

**REPORT OF THE
CONSTRUCTION UMBRELLA BODIES
ADJUDICATION TASK GROUP
ON ADJUDICATION
UNDER THE CONSTRUCTION ACT
July 2004**

1.0 INTRODUCTION

1.01 The Construction Umbrella Bodies Adjudication Task Group was formed in May 2001, following the demise of the Construction Industry Board. Over the course of twenty one meetings, it continued to work on the issues relating to adjudication which arose out of the first review of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts. This has included publishing the *Guidance for Adjudicators* in July 2002 and the *Users' Guide to Adjudication* in April 2003. At the meeting of the Review Group held on 29th April 2004, the Task Group (augmented by representatives from the FMB, SCIG and TeCSA) was asked to act as the adjudication working group for the second review. A list of current members of the Task Group, and the full titles of the bodies represented, is attached as Appendix 1.

1.02 The Task Group has been asked to provide a report to the Review Group on possible amendments to Part II of the Act, intended to make the adjudication provisions work more satisfactorily. It has considered responses to a request for views on the operation of the adjudication provisions of the Act and Scheme from those listed in Appendix 2.

1.03 Generally, those who responded commented that adjudication is working well, although there are concerns about the quality of adjudicators. The Task Group believes that this can best be dealt with through training, and by additional guidance on various matters, including:

- dealing with late and/or inadequate submissions;
- the adjudicator's powers to take the initiative to ascertain the facts and the law and on the appointment by adjudicators of experts, assessors and legal advisers;
- fees charged by adjudicators.

These matters will be addressed in a second edition of the *Guidance for Adjudicators*.

1.04 Similarly, it has been identified that there is a need for further guidance to enable those in dispute to assess whether adjudication is the most appropriate route for dispute resolution. The Task Group agrees, and will address this in a second edition of the *Users' Guide to Adjudication*.

1.05 The issues raised during the deliberations of the Task Group have been divided by the Group into three categories:

- green: issues on which the Task Group is unanimous;
- amber: issues on which two or more bodies represented on the Task Group are agreed, but others are not, so there is no unanimity;
- red: where an issue is only supported by a single umbrella body.

Issues in the last category are not included in this Report. Green items are listed first (in each of the three sections below, that is ‘Scope of the Act’, ‘Adjudication’ and ‘The Scheme’), followed by the amber items.

1.06 The Task Group was also asked to prepare a list of cases which have come before the courts on issues arising out of the Act and the Scheme. The task was assigned to TeCSA, whose paper, *Issues arising in the case law*, is being sent to the Review Group direct. It has not been considered by the Task Group.

2.0 SCOPE OF THE ACT

2.1 The exclusion of PFI contracts

green (with caveat)

Issue

2.1.1 Concern was expressed about the current exclusion made under Section 106(1)(b) of construction contracts if they are entered into under the Private Finance Initiative.¹ Respondents indicated that the present exclusion could create inconsistencies. There is evidence that adjudication is adopted as part of the dispute resolution procedure across all contracts in some PFI projects, despite the fact that some of the contracts in question may be excluded agreements. This approach was felt to be consistent and enabled those engaged under the concession agreement to have upstream rights of adjudication that correspond with the rights of their downstream contractors. Respondents suggested that this should be the preferred approach, and that the PFI exclusion should be removed.

2.1.2 Sir Michael Latham has asked that issues relating to the scope of the Act be dealt with by the Task Group. The Task Group has considered this issue in the context of adjudication. It has though not been able to make an examination of all the implications of the recommendations in the context of the payment provisions (and this also applies to the next item, the residential occupiers exclusion, in paragraph 2.2).

The Task Group’s view

2.1.3 **The Task Group is agreed that there is a case to consider amending the Orders made under Section 106(1)(b) which exclude contracts entered into under the Private Finance Initiative. The CC, whilst sympathetic to the Group’s views, believes that any amendment of these provisions must be considered with the payment provisions.**

1 For England and Wales, The Construction Contracts (England and Wales) Exclusion Order 1998 SI 1998 No 648, paragraph 4 and the equivalent Orders for other jurisdictions.

2.2 The exclusion of disputes involving residential occupiers

green (with caveat)

Issue

2.2.1 Respondents also suggested that the residential occupiers' exclusion (Section 106(1)(a)) should be deleted. They argued that adjudication is a relatively cheap and quick form of dispute resolution which should be available to residential occupiers. It should be said that bodies representing consumers are not represented on the Task Group.

