Arbitration | Adjudication | Conciliation | Mediation

Peter O'Malley Dispute Resolution

Alternative Dispute Resolution, Legislation and Regulation

An overview

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Presentation content

- Historic context
- Is resolution through court always appropriate?
- Alternative Dispute Resolution (ADR)
- ADR Schemes and principles
- Mediation
- Arbitration and the New York Convention
- Adjudication
- Conclusion

Historic context

- It is part of the human make-up to disagree, the opposition viewpoint has value, but sometimes disagreements will escalate into disputes.
- Historically disputes were resolved locally where the earliest code of law is Ur-Nammu c.2370 BC. More recently Celtic and Brehon law from c.600 BC, laws of equity in England from 1066 onwards.
- From 1500 onwards there has been a trend to seek to codify law, being fully refined under Napoleon. German Law 'if it isn't specifically permitted then it is forbidden' – highly ordered.
- As states have become established the central rule of law through a single state court system has become legitimised and ubiquitous. States have a significant interest in this system to support societal stability and control.

"Arguing with somebody is never pleasant, but sometimes it is useful and necessary to do so."

Lemony Snicket, pen name of Daniel Handler, novelist

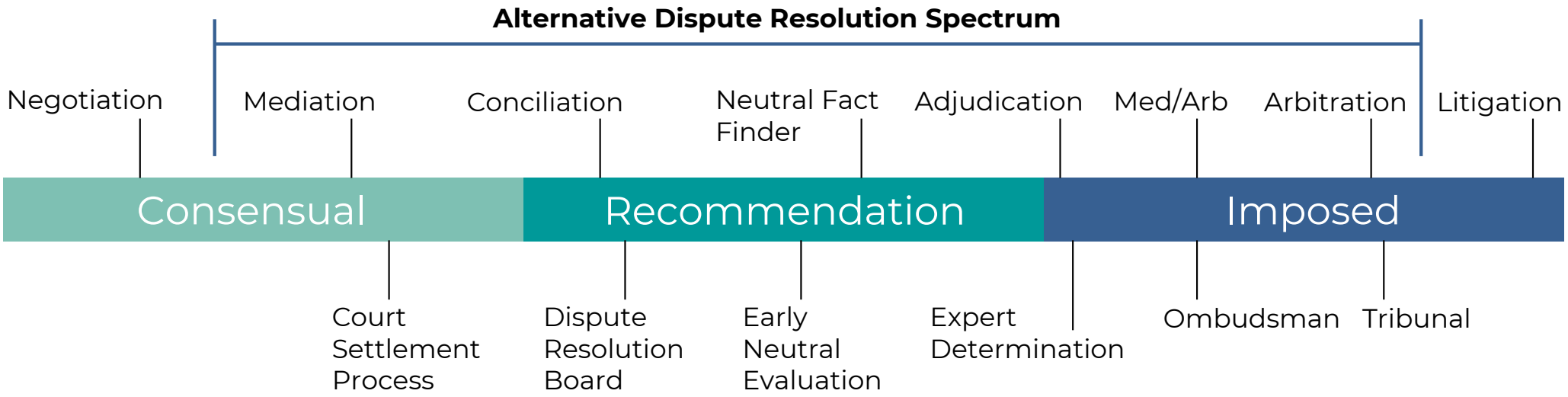
Is resolution through court always appropriate?

"Controversial disputes are a part of democratic culture."

Angela Merkel,
German politician

- Most disputes are limited to two parties, should it always be necessary to submit private disputes to public scrutiny – is this equitable?
- Is the 'one size fits all' process of state courts applicable to all types of dispute?
- The needs of parties seeking dispute resolution will usually be:
  - Expedience
  - Certainty
  - Finality
  - Efficiency
- Can a court system ever succeed in consistently meeting these needs for every type of dispute?
- Should the parties have a degree of autonomy on how their dispute is resolved?
- Is there an alternative?

Alternative Dispute Resolution (ADR)[1]



- A range of available processes.
- Informal to formal proceedings.
- Choice to accommodate breadth of simple to complex disputes.
- Choice of process according to cost and expediency.
- Allows party autonomy to decide on how to resolve the dispute.
- Privacy of proceedings.
- The 'forum can fit the fuss'.
- Capacity to resolve cross jurisdictional disputes.

1. The term Alternative Dispute Resolution (ADR) is generally credited to Professor Frank Sander who in 1976, at the Pound Conference in the US, coined the term 'Alternative Dispute Resolution' (ADR) to account for the use of 'alternative ways of resolving disputes outside the courts.'

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Alternative Dispute Resolution (ADR)

- The importance of ADR was re-affirmed in 2007 in the Lisbon Treaty at Article 65.2(g), where the European Parliament and Council shall adopt measures aimed at ensuring the development of ADR.
- ADR offers a solution to the problem of access to justice due to three factors: the volume of disputes brought before the courts is increasing, the proceedings are becoming more lengthy and the costs are increasing.
- There are types of disputes that are suitable for ADR, family law disputes, appropriate employment law disputes, property disputes, boundary disputes, probate disputes, medical negligence disputes and commercial and consumer disputes.

"Access to justice is not just about accessing institutions but also having the means to improve everyday justice, the justice of people's social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute."

Department of the Attorney General, Australia, 2009.

ADR Schemes

- The European Commission has encouraged member states to establish ADR Schemes for the resolution of customer disputes.
- There are a number of ADR Schemes in Ireland for the resolution of customer disputes:
  - Financial Services Ombudsman.
  - Pensions Ombudsman.
  - Residential Tenancies Board
  - Advertising Standards Authority of Ireland.
  - Irish Travel Agents Association.
  - Society of Irish Motor Industry.
  - National Roads Authority/National Farmers Association
- The Government recognises the importance of ADR as a means of resolving consumer disputes on the basis of being more efficient, flexible and cost effective.

An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

RTB
Bord um Thionóntachtaí Cónaithe
Residential Tenancies Board

SIMI

ASAI

irish travel agents association

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ADR Scheme principles

- The European Commission Recommendation 98/257/EC sets out the seven principles for ADR Schemes to follow:
  - **Independence** of the dispute settlement body to ensure the impartiality of its actions;
  - **Transparency** of the scheme to ensure that the consumer has all the necessary information about the procedure and that the results obtained can be objectively assessed;
  - **Adversarial** procedure to ensure that the consumer has the possibility to present all their views and are informed about the arguments of the other party;
  - **Effectiveness** of the procedure to ensure that the consumer will benefit from the advantages of an alternative dispute settlement;
  - **Legality** to guarantee that the decision taken by the dispute settlement body does not deprive the consumer of the protection afforded by the relevant consumer protection legislation;
  - **Liberty** to ensure that the decision taken may be binding on the consumer only if they are informed of its binding nature in advance and specifically accept this after the dispute in question has arisen; and
  - **Representation** to ensure that the consumer has the possibility to be represented in the procedure by a third party if they wish.

