IBA International Construction Projects Committee

ADR in Construction

Ireland

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1. Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

Types of dispute resolution in Ireland

Under Irish statutory law, it is not mandatory to resolve construction disputes using alternative dispute resolution ('ADR'). However ADR is widely used in practice and prescribed in the Irish standard form construction contracts. In addition, use of ADR can be driven by the parties on their own initiative or suggested (although not imposed) by the Irish courts, where appropriate.

A particular unique feature of ADR in Ireland is conciliation (described below) which facilitates early and less costly resolution of disputes. Mediation and arbitration also play a role particularly in tiered or stepped dispute resolution procedures, with expert determination arising in more property related disputes.

Dispute adjudication board (the 'DAB') are not prevalent in Ireland although sometimes arise in infrastructure projects adopting FIDIC contract provisions. Statutory adjudication is due to be imminently introduced which should present interest opportunities and challenges for ADR in Ireland. The use of ADR has generally increased in Ireland in the last ten years.

Types of ADR in Ireland include:

Tiered or Stepped Dispute Resolution Procedures
Irish public and private sector standard form construction contracts prescribe stepped dispute resolution procedures which include ADR mechanisms such as conciliation (described below) followed generally by arbitration. Bespoke construction contracts also tend to adopt these tiered ADR procedures. This approach is driven by the perception that conciliators and arbitrators in Ireland have construction related expertise necessary to facilitate early resolution of such disputes.

Structured Negotiations
Structured negotiations play an important early role in construction dispute resolution. Over time this has become more formalised through the development of mediation. Historically, negotiated settlements have been found to be a very successful method of resolving construction disputes prior to a final judgment or award.

Conciliation
Conciliation is a voluntary method of ADR frequently used in Irish construction contracts. The procedure is similar to mediation, although a conciliator can be seen to be more pro-active than a mediator and will propose the terms of a settlement to the dispute or, in the absence of settlement, issue a recommendation to the parties. Such recommendation from the conciliator has the key advantage of confidentiality and will typically bind the parties if they do not reject it within a specified period of time. Where this recommendation is

challenged, the issues typically end up being resolved by the courts, or arbitration, as the contract provides.

Mediation
Similarly to conciliation, mediation is a voluntary method of ADR whereby parties to a construction contract agree to appoint an independent third party to facilitate negotiations between them with a view to reaching an agreement.

The right of the parties to recourse to mediation was reinforced in Ireland by the introduction of the European Communities (Mediation) Regulations 2011 (SI 209 of 2011) (the 'Mediation Regulations') which transposed Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

The Irish courts have the discretion to invite the parties to use mediation to resolve disputes where the courts consider it appropriate, having regard to all of the circumstances of the case and with the parties' consent. The parties, by agreement, can also request adjournment of the proceedings to explore mediation. Where the parties decide to use mediation, the Irish courts may then make such necessary orders or directions so as to facilitate mediation.

It is now confirmed that all written mediation agreements can be enforced through the Irish courts. The Mediation Regulations provide a time limit on applications for enforcement of mediation agreements (six years from the conclusion of the mediation).

The Mediation Regulations also support the principle of confidentiality of mediation, except in specified limited circumstances, such as public policy and where necessary to enforce the mediation agreement.

Adjudication
Adjudication has been successfully used in other jurisdictions`, such as the UK, for some time. Very recently, adjudication was put on a statutory footing in Ireland through the enactment of the Construction Contracts Act 2013 (the 'Construction Act').

Under the Construction Act, parties to a construction contract are required to refer any payment related dispute to an adjudicator. A fast and cost effective resolution of such disputes is facilitated by short timelines prescribed by the Construction Act.

An adjudicator's decision will be binding, pending determination of the payment dispute via litigation or arbitration. Alternatively, the decision would be binding if both parties agree for it to be so. The parties must comply with the decision whether or not they object to it.

Given that the timescales are short, adjudication is generally considered less expensive than prolonged litigation. There are no binding judicial decisions on the interpretation of the legislation.

Expert Determination
Expert determination is a voluntary method of resolving construction disputes by an independent third party with experience in the relevant discipline. However, expert determination is typically used in the context of rent review/service charge provisions/practical completion/time and quantum disputes in a bespoke lease/agreement

for lease/development agreements. Such provisions will usually specify the capacity in which the expert (independent third party) is to act.

The expert is usually appointed by the parties or alternatively by an independent professional body agreed upon in the contract. In determining the dispute between the parties, the expert is required to apply his own skills and expertise in evaluating the evidence before them.

Most such provisions are typically drafted to be final and binding upon the parties. Expert determination is aimed at fast and cost effective resolution of disputes. In Ireland, expert determination is governed by common law principles rather than statute.

Dispute Adjudication Boards (DAB)
The use of DABs is not common in Ireland. In fact in such contracts, in practice, the DAB provision is generally deleted in favour of conciliation or arbitration.

Where these arise in Ireland, it tends to be on larger complex infrastructure projects in the utilities and heavy industry sectors.

Arbitration
Arbitration in Ireland, including construction arbitration, is now governed by the Arbitration Act 2010 (the 'Arbitration Act') which applies to domestic and international arbitration.

Arbitration has been used in Ireland for many years and historically was the dispute resolution process of choice in the construction industry. The perceived benefits of arbitration include confidentiality and the availability of expert arbitrators providing an alternative to the court process.

However, as is the case in many common law jurisdictions, arbitration has become somewhat the mirror image of court proceedings, with similar cost and time related issues arising.

