



# ICLG

The International Comparative Legal Guide to:

## **Construction & Engineering Law 2018**

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# Ireland

Matheson

Rhona Henry



## 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 a number of standard-form construction contracts used in this jurisdiction. The most commonly used forms are as follows:

1. Conditions of Building Contract issued by the Royal Institute of the Architects of Ireland (“RIAI”) (together with a sub-contract form); and
2. Engineers Ireland conditions of contract for works of civil engineering construction (together with a form of sub-contract).

These conditions of contract are, particularly with respect to larger projects, usually heavily amended through a schedule of amendments to reflect risk profile currently acceptable in the market and to reflective legislative changes. In a design and build scenario, a further set of amendments can be incorporated into these conditions to facilitate a design and build procurement route.

In the case of more complicated projects, for example, in the pharmaceutical, information technology and energy market, there are a number of other types of contracts which are commonly used. For example:

- (a) the *Fédération Internationale des Ingénieurs-Conseils* (“FIDIC”) suite of contracts, which includes a build-only form of contract, a design and build mechanical and electrical contract and a turnkey or engineering, procurement and construction (“EPC”) contract;
- (b) management contracts (which, in this jurisdiction, are typically based on the RIAI form);
- (c) Institution of Engineering and Technology MF/1;
- (d) New Engineering Contract (“NEC”) Forms; and
- (e) Joint Contracts Tribunal (“JCT”) Forms.

In the case of public sector works, the Government Construction Contracts Committee (“GCCC”) have produced a suite of standard documents (including a build only, design and build (for both

building works and civil engineering works), site investigation contract, framework agreement, minor works contract, a short form contract plus a contract for early collaboration) for use in public sector construction procurement.

The most commonly used design-only contracts in this jurisdiction are those contracts which are produced by the regulatory bodies for disciplines like mechanical and electrical consultancy, civil engineering and architecture together with bespoke forms. When used, certainly in the context of larger projects, these contracts are often heavily amended. In addition, the GCCC has produced a design-only contract for use in the case of public sector projects.

**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)?**

The legal essential requirements of a contract in this jurisdiction are: agreement; consideration; certainty; intention to create legal relations; and capacity. Generally, there is no requirement for a construction contract to be in writing. Recent legislation in this jurisdiction, the Construction Contracts Act, 2013 (which came into force on 25 July 2016), includes a right on the part of parties to a construction contract to refer payment disputes to adjudication, provides for certain new payment provisions and includes a statutory right on the part of a contractor/sub-contractor to suspend works under a construction contract for non-payment.

**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.**

In general, a letter of intent (“LOI”) may be issued to indicate an employer’s intention to create a contract or similar arrangement with a contractor in due course. The phrase LOI is not a legal term of art in Ireland, however, and as such the effect of each LOI will depend on the individual LOI’s terms and on the context in which the LOI is issued. In the context of a construction project, an LOI may be issued when the parties to a construction contract are negotiating contract particulars so that, for example, the employer can induce

the contractor to begin preliminary contract work (e.g., begin site clearance and site preparation, and the ordering of equipment) before the parties execute a final contract.

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**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?**

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Irish statute law does not require specific insurances in relation to construction projects, save for motor vehicle insurance where appropriate. However, construction projects will typically involve some/all of the following insurances:

- (a) insurance of the project works (typically referred to as "All Risks" insurance), taken out by either the contractor or the employer to cover loss or damage to the works and/or project materials;
- (b) employer's liability insurance, taken out by the contractor to cover injury to or the death of its employees during the course of a construction project;
- (c) public liability insurance, taken out by the contractor to cover third-party claims in relation to personal injury, death or injury to third parties and property damage (other than damage to the works); and
- (d) professional indemnity ("PI") insurance, taken out by any party with design responsibility to cover design liability.

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**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?**

---

**(a) General Requirements**

The Construction Contracts Act 2013 (the "CCA") applies to all construction contracts (as defined under the CCA) entered into after 25 July 2016. The CCA applies to oral and written agreements. The CCA:

1. introduces requirements in relation to payment under a construction contract;
2. renders "ineffective" "pay when paid" clauses in construction contracts; and
3. provides for an adjudication regime in relation to payment disputes under construction contracts.

The Building Control (Amendment) Regulations 2014 also introduced a new regime in this jurisdiction aimed at achieving minimum standards in building practice in relation to design and construction methods.

