



# ADR GUIDE 2018

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Pictured above at the launch of the ADR Guide in 2015 from left to right are: John Lunney, ADR Committee Secretary; Kevin O' Higgins, President of the Law Society of Ireland (2015); Helen Kilroy, McCann Fitzgerald; Deirdre Flynn, Law Society of Ireland; James Kinch, Chief State Solicitors Office

# INTRODUCTION

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The dispute resolution process continues to develop and evolve. The purpose of this booklet is to provide a practical summary for solicitors of dispute resolution methods outside the court process, referred to as 'Alternative Dispute Resolution' (ADR). A wide variety of ADR methods are now available to solicitors when advising clients. It may be that the process requires the view of an independent third party, in which case conciliation may be appropriate, or that the parties require a binding outcome that will not have the publicity of a court judgment, which may call for arbitration or expert determination. Or it may be a priority of the parties to maintain control over the dispute, and to maintain some relationship between the parties into the future, in which case mediation may be most appropriate. The choice of ADR method may depend on the dynamic of the dispute and the willingness of the parties to engage. Solicitors need to be able to offer alternatives to the client so the client is fully informed as to the most effective method to resolve their dispute. A comparative summary is provided at the end of the booklet. It is hoped that this booklet will act as a quick and practical guide for solicitors as to the most appropriate dispute resolution method when advising clients. Members are also invited to consider availing of the 'Find a Mediator' section of the Law Society website for a selection of solicitors who practise as mediators.

JAMES KINCH

Chair, Alternative Dispute Resolution Committee

September 2015

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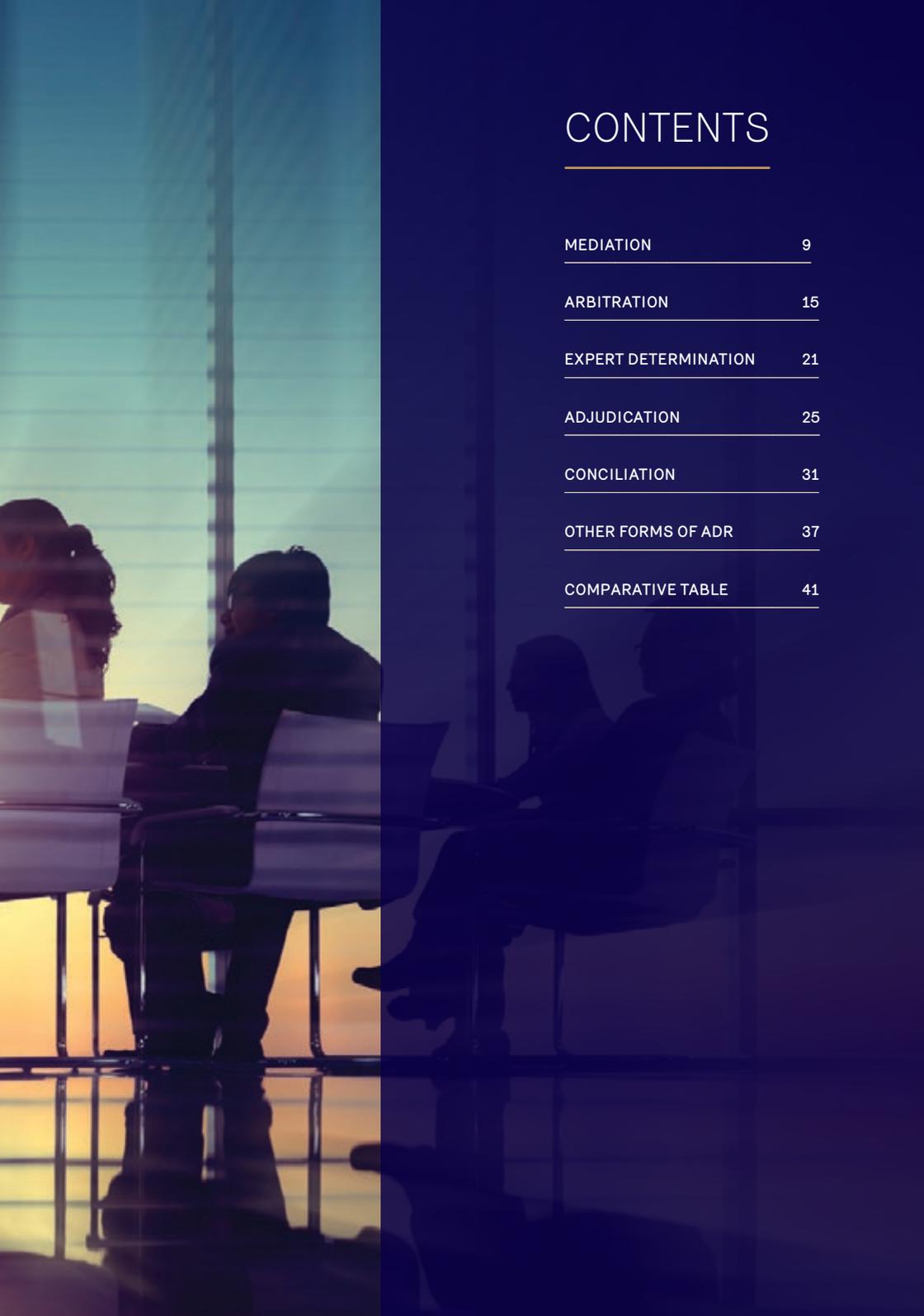
*\* This booklet was first published in 2015 under the Chairmanship of James Kinch. It has been recently updated to take account of the implementation of the Construction Contracts Act 2013 and the enactment of the Mediation Act 2017.*

ANTHONY HUSSEY

Chair, Alternative Dispute Resolution Committee

March 2018



The background of the page features a vertical split. The left side shows a silhouette of a person sitting at a table with a laptop, looking towards a large window with blinds. The right side shows a silhouette of two people sitting at a table, one with a laptop, in a similar setting. The overall lighting is dim, with a warm glow from the window on the left.