Trends or Preferences in Dispute Resolution in Ireland

Certain trends have emerged in construction dispute resolution in the past ten years. Given the recent rapid development of Ireland's economy, including a construction boom followed by a sudden decline in construction activity, the preference for cost effective and timely dispute resolution procedures has increased. Bodies prescribing the standard form construction contracts and related dispute resolution procedures have responded to this demand.

The preference for ADR procedures in Ireland has increased, consequently reducing the number of construction disputes before the courts or in arbitration. This would appear to mirror what is happening generally in practice in many areas in Europe and internationally.

According to the Irish Law Reform Commission's *Report on Alternative Dispute Resolution: Mediation and Conciliation* (2010), a survey carried out by the Irish Construction Industry Federation revealed that the preferred method of resolving construction disputes was mediation (52%), followed by conciliation (45%) and arbitration (3%).

In practice, advisors to parties in construction disputes in Ireland now routinely advise ADR as the first step in trying to bring about a resolution of the dispute. The cost and time savings resulting from successful ADR in construction disputes are also significant. This has provided a strong incentive in Ireland for the parties to consider using ADR clauses in construction contracts. In practice, the higher the cost of the claim in dispute, the higher the cost that is typically spent on the relevant ADR procedures. The rationale here is that the parties realise that the potential savings from engaging in ADR are likely to be correspondingly high.

ADR procedures are often used by the parties even during a litigation or arbitration process. In practice, ADR procedures are seen as more effective when commenced by the parties either at the exchange of pleadings stage or alternatively just before the commencement of litigation or arbitration hearings.

Another development in construction dispute resolution in the last ten years has been the evolution of the Commercial Court (a division of the Irish High Court) which was enacted in 2004 to fast track litigation of particular disputes of a commercial) value and significance.

Defects claims, in practice, are predominantly being dealt with by the courts or in arbitration (rather than through other ADR mechanisms) because they often require extensive expert evidence. In Ireland, pyrite related defects have become a particular area of focus in recent years. Pyrite can be found to occur in ground fill in certain circumstances. It can cause extensive swelling which may lead to structural damage of buildings.

Design and professional indemnity insurance issues related to such defects claims can be very technically and legally complex and as such, typically also end up in arbitration or litigation.

In practice, claims relating to variations, delays, quantum and site conditions are often referred to conciliation and where a settlement is not reached, on to arbitration or litigation as prescribed by the contract.

The last ten years in Ireland have also seen a growth in the promotion of mediation by the legislature, courts, industry bodies and legal advisors. The Irish legislature is also now looking to put ADR mechanisms on a statutory basis and to improve existing legislation in this area.

1.2 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

Adjudication
Statutory adjudication has been recently introduced in Ireland by the Construction Act. The Construction Act was enacted on 29 July 2013 and the intentions behind the Act have received widespread industry support in Ireland.

The legislation is broadly modelled on the UK legislation on adjudication and applies to agreements to carry out or procure broadly defined construction operations.

The Construction Act seeks to address outstanding payment issues between employers, contractors and sub-contractors and introduce a new dispute resolution mechanism for payment related disputes: adjudication by an independent third party.

A further advantage is that parties will be able to make use of this dispute resolution process prior to the completion of the project.

Conciliation
Conciliation is currently governed by common law rather then express statute. A draft Mediation and Conciliation Bill 2010 was proposed by the Irish Law Reform Commission in its *Report on Alternative Dispute Resolution: Mediation and Conciliation* (2010) which had a much wider ambit. The conciliation aspects of this draft Bill have not yet been adopted in any draft legislation published by the Irish legislature.

Mediation
Ireland transposed Directive 2008/52/EC via the Mediation Regulations. The Mediations Regulations apply to all mediations, including construction related mediation, in Ireland and reinforce the right of parties to recourse to mediation.

A follow-on draft general scheme of a Mediation Bill was published in March 2012 by the Irish Department of Justice. The aim of the Mediation Bill is to encourage and facilitate the use of mediation in resolving civil, commercial and family disputes. It seeks to provide an effective and efficient alternative to litigation by reducing legal costs and speeding up the resolution of disputes. The costs, while modest by comparison to litigation, are not inexpensive. This area is to be watched, particularly in light of increased regulation and procedural parameters.

As currently drafted, the scheme of the Mediation Bill:

- introduces a new statutory obligation on solicitors and barristers to inform their clients, prior to commencing court proceedings on their behalf, about the possibility of using mediation as an alternative means of resolving the dispute;

- provides that all mediation related communications between parties shall be confidential;

- provides that it is for the parties themselves to determine the enforceability of any agreement reached as a result of the mediation;

- provides a statutory basis for the courts to invite parties to consider mediation and adjourn court proceedings while mediation is on-going, echoing existing procedures in the court rules; and

- introduces an obligation on mediators to provide the parties with information on their training and qualification.

The Mediation Bill contains a provision that will allow parties to request the mediator, at any time during the mediation process, to make proposals to resolve the dispute, which the parties can then accept or reject. Such a request would effectively convert the process into conciliation. Conciliation does not yet form part of the Mediation Bill and this provision is likely to be the subject of further debate as it is developed.

The draft Mediation Bill is being progressed prior to its publication which is anticipated later in 2013.

Arbitration
Arbitration in Ireland, including construction arbitration, is now governed by the Arbitration Act which applies to domestic and international arbitration. The Arbitration Act consolidated and streamlined Ireland's various domestic and international arbitration laws, implementing the UNCITRAL Model Law on International Commercial Arbitration (the 'UNCITRAL Model Law'). This development has changed the environment for construction arbitration to one of improved cost and time efficiency within high quality parameters.

Expert Determination
There is no specific statutory regime to govern expert determination in Ireland.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators? What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

Ireland is a common law country and does not have a civil code.