**(b) Labour**

The following principal legislation relating to labour must be taken into account when drafting construction contracts in Ireland; however, there is a large body of broader employment law that will also apply depending on the issue and circumstances:

1. *The Employment Equality Acts 1998 to 2015*: these acts deal with employment discrimination on the grounds of gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of the traveller community. They also regulate issues such as harassment, sexual harassment, discriminatory dismissal, victimisation, access to employment, equal pay and working conditions.

2. *Data Protection Acts 1988 to 2003*: these acts outline obligations regarding the type of data an employer may hold on employees, the background checks that an employer can carry out on potential employees, seeking Garda vetting of potential employees and how long an organisation can retain employee data.
3. *The Minimum Wage Act 2000*: provides for a national minimum wage per hour for an adult employee which is €9.55 per hour. In the construction sector, employers usually pay at a higher rate as a matter of sector-level practice.
4. *Sectoral Employment Order (Construction Sector) 2017 (SI 455) ("SEO CS")*: this came into force on 19 October 2017 pursuant to the Industrial Relations (Amendment) Act 2015. The SEO provides for statutory minimum pay (varying depending on the type and skill of the worker), unsocial hours premiums, pension, death in service benefit and sick pay entitlements for craftsmen, construction operatives and apprentices who are employed in the construction sector.
5. *Sectoral Employment Order (Mechanical Engineering Building Services Contracting Sector) 2018 (SI 59) ("SEO ME")*: this came into force on 6 March 2018 pursuant to the 2015 Act and applies to certain workers in the mechanical engineering building services sector, which will include, but is not limited to, qualified plumbers and pipefitters, and registered apprentice plumbers and pipefitters. The SEO ME is sufficiently wide in scope so that it will also cover those employed through an employment agency. Like the SEO CS, the SEO ME also provides for statutory minimum pay and minimum pension entitlements.
6. *The Industrial Relations Acts 1942 to 2015*: this legislation provides the overall industrial relations framework for resolving industrial disputes in Ireland. It is based on a predominantly voluntarist system, the central feature of which is that an employer cannot be required to recognise a trade union or to negotiate directly with it. The recommendations from the Workplace Relations Commission or the Labour Court are in most cases non-binding; however, in certain circumstances the Labour Court can issue binding orders in relation to terms and conditions.
7. *The Organisation of Working Time Act 1997*: regulates working time, annual leave and public holiday leave. It provides for a maximum working week of 48 hours averaged over a four-month period (or in certain cases longer averaging periods), daily and weekly rest periods, and minimum annual leave entitlements.
8. *The Protected Disclosures Act 2014*: this is the Irish general whistleblower code and allows employees to raise concerns regarding potential health and safety issues at the workplace and failure of the employer to comply with legal obligations, amongst other issues.
9. *The Protection of Employees (Part-Time Work) Act 2001*: in addition to providing protection to part-time employees against less favourable treatment, this legislation implements the EU-posted workers directive, imposing certain minimum mandatory standards under local law to any employees working in the jurisdiction, irrespective of nationality, where they were originally hired or the place of residence. In short, this prevents foreign service providers using foreign labour on more cost-effective terms and conditions to undercut local service providers.
10. *The Protection of Employees (Transfer of Undertakings) Regulations 2003*: the rules ("known as TUPE") provide that where a business or part of a business transfers from one employer to another, any employees attached to that business will be entitled to transfer with it on the same terms and conditions, and with their service recognised in full. Changes or dismissals related to the transfer are not permitted, though redundancies are.

11. *Paternity Leave and Benefits Act 2016*: this allows the “relevant parent” to take a two-week period of leave at any time between the date of birth or the placement of a baby/child (if adopted) and in any event a date not later than 26 weeks after such date. This is protected leave. An employer is not obligated to pay an employee who is on paternity leave, and in any event the employee can claim a paternity benefit for the two-week period, which is on par with similar benefits such as maternity benefit amounting to €230 per week, subject to the employee having made appropriate PRSI contributions.
12. EU legislation such as the Equal Pay Directive, the Equal Treatment Directive and the General Framework Directive must also be considered when drafting construction contracts.

