

RIAI

Role of the Employers Representative (ER) in the Public Works Contract

Dispute avoidance and resolution

Peter O'Malley, FCI Arb, RIBA, RIAI

- The skill set of an Employers Representative in the context of the Public Works Contract (PWC) can be demanding, where increased management skills become more important as projects increase in scale.
- The Public Works Contract is a lump sum contract for *'Building works designed by the employer'*, often procured with incomplete tender information as part of a constrained overall project programme.
- For virtually all small to medium contracts the primary criteria for a successful tender is the securing of a low price – a low tender is not necessarily a good tender.
- The client body will be cost sensitive, sometimes not sufficiently experienced, exposed to scrutiny and answerable in terms of cash flow, budget and internal oversight.
- It is not unusual for Contractors to not fully appreciate the PWC contract risks, ground works and background information as examples, or to have under-anticipated the necessary management resource required in administering the PWC contract.

There is less latitude in PWC contracts compared to other standard form contracts.

- The role of the Employers Representative in the Public Works Contract (PWC) requires a change of 'mind set' from that of the Design Architect.
- The Public Works Contract requires an organised approach to management and record keeping to fulfil your obligations in administering of the contract, within the context of treating both parties even-handedly, in a fair minded and unbiased manner.
- The role also requires an anticipatory approach to identifying issues that could escalate to become disputes – always remember that you have the opportunity, usually limited, to resolve issues before they get out of control.
- If you don't use this opportunity and the dispute escalates it will be taken out of your hands, you move from being the referee to being a supporter on the side-lines.
- Remember that projects can go wrong, you have a vested interest in trying to prevent this. See *Riva Properties v Foster + Partners Ltd* [2017] EWHC 2574 (TCC) and *Freeborn & Goldie v Daniel Marcal Architects* [2019] EWHC 454 (TCC).

As ER you have a considerable vested interest in pro-actively avoiding disputes.

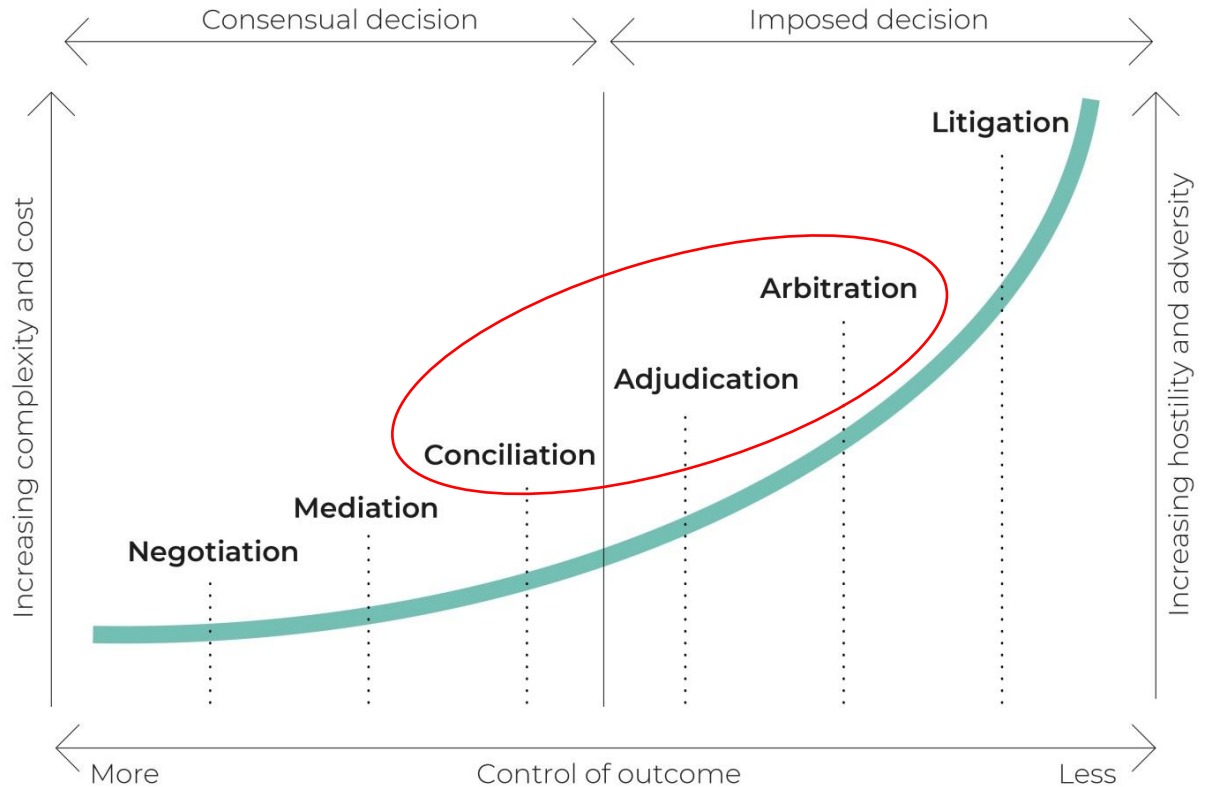
- Sub-clause 4.1.1 states that the Employer and the Contractor shall support reciprocal co-operation, but often there are limits to the extent of co-operation.
- Most disputes originate as claims under the contract *‘whether for payment, for time, for variation, for a perceived failure in the administration of the contract or arising from a departure by one or other party from its obligations under the contract’*¹
- Sub-clause 10.5.1 of the PWC form requires the ER to make a determination of any claim or a proposal made by the contractor under sub-clauses 10.3 or 10.4 within 20 working days of receipt.
- A dispute will then arise where typically the Contractor’s claim is rejected, usually through the ER’s determination, and this rejection is in turn rejected by the Contractor. At this point the ER’s capacity to avoid the dispute is likely to have been lost.
- Either party has the right to refer, sub-clauses 10.5.4 and 10.5.5, the dispute to the Dispute Management Procedure at sub-clause 13.1 or to Conciliation, sub-clause 13.2

