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DISPUTE RESOLUTION UNDER THE PRINCIPAL IRISH FORMS OF BUILDING CONTRACT

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Introduction

The construction industry is known to be litigious (Latham, 1994). This is hardly surprising given the industry's fragmented nature in which project teams comprising an extensive network of employers, designers and constructors are brought together to deliver once-off projects, following which, the organisation is almost always disbanded. The short term objectives of the various groupings are often competing and occasionally incompatible. For example, many employers will wish to minimise costs in developing a project, designers may resist pressures on budgets in order to safeguard their 'brand', and the commercial imperative of maximising profit will drive contractors towards charging what the market will bear. It is not difficult to see disputes breaking out in these circumstances.

Construction projects are often technically complex and may involve contractors taking on considerable risk and/or onerous obligations. Competitive tendering requirements compound these pressures. The contractor's need to 'win' contracts often means that a project has been priced too low and a struggle ensues to recover the costs. Such disputes damage the industry and its clients. The costs associated with resolving disputes are often high, and can take a very long time to resolve. The overall impact of disputes on individual projects can jeopardize the objectives of all involved in them. A preventative approach would obviously be the best situation, that is, removing the causes of disputes altogether. However, such an environment could only be created by radically changing the processes, attitudes and structures that lead to disputes. (Ramus, Birchall and Griffiths, 2006)

This study examines various means by which a construction dispute may be resolved and focuses in particular on the dispute resolution arrangements set out in the principal Irish standard forms of building contract. O'Higgins (2013a) explains that disputes arising under construction contracts in Ireland have typically employed arbitration as the final forum for dispute resolution, generally preceded by either conciliation and/or high level negotiations. She also reports that dispute resolution boards have been used in certain instances, such as where the FIDIC contract is used. She argues that an understanding of the merits of the various dispute resolution methods remains necessary as

initiatives such as the imminent introduction of statutory adjudication under the Construction Contracts Act 2013 will be binding in the interim only. Keane (2003) comments that *‘The question that must be asked when any dispute arises is, which is the appropriate method for resolving that particular dispute. Subject to the consent of all the parties any dispute can be settled in any manner and in any forum chosen by the parties themselves. They can agree to toss a coin if they wish.’*

The dispute resolution procedures under the current Irish standard forms of building contract are set out in Table 1 and these are discussed below. The procedures set out in the RIAI ‘Yellow’ and Public Works PW-CF1 forms of contract are examined in the Appendix to the main study.

RIAI ‘Yellow’ and ‘Blue’ Contracts	Conciliation/arbitration
Public Works Contracts	Conciliation/arbitration
CIF Subcontract.	Arbitration
CIF Domestic Subcontract for use with Public Works Contracts	Mediation/arbitration
Informal and/or bespoke contracts which are silent on dispute resolution procedures	Currently litigation – however Adjudication will precede litigation following the commencement of the Construction Contracts Act 2013

Table 1 Forms of Dispute Resolution under Irish Forms of Contract

Disputes

Claims are almost inevitable during construction contracts, and all of the main Irish standard forms of building contract contain procedures for dealing with them. The contract conditions determine whether or not claims are valid, and set out procedures for administering and evaluating them. Most claims are settled through the contractual mechanisms, occasionally, some are not, and these unresolved claims develop into disputes.

Murdoch and Hughes (2008) explain that disputes occur because *‘people are interacting in some way’*. A disagreement escalates when those involved become intransigent and it becomes an altercation; particularly when the argument involves rights and is *‘justiciable’*. They claim that these disputes are more likely to arise when a project is on site because the disagreements are more contractually based. They conclude that: *‘Contractual disputes tend to arise when one party alleges that the other party has not kept to the bargain.’*

Hussey Fraser (2007) add that most disputes originate as claims under the contract. - *‘whether for payment, for time, for variation, for a perceived failure in the administration of the contract or arising from a departure by one or other party from its obligations under the contract.’* They explain that these claims are initially decided by the contract administrator who can:-

- accept the claim;
- reject the claim – either because it has no contractual justification or, because the contractor has lost his right to claim by virtue of the claiming mechanism set out in the contract;
- accept the claim in principal but reject the quantum, or
- accept the claim, including the quantum, but set-off or apply contra-charges.

Disputes arise where the parties disagree with the decision; - typically the contractor’s claim is rejected and this rejection is in turn rejected by the contractor. (Nael Bunni referenced in Hussey and Fraser, 2008)

Fryer, Egbu, Ellis and Gorse (2004) observe that *‘Disputes rarely result in a satisfactory outcome.’* They explain that during serious disputes parties *‘invest considerable time and resources’* defending their position, and usually employ experts to argue their case. These costs must be met by either, or both, of the disputing parties. In Figure 1 they illustrate the rising costs associated with various techniques which may be employed to resolve an escalating dispute. As the dispute intensifies, the involvement of third parties increases and, so too, do the associated resolution costs. This external involvement, however, does little to improve the project’s performance.

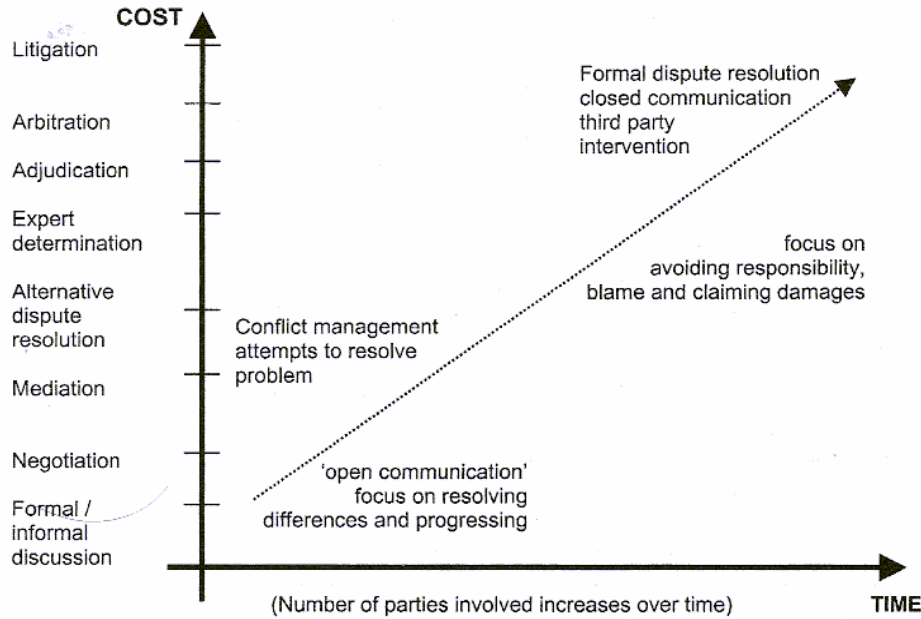


Figure 1 Contract Management Strategies against Time and Cost – Source Fryer et al. (2004) p.104

Dispute Resolution

According to the Royal Institution of Chartered Surveyors (RICS) Practice Note *Conflict Avoidance and Dispute Resolution* (2012), dispute resolution is about ‘recognising when a dispute has arisen and appreciating the escalation of that dispute. In addition, it is understanding the range of techniques that might be available to resolve the dispute and seeking appropriate guidance before the client is placed at a disadvantage in respect of its position with the other party.’ (p. 2)

The RICS (2012) have categorised the various techniques of resolving disputes in three main groupings, which they refer to as the ‘the three pillars of dispute resolution’: negotiation where the dispute is settled by the parties themselves without outside help, mediation where a third party intervenes to assist the parties to reach agreement, and adjudication where a third party imposes a binding decision on the parties. Figure 2 provides an overview of the most common techniques used in resolving disputes and locates their position within that spectrum.