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# MEDIATION

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Mediation is a private and confidential dispute resolution process in which an independent third party, the mediator, seeks to assist the parties in reaching a mutually acceptable settlement. It is a voluntary and non-binding process that only becomes binding on the parties if and when a settlement is reached. The process usually involves some level of briefing of the mediator before the mediation itself, which typically lasts a day. The mediation is attended by a 'decision maker' for each party and often by their legal advisers, relevant experts, and insurers (if any).

## THE MEDIATION ACT 2017

The Mediation Act 2017 (the Act) came into force on 1st January 2018. The Act provides a statutory framework to promote the resolution of disputes through mediation as an alternative to court proceedings. The underlying objective of the Act is to promote mediation as a viable, effective and efficient alternative to court proceedings, thereby reducing legal costs, speeding up the resolution of disputes and reducing the disadvantages of court proceedings.

The Act:

- introduces an obligation on solicitors and barristers to advise parties to consider using mediation as a means of resolving disputes;
- provides that a court may, on its own initiative or on the initiative of any party invite the parties to consider mediation as a means of resolving the dispute;
- provides for an agreed “stopping of the clock” for the purposes of the Statute of Limitations where parties have entered into an agreement to mediate
- contains general principles for the conduct of mediation by qualified mediators;
- provides that communications between parties during mediation shall be confidential;
- provides for the possible future establishment of a Mediation Council to oversee development of the sector;
- provides for the introduction of codes of practice for the conduct of mediation by qualified mediators.

## WHAT IS THE ROLE OF THE MEDIATOR?

The mediator is a facilitator appointed by the parties. The mediator’s function is to support the process, gather information, and assist in problem-solving. The mediator does not decide who is right and wrong. Rather, the mediator isolates the issues, helps the parties

to evaluate the strengths and weaknesses of each other's case, and encourages the parties to work cooperatively towards settlement. This is done in private meetings between the mediator and each party and, if appropriate, in joint meetings where the parties (or some of their representatives) attend with the mediator. Parties may select a mediator who is a specialist in the particular area of the dispute.

### WHAT IS THE ROLE OF ADVISERS TO THE PARTIES?

The role of a legal adviser to the parties is similar to that of other dispute resolution processes in terms of taking initial instructions and advising on the legal merits, but the legal adviser's role is more like acting as a guide for the client in the course of the process. A legal adviser would typically prepare a short note summarising the party's case in advance of the mediation. At the mediation, advice may be required on a particular point (whether legal, financial or technical) or likely outcomes at trial if there is no settlement. It is important to recall, however, that an adversarial approach – which may be typical of other dispute resolution mechanisms, such as litigation and arbitration – is inimical to the mediation process.

In order for a mediation process to work, goodwill is required from both parties, and a legal adviser should be mindful of that context. It is important that clients understand that the mediation process is their opportunity to 'take control' of how the dispute is resolved. Clients should be asked to consider in advance what scope there is to conclude a deal and where they would 'like to get to' in terms of their arrangements with the other party.

It is suggested in that context that the clients be asked to consider the following:

- Put themselves 'in the shoes' of the other party and view the dispute from the perspective of the other party,
- Explore the potential for an outcome that benefits both parties, if not overall, then in respect of some elements of the dispute,
- Adopt an approach that focuses on the present and future – a

‘where am I now and where do I want to get to’ approach, rather than focusing on the past.

## HOW IS THE MEDIATION PROCESS CONDUCTED?

Mediation typically involves five phases, one in advance of the mediation and the others on the day of the mediation.

- 1) **THE PREPARATION PHASE.** This involves selection of the mediator and agreeing the terms of the mediation, which are set out in a mediation agreement (typically three or four pages long). The terms will include the time and venue for the mediation, details of the mediator’s fees, the nature of information or documentation (such as short case summaries) to be exchanged by the parties in advance of the mediation, the role of the mediator as facilitator rather than decision maker, and confirmation that the process is confidential and without prejudice to any proceedings.
- 2) **THE OPENING PHASE.** Many mediations start with the parties meeting in joint (‘plenary’) session, at which everyone is introduced, the mediator outlines the procedure for the day, and the parties typically make a short opening statement to each other setting out their position and objectives. Mediators decide on a case-by-case basis whether it is appropriate to have an opening joint meeting (and, if so, what form it should take).
- 3) **THE EXPLORATION PHASE.** Private meetings take place between each party and the mediator, at which the mediator will seek to explore the nature of each party’s case, their aims and objectives, and engage in ‘shuttle diplomacy’. The ground is prepared for settlement negotiations between the parties by clarification of their respective issues and agendas.
- 4) **THE NEGOTIATION PHASE.** Direct and indirect negotiations begin with the assistance of the mediator, who challenges each side to explore the strengths and weaknesses of their position and what their best and worst alternatives are to a negotiated agreement (‘BATNA’ and ‘WATNA’). Working groups (for example, between

experts) may be established as parties discuss the issues in an attempt to break the deadlock.

- 5) THE CONCLUDING PHASE. Lawyers representing both sides draw up the agreement recording the settlement.

#### WHAT ARE THE ADVANTAGES OF MEDIATION?

The main advantages of mediation are that it affords parties the opportunity to manage the dispute in a confidential setting which is without prejudice to any proceedings and that allows them to arrive at a mutually agreeable resolution rather than an 'imposed' outcome which would often result from other dispute resolution methods such as litigation or arbitration. Information and documentation shared privately with the Mediator cannot be passed to the other party during the Mediation without express permission. Furthermore, the outcome of the Mediation is only publicised if the parties so agree. The process can also result in reduced costs for the parties when compared to litigation or arbitration. Expenses include the Mediator's fee, the cost of preparatory work undertaken and overheads for the day. The Mediator's fee and overheads are usually shared between the parties. Each party bears its own costs and expenses.

