Opinion Paper

« Settlement of Disputes in the Construction Industry »

[LRC_R&P 138, October 2019]

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Executive Summary

Opinion Paper about « Settlement of Disputes in the Construction Industry »
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At the request of the Attorney-General’s Office, the Law Reform Commission has prepared an Opinion Paper about settlement of disputes in the construction industry. In this Opinion Paper, the Commission has first examined standard forms of contract which govern construction contracts in Mauritius, and which are issued by the Federation Internationale des Ingenieurs Conseils (FIDIC) or the Joint Contract Tribunal (JCT). Also, a review was done of clauses such as “Pay when Paid” which are included by some parties to such contracts, which is detrimental to the contractor’s community. Under this clause, developers put a condition that they will only pay the contractor or sub-contractor for work done or service provided for goods and services supplied, when he gets paid from the principal.

The LRC then suggested changes to the current legislative framework that would, inter alia:

(i) afford a guarantee that the important clauses of the standard forms of contract are not obliterated in order to give undue advantage to any party to the contract;
(ii) prohibit abusive clauses and provide special conditions and procedures to be followed for withholding of any payment;
(iii) make provisions to enable the contractor, sub-contractor or supplier to suspend work or supply, in case of undue delay in settlement of claims, under specified conditions; and
(iv) provide a statutory dispute resolution mechanism for construction contract disputes, through adjudication process.
INTRODUCTION

1. The Attorney-General’s Office has requested the Commission to examine and review aspects of Mauritian law in relation to settlement of disputes in the construction industry, in order to provide for the following: that important clauses of the standard forms of contract are not obliterated in order to give undue advantage to any party to the contract, to prohibit abusive clauses, to make provisions to enable the contractor, sub-contractor or supplier to suspend work or supply, in case of undue delay in settlement of claims, under specified conditions, and to allow statutory dispute resolution mechanisms for construction contract disputes.

2. Construction Industry is one of the most thriving industries in the world. This industry is mainly an urban-based one which is concerned with preparation as well as construction of real estate properties. In Mauritius, its contribution to GDP is estimated at around 7.5% for the year 2017. In terms of employment, the construction sector currently provides some 56,500 jobs or around 10% of total employment in the country.¹

3. According to Lord Diplock, “A building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done.”²

4. Construction contracts are governed by standard forms of contract issued by the Federaton Internationale des Ingenieurs Conseils (FIDIC) or the Joint Contract Tribunal (JCT). These standard forms of contract stipulate that the local legislation would prevail.

¹ CCM Final Report, Market Study of the Construction Industry in Mauritius, 19/06/19, p. 6.
² Modern Engineering (Bristol) Ltd v Gilbert-Ash Northern [1974] AC 689
This sometimes leads to ambiguous situation whereby the special conditions in the contract are abusively adulterated by one party to the contract.

5. Construction industry disputes are therefore common and the monetary amounts in dispute are frequently quite high. Additionally, disputes in the construction industry are often quite complex, thus making it difficult to present issues clearly to non-technical triers of fact.

6. Clauses such as "Pay when Paid" are included by some parties to such contracts, which are detrimental to the sub-contractor's interests. In fact, under this clause, main contractors put a condition that they will only pay the sub-contractor for work done, when they get paid from the principal, i.e. the maître d'ouvrage. In such circumstances, the sub-contractor suffers undue prejudice as he has to face cash flow problems and this ultimately has an impact on the project, be it in terms of quality or timeliness.

7. It should thus be guaranteed that the important clauses of the standard forms of contract are not obliterated in order to give undue advantage to any party to the contract.

8. There should also be provisions to enable the contractor, sub-contractor or supplier to suspend work or supply, in case of undue delay in the settlement of claims, under specified conditions.

9. Timely resolution of construction disputes should also be assured by some dispute resolution mechanism, thereby ensuring continuous cash flow and smooth progress of the project.
(A) CONSTRUCTION CONTRACTS LAW

10. According to the Construction Industry Development Board Act, “construction works” includes, whether for a permanent purpose or not, any of the following works –

(a) reclaiming of land, draining or preventing subsidence of land, movement or erosion of land;
(b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any works, apparatus, fittings, machinery or plant, associated with any works referred to in paragraph (a);
(c) constructing a building or structure, that forms or will form part of land or the sea bed, whether above or below it;
(d) fixing or installing any thing to a building or structure, including –
   (i) fittings for civil works, electricity, gas, water, fuel oil, air sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection or cleaning; and
   (ii) lifts, escalators, insulation, furniture and furnishings;
(e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any thing to a building or structure or any fittings as described in paragraph (d);
(f) civil works;
(g) any work that is preparatory to, or necessary for the completion of, any work referred to in paragraphs (a) to (e), including –
   (i) site or earth works, excavating, earthmoving, tunnelling or boring;
   (ii) laying foundations;
   (iii) erecting, maintaining or dismantling temporary works, a temporary building or temporary structure, including a crane or other lifting equipment, and scaffolding;
   (iv) cleaning, painting, decorating or treating any surface; and
   (v) site restoration and landscaping.

11. The Construction contract normally “outlines the roles and responsibilities of the parties, allocates project risks and sets our procedures for the avoidance and resolution of any disputes arising. The contract attempts to anticipate everything that might happen during the project and directs the parties as to how they should deal with such developments”.

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3 Mason, Jim, Construction Law, CRC Press, p. 22.
12. Standard clauses have been settled over the years by negotiation between the various stakeholders in the relevant industries. The purpose of these forms is to facilitate the conduct of trade and a fair allocation of risk between the parties. The types of contract invariably used in large-scale construction works include the Joint Contracts Tribunal (JCT) Standard Form of Building Contract and the New Engineering Contract (NEC). Both forms tend to govern major works along with the International Federation of Consulting Engineers (FIDIC) contract employed on international projects. Another form of contract is the Project Partnering Contract (PPC2000).

13. The point about using standard forms of contract is that contractors know what to expect.

14. Construction contracts are governed in Mauritius by standard forms of contract issued by the *Fédération Internationale des Ingénieurs Conseils* / International Federation of Consulting Engineers (FIDIC) or the Joint Contract Tribunal (JCT).

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4 The New Engineering Contract (NEC) is a series of contracts designed to manage any project from start to finish. The contracts are written in plain English with a straightforward structure and are designed to be easily understood. NEC contracts aim to prevent costly disputes. First developed in 1993, they were designed to replace typical construction contracts which until then had been largely ‘adversarial’ in approach.

5 PPC 2000 was launched in September 2000 by the chairman of the Construction Task Force, Sir John Egan. It was formulated by the Construction Industry Council (CIC) in collaboration with the Association of Consultant Architects (ACA). It is published by the Association of Consultant Architects, and is a joint venture with the Association of Consulting Engineers (ACE). They also publish TPC 2005, the first standard form Term Partnering Contract launched by Sir Michael Latham, author of the 1994 Latham report. TPC 2005 applies the principles adopted by PPC 2000 to term contracts (TPC 2005 was superseded by Term Alliance Contract 1 in 2017).

