

Improving Payment Practices in the Construction Industry

DTI Consultation



Response from the Construction Industry Council on the adjudication related issues

June 2005

Trustee stakeholder accounts

Q10.1 Is the current use of trustee stakeholder accounts appropriate? What is the impact on the industry (positive or negative)?

The current use of such accounts is not appropriate and their impact is negative.

In its July 2004 report, the CUBATG unanimously recommended that the legislation be amended to prohibit devices such as those that provide for monies to be paid into trustee stakeholder accounts (or similar) or that require adjudicators to order payment into trustee stakeholder accounts (or similar) pending the final outcome of a dispute. CIC supports this recommendation and is against the proposal that this should not apply in the case of insolvency. To fulfil the expectations of adjudication, the only sensible course is to outlaw stakeholder trustee accounts in all instances, and leave it to the courts to decide matters concerning insolvency during any enforcement proceedings.

Q10.2 If you think the current practice is not appropriate, how do you think the legislation should be amended to improve cash flow and the effectiveness of the adjudication process? Should we include:

- (a) a provision in the Construction Act to make unenforceable contractual provisions requiring the payment of an award into a "trustee stakeholder account"?
- (b) a power for the adjudicator to overrule any contractual provision requiring the payment of his award into a "trustee stakeholder account"?
- (c) a broader power for the adjudicator to overrule any contractual requirement for payment at all to be made into a "trustee stakeholder account" (not simply the adjudication award)?
- (d) a broader power for the adjudicator to overrule any contractual requirement at all which has the effect of delaying the effect of his decision?
- (e) Other - please specify

(a).

Q10.3 Do you believe that the adjudicator should be allowed to make his award into a “trustee stakeholder account” in cases where the receiving party is subject to insolvency proceedings. If so, should this be possible:

- (a) under all adjudications by including a requirement in the Construction Act?
- (b) under all adjudications under the Construction Act as the only means of obtaining a stay in the adjudicator’s decision?
- (c) only in adjudications under the Scheme and in cases where the parties have agreed to the use of a “trustee stakeholder account” for adjudicators award (as we have proposed)?
- (d) Other (please explain)?

Alternatively, do you believe that:

- (e) stays in an adjudicator’s decision should only be available through the courts?
- (f) stays in adjudicator’s decisions should not be available at all?

No. (e).

Q10.4 If you do believe that the adjudicator should have the ability to place his award into a “trustee stakeholder account”, when should this be permitted or required?

- (a) when the receiving party is subject to insolvency proceedings?
- (b) other - please specify?

Please give the reason for your recommendation and indicate the change in costs, risks to different members of the supply chain (and its clients) and to delivery of projects that you believe would result.

Not applicable.

Q10.5 If the law were to provide for the payment of adjudicators’ awards into trustee accounts when a receiving party appears likely to become the subject of insolvency proceedings, do you believe that on the application of a paying party...

- (a) ...the courts need to fulfil the role of determining whether a receiving party is likely to become subject to insolvency proceedings (as at present)?
- (b) ...the adjudicator could equally fulfil the role of determining whether a receiving party is likely to become subject to insolvency proceedings?

We would welcome respondents’ views on how this mechanism could operate and the risks and costs associated with your proposed solution.

(a) Yes (b) No.

Q10.6 Should it be agreed that the adjudicator should have the power to place payments in a “trustee stakeholder account”, how do you believe that the proposed trustee stakeholder account should operate?

- (a) Do you agree that the adjudicator should act as the trustee? (Yes/No - please give reasons)
- (b) How long do you believe the adjudicator should hold the award for before it is released to the receiving party (if the paying party has not referred the dispute to court or arbitration in that time)? (One month as proposed/Other - please specify)

Please indicate the reasons for your response and the impact on costs and project delivery across the supply chain it would result in.

(a) No. The procedural difficulties for many adjudicators in setting up a trustee stakeholder account would appear to be insurmountable. If this suggestion is adopted it is likely to severely restrict the number of available adjudicators. It would certainly detract from the efficient working of the adjudication process. Our considered view is that it would be too complicated in the context of a 28 day adjudication.

