

Homebuilding market study

Annexe H - Review of alternative dispute resolution

September 2008

OFT1020h

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H.1 INTRODUCTION

H.1.1 This is a review of the key alternative dispute resolution mechanisms (ADR) in the new homebuilding market.¹ Most of the ADR mechanisms examined are available to purchasers of new homes (homebuyers) who have suffered financial or other loss (detriment) because of the way their homes have been constructed, marketed and sold. The type and gravity of loss suffered as well as the circumstances can affect the type of ADR that a homebuyer can use. All the ADRs considered in this review are available in England and Wales. Some are also available to homebuyers in Scotland and Northern Ireland.

H.1.2 There are broadly two types of homebuyer in this market. The most common is the homebuyer who purchases a new home that has or will be constructed by a homebuilder. Most of the review will deal with the rights and obligations of this type of homebuyer. The other is a homebuyer who buys a plot of land with a view to building or engaging an architect or other specialist to oversee the building of his own home (a self build homebuyer). For the purposes of this Annexe self build covers all instances where homebuyers are involved in the production of their new home.²

H.1.3 A homebuilder will usually be a developer or building company that constructs a number of new homes for sale. It will engage and manage sub-contractors, architects and engineers to complete the construction works.

H.1.4 The OFT has found that homebuyers will encounter most problems when:

¹ The review was prepared in the wake of an ongoing consultation process being undertaken by the Department of Business, Enterprise and Regulatory Reform and the Department of Communities and Local Government about regulation and redress in the entire UK housing market. As part of that process Professor Colin Jones and Dr Noah Kofi Karley of Heriot-Watt University are producing a report on the subject.

² *Homes to DIY for – The UK's self-build housing market in the twenty-first century* James Barlow, Robert Jackson and Jim Meikle.

- They are trying to obtain answers to enquiries about the new home before signing a contract for sale.
- They are trying to recover monies paid (for example reservation fees or deposits) towards buying their new home, because the homebuilder has defaulted in some way (for example the homebuilder has not built the new home on time).
- They are trying to get defects in construction works repaired after they have moved into their new home.

H.1.5 Where the homebuyer suffers detriment because of these problems they may have a number of legal rights and remedies against:

- A homebuilder
- A sub-contractor
- A professional consultant (for example a surveyor, architect or engineer)
- A solicitor
- An estate agent

H.1.6 The homebuyer usually has a number of options as to the ways in which these rights and remedies can be enforced. The best known is court action. Alongside the courts system there is what can best be described as a patchwork of ADRs which can be used in its place.

H.1.7 Following a brief consideration of the option of court action, examples of some of the key ADR mechanisms available to in the homebuilding market will be considered.

H.2 COURT ACTION

- H.2.1 The best known method of enforcing legal rights and remedies where detriment is suffered is court action.
- H.2.2 Court actions relating to the purchase of defective homes are likely to be civil in nature, in that they are likely to involve breach of contract or tort claims (for example negligence or deceit).³
- H.2.3 Depending on the type of claim and the amount of money involved, contract and tort actions must be brought in the County Court or High Court. There are rights of appeal to the Court of Appeal and House of Lords.
- H.2.4 The civil courts in England and Wales are governed by a myriad of legislation, including the County Courts Act 1984, the Civil Procedure Rules 1998 (the CPRs) and Practice Directions and the Supreme Court Act 1981.
- H.2.5 To show that they have suffered detriment, a homebuyer will have to prove that the core legal elements of their claim have been met. For example, a tort of negligence claim may be based on the allegation that a homebuilder, contractor, sub-contractor or architect failed to exercise the necessary skill and care because of acts of negligence committed during the construction of a new home. Further, the negligence may have caused personal injury to and/or damage to personal property belonging to the homebuyer.
- H.2.6 To succeed a homebuyer would have to produce cogent evidence that satisfies the civil standard of proof, usually referred to as the balance of

³ A tort is a civil wrong. There are several types of tort including negligence and deceit. Negligence means failing to exercise reasonable care and skill to someone to whom you owe a duty of care. Whilst deceit means a false statement of fact knowingly or recklessly made with the intent that it shall be acted on by another, and that the other acts on and suffers damage as a result.

probabilities test. This means the evidence must show it was more likely than not that the alleged acts of negligence were committed.⁴

- H.2.7 The task is not made easier by the commonly held view that the more serious the allegation the higher the required degree of proof (for example fraud or professional misconduct).⁵
- H.2.8 There are limits on the type or amount of detriment that can be recompensed by a successful court action. A homebuyer may be able to recover 'pure economic loss' (for example the diminution in value of a property) in a successful breach of contract action. However, the same cannot usually be said for claims made in tort.⁶
- H.2.9 This has been partially alleviated by standard warranty/insurance cover agreements routinely purchased by homebuilders from specialist providers like Building Life Plans Limited, the Local Authority Building Control New Home Warranty, the National Homebuilding Council, Premier Guarantee and Zurich Building Guarantee, via which homebuyers can sometimes make claims where new homes have defects. However, the scope of insurance cover is limited by the relevant policy terms as discussed at paragraphs 6.37 – 6.53 in the main report.
- H.2.10 Despite attempts to make the court process easier and more efficient, it remains an expensive and lengthy course of action, requiring the help of well trained specialists (for example solicitors and barristers).⁷

⁴ Miller v Minister of Pensions [1947] 2 ALLER 372. See also the Civil Evidence Act 1968 and the Civil Evidence Act 1995.

⁵ Hornal v Neuberger Products Ltd [1957] 1 QB 247, [1956] 3 ALLER 970, CA Miles v Cain [1989] Times, 15 December and the R (N) v Mental Health Review Tribunal (2006) QB 468.

⁶ Murphy v Brentwood DC [1991] AC 398 and Henderson v Merrett Syndicates Ltd [1995] 2AC 145.

⁷ For more detailed information on the difficulties encountered by those who seek to take legal action without the help of a lawyer see 'Litigants in person unrepresented litigants in first instance proceedings' Department of Constitutional Affairs Research Series 2/05 March 2005 by Professor Richard Moorland and Mark Sefton of Cardiff University. The paper can be found on website address: www.dcs.gov.uk/research/2005/2_2005.pdf

H.2.11 The position was clearly set out in the 1996 'Access to Justice-Final Report' report by Lord Woolf.⁸ The report resulted in the making of the CPRs. Commenting on the results of a Supreme Court Taxing Office survey which was reproduced in the report and covered a broad cross section of civil claims Lord Woolf stated:

'The perception of clients remains, however, that cost is excessive and in many cases disproportionate and that the overall time taken is still too long and when the facts are examined it is clear this perception is far from being without foundation'.⁹

H.2.12 The survey concluded that it was only in relation to claims for more than £50,000 that the average combined costs of the parties were less than the claim value.¹⁰

H.2.13 Further, most cases had an overall duration of 20 to 35 months, although in the case of claims involving personal injury the median period was between 54 to 61 months, regardless of whether the case was simple, complex or legally aided.¹¹

H.2.14 Since the passage of the CPRs things have improved, but court action remains a daunting prospect for most people.

Scotland

H.2.15 There are some differences between the civil courts systems of England and Wales and Scotland.

⁸ 'Access to Justice-Final Report' by the Right Honourable the Lord Woolf, Master of the Rolls, July 1996. Final Report to the Lord Chancellor on the Civil Justice system in England and Wales is on the Department of Constitutional Affairs (now the Ministry of Justice) website address: www.dca.gov.uk/civil/final/contents.htm.

