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 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.