(b) Other - any stays should be a matter for the courts.

Regulatory impact

Q10(i) What would be the cost/benefit to your business and your projects of permitting the use “trustee stakeholder accounts” for adjudication awards in cases where the receiving party is insolvent, or will become insolvent before the dispute is finally decided?

Anything that increases administration increases the cost of adjudication. Moreover, there could be considerable arguments about whether a party is, or might become, insolvent which would detract from the real issues that the Act is intended to tackle – the payment of sums due. Setting up a trustee stakeholder account would increase costs.

Q10(ii) How often do you believe construction contracts contain clauses requiring adjudicator’s decisions be paid into “trustee stakeholder accounts”?

- (a) More than one contract in 10?
- (b) Between one contract in 10 and one in 100?
- (c) Fewer than one contract in 100?

How do you think this would change if the legislation were amended and what would be the impact (cost and risk) on companies in the supply chain?

(c) from the evidence of the adjudicator members of the CIC Adjudication Board.

Any change in the legislation is likely to increase costs as noted previously.

- Q10(iii)** How often do you believe these clauses result in a party deciding against referring a dispute to adjudication where it would otherwise have been referred?
- (a) More than half of disputes?
 - (b) About half of disputes?
 - (c) Fewer than half of disputes?
- What is the cost/benefit to the industry and to delivery of projects of this practice?

The CIC has no evidence.

- Q10(iv)** How often do you believe an award is made at adjudication where the receiving party is in insolvency proceedings?
- (a) More than one adjudication in 10?
 - (b) Between one adjudication in 10 and one in 100?
 - (c) Fewer than one adjudication in 100?

(c) from a sample of three adjudicators – in one case 2 in 150, in another 2 in 150 and in another 1 in 20.

- Q10(v)** How would this figure change if we included cases where the receiving party would be deemed to be likely to become insolvent in spite of receiving the adjudicator's award compared to the number already insolvent?

The CIC has no evidence.

Adjudicator ruling on his jurisdiction

- Q11.1** Do you believe an adjudicator should have –
- (a) ...no power to make a final and binding decision of his jurisdiction?
 - (b) ...power to make a final and binding decision of his jurisdiction only in certain areas?
 - (c) ...power to make a final and binding decision of his jurisdiction in any area?

What would be the impact of this approach on members of the supply chain or on the likely completion of projects?

(b). This is subject to some of the answers below. If the issues over which jurisdictional challenges are commonly made are reduced, there would be fewer challenges and therefore less advantage in enabling an adjudicator to make a binding decision on jurisdiction.

- Q11.2** Do you agree with the principle that an adjudicator should only have the responsibility to make binding decisions in response to jurisdictional challenges in areas where there can be confidence in his ability to make a correct and reliable decision? (Yes/No)

Yes. This however ignores the question on how there can be confidence in the ability of adjudicators who are appointed by nominating panels when training and standards differ.

Q11.3 Given the principle in Q11.2, do you agree that adjudicators could be expected to make correct and reliable decisions on the following grounds:

- (a) whether there is a construction contract for the purposes of Sections 104 and 105 of the Construction Act? (Yes/No)
- (b) whether there is a dispute? (Yes/No)
- (c) whether the adjudicator was properly appointed? (Yes/No)

(a) Yes

(b) Yes

(c) Yes.

Q11.4 Please explain your answer and indicate if you think there could be any complications or circumstances in which this would not be feasible? Please indicate if you think there are other circumstances in which the adjudicator would be in a position to decide on jurisdiction and whether there are circumstances in which this might not apply?

Currently there are no amendments proposed to S104, S105 or S107 of the Act. Scope changes are necessary for two reasons.

1. It is unjust that firms carrying out exactly the same type of work are within the adjudication regime for one type of project and excluded on another. This anomaly is created by S105(1) and 105(2).

