

IMPROVING PAYMENT PRACTICES IN THE CONSTRUCTION INDUSTRY IN NORTHERN IRELAND

Consultation on proposals to amend the Construction
Contracts (Northern Ireland) Order 1997 and The Scheme for
Construction Contracts in Northern Ireland
Regulations (Northern Ireland) 1999

April 2009

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Foreword

The construction industry is one of the largest in Northern Ireland and plays a vital role in the economy. Given the importance of the industry, I believe it is essential that we therefore have fair payment practices in place. While the introduction of the Construction Contracts (Northern Ireland) Order almost ten years ago did bring significant benefits, it has since become apparent that we now require further improvements in the legislative framework.

I am delighted that I am now able to launch this consultation on my proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.

The measures proposed are intended:

- to encourage parties to resolve disputes by adjudication;
- to improve transparency and clarity in the exchange of information relating to payments, thereby enabling parties to construction contracts to manage cash flow better; and
- to improve the right to suspend performance under the contract.

I am however proposing proportionate amendments to existing provisions rather than radical change. I believe that guidance must remain our preferred option to improve the operation of construction contracts and have considered further legislative intervention only where I believe it to be absolutely necessary.

The proposals will create a better defined and a more effective regulatory infrastructure intended to reinforce the measures contained in the current Construction Contracts Order and so help maintain a fine balance across the range of interests represented within the industry. They comprise a number of amendments, each specifically aimed to address particular identified weaknesses in the current operation of the Order. In order to maintain parity of legislation and commercial opportunity, the proposed changes are also intended to keep pace with proposed amendments to the Construction Act in Great Britain.

I believe the amendments I am proposing will bring benefits overall to all participants in the industry and I look forward to this consultation generating a healthy discussion and a positive outcome.

Nigel Dodds OBE, MP MLA,
Minister for Finance and Personnel

April 2009

Executive Summary

Background

This consultation is about amendments we are proposing to make to the Construction Contracts Order (Northern Ireland) 1997 ('The Construction Contracts Order') and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 ('The Scheme').

The Construction Contracts Order and The Scheme became effective in 1999 in the wake of the originating legislation in GB, Part II of the Housing Grants Construction Regeneration Act 1996 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 ('The Construction Act' and 'The Scheme').

Proposals to amend this legislation in England and Wales and in Scotland are currently in progress through Parliament following extensive public consultation. To make the same improvements and so maintain parity of legislation across the United Kingdom, we are proposing to make similar amendments to the NI legislation.

The Review of the Construction Act in England and Wales was announced in the 2004 Budget. Nigel Griffiths, then Parliamentary Under Secretary of State for Construction, Small Business and Enterprise, asked Sir Michael Latham to undertake a review of the Act.

Sir Michael's report, published in September 2004, concluded that while the Construction Act generally was working well, some improvements would be helpful. According to various industry surveys, poor payment practices continued to be a major issue for many in construction.

In March 2005 the then Department of Trade and Industry (DTI), (since June 2007, the Department for Business, Enterprise and Regulatory Reform, or BERR) and the Welsh Assembly jointly published a consultation paper - *'Improving Payment Practices in the Construction Industry'*. In January 2006 they issued a consultation analysis, which set out a proposed way forward. During the remainder of that year, other members of a DTI appointed sounding board, working with Sir Michael Latham, developed detailed proposals.

On 20 June 2007 a second Consultation Document was issued jointly for England and Wales taking account of the responses to the first consultation. This considered proposed amendments to Part II of the Housing Grants, Construction and Regeneration Act 1996, which would be taken through the UK Parliament and would affect both England and Wales.

The Scottish Government embarked on a separate consultation on 29 August 2007 relating to Part II of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts (Scotland) Regulations 1998. Subsequently the Scottish Government agreed to make common purpose with England and Wales and the proposed legislation will now also apply to Scotland.

Proposals

We believe prompt and fair payment practice throughout construction supply chains will better enable the industry routinely to adopt integrated working as the norm.

We are proposing to:-

- encourage parties in dispute in construction contracts to resolve their differences through adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation;
- improve transparency and clarity in the exchange of information relating to payments to enable cash flow to be managed better; and
- improve the facility to suspend performance under the contract.

We are proposing to do this by:

On adjudication:

- improving access to the right to refer disputes for adjudication by:
 - applying the legislation to oral and partly oral contracts;
 - preventing the use of agreements that interim payment decisions will be conclusive to avoid adjudication on interim payment disputes;
- ensuring the costs involved in the process are fairly allocated.

On payment:

- preventing unnecessary duplication of payment notices;
- clarifying the requirement to serve a Article 9 (2) payment notice;
- clarifying the content of payment and withholding notices;
- ensuring the payment framework creates a clear interim entitlement to payment; and
- prohibiting the use of pay-when-certified clauses.

On suspension:

- improving the statutory right to suspend performance by allowing the suspending party to claim the resulting costs and delay.

The proposals are not wholesale change, but proportionate reforming amendments to the existing framework intended to address specific issues that have arisen during the nine years the Construction Contract Order has been in operation. Guidance remains the preferred route to improve the operation of construction contracts and further legislative intervention has only been considered where we believe it to be absolutely necessary.

We are now seeking the views of the construction industry and its clients, through this consultation process, on:

- whether this package of proposals properly and adequately addresses the weaknesses in the existing framework; and
- how we might evaluate the costs and benefits of the package.

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Introduction

Construction is one of the pillars of the NI economy. Figures derived from the Northern Ireland Annual Business Inquiry (NIABI) show that construction accounts for 16.1% of national gross value added in Northern Ireland. Its economic importance is wider. Well-managed and successfully delivered construction projects improve public services (health, education and transport), business productivity (offices, communications and retail) and housing, cultural and public spaces.

There are more than 10,000 enterprises active in construction contracting and consulting in Northern Ireland, of which 98.9% are small or micro enterprises. Characteristically, profit margins in the industry are low and insolvencies are high compared to the economy as a whole. The supply team on a construction project often includes a large number of firms.

The context for the Construction Act in GB and its Northern Ireland derivative, the Construction Contracts Order, was originally set by Sir Michael Latham's 1994 report '*Constructing the Team*'. Latham's overall approach to improving the performance of the construction industry - greater collaboration and integration - was subsequently reinforced by Sir John Egan in '*Rethinking Construction*' (1998) who recognised that a successful, collaborative commercial arrangement cannot be supported by poor payment practices.

The Construction Contracts (Northern Ireland) Order 1997

Since The Construction Act in GB and the Northern Ireland Construction Contracts Order came into force, a number of difficulties has come to light and concerns have been raised about their effectiveness. These difficulties have prompted the current review.

How the Order Works

The Construction Order has two main aims:

- to allow swift resolution of disputes by way of adjudication; and
- to ensure prompt cash flow.

The Order currently promotes this by:

- providing a statutory right to refer disputes to adjudication. The adjudicator's decision is binding until finally determined by legal proceedings or arbitration (where there is an arbitration agreement) - Article 7;
- providing the right to interim, periodic or stage payments - Article 8;
- requiring that contracts should provide a mechanism to determine what payments become due and when, and a final date for payment - Article 9 (1);

- requiring that the payer gives the payee early communication of the amount he has paid or proposes to pay - Article 9 (2);
- providing that the payer may not withhold money from the sum due unless he has given an effective withholding notice to the payee - Article 10;
- providing that the payee may suspend performance where a sum due is not paid in full by the final date for payment - Article 11; and
- prohibiting pay-when-paid clauses which link payment to payments received by the payer under a separate contract - Article 12.

Other sections of the Order do the following:

- define the scope of construction contracts - Article 3;
- define the meaning of construction operations including exemptions - Article 4;
- exempt residential occupiers - Article 5;
- restrict the application of the Order to contracts in writing - Article 6;
- provide a power to make a scheme for construction contracts - Article 13; and
- make provision on service of notices, calculation of periods of time and application to the Crown - Articles 14 – 16.

Background to this consultation

The Chancellor announced a review of the Construction Act in the Budget in March 2004:

"Following concerns raised by the construction industry about unreasonable delays in payment, the government will review the adjudication and payment provisions of the Housing Grants Construction and Regeneration Act in order to identify what improvement can be made."

Nigel Griffiths, then Parliamentary Under Secretary of State at DTI (now BERR), asked Sir Michael Latham to review the legislation. Sir Michael's findings were published in September 2004. His report concluded that the Construction Act is generally working well, but that some improvements would be helpful, if means could be found, which would not impact adversely on other parties, or other elements of payment processes, to deliver them.

Following the publication of Sir Michael Latham's report, DTI published a consultation paper, *'Improving Payment Practices in the Construction Industry'*, in March 2005. This first consultation document considered a number of proposals under the following headings:

- improving the ability of parties to a construction contract to reach agreement on what should be paid and when;
- improving the ability of parties to a construction contract to manage cash flow and enable completion of work on the project; and
- reducing disincentives to referring disputes to adjudication.

An analysis of the consultation responses was published in January 2006 and subsequently, DTI held industry-wide, post-consultation events - a series of discussions with its sounding board of key industry figures. It also conducted an

informal consultation with the Construction Umbrella Bodies Adjudication Task Group to develop a more detailed consultation on specific proposals.

On 20 June 2007, the DTI and the Welsh Assembly jointly issued a second Consultation Document for England and Wales, which further considered amendments to Part II of the Housing Grants Construction and Regeneration Act 1996. It was proposed that these would be taken through the UK Parliament and would affect both England and Wales. This consultation also covered amendments to The Scheme for Construction Contracts (England and Wales) Regulations 1998.

The Construction Act also applies in Scotland and policy responsibility for the Act in Scotland and The Scheme for Construction Contracts (Scotland) Regulations 1998 is a matter for the Scottish Executive. The Scottish Government also carried out its own consultation exercise relating to Part II of the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts (Scotland) Regulations 1998. This essentially replicated the proposals in the consultation issued jointly by DTI and the Welsh Assembly.

While the Scottish Government had embarked on a separate consultation with a view to making its own legislative proposals, it subsequently agreed to make common purpose with England and Wales and the legislation now under consideration in Parliament, and reflecting Scottish input, will also apply to Scotland.

Peter Robinson, then Minister of Finance and Personnel in the Northern Ireland Executive, gave his approval on 15 June 2007 for the Northern Ireland Legislative Programme to commence amendments to the Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 to correspond with the changes then proposed in England and Wales (and now in Scotland).

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Chapter 1 – Adjudication framework

1. Removing the requirement that the Construction Order should apply only to contracts in writing.

Background

At present the Construction Order applies to contracts in writing only. This requirement is defined broadly to include an agreement “recorded in any form”. As interpreted by the courts¹, the requirement is applied to all the non-trivial terms of the agreement creating grounds for the adjudicator’s jurisdiction to be challenged. The effect of this can be as follows:

A dispute is referred to adjudication under the Order and one of the parties alleges that a contractual provision is not in writing (or that the contract has been varied by an oral agreement). The adjudicator can then decide either:

- that the contract is in writing and he has jurisdiction, or
- that not all the agreement is in writing and he does not have jurisdiction.

Where the adjudicator decides he does have jurisdiction, he will continue with the adjudication. However his decision will not be enforced on an application for summary judgement, if the court considers that the adjudicator did not have jurisdiction, or that there is an arguable dispute as to his jurisdiction.

Where the adjudicator decides he has no jurisdiction, the adjudication of the dispute will come to an end.

Either outcome involves time and expense, not least the consideration of the challenge itself.

Current legislation

Article 6 has the following structure:

- **Article 6 (1)** – Restriction of the application of the Order to contracts in writing. Any other agreement is also only effective for the purposes of the Order if agreed in writing.
- **Article 6 (2)** – Definition of an agreement in writing (Article 3 states that a construction contract is an agreement). The courts have found that all three of the possible ways in which an agreement might be in writing must apply to the whole agreement (i.e. all of the contract terms must be in writing, agreed in a written exchange or “evidenced” in writing).
- **Article 6 (3)** – An agreement by reference to written terms is an agreement in writing.
- **Article 6 (4)** – An agreement recorded by a party or third party with the consent of the parties is an agreement evidenced in writing.

¹ See RJT Consulting Engineers Ltd –v-DM Engineering Ltd (2002) EWCA Civ 270, 8 March 2002

- **Article 6 (5)** – An agreement alleged by one party and not denied by the other in adjudication, arbitration or court is an agreement in writing for the purposes of the application of the Order subsequently.
- **Article 6 (6)** – An agreement recorded by any means is in writing.

Proposal

We are proposing to remove the restriction of the application of the Construction Order to contracts in writing only. The effect will be that the Order will apply to construction contracts which are agreed wholly in writing, only partly in writing, entirely orally, or which have been varied by oral agreement.

However, certain important contractual provisions required by the Order, such as provisions relating to a contractual adjudication scheme, will continue to need to be in writing. Where this is not the case, the relevant provisions of The Scheme will apply. The contract will still be a ‘construction contract’ for the purposes of the Order.

The Scheme

We believe that the various references to ‘agreements’, whether written or oral, between the parties in The Scheme, will be understood to refer to any agreement following the amendments proposed above. We will therefore specify in The Scheme that such agreements must be made in writing. We consider the agreement of an adjudicator under Part 1 paragraphs 2 and 5(2) must be made in writing.