Remember your determination may not be final, it may come under closer scrutiny.

- The Dispute Management Procedure is set out at sub-clause 13.1 of the PWC contract, where the parties engage through a Project Board in a, without prejudice, dispute resolution process prior to any reference to Conciliation.
- The Project Board, usually consisting of two or three representatives from each party, will review any ER determinations, issued under sub-clauses 10.5.4 and 10.5.5 where any supporting evidence as part of formulating the determination can be called for.
- Neither the Contractors Representative or the Employers Representative may sit on the Project Board, nor may they attend meetings of the Project Board unless requested to do so.
- The Project Board has the advantage of involving individuals who will be at distance from the 'day to day' running of the project, but the Project Board is disadvantaged insofar as the dispute will have already arisen before it is referred. As a result positions may already be entrenched.

If the Project Board cannot resolve the dispute it is then referred to Conciliation.

- The PWC contract only provides for Conciliation and Arbitration at sub-clauses 13.2 & 13.4, whilst acknowledging Adjudication at 13.3.
- Early intervention through diplomacy followed by negotiation will always be the most expedient way to resolve a dispute.
- As a dispute escalates your involvement, as the ER, will increase correspondingly, but your influence will decrease rapidly.
- Advising and supporting adversarial dispute resolution is distracting and demanding on time and resource.



Characteristics of primary dispute resolution procedures

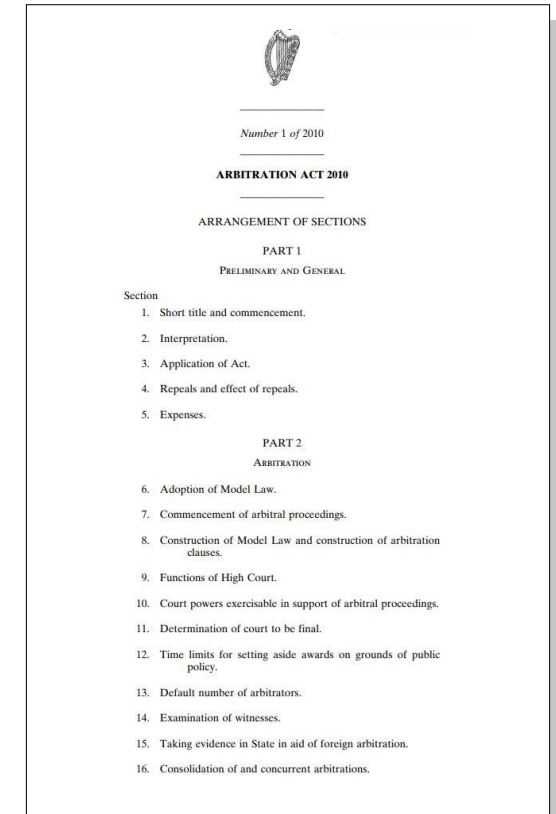
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As a dispute escalates it incurs increasing cost, which you may not have allowed for.

