Improving Payment Practices in the Construction Industry

2nd Consultation on proposals to amend Part II of the Housing Grants Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998

Response by the City of London Law Society Construction Law Committee

September 2007

The City of London Law Society is the representative body for law firms with offices within the City of London. Nearly all of the top 20 UK law firms, by size and turnover are members of the CLLS. The CLLS construction law committee is made up of representatives of 23 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 current consultation and have first hand experience of the repayment processes found in the UK construction industry and of the resolution of disputes by adjudication.

The CLLS provided a full response to the first consultation exercise in June 2005. Where issues raised in the second consultation are similar to issues raised in the first consultation the CLLS position has remained the same. However, the CLLS note with disappointment that the proposal contained in the first consultation to remove the requirement for Section 110(2) notices has been dropped. The retention of such notices when coupled with the proposal contained in the current consultation to, in certain circumstances, allow a payee's application for payment to constitute the "sum due" would, in the view of the CLLS, have an adverse impact on payment in the construction industry and would lead to an increase in disputes. These points are discussed in further detail below.

Please note, we have not attempted to complete the "what proportion" questions as it is not possible, given the way the questions are framed, to do so in any meaningful way.

Chapter 1 – Adjudication framework

1 Removing the requirement that the Construction Act should only apply to contracts in writing

(a) Do you agree that Section 107 the Housing Grants, Construction and Regeneration Act 1996 should be removed so that the application of Part II of the Construction Act is not restricted to contracts where all the terms are in writing? Yes [١] No [ ]

The current definition of an agreement in writing set out in Section 107 of the Act is not clear. Unfortunately case law as to what is required by "evidenced in writing" has failed to provide any further clarity. It is also unclear if this would include "letters of intent" which are planned such that "no contract shall come into force until the contract is executed". The wording of Section 107 has allowed parties to seek to avoid enforcement of adjudicators' awards on jurisdictional grounds, often in an opportunistic fashion. The CLLS support the proposal to remove Section 107 of the Act. The CLLS do not believe this would encourage parties to agree oral terms in their contracts or to rely solely on oral terms to the exclusion of written contracts. At present the use of oral terms and oral contracts is a symptom of bad practice rather than a deliberate attempt to circumvent the Act. Such bad practice is best addressed by guidance.

(b) Do you agree with us that the terms of an adjudication Scheme required by section 108 of the Construction Act should only be effective if agreed in writing? Yes ☐ ١ No ☐

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(c) Do you agree with us that the removal of the requirement that the parties must agree a contract in writing in order for the Construction Act to apply is unlikely to encourage the agreement of more oral or partly oral contracts? Yes ☐ ١ No ☐

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(d) What proportion of contracts as a whole do you consider contain nontrivial terms which have been subject to oral agreement or variation?

(i)	(i) 0% – 10%	☐
(ii)	(ii) 10% – 25%	☐
(iii)	(iii) 25% – 50%	☐
(iv)	(iv) 50% – 75%	☐
(v)	(v) 75% – 90%	☐
(vi)	(vi) 90% – 100%	☐

Please select one from (i) to (vi).

(e) Do you agree with us that an agreement under paragraph 2 or 5(2) of Part I of the Scheme, as to who should act as adjudicator, should only be effective if agreed in writing? Yes ☐ ١ No ☐

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2 Prohibiting agreements that interim or stage payment decisions will be conclusive

(a) Do you agree that the Construction Act should be amended to prohibit agreements that decisions as to the amounts of payments whether by instalment, stage or other periodic payments are conclusive?

Yes ☐ No ☐

The CLLS do not believe that contract drafting that states decisions as to instalment, stage or periodic payments are to be binding is widespread in the industry. The most widely used standard form contracts do not make interim payments conclusive and binding. However, if it is decided to revise the Act to prohibit agreements that decisions as to amounts of payments are to be conclusive then the CLLS will not object to that provided decisions and agreements as to the amount of a final payment (as under the JCT Forms of Contract) and decisions and agreements made in writing between the parties as to whether a sum is final and binding are excluded.

