

COULSON ON CONSTRUCTION ADJUDICATION

THIRD EDITION

THE HONOURABLE
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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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First Edition published in 2007
Second Edition published in 2011
Third Edition published in 2015

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2014959026

ISBN 978-0-19-872654-8

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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THE LATHAM REPORT AND ITS AFTERMATH

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5.13 There are several ways to approach the concerns expressed by all sides of the construction process about contracts. They are—

1. To do nothing.
2. To amend existing Standard Forms to meet some of the concerns.
3. To try to define what a modern construction contract ought to contain. If this can be achieved, there are then two further alternatives, which are to change existing contract forms to take account of such requirements and/or to introduce a new contract which will deliver them.

5.14 It is no longer possible to do nothing. That option can be discarded at once.

From 'Constructing the Team' by Sir Michael Latham, Final Report, July 1994

Introduction

A graph that indicated the health (and otherwise) of the construction industry in the UK in the twentieth century would make a startling sight: a bewildering series of peaks and troughs that often, but not always, mirrored the wider health of the UK economy. On occasions in the past, many have endeavoured to promote or otherwise help the construction industry, with a record of success that can only be described as mixed. Changing priorities amongst the senior judiciary have not always helped to encourage stability and certainty. Thus, for example, in *Dawnays v Minter*,¹ Lord Denning MR decided, not for the first or the last time, that architects' certificates under standard forms of building contracts were, broadly speaking, to be regarded in the same way as a cheque or cash, and that, because 'cash flow was the very lifeblood of the enterprise', such certificates had to be honoured. He held that a certified sum had to be paid, regardless of the existence of cross-claims or other

¹ [1971] 1 WLR 1205.

potential deductions. The principle, if that is what it was, in *Dawnays v Minter* was quickly overruled by the House of Lords in *Modern Engineering Ltd v Gilbert-Ash*.² In that case Lord Diplock famously observed that cash flow was the life blood of the village grocer, too.

- 1.02** The reason that these, and other reported cases concerned with interim payments, mattered so much was due to the volatility of the construction industry. A general building contractor who was not paid on time might find himself unable to complete the contract and, within weeks, out of business and bankrupt. These problems were exacerbated by the fact that, by their very nature, construction contracts have always generated disputes about payment. They last a good deal longer than most commercial contracts, thus increasing the chances of things going wrong somewhere along the line. Most disputes arising in connection with commercial contracts concern defects of one sort or another; in construction contracts, it is common for there to be complaints about defects and delays, as well as the inevitable disputes about variations and extra expense.³
- 1.03** Following the decision in *Modern Engineering*, an employer who wanted to avoid making an interim payment to his contractor was often able to do so by putting together some kind of cross-claim which, even if it was rather thin, would be good enough to avoid summary judgment being given on the contractor's claim under RSC Order 14. For many years it was felt that this was an unsatisfactory state of affairs and that, in the right circumstances, something should be done to tip the balance at least a little way back in favour of the claiming party, even at the temporary expense of those who had to pay. This was the genesis of compulsory adjudication. However, it took a major recession before the idea became more widely advocated.
- 1.04** By the early 1990s, it was generally considered that the construction industry in the UK was in the grip of a major and deep-seated crisis. The general recession of the late 1980s/early 1990s had hit the construction industry hard. The decline in property prices led to a reduction in work, and the wider financial constraints meant that contractors and sub-contractors were continually starved of the necessary cash flow. It was calculated that, by 1993, construction output was some 39 per cent below its 1990 peak, compared to a reduction of just three per cent in the manufacturing industry.⁴
- 1.05** However, the difficulties in the industry went much wider than the general effects of the recession. Another major concern was the high cost of the UK construction industry, particularly when compared with costs in Europe and in the USA. Allied to the concerns about high cost were worries about the high proportion of disputes within the construction industry, the length of time that it took for such disputes to be resolved, and their cost. It was, for instance, noteworthy that during this period of recession for the industry, there was a significant increase in the volume of work for those directly concerned with construction disputes, including barristers, solicitors, claims consultants and other construction professionals.