In accordance with the Mediation Act, Mediation may be suggested by either party or imposed by a Court during the course of proceedings and refusal to participate or do so in good faith may have negative cost consequences.

Mediation also offers a degree of flexibility and commerciality which may be particularly useful where there is an ongoing commercial relationship, which parties wish to preserve. The parties are encouraged to make non-binding concessions to propose their own formulae for resolving the dispute, thereby providing the parties with an opportunity to negotiate a tailor made solution that will suit their mutual needs.

#### WHAT ARE THE DISADVANTAGES OF MEDIATION?

The main disadvantage in mediation is that it may result in a time delay for the resolution of a dispute if it does not resolve matters or if there is a failure to engage by one of the parties.



# ARBITRATION

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Arbitration is a means of dispute resolution whereby two disputing parties submit their dispute to a neutral third party for determination. Arbitration is often chosen by parties to commercial agreements as an alternative to litigation.

Arbitration in Ireland is governed by the *Arbitration Act 2010*. As with all forms of dispute resolution other than litigation, arbitration is entirely dependent on the agreement of the parties to adopt it. Without the agreement of the parties, there can be no arbitration. The parties' agreement to submit their disputes to arbitration is most commonly found in the form of an arbitration clause incorporated into the contract between the parties. Occasionally, where a dispute arises and there is no arbitration clause incorporated into the contract, the parties can nonetheless agree to submit the dispute to arbitration. This is often referred to as a 'submission agreement'.

Should a party begin court proceedings in relation to a dispute where the parties have already agreed that disputes between them will be referred to arbitration, the other party may apply to the court for the proceedings to be stayed, and (provided that the party applying for the stay does so no later than when submitting his first statement on the substance of the dispute) the court is bound, other than in exceptional circumstances, to put a stay on the court proceedings so that the dispute may be referred to arbitration in accordance with the parties' pre-existing agreement.

## WHAT IS THE ROLE OF THE ARBITRATOR?

An arbitrator serves as the decision maker and ‘referee’ in arbitration proceedings, much like a judge during court litigation. The arbitrator reviews testimony and evidence presented by the disputing parties at a hearing and determines the dispute by issuing a decision that may include an award of money. You can think of an arbitrator as a private judge hired by the disputing parties to determine their dispute. The arbitrator’s award is binding on the parties, and the parties can only seek to set aside the arbitrator’s award, by way of application to the court, in very limited circumstances. The arbitrator is bound by the rules that may be outlined in the parties’ arbitration agreement, either within a clause in the contract or the submission agreement, together with any institutional rules adopted by the parties or referenced in the arbitration clause. The arbitrator’s further powers and obligations arise out of the *Arbitration Act 2010*.

The arbitrator will apply the rules and laws applicable to the arbitration, facilitate and direct the exchange of pleadings between the parties (which may include making procedural orders, the scope of discovery, and pre-hearing exchange of witness statements), legal submissions and any other documents in advance of the hearing.

## WHAT IS THE ROLE OF ADVISERS TO THE PARTIES?

The role of the legal adviser to a party in arbitration is very similar to the role the legal adviser will have in respect of advising his/her client in litigation proceedings. The legal adviser will take initial instructions, assist the claimant party in referring the dispute to arbitration (or, if acting for the opposing party, assisting in responding to any referral), ensure the valid appointment of the arbitrator, attend any preliminary meeting, prepare pleadings, discovery, witness statements, engage experts, and carry out all further functions that one would expect a legal adviser to carry out in respect of litigation proceedings. The legal adviser will also assist the client in deciding whether to engage counsel or may act as advocate at the arbitration hearing. The legal adviser should have a thorough understanding of arbitration law, in addition to understanding the law in respect of the substantive issues in dispute. Although in most cases in arbitration proceedings parties will be legally represented, there is no requirement for a party to have legal representation.

## HOW IS THE ARBITRATION PROCESS CONDUCTED?

The arbitration clause will invariably provide for all, or certain, specified disputes to be determined by an arbitrator to be agreed by the parties or, if the parties cannot agree, appointed on the application of either of the parties by the president or other senior officer of a professional institution such as the Law Society. Some institutions have produced rules for the conduct of arbitration and, as mentioned above, parties may choose to have their arbitration conducted in accordance with those rules.

Once the arbitrator has been appointed, he/she will usually seek to convene a preliminary meeting as soon as possible with the parties and/or their advisers. The purpose of the preliminary meeting will be to clarify the requirements of the parties and to agree or determine the future conduct of the arbitration, with a view to having the dispute resolved in the most efficient and economical way. A timetable will be established for the parties to submit their claims and replies (exchange of arbitral pleadings) and make disclosure of documents relevant and necessary to addressing the issues in dispute (that is, discovery). Following discovery, there may be an exchange of witness statements, expert reports, and legal submissions in advance of an arbitration hearing, at which evidence will be given by the parties and their witnesses. The parties are free to agree to dispense with the need for discovery, exchange of witness statements, expert reports, submissions, and a hearing if they so wish.

Arbitrators must base their arbitral award on what has been put before them by the parties. Under the *Arbitration Act 2010*, arbitrators are required to give their award in writing and, unless the parties have agreed that no reasons are to be given, to state in the award the reasons upon which it is based. Unless the parties have agreed otherwise, liability for the costs of the arbitration, including the arbitrator's own costs, is in the discretion of the arbitrator, who may direct to whom and by whom and in what manner those costs or any part of them should be paid. Arbitrators generally adhere to the principle that costs follow the event.

## WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION?

- 1) **PRIVACY.** Arbitration proceedings are held in private. Arbitration is therefore frequently adopted for the resolution of disputes such as partnership disputes or disputes involving sensitive information, which the parties wish to be resolved in private and not in open court and therefore in the public domain.
- 2) **SPECIALIST KNOWLEDGE OF ARBITRATOR.** Where the dispute requires specialist knowledge or experience to be understood, the parties may feel more comfortable having the dispute adjudicated by a person with the particular specialist knowledge or experience required. In arbitration, the parties can choose the person, or the qualifications of the person, whom they wish to act as arbitrator or, alternatively, the method by which the arbitrator will be appointed.
- 3) **FLEXIBILITY OF PROCEDURE.** Since it is ordinarily by agreement, the parties can, to an extent, control the process. The agreement to arbitrate is like any other agreement and can be contracted or expanded by mutual choice. The parties can therefore retain more control over the process than they do in litigation proceedings. However, the corollary of this is that, if the parties are in dispute mode, a lot of time can be wasted disputing how the arbitration should proceed as opposed to disputing the substantive issues.
- 4) **SPEED.** Because the parties have control over the arbitration procedure, they have control (subject, of course, to the cooperation of the arbitrator) over the speed at which the arbitration will be conducted and the time within which they can have a ruling on their dispute.
- 5) **COSTS.** Arbitration has the potential to be less expensive than litigation if well managed. The caveats to this are that you must pay the arbitrator and pay for the use of a premises for the purposes of the hearing or any meetings, whereas a judge and courtroom are free.

- 6) **FINALITY OF ARBITRATOR'S AWARD.** An arbitrator's award is final and binding. There are very limited grounds of appeal to the courts.
  
- 7) **ENFORCEMENT ABROAD.** The 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* makes arbitration awards much easier to enforce in countries that have subscribed to the convention – and something in the order of 150 countries around the world have done so. This compares positively as against the enforcement of court judgments abroad, which can be difficult.



# EXPERT DETERMINATION

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Expert determination is used to resolve disputes that require specialist expertise that is unlikely to be available in a court or that is arcane in nature. The parties to expert determination do not usually adopt defined positions, but rather agree that there is a need for an evaluation by an expert in the field. Examples would include rent review or the determination of technical matters, such as whether a computer matches the specification, or whether a malfunction is due to a technical or design fault.

As such, it differs from the arbitration or litigation processes, where parties are inclined to adopt 'position taking' or mutually antagonistic positions requiring a decision. Like all ADR processes, it is entirely confidential.

In such circumstances, it is important to clearly identify the issue to be determined and ensure that the outcome of the determination is binding on the parties. Ideally, the parties should set out in their agreement, in advance, those matters that may be referred for resolution by expert determination.

### WHAT IS THE ROLE OF THE EXPERT DETERMINER?

The role of the expert determiner is to give his/her expert finding on the matter on which he/she has been asked to determine. The parties submit all relevant information to the expert determiner, following which the expert determiner will issue the determination.

Although expert determination is an alternative dispute resolution process, the expert determiner can be called upon when there is no dispute, but there is a difference that needs to be resolved – for example, the valuation of a private business. Because of its flexibility, expert determination is suited to multi-party disputes.

### WHAT IS THE ROLE OF ADVISERS TO THE PARTIES?

The legal adviser's role is to ensure that the terms of engagement of the expert determiner are such that it will provide a final determination of the matter required and that there is an adequate description of the matter to be determined. This is all the more important in the absence of legislation in this jurisdiction on expert determination, which has the effect that the engagement of the expert determiner is a matter of contract between the parties.

### HOW IS EXPERT DETERMINATION CONDUCTED?

An expert determiner is agreed upon between the parties, following which the parties submit the issue to be determined and provide the expert determiner with the relevant information and context within which to give a determination. The parties will usually request that the determination be made within a certain time period.

### WHAT ARE THE ADVANTAGES OF EXPERT DETERMINATION?

The main advantage is that an expert determiner's decision can provide a cost-efficient resolution of technical issues by an expert in the field that is legally binding. There is only a very limited basis to challenge the determination. It is therefore important that the parties select an expert with both relevant expertise and experience, in addition to knowledge of the determination process. Sometimes the expert's decision is not binding, but advisory. This is known as 'expert evaluation'. In such circumstances, although the determination is not binding, the evaluation often forms the basis of a settlement. Further advantages

include that the parties control the procedures to be used and can adopt rules that suit their needs.

#### WHAT ARE THE DISADVANTAGES OF EXPERT DETERMINATION?

While the absence of ‘position taking’ in expert determination can be welcomed, it must be viewed in the context of an absence of legislation regulating expert determination in Ireland – a factor, it is suggested, that may give rise to some legal uncertainty. It is important to ensure that the terms of engagement of the expert determiner are sufficiently clear and precise.



# ADJUDICATION

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Adjudication is the legal process by which an adjudicator reviews the facts and legal arguments set forth by the parties in dispute in order to reach a decision that determines the parties' respective rights and obligations in respect of the matters in dispute. It is designed to be a speedy process, so as to avoid resorting to lengthy and expensive court procedures.

The Irish government introduced statutory adjudication in relation to payment disputes under construction contracts through the enactment of *The Construction Contracts Act 2013* (the "Act"). The act applies to all contracts to which the legislation relates entered into after the 25th July 2016.

While statutory adjudication only relates to construction contracts, theoretically there is no reason why adjudication cannot be extended into other sectors by statute, by contract, or by agreement otherwise between the parties in dispute.

