GAR KNOW HOW CONSTRUCTION ARBITRATION

Ireland

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

Ireland is a common law jurisdiction deriving its laws substantially from laws of other common law jurisdictions, principally England and Wales. The Constitution, Acts of Parliament, Statutory Instruments, regulations, European Union legislation all have legal force and effect. The Oireachtas (the Irish parliament comprising two houses – Dáil Éireann and Seanad Éireann) is the lawmaking body. New laws are published by the Oireachtas on the Irish Statute Book (irishstatutebook.ie) and are signed into law by the President. Laws can be passed with retrospective effect, provided they do not seek to render as an infringement, an act that was innocent at the time of its commission (article 15.5.1 of the Constitution) as upheld by the Irish Supreme Court in McKee v Culligan [1992] 1 I.R. 223.

Typically, construction contracts in Ireland provide for alternative forms of dispute resolution procedures such as mediation/conciliation/arbitration, etc, rather than referral of disputes under a construction contract to the courts. As such, there is a limited pool of decisions relating to constructions disputes emanating from the Irish courts. Practitioners, therefore, tend to look to court decisions coming from the United Kingdom for guidance.

Contract formation

2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

The essential requirements of a construction contract are: agreement, consideration, certainty, intention to create legal relations and capacity.

If a letter of intent is to be given contractual effect, this should be clear from its terms. The letter of intent should: record the agreement of both the parties, provide for consideration and be clear on its face that the parties intend to enter into a contractually binding arrangement (an intention to create legal relations) and that the terms of that arrangement are clear.

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

Under the Arbitration Act 2010 (the 2010 Act), parties are free to choose the governing law of their contract, the law of the arbitration agreement, the seat of the arbitration, the arbitral rules, the choice of arbitrator(s) and the language of the contract and arbitration.

If the parties do not agree the number of arbitrators or the appointing body in their arbitration clause, the 2010 Act provides that the arbitral tribunal will consist of one arbitrator and the Irish High Court has the power to appoint the arbitrator in the absence of an alternative agreement between the parties. In an arbitration with three arbitrators, each party appoints one arbitrator, and the two appointed arbitrators will appoint the third arbitrator. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made by the High Court. The 2010 Act incorporates the UNCITRAL Model law wholesale and so its provisions will apply to an arbitration under the 2010 Act unless the parties agree to use another set of ad hoc rules or institutional rules.

In January 2018, the Irish High Court in Achill Sheltered Housing Association CLG v Dooniver Plant Hire Ltd [2018] IEHC 6 granted an order determining that the appointment of an arbitrator had been invalid, as the matters referred to arbitration had not previously been referred to conciliation as required under the contract.

In October 2019, the Irish High Court in XPL Engineering v K&J Townmore Construction Ltd [2019] IEHC 665 stayed court proceedings and ordered that the matter be referred for arbitration. This is consistent with article 8(1) of the UNCITRAL Model Law where, in circumstances where there is a valid and binding arbitration agreement and one of the parties so requests, the court must refer the dispute between the parties to arbitration.

In a further October 2019 decision, the Irish High Court in K & J Townmore Construction Ltd v Kildare and Wicklow Education and Training Board [2019] IEHC 666 found that the conditions of article 8(1) were not met because a later agreement between the parties to refer the dispute for expert determination had the effect of disapplying the conciliation and arbitration clauses in the original building contract.

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

The common law of Ireland has developed to include various specific implied terms in construction contracts, many of which relate to design and quality. Terms may be implied into a construction contract by statute, by custom or practice or to satisfy the 'business efficacy' test so as to make a contract workable. Generally, an employer under a construction contract will be under an implied term of cooperation, which includes doing all that is necessary on its part for the execution of the Works. Contractor implied terms include a duty to complete works within a reasonable period of time (where none is specified or where an act of prevention makes the date for completion inapplicable), a duty to execute work with proper skill and care in a good and workmanlike manner and a duty to use materials that are reasonably fit for purpose and of good quality.

The Sale of Goods and Supply of Services Act 1980 (the Sale of Goods Act) applies to construction contracts in Ireland and implies terms that include that the contractor has the necessary skill to render the service, that the service will be supplied with due skill, care and diligence and that where materials are used, they will be sound and reasonably fit for purpose. The Sale of Goods Act also creates a statutory right of action for misrepresentation.

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

There is an implied contractual obligation for the certifier to act independently, fairly and impartially as between the contractor and the employer. It is not unusual in Ireland for the employer to appoint an employee within its organisation as employer's representative and certifier under the construction contract, but where that does happen, the same duties of impartiality will apply.

The commonly held position in Ireland prior to 2007 was that a contractor was entitled to enforce an interim payment certificate by way of summary judgment as a debt due. Following the decision of the Irish High Court in Moohan v Bradley Construction Limited v S&R Motors (Donegal) Limited [2007] IEHC 435, contractors operating under the standard RIAI contract terms can no longer rely on being awarded summary judgment in court on interim certificates where a valid defence is raised. In such cases, even where judgment is granted, the execution of that judgment may be stayed pending the outcome of an arbitration hearing on all the issues between the parties. Moohan v Bradley has continued to be applied in a number of recent Irish cases.

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

Irish law (like the law of England and Wales) is constantly evolving on this topic and there has been no Irish decision since the case of Walter Lily v Mackay [2012] 1773 (TCC) in England. Irish law tends to follow the precedent set down in Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con LR 32 regarding concurrency of delay, namely:

If there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.