In conciliation, the conciliator issues a recommendation which is binding unless it is rejected by either party. As noted above, conciliation in Ireland is currently not governed by legislation.

Arbitration decisions in Ireland are final and binding and governed by the Arbitration Act. A body of judicial decisions/case law is now emerging on the Arbitration Act.

Under the adjudication procedures as set out in the Construction Act, an adjudicator's decision will be binding, pending determination of the payment dispute via litigation or arbitration. Alternatively, the decision would be binding if both parties agree for it to be so. The Construction Act also provides that a construction contract cannot be drafted so as to negate or reduce the statutory right to adjudication.

1.4 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

The Arbitration Act governs the enforcement and recognition of domestic and international arbitral awards. An arbitral award will have to be enforced or recognised by the High Court of Ireland (which is the court responsible under the Arbitration Act for arbitration) upon application in accordance with the Arbitration Act.

The Arbitration Act incorporates (as did previous Irish arbitration legislation) the New York Convention (the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards); the Washington Convention (the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States); and the Geneva Convention (the 1927 Convention on the Execution of Foreign Arbitral Awards). It also incorporates the UNCITRAL Model law. The Arbitration Act does not apply to non-arbitration awards.

In seeking enforcement of an arbitral award pursuant to the Arbitration Act, a party will take an action or apply for leave of the High Court of Ireland by way of summary procedure

on affidavit evidence only, in a similar manner to seeking enforcement of a judgment of the High Court. Where leave is given, judgment may be entered in terms of the award. Such award shall, unless agreed by the parties, be treated as binding for all purposes on the parties between whom it is made. Further, it may be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Ireland.

The Mediation Regulations provide that all written mediation agreements can be enforced through the courts in Ireland. The Regulations provide a time limit on applications for enforcement of mediation agreements (six years from the conclusion of the mediation). The mediation agreement is enforced upon application to the Master of the High Court to have the mediation agreement determined a rule of court.

A conciliator's recommendation or expert determinator's award in Ireland is enforced in a similar manner to that of a mediation agreement described above,

The High Court has recently held that a contractual dispute resolution mechanism, where properly constituted and adopted by the parties, will be upheld and respected by the Irish courts. The case in question revolved around a standard form construction contract which contained a mandatory conciliation procedure as the first step in a multi-tier dispute clause.

1.5 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

Ireland does not have a specialist construction court, as there is in other jurisdictions such as in the UK. The High Court in Ireland has statutory jurisdiction for arbitral related matters pursuant to the Arbitration Act.

There are a number of industry bodies with offices in Dublin which deal with construction disputes although there is not one centralised body. The nature of the contract and the dispute typically influences the industry body selected.

These include the Law Society of Ireland, the Chartered Institute of Arbitrators (CIArb), the Society of Chartered Surveyors of Ireland (SCSI), Engineers Ireland (EI), the Royal Institute of the Architects of Ireland (RIAI) and the Construction Industry Federation (CIF). For mediation, the relevant bodies are the Centre for Effective Dispute Resolution (CEDR) Ireland, the Irish Commercial Mediator's Association (ICMA), Friarylaw and the Mediator's Institute of Ireland (MII).

These industry bodies are typically appointing bodies. They have various codes of conduct to which their panel members must adhere, training requirements and complaints mechanisms to address, in particular, misconduct issues. Unlike other dispute resolution bodies such as the International Chamber of Commerce (ICC), these industry bodies do not typically have an express monitoring role for the entire process governing the conduct of the dispute resolution proceedings or scrutinising the nature of the awards or recommendations.

A survey conducted by CEDR Ireland in association with ICMA dated 21 March 2013 noted that over 25% of the responding mediators were not members of a mediation body. This reflects the fact that many mediators have been independent for a number of years.

However, this position is likely to change when the regulation of mediation is addressed in more detail within the Mediation Bill later this year.

1.6 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

Mediation is of increasing prevalence in construction dispute resolution in Ireland. This is due to significant support from the judiciary, particularly the Commercial Court, as well as from legal professionals.

The Irish court rules expressly permit the courts to adjourn litigation proceedings in order to facilitate the parties to carry out mediation.

Conciliation is the preferred dispute resolution process which features in the provisions of public and private sector standard and private form and bespoke construction contracts alike and is the pre-requisite to binding arbitration. As noted earlier, it is a process similar to mediation whereby the conciliator seeks to facilitate a settlement between the parties. Under the industry defined procedures, conciliation results in either a structured negotiated settlement between the parties, or alternatively, the conciliator is obliged to issue a recommendation for the resolution of the dispute if the parties fail to reach a settlement.

1.7 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

There has been no decision by the Irish courts on this matter to date.

Although DAB decisions will not be considered as binding, they are likely to be considered valid evidence if their existence is raised in subsequent arbitration or court proceedings in Ireland subject to the rules of evidence which apply.

The arbitral tribunals or the judge may take such decision into consideration unless contrary to the rules of admissible evidence.

Any judicial decisions in the UK on DAB decisions are likely to be of persuasive authority in Ireland.

1.8 What form of ADR is considered to be cost effective for construction disputes in your jurisdiction? Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

Conciliation is deemed to be a cost effective dispute resolution mechanism for construction disputes in Ireland given its tight timelines in the standard form contracts. The parties typically bear their own costs relating to the conciliation, although they can be held jointly and severally liable. The costs of the conciliator are jointly borne between the parties. Conciliation is seen as being considerably more cost favourable to litigation.

The Arbitration Act prescribes greater flexibility for costs in arbitration and allows the parties to agree such cost allocation as they see fit. Where the parties have not agreed costs, the arbitral tribunal has the power to determine such costs as it sees fit but must state the grounds or reasons on which it has acted in determining the elements of costs that are recoverable.