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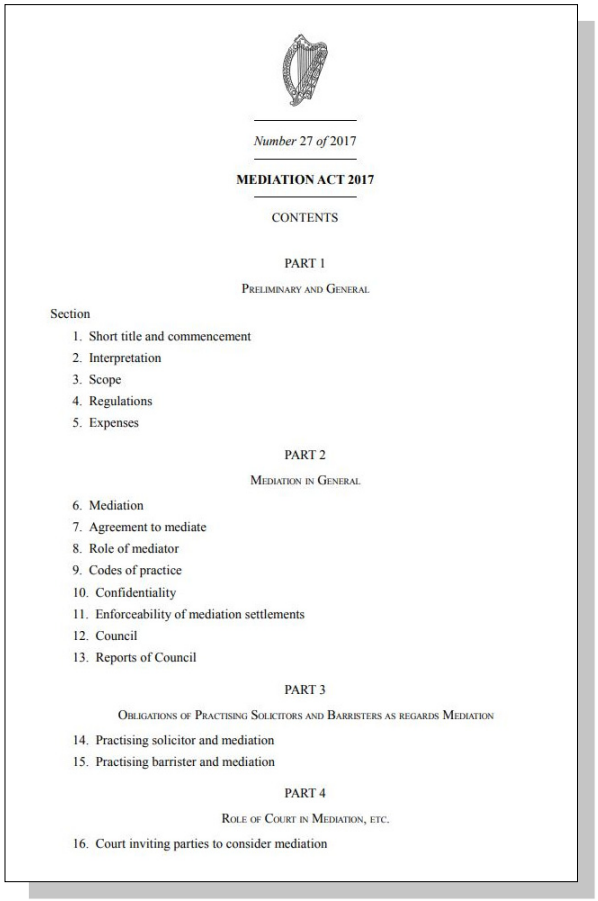
Mediation

- The Mediation Act came into force on 1 January 2018 to promote increased recourse to mediation as a process for dispute resolution.
- Places the obligation to consider mediation on a statutory footing.
- Requires litigants to confirm to the Courts that they have considered mediation.
- Recognises that the mediation process has the potential to achieve better outcomes and can alleviate the strain on the Court system.
- The '*Financial Services and Pensions Ombudsman Act 2017*' and the '*Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017*' promote mediation as a prompt and effective way of resolving financial services disputes.



Number 27 *of* 2017

MEDIATION ACT 2017

CONTENTS

PART 1

PRELIMINARY AND GENERAL

Section

1. Short title and commencement
2. Interpretation
3. Scope
4. Regulations
5. Expenses

PART 2

MEDIATION IN GENERAL

6. Mediation
7. Agreement to mediate
8. Role of mediator
9. Codes of practice
10. Confidentiality
11. Enforceability of mediation settlements
12. Council
13. Reports of Council

PART 3

OBLIGATIONS OF PRACTISING SOLICITORS AND BARRISTERS AS REGARDS MEDIATION

14. Practising solicitor and mediation
15. Practising barrister and mediation

PART 4

ROLE OF COURT IN MEDIATION, ETC.

16. Court inviting parties to consider mediation

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Mediation

- The Act obliges solicitors to advise clients engaged in litigation to consider mediation as a means of resolving their dispute.[1]
- Solicitors are obliged to 'swear' a statutory declaration confirming advice of mediation.
- The process belongs to the parties, it is for the parties to advance proposals for settlement.
- The mediator can advance proposals only if the parties give explicit permission to do so.
- The Act provides that all records and communications of the mediation process are confidential and will not be disclosed in Court.
- The Act seeks to provide greater structure and clarity to an already well established process of dispute resolution.

1. Similar provisions already exist in family law legislation, Section 5 of the Judicial Separation and Family Law Reform Act 1989

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Cross-border Mediation enforcement

- The EU Mediation Directive No.2008/52/EC allows for the enforcement of cross border mediated settlement agreements through the national courts of EU Member States.
- The Directive has prompted significant legislative changes in several Member States.
- The Commission recognises that there are difficulties with the functioning of many national mediation systems in practice, attributed principally to the lack of 'mediation culture'.
- Beyond the EU enforcement is significantly more difficult to the point of being essentially unavailable.
- The Singapore Convention of 7 August 2019 has sought to address international enforcement, but only six state signatories to date.

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Arbitration

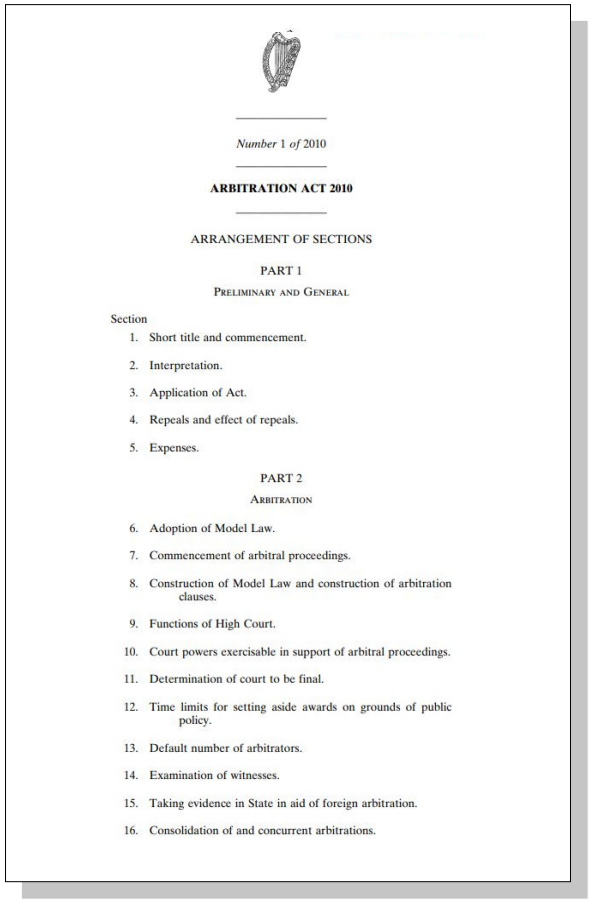
- Arbitration is an ancient and well established method of resolving disputes, that benefits from:

  - An arbitrator chosen according to expertise.
  - Parties being able to agree on the arbitrator.
  - Parties can control the proceedings.
  - Certain Court proceedings can be avoided.
  - Legal representation is not necessary.
  - There is privacy of proceedings.
  - There is confidentiality of the award.

