



THE DRAFT CONSTRUCTION CONTRACTS BILL?

So at long last we have the draft amendments to Part II of the Housing Grants, Construction and Regeneration Act 1996 or the 'Construction Act' as many call it. Was the wait worth it? Well let's see:

First, it is called the draft Construction Contracts Bill which is nice and clear but it will (as was announced last May) form part of the Community Empowerment, Housing and Economic Regeneration Bill or 'CEHER' for short. So as with the 1996 Act, the construction industry (despite its contribution to the financial coffers of UK plc) remains the bridesmaid rather than the bride having to 'piggy back' on other planned legislation.

“Was the wait worth it?”

Second, the draft Bill is not necessarily the draft Bill because the government now seeks your comments. These need to be sent in by 12 September. [Please click here](#) to download a copy of the draft Bill and Explanatory Notes.

Third, the draft Bill, which runs to eight pages and twelve sections, comes with thirteen pages of Explanatory Notes to help the reader understand what the draft Bill

means. Fourth, some of the proposed amendments have been long talked about and expected. These include:

- the repeal, i.e. end of, section 107 of the 1996 Act. This brings to an end the need for construction contracts to be in writing. That all being said, the Bill and the Explanatory Notes make it clear that certain provisions must, nevertheless, be 'in writing' and the Bill introduces a new definition of what is meant by this by way of a new section 115A to the 1996 Act.

So it's a case of a partial repeal in order to rectify the concerns raised by the much criticised Court of Appeal decision in

RJT Consulting which required every single provision of a contract to be in writing before the the Act could apply;

- the end of the so-called *Tolent Construction* provisions which make one of the parties responsible for all or part of the costs regardless of the outcome of the adjudication. This is section 4 of the draft Bill (introducing sections 108A and 108B of the 1996 Act) and we doubt that

many will complain about the ending of this abuse;

- the ending of conclusive interim payment decisions. This is section 5 of the Bill introducing new subsections to section 109 of the 1996 Act;
- an end to the practice of making the determination of the amount due subject to an upstream or other contract. This is section 6 of the Bill;





- an attempt to clarify what is intended by way of a section 110 or the payment notice provisions of the 1996 Act, including the giving of the right to the payee to give notice of the amount due. The Bill also allows the contract administrator or architect etc to give the payment notice rather than the actual payer. That all being said, this part of the draft Bill (section 7 introducing sections 110A and 110B) is unlikely to win the 'crystal mark' for the use of plain English;
- similarly, the Bill seeks to clarify section 111 (withholding notice) of the 1996 Act introducing, amongst other things, a new provision (section 111(10)) confining the House of Lords' decision in *Melville Dundas*, to where the payee becomes insolvent after the date for serving a "section 111 notice"; and
- the right to recover the costs of suspending the works pursuant to clause 112 of the 1996 Act, i.e. the payer must pay "costs and expenses reasonably incurred"

by the suspending party as a result of him exercising that right.

There is no change in terms of PFI projects. Therefore, these projects remain outside of the ambit of adjudication insofar as the project agreement level and above is concerned. In other words, the 'mismatch' between those down the contractual chain and those higher up (as exposed by the M6 Toll or *Midland Expressway* case) remains and so do the many hours of negotiating over the extent and meaning of equivalent project relief or EPR.

Notwithstanding the call for the end of the 'residential occupier' exclusion there is no change here either. This is welcomed given the absence of any private consumer representative on any of the previous reviews including that overseen by Sir Michael Latham. That said, residential occupiers can still come within the ambit of the adjudication process by signing up to standard form contracts containing such procedures.

Save for section 3 (which is to apply to Scotland only) the changes will apply to England, Wales and Scotland on dates to be

announced (section 11 of the Bill).

It has been a long journey since the first calls for reform back in 2001, less than 3 years after the 1996 Act came into force. The journey is far from over but the end is, perhaps, getting a little closer. We will certainly be scrutinising the detailed wording of the draft Bill and making our comments known to the BERR by 12 September on this important and long awaited piece of legislation.

If you want to know more about the proposed changes, our next Construction Law Brief will look at the draft Bill in far more detail as will our London Construction Breakfast Briefing on 22 October.

This Bulletin is intended to be a general guide to the law. If you have any specific questions about your own circumstances, these should be referred to a member of our team for a definitive response.

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