ICLG

The International Comparative Legal Guide to:

Construction & Engineering Law 2015

2nd Edition

A practical cross-border insight into construction and engineering law

Published by Global Legal Group, with contributions from:

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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2015

ISBN 978-1-910083-52-9
ISSN 2054-7560

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

General Chapters:

Country Question and Answer Chapters:

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have contracts which place both design and construction obligations upon contractors? If so, please describe the types of contract. Please also describe any forms of design-only contract common in your jurisdiction. Do you have any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

There are various Irish standard forms of contracts.

For building works in the private sector, the most common forms are the RIAI (the Royal Institute of the Architects of Ireland) forms of contract, with quantities (printed on a yellow form) or without quantities (printed on a blue form). Frequently, especially for larger projects, parties will also agree amendments and special conditions to those forms.

The RIAI, in conjunction with the Construction Industry Federation, has prepared a form of subcontract for use with the RIAI form of main contract.

There is also the Engineers Ireland (formerly the Institution of Engineers of Ireland ("IEI")) Third Edition form of contract, which is generally used for civil engineering works. This had been the principal form used for most publicly funded roads and water projects until the advent of the Public Works forms (see below). There is a standard form of subcontract for use with the IEI Third Edition.

In 2007, the Government Construction Contracts Committee ("GCCC") developed a number of contracts for use in public sector building and civil engineering works for contractors. These include traditional and design-and-build forms, as well as a minor works contract and a short form of contract for smaller projects, a contract for investigation works, a framework agreement, a contract for early collaboration with the Contractor on complex projects with a high value, and a term maintenance contract. These contracts replace the Government Departments and Local Authorities ("GDLA") form of contract (similar to the RIAI form and prepared for use in the public sector) as well as the use of the IEI Third Edition for civil engineering works. The public works contracts are mandatory for all public works.

There are also standard forms for construction professionals developed by the representative bodies for construction consultants (the RIAI, IEI and the Society of Chartered Surveyors ("SCS")). In addition, the GCCC has developed standard conditions of engagement for construction professionals in public works.

UK and international forms are used as well. The FIDIC (International Federation of Consulting Engineers (*Fédération Internationale des Ingénieurs-Conseils*)) suite is well known and frequently used, particularly in the energy sector. Other forms used include:

(a) Institution of Civil Engineers;

(b) Joint Contracts Tribunal;

(c) New Engineering Contract forms;

(d) Institution of Chemical Engineers ("IChemE"); and

(e) Institution of Engineering and Technology MF/1 (amended for the Irish market).

There is no standard form of Management Contract; however, a bespoke form is often produced based on one of the RIAI contracts referred to above.

1.2 Are there either any legally essential qualities needed to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations), or any specific requirements which need to be included in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

It is not necessary for a construction contract to be in writing. There are no legally essential qualities required under Irish law to create a legally binding construction contract other than the normal principles of contract formation, which require an intention to create legal relations and the ingredients of offer, acceptance, consideration, and certainty of terms. However, it is, in practice, difficult to contemplate a construction contract for any reasonably-sized project not being in writing or at least comprising some written terms such as a specification.

1.3 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

A Letter of Intent ("LOI") may be used to create either a non-binding arrangement or a legally binding contract. Express terms can be included stating that the parties do not wish to create a binding arrangement, such that the LOI is simply a letter stating an intention

to enter into a contract at a future date. However, the LOI is also seen as a device to create an interim binding arrangement pending the execution of formal contract documents, to allow for example site set-up, ordering materials and the like, usually subject to a financial limit and with the right to terminate the arrangement at will.

1.4 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

There are no insurances related to a construction project required by statute other than motor vehicle insurance.

A construction contract will typically require the following insurances:

(a) insurance of the works (usually referred to as "All Risks" insurance) – taken out by either the Employer or the Contractor, covering loss or damage to the work executed and site materials up to practical completion in the joint names of both parties to the contract;

(b) public liability insurance – covering claims in relation to death or injury to third parties or damage to property other than the construction works;

(c) employer's liability insurance – to be taken out by the Contractor to cover the injury or death of its employees; and

(d) professional indemnity insurance ("PI") – to cover design liability and to be taken out by any party carrying out design (including the Contractor where it is doing some design under the contract). PI policies cover the insured against claims for professional negligence and are usually required to be in place from commencement of the work/services until six years (and sometimes 12 years) after practical completion.

