The long-awaited amendments to the Construction Act¹ and Scheme² should come into force on 1 October 2011 as we speculated in our last update³ on this subject. An Order was placed before Parliament yesterday for the commencement of the Amending Act⁴ and the amended Scheme on that date (provided the amended Scheme has been passed).

Furthermore, the contentious new s108A regarding Tolent clauses will not be isolated from the other amendments coming into force.

Construction Act

The decision regarding s108A is disappointing but unsurprising. As noted previously, Parliament intended to ban Tolent clauses – under which a referring party is contractually required to pay both their own costs and those of the other party, regardless of the outcome. However, last minute changes by the House of Commons plus some unfortunate drafting may have inadvertently achieved the opposite result.

The Construction Umbrella Bodies Adjudication Task Group (“Umbrella Group”) wrote to the Department for Business, Innovation and Skills (“BIS”) expressing concern that s108A may fail to achieve Parliament’s intention because, on a literal reading, Tolent clauses could be permissible if the construction contract gives the adjudicator the power to allocate his or her own fees/expenses only. Arguably, this would leave the parties open to agree that the referring party shall pay both parties’ own costs, win or lose.

On the same day that the above Order was laid before Parliament, BIS responded to the Umbrella Group stating that it considers there is no drafting issue (which is unsurprising) and the courts can in any event “quickly answer” any ambiguity that does exist (which is somewhat unrealistic). As a result, s108A will not be isolated and, regrettably, parties to construction contracts agreed on or after 1 October 2011 will have to either avoid Tolent clauses by negotiation or await a favourable judgment on the interpretation of s108A, if there is one.

Please see our earlier updates for details of the other main changes to the Construction Act, which consultants should familiarise themselves with: December 2008, January 2009, March 2010 and June 2011.

Scheme for Construction Contracts

BIS is still to publish its proposed changes to the Scheme following last year’s consultation process. However, this must now be imminent as it has been announced that the amended Scheme will go before both Houses within the next 40 days with the aim of coming into force on 1 October 2011.

This does not allow much time, particularly taking into account Parliament’s summer recess. If there are any issues with the amended Scheme (eg drafting changes in the Commons), then the amendments to both the Scheme and the Construction Act could still be postponed beyond 1 October. The two statutory instruments operate together and so these changes are intended to come into force simultaneously.

Please see our previous update for a summary of the likely changes to the Scheme.

For further information, please contact Rachel Barnes (020 7420 8702) or Nick Gillies (020 7420 8713).

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¹ Housing, Grants, Construction and Regeneration Act 1996
² Scheme for Construction Contracts (England and Wales) Regulations 1998
³ June 2011
⁴ Part 8 of the Local Democracy, Economic Development and Construction Act 2009