



CONCILIATION GUIDELINES & PROCEDURES

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For use by parties to Construction Contracts.

**RIAI Construction Contract Drafting Group:
Dispute Avoidance & Dispute Resolution document 30th September 2016**

These guidelines and procedures are available for use by parties to Construction Contracts, e.g.; private and public forms of main contracts, domestic and nominated subcontracts, client-consultant and consultant-sub-consultant agreements, etc..

This document also contains specific provisions within Section 6 in relation to Conciliation clauses used in the RIAI suite of Construction Contracts as printed into the 2016 RIAI forms of contract.

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to recognise the enactment of the Mediation Act 2017

1 Introduction

Parties are always encouraged to earnestly endeavour to resolve their differences and/or disputes by direct negotiation. The general purpose of the provisions for conciliation in construction contracts is to provide for the availability of assistance by a Conciliator to parties in the context of their endeavours to resolve any differences and/or disputes which might arise between them.

Parties may avail of conciliation whilst retaining such rights as they may already have; a) to statutory adjudication under the Construction Contracts Act 2013 (CCA); and/or b) to Arbitration where an arbitration clause is provided for - and/or c) to litigation in Court.

The advent of professional Mediation training and accreditation in recent decades has had a beneficial effect on the development of understandings generally given to *Conciliation* in the context of construction contracts in Ireland. This has led to a significant success rate for the process of conciliation where Conciliators have appropriate training and experience in Mediation.

The conciliation technique that is now favoured is *MedRec Conciliation*: That is to say a process which has developed whereby a primary emphasis is placed on **facilitative mediation** as the first priority in assisting parties to reach settlement. The idea is to try to prevent undue escalation of unresolved differences or disputes by early conciliation.

Essentially, it is Mediation - and In the event that that *mediation* phase does not resolve all of the issues referred by the parties, the parties may, by agreement between them, ask the Conciliator to make a Recommendation on those (remaining) areas of difference or dispute which the parties are unable to resolve through the mediation phase.

There can be a perception by parties and their advisers of potential conflict between a neutral *facilitative mediation process* - and an *adjudicative* process of recommendation. Proper training for Conciliators in the *MedRec Conciliation* technique is intended to considerably reduce the possibility of such conflict. These conciliation methods are explained briefly at 6 *Conduct of the Conciliation* below. This document is intended to be introductory in nature and it is not intended to be a "handbook" on the process *per se*.

Note: In the event of a conflict between the provisions of these *Guidelines and Procedures* and the specific terms of the referable *Dispute Avoidance and Dispute Resolution (DADR)* or *Dispute*

Resolution (DR) contract condition, the provisions of the condition in the contract shall take precedence - unless otherwise agreed. This is important in the context of the *Conciliation* provisions in the contracts published by the Office of Government Procurement at the Department of Public Expenditure and Reform in particular.

2 The Principles

The following principles have emerged arising from practical experience, discussions with industry stakeholders, knowledge of dispute resolution and the modern needs of parties to contracts.

- (a) Parties are encouraged to try to resolve any difficulties, differences and disputes that may arise by **negotiation**.
- (b) If negotiation does not lead to resolution of a dispute and/or difference(s), the Dispute Avoidance and Dispute Resolution (DADR) or Dispute Resolution (DR) condition in the parties' contract may be invoked by one or both parties. Where the parties' contract provides for conciliation, parties are encouraged to avail of the conciliation service. Where the parties' contract does not provide for conciliation, parties are always free to agree to engage in conciliation and to do so along the lines of these *Guidelines and Procedures* in an *ad hoc* agreement to that end.
- (c) The commencement of the Construction Contracts Act 2013 (CCA) does not inhibit the right of parties to agree to avail of conciliation.
- (d) Participation by the parties in conciliation is entirely voluntary and a matter for mutual consent. Any party may withdraw consent and discontinue participation at any time. If a party withdraws, the reference to conciliation is at an end, a Recommendation shall not issue unless the parties agree to such a step, the Conciliator's appointment is terminated.
- (e) Conciliation may be availed of before, during or after any Adjudication, Arbitration or Court action.
- (f) Nothing in an agreement to conciliate inhibits a party's right of recourse to Adjudication under the CCA, Arbitration (or to the Courts if there is no effective arbitration agreement or the parties agree not to avail of arbitration if there is an arbitration clause) without first availing of conciliation.