The arbitral tribunal has the power to determine the allocation of costs and the party liable for such costs. Typically, costs are seen to follow the event. Pursuant to the Arbitration Act these costs include the legal and expert reasonably incurred costs; costs of the arbitral tribunal together with reasonable costs of travel; reasonable travel costs of factual witnesses and general costs of the arbitration.

In domestic commercial arbitration, an arbitral tribunal can direct that costs be taxed by the Taxing Master or a County Registrar. The courts do not have the power to review an arbitral tribunal's decision on costs.

It is difficult to ascertain what the costs of an arbitration would be compared to the cost of litigation proceedings although the use of Counsel and the quasi-judicial nature of the proceedings mean that that associated costs are typically likely to be somewhat similar.

If the parties submit to an institution for the appointment of an arbitrator, they are typically bound to comply with the rules of that institution relating to costs.

Adjudication is also likely to be a cost effective way of resolving a dispute compared to litigation. As it has it has only been enacted there is no cost information available on this. Cost information available in relation to expert determination is generally not available.

2. Dispute Resolution Agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

The requirements for a valid arbitration agreement and a multi-party arbitration agreement in Ireland are set out in Article 7 of the UNCITRAL Model Law. An arbitration agreement may be a clause in a contract or it may take the form of a separate agreement to arbitrate. It will be deemed to be in writing if it is recorded in a hard copy or by electronic means, whether or not it has been concluded orally, by the parties' conduct, or by other means. It is also deemed to be in writing if the existence of the arbitration agreement is alleged by one party and not refuted by another in an exchange of pleadings such as a statement of claim and a defence.

The Irish courts are supportive of arbitration clauses and will typically refer the matter to arbitration where there is a valid arbitration agreement in place. No court intervention is allowed unless it is expressly permitted under the UNCITRAL Model Law. However, a party to an arbitration agreement may apply to a court for interim measures. In Ireland, the High Court has jurisdiction to determine such matters.

In relation to sub-clause 20.6 of the FIDIC Red Book, this clause could be considered a valid arbitration type clause if it meets the requirements of Article 7 ie if it is in writing or evidences an agreement in writing (in hardcopy or electronic or even in statements of claim or defence) to submit all or certain disputes which have arisen or which may arise between the parties in respect of a defined legal relationship, whether contractual or not to arbitration.

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

A valid and enforceable arbitration clause must meet the criteria under Article 7 of the UNCITRAL Model Law. The standard form construction contracts have been updated to take account of these requirements. Importantly, the Arbitration Act does not apply to certain contracts, such as employment contracts or the remuneration of employees. Further, under the Arbitration Act, arbitral tribunals in Ireland do not have the power to order specific performance for a contract for the sale of lands.

Most other forms of ADR clauses in Ireland would be required to be in writing in order to be considered valid. There has been recent caselaw in the UK in 2012 (which is of persuasive although not binding authority in Ireland) which sets out guidance on what would be deemed to be an enforceable ADR clause.

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

All of the standard form construction contracts in Ireland contain arbitration as a preferred method of binding dispute resolution. As noted above, it is typically found in a multi-tiered clause with another form of ADR, such as conciliation, as a step in a multi-tiered dispute resolution clause.

There is typically reference in such dispute resolution mechanisms to a professional body, such as the Law Society of Ireland, the CIArb, the SCSI, Engineers Ireland, the RIAI and whether the rules of that body of the date are applicable. Some of these rules are prescribed while others can be determined by the parties.

The ICC Arbitration Rules are used to a more limited extent in complex infrastructure projects.

2.4 May arbitration agreements bind non-signatories (for example sub-contractors)? If so, under what circumstances? Is this different for other forms of ADR?

It is possible that arbitration agreements may bind non-signatories. However, due to the doctrine of privity of contract, the law on binding non-signatories is strictly interpreted in Ireland.

Clear evidence of consent of a non-signatory would be required in order to make a case for the extension of an arbitration clause to the non-signatory. For example, this could be achieved by a provision that states if there is a provision between the parties it must be

referred to arbitration by reference to the provisions of the main/head contract which contains an arbitration clause.

Here in Ireland the provision would have to meet the requirements of Article 7 of the UNCITRAL Model Law in relation to arbitration agreements.

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

Expert determination is not mandatory in Ireland but can be agreed upon as a dispute resolution mechanism by the parties. In Ireland, expert determination is governed by common law principles rather than statute. Most such provisions are typically drafted to be final and binding upon the parties.

Clear and concise drafting language with a reference to the procedure being final and binding should be included for it to be enforceable. The clause should specify when or how the procedure is completed.

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

Typically, in Irish multi-tiered dispute resolution clauses, steps can usually be skipped only with the parties' consent or in cases where this right is built into the standard form contracts. As noted previously, multi-tiered dispute resolution clauses are common in Irish construction contracts. As noted above, these normally incorporate an architect's/engineer decision followed by structured negotiations (in some instances) and where unresolved, subsequently by conciliation or arbitration.

3. ADR and Jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

In Ireland, disputes arising from employment contracts or in relation to the remuneration of any employees, specific performance for a contract for the sale of land and disputes in criminal proceedings can only be determined by the courts and not by an arbitral tribunal.

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

Only disputes in civil proceedings can be determined by binding expert determination or other binding third party decision. As such, determination is not prescribed by statute or in any of the standard form construction contracts, it will only be applicable where the parties so agree between themselves.

