IN-DEPTH

Construction Disputes

IRELAND

LEXOLOGY

Construction Disputes

EDITION 5

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In-Depth: Construction Disputes (formerly The Construction Disputes Law Review) is a useful guide to the most consequential aspects of international construction disputes, highlighting the practical implications of the relevant case law, statutes and procedures. Topics covered include time bars as condition precedent to entitlement; right to payment for variations; concurrent delay; suspension and termination; penalties and liquidated damages; defects correction and liabilities; overall liability caps; and much more.

Generated: November 24, 2025

Ireland

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Summary

Introduction

Ireland is a common law jurisdiction, developing its laws both from within the jurisdiction and from other similar jurisdictions, principally England and Wales. The Constitution, Acts of Parliament, statutory instruments, regulations and European Union legislation all have legal validity. Standard construction contracts in Ireland normally provide alternative forms of dispute resolution procedures, such as mediation, conciliation, arbitration, etc., rather than more formal litigation proceedings, with the natural consequence that there is a relatively small pool of decisions relating to construction disputes emanating from the Irish courts. Consequently, the decisions arising in the courts of England and Wales, particularly the Technology and Construction Court, are closely followed in Ireland. However, with the advent of statutory adjudication in the jurisdiction, a developing body of case law is continuing to emerge in relation to issues of enforcement and interpretation of the Construction Contracts Act 2013 (CCA).

Year in review

The year 2025 proved to be interesting for the evolution of construction adjudication enforcement proceedings, with not just one but two significant cases brought before Justice Simmons at the High Court. Both of which, bucking the trend of recent years, were denied, the first for grounds related to the procedural issuance of the notice of intention to refer to adjudication and the second concerned whether the matter was in fact a 'payment dispute' and therefore a valid dispute capable of adjudication under the Construction Contracts Act 2013 (the Act).

First, *Tenderbids trading as Bastion v. Electrical Waste Management Ltd*[1] concerned the delivery of a notice of intention to refer a payment dispute to adjudication and whether such notice, delivered by email, was a valid means of delivery, where the parties had agreed in contract that such notices were to be delivered by registered post and if such a method invalidated the adjudication process itself.

Section 10 of the Act governs the method of delivery of notices as follows: '(1) The parties to a construction contract may agree on the manner by which notices under this Act shall be delivered. (2) If or to the extent that there is no such agreement, a notice may be delivered by post or by any other effective means.'

The parties contracted under an RIAI (Yellow Form) (August 2017 edition). The articles of agreement provide as follows at Clause 5:

> As allowed under s10 of the Construction Contracts Act 2013 (CCA) all notices arising under the CCA shall be delivered by registered post. Notwithstanding this, a payment claim notice under s4 of the CCA may be delivered by the Contractor to the Architect by means of email to the email address stated in the Appendix with effectiveness of delivery at the risk of the sender. Note: The Parties further agree that the Architect may notify the Contractor of a change of email address after this agreement is made. s4 of the CCA provides for 'another person specified under the construction

> contract'; the Architect is the person referred to as 'another person' specified under this construction contract.

Tenderbids referred a payment dispute to adjudication and issued the notice of intention to refer by email to directors of Electric Waste Management.

The Construction Contracts Adjudication Service (CCAS) nominated and appointed the adjudicator. In any event, the respondent did not participate in the adjudication process.

The adjudicator continued regardless and issued their decision directing payment of €1,531,580.85 and found that the referring party had issued a valid notice of intention to refer by way of email.

The case rested on the question as to the validity of the notice of intention to refer by way of procedural issuance. J Simons set out his considerations on the Principles of Statutory Interpretation as restated by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála*[2] (*Heather Hill*), noting Murray J's emphasis that:

> the literal and purposive approaches to statutory interpretation are not hermetically sealed. In no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.

The parties both submitted that the notice of intention to refer was not delivered in the contractually prescribed manner; however, the applicant contested that such was 'not fatal'.

The applicant further submitted that a reservation of rights to bring a jurisdictional challenge as to the adjudication process at the earliest opportunity should have occurred.

The respondent brought the court's attention to the 'sequential framework' under the Act, supporting the position that the adjudicator's jurisdiction is dependent upon a validly served and contractually compliant notice of intention. In this instance, a validly served notice of intention demanded it to be delivered by registered post and that the statutory intent of the legislature is to maintain the parties' contractual freedom.

J Simons found the proposition that 'it is sufficient to ground a valid adjudication process that the notice of intention to refer has been delivered by any effective means' to be in opposition to the first subsection of Section 10 of the Act.

> Under the applicant's argument, the section must be read as if it provided that a notice may be delivered by post or by any other effective means notwithstanding that the parties to a construction contract have agreed on the manner by which notices under the Act shall be delivered. This necessitates displacing the clear language of the section.