- If the dispute remains unresolved under the Dispute Management Procedure under sub-clause 13.1 it is then referred to Conciliation under sub-clause 13.2.
- The Conciliator has wide powers including the conduct of investigations 13.2.5(2) and obtaining technical or legal advice 13.2.5(4).
- The ER determination and the evidence to support the decision made will be central to the Conciliators consideration of the dispute.
- If the parties cannot come to agreement, facilitated by the Conciliator, in settling the dispute the Conciliator will issue a recommendation that if not rejected within 42 days becomes conclusive and binding 13.2.10.
- For projects over 10m euro it is mandatory to engage a Standing Conciliator (Section N of the PWC Schedule) who will be engaged in seeking the early resolution of disputes throughout the duration of the project.

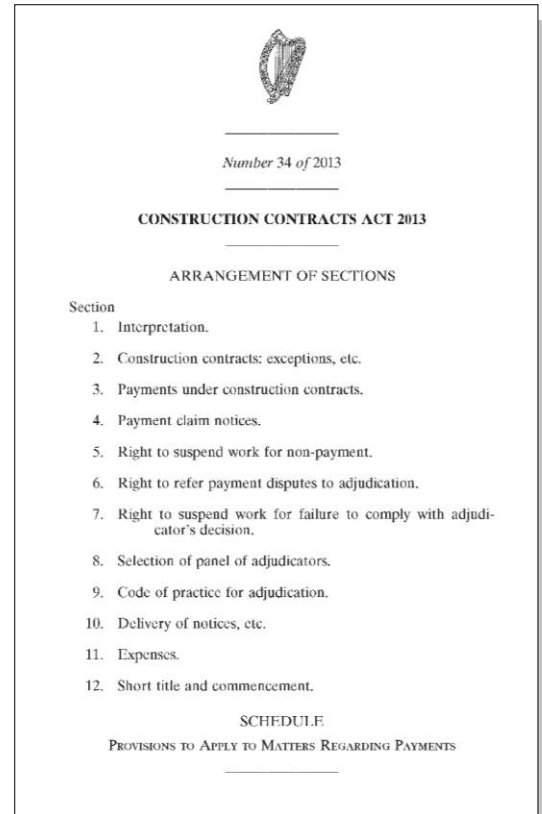
If the dispute is not resolved through Conciliation it continues to Arbitration.

- Arbitration is the concluding process in resolving any dispute under the PWC contract, it is a formal process that is final and binding, with virtually no grounds for appeal.
- Arbitration, akin to court proceedings, is likely to be prolonged taking months and even years in duration on large disputes.
- The ER's determination will be subjected to the highest level of scrutiny together with the ER's project records.
- As the ER to the project there is every likelihood of being called as a witness of fact during the arbitration hearing.
- Cross examination at an arbitral hearing is demanding and requires extensive preparation, where any weaknesses in your contract administration will be exploited.