⁹ Section II Chapter 1 paragraph 10 of the 'Access to Justice- Final Report'.

¹⁰ Section II Chapter 1 paragraph 11 of the 'Access to Justice- Final Report'.

¹¹ Section II Chapter 1 paragraph 13 of the 'Access to Justice- Final Report'.

H.2.16 For example, in Scotland, civil cases can be held in the Sheriff Courts with rights of appeal to the Court of Session in Scotland and the House of Lords.

H.2.17 Examples of legislation which govern the court systems include the Sherriff Court Rules and the Sherriff's Courts (Scotland) Act 1971 which set out the procedures that apply to those Courts.

Northern Ireland

H.2.18 The civil courts system is similar to that of England and Wales. In Northern Ireland cases can be heard in the Northern Ireland county courts and high courts, with rights of appeal to the Court of Appeal in Northern Ireland and the House of Lords.

H.2.19 Northern Ireland civil courts are also governed by a number of statutes, including the Rules of the Supreme Court (Northern Ireland) 1980 S.R 1980 No.346 and the County Court (Northern Ireland) Order 1980 S.R 1980 No .397 (N.I.3).

H.3 ALTERNATIVE DISPUTE RESOLUTION

H.3.1 To reduce their workload courts have encouraged the use of ADR in the public and private sector to settle disputes. Rule 1.1 of the CPRs provides that the CPRs is a procedural code with the overriding objective of:

- Ensuing parties are on an equal footing
- Saving expense
- Dealing with a case in ways that are proportionate
- Ensuring a case is dealt with expeditiously and fairly
- Allotting an appropriate share of court resources to a case

H.3.2 To ensure compatibility with the overriding objective, rule 1.4 of the CPRs provides that a court must actively manage cases which can include: 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure...'.¹²

H.3.3 There are even instances (albeit limited) where a court can make an order for costs against a party who has unreasonably refused to go to ADR.¹²

H.3.4 The effect of all this is that although resorting to ADR is not compulsory¹³ it is more encouraged than ever before.

¹² See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and 1.W.L.R. 3002, CA and *Hickman v Blake Lapthorn* [2006] EWHC 12.

¹³ Rule 1.4(2) of the CPR does not allow the court to compel parties to enter into ADR. Such compulsion could be a breach of article 6 of the European Convention on Human Rights 1950. See *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and 1.W.L.R. 3002, CA.

H.3.5 This has been endorsed by the Community Legal Service which is managed by the Legal Services Commission, which produced an information leaflet listing leading ADR providers.¹⁴

H.3.6 There are broadly five types of ADR style.

- Adjudication. An adjudicator is an independent third party who seeks to resolve a dispute objectively and speedily. They make a decision which can be subject to appeal by arbitration or court action
- Arbitration. An arbitrator is an independent third party who either sitting alone or with a panel of arbitrators can preside over a hearing between the parties and make binding determinations. The determinations are often subject to limited rights of appeal to a court
- Mediation. A mediator is also an independent third party who gives an assessment of the strength of the parties' cases and through structured negotiation tries to help them achieve a settlement. Often the mediator will put together the terms of a settlement. It is a flexible and informal process. Mediation is usually confidential in nature and carried out on a without prejudice basis¹⁵
- Conciliation. This is similar to mediation, but where the independent third party takes a more interventionist role, for example, by arranging face to face negotiations which can lead to a settlement. Also it is the parties rather than the conciliator who forge the terms of any settlement. As with mediation the process it is flexible and

¹⁴ See CLS Direct Information Leaflet 23 'Alternatives to Court Dealing with problems without going to court.' November 2007 on the CLS website address: www.clsdirect.org.uk.

¹⁵ CPR 2.2 Glossary states that 'without prejudice' means that the circumstances in which the content of settlement negotiations may be revealed to a court are restricted. See also *Woodard v Eastern Counties and London and Blackwall Rly Co* (1855) 1 Jur NS 899; *Kurtz & Co v Spence & Sons* (1887) 57 LJ Ch 238 at 241; *Walker v Wilsher* (1889) 23 QBD 335 at 337, CA; and *Re River Steamer Co, Mitchell's Claim* (1871) 6 Ch App 822 at 831.

informal, as well as confidential and carried out on a without prejudice basis¹⁶

- Ombudsman and redress type schemes. These also involve an independent third party to whom written complaints are submitted. The third party investigates the complaints and makes non-binding recommendations or binding decisions. These are sometimes subject to limited rights of appeal in court

H.3.7 The most commonly used ADR mechanisms in relation to property based disputes, including those involving new homes are arbitration, adjudication and ombudsman and redress type schemes. Although the courts have ordered mediation where it is seen as appropriate.¹⁷

¹⁶ Ibid

¹⁷ Cable and Wireless v IBM United Kingdom Ltd [2002] EWHC 2059.

H.4 ADJUDICATION AND ARBITRATION

H.4.1 Adjudication and Arbitration are ADR systems which have a long history of use in resolution of mainly construction disputes, although they can be used in other types of dispute.

Adjudication

H.4.2 Adjudication is a form of ADR often used in the construction sector, especially in relation to payment disputes.¹⁸ Its main selling point is that it can be used as a speedy mechanism for resolving construction disputes especially in relation to issues that have occurred on the site of construction works. It has been given statutory recognition by the Housing Grants, Construction and Regeneration Act 1996. If the parties in dispute agree with an adjudicator's decision the matter can be settled quickly, if not, the decision will be an interim one which can be enforced pending a final determination by an arbitrator or a court.

H.4.3 The use of adjudication in construction disputes will usually have been agreed as a term in a construction contract. However, since 1 May 1998¹⁹ there is a right to refer any dispute relating to a construction contract to adjudication at any time under section 108 of the Housing Grants, Construction and Regeneration Act 1996.²⁰

H.4.4 The policy behind the 1996 Act is 'pay first, argue later'²¹ with a view to ensuring all those engaged in construction works are paid when they

¹⁸ Section 108(1) of the 1996 Act provides that for the purpose of referring a dispute under a contract for adjudication 'dispute' includes 'any difference' between the parties.

¹⁹ Article 1(2) Housing Grants Construction and Regeneration (England and Wales) (Commencement No.4) Order S.I.1998/650 states that section 108 came into force on 1 May 1998.

²⁰ Section 108 Housing Grants, Construction and Regeneration Act 1996 and Article 1(2) Housing Grants Construction and Regeneration (England and Wales) (Commencement No.4) Order S.I.1998/650 which states that section 108 came into force on 1 May 1998.

²¹ Tally Wiejl (UK) Ltd v Pegram Shopfitters Ltd [2003] EWCA Civ 1750 and RJT Consulting Engineers v DM Engineering (Northern Ireland) Ltd [2002] EWCA Civ 270.

should be and/or other concerns are resolved, enabling the completion of the works on time.

- H.4.5 One of the results of the 1996 Act is that adjudication is now provided for in many of the standard form building contracts produced by the Joint Contracts Tribunal Limited.²²
- H.4.6 Despite its advantages, for a number of reasons, most homebuyers and self build homebuyers are unlikely to have access to the adjudication process created by the 1996 Act. First, a major barrier to the benefits of the 1996 Act adjudication process for homebuyers and self build homebuyers is section 106 of the 1996 Act. This provides that the 1996 Act does not cover: 'a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence.' A dwelling includes a house and a flat.
- H.4.7 The end result of all this is that, homebuyers and self build homebuyers do not have an automatic statutory right to insist on adjudication of a construction dispute which may affect the completion or repair of their new home. As such, if adjudication occurs between a homebuilder, contractor or others involved in the construction of a new home no one is obliged under the 1996 Act to take account of the homebuyer's interests.
- H.4.8 Also, sections 104 and 108 of the 1996 Act state that the right to refer to adjudication applies to 'construction contracts' which involve 'construction operations. Section 105 defines 'construction operations' as including building, surveying, architectural and engineering works.

