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# Bringing Section 9.7.2 within the formal Disputes process

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**Meeting Name:** DC10

**Paper Number:** DC 10\_02

**Meeting Date:** 25 August 2021

**Purpose of Paper:** For information

**Classification:** Public

**Synopsis:** This paper outlines the implications of, the discussions with the Credit Committee on and the CPW080 legal drafting for bringing Section 9.7.2 within the formal Disputes process.

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**RECOMMENDATION:** The DC is invited to:

- **Note the information provided in the paper to assist with consideration of a potential Change Proposal to bring Section 9.7.2 within the formal Disputes process.**

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## DC10\_02 Bringing Section 9.7.2 within the formal Disputes process

### 1. Background

The Disputes Committee (DC) asked for an exploration of a potential Code change to the WRC's Schedule 1 Part 2: Business Terms, Section 9.7.2 which permits the withholding of payment for part of an invoice in dispute or subject to question contrary to the Wholesale Contract's general approach of no deduction or withholding. It requested a short briefing paper containing legal drafting, the potential implications of the change and a summary of the discussions that had already taken place in general terms.

This means that whilst issues relating to Section 9.7.2 were cited within the evidence supporting DIS0020, brought before the Disputes Committee (DC) by Thames Water against Castle Water on 24 February 2021 at DC04, these will not be referred to in the paper as DIS0020 is under the jurisdiction of the London Court of International Arbitration (LCIA).

This paper outlines the proposals developed by the Credit Committee in Code Change Proposal, CPW080: Simplification of the Default and Termination Process and the associated discussions with the Trading Disputes Committee (TDC) on improving Section 9.7.2.

### 2. Code Change Proposal CPW080: Simplification of the Default and Termination Process

CPW080 was developed by the Credit Committee and recommended for approval by Ofwat on 5 June 2020. It is still awaiting a decision from Ofwat.

With regards to Section 9.7.2, it sought to resolve two issues:

1. Uncertainty whether credit items disputed under Section 9.7.2 may be withheld which meant that if a Retailer's failure to provide part of its Credit Support Balance, for example, was not accepted under Section 9.7.2 it would potentially be classed as a Defaulting Trading Party (DTP).

The Credit Committee decided that by explicitly stating that disagreements over credit items were covered by Section 9.7.2 it would be clear that these were not grounds for classing a Retailer as a DTP.

2. Uncertainty around how disputes or questions on items were raised and progressed under Section 9.7.2 as the Code does not make it clear how such disagreements are properly raised or progressed to resolution.

The Credit Committee's approach was to classify such disagreements as Disputes and require them to be raised under the appropriate Disputes Procedure and to be notified to MOSL if not part of the

process to ensure that there was clarity and formality over when and how amounts might be withheld and resolved which the current rules don't provide.

### 3. Discussions

The Credit Committee saw the TDC's consideration of a Unified Disputes Process and Committee as helpful both in bringing Section 9.7.2 into the formal Disputes process and in streamlining the process itself. Consequently, the Credit Committee agreed to seek the endorsement of its approach from the TDC before continuing with the proposal of adding "Dispute" to modified Sections 9.7.2 and 9.7.3 in the expectation that the TDC's Unified Disputes Process and Committee proposal would add a quicker and improved Disputes process in the future.

At the TDC Meeting (TDC33) on 12 February 2020, the Credit Committee asked the TDC to consider endorsing its approach and as part of its consideration on the Unified Disputes Process and Committee to develop:

- a process that established whether a Section 9.7.2 dispute was "frivolous or vexatious", i.e. whether it was a valid dispute.
- a streamlined process for credit issues.

The TDC endorsed the Credit Committee's approach in principle to progress the inclusion of Section 9.7.2 in the formal dispute process through the defined term for "Dispute" in advance of the completion of its Unified Disputes Process. It also agreed to consider developing a process to assess the validity of Disputes at an early stage, although it indicated that its streamlined process would cover credit issues. Concerns were expressed on the practicalities with regards to the potential for the number of Disputes to increase and on determining what was "frivolous or vexatious".

