



Northern Ireland
Assembly

Research and Library Service Bill Paper

14 July 2010

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Construction Contracts (Amendment) Bill

NIAR 295-10

This paper examines the Construction Contracts (Amendment) Bill that was introduced to the Assembly by the Minister of Finance and Personnel on 26 April 2010. Responses to DFP's consultation are considered along with issues raised during consultation on equivalent legislation in Great Britain.

Executive Summary

The Construction Contracts (Amendment) Bill appears to be a relatively non-controversial piece of legislation. The Committee for Finance and Personnel's call for evidence in relation to the proposals received no responses.

The Department for Finance and Personnel's consultation on the proposals also appears to have received a modest response. Consultation on equivalent legislation in Great Britain during 2008 did not give rise to any significant issues.

One aspect of the consultation responses that is particularly worth noting is that each of the three consultation exercises conducted in Great Britain and Northern Ireland found that there was strong support from respondents for maintaining parity in the law across the UK; this suggests that the Department's approach of replicating provisions contained in legislation in Great Britain is appropriate.

The only issue where it appears that consultation responses were in disagreement was in relation to clarification related to a House of Lords judgement on a legal dispute. It may be worth the Committee for Finance and Personnel seeking further information on this issue and the consultation responses to it.

Finally, the Department conducted a pre-consultation exercise with umbrella groups representing the interests of the construction industry. No likely adverse impacts or opportunities to promote better community relations were identified.

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1 Introduction

The Construction Contracts (Amendment) Bill (“the Bill”) amends the Construction Contracts (Northern Ireland) Order 1997 (SI No.274 (N.I. 1))¹ This Order replicated legislation in Great Britain and was intended primarily to allow swift resolution of disputes by way of adjudication and to improve payment practices to relieve issues that were identified as problematic within the construction industry.

The amendments in the Bill are aimed at reducing poor payment practices and restrictions on access to adjudication, and clarifying that a contractor may stop carrying out some or all work in the event of non-payment by the other party. These amendments mirror changes to the originating legislation in Great Britain. The explanatory memorandum to the Bill explains that:

The proposed measures seek to follow the GB approach which was to build on the good track record between government and the industry where possible [...] Legislative intervention is proposed only where it is clearly necessary and then only to ‘fine-tune’ rather than re-invent the statutory framework.²

2 Consultation Responses

2.1 General

The Department for Business, Enterprise and Regulatory Reform (BERR) consulted on the proposed amendments in conjunction with the Construction and Domestic Energy Division of the Welsh Assembly Government. BERR’s analysis on the consultation responses concluded that:

There was broad support for the proposals set out in the consultation paper though, given their technical nature, respondents were understandably concerned with the precise wording of any proposed amendments.³

The Scottish Government’s own consultation also found that “there was broad support for the proposed amendments set out in the consultation.”⁴

¹ Available online at: <http://www.opsi.gov.uk/si/si1997/19970274.htm> (accessed 07 July 2010)

² Explanatory Memorandum available online at: http://www.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see ‘Options Considered’)

³ BERR (2008) ‘Improving payment practices in the construction industry’ available online at: <http://www.bis.gov.uk/files/file47090.pdf> (accessed 07 July 2010) (see page 9)

⁴ Scottish Government (2008) ‘Improving Payment Practices in the Construction Industry’ available online at: <http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf> (accessed 07 July 2010) (see page 5)

2.2 Adjudication

The proposals for amending the requirements in respect of adjudication were broadly supported across the administrations.

The BERR consultation analysis found that:

- *The support for the proposed amendments on adjudication was particularly strong.*
- *Respondents almost universally supported the proposal to remove the requirement that contracts should be in writing for the provisions of the Construction Act to apply.*
- *The proposal on conclusive decisions was welcomed – though some felt it might be better to deal with the issue with a different legislative solution.*
- *The introduction of a statutory framework for costs was broadly welcomed though some respondents felt it would be better to introduce an outright ban.⁵*

In Scotland, the consultation analysis found that:

The responses for the proposed amendments on adjudication were exceptionally robust.