The references in The Scheme to written notices and notices in writing are unhelpful and we propose to remove them. Article 14 makes clear that notices under the Construction Order are intended to be in writing, whether or not this is specified explicitly.

Discussion

The practical difficulty of agreeing a full written contract has acted as a barrier to the referral of disputes. Our proposal extends the application of the Construction Order to oral and partly oral construction contracts. Large numbers of construction contracts contain orally agreed terms.

Adjudication is strongly supported throughout the industry and increasing access to it is a clear benefit of our proposal.

This proposal is not intended to encourage more oral or partly oral contracts, nor is it likely to do so. There are wider business benefits to contracting on a clearly recorded basis which act as a clear incentive to do so.

There is a paucity of data on the extent of adjudication in Northern Ireland. However, Glasgow Caledonian University’s August 2005 report on adjudication in GB suggested that the incidence of jurisdictional challenge may be reducing the effectiveness of adjudication and increasing its cost, finding that challenges to the adjudicator’s appointment featured in some 40% of adjudications. Of these, 3% related specifically to whether the contract was in writing. A further 7% related to unspecified challenges to the adjudicator’s jurisdiction, which are likely to include

challenges alleging an oral agreement. Many of these then lead to enforcement proceedings.

The annual reports of the Technology and Construction Court (in England and Wales only) for 2005 and 2006 suggest that, on average, approximately 100 claims for enforcement of adjudications are submitted each year. The Technology and Construction Solicitors' Association has found that, of 154 enforcement cases they considered, 23 (or 15%) related to whether the construction contract was in writing. *'Improving Payment Practices in the Construction Industry'* found that on average this may cost £12,500. The total approximate cost is therefore $100 \times 15\% \times £12,500 = £187,500$.

Based upon Glasgow Caledonian University's reports, we believe it is reasonable to assume that approximately 1,750 adjudications are conducted each year in England and Wales. This is an estimate based on construction output in England and Wales as a proportion of that in the UK and taking an average of 2,000 adjudications per year in the UK based upon the survey. The average cost of enforcement proceedings per adjudication is therefore $187,500 / 1,750 = £107$. We presume that this estimate of average cost is also applicable in Northern Ireland.

2. Prohibiting agreements that interim or stage payment decisions will be conclusive

Background

Prior to the introduction of adjudication under the Construction Contracts Order, it was rarely possible to resolve payment disputes via litigation or arbitration during the project. As adjudication is a quick form of dispute resolution, interim or stage payment disputes can now be resolved before the project has come to an end. However, construction contracts often provide that a payment decision will be conclusive of the amount of an interim or stage payment. The effect of such clauses is to prevent the referral of disputes relating to an interim or stage payment decision to adjudication, the initial decision having already effectively concluded the matter.

The ability of the parties to agree that such decisions are conclusive of the payment amount is reflected at paragraph 20(a) Part I of the Schedule to The Scheme, which provides that an adjudicator may not open up, revise, or review any decision, or certificate, if the contract states that the decision or certificate is final and conclusive.

Current legislation

Article 7 of the Construction Contracts Order provides the right to refer a dispute under a construction contract to adjudication. The contract must provide a process whereby a party may give notice at any time of its intention to refer a dispute to adjudication.

Article 8 of the Construction Contracts Order requires all construction contracts of duration 45 days, or more, to provide for payment by instalments, stage payments, or other periodic payments.

Paragraph 20(a) of Part I of the Schedule to The Scheme provides that an adjudicator may not open up, revise or review any decision by any person if the contract states that the decision or certificate is final and conclusive.

Proposal

We are proposing to provide that:

- an agreement that a decision will be conclusive as to the amount of an interim payment, whether an instalment, stage or other periodic payment, will be ineffective. Decisions as to the amount of a final payment (which are often governed by clauses making them conclusive after a period of time) are excluded;
- the parties may agree that a payment decision is conclusive of the amount of an interim payment after the decision of the amount of the interim payment has been taken and notified to them (an effective agreement); and
- a decision as to the amount of an interim payment will include any decision which relates to work performed under the contract to the extent that it affects the amount of the payment.

This proposal reinforces the combined effects of Articles 7 and 8 of the Construction Order by providing a right to stage or interim payments which are properly determined in accordance with the contract.

The Scheme

Following the above amendment, parties will no longer be able to agree that interim decisions will be final and conclusive as to the amount of the payment unless that agreement is entered into after the parties have been notified of the amount of the interim payment. We therefore propose to provide that the adjudicator's ability to "open up, revise and review a decision" applies, unless the parties have made an effective agreement to the contrary.

Discussion

Following the consultation in England and Wales, *'Improving Payment Practices in the Construction Industry'*, we have concluded that:

- the current incidence of agreements that interim or stage payment decisions should be conclusive is high (responses to the consultation suggested 15% of contracts provide for conclusive decisions that are only of substance to interim payments);
- this can be viewed as a means of avoiding the referral of interim payment disputes to adjudication and is contrary to the intention of the Act in GB (and of the Construction Contracts Order in Northern Ireland);

- the adjudicator's power to open up conclusive interim, or stage, payment decisions should extend to decisions about the work done in relation to the interim payment; and
- though it can be argued that some stage payments are finally decided at the completion of a stage of work, this is rare as there is often a reappraisal of the valuation of all stages at the completion of the contract.

BERR statistics for GB suggest that 15,000 contracts are of a duration of less than 45 days and that the remaining 85,000 in the industry are therefore subject to the statutory right to interim payments. Interim payments are usually monthly so assuming that each contract provides for a final payment at its completion and an interim payment at the completion of each whole month during the contract, in GB some 492,000 interim payments are made each year across the industry. Of these payments, 85%, that is some 418,200, are subject and may be referred to adjudication.

The joint DTI / Construction Industry Council (CIC)² survey of adjudicators in GB found that 50% of disputes referred to adjudication relate to interim payments, while the remainder relate to final payments or other matters. The survey also found that resolving payment disputes at the interim stage reduced the cost of adjudication by approximately 10%, or £2,000. This would indicate that approximately 875 adjudications in England and Wales relate to interim payments. If adjudication of interim payment disputes was encouraged by increasing the number that may be referred by a factor of 100 / 85, this would represent an additional 154 interim payment adjudications. Compared to adjudication of the final account, this would result in an approximate reduction in cost of £308,000, or £176 per adjudication, on average. Any arbitration or litigation cases that were also averted would increase this figure. It is estimated that similar savings could be expected to apply in Northern Ireland.

The more significant benefit resulting from the prompt payment of the correct sum following the adjudication is more difficult to quantify, as the dispute may be decided in favour of either party.

3. Introduction of a statutory framework for the costs of adjudication

Background

The Construction Contracts Order provides that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication.

One of the disincentives to parties to a contract in referring disputes to adjudication is the financial cost in doing so. Parties can agree in the contract that the 'loser' will pay the costs of the adjudication, or even that, win or lose, the referring party³ will bear all the costs. This creates a disincentive to the party

² Joint DTI/CIC Survey took place between January through to March 2007

³ These agreements first arose in the case of Bridgeway Construction -v- Tolent Construction (11 April 2000) and were a particular concern of respondents to Improving Adjudication in the Construction Industry (Department of the Environment, Transport and the Regions 2001) and 'Improving Payment Practices in the Construction Industry' (DTI and the Welsh Assembly Government 2005).

which would thus become liable for costs to refer disputes to adjudication and can conversely encourage the other party to escalate costs.

Current legislation

Article 7 provides a statutory right to refer disputes to adjudication. It also sets out the basic requirements of the adjudication scheme to be contained in the contract such as the timetable for securing the appointment of the adjudicator.

Following a consultation by the Department of the Environment, Transport and the Regions in 2001, DTI developed proposals for a statutory framework in relation to the costs of the adjudication which:

- ensures that the parties should pay their own legal and other costs thereby providing an incentive to reduce costs, unless they agree otherwise after the adjudicator is appointed;
- provides that agreements about payment of costs between the parties are only valid if made in writing after the appointment of the adjudicator; and
- provides a statutory entitlement for the adjudicator to recover his fees and expenses.

Proposal

We are proposing to include new provisions in the Construction Contracts Order so that the following agreements are valid only if made in writing and after the appointment of the adjudicator:

- agreements that a party should pay the whole or part of the costs of the adjudication (the legal or other costs of the parties and the fees and expenses of the adjudicator); and
- agreements that the adjudicator may make a decision that a party should pay the whole or part of the costs of the adjudication;

Where the parties have made a valid agreement as described above and unless the parties have agreed which costs of the adjudication will be recoverable, the adjudicator will be required to award:

- a reasonable amount only in respect of costs reasonably incurred by the parties; and
- such reasonable amount as the adjudicator shall determine by way of fees for work reasonably undertaken and expenses reasonably incurred.

We also intend that, notwithstanding the adjudicator's contractual entitlement to his fees and expenses, the parties shall be jointly and severally liable for the adjudicator's reasonable fees and expenses (the formula above). This "backstop" is intended to ensure the adjudicator can recover his reasonable fees when:

- he decides the dispute; or
- his appointment is brought to an end for reasons other than his default or misconduct.

We have considered whether the Construction Contracts Order could include a similar provision requiring the adjudicator to make an allocation of his fees and expenses between the parties. This is not possible if the parties are to be jointly and severally liable for fees. An allocation by the adjudicator appears to be no more than a statement of the proportions in which he will seek to recover them from the parties. It is not binding on him, as he is not a party to the dispute.

We will provide that in general the decision of the adjudicator as to the costs of the adjudication is final and binding, other than in cases where:

- the parties agree that the adjudicator shall make a decision as to their reasonable legal and other costs and he fails to do so; or
- the adjudicator claims or decides his reasonable fees and expenses under the new provisions.

In these cases we will provide the courts with powers to determine the matter.

The Scheme

Having made full statutory provision for the costs of the adjudication in the amendments to the Construction Contracts Order, we intend to remove all provisions as to the costs of the adjudication from Part 1 of the Schedule to The Scheme. These are:

- the provisions entitling the adjudicator to his fees when his appointment is revoked under paragraph 11; and
- the provisions entitling the adjudicator to his fees when he decides the dispute under paragraph 25.

We are also proposing to remove the provisions entitling the adjudicator to payment where he resigns in certain cases, where, for example, he does not have jurisdiction to decide the dispute. As The Scheme does not apply in these situations, the terms of the adjudicator's appointment would determine his payment in this case.

Discussion

We are proposing a framework which will provide greater access to the adjudication process for those in the construction industry who would otherwise be reluctant to go through this process because of the costs involved. Our proposal will, to a degree, allow all parties to compete on a 'level playing field'.

We will provide that the parties may not agree before a dispute has arisen and an adjudicator has been appointed, that one party will be liable for all or part of the costs of the adjudication. This provision will remove a disincentive to refer disputes, whilst at the same time reducing any incentive to refer frivolous disputes.

In addition, we believe we are encouraging parties to keep costs at a reasonable level by providing that, where the adjudicator is to make a decision as to who shall pay the costs of the adjudication, he shall only award a reasonable amount to reflect costs reasonably incurred. This will also encourage the parties to keep costs at a reasonable level and result in disputes being resolved more promptly.

The parties in dispute will share liability for the adjudicator's fees and expenses. This will ensure the adjudicator can secure payment of his fees and expenses and reduce the possible financial cost to him if he is not paid. This proposal will also ensure that the adjudicator's allocation is impartial because he will not be tempted to allocate his fees to the party better able to pay.

The adjudicator will also not need to ask the parties to sign an 'adjudication agreement' upon his appointment to secure his fees and expenses.

The joint DTI / CIC survey in GB of adjudicators suggested that both parties' combined legal and other costs in an adjudication amount together to approximately £15,000. The same survey found that the adjudicator's fees and expenses are on average approximately £5,000. The total costs of an adjudication may therefore be approximately £20,000, on average. Statistics from the CIC in 2001 suggested that the incidence of agreements that the referring party should pay all of the costs of the adjudication arises in 3% of adjudications. Results from the DTI / CIC survey were unclear and the extent of the problem is considered as part of this consultation. However, if these clauses arise in 3% of the 1,750 adjudications each year in England and, in each one, on average half of the costs are unfairly allocated at a total cost of £525,000, this would indicate a cost on average of some £300 per adjudication. It may be supposed that similar cost profiles pro rata would apply in Northern Ireland.

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Chapter 2 – Payment framework

Overall Background

To help achieve its objective of ensuring prompt cash flow and allowing the swift resolution of disputes by way of adjudication, the Construction Order sets out a payment framework:

- **Article 8** introduces a right to instalment, stage or periodic payments;
- **Article 8 (2)** provides that the parties are free to agree the amounts of the payments and the intervals and circumstances in which they become due;
- **Article 9 (1)** requires the contract to have an adequate mechanism for determining what will become due and when;
- **Article 9 (2)** provides that the payer gives the payee early communication of what will be paid;
- **Article 10** provides that the payer may not withhold money unless he has effectively communicated this to the payee;
- **Article 11** provides that a payee may suspend performance when the amount due is not paid by the final date for payment; and
- **Article 12** prohibits so called “pay-when-paid” clauses.

