

**REVIEW OF THE *SCHEME FOR CONSTRUCTION CONTRACTS*
A CIB REPORT TO THE CONSTRUCTION MINISTER, DECEMBER 2000**

1 INTRODUCTION

The CIB was asked to provide the Construction Minister with an impartial assessment of the industry's current view of the adjudication provisions of the *Scheme for Construction Contracts* and of any changes which might be thought necessary. A task group was established for this purpose, with the membership and terms of reference as shown at annexes A and B, and an interim report was widely circulated for comment within umbrella bodies.

2 OVERVIEW

The objective of incorporating a mandatory right to adjudication in construction projects was to provide a quick, low-cost and impartial means of resolving disputes during projects. This was proposed by Latham¹, supported by all the members of the Construction Industry Board, and enacted by the (then) Department of the Environment.

The four umbrella bodies in membership of the Construction Industry Board which took part in this review² all agree that the adjudication provisions of the *Act*³/*Scheme*⁴:

- have proved generally to work well in meeting the original objectives, thanks in no small measure to the support of the judiciary; and
- may benefit from a limited number of specific amendments to the *Scheme* to improve the process of adjudication and the benefits which it has brought.

We also agree that:

- if the opportunity arises, consideration of a limited number of improvements to the *Act* would be beneficial;
- a number of recommendations for the voluntary improvement of contracts and adjudication should be conveyed to contract-writing bodies, Adjudicator Nominating Bodies (ANBs) and individual firms; and
- Ministers should be asked to undertake a further review in say two years' time.

We note the report submitted by the CLG to the Minister in June 2000⁵, which has provided a major input to this review. However, not all the matters raised by the CLG are agreed by all the parties to this review, except where it is specifically stated.

3 CONTENT OF THE *SCHEME*

In practice, the content of the *Scheme* has stood up well. The majority of problems have 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. This is addressed further in section 3.2 below.

The task group considered the provisions of the *Scheme* in practice, and whether adjudication is being

¹ *Constructing the Team*, 1994

² See Annex 1.

³ In this report, 'the *Act*' is *The Housing Grants, Construction and Regeneration Act 1996* (clauses 104-117).

⁴ In this report 'the *Scheme*' is *The Scheme for Construction Contracts (England and Wales) Regulations 1998* (Statutory Instrument 1998 No. 649) and *The Scheme for Construction Contracts (Scotland) Regulations 1998* (Statutory Instrument 1998 No. 687, (S.34)) unless specified otherwise.

⁵ Report on the operation of the *Act* by the Constructors Liaison Group, June 2000.

used in the manner and spirit intended. If abuses were to be alleged, we were conscious of the need for examples and evidence rather than anecdotes.

3.1 Adjudication procedures

3.1.1 Ambush. There has been less evidence of the tactic of submission for example just before a Bank Holiday than many predicted. There is some evidence of an alternative form of ambush, that of enormous quantities of 'relevant information' in the submission, which under paragraph 17 of the *Scheme* the adjudicator is obliged to take into account. However, any attempt to limit the amount of paperwork, e.g. by imposing a maximum limit, may be counter-productive, serving as an incentive to increase the size of a typical submission up to the maximum limit. Robust adjudicators have dealt with this matter effectively by telling the referring party that a decision is not possible in the time available or by requesting summary submissions when appointed. However, in order to avoid any suggestion that this practice is an infringement of paragraph 17, we recommend that the paragraph should be deleted.

Recommendation: Amendment to the Scheme by deletion of paragraph 17.

3.1.2 Natural Justice. In a recent case⁶, in which the adjudicator had not informed one party that he had been in contact with the other, an adjudicator was found not to have acted in accordance with the principles of natural justice. This is perhaps unsurprising, given that many adjudicators do not have a legal background (although the principles of natural justice often amount to 'acting with common sense'). Action is required to reduce opportunities for such attacks on adjudicators' decisions, as this has the potential to discredit the whole process.

Recommendation: No change but Ministers are asked to consider how best to deliver guidance to adjudicators on the principles of 'natural justice'.

3.1.3 Entitlement to submit a response. The right for defendants to respond to a referral to adjudication is not clear. This should be addressed through a new paragraph 13(a) requiring the adjudicator to "advise the party or parties complained against of their right to put forward a response, and determine a date no later than 14 days after receipt of the referral notice before which such response to the referral notice should be submitted."