The Task Group's view

2.2.2 **The Task Group believes that there is a case to consider deleting Section 106(1)(a), the residential occupier exclusion. If disputes involving residential occupiers are brought within the scope of the Act, the Task Group recommends that clear guidance be published. The CC, whilst sympathetic to the Group's views, believes that any amendment of these provisions must be considered with the payment provisions.**

2.3 'In writing'

green/amber

Issue

2.3.1 Most of those who responded agreed that the definition of 'evidenced in writing' should be examined in the light of recent judgments which appear to the majority of those on the Task Group to be too restrictive. In the case of *RJT Consulting Engineers v DM Engineering*² the Court of Appeal adopted a narrow interpretation of Section 107(2), deciding that the term 'evidenced in writing' in paragraph (c) required not merely evidence of the *existence* of an agreement, but evidence in writing of *all* of the terms of the agreement between the parties, or at least those relevant to the dispute.

2.3.2 Considerable concerns were expressed about the confusion caused by this decision and its likely effect. It is considered by the majority that such a restrictive interpretation of Section 107 will lead to more disputes about whether an agreement falls within the scope of the legislation, a result never intended by Parliament. A consequence may also be that many industry contracts, particularly those involving small and medium-sized enterprises, will fall outside the scope of the legislation.

The Task Group's view

2.3.3 **This is an important issue, and if left unresolved the whole policy of adjudication could be seriously undermined. The Task Group unanimously recommends that the law needs to be clarified in the light of the decision in *RJT Consulting Engineers*. There is though no agreement as to what contracts should be within the scope of the Act: the CC believes it should be contracts wholly in writing only; the CCG, SCIG, SEC Group, NSCC and TeCSA believe it should be contracts wholly or partly in writing; and the CIC believes that in addition wholly oral contracts should be included (as in Australia and New Zealand). The Task Group also feels that this is a topic which should be covered in guidance.**

2 *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] 1WLR 2344, CA.

2.4 Section 105(2)(c) and process plant

amber

Issue

2.4.1 Several of the respondents suggested that consideration should be given to removing the exclusion of the construction operations listed in Section 105(2)(c) (relating to the process plant industry), pointing out that there are particular problems with the marginal scope of the excluded activities. The current position is unsatisfactory because, for example, some elements of a contract for a process plant are covered by the Act and others are not. Because of the way that the exclusions are currently framed, there is not a clear division between operations within the Act and those outside its scope, and this has resulted in unnecessary disputes, time and legal costs in resolving an issue which is peripheral to the real dispute between the parties. There are a number of court decisions on this and related issues. Some respondents pointed out that the excluded operations are just as likely to suffer from payment problems and disputes as other operations which are within the Act.

2.4.2 Whilst some of the bodies represented on the Task Group include members working in the process plant industry, it is noted that there are other bodies specific to that industry which are not represented on the Task Group.

The Task Group's view

2.4.3 **The Task Group believes that there is a case to consider deleting the exclusions in Section 105(2)(c), meaning that the activities listed in that section are brought within the scope of the Act. The CC does not support this view.**

3.0 ADJUDICATION

3.1 Costs

green/amber

Issue

3.1.1 This issue arose out of the first Review of the Act and remains unresolved. There are two aspects.

3.1.2 Some organisations have used their dominant position in the market place to impose adjudication procedures that require the referring party to pay all the legal costs (and the ANB fee) – whether they win or lose. The purpose has been to discourage the use of adjudication as a dispute resolution procedure, by imposing unfair penalties on those who do. The right to impose such provisions under the current legislative regime has been upheld in the case of *Bridgeway Construction Ltd v Tolent Construction Ltd*³. This is universally felt to be an unfair practice, which should be outlawed.

3.1.3 The second issue is linked and relates to whether the adjudicator should be able to award the parties costs. The Act (and the Scheme) are silent about whether the parties can apportion the legal and other costs by contract and although it was thought by many that the intention was that the parties bear their own costs, the courts have held that if the parties agree, they may give the adjudicator power to award costs. There is a strong

3 *Bridgeway Construction Ltd v Tolent Construction Ltd* unreported, 11th April 2000, TCC (Liverpool), noted at CILL 2000 (October) 1662-1664.

view amongst some bodies that the parties should bear their own costs and it should not be possible to give the adjudicator this power at any time. Others are of the view that it should be possible to give the adjudicator the power but only *after the dispute has arisen*.