2. The industry intended a wider interpretation of 'in writing' under S107 than is the law following the *RJT* case. (Please refer to the debate on clause 106 (now S107) on 18 June 1996 Standing Committee F.) The question of whether the contract is in writing and whether or not there is a dispute are probably the areas where there are the greatest number of challenges to jurisdiction. If the reasons for challenge are removed, dealing with jurisdiction and any subsequent enforcement would become much less of a problem.

Q11.5 Do you believe there are other questions an adjudicator could be relied upon to decide correctly if included in challenges to his jurisdiction? (Yes - please specify/No)

Yes. "Is there is a contract in writing under S107?" This has to be decided by adjudicators now in any event. If the Act were extended to include partly oral or wholly oral contracts, as in Australia and New Zealand, the position would be no different to that currently experienced, except that the adjudicator would then have to determine the relevant terms of an oral contract.

Q11.6 Do you believe that the legislation should make explicit the adjudicator's right to payment in any of the following circumstances:

- (a) when standing down after deciding he does not have jurisdiction?
- (b) when standing down after making a binding decision that he does not have jurisdiction under the proposal?
- (c) when standing down with the agreement of both parties to the contract (as at present)?

(a) Yes

(b) Yes

(c) Yes

Ensuring that adjudicators are paid when standing down will encourage honest decisions on jurisdiction. It should be noted however that if the scope for challenges on jurisdiction were reduced, this would not be the problem that it is currently.

Regulatory impact

Q11(i) How often do you believe adjudicators make non-binding decisions as to their jurisdiction?

(a) in 95 - 100% of adjudications;

(b) in 75 - 95% of adjudications;

(c) in 50 - 75% of adjudications;

(d) in 25 - 50% of adjudications;

(e) in 5 - 25% of adjudications;

(f) in 0 - 5% of adjudications.

(b).

Q11(ii) How often do you believe a jurisdictional challenge relates largely to: whether there is a construction contract for the purposes of Sections 104 and 105 of the Construction Act; and/or

whether there is a dispute; and/or

whether the adjudicator was properly appointed;

(a) More than half of jurisdictional challenges;

(b) About half of jurisdictional challenges;

(c) Fewer than half of jurisdictional challenges.

S104 and 105 challenges are rare.

A “whether there is a dispute” challenge is common - answer (b).

A “properly appointed” challenge is more infrequent; from the evidence of the adjudicator members of the CIC Adjudication Board probably about 2 in 150.

Q11(iii) What other jurisdictional challenges are common within the adjudication process? To what degree would amending the legislation in these areas reduce the number of challenges or referrals to Courts to overturn decisions?

The commonest areas of challenge are “is there a dispute?” and re S107 “is the contract in writing?” Challenges under S107 were rare before *RJT* but they are now commonplace and access to adjudication is suffering as a result. If the scope of the definition of “dispute” was widened and oral or partly written and partly oral contracts were included in S107 then this would reduce the number of challenges and referrals to the courts.

Q11(iv) How often do you believe jurisdictional questions are the main arguments forcing an adjudication to go to enforcement?

- (a) More than half of enforcements
- (b) About half of enforcements
- (c) Fewer than half of enforcements

S105 - 9 in 200

S107 - 5 in 200

S108 – “no dispute” 12 in 200.

(These figures are based on the TeCSA case analysis which accompanies the CUB Adjudication Task Group response.)

Q11(v) How often do you believe a jurisdictional challenge is correct when made at adjudication or enforcement (irrespective of the outcome)?

- (a) More than half of jurisdictional challenges
- (b) About half of jurisdictional challenges
- (c) Fewer than half of jurisdictional challenges

(c).

Q11(vi) What do you believe to be the average total cost of enforcement proceedings to the parties? (£)

£10k to £40k for larger cases in the Technology and Construction Court and under £3k in the County Court.

Final and conclusive decisions

Q12.1 What, if any, benefits arise from the use of “final and conclusive” decisions for interim payments?