Clearly careful drafting is needed to limit the prohibition to provisions making amounts conclusive rather than provisions making conclusive decisions that affect amounts (eg. extensions of time provisions).

(b) Do you agree that the prohibition of agreements that decisions are conclusive should include:

(i) (Decisions as to the amounts of stage payments (i.e. for completed stages of work)? Yes ☐ No ☐

(ii) Decisions which relate to the work that has been performed under the construction contract to the extent that it affects the amount of the payment?

Yes ☐ No ☐

...but that it should exclude:

(iii) Decisions as to the amount of final payment? Yes ☐ No ☐

(iv) Payment decisions that have already been taken and notified to the parties?

Yes ☐ No ☐

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3 Introduction of a statutory framework for the costs of adjudication

The CLLS agree with all these proposals.

(a) Do you agree with our proposal to prohibit agreements as to the allocation of the costs of the adjudication until after the adjudicator is appointed?

Yes ☐١ No ☐

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(b) Do you agree with our proposal to provide that the adjudicator should have no jurisdiction as to the costs of the adjudication unless the parties have made an agreement to that effect after the adjudicator is appointed?

Yes ☐١ No ☐

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(c) Do you agree that adjudicators should be statutorily entitled to claim a reasonable amount in respect of fees for work reasonably undertaken and expenses reasonably incurred?

Yes ☐١ No ☐

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(d) Do you agree that the courts should have jurisdiction to decide whether:

(i) The fees and expenses claimed by the adjudicator are reasonable when they are claimed under the proposed statutory right?

Yes ☐١ No ☐

(ii) The legal or other costs of the parties are reasonable when the parties have agreed that the adjudicator should make a decision as to legal or other costs and that the parties should be jointly and severally liable for this amount?

Yes ☐١ No ☐

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(e) What proportion of contracts do you think contain an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

(i) Less than 0.1% ☐

(ii) 0.1% – 0.5% ☐

☐

(iii) 0.5% – 1%

(iv) 1% – 5% ☐

(v) 5% – 10% ☐

(vi) More than 10% ☐

Please select one from (i) to (vi)

(f) What proportion of adjudications do you think are conducted under contracts containing an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

(i) Less than 0.1% ☐

(ii) 0.1% – 0.5% ☐

(iii) 0.5% – 1% ☐

(iv) 1% – 5% ☐

(v) 5% – 10% ☐

(vi) More than 10% ☐

Please select one from (i) to (vi)

Chapter 2 – Payment framework

1 Prevention of unnecessary duplication of payment notices

(a) Do you agree that the Construction Act should be amended so that a certificate from a third party supervising officer under a construction contract, which makes a valuation of the work done, may function as a section 110(2) payment notice?

Yes ☐ No ☐

The consultation states that the intended purpose of this amendment is to prevent unnecessary duplication of Section 110(2) notices and payment certificates. The consultation acknowledges that Section 110(2) notices are frequently not issued when required. It also correctly notes that there is no sanction for the non-issue of such notices. With these points in mind the first consultation suggested the removal of the requirement to issue Section 110(2) notices and this approach was strongly supported by the CLLS. As the CLLS noted in their response to the first consultation, the majority of contracts used in the industry contain a certification mechanism which renders the need for Section 110(2) notices irrelevant. Where contracts do not contain such a mechanism, they often contain an alternative mechanism for establishing what is "due" usually based on the contractor's application for payment. The issue of Section 110(2) notices is superfluous and adds an unnecessary level of bureaucracy to all contracts. If it was felt that there was a need to make clear what payments become due and when this would be better achieved by including a requirement in Section 110(1) of the Act to define what constitutes an "adequate mechanism" for payment. This proposal was made in the initial consultation and was strongly supported by the CLLS.