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

An arbitral award in Ireland must be made in writing, signed, dated and state the place in which it is made. A signed copy must be given to each party. The award must also set out reasons unless the parties have agreed otherwise in accordance with the UNCITRAL Model Law. There are generally no restrictions on the relief which may be granted in an arbitral award, except for the ability to grant orders for specific performance for the sale of land.

The conciliator's recommendations under most of the construction institutional rules must be in writing. The requirement to give reasons is subject to each individual institution's rules.

A DAB is not common in Ireland and there is no case law on this. It tends to be used in larger complex infrastructure projects typically in the utilities and heavy engineering sectors. In practice, the DAB provision is generally deleted in such contracts in favour of conciliation or arbitration. This is particularly the case in the water sector. The question of whether the recommendations or decisions of the DAB are binding or non-binding will depend upon the contractual provisions in question.

If the clause provides that it is to be final and binding the courts may, subject to the rules of evidence, treat this as binding upon the parties, for example in a similar manner to that of expert determination.

3.4 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

Public bodies in Ireland are not barred from settling disputes by ADR. The Irish Government, legislature and judiciary fully support the use of ADR to settle disputes with a view to saving costs and maximising efficiencies.

3.5 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

Ireland has not enacted specific legislation on state parties' immunity and is not a signatory to the European Convention on State Immunity which aims to establish common rules relating to the scope of the immunity of one party from the jurisdiction of the courts of another party.

Ireland is a dualist State. Article 29.6 of the Irish Constitution provides that international agreements have the force of law to the extent determined by the Oireachtas (Irish parliament).

The exception to this is European Community law, which, under the terms of Article 29 of the Irish Constitution, has the force of law in Ireland. This means that any law or measure, the adoption of which is necessitated by Ireland's membership of the European Union, may not, in principle, be invalidated by any provision of the Constitution.

There has been some recent UK cases on immunities which would be of potentially persuasive authority here, although not binding, if the issue were to arise before the Irish courts.

3.6 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

Typically, procurement disputes are not decided by ADR and are determined by the Irish courts instead.

3.7 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated "The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it,". In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause? If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

Yes, provided that there are provisions permitting the consolidation of referrals to the DAB.

Given the doctrine of privity of contract in Ireland, a DAB would not be permitted to decide upon issues falling outside the construction contract and such decisions would be deemed to be made outside its jurisdiction. In these circumstances, it may be open to the party dissatisfied with the DAB decision to challenge it.

Provided that the parties have not determined in the contract that the DAB decision is final and binding on the parties, the challenged decision could be referred to arbitration or the courts as determined by the contract.

If the DAB decision is of a final and binding nature it is likely to be treated in a similar manner to expert determination by the courts or arbitration tribunals. Therefore they are unlikely to interfere with such a final and binding decision unless there is evidence of matters such as fraud or collusion.

4. Arbitrators, Adjudicators, Dispute Board Members, Mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

While there are no express limitations in Ireland on the appointment of arbitrators, arbitrators appointed by institutional bodies typically must have qualifications and experience specified by those bodies' rules for nomination to their panels. Parties may seek to impose certain qualifications in bespoke dispute resolution clauses. More often then not these qualifications will depend on the nature of the dispute between the parties and this cannot be predicted at the time of the contract.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

In Ireland, institutions dealing with construction arbitrations would usually maintain lists or panels with names of possible arbitrators. In the first instance, the standard form construction contracts typically require the parties to try and agree the appointment of an arbitrator of their own choosing and as such, the arbitrator does not have to be on the relevant institution's panel or list.

If the parties fail to reach an agreement, either party may request the institution to appoint an arbitrator in accordance with their procedures. The lists or panels are prepared by each institution individually and the selection procedures vary between institutions.

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer? Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

In Ireland, there is no specific requirement for arbitral tribunals or tribunals issuing binding decisions regarding construction disputes to include a lawyer. Equally, there is no specific requirement for secretaries added to such tribunals to be a lawyer.

Under the Arbitration Act and under most conciliation rules, the arbitral tribunal and conciliator respectively can engage experts to assist them in their functions. Where required, such an expert may be a lawyer. These issues should be given careful consideration by the parties at the time of drafting or selecting their dispute resolution options.

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and construction professionals possible/common? Is there a difference with other forms of ADR?

In construction industry arbitrations in Ireland, many arbitrators belong to the engineering, architect or quantity surveyor professions. Panel lists of arbitrators, conciliators and mediators of the various institutions in Ireland are typically made up of the respective construction professionals and lawyers. In practice, mixed dispute resolution panels are not common, although they sometimes arise in more complex infrastructure projects.

In respect of other forms of ADR mechanisms, such as conciliation and expert determination, the vast majority of dispute resolvers (eg conciliators, adjudicators and expert valuers) are construction professionals. However, in our experience the majority of mediators tend to be legally qualified although a significant minority are construction professionals.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Arbitrators and other tribunals issuing binding decisions (eg conciliators) can only make determinations based on the parties' submissions. However, expert determinators is not limited to the parties' submissions as they are entitled to make their own investigations and use their own expert judgment.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

The UNCITRAL Model Law implemented by the Arbitration Act provides that the dispute should be decided in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute.

Unless otherwise stated, the substantive law of the contract will apply to the dispute. Where the parties have failed to designate a chosen rule of law, the arbitral tribunal can decide to determine the dispute *ex æquo et bono,* as amiable compositeur, or in equity.

5. ADR Procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

Arbitrators in Ireland must follow the due process requirements set out in Article 18 of the UNCITRAL Model Law and in the Arbitration Act. Each party must be treated with equality and must be given an opportunity to present its case.

Under Article 19 of the UNCITRAL Model Law, the parties are free to agree on the applicable rules or to have the arbitration conducted under any of the rules of the international arbitration bodies, such as the ICC.

