

[HARP]

CONSTRUCTION CONTRACTS BILL 2010

*Mar a tionscnaíodh
As initiated*

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[HARP]

CONSTRUCTION CONTRACTS BILL 2010

BILL

entitled

AN ACT TO REGULATE PAYMENT AND CERTAIN OTHER MATTERS UNDER CONSTRUCTION CONTRACTS AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

	SCS Comment/Submission
1. Short Title and commencement	
(1) This Act may be cited as the Construction Contracts Act 2010.	
(2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or provisions.	
2. Interpretation	
(1) this Act –	
(a) a reference to any enactment shall, unless the context otherwise requires, be construed as a reference to that enactment amended or extended by or under any subsequent enactment including this Act when enacted,	
(b) a reference to a section or Schedule is a reference to a section of, or Schedule to, this Act unless it is indicated that reference to some other enactment is intended,	

	SCS Comment/Submission
(c) reference to a subsection, paragraph or subparagraph is a reference to the subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended.	
(2) “construction contracts” shall have the meaning assigned to it in Section 3.	
(3) “commencement of the contract” shall, for the purposes of Section 10 and Schedule 1, occur on the date stated in the construction contract; in the absence of such date the date of commencement of the construction contract will be the date on which the parties entered into the contract.	Drafting error: Omit “for the purposes of Section 10 and Schedule 1” – this phrase does not occur in Section 10 but does occur in other sections of the Act.
(4) “the Minister” means the Minister for Finance	
(5) “payee” means the person to whom the payment is to be made.	
(6) “payer” means the person who must discharge payment to the payee.	
(7) “specified person” means a person specified in or determined in accordance with the provisions of the construction contract.	
3. Construction Contracts	<p>The Act must be uniform across all sectors, at all levels and easily understood.</p> <p>The introduction of any ambiguity as to which contracts the legislation is applicable to or a distinction between payments between employer and main contractors as opposed to main contractor and subcontractor must be avoided.</p> <p>Any exclusions will give rise to dispute at the margins of such exclusions and create doubt and confusion in the lower tiers of the payment chain.</p> <p>The SCS believe that Public Works Contracts, independently certified contracts and contracts with residential occupiers must not be excluded. All such contracts are prone to payment dispute just as any other contracts.</p> <p>However, care needs to be taken for residential consumers in relation to conflicts with prior legislation and in particular the S.I. No. 27/1995: European Communities (Unfair Terms In Consumer Contracts) Regulations, 1995.</p>

	SCS Comment/Submission
(1) In this Act a “construction contract” means an agreement with a person for any of the following:	This definition must be expanded to include companies or bodies corporate as well as individuals.
(a) the carrying out of construction operations;	
(b) arranging for the carrying out of construction operations by others, whether under sub-contract to that person or otherwise;	
(c) providing that person’s own labour, or the labour of others, for the carrying out of constructions operations.	
(2) References in this Act to a construction contract include an agreement to:	
(a) do architectural, design, or surveying work; or	
(b) provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape;	
in relation to construction operations.	
(3) References in this Act to a construction contract do not include a contract of employment (within the meaning of the Organisation of Working Time Act 1997).	
(4) The Minister may by order add to, amend or repeal any of the provisions of subsections (1) or (2) as to the agreements which shall be construction contracts for the purposes of this Act or are to be taken or not to be taken as included in references to construction contracts.	
(5) No such order shall be made unless a draft of it has been laid before and approved by a resolution of, both Houses of the Oireachtas.	
(6) Where an agreement relates to construction operations and other matters, this Act shall apply to it only so far as it relates to construction operations.	<p>This would result in an ability to leave components of any contract outside the Act. The SCS believe it would be better to state where an agreement relates to construction operations and other matters, that this Act shall apply the whole of the agreement.</p> <p>The principle of drafting the Act to apply to all construction activity needs to be unambiguous in order to avoid the risk of disputes as to whether the Act applies.</p>

	SCS Comment/Submission
<p>An agreement shall be deemed to relate to construction operations so far as it makes provision of any kind within subsections (1) or (2).</p>	
<p>(7) This Act shall apply only to construction contracts which:</p>	
<p>(a) are entered into after the commencement of this Act, and</p>	<p>Commencement of the Act must provide for sufficient notice to avoid a situation where the Act would not apply to an employer/main contractor relationship but would then apply for the same works between this main contractor and his subcontractors</p> <p>For example a two year construction project that has just started on site when the Act comes into force would have many, perhaps in excess of a hundred subcontracts to be placed, the contract between the employer and the main contractor would not be subject to the provisions of the Act as it pre-existed, but the subcontracts that are placed after the Act comes into force would be.</p> <p>In this case the main contractor will have tendered on the basis of “pay when paid” and his credit requirements will be relatively low, however with the introduction of the Act, he will be obliged to pay in accordance with the Act regardless of whether he has been paid or not.</p> <p>Even in the case of fully compliant main contractors, this would have the probability of an unbearable burden, would be unfair and do nothing to address the issues that caused this Act to be considered.</p>
<p>(b) relate to the carrying out of construction operations in the State.</p>	
<p>(8) This Act shall apply whether or not the law of the State is otherwise the applicable law in relation to the construction contract.</p>	
<p>4. Meaning of “construction operations”</p>	
<p>(1) In this Act “construction operations” means, operations of any of the following descriptions:</p>	