(c) **Tax**

Subject to limited exceptions, workers on a construction project (like all employed/self-employed persons working in Ireland), are generally subject to the payment of income tax, universal social charge (“USC”) and pay-related social insurance (“PRSI”) either through self-assessment as self-employed persons or through the pay-as-you-earn or PAYE system. In the case of employees, the employer needs to correctly operate the PAYE system of withholding tax and be mindful of its obligations and its filing requirements in this regard. In the case of individuals engaged as independent contractors, the contracting entity needs to be entirely satisfied that they are genuine independent contractors from an Irish tax, social security and employment law perspective. The classification of workers as independent contractors rather than employees is a risk area frequently audited by Irish Revenue.

Furthermore, Relevant Contracts Tax (“RCT”) must be operated by a party who falls under the definition of a principal contractor. In order to operate RCT, the principal contractor must register for RCT purposes and through the Revenue Online System (“ROS”) register all relevant contracts under which it has engaged sub-contractors involved in the project and notify Revenue in advance of any payments to be made to the sub-contractors. This system allows the Revenue to require sums of money to be withheld for tax purposes from the sub-contractor each time the principal contractor makes a payment and the withheld amount is required to be paid to the Revenue by the principal contractor. Revenue imposes heavy penalties for those who do not register and fail to operate RCT. The purpose of the system is to ensure that sub-contractors satisfy their tax obligations on time as the withheld amounts may be offset by the Revenue on behalf of the sub-contractor against any tax liabilities they may have. It should also be noted that where RCT applies, it can alter the application of VAT to the relevant contract as well.

(d) **Health and Safety**

The following key pieces of health and safety legislation affect the construction industry in this jurisdiction:

- Safety, Health and Welfare at Work Act 2005.
- Safety, Health and Welfare at Work (Construction) Regulations 2013.
- Safety, Health and Welfare at Work (Asbestos) Regulations 2006 to 2010 and the Safety, Health and Welfare at Work (Carcinogens) (Amendment) Regulations 2015.
- Safety, Health and Welfare at Work (General Application) Regulations 2007 to 2012.

The above regulations set out obligations and duties to ensure a minimum standard of health and safety in the workplace, and specify certain equipment and procedures to minimise risk. Failure to discharge the statutory duties within the legislation can have huge implications ranging from a €3 million fine and/or up to two years’ imprisonment.

The following are some examples of an employer’s obligations in relation to a construction project under Irish health and safety legislation:

1. An employer must satisfy itself that the contractor to be appointed to the project has demonstrated that it is competent to complete the project works.
2. An employer must appoint, in writing, a competent Project Supervisor Design Process (“PSDP”) and a competent Project Supervisor Construction Stage (“PSCS”) to discharge an employer’s obligations related to the respective design and construction of the works.
3. An employer must maintain a safety file in relation to each construction project it undertakes, containing relevant health and safety information.
4. If the duration of a construction project is expected to exceed specified limits (e.g., last longer than thirty (30) working days), an employer must give written notice to the Health & Safety Authority of the particulars of the respective PSDP and PSCS appointments.

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**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?**

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Standard-form construction contracts in this jurisdiction provide for an agreed percentage of the contract sum to be retained by the employer for the purposes of remedying defects. The typical retention amounts are between 3% and 10%. Usually, the contractor will invoice the employer for half of the amount of the contract sum retained upon issue of the certificate of substantial completion. The balance of the retention monies is invoiced upon the issue of the defects certificate/final certificate. In standard-form construction contracts, such as the RIAI and GCCC, the retention money is held in trust by the employer for the contractor.

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**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?**

---

Performance bonds and parent company guarantees are permissible and commonly seen in construction projects in this jurisdiction. They are not mutually exclusive and regularly both kinds of contract security are sought by employers. Performance bonds usually involve an employer, a contractor and an independent third party such as a bank or a financial institution, which guarantees to cover certain losses sustained by the employer due to the non-performance by the contractor. The amount of the bond is usually between 10% and 12.5% of the contract sum. In contrast, a parent company guarantee will come directly from the parent company, where the contractor is a subsidiary of the parent company, and will cover the entirety of the works. Company guarantees are often capped at the contract sum. On-demand bonds are very difficult to obtain in Ireland.

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**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?**

---

Retention of title (“ROT”) clauses are permissible in construction-related contractual agreements in Ireland.

In general, a ROT clause will be effective in reserving title to goods already supplied to an employer so long as the goods exist in the same state in which they were supplied and so long as the goods have not either been mixed with other similar goods, transmuted into a manufactured product or affixed to real property (i.e., land or buildings).

The RIAI form of contract provides that title to goods will pass on payment.