The Task Group's view

3.1.4 Proposals have been previously approved⁴ to (*inter alia*) prevent the practice of one party requiring that the referring party pay both parties legal costs irrespective of the outcome of the adjudication. There is unanimity that the Act and the Scheme should be amended to outlaw this. The Task Group strongly recommends that there is a need for these proposals to be implemented and requests that immediate progress should be made to effect the necessary changes to the primary and secondary legislation to prevent parties from introducing *Bridgeway v Tolent* type provisions.

3.1.5 The following bodies are of the view that the parties should have the freedom to agree that the adjudicator may award the parties legal costs (and the ANB fee), providing the agreement is reached after the dispute has been referred: the CC, CCG, CIC and TeCSA. The NSCC and SEC Group do not agree on the basis that it should always be the case that the parties bear their own costs and that, even after the dispute has arisen, commercial pressure can be put on parties to reach agreement.

3.2 Single adjudication procedure

green/amber

Issue

3.2.1 There are a handful of standard industry procedures published by industry bodies, which are used in some standard forms of contract, principally because they are thought to be clearer than the Scheme. In addition, there are a multitude of bespoke adjudication procedures that substantially increase the industry's transactional costs as well as providing scope for the inclusion of onerous requirements designed to reduce access to adjudication and its effectiveness. Such bespoke procedures also increase the scope for disputes peripheral to the main dispute.

The Task Group's view

3.2.2 There are strong views from a number of bodies that there should be a single procedure: namely the CCG, NSCC, SEC Group, SCIG, the National Federation of Builders and the Major Contractors Group (both part of the CC). Other bodies are not in favour: the Civil Engineering Contractors Association (part of the CC), CIC and TeCSA. There is though some suggestion that because bespoke procedures sometimes include unacceptable provisions, Section 108 should be extended to outlaw provisions which are unacceptable, by tightening up on the minimum requirements for a compliant procedure.

4 On 23rd July 2002 the then Construction Minister, Brian Wilson MP announced the Government's intention to make amendments on this issue when an appropriate means of doing so became available; this was endorsed by the current Minister, Nigel Griffiths MP at a meeting with representatives from the CUBATG on 16th October 2004.

3.3 Adjudicator immunity

green

Issue

3.3.1 Some respondents identified that the problem with the immunity given by Section 108(4) of the Act is that it is not a statutory immunity, but an express or implied term of the construction contract. This means that it only binds the parties to the contract, and the adjudicator is not immune from action by third parties. In contrast, the Arbitration Act provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

3.3.2 It is vital to the process that the adjudicator is impartial – and this includes not needing to look over his shoulder, fearful that a third party will make a claim against him. Under the current legislation adjudicators remain vulnerable to legal action from third parties who may be affected by their decisions. It is felt that in the longer term, and against the background of increasing litigation, this could promote an escalation of disputes. Additionally, some argue that with the high cost of professional indemnity insurance the vulnerability to third party claims might prove to be a financial obstacle to those who wish to become adjudicators. Such claims may be spurious or unsuccessful, yet the costs of defending them can be high. Statutory immunity would reduce the risk of third party actions and might consequently reduce the cost of insurance.

The Task Group's view

3.3.3 **The Task Group believes that further consideration should be given to the introduction of statutory protection for adjudicators in line with that provided to arbitrators under Section 29 of the Arbitration Act 1996.**

3.4 Extension of Section 108(1)

green

Issue

3.4.1 Although from a strict legal perspective (as far as England and Wales are concerned) the current description contained in Section 108(1) of disputes that are capable of referral, namely disputes ‘under the contract’ is almost certainly broad enough to embrace disputes involving claims for damages for breach of contract, it was agreed that clarification would be desirable. This is in view of the distinction that is commonly drawn between ‘claims under the contract’ and ‘claims for damages for breach of contract’.

3.4.2 It is agreed that something along the lines of ‘disputes under or arising out of the contract’ would provide the necessary clarification. The Scottish courts have considered the point,⁵ so the amendment is unnecessary in Scotland, but innocuous. As a general objective is to keep adjudication throughout the UK as similar as possible, the change should be made to the Scottish Scheme as well.

5 *Gillies Ramsey Diamond v PJW Enterprises Ltd* (2004) BLR 131, Inner House of the Court of Session.