	SCS Comment/Submission
(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);	<p>Is it the intention to include temporary structures such as event stands, wedding marquees and similar temporary structures?</p> <p>While these contracts are not normally considered part of the construction industry, it is possible that they could be interpreted as “Construction Operations” under this clause. It would be helpful, for the avoidance of doubt, if these structures are mentioned as being encompassed by the Act or not.</p>
(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;	
(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, thermal insulation, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;	
(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;	The use of “internal and external” is unnecessary
(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection and/or maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;	“Site investigations” should be added to this list of operations
(f) painting or decorating the internal or external surfaces of any building or structure;	The use of “internal and external” is unnecessary
(g) drilling for, or extraction of, oil or natural gas;	<p>These operations are not naturally part of the construction industry and are very specialised industries.</p> <p>These industries should be consulted on the inclusion of these within this Act.</p>

	SCS Comment/Submission
(h) the making, installation and repair of artistic works such as sculptures, murals and similar artistic works.	<p>These operations are not naturally part of the construction industry. They are specialised industries and rarely form part of a construction project. When forming part of a construction project they are encompassed by clause (e) above.</p> <p>These industries should be consulted on the inclusion of these within the Act.</p>
(2) The manufacture or delivery to site of the following shall not be construction operations within the meaning of this Act:	
(a) building or engineering components or equipment;	
(b) materials, plant or machinery; or	
(c) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems;	
except where:	
(i) they are individually, manufactured for the site or	<p>On major contracts virtually all components are individually made, e.g. standard bricks will be made to order, but are not necessarily identifiable separately in the factory.</p> <p>The SCS recommend that this should be extended at least to read “are individually <u>designed</u> and manufactured for the site”</p>
(ii) they are supplied under a contract which also provides for their installation.	
(3) The Minister may by order add to, amend or repeal any of the provisions of subsections (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Act.	
(4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of both Houses of the Oireachtas.	

	SCS Comment/Submission
5. Review of operation of the Act	
(1) The Minister shall, not later than 5 years after the passing of this Act, commence a review of its operation.	
(2) A review under <i>subsection (1)</i> shall be completed not later than one year after it was commenced.	
6. Provisions applicable to all agreements	
(1) The provisions of this Act shall apply to all construction contracts	
(whether written or oral or partially written or partially oral).	<p>The SCS do not believe that this statement is necessary. If silent all contracts will be included written or not.</p> <p>It would appear that this clause has been introduced as a clarification of the UK Act which has to date excluded oral contracts. It is unnecessary in a stand alone Act.</p>
(2) References in this Act to anything being written or in writing include its being recorded by any means.	
(3) The provisions of this Act shall apply irrespective of any agreement by the parties to a construction contract to exclude or otherwise limit in any way the application of the statutory provisions.	
7. Payment claim date	<p>Time scale for notification of intention to pay any amounts other than that claimed must be realistic within the construction process. In cases where there are many subcontracts receiving monthly payments, it is imperative that the time frame for notifications are not administratively impossible without significant additional resources being applied.</p> <p>The introduction of the legislation must not corrupt or distort the cash flow of existing fully compliant employers, contractors and sub-contractors. The introduction must take cognisance of existing contracts and the fact that there will be contracts procured with the pre-legislation credit terms and conditions assumed but that the subcontracts to those contracts will not have been let. It is important that these existing contracts and the subcontract to these contracts are respected.</p>

	SCS Comment/Submission
(1) Every construction contract shall –	
(a) specify a payment claim date in respect of each interim payment, where the contract makes provision for interim payments, and the final payment; and	
(b) provide for a final date for payment in relation to the payment claim date(s).	
The parties are free to agree how long the period is to be between the payment claim date(s) and the final date for payment.	This clause should refer to the industry norm of holding retention for a period after the works are complete to allow for snagging and defect that become apparent in the period immediately after completion of the works
(2) Where a construction contract does not comply with the requirements of this section the provisions of Schedule 1 shall apply.	
8. Amount to be paid by the final date for payment	
(1) Not later than five days after the payment claim date the payee may submit a claim for payment to the payer or a specified person.	<p>The date of a subcontract payment claim is early in a chain of dates that lead through to the employer / main contractor payment. The later payment periods are all of fixed maximum duration and it is not possible to have a “not later than ...days after ...” in a chain of such events.</p> <p>This clause must be altered to read “Not later than the payment claim date the payee may submit a claim for payment to the payer or a specified person.”</p>
(2) The claim for payment shall specify –	
(a) the amount claimed,	
(b) the period, stage of work or activity to which the claim relates,	
(c) the subject matter of the claim, and	
(d) the basis of the calculation.	
(3) Not later than twenty-one days after the payment claim date the payer or a specified person may issue a response to the payment claim.	See Clause 8(1) above – this is one of the later fixed periods. If Clause 8(1) is not altered, this period will in effect be reduced to 16 days.

	SCS Comment/Submission
(4) The response must specify the amount the payer proposes to pay and, where that amount is different from that in the payment claim:	
(a) the reason(s) for the difference in amounts, and	
(b) the basis on which the amount was calculated.	It is impractical to have to give a detailed response to a claim that is inadequately detailed, this Clause must be extended to provide for the following: “... provided always that the payer shall not be obliged to provide any greater level of detail in response than that provided in the payment claim ...”
(5) Where the reason(s) for the different amount in the response refers to a claim for loss or damage arising from an alleged breach of the payee’s contractual or legal obligations, the response must also specify –	
(a) when the loss or damage was incurred,	
(b) the items constituting such loss or damage, and	
(c) the amount(s) claimed in respect of each item.	
(6) Where in his response the payer asserts a claim against the payee such claim must not relate to a contract other than the extant construction contract.	
(7) On or before the final date for payment the payer shall make payment of –	
(a) the amount in a payment claim complying with <i>subsection 2</i> in the absence of a response or of a response complying with <i>subsections (3), (4), (5) and (6)</i> ; or	
(b) where a response complying with <i>subsections (3), (4), (5) and (6)</i> is issued, the amount stated in that response.	
9. Referral of response to adjudication	