J Simons did not accept that approach and commented that 'There is nothing in the Act which authorises the court to dispense with the prescribed method of service agreed by the parties'.

As to the argument that an early reservation of rights should have occurred at the earliest opportunity, J Simons found:

> The implication of this submission seems to be that the respondent should have engaged with the adjudication process to the extent of raising an objection that the adjudication process was invalid. With respect, there is no such requirement. The entire adjudication process was a nullity in consequence of the failure of the applicant to deliver a notice of intention to refer in the manner prescribed. The respondent was not obliged to engage with a nullity.

J Simons also noted that case law from England and Wales related to similar legislation should be approached with 'a degree of caution' as domestic legislation must be interpreted on its own merits.

In conclusion, where an adjudicator's jurisdiction is derived from the notice of intention to refer, such should be issued validly as failure to do so renders the adjudicator's jurisdiction invalid and any adjudicator's decision reached in the absence of jurisdiction is a 'nullity'.

Second, *Albert Connaughton v. Timer Frame projects Ltd T/A Timber Frame Ireland*-[3] concerned the principle of whether a claim by an employer for damages, made consequential to the termination of a construction contract for repudiatory breach, compromise a payment dispute under the Act.

J Simons also addressed two additional issues: did the adjudication itself comply with fair procedures; and whether the contract should be regarded as illegal due to the works not having the benefit of planning permission.

Once again, the Court required determination as to whether the adjudicator did have jurisdiction over the 'underlying dispute' as the applicant contended that the 'the underlying dispute is not one which is amenable to statutory adjudication. It is contended that a dispute relating to payment must have its foundation in a particular term under the construction contract which allows for such a claim for payment to be made.'

The objection to enforcement was grounded in the argument that a payment dispute under the Act must have its origin in a term of the contract that permits such a payment claim to be made.

J Simons once again turned to the *Heather Hill* case in recalling the principles governing the interpretation of legislation, noting that:

> the court must construe those words having regard to (i) the context of the section and of the Act in which the section appears, (ii) the pre-existing relevant legal framework and (iii) the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this.

J Simons continued to note that Section (6)1 of the Act confers the right to refer a dispute to statutory adjudication: 'A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a 'payment dispute').'

He also noted that it is not 'every dispute' that can be referred to adjudication, rather it must be related to payment and considered what 'payment' signifies. The Act does not define what 'payment' is; however, Section 1 offers a definition of a 'payment claim', 'meaning a claim to be paid an amount under a construction contract'" and noted that it must be read with Section 3, which 'stipulates that a construction contract shall make provision for the amount of, and timing of, each interim payment and the final payment under the construction contract'.

A payment can capture any type of payment stipulated under the construction contract. J Simons provided the example of clauses dealing with termination of the contract as per the RIAI Contract (Blue Form) but stopped short when considering that 'However, the concept of a "payment" is not apt to embrace common law damages for breach of contract.'

J Simons found that the right to refer a dispute to adjudication is 'confined to circumstances where the dispute relates to a payment which is provided for under contract.' This is essential for a referral to adjudication to be valid.

The judge also clarified that the dispute is not entirely confined to just this, noting that a responding party is entitled to raise any defence or set-off that could reduce or extinguish any liability for a contractual payment due, noting that Section 4 of the Act enshrines this entitlement in response to a payment claim notice.

However, the judge summarised that this entitlement does not extend to a claim for common law damages for breach of contract and discussed how a broad interpretation of the concept of a 'dispute relating to payment' is not to be applied under the Act.

J Simons discussed how the approach and case law in other jurisdictions, notably Australian states and territories and Singapore, must be treated with caution and is not to be 'read across' to the Act.

> The gravamen of the employer's case is that the phrase 'dispute relating to payment' should be interpreted as encompassing any dispute the outcome of which will have a bearing on the amount of money to be paid by one party to another under a construction contract. With respect, this contended-for interpretation necessitates construing the term 'payment' in a manner that is both contrary to its ordinary and natural meaning and to the meaning that the term bears in the preceding sections. The concept of a 'payment' under a contract is not synonymous with 'monetary damages' or 'financial consequences'. The legislative context indicates that 'payment' refers to a payment provided for under a construction contract (i.e., a payment that is expressed or stipulated in the terms of the contract).

In relation to the specifics of the contract, there was no provision for termination payments within the contract. Also important in this matter is that the respondent did not participate in the adjudication process, and the applicant sought compensation for consequential

losses incurring from the alleged repudiatory breach of the construction contract by not completing the house by an extended deadline.

J Simons found that it was not a type of dispute applicable to statutory adjudication.