The Task Group's view

3.4.3 Section 108(1), which provides that 'A party to a construction contract has the right to refer a dispute *arising under the contract*..' should be amended to read something along the lines of 'a dispute *under or arising out of the contract*'.

3.5 Adjudicator independence

green

Issue

3.5.1 Several respondents suggested that provision should be made in Section 108(2) that the adjudicator be independent of the parties in addition to the requirement in Section 108(2)(e) to act impartially. Industry concerns have been raised about the practice adopted by some parties of naming within their contracts adjudicators who are not independent of the parties and there are strong views that the Act should be amended to prohibit this. Some feel that the impartiality requirement in Section 108(2) does not sufficiently protect parties from this type of abuse.

The Task Group's view

3.5.2 Some concerns are expressed about whether the term 'independent' is capable of clear definition. It is agreed therefore that paragraph 4 of Part 1 of the Scheme (which provides: 'A person requested or selected to act as an adjudicator shall be a natural person acting in his personal capacity and not be an employee of any of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute') should be added to Section 108.

3.6 Trustee stakeholder accounts

green

Issue

3.6.1 Some respondents identified that bespoke adjudication procedures sometimes include devices such as providing that where an adjudicator has made a decision that one party should pay an amount to the other, the monies should go into a stakeholder account until the dispute is finally determined. One of the principal intentions of the Act is to facilitate timely payment within the industry – this will not be achieved if payments have to be made to a trustee stakeholder (or similar) account.

3.6.2 A second use of trustee stakeholder accounts is where the referring party is required to pay a sum of money into a stakeholder account (or equivalent) before commencing an adjudication.

The Task Group's view

3.6.3 The Task Group recommends that the legislation be amended to prohibit such devices as providing that monies should be paid into a trustee stakeholder (or similar) account or require adjudicators to order payment to a trustee stakeholder (or similar) account pending the final outcome of the dispute.

3.7 Adjudicator's power to rule on jurisdiction

amber

Issue

3.7.1 Many of the respondents suggested that consideration should be given to amending the primary legislation to provide adjudicators with the express power to determine their jurisdiction.

3.7.2 The Act is silent on the point and the extent to which the adjudicator has power to rule on his own jurisdiction is therefore not clear. There is evidence that jurisdictional challenges by parties are increasing, and there have been a growing number of cases where the courts have refused to enforce decisions because of a lack of jurisdiction. In successive cases the courts have adopted the view that unless the parties otherwise agree, an adjudicator does not have the power to make a *final* decision about jurisdiction. If an adjudicator is given the power under the contract, then their decision on the matter is final; if, however, they have no such express power then any decision the adjudicator makes on jurisdiction is of interim effect only and can be opened up by the courts.

3.7.3 In 2002 the Task Group provided advice on this matter in the *Guidance for Adjudicators*, suggesting that if adjudicators are faced with a jurisdictional challenge, they should investigate, seek the views of the parties and reach their own conclusion on the merits of the challenge. If they fail to do so, it may seem that they are not impartial, and their decision would thus be unenforceable.

3.7.4 Concerns were therefore expressed that the current position is unsatisfactory and strong suggestions were made that the review should consider whether the legislation provides sufficient clarity to avoid the difficulties which adjudicators face over whether they have the ability to rule on their own jurisdiction. The problem is that challenges to jurisdiction in the courts can hinder the process and delay payment of monies which the adjudicator has ordered should be paid.

3.7.5 There was though a diverse and opposing range of views within the Task Group about whether the adjudicator should be given an express power to rule on his own jurisdiction in relation to all or any issues.

3.7.6 Some felt that adjudicators should have a full express power to determine their own jurisdiction. In practice, adjudicators frequently investigate their own jurisdiction to decide whether to proceed with an adjudication or not, but their views can (and frequently are) challenged in court. A power to decide jurisdiction would thus not add to an adjudicators' burden but – save in the wholly unreasonable exercise of the power – would avoid much litigation. Alternatively, such a power could be limited to certain areas only, for example the power to determine:

- (a) whether there is a construction contract and if so, whether it is in writing for the purposes of s. 107;
- (b) whether a proper appointment has been made;
- (c) whether there is a dispute under or in connection with the contract and if so, what matters are in dispute.

3.7.7 Others, however, do not agree with this view, believing that not all adjudicators have the requisite skills to determine complex legal matters.

