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CURRENT LEGISLATIVE DEVELOPMENTS EFFECTING DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY IN NEW ZEALAND

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ABSTRACT
During recent years in New Zealand there have been several liquidations/receiverships of major commercial construction contractors, which has prompted the government to introduce legislation that affords protection of payments to contractors and subcontractors. The paper will discuss the events leading to the introduction of the Construction Contracts Bill; the changes to the Dispute Resolution processes that will eventuate as a consequence of new legislation; the potentiality for the success of the legislation; and contemplate the future role of construction industry professionals.

KEYWORDS
Dispute Resolution, Legislation, Adjudication

1. INTRODUCTION

1.1 The Events Leading to the Introduction of the Legislation

Prior to being repealed in 1987, the Wages Protection and Contractors Liens Act 1939 afforded some protection to contractors and sub-contractors from the potentiality of clients and developers from not paying them as a consequence of a dispute and/or as a result of them going into liquidation or receivership. There is anecdotal evidence to suggest that this legislation was often abused by sub-contractors who, toward the end of a project, would register a 'lien' on the certificate of title of the land as a form of additional 'insurance' to ensure that they would receive their final payment. The effect of the 'lien' would mean that the registration of additional mortgages or a sale of the property could not go ahead without the charge being removed.

The measure was seen by many to be draconian. There are some certificate of titles which read like a "whos who" of subcontractors. The effect of these registrations is also such that, even though the claims would eventually have been settled, the names of the claimants remain on the certificates for all time and therefore, can be seen as an potential impediment to a sale of the property at some future date or as a indicator of concern for a potential mortgagor.

And so, from 1987 to present, New Zealand does not have any specific legislation that would protect the payment due to contractors or subcontractors by their Employers or by subcontractors from contractors. Any dispute over payment would have to be dealt with by either the Litigation or Alternative Dispute Resolution (ADR) process.

During the last two years, three large Auckland based construction companies have failed. Goodall ABL went into liquidation in March 2000 with reported debts of more than NZ$20m.; Hartner Construction went into receivership in February 2001 with reported debts of NZ$28.5m., and in May 2001 Projects Works Construction went into voluntary liquidation. It is further reported that most of the money owed is mainly to suppliers and subcontractors.

In August 2000, the New Zealand government introduced the 'Construction Contractors Bill'. This legislation has three main aims:

1. To facilitate prompt and regular payments within the industry;
2. To provide for the swift and resolution of disputes arising out of construction contracts; and
3. To provide remedies for the recovery of payments due under construction contracts.

After receiving its First Reading in Parliament, the Bill was referred to a Select Committee who have already elicited and heard submissions from interested parties and the general public. These hearings were held during September 2001. At the time of writing, the Committee has not reported back to Parliament.

The Bill did not contain several recommendations of the Industry Advisory Group when presented to Parliament. One of the most significant of these was the provision that the remedies for the recovery of payments due under construction contracts were not extended to residential projects.

This sector provides for the majority of work on New Zealand and there is some evidence to show that many of the projects undertaken in the residential sector are in fact, done so without the execution of a 'formal' contract (as is required in Australia). If the weight of submissions (supporting the comprehensive inclusion of all provisions being extended to residential projects) is anything to go by, it is quite conceivable that the Bill will be amended accordingly when the Select Committee report back.

Comment will be made later as to why the residential sector should be fully catered for in any new legislation.

1.2 Changes to the Dispute Resolution Processes

There are several standard forms of contracts available in New Zealand all of which contain dispute resolution provisions. The most common are:

1. NZIA 'Standard Conditions of Contract' SCC1: 2000: 2nd. Edition
2. NZIA 'Standard Conditions of Contract for Minor Works' MW2: 2000: 4th. Edition
3. NZIA National Building Contract (Small Works): NBC-SW2: 1999
4. New Zealand Standard NZS 3910: 1998. "Conditions of Contract for Building and Civil Engineering Construction".
5. Registered Masters Builders contract. 1988 edition.

These standard forms have been developed over many years and all, with the exception of the Registered Master Builders contract, have had significant changes to the 'Disputes' sections of the contracts included in their latest updates.

The principle generally adopted by these contracts requires that, if the direction of the Architect (or administrator of the contract) is disputed by either party to the contract then the dispute resolution process is promulgated. This requires the matter to be referred to mediation; and if not resolved by this method, then the matter is submitted to arbitration. The arbitration is conducted under the terms of the Arbitration Act 1996 (which is currently under review by the Law Commission) and accordingly, the decision of the arbitrator(s) is final and binding.