6 It was started in 1913 by the trio of France, Belgium and Switzerland. FIDIC is headquartered in Switzerland and now boasts of membership from over 60 different countries. Over the years, FIDIC has become famous for its secondary activity of producing standard form contracts for the construction and engineering industry. This first contract by FIDIC was undertaken jointly with the International Federation of Building and Public Works. FIDIC’s concerted effort at achieving broad consultation and acceptance of its contract forms has seen subsequent editions of its contracts being ratified by the International Federation of Asian and Western Pacific Contractors Association, Associated General Contractors of America and the Inter-American Federation of the Construction Industry, Multilateral Development Banks among others. Because of the broad support it enjoys, FIDIC contracts are the foremost contracts in international construction.
Standard Forms

Characteristics of FIDIC contracts

15. The International Federation of Consulting Engineers (FIDIC) in association with the European International Federation of Construction (FEIC) publishes a suite of forms.\(^7\)

16. FIDIC is usually divided in two parts: Part I consists of the general conditions while Part II is about the conditions of particular application (including guidelines for the preparation of Part II clauses). Part I contains the general terms of the contract, such issues as rights and obligations of each party, procedure for payment, variation, certification and dispute resolution. Part II of the contract is the conditions of particular application and is to be used to introduce project specific clauses, such as language of the contract, choice of law, the name of the person or firm appointed to act as Engineer or Employers representative for the project among other terms. The Appendix usually contains sample of documents to be used for the procurement process.

17. FIDIC contracts adopt a multi-tier dispute resolution process. The emphasis in recent years has been on the amicable settlement of disputes. The process usually provides as a first step, for disputes to be submitted for adjudication before an Engineer or a Dispute Board. If one (or both) of the parties is dissatisfied, a period is allowed for amicable settlement. If the parties are not able to settle the dispute during the ‘amicable settlement’ period, the final stage is to proceed to arbitration. FIDIC contracts provide as a default position that the arbitration rules of the International Chambers of Commerce should apply in the arbitration of disputes arising from the contract.

\(^7\) Its first form of construction contract, published in 1957, was substantially based on the 4th edition ICE form, modified to enable it to be used anywhere in the world. It contained special provisions to enable the parties to decide under which nation’s legal system the contract will be executed. This, traditionally, was the country of the engineer, but recently it has become more usual for it to be the country of the employer.
18. Unlike other forms, FIDIC has a separate clause dealing expressly with *force majeure*. This is defined to mean an exceptional event or circumstance which is beyond a party’s control, which such party could not reasonably have provided against before entering into the contract, which, having arisen, such party could not reasonably have avoided or overcome and which is not substantially attributable to the other party. This might include war, acts of foreign enemies, riots, natural catastrophes and the like. This clause, in effect, is an express provision for which at common law might have been termed frustration, as noted below. Clause 19.6 notes that if substantially all of the works in progress is prevented for a continuous period of 84 days or for multiple periods totalling 140 days then either party may give notice and the contract is terminated 7 days later.

*Characteristics of JCT Contracts*

19. JCT\(^6\) produce standard forms that meet clearly defined needs and apportion risk in a way that is appropriate for the procurement methods they reflect. The JCT suite of contracts is made up of ‘families’ of standard forms, guidance and other documents that are suitable for the majority of construction projects and procurement methods.

20. There are nine main sections to the JCT suite of contracts. They cover the following: definitions, carrying out the works, control of the works, payment, variations, injury, damage and insurance, assignment, third party rights and collateral warranties, termination, and settlement of disputes.

21. The JCT contract payment provisions are flexible. They may make room for upfront payments from employers to contractors, usually accompanied by payment security such

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\(^6\) The Joint Contracts Tribunal (JCT) is made up of seven members who represent a wide range of interests in the building and construction industries. It produces standard forms of contract, guidance notes and other standard documentation for use in the industry. The intention of the JCT is that the contracts generated by them represent a balanced allocation of risk between the parties.
as a bond, and/or invoicing once work has been certified as completed. Certification is
generally by an independent third party (such as an architect, an employer's agent or a
contract administrator). Interim payments are usually made as the works progress. JCT
considers retention of an agreed percentage of the contract sum until practical
completion, and then a reduced percentage until a period after final completion. This is
usually intended to act as an incentive to the contractor to deal with defects which come
to light after the project has been completed. JCT gives a fixed date for completion and
envisages up front agreement of liquidated damages as an estimate of the employer's
losses if the contractor does not complete the works by that contractually agreed date.
The contractor will be entitled to ask for an extension of time for completion if an event
occurs which is at the employer's risk and delays the contractor.
The JCT was one of the first standard forms to embrace “third party rights” as an option
for use instead of collateral warranties (although collateral warranties are still the most
common option).

22. In terms of JCT standard-form contracts, most forms of the 2011 suite contain the
following reference in their conditions: The parties may by agreement seek to resolve any
dispute or difference arising under the Contract through mediation. A particular
‘mediation procedure’ is not specified. This is because the Joint Contracts Tribunal is of
the opinion that this decision should be better taken by the parties when a dispute arises.
However, the parties can use the mediation agreement published by the JCT in its 1995
Practice Note 28. Additionally, an optional clause, if adopted, requires each party to
notify the other of any matter that appears likely to give rise to a dispute or difference,
following which senior executives named in the contract particulars are to meet for direct, 
good faith negotiations to resolve the matter.  

- “Pay-when-Paid” Clause

23. Construction contracts contain many important clauses, such as “Pay-If-Paid” and “Pay-
When-Paid” provisions. Each of these significantly defines important rights and potential 
liability of parties to the contract. While each of these terms affects a prime contractor’s 
obligations to its subcontractors, whether or not they are paid by the owner, the critical 
distinctions seriously affect primary rights and duties.

24. In our law, subcontracts are governed by articles 1799-1 to 1799-6 of the Code civil 
Mauricien. The law relating to sub-contractor was introduced in our Civil Code by Act 
9 of 1983 [Act No. 9 of 1983], (which reproduced the French Law of “la sous-traitance”-
Loi No. 75-1334 du 31 décembre 1975). According to article 1799-3, a contractor who 
intends to perform a contract using one or more subcontractors shall, at the time of 
conclusion and throughout the term of the contract, have each subcontractor accept and 
approve the terms of payment for each subcontract by the master of work (maître 
d’ouvrage); the main contractor shall be required to communicate the subcontract or 
contracts to the master of work upon request. The subcontractor has a direct action 
against the master of work if the main contractor does not pay, one month after being 
served with a notice of default, the amounts due under the subcontract. The system 
relating to direct action is a matter of public policy; the subcontractor may not waive it.

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12 JCT SBC 11, Schedule 8, clause 6 and SBC DB 11, schedule 2, clause 12.
13 According to article 1799-1 of the Civil Code: “La sous-traitance est un contrat par lequel un entrepreneur confie 
à une autre personne appelée sous-traitant tout ou partie de l'exécution du contrat d'entreprise ou du marché public 
conclu avec le maître de l'ouvrage.”
14 Fasti Track Contracting Ltd v Mella Villas Ltd & anor (2016) SCJ 446
15 Article 1799-4 of the Civil Code.
The direct action is subject to the acceptance of the subcontractor and the approval of the terms of payment by the master of work.\textsuperscript{17}

According to Ireland Blyth Ltd v Laxmanbhat & Co (Mitus) Ltd (1996) SCJ 298, if the main contractor is insolvent, the sub-contractor may have a direct action against the "maître de l'ouvrage". The master of work against whom the direct action is validly brought shall be bound only to the extent of what he still owes to the main contractor at the time of receipt of the copy of the formal notice.\textsuperscript{18}

25. Pay when paid clauses "are inserted in sub-contracts for two main purposes. The first is to protect the main contractor's cash flow. This occurs because the main contractor will merely act as a channel of payment between the employer and the sub-contractor and will thus be in no danger of having to finance the subcontractor's work. The second purpose, which is less obvious, is to make the subcontractor carry the risk of the employer becoming insolvent. This will happen in circumstances where the employer's insolvency occurs after sub-contract work has been certified, but before the main contractor has been paid for it. Without a pay when paid clause, it is the main contractor who will bear the resulting loss, in the sense of having to pay the sub-contractor and then recoup whatever can be salvaged in the employer's liquidation. Under a pay when paid clause, by contrast, the main contractor needs only pass on to the sub-contractor what can be recovered in the employer's liquidation, and even this will naturally be put first to meeting the main contractor's own claims".\textsuperscript{19}

26. General contractors sometimes try to avoid being stuck with liability for subcontractor claims which cannot be passed through by writing "pay-when-paid" clauses into their

contract. These clauses attempt to pass the risk of the owner not paying on to the subcontractor.