The Task Group's view

3.7.8 The following bodies are of the view that an adjudicator should have the power to make a full and final decision on their own jurisdiction for all purposes: CIC and SEC Group. The CC, CCG, NSCC and TeCSA do not agree. The NSCC, SCIG and TeCSA feel that a power limited to the circumstances listed in (a) – (c) above is acceptable, meaning that those in favour of a limited power are: the CIC, SEC Group, NSCC, SCIG and TeCSA. The CC and CCG are against the adjudicator having any power to rule on their own jurisdiction.

4.0 THE SCHEME

4.01 The Task Group has also considered submissions on the adjudication aspects of the Scheme and has considered how the Scheme might be amended to make its provisions work more satisfactorily.

4.02 The Task Group has not formed a view on those amendments to the Scheme that might be appropriate should the Scheme form the basis of a single mandatory procedure. If a single procedure is to be adopted and the Scheme is to form the basis of it, all the industry bodies represented on the Task Group would wish to be involved in looking at the provisions of the Scheme in that context.

4.03 All references are to Part I of The Scheme for Construction Contracts (England and Wales) Regulations 1998 SI 1998/649. Similar amendments would be needed to The Scheme for Construction Contracts (Scotland) Regulations 1998 SI 1998/687 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999, adapted as necessary.

4.1 Costs (new provision)

green/amber

Issue

4.1.1 See the discussion above regarding costs in relation to the Act (paragraphs 3.1.4 and 3.1.5). The Scheme is silent as regards whether the adjudicator may make provision for payment of costs as part of his decision. Many in the industry understood that the intention was that the parties bear their own costs (and many other procedures provide expressly that the parties will bear their own costs), but the courts have interpreted the fact that the Scheme is silent on the matter as meaning that the adjudicator can be given power to award costs. This has been abused, as explained above.

The Task Group's view

4.1.2 The views of the Task Group in relation to the Scheme reflect those set out above in relation to the Act (paragraphs 3.1.4 and 3.1.5).

4.2 Paragraph 7(1)

green

Issue

4.2.1 The Act provides at Section 108(2)(b) that the contract shall provide a timetable with the object of securing the appointment of the adjudicator and the referral of the dispute to him within 7 days of such notice. The Scheme provides at paragraph 7 that the referring party shall, not later than 7 days from the date of the notice of adjudication, refer the dispute in writing to the adjudicator.

4.2.2 Some adjudicators take the view that, if the dispute is referred to them more than 7 days from the date of the notice, the parties must re-apply to the ANB for a nomination.

4.2.3 In *William Verry Ltd v NW London Communal Mikrah*,⁶ HHJ Thornton QC held that the language of Section 108(2)(b) is not ‘rigid’ – the contract must allow a referring party, if it chooses, to issue a referral notice within the prescribed 7 day timescale but may also provide machinery to enable an adjudicator to extend that timescale. Where there is contractual machinery enabling an adjudicator to set his own procedure (as there is in the Scheme) it is possible to extend the time for service of the referral notice without the adjudicator acting outside his jurisdiction.

The Task Group’s view

4.2.4 **The Task Group believes, for the sake of clarity, that there is a case for amending paragraph 7(1) so that it reads, for example: ‘Where an adjudicator has been selected in accordance with paragraphs 2,5 or 6, the referring party shall refer the dispute in writing (the “referral notice”) to the adjudicator within 7 days of the date of the notice of adjudication subject to any direction as to timetable given by the adjudicator in accordance with subparagraph 13(g).’**

4.3 Paragraph 8

green

Issue

4.3.1 The adjudicator’s power to adjudicate at the same time on more than one dispute under the same contract is subject to ‘the consent of all the parties in those disputes’ Similarly the power of an adjudicator to adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes, is subject to the consent of all parties to those disputes. The Task Group believes that it can be beneficial for the same adjudicator to deal with related disputes and that the inclusion of these paragraphs in the Scheme is either otiose (in that the parties are free to agree the appointments in any event) or unnecessarily restrictive. The problem arises from the fact that paragraph 8 was intended to be permissive but the courts have interpreted it to be restrictive.

The Task Group’s view

4.3.2 **The Task Group agree that paragraph 8 should be deleted (the CC agreeing in principle, although with some doubts as to whether it would work in practice).**

6 *William Verry Ltd v NW London Communal Mikrah*, 11th June 2004, TCC.

