RESPONSE BY THE CITY OF LONDON LAW SOCIETY CONSTRUCTION LAW COMMITTEE TO THE CONSULTATION ON AMENDMENTS TO THE SCHEME FOR CONSTRUCTION CONTRACTS (ENGLAND AND WALES) REGULATIONS 1998

THE CITY OF LONDON LAW SOCIETY

The City of London Law Society is the representative body of law firms with offices within the City of London. Nearly all of the top twenty UK law firms, by size and turnover, are members of the CLLS. The CLLS Construction Law Committee is made up of representatives of twenty three major City law firms. Committee members include many well known construction law practitioners acting for a wide variety of clients including employers, contractors, consultants and sub-contractors. Associate members of the committee include representatives from major contractors, insurers, employers and consultants. Members of the committee are familiar with the issues covered by the amendments to the Housing Grants, Construction and Regeneration Act 1996 and proposed amendments to the Scheme and have first hand experience of the payment processes found in the UK construction industry and of the resolution of disputes by adjudication.

The CLLS provided a full response to the first and second Construction Act consultation exercises in June 2005 and September 2007 respectively and also the technical scrutiny of draft Construction Act clauses in September 2008. Our response to the consultation on the amendments to the Scheme is set out below.

ADJUDICATION COSTS

1. **DO YOU BELIEVE THAT IT IS APPROPRIATE AND NECESSARY FOR THE SCHEME TO CONTAIN A PROVISION ALLOWING THE ADJUDICATOR TO APPORTION HIS FEES AND EXPENSES BETWEEN THE PARTIES TO A DISPUTE?**

1.1 The CLLS agree that the adjudicator should be able to apportion his fees and expenses, but would note that the Scheme already permits the adjudicator to apportion his fees and expenses between the parties to a dispute (as set out in paragraphs 9(4), 11(1) and 25). The CLLS do not believe that any further amendments are therefore required to the Scheme.

THE "SLIP RULE" – (ADJUDICATOR'S POWER TO MAKE CORRECTIONS)

2. **DO YOU BELIEVE THAT 7 DAYS IS AN ADEQUATE PERIOD TO ALLOW FOR CORRECTION OF ERRORS? IF NOT, WHAT WOULD YOU SUGGEST IS AN APPROPRIATE PERIOD AND WHY?**

2.1 If there are clerical or typographical errors in the published decision of an adjudicator, these should be corrected within a reasonable time, provided that the correction is giving effect to what the adjudicator originally intended in his direction. As has been highlighted in recent case law, whilst the adjudicator cannot revisit his decisions on the merits of the dispute, genuine mistakes or accidental clerical errors can be retrospectively corrected by the adjudicator provided this is done within a reasonable time and without prejudicing the other party. In *Bloor Construction (UK) Ltd v Bower and Kirkland (London) Limited*[1], the adjudicator amended his decision within two and a half hours. In *YCMS Limited v Grabiner,* it was noted by Akenhead J that a period of 48 hours could not be said to be excessive.[2]

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[1] [2000] BLR 314.

[2] [2009] EWHC 127 (TCC), para 60.

2.2 The CLLS therefore believe that 7 days is too long and a period of no more than 5 days should be sufficient.

3. **DO YOU AGREE IT IS NECESSARY TO AMEND PARAGRAPH 21 OF PART 1 OF THE SCHEME TO ALLOW FOR A PERIOD OF TIME WITHIN WHICH THE ADJUDICATOR'S DECISION SHOULD BE COMPLIED WITH?**

3.1 The CLLS believes that relaxing the requirement of paragraph 21, will potentially undermine section 108(3) of the Construction Act which provides that the "decision of the adjudicator is binding until the dispute is finally determined by legal proceedings". As noted in the case of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*[3], a decision made within jurisdiction must be complied with and is immediately enforceable.

3.2 The decision of an adjudicator should be complied with from the date that it is issued, and if there are genuine mistakes or accidental clerical errors these can be corrected. By including an additional period for compliance, this would mean that a 28 day adjudication would become 28 days + 8 days. As occurs presently, most adjudicators make a direction as to time for payment of an award. Including this provision would make matters more complicated and may actually encourage parties to challenge the decision of the adjudicator because the "non-compliance" period would afford them the opportunity to do so. Since the purpose of the adjudication process is to provide a quick and efficient resolution of disputes, a non-compliance period of 8 days potentially runs against the spirit of the Construction Act.

4. **DO YOU AGREE THAT 8 DAYS IS AN ADEQUATE PERIOD FOR COMPLIANCE? IF NOT, WHAT WOULD BE AN APPROPRIATE PERIOD?**

4.1 No - an 8 day period for compliance is not necessary. See our response to question 3.

PAYMENT NOTICES

5. **DO YOU AGREE THAT, PARAGRAPHS 9 AND 10 ASIDE, THE SCHEME REQUIRES NO FURTHER AMENDMENT CONSEQUENT TO THE CHANGES TO THE ACT'S PAYMENT FRAMEWORK? IF NOT, WOULD YOU SET OUT WHAT FURTHER AMENDMENTS YOU BELIEVE TO BE NECESSARY AND EXPLAIN WHY?**

5.1 The CLLS have no further comments on paragraphs 9 and 10 of the Scheme, but would note that the provisions from the Construction Act dealing with payee default notices have not been stepped down into the Scheme. We would suggest that additional drafting should be included so that the Construction Act and Scheme are consistent.