	SCS Comment/Submission
<p>Where a response complying with <i>subsections</i> (3), (4), (5) and (6) in Section 8 is issued, but on the matter being referred to adjudication, it is decided that the whole or part of the difference in the amounts between the payment claim and the response should be paid, the decision shall constitute a debt requiring payment in full not later than seven days from the date of the decision.</p>	
<p>10. Prohibition of conditional payments</p>	
<p>(1) A provision in a construction contract making entitlement to or the liability to make payment or the timing of payment conditional or dependent upon the operation of another contract is ineffective.</p>	<p>This will cause cash flow difficulties for existing compliant main contractors.</p> <p>At present on normal construction projects where relationships are good and the main contractor is fully compliant with his obligations to pay, the main contractor will be funding 20% to 25% on the project through his own credit facilities, the remaining 75% to 80% is funded through the subcontractor’s credit facilities.</p> <p>The introduction of a prohibition on “pay when paid” clauses will mean that in some circumstances the subcontractor will be paid while the main contractor will not, leaving the main contractor requiring significantly increased credit facilities.</p> <p>Many contracts are prone to funding delays which, on the introduction of the Act would create an intolerable burden on the compliant main contractors, particularly in light of the lack of credit available.</p> <p>The drafting of the Act must take these considerations into account</p>

	SCS Comment/Submission
<p>(2) The reference in <i>subsection (1)</i> to the operation of another contract includes the issue of any notice or certificate, the making of any decision under another contract or the occurrence of any event under another contract.</p>	<p>Is it the intention for this clause to cut across the certification process of Nominated Subcontracts?</p> <p>Currently Nominated Subcontractor monies only become due following the inspection and certification of the value and quality of the works by certain professionals. It would appear that this clause may cut across this process unnecessarily. The certifier is usually not a party to the construction contract but working under a contract directly to the employer (for example a services engineer).</p> <p>Is it the intention of this clause that the main contractor must decide what is due and pay that amount to the subcontractor when at a later time the qualified professional responsible for the cost and quality of the work of that subcontract may certify a different amount? The risks of dispute in such circumstances are considerable.</p> <p>Further this will disrupt the process of the certification of the building as complete. Practical and final completion being certified on projects by registered independent professionals (usually an Architect). Arising from this clause the Contractor will have to “self-certify” the works as complete as between himself and any subcontractor, whereas he currently relies upon this registered professional.</p>
<p>(3) <i>Subsection (1)</i> shall not apply where, at the relevant payment claim date, the payer under the other construction contract referred to in the conditional payment provision is insolvent within the meaning of <i>subsection (4)</i>.</p>	
<p>(4) For the purposes of this Section:</p>	
<p>(a) a company is insolvent where,</p>	
<p>(i) it is wound up voluntarily under Section 251 Companies Act, 1963, or</p>	
<p>(ii) it is wound up by the court by virtue of Section 213 Companies Act 1963, or</p>	<p>The process of winding up a company takes many months if not years and in the context of this Act the time scale of the completion of winding up is irrelevant. This clause should be amended to provided for “ ...or a liquidator is appointed....”</p>

	SCS Comment/Submission
(iii) a receiver of the property of the company has been appointed under Section 19 Conveyancing and Law of Property Act, 19881, or	
(iv) a court has appointed an examiner to the company under Section 2 Companies (Amendment) Act, 1990	
(b) an unregistered company is insolvent in the circumstances defined in Section 344 Companies Act, 1963.	
(c) an individual is insolvent where an act of bankruptcy is committed within the meaning of Section 7 Bankruptcy Act, 1988.	
(5) Where a provision in a construction contract is ineffective by virtue of <i>subsection (1)</i> , Schedule 1 shall apply to the contract to the extent that it does not fulfil the requirements of Section 7.	
11. Adjudication	<p>Adjudication must be available for all disputes, as any process of filtering or deciding as to whether the legislation is applicable will only cause a further layer of delay and dispute.</p> <p>Small value disputes can, on occasion, be immensely complex, while very large disputes can be relatively simple.</p> <p>To draw any line as to what is or is not covered by the legislation due to size or complexity will cause delay and undermine the purpose of the legislation</p>

		SCS Comment/Submission
(1)	A party to a construction contract has the right to refer a dispute arising under the contract for adjudication.	<p>As the purpose of the legislation is to improve cash flow and security of payment for current payments, consideration should be given to drafting time limits on when a dispute over an interim payment can be raised. It is not in anyone's interest, other than the vexatious litigant, to leave the time for an interim payment dispute open ended.</p> <p>The SCS would favour a limit of 28 days from the final payment date for the interim payment as a limit for the notification for a dispute on that interim payment.</p> <p>In effect a dispute should only be allowable before the next interim payment is due. Once the next interim payment date has been reached, the time for disputing that cumulative payment restarts however it should not be possible to raise a dispute over the timing or quantum of a payment made in previous months.</p>
	For this purpose 'dispute' includes any difference.	
(2)	The adjudication shall be conducted solely in accordance with the adjudication provisions in the Schedule 2 to this Act.	<p>The SCS consider that this clause is very restrictive and that the parties should be permitted to agree flexibility as to the terms of the Adjudication after the dispute has been notified. However, failing such agreement the requirements of the Act would be applicable.</p> <p>For example both parties may agree that the issues are too complex to present or agree within the 28 day period and agree that a greater period is required.</p>
(3)	Any contractual provision between the parties to a construction contract which adds to, varies or excludes any or all of the provisions of Schedule 2 is ineffective.	See (2) above
	It is immaterial whether or not the contractual provision is contained in the construction contract.	