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- (g) Where the assistance of a Conciliator is sought to assist in resolving disputes, the parties are encouraged to try to concur on the selection and appointment of their Conciliator.
- (h) Unless the parties have agreed otherwise in writing - or unless prohibited by applicable law or court order, the parties may commence or continue any judicial, arbitral, adjudicative or similar proceedings in respect of their differences and/or disputes, notwithstanding their engagement in Conciliation. Similarly, parties may initiate or continue conciliation following on a determination arising from any judicial, adjudicative, arbitral, or other proceedings.
- (i) Where the default provision in the DADR or DR clause provides for the President of the RIAI (or a Vice President of the RIAI) to be the nominating authority for a person to act as Conciliator, the President (or Vice President) will follow the RIAI President's **Policies on DADR** as adopted in July 2013*.

* Policy 7 reads: *Where a request is made to the President for the nomination or appointment of a Conciliator, Mediator, Adjudicator, Arbitrator, Expert Determiner or other ADR service provider, the President will use the President's sole discretion in acting on the request – and the President will not be bound to nominate or appoint a person from any particular panel, whether an RIAI panel or other panel, unless the parties' Agreement on foot of which the request has arisen provides otherwise.*

Note: The RIAI has no plans to introduce a "closed list" system for nominators or appointments by the President.

3 Confidentiality

Parties using these guidelines and procedures agree to the following;

- a) Each party to the conciliation is bound to maintain the confidentiality of the process, and each party shall endeavour to ensure that all persons attending the conciliation at their request agrees to maintain the confidentiality of the process as appropriate. This confidentiality shall extend to all matters discussed in or about the conciliation, all documents, information, materials made, given or exchanged during the Conciliation, prior to the reference or afterwards.
- (b) Generally, a written confidentiality agreement clause will appear in such a standard conciliation agreement a Conciliator would share with the parties at an early stage in reference to conciliation:

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- (c) Such documents and information referred to at (a) above shall be inadmissible in any legal proceedings in Court or Arbitration to the maximum extent permitted by law:
- (d) Information which is otherwise admissible in legal proceedings shall not be rendered inadmissible as a result of use of such information in the Conciliation:
- (e) By participating in the process, the parties irrevocably agree not to summon or otherwise require the Conciliator to appear or testify or produce records, notes, or any other information or material in any legal proceedings in Court or Arbitration or Adjudication under the CCA. No recordings or stenographic records will be made or allowed at conciliation meetings.
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4 Selection of Conciliator

The selection of a person to act as Conciliator is an important process: Preferably, parties are advised to select and appoint a Conciliator by agreement between them.

Alternatively, they may avail of the default position in the conciliation sub-clause in the DADR or DR Condition in their construction contract where it provides for a nomination by a named *nominating* authority.

Skillsets of a Conciliator; It is now generally appreciated that the preferred skillsets for a Conciliator include;

- 1) high-level construction industry knowledge and experience;
- 2) high-level knowledge and experience of the particular form of contract used by the parties to the dispute;
- 3) most importantly, formal Mediation training, accreditation and experience and
- 4) undergraduate or postgraduate qualification and experience in Arbitration law & practice and recognised CPD training on the provisions of the Construction Contracts Act 2013 (CCA) and Adjudication under that Act.

The Conciliator will usually communicate with the parties promptly upon selection by the parties or upon nomination - and it is for the Conciliator and the parties to agree on formalising the appointment for the provision of the service. The parties are not legally bound to accept a President's nomination owing to the consensual nature of the process as it is now seen. Parties are free, for instance, to repeat a number of names to be nominators from which they may select by agreement .

Prior to formal appointment or shortly thereafter, the Conciliator may wish to convene a brief pre-meeting (by teleconference or in person) with the parties - to listen to an outline of the parties' issues and concerns, discuss the nature, scale, complexity and likely time commitment required - in order to put forward appropriate *Terms of Appointment* tailored to meet the requirements of the parties to the reference.