- However, there are disadvantages:

  - The parties bear the cost of the arbitrator.
  - Limited powers to deal with recalcitrant parties.
  - Difficulty in disputes with more than two parties.

- Is the privacy of an arbitral award advantageous in terms of the public interest?



Number 1 *of* 2010

ARBITRATION ACT 2010

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

Section

1. Short title and commencement.
2. Interpretation.
3. Application of Act.
4. Repeals and effect of repeals.
5. Expenses.

PART 2

ARBITRATION

6. Adoption of Model Law.
7. Commencement of arbitral proceedings.
8. Construction of Model Law and construction of arbitration clauses.
9. Functions of High Court.
10. Court powers exercisable in support of arbitral proceedings.
11. Determination of court to be final.
12. Time limits for setting aside awards on grounds of public policy.
13. Default number of arbitrators.
14. Examination of witnesses.
15. Taking evidence in State in aid of foreign arbitration.
16. Consolidation of and concurrent arbitrations.

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Arbitration clauses

- Arbitration clauses are incorporated within the terms and conditions of many contracts.
- Arbitration clauses are common in both consumer contracts and commercial contracts.
- Where an arbitration clause is included or even implied within a contract, the Courts will recognise and uphold the clause as the agreed process by which a dispute is to be resolved.
- A defectively worded dispute resolution clause can give rise to significant difficulties to parties in resolving their disputes.

14. DISPUTES
If you have a complaint in relation to the purchase of a vehicle, you are entitled to:

a) Refer this complaint to the SIMI investigation and Complaint service for investigation and mediation.
b) Subject to the provision of these Conditions any dispute or difference of any kind whatsoever that arises or occurs between you and the Dealer in relation to anything or any matter arising under, out of or in connection with this contract shall either be referred to arbitration under the Arbitration Rules of the Chartered Institute of Arbitrators (Irish branch) or
c) If the total amount in dispute and claimed is less than 1,270 euro (or any subsequently amended limit), the dispute may be referred to the Small Claims Court.

SIMI Dispute resolution clause

Disputes and Arbitration
If a dispute or difference arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, is not resolved within thirty (30) days after the service of a Dispute Notice, whether or not a Dispute Meeting has been held, it may be referred by either Party to and finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this Clause. The number of arbitrators shall be one who shall be qualified both as a lawyer and as a civil engineer. The seat, or legal place, of arbitration shall be Dubai, United Arab Emirates. The language to be used in the arbitration shall be English.

Typical international arbitration clause

Arbitration

- Arbitration is a formal procedure, where the arbitrator's award will reflect the 'rights and obligations' between the parties in their contract.

"If parties have a dispute with each other respecting their private obligations, and desire to choose an arbitrator, be it lawful for them to select whomsoever they will. But when they have mutually selected an arbitrator, let them stand fast by his decision and by no means carry an appeal from him to another tribunal. But let the arbitrator's sentence be supreme."[1]

- Arbitration has the distinct advantage of unrivalled enforceability on a worldwide basis – it is the cornerstone of international trade.

1. The Athenian Demosthenes 384 BC.

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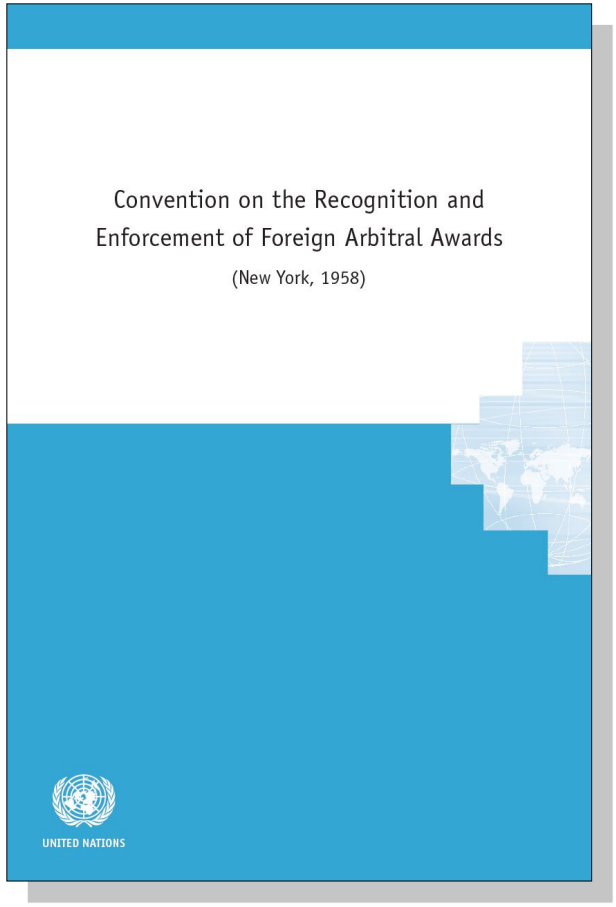
The New York Convention 1958

- A legislative standard for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitration awards.
- Requires courts to deny parties to access court proceedings in seeking to contravene their agreement to refer their dispute to arbitration.
- To ensure that foreign and non-domestic arbitral awards not discriminated against, are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards.
- There is an overriding presumption to enforce awards with only very narrow grounds upon which to refuse – essentially pro-enforcement.



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The ‘narrow’ grounds for refusal.

1(a) incapacity of lack of a valid agreement.

1(b) a party not being given notice of opportunity to present their case.

1(c) the award being made outside the terms of the case.

1(d) composition of tribunal not being in accordance with the agreement between the parties.

1(e) the award is not binding or has been set aside.

2(a) the subject matter is not capable of settlement under the law of the country in which the award was made.

2(b) enforcement would be contrary to the public policy of the country in which enforcement is being sought.