	SCS Comment/Submission
<p>(4) The adjudicator shall be appointed by one of the bodies listed in the appendix to Schedule 2 as an adjudicator nominating body.</p>	<p>Like most dispute resolutions clauses the parties must be afforded the opportunity to agree on the third party adjudicator. However a very tight time limit for such agreement should be set, no longer than 5 days.</p> <p>The parties to construction disputes know the issues of the dispute intimately and they also know that the resolution of that dispute will need certain third party knowledge, experience or skills. In the majority of constructions disputes, while the parties may disagree violently on many issues they often agree on the type, if not the individual best qualified to resolve the dispute.</p> <p>The nominating body on the other hand does not have this intimate knowledge of the dispute and will be appointing an adjudicator on the basis of limited knowledge of the dispute in a very limited time frame.</p> <p>While the appointed adjudicator will have appropriate skills and experience, they may have a steep learning curve for the particular dispute and as such the parties to the dispute would be better served by an agreed adjudicator or the option to agree the nominating body.</p> <p>A default in the case on no agreement and the default must come into operation in a very short period of time. The default must also prescribe the nominating body not a list or choice, in the case of disagreement.</p>
<p>(5) Any person selected by an adjudicator nominating body to act as adjudicator shall be a natural person acting in his personal capacity. He shall not be an employee of any of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute.</p>	<p>The Society of Chartered Surveyors currently appoints or nominates 300 to 500 property arbitrators every year and has extensive experience of the difficulties and pitfalls of carrying out this function. The difficulties of appointing appropriated skilled arbitrators that are not conflicted in a very small market and to very tight time scales should not be underestimated.</p>
<p>(6) The Minister shall issue a code of practice governing the conduct of adjudicator nominating bodies.</p>	<p>The Society of Chartered Surveyors will make a separate submission on the issues of nominating bodies for the appointment of adjudicators for consideration.</p>
<p>(7) As soon as practicable after the commencement of this Act the Minister shall prepare a draft code of practice to be issued under <i>sub-section (6)</i> and shall consult on the draft with such persons or bodies and in such manner as he or she considers appropriate.</p>	
<p>(8) The Minister shall, after completion of the consultation under <i>sub-section (7)</i> may make such amendments to the draft as he or she deems appropriate.</p>	

	SCS Comment/Submission
(9) The Minister shall lay before each House of the Oireachtas a copy of the code of practice.	
(10) The Minister may, by order, amend the list in the appendix to Schedule 2 to remove a body from the list where he or she considers such body to be in breach of the code of practice or by adding to the list a body wishing to be an adjudicator nominating body and which has undertaken to comply with the code of practice.	
12. Right to suspend performance for non-payment	
(1) Where the payer fails to make payment in full in accordance with section 8, the payee shall have the right (without prejudice to any other right or remedy) to suspend performance of all or part of his or her obligations to the payer under the construction contract.	<p>The clause needs to be expanded to cover the issue of retention</p> <p>The industry relies on the “retention” of a small percentage of the value of works for the rectification of snags or defects that become apparent during a set period after completion, often one year. This is an essential tool for correction of these defects and it is included for in the pricing of most contracts by the contractor.</p> <p>The omission of any reference to “retention” here could lead to dispute as to the meaning of “payment in full”.</p>
(2) The right may not be exercised without first giving to the payer at least seven days’ notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.	
(3) The right to suspend performance ceases when the payer makes payment in full of the amount to be paid by virtue of section 8.	
(4) Where the right conferred by this section is exercised the payer shall be liable to pay the payee a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.	<p>This Clause provides for the reimbursement of reasonable costs incurred in the suspension, however it does not provide for the reasonable cost of remobilisation or making good, repair or replacement of work that has deteriorated during or as a consequence of the suspension.</p> <p>For example a partially finished roof where work has been suspended with incomplete flashings could be damaged by the ingress of water into the insulation layers, requiring the roof cover to be lifted and the insulation replaced. The legitimate cost of such work is not provided for in this clause.</p>

	SCS Comment/Submission
<p>(5) Any period during which performance is suspended in pursuance of or in consequence of the exercise of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.</p>	<p>In addition to the time of suspension, in the case of a significant suspension reasonable time must also be allowed for re-mobilisation and in cases where there has been deterioration of the works, time for the making good of such works.</p> <p>The time required to return plant and machinery to site, to reorganise labour that may have been removed from site can be a serious challenge that inevitably takes time.</p> <p>If the Act confers a right of suspension, then both the reasonable cost and reasonable time required to return to site must be provided for.</p>
<p>(6) Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.</p>	
<p>13. Security for Payment</p>	<p>The security of payment system to be introduced must be operable for all contracts bearing in mind the immense complexity of main contracting with many subcontracts in cases exceeding 100 or more on any one project.</p> <p>The mechanism for security of payment for such subcontracts must be administrable in an affordable fashion.</p> <p>Without security of payment the point of this piece of legislation has been lost and the introduction of the Act would be utterly meaningless.</p>

	SCS Comment/Submission
<p>(1) A payer under a construction contract shall, at the commencement of the contract, provide adequate security for payment in respect of an amount equivalent to 10% of the contract price and such security shall be maintained in place for the duration of the contract.</p>	<p>This clause must be amended to provide security of payment being in place before the contract has been awarded.</p> <p>The clause needs to be unambiguous as to the meaning of “commencement of the contract” as it stands this could be interpreted as the commencement of the work or the award of the contract or the execution of contract documents or some such other time that may be determined by the adjudicator.</p> <p>If the security is not acceptable to the payee, then the payer must be free to reject the tender prior to the award of the contract. There is a risk that a payee accepts a contract knowing the type of security available, but having been awarded the contract, before commencing the work on site, objects to the adequacy of the security, thereby delaying the entire contract.</p> <p>This risk is acknowledged in other forms of contract in particular the Public Works Contracts forms where the award of the contract can only be made after the performance bond has been executed.</p> <p>There are many incidences where a subcontractor or indeed a main contractor will wish, having been awarded the contract, to delay the commencement of the work due to resource availability, cost of early mobilisation, economic availability of materials etc.</p>