²² The Joint Contracts Tribunal Limited is a specialist body that provides standard form contractual agreements in the construction industry. It has a number of members which include the Royal Institute of British Architects, the Royal Institute of Chartered Surveyors, the Scottish Building Contracts Committee and the Royal Society of Ulster Architects. For more information on the Joint Contracts Tribunal Limited see website address: www.jctltd.co.uk/

H.4.9 Contracts of sale between homebuilders and homebuyers do refer to building works, especially in the case of a new home which has yet to be built, so it is arguable they do refer to 'construction operations'. The position is easier where self build homebuyers have directly engaged contractors and sub-contractors. The contracts they make are more likely to be 'construction contracts' relating to 'construction operations.'

H.4.10 However, not all works are recognised as 'construction operations' which can be referred to adjudication under the 1996 Act. For example, a dispute about the supply and installation of lighting to a building may be a dispute about a 'construction operation' within a construction agreement, which can be adjudicated upon. However, under the same contract the supply of spare lights or fittings for that installation to cover for wear and tear may not be. Much will depend on the way the contract has been drafted.²³

H.4.11 Even if these obstacles did not exist there are others which would restrict the use of adjudication for homebuyers. Adjudication under the 1996 Act is not free. An adjudicator's fees and expenses must be paid by the parties on agreed terms. Costs may increase if the parties have agreed to pay for expert assistance or legal advice to the adjudicator. Parties usually bear their own costs which can be on a 50/50 basis. However, an adjudicator's findings may be such as to allow them to order one party to pay all costs.

H.4.12 Further, although section 108 of the 1996 Act provides that a party can refer a dispute to adjudication at 'any time', there is case law that indicates that an adjudicator can take into account the time limits set by

²³ See *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd* [2001] BLR 407 where the court held that the installation of shop fittings was not a 'construction operation' and *ABB Power Construction Ltd v Norwest Holst Engineering Ltd* [2001] 17 Con LJ246 where the court held that the installation of insulation to clad pipework was not a 'construction operation'.

the Limitation Act 1980 as amended by the Latent Damage Act 1986, when determining whether there is a dispute to consider.²⁴

H.4.13 The effect of this may be that homebuyers with claims that are old enough to exceed the time limits for court action under the 1980 and 1986 Acts (for example claims which are limited to 3²⁵, 6²⁶, 12²⁷ and 15²⁸ years respectively) could potentially be denied the right to adjudication.

H.4.14 Further, it has been claimed that some adjudication decisions are too easily upheld by the courts, even if they contain errors of judgment. However, this has been countered by the view expressed in many legal judgments that given that adjudication is run on a tight timetable and, as a result, adjudicators cannot always deal with cases as thoroughly as they would like, an adjudication decision cannot be criticised or set aside by a court even if there are errors.²⁹

H.4.15 It has also been argued that even if homebuyers were to have access to adjudication they would have little or no experience of the construction

²⁴ Connex South Eastern Ltd v MJ Building Services Group PLC [2005] BLR 201.

²⁵ Section 11 of the Limitation Act 1980 provides that actions that concern personal injury claims in negligence, nuisance or breach of duty must be taken within 3 years from the accrual of the cause of action, which may be the date the injury was sustained or the plaintiff became aware of the cause of action accrued or the date the plaintiff became aware of that the injury was caused by negligence etcetera.

²⁶ Section 2 of the Limitation Act 1980 provides that actions that concern claims arising from the tort of negligence (other than those concerning personal injury or fatal accidents) must be taken within 6 years from the date the cause of action accrued, which could be from when there is damage to a new home caused by negligence.

²⁷ Section 170 of the Limitation Act 1980 provides that legal action arising from a contract sealed as a deed must be taken from within 12 years from the date the cause of action accrued, which may be when the contract was breached.

²⁸ Sections 14B of the Limitation Act 1980 provides that legal action relating to claims of latent damage caused by negligence must be taken within 15 year from the date on which the negligent act or omission occurred.

²⁹ Bouygues UK Ltd v Dahl-Jensen UK Ltd [2000] BLR 522.

industry and as such they may be unable to present their case advantageously in the face of experts on the other side.³⁰

H.4.16 In certain quarters the lack of access for homebuyers to adjudication under the 1996 Act and its other problems are seen as unfair on the homebuyer.³¹ This unfairness is all the more significant given the simple nature of the procedure, which appears to be tailor made for building disputes.

H.4.17 Its simplicity is reflected in section 108 of the 1996 Act which provides that when a construction contract gives parties the right to refer disputes 'arising under the contract' to adjudication the contract must:

- Enable a party to a dispute to give notice of their intention to refer the matter to adjudication.
- Provide a timetable with the object of securing the appointment of an adjudicator and referral of the dispute to them within seven days of such notice.
- Require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties.
- Enable the adjudicator to extend the 28 day period for decision by a further 14 days with the consent of the party who referred the dispute.
- Impose a duty on the adjudicator to act impartially.
- Allow the adjudicator to take the initiative in ascertaining the facts and the law.

³⁰ See paragraphs 18.422 and 18.423 of 'Construction Contracts Law and Practice' by Richard Wilmot-Smith QC. See also article by Paul Newman and Hugh James 14(7) CLJ 29.

³¹ See comments in paragraph 18.68 of 'Construction Contracts Law and Practice' by Richard Wilmot-Smith QC.

- Provide that the adjudicator's decision will be binding and final if the parties agree, or provide that the decision is an interim one subject to final determination by litigation, arbitration or agreement.
- Provide that the adjudicator and any employee or agent of theirs will not be liable for anything done or omitted whilst carrying out their functions unless the act or omission is in bad faith.³²

H.4.18 Section 108(5) of the 1996 Act provides that if the contract does not cover these matters then the adjudication provisions of the Government Scheme for Construction Contracts (SI 1998/649) will apply to it. This sets out a more detailed framework which the parties can adopt in the absence of a contractual provision.³³

H.4.19 A named adjudicator can be agreed by the parties or nominated by a body that has a panel of respected adjudicators. Examples of those bodies include the Centre for Dispute Resolution; the Chartered Institutes of Arbitrators, Surveyors or Architects; the Institute of Civil Engineers; and the Technology and Construction Court Solicitors Association.

H.4.20 An adjudicator has wide powers of investigation to enable them to reach a decision. These include:

- To require the parties to provide documentation.
- To meet and question any of the parties and their representatives.
- To make site visits and carry out inspections and tests.
- To appoint experts.

³² This list of matters can be found in sections 108(1)-(4) of the 1996 Act.

³³ For example, regulation 1 provides that any party to a construction dispute can give written notice of their intention to refer a dispute to adjudication. However the notice must include certain matters, for example, the nature and a brief description of the dispute and of the parties involved.

H.4.21 As with the civil courts the standard of proof required in adjudication is to satisfy the balance of probabilities test.³⁴

H.4.22 Further, an adjudicator can order a number of remedies including:

- The payment of money within a specified period. Unlike other ADR mechanisms, there are no limits on the amount of money a 'guilty party' can be required to pay.
- A declaration of the party's legal rights.
- Opening, revising and reviewing a decision made or certificate issued by anyone referred to in the construction contract, unless it is stated that such decision or certificate is final and conclusive.

