Coronavirus, construction disputes, and the Act

by Peter
O'Malley MRIAI

In June 2019, it was reported that the turnover of Ireland's top fifty construction contractors had increased by twenty-five percent to €8.39bn in the last year,3 confirming, what was then, a strong recovery for the sector. Now less than twelve months later, we find the Director General of the Construction Industry Federation, Tom Parlon, announcing that 'Construction companies have seen 100,000 of their workers lose their jobs in the past month',2 such has been the destructive impact of the COVID-19 pandemic on the construction industry.

'Back to work' day on 18 May 2020 represents the beginning of what will be a long journey to some semblance of normality, in whatever form this normality takes. For those contracts awarded before the onset of the pandemic, there is a new reality ahead. The risk profile associated with the re-commencement of works is now greater than anyone could ever have foreseen.

Over the past few months, construction companies have been starved of the lifeblood of the industry – namely cash flow – resources have been depleted, and supply chains disrupted. Contractors are now being forced to look at those rarely used provisions in their contracts such as 'force majeure', if it is included, and 'frustration' in attempting to seek shelter and hopefully recompense. But this route is uncertain; for example in the Public Works Contracts there is no such term as force majeure and frustration comes with a very high threshold of recognition in law.

Notwithstanding reference to contractual provisions, there is also the 'p word': productivity. It is now inevitable that progress on projects will be slower. Social distancing, enhanced health and safety procedures, together with the questionable availability and late delivery of materials are just some of the issues that will negatively impact productivity. There is now a realisation that original project programmes are no longer relevant, deadlines have been missed and projects are facing the prospect of substantial and increasing delay.

Can forbearance from employers be relied upon in recognition of the difficulties that have and will continue to occur? In many cases it is hoped so. But it is almost certain that there will be some employers that cannot or will not recognise the level of forbearance that is required. It therefore follows that there will be a significant increase in the latitude for disputes.

In the past, construction disputes had only the mechanisms of conciliation, arbitration, and litigation in which parties could pursue resolution. The disadvantages of arbitration and litigation through excessive cost, largely brought about by extended timelines, and the potential for reputational damage have long been recognised.

Against this backdrop, conciliation gained and maintained the comparative advantages of being consensual, private, and flexible. However, in July 2016 the Construction Contracts Act 2013 (the Act) came into force, offering an alternative approach to dispute resolution through adjudication.

It is noteworthy that the adjudication provisions of the Act have had a slow take up across the industry, reflecting a lack of familiarity combined with an understandable priority of focus on industry recovery from the past banking crisis. From a faltering start of just one reported adjudication case in the first twelve months from the Act becoming law, adjudication now seems to be gaining traction. In the year 2019-2020, there were forty-two reported adjudication cases representing forty percent of the total of reported construction disputes facilitated through mediation, conciliation, adjudication and arbitration.3

The fourth year of the Act coming into force ends in July 2020, where it is expected that adjudication will become even more prevalent. Current anecdotal evidence, gathered from discussion from leading dispute resolution practitioners, suggests that interest in adjudication is increasing rapidly. Mediation can often imply compromise, which may be entirely appropriate in certain circumstances. Arbitration will usually incur excessive cost and is not unlike litigation. Conciliation, in the absence of an agreed resolution, requires that both parties make the choice of accepting the conciliators recommendation to resolve the dispute.

It appears that the distinct advantages of speed and certainty of decision offered through adjudication are now receiving greater consideration across the industry. The speed of adjudication, with a default period of just twenty-eight days from referral of the dispute until the decision is issued, is clearly attractive. Without doubt adjudication is intense, and requires meticulous preparation. But at least from the beginning, the end date and the conclusion are within sight, which is not the case for mediation, conciliation, or arbitration.

Adjudication offers certainty with a binding decision from an objective adjudicator, at least in theory. To date, there has not been a challenge, despite this possibility being available, to the enforcement of an adjudicator's decision in Ireland. When comparison is made with other jurisdictions, particularly that of England and Wales, where there is an extensive, established body of case law, the courts have been highly supportive of adjudication. As a result, challenges to enforcement have been dismissed in the vast majority of cases.

It follows that for senior managers or finance directors of construction companies, in trying to limit exposure of time and resource in disputes, adjudication provides a practical approach to the recovery of cost, where representations in negotiation have failed. However, adjudication is not without its faults; it is clearly adversarial and damaging to the relationship between the parties, aspects that have possibly contributed to a reluctance to more fully embrace adjudication in the past. But in straightened times, where the potential for dispute has been significantly broadened, and recalcitrance is present, the advantages of adjudication in facilitating a quick and relatively certain decision in seeking recovery of cost are likely to become increasingly more attractive.

Notes

1. Construction Industry Federation (CIF), top fifty contractors list, as reported in the Irish Times, 12 June 2019.
2. CIF survey of 360 participants, April 2020.
3. Author's survey of 2019 data from the primary dispute nominating boards, comprising the CIF, ClArb, SCSI, RIAI, EI, and the CCAS.