

These notes refer to the Construction Contracts (Amendment) Act (Northern Ireland) 2011 (c.4) which received Royal Assent on 10 February 2011

Construction Contracts (Amendment) Act (Northern Ireland) 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1 - Requirement for construction contracts to be in writing

As originally enacted, Article 6 of the 1997 Order provided that the 1997 Order only applied to contracts which were “in writing”. The corresponding provision within Part 2 of the Housing Grants, Construction Regeneration Act 1996 in GB was interpreted restrictively by the courts such that all of the non-trivial terms of construction contracts had to be “in writing” for Part 2 to apply.

Section 1 removes this general requirement, whilst prescribing that various matters must nonetheless be in writing.

Subsection (1) repeals Article 6 in its entirety with the effect that the 1997 Order will apply to all construction contracts – those which are wholly in writing, partly in writing or wholly oral.

Subsection (2) provides that certain provisions of a construction contract, relating to adjudication, must be “in writing”. These are various provisions relating to adjudication.

Section 2 – Power to disapply provisions of the 1997 Order

Subsection (1) of section 2 amends Article 5 of the 1997 Order and its heading. New paragraph (1A) allows the Department to disapply, by order, any or all of the provisions of the 1997 Order in relation to descriptions of construction contracts specified in the relevant order. This new power replaces the power in the 1997 Order as it was originally enacted which allowed the disapplication of the whole of the 1997 Order (but which did not allow the disapplication of only parts of the 1997 Order).

Section 3 - Adjudicator’s power to make corrections

This section inserts new paragraph (3A) into Article 7 of the 1997 Order. New paragraph (3A) has the effect of requiring the parties to a construction contract to provide in their contract that the adjudicator has the power to correct a clerical or typographical error in his decision arising by accident or omission. The

provision concerned must be in writing. Such a requirement of their contract is in addition to the requirements which already apply.

Section 4 - Adjudication costs

Section 4 inserts new Article 7A into the 1997 Order. New Article 7A provides that any contractual provision by the parties to a construction contract concerning the allocation between them of costs relating to an adjudication is ineffective except in two cases. The first such case is where the contractual provision is in writing, is a provision of the parties' construction contract, and is one which allows the adjudicator to allocate his own fees and expenses between the parties. The second such case is where the contractual provision is in writing and is made after the giving of notice by one party to the other of the former's intention to refer a dispute to adjudication.

Section 5 - Determination of payments due

Section 5 inserts new paragraphs into Article 9 of the 1997 Order. Paragraph (1) of Article 9 stipulates that every construction contract is to provide an "adequate mechanism" for determining what and when payments become due under the contract. In interpreting the corresponding provisions within Part 2 of the Housing Grants, Construction Regeneration Act 1996, section 110(1), the courts in GB have held that an "adequate mechanism" can include a certificate issued by a third party (for example, an architect or quantity surveyor) under a superior contract. This has caused difficulties – a subcontractor may not be aware that a certificate has been issued in a superior contract and, where such a certificate covers work undertaken by other subcontractors, payment to the subcontractor is often delayed until all of the other work has been completed.

New paragraph (1A) secures that it is not an adequate mechanism for these purposes to make the determination of what payments are due, or when, dependent upon the performance of obligations in a different contract (for example, in a superior contract) or upon someone's decision as to whether obligations have been performed in a different contract.

New paragraph (1B) has the effect of excluding, from this general prohibition at new paragraph (1A), obligations (in a different contract) to make payments: Article 10 of the 1997 Order already secures that "pay when paid" clauses in a construction contract (clauses whereby one party is not to be paid unless the other party has been paid) are (for the most part) ineffective.

New paragraph (1C) creates a material exception to the general prohibition at new paragraph (1A) to ensure, for instance, that payments in a superior contract can of course continue to depend upon the work carried out in a subcontract. Thus, where a construction contract is an agreement between two parties, A and B, to the effect that a third party, C, is to carry out construction operations (a contract of the type referred to at Article 3(1) (b) of the 1997 Order), it will be permissible for A and B to provide in their contract that payments in that contract

may be dependent upon C carrying out those obligations (in the contract which B has with C).