## ADJUDICATION IN CONTEXT

The purpose of statutory adjudication is to ensure that the party executing the work has a speedy means of obtaining payment for the work done. Under the standard forms of construction contract, it is all too easy for a developer or main contractor to rely upon an alleged breach of contract on the part of the main contractor or subcontractor, respectively, as a basis for withholding payment. Under standard forms, the party executing the work has to complete the work in these circumstances and, if necessary, litigate or arbitrate for the payment, which might take years. Statutory adjudication entitles a party who alleges he has not been paid a sum due to have an adjudicator appointed without delay and to obtain a decision from that adjudicator in a very short period of time. In Ireland, the period is 28 days (unless agreed otherwise). If the adjudicator decides that a sum of money is due, that money must be paid immediately.

Adjudication, by necessity, offers rough justice. Disputes referred to adjudication are often so complex that they cannot be reviewed as thoroughly as justice would normally demand. The rough nature of the justice is excused on the basis that it is only a temporary measure, pending arbitration or litigation.

The courts in the UK and elsewhere have robustly supported adjudication, to the extent of upholding the adjudicator's decision even where the adjudicator's decision is clearly wrong.

The courts do, however, insist that the tenets of natural justice be adhered to and do refuse to enforce an adjudicator's decision where the adjudicator has materially breached natural justice. It is anticipated that the Irish courts will be required to look more closely at the manner in which the adjudication procedure was operated by reason of constitutional restraints. Questions such as whether an adjudicator is obliged under Irish law to conduct an oral hearing and permit cross-examination where there are significant factual disputes are likely to arise.

Adjudication has been a very successful means of resolving disputes in other countries. While in theory it is only a temporary measure, in prac-

tice the adjudicator's decision usually brings finality to the dispute. Adjudication has been particularly successful in the UK, where the standard achieved by adjudicators is high and, as a result, the process generally enjoys the confidence of the industry. Standard contracts have been amended so as to include adjudication. Whereas statutory adjudication does not apply to all construction contracts (certain residential contracts, for example, being an exception in Ireland and the UK), adjudication may nonetheless apply to exempted projects by virtue of a contractual provision having been made for it in the parties' contract.

### WHAT IS THE ROLE OF THE ADJUDICATOR?

The adjudicator's role is to act as the arbiter and decision maker in relation to the parties' respective rights and obligations in respect of the matters in dispute that have been referred to adjudication. The *Construction Contracts Act 2013* provides that payment disputes may be referred to adjudication for the decision of an adjudicator. The act places obligations on the adjudicator to adhere to strict timeframes within which to reach and issue his/her decision, unless the parties agree to extend the period for the decision. The act also empowers the adjudicator to take the initiative in ascertaining the facts and the law. The act will be accompanied by a statutory instrument introducing a code of practice for adjudication.

The adjudicator, in accepting his/her appointment, conducting the adjudication, and reaching a decision, should ensure that he/she has jurisdiction to determine the dispute referred, that the underlying contracts in relation to the dispute are not excluded contracts and come within the definition of a relevant construction contract under the act, that the dispute has crystallised, and that he/she is validly appointed.

It is critical to the success of the adjudication process and the enforceability of the adjudicator's decision that the adjudicator acts fairly, impartially, in good faith, and without bias as between the parties and adheres to the rules of natural justice, affording each party the opportunity to adequately state its case.

The act provides that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his or her

functions as adjudicator, unless the act or omission is in bad faith. The adjudicator's fees, costs, and expenses are paid by the parties in accordance with the decision of the adjudicator.

### WHAT IS THE ROLE OF ADVISERS TO THE PARTIES?

While there is no obligation on the parties to be legally represented in adjudication, due to the time pressures involved in the process and the temporarily binding nature of the adjudicator's decision, in practice the parties will very often be represented by legal advisers, particularly in larger disputes. The role of the legal adviser is similar to the legal adviser's role in arbitration or litigation in the preparation of the client's case, save to the extent that the adjudication process is truncated.

There are strict timeframes imposed by the act in relation to the referral of a dispute to adjudication, and if these are not adhered to by the parties (and their legal advisers), the adjudicator may not be able to proceed with the adjudication or, if he/she does, the adjudicator's decision may be unenforceable. The legal adviser should ensure that his/her client is aware of these tight timeframes and that the client complies with them. The legal adviser should also make his/her client aware of the temporarily binding nature of the adjudicator's decision and the fact that each party bears their own costs in respect of the adjudication.

### HOW IS THE ADJUDICATION PROCESS CONDUCTED?

The adjudication process is initiated by the service by the referring party on the other party of an intention to refer the dispute to adjudication. The notice of intention to refer is in the form of a notice of adjudication, and the code of practice (which is to be introduced by way of a statutory instrument) prescribes the content of the notice of adjudication.

