SCSI

Chartered property, land and construction surveyors

ALTERNATIVE DISPUTE RESOLUTION

INFORMATION PAPER - 1ST EDITION

PUBLISHED 2022

THE SCSI ENCOURAGES ITS MEMBERS TO COMMIT TO:

1. Work proactively to avoid conflict and facilitate early resolution of potential disputes.

2. Develop their capability in the early identification of potential disputes and in the use of conflict avoidance measures.

3. Promote the value of collaborative working to prevent issues developing into disputes.

4. Work with industry partners to identify, promote and utilise conflict avoidance mechanisms.

5. Utilise mediation as a first step for parties to promote the amicable settlement of their disputes.

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SCSI/RICS DOCUMENTS STATUS DEFINED

The SCSI/RICS produce a range of professional standards, guidance and information documents. These have been defined in the table below. This document is an information paper (IP).

STANDARD		
International standard	An international high-level, principle-based standard developed in collaboration with other relevant bodies.	Mandatory.
PROFESSIONAL		
SCSI/RICS professional statement (PS)	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term encompasses practice statements, Red Book professional standards, global valuation practice statements,regulatory rules, SCSI/RICS Rules of Conduct, and Government codes of practice.	Mandatory.
GUIDANCE		
SCSI/RICS code of practice	Document approved by the SCSI/RICS, and endorsed by another professional body/stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice (will be confirmed in the document itself). Usual principles apply in cases of negligence if best practice is not followed.
SCSI/RICS guidance note (GN)	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best best practice. Usual principles apply in cases of negligence if best practice is not followed.
SCSI/RICS information paper (IP)	Practice-based document that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended good practice. Usual principles apply in cases of negligence if best practice is not followed.
SCSI/RICS insight	Issues-based input that provides users with the latest information. This term encompasses thought leadership papers, market updates, topical terms of interest, white papers, futures, reports and news alerts.	Information only.
SCSI/RICS economic/ market report	A document usually based on a survey of members, or a document highlighting economic trends.	Information only.
SCSI/RICS consumer guide	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent, peer-reviewed, arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

SCSI INFORMATION PAPER

This is an information paper (IP). IPs are intended to provide information and explanation to SCSI members on specific topics of relevance to the profession. The function of this paper is not to recommend or advise on professional procedure to be followed by members. It is, however, relevant to professional competence to the extent that members should be up to date and have knowledge of IPs within a reasonable time of their coming into effect. Members should note that when an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of any relevant IPs published by the SCSI in deciding whether or not the member has acted with reasonable competence.

INTRODUCTION

Chartered Surveyors are involved at all stages of the dispute avoidance, management, and/or resolution process. Across the various professional disciplines, Chartered Surveyors bring extensive experience and a wide range of developed skills focused towards resolving a variety of disputes related to property, land and construction.
Chartered Surveyors act as negotiators, advocates, expert witnesses and third-party resolvers. With the benefit of in-depth knowledge of property, land and construction, Chartered Surveyors are also well placed to review property and construction contracts, and to identify and avoid potential flash points that may commonly occur. This document is intended to provide information to Society of Chartered Surveyors Ireland (SCSI) members on alternative dispute resolution (ADR):

- mediation;
- conciliation;
- arbitration;
- independent expert; and,
- adjudication.

SCSI DISPUTE RESOLUTION SERVICE AND ADR PANELS

The SCSI Dispute Resolution Service assists parties and their advisers by providing a service that appoints suitable third-party ADR professionals to disputes relating to property, land and construction.
The role of the SCSI in making appointments is an important one, and the SCSI aims to ensure that ADR professionals appointed by the SCSI President have the requisite relevant skills and experience to perform their functions to the highest standards.
The SCSI maintains various panels to which the SCSI President refers when making appointments and nominations of ADR professionals under the SCSI's Dispute Resolution Service. All Chartered Surveyors who have been recommended for entry to the SCSI ADR panels have met robust criteria and have undergone an interview process. To continue on an SCSI ADR panel, all panel members must resubmit for reassessment at regular intervals, usually every three to five years. Interview boards will always have independent representation from outside the SCSI.

Property panels

The SCSI is Ireland's leading appointing authority to property rent review disputes. In fact, most, if not all commercial leases contain provision for the SCSI President to appoint an arbitrator or independent expert, and in default of agreement between the parties as to the rent, an application is made to the SCSI's President to appoint the dispute resolver. These appointments are drawn from the SCSI's property panels of arbitrators and independent experts following thorough conflict of interest checks.

Construction panels

The SCSI's President from time to time receives requests to appoint Chartered Surveyors to construction-related disputes. The authority for the SCSI to appoint in these types of cases will typically rest within a contract agreement between the parties. These appointments are drawn from the SCSI's construction panels of conciliators, arbitrators, independent experts and adjudicators.