As each ROT clause will be considered and interpreted on its own terms, it is important to note the specific circumstances around each contractual arrangement are important in each individual case.

## 2 Supervising Construction Contracts

**2.1 Is it common for construction contracts to be supervised 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.**

Construction contracts in Ireland are commonly supervised and administered by either an architect/engineer, or another contract administrator (appointed separately by an employer). Examples of circumstances of where such a contract administrator has a duty to act impartially are as follows:

- (a) In the event of dispute: if the contractor is disputing an architect/engineer's decision for, e.g., putting extra expenses on the contractor, then the architect/engineer must decide on the merits of the contractor's claim, and in so doing must act fairly and impartially between the parties.
- (b) Payment and issue of certificates: the architect/engineer must act impartially when deciding how much the contractor is entitled to receive by way of payment. The employer must not interfere with the architect/engineer's role of issuing certificates.
- (c) Extensions of time for completion: the contractor will normally look for an extension when he is delayed due to a cause which he believes entitles him to an extension of time under the contract. In deciding whether the cause of the delay was such as to entitle the contractor to an extension of time, the architect/engineer must act impartially.

**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?**

The Construction Contracts Act 2013 ("CCA"), section 3, renders "ineffective" so-called "pay when paid" clauses except in the limited circumstances provided for under the CCA such as, for example, where a party to a construction contract is in either a bankruptcy or an insolvency process (as appropriate).

**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?**

Liquidated damages are commonly seen in construction contracts. The employer and the contractor are permitted to agree a contractual rate of damages which will cover particular breaches, e.g., damages for late completion. Liquidated damages can be expressed in a single sum but it is more common to specify a daily or weekly rate. The contractual rate of those damages must be a genuine pre-estimate of the employer's loss at the time of entering into the contract. It is invalid and unenforceable if what it stipulates is a penalty. Whether a provision is a penalty will be a matter for the courts to interpret according to the circumstances existing at the time the contract was made. If a court finds that a clause in a contract is a penalty clause, it will not enforce it. In *Durkan Homes v Minister for the Environment Heritage & Local Government* [2012] IEHC 265, it was held that a clause prescribing weekly rates of liquidated damages amounted to a penalty as the accumulated figures far exceeded the value of the property which was affected by the financial crash.

## 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?**

Unless there is an express provision in the contract, variations are not allowed in construction contracts under common law. Clause 13 in the RIAI contract gives the employer the right to order variations through the architect. Most construction contracts in this jurisdiction contain detailed variation provisions. The architect is responsible for valuing the variations and recording them without undue delay. The contractor is then entitled to prompt payment for variations properly authorised and carried out. If a proposed variation is outside the scope of what was anticipated by the contractor and the employer, it may fall outside the scope of the power of the employer 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?**

The employer is not entitled to omit work and have it performed by another contractor, unless there is an express power in the contract. If work is omitted, the contractor would usually have to be compensated on a *quantum meruit* or "as much as he deserves" basis. The contractor would have to provide evidence of the expenses incurred as a result of the omission and may also be awarded compensation for the loss of anticipated profit and for under-productive use of overheads as a result of reduced workload.

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

In addition to the express terms of a construction contract, there may be other terms, known as "implied terms", which form part of the

contract also. Implied terms may come from one or more sources, including: custom; Judges' decisions; and statute law. There are numerous statutes which affect terms in construction contracts, in particular, the Sale of Goods and Supply of Services Acts 1893–1980, Construction Contracts Act 2013, consumer legislation and employment legislation. Some terms which can be implied into construction contracts include an implied fitness for purpose warranty, duty to exercise reasonable skill and care, a warranty that materials supplied will be of good and proper quality and an obligation to carry out work in a good and workmanlike manner.

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**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?**

---

Concurrency describes an effect caused by at least two events occurring at the same time, of which one is at the contractor's risk and one is at the employer's risk. In the construction contract context, concurrency is often used by the employer as a defence to a claim for compensation. A claim for compensation based on concurrent delay in Ireland will most likely be determined, at least at first, by reference to the express extension of time clause in the construction contract (if any).