1. For the full text upon which the enforcement of an arbitral award may be refused refer to United Nations Secretary General, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* United Nations conference on International Commercial Arbitration 10 June 1958 at Article V 1. (a) to (e) and 2. (a) and (b)

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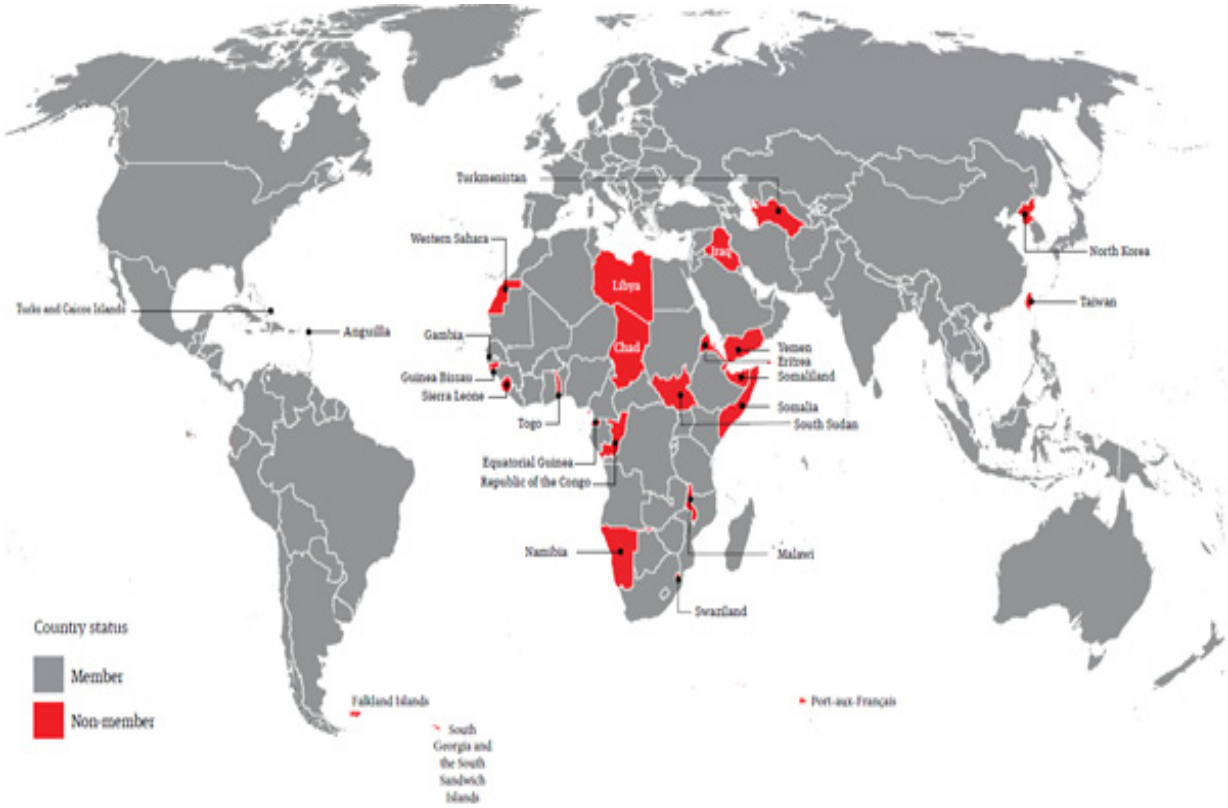
The New York Convention 1958

"the most successful multilateral instrument in the field of international trade law."

ICCA Guide to the interpretation of the 1958 New York Convention.

- A virtually worldwide mechanism of international law.
- Iraq was the 168th state signatory, 23 March 2021.



Signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. [1]

1. Norton Rose Fulbright, 2020

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Adjudication

- Statutory Adjudication, in the construction industry, was championed by the late Senator Feargal Quinn - unusually through a private members bill.[1]

"I knew that cash flow was very important to sub-contractors, many of whom were left high and dry in the recession after the main contractors they had worked with refused to pay them" [2]

- Introduced through the Senate in May 2010 the Construction Contracts Bill became law on 29 July 2013.[3]
- The necessity to draw up a Code of Practice, formulate an Adjudication Panel and amend the Rules of the Superior Courts resulted in extensive delay to implementation.

1. Unusually, because because the most recent Private Members' Bill initiated in the Seanad to become Law, prior to the Construction Contracts Act, was the 'Protection of Animals (Amendment) Act 1965'.
2. Feargal Quinn, Quinntessential (2016) at p. 252.
3. There are exceptions to the legislation such as contracts of less than 10,000 euro as an example.

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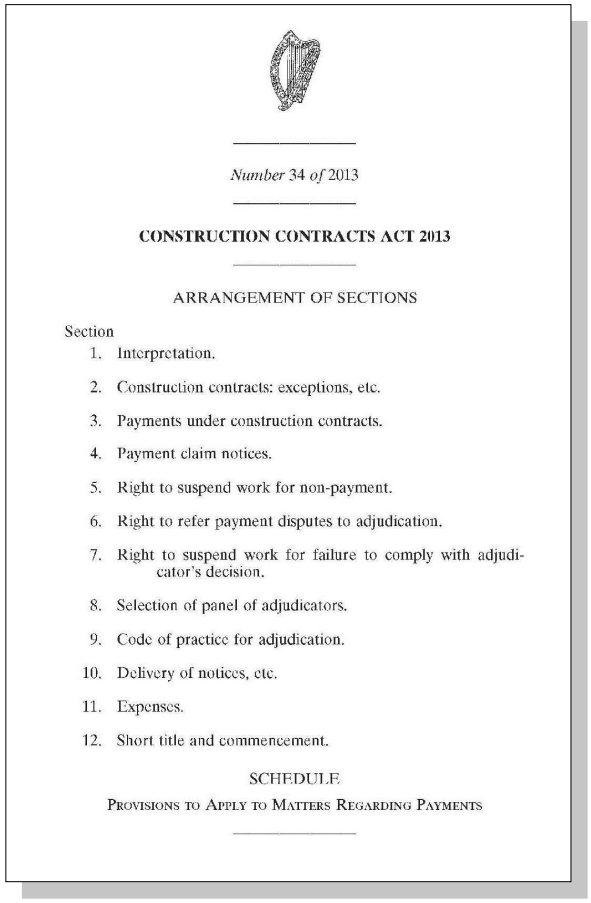
Construction Contracts Act 2013

- Statutory Adjudication was established as part of the Construction Contracts Act 2013 (CCA 2013) – enacted into law on 25 July 2016.
- The CCA 2013 seeks to improve payment practices in the construction industry and allow for the swift resolution of disputes.[1]
- The objective of the CCA 2013 is to impose payment mechanisms, particularly to sub-contractors, with adjudication introduced as an additional protection.
- Statutory Adjudication is available for any party engaged in a qualifying construction contract, with limited exceptions. [2]



Number 34 *of* 2013

CONSTRUCTION CONTRACTS ACT 2013

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.
2. Construction contracts: exceptions, etc.
3. Payments under construction contracts.
4. Payment claim notices.
5. Right to suspend work for non-payment.
6. Right to refer payment disputes to adjudication.
7. Right to suspend work for failure to comply with adjudicator's decision.
8. Selection of panel of adjudicators.
9. Code of practice for adjudication.
10. Delivery of notices, etc.
11. Expenses.
12. Short title and commencement.