Scotland and Northern Ireland

H.4.23 The 1996 Act's provisions on adjudication also apply to Scotland.³⁵ There is similar law on adjudication in Northern Ireland.³⁶

Arbitration

H.4.24 Arbitration is also used in construction disputes as a means of resolving disputes. However, since 1 May 1998 it is not used as much as it used to be because of the increased popularity of adjudication in the industry. However, adjudication decisions can be appealed via arbitration proceedings. As a result, many construction contracts still have clauses which provide for arbitration.³⁷

³⁴ See *Miller v Ministry of Pensions* [1947] 2 ALLER 372 and *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. See also the Civil Evidence Act 1968 and Civil Evidence Act 1995.

³⁵ See section 148 of the Housing Grants Construction and Generation Act 1996.

³⁶ See the Construction Contracts (Northern Ireland) Order 1997 S.I.1997/274 (N.I.1) and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 S.R.1999 No.32.

³⁷ See section 7 of the Joint Contracts Tribunal Limited Minor Works Building Contract.

H.4.25 As with adjudication, it is unlikely that arbitration for a construction dispute will be available for a homebuyer or self build homebuyer. As an adjudicator's decision under the 1996 Act can be appealed via arbitration, a homebuyer and self build homebuyer is unlikely to have any access to it. This is because (for the reasons mentioned above see paragraphs H.4.6 – H.4.10) they will have had no access to the adjudication process in the first instance.

H.4.26 Even if arbitration on a construction dispute were not connected to the 1996 Act it is unlikely that a homebuilder will have access to it. As mentioned above, homebuilders are usually not parties to construction contracts as such they would not have a right to enforce any adjudication and/or arbitration provisions in such contracts. Subject to the problems of the 1996 Act (see paragraphs H.4.6 – H.4.10 of this Annexe), a self build homebuyer's ability to access arbitration may be easier if they are a party to a construction contract by which they have engaged a contractor or others involved in the construction process, because they are supervising the construction works, especially if the arbitration is not linked to an adjudication decision made under the 1996 Act.

H.4.27 The perceived advantages of arbitration were expressed in a 2001 press release on a proposed Scottish Arbitration Bill by the Scottish Council for International Arbitration (SCIA) and the Chartered Institute of Arbitrators (CI Arb):

‘Disputes referred to Arbitration are a private matter between the parties. This means that the burden of work on the Courts can be reduced. Costs do not impinge on the public purse, and the parties to a dispute pay for the Arbiter, who should be technically qualified in the subject matter. Resolution of disputes can be speedier; since there is no waiting for Court time, and importantly for many companies, they can be resolved in private’.³⁸

³⁸ SCIA & CI Arb Scottish Branch completed draft of New Scottish Arbitration Bill. See website address www.scia.co.uk/News.htm.

H.4.28 However, arbitration also has its critics. See for example the following in a Construction Update of May 2006 where the following view was expressed:

'Over the years arbitration became as formalised, lengthy and expensive as litigation. In fact arbitration became even more expensive than litigation in that parties have to pay the arbiter's fee and venue hire....'.³⁹

H.4.29 The way an arbitration is run is governed by the terms of the relevant contract, the Arbitration Act 1996 (the Act 1996) and the arbitrator.

H.4.30 No arbitration is the same. The procedure can vary from a short oral hearing to a full blown 'court hearing' with interlocutory stages⁴⁰ in between. Much depends on the nature of the dispute and such factors as the amount of money involved, the issues in dispute and whether there is a need for expert witnesses.

H.4.31 Section 82 of the 1996 Act provides that arbitration can cover any difference between the parties, which need not be contractual. Typical examples in a construction contract include disputes over defective work, financial loss that may have resulted from it, and the failure to meet deadlines.⁴¹

H.4.32 An arbitrator is usually someone agreed by the parties or if there is no agreement someone nominated by the same professional bodies that nominate adjudicators.

H.4.33 Arbitrators are empowered to make a variety of decisions. Examples include requiring the 'guilty party' to:

- Pay money 'to the innocent party' in any currency

³⁹ See 'Litigate or Arbitrate (or Neither)' Construction Update May 2006 www.bellscott.co.uk/contents/eupdates/constructlawupdate.htm.

⁴⁰ An intermediate hearing or meeting during the course of an arbitration which may determine procedures or an issue but does not conclude a case.

⁴¹ See *Amec Civil Engineering v Secretary of State for Transport* [2005] EWCA Civ 291.

- Do or not do something
- Rectify, set aside or cancel a deed or other document

H.4.34 Interestingly, section 48(5) (b) of the 1996 Act provides that an arbitrator can order specific performance of a contract, but he cannot do so for a 'contract relating to land'. One of the reasons for this is that there may be difficulties in attempting to enforce such an order in respect of land, against a party who has an interest in that land, but is not a party to the arbitration.⁴²

H.4.35 Like adjudication, there are no limits on the amount of money a 'guilty party' can be required to pay.

H.4.36 Also arbitration is not free. Section 59 of the 1996 Act provides that the cost can be made up of the reasonable fees and expenses of the arbitrator, as well as legal and other costs of both parties. They can be agreed by the parties or determined by the arbitrator. There are some limits. Section 65 of the 1996 Act provides that an arbitrator has the power to cap costs, unless the parties do not want that.⁴³

H.4.37 There are restrictions on challenging an arbitrator's decision. Section 58 of the 1996 Act provides that a decision by an arbitrator is binding on both parties and any person 'claiming through or under them'.

⁴² See 'An introduction to International Commercial Arbitration' by Geoffrey M Beresford Hartwell a Chartered Engineer and International Arbitrator Mediator and Adjudicator on website address: www.hartwell.demon.co.uk/. Also see 'Can an arbitrator always order specific performance?' By James Behrens in Issue 6 of the Serle Chambers Quarterly Newsletter at website address: www.serlecourt.co.uk/Resources/Newsletters.aspx

⁴³ See 'A Guide to Arbitration' by the Royal Institute of Chartered Surveyors states that arbitration is quicker and cheaper than going to court. There are no guidelines on the level of fees that an arbitrator can charge. The RICS is precluded by law (for example the Competition Act 1998) from setting or recommending fees. The guide is on the RICS website: www.rics.org/Services/Disputeresolution/EnglandandWales/ .

H.4.38 Section 69 of the 1996 Act provides that there is a limited right of appeal to the court on a point of law, which cannot be exercised unless the parties agree or the court gives permission.

H.4.39 The latter is not easy to achieve. It would have to be shown that:

- There is a question of law that could 'substantially' affect the rights of one or both parties
- The arbitrator's decision is 'obviously wrong', or raises an issue of public importance, or 'open to serious doubt'. Both are high hurdles to jump⁴⁴

H.4.40 Like civil court action and adjudication the commencement of arbitration proceedings is subject to the time restrictions in the Limitation Act 1980 and the Latent Damage Act 1986. (See paragraphs H.4.12 to H.4.13).

Scotland and Northern Ireland

H.4.41 The 1996 Act applies to all arbitrations in England, Wales and Northern Ireland. The law in Scotland has some similarities but there are key differences.