Mediation panel

A cross-disciplinary mediation panel also supports parties in a whole range of property, construction and boundary disputes, and is promoted to the general public and to legal advisors of clients who find themselves party to such disputes.

Appointment process

Potential users of the SCSI Dispute Resolution Service can email drs@scsi.ie to request an application form to apply to the SCSI President to appoint a Chartered Surveyor ADR professional to your dispute. Appointments are made at the absolute discretion of the SCSI President.
An appointment fee is payable in advance to the SCSI. Further information on the SCSI Dispute Resolution Service and ADR Panels is available at www.scsi.ie.

ADR MECHANISMS

Comparative summary of dispute resolution mechanisms. Source: *Law Society of Ireland ADR Guide 2018;* extracted from *Arbitration and ADR in Construction Disputes* by G Brian Hutchinson. Round Hall, 2010: 16.

ARBITRATION	CONCILIATION	MEDIATION	ADJUDICATION	EXPERT DETERMINATION
Flexible application of legal principles	Less emphasis on legal principles	Less emphasis on legal principles	Flexible application of legal principles	Flexible application of legal principles
Arbitrator may be expert in field	Conciliator may expert in field	Mediator may be expert in field	Adjudicator may be expert in field	Expert
Outcome binding and enforceable	Settlement agreement enforceable as a contract only[1]	Settlement agreement enforceable as a contract only[1]	Outcome temporarily binding	Outcome binding
Limited range of outcomes	Creative solutions possible	Creative solutions possible	Limited range of outcomes	Limited range of outcomes
Outcome not transparent unless reasons provided	Parties alone determine outcome	Parties alone determine outcome	Outcome not transparent unless reasons provided	Outcome not transparent unless reasons provided
No appeal	No need for appeal	No need for appeal	Appeal to arbitration possible[2]	No appeal
Polarising – emphasis on differences	Brings parties together – emphasis on common goals	Brings parties together – emphasis on common goals	Polarising – emphasis on differences	Less polarising than adversarial mechanisms

[1] *S.11 of the Mediation Act 2017 provides for enforcement of mediation settlements in Ireland, and the EU Mediation Directive 2008 provides for mutual recognition of Irish mediated settlements throughout the EU.*

[2] *Since the Construction Contracts Act 2013, an adjudicator's decision is binding until and unless it is later overturned by an arbitrator or a court.*

MEDIATION

Introduction

Mediation is one form of ADR. Practitioners should be aware that there are other forms of ADR that may be more appropriate for their dispute. Mediation can be used for all types of property disputes including, but not limited to, those relating to commercial or residential property, construction, planning, service charge disputes, dilapidations, rent reviews and all other leasehold property issues, neighbour disputes, and development properties. With mediation it is also possible to achieve a settlement whatever the value of the dispute, e.g., from small neighbour claims to large multi-million-Euro commercial disputes.

Mediation Act 2017

On January 1, 2018, the Mediation Act 2017 came into force in Ireland.

What is mediation?

The generally accepted description of mediation, be it commercial or otherwise, is a voluntary, non-binding, private dispute resolution process facilitated by a neutral person (the mediator), and which enables the parties to reach a mutually negotiated agreement. A core principle of mediation is that the parties' 'control' their outcome, rather than it being imposed upon them. Unless required by contract, the parties attend mediation voluntarily. Even where it is a contractual requirement, either party can terminate the mediation at any time, as participation must always be voluntary.

Mediation is usually a powerful first step towards settlement, restoring direct communication where it may have broken down previously. It may be entered into at any time, even during proceedings.

Fees and costs should be kept to a minimum; however, they are still payable whether the mediation has been successful or not. In general, the costs of a mediation are significantly less than other forms of ADR or litigation.

Principles of mediation

- Confidentiality
- Impartiality and neutrality
- Respect
- Self-determination
- Voluntary participation

The role of the mediator

The role of the mediator is not to impose a solution, nor is it to advise the parties as to their legal rights and/or obligations. Rather, the mediator is there to assist parties to work out a mutual agreement that works for the parties themselves. The mediator may not impose proposals or solutions; however, if asked by the parties, the mediator may make proposals to assist the parties to reach terms that they can both live with, and looking at a broad range of issues (such as those outside of legal rights, and ridged facts).

MEDIATION

Mediation is used in a wide variety of contexts, from multi-million-Euro commercial disputes to employment and workplace disputes, through conflicts in family and community settings. Mediation is now encouraged by the courts at all stages of the litigation process.

A skilled mediator will have received specific training in all aspects of the mediation process and competencies. The mediator should therefore be able to mediate whatever the background of the dispute, regardless of the mediator's own underlying technical discipline(s). That said, it is the case that many clients will prefer to have a mediator who also has good subject knowledge of a primary technical area that is relevant to the issues in their dispute. A skilled mediator should be able to:

- reopen communications between parties;
- engage with the parties to take control of their dispute;
- bring a fresh, neutral pair of eyes to an old problem;
- take a broader perspective, and help the parties to explore a range of options and create suitable solutions;
- help the parties to move towards a realistic, negotiated agreement, in a cost-effective manner that is capable of implementation; and,
- make sure that the parties are aware of their rights to each obtain independent advice (including legal advice) prior to signing any mediation settlement.