1.5 Are there any statutory requirements in relation to construction contracts in terms of: (a) general requirements; (b) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (c) tax (payment of income tax of employees); or (d) health and safety?

General Requirements

The Construction Contracts Act, 2013, which applies to construction contracts (which in turn covers not only construction contractors but also construction consultancy appointments such as architects and engineers, for example), has been passed but not yet commenced. It sets out requirements in relation to payment arrangements, minimum periods for payments (with an emphasis on protecting sub-contractors), the ineffectiveness of "pay when paid" provisions in a construction contract, suspension for non-payment and, most significantly, a mandatory regime of adjudication in relation to payment disputes. The Building Control Act 1990 as amended by the Building Control Act 2007 and Regulations made pursuant to those Acts deal with issues such as, for example, building standards, workmanship, conservation of fuel and energy and access for people with disabilities.

Labour

The Employment Equality Acts 1998 to 2011 deal with discrimination within employment. The Acts deal with discrimination related to any of the following grounds: gender; civil status; family status; age; race; religion; disability; sexual orientation; and membership of the Traveller community. Most employment equality issues are dealt with by the Acts, including: dismissal; equal pay; harassment and sexual harassment; working conditions; promotion; access to employment, etc.

There are also obligations on an Employer under data protection legislation (Data Protection Acts 1988 and 2003).

The Minimum Wage Act 2000 provides for a national minimum wage per hour for an adult employee. Until 9 May 2013, a registered employment agreement applicable to many classes of construction worker provided for pay rates which far exceeded the national minimum wage. On that date all registered employment agreements were struck down as unconstitutional, however the Government has committed to 'fixing' the relevant legislation and to this end published a Bill in May 2015 which will lead to the reintroduction of registered employment agreements.

The Organisation of Working Time Act 1997 provides for minimum annual leave entitlements, work breaks, daily and weekly rest periods and a maximum working week of an average of 48 hours calculated over a reference period of, usually, four months.

The Protected Disclosures Act 2014 came into effect on 15 July 2014. This Act deals with the protection of 'whistleblowers' and is intended to provide a robust statutory framework within which workers can raise concerns regarding potential wrongdoing that has come to their attention in the workplace, in the knowledge that they can avail of significant employment and other protections if they are penalised by their employer or suffer any detriment for doing so. "Workers" is given a very wide definition and includes permanent and temporary employees, former employees, secondees, interns, consultants, contractors and agency personnel. The types of wrongdoing specifically include things like the commission of offences, the failure to comply with legal obligations, health and safety issues and damage to the environment.

In May 2015, the Workplace Relations Act was passed. This Act radically consolidates and streamlines the employment law bodies and claims procedures in Ireland. It also provides that employees absent from work due to illness continue to accrue annual leave and must be given the opportunity to use such leave on their return.

The EU Posted Workers Directive ("PWD") is provided for in Irish law through section 20 of the Protection of Employees (Part-Time Work) Act 2001 ("section 20"). However, section 20 goes further than the PWD and provides that rights are guaranteed not just to posted workers but to "a person, irrespective of his or her nationality or place of residence" who, amongst other things, works in the State under a contract of employment. Section 20 also goes further than the PWD as regards the rights to be provided. It states that any Irish enactment conferring rights on employees shall apply to the classes of workers mentioned above, where the principal functions of those enactments are vested in certain Ministers or Departments. This would therefore entitle such workers to the protection of the vast majority of Irish employment legislation.

There are no mandatory payments on termination of employment (other than on redundancy).

Tax

Employees in a construction project are subject to payment of income tax as with all employees. In construction projects, Relevant Contracts Tax (also known historically as sub-contractors' tax) is a withholding tax regime that can apply to payments made for construction services (which is widely defined and includes ancillary activities such as provision of labour for construction and haulage services related to construction activities). It does not apply to employees. The rate of withholding can range from zero to 35% depending on the contractor's status with the Irish Revenue. Revenue clearance is required to make payments where the rate of withholding is less than 35%. Tax withheld is available for credit against the tax liability of the contractor, or can be refunded where there is no such liability.

Health and Safety

Regulation of health and safety is addressed mainly in a statutory framework, and failure to discharge the statutory duties can carry criminal sanction, including fines of up to €3 million and/or imprisonment for up to two years for convictions on indictment. The following contain the core health and safety legislation relevant to construction:

- Safety, Health and Welfare at Work Act 2005, which imposes core duties on all employers to ensure, so far as is reasonably practicable, the health and safety of their own employees and of third parties, including employees of others and members of the public.
- Safety, Health and Welfare at Work (Construction) Regulations 2013.
- Safety, Health and Welfare at Work (Asbestos) Regulations 2006 to 2010.
- Safety, Health and Welfare at Work (General Application) Regulations 2007 to 2012.