The dominant approach to the issue of concurrent delay in England and Wales is that the contractor is entitled to a full extension of time caused by the two or more events, regardless of the contractor's own fault. This approach was set out in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* [1999] 70 Con LR 32 (“**Malmaison**”) where it was common ground between the parties that:

*“...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.”*

The approach in *Malmaison* was approved of more recently in the case of *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) (“**Adyard**”). There, the alternative approach that, in such circumstances, the contractor is entitled only to a reasonably apportioned extension of time (as set out in the Scottish case of *City Inn Limited v Shepherd Construction Limited* [2010] BLR 473 (“**City Inn**”)) was discussed. In *Adyard*, however, Mr. Justice Akenhead confirmed that the *Malmaison* approach was the correct approach to take in English law jurisdictions. The Irish courts are certainly likely to have regard to this decision.

The general rule in relation to recovery of costs, set out in *De Beers v MTDS Origin IT Services UK* (2011) BCR 274, is that in the event of concurrent delay the contractor will normally be entitled to an extension of time but not entitled to recover costs. This was affirmed in *Walter Lilly & Co Ltd v Mackay & Anor* [2012] EWHC 1772 (TCC).

The public works contracts published by the Government Contracts Committee for Construction (“**GCCC**”) for use in all public sector construction projects expressly provide that in the event of concurrent delay, the contractor will not be entitled to claim for any costs.

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**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?**

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In a construction context, the term float is generally used to refer to the unallocated time between the finish of the last planned activity under a construction contract and the date for completion. At common law, neither the contractor nor the employer “own” the float in the absence of express agreement to the contrary. In practice, the question “who ‘owns’ the float?” tends to be decided by examining whether or not the contractor has allowed more time in its programme for the series of contract activities that is longer than these series of activities will, in fact, take to complete. If the contractor has done so and if the employer wishes to take advantage of this unallocated time (i.e., to propose a change/variation that absorbs the float), the question “who ‘owns’ the float?” becomes an examination of whether the employer is entitled to make use of the float at no cost. Conversely, the float can also be looked at as a consequence – i.e., insofar as a delay to the contract programme causes disruption to the contractor, and consequential loss and/or expense result in the “float” being absorbed, can the contractor claim an entitlement to an extension of time and/or compensation for the consequential loss/expense it actually suffers as a result of this delay/disruption?

The argument in favour of the employer “owning” the float is, at a high level, that the employer has paid for the contractor's programme as the employer has agreed to pay the contractor's cost of programming the works and the contractor's costs during the duration of the contract period and, therefore, the employer has contracted to buy the float and so can use it as it wishes. Conversely, the argument in favour of the contractor “owning” the float is premised on the fact that the contractor's costs and profit for a project are influenced by the efficiency with which its resources are applied and the duration over which they are planned to be executed.

Irish law on who “owns” the float is not clear where a construction contract does not expressly provide for “ownership” of the float. Frequently, construction contracts in this jurisdiction do not specifically deal with ownership of the float.

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**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?**

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Generally, the time limits for bringing a claim under a construction contract are governed by the Statute of Limitations Act 1957 (the “Act”) (save to the extent that a construction contract specifically provides otherwise). If the contract is signed by hand, the parties have six years to bring the claim from the date of accrual of the action, and if the contract is a deed, the parties have 12 years. If the parties are bringing a claim in tort, they have six years from the date on which the incident occurred. Recent case law in Ireland has discussed the issue of when the cause of action accrues. In *Brandley v Deane* [2017] (SC, Unreported), Mr Justice McKechnie set out that the limitation period runs from when the damage (not the defect) becomes “manifest” – i.e., capable of being discovered by a plaintiff. This decision affirms the judicial approach whereby defective work and resultant damages are distinguished in determining limitation periods.

### 3.7 Who normally bears the risk of unforeseen ground conditions?

Normally, the unforeseen ground conditions risk lies with the contractor; however, it is important when negotiating a construction contract to ensure that risks are placed with the party who is best able to manage them.

The RIAI form of contract does not include a clause on unforeseen ground conditions. It is not unusual for the parties to provide a clause in a schedule of amendments to the RIAI, which would allow the contractor an extension of time if particular unforeseeable events occur, such as the presence of archaeological remains or discovery of utilities. However, if the contract is silent, the risk will pass entirely onto the contractor.

Like the RIAI, the JCT does not generally provide for unforeseen ground conditions.

In the GCCC form of Civil Engineering Contract used for Public Works, there is an option for an employer to take some risk regarding the unforeseen ground conditions.

Under FIDIC's red and yellow books, the employer bears the risk of physical conditions which could not have been reasonably foreseeable by an experienced contractor at the date of tender (clause 4.12).

