the approach outlined above; each proposal follows a brief summary of the concerns identified in the Construction Industry Board's report.

### **3.1 Unmanageable Documentation**

The Construction Industry Board's review identified a form of ambush in which referring parties submit unmanageable quantities of "relevant information" which under paragraph 17 of the Scheme the adjudicator is obliged to take into account. The Construction Industry Board's review noted that some adjudicators have dealt with this matter robustly by informing the appropriate party that a decision is not possible in the time available or by requesting summary submissions when appointed. The Construction Industry Board's review concluded that, in order to avoid any suggestion that this practice is an infringement of paragraph 17, that paragraph should be deleted.

DTI and the Adjudication Task Group concluded that in England no change is required to the legislation, but that the issue should be dealt with in guidance. That guidance has now been published (see Section 3.9 below).

The Scottish Executive's view is that paragraphs 13 and 17 of the Scheme, read together, provide a balance of powers and duties that is reasonable as between adjudicators on the one hand and the parties on the other. Deletion of paragraph 17 might alter that balance, detracting from the rights of the parties. This paragraph is the key to a party's 'right of response' as advocated by the Construction Industry Board as it puts a duty on the adjudicator to consider "any relevant information". It is clear, however, that both adjudicators and the parties would benefit from guidance with regard to their powers, duties and rights provided in the Scheme.

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

### **3.2 Natural Justice**

The Construction Industry Board's review concluded that guidance is needed both for adjudicators and the parties on applying the principles of natural justice to the conduct of adjudications. Natural justice is about ensuring fairness as between the parties, that they know the case against them and are able to submit their own arguments and documents within the procedural framework and to have enough time to do so commensurate with the timescales of adjudication. It also involves the adjudicator ensuring that he/she acts impartially as well as having no interest in the outcome of the adjudication.

DTI and the Adjudication Task Group concluded that in England no change is required to the legislation, but that the issue should be dealt with in guidance. That guidance has now been published (see Section 3.9 below).

The Scottish Executive's view is that it is clear that both adjudicators and the parties would benefit from guidance on their duties and rights provided for by the Scheme.

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

### **3.3 Entitlement to submit a response**

The Construction Industry Board's review recommended that the right of defendants to respond to a referral to adjudication should be made clear.

DTI and the Adjudication Task Group concluded that in England no change is required to the legislation, but that the issue should be dealt with in guidance. That guidance has now been published (see Section 3.9 below).

The Scottish Executive's view is that paragraph 7(3) read together with paragraph 17 provides an implicit right of response to the parties and a duty on the adjudicator to consider any relevant information submitted, and that further provision in the Scheme is deemed unnecessary. However, the Scottish Executive considers that there is a need for guidance to parties and adjudicators about their rights and duties under the Scheme.

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

### **3.4 Intimidatory tactics**

The Construction Industry Board's review referred to reports of intimidatory tactics being used, including “overly-legal jargon used by law firms on behalf of their clients against inexperienced (in legal matters) adjudicators”. The Construction Industry Board recommended that this matter be kept under review, with improved publicity to deter bad practice.

DTI and the Adjudication Task Group concluded that in England no change is required to the legislation, but that the issue should be dealt with in guidance. That guidance has now been published (see Section 3.9 below).

The Scottish Executive's view is that this is an issue that has not presented significant problems in practice but that it should be covered in guidance to adjudicators.

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

### **3.5 Correction of Errors**

The Construction Industry Board's review was concerned to clarify that adjudicators should have the power to correct obvious mistakes on the face of the decision (ie. that part which the parties are bound to implement). It suggested using the device of a simplified version of the 'slip rule' as used in the Arbitration Act 1996<sup>[5]</sup>. The Arbitration Act does not apply in Scotland.

DTI and the Adjudication Task Group concluded that in England no change is required to the legislation, but that the issue should be dealt with in guidance. That guidance has now been published (see Section 3.9 below).