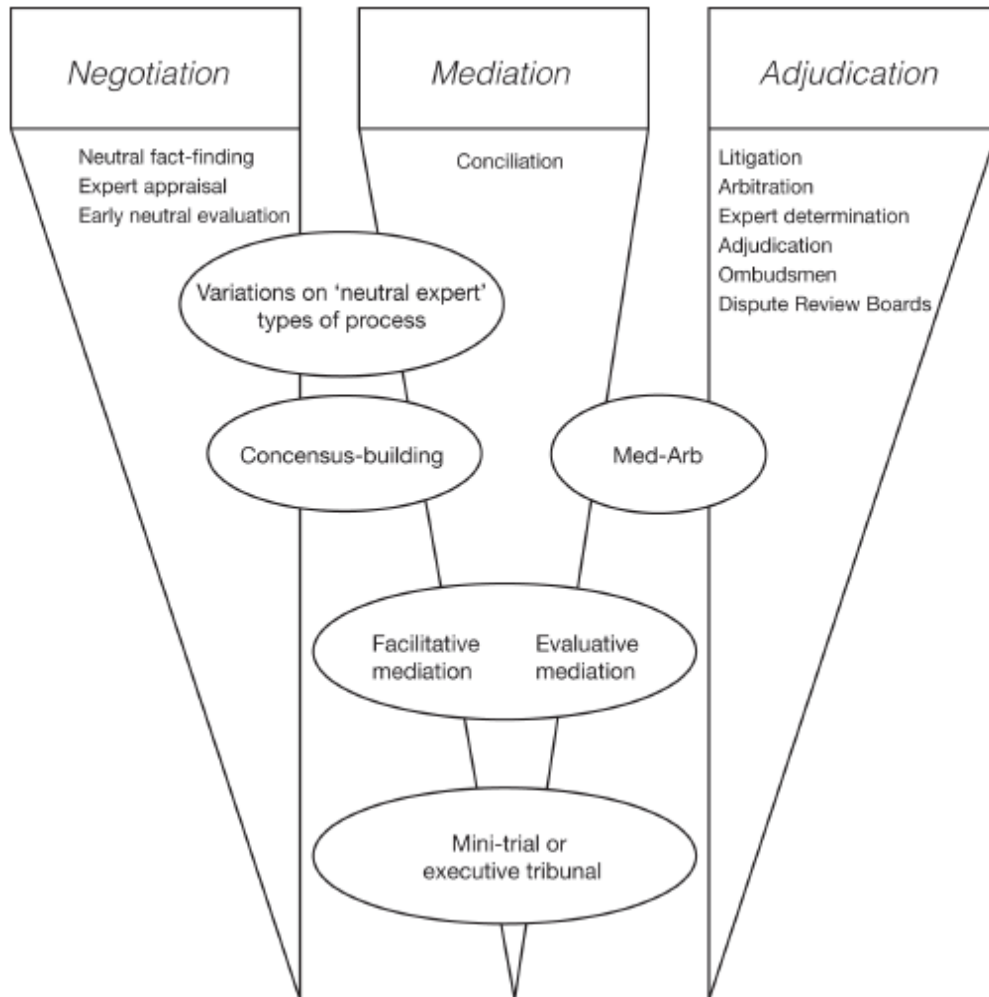


Figure 2 The Dispute Resolution Landscape – Source RICS (2012) p.6

Negotiation

‘Compromise is the best and cheapest lawyer’ – Robert Louis Stephenson

‘Negotiation is the process whereby the parties work out between them how to resolve any issues that have arisen. Power to settle the dispute rests with the parties.’ (RICS, 2012)

The parties involved in a disagreement should, of course, make every effort to resolve their differences before they develop into disputes.

... The most desirable way of resolving any dispute is for the parties themselves to reach a mutually acceptable *compromise*. This is likely to be quicker and cheaper; no third party may be involved or even informed of the dispute; and future business relations can be maintained. (Royce, 1989)

Occasionally the impasse may have arisen because of a clash of personalities, or misunderstandings due to poor communication, which has led to entrenched positions and soured working relationships. Circumstances may, however, be viewed differently by ‘detached’ members of staff or more-senior colleagues. If the air can be cleared a compromise may be reached which is agreeable to both parties. Such compromise may preserve existing business relationships, and possibly even strengthen them.

Fryer *et al.* (2004) suggest that informal meetings between the disputing companies may be beneficial and encourage the parties to talk frankly. Formal recorded discussions may also be attempted to bring matters to a head, however, these tend to bring about a more serious atmosphere and may curtail open discussion. Alternatively a negotiation forum may be established to help resolve the problems, seek mutual benefits through lateral thinking, or ‘*the parties may look for compromise to overcome their problem.*’

There are, however, occasions when differences of opinion and disagreements pass beyond the point where the parties to a contract feel that they are able to reach a mutually acceptable settlement through negotiation, and they decide that reference should be made to an independent third party.

Alternative Dispute Resolution

Many of the methods identified by the RICS in Figure 2 above are commonly described using the term alternative dispute resolution (ADR) techniques. The Law Reform Commission (LRC) (2010) defines the term ADR as:

A broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked or integrated with litigation, and which involves the assistance of a neutral third party and which empowers parties to resolve their own disputes.

The Commission identifies the following common factors relating to ADR:

- a wide range of processes;
- excludes litigation – various construction writers also exclude arbitration (RICS 2012; Ashworth, Hogg and Higgs, 2013);
- a structured process;
- typical independent impartial third party assistance, and
- decisions are non-binding initially.

The philosophy underpinning ADR techniques is the desire to secure an *agreed* settlement. The disputing parties are usually helped to reach a mutually acceptable arrangement to resolve their dispute. The solution is therefore consensual. Although the outcomes of these procedures are not initially binding, they have high instances of acceptance, thereby resolving disputes outside of the Courts or arbitrations systems.

Ashworth et al. (2013) report the following claimed advantages of ADR:

- Private. - Confidentiality is retained.*
- Speed. A matter of days rather than weeks, months or even years.*
- Economy. Legal and other costs resulting from lengthy litigation are avoided.*

They argue that goodwill is a *‘vital ingredient on both sides to settle the matter on a commercial rather than a litigious basis. If this goodwill does not exist, then the parties have no option but to resort to arbitration or the courts, without wasting further time and resources.’* (p. 343)

Kwayke (1993) lists the following additional potential advantages:

- a less formal and more flexible and convenient arrangement regarding place, date and time can be accommodated;
- the outcomes are agreed by the opposing parties themselves rather than being influenced by lawyers: - self-determination;
- suitability of ADR to commercial and technically orientated construction disputes;
- potential for a creative and amicable outcome in response to an evaluation of the respective cases;
- focus on mutually beneficial commercial, rather than legal solutions, and
- focus on continuity of ongoing business relationships without loss of face.

It must be remembered, however that ADR techniques, while generally successful, will occasionally fail and the dispute will then proceed to litigation or arbitration. This failure will probably *add* to the overall cost and time taken to resolve the dispute. Critics of ADR may argue that *“it is soft justice, nothing more than an additional layer of cost in the litigation stream. ...”* (LRC, 2010)

Kwayke (1993) adds that ADR is not ‘a panacea’ for all construction disputes and has identified the following issues as being problem issues:

- absence of good faith, unwillingness to compromise;
- complex construction disputes are usually not be resolved quickly, unless one party agrees to a painful compromise, for example for the sake of continued business relationships;
- the ‘neutral’ may be biased, lack the necessary experience or technical understanding to conduct an effective procedure;
- unscrupulous parties may use the process to drag out final payment by subsequently proceeding to escalate the dispute, - Keane (2003) refers to such persons as the ‘reluctant litigant’;
- complex legal issues form the basis of the dispute;
- inability of the neutral to establish the true facts underlining the dispute; - litigation may be the only option, and
- self-interest, defensiveness and legal advice on the strength of their case, again displaying a lack of willingness to compromise.