This payment framework creates the means of crystallising the amount to be paid on, or before, the final date for payment for each instalment, stage or periodic payment. It does this by introducing the concepts of ‘sum due’ and ‘due date’ together with a requirement to issue notices during the payment period to communicate the basis on which the amount paid, or proposed to be paid, has been calculated.

- The due date is the contractually agreed milestone which starts the payment period.
- The payment period is the time between the due date and the final date for payment. The length of this period is a matter for contract.
- The sum due is a notional amount determined by the contract which begins the process of crystallising the amount payable on the final date for payment.
- The final amount for payment is the sum due minus deductions – some of which are required to be set out in Article 10, withholding notices.

The problems associated with the operation of the payment framework have been considered at each stage of the review of the Construction Order. The proposals in this chapter have resulted from consideration with BERR’s sounding board. We have revisited the conclusions of *‘Improving Payment Practices in the Construction Industry’* and the proposals made in the January 2006 analysis of BERR’s consultation, particularly in respect of the potential roles of the payer and payee in ‘certifying payments’. We have tried to identify the most appropriate balance between effective regulation and reducing the regulatory burden, particularly in respect of the notice requirements Articles 9 (2) and 10.

1. Prevention of unnecessary duplication of payment notices

Background

Article 9 (2) requires the payer to issue a payment notice setting out the payments made or proposed to be made not later than five days after the date on which a payment becomes due. However, under most contracts with certificates, the information in the payment notice only duplicates the information already contained in the certificate. For those contracts, this represents a needless duplication.

Current legislation

Article 9 (2) requires every construction contract to provide for the payer to give notice not later than five 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.

Proposal

The intended purpose of the proposal is to prevent unnecessary duplication by allowing a notice, or certificate from a third party, to act as an Article 9 (2) payment notice.

The Construction Order

This proposal relates primarily to the drafting of Article 9 (2) of the Order. We consider that, as well as the party from whom payment is due, certain other people should be able to issue a payment notice complying with Article 9 (2). We propose that, where the contract provides, the Order should allow the notice to be issued by:

- a person identified in the contract; or
- a person who has been identified in a notice to the payee.

The Scheme

We propose to amend paragraph 9 of Part II of The Scheme to make provision for a payment notice in accordance with the new provisions in Article 9 (2) of the Order. Under The Scheme a payment notice cannot be issued by a named individual, so we propose that it should be issued either by:

- the person from whom payment is due; or,
- a person who has been identified in a notice to the payee.

Discussion

The current framework creates notice requirements which duplicate certification procedures. Under approximately 60% of main contracts, a certificate is issued by an architect, engineer or surveyor to determine the sum due. Shortly afterwards the payer must issue a payment notice stating the amount to be paid. The payer is usually happy to pay the sum due as certified and the information in the notice only duplicates that in the certificate. There is a significant financial cost associated with the administrative inconvenience of complying with both requirements. DTI statistics suggest that 396,000 main contract payments are made each year in GB. Responses to *'Improving Payment Practices in the Construction Industry'* reckon that the cost of issuing a payment notice is approximately £25 per payment. Overall this gives us an estimated reduction of $396,000 \times 60\% \times £25$, that is, some £5.94 million per year. The relative size of the construction output in Northern Ireland would therefore suggest a reduction in cost to the industry of the order of £191,800.

2. Clarification of the requirement that a Article 9 (2) payment notice should be served

Background

Article 9 (2) requires a payment notice to be served in certain circumstances. The simplest of these is where a payment is due. The other is where the payment would have been due had a combination of circumstances arisen. We do not consider that the drafting of these provisions is ideal: specifically, it is not clear that the obligation to issue a payment notice continues even where no payment is due because of abatement or set-off under the contract at issue.

Current legislation

Article 9 (2) requires every construction contract to provide for the payer to give notice not later than five 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.

Proposal

The intended purpose of the proposal is to make clear that a payment notice is always required if a payment would have become due under the contract. That will be the case even where there is no obligation to make any payment because the work has not been carried out, or there has been set-off under the contract, or one or more other contracts, or abatement under the contract.

The Construction Order

We are proposing to amend Article 9 (2) so that a payment notice will be required where a payment would have been due if:

- the party performing work under the contract had carried out his obligations under the contract;
- no set-off was permitted by reference to any sum claimed under the contract or one or more other contracts; and
- no abatement was permitted in respect of the work.

The Scheme

We will amend the payment notice provision in Part II paragraph 9 of The Scheme to reflect the amended requirements in the Order.

Discussion

The current drafting of Article 9 (2) may lead the payer mistakenly to conclude that he need not issue a payment notice because of certain deductions from the sum that would otherwise have been due. Payment notices are an important tool in ensuring early communication of payments made, or proposed to be made. Such notices are therefore important, even where no payment is proposed because the work has not been carried out, or there are set-offs, or abatements, that mean the payer is not obliged to pay.

3. Clarity of the content of payment and withholding notices

Background

The Construction Order introduced the requirement that the payer should serve Article 9 (2) payment and Article 10 withholding notices to the payee. There is confusion in the industry about how they relate to each other, what each should contain and how they create a sum due. This lack of clarity can lead to the needless issue of two separate notices when a single payment notice would suffice.

Clearly, measures to improve the clarity of notice content will help address some of the issues relating to a sum becoming due and these are considered in Section 4 of this chapter.

Current legislation

Article 9 (2) requires every construction contract to provide for the payer to give notice not later than five 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.

Article 10 (1) requires a party withholding payment after the final date for payment of a sum due to give an effective withholding notice.

It also provides that a Article 9 (2) notice may be an effective withholding notice if it complies with Article 10.

Article 10 (2) describes an effective withholding notice. It 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.

Article 10 (3) allows the parties to agree the prescribed period and provides that in the absence of agreement the period is that provided in The Scheme.

Proposal

The intended purpose of the proposal is to:

- introduce clarity as to the content of the payment and withholding notice framework;
- prevent unnecessary duplication by making clear provision on how a Article 9 (2) notice can act as a withholding notice; and
- align the information required in Article 9 (2) payment notices and Article 10 withholding notices.

The Construction Order

We are proposing that the payer must set out in the payment notice the amount (if any) that he has paid, or proposes to pay.

Where this is different from the amount that would have been paid had:

- the payee carried out his obligations under the contract;
- no set-off was permitted by reference to any sum claimed under the contract, or one or more other contracts; and
- no abatement was permitted in respect of the work,

We propose that the payer will have to set out the grounds for paying less than the amount calculated in accordance with the above formula. Where there is more than one ground for making deductions from that amount, the payer will be required to set out each ground and the amount attributable.

Further, we are proposing to require that all withholding notices should be in the same format as an Article 9 (2) notice with the effect that the withholding notice becomes a revision of the payment notice.

Once the 'prescribed period' under Article 10 (3) has passed, the payer cannot revise the amount in the notice any further.

We propose to make clear that the withholding requirement is in respect of any amount (i.e. including abatement) and not just the withholding "of a sum due" as at present (which is thought by many to relate to sets-off only).

The Scheme

We will make changes to align The Scheme with the above in respect of payment notices.

Discussion

Our proposal creates a clear connection between the information in the Article 9 (2) notice and that required to withhold payment in accordance with Article 10. This will remove unnecessary duplication in the system as we understand some payers at present routinely submit both a payment notice and a withholding notice where only one is necessary.

Our proposal sets out a framework where a withholding notice should take the form of a revised payment notice. This single format creates clarity and simplicity, though in places, additional information is required.

The proposal that the withholding notice would be required to state the amount of the payment made, or proposed to be made, was supported in *'Improving Payment Practices in the Construction Industry'* in 2005. Though that proposal had initially been rejected following consultation, further consideration has led us

to conclude that it would allow the payment and withholding notice requirements to work more effectively and economically.

Administrative cost

It is arguable that this proposal will increase the number of Article 10 withholding notices that must be issued under contracts without certificates. It is possible to estimate the cost to the construction industry of this change using DTI's estimate that 356,400 payments are made each year (in GB) under contracts without certificates (40% of main contract payments and an additional 50% as an estimate for the number of payments made under sub-contracts). Based on the relative scale of construction output in Northern Ireland proportionate to GB output, these assumptions would suggest that some 11,500 payments are made under certificates in Northern Ireland.

We are seeking responses from consultees on the proportion of payments that are subject to abatement after the payment notice deadline. If it is one monthly payment every two and a half years and the cost of a withholding notice is £25, we estimate that the additional inconvenience will cost the construction industry in Northern Ireland $11,500 \times £25 / 30$, that is, approximately £9,600 per year.

4. Clarity of the sum due

Background

In the Construction Order the sum due is the cornerstone on which the rest of the payment framework is built.

The concept of what constitutes the sum due is clear where the contract provides for certification of work by a third party (such as an architect). In these cases the courts have upheld the position that the sum due is the amount in the certificate.

However, in contracts without certificates, the position is less clear and the current payment framework can fail to create a clear understanding between the parties as to what is the sum due. As a result, the Order can fail effectively to crystallise the amount to be paid on, or before, the final date for payment, or allow access to the right of suspension.

Proposal

The Construction Order

We are proposing that, where the payer has issued a payment notice as described in Section 3 of this Chapter, this amount becomes the sum due, which can then be subject to withholding. Non-payment of the remainder will provide the payee with the right to suspend performance.

We would then provide that:

- where the payment notice is not issued, the sum due is determined by a new fall-back provision. The sum due would then be the amount in a claim by the payee issued before the final date for payment; and
- where that claim determines the sum due, but is issued after the due date, the payment period would then run from the date of the claim to allow the payer time to issue a withholding notice.

We would also provide that, like the current provision in Article 10 (4) for amounts to be withheld, the amounts to be paid under a payment notice could be referred to adjudication and the payment delayed until a week after the date of the adjudicator's decision.

The Scheme

We are proposing that the fall-back provision whereby the sum due is determined by a claim by the payee should take effect as a statutory fall-back, rather than a requirement that the contract should provide this fall-back. As such, no corresponding provision is necessary in The Scheme.

Discussion

Article 9 (2) requires the contract to provide for the payer to notify the payee of "the amount (if any) of the payment made or proposed to be made". There are two practical problems with this:

- it is not clear how the amount specified in the notice relates to the sum due. The sum due is not then clear for the purposes of Articles 10 and 11; and
- failure to issue the notice may be no more than a minor breach of contract. This is because nothing in Article 9 (2) compels the payer to issue it. *'Improving Payment Practices in the Construction Industry'* found that the notice is only issued for about 40% of payments.

Where these problems arise, their effect on Articles 10 and 11 of the Construction Order raises the following issues:

Article 10 enables a payer to withhold payment from a sum due where he has issued a withholding notice. In the absence of a withholding notice, the payer must pay the whole sum due. However, the lack of transparency about what constitutes the sum due (whether or not he has received an Article 9 (2) payment notice) can leave the payee with less payment than expected. This can result in costly legal proceedings to determine the 'sum due'. It can often be argued that no notice is needed as the abatements were never due. Generally, sets-off should be notified, though this may differ under certain contracts. In any respect, the majority of contractors cannot distinguish one form of deduction from the other.

Article 11 provides a right to suspend performance where the payer fails to pay the sum due (subject to any withholding under Article 10). However the lack of

transparency about what constitutes the sum due acts as an effective barrier to the exercise of this right.

We therefore intend to introduce much greater transparency about the sum due by providing a statutory definition.

5. Prohibiting the use of pay-when-certified clauses

Background

As part of the proposal to create a clear understanding of the sum due under a construction contract, we have concluded there may be value in restricting the use of pay-when-certified clauses. This ensures that there is clarity about when payments become due, as well as to what is the due sum.

Current legislation

Article 9 (1) of the Construction Order provides that “every construction contract should provide an adequate mechanism for determining what payments become due under the contract, and when”. This provision allows payment to be triggered by the timing of a decision which is conditional on work under a separate contract.

Article 12 of the Construction Order states that, “A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective”. This prohibition of pay-when-paid clauses also does not appear to affect a clause making the timing of payment conditional on a decision about payment from a third person.

Proposal

The Construction Order

As part of a new payment framework, we are proposing to ensure that a certificate covering work under one contract cannot act as a mechanism to determine the timing of payment for work done under another contract. In effect we propose to prohibit pay-when-certified clauses.

The Scheme

No amendment to The Scheme is necessary

Discussion

Respondents to *‘Improving Payment Practices in the Construction Industry’* suggested that pay-when-certified clauses were a way for the main contractor to shift the burden of non-payment to the sub-contractor. The sub-contractor has no

way of knowing whether a main contract certificate has been issued, or of its contents, or whether the payer has grounds under the pay-when-certified clause to withhold payment.

Although prohibiting pay-when-certified clauses may have the result that the main contractor pays the sub-contractor before he himself is paid, it is in keeping with the purpose of the Order for funds to be distributed promptly through the construction supply chain.

Our proposal is seeking to ensure that, provided a sub-contractor has completed the work he has been engaged to do and, upon the issue of his invoice, the payer must pay regardless of whether or not a certificate has been issued under the main contract.

This will ensure that money flows through the supply chain thereby reducing the need for companies to service loans/debts. The benefit to the whole supply chain is that firms can improve the management of their cash flow. We would also expect there to be fewer disputes.