These regulations set out more detailed duties in respect of certain activities and in respect of the use of certain equipment, and provide for the management of specific risks.

The Safety, Health and Welfare at Work (Construction) Regulations 2013 require the appointment of duty holders responsible for specific functions to ensure that construction projects are planned, designed, and executed taking health and safety into account during the design and construction phases, and in subsequent use of the completed project.

Duties are also imposed on parties procuring construction works, and on both designers and contractors involved in construction work.

1.6 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability is complete?

Standard form construction contracts typically provide for a retention amount, usually in the range of 3% to 5% of the contract sum, retained from each interim payment. Typically, half of the retained amount is released at practical completion and the remainder at the expiry of the defects liability period, or issue of the final certificate under the contract. Retention provisions usually place a trust obligation (without obligation to invest) on the Employer for the retained amounts.

1.7 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such bonds and guarantees?

It is both permissible and common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies. The amount of the bond is typically between 10% to 12.5% of the contract sum. It can be difficult for contractors to procure a bond for a higher amount. The usual arrangement in a construction contract is for the performance bond to be a default bond, i.e. the beneficiary must show a default by the Contractor and loss arising before a payment is made. However, in some situations, an on-demand bond is provided (where payment is made on foot of a demand made to the bondsman in a specific format, notwithstanding that there may be a dispute between the Contractor and Employer as to the amount due). Such a bond is usually required, for example, in the case of an advance payment or early release of retention monies.

1.8 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that until they have been paid they retain title and the right to remove goods and materials supplied from the site?

Where goods and materials supplied for use in a construction project are the subject of a retention of title clause, the effectiveness of the clause will depend on whether the goods are considered chattels or fixtures of the building. If goods or materials supplied during construction are fixed to land or buildings during the construction process, title will pass to the owner of the land or buildings and any retention of title clause will fall away.

If, however, the goods supplied have not yet been annexed to the land, e.g. items which are stored separately on site, the retention of title clause will retain title to the goods in the seller. Generally, if the good can be removed without causing damage to the land or building, it is not fully annexed. Each set of facts would have to be considered.

The general rule is that a party – for example, the Contractor – cannot pass better title than it has itself. There is a statutory exception to this rule under the Sale of Goods Act 1893 for a *bona fide* purchaser without notice, so that it may be possible for an Employer to obtain good title to goods notwithstanding that they are subject to a retention of title clause between a Contractor and his supplier.

Many contracts, including the RIAI form, provide that title to goods will transfer on payment of an interim certificate by the Employer. However, such vesting clauses can only affect the position between the Employer and the Contractor. The effect of such a clause on the contract between the Contractor and third party supplier or sub-contractor will have to be considered in each case.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be suspended on behalf of the employer by a third party? Does any such third party (e.g. an engineer or architect) have a duty to act impartially between contractor and employer? Is that duty absolute or is it only one which exists in certain situations? If so, please identify when the architect/engineer must act impartially.

There is no common law right for a party to a contract to suspend performance of its contractual obligations in the event of a breach of contract by the other party, and there is no right at common law for a third party to suspend on that party's behalf. It is a matter for the construction contract to expressly grant a right to the Employer's contract administrator to suspend performance of the contract. For example, the Public Works forms of contract published by the GCCC contains such a right. The FIDIC Red and Yellow Books enable the engineer to instruct the Contractor to suspend progress of part or all of the works (with a resulting entitlement for the Contractor to claim for such suspension under the contract to the extent the cause of the suspension is not the responsibility of the Contractor).

A duty is usually implied on the professional consultant responsible for issuing certificates in accordance with a building contract to act impartially between the Employer and the building contractor. For example, it has been implied on architects (see *Sutcliffe v. Thackrah* [1974] AC 727). Often, professional appointments contain an express

duty of impartiality; for example, the GCCC form of Consultant's appointment prohibits a client from overriding a consultant's duty of impartiality.

2.2 Are employers entitled to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

Under the Construction Contracts Act, 2013, such a clause is "ineffective" save in limited circumstances relating to insolvency. That Act has not yet been commenced. However, once commenced, the Act will not prohibit such a clause, but merely limit the circumstances under which a party may rely upon it.