	SCS Comment/Submission
	<p>The level of security at 10% is inadequate to protect a contractor and needs to be increased to 20% or 25%</p> <p>In the majority of general building work contracts where the employer is a bona-fide business and the investment in the building is part of a good business plan then there should not be any issue with the size of the security, the money will still only be paid on receipt of the building and there should be little additional financial demands on the employer.</p> <p>However, if the construction is speculative and dependant on the future sale of the building or units of the building, then there is a real security risk. This is the source of much of the current difficulties when the residential market stalled and there were no sales to pay for work done.</p> <p>This is a risk that should not be transferred to the lowest in the payment chain and security of the payment at the top of the chain is imperative.</p> <p>The level of security must reflect the nature of cash flow on site and if an average construction project is 10 to 12 months, consider work done on week one, payment claim is on week four / five and receipt of payment about week eight. This means that there is in the order of 20% of the contract value constructed at any one time for which payment has not been received – security of this value is what needs to be addressed at the top of the payment chain.</p> <p>And in addition to this, the contractor will have made financial commitments to suppliers of goods and services for delivery in the following months.</p>

	SCS Comment/Submission
<p>For the purposes of this section “contract price” means the entire sum payable under the construction contract at the date of the contract in respect of the work, materials and/or services to be provided there under and “adequate security” may include bank guarantees and bonds.</p>	<p>The nature of and the level of security of payment from a main contractor on his sub-contractors should be drafted to acknowledge the extent and complexity of the sub-contracting industry and to provide a reasonable and affordable system of security.</p> <p>It must be remembered once the principal security is in place, payment to the lower tiers of sub-contractors are generally made. While any individual contractor will from time to time get into difficulty and at times will attempt to delay payment, this is not the primary source of the problems of subcontractors not being paid.</p> <p>The sheer scale and number of subcontracts that any one main contractor will have in place at any one time (potentially many hundreds and each with a duration of only months) must be understood. It is not viable that individual bonds be placed for each and every one on two grounds:–</p> <ul style="list-style-type: none"> • Time; the length of time to acquire a bond would add significantly to the lead times for subcontracts and • Cost; the cost of such bonds will have a significant cost to the industry both in terms of the cost of the bond itself but also the administration time necessary to place such bonds. <p>Therefore some other form of security for the lower tiers of the industry is essential. In other jurisdictions various options have been implemented, In the USA the Miller Act may be closer to a model that could work for the Irish industry. Perhaps a bond taken out at the top of the payment chain to cover security of all payment to all levels, or a bonding system such as used in the travel industry.</p> <p>The US Miller Act payment bond covers subcontractors and suppliers of material who have direct contracts with the prime contractor. These are called first-tier claimants. Subcontractors and material suppliers who have contracts with a subcontractor, but not those who have contracts with a supplier, are also covered and are called second-tier claimants. Anyone further down the contract chain is considered too remote and cannot assert a claim against a Miller Act payment bond posted by the contractor</p> <p>It is imperative that the issue of lower tier security is given detailed consideration to arrive at a solution that is both viable and economic to implement.</p>

	SCS Comment/Submission
(2) Where the payer fails to comply with subsection (1) because he:	
(a) fails to provide any security for payment, or	See Clause 13(1) it is fundamental that Security of payment is known, in place and agreed before the award of the contract.
(b) the security provided is not adequate, or	<p>The phrase “not adequate” is loose and subjective and is likely to lead to dispute. There is a risk of wrongful suspension here due to a payee consideration that the security is inadequate, having taken up the contract knowing the form of security.</p> <p>For example a subcontractor could ask for proof of security 20 days into a project and then decide that security produced is inadequate saying an AA rated bond is inadequate and that he is demanding an AAA rated bond. There is a risk that such action would be taken to hide other failures on the part of the subcontractor to perform the works contracted for</p> <p>As noted before, the details of the security must be provided prior to the award of the contract and the payee must give their agreement to such security before the award of the contract, otherwise this clause would be open to abuse.</p>
(c) the security has lapsed,	
the payee has the right to suspend any or all of his obligations under the construction contract.	
(3) Where the right is exercised in relation to subsection (2)(a) and (b) it shall be exercised not later than thirty days from the commencement of the contract.	<p>As noted before it is essential that the adequacy, or provision of security is provided and agreed before the contract is awarded, otherwise this will be abused and used as a means of delaying the commencement of the works.</p> <p>The inclusion of a set period for contracts that are wildly varied from a couple of days to several years is inappropriate but in all cases this can be put in place in advance of the contract.</p> <p>See Clause 13(1) it is fundamental that Security of payment is known, in place and agreed before the award of the contract.</p>

	SCS Comment/Submission
(4) The right may not be exercised without the payee first giving the payer at least seven days notice of intention to suspend performance, stating that performance will be suspended unless, in the meantime, the security required under subsection (1) is provided.	
(5) The right to suspend performance ceases when the payer makes available to the payee the security required under subsection (1).	
(6) The consequences of the exercise of the right of the suspension under subsection (2) are as set out in subsections (4) and (5) in section 12.	
(7) In the event of a dispute in relation to the adequacy of the security provided the dispute shall be referred to adjudication in accordance with section 11	<p>This clause would be unnecessary if the adequacy of security is agreed in advance.</p> <p>The adequacy of security is a commercial decision with associated commercial risk management issues for the payee. A payee cannot be put in a position where he is forced to accept security that he considers inadequate and of greater risk than he is willing to bear. This risk must be assessed by the payee at the time of his tender. It is therefore essential that at the time of tender the type of security is known to the tenderer and that the adequacy is agreed prior to the award of contract.</p> <p>However, this clause could be amended to provide for the referral of the adequacy of the security in the event that the payer wishes to vary the security in anyway.</p>
(a) The dispute must be referred to the adjudicator not later than thirty days from the commencement of the contract.	This clause would be unnecessary if the adequacy of security is agreed in advance.
(b) Where the adjudicator decides that the security is not adequate the right to suspend performance under subsection (2) shall be exercised no later than thirty days from the date on which the adjudicator's decision was delivered to the parties.	
14. Service of Notices, etc.	
(1) The parties shall be free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Act.	