Standard forms of construction contracts used in the private sector in Ireland (RIAI and Engineers Ireland forms) generally do not include a clause dealing with concurrent delay. However, in recognition of the ever evolving law in this area and the risk of remaining silent leading to disputes, parties will generally include a concurrent delay clause in their construction contracts dealing with, in particular, whether the contractor can recover delay costs where there is an entitlement to an extension of time for concurrent delays.

The Public Works Contracts in Ireland for use on all public sector construction projects expressly provide that a contractor is not entitled to recover delay costs for the period of concurrent delay where the works are concurrently delayed by more than one cause and one or more of the causes is not a compensation event under the contract.

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

The standard form contracts in Ireland tend to be silent on the issue of disruption, namely, there is generally no express provision to the effect that the employer will not disrupt the contractor's work save that the contractor's right to claim disruption is expressly excluded under the Irish Public Works forms of contract and only delay costs notified in accordance with the strict provisions of the Public Works Contracts and included in the contractor's tender are recoverable.

The courts recognise an implied term of construction contracts that neither party will hinder the other in completion of its contractual obligations and so a contractor may rely on this implied term to ground a claim for disruption that is essentially a breach of contract claim and the remedy will be compensation for the loss and expense incurred.

The contractor must show that the disruptive event was at the risk of the employer and that this event caused the contractor's claimed losses. Establishing a claim for loss of productivity or disruption is dependent on very precise records being kept and produced by the contractor. The contractor must be able to prove the effect of each individual disruptive event on its work and this test is applied quite strictly by the courts.

Acceleration

8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

The Irish courts have not yet had cause to determine whether a doctrine of "constructive acceleration" exists in Ireland, nor do standard form contracts in Ireland expressly recognise the concept. However, were an Irish court to be called upon to

consider the issue, it more than likely would follow the position in England and Wales, in which no definitive authority exists for constructive acceleration.

However, under Irish law, in practical terms should a contractor be forced to accelerate its works to avoid the application of liquidated damages where delays are subsequently found to be due to the fault of the employer, a contractor may be able to recover the costs of acceleration by:

- a claim for loss and expense due to disruption (as distinct from delay costs), where the construction contract allows for recoverability of disruption costs (see question 7); and/or
- a claim for damages for breach of contract by the employer in failing to grant an extension of time to which the contractor was otherwise entitled to, including the contractor's costs of mitigation (the contractor must make reasonable attempts to mitigate its loss; where it does so, the costs of such mitigation are recoverable).

A contractor may also be entitled to relief in Ireland (as distinct from damages), under the prevention principle, in cases where some act of prevention by the employer puts time at large and the contractor's liability to complete by a specified date falls away (as does the liability to pay liquidated damages from that date).

In the UK, the Technology and Construction Court in September 2017 held in North Midland Building Limited v Cyden Homes Limited [2017] EWHC 2414 (TCC) that in circumstances of concurrent delay, the prevention principle will only be applicable if the contractor can show that the employer's acts or omissions have prevented the achievement of an earlier completion date. If the earlier completion date would not have been achieved in any event due to the concurrent delays resulting from the contractor's own default, the prevention principle will not apply. This decision was upheld by the UK Court of Appeal [2018] EWCA Civ 1744 (TCC). The Irish courts have not yet had cause to determine this specific issue; however, if an Irish court were to be called upon to consider the same, it more than likely would follow the position reached by the TCC.

Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

There is no automatic entitlement to relief for force majeure under Irish law. Parties to a contract may only rely upon force majeure when an express force majeure clause has been included in the contract. Typically a force majeure event will be defined by the occurrence of an event or events outside of the control of one or both of the parties (unforeseeability is not always a requirement) and may include a non-exhaustive list of events or express exclusions.

The covid-19 pandemic has brought force majeure clauses into sharp focus. A contract that provides for force majeure may do so in a manner that expressly does not include pandemics.

Where a contract expressly provides relief from liability for non-performance due to a force majeure event, the meaning of the force majeure clause will be subject to the usual rules of interpretation relating to contracts – the allocation of risk under the contract will not alone determine whether an event qualifies.Relief for force majeure is typically limited to relief from liability to perform the relevant contractual obligations and/or entitlement to an extension of time in which to perform obligations. A force majeure event is not usually required to have a permanent effect on performance of the contract nor to render the entire contract impossible (as distinct from the doctrine of frustration). Being prevented in performing the contract is usually required for force majeure to arise; however, depending on how a force majeure clause is drafted, a degree of difficulty or hardship may qualify for relief, such as where the clause refers not only to being prevented but also to being 'hindered'.

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

There are no automatic grounds under Irish law for relief for a contractor arising from a contract merely becoming expensive or commercially unprofitable or otherwise difficult to perform, save for where the contract itself expressly allows claims to be made by the contractor (ie, delay events, increases in the price of labour and/or materials, variations, etc). Depending on the circumstances, a contractor may also become entitled to relief, in the absence of express provisions, where a case can be established that the employer or its representative has waived strict compliance with the contractor's obligations under the contract.

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

There may be relief for a contractor where it becomes impossible to perform the contract. Whether a contractor will be entitled to relief is dependent upon a number of factors, including whether the contractor has prepared the specification itself or warranted that it has reviewed the specification and that it is buildable. Where the contractor has assumed contractual responsibility for the specification and the impossibility does not arise from a change in law or subsequent illegality, the contractor will not usually be entitled to relief unless the variation or change order provisions of the contract expressly allow the contractor to make a claim in the circumstances.