² [1974] AC 689.

³ In his judgment in *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd* [2003] EWCA Civ 1750, [2004] BLR 65 May LJ said: 'Construction contracts do by their nature generate disputes about payment. If there are delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due.'

⁴ See paragraph 2.6 of the Latham Report.

The problems within the construction industry mattered because the industry itself comprised such a major part of the UK economy overall. For example, in 1993, the value of output in the whole construction industry was £46.3 billion, which represented about eight per cent of gross domestic product.⁵ With as many as 200,000 contractors in the UK, the health of the industry plainly mattered to the health of the UK economy as a whole. **1.06**

The Main Recommendations of the Latham Report

On 5 July 1993, it was announced in the House of Commons that there was to be a Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry. The Review was funded by the Department of the Environment, together with four industry organisations and two groups representing clients. The Review was conducted by Sir Michael Latham. An Interim Report, entitled 'Trust and Money', was published in December 2003. The Final Report, entitled 'Constructing the Team', was published in July 1994. This latter document is referred to below as 'the Latham Report'. It is not to be confused with the subsequent Latham Report which led, eventually, to the changes set out in Part 8 of the Local Democracy, Economic Development and Construction Act 2009, referred to as the 2009 Act and analysed in Chapter 4 below. **1.07**

The Latham Report was extremely wide-ranging. Although this book, out of necessity, concentrates on those aspects of the Latham Report that relate to construction contracts and the efficient resolution of construction disputes, it should be noted that the Report dealt with a wide variety of topics, including the 'Role of Clients', 'The Design Process', 'Selection and Tendering Procedures', 'Team Work On Site' and even 'Liability Post-Completion'. A number of the recommendations in these areas have yet to be implemented. **1.08**

The two most radical aspects of the Latham Report concerned its recommendation of particular payment provisions to be applied into building contracts, and its unequivocal recommendation of a new type of mandatory dispute resolution mechanism known as adjudication. **1.09**

Contract Terms

Despite the wide range of available Standard Forms of Construction and Engineering Contracts, it appears that Sir Michael Latham was unimpressed with their applicability to what he called the 'reality on modern construction sites'.⁶ He considered that certain common features of all construction and engineering contracts were desirable and should include: **1.10**

1. a general duty to trade fairly, with specific requirements relating to payment and related issues;
2. clearly defined work stages, including milestones or other forms of activity schedules;
3. the pre-pricing of any variations;
4. an adjudication system which was independent of contract administration.⁷

⁵ This statistic can be found at paragraph 2.1 of the Latham Report. The source is given as the Department of the Environment.

⁶ See paragraph 5.17(2) of the Latham Report.

⁷ See paragraph 5.17(4) of the Latham Report.

The recommendations for ‘the most effective form of contract in modern conditions’⁸ identified 13 specific elements which, in Sir Michael Latham’s view, should be included in any contract.

1.11 The Report was particularly critical of what were described as ‘unfair conditions’ that were regularly included within construction contracts. Paragraph 8.9 of the Report (Recommendation 25) recommended that there should be a ‘Construction Contract Bill’ which should state that particular actions were unfair or invalid. These included any attempt:

1. to amend or delete those sections of the contract relating to times and conditions of payment, and the right of interest on late payments;
2. to seek to deny or frustrate the right of immediate adjudication to any party to the contract or sub-contract, where it has been requested by that party;
3. to refuse to implement the decision of the adjudicator;
4. to seek to exercise any right of set-off or contra-charge without:
 - (i) giving notification in advance;
 - (ii) specifying the exact reason for deducting the set-off; and
 - (iii) being prepared to submit immediately to adjudication and accepting the result;
5. to seek to set off in respect of any contract other than the one in progress.