The ‘reluctant litigant’ referred to above is the party who seeks to avoid paying. They employ delaying tactics in an attempt to wear out the claimant. They appear to want to resolve the dispute, but in reality they drag out proceedings by appealing losing decisions to a higher tribunal. Mr. Justice Frank Clarke (2014) comments: *‘if someone does not want to pay and there are ways in which they can delay the system, they will try to delay the system. That is a given. ... [he then argues]... that system should not allow people who have no real basis for not paying what the adjudicator has decided, to delay payment by stringing out the process and, thus defeating the whole point of the timely payment principle’*

Dispute Resolution Techniques:

The RICS (2012) note that there has been a move towards substituting the term ‘alternative’ in ADR with ‘appropriate’ They add that an appropriate resolution procedure should aim to resolve the dispute in an economic and timely manner, while seeking to support existing business relationships through a confidential and flexible process. They conclude that this should lead to greater satisfaction with the process for the parties.

Assisted Negotiations: The Mediation and Conciliation: spectrum

Having failed at negotiation, conciliation or mediation is often an effective way to resolve a construction dispute. The RICS describe mediation and conciliation *‘as involving the parties agreeing on an independent, third-party neutral system to facilitate discussions between them, with the goal of reaching a settlement. The power to settle remains with the parties, but the process is led by the mediator.’* (RICS, 2012)

The terms mediation and conciliation tend to be used interchangeably, indeed, the RICS *Practice Note* (2012) reads: *‘Conciliation is for our purposes the same as mediation’*. In the Irish context, Keane (2003) explains that mediation originally described the process where a mediator would attempt to convince disputing parties to reach a compromise themselves. *‘The mediator would not suggest a solution’*. He distinguishes the mediator from the conciliator who may try to broker a ‘fair and reasonable’ solution, or make a non-binding recommendation in an attempt to resolve the issues. He adds that these distinctions seem to be disappearing and the term conciliation is used in most Irish contracts. The LRC (2010) remains concerned that this lack of precise definition of various dispute resolution terms is causing confusion and is leading, on occasion, to unnecessary litigation in the courts and tribunals. It is prudent therefore to ensure that the parties agree on the precise meaning of the proposed procedure.

Mediation

The Society of Chartered Surveyors in Ireland (SCSI) (n.d.) and the RICS (2012) regard mediation as a ‘facilitative’ process.

The LRC suggest that the term mediate derives from the Latin verb *mediare* - to be in the middle. The Commission sets out the 2008 EC Directive on Mediation definition of mediation as *‘...a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.’* (LRC, 2010).

The SCSI (n.d.) describes commercial mediation as *‘a voluntary, non-binding, private dispute resolution process facilitated by a neutral person (the mediator), and which enables the parties to reach a negotiated settlement.’* A core principle of mediation is that the parties ‘control’ the outcome, rather than it being imposed upon them.

O'Higgins (2013a) considers that mediation '*can be a very effective means of dispute resolution and is favoured, and indeed, can be imposed, by the Courts.*' She notes that the entire process is confidential and without prejudice, and is generally run on the basis that each party bears its own costs. The optimum time for referring a dispute to mediation can vary, but even if it is not a contractual requirement, or prompted by the courts, it is an option that can, and should, always be considered.

In mediation representatives from the disputing parties engage with a mediator to attempt to reach a settlement. The mediator will usually be an expert in the particular subject matter of the dispute, and will speak to each party separately to help them define their differences and work towards a solution. A mediator will not disclose confidential information to the other side. The SCSI (n.d.) identifies a particular characteristic which distinguishes mediation from other dispute resolution techniques: - '*no one tells the disputing parties who is right and who is wrong*'.

Mediation proceeds in an informal atmosphere where each party is represented by an executive. The mediator begins by explaining the process. Each side then describes the dispute and their positions. This allows each side to understand the others point of view and to analyse their own weaknesses. The mediator then discusses the possibility of settlements with each party in turn in private in an attempt to coax an agreement which they themselves ought to suggest.

The mediator may convene a joint meeting if the participants wish, but the essential role of the mediator is to engage in shuttle diplomacy between the parties while not expressing a personal opinion or revealing the strengths or weaknesses of their case. He or she will, if authorised, carry offers from one side to the other, until the parties reach a settlement.

The selection, skill and proper training of the mediator are critical to success. Invariably the parties are poles apart in the early stages of the mediation, however they are drawn closer together by the private caucus method and if nothing else, this keeps the parties talking at least.

Claimed advantages

The SCSI (n.d.) outline following potential advantages of mediation:

- mediation is non-binding until the parties sign a settlement agreement, at which point it becomes a binding contract in law;

- the process is private and confidential to the parties, except as they may agree. This environment encourages the parties to talk frankly about the merits of their own and their opponent's 'case', without prejudicing their position if the dispute is not settled and subsequently goes to Court. Negotiations and communications are – subject to some narrow exceptions – inadmissible in subsequent legal or other proceedings;
- the mediator is neutral and his/her only interest is in providing the parties with their best chance of achieving a settlement to their dispute, and
- the parties' control and ownership of the outcome, this is seen as a key strength of the process. They can withdraw from the process at any stage. A final settlement may take into account other factors such as on-going business relationships, opportunities for further work, the offer of goods or services at the agreed cost, or other matters outside the scope of the actual dispute.

Conciliation

The LRC (2010) refers to the *EC Directive on Mediation* to distinguish mediation from conciliation. The '*Directive* [i.e. mediation] *should not apply to "... processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.*' The Commission notes that conciliators may perform an advisory role and can issue formal recommendations in brokering an agreement. They regard this distinction as '*highly significant in settling the duties and the boundaries of the third parties under either process.*'

Keane (2003) describes conciliation (and mediation) as '*the intervention into a dispute, or negotiation, by an acceptable, impartial, and neutral third party who has no authoritative decision making power in order to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.*' He regards the voluntary nature and absence of the power to impose a solution, regardless of a recommendation, as the two most important aspects of that definition. He adds that the voluntary part may carry a psychological advantage whereby '*the seeds of settlement are already sown and a disposition towards agreement exists.*' He notes that avoiding adversarial content facilitates settlement which is important in maintaining continuing business relationships, particularly in small societies like Ireland.

O'Higgins (2013a) describes the conciliator's task as bringing *'the parties together in a negotiated settlement, if agreement cannot be reached, the conciliator will issue a recommendation which will generally become binding on the parties if not rejected within a stated period.'*

Keane (2003) suggests that conciliation attempts to correct perceptions, reduce misunderstandings, and improve communication, thereby enabling 'rational bargaining' to proceed. He explains that the conciliator will make a non-binding recommendation if the parties cannot reach agreement. He regards this as 'very useful' as this independent view may be an accurate predictor of an outcome which may otherwise be referred to arbitration or litigation. Mr Justice Frank Clarke (2014) speaking in the context of adjudication, makes the following comments which are also applicable to conciliation. *'If the parties are inclined to think that, by and large, adjudicators get things right, will an affected party really put a lot of time and effort into a major arbitration to second guess what happened in an adjudication? ... Therefore, to win an arbitration in substance, an affected party will have to do better than the adjudicators award and equally, to lose an arbitration, a party will have to do worse than that same adjudicator's award.'*

The LRC (2010) point out that while *'there is no such thing as a free conflict resolution process, alternative or otherwise'* they regard successful mediation/conciliation as being 'patently cheaper' than litigation. Costs are normally shared; Keane (2003) adds that these costs tend to be 'very modest', averaging around 10% of comparable arbitration or litigation costs. He also notes that futile conciliations *'seldom last for more than two days'* as it soon becomes apparent that a settlement is unlikely, in these cases a realistic mediator/conciliator will quickly terminate proceedings that are not working.

Mediation/conciliation is not binding unless the parties agree to make it binding. Typical conciliation/mediation arrangements contain a confidentiality clause, confirming that no documents, or any evidence and facts, will be discoverable in subsequent proceedings if the process fails. However if the process is successful the mediator/conciliator will encourage the parties to formalise their agreement in writing and sign it, thereby creating an enforceable contract. Keane (2003) notes the importance of drafting this agreement accurately as it could be discoverable if one of the parties reneges on the agreement.