Where it becomes physically or commercially impossible for a contractor to fulfil a particular aspect of the contract due to an external event (after the parties have entered into the contract) that is not the fault of the parties, the doctrine of frustration may apply. The Irish law principles were set out in McGuill v Aer Lingus Teoranta and United Airlines Incorporated (The High Court, Unreported, 3 October 1983). The threshold for meeting the test to find that a contract is frustrated is high.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example, making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

In bespoke and international contracts (rather than Irish standard forms), specified force majeure exclusions often apply and are generally upheld by the courts once agreed between the parties. The passing of entire ground risk to the contractor (whether or not foreseeable) would be unusual in Irish standard and bespoke forms of construction contract. However, if such terms have been agreed by two commercial parties at the outset, they are generally deemed enforceable. In recent years, there has been a tendency under the Irish Public Works Contracts to transfer a greater amount of risk to the contractor (including risk which may be considered to be incapable of being priced), yet these clauses are enforceable.

In relation to consumer contracts, the EU Unfair Terms in Consumer Contracts Regulations 1999 provide that unfair terms (that is, terms that may be contrary to good faith requirements and create an imbalance between the parties) are not enforceable if they prejudice the consumer.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

This will depend on the individual circumstances of the case and the provisions of the contract. As a general common law principle, if the contractor is aware of a potential issue with the design, particularly where this is dangerous, then he has a duty to bring this to the employer's attention. It is likely that the Irish courts would follow the England and Wales TCC decision in Cleightonhills v Bembridge Marine Ltd and others [2012] EWHC 3449 (TCC), where it was held that failure by the contractor to warn of a potential danger could result in a breach of a duty of care to a third party (employer) if it can be shown that the contractor knew of the danger. However, if the contractor can show that it was not aware of any issue with the design or potential danger then no duty of care will be owed. Similarly, where a competent contractor ought to have known that a design was fundamentally flawed, the contractor may share responsibility for constructing to the flawed design that ultimately fails.

An England & Wales TCC decision in Stagecoach South Western Ltd v Hind [2014] EWHC 1891 (TCC) found that a duty to warn did not impose an obligation to carry out wide-ranging inspections and investigations so as to discover whether there is an obvious defect, which might then trigger a duty to warn. This case was cited in the 2015 case of Goldswain and Hale v Beltec Limited and AIMS Plumbing & Building Services [2015] EWHC 556 (TCC) and is likely be followed by the Irish courts in determining whether a duty to warn exists.

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

There is no general duty to perform contracts in good faith under Irish law, although a good faith term is sometimes expressly referenced within the contract provisions.

The employer is, however, subject to the common law implied terms that include a duty to cooperate with the contractor, not to prevent completion, not to hinder the works and not to prevent access to the site.

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

Time bar provisions are effective and upheld under Irish Law and are commonly found in construction contracts. Certain standard Irish forms (for example, the RIAI form of contract) do not make express reference to the notification of a claim being a condition precedent to the contractor's right to recovery but they are commonly amended by the parties to include such a provision.

The Irish Public Works contracts have very prescriptive time bar provisions, including in relation to the notification of 'any other entitlement the contractor has under or in connection with the contract'. Certain of the bespoke forms will have equally stringent time bar provisions both in respect of claims for time and money and both have been upheld by the courts.

Under both the Irish Public Works contracts and the RIAI form of contract, a claim based on weather or ground conditions generally gives rise to an entitlement to an extension of time but not to monetary compensation.

Generally, the notification of both employer caused events and neutral events are dealt with in the same manner under Irish standard forms of construction contracts.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

Unless the contract expressly provides for the employer's right to suspend the works due to the contractor's non-performance, there is no implied common law right to suspend. The employer may however be entitled to terminate the contract due to the contractor's breach of contract if same can be established under the terms of the contract or a repudiatory breach of contract can be established at common law. In respect of payment of the contractor by the employer, there is no implied term allowing suspension by the contractor for non-payment but most standard forms provide for an express right of suspension for non-payment, provided prior notice (of 7 to 14 days) is given.

In addition to what is expressly set out in the parties' contract, a contractor's right of suspension for employer's non-payment is now included in the Construction Contracts Act 2013, which provides the contractor with a statutory right (that cannot be contracted out of) to suspend its works for non-payment by the employer on giving at least seven days' prior written notice.

Omissions and termination for convenience

17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

The employer may omit work or terminate the contract at will if the contract expressly provides a termination for convenience clause and/or an omissions clause. Termination at will or for convenience clauses are regularly included within construction agreements in Ireland and do not require express reference to be made to the reason for the employer exercising the right to terminate once sufficient notice is given and there is an adequate compensation mechanism included in the contract whereby the contractor will be entitled to be paid for all work carried out to the date of termination together with any demobilisation costs. Where such an express provision to terminate at will is included in contracts, it is often on the basis that the employer will not engage any other contractor to complete the works within a certain number of years.

Unless there is an express provision for the same, the employer will not be permitted to terminate or omit works in order to engage another contractor to carry out those works. Unless termination is carried out correctly, in that the party terminating the agreement has a valid contractual basis for so doing and has complied with all relevant formalities and obligations relating to termination, that party may be liable under contract law for damages for repudiatory breach of the contract. Furthermore, if the employer terminated the works and subsequently instructed another contractor to complete the works, in breach of a prohibition of the same, the contractor could bring a claim against the employer in common law for abandoning the progress of the works and breaching the employer's implied duties not to prevent completion or hinder progress of the works.

An employer may only carry out omitted work itself or instruct another contractor to do so if such right(s) is/are expressly included for in the contract.

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

Contractual and common law termination rights exist in Ireland.

Contractual termination rights generally exist for default of either of the parties for breach of contract or for an insolvency event. Common law termination rights exist for repudiatory breaches of contract where there is evidence of an intention not to be bound by the contract.