H.4.42 First, arbitrators are referred to as arbiters in Scotland. Second, there is no statutory definition of arbitration in Scotland. It is mainly governed by common law.⁴⁵ This has meant that arbitration procedure and decisions in Scotland are more likely to be affected by the twists and turns of court judgments and the details of the relevant contract. For example, a Scottish arbiter has no inherent power to award damages unless agreed by the parties in contract. However, there is usually provision for this and the ability of the arbiter to make other financial determinations in

⁴⁴ See *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtsgesellschaft mbH & Co* 2003] 1 WLR 1015.

⁴⁵ See *Sanderson & Son v Armour & Co Ltd* [1992] S.C. (H.L) 117 and *Scrabster Harbour Trust v Mowlem plc trading as Mowlem Marine*, Case No [2006] CSIH 12, First Division, Inner House, Court of Session.

disputes has been recognised in standard building contracts used in Scotland for construction works.⁴⁶

H.4.43 The result of all this is that the extent to which a Scottish homebuyer or self build homebuyer may recover financial and other losses caused by a contractor may also depend on the extent to which they can access the terms of the relevant construction agreement.

H.4.44 Also it is difficult to challenge an arbiter's decision even if it is based on an error of law or fact, because Scottish courts are very reluctant to intervene in arbitration proceedings.⁴⁷

H.4.45 There is some Scottish legislation on arbitration but it is very dated and limited in application. For example, the Scottish courts have a limited right to appoint an arbiter under the Arbitration (Scotland) Act 1894 (for example, where parties to an agreement cannot agree on a nominated arbiter and there is no procedure by which the stalemate can be resolved).⁴⁸

H.4.46 In their 2001 Press Release SCIA and CIArb condemned the state of Scottish arbitration law in these terms:

⁴⁶ See for example, clauses in 41B of the Scottish Building Contract with Quantities (August 1998 and 2005).

⁴⁷ See *West v Secretary of State for Scotland* [1992] S.L.T 636; *Anisminic v Foreign Compensation Commission* [1969] 2.A.C. 147; and where the courts have held that any tripartite decision making process including arbitration can be subject to judicial review. However, the courts are reluctant to intervene. See for example Lord Jauncey in *O'Neill v Scottish Joint Committee for Teaching Staff* [1987] S.L.T 648 who said of that committee's decisions: 'If the decision is based on a gross error of law it cannot be interfered with.'

⁴⁸ See *Sanderson & Son v Armour & Co Ltd* [1992] S.C. (H.L) 117 and *Scrabster Harbour Trust v Mowlem PLC trading as Mowlem Marine*, Case No [2006] CSIH 12, First Division, Inner House, Court of Session

It is impenetrable and inaccessible, buried in old statutes and in long out of date court decisions, many of them from the nineteenth century and earlier.⁴⁹

H.4.47 To ease the problem SCIA and CIArb created the Scottish Arbitration Code (sometimes referred to as the Scottish Arbitration Rules). The Code is well respected but is focused on commercial arbitrations.⁵⁰

H.4.48 The SCIA and the CIArb also set up a Joint Working Group chaired by Lord Dervaird to lobby for and prepare a new Arbitration Bill for Scotland. A draft version was produced in 2001 but little progress was made. This was because of the increased use of the Code which appears to have been 'universally' accepted in Scotland and has indirectly achieved the aim of the draft Bill, to provide a standard approach to arbitration procedure.⁵¹ Also there has been a lack of time in the Scottish Parliament to take on new legislative initiatives.⁵²

⁴⁹ SCIA & CIArb Scottish Branch completed draft of New Scottish Arbitration Bill. See website address www.scia.co.uk/News.htm.

⁵⁰ SCIA & CIArb Scottish Branch completed draft of New Scottish Arbitration Bill. See website address www.scia.co.uk/News.htm for the latest version of the Code.

⁵¹ SCIA & CIArb Scottish Branch completed draft of New Scottish Arbitration Bill. See website address www.scia.co.uk/News.htm.

⁵² See 'Litigate or Arbitrate (or Neither)' Bell & Scott Construction Update May 2006 www.bellscott.co.uk/contents/eupdates/constructlawupdate.htm.

H.5 OTHER ALTERNATIVE DISPUTE RESOLUTION SCHEMES

H.5.1 The ADR schemes considered below operate various forms of adjudication, mediation and conciliation. Most have been created as a result of:

- The making of an increased amount of legislation to regulate those who provide services to homebuyers in the entire property market
- Increased court awareness, confidence and encouragement to access ADR schemes
- Increased public awareness and confidence in the use of ADR

H.5.2 A number of ADR schemes have been created in the wake of the increased regulation of estate agents and surveyors.

H.5.3 For the regulation of estate agents the key statutes are the Estate Agents Act 1979 as amended by the Consumers, Estate Agent and Redress Act 2007 (CEAR Act 2007) and their supporting Regulations. Section 23A of the 1979 Act requires all those engaged in estate agency work to be members of an independent approved redress scheme. The scheme must cover disputes between estate agents and buyers or sellers of residential property.⁵³

H.5.4 For a scheme to operate it must be OFT approved.⁵⁴ Further, there are no limits on the numbers of schemes that can obtain such approval.

H.5.5 In deciding whether to give approval the OFT must be satisfied that a number of requirements are met. Some are listed in paragraphs 2 to 8 of Schedule 3 of the 1979 Act. Examples include that the scheme makes satisfactory provision:

⁵³ Similar provision is made in relation to redress schemes for HIP complaints against estate agents. See the Housing Act 2004 and the Home information Pack (Redress) Scheme (No.2) Order 2007.

⁵⁴ See paragraph 1 of Schedule 3 of the Estate Agents Act 1979.

- Allowing complaints to be made about non-compliance with a code of practice or other document
- Ensuring the right type of redress is available to consumers, ranging from the right to an apology and explanation for mistakes to the right to the payment of compensation
- Ensuring the interests of consumers are met

H.5.6 In addition, in the 'OFT approval of estate agents redress schemes Criteria-final- April 2008' the OFT provided detailed guidance on the criteria that must be met for its approval of an estate agents redress scheme. Broadly, examples of the criteria include:

- That the ombudsman scheme be independent
- The scheme must be adequately staffed and funded
- The scheme must demonstrate its ability to attract and retain a sufficient number of potential members to ensure it is viable
- The scheme must be easily accessible to those entitled to use it
- Members of the scheme should be required to have an effective internal complaints procedure
- The complainants must be informed that the ombudsman's decision will not be legally binding on them and they will have the power to accept or reject it
- The complainant must also be kept informed of what their alternative or additional actions could be at each stage of the process
- The scheme must make provision for dealing with all types of complaints within reasonable timescales
- The scheme's operation and procedures must be transparent

- There must be free exchange of information between the parties relating to a complaint
- There must be a range of awards which take account of the level and type of detriment caused
- The scheme must ensure that decisions are implemented
- Membership requirements to join the scheme must be fair

H.5.7 The Housing Act 2004 and the Home Information Pack (Redress) Scheme (No.2) Order 2007 also provide that estate agents and surveyors who provide home information packs (HIP) services must be members of redress schemes that deal with complaints about the provision of services relating to HIPs.

H.5.8 HIP redress schemes must be approved by the Secretary of State for Business, Enterprise and Regulatory Reform (BERR). Again, there can be more than one approved scheme.