2.3 Are the parties permitted to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss suffered?

Parties are permitted to agree in advance a fixed sum (liquidated damages), which will be paid by the Contractor to the Employer in the event of particular breaches, e.g. liquidated damages for late completion, usually expressed as a fixed amount for every day or week of delay beyond the date for Practical Completion. The sum to be paid must be a genuine pre-estimate of loss, but if it is not, the Contractor can seek to set it aside as a penalty. If the purpose is not intended to be compensatory but rather to force performance with the contract, that will be a factor pointing to it being a penalty.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be done under the contract? Is there any limit on that right?

At common law, unless there is an express provision in the contract authorising the Employer or his administrator to vary the works, an employer is not generally entitled to vary or alter the contracted-for work without the Contractor's consent. It is unusual for a construction contract not to contain an express variation clause setting out the procedure to be followed and the rules for valuing the changed work and making provision for an extension of time. The extent to which the Employer may vary the works is generally a matter of scale or scope.

Whether a particular variation instruction is within the ambit of the power to direct variations depends upon the precise terms of the contract, when viewed against the commercial background of the project. No general answer can be given to the question as to when a variation instruction will be beyond the power of the Employer owing to the nature or scope of the instructed change. It will depend upon the terms of the particular contract and the nature of the instruction given. However, a proposed variation that goes beyond what the parties (particularly the Contractor) could have anticipated or expected at the time of entering into the contract, may fall outside the scope of the power to order a variation.

3.2 Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?

A power to omit work may be included in the contract but in the absence of an express power in the contract to do so, the Employer may not omit work without the express agreement of the Contractor. In any event, a typical construction contract will contain a power to omit work but that power generally may not be used in order to give that work to another Contractor or so as to permit the Employer to perform the work itself. An omission of work for the purpose of having it performed by someone else other than a Contractor may only be valid if either the contract expressly empowers an omission to be made for that purpose or a clear agreement is reached with the Contractor to that effect.

3.3 Are there terms which will/can be implied into a construction contract?

Terms may be implied into a contract as a result of the provisions of a statute; others may be implied based on an intention imputed to the parties from their actual circumstances; and some terms may be implied from custom and usage. Examples of terms which may be implied into construction contracts include:

1. Quality of goods supplied. A Contractor who undertakes to do work and supply materials impliedly warrants that the materials supplied will be of good and proper quality (unless the circumstances of the case show that the parties intended otherwise).
2. Fitness for purpose. It is an implied warranty of a construction contract under which the Contractor assumes responsibility for design, that the result of its work will be reasonably fit for the purpose for which it is agreed or known to be required.
3. Quality of goods/fitness for purpose. Contracts for the sale of goods in the course of business are subject to an implied term that the goods will be of satisfactory quality, and if the purchaser makes the intended purpose known to the seller, there will be an implied term that the goods are fit for that purpose.
4. Quality of work. It will generally be an implied obligation on a Contractor to perform its work properly, which includes completing the work it has undertaken to perform, and doing so in a good and workmanlike manner.
5. Duty to exercise reasonable skill and care. It is an implied obligation of a party that has undertaken to perform work pursuant to a contract, that it will use reasonable skill and care in performing its obligations.
6. Duty to cooperate/duty not to hinder performance. Parties are required to cooperate with each other to the extent that it is necessary to secure the performance of the contract.
7. Duty to act in good faith.
8. Duty to act honestly in the performance of obligations and the assertion of rights under the contract.
9. Duty to provide accurate design information. Where a party is under a contractual obligation to provide design information so as to enable another to perform its works, it will usually be an implied term that this information is accurate.

3.4 If the contractor is delayed by two events, one the fault of the contractor and one the fault or risk of his employer, is the contractor entitled to: (a) an extension of time; or (b) the costs occasioned by that concurrent delay?

The contractual consequence of a project being delayed by the

simultaneous operation of (a) a delay for which the Employer is responsible, and (b) a delay for which the Contractor is responsible, will be determined by reference to the extension of time clause in the contract. Where their respective delays are of equal causative effect (and in this regard it must be an unusual set of circumstances where that will occur), the consequence may be that the Contractor is entitled to an extension of time due to the effect of the delay for which the Employer is responsible, notwithstanding that the Contractor was also simultaneously in delay. In the UK case of *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32, it was common ground between the parties that this was the case. This case will be of persuasive effect in Ireland.