A construction contract can be terminated in part provided it contains a survival provision noting which specific clauses will remain enforceable. Often, the right to terminate is expressed as a right to terminate the contractor's employment, rather than a termination of the underlying contract.

When a construction contract is terminated, the practical and financial consequences are significant for both parties and it is a decision that is never taken lightly by the party invoking the right to terminate.

The remedy for compensation in respect of contractual termination is usually set out within the contract. In the standard forms regularly used in Ireland, the compensation on termination for contractor default generally includes a balancing or set off exercise between the contractor's costs as at the date of termination as compared with the employer's completion costs.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

Common law rights are retained unless they are expressly excluded. However, where there are express rights of termination, and related remedies, these may curtail or limit the common law entitlements.

The standard of proof for the common law ground of termination on the basis of a repudiatory breach of contract has been set very high in Ireland and the employer may be faced with a claim for damages for wrongful termination where the employer fails to prove the breach. The remedy for either party invoking a termination under common law is a claim for damages.

20 What limits apply to exercising termination rights?

The notification periods and time limits for exercising a party's termination rights will generally be agreed between the parties in their construction contract and usually require that the defaulting party has been given an adequate opportunity to remedy the breach.

If terminating on the common law ground of acceptance of a repudiatory breach of contract, the party accepting the repudiatory breach of contract must act quickly as a failure to do so will be construed against that party when endeavouring to prove acceptance of a repudiatory breach of contract.

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

Not by operation of law. This will depend on the terms of the contract.

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

No. The employer's rights in respect of latent defects or defects not identifiable on completion are generally retained. The terms of the contract will usually determine what constitutes acceptance. In the absence of express terms, acceptance may be agreed between the parties or it may be implied from the facts and/or circumstances of the situation.

Taking over the work may provide prima facie evidence that the employer accepts the work, however, this is not necessarily the case as there may be many reasons why an employer will accept works that are incomplete or have defects in them.

Issues of estoppel and waiver may arise in circumstances where an employer has accepted works which are incomplete and/or have defects. This will obviously depend on the circumstances in question and other relevant facts of the case.

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

In a situation where the parties have agreed the liquidated damages for delay, then the employer is not entitled to claim any further damages in respect of the delay and will be entitled only to recover the delay damages even where these are higher (or lower) than the actual losses provided the delay damages are a genuine pre-estimate of the employer's loss, assessed at the time the contract is entered into.

In the 2015 UK Supreme Court decision of Cavendish v Makdessi [2015] UKSC 67, however, it was held that where compensation went beyond the readily calculable damages resulting from the breach, this could be legitimately upheld by the courts. The Court found that deterrence value of a higher sum can be reasonably determined to protect the performance of the contract, particularly given that both parties had access to legal advice and could negotiate on equal terms. This move away from an emphasis on a genuine pre-estimate of loss means there may now be scope to seek greater sums in liquidated damages than previously, provided the sums stipulated are not 'out of all proportion'.

In the Irish case of Sheehan v Breccia [2016] IEHC 120, the Irish High Court continued to apply the traditional test in relation to liquidated damages. While the High Court did consider the test applied in the 2015 UK Supreme Court decision of Cavendish v Makdessi, it chose not to apply it. Instead, the High Court suggested it would be a matter for an appellate court to determine whether the "Cavendish test" should be adopted in Ireland in future cases.

In Launceston Property Finance Limited v Burke [2017] IESC 62, McKechnie J made the obiter comment that the starting point for an assessment of the law relating to penalty clauses remained the principles set out in the speech of Lord Dunedin in Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co. Ltd. [1915] A.C. 79 (Dunlop Pneumatic Tyre Co) at pp. 86-88. While Haughton J, in ACC Bank v Friends First [2012] IEHC 435, saw some merit in the new UK approach, he had stopped short of outright endorsing it, much less applying it, preferring instead to leave it to an appellate court to consider whether a recalibration of the Irish test was required. McKechnie J took the opportunity to say, obiter, that he was not immediately convinced that any change to the test was necessary, nor that the route taken by the UK Supreme Court was necessarily a superior one. However, the live debate would appropriately be left over for a more suitable case.

The decision in Sheehan v Breccia was upheld in the Court of Appeal ([2018] IECA 273) and, to date, the appellate court in Ireland has not overturned the traditional test.

Where there are delays prior to the completion date, it would be difficult to argue that the contractor should be liable for liquidated damages unless they are specifically linked to something such as an interim milestone or sectional completion date.

Subject to the terms of the contract, any fraud, wilful misconduct, recklessness or gross negligence on the part of the contractor may constitute a repudiatory breach of contract for which the employer will be entitled to damages. Depending on the facts of the case, the level of liquidated damages may provide guidance in assessing the quantum of damages flowing from the breach. In a situation of a breach of contract, the parties will not be confined to the agreed liquidated damages.

There is no statutory definition for the terms 'fraud', 'wilful misconduct', 'recklessness' or 'gross negligence', although the parties may agree on the definitions of these terms in the contract. It is open to the parties to agree on whether any particular risk shall be excluded and, once freely agreed, the Irish courts will generally uphold the exclusions. In two Irish cases, Western Meats Ltd v National Ice & Cold Storage [1982] I.L.R.M. 99 and Token Grass Products v Sexton & Co Ltd [1983] IEHC 96, Barrington J and Doyle J respectively pointed out that the intentions of the parties must be respected when they freely and voluntarily agree on the question of who is to bear a commercial risk. If it is the intention of the parties to leave the risk of grossly negligent performance or wilful misconduct leading to unsatisfactory performance, at the door of the other, then generally this will be upheld.