H.5.9 A number of schemes have emerged which homebuyers can use to complain about estate agents and/or others who provide HIP services. There are also schemes by which homebuyers can complain about private property search firms they or their solicitors or licensed conveyancers may have engaged during the homebuying process. Some have been approved by the OFT and BERR. Key examples, which will be discussed below, are:

- Ombudsman for Estate Agents (the OEA)
- The Surveyors Ombudsman Service (SOS)
- The Independent Property Codes Adjudication Scheme (IPCAS)

H.6 THE OMBUDSMAN FOR ESTATE AGENTS

- H.6.1 If during the course of a new home purchase an estate agent is used to market its sale or provide a HIP, a complaint about the quality of the service provided by the estate agent can be made to the OEA.
- H.6.2 The OEA was created in 1998,⁵⁵ however in June 2008 it was formally approved by the OFT as a redress mechanism under the CEAR Act 2007.⁵⁶ It had already received approval from BERR for dealing with complaints about HIP related services under the Housing Act 2004.⁵⁷ It is an independent scheme whereby an ombudsman reviews and makes determinations about complaints against estate agents. It is funded by its members, most of whom are estate agents. As a result it is free for homebuyers.
- H.6.3 Membership of the scheme is open to all firms with a principal, director or partner who is member of the National Association of Estate Agents or the Royal Institute of Chartered Surveyors (RICS).
- H.6.4 Membership of the OEA is extensive. It covers approximately two thirds of the 12,000 estate agent branch offices in the UK.⁵⁸
- H.6.5 The OEA is administered by the Ombudsman for Estate Agents Limited which is a private not for profit company limited by guarantee and supervised by an independent OEA Council. The Council's members come from industry. The OEA reports to the Council which also reviews the OEA's budget and expenditure.
- H.6.6 In terms of the provision of estate agency services the OEA can deal with complaints where a homebuyer has lost money or suffered stress because an estate agent has:

⁵⁵ See the OEA website address: www.oes.co.uk

⁵⁶ See OFT Press release on OFT website address: www.of.gov.uk/new/press/2008/75/08

⁵⁷ See OFT and BERR Press release on BERR website address:
www.berr.gov.uk/consumers/business/estate-agents/ea-redress/page39503.html

⁵⁸ OEA press release dated 25 October 2007 states the OEA scheme has 11,816 estate agency branch members. See OEA website address: www.oea.co.uk/press_releasses_07.htm

- Breached the 1979 Act
- Breached the 'OEA Code of Practice for Residential Estate Agents'
- Breached HIPS legislation and/or Codes of practice
- Treated the homebuyer unfairly
- Been guilty of maladministration (for example undue delay)

H.6.7 The OEA will not deal with complaints where:

- The estate agent is not a member of the OEA scheme or the events to which the complaint relates happened before the agent became a member
- The homebuyer is not a private individual or the property is commercial
- The matter has been resolved in court or a similar body
- The complaint is about a survey or some form of valuation of the homebuyer's property
- The complaint is older than 12 months
- The claim made is for more than £25,000 in compensation

H.6.8 The basic procedure is that a homebuyer must make a written complaint within 12 months of the events which led to it. Before submitting a complaint to the OEA the homebuyer must initially complain to the estate agent direct, via the firm's internal complaints procedure, if there is one. If that is unsuccessful then they can approach the OEA. The approach must be in writing and the OEA has a standard complaint form that can be completed and sent with copies of all relevant documents by the homebuyer.

H.6.9 On submitting a complaint to the OEA the homebuyer must explain the events that led to the dispute, the reasons for it and the remedy they want.

H.6.10 A caseworker will review relevant complaint documents, including those which contain the findings of the estate agent's internal complaints system, if there were any. The caseworker has the right to request documents from the homebuyer and estate agent. They can also obtain oral evidence if they consider it appropriate.

H.6.11 Once a caseworker makes an assessment of the case they can refer the matter to both parties for further representations. A final assessment is then passed to the OEA for a further review. Once the OEA has conducted the further review, the OEA can uphold or reject a complaint or suggest a form of settlement. In carrying out the further review the OEA is largely guided by the following:

- Whether the estate agent breached the OEA Code of Practice
- Whether the estate agent fell short of a number of basic principles, for example, that their primary responsibility at all times when providing an estate agent service was with their client, that they have a legal obligation to forward all offers received for a home and that offers are accepted 'subject to contract' and both the homebuyer and seller can re-negotiate the price or any conditions of sale

H.6.12 For a complaint to be upheld the OEA must receive evidence which supports the homebuyer's complaint that an estate agent's act or omission has caused a homebuyer to suffer:

- Actual financial loss; and/or
- Undue and avoidable stress and inconvenience over and above the norm

H.6.13 If the OEA decides to uphold a complaint it can make a variety of decisions. These can range from requiring an agent to make a written apology or requiring the payment of compensation of up to £25,000. Prior to the OEA formally issuing the decision to uphold the complaint the estate agent and the homebuyer are given an opportunity to make representations. The OEA can take these into account and amend the

decision if necessary. If the homebuyer is unhappy with the decision they can reject it and challenge it by the means mentioned below, but in doing so they will lose the benefit of the decision.

H.6.14 If the OEA does not uphold a complaint a homebuyer can initially challenge the decision on the basis that the OEA has made a 'significant error in fact' or that 'significant new evidence' is available. If the OEA does not change its decision and the homebuyer remains unhappy then the homebuyer can take court action to resolve their complaint (for example they may try to judicially review the OEA's decision or sue the estate agent in court). This is not an easy route to take as courts are reluctant to overturn the findings of ombudsmen.⁵⁹

H.6.15 The OEA is a successful and respected form of ADR. However, there may be problems in terms of access and redress for a homebuyer.

H.6.16 First, in relation to complaints about estate agency work, a homebuyer will have no access to the OEA scheme if the purchase of their new home did not involve an estate agent who was a member of the scheme.

H.6.17 Second, they will have no access to the scheme if their claim is more than 12 months old. This may seem a short period given that courts can deal with breach of contract or tort claims that are much older than that.

H.6.18 Third, the OEA's £25,000 ceiling on compensation may cause problems. If, as a result of an estate agent's misconduct, a homebuyer paid a premium price⁶⁰ for their new home which exceeded its true market value they may have difficulty recovering all the money they have lost even if the OEA upholds their complaint, if the loss exceeds the ceiling amount.

⁵⁹ See *R (Siborurema) v OIA* [2007] EWCA Civ 1365.

⁶⁰ See Annex X – Glossary for meaning of price premium.

Scotland and Northern Ireland

H.6.19 The OEA scheme is available to homebuyers in Scotland and Northern Ireland.

H.7 THE SURVEYORS OMBUDSMAN SERVICE

- H.7.1 The SOS is an independent and new redress scheme created by RICS. On 18 July 2007 BERR approved the SOS scheme under the Housing Act 2004 for dealing with complaints about HIP related services provided by surveyors and estate agents who are members of the scheme. On 15 August 2008 the OFT also approved the SOS redress scheme for dealing with complaints against estate agents under the CEAR Act 2007.⁶¹
- H.7.2 As with the OEA, SOS provides a free service funded by its members. The members are made up of estate agents and surveyors who are members of RICS. The SOS is run by The Ombudsman Service Limited (TOSL) a private not for profit company limited by guarantee.
- H.7.3 With the help of TOSL, SOS is managed by a Council which consists of independent persons and industry members from the SOS's Surveyors Member Board. The Council's role is to agree the appointment of an ombudsman, ensure SOS's independence and review its performance and recommend any changes that need to be made in the way it works. The Surveyors Member Board is made up of RICS and non-RICS members. The Board is primarily responsible for the SOS funding and budget.
- H.7.4 The SOS procedure for dealing with complaints is broadly similar to the OEA scheme. A homebuyer must make a complaint to an estate agent or surveyor within 12 months of knowing there is a problem. If they do not, the SOS will not deal with the matter. Initially, once a complaint is submitted on time the homebuyer must follow the firm's internal complaints procedure with a view to trying to achieve settlement via its internal complaints system.
- H.7.5 If settlement is not achieved, the homebuyer can then pass the complaint to the SOS. This can happen in one of two ways:

⁶¹ See OFT Press release on OFT website address:
www.bellscott.co.uk/contents/eupdates/constructlawupdate.htm

- If the firm fails to resolve the problem within three months. For example, it fails to respond to the complaint or does not provide a solution which satisfies the homebuyer, the homebuyer has nine months within which to forward the matter to SOS
- If the firm responds to the homebuyer's complaint by sending a 'deadlock letter'⁶² that is a letter that says the firm cannot do anything for the homebuyer and that is its final position. Then the homebuyer has six months from the date of the letter to pass the matter on to the SOS

H.7.6 In order to pass the matter on to the SOS the homebuyer must submit their complaint in writing by completing and sending an SOS complaint form with copies of all relevant documents.

