CONSTRUCTION CONTRACTS BILL 2010 – UPDATE

By Mary Smith and Tara Cosgrove

In our previous report on the Construction Contracts Bill in August 2010 we commented on the first draft of the Bill. Since then this private members Bill, promoted by Senator Fergal Quinn, has been amended and was passed on the 8 March 2011 in the Seanad. It is currently with the Department of Finance before going to the Dail.

For this Bill to have the desired effect it is essential that any solution be quick, affordable, enforceable and accessible. Parties in construction contracts need certainty that there will be funds available for payment, certainty of the amount which is to be paid, certainty in respect of the time in which the payment is to be made and certainty in respect of enforcement. Poor cashflow is always an issue but currently is having a very significant deleterious effect on all aspects of the construction industry.

Will it apply to you?

The Bill in its current format is intended to apply to both oral and written contracts involving construction operations as defined unless otherwise excluded. The parties cannot limit or exclude its application.

However, currently the arrangements would not apply to any of the following contracts:

- Public contracts for a contract value of less than €50,000;
- Certain residential contracts;
- Contracts other than (a) and (b) above where the contract value is less than €200,000;
- Public/private partnership arrangements as defined by the State Authorities (Public Private Partnership Arrangements) Act 2002;
- The manufacture or delivery of building components, equipment, materials, plant, machinery, lighting, ventilation, security and heating systems unless the contract provides also for installation.

It would probably be better for the Bill to have uniform application across all sectors. Low value contracts (which are more likely to be awarded in this economic climate) both in the public and private sector are currently excluded and as such many small local contractors will be denied the potential protections offered.

Contracts with residential occupiers should also be covered regardless of value as such contracts can be prone to payment disputes just as any other construction contract. It may be that the thinking is that if it were to apply to residential and lower value contracts that the effect may be to place an unnecessary cost burden on these projects. We believe however that uniformity across all sectors would be preferable to avoid ambiguity and to provide transparency.

Will it improve cashflow?

Cashflow is the lifeblood of the construction industry and this sentiment has never been more relevant than today. In the current climate those involved in construction, regardless of size, are experiencing severe cashflow problems. A significant purpose of the Bill is to facilitate cashflow and to address the issue of non payment.

The effect of Section 3 of the Bill is that all construction contracts will have to provide for a right for interim and final payments to be made and make clear the dates upon which these payments fall due. If the contract fails to specify these matters (for example an oral contract) then default terms will automatically apply.
There is a new section on “Payment Claim Notices”. The new Section 4 provides that payment notices must be issued within five days after the payment claim date stating the amount claimed and the basis of calculation. If the paying party disputes that the amount is due then they must deliver a response within twenty one days after the payment claim date stating the amount they propose to pay (which could be zero) and the basis on which the lesser amount is calculated. However, if the amount is not then settled, then the paying party must discharge the uncontested amount due.

Pay when paid/certified provisions have now been expressly prohibited save in the event of insolvency. In our last article we said that the Bill’s main purpose in improving cashflow was unlikely to be achieved unless these provisions were introduced so this is a very welcome amendment. However, this amendment could also mean that a main contractor could be obliged to pay a sub-contractor while not having received payment himself.

The statutory right to suspend performance of work where a sum due is not paid by the due date for payment remains in the current version of the Bill. However, the suspension may not last longer than fourteen days regardless if payment has been made. It may well be unreasonable to limit the period of suspension to fourteen days if payment remains outstanding.

**Will this result in the speedy resolution of disputes?**

The adjudication provision has been amended to apply only to payment disputes. The Bill in its previous format applied to disputes in general. If the right to adjudicate is limited to payment then the parties to the contract may not find it workable where they have to resolve other disputes in different forums. This could result in an increased expense. More often than not payment disputes are intrinsically linked to delay and defective work claims and it could be more practical to have all issues heard together. In the UK the statutory adjudication procedure is intended to deal with all manner of disputes, including delays, additional cost claims, variations, valuation of work and defective work.

Perhaps one of the more controversial amendments to this section is the provision that the adjudicator’s decision is to be non-binding if the payment dispute is referred to arbitration or otherwise. The Bill in its previous format provided that the decision was to be binding in the interim.

The Bill in its current format may lead to parties against whom decisions are made to delay payment by referring the matter to arbitration or otherwise. However, this could be avoided if the decision was binding in the interim until such a time as it is subsequently overturned.

The general consensus is that adjudication is successful in the UK. With the likely enactment of this Bill we now look set to move towards some form of adjudication in the near future.

As always it will be important to get an experienced adjudicator and for the parties to agree on clear and suitable rules within which to conduct the adjudication. Adjudication is generally considered to be quicker and less expensive than litigation or arbitration but still has a level of formality attached to it. It will be important for each party to have a competent team in place to ensure that within the relevant and often tight time limits.

Adjudication may also give the parties an early opportunity to settle their disputes and proceed with the works where they would otherwise be subject to the uncertain and lengthy Court lists.

**When will the draft Bill be signed into law?**

It is anticipated that this Bill may be passed shortly but hopefully this will be in a format which will assist in achieving its purpose. Consistency will need to be achieved so that the Bill applies in an effective and efficient manner to all contracts alike. We will be keeping a close eye on developments.

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