If not withstanding our objection set out above the new proposal is enacted, the drafting will need to be looked at very carefully.

(b) Do you agree that the Construction Act should allow the contract to provide that a section 110(2) payment notice may be issued either:

(i) By the payer? Yes ☐ No ☐

(ii) By a person identified in the contract? Yes ☐ No ☐

(iii) By a person identified in a notice to the payee? Yes ☐ No ☐

See above. If proposal enacted the CLLS would answer "yes" to (i) to (iii) above.

(c) Do you agree that the Scheme should provide that a payment notice under Part II paragraph 9 may be issued either:

(i) By the payer? Yes ☐ No ☐

(ii) By a person identified in the contract? Yes ☐ No ☐

See above. If proposal enacted the CLLS would answer "yes" to (i) to (iii) above.

2 Clarification of the requirement that a section 110(2) payment notice should be served

(a) Do you agree that the drafting of the provision in section 110(2) of the Construction Act on when it is necessary to issue a section 110(2) payment notice should be improved to make clear that:

(i) a payment notice should be issued whenever the payment has been set-off, whether under another contract or the contract in question?

Yes ☐ No ☐

(ii) allowance need only be made for abatement of the sum due under the contract in question and not another contract?

Yes ☐ No ☐

As noted above the CLLS believes that the requirement for Section 110(2) notices should be removed. If the proposal set out in the consultation is enacted, and there is no sanction in relation to the non-issue of Section 110(2) notices it is hard to see what benefit the changes set out in this paragraph will bring. Use of terms such as abatement and set-off in any enacted legislation will, without proper guidance, lead to confusion.

(b) Responses to Improving payment practices in the construction industry in 2005 suggested that a section 110(2) payment notice is only issued for 40% of payments. What proportion of cases where the notice is not issued do you think can be explained by the current deficiencies in the requirement in section 110(2) of the Act?

(i) Less than 10% of cases where the notice is not issued (less than 6% of payments as a whole)? ☐

(ii) Between 10% and 33% of cases where the notice is not issued (between 6% and 20% of payments as a whole) ☐

(iii) Between 33% and 66% of cases where the notice is not issued (between 20% and 40% of payments as a whole) ☐

(iv) Between 66% and 90% of cases where the notice is not issued (between 20% and 54% of payments as a whole) ☐

(v) More than 90% of cases where the notice is not issued (more than 54% of payments as a whole)? ☐

Please select one of (i) to (v)

3 Clarity of the content of payment and withholding notices

(a) Do you agree that section 110(2) of the Construction Act should be amended to require that, in addition to the amount of the payment made or proposed to be made, and the basis of calculation, payment notices should also state:

(i) the amount(s) withheld, where the payment is less than the amount that would have been due had the payee performed all his obligations under the contract and there were no set-off or abatement?

Yes ☐ No ☐

(ii) the grounds for withholding where amounts have been withheld?

Yes ☐ No ☐

(iii) the basis of calculation of any amounts withheld.

Yes ☐ No ☐

As stated above the CLLS believe the requirement to issue Section 110(2) notices should be removed from the Act. If such notices are to be retained the CLLS would answer " yes" to questions (i) to (iii) above.

(b) If we introduce a requirement that payment notices should be in the format described above, do you agree that section 111 should be amended to require that withholding notices should be in the same format?

Yes ☐ No ☐ ١

The CLLS believes that the current requirements for Section 111(1) notices are adequate. Changing their format at this stage is likely only to create confusion and will require unnecessary amendments to be made to most industry standard forms of contract.

(c) Responses to Improving payment practices in the construction industry in 2005 suggested that a section 110(2) payment notice is only issued for 40% of payments. In what proportion of cases where the notice is issued do you believe it is later supplemented by a separate section 111 withholding notice because the payer is unclear about how the section 110(2) notice should act as a section 111 withholding notice?