1.12 In addition, the Report concluded unequivocally that ‘pay-when-paid’ clauses should be expressly declared unfair and invalid.⁹ In making this recommendation, the Report was essentially accepting the submissions made to the review by the Constructors Liaison Group and the Confederation of Construction specialists, representing sub-contractors, who were particularly upset at the widespread use of such provisions. Of course, it was the sub-contractors who often bore the financial burden of the insolvency or failure of a company much higher up the contractual chain. Thus, in the many pieces of satellite litigation arising out of the building of the first tower at Canary Wharf, and major developments such as the Hatfield Galleria development over the A1 in Hertfordshire, the financial difficulties of the employers were passed on, via ‘pay-when-paid’ clauses, to those sub-contractors who had actually carried out the work and were therefore most at risk if the relevant payments were not made.

Adjudication

1.13 The entirety of Chapter 9 of the Latham Report was given over to a discussion about dispute resolution. This highlighted the adversarial attitudes in the UK construction industry. Whilst it maintained that ‘the best solution is to avoid disputes’,¹⁰ the Report realistically accepted that a certain number of disputes were inevitable. The unequivocal recommendation in the Report was that the best way of resolving such disputes was by way of adjudication: indeed, at paragraph 9.4, the conclusion was that a system of adjudication ‘must become the key to settling disputes in the construction industry’.

1.14 The Latham Report identified a number of key elements of the adjudication process that it was recommending. Amongst other things, the Report stated that there was no inherent

⁸ See paragraph 5.18 of the Latham Report.

⁹ See paragraph 8.10 of the Latham Report.

¹⁰ See paragraph 9.3 of the Latham Report.

reason why adjudication should not be used for any size of contract. It recommended that there should be no restriction on the issues to be placed before the adjudicator for decision and no specified ‘cooling-off period’ before the adjudicator could be called in. It recommended that the adjudicator be named in the contract before the work started and could then be called in when necessary. The Report also stated that:

As well as dealing with disputes between clients and main contractors, the contract documents must specify that the adjudicator must have equal scope to determine disputes between contractors and sub-contractors, and between sub-contractors and sub-sub-contractors. Jurisdiction on sub-contract issues should not be limited to disputes over set-off. It should encompass any matter which can also be within the scope of resolution under the main contract.¹¹

It is interesting to note that, even at this stage, the Report grappled with the extent to which the decisions of adjudicators should be final and binding. It is clear that at least one well-known construction claims consultant recommended that, once an adjudicator had reached his decision, no appeal or reference to the High Court should be permitted under any circumstances. However, the Report concluded that this was going too far. At paragraph 9.7, it was recorded that: **1.15**

It is correct that the authority of the adjudicator/expert must be upheld, and that the decision should be implemented at once. Such published experience as exists of adjudication—and it does not seem very extensive at main contract level, because the possibility of the system being used appears to induce the parties to reach their own settlement without recourse to it—suggests that it is successful in reducing disputes without further appeal or litigation. But it would be difficult to deny a party which feels totally aggrieved by an adjudicator’s decision any opportunity to appeal either to the courts or arbitration. I doubt whether such a restriction would be enforceable.

Accordingly, the Latham Report recommended that, whilst an adjudication result had to be implemented at once, it could subsequently be overturned by the courts or an arbitrator after practical completion. Thus, as the Report made plain, ‘if the award of the adjudicator involves payment, it must be made at once.’¹² The Report also stated that, unless there was some exceptional or important issue of law that had to be brought to court immediately, the courts should only be approached as a last resort, and after practical completion of the contract. **1.16**

Accordingly, at paragraph 9.14, the Report set out its recommendations as to adjudication: **1.17**

I have already recommended that a system of adjudication should be introduced within all the Standard Forms of Contract (except where comparable arrangements already exist for mediation or conciliation) and that this should be underpinned by legislation. I also recommend that:

1. There should be no restrictions on the issues capable of being referred to the adjudicator, conciliator or mediator, either in the main contract or sub-contract documentation.
2. The award of the adjudicator should be implemented immediately. The use of stakeholders should only be permitted if both parties agree or if the adjudicator so directs.
3. Any appeals to arbitration or the courts should be after practical completion, and should not be permitted to delay the implementation of the award, unless an immediate and exceptional issue arises for the courts or as in the circumstances described in (4)...