- *Almost all of the respondents supported our proposal to remove the requirement that contracts should be in writing for the provisions of the Construction Act to apply.*
- *Our proposal on conclusive decisions was welcomed – although some felt it might be better to deal with this issue with a different legislative solution.*
- *Our proposal in relation to the introduction of a statutory framework for the costs of adjudication was broadly welcomed.⁶*

In Northern Ireland, the consultation found that:

Respondents were unanimous that the Construction Contracts Order should be amended to remove the requirement that the Order should apply only to contracts in writing.

All respondents broadly welcomed the prohibition of agreements where decisions as to the amounts of interim payments are conclusive.

⁵ BERR (2008) 'Improving payment practices in the construction industry' available online at: <http://www.bis.gov.uk/files/file47090.pdf> (accessed 07 July 2010) (see page 9)

⁶ Scottish Government (2008) 'Improving Payment Practices in the Construction Industry' available online at: <http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf> (accessed 07 July 2010) (see page 5)

There was broad, but not unanimous, support for DFP's proposal to prohibit agreements on the allocation of costs of adjudication until after the adjudicator is appointed.⁷

2.3 Payment Framework

The BERR consultation found that:

There was understandably a little more difficulty with the proposed amendments to the payment framework.

- *The removal of the requirement to issue a payment notice for contracts subject to a third party certification process was generally welcomed though some questioned the extent to which it was an issue.*
- *Respondents broadly welcomed the increased clarity and transparency our proposals were seeking to introduce to the existing statutory payment framework.*
- *However, some saw no need to intervene at all while others sought to make the case for a much greater intervention into freedom of contract and for wholesale reform of the existing statutory payment framework.*
- *Responses on the abolition of pay-when-certified clauses were mixed although no clear alternative proposal emerged which would provide greater clarity about when a payment would be made.⁸*

In Scotland, consultation found that:

There was understandably a range of diverse views in relation to the proposed amendments to the payment framework. However on balance, it was generally felt that our proposals would improve the operation of the existing statutory framework.

- *The removal of the requirement to issue a payment notice for contracts subject to a third party certification process received mixed responses with some questioning the extent to which it was an issue.*
- *Respondents broadly welcomed the increased clarity and transparency our proposals were seeking to introduce to the*

⁷ Explanatory Memorandum available online at: http://www.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see 'Consultation')

⁸ BERR (2008) 'Improving payment practices in the construction industry' available online at: <http://www.bis.gov.uk/files/file47090.pdf> (accessed 07 July 2010) (see page 9)

existing statutory framework, although some felt that the issues concerning payment would be best dealt with through guidance.

- *The proposal to abolish “pay-when-certified” clauses was broadly welcomed although this support was subject to the detailed mechanisms being made sufficiently robust.⁹*

DFP’s consultation found that:

Respondents agreed unanimously that that the Construction Contracts Order should be amended so that a certificate from a third party setting out a valuation of the work done may function as an Article 9(2) payment notice and that an Article 9(2) notice may be issued by either the payer or a person identified in the contract.

While most agreed with DFP’s proposal to include provision in Article 9(2) for greater clarity on when it is necessary to issue an Article 9(2) payment notice, one respondent felt that guidance would be preferable to legislation.

Broad support was offered for DFP’s proposal to amend Article 9(2) to require that in addition to the amount of a payment and the basis of its calculation, payment notices should state the amount of any sums withheld.

All respondents accepted DFP’s proposals that the Construction Contracts Order should be amended to ensure that both payer and payee should know the sum due for the purpose of Article 10 so that deductions can only be made by issuing a withholding notice and that, for the purpose of Article 11, both should know the amount to be paid if the payer is to avoid the possibility that the payee will suspend performance.

All respondents agreed that pay-when-certified agreements should be prohibited.¹⁰

2.4 Suspension

BERR’s consultation found “almost unanimous support” for its proposals to improve the right of suspension. In Scotland the proposal met with “unanimous support.” The DFP analysis does not include explicit reference to the right of suspension but did find that “all respondents agreed, some emphatically, that parity of legislation within the UK was highly desirable.”

⁹ Scottish Government (2008) ‘Improving Payment Practices in the Construction Industry’ available online at: <http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf> (accessed 07 July 2010) (see pages 5-6)

¹⁰ Explanatory Memorandum available online at: http://www.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see ‘Consultation’)

2.5 Other issues

Parity of legislation

As stated above, respondents in Northern Ireland felt that parity of legislation within the UK was highly desirable. This response was mirrored in the respective consultations in Great Britain.

