

Construction Contracts (Amendment) Bill

May 2010



Since 1997 the legislation governing adjudication and payment within the construction industry has remained unchanged; 13 years later the Construction Contracts (Northern Ireland) Order 1997 (“the Order”) is set for a shake up.

In April 2009 the Department of Personnel and Finance launched a consultation paper on the proposals to amend the Order and the corresponding Scheme for Construction Contracts in Northern Ireland (Northern Ireland) Regulations 1998. The closing date for the consultation was 3 July 2009 and their findings were published in November 2009. In April 2010 the Construction Contracts (Amendment) Bill passed its First Stage in the Northern Ireland Assembly with the date for the Second Stage still to be confirmed.

The main changes are as follows:

1. REQUIREMENT FOR CONSTRUCTION CONTRACTS TO BE IN WRITING

- At present:** the Order only applies to construction contracts evidence in writing
- Issue:** time and money being spent on adjudication only to have the adjudicator determine that he has no jurisdiction to act as the contract is not entirely in writing. This over time became a deterrent to parties seeking resolution of construction disputes by way of adjudication
- Amendment:** the Order will apply to construction contracts which are wholly or partially agreed or varied in writing/orally
- Aim:** all construction contracts will be able to avail of adjudication of construction disputes regardless of the form of contract

2. ADJUDICATION COSTS

- At present:** the parties may specify within the contract who shall be liable for costs
- Issue:** in the past this has acted as a disincentive for matters being referred to adjudication
- Amendment:** contractual provision for the payment of adjudicator’s costs will be only be effective on two occasions;
- (i) if it is made in writing and confers power on the adjudicator to allocate his fees and expenses between the parties; or

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- (ii) if it is made in writing between the parties after the referring party serves its notice of intention to refer the dispute to adjudication

Aim: the decision to refer a dispute will no longer be based upon financial constraints agreed at the time of entering the contract but rather on the merit of any claim/dispute

3. DETERMINATION OF PAYMENTS DUE

At present: whilst the Order already prohibits “pay when paid” clauses the courts have upheld the use of “paid when certified” clauses

Issue: a sub-contractor may be due payment which is caught within an interim certificate under a superior contract which also catches the work of others. In the past this has resulted in payments to the sub-contractor being delayed until the work by others has been completed and certified as such

Amendment: unless one of the exceptions apply “pay when certified” clauses will no longer be permitted

Aim: payments to sub-contractors will no longer be delayed due to the actions of a third party over which they have no control

4. PAYMENT NOTICES BY A THIRD PARTY

At present: the employer must issue a payment notice even in circumstances where a payment certificate has been issued

Issue: there is an unnecessary duplication as the payment certificate and payment notice usually contain the same information

Amendment: a specified person can now serve the payment notice

Aim: payment notices will no longer be duplicated as the architect can serve same provided they are the specified person under the contract

5. CLARIFICATION THAT A PAYMENT NOTICE SHOULD BE SERVED

At present: the Order requires a payment notice to be served in certain circumstances

Issue: the drafting is unclear

Amendment: a payment notice must be served within 5 days after the payment becomes due under the contract

Aim: to clarify the position to prevent unnecessary disputes

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6. CLARIFICATION OF THE SUM DUE

At present: the Order requires separate payment and withholding notices to be served

Issue: there is currently confusion as to how the two notices interact

Amendment: the payment notice must state the amount due and how same is calculated including information about any set-off or withholding

Aim: the payment notice will act as both a payment and a withholding notice

7. IMPROVING THE RIGHT TO SUSPEND PERFORMANCE

At present: following a 7 day notice period the contractor may suspend performance if the employer has defaulted on its payment obligations

Issue: suspension can lead to remobilisation costs which the contractor has no right to recover under the contract

Amendment: statutory right to compensation for reasonable costs and expenses

Aim: removal of the financial burden on the contractor who suspends works due to the non-payment of the employer

If you feel that this may affect you or your business please contact **Lisa Boyd** or another member of the Construction Unit who will be happy to help you.

This item is a brief outline of the legal issues arising and is not intended to provide a comprehensive or detailed statement of the law. Specific legal advice should be sought on the circumstances of a particular case.

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