4.4 Paragraph 9

green

Issue

4.4.1 Paragraph 9 concerns the circumstances in which it is necessary or appropriate for an adjudicator to resign, how the parties should proceed following such a resignation and the entitlement of the resigning adjudicator to payment to his fees. There is currently no mention of an adjudicator resigning due to lack of jurisdiction.

The Task Group's view

4.4.2 The Task Group believes that where an adjudicator decides in good faith that he does not have jurisdiction to decide the dispute before him, he should resign and should be entitled to his fees in accordance with paragraph 9(4). Reference to the adjudicator resigning through lack of jurisdiction should therefore be added to paragraph (4).

4.5 Paragraph 20(c)

green

Issue

4.5.1 The Scheme is unclear regarding the adjudicator's power to decide that interest is payable.

The Task Group's view

4.5.2 The Task Group recommends that the sub-paragraph should be amended along the following lines: 'Decide the circumstances in which, and the rates at which, and the period for which simple or compound rates of interest shall be paid, having regard to any term of the contract relating to payment of interest and the law.'

4.6 Paragraph 22

green

Issue

4.6.1 The Scheme currently provides that the adjudicator shall provide reasons for his decision 'if requested by one of the parties to the dispute'.

The Task Group's view

4.6.2 The Task Group considers that this paragraph should be reversed so that the adjudicator shall give reasons for his decision unless the parties agree otherwise.

4.7 Paragraphs 23(1) and 24

green

Issue

4.7.1 These paragraphs in the Scheme refer to enforcement of an adjudicator's decision and are out of line with current practice in the Technology and Construction Court for enforcement (which is by way of summary judgment).

The Task Group's view

4.7.2 The Task Group recommends that both paragraph 23(1) and paragraph 24 are deleted.

4.8 Paragraph 26

green

Issue

4.8.1 Since the protection of the adjudicator extends to anything done or omitted unless it is in bad faith, it would seem to follow that this covers anything done or omitted negligently. However there might be an argument that since negligence is not referred to expressly, it is not covered by the paragraph. The position is arguably not clear, which is unsatisfactory.

The Task Group's view

4.8.2 The Task Group agrees that the position should be clarified for example by the words 'whether in negligence or otherwise' being inserted after the words 'his functions as adjudicator' in paragraph 26.

4.9 A response (new provision)

green

Issue

4.9.1 There is no express right within the Scheme for a responding party to serve a response to the referral notice.

The Task Group's view

4.9.2 The Task Group believes that there should be an express reference to the right to service a response, for example by adding a paragraph along the following lines: 'The responding party or parties shall be entitled to provide a written response to the referral notice to the adjudicator and the other parties to the dispute. The time by which the response shall be provided shall be determined by the adjudicator.'

4.10 Slip rule (new provision)

green

Issue

4.10.1 There has been some doubt as to whether and if to what extent, an adjudicator can put right errors in his decision, and this has resulted in a number of court decisions. It would therefore be beneficial to clarify the position and include an express 'slip rule' in the Scheme.

The Task Group's view

4.10.2 The Task Group recommends that wording along the following lines should be added to the Scheme:

'(1) The adjudicator may, within 7 days of delivery of the decision to the parties, deliver a corrected version of his decision which removes any accidental error or omission or clarifies or removes any ambiguity.

(2) A party to the adjudication may, within 3 days of delivery of the

adjudicator's decision, identify in writing to the adjudicator any clerical error or omission or ambiguity that may be apparent in the decision and invite the adjudicator to exercise his powers to correct the decision in accordance with sub paragraph (1) above. Any submission made to the adjudicator in accordance with this provision shall at the same time be copied to every other party to the dispute.'

4.11 Legal and technical advice (new provision)

green

Issue

4.11.1 The Scheme provides that the adjudicator may obtain legal and technical advice, and natural justice and fairness would require that any advice obtained by copied to the parties (who will be paying for it). However, there is presently no express provision that this be done, and to clarify matters it would be better if there was such a requirement.

The Task Group's view

4.11.2 The Task Group recommends that there should be an express requirement within the Scheme that the adjudicator shall copy any legal or technical advice he has obtained to the parties forthwith.

4.12 Paragraph 16(2)

amber

Issue

4.12.1 Paragraph 16(2) of the Scheme provides that a party may not be represented by more than one person at an oral hearing, unless the adjudicator gives directions to the contrary, ie the default position is that only one representative is permitted. This can create uncertainty in practice, and the majority view is that the rule is impractical and unnecessary.

