Construction Contracts Act 2013

Encouraging cash flow in the construction industry

The Construction Contracts Act 2013 (the “Act”) was enacted as far back as 29 July 2013 after a long and drawn out journey through the Houses of the Oireachtas. The Act still remains dormant as it is subject to a Ministerial commencement Order (from the Minister for Business and Employment (the “Minister”)), before it becomes operative. The Order was expected in spring 2015, however, it is now unlikely until later this year or even into 2016. The fact that the Act remains inoperative almost 2 years after enactment is a cause of concern and frustration within the industry.

By way of background, the legislation was first introduced by Senator Fergal Quinn as a Private Members Bill in May 2010 and somewhat unusually survived from a private members bill to being enacted as legislation.

The aim of the Act is to improve cash flow within the construction industry, particularly, for sub-contractors. There has been a history of late and, in some cases, non-payment in the Irish construction industry. The economic downturn of recent years exacerbated the issue and highlighted the lack of formal contractual arrangements and late payment practices in this sector.

Key changes

The two key changes brought about by the Act are:

- the introduction of statutory requirements regarding payments; and
- providing for Adjudication as a forum for the resolution of payment disputes.

The Act will apply to certain construction contracts with a value in excess of €10,000 entered into after the commencement date, by way of statutory instrument. It is anticipated that when the Minister publishes his statutory instrument, he will designate a future date to allow sufficient lead in time for industry to implement any necessary changes to ensure compliance with the Act.
**Interim payments**

The Act will require that all construction contracts, (which is a widely defined term), include adequate arrangements for determining both the amounts of, and periods for, interim payments. Whilst most standard form construction contracts allow for such arrangements, the Act provides for default arrangements where these are absent. In the case of sub-contracts, these default provisions will apply unless the sub-contract provides for more favourable terms for the sub-contractor.

*Pay when paid* clauses, whereby contractors pay their sub-contractors only when they themselves have been paid, are prohibited, save in exceptional circumstances relating to the insolvency of the employer or contractor further up the supply chain. This is an important change to a practice that has been standard in the Irish construction industry.

A procedure is prescribed to deal with payment claims. Where a payment claim notice is delivered and the amount is contested by the paying party, then it must respond within a 21-day period with certain minimum information. Any undisputed amount must be paid by the due date for payment.

**Binding Adjudication**

The Act introduces an entitlement for parties to refer disputes regarding payment to adjudication. A Notice of Adjudication (the “Notice”) must be issued by the party referring a payment dispute to adjudication. This may be served “at any time” and irrespective of any other contractual dispute resolution clauses and indeed, at any time during the contract performance. A draft Code of Practice (the “Code”) has been published which, amongst other matters, details the application of the process and details the information to be provided within the Notice. Assuming the Irish Courts follow their UK counterparts, in the event of a challenge to the process, the Notice will be an important first step in defining the extent of the dispute (not unlike a Notice to Refer in Arbitration). Parties will also undoubtedly seek to challenge the validity of the Notice and the scope of the dispute as detailed in the Notice.

Interestingly, the Act allows an adjudicator to deal with more than one adjudication. However, it does not specify if this means that each adjudication should be determined as part of the same or separate processes. This is likely to be an area where either the Courts will be asked to make a determination or where the industry will lobby for amending legislation to clarify the position. As matters stand it seems that it will be best practice to issue a separate Notice for each payment dispute that may exist and seek to agree to have all the disputes heard by the same adjudicator at the same time.

Following service of the Notice, the time scales for agreeing a party-nominated or selecting an adjudicator from a Ministerial appointed Panel of Adjudicators (the “Panel”) is tight (ie 5 days). The Panel has not yet been appointed by the Minister, but the indications are that the Chair of the Panel will be appointed during the summer of 2015 and the other members later this year. Where an adjudicator is appointed by agreement the Code provides that the adjudicator must respond within 2 days and either accept or decline the appointment. Failing agreement on the appointment of the adjudicator the Chair of the Panel will be asked to make the appointment, and again the Code directs the process for the appointment.

Following appointment the Referring Party has 7 days within which to provide its Referral and supporting documents to the adjudicator and Responding Party. It cannot be over emphasised that the timescales involved are extremely tight and will put great pressure on all parties involved. Hence a decision to invoke adjudication should not be taken lightly; and then only when the Referring Party has amassed sufficient internal and external resources to mount its case fully.