	SCS Comment/Submission
(2) If or to the extent that there is no such agreement the following provisions shall apply.	
(3) A notice or other document may be served on a person by any effective means.	
(4) If a notice or other document is addressed, pre-paid and delivered by post:	This should this read registered post. It then needs to be defined as to when it is deemed to have been received/ delivered to commence the 'notice period'. Note: the definitions in the Public Works contract in this regard, 10am two days after date of posting.
(a) to the addressee's last known principal residence or, if he or she is or has been carrying on a trade, profession or business, his or her last known principal business address; or	
(b) where the addressee is a body corporate, to the body's registered or principal office;	
it shall be treated as effectively served.	
(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court or otherwise by law.	
(6) References in this Act to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.	
15. Reckoning Periods of Time	
(1) For the purposes of this Act periods of time shall be reckoned as follows:	
(2) Where an Act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.	
(3) Where the period includes a day which is a public holiday as defined in paragraph 1 of the Schedule to the Holidays (Employees) Act 1973 and regulations issued thereunder, that day shall be excluded.	The wording appears to include Saturdays and Sundays but exclude public holidays. This needs to be clarified.
Section 7 SCHEDULE 1	

PROVISIONS TO APPLY WHERE A CONSTRUCTION CONTRACT DOES NOT COMPLY WITH THE REQUIREMENTS OF SECTION 7	SCS Comment/Submission
1. Unless paragraph 5 applies, paragraphs 2 and 3 shall apply where a construction contract does not specify the payment claim dates in accordance with section 7.	
2. The payee shall be entitled to interim payments at intervals of 30 days in respect of the works, materials and/or services provided under the construction contract.	
3. (1) The payment claim date for the first interim payment shall occur on the expiry of 30 days following commencement of the contract.	
(2) Thereafter the payment claim dates in respect of all interim payments shall be at intervals of 30 days.	
(3) The payment claim date for the final payment shall occur on the expiry of 30 days following completion of the works and/or services provided under the construction contract.	<p>This clause fails to recognise current business practice in respect of final account agreement. If this clause is to remain the issues of final account measurement, measurement of variations, normal contract claims, extension of time claims, retention, defects liability periods, commissioning periods, price fluctuation clauses and many other factors must be considered.</p> <p>This clause needs to be omitted or radically altered.</p>
4. Where the payee has a claim under the construction contract which is not in respect of the works, materials and/or services provided thereunder, the payment claim date shall be the date on which the payee submitted his claim for payment to the payer or a specified person.	
5. Where a construction contract does not provide for a final date for payment that date shall be no later than 30 days from the payment claim date.	
6. (1) This paragraph applies where either it is stated in the construction contract or the parties have agreed that the duration of the work is or is estimated to be less than 45 consecutive days.	

	SCS Comment/Submission
(2) Where the payment claim date is not specified it shall occur on the expiry of 14 days following completion of the work.	
(3) Where the construction contract does not provide for a final date for payment that date shall be no later than 30 days from the payment claim date.	
Section 11 SCHEDULE 2	
ADJUDICATION PROVISIONS	
Notice of Intention to Seek Adjudication	
1. (1) Any party to a construction contract (the “referring party”) may give written notice (the “notice of adjudication”) of his intention to refer any dispute arising under the contract, to adjudication.	<p>We refer to our previous comments, Clause 11(1), on time bars on interim payment disputes. This clause may require redrafting in this light.</p> <p>The SCS have serious concern that this will give rise to the “Trade or Professional Association” of one party nominating the adjudicator in a dispute where the other party is not a member of that association.</p> <p>For example if the referring party is a builder and the dispute is with the client or architect, it is inappropriate that the builder can go to his “Trade Association”, a nominating body, and have another builder appointed as adjudicator. It should be a person entirely independent of the two parties.</p> <p>However, if both parties to the dispute are in that Trade Association, there should not be such a prohibition.</p>
(2) The notice of adjudication shall be given to every other party to the contract.	
(3) The notice of adjudication shall set out briefly –	
(a) the nature and a brief description of the dispute and of the parties involved;	
(b) details of where and when the dispute has arisen;	
(c) the nature of the redress which is sought, and	

	SCS Comment/Submission
(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).	
Appointment of the Adjudicator	It is fundamental, as in the Arbitration Act, that immunity is provided to the nominating body for their role in the process
2. Following the giving of a notice of adjudication the referring party shall request one of the adjudicator nominating bodies listed in the appendix to this Schedule to select a person to act as adjudicator.	We refer to our previous comments on the freedom for the parties to agree an adjudicator, see Clause 11(4). This clause may need to be redrafted in light of this.
3. The request referred to in paragraph 2(1) shall be accompanied by a copy of the notice of adjudication.	Note drafting error in clause reference
4. The adjudicator nominating body must communicate the selection of an adjudicator to the referring party within five days of receiving a request to do so.	The Society of Chartered Surveyors currently appoints or nominates 300 to 500 property arbitrators every year and has extensive experience of the difficulties and pitfalls of carrying out this function. The difficulties of appointing appropriated skilled arbitrators that are not conflicted in a very small market and to very tight time scales should not be underestimated. The Society of Chartered Surveyors will make a separate submission on the issues of nominating bodies for the appointment of adjudicators for consideration.
5. Where the adjudicator nominating body fails to comply with paragraph 4, the referring party may request any other adjudicator nominating body listed in the appendix to this Schedule to select a person to act as adjudicator.	
Referral of a Dispute to the Adjudicator	
6. (1) The referring party shall, not later than seven days from the date a copy of the notice of adjudication was sent pursuant to paragraph 3, refer the dispute in writing (the "referral notice") to the adjudicator.	
(2) A referral notice shall be accompanied by copies of, or relevant extracts from the construction contract and such other documents as the referring party intends to rely upon.	
(3) The referral notice shall be confined to issues raised in the notice of adjudication.	

