

Construction Contracts Act 2013

The Construction Contracts Act 2013 (the “Act”) was enacted on 29 July 2013. The Act is one of the most significant pieces of industry legislation in recent years and is likely to prove a game changer.

The Act applies to construction contracts in both the private and public sector (other than PPP contracts). For the first time in Ireland it will introduce a statutory dispute resolution mechanism for construction contract payment disputes through adjudication by an independent third party.

Timing

The Act is expected to commence in Spring 2015 following publication of commencing legislation by the Minister for Jobs, Enterprise and Innovation (the “Minister”). This role was transferred last year from the Minister for Public Expenditure and Reform by ministerial order. Commencement of the Act is identified as a key measure under the Action Plan for Jobs to help build the capacity of the construction industry. The Act will apply to construction contracts entered into after such day as the Minister may by order appoint.

Background

The Act is broadly modelled on the UK’s Housing Grants, Construction and Regeneration Act 1996 (HGCRA) and the Construction Contracts (Northern Ireland) Order 1997. It also incorporates some subsequent provisions similar to those set out in the UK’s Local Democracy, Economic Development and Construction Act 2009. As a result, a significant body of persuasive, although non-binding, caselaw from the UK will be helpful in understanding the Act and its implications.

Scope of the Act

The Act applies to agreements to carry out or procure construction operations. Broadly defined, this includes a comprehensive list of works or advices, ranging from temporary to permanent construction, alteration, repair, maintenance, extension, demolition or dismantling of works ranging from buildings, road-works and utilities, to scaffolding and landscaping and painting.

The Act also applies to agreements to provide professional services ancillary to construction, including architectural, design, surveying, engineering or project management services.

Where an agreement relates to construction operations and other matters, the Act applies only to that part which relates to construction operations.

Importantly, the Act will apply irrespective of whether parties to a construction contract attempt to limit or exclude its application and/or where the applicable law is Irish or otherwise.

Exclusions from Act

The Act excludes, in summary, construction contracts:

- with value below €10,000;
- between a State Authority and its partners in a PPP arrangement;
- relating to residential dwellings with a floor area not greater than 200 sqm and where one of the parties will occupy the property as their residence;
- of an employment nature; and
- relating to manufacture or delivery of building or engineering components or equipment, materials, plant or machinery (except where the contract also provides for their installation).

Payment Provisions

The need to ensure prompt payment was a key driver for the enactment of this legislation. The Act imposes statutory **obligations and prohibitions** on parties in relation to payments and provides **rights** for parties seeking payment. Regardless of whether the contract is bespoke or in a standard form or whether it is a private or public sector contract, the provisions of the Act will apply (subject to the exclusions noted above).

Construction contracts must now provide for the amount of **interim and final payments** or for an “**adequate mechanism**” by which to determine when payments become due and in what amount. The Act does not define what an adequate mechanism is and it will be interesting to see how this is interpreted. A payment mechanism must ensure that the parties are able to ascertain:

- the amount of each payment; and
- the timing of each payment.

In the absence of an adequate mechanism in the construction contract, the Act sets out a **default mechanism** which will apply to determine such payments, which is set out in the Schedule to Act. The Schedule shall apply to a subcontract except to the extent that it makes provision which is more favourable to the executing party than that which would otherwise be made by the Schedule

Payment Claim Notices

The Act provides for the issue of payment claim notices within specified periods. In respect of each payment due under the construction contract, a notice must be given, within the specified period, by the paying party. The form of notice should specify:

- the amount of payment;
- the period or activity to which payment relates;
- the subject matter of the claim; and
- the basis of the calculation.

The intention of the payment claim notice is to set out in sufficient detail why payment is being sought which in turn facilitates the paying party determining whether the amount is due or not. Advice should be sought where unclear on dealing with such notices.

Response to Payment Claim Notice

If the other party contests that either the whole or part payment is due and payable it cannot withhold payment or part payment due, unless they have issued a response to the payment claim notice (like a “Withholding Notice”).

This written notice must be issued within 21 days after the payment claim date and must contain certain information including:

- the amount which the paying party is proposing is to pay;
- the basis of calculation for amount being paid;
- the reasons for any difference between the amount to be paid and the amount claimed;
- if any of the reasons includes a claim for breach of contract or any other claim, details as to loss and damage.

“Paid when Paid” Clauses

The Act prohibits terms which make payment conditional on certain events eg **“paid when paid”** clauses. “Paid when paid” or conditional payment clauses allow one party to defer payment unless or until the other party has been paid. Such provisions are generally passed down to other parties, notably sub-contractors and/or suppliers, in the project contract chain. “Paid when paid” clauses will no longer be acceptable except in limited circumstances, primarily linked to insolvency situations noted in the Act. Such clauses are now also outlawed in the UK.

Right to Suspend

The Act introduces a new, limited statutory right to **suspend performance** under a construction contract for non-payment subject to certain requirements, including service of notice on the defaulting party. This notice should specify the grounds on which it is intended to suspend work and be served at least 7 days before the suspension is due to begin.

The non-suspending party will be entitled to a reasonable sum, in respect of costs and expenses reasonably incurred, related to unjustified suspension.

Adjudication

The Act introduces a statutory adjudication process for dispute resolution. Under the Act, either party can refer **payment disputes** arising under a construction contract to **adjudication** at any time. The right to refer disputes to adjudication remains available notwithstanding any dispute resolution process prescribed by the underlying contract.

The process is initiated by various notices within prescribed short timelines set out in the Act. It is critical where notices are served or received that procedures and timelines are carefully followed.

Timelines

The Act prescribes short timelines for the completion of adjudications. By default, the adjudicator’s decision must be reached within 28 days of referral, or within 42 days with the referring party’s consent. If both parties agree, this period can be further extended.

Adjudicators and Adjudication Decision

The parties can either appoint an adjudicator of their own choice or choose one from the panel to be selected by the Minister. If the parties fail to agree, the chairman of the panel will select an adjudicator. Adjudicators must act in good faith and impartially and will be assisted by a statutory Code of Practice. The adjudicator’s decision is binding on both parties unless the dispute is resolved by agreement or the adjudicator’s decision is overturned in arbitration or litigation.

Costs

Parties bear their own legal and other costs in connection with the adjudication. Given that the timescales are short, adjudication is generally considered less expensive than prolonged litigation.

Summary

The Act is likely to have a revolutionary effect on payments in the construction industry and dispute resolution in construction and projects contracts. Most construction contracts will need to be reviewed in the context of the Act. The various professional bodies have been updating their own contracts, and the public sector works suite is also being adapted. This is likely to raise some practical issues going forward. It will also be interesting to see whether adjudication overtakes conciliation and arbitration as the preferred method of dispute resolution in the construction industry.

Parties in the public and private sector will need to familiarise themselves with the Act, and seek legal advice both in relation to the drafting of contracts and how the Act will apply in practice.

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