¹¹ See paragraph 9.5 of the Latham Report.

¹² See paragraph 9.7(2) of the Latham Report.

4. Resort to the courts should be immediately available if a party refuses to implement the award of an adjudicator. In such circumstances, the courts may wish to support the system of adjudication by agreeing to expedited procedures for interim payment.
5. Training procedures should be devised for adjudicators. A Code of Practice should also be drawn up under the auspices of the proposed Implementation Forum.

1.18 In these recommendations, the concept of mandatory adjudication was born. It should not, however, be thought that this was the first time that such a dispute resolution mechanism had been invented. Indeed, as May LJ pointed out in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd*,¹³ ‘those who consider and make policy for the building industry, including the Government, have taken a general view over the years that a temporary balance should in appropriate circumstances fall in favour of those who claim payment, at the temporary expense of those who pay’ with the result that, prior to the Latham Report, a number of standard forms of building and engineering contracts already made provision for a type of adjudication process. What was radical about the recommendations in the Latham Report was that adjudication would now be the compulsory first step in any dispute arising under most construction and engineering contracts.

The Debates on the Bill

1.19 The Housing Grants Construction and Regeneration Bill was introduced early in 1996. One of its main features were the complex provisions concerning what were ‘construction operations’ (which were covered by the Bill and therefore subject to the detailed adjudication provisions) and what was outside the definition of ‘construction operations’, which would have the effect of excluding the underlying contracts from the scope of the Bill. The debates in Parliament, particularly those in the House of Lords, foreshadowed the disputes that arose in the TCC in the early days of adjudication, as to whether or not a particular operation or activity was within or outside the Act. It is difficult, even now, to see quite why, if adjudication was the effective solution to dispute resolution that its advocates proclaimed it to be, it was thought necessary to exclude from its reach so many operations that would ordinarily be within the rubric of ‘construction activities’ and thus deprive so many parties within the construction industry of its alleged benefits.

1.20 It is instructive to take just one example from the debates to illustrate the nice distinctions that were being, and continue to be, made. In the House of Lords on 28 March 1996, Lord Howie of Troon used by way of example the component parts of the then new Waterloo International Terminal. He made the point that the steel train shed was made in a factory and then brought on site and assembled. As a result, that element of this major project would be excluded from the Bill because of the distinction between manufacture and construction. However the undercroft was formed of massed concrete that was carried out on site, and would therefore be included within the Bill. However, he then went on to say that, to the extent that parts of the undercroft were pre-cast concrete elements, manufactured elsewhere, those might be outside the Bill after all. Earl Ferrers seemed rather reluctant to discuss the precise consequences of the Bill for particular industries, saying that ‘those

¹³ [2003] EWCA Civ 1750, [2004] BLR 65.

muddy what we seek to do in the Bill'.¹⁴ Having conceded that 'this is not a simple area', he confirmed that 'the fitting in of a part manufactured elsewhere' was part of the manufacturing process and was not therefore a construction activity. It seems a pity that no-one pointed out that the simple task of bricklaying, the quintessential 'construction activity', could be described as 'the fitting in of a part manufactured elsewhere', and was thus, at least on one analysis, excluded from the Bill.

Some members of the House of Lords could not understand why certain industries had asked to be excluded from the Bill given that the principal aim of the Bill appeared to be: **1.21**

... to ensure that where we have a contractual morass within the construction industry there is a fall-back position to protect everyone in the industry from the previous regime of litigation concerning contracts that have not been fulfilled adequately and endless arbitration and disputes procedures. It is a fall-back position to protect the people operating within the industry rather than an imposition of some new series of regulations, red tape and other paraphernalia. If one looks at it in that light, the arguments from the processing industry, the mining industry and the small contractor effectively fall away.¹⁵

This point was later reflected in the debate in the House of Commons, when one MP, not unreasonably, made this comparison:

There is no more reason to exclude the process industries than to exempt drivers who have never had an accident from obeying the Highway Code. This is a good Bill, and we should include all the industries that are relevant to construction, and leave out the process industries because they have largely been able to manage their affairs reasonably well in the past. There can be problems, and the industries would benefit from the legislation.¹⁶

Whatever the intrinsic merits of these points, they were not successful. When the Bill passed into law, it included a lengthy definition of the works included within 'construction operations' (s105(1)), and it also allowed the exclusion of a number of different industries and activities which might ordinarily be thought of as encompassing 'construction operations' (s105(2)). **1.22**

Another point that arose during the debates in the House of Lords was the extent to which it was necessary to exclude smaller contracts from the provisions of the Bill including, of course, the requirement for adjudication. At one stage, a minimum limit of £25,000 was suggested.¹⁷ Although this suggestion was received sympathetically, in the end the Bill passed into law with no such lower limit. However, the fact that the Bill excluded contracts with residential occupiers, and contracts that would take less than 45 days to complete, made it less important to exclude small value works, since small scale work would be likely to be carried out as part of domestic refurbishment, or take a short period to complete, and would therefore be excluded in any event. **1.23**

Unsurprisingly, there was a considerable debate about the extent to which the decision of the adjudicator would be binding. Lord Lucas made it clear, on behalf of the Government, that many parties wanted adjudication to resolve disputes only until practical completion **1.24**

¹⁴ See Hansard, 28.3.96, column 1858.

¹⁵ See the speech of Lord Monkswell, Hansard 28.3.96, column 1865.

¹⁶ Taken from the speech of Mr Peter Thurnham, MP for Bolton North-East, in the debate on 8 July 1996 (Hansard, column 94).

¹⁷ See the speech of Viscount Ullswater, Hansard 28.3.96, column 1865.

of the contract, and that this was perfectly acceptable.¹⁸ However, difficulties arose from the proposed fall-back position that, if the contract did not provide to the contrary, the adjudicator's decision would be final. As Lord Berkeley put it:

I do not believe that there is any situation in which the adjudication could be made binding on all contracts. If there is a serious problem, one cannot expect disputes worth tens or hundreds of millions of pounds to be resolved in four weeks.¹⁹

However, the debate on this topic revealed a lack of clarity as to the extent to which an adjudicator's decision would be binding. Despite Lord Lucas registering his 'surprise' that arrangements could be contemplated that allowed a dispute involving £1 million or £100 million to be settled in 28 days by a single individual, choosing his own evidence and with no form of appeal, it was pointed out that there was a risk that the Bill, and the provisional version of the scheme included within it, provided for just that. The uncertain nature of the status of the adjudicator's decision was exacerbated when it was said that 'binding' meant that the decision was 'the end of it unless you have a dispute which can be taken to the court. That is a strictly limited category connected with areas of law and misbehaviour.'²⁰

- 1.25** There was grave concern that, on this point at least, the Government's proposals were moving away from the type of adjudication envisaged in the Latham Report. That allowed for a decision that was binding until practical completion and had to be complied with, but with no fetters or restrictions on the type or nature of the challenge that could be made after practical completion. This point was made in the debate in the House of Lords by Lord Howie of Troon who referred, not for the first time, to a confusion in the Bill between adjudication and arbitration. He made plain that it was inherently impractical to have a situation in which, after just 28 days, the adjudicator's decision was binding and could only be reviewed on a point of law. He said that the adjudicator's decision must be subject to revisitation 'not only on points of law but on whether he was correct in his decision in terms of the contract and the context in which the contract was carried out'. In the end, it was this view that prevailed.
- 1.26** The Bill also included a proposed scheme for adjudication, withholding notices and the like, to be incorporated into all contracts that made no express provision for such matters. In the debates in both the House of Lords and the House of Commons, it can be seen from Hansard that, whilst there was a general level of agreement as to the provisions in the Bill, there was widespread dismay at the provisions of the proposed scheme for adjudication itself. Again, many of the difficulties appear to arise from a confusion between adjudication and arbitration.²¹ There was also concern as to the over-complex nature of the scheme originally proposed, leading to the conclusion that, although the scheme had been 'conceived with the best intentions...it is really a monster'.²² These criticisms reflected comments made by industry professionals: the Institute of Civil Engineers described the scheme as originally proposed as 'dismal', whilst the Building Employers Confederation said that they had given the scheme 'the thumbs down'. The Constructors' Liaison Group described

¹⁸ Hansard 28.3.96, column 1909.