Recommendation: Amendment to the Scheme by addition of a new paragraph 13(a).

3.1.4 Intimidatory tactics. There are reports of severe intimidatory tactics, including overly-legal jargon used by law firms on behalf of their clients against inexperienced (in legal matters) adjudicators. All parties feel strongly about this matter and feel that it is necessary to publicise the problem more widely.

Recommendation: No change. Ministers may wish to keep this issue under review with assistance from industry bodies, ANBs etc.

⁶ *Discaim Project Services -v- Opecprime Development Ltd (2000) BLR402*

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- 3.1.5 Human Rights Act. Legal opinion has been divided on the implications of the new Human Rights Act (HRA). The courts appear to have taken the view that adjudication is not a determination (final and binding) by a 'public authority' but rather an interim settlement to which the HRA does not apply. However, there remains the test of 'fairness'.

Recommendation: No change. Ministers will wish to keep this issue under review with assistance from industry bodies, ANBs etc.

- 3.1.6 'Slip rule'. Recent cases have considered whether adjudicators should be allowed to correct obvious arithmetic mistakes, along the lines of the 'slip rule' in arbitration or litigation proceedings.

Recommendation: Amendment to the Scheme to incorporate a 'slip rule'. Recommendation to contract-writing bodies to include such a rule voluntarily in standard forms.

- 3.1.7 Costs. We all agree that each party in an adjudication should be required to pay their own legal costs, i.e. there should be no provision for the adjudicators to award costs against another party. This supports the original intention of the *Act* but, in the light of recent conflicting judgements, further clarity is required. Related to this, we condemn those bespoke contracts which require the referring party to pay all fees related to the adjudication - this is against the spirit and intention of the *Act*, and the industry umbrella bodies were united in originally excluding this option from the *Scheme*.

Recommendation: Amendment to the Scheme (and amendment to the *Act* if opportunity arises) to require each party to meet its own costs.

- 3.1.8 Timing of reasons. At present paragraph 22 of the *Scheme* requires adjudicators to provide an explanation of the basis for their decisions if requested by one of the parties. This should be improved to clarify that the request 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.

Recommendation: Amendment to the Scheme (paragraph 22).

- 3.1.9 Enforcement mechanism. In the event of non-compliance with an adjudicator's decision, paragraph 24 of the *Scheme* in England and Wales seeks to provide a remedy by cross-referring to the *Arbitration Act*. In practice this paragraph is inoperable. For example, in the event of a financial award, the remedy should continue to be debt recovery procedures in the Courts; in the event of a non-monetary award, a mandatory injunction. The most straightforward way to remedy this is to delete paragraphs 23(1) and 24.

Recommendation: Amendment to the Scheme in England and Wales by deletion of paragraphs 23(1) and 24.

- 3.1.10 Enforcement mechanism (Scotland). The Scottish Executive asked the task group to have regard to the operation of adjudication in Scotland, where Scottish law means the relevant *Act* and *Scheme* are different. Annex C summarises the differences in the *Scheme*. Rather than the Arbitration Act, the enforcement mechanism specified in paragraph 24 is the registration of the adjudication decision in the Books of Council and Session. This allows enforcement without involvement of the court, but it is unclear what recourse is available in the event of default of this mechanism (i.e. there is no procedure in the eventuality that the losing party refuses to give its consent to registration).

Recommendation: Possible amendment to the Scheme in Scotland to deem consent of the losing party to registration.

- 3.1.11 'Final and conclusive' provisions. Paragraph 20(a) of the *Scheme* prevents an adjudicator from reviewing any decision or certificate previously expressed to be 'final and conclusive' under the contract. The CLG and CIC are concerned that this term is being abused as an 'avoidance mechanism' to exempt a wide range of matters from being referred to an adjudicator. The CCF and CIEC, on the other hand, feel that it is valid in certain circumstances, e.g. a final certificate within a contract, or in matters of security on government contracts.

Recommendation: We are unable to make a recommendation at the current time.

3.2 Compliant contract forms

The task group considered whether appropriate provision is now made in all standard forms of contract, and sought evidence of the extent of compliance in bespoke forms.