H.7.7 As well as not dealing with complaints that fall outside the 12 month period, the SOS will not deal with complaints:

- That would be better dealt with by the courts
- That relate to a service that is regulated by another body
- That should be dealt with by another ombudsman

H.7.8 Complaints must concern the way a firm or individual provides a surveying service. This means they can cover allegations of:

- Breach of legal obligations
- Unfair treatment
- Avoidable delays
- Failure to provide proper procedures

⁶² See page 9 of the SOS booklet 'Resolving Complaints fairly. Making a complaint to the Surveyors Ombudsman Service' on the SOS website address: www.surveyors-ombudsman.org.uk.

- Rudeness or poor or incompetent service

H.7.9 As with the OEA once a complaint is received and accepted by the SOS, the complaint and all copy documents provided by both sides are reviewed.

H.7.10 The SOS has extensive powers, including the right to disclose any documents to the homebuyer and the firm or individual, in order to complete the review and make a decision. The SOS also has the right to seek further documents and take information orally.

H.7.11 The SOS can try to settle a matter informally, where the parties have indicated a willingness to do so. If settlement is a non-starter then after the SOS has reviewed all paperwork the SOS can make a formal decision with reasons.

H.7.12 This is done by sending the homebuyer an initial decision for comment. The homebuyer has the right to submit:

- Further information in response but only if: '[the SOS] has made a significant error in fact which [had] a material effect' on his decision
- New evidence 'which will have a material effect' on the SOS's decision

H.7.13 Thereafter, the SOS will make a formal decision upholding or rejecting the homebuyer's complaint. If upheld, the SOS can require the firm or individual to:

- Pay up to £25,000 including valued added tax. for loss and expenses
- Pay up to £500 for stress and inconvenience
- Apologise for and/or explain its misconduct
- Change its procedures and policies

H.7.14 On signing up to the scheme the firm and the estate agent or surveyor concerned has agreed to be bound by any decision the SOS makes. It is

up to the homebuyer whether they choose to accept the decision. If they do not they lose the right to benefit from it. However, they can pursue other routes of challenge (for example court action).

Scotland and Northern Ireland

H.7.15 Since 1 June 2007 the SOS has dealt with complaints from Northern Ireland in relation to Chartered Surveyors. It has been able to deal with Scottish complaints about surveying since 1 October 2003. In both instances, the procedures are similar to those mentioned above.

H.8 THE INDEPENDENT PROPERTY CODES ADJUDICATION SCHEME

- H.8.1 Since 2007, IPCAS has provided an independent dispute resolution scheme which deals with disputes about the provision of services by private property search firms, for example, firms that are instructed by homebuyers to search for information on things like planning applications, road schemes, environmental risks, water supplies and sewer connections in relation to the purchase of new homes as part of the purchasing process. IPCAS is run by IDRS Ltd, a wholly owned subsidiary of the Chartered Institute of Arbitrators (CIA), in association with the Property Codes Compliance Board (PCCB).
- H.8.2 The PCCB was created in September 2006 to independently regulate private property search firms. In addition to helping the CIA create IPCAS, it also keeps a register of all firms subscribing to the Search Code of Practice which was sponsored by the Council of Property Search Organisations and monitors compliance with the code.
- H.8.3 IPCAS complaints are determined by nominated adjudicators. In the main, the conduct of the firm concerned is assessed by reference to relevant codes of conduct of which the Search Code is an example. Another example of a relevant code is the Association of Home Information Pack Provider's Code of Practice and the RICS Code of Conduct.
- H.8.4 As with the OEA and the SOS, the service is free to homebuyers. A homebuyer must initially use a search company's internal complaints procedure. If unhappy with the result, the homebuyer must make a complaint within three months of its last communication with the search company. All complaints must be made on the IPCAS Adjudication claim form, which must be supplied and endorsed by the search company.
- H.8.5 The form must explain the events that led to the complaint, the precise nature of the dispute, the grounds for claiming the remedy sought and it must give reasons for the amount of compensation claimed. As with the

OEA and SOS schemes, the form must be supported by copies of relevant documentation.

H.8.6 IPCAS will not deal with complaints:

- That involve complex issues of law
- That are part of an existing or previous court action unless that action is suspended or discontinued by agreement between the parties or by order of the court
- A complaint which involves an amount of more than £5,000, including any consequential damages and value added tax, for any one homebuyer

H.8.7 The complaint is allocated to an administrator who sends a copy of the form to the search company. The search company is given 14 days to produce a response or provide written confirmation that the complaint has been settled and details of the settlement. This period can be extended on request.

H.8.8 If the search company does not respond or does not respond on time an adjudicator is allocated to the case. An adjudicator who is appointed can determine the matter by considering only the information provided by the homebuyer.

H.8.9 If the firm does respond, the homebuyer will be given seven working days to comment on the response and provide further comment. In doing so, the homebuyer can only comment on points made in the search company's response, the homebuyer is not entitled to introduce new matters of evidence. However, with the written permission of the adjudicator both parties can make further comments during the adjudication process.

H.8.10 The adjudicator considers the complaint, the response and the homebuyer's comments. The adjudicator can contact the parties by any means and request further information. Failure to comply with an adjudicator's request for further information within the time they have

set means that they may determine the matter on the information they have to date.

H.8.11 The adjudicator will usually make a decision within six weeks of the application being made. The administrator will provide a copy to the parties.

H.8.12 The homebuyer has six weeks from the date the decision is issued to confirm whether or not they accept it. The decision is only binding if it is accepted by the homebuyer. The decision cannot be appealed.

H.8.13 As with the OEA and SOS, an adjudicator can decide that the search company must:

- Apologise or explain its action
- Take some practical action that will benefit the homebuyer
- Pay the homebuyer compensation

H.8.14 The search company must pay the costs of the administrator and the adjudicator, together with any case fees (for example the IPCAS Rules (2007 Edition) states that the adjudicators fees are £200 plus VAT per case). The homebuyer and search company must pay their own costs of preparing their cases and attending any conference or meeting that may result. They are not allowed to take any legal action to recover these costs.

H.8.15 If an adjudicator upholds a complaint under this scheme, the adjudicator can only award a maximum of £5,000, including any consequential damages and VAT, to a homebuyer. In the event of a complaint seeking compensation for inconvenience an award for up to £250 can be made.

H.8.16 The search company must pay any amount awarded by the adjudicator within four weeks of the homebuyer notifying acceptance of the adjudicator's decision.