27. In Timbro Developments Ltd. v. Grimsby, Diesel Motors Inc. et al, a Canadian case, the owner refused to pay the contractor who subsequently refused to pay the subcontractors. The standard form agreement between the contractor and each of the subcontractors contained the following clause: “Payments will be made not more than thirty (30) days after the submission date or ten (10) days after the certification or when we have been paid by the owner, whichever is the later”. The majority of the Ontario Court of Appeal (Blair and Cory JJ.A.) upheld the clause and dismissed the claims by the subcontractors. The majority of the court held: “...the clause clearly specifies the condition governing the contractor’s legal entitlement to payment and not merely the time of payment. Under the clause, the subcontractor clearly assumes the risk of non-payment by the owner to the contractor”.

28. But in Arnoldin Construction & Forms Limited v. Alta Surety Co, the payment clause stated: “The balance of the amount of the requisition as approved by the Contractor shall be due to the Subcontractor on or about one day after receipt by the Contractor of payment by the owners. Final payment shall be made on acceptance of the work by the Contractor, Architects and/or Engineers, and Owners, and within 30 days after payment has been received by the Contractor.” The Nova Scotia Court of Appeal found for the subcontractor, ruling: “In my opinion, in order for a general contractor to impose a term on a subcontractor pursuant to a standard form of contract, that payment for its work is conditionally on the contractor being paid by the owner the contract would require much clearer language than that contained in the subcontract between Gem and the appellant.

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20 Timbro Developments Ltd. v. Grimsby Diesel Motors Inc. et al. (1988), 32 C.L.R. 32 (Ontario Court of Appeal)
An intention so important cannot be buried in obscure language that would not alert the subcontractor that payment for the subcontract work was conditional on the owner paying the contractor.”

**DISPUTES**

29. Contractual disputes in construction arise because of a series of factors that combine in various ways to produce arguments, disagreements and, ultimately, disputes. Some of these factors are basic to all disputes between humans, such as the motivating factors of individuals, human behaviour, organisational behaviour, culture, etc. What makes construction contract disputes different is the nature of the dispute. This depends upon a range of things such as the terms of the contract, the technological issues of the site and the building, the character of the project personnel, the amount of time and money available, the realism of people’s expectations, project environmental factors, the legal basis of the argument, the magnitude of the issue, and so on. The third group of variables in this area concerns the choice of methods for resolving disputes once they have arisen. What are the options available in the contract, and what other options are there?

30. The first factor defining the nature of a construction dispute is the terms of the contract. Basically, a contract is an enforceable promise. And the subject of this enforceable promise is the production of a unique, technical artefact, using temporary management systems.

31. It is generally thought that any dispute arising from a construction contract must be resolved by court action, arbitration or adjudication. Nothing is less true. In UK construction contracts for instance, the parties have a statutory right to refer their disputes to adjudication. Moreover, whether or not there is an arbitration agreement in the
contract, it must always be remembered that contracting parties can alter the terms of their contract (and any dispute about its interpretation) at any time, by mutual consent. This fact was not laid down anywhere in the clauses of earlier versions of JCT building contracts. However, JCT SBC 11 (and also the other major building contracts of JCT’s 2011 contract suite) now expressly mentions mediation.

> Dispute Resolution Mechanisms

32. The resolution of construction disputes relies either on the courts of the country named in the contract or, more likely, on some form of ADR (alternative dispute resolution) such as arbitration, conciliation, mediation, expert determination or adjudication by itself or through the use of a Dispute Board. Indeed, in addition to the classical method of dispute resolution through arbitration, there have been other methods utilised, most notably the use of adjudication or expert determination or valuation. Lord Esher MR, stated: "... Since it is just a matter of construction, not much assistance can be gained from authority, but the question whether an agreement is an agreement to arbitrate or merely to value as an expert has occasionally had to be decided." There a contract for the sale of land provided that the timber was to be paid for at a valuation made by two valuers appointed by the parties, who were to appoint an umpire to decide if the valuers did not agree. The valuers did not agree, so the umpire decided. The aggrieved party applied to set that valuation aside on the basis that it was an arbitration award and, thus, according to the legislation then in force, could be set aside on certain grounds. The Court of Appeal refused to entertain the application. If it appears from the terms of the agreement by which a matter is submitted to a person’s decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective

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²² Re Carus-Wilson and Green (1886) 18 QBD 7.
cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner.

33. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.

- Litigation

34. The courts have inherent jurisdiction to hear a dispute in respect of just about anything. In the absence of any other procedure, the parties will have a right to refer their matter to an appropriate court. The nature, complexity and value of the dispute will determine which court will hear a particular dispute.

- Arbitration

35. Arbitration was originally devised as an alternative to litigation but is prone to many of the problems that beset litigation. Arbitration can only arise where certain conditions are met. In particular, there must be: 1. A genuine dispute or difference between the parties, of a kind 'justiciable at law'. This means that the arbitrator's award must be capable of enforcement as if it were a judgement of a court. 2. A binding contractual agreement to
submit that dispute to arbitration by a third party chosen either by the parties or in accordance with their instructions. Such an agreement may be made when a dispute has arisen; however, it is more common for a contract to provide from the outset that any dispute arising between the parties shall be finally determined by arbitration. In either case, the arbitration agreement itself need not name the arbitrator; the parties may and frequently do provide for a professional body to nominate a suitable person.

3. A reference to arbitration in accordance with whatever procedure is laid down in the agreement. Thus, for example, ICC 11 clause 66C(1) requires a ‘notice to refer’ (to arbitration), which must be served no later than three months after the decision of an adjudicator. NEC 3 requires the dispute to have been referred first to adjudication before a reference to arbitration is made (clause W1.4 or W2.4). Equally, under FIDIC 1999 Red Book, unless agreed otherwise, the parties may only refer to arbitration the DAB’s decision that has not become final and binding (clause 20.6).

- Conciliation

36. A ‘conciliator’ must be independent of the parties to the contract. Impartiality is essential, since the purpose of this process is to precipitate an agreement by persuasion and suggestion. Conciliators do not take sides, take decisions or make judgements. They talk to each party in private, and must be sure not to reveal anything to the other party. Confidentiality is essential in order for discussions to be frank and meaningful. The conciliator may bring the parties together after a while for an open discussion, which he or she chairs and leads. The conciliator will be seeking to establish common ground, ascertaining the facts that are in dispute. In order to undertake this function effectively, the conciliator needs considerable knowledge of construction disputes. There may be previous judicial precedents which are appropriate to refer to, and the conciliator must be able to advise the parties of these, if necessary. Where conciliation is adopted, the end of this process is very different from mediation in that, if no negotiated settlement results
from the process, the mediator will make recommendations to settle based on his or her findings. A distinctive feature of conciliation is that the conciliator will issue a non-binding recommendation to the parties with a view to helping them to settle their disputes in the immediate aftermath. Under some contract forms, there is an added impetus to settle where, after 30 days has elapsed, the recommendation is to be treated as being binding on both parties unless disputed in arbitration or court proceedings within a further 30-day period.