- 3.2.1 Compliant forms. Our view is that there has been less evidence of widespread avoidance techniques in relation to adjudication than was feared when the legislation was introduced, however there remain a number of issues that need addressing. As mentioned in the introduction to section 3 above, most problems are found to have arisen due to 'bespoke' adjudication processes. For example, the CLG reported⁷ that 51 of 100 bespoke subcontract forms reviewed did not have compliant adjudication provisions. However, the CIEC does not agree with the criteria used by CLG in their analysis, in particular the definition of 'compliant' (e.g. the 'avoidance mechanism' of a trustee stakeholder account or similar by 50% of contracts analysed has not been established by the courts to be a non-compliant mechanism). We recognise that, if contracts prove to be non-compliant, the Scheme will apply in any case, but reliance on this default mechanism increases the risk of jurisdictional challenge and hence increased costs for all parties, which is undesirable.

Recommendation: See 3.2.3 below.

- 3.2.2 Pre-adjudication procedures. Some contract forms, such as the standard forms produced by the ICE, have introduced a prior step of a 'notice of dissatisfaction', which may delay the point at which a 'dispute' is defined and can thus be referred to adjudication. The validity of such mechanisms has been strongly questioned in recent decisions of the courts.

Recommendation: See 3.2.3 below.

- 3.2.3 Enshrinement of the Scheme. One response to the issues raised in 3.2.1 and 3.2.2 above would be to enshrine the provisions of the *Scheme* (incorporating the amendments proposed in this

⁷ *ibid*

report) in the *Act*. The *Scheme* would thus become the statutory procedure. This would provide certainty in procedure for all parties by eliminating the potential for bespoke adjudication processes, of which there has developed a plethora which in turn provides fertile ground for the development of avoidance mechanisms. It would be a straightforward process for the authors of standard contract-writing forms to amend their forms accordingly. We are conscious that some would oppose this, but alternatives to prevent people opting out of the intentions of the *Act* have not been proposed.

Recommendation: Consideration of amendment to the Act.

3.3 Adjudicators and their appointment

The task group considered the quality of adjudicators, and also whether the system of appointing them is working satisfactorily.

- 3.3.1 Quality of adjudicators. According to figures collected by the Adjudication Reporting Centre run by Glasgow Caledonian University (GCU)⁸ from all but one of the 21 ANBs covering England and Wales, and Scotland, 1188 adjudicator appointments had been made up to February 2000. Six of these bodies come under the auspices of the CIC, who have approved their quality procedures. No formal complaints about the quality of adjudicators have been received by the CIC or Construction Confederation, another significant ANB, and CLG report no such concerns either. Clients report anecdotal concerns about the quality of adjudicators, many of whom are of course named or agreed in the contract rather than appointed by ANBs.

Recommendation: No change. Ministers will wish to keep this issue under review with assistance from industry bodies, ANBs etc. In the meantime, ANBs to keep their quality procedures under review.

- 3.3.2 Time period. We consider that the time period allows robust adjudicators both to deal with any jurisdictional dispute and to reach a decision.

Recommendation: No change.

- 3.3.3 Adjudicators' fees. The cost of adjudicators' fees (other fees, e.g. lawyers engaged by each party, are a matter for those parties - see 3.1.7 above) are proving reasonable. We do not support calls for adjudicators to be able to withhold their decisions until their own fees have been paid.

Recommendation: No change.

⁸ Adjudication Reporting Centre. Research analysis of the progress of adjudication based on questionnaires returned from adjudicator nominating bodies (ANBs) and practising adjudicators. Report no. 2, August 2000. P Kennedy and JL Milligan, Glasgow Caledonian University.

- 3.3.4 Growth in appointments. GCU estimate that the number of adjudicator appointments by ANBs has grown by 460% in the second year since the *Act* came into force. Significantly, this data does not include any individuals (rather than ANBs) named up front in the contract, and we only know that the proportion appointed in this way is sizeable. It remains to be seen whether the evident initial rapid growth in ANB appointments, to be expected given implementation of the *Act* from May 1998 and the elapsed time required for most contracts to reach the stage of adjudication, will continue.

Recommendation: No change.

4 CONTENT OF THE ACT

The review has identified a number of matters which, if the opportunity arises, it would be beneficial to address through improvements to the *Act*.

4.1 Matters relating to the *Scheme* within the *Act*

Two recommendations in section 3 above imply amendments to the *Act* if an opportunity arose:

- costs (3.1.7), and
- enshrining the *Scheme* in the *Act* (3 above).