In assessing the impact of this proposal, we are proposing to consider its effect on standard forms of sub-contract only. We understand that traditional civil engineering sub-contracts continue to include pay-when-certified clauses. DTI statistics suggest that 11,400 payments are made each year in GB under civil engineering sub-contracts. As these will no longer become due under a pay-when-certified clause, the terms of The Scheme will apply and the payment will become due following the expiry of the relevant period, or upon the issue of a claim by the payee, whichever is the later. The payer will then have to issue a payment or withholding notice. Assuming a main contract certificate has not been issued, this will require additional administration by the payer. Assuming a cost of £25, the total cost in GB will be £285,000. Again by applying scaling factors reflecting the relative construction outputs in GB and NI, the cost in Northern Ireland is estimated to be some £9,200.

Overall benefits of the revised payment framework

We believe the revised framework will:

- improve communication between the parties;
- enable cash to flow through the supply chain and improve liquidity and reduce costs of servicing debt; and
- enable the parties to address problems that give grounds for withholding payment.

Additional:	Simplification of payment notices -	£191,800
Less:	Clarity as to the sum due -	£ 9,600
	Pay when certified -	£ 9,200
	Total -	£173,000

The reduced burden of the revised payment framework is therefore estimated to be approximately £173,000.

The broader benefit of the new framework is the creation of clear entitlements to payment which may be reviewed at adjudication in an arrangement that is comparable to interim certification under many forms of construction contract. This will enable disputes to be resolved at an early stage in any given payment period. We believe this will reduce financial costs for both the payer and the payee prioritising the need for payment to crystallise and change hands at an early stage rather than being delayed by the determination of the amount legally payable irrespective of the delay. This is of considerable benefit to the industry and its customers.

Quantifying the saving to the construction industry and its clients in terms of reduced cost and improved productivity and efficiency is difficult. However, research recently commissioned by the Office of Government Commerce in support of the Fair Payment Charter, which indicated that improvements to the payment framework to ensure contracts create clear and timely entitlements to interim payment, are estimated to save 1% – 1.5% on the average project. If this were reflected across construction in Northern Ireland, it would represent potential savings of some £3.25 – 5.0 million.

To identify overall the savings that result specifically from our proposals we have considered the comparison between the operation of contracts with certificates and of contracts without certificates. In future, the Article 9 (2) payment notice will act like a certificate in creating an entitlement to payment subject to withholding under Article 10 and final determination by adjudication, arbitration or litigation. In the absence of a payment notice, a claim by the payee will determine the sum due on the same basis. A similar system also operated on the Joint Contracts Tribunal “With Contractor’s Design” contract until its revision in 2005. Statutory support for this approach would be likely to ensure its effective operation.

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Chapter 3 – Improving the right to suspend performance

Background

The Construction Order provides a statutory right for the payee to suspend performance under the contract. This right:

- is a powerful sanction in cases of non-payment, and
- allows the payee to reduce his expenditure on the project during a period when he is not being paid.

However, there is a number of disincentives to the exercise of this right which centre on the costs of suspending performance.

Current legislation

Article 11 (1) gives a statutory right to the payee to suspend performance of obligation to the payer in cases of non-payment of a sum due (less any amounts properly withheld);

Article 11 (2) provides that the right can only be exercised if the suspending party has given the payer in default seven days notice of his intention to suspend work stating the reasons why work will be suspended;

Article 11 (3) provides that the right to suspend work ends when the outstanding amount is paid in full; and

Article 11 (4) provides that there should be a readjustment to the contract to compensate for the time lost during a period of suspension.

Proposal

We intend to make the existing right to suspend performance a more effective remedy by reducing the burden on the party who exercises this right. We will:

- make clear that a party need not suspend all of his obligations to the party in default when exercising the statutory right;
- provide a statutory right for the suspending party to be compensated for reasonable losses caused by the suspension; and
- provide an extension of time for any delay caused by the exercise of the right to suspend.

Discussion

Our proposals are intended to make the right of suspension more accessible and effective. The measures are not intended to alter radically the process and should decrease the costs of suspension to the suspending party. Without access to the statutory right of suspension, the payee cannot secure prompt payment, or take steps to reduce his expenditure, when he is not paid.

The following disincentives upon the suspending party result from the current legislative framework:

- the costs of suspending and remobilising performance under a construction contract: these are the inherent costs involved in exercising the right of suspension and then remobilising when payment is made. These costs, which may include damaged materials while clearing site, storage charges, additional management costs and the cost of retaining sub-contract labour and hired plant and equipment all fall to the suspending party (the payee). The possibility of incurring additional costs for remobilisation when the payer later makes the outstanding payment is also a burden. The current legislation requires the payee to remobilise immediately upon payment which can impose additional cost;
- the inconvenience and cost of remobilising immediately upon payment of the outstanding debt: currently, the Construction Order makes no allowance for any delay for the suspending party to remobilise. The suspending party is required to be prepared to remobilise immediately when payment is made as the contract may also impose a sanction. Given the uncertainty about whether the payment will be made, and if so when, and to reduce the costs of suspension, the payer may have transferred labour and equipment to a different project; and
- the inconvenience and cost of having to suspend all obligations under the contract: we believe that the right of suspension can be exercised in respect of suspension of any or all of the payee's obligations under the contract. However this view is not shared throughout the whole construction industry and there is support for some clarification.

In *'Improving Payment Practices in the Construction Industry'*, consultees were asked how frequently the right to suspend performance was exercised and how frequently it was believed it would be exercised following the proposed amendments. While the majority of respondents thought it was exercised in fewer than one in 100 cases of defaulted payment at present, almost half thought that this would lead to increases of between 1 in 100 and 1 in 10 cases of defaulted payment in the future.

Though there might be a modest increase in the use of the statutory right to suspend performance following the amendments proposed above, we also intend that improving access to the right should ensure that payment is made on time more often in future. We are considering the extent of any improvement in payment as a result of these proposals as part of this consultation.

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Chapter 4 – Other issues

1. Minimising Divergence

It is desirable that, although responsibility for Part II of the Housing Grants, Construction and Regeneration Act 1996 has been transferred to the Northern Ireland and Scottish administrations, where possible the cross-border administrations should work together to minimise divergences. It is accepted however that certain legal distinctions between the Law in Northern Ireland and England and Scottish Law may continue to necessitate modest differences in approach. The Northern Ireland Executive hopes to keep these to a minimum and is working with colleagues in BERR and the Scottish Government to achieve this aim of maintenance of parity of legislation across the United Kingdom for the construction industry.

This consultation seeks your views on the need to minimise any divergence across the United Kingdom (see Consultation Response Form – Annex B).

2. Introduction of 'slip rule' to enable the correction of error

An outcome of the Scottish Executive's consultation in 2003 on '*Improving Adjudication in the Construction Industry*' was the suggested need for a "slip rule". The Scottish Executive's report on that consultation proposed that a "slip rule" should:

"... give adjudicators powers to correct their decisions so as to remove any clerical, or arithmetic, mistake or error that has arisen from an accidental slip or omission; and they should be permitted to do this at the request of any party to the adjudication, and where the adjudicator becomes aware of such an error. It is also proposed that adjudicators should be empowered to correct any other aspects of their decisions where the parties are in agreement that they should do so.

"Any corrections of clerical or arithmetic errors are likely to be relatively straightforward, and so the timescale for notifying the adjudicator, and for making corrections, need not be particularly lengthy, bearing in mind the need to achieve relatively quick resolution of disputes. It is proposed, therefore, to amend the Scheme to provide that adjudicators may make corrections as soon as possible and by not later than seven calendar days after the date of issue of their decisions or such longer period as the parties may agree. This should allow sufficient time for corrections to be made without unduly delaying the process.

“Consideration has been given to whether there is a need to set a time limit for parties to request an error to be corrected. It is felt that by setting a time limit on the period allowed for correcting a decision, and giving adjudicators discretion on whether or not they make a correction, there should not be a need to set a time limit within which the error must be brought to the adjudicator’s attention.”

In this consultation we are seeking the views on whether, or not, the Northern Ireland Executive should work with BERR to develop proposals further for a slip rule. In particular we are seeking your views on whether the slip rule should provide the adjudicator with:

“...power to correct a clerical or arithmetic error, or any other matter that the parties may agree, for 7 days after the adjudicator’s decision, or such longer period as the parties may agree.”

In England and Wales, it has not been necessary to introduce a slip rule as the courts have implied such a rule by reference to the Arbitration Act 1996. However, if provision were to be introduced in Northern Ireland, this legislation would remove the courts' current discretion as to the time limits and applicability of a slip rule.

3. Expenses (but not adjudicators’ fees)

The Scottish Executive's consultation in 2003 on *Improving Adjudication in the Construction Industry* had also asked whether there was a problem in Scotland with regard to the award of expenses and what the nature of any problem was. Respondents indicated that there did appear to be some uncertainty amongst the users of adjudication about whether adjudicators can award expenses under The Scheme. Chapter 1, Adjudication Framework, covers this area and replicates the proposals in the Scottish and England/Wales consultations.

4. The judgement of the House of Lords in Melville Dundas -v- George Wimpey

Background

This judgement relates to a Scottish case. However, it concerns the interpretation of the Construction Act as it applies in England and Wales (and as the Construction Order in Northern Ireland) as well as Scotland. It is likely to be followed across the UK. It has since been referred to in the case of Pierce Design International Limited against Mark Johnston and another (EWHC1691 TCC). We are seeking the views of consultees on:

- whether the judgement raises an issue which must be addressed via a legislative amendment; and
- what options there are for addressing those issues.

The case

In the case, Wimpey employed Dundas to construct a housing development. On 2 May 2003, Dundas applied for an interim payment. There was no dispute that this payment was due. The final date for payment was 16 May (14 days after Dundas' application). On 30 May 2003, Wimpey terminated the contract due to the appointment of an administrative receiver to Dundas. The contract provided that where Wimpey terminated the contract, it was not obliged to pay any payment due which accrued less than 28 days before the earliest date that Wimpey could have first given notice to terminate the contract (22 May).

Dundas sought to enforce the payment in the Outer House of the Court of Session in Scotland claiming that the payment ought to have been made on or before the final date for payment, notwithstanding the termination of the contract. No withholding notice had been issued in accordance with section 111 of the Construction Act before the 11 May contractual deadline. Lord Clarke refused to enforce the payment, stating that the payment had not been withheld, but that the final date for payment had been delayed while a final payment following termination was calculated. This was overruled by the Inner House of the Court of Session (Appeal Court in Scotland). On 25 April 2007, by a majority of 3 to 2, the House of Lords restored Lord Clarke's original judgement, though for different reasons.

The judgement

The reasoning of the prevailing judgements in the House of Lords can be summarised as follows:

- the Construction Act is intended to balance the parties' freedom of contract with the need for clarity as to amounts of payments under the contract and any amounts to be withheld. This was intended to balance the interests of the payer and the payee;
- section 111 should apply to interim payments, where these become due by virtue of the statutory right to interim of stage payments in section 109 of the Act. So long as the contract is in operation, a notice would be required for these to be withheld via set-off as a result of a cross-claim;
- it was not clear that section 111 applied to withholding under the standard determination clause in the contract because:
 - The determination clause was already drafted in a standard contract so as to balance the interests of the payer and payee;
 - it allowed the payment to be withheld in cases of administration in the same way as would apply under the legislative framework for cases of bankruptcy and liquidation; and
 - after the payment was withheld, a final payment would be determined taking into consideration all of the parties respective entitlements. The

effect was that the interim payment that had been due was no longer due, and instead a final payment would become due;

- in the absence of clear provision in the Act, the Inner House should not have insisted on the payment being made, but should have found that the determination clause applied; and
- the two dissenting Law Lords found that the only way systematically to apply the withholding notice requirement in the Act was to find, as the Inner House did, that, in the absence of a withholding notice, the determination clause did not apply. The Act did not provide an exception to the application of section 111.

Issues raised

We consider that the judgement raises two areas of uncertainty:

- whether section 111 applies in cases where the contract is determined, or only where it is determined in cases of insolvency; and
- whether section 111 applies to other grounds for withholding in respect of final payments.

Policy

From a policy perspective, we consider that:

- **section 111 should not apply in cases of insolvency.** Currently the courts will not enforce the decision of the adjudicator in accordance with section 108 of the Construction Act in cases where the payee is insolvent. The House of Lords considered that the application of section 111 was comparable; and
- **section 111 should apply in all other cases.** We consider that section 111 should apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as “payments by instalments, stage or other periodic payments” which become due in accordance with section 109 of the Construction Act) while a construction contract is in operation. It appears clear to us that this was the original intention.

The consultation response form at Annex B asks you for your view as to whether:

- the House of Lords judgement is likely to be followed by the lower courts so as to have the effect that we consider should apply;
- the Order should expressly provide a corresponding exception to section 111 in the Act in cases where the payee is insolvent (section 113 already provides an example of an exception for insolvency), or leave this exception to be decided by the courts; and whether

- the Order should be correspondingly amended to make clear that its equivalent provision for section 111 of the Act applies to all other grounds for withholding in respect of all payments.