> The crucial point for present purposes is that the dispute, which had purportedly been referred to adjudication, did not relate to a payment provided for under the construction contract. There was no clause under the construction contract which made provision for payment to the employer in the event of wrongful termination by the contractor.
>
> Having regard to the wording of section 6 of the Construction Contracts Act 2013, the distinction between termination of a construction contract by way of the acceptance of a repudiatory breach at common law, on the one hand, and by way of the exercise of a contractual right to terminate, on the other, is of crucial importance. The right to refer a dispute to statutory adjudication only arises in the case of the latter. The dispute in the present case is not a payment dispute. It follows that the adjudicator did not have jurisdiction under the Construction Contracts Act 2013 to entertain the claim and that the adjudicator's decision is a nullity and cannot be the subject of an enforcement order under section 6(11) of the Act.

The alleged breach of fair procedures issue required consideration of whether or not there was a blatant or obvious breach to the extent that enforcement of payment would be unjust. J Simons referred to the *John Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3 (at paragraphs 9 to 12)

The respondent contended that the adjudicator should not have continued with the process where the referring party had refused to grant an extension of time and that failure to regard potential matters of defence amounted to a breach of fair procedures.

The respondent sought an extension of time to the adjudication process, which the adjudicator correctly stated could only be granted by the referring party, which was not granted. The respondent contended that the adjudicator should have resigned, which was not accepted by the court, which considered that the adjudicator issued a fair and reasonable timetable.

The court found that: 'In truth, the contractor/respondent failed to submit a response to the claim within the time period specified by the adjudicator.' And therefore, the court dismissed the argument that failure to regard potential matters of defence amounted to a breach of fair procedures.

J Simons noted that where a party failed to participate despite having been given a reasonable opportunity to do so, the adjudicator was entitled to continue the process in their absence.

The judge reiterated the position, as explained in *John Paul Construction Ltd*,[4] that 'the court will not be drawn into a detailed examination of the underlying merits of an adjudicator's decision under the guise of identifying a breach of fair procedures.'

The issue as to whether the contract should be regarded as illegal due to the works not having the benefit of planning permission was found that:

> It is not necessary, for the purpose of resolving the present proceedings, to determine the proper interpretation of the planning permission. This is because even on the assumption that the carrying out of the works would have involved a breach of planning permission, this would not justify the refusal of leave to enforce the adjudicator's decision. As explained below, the construction contract is not void or unenforceable.

As to whether public policy requires that an illegal contract should be regarded as void required a determination as to the relationship between the relevant illegality of the transaction in order for it to be sufficiently 'tainted' for it to be void or unenforceable. In this instance J Simons found that: 'Here, the construction contract is lawful on its face: the contract does not purport to do something which is prohibited by the planning legislation.'

J Simons concluded that:

> The dispute in the present case is not a payment dispute. It follows that the adjudicator did not have jurisdiction under the Construction Contracts Act 2013 to entertain the claim and that the adjudicator's decision is a nullity and cannot be the subject of an enforcement order under section 6(11) of the Act. Accordingly, the relief sought in these proceedings must be refused in its entirety.

A notable case related to the Mediation Act of 2017 (the 2017 Act) came before Justice Twomey in the Commercial Court, *V Media Doo & First Click Marketing Operations Management Limited v.Teachads Media Ltd*.[5]

Section 14(1) of the 2017 Act requires that a solicitor can only issue court proceedings on behalf of their client specifically in circumstances that mediation advice has been given to a client and set outs what advice must be given before the client considers litigation.

Section 14(2) requires that should litigation be commenced, evidence of such advice must be provided by way of a statutory deceleration (mediation declaration). Failure to provide such requires that the court must adjourn the proceedings. Effectively, a court must seek evidence that a plaintiff was correctly advised to consider mediation instead of litigation before the court will hear an action.

The judge recognised that such measures are a restriction on the constitutional right of the courts; however, the legislature is encouraging parties to consider that litigation is the last resort as opposed to the first.

In this case, no mediation declaration was issued prior to the commencement of the court hearing. One was issued at the hearing and the court found:

> the Court was provided with a copy of a Mediation Declaration that had just been sworn. However, this declaration did not, and could not, retrospectively remedy the breach of the 2017 Act, since the proceedings in this case had been instituted, without being 'accompanied by' the Mediation Declaration, and so in direct contravention of s 14(2) of the 2017 Act.

J Twomey noted that the legal advice to be given is comprehensive and not a 'box ticking exercise for solicitors'.

