

Human Rights Act 1998 - the business implications

Construction



The Human Rights Act affects the construction industry significantly, most obviously in the way it resolves its disputes, but also more widely.

Article 6 - the right to a fair trial and public hearing

Arbitration

At first sight arbitration is very different from the type of process at which Article 6 is directed. There is no public hearing and no public judgment. In addition where a construction contract contains an arbitration clause, the parties have at least in principle agreed to pursue arbitration rather than seek redress through the courts and avail themselves of the protection of Article 6. Human Rights law respects the freedom of parties to contract as they wish. However there is a possibility that the courts could intervene where a party has been compelled to contract on a standard form including an arbitration clause.

Adjudication

Adjudication was introduced by the Housing Grants Construction and Regeneration Act 1996 ("the Act") and decisions are binding and enforceable until the dispute is finally determined by litigation arbitration or agreement.

The European Commission has held that Article 6 does not apply to decisions on interim relief. By analogy, therefore, Article 6 would not apply to adjudication. However some commentators have doubted whether this is correct. Judicial opinion appears to be divided and there has so far not been any decision directly on the point.

It has been argued that adjudication in its present form itself conflicts with Article 6. For example:

- Article 6 requires a decision "within a reasonable time". The Act requires a decision within 28 days. This, it could be argued, is an unreasonably short period of time to decide many construction disputes.
- Article 6 requires the Tribunal to be independent. The Act simply requires adjudicators to act impartially.
- Under Article 6, the parties are entitled to "equality of arms" - including an equal opportunity to be heard. Very often the short timeframe in adjudications does not allow this to happen.
- Article 6 requires a public hearing and judgment. The Act does not stipulate a hearing and adjudication, like arbitration, is private.

How will these arguments be resolved? There are two schools of thought:

Those who believe statutory adjudication violates Article 6 say that the Human Rights Act does not allow tribunals to act in a way that is inconsistent with the Convention. If so, courts will be compelled to reject applications to enforce adjudicator's decisions where the procedure was not compliant with Article 6.

Those who support the current regime argue that the limitation imposed by statutory adjudication on the parties' Article 6 rights can be justified on the grounds that it is necessary and in the best interests of the construction industry that there should be speedy, if temporary, resolution of disputes - this is the proportionality test.

In addition, it is said, following the decision in *Bryan v UK*, a procedure which is non-compliant can nevertheless be "saved" if the proceedings are subject to subsequent control by a judicial body that has full jurisdiction to review the adjudicator's decision and which does guarantee Article 6 rights. Most adjudications are subject to just such a review.

Even before the Human Rights Act came into effect, the judges of the Technology and Construction Court have refused to enforce adjudicators' decisions where there has been a significant departure from the principles of natural justice. Now the Human Rights Act will allow challenges to the enforcement of adjudicators' decisions on a wider range of grounds than previously. The Courts will be aiming to strike that difficult balance between the Latham principle of speedy interim dispute resolution on the one hand and the need to follow Article 6 requirements on the other.

Litigation and Alternative Disputes Resolution (ADR)

The Human Rights Act will also be of relevance to litigation generally and aspects of the new Civil Procedure Rules, such as recourse to single joint experts, could be challenged. Alternative dispute resolution (particularly mini trials and expert determinations) may also be affected if parties are put under pressure to resort to ADR or accept its outcome.

The impact of the Act in other areas

These are difficult to predict fully. The Human Rights Act will, however, be relevant to contractors involved in PFI or PPP transactions as a contractor carrying out functions of a public nature will be treated as a "public authority" under the Human Rights Act, as far as those functions are concerned. It will therefore have to meet the requirements imposed on such authorities by the Human Rights Act, including the requirement not to act incompatibly with a Convention right.

More broadly the Act has already affected the procedures for applying for planning permissions with potentially significant consequences for delays to the implementation of construction projects. The Act also gives additional rights so those affected by developments, such as adjoining owners, which could well impinge upon contractors' work.

For further information please contact Caroline Cummins on 020 7367 2914 or at caroline.cummins@cmck.com.

CMS Cameron McKenna

Mitre House
160 Aldersgate Street
London EC1A 4DD

Tel: 020 7367 3000
Fax: 020 7367 2000
E-mail: info@cmck.com
Web: www.cmck.com