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Chapter 5 – Partial Regulatory Impact Assessment

Proposals to amend Construction Contracts (Northern Ireland) Order 1997 ('The Order') and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 ('The Scheme')

1. Objective

Disputes under construction contracts can jeopardise the effective delivery of projects on time and within budget. They can also threaten the viability of individual businesses and can undermine the longer-term health of the construction industry. The proposals being considered in this Regulatory Impact Assessment (RIA) seek to improve the statutory framework set out under the Construction Order to reduce the incidence and impact of these disputes.

We are seeking to introduce a better, more focused and effective regulatory framework by:

- improving the transparency and clarity in the exchange of information relating to payments to enable the parties to construction contracts to better manage cash flow; and
- encouraging the parties to resolve disputes by adjudication, where it is appropriate, rather than resorting to more costly and time consuming solutions such as litigation.

The proposals are proportionate amendments to the existing framework which has, in large part, worked well, rather than wholesale reform.

In considering the responses to this consultation we will bear in mind:

- the need for improvement in payment practices under the legislation for all concerned;
- the need to respect the principle of freedom of contract, keeping intervention only for those situations where it is deemed essential;
- the possibility of guidance to address certain issues as an alternative to regulation; and
- the continuing development of case law on adjudication and the payment provisions of the Construction Contracts Order in NI.

2. Background

The Chancellor announced in the 2004 Budget Report that:

“Following concerns raised by the construction industry about unreasonable delays in payment, the government will review the adjudication and payment provisions of the Housing Grants Construction and Regeneration Act in order to identify what improvement can be made.”

It was from this Act that the Northern Ireland Construction Contracts Order was derived.

In April 2004, the then Construction Minister, Nigel Griffiths MP, appointed Sir Michael Latham to undertake the first stage of the review. The purpose of this first stage was to identify the extent, for all sectors of the industry, to which the Act:

- was working well;
- needed improvement; and
- what might be the potential impact of proposed improvements on other parties or processes.

Sir Michael’s report to Nigel Griffiths (September 2004) concluded that the industry had come a long way since the Construction Act was introduced in 1996 and that it was indeed generally working well. However, the report identified some areas where further progress was desirable. The DTI and Welsh Assembly Government’s March 2005 Consultation exercise, *‘Improving Payment Practices in the Construction Industry’*, explored some of these in more detail.

Over the course of this review, the Government has considered a wide range of proposals to change the operation of the adjudication and payment provisions in the Construction Act. The outcome of the process was published in July 2008 in *The Analysis of the 2nd Consultation on proposals to amend Part 2 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998* and the legislative proposals arising are set out in Part 8 of the Local Democracy, Economic Development and Construction Bill currently in passage through Parliament. The corresponding changes to the Northern Ireland Order are set out in this document (see paragraph 4 below).

3. Rationale for Government intervention

Sir John Egan, Chair of the Construction Task Force said in the Foreword to *Rethinking Construction* (1998):

“A successful construction industry is essential to us all. We all benefit from high quality housing, hospitals or transport infrastructure that is constructed efficiently. At its best the UK construction industry

displays excellence. But, there is no doubt that substantial improvements in quality and efficiency are possible. Indeed, they are vital if the industry is to satisfy all its customers and reap the benefits of becoming a world leader.”

Disputes under construction contracts can pose a major threat to the effective delivery of projects on time and on budget. At the broader industry level, the culture evidenced by such disputes can only undermine the industry's ability to achieve the performance improvements set out in *Rethinking Construction* (1998) and *Accelerating Change* (2002).

As Sir Michael Latham's report in 2004 confirmed, the Construction Act has been generally welcomed since it came into force in GB on 1 May 1998 and the Construction Contracts Order in Northern Ireland on 1 June 1999. The adjudication process in particular appears to have reduced the number of disputes reaching the courts. However, payment practices in the construction industry continue to cause concern. Problems of disputed, late, or non-payment issues continue to be commonplace.

4. Consultation

The development of BERR's proposed changes to the Housing Grants Construction Regeneration Act 1996, which form the basis of our proposals for amendment to the NI legislation, has involved extensive formal and informal consultation with the construction industry, its clients, Government and other stakeholders in GB.

Within Government

BERR has had discussions with:

- The Cabinet Office
- Office of Government Commerce
- HM Treasury
- The Department for Communities and Local Government
- Department for Constitutional Affairs; and
- Devolved Administrations

With industry

Consultation with the industry has included:

- The review undertaken by Sir Michael Latham in 2004;
- The first consultation '*Improving Payment Practices in the Construction Industry*' in 2005;
- The analysis of '*Improving Payment Practices in the Construction Industry*', 2006;

- Industry stakeholder events organised by the DTI Construction Sector Unit in June 2005 and February 2006;
- Industry stakeholder events organised by the umbrella bodies during the 2005 consultation period; and
- A pre-consultation exercise on adjudication in autumn 2006

DTI/BERR also established a sounding board. Sounding board members did not represent specific sectors of the industry, but were asked to assist in view of their personal knowledge, experience and access to industry networks. The sounding board was recognised as invaluable in assisting BERR with the preparation of the proposals. Its members were Richard Bayfield, Chris Dancaster, Richard Haryott, Sir Michael Latham, HH Humphrey Lloyd QC and Peter Rogers CBE.

5. Options

One of the options considered was to maintain the legislation as it stands and take forward a voluntary process of improving construction contract and payment practices through guidance.

Government and all parts of the industry have a good track record on working together to improve adjudication. An example of this has been the work of the Construction Umbrella Bodies Adjudication Task Group (CUBATG) in preparing guidance in response to a number of issues and concerns raised during a previous review of the operation of the adjudication provisions of the Construction Act. This guidance is available from the Construction Industry Council Website (<http://www.cic.org.uk/services/adjudication.html>)

BERR sought to maintain and build this existing positive relationship with CUBATG in developing its proposals to amend legislation on adjudication and to develop suggestions for areas where further guidance would be helpful.

Throughout the process of this review a number of issues was raised where it has been decided that 'doing nothing' is the best option. The reasons for taking this approach in those cases have been set out in the public information which accompanies this Review. The key documents are:

- Nigel Griffiths' letter of 21 October 2004 to Sir Michael Latham;
- *'Improving Payment Practices in the Construction Industry'*;
- March 2005 Consultation Document;
- January 2006 Analysis of Consultation Responses; and
- July 2008 Analysis of the 2nd Consultation report.

These are available on the construction pages of BERR's website:

<http://www.berr.gov.uk/sectors/construction>

A. Targeted regulation

In developing the payment and adjudication proposals we have chosen to go down the 'targeted regulation' route, i.e. to intervene where it is clear that the legislation is not meeting the original objectives effectively. We are seeking to 'fine tune' rather than re-invent the existing statutory framework.

Through this approach we have identified a package of legislative measures to address weaknesses and improve the clarity of operation and effectiveness of the existing legislation. Many of these measures are technical and have low regulatory impact. They are outlined below.

Proposals

Prompt and fair payment practice throughout construction supply chains will better enable the industry to adopt integrated team working as the norm.

The amendments to the Construction Order will:

- improve the transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow;
- encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and
- improve the right to suspend performance under the contract.

This will be done by:

On adjudication

- improving access to the right to refer disputes for adjudication;
- applying the legislation to oral and partly oral contracts;
- preventing the use of agreements that interim payment decisions will be conclusive to avoid adjudication on interim payment disputes; and
- ensuring the costs involved in the process are fairly allocated.

On payment

- preventing unnecessary duplication of payment notices;
- clarifying the requirement to serve a Article 9 (2) payment notice;
- clarifying the content of a notice;

- ensuring the payment framework creates a clear interim entitlement to payment; and
- prohibiting the use of pay when certified clauses.

On suspension

- improving the statutory right to suspend performance by allowing the suspending party to claim the resulting costs of delay as well as direct costs.

This is not wholesale reform. These proposals are intended to be light touch and proportionate amendments to the existing framework to address specific issues that have arisen during the decade the Construction Order has been in operation. Guidance remains the preferred route to improve operation of construction contracts and we have only considered further legislative intervention where we believe it is absolutely necessary.

B. Extensive regulatory intervention

Another option which is not being pursued is that of 'extensive regulatory intervention'. As the review of the Construction Order has progressed, some proposals have been suggested which, in our view, would undermine the compromises that were reached in 1997, or would fundamentally alter the existing statutory framework. Throughout the review process, we have been mindful of the finely balanced compromise that was struck by the original legislation. Our guiding premise therefore has been only to intervene where it has been considered that the legislation has shown to not have delivered its original objective. We have only intervened in ways which do not undermine the existing structure of the legislation. Such proposals as we do wish to make are targeted interventions to "fine tune" the existing statutory framework.

Following a more regulatory route would be to change fundamentally the Construction Order and the contracts it regulates. At the very least this would impose considerable transitional burdens on the industry and its customers. For instance the large number of standard forms of contract (as an example the Joint Contracts Tribunal has some 20 contracts) would need to be revised extensively as the transition was made from one statutory framework to another with the resultant additional costs and disruption that entails.

6. Costs and benefits

The proposals we are seeking to introduce to amend the Construction Order will:

- improve access to the adjudication system by applying the legislation to oral and partly oral contracts and ensuring the costs involved in the process are allocated fairly;
- improve the operation of the payment framework in the legislation by removing the duplication between statutory payment notices and contractual payment certificates; and
- ensure the payment framework operates effectively to create a clear interim entitlement to payment which can be finally determined through arbitration or adjudication if necessary.

The costs and benefits of each of these proposals are summarised in the following table:

Proposals	Benefits	Costs	Net Benefit
Prevention of unnecessary duplication of payment notices	A significant reduction in the number of payment notices that need to be issued by the payer. This reduction in the requirement for Article 9(2) notices will save the industry approximately £173,000		<ul style="list-style-type: none"> • Our proposals create a clear connection between the information in the Article 9(2) notices and that required to withhold payment in accordance with Article 10. This will remove unnecessary duplication in the system as we understand some payers at present routinely submit both a payment notice and a withholding notice where only one is necessary.
Clarification of the requirement that a Article 9(2) payment notice should be served	<p>At present there is no clear link between the “sum due” under the contract and the amount notified in a Article 9(2) notice; this creates a range of problems under contracts without certificates, as the payee does not have a clear entitlement to payment.</p> <p><i>This measure brings the following benefits under these contracts:</i></p> <ul style="list-style-type: none"> • It will not be possible to withhold payment without notice; and • It will be much clearer when the payee is entitled to suspend performance. 		<ul style="list-style-type: none"> • The current drafting of Article 9(2) may lead the payer to conclude that he need not issue a payment notice because of certain deductions from the sum that would otherwise have been due.

Proposals	Benefits	Costs	Net Benefit
<p>Clarity of the Content of Payment and Withholding Notices</p>	<p>Our proposal creates a clear connection between the information in the Article 9(2) notice and that required to withhold payment in accordance with Article 10. This will remove unnecessary duplication in the system as we understand some payers at present routinely submit both a payment notice where only one is necessary.</p> <p>Our proposal sets out a framework where a withholding notice should take the form of a revised payment notice. This single format creates clarity and simplicity, though in places additional information is required.</p>	<p>This proposal will increase the number of Article 10 withholding notices that must be issued under contracts without certificates as the obligation is extended to all deductions.</p> <p>It is possible to estimate the cost to the construction industry of this change using DTI's estimate that 356,400 payments are made each year under contracts without certificates (40% of main contract payments and an additional 50% as an estimate for the number of payments made under sub-contracts).</p> <p>Based on the relative scale of construction output in Northern Ireland proportionate to GB output, these assumptions would suggest that some 11,500 payments are made under certificates in Northern Ireland.</p> <p>We are seeking responses from consultees on the proportion of payments that are subject to abatement after the payment notice deadline but, if it is one monthly</p>	

Proposals	Benefits	Costs	Net Benefit
		<p>payment every 2½ years, and the cost of a withholding notice is £25, we estimate that the additional inconvenience will cost the construction industry in Northern Ireland 11,500 x £25 / 30, that is, approximately £9,600 per year.</p>	

<p>Clarity of the sum due</p>	<p>By introducing much greater transparency about the sum due by providing a statutory definition. We believe this will:</p> <ul style="list-style-type: none"> • Improve communication between the parties; • Enable cash to flow down the supply chain; • Enable contractor to plan cash flow and address poor performance; and • Potentially improve liquidity and reduce costs of servicing debt. 	<p>There will be an additional cost which will be borne by the payer as the Article 9(2) payment notice does not make it clear whether the payer needs to account for abatements and/or set-offs.</p> <p><i>This is an administrative inconvenience</i> which the industry has chosen to deal with by issuing separate notices under Articles 9(2) and 10.</p>	
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<p>Preventing 'pay when certified'</p>	<p>Improves the predictability of cash flow and provides the supply chain with a degree of certainty about what sum they will receive and when.</p>	<p>We understand that traditional civil engineering sub-contracts continue to include pay when certified clauses.</p> <p>Based on DTI statistics that suggest 11,400 payments are made each year in GB under civil engineering sub-contracts and, by applying scaling factors reflecting the relative construction outputs in GB and NI, this would indicate some 370 payments in NI each year.</p> <p>As these will no longer become due under a pay-when-certified clause, the terms of The Scheme will apply and the payment will become due following the completion of the work or upon the issue of a claim by the payee, whichever is the later. The payer will then have to issue a payment or withholding notice. Assuming a main contract certificate has not been issued, this will require additional administration by the payer.</p> <p>Assuming a cost of £25 the total cost will be some £9,200.</p>	<ul style="list-style-type: none"> • Improves communication between the parties; and • Ensures money flows down the supply chain.
<p>Enhancing the existing right to suspend performance where there has been non- payment</p>	<p>This proposal creates a statutory right for the payee to receive compensation for losses caused by the suspension.</p>	<p>This proposal does not introduce any overall increase in costs.</p>	<p>Suspension is a remedy of last resort and the current incidence of its use is low.</p> <p>The limitation to only loss and</p>