• Mediation

37. The Joint Contracts Tribunal has recognised the growing importance of mediation by referring to it in clause 9.1 of JCT SBC 11. Mediation is the most widely used and therefore the most important mode of ADR. It is like an extended version of conciliation. The process is made effective by the parties themselves appointing the mediator, who will assist them in reaching an acceptable solution. Further, the parties give the mediator his/her powers, which include exploring realistic possibilities of bringing the parties together, and redesigning the agenda if necessary as the mediation proceeds. The parties themselves have considerable powers which, amongst other things, include deciding what to empower the mediator to say to another party, and withdrawing from the mediation altogether.23

38. The initial stages will probably follow a very similar process, often referred to as shuttle diplomacy, as the mediator consults first with one party and then with the other. It is ultimately up to the parties themselves to reach an agreement, and to decide upon the precise terms of that agreement, albeit with some encouragement and guidance from the

mediator. This process accordingly retains the flexibility of conciliation, while encouraging a slightly more active role for the mediator. As a result, it tends to be less open-ended.

- **Adjudication**

39. Adjudication was introduced into the Building and Construction Industry to facilitate the cash flow of parties, which Lord Denning observed in 1970 “is the very lifeblood of the enterprise.” Judge Frances Kirkham describes the time involved in adjudication as “a comparatively quick process” and that “it is clear from anecdotal evidence that the limited time and necessarily limited cost elements of adjudication are significant for the parties.” According to the same Judge, “the cost can be lower than the cost of litigation or arbitration…there is generally no exposure to the other side’s costs.”

40. The adjudicator, while not an arbitrator, is more than an independent expert. He or she must accept and consider any information properly submitted by the parties and must make any information submitted by one party, which the adjudicator intends to take into account, available to the other party. An independent expert would not be required to do either of these things.

41. According to the UK case of Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd [2000], the adjudicator shall have the right to correct a slip error (such as in the calculation of monetary amounts) within a reasonable time after the decision has been published so that the correction does not prejudice the affected parties.

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42. In UK, the Scheme for Construction contracts\textsuperscript{25} merely states that ‘the adjudicator shall decide the matters in dispute’. However, the Scheme goes on to say that the adjudicator may ‘open up, revise and review’ any certificates issued under the contract, other than those which are stated to be conclusive, and may decide that a party is liable to pay money to another (specifying the due date and final date for payment). In fact, the adjudicator has power to decide on any referred matter as long as it arises under the agreement.

- **Expert Determination**

43. Expert determination is a creature of contract. The parties agree by contract to refer a dispute to a third party who will then decide that particular issue. The third party might decide a technical or valuation issue, as is common, but, in theory, an expert can determine any dispute which the parties agree to refer. Traditionally, expert determination was used for valuing shares in private companies or certifying profits or losses of companies during sale and purchase. In the construction industry expert determination has been and is used for determining value, either of an entire account or sometimes in relation to parts of an account, such as variations.\textsuperscript{27}

\textsuperscript{25} It is a scheme which applies when construction contracts do not comply with the Housing Grants, Construction and Regeneration Act. The Scheme either supplements the provisions of the contract where it has deficiencies relative to the requirements of the Housing Grants, Construction and Regeneration Act, or replaces the contract where it is non-compliant. This enables construction contracts to remain remain capable of performance, whilst allowing regulatory control over their provisions. Part 1 of the Scheme makes provision for adjudication where the contract does not comply with the requirement for adjudication in the Housing Grants, Construction and Regeneration Act. Part 2 of the Scheme replaces those provisions in relation to payment that do not comply with the Housing Grants, Construction and Regeneration Act.

• Dispute Board

44. Essentially a dispute board is a contractual mechanism for avoiding and/or resolving disputes without employing the cost and time required for arbitration or litigation. The process falls into the collection of procedures generally described as 'ADR'—Alternative Dispute Resolution. Some dispute boards are like adjudication, whilst some bear more resemblance to conciliation. However, no dispute board process has the finality of arbitration or litigation.
(B) PROPOSALS FOR REFORM

(1) Payments under Construction Contracts

45. It could be provided, as it is the case under Section 3 of the Irish Construction Contracts Act 2013, that:

“(1) A construction contract shall provide for—
(a) the amount of each interim payment to be made under the construction contract, and
(b) the amount of the final payment to be made under the construction contract, or for an adequate mechanism for determining those amounts.
(2) A construction contract shall provide for—
(a) the payment claim date, or an adequate mechanism for determining the payment claim date, for each amount due under the construction contract, and
(b) the period between the payment claim date for each such amount and the date on which the amount is so due.”

- Ineffectiveness of Conditional payment provisions

46. It is proposed that could be provided that a conditional payment provision of a construction contract has no legal effect and accordingly is not enforceable in any civil proceedings; and may not be used as a basis for withholding payments that are due and payable under the contract.28

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47. It could be provided\textsuperscript{29} that money can be withheld by a party to a construction contract (party A) from an amount payable to another party to the contract (party B) as security for the performance of party B’s obligations under the contract. All retention money must be held on trust by party A, as trustee, for the benefit of party B. Retention money held on trust may be held in the form of cash or other liquid assets that are readily converted into cash. Party A must not appropriate any retention money held on trust to a use other than to remedy defects in the performance of party B’s obligations under the contract.

48. Retention money held on trust is not available for the payment of debts of any creditor of party A (other than party B). It is also not liable to be attached or taken in execution under the order or process of any court at the instance of any creditor of party A (other than party B).

\textsuperscript{29} See Subpart 2A of the New Zealand Construction Contracts Act 2002.
(2) Abusive and Mandatory Clauses

- "Pay-when-paid clauses"

49. Courts in Hong Kong and Singapore have treated them as valid and enforceable, at least to the extent of protecting the main contractor's cash flow by merely delaying the obligation to pay the sub-contractor. On the other hand, courts in both the United States and New Zealand have sought to interpret such clauses in such a way that they cannot make the sub-contractor bear the risk of the employer's insolvency. Those courts have effectively held that 'pay when paid' does not also mean 'pay if the main contractor is ever paid'. In UK, the Latham Report (Latham 1994) was highly critical of pay when paid clauses and recommended that their use should be prohibited. That recommendation was put into effect by section 113 of the Housing Grants, Construction and Regeneration Act 1996.

50. Moreover, according to Mauritian case-law, "Pay-when-Paid" should not generally be enforced. Indeed, in The Mauritius Commercial Bank Ltd v The Mauritius Union Assurance Co Ltd (2014) SCJ 416, it was said that: "The real context for the application of such exclusion as is being invoked by the defendant of "pay when paid" clauses has been fully considered in the case of Shepherd Construction Limited v William Hare Limited [2010] EWCA CW 283, where the legal position with regard to 'pay when paid' exclusion clauses is succinctly summed up in the decision of the Court of Appeal (Civil


In 1994 the Latham Report 'Constructing the Team' was published. The report was commissioned by the UK government to investigate the perceived problems with the construction industry, which the report's author, Sir Michael Latham described as 'ineffective', 'adversarial', 'fragmented' and 'incapable of delivering for its customers'.
Division) of the High Court of Justice of England, on appeal from the decision of the Queen’s Bench Division, Technology and Construction Court. In that case the Court was concerned with the interpretation of the word “insolvent” in the context of the interpretation of Section 113 (1) of the English Housing Grants (Construction and Regeneration) Act 1966 which outlawed “pay when paid” clauses in the construction industry unless it could be shown that the third party employer was insolvent. That decision is relevant to the case in hand regarding the consideration of the intention of parties and what would have been within their reasonable contemplation, more particularly, that “…… the law does not require judges to attribute to the parties an intention which they plainly could not have had”.