As reflected in the Minutes of TDC33, concern was expressed about the potential impact of including credit within Section 9.7.2. This was addressed both by making it clear from the Credit Committee's Minutes that it was their intention (see TDC34 Minutes) and an example provided in the Final Recommendation Report for CPW080 showing that a disagreement over the level of a UCA of 10% would make a monthly difference of £71,768 and £2.43 million of credit to be lodged with a Wholesaler by a Retailer with less than 5,000 Supply Points and more than 5,000 Supply Points respectively based on median Credit Support Requirement (CSR) levels for September 2019 to February 2020.

### 4. Legal Drafting

Following the TDC's endorsement, the Credit Committee agreed to include Section 9.7.2 disputes in the formal Disputes process and to modify Sections 9.7.2 and 9.7.3 accordingly. In the proposed drafting changes in Appendix A below, the changes to clarify that credit items are covered by Section 9.7.2 are in red and the further changes to include Section 9.7.2 in the formal Disputes process are in blue. The Sections have been divided further to make it clear that Disputes under Section 9.7.2 have to properly raised in accordance with the appropriate Disputes Procedure and notified to MOSL, being made in good faith and not on frivolous or vexatious grounds and that Default interest will be from an agreed date and on an agreed amount.

Minor changes to the drafting may be appropriate as the Unified Disputes Process is now in place.

Appendix A below provides the current legal text of the WRC's Schedule 1 Part 2: Business Terms, Section 9.7 and the changes proposed by CPW080 to Sections 9.7.2 and 9.7.3.

## 5. Recommendation

The DC is invited to:

- **Note the information provided in the paper to assist with consideration of a potential Change Proposal to bring Section 9.7.2 within the formal Disputes process.**

## Appendix A: WRC Schedule 1 Part 2: Business Terms, Section 9.7 and the Proposed CPW080 Changes to Sections 9.7.2 and 9.7.3

### 1. WRC Schedule 1 Part 2: Business Terms, Section 9.7

#### 9.7 No deduction or withholding

- 9.7.1 All payments by a Party under the Wholesale Contract shall be made without any deduction, withholding or set-off (except to the extent permitted by Section 2.4.2, Section 9.7.2 or required by Law).
- 9.7.2 If any item or part of an item in an invoice or statement rendered by a Party under this Section 9 is disputed or subject to question, payment of the remainder of the invoice or statement shall not be withheld on those grounds, and the provisions of Section 9.9.2 shall apply to the disputed or questioned item from the time, and to the extent that, it shall subsequently be agreed or determined to have been properly payable. Where a Party wishes to dispute or question an item or part of an item in an invoice or statement, it may only do so in good faith and on grounds which are not vexatious or frivolous.
- 9.7.3 Any dispute or question properly raised under Section 9.7.2 shall not be considered a breach of the Wholesale Contract.

### 2. Proposed CPW080 Changes to Sections 9.7.2 and 9.7.3

9.7.2 If any item or part of an item in an invoice or statement or Credit Support Notice rendered by a Party under this Section 9 is subject to a Dispute, payment of the remainder of the invoice, statement (or in the case of a Credit Support Notice, provision or maintenance of the Eligible Credit Support and/or Alternative Eligible Credit Support) shall not be withheld or delayed by virtue of the Dispute

9.7.3 If the Disputed item is subsequently agreed or determined to be properly payable, the provisions of Section 9.9.2 shall apply to the Disputed item from the new time for and amount of payment (and in the case of Eligible Credit Support and/or Alternative Eligible Credit Support provision or maintenance) so agreed or determined.

9.7.4 Where a Party wishes to Dispute an item or part of an item in an invoice, statement or Credit Support Notice it must: (i) only do so in good faith and on grounds which are not vexatious or frivolous; and (ii) properly raise the Dispute in accordance with the appropriate Disputes Procedure notifying the Market Operator where notification is not already part of that process.