In the context of the Chancellor’s 2004 Budget Speech there is no benefit to the industry. This provision in the Scheme has been latched onto by those drafting bespoke contracts on behalf of some “payers”, where “final and conclusive” provisions have been inserted into contracts (where they did not appear before the Construction Act was passed) with the intention of preventing the payee from commencing adjudication.

Q12.2 Do you agree that unless a decision is of substance to a non-interim payment, the interim payment resulting from an adjudicator’s decision could be revised in a subsequent payment or in the final account? Are there any circumstances in which this might not be the case? If so, is there a mechanism by which this could be addressed within the proposal?

An adjudicator’s decision on an interim payment should always be open for review and revision by the payer in a subsequent interim payment, or at the time the final account is prepared, so as to reflect changed circumstances. If that review is disputed a further adjudication may ensue. The second adjudicator should not be bound by the first adjudicator’s decision in such circumstances.

- Q12.3** Do you agree that the legislation should
- a) allow adjudicators in all adjudications to open up decisions or certificates which are of substance to interim payments; or
 - b) leave the matter to the contract between the parties as at present with the current provision in the Scheme allowing the adjudicator to open up only decisions and certificates that are not final and conclusive?

Please explain your answers.

(a) Yes – see answer to Q12.1 above

(b) No – see answer to Q12.1 above.

- Q12.4** Do you have an alternative proposal, if so, please specify and outline the benefits of your proposed approach.

No.

Regulatory impact

- Q12(i)** How often do you believe contracts include clauses making decisions or certificates “final and conclusive” of matters that are only of substance to interim payments?

- a) in 95 - 100% of contracts;
- b) in 75 - 95% of contracts;
- c) in 50 - 75% of contracts;
- d) in 25 - 50% of contracts;
- e) in 5 - 25% of contracts;
- f) in 0 - 5% of contracts.

(e) but its use is increasing to avoid adjudication, as paying parties have been alerted to the possibility by its inclusion in the Scheme.

- Q12(ii)** How often do you believe this is...

- a) usually intended as means to avoid adjudication.
- b) usually intended for another genuine benefit (please describe).
- c) usually included by mistake.

(a) 100%.

- Q12(iii)** If you believe there is another genuine benefit to the contract and have suggested it in answer to Q12.2 above, what do you believe it would cost the contracting parties if this benefit were denied them under a change in the law? (£ per interim payment)

There is no genuine benefit to the industry in the context of the Chancellor’s 2004 Budget Speech.

Adjudicator immunity

- Q13.1** Do you agree that the adjudicator should be provided with statutory immunity, as is provided to arbitrators by Section 29 of the Arbitration Act 1996 in place of the current requirement for contractual immunity in Section 108(4) of the Construction Act?

Yes.

Q13.2 Are you aware of instances where the possibility of a third party claim against an adjudicator has had an adverse effect on the adjudication? (Please give details)

It is debatable to what degree the current regime of immunity works at all. It relies on a benefit being written into a construction contract to which the adjudicator is not a party. This was a “green” issue for the CUBATG, the industry unanimously agreeing that there should be statutory immunity for adjudicators.

The Report on The Arbitration Bill produced by the Departmental Advisory Committee on Arbitration Law in February 1996 (‘the DAC Report’) firmly recommended immunity for arbitrators (see paragraphs 131-136), seeing it as a feature of independence. For the same reasons, adjudicators should enjoy the same immunity.

It is not only claims by third parties that need to be considered, but actions by one of the parties as well. There are instances where one of the parties has attempted to put undue pressure on the adjudicator – which undoubtedly has an adverse effect on the adjudication even if the adjudicator can resist the pressure. Two cases highlight the point – *John Mowlem Ltd v Hydra-Tight Ltd* (2001) 17 Constr LJ where an action was commenced against the adjudicator after the adjudication and *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* 28th October 2004 (in the Court of Appeal) where threats against the adjudicator were derogated by the court.

For similar reasons, the Adjudicator Nominating Bodies have difficulties and should be given immunity. See the DAC Report in relation to arbitration, paragraphs 299 to 301; again the same arguments apply.