The task that solicitors have been set by the Oireachtas should not be underestimated. In particular, under Section 14(1)(a) and Section 14(c)(i) of the 2017 Act, the solicitor must advise the client on the 'advantages of resolving the dispute otherwise than by way of the proposed proceedings' and on the 'benefits' of mediation. Solicitors are being asked to act in a way, which it could be argued, is contrary to the solicitor's financial interest. This is because the Oireachtas has set solicitors the onerous task of advising plaintiffs on the benefits of mediation, which must include the very considerable financial benefits of mediating, rather than litigating. Thus, a solicitor would, it seems, be required to explain to the client that the legal fees for a successful mediation (e.g., over a month or two) are likely to be a fraction of the legal fees generated over, say, four years of litigation (i.e., issuing various proceedings, making and defending pre-trial applications, discovery, undergoing a trial and then an appeal). This is particularly so since High Court legal costs have been described as 'prohibitive' and so a considerable financial negative for the client. Though, prohibitive fees might be regarded as a financial positive for recipient of those fees – the lawyers.

The judge commented that mediation is an opportunity for a 'reality check' of a claim before it comes before a court.

> Mediation, therefore, offers a great opportunity for a reality check regarding firstly the likelihood of a litigant's claim being successful and, second, even if it is, a reality check regarding the likelihood of a litigant obtaining anything close to the sums claimed.

In this case, there was no mediation and therefore no 'reality check'. In the circumstances of a claim of circa US$2.5 million, a counterclaim of circa US$1.8 million and estimated costs exceeding €1 million, a reality check would have been of great benefit, more so considering the judge found neither party were entitled to any award.

J Twomey thus summarised the issue:

> This case should therefore act as a salutary lesson for all plaintiffs, when they receive the advice to consider mediation instead of litigation (which the 2017 Act obliges their solicitor to provide to them), that they do seek to undergo the reality check of mediation. This is because the 2017 Act makes clear that litigation should be the option of last resort, rather than first resort, when it comes to resolving disputes.

Courts and procedure

Fora

The Irish civil court system is tiered by monetary value, as follows:

1. district court: €2,000 in small claims or claims of up to €15,000;
2. circuit court: claims of between €15,000 and €75,000 (€60,000 in personal injury claims); and
3. High Court: claims above €75,000 with no upper limit.

There is no specialist construction component in the mould of the United Kingdom's Technology and Construction Court. However, the Irish High Court does operate a distinct division, the Commercial Court, which deals with all types of business disputes, including breach of contract, tort, property, trust and probate, IT disputes, judicial review, corporate mergers, global restructuring, insurance portfolio transfers, international swaps and derivatives or other investment disputes, and intellectual property disputes. This Court also includes a specialist sub-list called the Intellectual Property (IP) and Technology List, which under the amended Order 63A includes any IP proceedings or those related to issues of 'technological complexity on any field of industry'. There are also related specialist lists dealing with competition cases, arbitration matters, strategic infrastructure developments and insolvency. Proceedings dealt with by the Commercial Court must have a commercial dimension and generally a value of no less than €1 million. In response to the advent of construction adjudication, the High Court issued Practice Direction HC 105 in April 2021.

Jurisdiction

Construction contracts commonly include multi-tier dispute resolution clauses, yet there is scant authority regarding the enforceability of such clauses, except for matters addressing ambiguous clauses rather than the substance of the clauses' principles themselves. A well-drafted multi-tiered dispute resolution clause is therefore likely to be enforced in Ireland.

Irish courts are keen to encourage parties to explore alternative dispute resolution (ADR) options, particularly mediation and arbitration.

In *John G Burns v. Grange Construction and Roofng Co Ltd*,[6] Ms Justice Laffoy observed that, 'it would be infinitely preferable if the dispute between the applicant and the respondent was resolved by some process of alternative dispute resolution, rather than by litigation'.

In Ireland, the Mediation Act 2017 is a statutory framework designed to 'facilitate the settlement of disputes by mediation, to specify the principles applicable to mediation [and] to specify arrangements for mediation as an alternative to the institution of civil proceedings'. Section 16 of the Act provides that a court may, on its own initiative or on the initiative of the parties, invite the parties to consider mediation as a means of resolving the dispute.

Procedure rules

It is common that construction disputes are contractually restricted from litigation under most Irish standard forms of contract, which typically provide for disputes to be referred to conciliation or arbitration (the CCA 2013 introduced a statutory right to adjudication). As

mentioned above, the courts prefer ADR and will invoke the Mediation Act 2017 if deemed appropriate. However, if a party desires its day in court, the High Court, or particularly the Commercial Court, is the most likely venue, subject to the monetary thresholds described above.

Evidence

Discovery of documents occurs once the pleadings have closed. The rules governing this process are set out in Order 31 of the Rules of the Superior Courts. The parties issue written requests for voluntary discovery of specific categories of documents currently or previously in their possession, power or procurement that are relevant to the dispute. This request must comply with the following requirements:

1. parties must stipulate the exact categories of documents that they require;
2. requests must be confined to documents that are material to the issues in dispute and necessary for the fair disposal of the proceedings or for saving costs; and
3. a reasonable amount of time must be provided for discovery to be made.