5 Costs

Each party to the Conciliation shall pay their own costs. The parties shall be jointly and severally liable for the Conciliator's costs until paid in full - costs will be billed in equal shares, unless all parties agree otherwise with the Conciliator.

6 Conduct of the Conciliation

6.1 Procedure and timeframe - Generally;- process, procedure and timeframe will be discussed between the parties and the Conciliator at an early stage. The Conciliator will then propose a process and overall timeframe tailored to meet the needs of the parties in the individual case - for discussion and agreement.

6.2 Procedural flexibility: A great value of a *MedRec* Conciliation process is its flexibility. It can be developed and changed to meet the parties' requirements during the course of the reference - by agreement. As now practised the *MedRec* technique does not favour a prescriptive "*one size fits all*" approach. Rather, it favours the tailoring of a process and timeframe which; would be suited to the nature, scale and complexity of the reference; respects party autonomy and the idea of mutual consent all the way.

The experience of the use of the *MedRec* technique is that the settlement statistics informally reported are that the settlement rate during the Mediation phase is higher than otherwise. Parties are encouraged to regard a Request for a Recommendation on remaining unresolved matters as a last resort - with encouragement to engage in the mediation phase to try to reach settlement.

In the event that the Conciliator is asked by the parties to make a recommendation, parties agree to request a reasoned written recommendation based on the rights and obligations of the parties under their Contract. The reason for this is to ensure, to the extent possible, that the recommendations are predictable outcomes. That said, parties can agree to ask for a written recommendation without the reasoning being written in.

6.3 For guidance, typical processes, to include steps to be taken and sample timelines for different types of cases are set out below:

Following on preliminary arrangements for appointment of Conciliator, pre-meeting(s) by conference call or in person, the following steps were generally be advanced.

Exchange of brief written statements of Issues and concerns; Each party would set out its issues and what each party wishes to achieve in the reference to conciliation: This brief document can include appendices of relevant and material, e.g.; copy agreements, drawings & specifications, chronologies, communications, copy accounts, photographic records, reports, etc.. This may be done consecutively or concurrently by the parties - as may be agreed with the assistance of the Conciliator.

Conciliation Meeting(s): A meeting or meetings, chaired by the Conciliator, may take place at an agreed venue or agreed venues.

The process is one of *mutual* consent every step of the way. The process can be terminated by one party or all parties at any time (or in rare circumstances by the Conciliator) - that is its strength. The parties participate because *they want to participate* (mindful of the alternatives), not because *they have to* - owing to some perception of a potential threat of legal sanction for not participating.

Settlement: If agreement emerges, parties will generally put the terms of their agreement to writing and may avail of their own independent advice in doing so.

Recommendation failing agreement between the parties on all issues:

In the event that the parties are unable to agree **all** of the issues referred, parties may make a written settlement agreement with regard to matters which they have agreed - and parties may agree to refer the remainder of the issues to the Conciliator for a reasoned Recommendation. Similarly, if the parties are unable to agree on a resolution of **any** of the issues referred, parties may agree to refer such issues to the Conciliator for a Recommendation.

The Conciliator's Recommendation will be in writing; setting out the issues referred for resolution; setting out the reasoning and concluding in a *determination* on all issues referred for recommendation. **The Recommendation will be reasoned** (unless the parties otherwise agree) and **based on the legal rights and legal obligations of the parties under their contract**.

Note: Important understanding in the MedRec Conciliation technique:

The Conciliator shall only use shared information in preparing the recommendation and no privately disclosed or privileged information shall be used in the deliberation and preparation of the recommendation. This will be apparent on the face of the Recommendation as such information must not appear or be considered in the written reasoning. This is a critically important measure in MedRec practice. Private information includes information disclosed in any private sessions with any party or private communications between a party and the Conciliator.

Information which is otherwise shared is not rendered private by being disclosed in private session or private communications with the Conciliator.