However, there is no obstacle to a contract providing that in such a case, the Contractor is not entitled to an extension of time nor is there any obstacle to a contract providing for the responsibility for the delay being apportioned between the parties. Where there is unequal causative effect of the respective delays, then it will depend how much weight is to be given, under the relevant contract, to the various causes of delay. It is not common for a construction contract to provide expressly that where a period of delay has resulted from more than one cause, an assessment of the Contractor's entitlement to a extension of time is to be resolved by reference to which of the relevant causes was the dominant one. It remains to be seen whether Irish courts will follow the decision in *City Inn Ltd v. Shepherd Construction Ltd* [2010] CSIH 68, in which the "fair and reasonable" extension of time is one which involves an apportionment of periods of delay as between Employer and Contractor where there are concurrent or overlapping periods of delay for which each party bears responsibility.

It also remains to be seen whether the position set out in the UK case of *De Beers UK Ltd v. Atos Origin IT Services UK Limited* [2010] EWHC 3276 (and quoted with approval in *Walter Lilly & Company Limited v. Mackay and DMW Developments Limited* [2012] EWHC 1773), will be followed in Ireland. In that case, the Judge stated as follows:

"The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.

By contrast, the contractor cannot recover damages for delay in circumstances where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible."

3.5 If the contractor has allowed in his programme a period of time (known as the float) to allow for his own delays but the employer uses up that period by, for example, a variation, is the contractor subsequently entitled to an extension of time if he is then delayed after this float is used up?

Float refers to the period of time during which, if an activity is delayed, it will not have the effect of delaying completion of the works, or a subsequent activity. An activity will be in float where it is not on the critical path. Total float is the difference between a Contractor's planned early completion date and the contract date for completion. Where a contract makes no provision (or no adequate provision) regarding the "ownership" of float, it will be unclear as to which of the parties "owns" the float. A party "owns" float where it may delay or cause delay to an activity without the other party being entitled to claim relief for that delay. The law is not clear in a case where the contract does not provide for ownership of float, and the effect (if any) on the date for completion of float to be used up by one or both of the parties will depend on the particular extension of time clause in the contract.

3.6 Is there a limit in time beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and from what date does time start to run?

The parties are free to agree a limitation period, but in the absence of an express agreement, the limitation period as set by the Statute of Limitations, 1957, for a claim for a breach of contract is six years from accrual of the cause of action (which is the date of the breach of contract) if the contract is signed under hand, and 12 years from the date of the breach where the contract is executed as a deed. In tort, the Statute of Limitations, 1957, as amended, provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. There has been considerable debate as to when the cause of action accrues. In *Hegarty v. Flanagan Brothers Ballymore Ltd* [2013] IEHC 263, the High Court applied the decision in *Murphy v. McInerney Construction Ltd* [2008] IEHC 323, deciding that the time limit in negligence ran from the date when the damage manifested itself and not from the date when the damage was discovered. The discoverability test was rejected in the *McInerney* case.

3.7 Who normally bears the risk of unforeseen ground conditions?

Unless the contract expressly provides otherwise, the risk in relation to the Contractor encountering unforeseen ground conditions in carrying out the work rests with the Contractor. However, it is not unusual for construction and engineering contracts expressly to entitle a Contractor to claim an extension of time for completing the works and possibly also to claim compensation or additional payment for performance in the event that unforeseen ground conditions are encountered. The right to claim an extension of time or compensation or payment may, however, be dependent on the Contractor having given written notice to the Employer within a set period of time in relation to the site conditions encountered and their actual or likely impact on the works. The GCCC form of Civil Engineering Contract used for Public Works in Ireland has the option for an Employer to take some of the risk in relation to unforeseen ground conditions or to seek to pass the entirety of the risk to the Contractor. The RIAI Contract is silent on the issue. Clause 12 of the IEI Third Edition form of contract provides detailed arrangements in relation to relief to the Contractor in the event that unforeseen ground conditions are encountered, with some conditions for the Contractor becoming entitled to the relief, including condition precedent that notice should be given in time.

3.8 Who usually bears the risk of a change in law affecting the completion of the works?

Unless the parties agree otherwise in the contract, this risk will be borne by the Contractor.

3.9 Who usually owns the intellectual property in relation to the design and operation of the property?

Those who create the copyright material in respect of the design and operation of a property typically own the intellectual property rights in relation to the project. Those are generally the Employer's design consultants or, where a contractor has carried out design, the Contractor. Usually, as a matter of contract, the Employer will be given a licence to use the material and occasionally, the Employer may seek to obtain the copyright through the consultancy contract, for example where the proposed building is a one-off, iconic project which the Employer would not want to see being repeated elsewhere.