It is not usual to limit liability for death and personal injury and such limitation may be regarded as contrary to public policy.

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

Where the employer causes a critical delay to the completion of the works and there is no provision within the contract for an extension of time to be granted, the extension of time mechanism is not able to operate and the employer can no longer require the contractor to complete the works by the completion date in the contract or by any other date referenced in the contract. The original date for completion falls away – time is said to be 'at large' – and the contractor is only under a duty to complete within a 'reasonable' time. In other words, there is no completion fixed date stated, and liquidated damages provisions within the contract are no longer enforceable against the contractor.

The employer will have a right to common law damages only, which may be difficult to quantify. English case law (persuasive in Ireland) suggests that the liquidated damages clause which is no longer enforceable may act as a cap on common law damages in some cases.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

It is not open to an Irish court to reduce or increase a liquidated damages rate. It merely determines whether or not the liquidated damages clause is enforceable. If the court deems the clause to be unenforceable due, for example, to it being a punitive clause, then the court can deem that general damages would be a more appropriate remedy pursuant to which the employer must prove its actual and genuine loss although the liquidated damages may operate as a cap.

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

See answer 25 above.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

Monetary compensation for breach of contract is generally assessed by reference to the actual loss suffered as a direct consequence of the breach by the party making the claim. If there is no actual loss, then he will only be entitled to nominal damages in recognition of the fact that he has a valid cause of action.

Potentially, the parties may be entitled to lost profits. It will depend on the terms of the contract and whether there are any terms excluding or limiting liability. The general principle under Irish law is that losses are recoverable if they:

(1) may fairly and reasonably be considered to arise naturally in the usual course of things (first limb); and/or

(2) may reasonably be supposed to be in the contemplation of both parties at the time they make the contract (second limb – the special knowledge loss).

[Hadley and Another v Baxendale and Others, Exchequer Court, 23 February 1854 (1854) 9 Ex. 341].

Any reference in a contract to excluding 'indirect' or 'consequential' loss can only exclude the second limb of losses described in Hadley v Baxendale. However, it should be noted that a limitation/exclusion clause using these general terms (without specifying the heads of loss intended to be excluded) may be of limited value in practice. Whether any loss is a considered as direct loss or an indirect/consequential loss will depend on the facts of the case.

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

The contractor will not be liable to remedy a defect if the costs of doing so are wholly disproportionate so as to make it unreasonable and if the default can be adequately compensated in damages.

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

There is no implied defects notification period although most standard form construction contracts provide that the contractor is required (and must be given opportunity) to return to remedy defects in the period following completion (generally between six and 18 months). Absent an express defects notification period, and any limitation periods, the employer's rights should not be affected.

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

A limitation/exclusion clause using these general terms (without specifying the heads of loss intended to be excluded) may be of limited value in practice. Whether any loss is a considered as direct loss or an indirect/consequential loss will depend on the facts of the case.

Exclusion or limitation clauses are difficult to draft successfully, because the Irish courts have historically been reluctant to construe agreements to permit someone to completely escape from the consequences of their own breach of contract or negligence. It is important therefore that exclusion or limitation clauses such as this are drafted in very clear terms. Furthermore, any losses or damages that are intended to be excluded from the contractor's liability should be listed as separate heads or categories of loss so that all parties to the contract are clear what losses are excluded.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Yes, contractually agreed limits are effective and will generally be upheld. It will depend on the circumstances of the case whether a court will disregard them. However, a court may be minded to disregard a statutory limitation period if the respondent has engaged in fraud, wilful misconduct, recklessness or gross negligence that directly affected the claimant's ability to make a claim within the agreed time period. Where a contract specifically states that the limitation periods apply notwithstanding the behaviour, then the courts will generally enforce the agreed limitation period provided it has been freely agreed between the parties.

The party seeking to avoid the agreed time limits will have to show that the conduct of the other party directly caused or contributed to the failure to comply with the time period. Again, the prevention principle could be relevant, depending on the facts of the case.

Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

There is no statutory right in Irish law for a contractor to exercise a lien in works it has carried out.

In general, a contractor's ability to retain title in goods or materials supplied will depend on an express retention of title provision and the extent to which the product has been incorporated within, or used in the manufacture of, another product. If the goods supplied by the contractor can be removed from the manufactured product without doing damage to them or to other components, the contractor may retain title by means of a retention clause within the contract. However, where the manufacturing process results in the contractor's goods being irreversibly incorporated into a new product, including the building, or otherwise losing their identity, the contractor's title to the original goods will be extinguished as they will cease to exist as an independent item. In such case, it will be assumed that title to the goods is intended to pass at the time the goods enter the manufacturing process which results in the loss of their identity.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

The Construction Contracts Act 2013 (the Act) has been enacted and applies to a wide range of construction contracts including main contracts, subcontracts and professional team appointments entered into after 25 July 2016. There are some limited exclusions to the application of the Act including contracts with a value of less than €10,000, public–private partnership (PPP) contracts or contracts for the construction of an owner-occupied dwelling of less than 200 square metres. The Act provides that provisions in a construction contract that make payment of an amount due, or the timing of such payment, conditional upon the making of payment by a person who is not a party to the construction contract, will be ineffective. (Section 3(6) of the Act does provide, however, that "pay-when-paid" clauses may be effective when the third-party payer up the contractual chain is insolvent.)

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

In general, a subcontractor will not be able to claim against an employer for sums due to the subcontractor from the contractor. This is on the basis that there is no contractual relationship between the subcontractor and the employer.