	<p>The payee will also have a sufficient length of time to remobilise on site.</p> <p>Threat of having to pay the additional costs of suspension incurred by the payee is intended to incentivise the payer to administer payment in a fair way.</p>		<p>expense reasonably incurred creates the correct balance between enabling the payee to utilise the right to suspend and the new obligations which will fall on the payer.</p> <p>Prompt payment is essential to ensure an effective construction industry.</p>
Introduction of a statutory framework for the costs of the adjudication	Greater access to adjudication for all.	Each party to a dispute is encouraged to be responsible for their own legal and other costs. Parties will also need to pick up the adjudicator's fees.	Legal and other costs will be kept low. Prompt resolution of disputes. Still cheaper and quicker than going to court.
To prevent the application of "final and conclusive" clauses to interim	<p>The joint DTI/CIC survey of adjudicators in GB found that 50% of adjudication disputes relate to interim payments while the remainder relate to final payments or other matters.</p> <p>The survey also found that resolving payment disputes at the interim stage reduced the cost of adjudication by approximately 10% or £2,000. This means that approximately 875 adjudications in England and Wales relate to interim payments.</p> <p>If adjudication of interim payments</p>		

	<p>was encouraged by increasing the number that may be disputed from 418,200 to 492,000 (i.e., by 17.5%) this would represent an additional 150 interim payment adjudications.</p> <p>Compared to adjudication of the final account, this would result in an approximate reduction in the average cost of £306,000 or £175 per adjudication on average. Any arbitration or litigation cases that were also averted would increase this figure.</p> <p>It is assumed that similar savings could be applicable to Northern Ireland.</p>		
<p>Deleting the existing Article 6 requirement that contracts need to be evidenced in writing</p>	<p>A large number of construction contracts contain orally agreed terms. Our proposal extends the application of the Construction Order to oral and partly oral construction contracts and so provides greater access to adjudication for more varied forms of construction contracts.</p>	<p>Responses to the joint DTI/CIC survey of adjudicators in GB revealed that the additional complexity of adjudicating on oral contracts would not lead to a significant increase (<5%) in the cost of adjudication.</p>	

7. Small firms impact test

The proposed amendments will apply to all construction contracts within the scope of the Construction Contracts (Northern Ireland) Order 1997 including mechanical, electrical, civil engineering, groundworks and professional services.

A table showing some key statistical data on these sectors for Northern Ireland is set out below. Where information is not available for 2008, the most recent information is provided.

	Construction Contracting¹	Construction Professional Services²	Total % of Whole Economy
Number of Enterprises <i>IDBR: March 2008</i>	9,608	857	(17.2%)
No of micro/small Enterprises (<50 emps) and % of total <i>IDBR³: March 2008</i>	9,498 (98.9%)	847 (98.8%)	
Total Turnover⁴ <i>NIABI: 2006</i>	£6,003 million	£286 million	12.4% ⁵
Net Output⁶ <i>QCE: 2007</i>	£3,435 million	N/A	N/A
Employment⁷ <i>CoE 2007 and LFS 2007</i>	73,100	7,760	9.6%
Total Net Capital⁸ Expenditure <i>NIABI: 2006</i>	£340 million	£8 million	12.0% ⁵
Number of company Insolvencies	27 (provisional)		

Background Notes

1. Construction activity is as defined in the Standard Industrial Classification code (SIC 2007) Section 45.
2. Professional Services are defined as the Standard Industrial Classification codes 74201 to 74204 (i.e. Architecture, including Urban Planning and Landscaping, Quantity Surveying and Engineering consultancy and design activities).

3. The Inter Departmental Business Register (IDBR) is the sampling frame used for the NIABI. The register consists of companies, partnerships, sole proprietors, public authorities, central government departments, local authorities and non-profit making bodies in the UK that have registered for VAT or are operating a PAYE scheme. The reporting units on IDBR hold the addresses to which the NIABI form is sent and may cover one or more local units. A local unit is an individual site (factory, shop, office etc) at which business is conducted.
4. Turnover is defined as total sales and work done. This is calculated by adding to the value of sales of goods produced, goods purchased and resold without further processing, work done and industrial services rendered and non industrial services rendered. The value of turnover includes intermediate consumption from within the construction industry and elsewhere.
5. The Northern Ireland Annual Business Inquiry (NIABI) results cover most sectors within the NI economy. The main areas excluded are public administration and defence. Health and social work, education, agriculture, forestry and fishing, and financial intermediation have also been excluded from publication. From 2002, all construction companies employing fifty or more employees are selected to contribute. Businesses falling below the threshold of complete enumeration are selected on a random stratified basis.
6. Quarterly Construction Enquiry net output is defined as turnover minus the value of intermediate consumption from within the construction sector.
7. Estimates of employment are derived by summing employee jobs sourced from the NI Census of Employment and Self-employed estimates from the Labour Force Survey.

The Census of Employment is a statutory enquiry of all employers in Northern Ireland, carried out biennially under the Statistics of Trade and Employment (Northern Ireland) Order 1988. The Census of Employment counts the number of jobs rather than the number of persons with jobs. Therefore a person holding both a full-time and a part-time job, or someone with two part-time jobs, will be counted twice. The Census of Employment does not include agriculture (but includes animal husbandry service activities and hunting, trapping and game propagation), the self employed, HM armed forces, private domestic servants, homeworkers and trainees without a contract of employment (non-employed status).

Estimates of self-employment jobs in the Construction sector are sourced to the Labour Force Survey (LFS) 2007 annual dataset. The figures include those persons that are self-employed in their main job and those who have a second job that has self-employed status. LFS self employed estimates for Construction Professional services are derived by using the employee jobs apportionments to provide an estimate of the appropriate 5 digit disaggregation. The division between employees and self-employed in the LFS is based on the survey respondents' own assessment of their employment status. Please note that since the LFS is a sample survey, all estimates obtained from it are subject to sampling error.

8. Net capital expenditure is calculated by adding to the value of new building work, acquisitions less disposals of land and existing buildings, vehicles and plant and machinery.

Engagement of small firms

As with the previous consultations in GB, we are inviting stakeholders of all sizes, in particular those in Northern Ireland, to voice their concerns/views either through their federations, trade associations, or as individuals.

Given this general industry context, the engagement of small firms, at all points in the supply chain, has been fundamental to the development of these proposals.

Among the many proposals considered, was whether “the payment framework under the Construction Order would benefit from the inclusion of a definition of what should constitute an adequate mechanism for payment?” The responses received to this suggestion indicated it would provide clarity for smaller firms and make clear on what date payment was due.

Likewise, support was also forthcoming for the proposal to “introduce a fallback provision should the payer not issue the advance notice of payment (Article 9 (2) Notice)”. The payer is already duty bound by the existing legislation to notify the payee of the amount they will be paid and of any deductions being made.

The cost of monitoring cash flow, negotiating credit, as well as the financing costs and administration, information and legal cost involved in disputes can bear disproportionately on smaller businesses. Not only does this constrain development by increasing relative costs and reducing the ability of small businesses to compete but it can also divert resources from training, innovation and management.

Late payment is a particular issue for all in construction, particularly among SMEs. This is borne out from a recent Small Business Survey in GB, which reported that 46% of construction firms saw late payment as a major obstacle. It was also reported in the same survey that late payment also significantly had a detrimental impact on cash flow.

This survey also reported that 31% of construction firms have had to resort to the courts as a result of late payment.

The benefits of the proposed amendments to small and micro businesses are:

- introducing greater transparency and clarity into the payment framework to assist in the management of cash flow;
- increasing access to a simple mechanism for resolving disputes;
- improving communication between payer and payee on what will be paid and when;

- encouraging prompt administration and communication of payment and improving the efficiency and productivity in the industry; and
- enabling the parties to continue to work together effectively to deliver high quality construction projects on time and on budget.

8. Equality Impact Assessment (EQIA)

Any policy developed by the Department of Finance and Personnel must have due regard to the need to promote equality of opportunity among nine categories of persons, namely among persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

The aim of an Equality Impact Assessment is to determine whether any of the nine groups defined above are significantly affected, either positively or negatively, by a change in government policy: does the policy under consideration create differential impacts between groups within each Section 75⁴ category? Is this impact adverse or beneficial?

While the Department of Finance and Personnel has carried out a preliminary cast among interested bodies within the industry and this did not identify any anticipated impact on any of the Section 75 groups, we wish to ask you whether you have any views on the relative impact of our proposals on the different Section 75 groups.

The proposed amendments to the Construction Order affect contracts between businesses and self employed individuals. They will apply equally to all businesses and individuals drawn from all ethnic groups, age groups and to men and women alike. We believe our proposals are unlikely to have a greater impact on any group as compared to another. The amendments all put in place regulatory reform that will remove burdens by:

- improving the operation of the existing legislation by introducing greater clarity and transparency and reducing disincentives to use adjudication where appropriate;
- helping to maintain a level playing field in a competitive market with a large proportion of small firms; and
- underpinning existing best practice in the industry.

These amendments will better enable contractors to plan cash flow, address poor performance, and potentially improve liquidity and reduce the costs of servicing debt. They are intended to benefit small businesses in particular.

⁴ The Northern Ireland Act 1998, Section 75.

9. Human Rights Assessment

The Department of Finance and Personnel considers that the proposals set out in this consultation are fully compliant with the Human Rights Act 1998.

10. Competition Assessment

The construction industry is extremely competitive. There is no dominant firm in the construction sector. Many firms report very low margins. Competition is healthy to the point of sometimes being extremely fierce and affecting profitability.

Similarly, there is no small key group of dominant firms in any sub-sector other than perhaps some very small specialist fields. The legislation does not set up barriers to entry to any sectors or to the construction industry and is unlikely to affect the size or number of firms, though it may reduce the churn brought about by the combination of insolvencies and new firms being established.

11. Enforcement, monitoring and sanctions

There is no proposal to change the enforcement mechanisms introduced through the original legislation. The main enforcement mechanism for the legislation other than the courts or arbitration is the adjudication process, which the legislation provides. The decision of the adjudicator is binding on the parties and enforceable through summary judgement in court.

The only sanction being introduced is where an application for payment becomes due if the payer fails to issue a payment notice. No other sanctions are proposed.

12. Implementation and delivery plan

I am proposing to introduce the amendments through an Assembly Bill. Following an assessment of the responses to the consultation on the proposed amendments, I will introduce legislation as soon as Assembly time is available.

13. Summary

This package of measures seeks to strike a fine balance between:

- the need to improve the effectiveness of the Construction Order on the one hand by:
 - Improving the transparency and clarity in the exchange of information relating to payments to enable the parties to construction contracts to better manage cash flow; and
 - Encouraging the parties to resolve disputes by adjudication, where it is appropriate, rather than resorting to more costly and time consuming solutions such as litigation; and
- On the other hand, the important principle of not upsetting the compromise between all sectors of the construction industry which underpinned the introduction of the original legislation in 1997.

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Chapter 6 – How to respond to this consultation

Responding to this Consultation Paper

We are inviting your written responses to our proposals to amend the Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland (Northern Ireland) Regulations 1998 and Partial Regulatory Impact Assessment. Responses must be submitted by **3 July 2009**.

The consultation response form is included at Annex B. This form contains questions on each section of the consultation paper and respondents are asked to indicate clearly in their response which questions, or parts of the consultation paper, to which they are responding, as this will greatly aid our analysis. Where a particular issue or proposal is of specific interest or concern, respondents are encouraged to feel free to make as many additional comments or suggestions as they feel is appropriate.

The questions on regulatory impact are important as they will help us to carry out the Impact Assessment that will be needed if we proceed with legislation. We would be very grateful if you would answer as many of these questions as you are able. Your responses will enable us to assess whether the proposals would deliver better payment practices than are supported by the legislation as it currently stands. Where no data have been available for Northern Ireland, we have, where necessary, based our calculations on nationally available statistics, interpolating pro rata.

The consultation response form also covers the amendments that will need to be made to The Scheme for Construction Contracts in Northern Ireland (Northern Ireland) Regulations 1999. Generally we intend only to make minimal consequential amendments to The Scheme. However where we believe we have exercised some discretion in policy terms as to how to amend The Scheme, we have included questions on the proposals in the response form.

Handling your response

The Department of Finance and Personnel will publish a summary of responses following the completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional circumstances.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear which organisation you are representing.

Though we cannot respond individually to each submission, we will publish an analysis of the consultation following completion of this exercise.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the introduction of the proposed amendments to Construction Contracts Order and The Scheme for Construction Contracts in Northern Ireland. We aim to issue a report on this consultation process by September 2009, with a view to pursuing legislative changes in 2010.

