

CONSTRUCTION CONTRACTS ACT 2004

Chapter 2

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Passed: 18th February 2004

AN ACT

to amend the law relating to construction
contracts.

WE, your Majesty's most dutiful and loyal subjects, the Council and Keys of the said Isle, do humbly beseech your Majesty that it may be enacted, and be it enacted, by the Queen's Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows (that is to say):—

Introductory

1. Construction contracts P1996/53/104

(1) Subject to any order under subsection (4), in this Act a "construction contract" means an agreement with a person for any of the following —

- (a) the carrying out of construction operations;
- (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
- (c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Act to a construction contract include an agreement —

- (a) to do architectural, design, or surveying work, or
- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations.

(3) References in this Act to a construction contract do not include a contract of employment (within the meaning of the Employment Act 1991[c.19]).

(4) The Department of Trade and Industry ("the Department") may by order provide that an agreement of a description specified in the order shall, or shall not, be treated as a construction contract for the purposes of this Act.

(5) Where an agreement relates to construction operations and other matters, this Act applies to it only so far as it relates to construction operations.

An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

(6) This Act applies only to construction contracts which—

(a) are entered into after the commencement of this Act, and

(b) relate to the carrying out of construction operations in the Island.

(7) This Act applies whether or not the law of the Island is otherwise the applicable law in relation to the contract.

2. Meaning of "construction operations"

P1996/53/105

(1) In this Act "construction operations" means, subject as follows, operations of any of the following descriptions —

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-

moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

- (f) painting or decorating the internal or external surfaces of any building or structure.

(2) The following operations are not construction operations within the meaning of this Act—

- (a) drilling for, or extraction of, oil or natural gas;
- (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
- (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is —
 - (i) nuclear processing, power generation, or water or effluent treatment, or
 - (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
- (d) manufacture or delivery to site of —
 - (i) building or engineering components or equipment,
 - (ii) materials, plant or machinery, or
 - (iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,except under a contract which also provides for their installation;
- (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

(3) The Department may by order provide that operations or work of a description specified in the order shall, or shall not, be treated as construction operations for the purposes of this Act.

3. Provisions not applicable to contract with residential occupier

P1996/53/106

- (1) This Act does not apply —
 - (a) to a construction contract with a residential occupier, or

(b) to any other description of construction contract excluded from the operation of this Act by order made by the Department.

(2) In this section —

"construction contract with a residential occupier" means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence;

"dwelling" means a dwelling-house or a flat;

"dwelling-house" does not include a building containing a flat;

"flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

(3) The Department may by order amend subsection (2).

4. Provisions applicable only to agreements in writing 1996/53/107

(1) The provisions of this Act apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Act only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing —

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Act to anything being written or in writing include its being recorded by any means.

Adjudication

5. Right to refer disputes to adjudication

P1996/53/108

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

(2) The contract shall —

- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
- (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
- (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
- (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
- (e) impose a duty on the adjudicator to act impartially; and
- (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of a scheme under section 11 apply.

(6) A scheme under section 11 may include provision —

- (a) conferring powers on the High Court in relation to adjudication, and
- (b) relating to the enforcement of the adjudicator's decision.

Payment

6. Entitlement to stage payments P1996/53/109

(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless —

- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
- (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

(2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

(3) In the absence of such agreement, the relevant provisions of a scheme under section 11 apply.

(4) References in the following sections to a payment under the contract include a payment by virtue of this section.

7. Dates for payment

P1996/53/110

- (1) Every construction contract shall--
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
 - (b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than 5 days after the date on which a payment becomes due from him under the contract, or would have become due if —

- (a) the other party had carried out his obligations under the contract, and
- (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of a scheme under section 11 apply.

8. Notice of intention to withhold payment P1996/53/111

(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 7(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

- (2) To be effective such a notice must specify —
- (a) the amount proposed to be withheld and the ground for withholding payment, or
 - (b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by a scheme under section 11.

(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than —

- (a) 7 days from the date of the decision, or
- (b) the date which apart from the notice would have been the final date for payment,

whichever is the later.

9. Right to suspend performance for non-payment P1996/53/112

(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made ("the party in default").

(2) The right may not be exercised without first giving to the party in default at least 7 days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

(3) The right to suspend performance ceases when the party in default makes payment in full of the amount due.

(4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in

computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

10. Prohibition of conditional payment provisions P1996/53/113

(1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

(2) For the purposes of this section a company becomes insolvent

—
(a) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 218 of the Companies Act 1931[XIII p.235], or

(d) on the making of a winding-up order under Part V of that Act.

(3) For the purposes of this section an individual becomes insolvent —

(a) on the making of a receiving order or order of adjudication against him under the Bankruptcy Code 1892[VI p.312], or

(b) when he makes a deed of arrangement within the meaning of section 78 of that Code.

(4) For the purposes of this section a partnership becomes insolvent when any company or individual who is a member of the partnership becomes insolvent.

(5) A company, individual or partnership shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of any country outside the Island.

(6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.

In the absence of such agreement, the relevant provisions of a scheme under section 11 apply.

Supplementary provisions

11. Scheme for construction contracts P1996/53/114

(1) The Department shall by regulations make a scheme containing provision about the matters referred to in sections 5 to 10.

(2) Before making any such regulations the Department shall consult such persons as it thinks fit.

(3) Where any provisions of a scheme under this section apply by virtue of this Act in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

12. Service of notices, &c P1996/53/115

(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Act.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post —

- (a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or
- (b) where the addressee is a body corporate, to the body's registered or principal office,

it shall be treated as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Act to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

13. Reckoning periods of time P1996/53/116

(1) For the purposes of this Act periods of time shall be reckoned as follows.

(2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(3) Where the period would include Christmas Day, Good Friday or a bank holiday, that day shall be excluded.

14. Interpretation

(1) In this Act —

"agreement" and cognate expressions have the meanings given by section 4(1);

"the Department" means the Department of Trade and Industry;

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"construction contract" has the meaning given by section 1;

"construction operations" has the meaning given by section 2.

(2) Until the coming into operation of section 2 of the Contracts (Applicable Law) Act 1992[c.2], any reference in this Act to the applicable law of a contract shall be construed as a reference to the proper law of the contract.

15. Subordinate legislation

Orders and regulations under this Act (except an order under section 16(2)) shall not have effect unless they are approved by Tynwald.

16. Short title and commencement

(1) This Act may be cited as the Construction Contracts Act 2004.

(2) This Act shall come into operation on such day or days as the Department may by order appoint.