Core competencies of a mediator

- Managing the process of mediation
- Managing the relationship in mediation
- Managing the content of the mediation
- Managing self

Advantages of mediation

There is one crucial factor that distinguishes mediation from most other forms of dispute resolution: it does not involve a third-party judgment on who is right and who is wrong. Without fear of such judgment, the parties have a greater opportunity to work together rather than against each other, and to focus on compromise and a workable solution.

Parties to a dispute may often interpret the same facts and events differently, and both may often have cause to believe that they are right. Without perspective, there is no right or wrong. They each see and interpret their situation through their own eyes conditioned by education, culture, age, environment, and other factors.

In other adjudicative dispute resolution processes (e.g., courts, arbitration, adjudication, expert determination), the third-party arbiter imposes their interpretation of right and wrong on the subject matter of the dispute, a potentially limiting way of resolving disputes.

In mediation, the focus of the dispute is changed from who was right and wrong towards a focus on what each party needs to be able to put the dispute behind them and move on from it constructively. The parties, with the help of the mediator, then negotiate towards establishing those needs and achieving a settlement that will work for all. Not only does this approach create an opportunity for a win-win outcome, but it can also save the parties a significant amount of money and time, while giving them a better opportunity for solutions that meet their needs.

The advantages of mediation can be outlined as follows:

- mediation is non binding up until the point of agreement, where the parties sign their negotiated settlement (at which point it becomes binding);
- the key to any mediation is the fact that it is private, and the process is confidential to the parties, except as they may agree – this enables the parties to talk frankly about the strengths and weaknesses of their arguments, and the other side's 'case', without it prejudicing their position if the case does not settle and goes to court. Negotiations and communications within the process are, subject to some narrow exceptions, inadmissible in subsequent legal or other proceedings;
- the mediator is neutral, and their only interest is in providing the parties with their best chance of achieving a settlement to their dispute; and,
- one of the key strengths of mediation is that the parties take control of the outcome and negotiate their own settlement, 'owning' the outcome. They can decide to withdraw from the process at any time. Any final settlements may take into account other dispute resolution processes, e.g., an ongoing business relationship opportunity for further work, or the offer of goods or services at the agreed cost. It may also take into account things that are totally outside of the dispute.

Disadvantages of mediation

The disadvantages of mediation can be outlined as follows:

- it is contingent on the parties reaching an agreement that they are willing to agree on;
- no one may impose a solution, i.e., unlike a judge were the dispute before the court; and,
- if no agreement is reached, mediation is an additional time and cost.

Costs of mediation

Generally, the costs of the mediation are borne equally by the parties,

and they should reflect the importance and complexity of the issues at stake, and the amount of work carried out by the mediator.

Code of Practice

A Code of Practice governing mediators is promised under the Mediation Act 2017. Mediators will be required to comply with the Code of Practice (CoP) when it is finally issued. At the date of publication of this document, the CoP is under construction.

The agreement to mediate

The agreement to mediate comes prior to the commencement of the mediation. It is an important first step towards a negotiated settlement. It is significant that the parties, before they have raised their issues or met in a mediation session, have indicated an agreement to mediate – this forms a strong positive starting point and is their first step towards a collaborative resolution. The agreement to mediate will usually include the agreed procedures to be followed, a confidentiality clause, and the terms upon which the fees and costs of the mediation will be discharged.
The mediator will draw up the agreement to mediate after consulting all parties. Like all aspects of mediation, the agreement to mediate is at the discretion of the parties involved.

Mediation settlement – 'the agreement'

Mediation settlements are also known as mediation agreements, settlement agreements, mediated settlement agreements, memoranda of understanding, notes of understanding, or just 'the agreement'. Whatever it is called, it is the document that sets out the nature and terms of the agreement in writing reached by the parties to a dispute during the course of a mediation, and signed by the parties and the mediator. The mediated agreement:

- is usually drafted in line with the heads of agreement as agreed through the mediator,
- cannot include anything that does not have the full agreement of all parties,
- is best dealt with in detail at the mediation, where parties may address any details that might later unravel the agreement or become obstacles to seeing matters successfully concluded,
- will be agreed and signed by the parties,
- will be legally binding, as a contract,
- can be as simple or complex as the parties need to effectively resolve the dispute,
- should be drafted in straightforward terms and plain English so as to avoid confusion or later disputes over the interpretation at a later date; and,
- can include all terms of importance to the parties, no matter how unusual or minor.

The legal status of a mediated agreement is subject to standard contract law application and interpretation.