51. Although our Civil Code provides that the sub-contractor has a direct action against the maître-d’ouvrage in case the “entrepreneur principal” does not pay, nonetheless, it would make sense for the sub-contractor to direct his claims towards the main contractor, which is rendered impossible by “pay-when-paid” clauses.

52. It should thus be made clear that a provision in a construction contract is ineffective to the extent that it provides that payment of an amount due under the construction contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract.

- **Mandatory Clauses**

53. It could be provided that any contract greater than a certain amount, must contain the following notice provision printed in no less than 12-point, capitalised, bold-faced type on the front page of the contract or on a separate page, signed by the owner and dated:

"Those who work on your property or provide materials and services and are not paid in full have a right to enforce their claim for payment against your property. This claim is
known as a construction lien. If your contractor or a subcontractor fails to pay subcontractors, sub-subcontractors, or material suppliers, those people who are owed money may look to your property for payment, even if you have already paid your contractor in full. If you fail to pay your contractor, your contractor may also have a lien on your property. This means if a lien is filed your property could be sold against your will to pay for labour, materials, or other services that your contractor or a subcontractor may have failed to pay. To protect yourself, you should stipulate in this contract that before any payment is made, your contractor is required to provide you with a written release of lien from any person or company that has provided to you a “notice to owner.” 34

If the contract is written, the notice must be in the contract document. If the contract is oral or implied, the notice must be provided in a document referencing the contract. The failure to provide such written notice does not bar the enforcement of a lien against a person who has not been adversely affected.

54. Also, a termination for convenience clause could be made mandatory. This clause establishes a process for stopping work and transitioning it to another contractor, whatever the reason. The clause should specify that the contractor receives compensation for completed work, materials purchased, overhead, and general conditions through the date of termination. If there is a penalty for early termination, the owner or contract holder should pay that as well. If warranty obligations are requested, make the case you should not be responsible for warranty work unless the owner can illustrate the defect was your fault. Otherwise, the contractor no longer has control over the job site or any work in place and therefore cannot take responsibility for anything that happens after the termination.

34 This mandatory clause is inspired by Section, 713.015(1), Florida Statutes (2012).
55. Furthermore, ADR clauses could be made compulsory. Construction Industry needs alternative dispute settlement mechanisms which are able to solve rapidly disputes. In any event, whatever the contract says, if a dispute arises, the parties are not compelled to resort to the courts for the settling of their differences. They can choose instead to attempt to settle their differences amicably. Of course, if this should happen, it is extremely important to record exactly what has been agreed, and to have it signed by both parties, in case of any future disagreement about what was agreed. The use of the courts for settling disputes is expensive, uncertain and time-consuming. It is also very public. The development of ADR techniques arises from dissatisfaction with and alienation from the legal system.\textsuperscript{35} Such clauses should spell out whether one can settle a dispute through arbitration instead of the courts. It can cut the cost of litigation significantly.

\textsuperscript{35} The terms most commonly found to describe these procedures are Conciliation, Mediation and Early Neutral Evaluation. However, these terms are often used interchangeably, and sometimes inconsistently. Collectively, they may be referred to as reconciliation. Similar to the widespread term ADR, reconciliation is a generic term that indicates private, non-adversarial methods of resolving disagreement. These techniques can be seen as an intermediate step between having an argument or disagreement, and referring to the courts (or to an adjudicator or arbitrator). Since reconciliation is voluntary, either party may pull out at any time and refer the matter to the courts instead, if satisfactory progress is not being made. What is more, the parties are not bound to accept the decisions of the person deciding the issue. As Brown and Marriott (1999) point out, ADR is based on a philosophy of empowering the disputants, putting them back in control of their own dispute. Much of the dissatisfaction with traditional dispute resolution procedures is because of the lawyers’ professionalization of a dispute, which leads to a legal dispute having a life of its own, almost displacing the disputants from the process.
(3) Dispute Resolution Mechanisms

- **Introduction of Pre-Dispute ADR Methods**

56. There are a number of ADR methods that can be implemented during the planning and pre-construction phases of the project. In addition to minimising and avoiding disputes by practising sound contract administration, discussed in the two earlier research perspectives in this series, contractors and owners alike can now take advantage of new practices developed within the construction industry in recent years. Several programs and concepts have evolved to resolve claims on a relatively informal basis through early cooperative intervention. These programs include: (i) Escrow bid documents; (ii) Delegation of authority; (iii) Dispute resolution ladder; (iv) Geotechnical design summary reports; and (v) Partnering.\(^\text{36}\)

(i) **Escrow bid documents**

57. Escrow Bid Documents ("EBD") is a form of ADR in that it provides for resolution of some disputes quickly and at a low cost. It is not a new process, having been recommended to the industry in the early 1990s. The EBD process requires that the apparent low bidder provides all worksheets, backup, and all other documents relied upon in preparing their bid to the owner shortly after bid opening (typically within 24 to 48 hours) as a condition precedent to contract award. The document package is jointly reviewed by the owner and the bidder. The owner's review is to determine that all documents submitted are legible. On the other hand, the contractor's review is to ascertain that everything relied upon during bidding is actually contained in the document package as the typical EBD clause in the contract states that any bidding document not included in the EBD package shall not be used or relied upon in any claim or dispute.

related to the project. The EBD are not being used for pre-award evaluation of the contractor’s methods or to assess the contractor’s qualifications. The information contained therein is considered a trade secret and its confidentiality is to be protected as such. The EBD are returned to the contractor, uncopied, at the end of the project as they are, and will remain at all times the contractor’s property.

(ii) Delegation of authority

58. One practical method of avoiding disputes is for the owner to delegate a certain level of change order and claims settlement authority to the project manager level. If smaller, discrete issues can be analysed, negotiated, settled and a change order or claim settlement document executed quickly and on site, then there is less likelihood that unresolved changes and issues will grow into larger disputes. The key to this form of early dispute resolution is to establish a meaningful delegated monetary amount such that a large tranche of issues can be handled on site and not have upper management become a bottleneck that causes unresolved issues to accumulate.

(iii) Dispute resolution ladder

59. Another practical method of avoiding unresolved disputes is for the owner and the contractor to establish, at the outset of the project, a formal, written dispute resolution ladder. This is a parallel organisational chart showing owner and contractor counterparts (i.e., Assistant Project Managers, Project Managers, Project Executives, etc.) including specific timeframes each level has to resolve issues. For example, if the Project Managers are given 45 days to resolve an issue and it remains unresolved, on day 46 the issue is automatically elevated to the next level. The concept is simple – assign issues to specific individuals by name and give them a set timeframe. Knowing that simply trying to “pass the buck” to the next higher level is a career limiting move, people at each level are
motivated to find ways to resolve issues as they arise. But, if numerous issues continue to be elevated for lack of resolution at the lower levels, it is likely that management on both sides will find a way to resolve this difficulty.

(iv) Geotechnical design summary reports

60. The Geotechnical Design Summary Report was also originally proposed in the 1970s for use in tunnelling construction projects, and has slowly spread to other types of construction. This is the Geotechnical Design Summary Report ("GDSR") or the Geotechnical Baseline Report ("GBR"). As an essential part of underground construction projects, the GBR goes further than the traditional site investigation report, boring logs and soils report. The GBR sets forth the designer’s interpretations of subsurface conditions and their impact on design and construction. Since the GBR is typically included in the definition of Contract Documents, this ADR mechanism also typically states that both the owner and the contractor have a right to rely upon the geotechnical interpretations set forth in the GBR.