As originally enacted, Article 9(2) of the 1997 Order provided that the parties to a construction contract had to include terms in their contract to the effect that, in relation to each payment and at most five days after such payment became payable (or would have become payable), the payer was to give the contractor (the payee) a notice. The notice had to specify the amount (if any) which the payer proposed to pay (or had by that time paid) and the basis on which that sum had been arrived at.

New Article 9A (see below) amends the original legislation relating to “payment notices”. New paragraph (1D) provides that the giving of a “payment notice” to the contractor is not an “adequate mechanism” for determining *when* payments become due under the contract. New paragraph (1D) therefore secures that a provision in the parties’ contract whereby a payment will only fall due if a “payment notice” in respect of that payment is given to the contractor is ineffective.

Section 6 - Notices relating to payment

Section 6 amends the original legislation relating to “payment notices” and, in doing so, provides for the giving of similar notices by the contractor (the payee). Section 6 achieves this by repealing what was Article 9(2) (*subsection (3)* of section 6) and inserting new Articles 9A and 9B into the 1997 Order (*subsection (4)* of section 6).

New Article 9A(1) provides that a construction contract is to contain either:

a provision which, in relation to every payment, requires the payer (or a “specified person”) to give the payee a “payment notice”; or

a provision requiring the payee to give the payer (or a “specified person”) a “payment notice”;

and in either case, requires the notice is to be given at most five days after the payment in question becomes payable.

A “specified person” is defined at new Article 9A(6) – such a person is one identified in the construction contract or one “determined in accordance with” terms in the contract (for instance, terms allowing the payer subsequently to notify the payee of the appointment and identity of such person). In practice, a “specified person” is generally an architect or engineer: someone qualified to value construction work.

New Article 9A(2) prescribes the contents of a “payment notice” given by the payer (or a “specified person”) to the payee. Such a notice is to identify the sum which the payer (or the “specified person”) believes is payable (by the payer) on the date that the payment concerned becomes payable (or, where some, or all, of that amount has been paid before the notice is given, the sum that would have been payable on such date). Such a notice is also to explain how that sum

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has been arrived at - for instance, by identifying any relevant monies paid before the payment concerned actually became payable, or by identifying any set-off or abatement applied by the payer.

New Article 9A(3) prescribes the contents of a “payment notice” given by the payee to the payer (or to a “specified person”). Such a notice is to identify the sum which the payee believes is payable (to the payee) on the date that the payment concerned becomes payable (or, where some, or all, of that amount has been paid before the notice is given, the sum that would have been payable on such date). Such a notice is also to explain how that sum has been arrived at.

The effect of new Article 9A(4) is to ensure that, even where, in relation to any payment, the payer or, as appropriate, the payee, considers that no sum is actually payable, a “payment notice” to that effect must still be given. Such a notice is also to explain (for instance, because of any set-off or abatement) why no sum is believed to be payable.

New Article 9A(5) provides that where the parties to a construction contract fail to include terms in their contract for the giving of a “payment notice” pursuant to new Article 9A(1), the appropriate provisions of the Scheme for Construction Contracts will apply. (The consequence of this is that terms providing for the giving of a “payment notice” by the payer to the payee will take effect as implied terms of their contract.)

In addition to the definition of “specified person”, new Article 9A(6) defines what is meant by “payee”, “payer” and “payment due date”.

New Article 9B applies in a case where the parties to a construction contract have said in their contract that the payer (or a “specified person”) is to give the payee a “payment notice” (at most five days after payments become due) and, in relation to a particular payment, no notice is actually given (or, if given, is late). New Article 9B also applies in a case where the parties have failed to make provision in their contract for the giving of “payment notices” (such that the Scheme for Construction Contracts has implied a payer “payment notice” term into the contract), and, in relation to a particular payment, no notice is actually given (or, if given, is late). In other words, new Article 9B addresses the situation of a payer failing to serve a payment notice as required either by an express or by an implied term of the contract.