The SCSJ (n.d.) note the close similarities between mediation and conciliation but view conciliation as an evaluative process rather than a facilitative one, *'on the basis that if the parties fail to reach*

agreement the conciliator will put forward his/her own proposals for the settlement of the dispute in the form of a Recommendation.' The Society sets out the following advantages associated with conciliation.

- Conciliation is widely used in the Irish construction industry and is included in almost all the standard conditions of contract, normally as a mandatory step prior to arbitration.
- It is a voluntary process which can be broken off at any stage and equally the parties are not obliged to accept a settlement.
- It is confidential and without prejudice to subsequent proceedings which means that communications, documents etc. produced as part of the conciliation are inadmissible.
- The parties are also free to reject the Recommendation normally within a specified time frame, but if they do not do so it becomes final and binding.

There is evidence that conciliations are effective in resolving construction disputes. Bond (2014) has documented his own experiences of conducting conciliations over a 25 year period. In the period following 1988, he completed 39 conciliations ranging in value from €75,000 to €23,000,000. 31 (84%) of these conciliations were settled by agreement; in a further six cases his recommendations were accepted; in the remaining two cases his recommendations were rejected, however one of these was subsequently settled. He argues that this represents a 95% success rate in resolving disputes. Bond (2014) also reports the results of a survey which he carried out of 13 conciliators' experiences involving 332 conciliations. The conciliations involved employers, contractors and sub-contractors and ranged in value from €28,000 to €23 million. In addition, there was one exceptionally large dispute of €160 million. The settlement sums as a % of the sum claimed ranged from 4% to 90%. Table 2 summarises Bond's main findings.

No of conciliations	332	%	% Range
No of disputes resolved	292	88%	100% to 40%
Settled by agreement	196	67%	100% to 37%
Accepted Recommendation	96	33%	0% to 46%
Rejected Recommendations	40	12%	0 to 56%

Table 2 Survey of 13 Conciliators Experience in 332 Conciliations Adapted from Bond (2014)

Bond (2014) explains that the 100% and 0% values in the right hand column of Table 2 resulted from one of the conciliators having carried out only four conciliations. He concluded that *‘conciliation has been very successful at resolving disputes and avoiding arbitration – maybe 97% success rate; [that] the majority of settlements are by agreement, but not uniformly so; [and that] very few conciliated disputes go on to arbitration.* He adds however that *‘conciliators vary significantly in how they run conciliations and in the results they get.’*

Non-Binding Awards

The following methods are adversarial in their nature but are useful because it is likely that the party with the stronger case will be identified during the process.

Adjudication

‘Adjudication may be described as a process whereby an independently appointed neutral, decides the issues in dispute within a predetermined, usually very short period of time’
(Engineers Ireland, n.d.).

Adjudication will shortly become the default means of resolving payment disputes arising on construction projects. Under the *Construction Contracts Act 2013* a party to a construction contract covered by the Act has the right to refer a payment dispute ‘at any time’ to an independent third party for adjudication. Mr Justice Frank Clarke, referring to the proposed form of statutory adjudication to be introduced under the 2013 Act, comments that *‘the decision is binding only in the short term sense of requiring specific payments to be made (2014).’* The option remains open for an aggrieved party to refer the dispute to arbitration or litigation at the end of the contract.

O’Higgins (2013b) comments that adjudication is intended as a short procedure, resulting in a decision which is binding in the interim, unless and until finally overturned either in arbitration or the courts. She suggests that it is probable, and *‘is intended, to result in ‘rough justice’ but which provides the parties with an answer to their differences, and will, hopefully, allow cash to flow, and may well finally resolve the dispute.’* She identifies the support of the courts as an essential element in the Act to ensure that adjudicator’s decisions can be promptly enforced, where not complied with.

The Act which adopts ‘a pay now argue later’ approach, operates a tight timetable to deliver a swift decisions. Disputes are scheduled to be settled within twenty eight days. This period may be extended by a further fourteen with the referring party’s consent or a further period may be

sanctioned if both parties are agreeable. A decision in such a brief space of time can be the difference between the survival and the liquidation of some companies.

The adjudicator's decision is binding on the parties unless they settle otherwise, or the decision is overturned by subsequent legal action. O'Higgins (2013b) comments that '*This means that where an adjudicator decides that a payment is due, that payment must be made.*' She adds '*If the Irish Courts follow the approach taken by the courts in the UK, the enforceability of adjudicator's decisions will be strictly upheld, subject to only very limited exceptions.*'

Evidence from the UK suggests that adjudication has a high success rate in resolving disputes.

Mini Trial

Mini trials are rare in Ireland. Murdoch and Hughes (2008) describe the process as conducting a trial in front of a panel of senior executives from the disputing organizations who have the necessary authority to reach and implement decisions. It is important that panel members have not have been personally involved in the dispute up to this point. The two parties are expected to take opposite stances and to argue their cases in front of the panel. Having heard the evidence, the panel can then negotiate their respective positions until they reach agreement.

Binding Awards

Independent Expert Determination

The SCSI (n.d.) describe expert determination as a process in which an independent third party, acting as an expert is appointed to decide a dispute. The appointment is usually provided for in the parties' contract and often provides for a nominated appointment. The Society describes the expert's duties as investigating the facts in dispute to arrive at a decision based on his/her expert professional opinion. He/she may choose, or be required under the contract, to accept representations from both parties but, unlike arbitration, is not bound to rely on these.

Murdoch and Hughes (2008) describe this process as 'private enquiry' and note that it is commonly used for highly technical disputes, but is also valuable where the issues to be resolved are sensitive. The SCSI (n.d.) suggest that the technique is appropriate in resolving disputes relating to valuation and/or determining the quality of work and/or materials. On the basis of the report produced, the parties are in a much better position to negotiate and reach a settlement.

Murdoch and Hughes (2008) note that because these enquiries are so wide-ranging, there is no fixed procedure for such an enquiry and it has to be individually formulated in each case. They add that it is important that the expert is given precise terms of reference in order to identify and carry out the intended task. They note that private enquiries typically discover technical facts much more quickly than judicial enquiries, partly because arbitrators and judges are prohibited from using their own experience, and must reach a decision purely on the basis of upon what is put before them. This contrasts with expert enquiry, where the expert can use his/her own knowledge and professional expertise to arrive at a decision.

The SCSJ (n.d.) adds that decisions are reached ‘expertly’ and usually conclusively. The expert’s decision is normally binding unless otherwise stated in the contract. The technique is somewhat similar to arbitration and litigation but the fundamental difference is that the expert usually has much more procedural freedom than an arbitrator or a judge. The Society notes that the ‘*expert is not normally bound by all the rules of Natural Justice and so can and is frequently encouraged to rely on his own knowledge or investigations without reference to the parties.*’

Lenny (2014) comments that courts will typically enforce an expert’s determination where the parties have agreed to be so bound. He adds that ‘*If there is no provision in the contract allowing for challenge or appeal of a decision to the courts, no challenge or appeal can be made.*’ He notes that courts are ‘reluctant to interfere’ with the expert’s procedures provided these have been agreed by the disputing parties beforehand. The parties may, however, challenge the decision in situations where the expert appears to have exceeded his powers, acted fraudulently and/or failed to conduct the enquiry in a bona fide manner.

Litigation

Litigation refers to court proceedings whereby one party seeks a legal remedy against the other party. Gould and Russell (2007) note that litigation through the courts is the traditional means of settling disputes. They observe, however, that the vast majority of disputes are settled by other means and that in the UK 90% of High Court proceedings are disposed of before reaching trial. The RICS (2012) comments that courts have: ‘*inherent jurisdiction to hear a dispute in respect of just about anything. In the absence of any other procedure, the parties will have a right to refer their matter to an appropriate court.*’

It is unusual for construction disputes to be the subject of litigation as the right of parties to litigate a dispute is restricted under most Irish standard forms of contract, which typically provide for disputes to be settled through conciliation or arbitration. Nevertheless, litigation remains a common method of resolving construction disputes where formal contracts have been not been concluded. This issue was one of the primary drivers for the introduction of *The Construction Contracts Act 2013*. Murdoch and Hughes (2008) point out that if the parties agree to do so, they may ignore an arbitration clause in a contract and proceed directly to litigation.