The Commercial Court rules provide that the parties serve factual and expert witness evidence in signed and dated statements, which is considered to be their evidence-in-chief at the hearing. Witnesses undertake examination-in-chief and cross-examination. Although cross-examination can be by affidavit evidence, a notice to cross-examine must be served in advance.

Statutory Instrument 254/2016 gives High Court judges power to regulate experts' duties and how expert evidence can be adduced. These rules also provide for hot tubbing, where experts are cross-examined concurrently. The court can also request that the experts meet privately (without the presence of any party or legal representative), with a view to providing a joint statement setting out points of agreement and, more importantly, areas of disagreement.

Alternative dispute resolution

Statutory adjudication

Statutory adjudication is provided for under the CCA 2013. Although the Act is dated 2013, it did not provide for the advent of adjudication in Ireland until 25 July 2016, with the passing into legislation of certain statutory instruments. As discussed above, the adjudication process has been endorsed in the Irish courts and its presence in the construction disputes sector continues to grow.

Arbitration

The Arbitration Act 2010 (2010 Act) confers on parties the freedom to choose the governing law of their contract, the law of the arbitration agreement, the seat of the

arbitration, the arbitral rules, the choice of arbitrators and the language of the contract and arbitration.

If the parties do not agree the number of arbitrators or the appointing body in their arbitration clause, the 2010 Act provides that the arbitral tribunal will consist of one arbitrator and the High Court has the power to appoint the arbitrator in the absence of an alternative agreement.

As is the norm internationally for three-member tribunals, each party appoints one arbitrator and the two appointed arbitrators will appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made by the High Court. The 2010 Act incorporates the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (UNCITRAL Model Law), and so its provisions will apply to arbitration proceedings under the 2010 Act unless the parties agree to use another set of ad hoc or institutional rules. As Ireland is a signatory to the 1958 New York Convention, an arbitral award, irrespective of the country in which it was made (provided that country is a signatory of the New York Convention), must be recognised and enforced in Ireland unless one of the grounds set out in the Model Law exists.

In *Achill Sheltered Housing Association CLG v. Dooniver Plant Hire Ltd*,[7] the High Court granted an order determining that the appointment of an arbitrator had been invalid, as the matters referred to arbitration had not previously been referred to conciliation as required under the contract.

In *XPL Engineering v. K & J Townmore Construction Ltd*,[8] the High Court stayed proceedings and ordered that the matter be referred for arbitration. This is consistent with Article 8(1) of the UNCITRAL Model Law whereby, in circumstances where there is a valid and binding arbitration agreement and one of the parties so requests, the court must refer the dispute between the parties to arbitration.

In *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board-*,[9] the High Court found that the conditions of Article 8(1) were not met because a later agreement between the parties to refer the dispute for expert determination had rendered the conciliation and arbitration clauses in the original building contract void.

As discussed above, the Courts and Civil Law (Miscellaneous Provisions) Act 2022 of 5 July 2023 paves the way for third-party funding in international arbitration matters. Previously, third-party funding of almost any manner was illegal in Ireland.

All arbitration in Ireland, both domestic and international, is governed by the 2010 Act.

Mediation

The Mediation Act 2017 encourages parties to settle their disputes at mediation, as opposed to in lengthy and costly litigation proceedings. Although the Mediation Act is not associated with the Arbitration Act 2010, it can bear on the arbitral process, up to the point when expert reports have been presented and a range of outcomes that could arise from the dispute resolution proceedings have been determined. Instigating mediation at this point, rather than continuing with the arbitration hearing (or hearings), can allow parties to resolve their disputes in a more time-efficient and cost-friendly manner.

Other ADR methods

In Ireland, conciliation is primarily used for the resolution of disputes in the construction industry and continues to play an important role in ADR. The local construction disputes sector is intimately familiar with the process, a familiarity garnered over many years of experience.

Conciliation is a voluntary process, entirely dependent on the parties agreeing to adopt it. It allows the parties to a dispute to determine a mutually agreeable solution without a requirement for a third party to determine and enforce a decision, such as in adjudication and arbitration. As it is a voluntary process (unless contractually mandated), the parties are able to withdraw at any time prior to an agreement being signed.

During the process, the conciliator is not able to pass information between the parties unless instructed to do so. The conciliator will only issue a recommendation on the settlement if the parties cannot reach an agreement. This advice will contain the conciliator's opinion on how the dispute should be resolved (although ordinarily without reasoning), which will not be limited in its scope, unless the parties' contracts specify otherwise (and they often do).

Most standard forms of Irish construction contract require the parties to engage in conciliation before referring a dispute to arbitration, litigation or another form of dispute resolution. Traditionally, the majority of construction disputes are settled at this stage of the process. However, with the advent of statutory adjudication, and if the Irish experience is to be similar to that in the United Kingdom, the use of conciliation may diminish in the years ahead while adjudication grows.