(v) Partnering

61. Partnering is the establishment of a team approach for mutually beneficial resolution of the ongoing difficulties and problems that typically arise on a construction project. The Associated General Contractors of America ("AGC") characterise the partnering process as "...attempts to establish working relationships among the parties through a mutually developed formal strategy of commitment and communications. It attempts to create an environment where trust and teamwork prevent disputes, foster a cooperative bond to everyone’s benefit, and facilitate the completion of a successful project.” 9 A more useful way of looking at partnering is to see it as a way for the owner, the design professional, the construction manager and the contractor to maintain regular communication and to discuss and implement cooperative efforts. It provides an alternative to the adversarial pattern that often exists when each party crafts all communication and correspondence
that establishes and protects one's own position to the exclusion of all others. Partnering is a voluntary process and primarily consists of workshops, meetings and the use of facilitators to help the parties establish working relationships where project problems can be discussed and resolved in a non-adversarial atmosphere.

62. Although somewhat interdependent, these programs and concepts can be applied independently to improve cooperative construction efforts and dispute resolution.

- **Right to refer payment disputes to adjudication**

63. It is proposed[^37] that a party to a construction contract has the right to refer for adjudication any dispute relating to payment arising under the construction contract. The party may exercise the right by serving on the other person who is party to the construction contract at any time notice of intention to refer the payment dispute for adjudication. The parties may, within 5 days beginning with the day on which notice is served, agree to appoint an adjudicator of their own choice. The adjudicator shall reach a decision within 28 days beginning with the day on which the referral is made or such longer period as is agreed by the parties after the payment dispute has been referred. The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the payment dispute was referred. The adjudicator shall act impartially in the conduct of the adjudication. The adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute and may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts. The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties.

[^37]: Based on Sec. 6 of the Irish Construction Contracts Act 2013.
or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator’s decision.

64. There are basically two types of arrangements for the costs of adjudication proceedings in overseas jurisdictions. According to the state of Victoria, Australia, the Claimant and Respondent are each liable to contribute to the adjudicator’s fees and expenses in equal proportions or in such proportions as the adjudicator might determine. In Singapore, an adjudicator shall, in making his determination in relation to any adjudication application, decided which party shall pay the costs of the adjudication and, where applicable, the amount of contribution by each party.

65. To encourage a greater use of adjudication and to give both parties a fair and equal opportunity, the adjudicator should be given an absolute discretion and express power to determine which party shall pay the costs of the adjudication. In determining the costs, the adjudicator may proceed on a basis that the parties shall bear their own costs equally (i.e. legal cost and adjudicator’s fee), but shall take into account the strength of the claims and defences.\textsuperscript{38}

- Establishment of a Dispute Resolution Board

66. It is suggested the establishment of a Dispute Resolution Board. Dispute Resolution Boards (DRB) administer a type of dispute resolution without any specific description. DRBs have evolved over time and can be formulated in a number of different ways. The procedure is based on contract rather than statute, and the parties to a contract are able to agree to a formulation that suits their particular project. A few standard contracts have

DRBs as part of their terms, of which the most prominent are the FIDIC contracts and the World Bank (Procurement of Works) contract.

67. In the UK, such boards are very common in major civil engineering projects, especially at international level. They have replaced the engineer in its role of being the first instance of dispute resolution in such projects (Draper 2007). The setting-up of a DRB requires an agreement between the parties which will often be part of a standard-form contract. The board commonly consists of three members (more rarely: only one member) and it is usually established at the commencement of a project, i.e. not only when a dispute actually arises. From the project’s beginning, the board members conduct routine visits on the site on a regular basis. Their presence on site serves to maintain a good working relationship between the employer, the contractors and the engineer; often they are used as sounding board by the parties: problems are being discussed before they develop into disputes. Another positive effect of the board members’ regular site visits is their familiarity with the project. As a consequence, when a conflict arises, the need for an evidential and hearing process can be kept to a minimum. Hence, although considerable costs may accrue already before any dispute arises, this mode of dispute resolution can be cost-effective if it avoids the more expensive modes of arbitration and litigation. This result, however, requires that the parties accept the decision of the board.

68. The DRB is a creature of the contract. Usually, the contract will provide for three members, two technical and one legal, usually the chairman. This formulation allows for technical disputes to be fully understood and resolved without the need for external advice, and similarly disputes involving or including legal issues being capable of resolution without external advice. The idea is for the board to be able to deal with any dispute that arises.
69. Each board member needs to be a respected member of their own profession, with qualifications and experience to match the project in hand. Essentially, the DRB can be likened to a project management tool that is used to ensure that the project remains on track, influencing the parties to the project to carry out their contractual obligations properly.

70. The three-member DRB will visit the project regularly and deal with any difficulties that have arisen. Occasionally, it will have to convene outside of its regular visits if a particular dispute requires it. The advantage to the parties is that the DRB gains an ongoing knowledge of the project as the members are exposed to the facts of any emerging disputes at a very early stage.

71. The operational philosophy behind a DRB is to provide interim solutions that are in tune with the interests of the project in a quick and effective manner. It is a process that is intended to find solutions to problems rather than form an adversarial forum. DRBs are designed to keep the parties working constructively together while finding solutions to problems as they occur, rather than allowing those problems to escalate in an ultimately destructive manner.

72. The recommendation or decision of a DRB is a contractual matter, and therefore any enforcement, will be seen in the light of a breach of contract. Enforcement will usually be a matter of the jurisdiction within which the DRB is operating. In England and Wales, the courts will not allow a party to avoid the DRB machinery, and summary judgement will recognise any express contractual provisions.
4) Power to Suspend Works

73. It is recommended\(^{39}\) that a party who carries out construction work under a construction contract (party A) has the right to suspend work under that contract if—

(a) any of the following circumstances applies:

(i) a claimed amount is not paid in full by the due date for its payment and no payment schedule has been provided by the party who it is claimed is liable for the payment (party B):

(ii) a scheduled amount is not paid in full by the due date for its payment even though a payment schedule given by party B indicates a scheduled amount that party B proposes to pay to party A:

(iii) party B has not complied with an adjudicator’s determination that party B must pay an amount to party A by a particular date; and

b) party A has served on party B a notice; and

(c) the amount mentioned in paragraph (a)(i) or (ii) is not paid, or the determination mentioned in paragraph (a)(iii) is not complied with, within 5 working days after the date of that notice.

\(^{39}\) As it is the case under Section 24A of the New Zealand Construction Contracts Act 2002.
74. Construction by its very nature is a complex undertaking involving numerous trades and disciplines all working under what is usually a “tight budget” and with time constraints for completion – all of which lead to the possibility of conflict and disputes arising as to time, quality, delay, and a myriad other complications.  

75. If disagreements cannot be resolved and ultimately turn into disputes, the Contract should allow for the provision of different choices of dispute resolution methods to facilitate the resolution of disputes under different situations. A dispute resolution clause seeks to take the uncertainty out of any dispute. This should save time, and saving time means saving money. 

76. It is thus recommended that all the following dispute resolution methods should be provided in the Contract for the contracting parties to choose: Mediation, Conciliation, Adjudication, Expert Determination and Arbitration. 

77. It is also proposed that a Dispute Resolution Board be put in place so as to administer a type of dispute resolution without any specific description. Provisions should also be made for the introduction of Pre-Dispute ADR Methods. 

78. Moreover, some abusive clauses should be forbidden, like “Pay-when-Paid” clauses, while others should be made mandatory. 

79. Finally, conditions for suspension of work should be clearly spelt out.

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41 As it is the case in Singapore. Thus, according to Section 9 (1) of the Building and Construction Industry Security of Payment Act: “A pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract.”
ANNEX

IRISH CONSTRUCTION CONTRACTS ACT 2013

Number 34 of 2013

CONSTRUCTION CONTRACTS ACT 2013

AN ACT TO REGULATE PAYMENTS UNDER CONSTRUCTION CONTRACTS
AND TO PROVIDE FOR RELATED MATTERS.