Response address

The response form can be downloaded from the consultation pages of the Department of Finance and Personnel website:

<http://www.dfpni.gov.uk/index/about-us/consultation-zone.htm>

Alternatively you can respond by letter or fax to:

*Department of Finance and Personnel
Central Procurement Directorate
Construction Initiatives Branch
Clare House
303 Airport Road West
Belfast
BT3 9ED*

Fax: 028 9081 6555

E-mail: consult.constructorder@dfpni.gov.uk

We will not be able to accept responses after the consultation deadline.

Help with queries

Questions about the policy issues raised in the consultation document should be addressed to:

*John Quin
Central Procurement Directorate
Department of Finance and Personnel
Clare House
303 Airport Road West
Belfast
BT3 9ED*

Email: john.quin@dfpni.gov.uk

Tel: 028 9081 6850

Fax: 028 9081 6555

Comments and complaints

If you have any other observations, or wish to make a complaint about the substance or conduct of this consultation exercise, please contact:

*Business Planning and Co-ordination Branch,
Central Procurement Directorate
Department of Finance and Personnel
Clare House
303 Airport Road West
Belfast
BT3 9ED*

E-mail: businessplanning.cpd@dfpni.gov.uk

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Annex A – List of Consultees

Association for Consultancy and Engineering
Belfast Solicitors' Association
Catholic Bishops of Northern Ireland
Civil Law Reform Division
Clerk of Petty Sessions, Laganside Courts, Belfast
Community Relations Council
Confederation of Associations of Specialist Engineering Contractors
Confederation of British Industry Northern Ireland Branch
Constructing Excellence NI (CENi)
Construction Confederation
Construction Employers Federation Northern Ireland
Construction Industry Council
Construction Industry Forum Northern Ireland
Council of the Inn of Court of Northern Ireland
Equality Commission for NI
Federation of Small Businesses
Food Standards Agency
HM Council of County Court Judges
HM Revenue and Customs
Human Rights Commission
Institute of Professional Legal Studies
Isle of Man Government
Law Centre (NI)
Ministry of Defence
National Specialists Contractors Council
NI Association of Citizens Advice Bureaux
NI Resident Magistrates' Association
Northern Ireland Chamber of Commerce and Industry
Northern Ireland Chamber of Trade
Northern Ireland Committee, Irish Congress of Trade Unions
Northern Ireland Council on Disability
Northern Ireland Council for Voluntary Action
Northern Ireland Court Service
Northern Ireland Federation of Housing Associations
Northern Ireland Government Departments
Northern Ireland Housing Executive
Northern Ireland Judicial Appointments Commission
Northern Ireland Law Commission
Northern Ireland Local Government Association
Northern Ireland Ombudsman
Northern Ireland Quarry Products Association
Participation & the Practice of Rights Project
Royal Institution of Chartered Surveyors
Royal Society of Ulster Architects
Scottish Executive
Society of Local Authority Chief Executives
Specialist Engineering Contractors' Group
Technology and Construction Solicitors' Association (TecSA)
The Construction Clients Group
The Department for Business, Enterprise and Regulatory Reform (BERR)

The General Consumer Council for Northern Ireland
The Head of School of Law, Queen's University Belfast
The Head of School of Law, University of Ulster
The Law Society of Northern Ireland
The Procurement Practitioners' Group
Translink
Welsh Assembly

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Annex B – Consultation Response Form

We should be very grateful if you would answer these questions on the proposals in this consultation paper and on their potential impacts. Please give reasons for your answers where you think it may be helpful. You should also feel free to suggest alternative approaches, or make whatever additional comments or suggestions you think are appropriate.

Name.....

Organisation.....

Address.....

E-mail.....

Chapter 1 – Adjudication framework

1. Removing the requirement that the Construction Order should only apply to contracts in writing

- (a) Do you agree that Article 6 the Construction Contracts (Northern Ireland) Order 1997 should be removed so that the application of the Construction Order is not restricted to contracts where all the terms are in writing?

Yes No

Comments:.....

.....
.....
.....
.....

- (b) Do you agree with us that the terms of an adjudication Scheme required by Article 7 of the Construction Order should only be effective if agreed in writing?

Yes No

Comments:.....

.....
.....
.....
.....

(c) Do you agree with us that the removal of the requirement that the parties must agree a contract in writing in order for the Construction Order to apply is unlikely to encourage the agreement of more oral or partly oral contracts?

Yes No

Comments:.....
.....
.....
.....
.....

(d) What proportion of contracts as a whole do you consider contain non-trivial terms, which have been subject to oral agreement or variation?

- (i) 0% - 10%
- (ii) 10% - 25%
- (iii) 25% - 50%
- (iv) 50% - 75%
- (v) 75% - 90%
- (vi) 90% - 100%

Please select one from (i) to (vi)

(e) Do you agree with us that an agreement under paragraph 2 or 5(2) of Part I of The Scheme, as to who should act as adjudicator, should only be effective if agreed in writing?

Yes No

Comments:.....
.....
.....
.....
.....

2. Prohibiting agreements that interim or stage payment decisions will be conclusive

(a) Do you agree that the Construction Order should be amended to prohibit agreements that decisions as to the amounts of payments whether by instalment, stage or other periodic payments are conclusive?

Yes **No**

Comments:.....
.....
.....
.....
.....

(b) Do you agree that the prohibition of agreements that decisions are conclusive should include:

(i) Decisions as to the amounts of stage payments (i.e. for completed stages of work)?

Yes **No**

ii) Decisions which relate to the work that has been performed under the construction contract to the extent that it affects the amount of the payment?

Yes **No**

...but that it should exclude:

(iii) Decisions as to the amount of final payment?

Yes **No**

(iv) Payment decisions that have already been taken and notified to the parties?

Yes **No**

Comments:.....
.....
.....
.....

3. Introduction of a statutory framework for the costs of adjudication

(a) Do you agree with our proposal to prohibit agreements as to the allocation of the costs of the adjudication until after the adjudicator is appointed?

Yes No

Comments:.....
.....
.....
.....
.....

(b) Do you agree with our proposal to provide that the adjudicator should have no jurisdiction as to the costs of the adjudication unless the parties have made an agreement to that effect after the adjudicator is appointed?

Yes No

Comments:.....
.....
.....
.....
.....

(c) Do you agree that adjudicators should be statutorily entitled to claim a reasonable amount in respect of fees for work reasonably undertaken and expenses reasonably incurred?

Yes No

Comments:.....
.....
.....
.....
.....

(d) Do you agree that the courts should have jurisdiction to decide whether:

(i) The fees and expenses claimed by the adjudicator are reasonable when they are claimed under the proposed statutory right?

Yes No

(ii) The legal or other costs of the parties are reasonable when the parties have agreed that the adjudicator should make a decision as to legal or other costs and that the parties should be jointly and severally liable for this amount?

Yes No

Comments:.....
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(e) What proportion of contracts do you think contain an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

- (i) Less than 0.1%
- (ii) 0.1% – 0.5%
- (iii) 0.5% – 1%
- (iv) 1% – 5%
- (v) 5% – 10%
- (vi) More than 10%

Please select one from (i) to (vi)

(f) What proportion of adjudications do you think are conducted under contracts containing an agreement that the referring party (or a specified party) should pay all or part of the costs of the adjudication?

- (i) Less than 0.1%
- (ii) 0.1% – 0.5%
- (iii) 0.5% – 1%
- (iv) 1% – 5%
- (v) 5% – 10%
- (vi) More than 10%

Please select one from (i) to (vi)

Chapter 2 – Payment framework

1. Prevention of unnecessary duplication of payment notices

- (a) Do you agree that the Construction Order should be amended so that a certificate from a third party supervising officer under a construction contract, which makes a valuation of the work done, may function as a Article 9 (2) payment notice? **Yes** **No**

Comments:.....
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- (b) Do you agree that the Construction Order should allow the contract to provide that a Article 9(2) payment notice may be issued either:

(i) By the payer? **Yes** **No**

(ii) By a person identified in the contract? **Yes** **No**

(iii) By a person identified in a notice to the payee? **Yes** **No**

Comments:.....
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- (c) Do you agree that The Scheme should provide that a payment notice under Part II paragraph 9 may be issued either:

(i) By the payer? **Yes** **No**

(ii) By a person identified in the contract? **Yes** **No**

Comments:.....
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2. Clarification of the requirement that a Article 9(2) payment notice should be served

(a) Do you agree that the drafting of the provision in Article 9 (2) of the Construction Order on when it is necessary to issue a Article 9 (2) payment notice should be improved to make clear that:

(i) a payment notice should be issued whenever the payment has been set-off, whether under another contract or the contract in question?

Yes No

(ii) allowance need only be made for abatement of the sum due under the contract in question and not another contract?

Yes No

Comments:.....
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(b) Responses to 'Improving Payment Practices in the Construction Industry' in 2005 suggested that a Article 9 (2) payment notice is only issued for 40% of payments. What proportion of cases where the notice is not issued do you think can be explained by the current deficiencies in the requirement in Article 9 (2) of the Order?

- (i) Less than 10% of cases where the notice is not issued (less than 6% of payments as a whole)?
- (ii) Between 10% and 33% of cases where the notice is not issued (between 6% and 20% of payments as a whole)
- (iii) Between 33% and 66% of cases where the notice is not issued (between 20% and 40% of payments as a whole)
- (iv) Between 66% and 90% of cases where the notice is not issued (between 20% and 54% of payments as a whole)
- (v) More than 90% of cases where the notice is not issued (more than 54% of payments as a whole)?

Please select one of (i) to (v)

3. Clarity of the content of payment and withholding notices

(a) Do you agree that Article 9 (2) of the Construction Order should be amended to require that, in addition to the amount of the payment made or proposed to be made, and the basis of calculation, payment notices should also state:

(i) the amount(s) withheld, where the payment is less than the amount that would have been due had the payee performed all his obligations under the contract and there were no set-off or abatement?

Yes No

(ii) the grounds for withholding where amounts have been withheld?

Yes No

(iii) the basis of calculation of any amounts withheld?

Yes No

Comments:.....
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(b) If we introduce a requirement that payment notices should be in the format described above, do you agree that Article 10 should be amended to require that withholding notices should be in the same format?

Yes No

Comments:.....
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(c) Responses to 'Improving Payment Practices in the Construction Industry' in 2005 suggested that a Article 9 (2) payment notice is only issued for 40% of payments. In what proportion of cases where the notice is issued do you believe it is later supplemented by a separate Article 10 withholding notice because the payer is unclear about how the Article 9 (2) notice should act as a Article 10 withholding notice?

- (i) Less than 10% of cases where the notice is not issued (less than 4% of payments as a whole)?
- (ii) Between 10% and 30% of cases where the notice is not issued (between 4% and 12% of payments as a whole)?
- (iii) Between 30% and 70% of cases where the notice is not issued (between 12% and 28% of payments as a whole)?
- (iv) Between 70% and 90% of cases where the notice is not issued (between 28% and 36% of payments as a whole)?
- (v) More than 90% of cases where the notice is not issued (more than 36% of payments as a whole)?

Please select one of (i) to (v)

4. Clarity of the “sum due”

(a) Do you agree that the Construction Order should be amended to ensure that the payer and the payee both know the sum due for the purposes of:

(i) Article 10 – so that deductions (whether by set-off or abatement) can only be made from that sum by issuing a withholding notice?

Yes **No**

(ii) Article 11 – so that they both know the amount that must be paid if the payer is to avoid the possibility that the payee will suspend performance?

Yes **No**

Comments:.....

(b) Do you agree that this should be achieved by providing that:

(i) the sum due under a construction contract should be the amount paid or proposed to be paid as specified in a Article 9 (2) payment notice?

Yes **No**

(ii) the amount in a claim by the payee should become due if no payment notice is issued?

Yes **No**

Comments:.....
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(c) For the purposes of this consultation, we have assumed that on average across the industry, one in 30 payments that are (or should have been) notified under Article 9 (2) are later abated. Do you consider that this proportion:

- (i) is about right?
- (ii) should be less than half of this (i.e. less than one in 60 payments)?
- (iii) should be more than twice this (i.e. more than one in 15 payments)?

Please choose one of (i) to (iii)

(d) Do you agree that the overall cost to the payee of securing payment under the payment framework in the Construction Order can best be measured as a percentage of each payment made under the contract?

Yes **No**

Comments:.....
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(e) Notwithstanding your answer to question (d) what percentage of the amount of each payment finally due under a construction contract do you consider is lost on account of the cost and delay involved in obtaining proper payment?

- (i) Less than 1% of each payment?
- (ii) Between 1% and 2.5% of each payment?
- (iii) Between 5% and 10% of each payment?

- (iv) Between 10% and 15% of each payment?
- (v) Between 15% and 25% of each payment?
- (vi) More than 25% of each payment?

Please select one answer from (i) to (vi)

- (f) If changes to the payment framework were introduced as proposed in this chapter, what percentage of the amount of each payment finally due under a construction contract do you consider would be lost on account of the cost and delay involved in obtaining proper payment?