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

The contractor is responsible for completing the works in accordance with the local law and regulations and carries the risk in the contract arising from a change in law, including in relation to the contract price. If the contractor does not want to carry the risk, he must ensure that provisions are expressly incorporated into the contract to deal with this event.

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

Under a construction contract, the parties have two alternatives. The copyright and ownership of the design can either remain with the contractor, who grants a licence to the employer to use the design documents for the works, or the copyright material can be assigned to the employer upon execution of the contract. The copyright design should not be transferred lightly and rarely is.

### 3.10 Is the contractor ever entitled to suspend works?

Most standard forms of construction contracts in this jurisdiction allow the contractor to suspend works if payment is not made. In addition, the Construction Contracts Act 2013 (the "CCA") introduced a statutory right on the part of a contractor/sub-contractor to suspend works under a construction contract for non-payment. Significantly, if works are suspended in compliance with the CCA and this suspension affects a contractor's/sub-contractor's ability to comply with the works programme, the CCA provides the suspension's duration is to be disregarded when calculating the contractual time limit to the works programme.

### 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?

There are a number of non-contractual rights to terminate a construction contract. The parties can terminate a contract if there are circumstances beyond the parties' control making the performance of the contract impossible (frustration). A contract can also be terminated if a serious or repudiatory breach occurs. However, most of the standard-form construction contracts do not depend on common law for termination purposes and contain termination rights for parties. The parties usually set a list of events, such as breach, *force majeure*, insolvency or non-payment, under which the contract may be terminated. Termination for convenience wording can be inserted into a contract which allows one party to end the contract without having to establish that some event has occurred, but such clauses are difficult to negotiate.

### 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* clauses exist to exclude liability where exceptional, unforeseen events beyond a party's control prevent the performance of its contractual obligations. *Force majeure* events within a construction contract generally include acts of God, earthquake, fire, flood or other natural physical disasters, acts of war and riot. As there is no doctrine of *force majeure* in Irish law, it is at the contractual parties' discretion whether they wish to rely upon *force majeure* and can do so by including a provision in their contract.

*Force majeure* may result in an automatic termination of the contract or by a party giving notice of the termination. However, the relevant event must have an adverse impact upon performance of the contracting party and cannot be used as an excuse to end the contract.

Frustration takes place only after a contract has been entered into, and means that the contract ceases to have effect from a particular date onwards. As such, it discharges an otherwise valid contract. In *Neville and Sons v Guardian Builders* [1995] the Supreme Court said that frustration arises whereby a supervening event occurs without the default of either party, and for which the contract makes no provision. The event must so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated, so as to make holding them to its stipulations unjust.

It is important to note that frustration is forward-facing. It will not discharge existing rights and obligations, but will discharge future obligations under the contract in question.

### 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?

Parties are unable to avail of a benefit of any contractual right if they are not party to the contract. This is due to the doctrine of privity in this jurisdiction which prevents a contract from being enforceable

in favour of or indeed against someone who is not a party to that contract. In order for a third party to receive a benefit, the claimed benefit must be independent or collateral to the main contract. This is typically done through collateral warranties with third parties (e.g., tenants, purchasers, funders).

### 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?

Set-off as a remedy has a legislative basis within section 6 (12) of the Construction Contracts Act 2013 stating that a decision by an adjudicator regarding payment disputes shall be binding, unless otherwise agreed by the parties and can be relied by any of them by way of defence, set-off or otherwise in any legal proceedings. The general position under building contracts is that set-off against certified sums will be allowed provided there are no special provisions in the contract which prevent or restrict this practice. In the case of *Mooahan and Another v S & R Motors Limited* [2007] IEHC 435, Clarke J. concluded that set-off was available.

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

The parties will normally owe a duty of care in both tort and contract. So, for example, builders of a house will have a duty in tort to take “reasonable care” to avoid reasonably foreseeable latent defects. A concurrent duty in contract will be owed by the builder arising out of their contractual obligation to act with skill and care.

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

The leading interpretation case in the United Kingdom is *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896. The Irish Supreme Court reaffirmed the Investors Compensation principles in the recent case of *McMullan Brothers Limited v Mc Donagh* [2015] IESC 19.