The Task Group's view

4.12.2 Various alternatives were discussed, and the majority view on the Task Group is that the simplest solution would be to delete the word 'not', thus reversing the default position. The CCG would prefer that the paragraph was deleted (with consequential amendment made to paragraph 16(1)). SEC Group would prefer that the paragraph is not amended.

4.13 Paragraph 20(a)

amber

Issue

4.13.1 The Scheme provides that the adjudicator shall have the power to open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive.

4.13.2 The 'final and conclusive' exclusion was designed to preserve existing standard provisions in contracts where, for example, following a period of submission of claims and ascertainment of entitlements, a final certificate is issued under the contract that identifies that the contract has been concluded in accordance with its terms and payment has been made in full in respect of it. If proceedings are not commenced within a

specified period after the issue of such a certificate, neither party (nor a court nor arbitrator on their behalf) is entitled to open up or review the position as set out in the certificate. The certificate is final and conclusive as to its terms.

4.13.3 In other words, the paragraph does not change the law, but it does highlight circumstances in which monies due under a certificate can not be disputed in an adjudication.

4.13.4 The Task Group accepts that, insofar as this exclusion applies to those existing standard provisions, it should be preserved. However, there is evidence that this provision is being abused because express provisions are being included in contracts to make all interim payments and decisions 'final and conclusive'. Sometimes these provisions are being imposed where one party has significantly less commercial clout. The practical effect of these provisions in a construction contract otherwise subject to the Act is to deny a party an effective remedy in adjudication should disputes arise.

The Task Group's view
4.13.5 **The majority of those on the Task Group agree that there is a problem (the CCG do not agree). For those who see a problem, it is not clear what the answer is. It might be helpful to delete paragraph 20(a) or amend it along the following lines: 'open up, revise and review any interim decision taken or any interim certificate given by any person referred to in the contract. Insofar as the decision or certificate is not of an interim nature, the adjudicator may open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive.' It might, on the other hand, be necessary to amend Section 108.**

4.14 Adjudicator as witness (new provision)

amber

Issue

4.14.1 It is thought by some undesirable that adjudicators should be called as witnesses in enforcement or other court or arbitral proceedings to explain their actions or the reasons for decisions given in adjudications, whether the adjudicator attends voluntarily or otherwise. The prospect of being called as a witness may put undue pressure on an adjudicator and distract him from performing his duties as adjudicator in the dispute to the best of his ability. The problem may not often arise, but is a possibility.

The Task Group's view
4.14.2 **The Task Group is unable to agree on a recommendation: the CCG, CIC, NSCC, SEC Group and TeCSA feel that there should be an express provision that an adjudicator can not be called as a witness. The CC do not agree. SCIG advises that such a provision would not work in Scotland.**

Appendix 1

Members of the Construction Umbrella Bodies Adjudication Task Group since May 2004

Graham Watts	chairman
Richard Bayfield	(co-opted) Society of Construction Law
John Bradley	Construction Confederation
Caroline Cummins	Technology and Construction Solicitors Association
Chris Dancaster	Construction Industry Council
Ian Davis	Federation of Master Builders
David Dobson	Scottish Construction Industry Group
Simon Elliott	Construction Clients Group
Dominic Helps	Technology and Construction Solicitors Association
Alan Mason	Local Government Association
Ann Minogue	Construction Clients Group
Chris Morley	Construction Clients Group
Tony Mulcahy	Department of Trade and Industry
Rod Pettigrew	Specialist Engineering Contractors Group
John Reilly	Construction Industry Council
Marion Rich	Specialist Engineering Contractors Group
John Riches	Construction Industry Council
Peter Shiells	National Specialist Contractors Council
Jo Simcock	National Specialist Contractors Council
Neil Smith	Construction Confederation
Paul Smith	Construction Act Review Group Secretariat
Harry Watson	(observer) Scottish Executive.
Frances A Paterson	secretary (Construction Industry Council)

Appendix 2

List of respondents

Adjudication Society
Chartered Institute of Building
Construction Confederation
Construction Clients' Group
Construction Industry Council
Construction Products Association
Federation of Master Builders
Institution of Civil Engineers
Institution of Civil Engineering Surveyors
Judges of the Technology and Construction Courts
National Specialist Contractors' Council
Royal Institute of British Architects
Royal Institution of Chartered Surveyors
Scottish Construction Industry Group
Specialist Engineering Contractors' Group
Technology and Construction Solicitors Association
Richard NM Anderson.