Figure 3 below sets out the structure and jurisdiction of the Irish Courts.

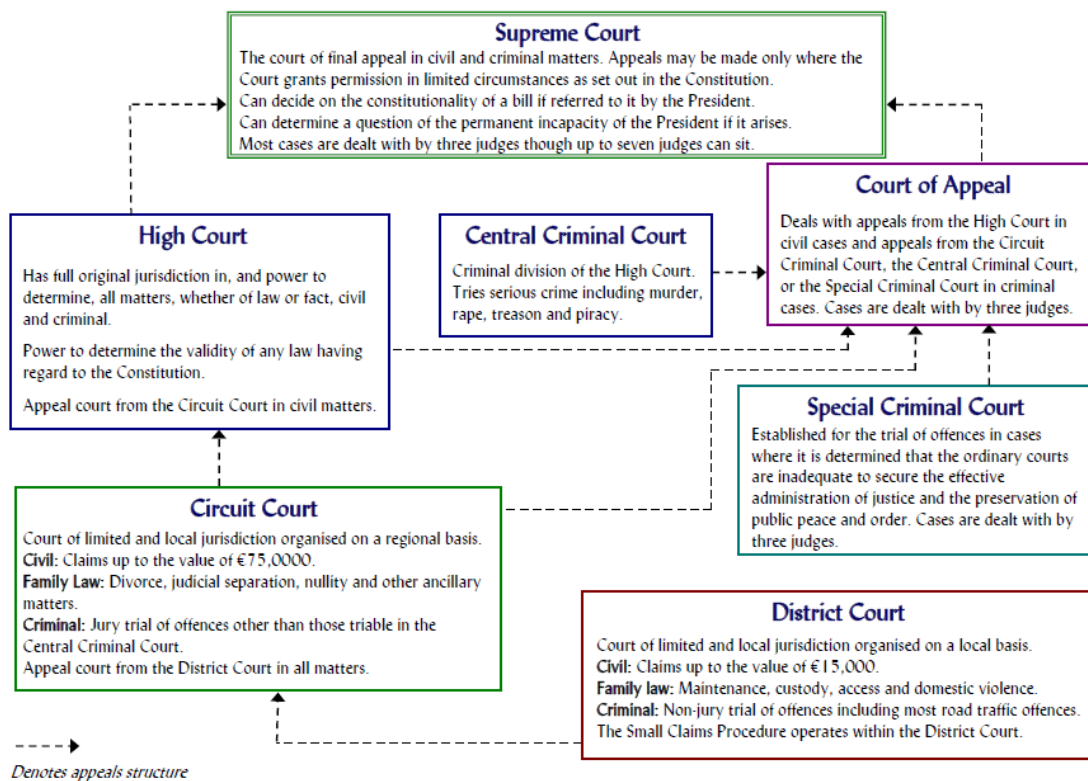


Figure 3 The Irish Courts System (Source courts.ie)

Court proceedings are governed by formal rules, and the nature, complexity and value of the dispute will determine which court hears the case. In Ireland the Civil Courts are organised in a hierarchy of four courts. The basic Civil Court is the District Court, which, in general, hears claims for damages of up to €15,000. The Circuit Court deals with appeals from the District Court, and hears cases involving disputes not exceeding €75,000 unless the parties consent to extend the limit, in which case there is no upper limit on the amount of the dispute. The High Court hears appeals from the Circuit Court and is the highest Court of first instance, again, with no upper limit on the value of the

dispute. It is the only Civil Court where the Judge, in certain cases, sits with a jury. The Supreme Court is not a Court of first instance, and primarily hears appeals from the High Court. There is also the Small Claims Court, which deals with a limited range of disputes with a value of up to a value of €2,000. Such disputes typically relate to faulty goods, bad workmanship, and minor damage to property. No lawyers are involved and appeals are heard by the Circuit Court (Keane, 2003).

Courts have the widest jurisdiction of all dispute resolution tribunals and can also issue Charging Orders, summon witnesses and involve the third parties in the dispute as necessary. (RICS, 2012)

Court proceedings are formal, following well-defined guidelines. Rigid procedures must be followed and consequently legal expertise is almost always employed. The decision of the judge is based solely on the evidence. He/she cannot look beyond that and must rely on the parties to supply all the information needed to reach a proper decision. Judges also have at their disposal a number of different remedies such as the power to order specific performance that the terms of the contract to be complied with, or to issue an injunction to prevent something being done, for example, the removal from the site of equipment of the contractor by the employer. These remedies are not available in most other dispute resolution approaches. Court decisions, subject to appeal, have the force of law whereas ADR processes are not finally binding and a party who is dissatisfied with the outcome in these processes must commence court or arbitration proceedings. The Court has substantial powers to ensure that the orders made are complied with. This ability may provide an advantage over other forms of dispute resolution.

Advantages

Towey (2012) lists the following advantages associated with litigation:

- judges are experts in the law;
- judges are impartial to the construction industry, referring to case and statute law;
- decisions are final as a win-lose outcome, and are binding unless overturned on appeal, and
- the legal system is reputable for providing a fair outcome using natural justice.

Murdoch and Hughes (2008) state that '*the perceived advantages of litigation include the ability to join third parties in the action, the availability of legal aid, the ability to deal with legal complexity and a more decisive approach by the decision maker.*' They add that construction disputes often

involve more parties than those bound by the particular contract and the ability to join others in the action is perceived as advantageous. Regarding legal aid, they comment that private individuals who qualify for legal aid will probably prefer litigation to arbitration where such aid is unavailable. Where a dispute primarily involves a point of law, they conclude that it is probably preferable that the outcome is decided by a judge rather than a construction specialist. Regarding decisiveness, they note the common perception that arbitrators tend to seek a consensus between the disputing parties and favour a 'split the difference approach', judges, however, have much less hesitation in dismissing claims in their entirety. The body of law, based on decided cases and the doctrine of judicial precedent delivers a degree of certainty and consistency in how the law is to be applied to the matter in dispute. If the plaintiff has a strong case for which there is a clear precedent then this will be applied to the facts of the case.

Disadvantages

On the other hand litigation is widely viewed as an inefficient means of solving a dispute.

Litigation is expensive. Court procedures almost inevitably lead the disputing parties to seek legal advice and representation. This usually adds significantly to the cost of pursuing and defending the action. Keane, (2003) commented at that time, that the costs of litigation could amount to €25,000 per day in a complicated case. Even where a party is successful, the amount of the judgement may not cover the cost of taking the action if the judge is of the opinion that a reasonable settlement had been unreasonably rejected during the dispute.

Litigation is slow. The courts are busy and have a backlog of cases awaiting trial. Keane writing in 2003 noted that it typically took two years to progress to the Court hearing. This can tie up vital cash flow pending resolution of the dispute with potentially disastrous results.

Litigation is adversarial. There is a winner, but perhaps as important is there is clearly a loser. This ruins business relationships and can threaten or bring about the collapse of the losing company. Even on the winning side the stress, time and effort put into to preparing for the court action can impact very negatively on a company's productivity. These invisible costs will not be recovered, leading the winner to wonder whether the action was pointless.

Litigation is risky. There is no such thing as a foregone conclusion and the opposition will no doubt have a defence to the claim. Despite the doctrine of judicial precedent noted above the outcome of

a case is by no means guaranteed. The judge may be persuaded to distinguish the case from previous precedents which may result in a judgement going against what seemed clear legal authority.

Litigation may not be final. The outcome of a court action can be appealed to a higher court. This prolongs the dispute and significantly escalates the cost of the action. The higher the court, the greater the expense of the action.