(i) Less than 10% of cases where the notice is issued (less than 4% of payments as a whole)? ١

(ii) Between 10% and 30% of cases where the notice is issued (between 4% and 12% of payments as a whole) ☐

(iii) Between 30% and 70% of cases where the notice is issued (between 12% and 28% of payments as a whole) ☐

(iv) Between 70% and 90% of cases where the notice is issued (between 28% and 36% of payments as a whole) ☐

(v) More than 90% of cases where the notice is issued (more than 36% of payments as a whole)? ☐

Please select one of (i) to (v)

4 Clarity of the "sum due"

(a) Do you agree that the Construction Act should be amended to ensure that the payer and the payee both know the sum due for the purposes of:

(i) section 111 – so that deductions (whether by set-off or abatement) can only be made from that sum by issuing a withholding notice?

Yes ☐ No ☒ ١

This amendment is largely unnecessary as case law has already established that a Section 111(1) notice must be issued before a deduction can be made whether by set-off or abatement where there is a certification process and the certificate states the sum due.

(ii) section 112 – so that they both know the amount that must be paid if the payer is to avoid the possibility that the payee will suspend performance?

Yes ☐ No ☒ ١

It is non-payment itself rather than the lack of clarity as to what must be paid that is most likely to lead to a party seeking to suspend work. As such this proposal is unnecessary and will not have the desired affect.

(b) Do you agree that this should be achieved by providing that:

(i) the sum due under a construction contract should be the amount paid or proposed to be paid as specified in a section 110(2) payment notice.

Yes ☐ No ☐

(ii) the amount in a claim by the payee should become due if no payment notice is issued.

Yes ☐ No ☐

The new proposals set out in the consultation would allow a party seeking payment to make an application for payment which would in certain circumstances be binding on the payer. The CLLS do not agree with such proposals and believe that adjudication would provide a sufficient default mechanism where a certifier fails to certify a "sum due". A binding application process would be extremely unfavourable to small companies and those who

are one off clients of the construction industry. For example such a client of the industry could find itself liable to pay a grossly inflated application for payment due to the failure of its certifier to issue a certificate or withholding notice when required. In such circumstances the client would find itself unable to make any set-offs withholdings or abatements against the sums claimed in the application for payment and could thus find themselves in a position where a large amount of money was payable for works which had either not been done or which had been done defectively. Payment of such grossly inflated applications would seem to be an extremely onerous consequence of what might be a simple administrative oversight. As such, if the proposals set out in this consultation are to be enacted the CLLS are strongly of the view that both proposals should be subject to the payer being able to withhold.

This change if made would provide an incentive to payees to over-claim (particularly towards the end of projects when it should not affect a subsequent interim payment and when payers might not be administering their projects to the same level as before) rather than counter the unscrupulous payer (who could still issue notices, even if unfounded). The case is not made out to change the status quo.

(c) For the purposes of this consultation, we have assumed that on average across the industry, one in 30 payments that are (or should have been) notified under Section 110(2) are later abated. Do you consider that this proportion:

(i) is about right? ☐

(ii) should be less than half of this (i.e. less than one in 60 payments)? ☐

(iii) should be more than twice this (i.e. more than one in 15 payments)? ☐

Please choose one of (i) to (iii).

(d) Do you agree that the overall cost to the payee of securing payment under the payment framework in the Construction Act can best be measured as a percentage of each payment made under the contract?

Yes ☐ No ☐ ١

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(e) Notwithstanding your answer to question (d) what percentage of the amount of each payment finally due under a construction contract do you consider is lost on account of the cost and delay involved in obtaining proper payment?

(i) Less than 1% of each payment ☐

(ii) Between 1% and 2.5% of each payment ☐

(iii) Between 5% and 10% of each payment ☐

(iv) Between 10% and 15% of each payment ☐

(v) Between 15% and 25% of each payment ☐

☐

(vi) More than 25% of each payment

Please select one answer from (i) to (vi)

(f) If changes to the payment framework were introduced as proposed in this chapter, what percentage of the amount of each payment finally due under a construction contract do you consider would be lost on account of the cost and delay involved in obtaining proper payment?