Enforceability of mediation settlements

A mediated settlement or agreement has the same effect as a contract between the parties to the settlement except where it is expressly stated to have no legal force until it is incorporated into a formal legal agreement or contract to be signed by the parties.
A court may, on the application of one or more parties to a mediation settlement, enforce its terms save for limited circumstances.

What if an agreement is not reached?

If an agreement is not reached there are no penalties or downsides, save for time and cost – the parties retain all options previously available to them, including:

- leaving the matter unresolved and moving forward;
- arranging another mediation session and trying again to reach resolution;
- identifying more information, which may assist a further attempt to mediate;
- trying another ADR process such as arbitration; or,
- 'going to law' or, if the matter is already in court, proceeding to a hearing.

The parties have the option to continue with the mediation sessions or discontinue them. In a court-referred mediation case, the mediation is simply reported as unsuccessful, and the case moves forward in the courts.

Court report

Under section 16(1), if the parties to the mediation subsequently apply to the court to re- enter the proceedings, the mediator shall prepare and submit a report to the court.

Court sanctions for failure to mediate

There are possible cost consequences should a party unreasonably refuse to mediate or attend mediation – see Section 21 of the Mediation Act 2017.

Documents relating to mediation

- The full text of the Mediation Act 2017 is available at www.irishstatutebook.ie.

CONCILIATION

Introduction

The process of conciliation is a means of resolving disputes. It is somewhat similar to mediation in that a neutral third party (the conciliator) attempts to facilitate a resolution of the dispute that exists between two parties. Conciliation is also governed by the Mediation Act 2017 (since it fits within the definition of 'Mediation' in s.2(1) of the Act). This means that the supports for mediation provided in the Act also apply to most conciliations.

What is conciliation?

Conciliation is an ADR method that has been used extensively in Ireland for the resolution of disputes in the construction industry in particular. Notwithstanding the introduction of the more stringent, though time-efficient, adjudication process, introduced by way of the Construction Contracts Act 2013, the process of conciliation continues to be relied upon by parties in construction disputes as a means of resolving disputes in a cost-effective, efficient, and less confrontational way. It is also a confidential process.

At the conclusion of the process, and in the event that a settlement has not been reached during the conciliation process, the conciliator will issue a 'recommendation' (as opposed to a decision). Ordinarily, this recommendation will be binding unless it is rejected by one of the parties within a specified timeframe.

Principles of conciliation

- Impartiality
- Objectivity and fairness
- Acknowledges the rights and obligations of all parties
- Values each party's experience, concerns, needs and dignity

The role of the conciliator

The role of the conciliator is to assist the parties in dispute, in an independent and impartial manner, in their attempt to reach an amicable settlement. The conciliator can play an active role in the process and, unlike in mediation, can suggest solutions for consideration; in this sense, conciliators act in an evaluative manner as opposed to a facilitative manner, as is more common in mediation.

The adoption of conciliation as a means of resolving disputes is very often stated in the Conditions of Contract, e.g., Clause 13 of the Public Works Contracts. A conciliator is usually appointed by an application being made to one of the institutes, such institute being specified in the contract. There are instances whereby standing conciliators are appointed on specific projects, and this is declared at the outset.

Following an appointment, the conciliator manages the process and ordinarily calls an initial meeting to discuss the process and the way forward. The conciliator then invites both parties to make a submission outlining their respective positions and copying these submissions to the other party. The conciliator may consider it worthwhile to meet parties separately and may

receive documents of a confidential nature prior to a more formal meeting. The conciliator will normally convene a formal meeting of the parties. This meeting will often comprise an initial joint session, followed by the conciliator meeting the parties individually. During these joint and individual meetings, the conciliator will endeavour to facilitate an agreement between the parties, both in a facilitative and evaluative manner. Any such agreement will be drafted up at the conclusion of the meeting and both parties will then sign that agreement. This agreement is binding.

In the event that parties do not reach an amicable agreement, the conciliator will issue a recommendation, which parties must reject within a specific time, failing which it becomes binding.

Core competencies of a conciliator

- Managing the process of conciliation
- Managing the relationship in conciliation
- Managing the content of the conciliation
- Managing self
- An ability to listen
- An ability to formalise an agreement

Advantages of conciliation

The advantages of conciliation can be outlined as follows:

- it is a relatively inexpensive and expedient process;
- the confidentiality of the process avoids unnecessary publicity;
- it is a collaborative method of dispute resolution that avoids the more confrontational processes of adjudication and arbitration, which can very often damage future relationships between the parties;
- parties have more control over the process as it progresses; and,
- it tends to focus more on the merits of a claim, rather than the legal arguments.

Disadvantages of conciliation

The disadvantages of conciliation can be outlined as follows:

- parties do not have the certainty of a binding decision, judgment or award at the end of the process – if agreement is not reached, the conciliator will issue a recommendation that is open to acceptance or rejection by either party;
- it is not as expedient as adjudication, which has strict timelines set out within the Construction Contracts Act 2013; and,
- as the conciliation process is somewhat informal, it can happen that one of the parties does not approach it with the seriousness required to enable the process to work.