The procedures in litigation are inflexible. The hearing is held in public. The courts appoint a judge to hear the case. However, the judge may have no experience of the particular matter in dispute. The judge will decide the case only on the basis of the evidence presented to him/her. The timing or location of the action may also be inconvenient.

Arbitration

The SCSI (n.d.) describe arbitration as

a dispute resolution procedure whereby two parties in dispute agree (an arbitration agreement) to be bound by a decision of an independent third party (the arbitrator) The role of the arbitrator is similar to that of a judge, save that, on principle of party autonomy' (whereby the parties agree procedure and evidential matters) the procedure can be less formal. An arbitrator is usually an expert in his/her own right.

Arbitration has been the usual means of resolving disputes under most Irish standard forms of building contracts. This position has changed, with mediation or conciliation becoming the initial means of resolving disputes, and arbitration providing a backup where the dispute fail to be resolved. In the wake of the 2013 *Construction Contracts Act* it is suggested that adjudication may rival, or surpass, the extent to which mediation and conciliation are used to resolve construction disputes.

Keane (2003) explains that '*The essence of arbitration as it affects the building industry is that the parties decide to refer any disputes which may arise to a tribunal of their own choosing, rather than to the Courts.*' He describes arbitration as '*no more and no less than litigation in the private sector. The Arbitrator is called upon to find the facts, apply the law and to grant relief to one or other or both of the parties.*' Hussey Fraser (2010) add that it is a formal process, which typically involves reviewing the documents presented, hearing evidence from both sides, establishing on the balance of probabilities the facts and legal position of the disputing parties, and making an award on the basis of the decision.

Murdoch and Hughes (2008) comment that the objective of arbitration is to:

- obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- enable the parties to agree how their dispute should be resolved, subject to certain legal safeguards, and
- avoid the intervention of the court, except as provided for in the Arbitration Act.

They note that three conditions must be present for an arbitration to arise. First there must be a dispute, secondly there must be an agreement to arbitrate and thirdly there must be a reference of the dispute to arbitration.

Arbitrations in Ireland are regulated by the Arbitration Act 2010. The Irish Arbitration Association (2010) notes that the Act repeals all previous Irish arbitration legislation and consolidates the law on arbitration within this single Act. Arthur Cox Solicitors (2012) explain that the Act sets out ‘a default framework’ regulating arbitration procedure where the parties have *not* agreed particular procedures themselves.

The SCSi (n.d.) note that arbitration agreements are often set out in contracts, however a separate agreement can be made after a dispute has arisen. Section 7 of the 2010 Act provides that arbitration commence proceedings either on an agreed date or on the date the second party receives a request *in writing* that the dispute be referred to arbitration.

Keane (2003) links the development of arbitration to the idea that technical disputes are best resolved by experts in the field of the matters in dispute. He notes that such experts are not required to have a legal background, although many do possess legal qualifications, but they are required to ‘*be conversant with the law of arbitration.*’ The arbitrator is chosen by the parties themselves or, failing agreement, is typically nominated by a senior official of an independent body such as the President of the RIAI, or the SCSi, or the Chartered Institute of Arbitrators. Arthur Cox (2012) note that where the arbitration agreement stipulates no specified default appointing body, then the parties may ask the High Court to make the appointment and the High Court’s decision on this matter is final.

The arbitrator must be impartial and should not be connected with either of the parties to the dispute. Arthur Cox (2013) explains that a proposed arbitrator has the duty to disclose any circumstances which may question his/her independence or impartiality. They explain that the appointment of the arbitrator can only be challenged “*if circumstances exist that give rise to justifiable doubts as to his*

impartiality or independence, or if he does not possess qualifications agreed to by the parties’’. The default period for making such a challenge is within 15 days of becoming aware of the grounds for challenge. If either party is unhappy with this decision they must appeal it to the High Court for a final decision within 30 days.

The procedure for conducting the Arbitration is agreed by the parties themselves and may be covered by terms in the contract, or failing agreement, it will be as directed by the Arbitrator, Section 13 of the Act provides that normally only one arbitrator will be involved. Dillon Eustace Solicitors (2010) comment that the arbitrator may choose to conduct either an oral hearing or hold the arbitration on a documents only basis. They add that, unless previously agreed, an oral hearing must be held if either party requests one. They comment that oral hearings are the norm. This is hardly surprising as arbitrations, in many cases, arise as a result of the failure to previously resolve the dispute by other means.

Once appointed, the arbitrator will contact both parties and demand the statements of claim and defence. Dillon Eustace (2010) comment that these must be delivered within the agreed timeframe, adding that a party may amend its pleadings unless the arbitrator considers that to be inappropriate on the grounds of delay. They also state that *‘If a party fails to turn up for a hearing or produce documents the arbitrator can proceed to decide the case on the basis of the evidence before him.’* The parties must be treated equally and given a full opportunity to present their cases. All statements, documents, and information must be disclosed to the other party, however, the arbitrator may nevertheless rule on the admissibility, relevance and weight of any evidence. The arbitrator can also require that evidence is given under oath unless otherwise agreed by the parties (Dillon Eustace, 2010). It is not necessary to be represented by lawyers, although in practice, many applicants are.

The arbitrator’s decision is called the award, which must be based on the evidence of witnesses, and the documents presented. Dillon Eustace (2010) point out that the award must be in writing, signed and dated by the arbitrator stating the location and given to both parties. They add that the award must set out reasons unless otherwise agreed. The Irish Arbitration Association (2010) comment that Section 21 of the 2010 Act provides that the parties may agree in advance on how the issue of costs are to be handled. Where no such arrangement is agreed the arbitrator has the power to determine the allocation of costs. The Association comments that this arrangement differs from the 1996 Westminster Arbitration Act, which provides that *‘party agreements on the allocation of costs*

irrespective of the eventual outcome of proceedings is void where made prior to the dispute arising.' The Association comments that parties may agree under Section 18 of the 2010 Act on the arbitrator's power to award interest.

It is possible to appeal an arbitrator's decision to the High Court in very limited specific circumstances. Dillon Eustace (2010) summarise these as '*incapacity, invalidity of agreement, party not given proper notice of the arbitration or was unable to present his case or the award deals with a matter not within the scope of the submission to arbitration ... or [the award] is in conflict with public policy.*' They add that typically an application to set aside an award must be made within three months. Otherwise the award has the full effect of the law by leave to the High Court (Arthur Cox, 2012). For example, if an arbitrator awards a sub-contractor compensation and the contractor fails to pay it, the sub-contractor can seek immediate enforcement of the arbitrator's award in the Court. The arbitrator's decision is treated with the same force as a decision by a Court.

Dillon Eustace (2010) note that prior to the enactment of the 2010 Act the Courts only tended to intervene in the arbitration process where there were patent errors of law or procedure in formulating an award which, if not corrected would lead to injustice. They add that the 2010 Act has dramatically restricted the ability of the courts to intervene and that '*time will tell what approach the Courts will take in cases of seeming injustice where the 2010 Act provides they shall not interfere.*'

Advantages of Arbitration over Litigation

Various commentators (Kwayke, 1993; Keane, 2003; Murdoch and Hughes, 2008) argue that many arbitrations have, in effect, become the mirror image of litigation, and have as a consequence lost many of the advantages claimed for the process. Murdoch and Hughes (2008), nevertheless, identify the following advantages often claimed for arbitration over litigation:

- **Cost:** it is widely claimed that arbitration is cheaper than litigation. While this might be the case for simple disputes, where more complex issues are in dispute, it is probable that legal representation will be instructed. They point out that arbitration may be more expensive in these circumstances, as the cost of the arbitrator, the venue, and transcripts must be borne by the parties. (Murdoch and Hughes, 2008) The referral to arbitration as a consequence of failure to resolve the dispute at an earlier stage, nevertheless represents a serious escalation in the intensity of the dispute and hence costs are likely to replicate litigation costs, regardless of the greater informality of the process.

