

Amendments to the Construction Act come into force on 1 October 2011

After a long period of consultation, debate and discussion, the amendments to the Construction Act are to come into force on 1 October 2011, but only in England. They will come into force in Scotland on 1 November 2011, but it is not yet known when they will come into force in Wales.

The JCT has already issued tracked change versions of its new 2011 suite of construction contracts showing the amendments. While the 2011 versions are primarily being issued to take account of the amendments to the Construction Act, the JCT has taken the opportunity to make some other amendments to its contracts. For example, the contracts are updated to refer to the Bribery Act 2010.

JCT anticipates issuing final versions of the contract in early September before the changes are implemented.

The difference in dates of implementation are unsatisfactory, as different adjudication and payment provisions will apply to construction contracts in England, Scotland and Wales at any one time. While this is not such a problem in Scotland, where the legislative system is different, most standard construction contracts and professional appointments contain choice of law clauses which refer to the laws of England and Wales. These clauses will now have to be amended to refer to the laws of England or the laws of Wales, to avoid confusion over which payment and adjudication provisions apply.

In summary, the main changes to the Act are as follows:

1. The requirement for construction contracts to be in writing for adjudication to apply will be removed, except for adjudication provisions which must still be in writing.
2. The Act introduces a statutory slip rule.
3. There are changes to the provisions governing payment of the costs of an adjudication.
4. The Act prohibits pay-when-certified clauses linked to other contracts.
5. The Act imposes a new regime of payment notices and abolished the regime of withholding notices.

6. There are enhancements to the statutory right to suspend performance for non-payment.

The first set of cases defining the operation of the amendments to the Construction Act should hit the TCC fairly soon after implementation, given the short time periods involved in adjudication and enforcement, and it will be interesting to see whether the courts continue their robust application of the principles behind the Act.

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