3.10 Is the contractor ever entitled to suspend works?

Most construction contracts give the Contractor the right to suspend if payment is not made in accordance with the contract. The Construction Contracts Act, 2013 introduces a statutory right on the part of the Contractor/sub-contractor to suspend for non-payment, though that Act has not yet been commenced. Typically, the Contractor will be entitled to an extension of time to complete the Works if work resumes.

3.11 On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?

A construction contract will rarely have a provision for automatic termination; one would need to be expressly agreed and it would likely be the subject of extensive negotiation.

The contract will usually set out clear grounds for termination. The contract typically provides for the Employer to be entitled to terminate for default or insolvency of the Contractor. In the case of the Contractor, it is typically for insolvency of the Employer or non-payment within a specified period.

If the contract does not have express contractual termination rights, or the express contractual termination rights do not apply, then a party may have grounds to terminate a contract at law. The principal reason for terminating at common law arises in the case of a repudiatory breach of contract (where one party refuses to perform all or substantially all of its obligations under a contract).

3.12 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the injured party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Force majeure is an expression sometimes used in contracts to describe events that are beyond the control of either party and which have the effect of causing damage, delay, disruption, or financial detriment to one or more of the parties to the contract. *Force majeure* events are usually defined in the contract to include matters such as acts of God, fire, flood, explosion, riot, war, or rebellion beyond the control or influence of the parties which have a significant affect on the ability of the party to perform its obligations.

Where a contract makes reference to *force majeure*, it will usually define the consequences of that event occurring. These could include excusing a party from performance of an obligation which it was prevented from performing by reason of the *force majeure* event and in some cases it may even give rise to the termination of the contract, either automatically or upon a party giving notice of termination. However, that would have to be as a result of agreement of the parties. There is authority in the United Kingdom (which is of persuasive effect in the Irish Courts) that inconvenience to a party was not enough for a *force majeure* clause to succeed and therefore it may well be the case that the fact that a contract has become uneconomic would not be a ground for a claim for relief due to *force majeure*.

3.13 Are parties which are not parties to the contract entitled to claim the benefit of any contract right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the original contracts in relation to defects in the building?

No. The privity of contract principle will preclude a person not a party to a contract from seeking to claim the benefit of that contract. Developers usually address this by providing for collateral warranties from the Contractor and sub-contractors in favour of tenants, purchasers, and funding institutions as well as collateral warranties from sub-contractors to the Employer, thus giving direct contractual links between the relevant parties.

There is no equivalent in Ireland to the Contracts (Rights of Third Parties) Act 1999 which exists in England, the provisions of which can be used to grant rights to third parties without having to procure the execution of collateral warranties.

3.14 Can one party (P1) to a construction contract which owes money to the other (P2) set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Generally speaking, unless the contract excludes or restricts the common law right of set-off, one party to a construction contract should be able to set off against the sum due to the other party, sums which are due to the first party.

In the case of *Moohan and Another v. S& R Motors (Donegal) Limited* [2007] IEHC 435, (a decision of the Irish High Court) (recently applied in *Creedon Construction Limited v. Kenny & Anor* [2014] IEHC 188), Mr. Justice Clarke stated that the "…default position is that a party is entitled to a set off in equity in relation to any cross claim arising out of the same contract. Thus if a builder is owed money on foot of a construction contract, the Employer is prima facie entitled to a set off in equity, in principle, in respect of any defective works". The judge was not satisfied that the standard form RIAI template gave rise to an agreement to exclude a set-off, at least where the contract had reached the stage of a certificate of practical completion having been issued and where any entitlement to arbitration on the part of the Employer was immediate.

3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?

Parties to construction contracts will generally owe a duty of care to each other in contract and in tort. For example, if a Contractor knows that the Employer is going to walk about on the site, it is the Contractor's duty to make the site reasonably safe. Parties to a contract may owe concurrent duties in contract and tort. For example, architects and engineers who are engaged pursuant to a contract will owe contractual obligations to an Employer, including an obligation to act with due skill and care. They may also owe to the Employer a concurrent duty in tort to exercise reasonable care in

the provision of services, so as to ensure that the Employer does not suffer harm, injury or loss as a consequence of their carelessness.

3.16 Where the terms of a construction contract are ambiguous are there rules which will settle how that ambiguity is interpreted?