[29th July, 2013]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation.

1.— (1) In this Act—

“construction contract” means (subject to subsection (7) and section 2) an
agreement (whether or not in writing) between an executing party and another
party, where the executing party is engaged for any one or more of the
following activities:

(a) carrying out construction operations by the executing party;

(b) arranging for the carrying out of construction operations by one
or more other persons, whether under subcontract to the
executing party or otherwise;

(c) providing the executing party’s own labour, or the labour of
others, for the carrying out of construction operations;

“construction operations” means, subject to subsections (3) and (4), any
activity associated with construction, including operations of any one or more of
the following descriptions:
(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, thermal insulation, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works and traffic management;

(f) painting or decorating the internal or external surfaces of any building or structure;

(g) making, installing or repairing sculptures, murals and other artistic works that are attached to real property;

"executing party", in relation to a construction contract, means—
(a) where the parties to the construction contract are a contractor and the person for whom the contractor is doing work under the contract, the contractor, or

(b) where the parties to the construction contract are a contractor and a subcontractor or are 2 subcontractors, the subcontractor or whichever of the subcontractors agrees to execute work under the contract;

"main contract" means a construction contract such as is referred to in paragraph (a) of the definition of "executing party";

"Minister" means the Minister for Public Expenditure and Reform;

"other party", in relation to a construction contract, means the party to the construction contract who is not the executing party;

"payment claim" means a claim to be paid an amount under a construction contract;

"payment claim date", in relation to a construction contract, means the date when a payment claim in relation to an amount due under the construction contract is required to be made;

"payment claim notice" has the meaning assigned to it by section 4;

"payment dispute" has the meaning assigned to it by section 6;

"subcontract" means a construction contract such as is referred to in paragraph (b) of the definition of "executing party";

"subcontractor" means a person to whom the execution of work under a construction contract is subcontracted by the contractor or another subcontractor;

"work", in relation to a construction contract, means any act done in furtherance of the construction contract under the terms of the construction contract.

(2) In this Act references to a construction contract include an agreement, in
relation to construction operations, to do work or provide services ancillary to the construction contract such as—

(a) architectural, design, archaeological or surveying work,

(b) engineering or project management services, or

(c) advice on building, engineering, interior or exterior decoration or on the laying-out of landscape.

(3) Subject to subsection (4) references in this Act to construction operations do not include the manufacture or delivery to a construction site of—

(a) building or engineering components or equipment,

(b) materials, plant or machinery, or

(c) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems.

(4) In this Act references to construction operations do include a case where the things referred to in subsection (3) are supplied under a contract which also provides for their installation.

2. — (1) A contract is not a construction contract—

(a) if the value of the contract is not more than €10,000, or

(b) if—

(i) the contract relates only to a dwelling, and

(ii) the dwelling has a floor area not greater than 200 square meters, and

(iii) one of the parties to the contract is a person who occupies, or intends to occupy, the dwelling as his or her residence.

(2) A contract of employment (within the meaning of the Organisation of Working Time Act 1997) is not a construction contract.
(3) A contract between a State authority and its partner in a public private partnership arrangement, as those terms are defined in the State Authorities (Public Private Partnership Arrangements) Act 2002, is not a construction contract.

(4) Where a contract contains provisions in relation to activities other than those referred to in the definition of a construction contract and section 1 (2), it is a construction contract only so far as it relates to those activities.

(5) This Act applies to a construction contract whether or not—

(a) the law of the State is otherwise the applicable law in relation to the construction contract, or

(b) the parties to the construction contract purport to limit or exclude its application.

3.— (1) A construction contract shall provide for—

(a) the amount of each interim payment to be made under the construction contract, and

(b) the amount of the final payment to be made under the construction contract,

or for an adequate mechanism for determining those amounts.

(2) A construction contract shall provide for—

(a) the payment claim date, or an adequate mechanism for determining the payment claim date, for each amount due under the construction contract, and

(b) the period between the payment claim date for each such amount and the date on which the amount is so due.

(3) The Schedule shall apply to a main contract if and to the extent that it does not make provision for the matters specified in subsections (1) and (2).

(4) The Schedule shall apply to a subcontract except to the extent that it
makes provision which is more favourable to the executing party than that which would otherwise be made by the Schedule.

(5) Except after the occurrence of the circumstances specified in subsection (6), a provision in a construction contract is ineffective to the extent that it provides that payment of an amount due under the construction contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract.

(6) The circumstances referred to in subsection (5) are:

(a) where the other person is a company other than an unregistered company—

(i) the commencement of its winding up pursuant to section 251 of the Companies Act 1963 where no declaration of solvency has been made under section 256 of the Companies Act 1963,

(ii) the presentation of a petition to wind it up pursuant to section 213 of the Companies Act 1963,

(iii) the appointment of a receiver in respect of any of its property or assets, or

(iv) the presentation of a petition for the appointment of an examiner under the Companies (Amendment) Act 1990 in relation to it;

(b) where the other person is an unregistered company, the commencement of its winding up pursuant to section 345 of the Companies Act 1963;

(c) where the other person is an individual or partnership, the making of an application for adjudication under the Bankruptcy Act 1988 in relation to it;

(d) the making of a winding up or similar order by a court in relation to the other person;
(e) the occurrence of any event corresponding to those specified in this subsection under the law of any state to which Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings applies.

Payment claim notices.

4.— (1) This section applies where, not later than 5 days after the payment claim date, an executing party to a construction contract delivers a payment claim notice relating to a payment claim to the other party or another person specified under the construction contract.

(2) A payment claim notice is a notice specifying—

(a) the amount claimed (even if the amount is zero),

(b) the period, stage of work or activity to which the payment claim relates,

(c) the subject matter of the payment claim, and

(d) the basis of the calculation of the amount claimed.

(3) If the other party or specified person referred to in subsection (1) contests that the amount is due and payable, then the other party or specified person—

(a) shall deliver a response to the payment claim notice to the executing party, not later than 21 days after the payment claim date, specifying—

(i) the amount proposed to be paid,

(ii) the reason or reasons for the difference between the amount in the payment claim notice and the amount referred to in subparagraph (i), and

(iii) the basis on which the amount referred to in subparagraph (i) is calculated,

And

(b) if the matter has not been settled by the day on which the
amount is due, shall pay the amount referred to in paragraph
(a) to the executing party not later than on that day.

(4) Where a reason for the different amount in the response is attributable to
a claim for loss or damage arising from an alleged breach of any contractual or
other obligation of the executing party (under the construction contract or
otherwise), or any other claim that the other person alleges against the
executing party, the response shall also specify—

(a) when the loss was incurred or the damage occurred, or how the
other claim arose,

(b) the particulars of the loss, damage or claim, and

(c) the portion of the difference that is attributable to each such
particular.

(5) The rights and obligations conferred or imposed by this section are
additional to any conferred or imposed by the terms of the construction
contract.

5.— (1) Where any amount due under a construction contract is not paid in
full by the day on which the amount is due, the executing party may suspend
work under the construction contract by giving notice in writing under
subsection (2).

(2) Notice under this subsection shall specify the grounds on which it is
intended to suspend work and shall be delivered to the other party—

(a) not earlier than the day after the day on which the amount
concerned is due, and

(b) at least 7 days before the proposed suspension is to begin.

(3) Work may not be suspended under subsection (1)—

(a) after payment by the other party of the amount due, or

(b) after notice has been served by a party to the construction
contract under section 6 (2) in relation to a dispute relating to
payment of the amount concerned.