Where there is no agreement between the parties, the relevant provisions of the Arbitration Act and the UNCITRAL Model Law will apply and the rules and procedures will be determined by the arbitral tribunal within the framework of the Arbitration Act. The powers conferred upon the arbitral tribunal include the power to determine the admissibility, relevance, materiality and weight of any evidence.

The conciliation procedures adopted in Ireland under the various standard form contracts of professional institutions would typically incorporate minimum due process rules and a right to a fair hearing.

5.2 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

Under Article 24 of the UNCITRAL Model Law as contained within, and subject to any contrary agreement by the parties, the arbitral tribunal must decide whether to hold oral hearings for the presentation of evidence or for oral arguments, or whether the proceedings shall be conducted on the basis of documents and other materials only. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if either party so requests.

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

All statements, documents or other information supplied to the arbitral tribunal by one party must be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision must be communicated to the parties.

The conciliation procedures adopted in Ireland under the various standard form construction contracts of industry bodies would typically follow a similar approach.

There are a number of industry bodies which publish construction contracts with associated conciliation clauses (although not arbitration procedures which would fall back to those in the Arbitration Act). In the public sector these can be obtained from the Irish Department of Public Expenditure and Reform.

In the private sector, the standard form construction contracts with associated arbitration/conciliation procedures linked to the Arbitration Act are typically purchased from bodies such as the Royal Institute of the Architects of Ireland (RIAI) (in conjunction with the Construction Industry Federation (CIF) and the Society of Chartered Surveyors of Ireland (SCSI) and separately Engineers Ireland (EI).

5.3 Are there rules on evidence in the laws or your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

Arbitrators in Ireland must follow the due process requirements set out in Article 18 of the UNCITRAL Model Law and in the Arbitration Act. Each party must be given equal treatment and have an opportunity to present its case.

Under Article 19 of the UNCITRAL Model Law, the parties are free to agree on the applicable rules or to have the arbitration conducted under any of the rules of the international arbitration bodies, such as the ICC. Where there is no agreement between the parties, the relevant provisions of the Arbitration Act and the UNCITRAL Model Law will apply and the rules and procedures will be determined by the arbitral tribunal within the framework of the Arbitration Act. Expert testimony is typically provided in writing, usually in the form of a report.

5.4 Is a hearing mandatory for all forms of ADR?

Under Article 24 of the UNCITRAL Model Law, subject to any agreement to the contrary by the parties, the arbitral tribunal must decide whether to hold oral hearings.

The conciliation procedures adopted in Ireland under the various standard form contracts of professional institutions would typically envisage a hearing, unless otherwise agreed between the parties.

Other ADR procedures in Ireland, such as mediation or expert determination, would also typically envisage a hearing or a settlement meeting, unless otherwise agreed between the parties, although it is not mandatory.

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) *conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules*,". Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

The principle of natural justice is recognised at law in Ireland and is given constitutional protection amounting to a constitutional right. The effect of this protection is to guarantee the basic fairness of procedures. It would therefore be imported into any FIDIC DAB hearing in Ireland and indeed all dispute resolution processes in Ireland.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

The types of experts used in construction related arbitration and litigation in Ireland would generally support disputes of a time and quantum related nature. Experts would be used in a similar manner to tribunals issuing binding decisions in Ireland.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

Experts can be appointed by an arbitral tribunal under the Arbitration Act or by the parties. Experts appointed by arbitral tribunals are not particularly common in Ireland. Expert testimony is typically provided in writing, usually in the form of a report.

If an expert is appointed by an arbitral tribunal, the parties share the related costs. If an expert is a party appointed expert, the parties are free to agree the allocation of costs (unless otherwise prescribed by the rules of the professional institution governing the arbitration).

5.8 Is the expert supposed to be independent to the parties/counsel?

The common law position would expect an expert to act objectively and independently.

5.9 Does the expert normally give written evidence or oral evidence?

Expert testimony given in arbitration and before other tribunals issuing binding decisions is typically in writing, usually in the form of a report.

5.10 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for following or not following the statement of an expert? Can part of the decision by the tribunal be "delegated" to the expert?

As previously noted, the powers conferred on an arbitral tribunal in Ireland pursuant to the Arbitration Act include the power to determine the admissibility, relevance, materiality and weight of any evidence. The weighting of any expert witness testimony and its persuasiveness or otherwise is for the arbitrator to determine.

Tribunal appointed experts are not common in Ireland. Article 26 of the Arbitration Act permits an arbitrator to appoint an expert to assist them. There are no express requirements that such an expert be selected from a particular list or that his evidence is followed.

Ultimately, arbitrators can, but are not usually bound to, give reasoning for arriving at a particular decision.

5.11 Is "hot tubbing" (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

Generally "hot tubbing" is not used in practice in Ireland although the merits of it are to be encouraged.

5.12 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

Site visits are not mandatory or required by law. The requirements for site visits in Ireland (if any) would usually be a matter for the arbitrator or conciliator, mediator, expert determinator etc, unless otherwise prescribed by the institutional rules of the professional body to which the dispute is subject.

5.13 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

There are no particular rules in Ireland in relation to the conduct of site visits. The requirement for the parties to be present or to be given an opportunity to comment on the findings of a tribunal is generally determined by the arbitrator or conciliator, mediator, expert determinator etc.

5.14 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

Witness testimonies with cross-examination are common in Irish construction arbitration. In Ireland, arbitrators can question witnesses. Such questioning generally follows after the witness has given his or her testimony.