For this provision to work effectively, it is vitally important that the chosen or nominated Conciliator has appropriate training in this MedRec Conciliation discipline. Such training includes training in the ability to disregard privileged information in the adjudicative process of reasoned Recommendation writing.

6.4 In the case of the RIAI suite of Construction Contracts and agreements:

In the case of parties to an RIAI Construction Contract, the parties are deemed to have agreed to the following provisions with regard to such Conciliator's Recommendation should it get to the stage that such a Recommendation is delivered:

Conciliation under Condition 38(a): *The parties are referred to the RIAI Conciliation Guidelines & Procedures (CGP) document current which contains the following binding mechanism with regard to the issue of a Recommendation under the following procedure in the CPG:-*

The parties are deemed to have agreed to the following provisions with regard to such Conciliator's Recommendation should it proceed to the stage that such a Recommendation is delivered to the parties:

(A) With the consent of the parties to do so and having; a) advised on an indicative period of time to write the Conciliator's Recommendation (the Recommendation) and b) had confirmation from each party of the email addresses and postal addresses to which the Recommendation is to be sent, the Conciliator will write the Recommendation and send the Recommendation to the parties; a) by simultaneous email to the parties' email addresses provided and b) by post (recorded postal delivery) simultaneously to the parties' postal addresses provided within one working day of the date that the email referred to at a) was sent.

(B) If neither party rejects the Recommendation in writing within 10 working days beginning on the working day after the sending of the Recommendation by email, the Recommendation shall be deemed to be agreed as a legally binding and enforceable settlement agreement between the parties - in full and final settlement of the issues as referred to and determined by the Conciliator in the Recommendation.

(C) If a party wants to reject the Conciliator's Recommendation, that party may reject the Recommendation by sending a written notice of rejection to the other party within 10 working days beginning on the working day after the Recommendation was sent as provided for at (A) above. A written notice of rejection is deemed to have been served if it has been sent to the other party; a) by email to the other party's email address to which the Recommendation was sent and b) by post (recorded postal delivery) to the other party's address to which the Recommendation was sent - within one working day of the date that the email referred to at a) was sent.

(D) In the case of the sending of a notice of rejection of the Recommendation as provided for at (C) above, the Conciliator's Recommendation is deemed to be of no legal effect and the parties are not bound by its terms.

Note: In the case of the Blue and Yellow forms of Construction Contract, these provisions are printed on the page following Condition 38.

6.5 In the case of the PWC Agreements:

The general principles set out in this document can be agreed to apply - save where there is conflict between the PWC Conciliation provisions and these guidelines & procedures, the provisions of the PWC with regard to conciliation shall retain their full force and meaning.

6.6 In the case of ad hoc conciliation agreements:

In the case of ad hoc conciliation agreements, parties can agree on the provisions regarding the standing of a recommendation, i.e.;

- (a) that the recommendation for the consideration of the parties and that it will be binding if not rejected within a specified period of time or

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- (b) that the recommendation is a recommendation for the consideration of the parties and not binding.

The parties can discuss the text of such ad hoc optional agreements with their Conciliator. It is preferable that this discussion would take place at an early stage in the process.

7 Sample Conciliation procedures and timelines

The nature of the cases which arise is very diverse. The Conciliator will facilitate agreement on an appropriate procedure and timetable depending on this the nature, scale and complexity of the case referred, the issues and the concerns of the parties. The parties and the Conciliator are free to amend the procedure and timetable by mutual consent.

It would generally be for the Conciliator to take a lead and propose an appropriate procedure for discussion and agreement with the parties.

Here are four typical examples for guidance purposes;

Case 1: Claim and no counter-claim.

As a guideline, the following procedure might apply;

- The claiming party circulates a written submission setting out relevant background information and a list of that party's *issues and concerns* to include an indication as to what that party would like to achieve in the Conciliation process. Typically, this task is agreed to be completed and delivered within a five working day period.
- The other party will provide a written statement of reply. Typically, this task is agreed to be completed within a further five working days - to include an indication as to what that party would like to achieve in the Conciliation.
- *Conciliation Meeting*; The parties will meet with the Conciliator at a time and venue to be agreed. The Conciliator will chair the meeting and explain the process.
The parties will participate with a view to resolving their dispute in full. If additional time beyond one day is needed, the parties are free to agree on that with the assistance of the Conciliator.
The aim is to resolve all matters by way of agreement during the *mediation* phase.