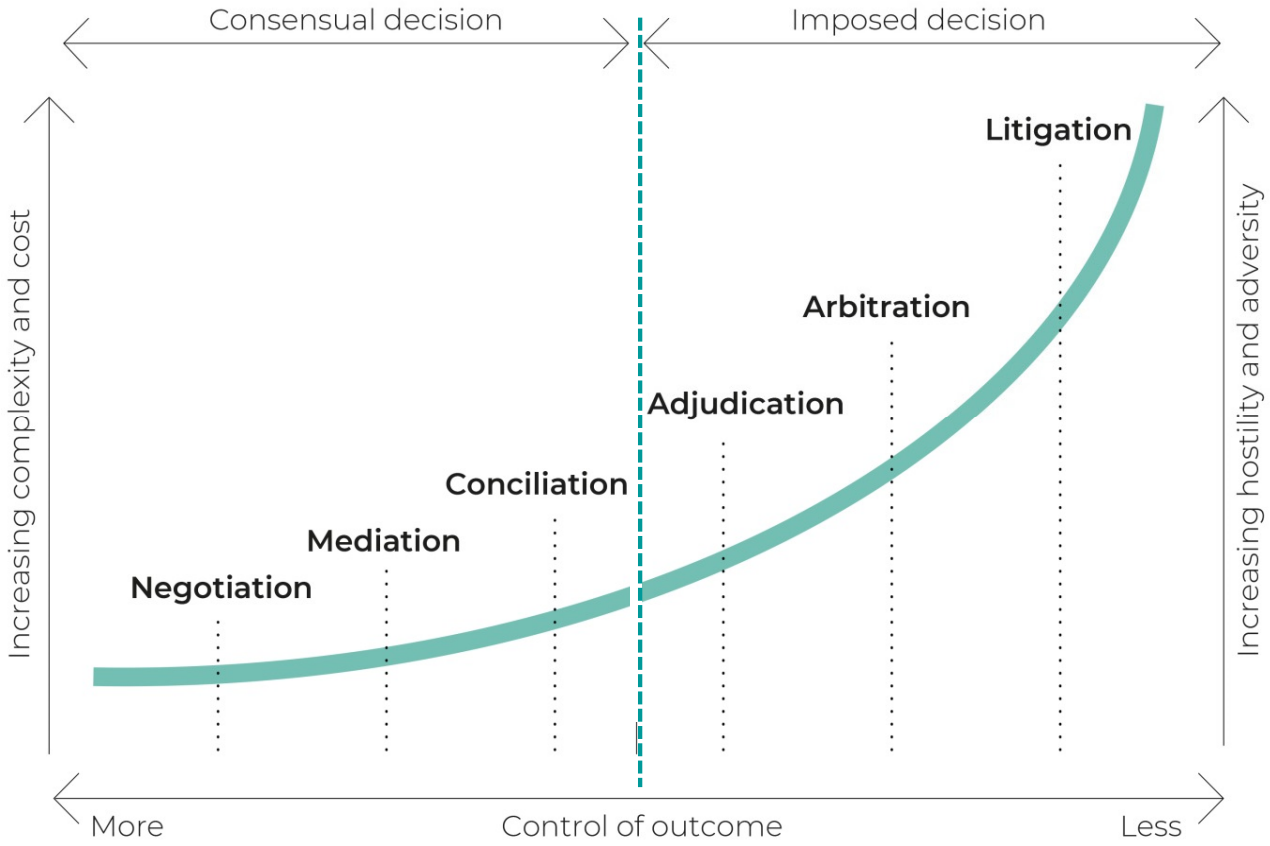
SCHEDULE

PROVISIONS TO APPLY TO MATTERS REGARDING PAYMENTS

1. The Construction Contracts Act 2013 at Section 1, includes main contracts, sub-contracts and professional appointments.
2. The exceptions are in Section 2 of the Act and include contracts of less than 10,000 euro as an example.

Adjudication in context

- Construction adjudication supports an imposed decision in resolution of a dispute.[1]
- The expediency of the process results in significantly lower costs.
- Adjudication is fast and adversarial, it does not support the continuance of good working relationships.
- Adjudication is becoming more popular as a dispute resolution mechanism



Construction adjudication in context

1. An adjudicator's decision is temporarily binding subject to reference to arbitration, if available, or litigation.

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Construction Contracts Act 2013 (CCA 2013)

- From the beginning 'the end is in sight' with most adjudications concluded with a decision issued in either 28 or 42 days.[1]
- The adjudicator's decision is temporarily binding, unless the dispute proceeds to arbitration, if available, or litigation.[2]
- The process is expedient where resources can be finitely directed within a fixed period of time.
- Payment is immediate on an adjudicators decision being issued – thus assisting with cash flow.
- Adjudication under the Act can be invoked '*at any time*',[3] it is not possible to contract out of adjudication.[4]
- The threat of invoking adjudication can encourage early settlement, either in its own right or in the context of other dispute procedures.

1. Construction Contracts Act at Section 6.-(6)&(7).
2. Compared to a conciliators recommendation which requires the acceptance of both parties, an adjudicator's decision is to all intents a binding decision imposed by a third party neutral.
3. Construction Contracts Act at Section 6.-(2).
4. Construction Contracts Act at Section 2.-(5).