- **Speed:** as for simple disputes, arbitration will normally be much quicker than litigation. Murdoch and Hughes (2008) comment that suitable procedures must be selected to achieve this objective. They note, however, that arbitrators tend to be less ruthless than judges in applying time limits. Keane (2003) adds '*All of us are aware of commercial [litigation] disputes that go on ... for five or even ten years and arbitration can be as bad, indeed worse, as the arbitrators power to deal with the relevant litigant are not as comprehensive as the Courts.*'
- **Technical complexity:** where the dispute involves a technical rather than a legal issue it is appropriate that an expert determines its resolution.
- **Convenience:** Murdoch and Hughes (2008) point out that arbitrations can be arranged to suit the parties in terms of location and timing.
- **Privacy:** Murdoch and Hughes (2008) comment that the benefits of privacy may be somewhat difficult to achieve, particularly where the dispute involves prominent personalities or numerous parties. Nevertheless, bad publicity is limited in private tribunals by the exclusion of reporters and Keane (2003) is of the view that this is beneficial. A difficulty which arises, however, is that privacy may lead to inconsistent approaches and interpretations being taken by individual arbitrators. This has become a particular difficulty in relation to the introduction of the Public Works Contracts which have little legal interpretation or precedent to guide arbitrators in formulating their award.
- **Commercial expediency:** Murdoch and Hughes (2008) note that arbitration is less confrontational than litigation, and that this characteristic may be important where the parties seek to maintain a continuing business relationship.

The relative advantages of litigation over arbitration discussed above, indicate the option to litigate should not be disregarded as it may provide an effective means of resolving particular types of disputes.

Dispute Resolution Techniques – a Review

As indicated above, there are various means of resolving construction disputes. Selecting the most appropriate will depend on the particular circumstances of the case, particularly the scale and complexity of the dispute. Kwayke, writing in 1993 before the introduction of the 1996 U.K Construction Act sets out a useful table of the characteristics, positives, negatives and issues relating

to litigation, arbitration and an all-inclusive category of various alternative dispute resolution approaches. This Table closely resembles to the current position in Ireland in advance of the commencement of the Construction Contracts Act 2013

Characteristics	Litigation	Arbitration	ADR
Place/Conduct	Public court. Unilateral initiation. Compulsory.	Private (with few exceptions). Bilateral initiation. Voluntary (subject to statutory provisions).	Private. Bilateral initiation. Voluntary.
Hearing.	Formal. Before a judge.	Formal; - conforming to rules of arbitration. Before an arbitrator.	Informal. Before a third party (a neutral).
Representation.	Legal; lawyers influence settlement.	Legal; lawyers influence settlement.	Legal only if necessary. Disputants negotiate settlement.
Resolution / Disposal.	Imposed by a judge after adjudication. Limited right of appeal.	Award imposed by an arbitrator. Limited right of appeal.	Mutually accepted agreements. Option of arbitration if dissatisfied.
Outcome.	Unsatisfactory; legal win or lose.	Unsatisfactory; legal win or lose	Satisfactory. Business relationship maintained.
Time/Cost.	Time consuming. Uneconomic.	Can be time consuming and uneconomic.	Fast. Economic.

Table 3 - Characteristics of Traditional and ADR Dispute Resolution Techniques
(Source Kwayke 1993)

In respect of statutory adjudication proposed under the Irish 2013 Construction Act and using the above matrix, the hearings will be compulsory for payment disputes, they can be initiated unilaterally and will be held in private. Hearings will be conducted by a neutral adjudicator who may be an agreed appointment or nominated by the presidents of professional bodies or from a panel appointed by the Minister for Public Expenditure and Reform, proceedings will be less formal than under litigation and arbitration. The need for legal representation is not envisaged under the approach. The outcome is binding in the interim and there is to recourse to arbitration or litigation in the event the parties reject the adjudicator's ruling. The approach is cheap and quick where a genuine predisposition to resolve the dispute exists among the parties.

Conclusion

This study has examined a range of methods by which construction disputes may be resolved. The particular focus was on the methods set out in the main forms of building contract in Ireland. The study outlined how disagreements become disputes and their escalation in terms of intensity and cost. The study has reviewed disputes resolution techniques in terms of their characteristics, benefits, and drawbacks and has covered issues related to negotiation, mediation and conciliation, statutory adjudication, arbitration and litigation.

References

- Arthur Cox (2012) *Arbitration Guide: The 2010 Act* available online at <http://www.arthurcox.com/wp-content/uploads/2014/01/Arthur-Cox-Guide-to-the-Arbitration-Act-2010-February-2012.pdf> accessed 25th March 2015.
- Ashworth, A, Hogg, K and Higgs, C (2013) *Willis's Practice and Procedure for the Quantity Surveyor*, 13th ed. Wiley Blackwell, Chichester West Sussex.
- Bond B (2014) *Conciliation: How has it served the Construction Industry and has it a future?* Presentation by Engineers Ireland 12th March 2014 available online at http://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/dispute-resolution/BrianBond_PaperOnConciliation12-3-2014.pdf accessed 25th March 2015.
- Clarke, Mr Justice F (2014) *Adjudication – the Role of the Courts*, Public Lecture at Engineers Ireland, 29 January 2014 available online at <http://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/dispute-resolution/The-Role-of-the-Courts-by-Justice-Frank-Clarke-29-01-14.pdf> accessed 25th March 2015.
- Courts.ie (2014) Structure of the courts chart, available at <http://www.courts.ie/Courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/The%20Courts> [Accessed 21st December 2015].
- Department of Public Expenditure and Reform (2013) *Capital Works Management Framework Guidance Note Public Works Contract GN 1.5 v 1.4*, Dublin.
- Dillon Eustace (2010) *A New Era for Arbitration in Ireland* available online at <http://www.dilloneustace.ie/download/1/A%20New%20Era%20for%20Arbitration%20in%20Ireland.pdf>. accessed 25th March 2015.
- Engineers Ireland (n.d.) Dispute Resolution Procedures available at <http://www.engineersireland.ie/Services/Dispute-Resolution/Procedures.aspx> accessed 25th March 2015.
- Fryer, B, Egbu, C, Ellis, R and Gorse, C (2004) *The Practice of Construction of Management* 4th Edition Oxford; Blackwell Publishing.
- Gould, N and Russell, V (2007) *Claims and Dispute Resolution*, in Pickavance, K (2007) *Construction Law and Management* (2007), Informa, London.

- Hussey Fraser (2007) *Claims and Disputes*, available online at <http://www.husseyfraser.ie/wp-content/uploads/2012/02/Paper-on-Disputes-and-claims.pdf> accessed 25th March 2015].
- Keane, D (2001) *The RIAI Contracts, a Working Guide*, Royal Institute of the Architects of Ireland, Dublin.
- Keane, D (2003) *Building and the Law* 4th ed. Royal Institute of the Architects of Ireland, Dublin.
- Kwayke, A (1993) *Construction Papers No 21 - Alternative Dispute Resolution (ADR) in Construction*, Chartered Institute of Building, Ascot.
- Latham, M (1994) *Constructing the Team: Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*, HMSO, London.
- Law Reform Commission (2010) *Alternative Dispute Resolution: Mediation and Conciliation*, Law Reform Commission, Dublin.
- Lenny, A (2014) Expert Determinations – Recent Developments, *Irish Construction Industry Magazine*, January/February 2014 p. 28-29, Dublin.
- Murdoch, J and Hughes, W (2008) *Construction Contracts: Law and Management*, 4th ed. Taylor and Francis, Oxford.
- Office of Government Procurement (2014) *Report on the Review of the Performance of the Public Works Contract*, Department of Public Expenditure and Reform, Dublin.
- O’Higgins, N (2013a) Choosing your Battleground and Winning the War, *Construction*, May/June 2013 p. 46, Dublin.
- O’Higgins, N (2013b) What the Act will do, *Construction*, September/October 2013 p.16, Dublin.
- Ramus, J, Birchall, S and Griffiths, P (2006) *Contract Practice for Surveyors* 4th ed. Butterworth Heinemann, London.
- RIAI - Royal Institute of the Architects of Ireland (2012) *Agreement and Schedule of Conditions of Building Contract*, Royal Institute of the Architects of Ireland, Dublin.
- RICS – Royal Institution of Chartered Surveyors (2012) *Conflict Avoidance and Dispute Resolution in Construction*, Royal Institution of Chartered Surveyors, Coventry.
- Royce, N (1989) Conciliation in Business Disputes: Has it a Future? *Construction Law Journal*, Vol 5 No. 1, Sweet and Maxwell.
- SCSI – Society of Chartered Surveyors in Ireland (n.d.) *Dispute Resolution, Procedures*, available online at <http://www.scsi.ie/arbitration/procedures> accessed 25th March 2015].
- Towey D (2012) *Construction Quantity Surveying : a Practical Guide for the Contractor's QS*, Wiley-Blackwell, Oxford.
- William Fry (2010) *What’s New for Surveyors, A Short guide to the Arbitration Act 2010* available online at http://www.williamfry.ie/Libraries/test/Whats-New-for-Surveyors_A-Short-guide-to-the-Arbitration-Act-2010-1.sflb.ashx accessed 12th May 2014.