The subcontractor's right to claim payment is a contractual right pursuant to the contract entered into between the subcontractor and the main contractor. There is no contractual privity between the subcontractor and the employer who engages the main contractor. However, if the subcontractor has entered into a collateral agreement for the benefit of the employer this may include an entitlement to seek payment direct from the employer in the event of default in payment by the main contractor. In addition, if this agreement contains step-in rights, then (depending on the terms of the collateral agreement), the employer may be responsible for certain payments to the subcontractor but these are usually limited to future payments that fall due after the date of step-in by the employer into the main contractor's shoes.

If it is the case that the law of another jurisdiction applies to the situation, then one would have to look at the relevant law to determine what the subcontractor's rights are.

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

Where a dispute arises in relation to the works carried out by a contractor, the employer's first recourse will usually be against the contractor, as there is no contractual relationship between the employer and the subcontractor. Where there is a binding arbitration agreement in the contract between the employer and the contractor, the employer can hold the contractor to this, unless the contractor agrees to litigate the matter in the courts. In such instances, the employer can initiate arbitration proceedings against the contractor, particularly as the contractor will usually be responsible for the acts or omissions of its subcontractors (there may be a limited carveout in relation to design undertaken by 'nominated' subcontractors, although this categorisation is increasingly rare).

In the event that there is a collateral agreement in being between the employer and the subcontractor, and this contains an arbitration agreement, then the employer would have the option of bringing arbitration proceedings against both the contractor and the subcontractor. If there is no joinder provision, or agreement of both the contractor and the subcontractor, the claims would have to be pursued in separate arbitration proceedings. However, the employer will not be able to recover the same damages twice and will be prevented from obtaining double recovery in respect of the same loss.

An employer can seek to go to litigation with the contractor and the subcontractor without regard to the arbitration agreement. Where there is an arbitration agreement with the contractor, the employer will only be able to proceed to litigation if the contractor agrees to waive the arbitration agreement or the contractor participates in the proceedings and 'takes a step' that is something more than merely entering an appearance to an initiating writ. The Irish courts give strong support to arbitration agreements and it is difficult to seek to avoid an arbitration agreement without the consent of the other party to the agreement.

Unless otherwise specified, the law of the arbitration agreement will be that of the seat of the arbitration. In such circumstances, one would have to look at the law of the seat and determine what provisions apply to the enforceability of the arbitration agreement.

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

No, there is no provision under Irish law to enforce contractual rights that purport to benefit a third party.

It would not be possible for a subcontractor to rely on exclusion or limitation clauses in a contract to which it is not a party. There is no equivalent provision in Irish law to the English Contract (Rights of Third Parties) Act, 1999, which permits a party in certain circumstances to enforce rights granted to it under a contract to which it is not a party.

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

Unless there is a contractual nexus between the employer and those connected with the contractor, it is not possible to make such claims under contract law. However, depending on the circumstances, the employer may be able to articulate a claim in tort against persons connected with the contractor.

Where there are exclusions and limitations of liability in the construction contract covering such connected persons, then the contractor may seek to enforce these against the employer. It would not be open to the connected person to do so as they are not a party to the contract.

Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

The limitation period in respect of any breach of contract is six years. However, where the contract between the parties is executed as a deed, this period is extended to 12 years. The limitation period will run from the date upon which the cause of action accrued (ie, the date upon which the breach of contract occurred).

In relation to claims for negligence, the limitation period is six years, save in respect of claims for personal injury where the limitation period is two years. Aside from claims relating to personal injuries, there is no reasonable discoverability test under Irish law as exists under English law. The Irish position is such that an action founded in tort shall not be brought after the expiration of six years from the date on which the cause of action accrued (generally when damage has occurred as a consequence of the tort) and not the date on which the claimant became aware, or should reasonably have become aware, of the damage leading to the cause of action.

It was held by the Irish Supreme Court in Brandley & Anor v Deane & Anor [2017] IESC 83 that the relevant date for the purposes of the Statute of Limitations Act 1957 when bringing a claim in tort for property damage is the date of manifestation of damage from the defective work, rather than the date the defective work was completed. While the Supreme Court clearly recognised the difficulties that might arise in some instances in determining when damage could be said to be manifest, Mr Justice McKechnie noted that "manifest" means "the date on which damage is capable of being discovered". Mr Justice McKechnie went on to say: "I accept that there is a definite distinction between a 'defect' and the subsequent damage which it causes. Time runs from the manifestation of damage rather than of the underlying defect. Thus, it is not the latent defect which needs to be capable of discovery: it is the subsequent damage caused by that latent defect."

In general, only the commencement of proceedings (whether by the commencement of arbitration or the issuing of court proceedings) will stop the running of the limitation period. Notification of a claim to the other party will not have the effect of suspending or interrupting the running of the period of limitation.

The parties are free to agree on the suspension of the limitation period, for example by way of a "standstill agreement". If a binding agreement is entered into to suspend the limitation period then that will be effective. Issues of estoppel and waiver may arise in circumstances where a respondent or defendant has indicated prior to expiry of the limitation period that liability is accepted, or otherwise represents that limitation will not be relied upon in the defence of the action. This will obviously depend on the communication in question and other relevant circumstances of the case.

The Statute of Limitations Act 1957, which dictates the limitation periods, applies to court as well as arbitration proceedings. It is substantive law as a party may rely on it as a full defence to proceedings, however, the court retains discretion as to whether any claim fails by reason of failure to comply with the limitation periods.

Subject to the laws applicable to contractual arrangements involving a "consumer", the parties are free to agree on a particular limitation period, the effect of which is that one or other party will not be liable to the other following the expiration of the agreed period.

Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Certain statutory requirements, such as compliance with duties arising under health and safety and environmental legislation, are not capable of being excluded, although the parties may agree, from a contractual perspective, that one or other party may be responsible for the same, although the statutory duty will remain with the designated duty holder. The Construction Contracts Act 2013 (the Act), which applies to construction contracts entered into after 25 July 2016, introduced mandatory payment provisions into all construction contracts and provides for an entitlement to refer disputes relating to payment under those contracts to adjudication. The Act states that a construction contract must provide for the amount of each interim payment or in the alternative an adequate mechanism for determining the amount of each interim payment. The Act also provides for the inclusion in construction contracts of a payment claim date (or an adequate mechanism for determining same) together with providing for the period for payment of the amount claimed. Furthermore, the Act outlaws the application of pay-when-paid clauses except in the case of the ultimate paying party's insolvency. Section 2(5) of the Act provides that one cannot contract out of any of its provisions.

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Again, certain statutory requirements, as above, will apply, regardless of the law of the contract.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

It would be possible for a party, which is the beneficiary of a decision of a DAB pursuant to a FIDIC (or equivalent) contract, to apply to the court seeking an order requiring payment of the DAB decision pending its being overturned in a subsequent arbitration. That said, arguments would likely be put forward to counter such an application and, even if minded to make such an order, the court would likely impose conditions on payment (such as the giving of security). The court system in Ireland can be quite cumbersome and it is also possible that a subsequent arbitration commenced on foot of a DAB decision might have advanced sufficiently by the time the application for enforcement came before the courts such as to dissuade the court from making the order sought.

Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

The Arbitration Act 2010 assigned a special judge to hear all applications arising under the Act. Save for this, there are no specialist courts dealing with construction or arbitration matters.

In relation to adjudications, a new Rule of the Superior Court was implemented in 2016 with a view to facilitating the functioning of the Construction Contracts Act, 2013 by providing a process for the enforcement of an adjudicator's decision through the Irish High Court. The new court rules do not provide for a special judge to deal with such enforcement applications, but they do give the Court a discretion to expedite the enforcement process.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

The Irish legal system operates within a common law system and as such, there is a system of precedent, including binding precedent for superior courts. The court system is organised by monetary thresholds, with the district court dealing with the lower value claims (claims up to €15,000), the circuit court responsible for claims up to €75,000 (€60,000 for personal injury actions) and the High Court responsible for claims over that threshold. The Commercial Court, a division of the High Court, also deals with claims with a value over €1 million and operates a system of strict case management, which is not usually applied so rigorously in the lower courts.

Arbitral awards are not published due to the implied doctrine of confidentiality and usually due to an express confidentiality provision in the arbitration agreement itself. Court applications related to arbitral proceedings are heard in open court and not in camera and decisions of the Court are published.

An arbitrator's decision is final and binding. An arbitrator's award has the same status as a judgment or order of the High Court and it is enforceable as such but the doctrine of binding precedent is not applicable to arbitration awards since they are not published. It is, however, applicable to judgments of the Court.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

In both the courts and arbitration, a judge or arbitrator may offer preliminary views on the issues as the case progresses, but there is no requirement or expectation that they do so.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

Contractual procedures are generally upheld and where there is a requirement to go through a stepped dispute resolution procedure, a failure to do so could be challenged on the grounds that an arbitrator, for example, has no jurisdiction to hear a dispute unless the contractual procedures have been adhered to.

The courts in Ireland also recognise and uphold parties' agreements to arbitrate and provided a party has not taken a step in the proceedings or otherwise submitted to the jurisdiction of the court, will accede to an application to stay any proceedings issued to arbitration.

In October 2019, the Irish High Court in XPL Engineering v K&J Townmore Construction Ltd [2019] IEHC 665 reiterated the Irish courts' continued support for the arbitral process. This decision emphasised that where the conditions of article 8(1) of the UNCITRAL Model Law (incorporated into Irish law by the 2010 Act) are met, the court is obliged to refer the dispute to arbitration.

Under the Construction Contracts Act 2013, which applies to construction contracts entered into on or after 25 July 2016, adjudication will be available as a further dispute resolution procedure that is capable of being initiated alongside either arbitration or court proceedings (depending upon the dispute resolution procedures contained in the contract). The Third Annual Report of the Chairperson of the Ministerial Panel of Adjudicators confirms that statutory adjudication is on the increase in Ireland.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

Yes. Parties may lose their right to arbitrate if they participate in the foreign court proceedings other than to challenge jurisdiction.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

It is more usual to have party-appointed experts, than experts appointed by the tribunal but the appointment of experts by the tribunal can also arise, particularly where the applicable arbitration rules promote this. Whether an expert is appointed by a party or by the tribunal, that expert will owe duties to the tribunal and similar principles are applied in Ireland as operate in the United Kingdom with regard to the requirements that experts should meet.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

State bodies and public authorities are required to comply with the applicable public procurement rules when procuring either goods, works and/or services. There are no other specific limitations or requirements that will apply to an employer that is a state entity or public authority.

Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

The mechanism for seeking to settle a dispute by making an offer, which is 'without prejudice save as to costs', or a sealed offer, is familiar to arbitration in Ireland. Such offers may either, be made to the other party and not advised to the arbitrator until after the award has been made on the issues in dispute, or made to the other party and a sealed offer enclosing a copy of the offer given to the arbitrator at the same time. In both events, the offer is not considered unless and until an award is made which is less than or equal to the amount of the offer. The fact of the offer is then taken into account in determining how the costs of the arbitration should be apportioned and generally upset the usual principle that 'costs follow the event'.