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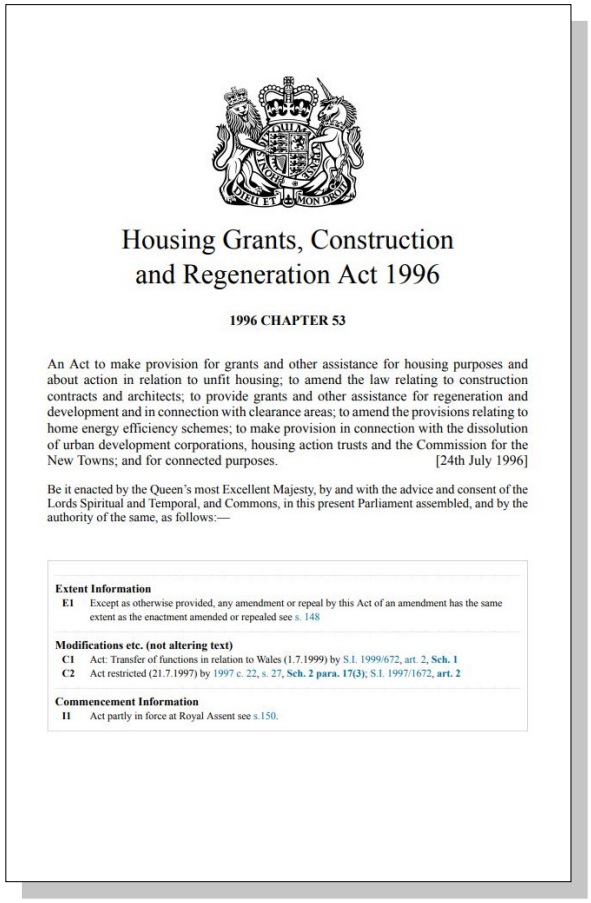
Construction Contracts Act 2013 (CCA 2013)

- Adjudication under the CCA 2013 is *'based'* on Section 108 of the Housing Grants, Construction and Regeneration Act 1996 of England and Wales.

"a speedy mechanism for settling disputes in construction contracts on a provisional basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement." [1]

"Injustice will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party." [2]

"the adjudicator's task was simply to find an interim solution that met the needs of the case, and that the need to have the "right answer" had been subordinated to the need to have the right answer quickly." [3]



Housing Grants, Construction and Regeneration Act 1996

1996 CHAPTER 53

An Act to make provision for grants and other assistance for housing purposes and about action in relation to unfit housing; to amend the law relating to construction contracts and architects; to provide grants and other assistance for regeneration and development and in connection with clearance areas; to amend the provisions relating to home energy efficiency schemes; to make provision in connection with the dissolution of urban development corporations, housing action trusts and the Commission for the New Towns; and for connected purposes. [24th July 1996]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extent Information

E1 Except as otherwise provided, any amendment or repeal by this Act of an amendment has the same extent as the enactment amended or repealed see s. 148

Modifications etc. (not altering text)

C1 Act: Transfer of functions in relation to Wales (1.7.1999) by S.I. 1999/672, art. 2, **Sch. 1**

C2 Act restricted (21.7.1997) by 1997 c. 22, s. 27, **Sch. 2 para. 17(3)**; S.I. 1997/1672, **art. 2**

Commencement Information

I1 Act partly in force at Royal Assent see s.150.

1. Dyson J, *Macob Civil Engineering Limited v Morrison Construction Ltd* [1999] EWHC 254 (TCC).
2. Dyson J, *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522.
3. Chadwick LJ, *Carillion Construction v Devonport Royal Navy Dockyard* [2005] EWCA Civ.1538 [2006] BLR 15.

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Adjudication detractors

- The introduction of Statutory Adjudication as a dispute resolution process has not been without its detractors:

  Adjudication "represents a disastrously misguided intervention by the DETR (Department of the Environment, Transport and the Regions) in the affairs of the construction industry. It can only serve to paralyse the effective administration of construction projects and act as a powerful impetus to increased litigation and higher construction costs." [1]

  Adjudication "is arguably the most radical interference by the legislature of any country in which it has been introduced in respect of the right to contract on such terms as the parties deem appropriate, with the possible exception of legislation prohibiting unfair terms where such legislation exists." [2]

1. Ian Duncan Wallace, *Contemporary Developments in Construction Law: the HGCRA 1996, the Arbitration Act 1996, and the Crouch Doctrine* (1998) 14 Construction Law Journal 164.
2. Anthony Hussey, *Construction Adjudication in Ireland* (2017) Routledge ISBN 978-1-138-18792-4 at p. 1.

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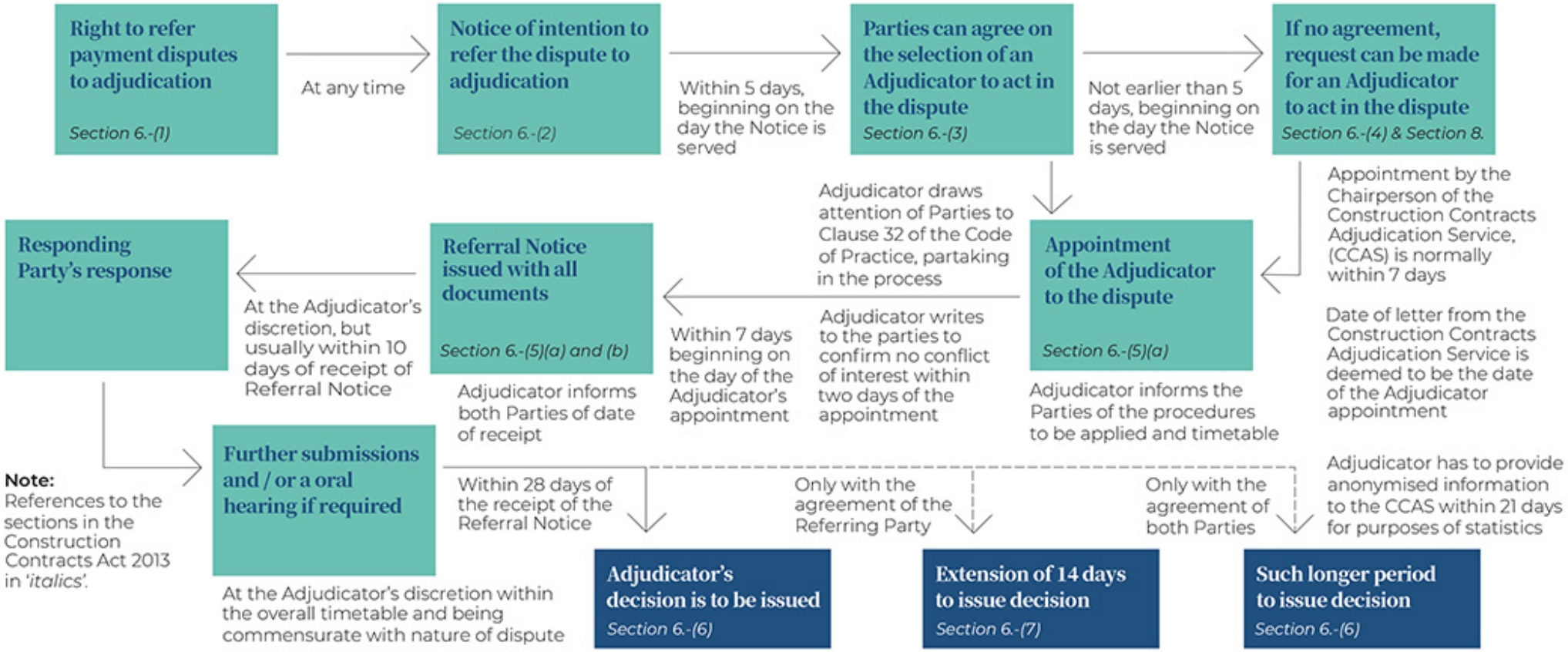
The adjudication process