A leading Irish case on interpretation of contracts is *Analog Devices BV & ors v. Zurich Insurance Company & anor* [2005] IESC 12 (recently applied by the Supreme Court in *McMullan Brothers Limited v. McDonagh* [2015] IESC 19). The Supreme Court in that case adopted the principles set out by Lord Hoffman in the United Kingdom case of *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Investments Co. Ltd. V. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

In addition, the courts are prepared to adopt the *contra proferentem* principle: if the exempting provision is ambiguous and capable of more than one interpretation, then the courts will read the clause against the party seeking to rely on it.

3.17 Are there any terms in a construction contract which are unenforceable?

Examples of clauses which may be unenforceable include:

1. A term which seeks to impose a financial consequence for breaching a clause in the contract. Such a term may be held to be unenforceable if it is seen as a penalty clause rather than a liquidated damages clause. The financial consequence imposed by the term must be a genuine pre-estimate of the financial loss which will be suffered due to the breach. The sum must not be disproportionate to the resulting loss and should not be included as a deterrent to a breach.
2. An indemnity against a criminal liability.
3. Except in the specific circumstances provided for in the Construction Contracts Act, 2013 (when commenced), a clause in a construction contract is ineffective to the extent that it provides that payment of an amount due under the construction contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract.
4. A clause seeking to avoid the application of the Construction Contracts Act, 2013 (when commenced) to the particular contract.

3.18 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

A designer, such as an architect or engineer, under the common law and statute (Sale of Goods and Supply of Services Act 1980), operates to the standard of "reasonable skill and care". A designer will not generally have to give an absolute guarantee of his work.

Some forms of building contract which are on a design-and-build basis (for example the GCCC form of Public Works contract for either building works or civil engineering where the Contractor is responsible for design) may seek to express the standard of care in design as one of fitness for purpose, and this may lead to a difficulty in the Contractor obtaining back-to-back liability from a sub-consultant engaged to carry out portions of the design.

4 Dispute Resolution

4.1 How are disputes generally resolved?

The most common methods of settling construction disputes are conciliation, mediation, arbitration, and litigation. Adjudication has been introduced by the Construction Contracts Act, 2013, but that Act has not yet been commenced.

4.2 Do you have adjudication processes in your jurisdiction? If so, please describe the general procedures.

See question 4.1 above. Under the Construction Contracts Act, 2013, the decision of the adjudicator will be binding until the dispute is finally determined by arbitration, through court proceedings or is settled. The successful party can apply to the Court to enforce an adjudicator's decision.

4.3 Do your construction contracts commonly have arbitration clauses? If so, please explain how arbitration works in your jurisdiction.

Arbitration is a common provision in construction contracts. Arbitration in Ireland is governed by the Arbitration Act 2010. An arbitrator's award is binding on the parties and is enforceable in

Court. A dispute will not be dealt with in arbitration unless the parties agree to refer it to arbitration. The agreement to refer can be in a separate agreement or more usually is contained within an arbitration clause in a construction contract. Parties are free to choose the rules for their own arbitration but typically in construction contracts the parties will adopt the rules of Engineers Ireland or another body such as the Chartered Institute of Arbitrators. The parties may choose the venue for the arbitration, and in the event that the parties cannot agree on the identity of the Arbitrator, the arbitration clause should appoint a nominating body. Arbitration is, compared with the resolution of disputes through mediation or conciliation, a relatively expensive and time-consuming process.

4.4 Where the contract provides for international arbitration do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles to enforcement.

Ireland is a signatory to the New York Convention (the "Convention") and it is incorporated into its legislation in section 24 of the Arbitration Act 2010. Article 35(1) of the Model Law, incorporated in section 6 of the 2010 Act, provides that an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced. International and domestic arbitral awards will be equally enforced by the Irish courts.

The courts will refuse to enforce an award in limited circumstances, such as those set out in Article V of the Convention. These include instances in which:

(a) a party to the arbitration agreement was under some incapacity;

(b) the arbitration agreement was not valid under its substantive law;

(c) a party against whom it is to be enforced was not given proper notice or was unable to present its case;

(d) the tribunal lacked jurisdiction;

(e) there was a procedural irregularity; and/or

(f) it would be contrary to public policy to recognise or enforce the award.

4.5 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction?

Recast Brussels Regulation (Regulation EU No 1215/2012) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) applies to legal proceedings instituted on or after 10 January 2015. It repeals and replaces the 2001 Brussels Regulations. The 2001 Regulations will still apply to cases issued before 10 January 2015.