(i) Less than 1% of each payment ☐

(ii) Between 1% and 2.5% of each payment ☐

(iii) Between 5% and 10% of each payment ☐

(iv) Between 10% and 15% of each payment ☐

(v) Between 15% and 25% of each payment ☐

(vi) More than 25% of each payment ☐

Please select one answer from (i) to (vi)

(g) If, as proposed, the sum due under a construction contract were to be viewed in law as the amount paid or proposed to be paid as specified in a Section 110(2) payment notice, (with the amount in a claim for payment becoming due if no notice were issued), what effect do you think this would have on the cost of resolving payment disputes at adjudication?

(i) The cost would not be subject to a significant reduction (i.e. less than 5%) ☐

(ii) The cost would be reduced by 5% to 15 ☐

(iii) The cost would be reduced by 15% to 35% ☐

(iv) The cost would be reduced by 35% to 65% ☐

(v) The cost would be reduced by more than 65% ☐

(vi) The cost would be increased? ☐

Please select one answer from (i) to (vi)

(h) Do you agree that the overall cost to the payee of securing payment can best be anticipated based upon recent experience of securing payments under:

(i) interim payment certificates following the introduction of the Construction Act; and

Yes ☐ No ☐

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(ii) the JCT "With Contractors Design" form of construction contract.

Yes ☐ No ☐

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5 Prohibiting the use of pay-when-certified clauses

(a) Do you agree that the Construction Act should be amended to make clear that pay when certified clauses are not an adequate mechanism for determining when payment becomes due?

Yes ☐ No ☒

The CLLS continue to oppose any prohibition on payment when certified clauses. Contractors and sub-contractors are free to enter into any contract they like and it is not the place of legislation to educate them on the merits or otherwise of pay when certified clauses. At any rate, such clauses are used within the civil engineering industry without any widespread problems and they also form a core part of the JCT management contract suite of documents where they have been used successfully (albeit not on a widespread basis) for a number of years.

(b) Do you agree with our understanding that:

(i) Pay-when-certified clauses are only used in Civil Engineering subcontracts?

Yes ☐ No ☒

See above.

(ii) Instalment, stage and other period payment decisions are not conclusive in any of the standard contract forms?

Yes ☒ No ☐

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Chapter 3 – Improving the right to suspend performance

(a) Do you agree that section 112 of the Construction Act should be amended to include a provision allowing the suspending party to claim a reasonable amount in respect of his costs caused by the exercise of the right to suspend from the party in default of payment (this would include the reasonable costs of remobilisation if this is required)?

Yes ☐ No ☐١

The CLLS acknowledge that the use of the statutory right to suspend performance is not widespread. However, the reason for this stems from a balancing of the right against the risk of wrongful suspension if a party is not entitled to do so. It does not stem from any concern of being unable to recover certain costs. As such the CLLS do not believe that there is any need for further legislative changes in this area. However, as any such changes are unlikely to make any significant difference to the take up of the statutory right to suspend, the CLLS do not feel strongly about this issue.

(b) Do you agree that section 112 of the Construction Act should be amended to include a provision allowing the suspending party to claim an extension of time for meeting any deadlines in his contract with the party in default of payment for any delay to the completion of work caused by the exercise of the right to suspend?

Yes ☐ No ☐١

This change is not necessary as a suspending party can, at any rate, claim an extension of time due to the "prevention principle" under common law and as provided for in many standard form contracts. We believe the issue may already, at any rate, be covered by Section 112(4) of the Construction Act.

(c) Do you agree that section 112 of the Construction Act should be amended to clarify that the suspending party may suspend any or all of his contractual obligations to the party in default of payment?

