

The Construction Act 2011

Background

The Housing Grants, Construction and Regeneration Act 1996 introduced adjudication as a form of dispute resolution for disputes arising out of construction contracts. This has generally been referred to as 'The Construction Act'. This will be referred to in this Information Sheet as the Original Construction Act.

The Original Construction Act was amended by the Local Democracy, Economic Development and Construction Act 2009 which came into effect on 1 October 2011 in England and Wales and will come into effect on 1 November 2011 in Scotland (this will be referred to in this Information Sheet as the New Construction Act). Northern Ireland is considering similar changes but no date has currently been fixed for it coming into effect. An amended Scheme for Construction Contracts is also coming into effect at the same time as the New Construction Act, which will apply where the relevant construction contract does not comply with the New Construction Act.

It will be necessary to be familiar with both Acts for some time since the Original Construction Act will still apply to those contracts entered into before 1 October 2011 on which disputes could arise for many years to come. The New Construction Act will apply to all relevant construction contracts entered into after 1 October 2011. There may be some projects where both Acts apply; by way of example where a main contract is entered into before 1 October 2011 and various sub-contracts are entered into after 1 October 2011.

Adjudication, regardless of whether the contract was entered into pre or post 1 October 2011, is a rapid form of dispute resolution using the services of an independent, impartial third party adjudicator to decide the dispute between the parties. The Adjudicator's Decision must be reached within 28 days, subject to any agreed extension of time.

The adjudication procedure under the New Construction Act is available for the majority of construction contracts entered into either in writing or orally (or a combination). Under the Original Construction Act adjudication was limited to those contracts entered into in writing. The Act (both Original and New) does not apply to residential occupiers (unless agreed otherwise) but does include architectural, design and surveying work.

A construction contract can make provision for adjudication but if it does not the Scheme for Construction Contracts will apply. The 1998 Scheme for those contracts entered into before 1 October 2011 and the amended Scheme (2011) for those contracts entered into after 1 October 2011.

The Decision of an Adjudicator does not finally determine the dispute. The disputing parties are free, if they wish, to refer their dispute to litigation, through Court proceedings or arbitration or they can agree to resolve their differences by reaching agreed terms of settlement.

In practice, many parties have chosen not to litigate their dispute following an Adjudicator's Decision.

Regardless of whether the parties do decide to litigate (or arbitrate) their dispute, the Adjudicator's Decision must be complied with since the High Court will almost always enforce an Adjudicator's Decision.

Changes in the New Construction Act

This information Sheet is concerned with the more significant changes brought about by the New Construction Act. For information about notification to your insurers in respect of adjudication refer to the Adjudication Information Sheet prepared by CIAT Insurance Services. For more general information on Adjudication see CIAT Information Sheet titled 'Adjudication' dated November 2008. Both of which are still available from CIAT.

The more significant changes brought about by the New Construction Act can be summarised as follows (appropriate changes have also been made to the amended Scheme for Construction Contracts):

Section 107 of the original Construction Act (which limited adjudication to contracts in writing) has been repealed. As a result adjudication can now be brought in respect of written or oral contracts (or a combination).

Section 112 (which relates to suspension) has been amended to allow the party suspending performance for non payment to recover their reasonable costs of doing so. A party suspending needs to exercise considerable care to ensure that there is a proper ground for suspension otherwise this could prove to be very expensive if it is later determined that there was no entitlement to suspend.

There are important changes in respect of payment, some of which now have some serious ramifications if not fully complied with.

Section 110 has been amended and now prevents a payee making payments subject to performance or certification under another contract. 'Paid when paid' or 'paid when certified' is not now permitted.

Section 110 also now requires the payer or a specified person to give a notice to the payee specifying the amount of the payment proposed to be made and the basis on which the amount is calculated. This is referred to as the 'Payer Notice'. Such notice to be given no later than five days after the payment due date. A notice is required even if the payment is zero. The contract can require the payee to give this notice if it does then this notice is regarded as the Payee Notice. In the event that no Payer Notice is given then the payee may give the requisite notice of the amount to be paid, this is referred to as the 'Payee Notice'. The Payee Notice may be given at any time after the date on which the Payer Notice was to be given. The payment period is postponed by the equivalent period.

Section 111 (notice to withhold payment) has been substituted with new provisions requiring the payer to pay the notified sum on or before the final date for payment. The 'Notified Sum' is either the amount shown in the Payer Notice or if this has not been issued (at all, in time or does not comply with the requirements set out in the Act) then the amount shown on the Payee Notice must be paid.

The above provision is a very powerful provision, particularly where the payer has not served a compliant Payer Notice, since the payer must then pay the amount shown on the Payee Notice. The payer can only avoid paying the amount shown on the Payee Notice if notice is given stating an intention to pay less than the notified sum. This is likely to become known as a 'Payless Notice'. The Payless Notice must be given not later than the prescribed period before the final date for payment. The prescribed period is either the period agreed by the parties to the contract or in the absence of agreement the period stated in the amended Scheme for Construction Contracts, namely seven days before the final date for payment. The Payless Notice must also set out the sum considered due and the basis on which the sum is calculated. No guidance is given as to how detailed this calculation should be.

The requirement to serve a Payer Notice, or in default for the payee to give a Payee Notice, is likely to catch many payers out. Members need to be fully aware of these provisions in order to ensure that they advise their clients of their obligations or alternatively to members must comply with these obligations on their client's behalf where they are administering contracts. Failure to do so may result in the payer being compelled to make payments to payees that they would otherwise not be entitled to.

Standard forms of contract have been amended to comply with the amendments in the New Construction Act. Members should ensure these updated contracts are used on all contracts entered into after 1 October 2011 (1 November 2011 in Scotland). If, however, the contract is non compliant with the New Construction Act then the Scheme for Construction Contracts (as amended) will apply.

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