6. **DO YOU BELIEVE IT IS THE RIGHT APPROACH TO CONTINUE WITH "PAYER-LED" PAYMENT NOTICE PROCEDURES IN THE SCHEME PROVISIONS? PLEASE GIVE THE REASONS FOR YOUR ANSWER.**

6.1 As the amendments to the Construction Act adopt a "payer-led" process, the CLLS agree that to maintain consistency between the Construction Act and the Scheme consequential amendments are necessary in the Scheme to reflect this approach. A payer-led procedure reflects the general approach adopted by employers in the industry.

7. **DO YOU AGREE THAT THE SCHEME SHOULD REQUIRE THE "INTENTION TO PAY LESS" NOTICE TO BE ISSUED 7 DAYS BEFORE THE FINAL DATE FOR PAYMENT?**

7.1 The CLLS believe that 5 days before the final date for payment is an appropriate period for the issue of the "intention to pay less" notice.

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[3] [2000] BLR. 49.

SUPPLEMENTARY PROPOSALS

8. **DO YOU BELIEVE IT IS NECESSARY TO CLARIFY THE DATE OF REFERRAL IN PARAGRAPH 7 OF THE SCHEME? SHOULD IT BE 7 DAYS:**

(a) **From receipt of the adjudication notice by the adjudicator?**

(b) **From the appointment of the adjudicator?**

(c) **From some other event?**

8.2 The CLLS believes that paragraph 7(1) of Part I of the Scheme should remain as currently drafted and requires no further amendment. To adopt any of the options (a)-(c) identified above would arguably make paragraph 7(1) inconsistent with clause 108(2)(b) of the Construction Act, which provides that contracts shall include provisions to "provide a timetable with the object of securing the appointment of the adjudicator and referral of a dispute to him ***within 7 days of such notice***". The period of seven days from the date of the notice is also a fixed reference point and provides certainty for all parties to the adjudication.

9. **ARE YOU CONTENT WITH THE CURRENT POSITION THAT AN ADJUDICATOR CANNOT ADJUDICATE RELATED DISPUTES UNLESS BOTH PARTIES AGREE?**

9.1 The CLLS are content with the current proposition and agree that it is often beneficial for the same adjudicator to deal with related disputes, because it allows the adjudicator to draw on previous knowledge of the project to develop a thorough and reasoned decision when adjudicating on particular issues. Paragraph 8 of the Scheme does not require amendment.

10. **HOW OFTEN DO YOU BELIEVE PARTIES TO AN ADJUDICATION WOULD WISH THE ADJUDICATION TO BE CONFIDENTIAL ON THE GROUNDS OF:**

(a) **The facts of the adjudication?**

(b) **The matters that arise in it?**

Paragraph 18 of Part I of the Scheme requires the adjudicator and any party to the adjudication not to disclose any information or document which the party supplying it has indicated is to be treated as confidential. It is difficult to determine how often parties would wish the adjudication to be confidential on the grounds of (a) the facts of the adjudication or (b) the matters that arise in it. However, the CLLS believe that the operation of clause 18 is generally well understood in the industry and should remain as drafted.

11. **IS THERE ANY "PRACTICAL" PROBLEM WHICH PREVENTS THE DELETION OF THE WORDS "UNLESS THE CONTRACT STATES THAT THE DECISION OR CERTIFICATE IS FINAL AND CONCLUSIVE" FROM PARAGRAPH 20(A) OF THE SCHEME?**

11.1 Paragraph 20(a) of Part I of 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 or conclusive. This "final and conclusive" exclusion is 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 is entitled to open up or review the position as set out in the certificate. Rather than deleting these words it might be better to make it clearer in paragraph 20(a) that the adjudicator can always

open up and review "interim decisions or interim certificates". However, the adjudicator could not open up decisions or certificates which the contract states are final and conclusive.

12. **DO YOU CONSIDER IT APPROPRIATE FOR THE SCHEME TO GIVE THE ADJUDICATOR A WIDER POWER TO AWARD INTEREST THAN THAT CURRENTLY CONFERRED BY THE SCHEME?**

12.1 The CLLS would note that paragraph 20(c) of Part I of the Scheme is potentially unclear regarding the adjudicator's power to decide that interest in payable. Recent case law suggests that the interest provision has been interpreted as providing the adjudicator with power to award interest if the issue has been referred to him, or had been agreed by the parties to be within the scope of the adjudication or was necessarily connected with the dispute, rather than an inherent power to award interest (*Carillion Construction v Devonport Royal Dockyard*[4]). Other industry rules provide for the award of interest by the adjudicator. The CIC / ICE adopts wording such as "as he considers appropriate". The TeCSA uses the words "as may be commercially reasonable." Upon this basis it would be sensible to clarify the drafting contained in paragraph 20(c) to provide the adjudicator with discretionary power to award interest on such terms as the adjudicator thinks fit.

17 June 2010
City of London Law Society Construction Law Committee

[4] [2005] EWHC 778