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- It can happen that the parties are unable to reach agreement on all issues referred. If this happens, the parties can agree to refer such remaining issues to the Conciliator for a reasoned Recommendation. The Conciliator can discuss and advise on a closing procedure leading to the preparation of the Recommendation.

The target time to complete the process from start to finish might be in the order of three to four working weeks.

Case 2: Claim and a Counter-claim.

As a guideline, the following procedure might apply;

- The claiming party and the counterclaiming party concurrently circulate written submissions to the other, copied to the Conciliator, setting out relevant background information and a list of their respective issues and concerns with supporting documentation to include an indication as to what each party would like to achieve from the Conciliation process. Typically, this task is agreed to be completed within five working days.
- Upon receipt of the respective submissions, the claiming party and the counterclaiming party will provide written statement of reply submissions to the other party, copied to the Conciliator typically within a further five working days. The parties are free to submit such supporting documentation as each may wish to submit with any of their submissions.
- Conciliation Meeting: The parties will meet with the Conciliator at a time and venue to be agreed. The Conciliator will explain the process and the parties will engage – by consent - with a view to resolving their dispute in full - preferably in the mediation phase. If additional time beyond one day is needed, the parties are free to agree on that with the assistance of the Conciliator. The aim is to resolve all matters by way of agreement during the mediation phase.
- It can happen that the parties are unable to resolve all issues referred. If this arises, the parties can agree to refer such remaining issues to the Conciliator for a reasoned Recommendation. The Conciliator can advise on a closing procedure leading to the preparation of the Recommendation. The target time to conclude the process from start to finish might be in the order of four to six working weeks.

Case 3: Claim and a counterclaim - complex high value case.

As a guideline, the following procedure might apply;

- The claiming party and the counterclaiming party concurrently circulate written submissions to the other, copy to the Conciliator, setting out relevant background information and a list of their respective issues and concerns. Typically, this task is agreed to be completed within a fifteen working day period, to include an indication as to what each party would like to achieve in the Conciliation.
- Upon receipt of the respective submissions, the claiming party and the counterclaiming party will provide written statements of reply submissions to the other party within a further ten working days, typically. The parties are free to submit such supporting documentation as each may wish to submit with any of their submissions.
- *First Conciliation Meeting:* The parties will meet with the Conciliator at a time and venue to be agreed. The Conciliator will explain the process and the parties will engage – by consent - with a view to agreeing a process to resolve their dispute. A range of possibilities could emerge. For example, the Conciliator, might suggest direct engagement of like expert disciplines from the parties' respective teams - with or without the attendance of the Conciliator (or Conciliator's assistant). This could be with a view to narrowing the areas in dispute, resolving areas of expert opinion - *such as; facts as facts; figures as figures; applicable legal principles as applicable legal principles.*
- *Second Conciliation Meeting;* The parties will meet with the Conciliator at a time and venue to be agreed. The Conciliator will discuss the process and the parties will engage further – by consent - with a view to resolving their dispute in full - preferably in the mediation phase. If additional time beyond this day is needed, the parties are free to agree on that with the assistance of the Conciliator. The aim is to resolve all matters by way of agreement during the mediation phase.
- It can happen that the parties are unable to resolve all issues referred. If this arises, the parties can agree to refer such remaining issues to the Conciliator for a reasoned Recommendation. The Conciliator can advise on a closing procedure leading to the preparation of the Recommendation. In a complex case, concurrent closing submissions to a ten working day timeframe could be an appropriate closing procedure - with a ten to fifteen working day period for the Conciliator to complete the recommendation and deliver the it to the parties.

The target time to conclude the process from start to finish might be in the order of six to eight working weeks.

Case 4: More than two parties: Claim, counterclaim, possibly cross claims - complex high value case.