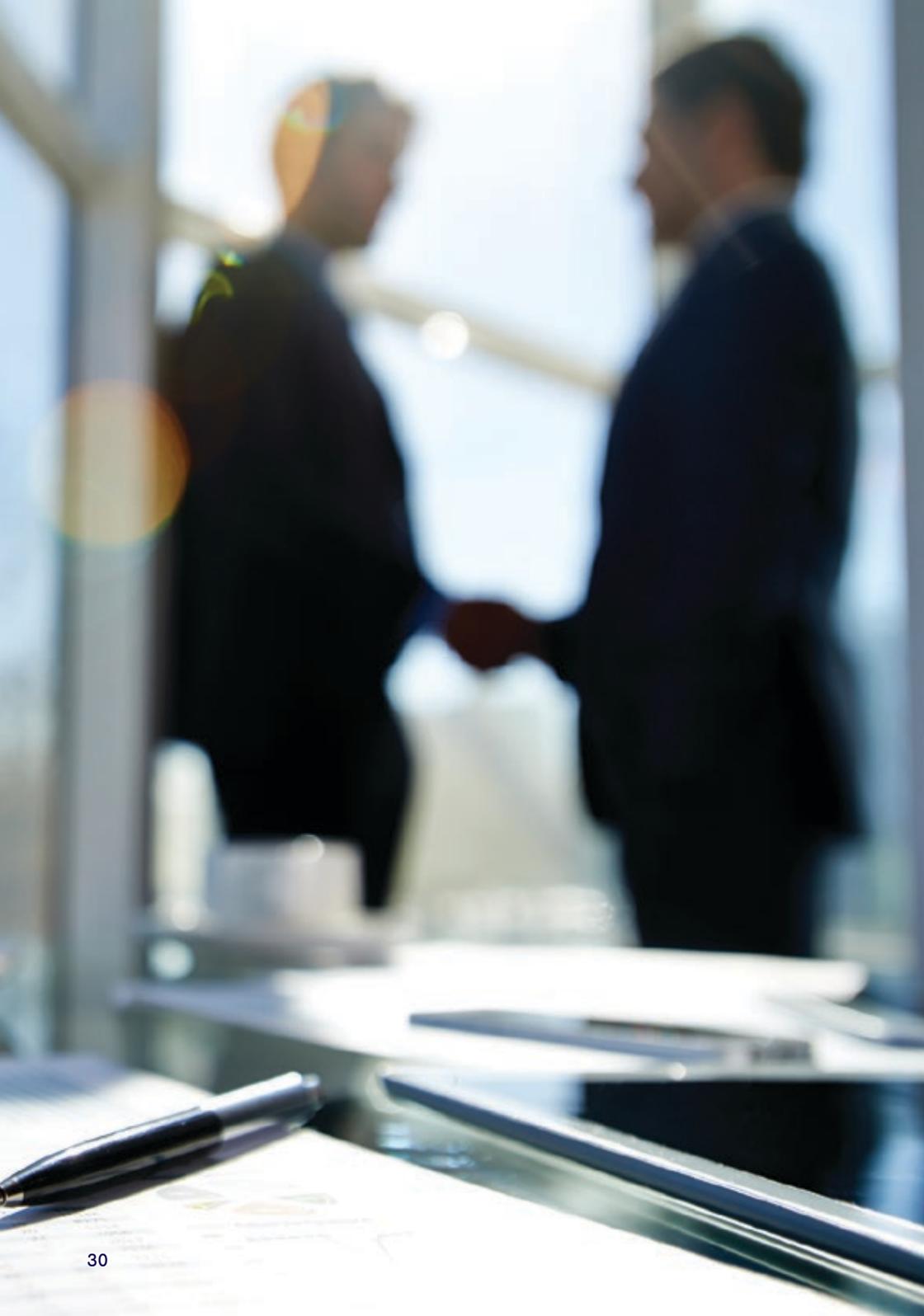
Following service of the notice of adjudication, the parties have a five-day period within which to seek to agree to the appointment of an adjudicator of their own choice or from a panel that will be appointed by the Minister for Public Expenditure and Reform. If the parties are unable to agree on an adjudicator, the chair of that panel appoints the adjudicator.

Following the appointment of an adjudicator, the referring party must refer the dispute to that adjudicator within seven days, beginning with the day on which the adjudicator's appointment is made. The adjudicator then has 28 days from the referral within which to reach a decision (this period may be extended by 14 days by consent of the referring party or such longer period as is agreed by the parties).

The adjudicator's decision is temporarily binding until the dispute is finally settled through arbitration, court proceedings, or by agreement. The decision therefore will be enforced by the courts, notwithstanding that the dispute is referred to arbitration or court proceedings are instituted in respect of the issue decided by the adjudicator. In this regard, either party is entitled to have the dispute dealt with under the mechanism provided for in the contract or through the courts in the normal way. The adjudicator's decision does not bind the court or the arbitrator in any way. Any subsequent litigation or arbitration is not by way of appeal from the adjudicator's decision. It is a totally different process that can take place concurrently with the adjudication, in which event the adjudication is not affected by the arbitration/litigation and vice versa. However, once the court or arbitrator makes a decision, that decision is final and binding. If that decision negates in whole or in part the decision of the adjudicator, any overpayment on foot of the adjudicator's decision must be refunded.

### WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF ADJUDICATION?

As previously mentioned, the objective of adjudication is to elicit a decision within a short fixed-time period, which must be adhered to until it is determined otherwise by arbitration, court, or agreement. As such, the main advantage of adjudication is that it provides a relatively quick and inexpensive means of obtaining cash flow. Although the result is legally only temporary, in practice, parties tend to accept the adjudicator's decision, and very few disputes go on to arbitration or litigation.



# CONCILIATION

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In the broader sense of the word, there is little difference between conciliation and mediation. Academics draw distinctions that are largely elusive and vary from one facilitator to another and from one jurisdiction to another. In Ireland, however, construction conciliation is a unique form of ADR fundamentally different to mediation. The essential difference is that, if the conciliator is unable to facilitate a settlement between the parties, he/she must then issue a recommendation that will be binding upon the parties unless it is rejected by either of them within the prescribed time.

Most conciliation provisions are silent as to the basis on which the recommendation is to be made, leaving the conciliator the option of recommending, on the one hand, a solution that he/she thinks is most likely to resolve the dispute or, on the other, reflecting the result he/she thinks an arbitrator would likely impose. The public works contracts are an exception to this, in that they require the conciliator to make the recommendation on the basis of the parties' strict entitlements under the contract.