Costs of conciliation

Generally, in conciliation, each party will bear its own costs, in addition to paying half of the conciliator's fees, irrespective of the outcome. It is acknowledged that the costs of conciliation are relatively low in comparison to the costs of litigation or arbitration. Both under the Public Works Contracts and within the Engineers Ireland conciliation procedure, the conciliator is required to conclude the conciliation process within 42 days of appointment, albeit this is often extended by agreement with both parties. There is no such timeframe specified by the Royal Institute of the Architects of Ireland (RIAI) in its procedure. The SCSI conciliation procedure states that the conciliator shall start the conciliation at the date of appointment and shall use best endeavours to conclude the conciliation as soon as possible, and in any event within 42 calendar days from the date of appointment, or within such other time as may be set out in the contract or otherwise agreed between the parties.

The conciliation agreement

This conciliation agreement would be similar to that drafted up on conclusion of a mediation, i.e.,:

- it is usually drafted in line with the heads of agreement as agreed through the mediator;
- it cannot include anything that does not have the full agreement of all parties;
- it is best dealt with in detail at the mediation, where parties may address any details that might later unravel the agreement or become obstacles to seeing matters successfully concluded;
- it will be agreed and signed by the parties;
- it will be legally binding, as a contract;
- it can be as simple or complex as the parties need to effectively resolve the dispute
- it should be drafted in straightforward terms and plain English so as to avoid confusion or later disputes over the interpretation at a later date; and,
- it can include all terms of importance to the parties, no matter how unusual or minor.

Documents relating to conciliation

- Engineers Ireland booklet: 'Conciliation Procedure 2013: For Use with the PWC Suite of Contracts';
- RIAI booklet 'Conciliation Guidelines & Procedures' (September 2016 Edition);
- PWC form of contract 'Public Works Contract for Civil Engineering Works Designed by the Employer' (PW-CF3 v1.10 dated 30 June 2016; Refer Clause 13); and,
- SCSI Conciliation Procedure, (to be published in 2022).

ARBITRATION

Introduction

Arbitration is one form of ADR and practitioners should be aware that other forms of ADR may be appropriate for their dispute.

Arbitration can be used for a variety of property-related issues but is most commonly utilised in rent review disputes and construction contracts.

Arbitration Act 2010

On June 8, 2010, the Arbitration Act 2010 came into force in Ireland.

What is arbitration?

Arbitration is an adversarial dispute resolution procedure whereby two parties in dispute agree to submit their dispute to a third party (the arbitrator) for determination.

The agreement to submit a dispute to arbitration is usually found in an arbitration clause contained in a contract (lease) between the parties. There can be a general arbitration clause to cover unspecified issues that may arise or a specific arbitration clause to deal with issues such as rent reviews.

The role of the arbitrator

An arbitrator is an independent and impartial third party who will make a decision (the award) based on the evidence put forward and the directions of the parties/arbitration clause. An arbitrator is usually an expert in the relevant field.

Core competencies of an arbitrator

- Understands fair procedures such as conflict of interest management and disclosures
- Case management skills
- Understands categories of evidence and the ability to decide on weighting if required
- Ability to formulate a logical rationale towards making an award
- Knowledge of arbitration law and related legislation

Advantages of arbitration

The advantages of arbitration can be outlined as follows:

- in advance of an appointment, the parties can agree a mutually acceptable arbitrator;
- proceedings are held in private and not in open court;
- comfort to the parties that the arbitrator will have specialist knowledge, such as the Chartered Surveyor as arbitrator with extensive knowledge of the property market and construction industry;
- both sides get an equal opportunity to put forward their case;
- it is normally a substantially quicker and more flexible process than the court process;
- costs are usually lower than court;
- a party to the arbitration is entitled to an oral hearing if they so require;
- unless agreed by the parties, the arbitrator will issue a reasoned award explaining how they reached their decision; and,
- an arbitrator's award is final and binding. There is very limited ground of appeal to the courts.

Principles of arbitration

- Obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense
- Parties should be free to agree how their dispute should be resolved, subject only to such safeguards as are necessary in the public interest
- Adversarial procedure, with each party presenting evidence to support their differing views
- Arbitrator should act fairly and impartially, using their general knowledge of the subject matter, and skill and expertise as an expert tribunal
- Arbitrator should understand and weigh the available evidence in reaching the 'right' result, based on the submissions and evidence upon which the parties have placed reliance
- Parties have the right to agree all procedural and evidential matters regarding the conduct of their arbitration – in the absence of such agreement, the arbitrator should make any direction they consider appropriate reflecting their duties

Disadvantages of arbitration

The disadvantages of arbitration can be outlined as follows:

- certain arbitrations, but not all, can be expensive, particularly if the hours involved exceed the original projection;
- it may not suit multi-party disputes;
- there is an inability to challenge an award except in very limited circumstances;
- limited range of outcomes; and,
- polarising – emphasis on differences.