Q13.3 If you believe the adjudicator should not be immune from the possibility of actions being brought by third parties please explain why and what problems, if any, you believe would arise from providing this immunity.

Not applicable (in view of the answer to 13.1).

Regulatory impact

Q13(i) How often do you believe an adjudication results in a real possibility that an action could be brought by a third party (irrespective of whether such an action is brought)?

- a) in 95 - 100% of adjudications;
- b) in 75 - 95% of adjudications;
- c) in 50 - 75% of adjudications;
- d) in 25 - 50% of adjudications;
- e) in 5 - 25% of adjudications;
- f) in 0 - 5% of adjudications.

The CIC has no firm evidence (although there is anecdotal evidence from adjudicators and see the *AMEC* case), but the CIC's view is that undue pressure on adjudicators does increase the costs of adjudication. Amending the legislation would increase certainty and keep costs down.

- Q13(ii)** How often do you believe third party actions are brought?
- g) More than one in 100 adjudications?
 - h) Between one in 100 and one in 1000 adjudications?
 - i) Fewer than one in 1000 adjudications?

The CIC has no evidence.

- Q13(iii)** Do you agree that adjudicators require additional protection under the legislation from claims of professional negligence? If so, please say why and what this would cost.

Yes, statutory immunity would provide this. The present situation, whereby the adjudicator should be given contractual immunity is unsatisfactory. It would be cost neutral.

The CIC believes that the adjudicator should be immune from suit in order to reinforce his/her independence. The provision of immunity would assist him/her in refuting attempts by the parties to put undue pressure on the adjudicator during the adjudication.

Some Adjudicator Nominating Bodies, who are also requesting immunity from suit, have already incurred costs in refuting potential claims. The costs of this will eventually be borne by parties wishing to go to adjudication.

Adjudicator independence

- Q14.1** Do you agree with the proposed amendment to replicate the Scheme test of independence in the Construction Act? What do you believe will be the impact of this amendment? Would it reduce access to adjudicator expertise for specific types of dispute for example? Would it potentially increase costs to any parties?

Taking the questions in order –

(i) Yes.

(ii) It will boost market confidence in adjudication and increase access to adjudication by all parties.

(iii) No.

(iv) No. Greater access has the potential to reduce costs.

- Q14.2** Would you prefer to leave the legislation as it stands? If so, please say why

No (see above).

- Q14.3** If you believe a further test of independence is needed but not going as far as the proposal, what form should it take?
- j) Adding the requirement in Paragraph 4 of Part II of the Scheme for adjudicators to declare their interests?
 - k) Adding the Scheme requirement that adjudicators cannot be employees of the parties?
 - l) Another form of amendment (please specify and give reasons for your answer).

No further test required. The Scheme test works and is sufficient. A more complex definition of independence might have an adverse effect. (See also the DAC Report referred to above, paragraph 102, for a discussion of the point in the context of arbitration.)

Regulatory impact

- Q14(i)** How often do you believe adjudications are conducted where the adjudicator would fail the requirement for independence in the Scheme for Construction Contracts?
- m) In 95 – 100% of contractual adjudications.
 - n) In 75 – 95% of contractual adjudications.
 - o) In 50 – 75% of contractual adjudications.
 - p) In 25 – 50% of contractual adjudications.
 - q) In 5 – 25% of contractual adjudications.
 - r) In 0 – 5% of contractual adjudications.

The CIC has no evidence. The greater concern however is how often a party has been put off taking a dispute to adjudication because the adjudicator is not independent, for example where an employee or ex-employee of one of the parties is named in the contract as adjudicator.

- Q14(ii)** What would be the impact of the alternative proposals on these figures?

Adoption of the Scheme test would reinforce and strengthen confidence in adjudication and increase access to the process.

- Q14(iii)** If you believe that widening the test for independence would reduce the availability of adjudicators for any particular types of adjudication, please say what you believe the cost of this might be to the industry (in terms of ability to use the adjudication process, impacts on time, payments, access to resolution mechanisms etc).