Construction contracts

Public procurement

The substantive procedural rules that apply to public procurement in excess of EU thresholds are contained in four pieces of legislation:

1. the Public Contracts Regulations,[10] which implement Directive 2014/24/EU into Irish law;
2. the Utilities Regulations,[11] which implement Directive 2014/25/EU into Irish law;
3. the Concessions Regulations,[12] which implement Directive 2014/23/EU into Irish law; and
4. the Defence Regulations[13] (as amended), which implement Directive 2009/81/EC into Irish law.

The guidelines setting out the remedies for a breach of the substantive procurement rules are governed by several regulations (collectively, the Remedies Regulations).

The Capital Works Management Framework includes standard procurement documents, model forms and works contracts, as well as guidance notes, which apply to the conduct of public sector capital works projects in Ireland, with a number of different award procedures. Under the Public Contracts Regulations, open and restricted procedures may be relied on. The competitive procedure with negotiation and the competitive dialogue procedure are available only in the circumstances prescribed in the Public Contracts Regulations. The open procedure is the most common procedure for public sector bodies, and the negotiated procedure is the most commonly used procedure in Ireland for utilities.

For above-threshold contracts, there are three principal sets of remedies regulations applicable to the public sector, the utilities sector and the award of concessions contracts, respectively:

1. the Public Contracts Remedies Regulations;[14]
2. the Utilities Remedies Regulations;[15] and
3. the Concessions Remedies Regulations.[16]

Contracting authorities are obliged to undertake a standstill period between giving notice of the contract award decision and the reasons for the decision to the unsuccessful bidders and entering into the contract. A minimum standstill of 14 days commences on the day after the notice is sent electronically.

For an application for remedies, the Remedies Regulations apply a strict 30 calendar days after the applicant was notified of the decision. A declaration that the contract is ineffective must be applied for within six months of the conclusion of the relevant contract. Although the High Court has the power to extend the limitation period, it takes a restrictive approach and is disinclined to use its power to grant applications for time extensions.

For ordinary judicial review proceedings, applications to set aside a decision must be made within three months of the date when the grounds for an application occurred. The High Court can extend this duration for good reason; however, again the courts take a restrictive approach to granting time extensions.

While the normal limitation period for an application for a declaration of ineffectiveness is six months under the Remedies Regulations, it can be reduced to 30 calendar days under specific circumstances.

The High Court has the power to set aside a decision or declare a reviewable public contract ineffective, and it can impose alternative penalties on a contracting authority or may make any necessary consequential order. It may also make interlocutory orders to correct an infringement, prevent any further damage or suspend the operation of a decision or a contract, and may award damages as compensation for resulting loss. While it is possible for a review application to be heard within six months, the more likely time frame is 12 months or more, depending on complexities.

Contract interpretation

Irish case law stresses that contract interpretation involves broad principles rather than strict rules. When interpreting the meaning of a contract, the court's first step will be to consider the natural and ordinary meaning of words (textualism), but if the natural

meaning remains unclear, a court may consider the commercial context (contextualism) to determine the meaning.

Irish case law suggests that a court in Ireland would not solely consider the words in isolation but would weigh the factual matrix and the circumstances under which a contract was negotiated and drafted, although care must be taken against placing too much emphasis on giving effect to commercial efficacy. As Robert Clark, an expert in contract law and the author of *Contract Law in Ireland*,[17] has warned, it is not the job of the court to impose contractual terms that were not intended, and 'there can be a fine line between interpreting a contract in a way that fixes a meaning that is commercially sensible and adjusting the meaning to improve the contract'.

Irish courts have an obligation to interpret the contract objectively, regardless of the subjective intention of the parties. The public policy behind this approach is readily understood: to avoid wholly different interpretations that could be given to two similar contracts where the parties to each contract had different subjective intentions. In explaining the objective approach that courts must take to contractual interpretation, Laffoy J put it succinctly in *UPM v. BWG*[18] as follows:

> The Court's task is to ascertain the intention of the parties and the intention must be ascertained from the language they have used considered in light of the surrounding circumstances and the object of the contract . . . in attempting to ascertain the presumed intention of the parties the Court should adopt an objective, rather than a subjective approach, and should consider what would have been the intention of reasonable persons in the position of the parties.

Parol evidence may be admissible to explain the subject matter and construction or correct a mistake in commercial contracts, but not to prove the validity of a contract.

Ambiguous contract clauses should be construed strictly against the party who provided the wording, in accordance with the *contra proferentem* rule, and provided that there is an element of ambiguity in respect of the relevant clause for the rule to apply.

The courts may imply terms into a contract. Implied terms are provided for by case law and certain statutes, such as the Sale of Goods Acts of 1893 and 1980.