- Compliance with the adjudication process timeline is critical.
- The linear timeline from invoking adjudication to issue of decision is intense and demanding on both parties.

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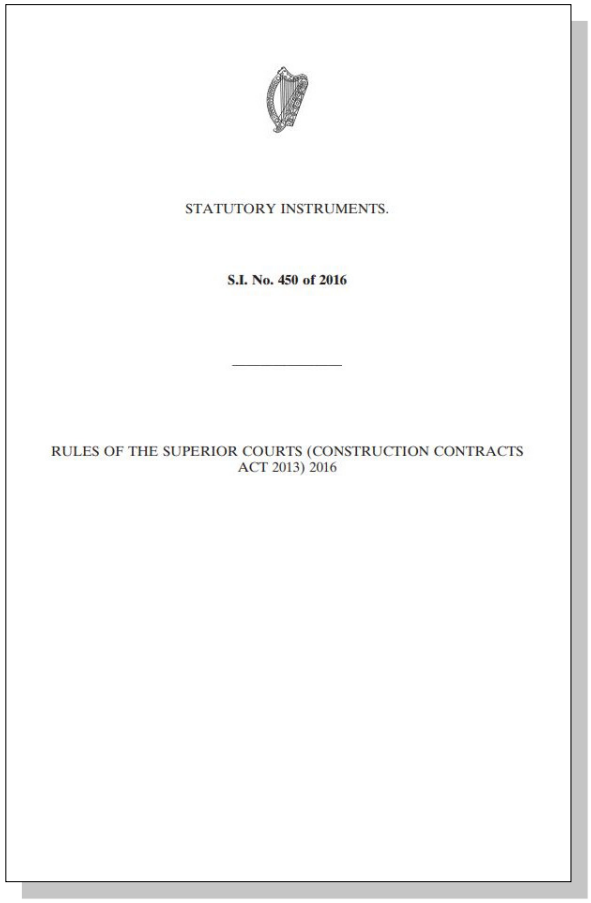
Adjudication and the Courts

- In the UK there have been over 800 court decisions in a period of 25 years.[1]
- For the first four years since enactment there was doubt about the enforceability of an adjudicator's decision and an absence of jurisprudence.
- Commentators have stated that adjudication is inherently incompatible with the Constitution due to the limited timescale in which decisions are made, often without a hearing.
- The Irish Courts have engaged and supported adjudication through the issue of Order 56B amending S.I No.450 of 2016 to determine proceedings for the High Court to enforce or enter judgment in respect of the decision of an adjudicator.[2]



STATUTORY INSTRUMENTS.

S.I. No. 450 of 2016

RULES OF THE SUPERIOR COURTS (CONSTRUCTION CONTRACTS ACT 2013) 2016

1. The investment in Statutory Adjudication in the UK is illustrated in the stated opinion that 'in the first 10 years from enactment it generated the equivalent of roughly 100 years of case law', attributed to Coulson LJ.
2. Since the beginning of 2021 there have been at least four cases where the High Court has supported the adjudication process.

Adjudication and the Courts

- There has been a dedicated High Court Judge for arbitration, Mr Justice Barniville, now Mr Justice Sanfey and there is now a dedicated High Court Judge for adjudication, Mr Justice Simons."

  "the legislation allows an adjudicator to take the initiative in ascertaining the facts and the law in relation to the payment dispute. The role of an adjudicator is thus more inquisitorial than that of a court." [1]

  "The 2013 Act confers binding status on the decision of an adjudicator in the interim such that any decision gives rise to an immediate payment obligation which should be treated as being capable of enforcement forthwith save in the narrowest of circumstances."[2]

- There is now a growing body of case law in support of adjudication from the Irish Courts – including the fast-tracking of enforcement cases through the court process.

1. Simons J, *Aakon Construction Services Limited v Pure Fitout Associated Limited* [2021] IEHC 562 at 6.
2. n1.

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Adjudication and regulation

- The Construction Contracts Adjudication Service (CCAS) is responsible for matters in relation to the implementation of the CCA 2013.
- The CCAS provides guidance on the CCA 2013 through its published information booklet.
- The CCA 2013 allows the parties to choose their own adjudicator, if no agreement can be reached an adjudicator is nominated by the Chairman of the CCAS, presently Mr Bernard Gogarty.
- The CCAS has a panel of 36 adjudicators from differing professions, where application was heavily over-subscribed, all of whom have been through a rigorous selection process.
- Previously most adjudications were between sub-'contractors v main contractors', now adjudication invoked by 'main contractors against employers' is becoming more prevalent.

Construction Contracts Adjudication Service

An Roinn Gnó,
Fiontar agus Nuálaíochta
Department of Business,
Enterprise and Innovation

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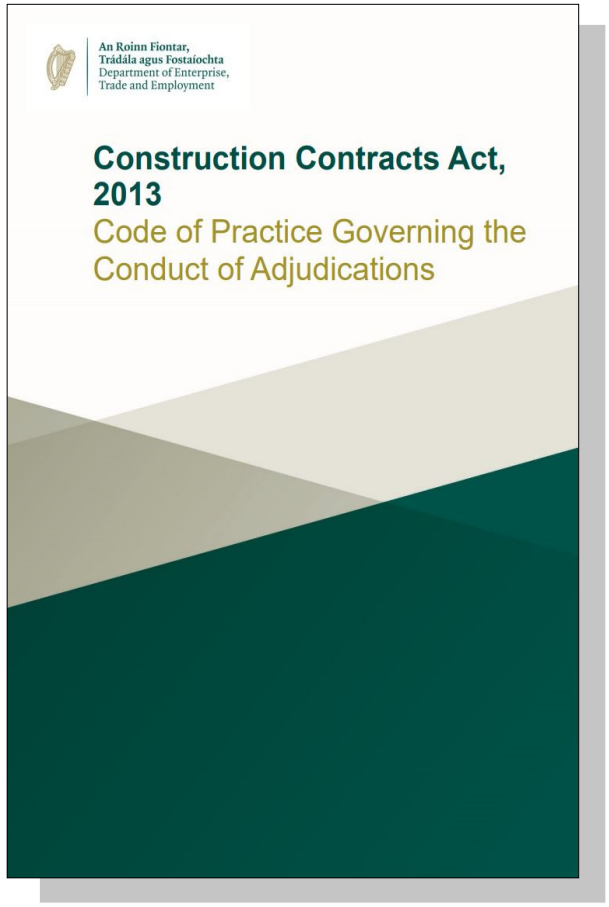
Adjudication and regulation

- The CCA 2013 has a Code of Practice Governing the Conduct of Adjudications.