Lord Hoffmann in the Investors Compensation lists his five principles in how to deal with ambiguity within the contract:

- (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.*”

Within his second principle, he expands on his previous principle:

- (2) “*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.*”

He stresses in his third principle that when attempting to understand the context to the agreement, this process should not evolve into an impermissible investigation of the subjective intentions of the parties in entering into the agreement:

- (3) “*The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.*”

Lord Hoffmann in his next principle acknowledges that within a complicated background, understanding the intention can have minimum value in understanding the meaning of the document:

- (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 grammars; 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 meanings 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.*”

Lord Hoffman concludes with his fifth principle on how ambiguity within a construction contract should be interpreted:

- (5) “*The ‘rule’ that words should be given their ‘natural and ordinary meaning’.*”

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

Terms of a construction contract which can be deemed unenforceable are:

- a) liquidated damage provisions (where the damages specified are not a genuine pre-estimate of loss but instead viewed as a penalty);
- b) a clause which creates an indemnity against criminal liability;
- c) a Construction Contracts Act 2013 renders ineffective “pay when paid” provisions; and
- d) a clause seeking to circumvent the application of the Construction Contracts Act 2013 will render the clause unenforceable according to section 12(2) of the Act.

### 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 has obligations which are implied into the contract. The Sale of Goods and Supply of Services Act 1980 imply a number of terms which have an impact on the extent of a designer’s liability. These include that the designer has the necessary skill to render the service and that the services will be supplied with due skill, care and diligence. It must be noted that these implied terms can be negated through the use of express terms within the contract. A designer will not usually have to give an absolute guarantee of their work.

In design and build contracts, a contractor can assume responsibility that works are fit for purpose unless otherwise explicitly stated in the contract. Yet a consultant is held to a less onerous standard of “reasonable skill and care”, meaning that the contractor assumes greater liability than those to whom they have subcontracted.

## 4 Dispute Resolution

### 4.1 How are disputes generally resolved?

Mediation, conciliation, arbitration and litigation are the most common methods of construction dispute resolution in this jurisdiction. Contractual adjudication and expert determination are also used. The Construction Contracts Act 2013 provides for statutory adjudication of payment disputes arising under construction contracts entered into after 25 July 2016.

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

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The Construction Contracts Act 2013 provides that a party to a construction contract has the right to refer a payment dispute arising under the contract for adjudication. To exercise this right, the party must serve a notice of intention to refer the payment dispute for adjudication. The parties may then agree to appoint an adjudicator within five days. If the parties are unable to reach agreement within that time, an application may be made for the appointment of an adjudicator from the panel established by the Minister for Business, Enterprise and Innovation.

Once the adjudicator is appointed, the party who initiated the adjudication must refer the payment dispute to the adjudicator within seven days beginning with the day on which the appointment is made. The adjudicator must reach a decision within 28 days from the date of the referral (or such longer period as may be agreed by the parties). With the consent of the referring party, the adjudicator may extend this 28-day period by a maximum of 14 days.

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

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

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Arbitration clauses are often included in construction contracts. The Arbitration Act 2010 applies to all arbitrations commenced after 9 June 2010 and the UNCITRAL Model Law has the force of law in Ireland (subject to the Arbitration Act). The Irish courts are very supportive of arbitration.

While court challenges to an award are possible, the grounds for challenges are very limited.

The parties can agree on the identity of the arbitrator or on a number of arbitrators to form a tribunal. Construction contracts generally provide for a default appointing mechanism, which typically involves an application by either party to the president of a named professional body (for example, Engineers Ireland) requesting that he or she appoint an arbitrator.

Article 19 of the Model Law confirms that the parties are entitled to set their own procedures. If no rules are chosen, and the parties cannot subsequently agree upon how the procedure is to be conducted, then the tribunal can set the procedures.

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**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.**

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Ireland is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has the force of law in Ireland (subject to the Arbitration Act 2010).

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. Enforcement is not generally problematic, unless there is reason to deny enforcement (the grounds for which are set out at Article 36 of the Model Law).

In a leading case, the High Court held that the Irish courts would not exercise jurisdiction over an application for the enforcement of an arbitral award where the party against whom enforcement was

sought had no assets in Ireland and no real likelihood of having assets in Ireland (*Yukos Capital S.A.R.L. v Oao Tomskneft Vnk Otkrytoye Aktsioneroye Obshchestvo "Tomskneft" Vostochnaya Neftyanaya Kompania* [2014] IEHC 115, in which one of the authors acted for the successful respondent).