Denmark has also decided to opt into the revised Brussels Regulation and will be adopting it through domestic legislation, however until it is implemented, the 2001 Regulations will continue to apply.

Uncontested claims are governed by the EEO Regulation (Council Reg (EC) No 805/2004) (does not apply to Denmark).

Judgments from the EFTA countries – Iceland, Norway, Switzerland and Liechtenstein: judgments from Iceland, Norway, and Switzerland are governed by the Brussels Regulation and the Lugano Convention 2007 (parallel convention on materially the same terms as the Brussels Regulation); the Regulation and the Convention do not apply to judgments originating from Liechtenstein.

Where neither of the regimes apply it is necessary to rely on the Irish common law rules of enforcement.

There is no bilateral treaty or multilateral international convention in force between the USA and any other country on the reciprocal recognition and enforcement of judgments.

4.6 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to reduce: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Claims in court are commenced by issuing proceedings. The value of the claim will dictate which of three civil court jurisdictions will apply.

The District Court can hear cases within its own geographical area and award compensation of up to €15,000. However, this can be increased if the parties involved in the case agree in writing. District Court appeals go to the Circuit Court.

The Circuit Court can hear cases within its own geographical area and award compensation of up to €75,000. However, this amount can be increased if the parties involved in the case agree in writing. An appeal usually lies from a Circuit Court at first instance to the High Court on Circuit.

The High Court has full 'original jurisdiction'. The 'original jurisdiction' of a court is the right to hear a case for the first time, as opposed to 'appellate jurisdiction' when a court has the right to review the decision of a previous, lower-level court. However, claims in excess of €75,000 are commenced in the High Court. Claims for judicial review or in public procurement cases are also commenced in the High Court. In the case of the High Court, there is an appeal to the Court of Appeal. Parties are entitled to bring an appeal of the High Court decision directly to the Supreme Court if the Supreme Court is satisfied that (i) the High Court decision involves a matter of general public importance, and/or (ii) the interests of justice require that the appeal be heard by the Supreme Court. If a question of European law arises, a case may be stated to the European Court of Justice.

All monetary claims involve the issue of a summons in the relevant court and the exchange of information with the other party about the claim and its defence through pleadings, or written statements about the respective cases being made. Oral evidence is usually given in the hearings in support of the respective cases made, and witnesses can be cross-examined. In more complex cases, discovery of documents and expert evidence may be required. There are defined time limits for the exchange of pleadings set down in the applicable Court rules.

The length of time to reach a hearing can vary depending on the court jurisdiction and other factors, but can take many months and, in some cases, years to reach trial. The exception to this is in the case of cases heard in the Commercial Court. The Commercial Court is a division of the High Court and was established in 2004 to provide efficient and effective dispute resolution in commercial cases. The Commercial Court deals with the following types of business dispute:

- disputes of a commercial nature between commercial bodies where the value of the claim is at least €1 million;
- proceedings under the Arbitration Act 2010 with a value of at least €1 million;
- disputes concerning intellectual property;
- appeals from or applications for judicial review of regulatory decisions; and
- other cases which a judge of the Commercial Court considers appropriate.

There is no automatic right of entry to the Commercial List of the High Court. It is at the discretion of a judge of the Commercial Court. The Commercial Court uses a detailed case management system that is designed to streamline the preparation for trial, remove unnecessary costs and delaying tactics, and ensure full pre-trial disclosure. The judge can adjourn proceedings for up to 28 days to allow resolution of the dispute through some form of alternative dispute resolution, such as mediation, conciliation or arbitration.

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Kevin leads the firm's Construction Group. He has aligned his extensive construction practice, which includes construction disputes, with a recognised expertise in all aspects of public procurement law/tendering. Kevin has considerable experience in leading the construction and procurement advice on large-scale construction and infrastructure projects, managing issues from initial query to resolution, including providing strategic advice on how to structure arrangements and producing draft documentation to reflect such arrangements, particularly with a view to avoiding or minimising conflict during the construction phase and seeking to have robust and clear arrangements in place.

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The firm is consistently recognised as being the market leader in many practice areas and its pre-eminence is endorsed by clients and market commentators alike. Our principal office is located in Dublin and we have overseas offices in London and Brussels.

The firm is divided broadly into four main groupings of corporate, banking & financial services, dispute resolution and litigation and real estate (including construction). We also operate industry sector and specialist practice groups which comprise professionals from different groupings. In this way, we provide advice and representation on the basis of what is best for clients and their requirements.

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