

## **Construction Contracts Bill 2010**

**By Mary Smith and Tara Cosgrove**

The Construction Contracts Bill 2010 was introduced to the Seanad (upper house of the Irish Parliament) as a Private Members Bill on Wednesday, 19 May 2010. The main purpose of the Bill is to improve payment practices on cash flow and to reform the dispute procedures in the construction industry. Unlike in the United Kingdom, there is currently no legislation in Ireland which regulates practices with regard to payment in the construction industry.

The Bill provides for a mechanism whereby prior notice of an intention to withhold sums from payments otherwise due to contractors and consultants must be given. Otherwise, payments must be made in full or the payee may suspend the provision of the works and/or services under the construction contract until payment is made in full.

The Bill as currently drafted applies to all construction contracts whether oral or in writing. Section 3 of the Bill defines construction contracts and includes an agreement to carry out construction operations. Also included are agreements to carry out architectural, design and surveying works. The Bill also applies to agreements to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape. However, like its UK equivalent, the Bill will not apply to a construction contract with a residential occupier. A 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. So the layman wishing to build, refurbish or extend premises that are or will be his residence will not be subjected to the provisions of the Bill which is aimed at improving practises between commercial entities.

Section 7 of the Bill provides for notice of intention to withhold payment. It requires the payer to give an effective notice of intention to withhold payment to a payee before any deduction from such payment can be made. To be effective such notice must specify the following:

- (i) the sum that the payer considers to be due on the date the notice is served; and;
- (ii) the basis on which that sum is calculated, the ground for withholding any amount to be withheld and if there is more than one ground, each ground and the amount attributable to it.

The notice must be given not later than the prescribed period before the relevant payment date. The parties are free to agree what the prescribed period is to be. In default of agreement the prescribed period is to be five days.

Beale and Company Solicitors

**Dublin:** Hamilton House · 28 Fitzwilliam Place · Dublin 2 · T: +353 (0) 1 775 9505  
**London:** Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474  
**Bristol:** Venturers House · King Street · Bristol · BS1 4PB · T:+44 (0)17 915 4021

Section 9 provides for the right to suspend performance for non-payment where a sum due under the contract is unpaid in full by the relevant payment date and no effective notice to withhold has been given. However, this right may not be exercised without the payee giving the party in default at least 7 days notice of intention to suspend. The section further provides that where this right is exercised then the party in default shall be liable to pay a reasonable amount in respect of costs and expenses reasonably incurred by the party exercising their right to suspend.

Section 8 of the Bill introduces a statutory right of adjudication. The parties can agree to accept the decision as a final determination or decide to refer it to conciliation, arbitration or litigation in accordance with their contract provisions.

The Bill has very similar provisions to its UK counterpart, the Housing Grants, Construction & Regeneration Act 1996 which was implemented into law 12 years ago. However, the Bill requires further work and consultation. Significantly, the Bill will need to be considered in light of the provisions of the Public Works Contracts and their current adjudication provisions. Furthermore, 'pay when paid' clauses are commonly invoked as a basis for non-payment in construction contracts and have yet to be tested in the Irish Courts. Unlike the UK Act, the Bill as currently drafted does not prohibit these clauses. It is unlikely that the Bill's main purpose could be achieved if payments could be validly withheld on the grounds of the 'pay when paid' clause in a contract.

We understand that the Bill is currently undergoing a five month period of consultation among Government departments and relevant industry and professional bodies. The Bill will be re-entered for debate in the Seanad on 19 October 2010. To date the Bill has been warmly received by those in the construction industry.

It is hoped that the final text of the Bill will achieve its purpose in improving cash flow by providing clarity and transparency in the payment of moneys due under construction contracts, providing real and practical benefit to the construction industry in general and to those working in the sector, especially subcontractors, who are usually small and medium-sized enterprises. However, given that it is a Private Members Bill it's progress will be dependent upon Government support. In any event, we will be monitoring the passage of the Bill.

For further information contact Mary Smith on +353 1 775 9541 or [m.smith@beale-law.com](mailto:m.smith@beale-law.com) or Tara Cosgrove on +353 1 775 9541 or [t.cosgrove@beale-law.com](mailto:t.cosgrove@beale-law.com)

**August 2010**

Beale and Company Solicitors

**Dublin:** Hamilton House · 28 Fitzwilliam Place · Dublin 2 · T: +353 (0) 1 775 9505  
**London:** Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474  
**Bristol:** Venturers House · King Street · Bristol · BS1 4PB · T:+44 (0)17 915 4021