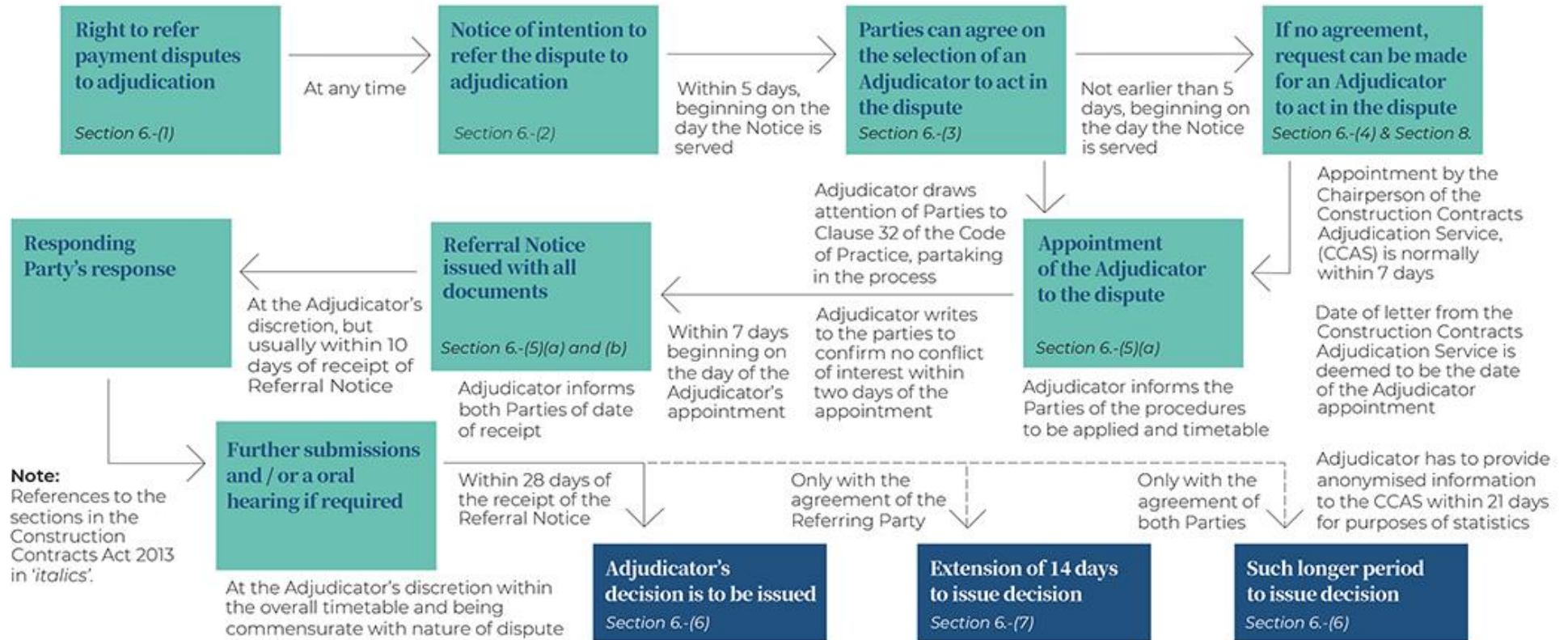
An arbitral hearing requires the same preparation from the ER as in court litigation.

- Statutory Adjudication is available for any party engaged in a qualifying construction contract, with limited exceptions, and can be invoked *'at any time'*, see PWC sub-clause 13.3.
- Statutory Adjudication was established as part of the Construction Contracts Act 2013, in force from 25 July 2016.
- The Act seeks to improve payment practices in the industry and allow for the swift resolution of disputes.
- The objective of the Act is to impose payment mechanisms for particularly to sub-contractors, with Adjudication being introduced as an additional protection.
- Adjudication is now gaining traction, providing relative certainty within a short timescale and is now being utilised more frequently in 'main contractor v employer' disputes.



Adjudication can be invoked at any time, as ER you need to look out for the signs.

Adjudication process



The Adjudication timeline under the Construction Contracts Act 2013

Adjudication is fast, adversarial and intense, as ER it will absorb a lot of your time.

- An important skill set in being an Employers Representative is to recognise the early warning signs and anticipate where a dispute can arise, then ensuring that your client is timeously advised.
- Contractors asserting rights of entitlement for either additional money or additional time should be considered as ‘part and parcel’ of the construction process – it should come as no surprise.
- As the Employers Representative you should do all you can to de-escalate any disagreement, within your remit, that could lead to a later dispute.
- Always compile any contract administration communications on the basis that they may be scrutinised by a third party at a later date – ‘sleep on a sensitive e-mail’.
- The ER role under the PWC contract is never going to be easy, be honest about where your skills are strongest, don’t be paranoid, just be sensible and ask the right questions at the right time.

Always remember your past records will be central to the resolution of any dispute.

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Thank you