Widening the test for independence would not reduce the availability of adjudicators for any particular types of adjudication. See answer to 14.1. There is currently a surplus of trained adjudicators.

The CIC has drafted some additional questions, particularly on issues raised in Annex 2, where there are matters of specific interest or concern. The questions and responses are set down below.

AQ1 Introducing a single adjudication procedure

AQ 1.1 Do you believe that it would be beneficial if the legislation (the Scheme for Construction Contracts) required the use of a single adjudication procedure for all adjudications?

Yes – but only if a new Scheme was drafted in conjunction with the industry.

Regulatory impact

AQ 1.2 How often do you believe that the use of an ad hoc adjudication procedure has caused procedural difficulties in adjudication?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 0 – 5% of adjudications?

See responses to other questions where problems have been specifically highlighted.

AQ2 Requiring the adjudicator to give reasons

AQ 2.1 Do you believe that it would be beneficial if the secondary legislation (the Scheme for Construction Contracts) required the adjudicator to give reasons for his decision unless requested not to?

Yes.

Regulatory impact

AQ 2.2 How often do you believe that the absence of a requirement for the adjudicator to give reasons for his decision has caused procedural difficulties in adjudication?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 0 – 5% of adjudications?

The CIC has no direct evidence.

AQ3 Expressly providing a right to respond to a referral

AQ 3.1 Do you believe that it would be beneficial if the secondary legislation (the Scheme for Construction Contracts) expressly providing a right to respond to a referral to adjudication?

Yes, particularly where the adjudication is part of a wider dispute.

Regulatory impact

AQ 3.2 How often do you believe that the absence of a right to respond to a referral to adjudication has caused procedural difficulties in adjudication?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(f).

AQ4 Expressly providing a slip rule on the face of the Scheme

AQ 4.1 Do you believe that it would be beneficial if a slip rule was expressly provided on the face of the Scheme for Construction Contracts?

We consider that this is not to be necessary under the law of England & Wales.

Regulatory impact

AQ 4.2 How often do you believe that the absence of an express slip rule has caused procedural difficulties in an adjudication?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(f).

AQ5 Removing paragraphs 23(1) and 24 on enforcement

AQ 5.1 Do you believe that it would be beneficial if paragraphs 23(1) and 24 on enforcement were removed from the Scheme for Construction Contracts?

This clause is now redundant and it would deregulatory to remove it.

Regulatory impact

AQ 5.2 How often have the provisions of paragraphs 23(1) and 24 been used in enforcement proceedings?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(f).

AQ6 Clarifying the right to refer disputes under the contract to expressly allow claims for damages

AQ 6.1 Do you believe that it would be beneficial if the right to refer disputes under the contract expressly allowed claims for damages?

The view of the CUBATG (see paragraph 3.4 of their July 2004 Report – green issue) was that although strictly the present wording is almost certainly broad enough to embrace disputes involving claims for damages for breach of contract, clarification would be desirable. If it were to be decided by a court that the wording be interpreted narrowly, the effect would be very serious and so the opportunity should be taken to clarify the matter.

Regulatory impact

AQ 6.2 How often has a claim for damages been successfully resisted on the basis that it is not a matter that arises under the contract?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(e) but see comment above.

AQ7 Expressly providing the adjudicator with the right to rule on timing of notice of referral

AQ 7.1 Do you believe that it would be beneficial if the adjudicator was expressly provided with the right to rule on the timing of the notice of the referral to adjudication?

In the light of the decision in *North London v Micbar* this is not needed.

Regulatory impact

AQ 7.2 How often has the absence of an express power to rule on the timing of the notice of the referral to adjudication been prejudicial to a party in adjudication proceedings?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(f).

AQ8 Requiring the adjudicator to share legal or technical expert advice

AQ 8.1 Do you believe that it would be beneficial if the adjudicator was expressly required to share with the parties any legal or technical expert advice he receives?

Yes.