Yes ☐ No ☐١

This does not seem necessary

(d) What would you estimate to be the reasonable one-off costs of suspending performance on a typical construction project?

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 15% of an average monthly interim payment. ☐

(iii) 15% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

(v) 100% to 200% of an average monthly interim payment. ☐

(vi) More than double an average monthly interim payment. ☐

Please select one of (i) to (vi)

(e) What would you estimate to be the reasonable monthly ongoing costs while in suspension on a typical construction project?

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 25% of an average monthly interim payment. ☐

(iii) 25% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

Please select one of (i) to (iv)

(f) What would you estimate to be the reasonable costs of remobilising performance on a typical construction project?

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 25% of an average monthly interim payment. ☐

(iii) 25% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

(v) 100% to 200% of an average monthly interim payment. ☐

(vi) More than double an average monthly interim payment. ☐

Please select one of (i) to (vi)

Do you consider that your answers to questions (d), (e) and (f) would be changed if the suspending party was not required to be ready to remobilise immediately, as at present, when the defaulted payment is eventually made, but was allowed an additional extension of time for any delay caused by the exercise of the right of suspension.

(g) Please select which of (i) to (vi) in question (d) you think would apply following the DTI's proposed amendment.

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 15% of an average monthly interim payment. ☐

(iii) 15% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

(v) 100% to 200% of an average monthly interim payment. ☐

(vi) More than double an average monthly interim payment. ☐

(h) Please select which of (i) to (iv) in question (e) you think would apply following the DTI's proposed amendment.

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 25% of an average monthly interim payment. ☐

(iii) 25% to 50% of an average monthly interim payment. ☐

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(iv) 50% to 100% of an average monthly interim payment.

(i) Please select which of (i) to (vi) in question (f) you think would apply following the DTI's proposed amendment.

(i) Less than 5% of an average monthly interim payment. ☐

(ii) 5% to 25% of an average monthly interim payment. ☐

(iii) 25% to 50% of an average monthly interim payment. ☐

(iv) 50% to 100% of an average monthly interim payment. ☐

(v) 100% to 200% of an average monthly interim payment. ☐

(vi) More than double an average monthly interim payment. ☐

As well as covering the regulatory impact of the proposals described in this chapter on the costs of suspension, the following questions also cover the impacts of the proposal in Chapter 2 on the transparency of the sum due and its effect on right to suspend.

In reading questions (j) to (i) consultees should bear in mind the finding of improving payment practices in the construction industry that the right to suspend performance is exercised in fewer than one in a 100 cases of defaulted payment at present.

(j) Following the introduction of both:

- our proposals to reduce the costs of suspending performance in cases of non-payment; and,
- our proposals to improve the transparency of the sum due...

...how frequently do you believe the right to suspend performance would be exercised?

(i) In more than one in five cases of defaulted payment? ☐

(ii) In between one in five and one in 20 cases of defaulted payment? ☐

(iii) In between one in 20 and one in 100 cases of defaulted payment? ☐

(iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change) ☐

Please select one of (i) to (iv)

(k) Following the introduction of only our proposal to reduce the costs of suspending performance in cases of non-payment how frequently do you believe the right to suspend performance would be exercised?

(i) In more than one in five cases of defaulted payment? ☐

(ii) In between one in five and one in 20 cases of defaulted payment? ☐

(iii) In between one in 20 and one in 100 cases of defaulted payment? ☐

(iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change) ☐

Please select one of (i) to (iv)

(l) Following the introduction of only our proposal to improve the transparency of the sum due in respect of the right to suspend performance, how frequently do you believe the right would be exercised?