  6. A prospective Adjudicator should only accept an appointment to a payment dispute under the Act if he/she: (i) is able to give the adjudication the time and attention which the parties to the payment dispute are reasonably entitled to expect; (ii) believes that he/she is competent to determine the issues in dispute; and (iii) is satisfied that no conflict of interest exists between him/her and the parties subject to paragraphs 11 and 20 of this Code of Practice.

  (14) 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, and any employee or agent of the adjudicator is similarly protected from liability.



- Is the CCAS a 'regulator' or a more correctly a 'monitor'?

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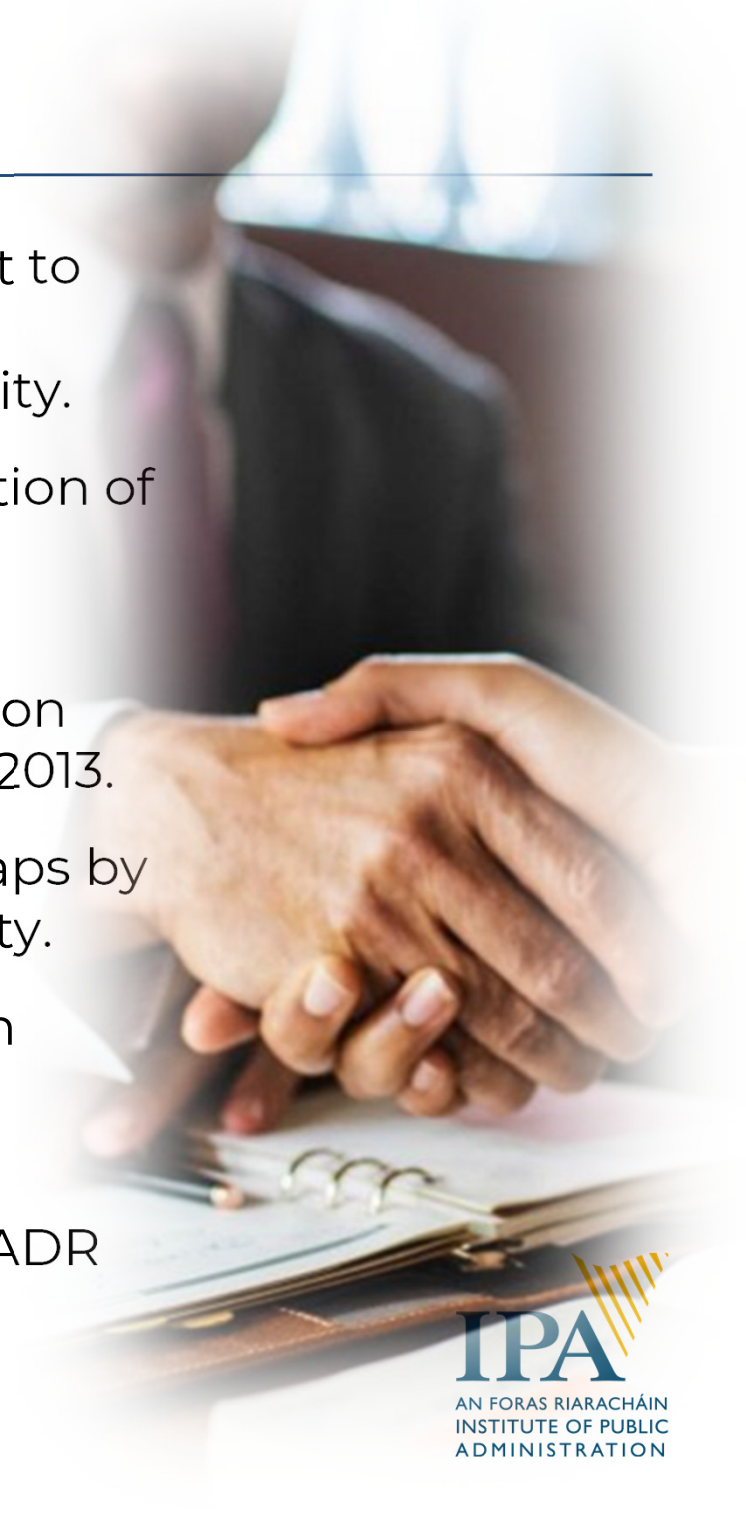
Regulation and ADR

- There is a lack of regulation across the ADR industry to determine who can practice dispute resolution, as a third party neutral, across the various choice of ADR processes.
- Presently regulation is voluntary, as in compliance with the CCAS Code of Practice.
- There are now a number of bodies, private and public, in different business sectors that offer panels of dispute resolution practitioners.
- Many of these panels demand minimum formal qualifications for inclusion, where the standards are steadily increasing.
- ADR now forms an integral part of a number of third-level courses, including TCD, UCD and UCC.
- ADR may become more regulated over time.

Conclusion

- There will always be a healthy tension in the extent to which the judiciary accedes to Alternative Dispute Resolution (ADR), whilst acknowledging its necessity.
- The last 15 years in Ireland has seen a steady evolution of ADR legislation, Arbitration Act 2010, Construction Contracts Act 2013 and the Mediation Act 2017.
- However regulation in support of this new legislation has been lacking, e.g. delay in implementing CCA 2013.
- Notwithstanding the lack of regulation ADR, perhaps by necessity, has now gained legitimacy and credibility.
- As the Court system continues to be strained by an increasing caseload and process restrictions, ADR allows access to justice for appropriate disputes.
- There is now an established body of thought that ADR should be compulsory before Court action.



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Thank you for listening

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