	SCS Comment/Submission
(4) The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs 6(1) and 6(2), send copies of those documents to every other party to the dispute.	
7. (1) The adjudicator shall, at the request of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.	
(2) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes.	
(3) All the parties in paragraphs 7(1) and 7(2) respectively may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these disputes.	
(4) Where an adjudicator ceases to act because a dispute is to be adjudicated on by another person in terms of this paragraph, the adjudicator’s fees and expenses shall be determined in accordance with paragraph 28. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.	
Provisions relating to the Resignation of the Adjudicator or the Revocation of his Appointment	
8. (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.	This does not belong in the Act and is a matter of the contract between the disputing parties and the adjudicator. No such provision is included in the Arbitration Act and there is no reason to have a “resignation for convenience” clause here.

	SCS Comment/Submission
<p>(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.</p>	<p>Resignation of the adjudicator is not the solution to a repeated and vexatious claim.</p> <p>The SCS consider that this clause should be redrafted to state that no party shall refer a dispute to adjudication that is the same or substantially the same as one which has been previously been decided on by an adjudicator, and if such a case is referred to adjudication and the adjudicator so decides, the errant party shall be liable for all time and costs associated with the adjudication.</p> <p>However, care must be taken that this clause does not preclude the offended party from referring a repeat of a previously referred breach.</p> <p>For example if a payer has refused to pay for a certain portion of work and the adjudicator decides that it should be paid for, the dept is paid, and subsequently in a later interim payment, this work is deducted from the payment, the dispute would be identical, but should not be barred from adjudication notwithstanding the fact that the dispute is identical.</p>
<p>(3) Where an adjudicator ceases to act under paragraph 8(1) –</p>	<p>Omit reference to 8(1) – if the adjudicator dies, he has not resigned but is not longer acting as adjudicator</p>
<p>(a) the referring party may serve a fresh notice under paragraph 1(1) and shall request an adjudicator to act in accordance with paragraphs 2 to 6; and</p>	<p>The option of a short circuit route to the new appointment must be considered, the parties, having come this far, may agree or the nominating body may have considered a list of suitable candidates to appoint and may not have to go through the full procedures.</p> <p>The option of requiring the adjudicator to inform the nominating body that a replacement for him is required failing which, the parties would have the right to revert to serving notice under 1(1) should be considered.</p> <p>The process needs to fulfil the time restrictions of a 28 day process, restarting at the beginning should only be the default in the event of the failure to agree a quicker mechanism.</p>
<p>(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.</p>	<p>This clause appears to be superfluous</p>

	SCS Comment/Submission
<p>(4) Where an adjudicator resigns in the circumstances referred to in paragraph 8(2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator's fees and expenses shall be determined in accordance with paragraph 28. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.</p>	<p>This would be entirely unfair on the responding party if the referral is vexatious. If the adjudication is thrown out because it is the same as a previously decided case, it is the referring party that is in error and should pick up the costs. Likewise in the case where the dispute is varied and the adjudicator is no longer competent, the adjudicator should consider the matter and award the costs as he see fit.</p>
<p>9. Where any party to the dispute objects to the appointment of a particular person as adjudicator, that objection shall not invalidate the adjudicator's appointment nor any decision he may reach in accordance with paragraph 19.</p>	<p>Refer to the Society of Chartered Surveyors separate submission on nominating bodies</p>
<p>10.</p> <p>(1) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator's fees and expenses shall be determined in accordance with paragraph 28. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.</p>	
<p>(2) Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties shall not be liable to pay the adjudicator's fees and expenses.</p>	
<p>Powers of the Adjudicator</p>	
<p>11. The adjudicator shall –</p>	
<p>(a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and</p>	
<p>(b) avoid incurring unnecessary expense.</p>	

	SCS Comment/Submission
<p>12. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may –</p>	<p>The SCS consider that the Adjudicator must present his findings and investigations before both parties and both parties must be entitled to examine such findings and investigations and make submissions on such matters in good time prior to any award.</p> <p>For example, the adjudicator may refer to a third party expert for an opinion on which he relies in his award and if such opinion is, in the opinion of one party, flawed, he must be given the option of challenging that expert opinion.</p>
<p>(a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 6(2).</p>	
<p>(b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom;</p>	
<p>(c) meet and question any of the parties to the contract and their representatives;</p>	
<p>(d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not;</p>	
<p>(e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments;</p>	
<p>(f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers;</p>	
<p>(g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and</p>	
<p>(h) issue other directions relating to the conduct of the adjudication.</p>	
<p>Conduct of the Adjudication</p>	

	SCS Comment/Submission
13. The parties shall comply with any request or direction of the adjudicator in relation to the adjudication.	
14. If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may –	
(a) continue the adjudication in the absence of that party or of the document or written statement requested;	
(b) draw such inferences from that failure to comply as circumstances may, in the adjudicator’s opinion, be justified, and	
(c) make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.	
15. (1) Subject to any agreement between the parties to the contrary, and to the terms of paragraph 15(2) below, any party to the dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.	
(2) Where the adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person, unless the adjudicator gives directions to the contrary.	
(3) The adjudicator shall not be required to observe any rule of evidence, procedure or otherwise, of any court or tribunal.	
16. Subject to paragraph 14 the adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.	