(i) In more than one in five cases of defaulted payment? ☐

(ii) In between one in five and one in 20 cases of defaulted payment? ☐

(iii) In between one in 20 and one in 100 cases of defaulted payment? ☐

(iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change) ☐

Please select one of (i) to (iv)

(m) What do you consider is the incidence of non-payment of a sum due in the construction industry?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

(n) What do you consider would be the incidence of non-payment following the introduction of both:

- our proposals to reduce the costs of suspending performance in cases of non-payment; and
- our proposals to improve the transparency of the sum due?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

(o) What do you consider would be the incidence of non-payment following the introduction of only our proposals to reduce the costs of suspending performance?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

(p) What do you consider would be the incidence of non-payment following the introduction of only our proposals to improve the transparency of the sum due in respect of the right to suspend performance?

(i) Fewer than 10% of payments ☐

(ii) 10% to 30% of payments ☐

(iii) 30% to 50% of payments ☐

(iv) 50% to 70% of payments ☐

(v) 70% to 90% of payments ☐

(vi) More than 90% of payments ☐

Please select one of (i) to (vi)

Chapter 4 – Other Issues which we are considering as part of this consultation

1 Devolution

(a) Do you agree that the DTI and Welsh Assembly Government should continue to work together to minimise the differences between the effect of the provisions of the Schemes in England and Wales given that responsibility for the Scheme has been devolved to the Welsh Assembly?

Yes ☐ ١ No ☐

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(b) Do you agree that, so far as is possible give the differences between Scots law and English law, the DTI and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of the Construction Act in England and Scotland given that responsibility for the Act has been devolved to the Scottish Parliament?

Yes ☐ ١ No ☐

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(c) Do you agree that, so far as is possible give the differences between Scots law and English law, the DTI and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of the Schemes in England and Scotland?

Yes ☐ ١ No ☐

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2 Correction of errors

(a) Do you consider that the DTI and Welsh Assembly Government should work with the Scottish Executive to develop a “slip rule” with the intention, so far as is possible, of introducing the same rule in England, Scotland and Wales to ensure it is applied in a uniform way by the courts in England and Wales and in Scotland?

Yes ☐ ١ No ☐

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(b) Do you agree with the suggestion in the Scottish Executive's report of its consultation on Improving adjudication in the construction industry that a slip rule should provide the adjudicator with:

(i) Power to correct a clerical or arithmetic error or any other matter that the parties may agree...

Yes ☐ ١ No ☐

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(ii) for one week after the adjudicator's decision or such longer period as the parties may agree?

Yes ☐ ١ No ☐

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3 The Judgement of the House of Lords in Melville Dundas -v- George Wimpey

(a) Do you agree that section 111 should not apply where the payee is insolvent, so that payment may be withheld without notice?

Yes ☐ ١ No ☐

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(b) Do you agree that sections 110 and 111 should apply in all other cases (i.e. to final payments as well as to "payments by instalments, stage or other periodic payments" which become due in accordance with section 109 of the Construction Act)?

Yes ☐ ١ No ☐

(c) Do you consider that the judgement of the House of Lords in Melville Dundas -v- George Wimpey will have the effect which we have proposed the Construction Act should have in our view, when it is applied by the lower courts, so that:

(i) Section 111 will not apply where the payee is insolvent, so that payment may be withheld without notice?

Yes [١] No [ ]

Yes. See <u>Pierce Design International Limited v Mark and Deborah Johnston</u> which confirms that the Melville Dundas decision is not limited to insolvency situations.

(ii) Section 111 will apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as "payments by instalments, stage or other periodic payments" in accordance with section 109 of the Construction Act)?

Yes [١] No [ ]

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Please answer (Yes / No) to questions (i) and (ii)

(d) Do you consider that:

(i) the Act should expressly provide an exception to section 111 in cases where the payee is insolvent (section 113 already provides an example of an exception or insolvency), or leave this exception to be decided by the courts through case law following the House of Lords' judgement?

Yes [ ] No [١]

Case law is sufficient

(ii) the Act should be amended to make clear that section 111 should apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as "payments by instalments, stage or other periodic payments" which become due in accordance with section 109 of the Construction Act)?

Yes [١] No [ ]