The effect of paragraph (2) of new Article 9B is (generally speaking) to allow the payee to give the payer a “payment notice” instead (one which complies with the requirements (as to content) of a “payment notice” given by a payee in cases where parties to a construction contract have agreed in their contract that it is the payee who gives this notice). A notice like this given by a payee in default of a payer’s (or “specified person’s”) “payment notice” may be given at any time after the date by which the payer (or “specified person”) ought to have given the “payment notice”.

New Article 9B(3) is a provision to postpone the “final date for payment” of a relevant sum where, pursuant to new Article 9B(2), the payee serves a notice

in default of the payer (or “specified person”) giving a “payment notice”. The effect of this new provision is to postpone the final date for payment of the sum in question by the same number of days after the date by which the payer (or “specified person”) ought to have given the “payment notice”, as the number of days after that date that the default notice was given. If, for example, a sum becomes payable on the 2nd day of the month (such that the date by which the “payment notice” should have been given was the 7th day) and must be paid, at the latest, on the 17th day, the effect of a payee’s notice in default served on the 14th day would be to postpone the date on which the relevant sum must finally be paid to the 24th day of the month (17 +7 = 24).

Paragraph (4) of new Article 9B provides that where the parties had agreed in their contract that the payee was to notify the payer (or a “specified person”) of the sum that the payee believed was due in relation to a payment and of how that sum was arrived at (what in the construction sector is known as a payee’s “application”), such a notification is deemed to be a notice given pursuant to new Article 9B(2) and, indeed, the payee cannot give a notice pursuant to new Article 9B(2) in such a case.

Subsection (2) of section 6 makes a consequential amendment to bring the wording of Article 8(4) into line with that used in new Articles 9A and 9B.

Section 7 - Requirement to pay notified sum

As originally enacted, Article 10 of the 1997 Order provided that a party to a construction contract could not withhold payment after the “final date for payment” of a sum due under the contract unless that party had given a notice of the intention to do so. Subsection (1) of section 7 substitutes a new Article 10 and, in doing so, replaces this provision in respect of “withholding notices” with (generally speaking) a requirement on the part of the payer to pay the sum set out in such a notice. The new Article 10 also makes provision for the sum in such a notice to, in effect, be challenged or revised by the giving of a type of counter-notice.

Paragraph (1) of new Article 10 provides that the payer must pay the “notified sum” — the sum set out in such notice — on or before the final date for payment of such sum, (to the extent that it is unpaid). Paragraph (2) has the effect of explaining what is meant by “the notified sum”. In relation to a payment, it is (as appropriate):

the sum set out in a “payment notice” given by a payer (whether such notice is given pursuant to an express term or one implied into the contract pursuant to the Scheme for Construction Contracts) or by a “specified person” (paragraph (2)(a));

the sum set out in a “payment notice” given by a payee (paragraph (2)(b));

the sum set out in a payee’s “payment notice” in default of one given by the payer or “specified person” (paragraph (2)(c)); or

the sum set out in a payee's "application", where such notification is deemed to be a notice given in default of one given by the payer (paragraph (2)(c)).

This requirement to pay the notified sum is intended further to facilitate cash flow by determining what is provisionally payable. What is properly and ultimately payable as a matter of the parties' contract is unaffected (see the decision of the Court of Appeal in *Rupert Morgan Building Services (LLC) Limited v David and Harriet Jervis* [2003] EWCA Civ 1563), (a transcript of which judgment can be found at <http://www.bailii.org/ew/cases/EWCA/2003/1563.html>).

Paragraph (3) of new Article 10 provides that a payer (or a "specified person") may, in relation to a payment, give a notice to the payee of the payer's intention to pay less than the notified sum. Paragraph (3) permits both the giving of such a counter-notice where the notice containing the "notified sum" was given by the payee and, also, the giving of such a counter-notice where the notice containing the "notified sum" was given by the payer – a payer may wish to revise the amount he proposes to pay because, for instance, he subsequently discovers that the work in question was unsound.

Paragraph (4) prescribes the content of such a counter-notice. It must identify the sum which the payer believes is payable on the date that such notice is given and is to explain how that sum has been arrived at (for instance, by identifying any moneys already paid by the date of the notice or by identifying any set-off or abatement applied by the payer). Paragraph (4) makes it clear that such counter-notice may be for a nil payment (for example, as a consequence of any such set-off or abatement).