As a guideline, the following procedure might apply;

- Each of the parties concurrently circulate written submissions to the other parties, copy to the Conciliator, setting out relevant background information and a list of their respective issues and concerns. Typically, this task is agreed to be completed within a fifteen working day period, to include an indication as to what each party would like to achieve in the Conciliation.
- Upon receipt of the respective submissions, the parties will provide written statements of reply submissions to the other parties within a further fifteen working days, typically. The parties are free to submit such supporting documentation as each may wish to submit with any of their submissions.
- First Conciliation Meeting: The parties will meet with the Conciliator at a time and venue to be agreed. The Conciliator will explain the process and the parties will engage – by consent - with a view to agreeing a process to resolve their dispute. A range of possibilities could emerge. For example, the Conciliator, might suggest direct engagement of like expert disciplines from the parties’ respective teams - with or without the attendance of the Conciliator (or Conciliator’s assistant). This could be with a view to narrowing the areas in dispute, resolving areas of expert opinion - such as; facts as facts; figures as figures; applicable legal principles as applicable legal principles.
- Second Conciliation Meeting; The parties will meet with the Conciliator at a time and venue to be agreed. The Conciliator will discuss the process and the parties will engage further – by consent - with a view to resolving their dispute in full - preferably in the mediation phase. If additional time beyond this day is needed, the parties are free to agree on that with the assistance of the Conciliator. The aim is to resolve all matters by way of agreement during the mediation phase.
- It can happen that the parties are unable to resolve all issues referred. If this arises, the parties can agree to refer such remaining issues to the Conciliator for a reasoned Recommendation. The Conciliator can advise on a closing procedure leading to the preparation of the Recommendation.

In a complex case, concurrent closing submissions to a ten working day timeframe could be an appropriate closing procedure - with a ten to fifteen working day period for the Conciliator to complete the recommendation and deliver the it to the parties.

The target time to conclude the process from start to finish might be in the order of six to eight working weeks. However, in highly complex multiparty cases, the process can take several months. Again, it is a matter for a skilled Conciliator to discuss and develop an appropriate procedure with the parties.

8 Termination

A Conciliation can be terminated in a number of ways, e.g.:-

- (a) By a withdrawal of one of the parties from the Conciliation by notice in writing to the other party. Where there are more than two parties involved in the reference, by withdrawal of one or more parties from the Conciliation. Any two remaining parties can agree to proceed with the reference.
- (b) By agreement between the parties.
- (c) By written notice to that effect from the Conciliator to the parties (in unusual circumstances such as non-participation by one or more parties - or excessive delay).
- (d) By the delivery of the Recommendation.

Some reference information

- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
- Law Reform Commission Report (982010) Alternative Dispute Resolution: Mediation and Conciliation.
- Rules of the Superior Courts: Mediation and Conciliation S.I. No. 502 of 2010.
- S.I. No. 209/2011 - European Communities (Mediation) Regulations 2011.
- Rules of the Superior Courts Amendment to: Order 56A S.I. No. 357 of 2012: Rules of the Superior Courts (European Communities (Mediation) Regulations 2011) 2012.

End Note at (10th October 2017)

Mediation Act 2017 - some relevant extracts:

Interpretation

Section 2 (1) “mediation” means a confidential, **facilitative and voluntary process** in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute;

Mediation

Section 6 (1) The parties to a dispute may engage in mediation as a means of attempting to resolve the dispute.

(2) Participation in mediation shall be **voluntary** at all times.

(3) The fact that proceedings have been issued in relation to the dispute shall not prevent the parties engaging in mediation at any time prior to the resolution of the dispute.

(4) A **party may**—

(a) **withdraw** from the mediation at any time during the mediation,

Role of mediator

Section 8 (3) Subject to subsection (4), the outcome of the mediation shall be determined by the mutual agreement of the parties and the mediator shall not make proposals to the parties to resolve the dispute.

(4) The **mediator may, at the request of all the parties, make proposals to resolve the dispute, but it shall be for the parties to determine whether to accept such proposals.**

(Emphasis added)



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