There appears to be uncertainty about whether adjudicators have the power to correct errors in their decisions. The Scottish Executive's view is that adjudicators should have the power to amend simple errors of typography or arithmetic. However, there would appear to be in Scotland neither statutory provision, nor a right in common law, to correct errors. To correct an error would in the absence of agreement between the parties, seem to involve the intervention of the court. The Scottish Executive is concerned that a wider definition would risk extending corrections to matters requiring more extensive and substantial consideration. The suggested changes in England, which are designed to reflect a provision in the Arbitration Act 1996 as developed by judicial decision there, would include clarification and removal of ambiguity. The risk in going to this extent is that the relative simplicity and rapidity of adjudication might be compromised.

It is accepted that in Scotland (where the Arbitration Act does not apply) clarification may be required. This could be addressed in guidance but it may be necessary to define the extent of an adjudicator's powers by inserting a "slip rule" into the Scheme. This would allow the adjudicator on his own initiative, or on the application of a party, to correct his/her decision so as to remove any clerical mistake or error arising from an accidental slip or omission. Requests for corrections would have to be made within a

specified time and it is suggested that: (i) this should be within, say, five or seven days of the date that the adjudicator's decision is delivered to the parties or such shorter period as the adjudicator may specify in his decision; and (ii) corrections should be made as soon as possible, or where made on the adjudicator's initiative, as soon as possible after the slip is discovered.

**Consultees are invited to indicate whether there is a need for clarification of adjudicators' powers to correct errors and in particular, whether they consider that it would be appropriate to deal with this in guidance to adjudicators.**

**If they consider that, for the sake of clarification, the legislation should be amended, views are invited on: (i) the extent and type of correction that should be permitted; (ii) the time limit that should be imposed on requests for corrections; and (iii) the time that should be allowed for an adjudicator to correct his/her decision.**

**Given the need to restrict argument, and in order to consider the extent and nature of any amendment to reflect the need for a rule about corrections, consultees are invited to consider also the extent to which the slip rule should reflect the position in England under the Arbitration Act and judicial decisions.**

### **3.6 Expenses (but not adjudicators' fees)**

The Construction Industry Board's review supported the original intention that each party in an adjudication should be required to meet its own legal and other expenses, but noted that in the light of conflicting judgements in the courts on adjudication under the Scheme, there was a need for clarification. The review also condemned as being against the spirit of the legislation, the inclusion in some bespoke contracts of a requirement for the referring party to pay "all fees related to the adjudication".

The Scottish Executive's view is that currently, neither the Act nor the Scheme give adjudicators any powers to determine parties' legal or other expenses, though it is always open to the parties to agree to include such matters in the construction contract and/or the adjudicator's agreement.

Addressing the reported problem relating to bespoke contracts would require an amendment to the Act that would require all parties to bear their own legal and other expenses. It has been suggested that such a provision would unduly restrain freedom of contract. The policy in relation to expenses behind the Act and the Scheme was for parties to bear their own expenses. Consultations in England have suggested that in the absence of any provision in the Act and the Scheme some unfair practices have resulted.

These focus particularly on contractual provisions which require a referring party to meet the whole expenses of an adjudication. **Consultees in responding are invited to indicate the extent to which, in their view, this sort of practice occurs in Scotland and to give examples of any contractual provisions to this effect.**

Leaving the legislation unchanged would ensure that the adjudication process retains its speed and simplicity, whilst retaining flexibility by leaving it open to parties to recover their legal and other expenses through the courts, or to agree to ask an adjudicator to decide on the amount and apportionment of all, or certain elements, of their expenses. If it is the case that some unfair practices have crept into the position in Scottish adjudications and if consultees consider that there are merits in restoring the original intention of the Act namely that parties should, by and large, meet their own expenses then one way of doing this might be to enable parties to agree that the adjudicator could award expenses. This would, of course, confer an additional jurisdiction on adjudicators and might risk moving adjudication towards an arbitration concept and away from the modality of quick and cheap dispute resolution. Reservations in the industry on this point may point to the undesirability of some parties being put under pressure to agree questions of expenses.