Following appointment the obligation on the adjudicator is to act impartially and the Code details the principles of procedural fairness that must apply. Significantly the Code also provides that, like other ADR processes, adjudication must remain confidential as between the parties. The Code also gives the adjudicator the initiative in ascertaining facts and the law on the payment dispute. The Code further provides that the parties must comply with the directions of the adjudicator. Failure to comply gives the adjudicator latitude in proceeding in the absence of the directed information, drawing information from the failure and to make a decision in the absence of the information sought. Commentators fear that this may give rise to circumstances in which the bona fides of the adjudicator may be open to challenge and lead to actions in the Courts.

The adjudicator has a period of 28 days within which to reach a decision and may, with the consent of the Referring Party, extend this period by a further 14 days or indeed such longer period as is agreed by the parties. It should be noted that during this 28-day period (or such extended period as is required) the adjudicator may request any reasonable or supporting documents pertaining to the payment dispute in the Notice. S/he can also seek written submissions, meet the parties and/or representatives, with the necessary consent, visit site, carry out inspections and tests, consider any legal or third party submissions, give directions on the length of documents or submissions or such other directions on the conduct of the adjudication as s/he thinks necessary. This latter point may prove important, as issues have been raised by
commentators that the Act may be subject to challenge for failing to meet the requirements of natural justice in the taking or provision of evidence. The problem being that the Act does not specifically provide for the taking or giving of sworn testimony. Nor does it deal with the status of the information provided in submissions or the Notice. The reality is that this is a procedural matter and can be overcome by an adjudicator acting practically and directing that if evidence is required it will have to be given on oath. Other forms of ADR, including conciliation and determination suffer the same problem. Indeed, in arbitration the pleadings themselves are not sworn testimony. As such there is a risk of challenge, although it is submitted that this risk also exists in other existing ADR mechanisms and has not to date proven a barrier to the success of the process. The adjudicator, unless otherwise agreed by the parties in writing, must give reasons for his decision. There is no requirement, however, that the reasons be of any particular depth.

Right to suspend work

The Act gives a statutory basis allowing contractors to suspend work in the event of non-payment. A party who does not receive payment on the date that it falls due, will be allowed, under the Act, to suspend work, provided that party has delivered a written notice to the paying party at least 7 days before the proposed suspension is due to begin. Although if a dispute is referred to adjudication, the suspension ceases and a contractor will be obliged to return to site.

Binding Adjudication – but hurdles to success

The adjudicator’s decision is binding in the interim until the parties finally settle the dispute or a different decision is reached following arbitration or court proceedings. Adjudication has been in place in the UK since 1996 and has proven to be an effective and swift means of resolving disputes. Importantly, it has been strongly supported by the judiciary and it is only in exceptional circumstances that an adjudicator’s decision will be set aside.

Whilst the Irish legislation is similar to that in the UK, (although it is confined to disputes relating to payment only), commentators have noted the different constitutional arrangements in operation in Ireland and the UK. In Ireland, the Courts will have to have regard to the constitutional rights and doctrines that prevail over acts of the legislature. This may lead to the Courts having a less deferential attitude to the decisions of arbitrators than in the UK.

There are a number of obstacles to the adjudication procedure provided for in the Act becoming the primary form of dispute resolution in relation to construction contracts in this jurisdiction. These obstacles can be summarised as follows:

- The legislature has not had sufficient regard to the difficulties that will be encountered in securing enforcement orders to ensure the prompt release of payments. Unlike in the UK where the Technology and Construction Court deals with such matters, there is no equivalent in Ireland. We would see the logical home for this as the Commercial division of the High Court, but with a reduced stamp duty entry fee, at the same level as the Master of the High Court application. The Commercial Court currently has a once off stamp duty payment of €5,000.
- Threats of constitutional challenge for issues highlighted such as:
  - Bias by adjudicators – this is no more an issue for adjudication than for other forms of ADR in Ireland;
  - Lack of application of rules of natural justice and breach of human rights provisions due to the evidence being provided without sworn testimony and due to the speed of the process being such that the parties do not get an opportunity to properly prepare their case. We believe both challenges can be overcome by practical application by adjudicators;
- The lack of speed and direction in the making of the Ministerial Commencement Order and of the finalisation of the Panel;
- The acceptance and success of other established ADR structures and processes within the construction sector;
- Lack of trust in the process;
- The costs and time input involved in submitting the Notice of Adjudication and Referral and the adjudicators’ costs may dwarf that involved in other successful ADR processes, and in particular conciliation and mediation.
Concluding comments

The Act is one of the most significant pieces of new legislation affecting the construction industry in recent times. However it has been commented by an academic commentator that, “it is one thing to change the law; changing the culture is another thing entirely” (Cunningham, Dublin Institute of Technology 2013).

It is accepted that the Act is well intentioned in seeking to bring about changes to the legal requirements ensuring the flow of payments, however, only time will tell whether the Act will ultimately have the desired effect and improve the payments culture in the Irish construction industry.

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