



Integrity

ARTHUR COX

E X P E C T E X C E L L E N C E

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*This document contains a general summary of legislation and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.*

## Construction Law Briefing

# NAMA and its implications for construction contracts

### Introduction

The *National Asset Management Agency Act, 2009* (“the Act”) came into effect on 21 December 2009 and Regulations have since been introduced to deal with various procedures under the Act. NAMA has extremely broad powers to achieve its objectives, which are to remove non-performing development loans from the Irish banking sector and release finance back into the economy. Many of the powers and rights conferred upon NAMA by the Act impact directly upon the operation of various construction contracts that have been, or will be entered into in relation to development land.

### Powers in relation to development land

Sections 174-179 of Chapter 7 of the Act set out NAMA’s powers where an acquired Eligible Bank Asset includes a charge over development land (and the charge is at a stage where it can be enforced):

- » Under Section 176 NAMA can create new agreements for the purpose of developing land (including with a debtor/original developer)
- » Under Section 177 NAMA has the same rights in relation to breach of contract or obligation as a bank/developer in relation to acquired Eligible Bank Assets (i.e. statutory collateral warranty)
- » Under Section 178, NAMA can require a bank to legally assign an agreement in relation to the development of land to NAMA
- » Under Section 178 (5) NAMA is granted licence to use design and planning documents and any lien over design is ineffective against NAMA (Section 178 (2))
- » Under Section 178 (1) NAMA has the option to elect to continue an existing agreement relating to the development of land i.e. statutory step-in rights

### New agreement for the orderly development of land

NAMA or any NAMA special purpose vehicle, may choose to enter into an agreement with the original developer (whether they are a defaulting borrower or not) or any other party in relation to a development under Section 176. NAMA’s objective in entering into such an agreement is “*the orderly development of the land concerned to secure the best return reasonably possible*” (see: Section 176 (2)).

### NAMA has the same contractual rights as land developers in relation to breach of contract or obligation

Section 177 of the Act confers upon NAMA the *same rights* that arise from breach of contract

or other obligation, which either the bank or the developer might have in relation to an acquired bank asset. Arguably, the use of the words "same rights" means that NAMA would be subject to any limitations on liability that the participating institution and/or debtor were subject to. NAMA is also empowered to confer its rights under Section 177 on another person, so for example, if it sells on an uncompleted development to a third party, it may confer on the purchaser all of the rights it has gained under the Act by issuing a certificate under its seal to the purchaser.

### Legal Assignment

Alternatively, under Section 178 (3) where an agreement with a person in relation to the development of land confers on a bank a right to assign the agreement, NAMA may direct that such agreement is legally assigned to it. In such a case, only the benefit of the agreement passes to NAMA (and none of the obligations). NAMA has no liability to any party, and contractors and designers will have to pursue any historic entitlements to payment against the original employer.

### Designs and planning documents for land development

Designers should be aware that Section 178 (5) grants NAMA a licence to use, reproduce, adapt or distribute any designs, plans or other documents (such as specifications) prepared by a third party and the power to grant sub-licences, even where the original licence in respect of the intellectual property prohibits assignment of the licence that was originally granted to either a bank or a developer. The creators of such design, plans or other documents will, however, be entitled to a 'fair and reasonable

fee' in respect of the licence granted to NAMA (Section 178 (7) (a)). Section 178 (2) also provides: "Where an agreement creates a lien over any design, plan or document prepared for the purposes of the development, the lien is void as against NAMA".

### NAMA's rights to continue an existing contract (i.e. step-in) - Section 178 (1) (b) (ii)

NAMA can decide to step into an existing agreement, such as a building contract (without entering into a further agreement with a party), pursuant to Section 178 (1) (b) (ii). As with legal assignment under Section 178 (3), NAMA will not be liable for any act prior to the date of its electing to continue the agreement (see: Section 178 (4)). Although NAMA cannot compel a third party to enter into a new agreement it can compel and/or enforce performance of an existing contract. The Act provides that if NAMA steps in to an existing contract, it assumes all the rights and obligations under the agreement of the party it is replacing from that date onwards.

### Conclusion

The Act contains sweeping provisions which allow NAMA to assume extensive rights and benefits from construction contracts. It remains to be seen how NAMA will meet the challenges it faces - particularly the level of cooperation it will receive from parties who have suffered a loss such as unpaid fees and contract payments in respect of uncompleted developments. It will be several months before the impact of NAMA's role begins to be felt. For those in the construction industry however, and for the wider economy as a whole, NAMA does provide some hope that recovery may be around the corner.

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