Costs of arbitration

The costs of an arbitration will vary depending on the quantum and complexity of the case. The parties to an arbitration agreement may make such provision as to the costs of the arbitration as they see fit. Where no such provision is made, the arbitrator shall award those costs as he/she sees fit.

The arbitration agreement

The arbitration clause will invariably provide for all, or certain specified, disputes to be determined by an arbitrator, to be agreed by the parties or, if the parties cannot agree, appointed on the application of either of the parties by the President or other senior officer of a professional institution such as the SCSI when the dispute relates to a property, land or construction matter requiring specialised knowledge. Once the arbitrator has been appointed, he/she will usually seek to convene a preliminary meeting with the parties and/or their advisors. The purpose of the preliminary meeting will be to clarify the requirements of the parties, and to agree or determine the future conduct of the arbitration with the view to having the dispute resolved in the most efficient and economical way.

The award

Arbitrators must base their arbitral award on what has been put before them by the parties. Under the Arbitration Act 2010, arbitrators are required to give their award in writing and, unless the parties have agreed that no reasons are to be given, to state in the award the reasons upon which it is based. The arbitrator's award is final and binding on the parties, with very limited grounds of appeal to the courts. The award is enforceable either by action or by leave of the High Court, in the same manner as a judgment or order of that Court.

Documents relating to arbitration

- Arbitration Act 2010, available at www.irishstatutebook.ie; and,
- Criteria for inclusion on the SCSI Panel of Arbitrators; available at www.scsi.ie.

INDEPENDENT EXPERT

Introduction

An independent expert determination, sometimes called 'expert determination', is one form of ADR and practitioners should be aware that other forms of ADR may be appropriate for their dispute.

An independent expert referral can be used for a variety of property-related issues, but is most commonly utilised in rent reviews, and in boundary and construction disputes. Independent expert determination is also well suited to construction-related matters (e.g., workmanship and completion issues under development agreements or specific technical disputes), and in the area of dilapidations and service charge disputes.

Legislation

Unlike the position with arbitration, there is no specific statutory background that controls the power and conduct of independent experts, and there are normally no specific documents beyond the parties' own agreement contained in the lease or other contractual document.

In some cases, the lease or contract will provide that one party can choose whether the matter is to be determined by an arbitrator or an independent expert, and the nature of the dispute and the available evidence are factors to be considered when making that decision.

Principles of an independent expert

- Act fairly
- Reliance on own investigations, knowledge and experience
- Not to delegate
- Confidentiality
- Carry out the determination within a reasonable time
- Apply the law

What is an independent expert referral?

An independent expert referral is an adversarial dispute resolution procedure whereby two parties in dispute agree to submit their dispute to a third party (the independent expert) for determination.

In the case of rent reviews, the lease provides the contract under which the independent expert is to act.

The lease or agreement may stipulate that the independent expert is to receive representations from the parties, although not being limited by them. The document may also stipulate the required qualifications and experience of the individual acting as independent expert.

The role of the independent expert

Where parties to an agreement intend that disputes shall be determined not by arbitration but by a surveyor exercising their own professional expertise and judgment, they may call the surveyor an 'independent expert', 'independent surveyor' or 'third-party surveyor'. In this information paper, the single expression 'independent expert' is used.

Unlike judges and arbitrators, independent experts determining a dispute bring their own knowledge to bear on the issues and are entitled to form a view based entirely on their own expertise, without the need for evidence from the parties.

An independent expert (not to be confused with an 'expert witness') must have in-depth knowledge of the subject matter of the dispute (otherwise they are not an expert) and is free to make their own investigations.

As a result, the dispute can be determined quickly and expertly and, usually, once and for all. Expert determination is particularly suited to disputes on discrete technical issues, including disputes of valuation or quality of work and/or materials.

The independent expert will usually seek submissions from both sides to the dispute and will exchange these submissions for comment by way of counter-submissions. While the independent expert can take these submissions and counter-submissions into account, they are not bound by them.

Core competencies of an independent expert

- Ability to reach an impartial conclusive valuation based on own investigations, knowledge and experience
- Ability to assemble relevant material, use professional skill and judgement
- Case management skills
- Only deal with the specific issues referred to them
- Knowledge of relevant legislation

Advantages of independent expert referral

The advantages of independent expert referral can be outlined as follows:

- speed, privacy and the ability to choose the decision-maker (or to have a suitable person appointed by a third party) – this is similar to arbitration;
- may be a quicker and simpler process than arbitration, depending on the nature of the dispute; and,
- may suit circumstances where there is a lack of particular evidence, or where there are advantages in the independent expert being able to carry out their own investigations.