Paragraph (5), read in conjunction with paragraph (7), prescribes the timing of such a counter-notice. It must be given no later than such number of days as the parties have agreed in their contract before the final date for payment or, where there is no contractual provision, such number of days before the final date for payment as the Scheme for Construction Contracts provides. Paragraph (5)(b) has the effect of prohibiting the giving of such a counter-notice before the payee has actually given his "payment notice" (whether in a case where the parties had agreed in their contract that "payment notices" were to be given by the payee, or the payee is giving (or is deemed to have given) his "payment notice" in a default of the payer giving a "payment notice").

Paragraph (6) has the effect that the amount set out in a counter-notice given under paragraph (3) of new Article 10 becomes the "notified sum" which the payer must pay pursuant to paragraph (1).

Paragraph (7) defines the "prescribed period". It is the period that has been agreed by the parties to the construction contract. Where there is no such agreement, the provisions of the Scheme for Construction Contract will apply. The Scheme currently provides that this is seven days before payment is finally due.

Paragraph (8) states that paragraph (9) applies where the payment notice provisions have been complied with but there is a dispute about the amount owing and the adjudicator decides that more money is owed than that set out in the relevant notice.

In such a case, paragraph (9) provides that any such additional amount must be paid by the date which is the later of seven days from the date of the adjudicator's decision or the date which, but for the notice, would have been the final date for payment.

Paragraph (10) has reference to the decision of the House of Lords in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others* [2007] UKHL 18 - a transcript of which judgment can be found at

<http://www.bailii.org/uk/cases/UKHL/2007/18.html>.

In that case, the House of Lords decided that the payer could legitimately withhold monies, notwithstanding that no “withholding notice” under current section 111 (of Part 2 of the Housing Grants, Construction Regeneration 1996 Act, the corresponding legislation in GB to the 1997 Order) had been given, in a case where the parties’ contract had provided that moneys need not be paid in the event of the payee’s insolvency. The key to that decision was the fact that the insolvency occurred *after* the period for giving a “withholding notice” had expired i.e. it was not in the nature of things possible for the payer to have given such a notice beforehand.

Paragraph (10) is intended to ensure that the *Melville Dundas* decision remains confined to insolvency situations alone (and is not interpreted to include other events which the parties may have specified in their contract). In the context of new Article 10, it provides that the paragraph (1) requirement to pay the “notified sum” does not apply where the contract allows the payer to withhold monies upon the payee’s insolvency and the payee becomes insolvent after the expiry of the period for giving a notice of intention to pay less than this sum (pursuant to paragraph (3)).

Paragraph (11) applies the existing definitions of “insolvent” in the 1997 Order (Article 12) to paragraph (10).

Subsection (2) of section 7 makes consequential amendments to Article 11 of the 1997 Order such that, in effect, relevant references in that Article are to the new paragraph (1) requirement i.e. the requirement to pay the “notified sum”.

Section 8 - Suspension of performance for non-payment

Article 11 of the 1997 Order permits a contractor to stop carrying out work under the contract in the event of non-payment by the other party.

Paragraph (a) of section 8 amends paragraph (1) of Article 11 to put it beyond doubt that a contractor may stop carrying out some, and not simply all, of the work in such a case.

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Paragraph (b) of section 8 inserts a new paragraph (3A) into Article 11. The effect of this is to make the “party in default” (the party who has not paid) liable to pay to the contractor stopping work pursuant to Article 11 a reasonable amount by way of the costs and expenses he incurs by stopping work (for instance, the payee’s reasonable costs in redeploying staff or removing plant and equipment).

Paragraph (c) of section 8 amends paragraph (4) of Article 11. Article 11(4) as originally enacted provided that any period during which the contractor stopped work in pursuance of this right to do so in a non-payment situation was to be disregarded in calculating any time period prescribed in the contract. The amendment extends this to any period in which the contractor stops work “in consequence of the exercise of” this right; with the effect that extra time is allowable – for instance, the time which the payee requires to remobilise staff or return plant and equipment to the relevant site.