¹⁹ Hansard 28.3.96, column 1911.

²⁰ Hansard 28.3.96, column 1911, taken from the speech of Lord Lucas.

²¹ See the speech of Lord Howie of Troon, Hansard 28.3.96, columns 1933 and 1934.

²² Lord Howie of Troon, Hansard 28.3.96, column 1934.

the proposed scheme as ‘quite appalling’ and the Official Referee’s Solicitors Association (now TeCSA) described it as ‘misconceived’.²³

On 7 May 1996, the Bill was debated in the House of Commons. The majority of the debate was given over to other elements of the Bill. There was, however, a useful introduction to the system of adjudication proposed in the Bill. The Minister for Construction Planning and Energy Efficiency, Mr Robert B Jones, said: **1.27**

The Bill promotes a clear system of dispute resolution called adjudication. The industry is clear about what it means by that: it wants a mechanism that produces a fast and impartial resolution of a dispute and allows the contract to continue. The industry does not want the decision necessarily to be the final one. It wants to ensure that disputes are tested at the time, on the spot and are resolved quickly to the parties’ satisfaction.

Our provisions provide a right to refer construction disputes for adjudication. We expect that entitlement to be met normally by the construction industry deciding, as a matter of course, to include adjudication arrangements in its contracts. The Government are challenging the industry to take action to improve its contractual practice and to introduce the sort of adjudication arrangements that best suit it. The best outcome must be that there is no need for a fall-back.

However, we have a view about the minimum standards that contract adjudication must satisfy. They relate to speed of decision, impartiality and the freedom for an adjudicator to investigate disputes and reach his own conclusion.²⁴

The reports in Hansard reveal that, when the Bill went into Committee, many of the potential anomalies in the definition of ‘construction operations’ were trotted out all over again. There was much debate about the nice differences between construction maintenance and construction repair. One MP made the justifiable point about these debates that: **1.28**

We are returning to definitional problems... which have bedevilled the industry. There will be a field day for lawyers and a wonderful opportunity for people to find ways of frustrating the good intentions of the Bill and Sir Michael Latham’s Report.²⁵

However, this intervention failed to persuade those responsible for the Bill to omit the various complex definitions of what was within, and what was beyond, the reach of the new compulsory adjudication process, definitions that are still giving rise to difficulties and unfairness today.²⁶

There was also a significant debate about the effect of an adjudicator’s decision. However, there seemed to be widespread agreement that, at least until practical completion, the adjudicator’s decision was not simply to be regarded as a recommendation or advisory, but a decision that had to be complied with. There was reference to the representation provided to the Committee by Professor John Uff CBE QC, who said that the objective should be to ensure ‘decisions of temporary finality only’.²⁷ However, no amendment to the Bill, to make clear the precise status of the adjudicator’s decision, was accepted. **1.29**

²³ All the references are taken from the speech of Lord Berkley, Hansard 1.4.96, column 13.

²⁴ Hansard, 7.5.96, column 52.

²⁵ From the speech of Mr Nick Raynsford, MP for Greenwich, Hansard, 13.6.96, column 292.

²⁶ See, for example, the recent cases of *North Midland Construction PLC v AE & E Lentjes* [2009] EWHC 1371 (TCC), [2009] BLR 574 and *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC), [2010] BLR 415.

²⁷ Hansard, 18.6.96, columns 331 and 332; Standing Committee F.