## WHAT IS THE ROLE OF THE CONCILIATOR?

Up to the time that he/she is called upon to make a recommendation, the role of the conciliator is to achieve a settlement between the parties. Acting in that capacity, conciliators will very often act as if they were a mediator. The conciliation procedures published by professional bodies usually provide for the conciliator receiving information in confidence. Conciliators will, however, very often ignore that information if they are called upon to make a recommendation, as the veracity and relevance of the information will not have been tested. As with mediation, the conciliator will meet with the parties in joint session and separately. Conciliators appointed in the construction industry are invariably professionals specialising in the industry. Some of the better known conciliators are lawyers, but most are engineers, architects, or quantity surveyors.

## WHAT IS THE ROLE OF ADVISERS TO THE PARTIES?

The role of a legal adviser to the parties is similar to that of other dispute resolution processes in terms of taking initial instructions and advising on the legal merits, but the legal adviser's role is more like acting as a guide for the client in the course of the process. A legal adviser would typically prepare a position paper summarising the party's case in advance of the conciliation. At the conciliation, advice may be required on a particular point (whether legal, financial, or technical) or likely outcomes at trial if there is no settlement. It is important to recall, however, that an adversarial approach – which may be typical of other dispute resolution mechanisms, such as litigation and arbitration – is not always appropriate in the conciliation process. In order for a conciliation process to result in a settlement, goodwill is required from both parties, and a legal adviser should be mindful of that context. It is important that clients understand that the conciliation process is their opportunity to 'take control' of how the dispute is resolved. On the other hand, parties need to be mindful of the fact that, if settlement is not achieved, they each want the best possible recommendation. Any admission of weakness to the conciliator in the conciliation process may jeopardise the recommendation.

Standard clauses often provide that it is a precondition to a dispute being referred to arbitration that it is first referred to conciliation under

the named procedure. The Royal Institute of Architects of Ireland has its own conciliation procedure, as does Engineers Ireland. In the public works contracts, there is no separate procedure – the steps to be taken in the conciliation are included in the contract itself.

#### HOW IS THE CONCILIATION PROCESS CONDUCTED?

Conciliation typically involves the five phases applicable to mediation as described on pages 11–12. The conciliation is conducted very much like mediation, with one important difference. A mediator is not particularly concerned with the rights and obligations of the parties. His or her main concern is to bring about a settlement. A conciliator has to put himself in the position of being able to write a recommendation if settlement is not achieved. Conciliations therefore often involve more debate on the validity or otherwise of the parties' arguments. The parties are also less inclined to be entirely frank with the conciliator than they would be with a mediator, lest that approach might adversely affect any recommendation.

#### WHAT ARE THE ADVANTAGES OF CONCILIATION?

The main advantages of conciliation are that it affords parties the opportunity to manage the dispute in a confidential setting that is without prejudice to any proceedings and that allows them to arrive at a mutually agreeable resolution, rather than an 'imposed' binding outcome that would often result from other dispute resolution methods, such as litigation or arbitration. Information and documentation shared privately with the conciliator cannot be passed to the other party during the conciliation without express permission. Furthermore, the outcome of the conciliation is only publicised if the parties so agree. The process can also result in reduced costs for the parties when compared to litigation or arbitration. Expenses include the conciliator's fee, the cost of preparatory work undertaken, and overheads for the day. The conciliator's fee and overheads are usually shared between the parties. Each party bears its own costs and expenses. Conciliation also offers a degree of flexibility and commerciality, which may be particularly useful where there is an ongoing commercial relationship that parties wish to preserve. The parties are encouraged to make non-binding concessions to propose their own formulae for resolving the dispute, thereby providing the

parties with an opportunity to negotiate a tailor-made solution that will suit their mutual needs.

An added advantage that conciliation may have over mediation is that, in the event that the parties are unable to come to a mutually agreeable outcome, the conciliator can give his/her recommendation. The recommendation will not be binding if it is rejected by either party within an agreed period. The recommendation is very often accepted by both parties.

Conciliation is a very successful means of resolving disputes. Anecdotal but reliable information would indicate that conciliators achieve success in about 80% of cases, whether by way of settlement or recommendation. It is likely, however, that conciliation will either disappear or be greatly diminished as a means of resolving disputes once statutory adjudication becomes applicable to construction contracts.

There is no reason why conciliation of this nature should be confined to the construction industry. It is a viable form of ADR in its own right and capable of being applied to other sectors. In the construction industry, the conciliator's recommendation is not binding in any way if it is rejected by either party. The parties to a contract, however, might consider the possibility of requiring the parties to implement the conciliator's decision, pending any contrary decision being made in litigation or arbitration, with the effect that, if the conciliator recommends a payment, that payment would have to be made, pending the outcome of litigation or arbitration.

#### WHAT ARE THE DISADVANTAGES OF CONCILIATION?

As is the case with mediation, the main disadvantage is that it may result in a time delay for the resolution of a dispute if it does not resolve matters or if there is a failure to engage by one of the parties.







## OTHER FORMS OF ADR

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In addition to the different ADR mechanisms already addressed in this booklet, one may occasionally encounter other forms of ADR, particularly in other jurisdictions. A number of these are dealt with briefly in this section. It is important, however, to bear in mind that the processes relating to these other forms of ADR are not as well recognised or developed in this jurisdiction, and therefore caution is required before advising or representing a client in relation to any of them, to ensure that you as a practitioner are fully apprised of how these different processes work and what the potential benefits and risks for a client might be.

## FACILITATED NEGOTIATION (ASSISTED NEGOTIATION)

Facilitated negotiation, or assisted negotiation, refers to a process where the parties to a dispute negotiate in an effort to resolve the dispute with the assistance of a dispute resolution practitioner (the facilitator). Generally, the facilitator in this context would have no role in advising on, or determining, the content of the matters discussed or on the outcome, but can advise on the process of facilitation or assistance that they will provide. It is important to distinguish facilitated negotiation or assisted negotiation from mediation as a form of ADR.