Litigation is not promoted by these contracts. The preliminary results from data currently being collected is tending to show that, in the residential sector, these standard forms of contract are not being as extensively used as it may be thought. Where this is the case, the use of litigation for the resolution of disputes is often the only resort available to the parties.

Personal experience, gained from being engaged in dispute resolution since 1977, has shown that it is usual for parties who have not entered into a contract containing previously agreed dispute resolution provisions, to find

agreement on a process after a dispute has arisen to be often impossible. The 'dominant' party is at liberty to "use" the slow and bureaucratic process of the court system, to prolong and delay the settlement of the dispute.

In the case where standard forms of contract are used in commercial contracts, it is quite usual for significant changes to be made that often render the final contract unrecognisable from the original.

1.3 The Potentiality for the Success of the Legislation

Although New Zealand is a Commonwealth country, legislation affecting the construction industry is completely different to the United Kingdom and Australia. For example, legislation in many Australian states require that residential projects (above A$5,000 in Victoria, for example) are to be formally executed by way of a written contract containing specific provisions such as insurances, variations, payments, etc. Whilst the Construction Contracts Bill was modelled on similar legislation from the United Kingdom and Australia, New Zealand has not adopted all the provisions from their respective legislation.

Reference was made earlier to the importance of the residential sector to the New Zealand industry.

There is an incorrect perception in New Zealand that the majority of building activity takes place in the non-residential (commercial) sector. The official statistics do not support this view.

Table 1: Value of Building Work Put in Place

	2000		2001		
	Sep	Dec	Mar	Jun	Sep
Building Type	$(million)				
Residential Buildings	1095.1	957.4	828.5	951.0	959.2
Non-Residential	689.9	789.9	611.7	771.7	839.0
Total	1,784.0	1,742.3	1,440.2	1,722.7	1,798.2

Note:
All amounts exclude Goods and Services Tax.
Residential Buildings include alterations and additions
Non-Residential include hotels & boarding houses, hospitals & nursing homes, factories & industrial buildings, educational buildings, social, cultural, religious, recreational & farm buildings, shops, restaurants, taverns, offices, administrative buildings and storage buildings.
Source: Statistics New Zealand http://www.stats.govt.nz

Table 1 shows the 'value of work put in place' during the period September 2000 until September 2001. During this period 56.4% of the work undertaken was residential. By way of comparison, the comparative figures for 1999 was 61.2% and for all of 2000 was 60.6%.

There are also opinions that suggest that the 'official' statistics regarding the size and relevance of the construction and property sector in New Zealand are also inaccurate.

Kenley (2001) states that: 'there are conflicting views about the size of the sector and its importance to the market. According to currently published statistics and popular belief, our sector is 3.3% of GDP reduced from 5% in 1985. This, if was true, represents an unimportant percentage of the national effort. But I don't think it's accurate. A United Nations study identifies construction alone at as being 11.8% of GDP. Furthermore, a New Zealand Statistics analysis of all industries in New Zealand indicates construction across all sectors, including new and rework, totals 14% of industry expenditure, and property totals 7%. This picture excludes a small number of industries, but if we adjust construction to 11% and property to 5%, its combined total is 16%'.

The importance of the legislation being extended to comprehensively include the residential sector cannot be understated.

With regard to 'dispute resolution', the proposed legislation does provide for a mandatory 'adjudication' process for all construction work whether executed under a 'formal' contract or not. This method of dispute resolution has not been evident in the New Zealand construction industry before and is certainly not contained within the 'standard' forms of building contracts generally available for use in the country. There will obviously be a requirement for all standard forms to be amended to include for such a process.

If the success (or otherwise) of any new legislation is to be assessed, then some form of monitoring must be put into place. At present, there are no statistics available on the number of arbitrations, for example, are conducted in New Zealand. Article 14 of the Arbitration Act 1996; Rule 6 of the Code of Ethics of the Arbitrators' and Mediators' Institute of New Zealand; and the provisions of the Privacy Act 1993 all provide reasons why practitioners should not provide statistical data on the arbitrations that they have been involved with either as counsel or arbitrator.

Submissions to the Select Committee on the legislation before parliament have recommended that a monitoring system be put into place similar to that undertaken by the Glasgow Caledonian University in the United Kingdom.

Kennedy et al. (2000) report that: 'following the introduction in the United Kingdom of the Housing Grants Construction and Regeneration Act 1996, Glasgow Caledonian University set up a U.K. wide Adjudication Reporting Centre which could gather data on the progress of adjudication and disseminate this back to the construction and property industries. This has been supported by the Adjudicating Nominating Bodies (ANBs) which are asked to periodically to complete a detailed questionnaire and return it to the Centre. The first phase of the research was to consider who were instigating the adjudications, how many there were and how the adjudication process was developing. The second phase seeks to provide more information about the adjudicators themselves by collecting data from adjudicators who are invited to respond confidentially to the Centre.'