DTI propose to amend the Act in England to outlaw the practice of putting into contracts requirements that a party that refers a dispute to adjudication should bear the other party's expenses. Depending on consultees' views as to the nature of any problem that might exist in Scotland and the nature of the existing legal position it is for consideration whether, in the interests of consistency of policy as between England and Scotland, some provision needs to be put into the Act in relation to Scotland. If so, the question is should it be the same as the provision in England in order to achieve the same effect, or whether that effect could be achieved in a different way possibly even by a provision in the Scheme itself? It is argued in some quarters that if the law in these terms is different, then some parties might seek artificially to adopt or apply the law of Scotland seeing it as favourable. This sort of "applicable law" shopping is to be discouraged. On the other hand there are provisions in the Act which should make this impossible, notably section 104(7) as read with section 114(1) and (3), the effect of which is that if a contract relates to the carrying out of construction work in Scotland, then Scottish law and the Scottish Scheme would be applicable. Similarly, if a contract relates to the carrying out of construction work in England, then English law and the English Scheme would be applicable

**The issue of the expenses of adjudication falls to be considered depending on what consultees' understanding is of the position in Scotland. In this regard, therefore, consultees are invited to indicate whether they think there is a problem in Scotland 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 are also invited to indicate whether there are contractual provisions in Scotland which require a referring party to pay all the expenses and if so whether these should be rendered unenforceable or illegal and whether they have any other thoughts regarding provisions for expenses.**

**More specifically consultees are invited to take a view as to whether it is preferable to leave the primary legislation as it is or whether an amendment should be made to the Act as may well happen for England. If not, do consultees consider that nothing should be done, or should consideration be given to amending the Scheme?**

**If consultees agree that legislation is necessary they are invited to indicate:**

- i. whether provision should be made for the parties to bear their own legal and other expenses; or**
- ii. that they might be free to confer jurisdiction on the adjudicator to award expenses and what criteria and procedural circumstances should be applied; that is, whether this should be at any time or only after the dispute has arisen.**

### **3.7 Timing of Requests for Reasons**

The Construction Industry Board's review recommended that the Scheme should be amended to require that any request to an adjudicator to provide written reasons to support his/her decision should be received before delivery of the adjudicator's decision and that, if requested by one party, the reasons should be provided to all parties in the interests of clarity and openness.

DTI and the Adjudication Task Group concluded that in England no change is required to the legislation, but that the issue should be dealt with in guidance. That guidance has now been published (see Section 3.9 below).

The right to request the reasons underpinning an adjudicator's decision already exists in the Scheme. The Scottish Executive's view is that there is some risk that introducing a time limit into the Scheme could provoke parties to take the precaution of requesting reasons in a greater proportion of cases. This might unnecessarily add to the complexity and time taken. Nonetheless, parties should have the opportunity to request the reasons for

an adjudicator's decision and there are practical reasons why it is better that the request should be made before the adjudicator issues his decision. (There is a view that the performance of the adjudicator's role ceases upon the reaching of his/her decision and that requests would in any case have to be made before the decision was reached).

It is proposed that adjudicators be given guidance that they can use their existing powers, under paragraph 13 of the Scheme, to require that a request for reasons should be put to them by a specified date. This would be a more flexible approach than amending the Scheme.

**Consultees are invited to give their views on the issue of the timing of requests for reasons, and in particular, to indicate at what stage in the process reasons should be requested and whether there should be a timescale for the response. Views are also invited on whether it would be appropriate to deal with this in guidance to adjudicators.**

### **3.8 Enforcement of Adjudicators' Decisions**

The Construction Industry Board's review noted that in Scotland the mechanism for enforcing adjudicators' decisions under the Scheme is by registration in the Books of Council and Session which enables enforcement without involvement of the Court. The report noted there was some uncertainty about the recourse that is available in the event of default of that mechanism.

The uncertainty is created by the fact that as the scheme is presently drafted it is not obligatory for consent to registration for execution to be forthcoming once the determination has been made. It is therefore open to consideration that the scheme might be amended to require parties to agree to execution by formally consenting to registration. Normally this is entirely a matter of agreement. In the context of adjudication, however, it may be thought that once parties have gone to adjudication they should agree to enforcement of the outcome.