Disadvantages of independent expert referral

The disadvantages of independent expert referral can be outlined as follows:

- an independent expert has no power to require disclosure of documents or evidence, reasons will not usually be given, there is no legislative underpinning, and an oral hearing is not normally available to the parties;
- it will not always be possible for the parties to comment or make submissions on all of the factors or evidence that the independent expert may take into account in reaching their decision;
- the decision of an independent expert, while binding, cannot be enforced in the same way as an arbitration award; it is simply enforceable under contract law;
- there are very limited grounds to challenge a decision; and,
- an expert has no immunity from suit and can be open to claims of negligence or breach of contract.

Costs of an independent expert referral

The costs of the referral are usually set out in the document governing the appointment with, for example, rent review disputes commonly providing that the costs are to be divided equally between the parties.

The award

As noted above, the award will not normally provide reasons and an independent expert has no power to award costs otherwise than specifically set out in the lease or agreement. The decision will be final and binding on the parties subject to limited challenges as noted above.

Documents relating to independent expert referral

- Criteria for inclusion on the SCSI Panel of Independent Experts, available at www.scsi.ie.

ADJUDICATION

Introduction

Adjudication in construction contracts is a dispute resolution process that has been established by statute in Ireland to ensure prompt payment practices within the construction industry. The distinguishing feature of adjudication is the very tight timeframe within which a decision on a dispute is required to be made.

Construction Contracts Act 2013

The Construction Contracts Act 2013 is an act to regulate payment under construction contracts and related matters such as applying for payment, assessing payments, timing of payments and suspension of the works. It also introduced statutory adjudication as a means of resolving payment disputes.

Adjudication under the Construction Contracts Act 2013 is limited to payment disputes; however, adjudication under contract can be used for all types of disputes. Under the Construction Contracts Act 2013, disputes must also relate to construction operations, which have a broad definition with a few exclusions relating to value, dwellings under a certain size, public-private partnerships, and contracts of employment.

What is adjudication?

Adjudication is a fast-track ADR method, which follows procedures that are set out in the Act. The Act and the Code set out various procedures that must be followed in order for a payment dispute to crystallise; however, creative lawyers will not be limited by these.

When commencing an adjudication, the referring party must issue a 'Notice of Intention to Refer a Payment Dispute to Adjudication' on the responding party. When the notice has been served, it is open to the parties to agree on an adjudicator and if they can't agree on one, they can apply to the ministerial panel set up under the Construction Contracts Act 2013 to appoint an adjudicator. It is worth noting that, as well as the ministerial panel, the SCSI has an established panel of highly competent adjudicators, which parties may wish to consider at the agreement stage of their process. This can be agreed directly with the SCSI adjudicators or by the SCSI President.

The advantage of agreeing on an adjudicator is that if the dispute relates to the valuation of works, a quantity surveyor with experience in that discipline can be appointed, for example. An application to the ministerial panel must include everything in the notice plus details of the notice served on the responding party.

The adjudication starts in earnest and the clock starts ticking when the adjudicator accepts the appointment (either agreed or appointed from the panel), with the referring party formally referring the dispute to the adjudicator within seven days of the appointment. The referral must include:

- everything previously included in the notice and the application to the ministerial panel if applicable; and,
- the contentions on which the referring party intends to rely to support their case.

Once the referral has been issued to the adjudicator and the responding party, the adjudicator must deliver their decision within 28 days, or 42 if the referring party agrees to an extension.

Principles of adjudication

- Reach a binding decision in a short timeframe and maintain cashflow on construction projects with all the procedures under the Act having time limits
- Under the Act, if a payment is due, it must be made within seven days of the decision even if the losing party intends to challenge the decision in arbitration or in the courts, leading to a situation that has been described as temporarily binding
- Fast-track nature of procedures can make the process very adversarial

Core competencies of an adjudicator

Under the Construction Contracts Act 2013, those who wish to be selected as a member of the ministerial panel must hold one of the following qualifications or an equivalent duly obtained in any other EU member state:

- a registered professional qualification as defined in section 2 of the Building Control Act 2007, i.e., a registered quantity surveyor;
- a chartered member of the Institution of Engineers of Ireland;
- a barrister;
- a solicitor; or,
- a fellow of the Chartered Institute of Arbitrators.

The role of the adjudicator

The adjudicator must act impartially during the process and time should be taken at the outset to ensure that there are no conflicts of interest between the adjudicator and either of the parties. Hearings may not be required; in these cases, parties argue their case through written submissions and responses, but if required, hearings can be held.
The adjudicator will be responsible for managing and administering the process, and they may:

- request written submissions and evidence from the parties;
- request supporting or supplemental information;
- meet jointly with the parties to clarify details;
- hold teleconference or remote meetings;
- hold hearings if required or requested;
- make site visits;
- appoint experts or advisors as necessary; and,
- take the initiative in ascertaining and investigating the facts.

