



CONTRACT CONSULTANTS

The Arbitration & Contract Dispute Specialists

The Public Works Contracts Dispute Resolution March 2008

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Speaker

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Overview

- Will there be any disputes?
- The Dispute Clause
- New Conciliation Procedure
- New Arbitration Rules
- Review



Will there be any disputes?

- YES!
 - ◆ New Contracts
 - ◆ Users not familiar with conditions
 - ◆ Wording not judicially tested
 - ◆ Differing views
 - ◆ Risk with contractor as much as possible



The Dispute Clause

- Clause 13
- For disputes “*Under the Contract*”
 - ◆ Conciliation
 - ◆ Arbitration
- All others
 - ◆ Court
- See www.finance.gov.ie for copies of current contracts, forms and rules



What disputes are not “Under the Contract”

- Only disputes under the contract can be referred to conciliation and arbitration
- There is a body of case law on what this term means
- It would probably not include claims for
 - ◆ Rectification
 - ◆ Misrepresentation
 - ◆ Or tortious claims



Who Appoints?

- The body named in the Schedule Part 1N
- What if left blank?
- Training Manual suggests
 - ◆ Chartered Institute of Arbitrators – Irish Branch
 - ◆ Engineers Ireland
 - ◆ Bar Council of Ireland
 - ◆ Law Society of Ireland
 - ◆ Royal Institute of the Architects of Ireland
 - ◆ Society of Chartered Surveyors



Conciliation

- Conciliation is the preferred method of ADR for construction disputes in Ireland
- Attention was paid to UK adjudication where a decision is made within 28 days which is binding until a judge or arbitrator rules otherwise
- PWC tries to incorporate some of the “pay now - argue later” mentality



Conciliation Procedure

- See Clause 13.1
 - ◆ Notice
 - ◆ Appointment
 - ◆ Each party serve brief details of the dispute
 - ◆ Allow Conciliator access to documents and site
 - ◆ Conciliator shall consult and attempt to resolve dispute by agreement



Conciliation Procedure Cont.

- If no agreement with 42 days (or longer if all agreed) Conciliator gives Written Recommendation
- Within 45 days either party may reject by “*Notice of Dissatisfaction*”, otherwise binding
- Either party may then refer dispute to Arbitration
- Procedure Confidential



The Recommendation

- Based on “*rights and obligations under the contract*”
- If not rejected then failure to abide by it can be referred to arbitration, and perhaps the courts



Clause 13.1.11

- If Conciliator recommends a payment, even if Notice of Dissatisfaction
 - ◆ Payment to be made provided other party:
 - Refers matter to arbitration
 - Provides a bond
- Wording would suggest that even if the recommendation not rejected and it is binding payment does not need to be made until matter referred to Arbitration



Arbitration Rules

- Any dispute under the contract is to be finally resolved by arbitration
- New set of Arbitration Rules
- Note 2 versions, 2007 and 2008, it is the 2007 ones that are referred to in the contract!



Why Have Rules?

- Arbitration is very flexible and can be used for minor consumer to multi billion investor state treaty disputes
- Rules help to set an appropriate framework or procedure for the process to take place in
- Helps the Arbitrator by giving him powers
- Long history in UK, e.g. CIMAR and in Ireland IEI has had a procedure since 1987.



Steps #1

- Notice to Refer
 - ◆ Nature of claim, supporting facts and amount in dispute and particulars of relief or remedies sought
 - ◆ Sets the Arbitrator's jurisdiction, or job description
- Appointment
 - ◆ Either by agreement or by nominating body named in the contract



Steps Cont.

- Jurisdiction
 - ◆ From notice and over “all issues connected with and necessary to the determination of the dispute”
 - ◆ Arbitrator can rule on his own jurisdiction
 - ◆ Any challenge on jurisdiction is to be made within 60 days of being aware of circumstances
- Arbitrator to
 - ◆ Notify DoF of appointment
 - ◆ Advise parties of any potential bias
 - ◆ Process as quickly and efficiently as possible
- Challenge
 - ◆ Nominating body to have a role



Steps Cont.

- Statement of Defence
 - ◆ Within 30 days of Notice to Refer or 14 days from appointment
 - ◆ Responding to issues and raising any other relevant issues, including counterclaims
- Pleadings?
- Preliminary Meeting
 - ◆ To give directions aimed at early resolution at minimum costs



Steps Cont.

- Arbitrator has power to decide on
 - ◆ Whether further statements are required
 - ◆ Disclosure of documents
 - ◆ Extent of expert evidence
 - ◆ Witness statements with no examination in chief
 - ◆ Tests required
 - ◆ Preservation of evidence
 - ◆ Detention, storage or sale of property which is the subject of the Arbitration



Steps Cont.

- Hearing
 - ◆ Required if one party requests
 - ◆ Arbitrator to direct on;
 - Bundle
 - Pre Hearing Submissions
 - Procedure at the Hearing
 - ◆ Hearings are private



Steps Cont.

- Short Procedure

- ◆ Default unless all parties or arbitrator determine it should not
- ◆ Within 30 days of Preliminary Hearing file of evidence sent to Arbitrator including documents, and witness statements
- ◆ Within 30 days arbitrator makes an award or calls a meeting, if so then award in a further 30 days



Steps Cont.

- Award
 - ◆ In writing
 - ◆ Arbitrator to send copy to DoF
 - ◆ May only be made public with parties consent
 - ◆ To be reasoned, unless all parties agree otherwise
 - ◆ No lien on the award
 - ◆ 30 day “*slip*” rule



Steps Cont.

- Costs
 - ◆ Arbitrator to determine
 - ◆ Generally costs follow the event
 - ◆ Can direct security for costs
 - ◆ If parties agree can cap the recoverable costs
- Joinder
 - ◆ Joinder provision only if same arbitrator



Issues

- Some claims will be dealt with in arbitration and some in the courts
- Conciliator's Recommendation cannot find a sensible non-contractual compromise, must be based on rights and obligations under the contract
- Arbitration may need to be commenced to get payment even if all agree with recommendation



Issues Cont.

- Arbitrator nominating body to have role in challenge
- Very different timing of pleadings
- Arbitrators to have much wider powers
- Will they know how to use them?



Conclusion

- Like other parts of the PWC the dispute provisions have been criticised
- My opinion is that they are generally an improvement but;
 - ◆ Parties must learn the new provisions and not act in the same way as they did before
 - ◆ Arbitrators must learn how to use their new powers wisely



Questions?