Kennedy et al. (2000) conclude their report by stating that: 'the evidence of this study so far is that the adjudication process is being used in significant numbers and that the trend is upwards – about 462% increase on the first year of statutory adjudication. The other overwhelmingly obvious conclusion is that the process is most used to address disputes over payment – which is as Latham (1994) had anticipated. The main parties involved in disputes are the main contractors in disputes with both their domestic subcontractors and their clients. Many of these disputes arise from their failure to observe the payment provisions of the 1996 Act. Despite the previous reluctance of subcontractors to engage in adjudication it appears that the combination of three forces may have resulted in this surge in adjudication. Firstly the huge interest raised by publicity given to the topic through the media, secondly the detailed setting out of payment provisions which took away the rights of contractors to impose 'unfair' conditions and foster a climate of uncertainty regarding the timing of payments and thirdly the statutory nature of the right to adjudication. The tactical way in which adjudication is being used to bring the other party to the table to resolve problems seems to show a new determination on the part of subcontractors and there can be little doubt that it is viewed as a weapon in the armoury of the subcontractor. As to the future it may be that referrals may decline as contractors seek more consensual forms of working together in the supply chain. Whilst adjudicators are reporting some minor problems with the Scheme and its' provisions, and the alternative rules available, clearly the overall view is that statutory adjudication is a positive step in the future direction of the industry'.

It is interesting to note that the major problems with the industry in the United Kingdom have been encountered with 'domestic subcontractors and their clients'. It has been the author's experience (and being supported by analysis of preliminary data being currently collected) that this is also the case in New Zealand notwithstanding the media reports of some "high profile" commercial liquidations.

The residential market, which many of the provisions of the Construction Contracts Bill were not intended to be extended to, could in fact, be the principal beneficiary of this legislation.

Current research is also highlighting another factor that is also contributing to the number of disputes within the industry. Many projects, specifically those in the residential sector, are not being administered by an independent third party. The result is that many projects, from their commencement, are liable to disputes eventuating. Quite often the two parties (being the client and the builder) have different perceptions about the roles and responsibilities of the other as well as each having different standards.

Whilst the proposed legislation will not directly resolve this problem, the mandatory adjudication process will have the effect that either party will be able to effectively appoint an independent third party (the adjudicator) without the approval or recourse to the other in the event of a dispute arising during the execution of the contract.

1.4 The Future Role of Construction Industry Professionals

It has been suggested that the main change that the legislation will bring about is the change of attitude of some employers to contractors; of some contractors to their subcontractors; a general raising of the standards of documentation expected to be provided at the tender stage; and an increased standard of record keeping being kept principally by subcontractors. In order to be able to substantiate a claim, a claimant must keep better records than they previously may have done.

With regard to the education of construction industry professionals, there appears to have been a subconscious move away from the role of the 'contract administrator' in recent times. There are suggestions that architects are choosing not to undertake this very important phase of the project for a variety of reasons. The role of the Clerk of Works effectively disappeared in the early 1990's in New Zealand following the government "deregistering" this sector. At the same time the government also "deregistered" Quantity Surveyors". The result of this was that many Quantity Surveyors have assumed the role (and title) of "Project Manager" and Architects have been engaged simply to design and prepare building consent drawings (often inadequately detailed).

Unfortunately, the role previously undertaken by the Architect where he/she would liase and coordinate the work of other consultants and oversee the works during the construction phase has not, in my opinion, been successfully adopted by the Project Managers and in the case of residential works, does not seem to have been taken on by anyone. The result has been a seemingly (but unsubstantiated because of 'confidentiality issues") increase in disputes. Therefore, the way in which all construction industry professionals are educated where their roles and responsibilities are clearly defined to suit whichever way that they are ultimately engaged, requires urgent definition. The result would hopefully, be less disputes and a reduced reliance on legislation similar to that proposed.

2. CONCLUSION

Whilst there is no measure of the acceptance (or otherwise) of the legislation, if the perceived degree of support that the Bill has received since its introduction; its first reading in parliament; and during the Select Committee hearings is an indication of both its necessity and popularity, then as long as the reservations (principally with regard to the residential sector being included under all provisions, are adopted), then there is no reason why the proposed legislation should not have the same measure of success as the similar overseas legislation.

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