

Construction 2022

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Construction

2022

Contributing editors**Robert S Peckar and Michael S Zicherman****Peckar & Abramson PC**

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Construction*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Iraq and Turkey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman of Peckar & Abramson PC, for their continued assistance with this volume.



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LOCAL MARKET

Foreign pursuit of the local market

- 1 | If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

In Ireland, there is a mandatory system of certification of building construction, which was introduced by the Building Control (Amendment) Regulations 2014 (BCAR). This system is intended to provide a level of assurance that a building is built in accordance with the Building Regulations 1997 – 2019 (the Building Regulations). There are a number of certificates that may be required in relation to any part or installation in a building, including a Certificate of Compliance on Completion confirming the building works comply with the Building Regulations.

If BCAR applies to a project, a commencement notice (ie, a notification to a Building Control Authority) that a person intends to carry out works will have to be issued no fewer than 14 days and no more than 28 days prior to works commencing on site.

In addition, there are numerous categories of developments listed in the Building Regulations that will require a fire safety certificate and a disability access certificate, and these include works in connection with the design and construction of a new building.

Under the Safety, Health and Welfare at Work (Construction) Regulations 2013, contractors are also subject to strict health and safety requirements. This includes the appointment of statutory roles of project supervisor for the design process and project supervisor for the construction stage. Further, contractors must keep a safety file and send notification to the Health and Safety Authority where necessary.

On 31 May 2017, the government published the General Scheme of the Building Control (Construction Industry Register Ireland) Bill 2017. The Construction Industry Register (CIRI) was established and is currently maintained by the Construction Industry Federation as a voluntary register of builders and contractors. However, the government has announced its intention to put the register on a statutory footing, with a view to ensuring that builders and contractors have and maintain a level of competence in their area of operation. Builders will be prohibited from carrying out works, or representing that they are entitled to carry out works, unless registered with the CIRI.

The regime applies to any builder carrying out building works that are subject to the Building Control Acts and the Building Control Regulations. However, electrical works carried out by a registered electrician, gas works carried out by a registered gas installer, employees of public bodies carrying out public works and works undertaken by an employee of an approved housing association on a building in its control fall outside the scope of the new bill.

In terms of progress, the Minister for Housing, Local Government and Heritage confirmed on 20 January 2021 that the government are

planning to move forward with the legislation however no time period has been provided for when it is expected to be approved by the government and enacted.

REGULATION AND COMPLIANCE

Licensing procedures

- 2 | Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

Construction workers do not require a licence to work locally in Ireland. However, certain types of consultants and designers, such as architects and quantity surveyors, will need to be registered with the appropriate body (eg, in the case of architects, with the Royal Institute of the Architects of Ireland).

Similarly, tradesmen involved in heating or electrical installation may require registration with the relevant trade organisations (eg, the Registered Electrical Contractors of Ireland).

In addition, if consultants or designers are involved in the auction of property, the purchase or sale of land, the letting of land or property management services (where residential units are included), then the contractor will require a licence under the Property Services (Regulation) Act 2011.

When enacted, the government's aim is for the Construction Industry Register to be the primary resource used by consumers in the public and private procurement of construction services and, therefore, registration is likely to become mandatory.

Competition

- 3 | Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

No, Irish laws do not afford any competitive advantage to domestic contractors.

Competition protections

- 4 | What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

Irish law includes rules on public procurement and competition that require public contracts to be subject to open competitions in which bidders must act independently. The relevant Irish laws are closely based on the provisions of article 101 of the Treaty on the Functioning of the European Union and the 2014 Public Sector and Remedies Procurement Directives.

Bribery

5 | If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

The principal statutory source of bribery law is the Criminal Justice (Corruption Offences) Act 2018 (the Corruption Offences Act). This legislation, which was commenced on 30 July 2018, repealed the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 – 2010, and modernised and consolidated the law in this area. Under the Corruption Offences Act, it is an offence for any person to corruptly give to, or accept from a person, a 'gift, consideration or advantage' as an inducement to, reward for or on account of any person doing an act in relation to his or her office, employment, position or business. It is also an offence for any person to corruptly give or accept a 'gift, consideration or advantage' to induce another person to exert improper influence over an act of an official in relation to that official's office, employment, position or business. Similarly, it is an offence for an Irish official to do any act or use any confidential information in relation to his or her office to corruptly obtain a 'gift, consideration or advantage'. Under the Corruption Offences Act, 'corruptly' is defined widely and includes acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information or by other means.

A person guilty of an offence under the Corruption Offences Act is liable on summary conviction to a fine of up to €5,000, imprisonment for a term not exceeding 12 months or an order for the forfeiture of property, or both. A person convicted on indictment is liable to an unlimited fine, imprisonment of up to 10 years or an order for the forfeiture of property, or both. In the case of a public official, a court may order that he or she be removed from his or her position as a public officer. The court can also prohibit those convicted of corruption offences from seeking public appointment for up to 10 years.