In a recent Court of Appeal decision, the Court held that terms implied into a commercial contract must:

1. be necessary to give business efficacy;
2. be so obvious that it is implied; and
3. give effect to the parties' intentions.

This followed on from an earlier decision in which the Court of Appeal found that an agreement was so imprecise and lacking in substance that it fell short of business efficacy.

In respect of oral modifications, the UK Supreme Court decision in *Rock Advertising Limited v. MWB Business Exchange Centres Limited* declined to give effect to these types of amendments.

In upholding the 'no oral modification' (NOM) clause, the Supreme Court noted that it provided similar benefits to an 'entire agreement' clause in a written contract. In particular, NOM clauses serve three important functions, namely:

1. to reduce the risk of disputes arising as to whether the parties had intended to vary the terms of a contract and what the precise amendments were;
2. to prevent written agreements from being eroded to the detriment of parties by informal means; and
3. to provide increased certainty for internal governance as to what obligations the party was promising to satisfy.

Whether this decision will be followed in the Irish courts remains to be decided. Irish courts have previously interpreted contracts and thus determined entitlement on the basis of how the parties managed and operated the contract during the project. Where this occurs, a party may subsequently be barred from renouncing the common understanding of how the contract was to operate in circumstances in which the other party would be unfairly prejudiced. However, ensuring amendments to NOM clauses are provided in writing abates the likelihood of contrary interpretation by the parties and therefore reduces their commercial risk. This also becomes beneficial to funders as it prevents parties modifying approved contractual terms without funder agreement.

Common substantive issues and remedies

Time bars as condition precedent to entitlement

The courts will generally implement conditions precedent if they are unambiguous, even if doing so appears punitive.[19]

Courts have shown a willingness to enforce exclusion clauses. However, where a condition precedent is considered ambiguous, the court is likely to take the narrower interpretation and consider that a true condition precedent does not exist. It is unlikely that the Irish courts are going to diverge from the international practice of giving effect to condition precedent provisions where the parties have agreed the specific requirements of time limits and notice requirements.

Right to payment for variations and varied scope of work

The Irish courts will generally treat a contractor's right of payment according to the mechanisms for varied work and associated valuation according to the terms of the contract.

Concurrent delay

Irish law has had no decision on the topic of concurrent delay since the UK case of *Walter Lily v. Mackay*.[20] Irish law more generally follows *Henry Boot Construction (UK) Ltd v.*

Malmaison Hotel (Manchester) Ltd [21] regarding concurrency of delay. If there are two concurrent causes of delay, one of which is an employer's risk event and the other not, then the contractor is entitled to an extension of time for the period of delay caused by the employer's risk event, notwithstanding the concurrent effect of the other.

Private sector standard forms of construction contract do not usually include a clause dealing with concurrent delay, but parties will generally include additional clauses in their construction contracts to address this issue. However, in the public sector, public works contracts expressly provide that a contractor is not entitled to recover delay costs for the period of concurrent delay.

Suspension and termination

There is no implied common law right to suspend the works, except for the express provision for an employer to suspend works because of the contractor's non-performance. However, there may be entitlement to terminate because of the contractor's breach of contract or if a repudiatory breach of contract can be evidenced.

There is no implied term allowing suspension by the contractor for non-payment, but most standard forms provide for an express right of suspension for non-payment, provided prior notice is given. The CCA 2013 provides a contractor's statutory right of suspension of the works for non-payment by the employer on giving at least seven days' prior written notice.

Penalties and liquidated damages

In a situation where the parties have agreed liquidated damages for delay, the employer is not entitled to claim any further damages in respect of the delay and will be entitled only to recover the delay damages even where these are higher (or lower) than the actual losses provided. The delay damages are a genuine pre-estimate of the employer's loss, assessed at the time the contract is entered into.

The High Court continued to apply the traditional test in relation to liquidated damages in *Sheehan v. Breccia*.[22] Although it considered the test applied in the 2015 UK Supreme Court decision in *Cavendish v. Makdessi*, that test was not preferred. Instead, it considered it would be a matter for an appellate court to determine whether the *Cavendish* test should be adopted in Ireland in future cases. The Supreme Court was not persuaded that any change to the test was necessary, or that the route taken by the UK Supreme Court was a superior one. The Court of Appeal[23] upheld the decision in*Sheehan v. Breccia,* and no appellate court in Ireland has since overruled the traditional test.

Defects correction and liabilities

Irish standard construction contracts do not usually include an express clause relating to latent defects, or state the period for which a contractor shall be liable for latent defects. In the absence of express contractual provisions, the common law regulates these claims. A party may raise an action for defects either by suing in contract or tort (typically for negligence), or, alternatively and more commonly, by means of concurrent liability under both contract and negligence.