APPENDIX
DISPUTE RESOLUTION PROCEDURES UNDER THE RIAI AND
PUBLIC WORKS CONTRACT

Public Works Contract PW-CF1

The Department of Public Enterprise and Reform (2013) recommends that the parties should attempt to resolve disputes themselves by informal means in the first instance, by resolving the disputes ‘*amicably at operational level*’ or ‘*refer[ring them] to senior management*’. The Department adds that high level negotiations may involve ‘*informal assistance from a third party.*’

Clause 13 of PW-CF1 currently sets out two levels of formal dispute resolution procedures in the event the parties cannot resolve their differences by informal means, these are conciliation, followed by arbitration.

Conciliation

The aggrieved party may refer a dispute to conciliation by notice to the other party. A conciliator must then be jointly appointed within ten days. Where the parties cannot agree on a candidate, the Contract Schedule identifies a person or body who will make the appointment. The parties must provide the conciliator and the other party with brief details of the dispute and their contentions. Information, documentation, and access to the site required by the conciliator must be made available promptly.

The conciliator must attempt to broker an acceptable solution and can meet the parties either separately or jointly and can consider all submitted documents, conduct separate investigations, use specialist knowledge, obtain technical or legal advice and can set out how the conciliation is to be conducted. The default period for resolving disputes by conciliation is 42 days, however, the conciliator may propose a longer period, subject to the agreement of the parties.

The conciliator will issue a written recommendation if a dispute has not been resolved by the end of the conciliation period. This recommendation becomes ‘*conclusive and binding*’ on the parties unless a written ‘*notice of dissatisfaction*’ is received within 42 days stating the reasons for the dissatisfaction, Such notice in effect escalates the dispute to arbitration. A bond must be provided where the State has to make a payment resulting from a conciliation.

Arbitration

Where conciliation fails to resolve a dispute the aggrieved party may seek arbitration. The procedures for appointing an arbitrator are set out in the Schedule to the Contract which identifies that the arbitration rules are *'The Public Works and Services Arbitration Rules, 2008.'* The appointment of the arbitrator may be agreed by the parties, failing which the person or body nominated in the Schedule will make the appointment.

A particular issue which has caused controversy is the inclusion in the Form of Tender of a pre-dispute agreement regarding capping costs which states: *'We also agree that should a dispute arise under any contract formed by the acceptance of this Tender that is referred to arbitration, to the extent permitted by law, each party will bear their own costs in relation to the arbitration proceedings.'* The SCSI (2014) call for the removal of this clause which it describes as *'a bar to justice ... The strategy is to reject a recommendation and then push for arbitration and cause the plaintiff to suffer his own costs pursuing his just entitlements.'*

The *Report on the Review of the Performance of the Public Works Contract* (Office of Government Procurement, 2014) proposes to review the triggers to the formal dispute resolution procedures to permit greater engagement between the parties through escalation up to senior management level prior to engaging in formal proceedings. The objective of this review is to reduce the costs incurred by both parties when disputes arise. To this end, the Report recommends *'the inclusion of informal dispute resolution methods to reduce the volume of disputes that are currently being referred to the formal procedures prescribed in the contract.'*

The RIAI form of Contract

Clause 38 of the RIAI Contract deals with dispute resolution and sets out the mechanisms for resolving disputes. A dispute is initially referred to conciliation and if settlement is not reached it is referred to arbitration.

The procedures for conducting a conciliation are attached as an appendix at page 28 of the Contract. In summary these require the aggrieved party to notify the other party and specify the matter in dispute. The parties must then jointly appoint a conciliator within 10 working days, otherwise the President of the RIAI will make the appointment. The parties must then present their cases within 10 working days. The conciliator then has 10 working days to arrange a 'convenient' hearing. The

conciliator may consider and discuss suggestions or solutions suggested by either party. This information is typically regarded as confidential to the conciliator. The conciliator may consult independent experts. Where an agreement is reached it is written down and executed by both parties. Where the parties fail to reach an agreement, the conciliator shall within 10 working days of the hearing, issue a recommendation. The conciliator is not required to give reasons for the decision. The recommendation becomes binding unless it is rejected within 10 working days. The recommendation remains confidential if rejected by either party. The proceedings of the conciliation are, in general, inadmissible in further legal proceedings. Each party pays their own costs and typically share the conciliator's costs.

Arbitration

Any '*dispute or difference*' under the contract may be referred to arbitration. The matters under dispute may relate '*to the construction of the Contract or as to any matter or thing arising thereunder or ... the withholding by the Architect of any certificate to which the Contractor may claim to be entitled.*' Such disputes may occur '*during the progress of the works or after the determination of the employment of the Contractor, ... or [following] the abandonment or breach of the Contract.*' The party seeking the arbitration must give notice '*forthwith*' of the dispute or difference to the other party and such notice is classified as a referral to arbitration. The appointment of the Arbitrator is to be agreed by the parties or, failing their agreement, nominated by the President of the RIAI in consultation with the President of the CIF. The arbitrator's decision and award is final.

In general arbitrations take place following practical completion of the works, however they may take place during the works where the employer and contractor both agree to this in writing. The sub-clause provides for three situations where an arbitration may be called for during the works:

1. the replacement of the architect under Article Three of the contract;
2. the replacement of the quantity surveyor under Article Four of the contract, and
3. '*on the question of certificates*': Keane (2001) comments that this provision includes interim certificates and in effect means that arbitration proceedings can commence '*at any stage of the contract*', He adds, however, that arbitrations normally occur at the final certificate stage of the project.

The arbitrator has power to:

- Open up, review and revise any opinion, decisions, requisition or notice.
- Determine all matters in dispute subject to what was submitted to him as per original notice of dispute.

The controlling legislation in the Republic is the Arbitration Act 2010 discussed above, and any Act amending same.

Keane (2001) regards the arbitrator's ability to '*open up, review and revise any opinion, decision, requisition or notice*' as '*an extremely wide power.*' He explains that the Architect's decisions regarding matters such as extensions of time, the degree to which the contractor is responsible for any delay, and when and how much should be paid, '*are very personal decisions,*' noting that '*within limits, different architects might reach different conclusions.*' He adds that such powers might be viewed as '*draconian and unacceptable*' if they were not capable of being independently reviewed.

Keane regards the power to '*open up, review and revise any certificates, opinions, decision, requirement or notice*' goes further than

entitling him to treat the Architect's certificates, opinions, decisions, requirements and notices as inconclusive in determining the rights of the parties. It enables, and in appropriate cases requires him to vary them and so create new rights, obligations and liabilities in the parties. This is not a power which is normally possessed by any court and again it has a strong element of personal judgement by an individual nominated in accordance with the agreement of the parties.

He concludes that this judgement seems to '*support the view that interim or final certificates can be reviewed, and therefore not regarded as final.*'