	SCS Comment/Submission
<p>17. The adjudicator and any party to the dispute shall not disclose to any other person any information or document provided to him in connection with the adjudication which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication.</p>	
<p>The Adjudicator's Decision</p>	
<p>18. (1) The adjudicator shall reach his decision not later than –</p>	
<p>(a) twenty eight days after the date of the referral notice mentioned in paragraph 6(1), or</p>	
<p>(b) forty two days after the date of the referral notice if the referring party so consents, or</p>	
<p>(c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.</p>	
<p>(2) Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph 18(1)</p>	
<p>(a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator nominating body to select an adjudicator to act in accordance with paragraphs 2 to 6; and</p>	
<p>(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.</p>	
<p>(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.</p>	
<p>(4) If the adjudicator fails to reach his decision in accordance with paragraph 18(1) or deliver a copy of the decision as required by paragraph 18(3), he shall not be entitled to any fees or expenses (save for the cost of any legal or technical advice subject to the parties having received such advice).</p>	

	SCS Comment/Submission
<p>19. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may –</p>	
<p>(a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract;</p>	
<p>(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in Euros or some other currency) and, subject to Section 9 of the Act, the final date for payment;</p>	
<p>(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.</p>	
<p>20. The parties shall comply with any decision of the adjudicator immediately on delivery of the decision to the parties.</p>	
<p>21. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision but the party making the request shall be responsible for any consequent increase in the adjudicator's fees.</p>	<p>The SCS consider that a reasoned award is a necessary part of the adjudicator's responsibility and that this clause should be redrafted to provide for the obliging the adjudicator to give his reasons.</p> <p>This is a binding process, and can only be overturned by the lengthy and expensive process of arbitration or court action, in many instances. It is entirely unfair that the aggrieved party has to make a decision to pursue the dispute without the reasons for the adjudicator's award.</p>
<p>22.</p> <p>(1) The adjudicator may on his own initiative or on the application of a party correct his decision so as to remove a clerical or typographical error arising by accident or omission.</p>	
<p>(2) Any correction of the decision shall be made within five days of the date upon which the adjudicator's decision was delivered to the parties.</p>	

	SCS Comment/Submission
(3) Any correction of the decision shall form part of the decision.	
Enforcement of the Adjudicator’s decision	
23. The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.	
24. To the extent that the adjudicator’s decision requires a party to pay a sum of money to the other such sum shall be treated as a debt and enforced through the debt recovery procedures in the courts. The debt shall be enforced irrespective of any counterclaim or claim relating to abatement of the price.	<p>The SCS consider that as this award, while binding, is temporary and potentially subject to further resolution by arbitration or the courts, which may overturn the award, it is essential that there is security of payment for the return of any award, by bond, bank guarantee or other mechanism as may be appropriate.</p> <p>While the use of vexatious counterclaims should be prohibited, in the case of adjudication in respect of a payee that is in liquidation and there are outstanding genuine counter claims, it would be inappropriate that the payer is forced to pay the liquidator the amount of the adjudicator’s award in full but not have any recourse to the counter claims. This clause should be expanded on the following lines:</p> <p style="text-align: center;">“Except such counterclaim being made against a party who has entered examinership , receivership, liquidation or who otherwise is insolvent”</p>
25. In addition or alternatively, where the party entitled to payment is the payee under the construction contract, he may suspend performance of any or all of his obligations on the giving of 7 days notice to the party in default in accordance with the provisions contained in section 12.	
26. Where the adjudicator’s decision (or any part thereof) does not require a party to pay a sum of money to the other it shall be enforced by a court having jurisdiction to issue a mandatory injunction. The injunction shall require compliance with the decision by the non-complying party to the extent that the subject-matter of the decision is capable of being so enforced.	
Costs of the Adjudication	

	SCS Comment/Submission
<p>27. The parties shall bear their own legal and other costs incurred in connection with the adjudication.</p>	<p>The SCS consider that it is inappropriate to prohibit the adjudicator from awarding costs. In a dispute where one party is clearly in breach of his duties to pay, it is unfair that the payee has to pay part or any of the cost of Adjudication to get his entitled payment.</p> <p>This clause should be amended to “costs shall follow the award or as otherwise directed by the adjudicator “</p>
<p>28. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him.</p>	
<p>29. As part of his decision the adjudicator shall determine how payment of his fees, expenses and the fee (if any) of the adjudicator nominating body is to be allocated between the parties. The parties shall be jointly and severally liable for any sum which remains outstanding following such determination.</p>	
<p>30. The adjudicator’s allocation of his fees, expenses etc under paragraph 29 may reflect the extent to which the adjudicator considers the referring party’s claim or the response to the claim to be without merit.</p>	
<p>Liability of the Adjudicator</p>	
<p>31. The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.</p>	<p>As noted previously, it is essential that the nominating body also is given immunity</p>
<p>32. No party may call an adjudicator as a witness in any legal proceedings or arbitration concerning the subject matter of the adjudication.</p>	<p>The process is binding and as with an arbitrator, the adjudicator while immune from liability must be available to an arbitration or the courts.</p> <p>There is no such impediment in the UK act. Indeed such an impediment may, for example, frustrate an attempt to enquire after bad faith.</p>
<p>APPENDIX</p>	
<p>[List of adjudicator nominating bodies]</p>	

**CONSTRUCTION CONTRACTS BILL
2010**

BILL

*As initiated
entitled*

An act to regulate payment under
construction contracts and to provide for
related matters.

*Presented by Senator Feargal Quinn,
[] May 2010*

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