- (i) Less than 1% of each payment?
- (ii) Between 1% and 2.5% of each payment?
- (iii) Between 5% and 10% of each payment?
- (iv) Between 10% and 15% of each payment?
- (v) Between 15% and 25% of each payment?
- (vi) More than 25% of each payment?

Please select one answer from (i) to (vi)

- (g) If, as proposed, the sum due under a construction contract were to be viewed in law as the amount paid or proposed to be paid as specified in a Article 9 (2) payment notice, (with the amount in a claim for payment becoming due if no notice were issued), what effect do you think this would have on the cost of resolving payment disputes at adjudication?

- (i) The cost would not be subject to a significant reduction (i.e. less than 5%)?
- (ii) The cost would be reduced by 5% to 15%?
- (iii) The cost would be reduced by 15% to 35%?
- (iv) The cost would be reduced by 35% to 65%?
- (v) The cost would be reduced by more than 65%?
- (vi) The cost would be increased?

Please select one answer from (i) to (vi)

Comments:.....
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(h) Do you agree that the overall cost to the payee of securing payment can best be anticipated based upon recent experience of securing payments under:

(i) interim payment certificates following the introduction of the Construction Order?

Yes No

(ii) the JCT "With Contractors Design" form of construction contract?

Yes No

Comments:.....
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5. Prohibiting the use of pay-when-certified clauses

(a) Do you agree that the Construction Order should be amended to make clear that pay when certified clauses are not an adequate mechanism for determining when payment becomes due?

Yes No

Comments:.....
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(b) Do you agree with our understanding that:

(i) Pay-when-certified clauses are only used in Civil Engineering subcontracts?

Yes No

Comments:.....
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(ii) Instalment, stage and other period payment decisions are not conclusive in any of the standard contract forms?

Yes No

Comments:.....
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Chapter 3 – Improving the right to suspend performance

- (a) Do you agree that Article 11 of the Construction Order should be amended to include a provision allowing the suspending party to claim a reasonable amount in respect of his costs caused by the exercise of the right to suspend from the party in default of payment (this would include the reasonable costs of remobilisation if this is required)?

Yes No

Comments:.....
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- (b) Do you agree that Article 11 of the Construction Order should be amended to include a provision allowing the suspending party to claim an extension of time for meeting any deadlines in his contract with the party in default of payment for any delay to the completion of work caused by the exercise of the right to suspend?

Yes No

Comments:.....
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- (c) Do you agree that Article 11 of the Construction Order should be amended to clarify that the suspending party may suspend any or all of his contractual obligations to the party in default of payment?

Yes No

Comments:.....
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(d) What would you estimate to be the reasonable one-off costs of suspending performance on a typical construction project?

- (i) Less than 5% of an average monthly interim payment?
- (ii) 5% to 15% of an average monthly interim payment?
- (iii) 15% to 50% of an average monthly interim payment?
- (iv) 50% to 100% of an average monthly interim payment?
- (v) 100% to 200% of an average monthly interim payment?
- (vi) More than double an average monthly interim payment?

More than double an average monthly interim payment.

Please select one of (i) to (vi)

(e) What would you estimate to be the reasonable monthly ongoing costs while in suspension on a typical construction project?

- (i) Less than 5% of an average monthly interim payment?
- (ii) 5% to 25% of an average monthly interim payment?
- (iii) 25% to 50% of an average monthly interim payment?
- (iv) 50% to 100% of an average monthly interim payment?

50% to 100% of an average monthly interim payment.

Please select one of (i) to (iv)

- (f) What would you estimate to be the reasonable costs of remobilising performance on a typical construction project?
- (i) Less than 5% of an average monthly interim payment.
 - (ii) 5% to 25% of an average monthly interim payment.
 - (iii) 25% to 50% of an average monthly interim payment.
 - (iv) 50% to 100% of an average monthly interim payment.
 - (v) 100% to 200% of an average monthly interim payment.
 - (vi) More than double an average monthly interim payment.

Please select one of (i) to (vi)

Do you consider that your answers to questions (d), (e) and (f) would be changed if the suspending party was not required to be ready to remobilise immediately, as at present, when the defaulted payment is eventually made, but was allowed an additional extension of time for any delay caused by the exercise of the right of suspension.

- (g) Please select which of (i) to (vi) in question (d) you think would apply following the proposed amendment.
- (i) Less than 5% of an average monthly interim payment.
 - (ii) 5% to 15% of an average monthly interim payment.
 - (iii) 15% to 50% of an average monthly interim payment.
 - (iv) 50% to 100% of an average monthly interim payment.
 - (v) 100% to 200% of an average monthly interim payment.
 - (vi) More than double an average monthly interim payment.

(h) Please select which of (i) to (iv) in question (e) you think would apply following the proposed amendment.

(i) Less than 5% of an average monthly interim payment

(ii) 5% to 25% of an average monthly interim payment.

(iii) 25% to 50% of an average monthly interim payment.

(iv) 50% to 100% of an average monthly interim payment.

(i) Please select which of (i) to (vi) in question (f) you think would apply following the proposed amendment.

(i) Less than 5% of an average monthly interim payment?

(ii) 5% to 25% of an average monthly interim payment?

(iii) 25% to 50% of an average monthly interim payment?

(iv) 50% to 100% of an average monthly interim payment?

(v) 100% to 200% of an average monthly interim payment?

(vi) More than double an average monthly interim payment?

As well as covering the regulatory impact of the proposals described in this chapter on the costs of suspension, the following questions also cover the impacts of the proposal in Chapter 2 on the transparency of the sum due and its effect on the right to suspend.

In reading questions (j) to (i), consultees should bear in mind the finding of *'Improving Payment Practices in the Construction Industry'* that the right to suspend performance is exercised in fewer than one in a 100 cases of defaulted payment at present.

(j) Following the introduction of both:

our proposals to reduce the costs of suspending performance in cases of non-payment; and

our proposals to improve the transparency of the sum due,

how frequently do you believe the right to suspend performance would be exercised?

- (i) In more than one in five cases of defaulted payment?
- (ii) In between one in five and one in 20 cases of defaulted payment?
- (iii) In between one in 20 and one in 100 cases of defaulted payment?
- (iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change)

Please select one of (i) to (iv)

(k) Following the introduction of only our proposal to reduce the costs of suspending performance in cases of non-payment how frequently do you believe the right to suspend performance would be exercised?

- (i) In more than one in five cases of defaulted payment?
- (ii) In between one in five and one in 20 cases of defaulted payment?
- (iii) In between one in 20 and one in 100 cases of defaulted payment?
- (iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change)

Please select one of (i) to (iv)

(l) Following the introduction of only our proposal to improve the transparency of the sum due in respect of the right to suspend performance, how frequently do you believe the right would be exercised?

- (i) In more than one in five cases of defaulted payment?
- (ii) In between one in five and one in 20 cases of defaulted payment?
- (iii) In between one in 20 and one in 100 cases of defaulted payment?
- (iv) In fewer than one in 100 cases of defaulted payment? (i.e. no significant change)

Please select one of (i) to (iv)

(m) What do you consider is the incidence of non-payment of a sum due in the construction industry?

- (i) Fewer than 10% of payments
- (ii) 10% to 30% of payments
- (iii) 30% to 50% of payments
- (iv) 50% to 70% of payments
- (v) 70% to 90% of payments
- (vi) More than 90% of payments

Please select one of (i) to (vi)

(n) What do you consider would be the incidence of non-payment following the introduction of both:

our proposals to reduce the costs of suspending performance in cases of non-payment; and

our proposals to improve the transparency of the sum due?

(i) Fewer than 10% of payments

(ii) 10% to 30% of payments

(iii) 30% to 50% of payments

(iv) 50% to 70% of payments

(v) 70% to 90% of payments

(vi) More than 90% of payments

Please select one of (i) to (vi)

(o) What do you consider would be the incidence of non-payment following the introduction of only our proposals to reduce the costs of suspending performance?

(i) Fewer than 10% of payments

(ii) 10% to 30% of payments

(iii) 30% to 50% of payments

(iv) 50% to 70% of payments

(v) 70% to 90% of payments

(vi) More than 90% of payments

Please select one of (i) to (vi)

(p) What do you consider would be the incidence of non-payment following the introduction of only our proposals to improve the transparency of the sum due in respect of the right to suspend performance?

(i) Fewer than 10% of payments

(ii) 10% to 30% of payments

(iii) 30% to 50% of payments

(iv) 50% to 70% of payments

(v) 70% to 90% of payments

(vi) More than 90% of payments

Please select one of (i) to (vi)

Chapter 4 – Other Issues which we are considering as part of this consultation

1. Devolution

- (a) Do you agree that, so far as is possible give the differences between the Law in Northern Ireland, England and in Scotland, that the Northern Ireland Executive, BERR and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of the Order in Northern Ireland and the Act in GB given that responsibility for the issue has been devolved to the Northern Ireland Assembly?

Yes No

Comments:.....
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- (b) Do you agree that, so far as is possible give the differences between the Law in Northern Ireland, England and in Scotland, that the Northern Ireland Executive, BERR and Scottish Executive should continue to work together to minimise the differences between the effect of the provisions of The Schemes in Northern Ireland and GB?

Yes No

Comments:.....
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2. Correction of errors

- (a) Do you consider that BERR and the Northern Ireland Executive should work with the Scottish Executive to develop a “slip rule” with the intention, so far as is possible, of introducing the same rule in Northern Ireland, England, Scotland and Wales to ensure it is applied in a uniform way by the courts in Northern Ireland, England and Wales and in Scotland?

Yes No

Comments:.....
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- (b) Do you agree with the suggestion in the Scottish Executive’s report of its consultation on *‘Improving Adjudication in the Construction Industry’* that a slip rule should provide the adjudicator with:

- (i) Power to correct a clerical or arithmetic error or any other matter that the parties may agree...

Yes No

Comments:.....
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- (ii) for one week after the adjudicator’s decision or such longer period as the parties may agree?

Yes No

Comments:.....
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3. The Judgement of the House of Lords in Melville Dundas v George Wimpey

NB The references in square brackets represent the Articles in the Construction Contracts (Northern Ireland) Order corresponding to the sections in the Housing Grants Construction Regeneration Act 1996.

(a) Do you agree that section 111 [Article 10] should not apply where the payee is insolvent, so that payment may be withheld without notice?

Yes No

Comments:.....

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(b) Do you agree that sections 110 and 111 [Articles 9 and 10] should apply in all other cases (i.e. to final payments as well as to “payments by instalments, stage or other periodic payments” which become due in accordance with section 109 of the Construction Act [Article 8 of the Construction Order])?

Yes No

Comments:.....

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(c) Do you consider that the judgement of the House of Lords in Melville Dundas -v- George Wimpey will have the effect which we have proposed the Construction Order should have in our view, when it is applied by the lower courts, so that:

(i) section 111[Article 10] will not apply where the payee is insolvent, so that payment may be withheld without notice?

Yes No

Comments:.....
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(ii) section 111 [Article 10] will apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as “payments by instalments, stage or other periodic payments” in accordance with section 109 of the Construction Act [Article 8 of the Construction Order])?

Yes No

Comments:.....
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Please answer (Yes / No) to questions (i) and (ii)

(d) Do you consider that:

(i) the Act [Order] should expressly provide an exception to section 111 [Article 10] in cases where the payee is insolvent (section 113 [Article 12] already provides an example of an exception or insolvency), or leave this exception to be decided by the courts through case law following the House of Lords’ judgement?

Yes No

Comments:.....
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(ii) the Act [Order] should be amended to make clear that section 111 [Article 10] should apply to all other grounds for withholding in respect of all payments (i.e. final payments as well as “payments by instalments, stage or other periodic payments” which become due in accordance with section 109 [Article 8 of the Construction Order])?

Yes No

Comments:.....

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Chapter 5 – Partial Regulatory Impact Assessment

1. Equality Impact Assessment (EQIA)

The title of the proposed policy is:

Proposed amendments to Construction Contracts (Northern Ireland) Order 1997 and The Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999.

The aims of the policy are:

within the context of construction industry related contracts:

- to improve transparency and clarity in the exchange of information relating to payments to enable cash flow to be better managed;
- to encourage parties in dispute to seek resolution of their differences through adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and
- to facilitate the right to suspend performance under a construction-related contract.

Section 75 refers to the Northern Ireland Act 1998, Section 75 which sets out nine categories of persons, namely:

- persons of different religious belief;
- political opinion;
- racial group;
- age;
- marital status;
- sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without.

The aim of an Equality Impact Assessment is to determine whether any of the nine groups defined above are significantly affected, either positively or negatively, by a change in government policy, that is, does the policy under consideration create differential impacts between groups within each Section 75 category and, if so, whether this impact is adverse or beneficial.

Do you consider that there is any likelihood of higher or lower participation or uptake by different groups? If so, please indicate below.

Yes No

Comments:.....
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Is there any evidence that different groups have different needs, experiences, issues and priorities in relation to the particular policy? If so, please indicate below.

Yes No

Comments:.....
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Is there an opportunity better to promote equality of opportunity or better community relations by altering the policy or working with others in Government or in the larger community? If so, please indicate below.

Yes No

Comments:.....
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Do you consider that implementation of this policy is likely to create problems which are specific to any of the relevant groups? If so, please indicate below.

Yes No

Comments:.....

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