The counter argument to this is that the statute states that the adjudicator's determination is final and binding until or unless there is further procedure by way of arbitration or litigation.

The Scottish Executive's view is that enforcement does not appear to have been a major problem and express arrangements are increasingly being made in contracts and adjudicators' agreements. In practice, it has proved effective to obtain a decree conform from the Courts.

Decree conform is a common law action in the Court of Session. The application to the court is for the authority of the court to be given so that enforcement can take place. Normally it is used for decrees of courts outside Scotland but is used also for other types of order which do not, by themselves, have the authority of a court for enforcement purposes.

A procedure by way of summons is relatively straightforward. In the Court of Session the practice currently is for such applications dealing with construction contract matters to be put to the Commercial Court where the procedure is expedited.

Indications are that decrees conform have been obtained relatively quickly and have not significantly delayed the enforcement process and so it is proposed that, at present, no amendments should be made to the legislation.

**Consultees' views are sought on whether registration for execution should be compulsory and whether the scheme should be amended to give effect to this.**

### **3.9 Guidance for Adjudicators**

The proposals described above refer to the possible need to produce guidance for adjudicators. Guidance for adjudicators has recently been published by the Adjudication Task Group<sup>[6]</sup>. Guidance has also been produced by a number of other industry organisations and Adjudicator Nominating Bodies.

The Adjudication Task Group has indicated a willingness to consider producing a Scottish or joint edition of its guidance with appropriate amendments based on input from Scotland.

**Consultees are invited to comment on whether the guidance produced by the 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 are also invited on which industry/professional bodies, or Adjudicator Nominating Bodies, in Scotland should be considered capable of producing, and would be able or willing to produce, or provide an input to, such guidance.**

## 4. Extent of Consultation

This consultation document is being sent by the Scottish Executive to a broad range of construction industry organisations, client groups and professional bodies, and to organisations that have advised the Scottish Executive that they carry out the function of an Adjudicator Nominating Body. It is also being issued to those persons and organisations who responded to the consultation paper issued in 1997 on The Scheme for Construction Contracts (Scotland) Regulations and to others with a relevant interest. This document is available on the Scottish Executive's website at <http://www.scotland.gov.uk>

## 5. Responses

Views and comments are invited from both individuals and organisations. Where consultees wish to comment by reference to the "Guidance for Adjudicators"<sup>[6]</sup> published by the Adjudication Task Group, it would be helpful if they could indicate in their response whether that is the case.

Responses should be sent as soon as possible, and by **11<sup>th</sup> April 2003** at the latest, to: Scottish Executive Building Division, Area 2-J(North), Victoria Quay, Edinburgh, EH6 6QQ. Alternatively, responses can be e-mailed to: [building-division@scotland.gsi.gov.uk](mailto:building-division@scotland.gsi.gov.uk). Enquires about this document, or requests for further copies, should be directed to The Scottish Executive Building Division at the above address (Telephone: 0131 244 7465). All responses will be given due consideration. Copies of responses will be placed in the Scottish Executive Library for public access, unless respondents indicate that they wish their responses to remain confidential. The Scottish Executive may enter the names and addresses of respondents on a computer database, including summaries of responses for the purposes of collating and analysing information.

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### Notes:

[1] The Housing Grants, Construction and Regeneration Act 1996 (ISBN 010 545396X).

[2] The Scheme for Construction Contracts (Scotland) Regulations 1998 (Statutory Instrument 1998 No. 687 (S.34)).

[3] The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Statutory Instrument 1998 No. 649).

[4] "Review of the Scheme for Construction Contracts" a CIB Report to the Construction Minister, December 2000: available (along with the DETR response) on <http://www.cic.org.uk/adjudication/adjudicationinfo.htm>

[5] The Arbitration Act 1996 (Part I section 57).

[6] "Guidance for Adjudicators" was published in July 2002 by the Construction Umbrella Bodies Adjudication Task Group, c/o Construction Industry Council, 26 Store Street, London, WC1E 7BT. <http://www.cic.org.uk/adjudication/adjudicationinfo.htm>

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