## EARLY NEUTRAL EVALUATION

This is a non-binding process conducted in private in which the parties to a dispute present evidence and arguments to the dispute resolution practitioner at an early stage. The dispute resolution practitioner does not decide on the facts in dispute, but does evaluate the strengths and weaknesses of the parties' positions and identifies the potential exposure of the respective parties. The process can be used to assist the parties in identifying and narrowing the issues that are in fact in dispute and to identify any other investigations that might assist in further narrowing matters.

The objective of early neutral evaluation is for each of the parties to the dispute to obtain an early assessment of the dispute by a neutral, credible third party (the dispute resolution practitioner) and to assist in narrowing the issues in dispute. Early neutral evaluation can lead to negotiations between the parties and agreed settlements, but does not have to do so.

## MINI-TRIAL

Mini-trials are sometimes used by businesses, particularly in the US, to resolve large-scale disputes. They involve a process in which the parties, or usually their legal representatives, present arguments and evidence to a dispute resolution practitioner who then, based on the presentations, seeks to assist by identifying possible desirable outcomes and the basis upon which those outcomes might be achieved between the parties.

The process assists by letting the parties to the dispute gain an insight into the strengths and weaknesses of their own position and the positions of others in the dispute. This can often give rise to negotiations between the parties, but does not have to. Given its nature, it tends to work best where one is dealing with clients who have experience of litigation and therefore more readily have an insight into the strengths and weaknesses of the position of the parties from attending at the mini-trial.

### DISPUTE REVIEW BOARDS

This process is conducted in private by a dispute review board and has been particularly developed on major construction, engineering, and energy projects. A dispute review board is usually composed of three experts who are appointed when the contract is awarded. The experts become involved in the project by making regular site visits and inspections and reviewing project documentation. They are copied on all the contract documents and progress reports, and so on. When a dispute arises that cannot be resolved by the parties, the dispute is referred to the dispute review board. The board will consider the dispute and make recommendations to the disputing parties. The recommendations of the board are not binding unless the parties accept the recommendations. The perceived benefit of dispute review boards is that the panel is familiar with the project and is in a better position to adjudicate on a dispute.

### MED-ARB

Med-arb (mediation combined with arbitration) is a process conducted in private where the parties agree to mediate but, in the event that mediation fails to achieve a settlement, the dispute is referred to arbitration. The same person may act as mediator and arbitrator. The pitfall in respect of the same person acting as both mediator and arbitrator in the same dispute is that the mediator may have been informed of matters in confidence by one or more of the parties, which that party may not be comfortable with an arbitrator having knowledge of.

### COLLABORATIVE LAW PRACTICE

Collaborative practice is practised in Ireland primarily in the area of family law. The stated aim of collaborative practice is to find a deep,

equitable and sustainable solution for people who are in dispute. It is geared towards the future and towards the wellbeing of all the parties. The essence of the process is that it is in the best interest of the participants to try to resolve the disputes in a non-confrontational way. In Ireland, the norm is that collaborative lawyers must withdraw if the matter does not resolve and goes to court.

Collaborative practice is a structured, creative, and successful method for a couple to resolve the issues arising on their separation or divorce, without going to court. It is an approach that addresses the needs of the whole family and brings about resolution through the participation of both parties and their collaborative solicitors, meeting together and resolving all issues by structured discussion.

Resolution is based on a commitment to the open sharing of all relevant information and a joint common aim to achieve outcomes through discussion and without the costs, delay, and additional trauma of court litigation. The couple and their collaborative solicitors control the content and timing of the process, and the couple decide upon and agree the outcomes. The spirit of cooperation fostered by the collaborative process allows everyone to maintain their dignity, lessens hostility, and reduces the negative impact on children. Freed from the option of court litigation, the collaborative solicitor's focus is on advising and assisting the couple to achieve agreements that are tailor-made to the needs of the whole family. By facing the facts of the separation or divorce in an open, cooperative manner, each participant is giving their best effort to achieving solutions that reflect the needs of all and that will last.

The success rate for the collaborative process is stated to be very high. However, if either of the participants decides to discontinue the process, then the process ends and both collaborative solicitors must withdraw. If either husband or wife decides that they wish to go to court, then neither of the collaborative solicitors involved in the collaborative process can become involved.

## COMPARATIVE SUMMARY\*

LITIGATION	ARBITRATION	CONCILIATION	MEDIATION	ADJUDICATION	EXPERT DETERMINATION
Strict application of legal principles	Flexible application of legal principles	Less emphasis on legal principles	Less emphasis on legal principles	Flexible application of legal principles	Flexible application of legal principles
Technical expertise must be introduced through expert witnesses	Arbitrator may be expert in field	Conciliator may be expert in field	Mediator may be expert in field	Adjudicator may be expert in field	Expert
Outcome binding and enforceable	Outcome binding and enforceable	Settlement agreement enforceable as a contract only	Settlement agreement enforceable as a contract only	Outcome temporarily binding	Outcome binding
Limited range of outcomes	Limited range of outcomes	Creative solutions possible	Creative solutions possible	Limited range of outcomes	Limited range of outcomes
Outcome transparent	Outcome not transparent unless reasons provided	Parties alone determine outcome	Parties alone determine outcome	Outcome not transparent unless reasons provided	Outcome not transparent unless reasons provided
Outcome public	Outcome private	Outcome private	Outcome private	Outcome private	Outcome private
Appeal	No appeal	No need for appeal	No need for appeal	Appeal to arbitration possible	No appeal
Polarising – emphasis on differences	Polarising – emphasis on differences	Brings parties together – emphasis on common goals	Brings parties together – emphasis on common goals	Polarising – emphasis on differences	Less polarising than adversarial mechanisms

\*Extracted from *Arbitration and ADR in Construction Disputes* by G Brian Hutchinson (Round Hall, 2010), p16.

## NOTES



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