

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 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 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.