- 1.30** The last debate in the Commons occurred on 8 July 1996. Some of the points identified above were revisited in argument but with little effect on the Bill. However, although it then received the Royal Assent, the Housing Grants Construction and Regeneration Act did not come into effect until 1 May 1998. This was principally because of the delays in the formulation of an acceptable scheme for adjudication.

The Debates on the Scheme

- 1.31** As noted above, the original scheme for adjudication proposed in 1996 as part of the Bill attracted far more opprobrium than the Bill itself. This was largely the result of attempts to limit the ways in which an adjudicator's decision might be capable of later challenge. In the debate in the House of Lords on 22 April 1996, Lord Ackner referred to the extensive criticism of the proposed scheme and said:

What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of 'pay now, argue later', which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts.

What is being proposed here is a speedy, fast-track arbitration which produces a binding conclusion, not open to any challenge after practical completion, but fixed and firm for all time in a wholly unrealistic time scale... What on earth is the point of rushing through an arbitration which is to be final and binding in a situation probably of great complexity and, what is worse, one where the speed can be frustrated by applications to the court of the kind envisaged by the new Arbitration Bill which will become an Act in 1996? Because of the finality which it is suggested is to be ingrained in the adjudication, the courts will obviously be listened to. So there will be delay and frustration in the sense that payment will be put off and the adjudication process which is designed will be self-defeating for a reason which I find difficult to follow.²⁸

- 1.32** As a result of this decisive intervention, and other points made during the debates about the scheme, it was decided that further consultation would be necessary before the scheme was finalised. In November 1996, once the Bill had received Royal Assent in July 1996, the Department of the Environment sent out a consultation paper, seeking responses as to the nature and extent of the scheme.

- 1.33** The eventual result of this consultation paper was the Scheme for Construction Contracts (England and Wales) Regulations 1998. In the discussions on these Regulations in the relevant Committees of the House of Commons and the House of Lords, it quickly became apparent that many of the concerns, raised by Lord Ackner and others two years previously, had been dealt with in the new version of the scheme, particularly in the removal of the provisions making an adjudicator's decision binding for all time. There was broad agreement as to the contents of the proposed scheme; it was felt that, finally, the concepts of arbitration and adjudication had been distinguished, and that the scheme allowed for a decision which was binding and had to be complied with, although it could be challenged either

²⁸ Hansard, 22.4.96, columns 989–990.

in arbitration or in the courts. The Regulations, and the Scheme for which they provided, came into effect on 1 May 1998.

Subsequent Legislation

In 2004, following concerns expressed by the construction industry, Sir Michael Latham was invited to review the workings of the 1996 Act and the Scheme. On 17 September 2004, he presented his supplementary report to the Construction Minister, which recommended various amendments to the 1996 Act. These were divided broadly into two types: some miscellaneous changes to provisions relating to adjudication (the most important of which was the scrapping of the requirement that the contract had to be in writing), and changes designed to simplify the payment process. **1.34**

There was then a lengthy consultation period which lasted for almost five years but, ultimately, the vast bulk of the proposals made by Sir Michael Latham in his supplementary report found their way into the Local Democracy, Economic Development and Construction Act 2009. However, just as the 1996 Act did not come into force until the Scheme had been finalised, two years later, so the 2009 Act did not come into force until 2011. It only applies to construction contracts that were entered into on or after 1 November 2011. In addition, there were also some important amendments to the Scheme itself. **1.35**

Although the unamended provisions in the 1996 Act, and the terms of the original Scheme, will continue to apply to construction contracts entered into prior to 1 November 2011, this third edition deals with the statutory provisions and the Scheme now in force, and applicable to contracts entered into after that date. Accordingly, the 1996 Act, as amended, is at Appendix A. Appendix B is the Scheme for Construction Contracts, also as amended. Although the changes are not overly significant, so that much of the structure and content of this book will be familiar to those who have read the second edition, it is important to stress that, because the principal focus is now on the amended provisions, those seeking to research points which no longer arise under the amended provisions (such as the authorities relating to contracts in writing) are respectfully referred to the second edition. **1.36**