The BERR consultation found that “there was strong support, over 98% of the respondents, for the suggestion of cross-border uniformity with the devolved administrations.”¹¹

In Scotland “respondents unanimously agreed that we should continue to work to minimise divergence across the United Kingdom, subject to legal difference between Scottish and English law.”¹²

Correction of errors

The BERR consultation found that there was:

*strong support, over 90% of respondents, for the introduction of a provision allowing the adjudicator to correct errors and omissions in his decision even though this was not strictly necessary in England and Wales.*¹³

In Scotland:

*There was undivided support for the introduction of a provision allowing the adjudicator to correct errors and omissions in their decisions and 7 days was generally agreed as an acceptable period to review the adjudicator’s decision.*¹⁴

In Northern Ireland:

*There was unanimous support for the introduction of a ‘slip rule’ to allow adjudicators to correct obvious errors in their decisions, but there was one objection to the proposal to allow up to a week for such corrections to be made.*¹⁵

¹¹ BERR (2008) ‘Improving payment practices in the construction industry’ available online at: <http://www.bis.gov.uk/files/file47090.pdf> (accessed 07 July 2010) (see page 16)

¹² Scottish Government (2008) ‘Improving Payment Practices in the Construction Industry’ available online at: <http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf> (accessed 07 July 2010) (see page 5)

¹³ BERR (2008) ‘Improving payment practices in the construction industry’ available online at: <http://www.bis.gov.uk/files/file47090.pdf> (accessed 07 July 2010) (see page 16)

¹⁴ Scottish Government (2008) ‘Improving Payment Practices in the Construction Industry’ available online at: <http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf> (accessed 07 July 2010) (see page 5)

¹⁵ Explanatory Memorandum available online at: http://www.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see ‘Consultation’)

Melville Dundas vs George Wimpey

The Bill proposes in Clause 7(10) to clarify the legislation in relation to a House of Lords judgement.

The BERR and Scottish consultation analyses found that the judgement had caused confusion. BERR concluded that “respondents were keen to see some clarification in statute.”¹⁶ The proposal was supported by 65% of respondents. In Scotland this was supported by “just over half” of the respondents.¹⁷

In Northern Ireland, views on this issue were “sharply divided.”¹⁸ It is not clear from the explanatory memorandum the reasons for the divided opinion; this issue may warrant further exploration.

3 Equality Impact Assessment

The Department for Finance and Personnel conducted a pre-consultation exercise with umbrella groups representing the main participants in the construction industry.

Groups consulted were:

- Construction Employers' Federation;
- Confederation of Associations of Specialist Engineering Contractors;
- Royal Institution of Chartered Surveyors;
- Royal Society of Ulster Architects; and
- Association for Consulting and Engineering

The Department indicated that responses showed that the proposed amendments to legislation contained in the Bill would not be likely to have any impact on the needs, experiences, issues or priorities of any section 75 group.

In assessing any opportunity to promote better equality of opportunity or better community relations, the Department stated in its equality screening exercise that:

the amendments are intended to promote fairer practice in ensuring prompt payment procedures are observed and that where disputes have arisen, these may be resolved in the first instance, and where appropriate, by adjudication, rather than by resorting to litigation. These are measures which may reduce the administrative burden on businesses by clarifying payment obligations and promote a less adversarial commercial environment, so helping improve relationships generally, if not specifically with regard to Section 75 groups.

¹⁶ BERR (2008) 'Improving payment practices in the construction industry' available online at: <http://www.bis.gov.uk/files/file47090.pdf> (accessed 07 July 2010) (see page 9)

¹⁷ Scottish Government (2008) 'Improving Payment Practices in the Construction Industry' available online at: <http://www.scotland.gov.uk/Resource/Doc/233912/0064048.pdf> (accessed 07 July 2010) (see page 6)

¹⁸ Explanatory Memorandum available online at: http://www.niassembly.gov.uk/legislation/primary/2009/niabill16_09_efm.htm (accessed 07 July 2010) (see 'Consultation')