(4) Where work is suspended under subsection (1) and the ability of the executing party to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the contractual time limit unless the suspension of work is unjustified in the circumstances.

(5) Where work is suspended under subsection (1) and the ability of a subcontractor to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the contractual time limit.

(6) A period of suspension of work under subsection (1) shall also be disregarded for the purpose of computing the time taken to complete the work under another construction contract where—

(a) the construction contract the work under which is suspended is a subcontract,

(b) the other construction contract is also a subcontract and the other party to that other subcontract is the same as the other party to the subcontract the work under which is suspended, and

(c) the ability of the executing party under that other subcontract to complete work within a contractual time limit is affected by the suspension of work.

(7) This section is without prejudice to the right of the other party to the construction contract under which work is suspended to claim for compensation or damages for any loss due to a suspension of work that is unjustified in the circumstances.

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6.— (1) A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a “payment dispute”).
(2) The party may exercise the right by serving on the other person who is party to the construction contract at any time notice of intention to refer the payment dispute for adjudication.

(3) The parties may, within 5 days beginning with the day on which notice under subsection (2) is served, agree to appoint an adjudicator of their own choice or from the panel appointed by the Minister under section 8.

(4) Failing agreement between the parties under subsection (3), the adjudicator shall be appointed by the chair of the panel selected by the Minister under section 8.

(5) The party by whom the notice under subsection (2) was served—

(a) shall refer the payment dispute to the adjudicator within 7 days beginning with the day on which the appointment is made, and

(b) shall at the same time provide a copy of the referral and all accompanying documents to the person who is party to the construction contract.

(6) The adjudicator shall reach a decision within 28 days beginning with the day on which the referral is made or such longer period as is agreed by the parties after the payment dispute has been referred.

(7) The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the payment dispute was referred.

(8) The adjudicator shall act impartially in the conduct of the adjudication and shall comply with the code of practice published by the Minister under section 9, whether or not the adjudicator is a person who is a member of the panel selected by the Minister under section 8.

(9) The adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute and may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts.

(10) The decision of the adjudicator shall be binding until the payment
dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.

(11) The decision of the adjudicator, if binding, shall be enforceable either by action or, by leave of the High Court, in the same manner as a judgement or order of that Court with the same effect and, where leave is given, judgement may be entered in the terms of the decision.

(12) The decision of the adjudicator, if binding, shall, unless otherwise agreed by the parties, be treated as binding on them for all purposes and may accordingly be relied on by any of them, by way of defence, set-off or otherwise, in any legal proceedings.

(13) The adjudicator may correct his or her decision so as to remove a clerical or typographical error arising by accident or omission but may not reconsider or re-open any aspect of the decision.

(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.

(15) Each party shall bear his or her own legal and other costs incurred in connection with the adjudication.

(16) The parties shall pay the amount of the fees, costs and expenses of the adjudicator in accordance with the decision of the adjudicator.

(17) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute and the parties shall be jointly and severally liable for the payment of the reasonable fees, costs and expenses incurred by the adjudicator up to the date of resignation.

(18) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator and the parties shall be jointly and severally liable for the payment of the reasonable fees, costs and expenses incurred by the adjudicator up to the date of the revocation.
7. — (1) Where any amount due pursuant to the decision of the adjudicator is not paid in full before the end of the period of 7 days beginning with that on which the decision is made, the executing party may suspend work under the construction contract by giving notice in writing under subsection (2).

(2) Notice under this subsection shall specify the grounds on which it is intended to suspend work and shall be delivered to the other party not later than 7 days before the proposed suspension is to begin.

(3) Work may not be suspended under subsection (1)—

(a) after payment by the other party of the amount due, or

(b) after the decision of the adjudicator is referred to arbitration or proceedings are otherwise initiated in relation to the decision.

(4) Where work is suspended under subsection (1) and the ability of the executing party or a subcontractor to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the contractual time limit.

(5) A period of suspension of work under subsection (1) shall also be disregarded for the purpose of computing the time taken to complete the work under another construction contract where—

(a) the construction contract, the work under which is suspended, is a subcontract,

(b) the other construction contract is also a subcontract and the other party to that other subcontract is the same as the other party to the subcontract the work under which is suspended, and

(c) the ability of the executing party under that other subcontract to complete work within a contractual time limit is affected by the suspension of work.

8. — (1) The Minister shall from time to time select persons to be members of a panel (in this section referred to as the “panel”) to act as adjudicators in
relation to payment disputes and shall select one of those persons to chair the panel.

(2) Persons selected under subsection (1) shall be members of the panel for a period of 5 years commencing on the date of selection and shall be eligible for reselection at the end of the period of 5 years.

(3) The Minister may, for good and sufficient reason, remove a member of the panel.

(4) A member of the panel may at any time resign by giving notice in writing to the Minister.

(5) In selecting persons to be members of the panel, the Minister shall have regard to their experience and expertise in dispute resolution procedures under construction contracts; and a person may not be selected to be a member of the panel unless the person is a person of any of the descriptions specified in subsection (6).

(6) The descriptions of persons referred to in subsection (5) are as follows:

(a) a registered professional as defined in section 2 of the Building Control Act 2007;

(b) a chartered member of the Institution of Engineers of Ireland;

(c) a barrister;

(d) a solicitor;

(e) a fellow of the Chartered Institute of Arbitrators;

(f) a person with a qualification equivalent to any of those specified in paragraphs (a) to (e) duly obtained in any other Member State of the European Union.

9. — The Minister may prepare and publish a code of practice governing the conduct of adjudications under section 6.

10. — (1) The parties to a construction contract may agree on the manner by
which notices under this Act shall be delivered.

(2) if or to the extent that there is no such agreement, a notice may be
delivered by post or by any other effective means.

(3) Where under this Act a notice is required to be delivered not later than a
specified number of days after a particular date and the last of those days is a
day which is a Saturday or Sunday or a public holiday (within the meaning of the
Organisation of Working Time Act 1997 ), the notice shall be taken to be validly
delivered if delivered on the next day which is not such a day.

11.— The expenses incurred by the Minister in the administration of this Act
shall be paid out of moneys provided by the Oireachtas.

12.— (1) This Act may be cited as the Construction Contracts Act 2013.

(2) This Act applies in relation to construction contracts entered into after
such day as the Minister may by order appoint.

SCHEDULE

Provisions to Apply to Matters Regarding Payments

Section 3 .

1. The payment claim dates under a construction contract shall (subject to
paragraph 2) be as follows:

(a) 30 days after the commencement date of the construction
contract;

(b) 30 days after the date referred to in clause (a) and every 30 days
thereafter up to the date of substantial completion;

(c) 30 days after the date of final completion.
2. Where a construction contract provides, or the parties to a construction contract otherwise agree, that the duration of the work under the construction contract is or is estimated to be less than 45 consecutive days, the payment claim date shall be 14 days following completion of the work under the construction contract.

3. The date on which payment is due in relation to an amount claimed under a construction contract shall be no later than 30 days after the payment claim date.

4. The amount of an interim payment under a construction contract shall (subject to paragraph 5) be the difference between—

(a) the aggregate of the gross value (determined in accordance with the construction contract) of the work done under the construction contract at the payment claim date concerned together with any additional amounts in the interim payment under the construction contract, less any deductions from payment provided for by the construction contract, and

(b) the aggregate amount of interim payments that have already been made at that payment claim date.

5. The aggregate of payments made under a construction contract shall not exceed—

(a) the amount provided for in the construction contract as originally concluded, and

(b) amounts provided for by any amendments to that contract agreed between the parties.