



Building the foundations of success

Implementation of the Construction Contracts Act 2013

The third Annual Report on the implementation of the Construction Contracts Act 2013 (the “Report”) was recently submitted by the Chair (Dr Bunni) of the Ministerial Panel of Adjudicators (the “Panel”), to the Minister of State at the Department of Business Enterprise and Innovation (the “Minister”), and has been published. This briefing, provides the background to the Act and summarises and interprets the content of that Report.

Background

The Construction Contracts Act 2013 (the “2013 Act”) came into operation on 25 July 2016 for all “construction contracts” entered into after that date. The purpose of the Act is to regulate payments under construction contracts covered by the legislation. The Act provides minimum contractual provisions relating to payments including the timing of payments. The Act provides exclusions for contracts of less than €10,000 in value, Public Private Partnership contracts, and contracts for a dwelling of less than 200 square metres where one of the parties occupies or intends to occupy it.

The Code of Practice Governing the Conduct of Adjudications (the “Code of Practice”) provides for the arrangements for the conduct of adjudications under the Act. The role of the Chair includes a requirement to report annually to the Minister, and this Report is the third such report, and covers the period from 26 July 2018 – 25 July 2019 (the “Period”).

Adjudication

The Act introduced a right for a party to a construction contract to refer a “payment dispute” (as defined under section 6 of the Act) for adjudication. The parties are free to agree to appoint an adjudicator of their own choice from the Panel, where however they fail to agree, the adjudicator is appointed by the Chair under section 6(4) of the Act.

The Report notes that in the Period, 39 applications seeking the appointment of an Adjudicator were made to the Chair out of which 32 appointments were made, with a combined value of €24.5 million.

Key data recorded in the Report

Under the Act, there is no mandatory reporting provision in respect of adjudications carried out. Rather, the Code of Practice, requests that certain information be provided following completion of each adjudication for the purpose of compiling anonymised data on the operation of the Act. This limitation is important in terms of relying on the data provided, as it is not the complete picture, a point noted in the Report where it states "it is not possible to state definitively that this [information] encompasses all cases". (Equally the Report will not include information on privately convened adjudications.)

The data compiled in the Report reveals, inter alia:

- The main locations for payment dispute adjudications were Dublin (21 cases), Cork (three cases), and Mayo and Tipperary (two cases).
- The most common parties in an adjudication were subcontractor/main contractor disputes, with the referral by the subcontractor.
- The most common issues related to interim and/or final payments.
- The most common value range for the disputes was €100,000 to €500,000. Out of the 32 cases referred to arbitration, 26 resulted in an Adjudicator determination. Of these 26 cases, 19 resulted in monetary awards by the Adjudicator, with the Referring Party also being successful in the remaining seven cases.
- Figures relating to the timescale for the Adjudicator decisions reveal that the majority of determinations were issued within the prescribed extended period of 42 days. But it was only in five disputes that a determination issued within the earlier prescribed period of 28 day from the date of the referral.
- The hourly fees charged by the Adjudicator varied between €200 and €350 per hour. The total amount of fees charged by the Adjudicator ranged up to €45,000, with the majority of fees falling within a range of €1,000 to €15,000.

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Conclusion

Payment disputes are on the rise since the last Report in July 2018 (as only nine disputes were referred to adjudication in 2017/2018). Yet the figures show that the market is not yet convinced by the process, as the referral figures remain low, given the level of construction activity in the country. The Chair notes that this may be an indication that the prescribed payment provisions in the Act are being met; whilst this is hoped to be the case, we think that this is unlikely and parties continue to seek to resolve construction payment disputes by more traditional means.

Where parties are considering referring a payment dispute for adjudication the Report reminds them of their obligations to comply with all relevant procedures under the Act and the Code of Practice.

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