Regulatory impact

AQ 8.2 How often has a failure by an adjudicator to share with the parties any legal or technical expert advice he receives been prejudicial to a party in adjudication proceedings?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(f) but where the adjudicator has not, the consequences have been serious.

AQ9 Making provision for the adjudicator to evaluate and advise the parties of any entitlement to interest

AQ 9.1 Do you believe that it would be beneficial if there were a specific provision for the adjudicator to evaluate and advise the parties of any entitlement to interest on late payments under the Late Payment of Commercial Debts (Interest) Act 1998?

No, unless it forms part of the claim.

Regulatory impact

AQ 9.2 How often do you believe that the absence of a specific provision for the adjudicator to evaluate and advise the parties of any entitlement to interest on late payments under the Late Payment of Commercial Debts (Interest) Act 1998 has prejudiced a party in an adjudication?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

Not known.

AQ10 Removing the restricting on referral of multiple disputes

AQ 10.1 Do you believe that it would be beneficial if the requirement in Paragraph 8 of Part 1 of the Scheme restricting the referral of multiple disputes to adjudicators was removed?

Yes, we strongly agree as it would reduce costs by using the same adjudicator on a number of disputes if they arise under the same contract and it would also avoid conflicting decisions.

Regulatory impact

AQ10.2 How often do you believe that the requirement in Paragraph 8 of Part 1 of the Scheme restricting the referral of multiple disputes to adjudicators has prejudiced a party in an adjudication?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(e) probably in about 20% of projects ie where there are multiple disputes.

AQ11 Providing a statutory limit on length of payment periods

AQ 11.1 Do you believe that it would be beneficial if a statutory limit was to be provided on the length of payment periods under construction contracts?

No, it is likely that the statutory limit (which could be quite long) would then become the norm in the industry.

Regulatory impact

AQ 11.2 In what proportion of contracts do you believe that the absence of a statutory limit on the length of payment periods under construction contracts has been prejudicial to a party?

- a) In 95 – 100% of adjudications?
- b) In 75 – 95% of adjudications?
- c) In 50 – 75% of adjudications?
- d) In 25 – 50% of adjudications?
- e) In 5 – 25% of adjudications?
- f) In 0 – 5% of adjudications?

(d).

AQ12 Providing payers under construction contracts with the right to redirect payments due to insolvent contractors

AQ 12.1 Do you believe that it would be beneficial if payers under construction contracts were provided with the right to redirect payments due to insolvent contractors to their creditors for construction work they have done under subcontracts on the project?

The difficulties in providing the hybrid legislation required are probably insuperable.

Regulatory impact

AQ 12.2 In what proportion of contracts do you believe that the absence of a provision that payers under construction contracts have the right to redirect payments due to insolvent contractors to their creditors for construction work they have done under subcontracts on the project has been prejudicial to a party?

- a) In 95 – 100% of contracts?
- b) In 75 – 95% of contracts?
- c) In 50 – 75% of contracts?
- d) In 25 – 50% of contracts?
- e) In 5 – 25% of contracts?
- f) In 0 – 5% of contracts?

(d).

AQ13 Amending the meaning of “evidenced in writing” in Section 107 of the Housing Grants, Construction and Regeneration Act to allow the legislation to apply to contracts where there is only evidence of the existence of an agreement

The Court of Appeal decision in *RJT Consulting v DM Engineering* [2002] was that contracts whose essential terms are not all evidenced in writing are not subject to the Construction Act. There are many smaller contractors who enter into oral contracts or contracts where all the essential terms are not in writing.

AQ 13.1 Should the scope of the Construction Act be extended to include oral contracts?

Yes - see response to Q11.5 and Q11(iii).

AQ 13.2 Should the scope of the Construction Act be extended to include contracts whose existence is evidenced by some formal exchange in writing but where all the essential terms of the contract are not in writing?

Yes - see response to Q11.5 and Q11(iii).

AQ 13.3 In what proportion of contracts do you believe that the decision of the Court of Appeal in *RJT Consulting v DM Engineering* [2002] prejudices a party by excluding it from the payment and adjudication provisions of the Construction Act?