It goes without saying that an adjudicator must be honest, fair and of high integrity, but they must also have:

- technical expertise in a construction discipline with sufficient knowledge of relevant acts, statutory instruments and codes of conduct;
- detailed knowledge of the standard forms of contract prevailing in their jurisdiction;
- detailed knowledge of current practices in adjudication and current case law;
- an analytical mind so that they can identify key issues and solve complex problems;
- good judgement and decision-making skills so they can issue a reasoned decision;
- an ability to work to tight deadlines while under pressure;
- strong numeracy skills with attention to detail to deal with payment disputes; and,
- an ability to think and write clearly so that they can produce an enforceable decision.

An adjudicator must also be strong-willed and have belief in their own knowledge and skills, so that they are not subjected to pressure from one of the parties.

Advantages of adjudication

The advantages of adjudication can be outlined as follows:

- speed – if successful, parties would receive a payment much quicker than under any other form of third-party neutral dispute resolution or court proceedings;
- the costs of an adjudication, while not cheap, are generally lower than court or arbitration, due to the short time frame and less formal procedures, with the result that it is easier for a smaller subcontractor to take on a main contractor, or for a small contractor to take on a large client;
- sometimes responding parties are very reluctant to engage with a party they are in dispute with and will be obstructive, taking the view that a debt in a few years' time is better than one today, but it is very hard to slow down an adjudication unless a party can run a successful jurisdictional challenge;

ADJUDICATION

- an adjudication can be taken during the course of a project to resolve disputes over interim valuations and it is not necessary to wait until the end of the project;
- it is possible to be strategic and break a larger dispute up into a number of smaller adjudications once parties have complied with all the requirements of the Construction Contracts Act 2013; and,
- statistics would show that generally the speed of the process would give the referring party the upper hand.

Disadvantages of adjudication

The disadvantages of adjudication can be outlined as follows:

- the decision is not necessarily final and parties may find themselves appearing in arbitration and/or court proceedings before the dispute is finally resolved;
- adjudication is quite a confrontational means of resolving disputes and, unlike mediation or conciliation, can be damaging to relationships;
- the tight timelines mean that adjudication is not suitable for all types of disputes – some may be simply too large or complex, and arbitration or the courts should be considered;
- the tight timelines also mean that most adjudications are held on a 'documents-only' basis, without witness statements or cross-examination, so there may not be the opportunity to really test evidence; and,
- adjudication is all encompassing for the duration for the people involved, and therefore can be much more disruptive to business than an arbitration or a mediation, which will be carried out at a slower pace with people dealing with issues as time becomes free.

Costs of adjudication

Each party is liable for their own legal and other costs in connection with the adjudication, and the adjudicator will allocate their own costs and fees between the parties depending on the outcome and circumstances of the dispute, although they will state that the parties are jointly and severally liable for this. Generally, costs will follow the event, but other factors may cause a sharing of the costs.

Code of practice

The code of conduct governing the conduct of adjudications is published by the construction contracts advisory services under section 9 of the Construction Contracts Act 2013. The code of conduct sets out requirements in relation to appointing an adjudicator, referring a payment dispute, adjudicating a payment dispute, issuing a decision, and providing reports to the chair of the ministerial panel. The code of conduct also sets out certain responsibilities for adjudicators towards the parties in relation to accepting appointments, confidentiality, impartiality, procedural fairness, and fees.

The adjudicator's decision

An adjudicator's decision must be delivered to both parties within 28 days beginning with the day on which the referral was made; however, 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 decision must be in writing and signed and dated in order to confirm compliance with the timelines, and must include reasons unless otherwise agreed in writing by the parties.

The decision is binding on the parties to the dispute unless it is overturned by a reference to arbitration or to court, and is enforceable by action or by leave of the High Court. This is sometimes referred to as temporarily binding; however, if a decision finds that a payment has to be made this must be made within seven days, even if the losing party intends to refer the dispute to arbitration or the courts. Failure to do so will give the party due the payment a right to suspend the works under the Construction Contracts Act 2013 if works are still ongoing.

Documents relating to adjudication

- Construction Contracts Act 2013 (the Act), available at www.irishstatuebook.ie;
- Code of Practice on the Conduct of Adjudications, available at www.enterprise.gov.ie;
- Information Booklet on the Construction Contracts Act, available at www.enterprise.gov.ie;
- Application to the Chairperson of the Construction Contracts Adjudication Panel for Appointment of Adjudicator, available at www.enterprise.gov.ie;
- Template forms – guidance on written notices under the Construction Contracts Act 2013, available at www.enterprise.gov.ie;
- Annual Report of the implementation of the Construction Contracts Act 2013, available at www.enterprise.gov.ie;
- Quantity Surveyors Guide to the Construction Contracts Act, available at www.scsi.ie;
- S.I. No. 450 of 2016, Rules of the Superior Courts (Construction Contracts Act 2013) 2016, available at www.irishstatuebook.ie; and,
- Criteria for inclusion on the SCSI Panel of Adjudicators, available at www.scsi.ie.

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