Bonds and guarantees

A guarantee is normally executed as a deed (as no consideration is passed) and must satisfy the same requirements as a contract. The Statute of Frauds Act (Ireland) 1695 renders an oral guarantor unenforceable.

The guarantor's liability will not be greater than that of the party to the underlying construction contract. However, it is commonplace for the guarantor to carry further obligations in the event of default in relation to performance or procuring an alternative contractor. In respect of on-demand bonds, the jurisdiction to make a call on a bond could be challenged where the applicable conditions triggering a call have not occurred, or where any procedural requirements have not been followed correctly.

Overall caps on liability

In addition to including a cap on liability, it is common to specify certain categories of loss that will not be recoverable by either party under the contract, such as:

1. indirect loss;
2. special loss, which may be considered the same as indirect or consequential loss;
3. exemplary loss, which is awarded by a court by way of punishment in excess of a claimant's loss to punish the defendant for unreasonable behaviour, and is only required in limited circumstances; and
4. loss of profits: parties may only recover costs and expenses they actually incur as a result the other party's breach of contract.

Irish contract law prohibits a contracting party from limiting its liability in respect of:

1. death or personal injury arising from that party's negligence;
2. fraud committed by that party; and
3. failure by that party to give good title to goods.

It is also common practice for the liability of each party to be unlimited in respect of wilful default.

Outlook and conclusions

The domestic construction disputes sector in Ireland is gaining more familiarity, whether by choice or otherwise, with the process of statutory adjudication. While, traditionally, most construction and engineering disputes have been dealt with through the tried and tested conciliation process – which in a relatively small and local marketplace is eminently sensible – if parties consider the comparative speed and efficiency of adjudication to provide a sufficiently attractive forum in which to resolve their disputes, it continues to challenge conciliation's dominance. Such considerations can only be augmented by the

decisions of the High Court, which continue to suggest that, much like in the UK, the 'pay now, argue later' principle that underpins the process of adjudication is wholly supported.

There are now two instances of successful enforcement challenges. One on grounds related to the procedural issuance of the notice of intention to refer to adjudication and the other concerned whether the matter was in fact a 'payment dispute' and therefore a valid dispute capable of adjudication under the Act. However it must be observed that both cases very much turned on a combination of judicial interpretation of the Act and the specific contractual circumstances.

Notwithstanding such, a number of important issues remain to be addressed by the High Court, including: (1) errors of law made by adjudicators; and (2) whether a payment claim notice is payable in full by default in the absence of a response.

Endnotes

1 *Tenderbids Ltd Trading as Bastion and Electrical Waste Management Ltd* [2025] IEHC 139. ^ Back to section

2 *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313. ^ Back to section

3 *Albert Connaughton and Timber Frame Projects Ltd T/A Timber Frame Ireland* [2025] IEHC 469. ^ Back to section

4 *John Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC. ^ Back to section

5 *V Media Doo & First Click Marketing Operations Management Limited and Teachads Media Ltd* [2025] IEHC 430. ^ Back to section

6 *John G Burns v. Grange Construction and Roofing Co Ltd* [2013] IEHC 284. ^ Back to section

7 *Achill Sheltered Housing Association CLG v. Dooniver Plant Hire Ltd* [2018] IEHC 6. ^ Back to section

8 *XPL Engineering v. K & J Townmore Construction Ltd* [2019] IEHC 665. ^ Back to section

9 *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* [2019] IEHC 666. ^ Back to section

10 SI No. 284/2016 – the European Union (Award of Public Authority Contracts) Regulations 2016. ^ Back to section

11 SI No. 286/2016 – the European Union (Award of Contracts by Utility Undertakings) Regulations 2016. ^ Back to section

12 SI No. 203/2017 – the European Union (Award of Concession Contracts) Regulations 2017. ^ Back to section

13 SI No. 62/2012 – the European Union (Award of Contracts Relating to Defence and Security) Regulations 2012. ^ Back to section

14 SI No. 130/2010 – the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 as amended. ^ Back to section

15 SI No. 131/2010 – the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 as amended. ^ Back to section

16 SI No. 326 of 2017 – the European Union (Award of Concession Contracts) (Review Procedures) Regulations. ^ Back to section

17 Clark, R (2016) *Contract Law in Ireland*, 8th Edition, Round Hall. ^ Back to section

18 High Court, Unreported, 11 June 1999 at p. 24. ^ Back to section

19 As in *CMA Assets Pty Ltd v. John Holland Pty Ltd* [No. 6] [2015] WASC 217. ^ Back to section

20 *Walter Lily v. Mackay* [2012] 1773 (TCC). ^ Back to section

21 *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32. ^ Back to section

22 *Sheehan v. Breccia* [2016] IEHC 120. ^ Back to section

23 [2018] IECA 273. ^ Back to section

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