

The Construction Contracts Bill 2010 and the introduction of adjudication in construction disputes in Ireland

An update

The government published the Regulatory impact Assessment in September following consultations with interested parties over the summer. Whilst some of the concerns with the draft legislation have been addressed it looks like Ireland is going to be the first country in the world to introduce an Adjudication procedure which is non-binding in the event of a referral to arbitration. This is a shame and a wasted opportunity.

The Construction Contracts Bill 2010 in a nutshell aims to introduce a statutory right to be paid defined amounts at defined stages in a project with a mandatory fast track adjudication process available to the parties to enforce such rights and a statutory right to stop working if payments are not being made on time.

The legislation is modelled on the UK Housing Grants, Construction and Regeneration Act 1996 which introduced adjudication in the UK in 1998 (the UK Act). Adjudication has been extremely successful since its introduction in the UK and has dramatically reduced the time taken to and the cost of litigating construction disputes in the UK.

There is one major difference between the Irish draft legislation and the UK Act which has the potential to destroy the effect of the legislation in Ireland and will certainly prevent the dramatic reduction in the time taken to and cost of litigating construction disputes in Ireland which was the result of the introduction of adjudication in the UK. The difference is contained at section 6(12) which provides as follows:

“The decision of the adjudicator shall not be binding if the payment dispute is referred to arbitration or proceedings are otherwise initiated in relation to the decision unless the parties agree to accept the decision as finally determining the payment dispute”.

The purpose of adjudication is to allow swift resolution of disputes allowing projects to be completed without wasting time and money in litigation. This clause, if enacted unchanged, makes this purpose impossible to achieve. It will simply add adjudication as another layer to an already lengthy and expensive dispute resolution process in construction contracts. A reluctant “payer” will go through the motions of adjudication knowing that the adjudicators’ decision can be referred to arbitration regardless of the outcome. There are no stipulated time deadlines for referring a dispute to arbitration and there is no right to suspend work where an adjudicators’ decision is referred to arbitration.

This issue is mentioned in the Regulatory Impact Analysis. The problem is recognised but not adequately addressed. The reasoning put forward for the provision is the protection of public monies. One cannot have a situation where tax payers money is paid out pursuant to a decision of an adjudicator which is subsequently overturned and the monies prove irrecoverable. The solution mooted is a possible two pillared approach with different arrangements for public and private contracts. The vast majority of contracts in Ireland right now are public contracts so this does not address the problem.

It is noteworthy that the UK, on 1st October, introduced amending legislation to the UK Act. The New Act (the Local Democracy, Economic Development and Construction Act 2009) aims to address all of the issues which have caused a problem with the adjudication process since its introduction in 1998. Nowhere in any of the consultations leading to the New Act was the matter of the binding nature of the adjudicators decision raised and the New Act makes no change to the fact that an adjudicators decision is binding notwithstanding a referral to arbitration. The reason for this is simple.... Adjudication has worked and the key to its success has been the fact that the process produces a binding decision within 28 days pursuant to which the “paying party” must discharge payment.

Other countries in the world such as Australia, Singapore, Malaysia and New Zealand have adopted legislation modelled on the UK Act over the years. None have seen fit to alter the fact that the adjudicators decision is binding notwithstanding a referral to arbitration. All are sophisticated construction jurisdictions. One must assume that this issue would have been raised in at least one of these countries if it had been a problem.

It is accepted that there is a need now more than ever to protect the public purse. There is a way of doing so however which does not involve destroying the effect of tried and tested legislation. It is interesting that the UK, Australia, New Zealand, Malaysia and Singapore, all of whom presumably have the same interest in protecting public monies have not seen fit to make such a change despite presumably paying out on foot of thousands of adjudicators decisions over the last decade.

As stated at the outset, it will be a shame if Ireland chose to pioneer a dispute resolution procedure which provides for a non-binding decision in the event of a referral to arbitration. Not only is it a shame, it is unnecessary and will be a wasted opportunity to solve the single biggest problem in the construction industry in Ireland – enforcing the right to payment.

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