- a) In 95 – 100% of contracts?
- b) In 75 – 95% of contracts?
- c) In 50 – 75% of contracts?
- d) In 25 – 50% of contracts?
- e) In 5 – 25% of contracts?
- f) In 0 – 5% of contracts?

(d). In addition the number of cases that have not (or will not now) be referred to adjudication are likely to be substantial, particularly with regards to small contractors and subcontractors.

AQ14 Removing the exclusion of head contracts under PFI

AQ 14.1 Do you believe that removing the exclusion of head contracts under the Private Finance Initiative would be beneficial?

Yes, and in practice it is now becoming the norm.

Regulatory impact

AQ 14.2 In what proportion of contracts do you believe that the exclusion of a head contracts under the Private Finance Initiative has been prejudicial to a party?

- a) In 95 – 100% of contracts?
- b) In 75 – 95% of contracts?
- c) In 50 – 75% of contracts?
- d) In 25 – 50% of contracts?
- e) In 5 – 25% of contracts?
- f) In 0 – 5% of contracts?

The CIC has no evidence.

AQ15 Removing the exclusion of contracts for work with owner occupiers

AQ 15.1 Do you believe that removing the exclusion of contracts for work on residential buildings with owner occupiers would be beneficial?

No, but the rapidly escalating costs for users of the small claims court procedure is however becoming a concern.

Regulatory impact

AQ 15.2 In what proportion of contracts do you believe that the exclusion of contracts for work on residential buildings with owner occupiers has been prejudicial to a party?

- a) In 95 – 100% of contracts?
- b) In 75 – 95% of contracts?
- c) In 50 – 75% of contracts?
- d) In 25 – 50% of contracts?
- e) In 5 – 25% of contracts?
- f) In 0 – 5% of contracts?

(e).

AQ16 Revising the exclusion of certain contracts for operations related to process plant

AQ 16.1 Do you believe that removing the exclusion of certain contracts for operations related to process plant would be beneficial?

Yes.

AQ 16.2 Which particular contracts to which the exclusion for operations related process plant applies cause difficulty for a payee?

Those contracts which would normally be subject to the Act but which are excluded due to the head contract being for or part of a process plant operation. These include contracts with BNFL, water companies etc where there is little justification for the exclusion and which causes considerable confusion for payees who are all carrying out the same type of work every day but sometimes with the Act applying and sometimes not.

Regulatory impact

AQ 16.3 In what proportion of contracts do you believe that the exclusion of certain contracts for operations related process plant would be beneficial?

- a) In 95 – 100% of contracts?
- b) In 75 – 95% of contracts?
- c) In 50 – 75% of contracts?
- d) In 25 – 50% of contracts?
- e) In 5 – 25% of contracts?
- f) In 0 – 5% of contracts?

(e).

AQ17 Costs of the adjudication process

AQ 17.1 Do you agree that the legislative proposals set out on page 17 adequately accommodate the industry's concerns regarding costs?

We agree with the three bullet points set down on page 3 of the Consultation Document.

Regulatory impact

AQ 17.2 How often has the fact that the legislation does not expressly provide that the parties bear their own costs been prejudicial to a party to the adjudication?

- a) In 95 – 100% of contracts?
- b) In 75 – 95% of contracts?
- c) In 50 – 75% of contracts?
- d) In 25 – 50% of contracts?
- e) In 5 – 25% of contracts?
- f) In 0 – 5% of contracts?

(e).

AQ 18 Improving payment practices?

AQ 18.1 Would the intentions of the Construction Act to improve payment practices in the industry be better fulfilled if the amendments proposed in the consultation document were to be put into effect?

Yes.

AQ 18.2 Are there any other matters – on which legislation is not proposed – on which legislation is needed, in order to improve payment practices?

We consider that the most important matter that needs resolution in this current review is an amendment to the legislation (not clarification) which allowed oral or partly written and partly oral contracts to be included in S107 as referred to in our responses to questions Q11.5 and Q11(iii).