There are generally no distinct rules relating to the admissibility of a testimony, although Section 14 of the Arbitration Act gives the arbitral tribunal discretion to direct that a witness who gives evidence in arbitral proceedings be examined on oath or on affirmation. The value of testimony given and its persuasiveness is generally a matter for an arbitrator to determine.

In conciliation and mediation, direct oral testimony is more common and cross-examination generally does not feature.

5.15 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

The broad principles of evidence as outlined above apply to arbitration and other tribunals issuing binding decisions, such as conciliation.

Under Article 19 of the UNCITRAL Model Law the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Failing such agreement, the arbitral tribunal may, subject to the provisions of the UNCITRAL Model Law, conduct the arbitration in such a manner as it considers

appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Generally, other types of tribunals issuing binding decisions have a discretion in weighing evidence, subject to the common law rules of natural justice which would arguably apply.

6. Interim Measures and Interim Awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

In Ireland, an arbitrator can grant interim measures to a party under Article 17 of the UNCITRAL Model Law.

This will include preserving evidence that may be relevant and material to the resolution of the dispute; maintaining or restoring the status quo pending determination of the dispute; preventative measures and preserving assets out of which an award might be satisfied.

The conditions for granting such interim measures are set out in Article 17A of the UNCITRAL Model Law. Interim measures will be recognised and enforced by the courts. The Irish High Court retains its own powers to grant interim measures where a party applies for such interim measures.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (g) decide upon any provisional relief such as interim or conservatory measures (…) The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

The Irish courts here, in interpreting contracts, will look to the intention of the parties, particularly in light of the language they have used, considered in the light of the surrounding circumstances and the object of the contract in question. The interpretation is generally one of business common sense or a commercially sensible construction.

The courts will also apply the *contra proferentum* rule, so that the meaning is construed against that of the drafter. If the clause is not clearly intended to be final and binding, the courts are not likely to find it as such.

The Irish High Court retains its own powers to grant interim measures where a party applies for such interim measures. Such powers could arguably be invoked, for example, in the context of preventing a party seeking to enforce a decision which was not intended to be final and binding and subject to meeting the other general criteria in relation to the applications for such interim measures.

7. Awards, Decisions, Recommendations, Negotiated Agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

An arbitration award is enforceable in Ireland in the same way as a judgment, either by action or leave of court. There are a number of formal requirements prescribed under the UNCITRAL Model Law, as adopted by the Arbitration Act. The award must be in writing, signed, dated and state the place where it is made. A signed copy must be given to each party by the arbitrator. It is recognised as binding, irrespective of the country in which it is made and must be enforced subject to the provisions of Articles 35 and 36 of the UNCITRAL Model Law which sets out the rules for enforcement and recognition of arbitral awards.

A conciliation decision is binding once it complies with requirements of the institutional rules in relation to same. In this regard, it must typically be in writing and provided to both parties.

All written mediation agreements can be enforced through the courts. The Mediation Regulations provide a time limit on applications for enforcement of mediation agreements (six years from the conclusion of the mediation).

Most expert determination provisions are typically drafted to be final and binding upon the parties. Clear and concise drafting language with a reference to the procedure being final and binding should be included for it to be enforceable by the courts. It should specify when or how the procedure is completed. In Ireland, expert determination is governed by common law principles rather than statute.

A conciliator's recommendation or expert determinator's award in Ireland is enforced in a similar manner to that of a mediation agreement described above,

In relation to DAB decisions, unless the operative clause leading to such decisions is drafted so that it is clearly intended that such decisions will be final and binding, the courts are not likely to find it to be so. As far as we are aware, the Irish courts have not expressly addressed such issue to date.

7.2 Does the award or binding decision have to be reasoned?

An arbitration award in Ireland must set out the reasons for the award, unless the parties have agreed otherwise. Most binding decisions in Ireland tend to be reasoned.

Conciliation decisions do not always have to be reasoned, depending on the rules of the professional institution.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

There is no express provision in the Arbitration Act for dissenting opinions. The Arbitration Act envisages that unless otherwise agreed by the parties, the arbitral tribunal shall consist

of one arbitrator only. Sole arbitrators are generally more typical in Ireland and so dissenting opinions are less likely to arise. In arbitrations with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal are sufficient, provided that the reason for any omitted signature is stated. This is set out in Article 31(1) of the UNCITRAL Model Law.

Conciliation, mediation and expert determination are generally carried out by one individual and therefore such a situation does not typically arise.

On DABs, as these typically comprise 3 people, there is the possibility of a dissenting view although DAB decisions tend to be unanimous.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

In Ireland, Article 33 of the UNCITRAL Model Law provides that a party has 30 days within which to ask the arbitral tribunal to correct an error (computational, clerical or typographical) or to provide an interpretation of a part of an award.

If the arbitral tribunal believes that the request is justifiable, the arbitral tribunal must make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

Unless otherwise agreed by the parties, a party may, upon giving notice to the other party, request within 30 days of receipt of the award the arbitral tribunal to make an additional award as to claims presented at the arbitration but omitted from the award. If the arbitral tribunal considers the request to be justified, they shall make the additional award within 60 days.

Additional awards must be in writing, signed, dated, noting the place of the arbitration and should be delivered to each party by the arbitral tribunal. The arbitral tribunal may, at their discretion, extend the time limits for an additional award or corrections to the original award.

8. Enforcement of and Challenges to Awards and Decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

In Ireland, a party can apply to the High Court to enforce an arbitral award, provided for under Section 23 of the Arbitration Act. This is done by way of summary procedure on affidavit evidence only. The party relying on an award or applying for its enforcement must supply the original award or a copy of such an award. If the award is not made in English, the Court may request the party to supply an English translation of the award. When leave is obtained, judgment may be given in the terms of the award. Unless agreed otherwise by the parties, it will be treated as binding on the parties. The Irish courts take a positive view towards arbitral award enforcement.