4.2 Additional matters relating to the *Act*

- 4.2.1 Scope of the Act. The definitions of operations in section 105(1) should be reviewed, e.g. to ensure that maintenance operations are fully included as intended. Section 105(2), which seeks *inter alia* to exclude contracts for process plant should also be reviewed. The current uncertainty caused by the ambiguous and partial drafting of this exclusion provides opportunities for unnecessary litigation, particularly regarding an adjudicator's jurisdiction. In particular, if a contract includes any construction work as defined in 105(1), the whole of the contract should be defined as a construction contract.

Recommendation: Amendment to the Act by order.

- 4.2.2 Exclusion Order. There is some evidence that the present wording of the Exclusion Order in relation to PFI has led to difficulties not anticipated at the time of implementation of the *Act*. In particular these relate to payment provisions between the special purpose vehicle and the main contractor which has led to convoluted drafting to meet the requirements of funders. Whilst recognising this problem, there is some resistance to widening the terms of the Exclusion Order without further consideration of the implications. Anecdotal reports from clients suggest that property development/management transactions are also having difficulties.

Recommendation: Further review in consultation with relevant parts of the industry.

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Building Centre, 26 Store Street, London, WC1E 7BT Tel 020-7636 2256 Fax 020-7637 2258
Email dward@ciboard.org.uk Web site <http://www.ciboard.org.uk>

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ANNEX A. MEMBERS OF THE TASK GROUP

The member bodies of the CIB which nominated members to the task group are:

- The Construction Industry Council (professional institutions and consultants),
- the Construction Industry Employers' Council (lead contractors),
- the Constructors Liaison Group (specialist contractors), and
- the Construction Clients' Forum⁹ (the clients of the industry from the public and private sectors).

The CIB's fifth member body, the Construction Products Association, did not participate in the working group as the review was of little direct interest to their members.

Task group members were as follows:

CIB	Chris Vickers Don Ward	CLG	Rudi Klein Nora Fung
CIC	Roger Sainsbury Graham Watts		Rod Pettigrew Marion Rich
CIEC	Neil Smith Clare Edwards Victoria Jeffries	CCF	Ann Minogue Christopher Morley

ANNEX B. TASK GROUP TERMS OF REFERENCE

Introduction

The CIB was asked to provide the Construction Minister with an impartial assessment of the industry's current view of the Scheme and of any changes which might be thought necessary. This was to be undertaken in autumn 2000 with a view to reporting conclusions to the Minister by the end of the year.

Terms of reference

Drawing directly from the Minister's letter of 28 June 2000 to Chris Vickers, the proposed terms of reference of this task group were as follows:

"To provide the DETR's Construction Minister with an impartial assessment of the industry's current view of the adjudication provisions of the Scheme for Construction Contracts and of any changes which might be thought necessary. This should balance the different interests of different parts of the supply chain."

Membership

The task group was convened under Chris Vickers' chairmanship to carry out this review, with Don Ward (CIB Chief Executive) as secretary. Each umbrella body was invited to nominate one or two members to this task group (see Annex A above). The following people were copied in on papers throughout the review: Alastair Wyllie (Scottish Executive), Lee Searles (Local Government Association), Chris Sneath (CIB Deputy Chairman).

⁹The CCF asked the British Property Federation to represent its interests in the review. The CCF was succeeded in October 2000 by the Confederation of Construction Clients.

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ANNEX C. ANALYSIS OF DIFFERENCES BETWEEN SCOTTISH AND ENGLAND/WALES SCHEMES

Scotland	England & Wales	Comment
Adjudication		
20(1)	20	Part decisions - the Scottish Scheme reflects industry views given at consultation, allowing an adjudicator to make a decision on different aspects of the dispute at different times.
24	24	Enforcement – As the Arbitration Act 1996 does not apply in Scotland an alternative enforcement procedure is necessary. Registration of the adjudication decision in the Books of Council and Session, for preservation and execution, allows enforcement without involvement of the court.
25(1) and (2)	25	Joint and several liability – the Scottish Scheme reflects views at consultation that parties should be jointly and severally liable until the adjudicator was paid his fees in full, whether or not he makes any direction as to liability between parties.
Payment		
12	12	“Claim by the payee”. Aligns the contents of the claim for payment, i.e. the additional wording “specifying to what the payment relates” with those of amount of payment notice in paragraph 9 (5 day notice).

Analysis by the Scottish Executive's Building Division, September 2000