Scotland and Northern Ireland

H.8.17 IPCAS scheme has registered search firms who are members from England, Scotland and Wales. But as yet it does not appear to have any registered search members from Northern Ireland.

H.9 DISPUTE MECHANISMS FOR STANDARD WARRANTY COVER

- H.9.1 There are standard terms and conditions for the resolution of homebuyer complaints in warranty and insurance cover agreements, like those provided by specialist warranty providers like the National House Building Council.⁶³
- H.9.2 The extent to which homebuyers' complaints will be resolved by a warranty provider will depend on the scope of the provider's warranty/insurance and the nature of the complaint. For example, most cover provides that no complaint can be made where it relates to defects that have arisen after an agreed period of cover (for example beyond 10 years).
- H.9.3 Providers are also reluctant to deal with complaints which in their view are not straightforward. Examples include contractual, financial and boundary disputes.⁶⁴
- H.9.4 Under the terms and conditions of a standard warranty a homebuilder will usually be responsible for rectifying defects or damage in the first two years, usually running from a date specified in the insurance certificate.⁶⁵ During that period homebuyers usually have to submit complaints directly to the homebuilder. Where a homebuilder has not responded to a complaint or has refused to rectify defects complaints may be accepted by the warranty/insurance provider's in-house 'resolution or claims' team.

⁶³ See 'NHBC Buildmark Your warranty and insurance cover' on website address: www.nhbc.org.uk.

⁶⁴ See for example pages 13 and 25 of 'NHBC Buildmark Your warranty and insurance cover' on website address: www.nhbc.org.uk.

⁶⁵ The insurance certificate for warranty cover is usually issued on the date of legal completion of the sale of the new home or in the case of Scotland on the date of entry by the homebuyer to the new home or when the new home is substantially completed in accordance with the provider's requirements.

- H.9.5 Complaints made during years 3 to 10 which usually run from the date specified in insurance certificate for the warranty issued can usually be submitted direct to the warranty provider's in-house resolution team. On receiving a complaint a warranty provider will usually notify the homebuilder seeking its views and relevant documents from both sides for review. Attempts may be made by the team to settle disputes between the homebuilder and homebuyer.
- H.9.6 Once the review is concluded the warranty provider will usually send a letter or report upholding or rejecting the complaint. If the complaint is upheld the provider will also set out what the homebuyer is entitled to receive in recompense. This can range from requiring the homebuilder to repair defects in line with the warranty/cover terms to the payment of financial compensation.
- H.9.7 If a homebuyer is unsatisfied with the results of the warranty provider's review they have a number of options. They can submit a complaint to arbitration, the courts or to the Financial Ombudsman Service (Financial Ombudsman).⁶⁶
- H.9.8 The Financial Ombudsman is a complaints scheme which was created by the Financial Services and Markets Act 2000 and has been in place since 1 December 2001.
- H.9.9 The Financial Ombudsman is funded by those who are subject to the Financial Services and Markets Act 2000. This includes firms which provide insurance or insurance mediation services. As a result most specialist warranty providers for new homes are regulated by and registered with the Financial Services Agency which is responsible for administering and enforcing the 2000 Act.
- H.9.10 The Financial Ombudsman is only able to deal with complaints about the warranty provider's insurance cover and mediation service. That means that the financial ombudsman's jurisdiction does not extend to dealing with complaints about the quality of building works, instead it is

⁶⁶ See the Financial Ombudsman Service Website address: www.financial-ombudsman.org.uk/

primarily concerned with the scope and implementation of insurance coverage in relation to those works and how complaints in relation to that coverage have been dealt with.

H.9.11 Like the OEA and other ADR schemes mentioned, the Financial Ombudsman's provides a free and independent service for homebuyers.

H.9.12 The Financial Ombudsman is administered by a company limited by guarantee. The powers and functions of the company are set out in the company's legal constitution.

H.9.13 As with the other schemes mentioned, Financial Ombudsman complaints must initially be sent to the warranty provider concerned with a view to resolution via the provider's in-house complaints system. A written complaint can be sent to the Financial Ombudsman if the provider sends a final response which does not satisfy the homebuyer or does not adequately respond to the homebuyer's complaint within eight weeks of it being made.

H.9.14 As with the other schemes mentioned, to initiate a complaint the Financial Ombudsman has a complaint form which can be completed by a homebuyer and sent to the Financial Ombudsman with relevant copy documents. The form enables the homebuyer to explain the background of the complaint and its nature and to set out what it would like the provider to do to put matters right.

H.9.15 The Financial Ombudsman will not generally deal with complaints:

- That have already be considered by the court or where court action is due to take place
- Complaints that would be better suited to court action. For example, where the homebuyer wants to have a hearing as a matter of course
- That are older than six months old although they may take on aboard older complaints but this may depend on the application of other time limits

- Complaints that involve more than £100,000

H.9.16 Overall a homebuyer has six months to complain to the Financial Ombudsman which is shorter than the other schemes. The time runs from the date warranty provider sends its final response to the homebuyer's complaint via its internal complaints system, which the homebuyer is not satisfied with or the provider fails to provide any response to a complaint within eight weeks of the homebuyer making a complaint

H.9.17 The Financial Ombudsman's initial procedure is an informal one. The Financial Ombudsman investigates a complaint by reviewing all documents provided. The Financial Ombudsman has extensive powers to obtain any information they need from all concerned. The Financial Ombudsman has similar powers to the OEA in the collection of written and oral evidence to determine a claim. Like the OEA the Financial Ombudsman is assisted by caseworkers who help them assess the strength of a case. In doing so, the Financial Ombudsman will:

- Look at the homebuyer's side of the complaint
- Contact the warranty provider and get their side of the story
- Weigh up the facts
- Give a view to both parties as to what should be done to resolve the matter

H.9.18 If the matter cannot be resolved informally, the Financial Ombudsman will adopt a more formal approach. This could mean further investigation of the matter by calling for further documents from or asking further questions of the parties. Even with the formal process, the Financial Ombudsman tends to decide cases based on information provided in documents or over the telephone. It is rare that the process will involve face to face meetings between the parties or hearings.

H.9.19 If a complaint is upheld, the Financial Ombudsman can order a range of remedies, from making the provider give an apology to a homebuyer to

making the provider pay a financial award of up to £100,000. If the complaint is not upheld the Financial Ombudsman can issue a decision to that effect with reasons.

H.9.20 If there is no clear cut right or wrong the Financial Ombudsman may suggest a compromise to help the parties settle the matter.

H.9.21 The Financial Ombudsman takes on average six to nine months to resolve disputes. If a homebuyer is unhappy with a decision they are free to go to court.

H.9.22 In addition to the Financial Ombudsman, some providers are also members of the Financial Services Compensation Scheme (FSCS) which operates a financial compensation service for homebuyers in the event that a provider of insurance cover (which is authorised by the Financial Services Authority) cannot meet its financial obligations (for example if the provider becomes insolvent).

H.9.23 It is a free service to which homebuyer can submit claims by way of an application form. Broadly, the amount payable under the scheme is limited to 100 per cent of the first £2,000 and 90 per cent of the remainder of the claim, without any upper limit.

Scotland and Northern Ireland

H.9.24 The Financial Ombudsman and the FSCS are also available in Scotland and Northern Ireland, although the majority of the complaints and claims received are from England and Wales.⁶⁷

⁶⁷ See the Financial Ombudsman Service Website address:
www.financial-ombudsman.org.uk/