A conciliator's recommendation or expert determinator's award in Ireland is enforced in a similar manner to that of a mediation agreement described above,

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

It is our view that in Ireland it is unlikely that the New York Convention would allow recognition and enforcement of a FIDIC Red Book DAB-type award to be the equivalent to an arbitral award, even through contractual arrangement.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

The process for the recognition or enforcement of a foreign arbitral award is governed by the New York Convention, which forms part of existing arbitration law in Ireland.

Article III of the New York Convention is applicable in Ireland and provides that New York Convention States such as Ireland must recognise arbitral awards as binding and enforceable within the rules of procedure of the particular state. More onerous conditions or higher fees cannot be charged on the recognition or enforcement of foreign arbitral awards.

Therefore if another country's award meet all the above requirements, it could be enforced in the manner as set out above.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

In the absence of a DAB decision having gone through arbitration it is unlikely that the courts will enforce any decision which was not clearly intended to be final and binding. Equally, while it remains to be determined, the courts may look at such decision in the case of fraud, failure to follow minimum due process or other serious irregularity.

8.5 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

In Ireland, expert determination is governed by common law principles rather than statute. An expert determination is unlikely to be subject to review on the merits under Irish law although it remains to be determined it may be the case that , the courts may look at such decision in the case of fraud, failure to follow minimum due process or other serious irregularity.

9. Trends and Developments

9.1 Please comment on any new trend or developments relating to ADR in construction in your country.

Conciliation and mediation have become increasingly important in Irish construction dispute resolution as they are viewed as providing time and cost efficiencies.

The Arbitration Act is also seen as creating potential cost savings for the parties, as it permits the parties to agree the allocation of costs and in addition, provides the ability to consolidate claims, which would also have the ultimate effect of saving costs. The introduction of the UNCITRAL Model Law is also seen as a positive development in harmonising the domestic and international arbitration law and procedures which will apply in Ireland. This, together with Ireland's location and skilled pool of arbitrators is seen as positioning it well as a suitable location for a seat for international arbitration, particularly in a European context.

Equally, parties to construction disputes may very often end up adopting several strategies whereby they seek redress through the courts or arbitration but at the same time attempt some form of facilitative ADR, such as mediation or conciliation, as well.

Mediation is becoming increasingly important due to significant support from the Irish judiciary (particularly from the Commercial Court) and the Irish legislature. The civil procedure rules governing matters which make the Commercial Court List entitle the High Court to adjourn litigation to enable the parties to consider mediation for the resolution of their dispute.

The courts in general take a very supportive role to ADR of construction and other disputes in Ireland and have encouraged the use of ADR by the parties where appropriate. The courts are unlikely to interfere in ADR processes except where such intervention is prescribed by law or is in the interests of natural justice.

A survey conducted by CEDR Ireland in association with ICMA dated 21 March 2013 has found that mediations have increased by over 700% from 2003 to 2012. The survey also found that there is a trend for mediations to become somewhat more legalistic and consequently more adversarial, with an increasing emphasis on submissions. The survey also found that mediators are expected to be more evaluative.

This also feeds into another theme we are seeing in Irish construction dispute resolution whereby the processes are being expanded to afford the parties greater control.

As noted above, statutory adjudication is being introduced in Ireland through the Construction Act. Given that the timescales are short, adjudication is generally considered less expensive than prolonged litigation. This new development is likely to have a significant impact on construction dispute resolution in Ireland and it will be interesting to see how processes such as arbitration and conciliation will be affected.

In general, ADR is playing an increasingly important role in construction dispute resolution in Ireland today. Even where an agreement has not been reached during the process itself, in practice, it is often seen to lead to a subsequent settlement or the narrowing of issues that are in dispute between the parties.

10. Other Important Issues

10.1 Please comment on any other important topics affecting ADR in construction in your jurisdiction.

A focus on up-skilling and training to meet new statutory requirements will be essential in order to deliver the quality of services required by parties in construction disputes.

The Arbitration Act represents a unique consolidation of domestic and international arbitration law since 1954. Interesting jurisprudence is now developing since its implementation which will be of relevance to the wider international arbitral community, given its application of the UNCITRAL Model Law.

A draft general scheme of a Mediation Bill was published in March 2012 by the Irish Department of Justice. The aim of the Mediation Bill is to encourage and facilitate the use of mediation in resolving civil, commercial and family disputes. The Mediation Bill is being progressed prior to its publication anticipated later in 2013.

A draft Mediation and Conciliation Bill 2010 was proposed by the Law Reform Commission in their *Report on Alternative Dispute Resolution: Mediation and Conciliation* (2010) which had a much wider ambit. The conciliation aspects of this have not yet been adopted in any draft legislation published by the Irish legislature.

Construction contracts often contain dispute resolution clauses requiring several tiers of dispute resolution processes, typically culminating in arbitration or court litigation. The use of such processes often results in early resolution of disputes that might otherwise not be resolved short of a final award or judgement. Increasingly, however, there is the exploitation of tiered dispute resolution clauses to frustrate rather than encourage the resolution of disputes.

Related professional negligence and insurance matters are likely to be areas of growth for ADR in the coming years.

The introduction of statutory adjudication in Ireland is likely to be a “game changer” in the construction industry and potentially adjudication may become a serious alternative to conciliation and arbitration.

Again, this mirrors the general shift towards facilitative dispute resolution mechanisms in Ireland and the move away from the more traditional redress options of litigation and arbitration. This is particularly the case in projects and construction matters.