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**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?**

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In relation to court judgments given in EU Member States, Regulation (EU) No 1215/2012 (the "Recast Brussels Regulation") applies. The Recast Brussels Regulation applies to proceedings and judgments in proceedings commenced on/after 10 January 2015. The 2001 Brussels Regulation (Regulation (EC) 44/2001) continues to apply to judgments in proceedings commenced before 10 January 2015.

The Recast Brussels Regulation provides that a judgment given in a Member State shall be recognised in the other Member States without any special procedures being required and is enforceable in other Member States without any declaration of enforceability being required.

Enforcement of judgments from Iceland, Norway and Switzerland is governed by the Lugano Convention.

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004, which provides for European Enforcement Orders for uncontested claims, applies to uncontested claims in civil and commercial matters.

Where foreign states are not Member States of the EU or contracting parties to the Lugano Convention, the recognition and enforcement of judgments from such jurisdictions is governed by the common law rules of private international law. To enforce a judgment from a foreign court at common law in Ireland, proceedings must be commenced before the Irish courts by either commencing an action on the foreign judgment or commencing fresh proceedings on the original cause of action.

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**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.**

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A court action is commenced by issuing proceedings (usually by way of a summons) in the appropriate court. The appropriate court jurisdiction for the proceedings will depend on the value of the claim. In civil actions in contract, the District Court has jurisdiction to award damages not exceeding €15,000. The Circuit Court has jurisdiction to award damages not exceeding €75,000. The High Court has original jurisdiction to hear virtually all matters and will generally hear matters that exceed the monetary jurisdiction of the Circuit Court.

Decisions of the lower courts can generally be appealed to higher courts, or questions regarding a point of law can be referred to higher courts.

Decisions of the High Court may generally be appealed to the Court of Appeal. The Court of Appeal was established in 2014. A decision of the Court of Appeal may only be appealed to the Supreme Court if:

- the decision involves a matter of general public importance; or
- in the interests of justice, it is necessary that there be an appeal to the Supreme Court.

A “leapfrog” appeal may be made directly from the High Court to the Supreme Court if the case involves a matter of general public importance or:

- there is some other reason requiring that the interests of justice is met by an appeal to the Supreme Court; and
- there must be exceptional circumstances warranting a direct appeal to the Supreme Court.

Once proceedings are issued, the parties will exchange documents setting out their respective claims and/or defences. The parties may also be required to disclose relevant documents to each other. This process is known as discovery. The parties may also exchange witness statements and expert reports in advance of the hearing. Oral evidence will usually be given by relevant factual witnesses and expert witnesses at the hearing of the case.

The length of time it may take to obtain a decision of the court of first jurisdiction will depend on the appropriate court jurisdiction, as well as a number of other factors. It may take many months or even years to obtain a decision of the court of first jurisdiction.

However, if the case is suitable for admission to the commercial division of the High Court (the “Commercial Court”), this timeline may be reduced. The Commercial Court has extensive case management powers and can deal with significant commercial disputes more quickly than the ordinary courts. To be admitted to the Commercial Court, the proceedings must be “commercial proceedings” (for example, a dispute relating to a business document, business contract or business dispute) and, in general, must have a value of over €1 million. Whether a case will be admitted to the Commercial Court is a matter for the discretion of the Commercial Court judge.

The length of time it may take to obtain a decision of the final court of appeal will depend on the complexity of the matter, the jurisdiction of the appeal court, as well as other factors. Currently, the Court of Appeal has a backlog of appeals, with appeals in that court taking over a year to be heard.



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Rhona Henry is a partner and head of Matheson's Construction and Engineering Group.

Rhona Henry is distinguished by her industry knowledge and extensive market experience which includes advising on the build-out of capital projects; construction/project finance; public-private partnership construction and construction regulation.

Her experience in the area of construction/project contracts encompasses the entire life cycle of strategic commercial arrangements including:

- Major international construction projects including pharmaceutical plants, infrastructure projects, utilities, data centres, power and process plants, corporate headquarters and commercial offices.
- Bespoke project agreements/construction contracts (including the RIAI, FIDIC, MF /1 (Revision 4 and 5), NEC and JCT contracts).
- EPC contracts.
- Professional/design team terms of engagement.
- Project/construction contract security including bonds, warranties and guarantees.
- Procurement strategy route (design and build, management contracting, construction management, EPC).
- Project/construction health and safety issues/project supervisor appointments.
- Collateral warranties/direct agreements.
- Facilities management/services agreements.
- Interface agreements.

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