Privilege

50 Does the law of your jurisdiction recognise "without prejudice" privilege (such that "without privilege" communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

Yes, the concept of without prejudice privilege is recognised in Ireland and such communications will be protected from disclosure. To attract this status, the communication(s) must arise in the context of a genuine attempt to settle the dispute. Marking a letter 'without prejudice' does not guarantee it this status.

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

Generally, yes, provided the in-house counsel is providing legal advice. If such advice is in fact, for example, commercial or strategic rather than legal, potentially, privilege may not be available. Legal professional privilege is a substantive common law principle.

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

A guarantee has to satisfy the same requirements as for a contract (see Q2) in order to be effective. A guarantee is usually executed as a deed, as there may be no consideration passing to the guarantor. An oral guarantor is not enforceable in accordance with the Statute of Frauds Act (Ireland) 1695.

53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

Yes, generally, absent express words, the liability of the guarantor will not be greater than that of the party to the underlying construction contract. However, it is quite usual for a guarantor of a party to a construction contract to assume additional obligations, including performance, or procuring an alternative contractor, in the event of default by that party.

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

If there are changes to the underlying contract that is the subject of the guarantee, this will, absent express wording, release the guarantor from its obligations under the guarantee. It is important that express wording is included to expressly provide that any such change will not affect the guarantor's obligations.

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

The jurisdiction to make a call on a bond could be challenged where the circumstances triggering a call have not arisen or where any procedural requirements set out on the face of the bond have not been complied with.

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

The court may be minded to restrain a call on a bond in circumstances where it is satisfied that requirements set out in the underlying contract have not been complied with. The court's approach will, however, always depend upon the wording of the bond, the operation of the bond and the underlying contract. Even where an entitlement arises, the court may still be minded to restrain a call for the incorrect amount, even where it is clear that there would be entitlement to make a call for a lessor amount. Again, the approach of the court will depend upon the wording of the bond.

In relation to performance bonds in particular, the Irish High Court in Clarington Developments Ltd v HCC International Insurance Company Plc [2019] IEHC 630 took a new approach to the interpretation of a form of wording widely used in performance bonds. It dismissed the employer's application to enforce the bond, noting that the employer had first to exhaust the dispute resolution procedures under the building contract to crystallise the amount to which the employer was entitled.

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

While there are significant differences between Ireland and other common law jurisdictions, many of the same or similar principles that apply in England and Wales will apply in Ireland also.

Karen Killoran

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Karen is a partner in the infrastructure, construction and utilities group at Arthur Cox and advises on all aspects of construction law, specialising in contentious matters. She is experienced in various forms of dispute resolution, having advised and represented employers and contractors in arbitrations (domestic and international), court proceedings including commercial court proceedings, settlement discussions, mediations and conciliations. Karen has significant arbitration experience both at international and domestic level and has recently advised clients on complex disputes arising out of the construction of pharmaceutical and power plants. Karen holds a diploma in arbitration from University College Dublin, is a fellow of the Chartered Institute of Arbitrators and a practising arbitrator.

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Niav O'Higgins is a partner in the infrastructure, construction and utilities group, and head of the construction and engineering team in Arthur Cox, which comprises two partners and eight associates, and is one of the leading practices in Ireland. The group provides advice to both public sector and private sector clients on both contentious and non-contentious matters for construction and engineering projects across a range of sectors. The group advises on the resolution of construction disputes, which, under standard (both Irish and international forms, notably FIDIC) and bespoke forms of contracts are generally resolved through either conciliation or arbitration, and has experience of advising on both domestic and international arbitrations, using local institutional rules as well as of the ICC and other international bodies. Niav is a qualified CEDR mediator, has a diploma in adjudication and sits on the Engineers Ireland Dispute Resolution Board.

Kate Monaghan

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Kate is an associate in Arthur Cox's market leading Infrastructure, Construction & Utilities Group and is also a member of the firm's Health and Safety Group. She advises on all aspects of contentious and non-contentious construction and engineering law matters in both the public and private sectors. Kate has experience in various forms of dispute resolution including settlement initiatives, mediations and arbitration. She is also experienced in traditional litigation having represented parties in the High Court.

In non-contentious matters, Kate advises contracting authorities, employers, contractors, sub-contractors and consultants, and has experience of providing advice across a range of sectors. Kate regularly advises on drafting and negotiating various contract documents for construction and engineering projects of all sizes.

ARTHUR COX

Arthur Cox is one of Ireland's largest law firms, with a leading corporate practice, and one of the largest construction and engineering groups in Ireland. We are an 'all-island' law firm, with offices in Dublin and Belfast. The firm also has offices in London, New York and Silicon Valley. Our reputation is founded on proven professional skills, a thorough understanding of our clients' requirements with an emphasis on sound judgment and a practical approach to solving complex legal and commercial issues. Our commitment to our clients goes further than simply responding to today's issues. We take a proactive approach in helping them prepare to meet what lies ahead – both the challenges and the opportunities.

The arbitration practice within Arthur Cox straddles the construction and engineering group, in which sector arbitration remains the preferred final forum for dispute resolution, and the litigation and dispute resolution group, which advises on commercial arbitration, both domestic and international. Following the introduction of the Arbitration Act 2010, which adopted the UNCITRAL Model Law as the de facto rules to regulate all international and domestic arbitral disputes in Ireland, international companies increasingly view Ireland as a venue of choice to resolve potential disputes and Arthur Cox has a strong track record of working in tandem with international law-firms to resolve disputes on their behalf. The lawyers in our arbitration practice are familiar with advising in arbitrations conducted in accordance with various international rules, including UNCITRAL, ICC, LCIA, ICSID, AAA, as well as CIARB and other rules developed by construction bodies in Ireland.

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