If a contractor has illegally obtained the award of a contract through bribery, it will be a matter for the courts to determine if the contract is enforceable. To date, a small amount of domestic bribery law enforcement has taken place and this has focused on bribery of Irish public officials.

There is no distinction drawn in Irish law between facilitation payments and other types of corrupt payments. As such, a facilitation payment will be illegal if it has the elements of the offences described in this question.

Reporting bribery

6 | Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

Section 19 of the Criminal Justice Act 2011 (the 2011 Act) introduced a general obligation to report to the Irish police information that a person or company knows or believes might be of material assistance in preventing the commission of a corruption offence or securing the arrest, prosecution or conviction of another person for a corruption offence.

The 2011 Act makes it an offence for a person to fail without reasonable excuse to disclose information as required by section 19. An individual guilty of this offence is liable on summary conviction to a fine of up to €5,000, a term of imprisonment not exceeding 12 months or both. On indictment, an individual may be liable to an unlimited fine, imprisonment for up to five years or both.

Under the Protected Disclosures Act 2014, any employee who makes a disclosure to the Irish police regarding a suspected offence is protected from dismissal and penalisation by their employer.

Political contributions

7 | Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

Persons are free to make political donations in Ireland subject only to the restrictions set out in the Electoral Acts 1997 – 2012 (the Electoral Acts) and guidelines published by the Standards in Public Office Commission (the Guidelines).

The Electoral Acts and the Guidelines provide that a political party cannot accept a donation from a person (which includes an individual or a body corporate) exceeding €100 without knowing the name and address of that person. If a person makes donations exceeding €600 in any one year they must disclose this information to the Public Offices Commission in a 'donation statement'.

Irish law does not expressly prohibit the ability of corporations to contract with public bodies because of their support for political candidates or parties. However, the Electoral Acts and the Guidelines provide that corporate bodies making donations over €200 must disclose this in their annual return and, further, they must be entered on the Register of Corporate Donors maintained by the Standards in Public Office Commission. Therefore, public bodies contracting with contractors making political donations will be aware of those donations.

Compliance

8 | Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

In Ireland, unlike in other jurisdictions, there is no distinction in legislation between corrupt acts or omissions of private persons and corrupt acts or omissions of persons employed by or acting on behalf of the public administration of the state. However, there is a presumption of corruption in certain instances that only applies to public officials. These include where:

- a payment was made by a person, or agent of a person, who is seeking to obtain a contract from a government minister or a public body;
- an undisclosed political donation above a certain threshold is made to certain specified persons and the donor had an interest in the donee carrying out or refraining from doing any act related to the office or position; or
- a public official is suspected of committing an offence under the Corruption Offences Act and the person who gave the gift or advantage had an interest in the public official carrying out a function relating to his or her position as a public official. Therefore, the compliance obligations of construction professionals who are employed by or are acting on behalf of the state are no different than if they were employed by or acting for private entities.

Other international legal considerations

9 | Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

Contractors should also be aware of the tax implications in the local market. Where a trade is being carried on in Ireland by a contractor through a branch or agency, a contractor (as a non-resident company)

will fall within the scope of Irish corporation tax, which is 12.5 per cent. Contractors also need to consider the taxes they will pay on behalf of their employees.

Where contractors from another EU member state send employees to work in Ireland for a limited period, those employees will be entitled to certain minimum terms and conditions of employment under the European Union (Posting of Workers) Regulations 2016 (as amended). In order to monitor compliance with such requirements, the Regulations will require such contractors to furnish certain information to the Workplace Relations Commission no later than the date on which the work begins.

There may also be immigration law considerations where the foreign contractor employees are not nationals of a country within the European Economic Area (ie, the member states of the European Union, Iceland, Norway and Liechtenstein), Switzerland or the United Kingdom as such individuals require an employment permit to work in Ireland (subject to certain limited exceptions).

CONTRACTS AND INSURANCE

Construction contracts

10 | What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

The most commonly used standard-form construction contracts are as follows:

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

These conditions of contract are, particularly with respect to larger projects, usually heavily amended through a schedule of amendments to reflect risk profiles currently acceptable in the market and to reflect 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 markets – there are a number of other types of contracts that are commonly used. For example:

- the International Federation of Consulting Engineers 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 contract;
- management contracts (which, in Ireland, are typically based on the RIAI form);
- the Institution of Engineering and Technology MF/1 form;
- New Engineering Contract forms; and
- Joint Contracts Tribunal forms.

For public sector works, the Government Construction Contracts Committee (GCCC) has produced a suite of standard documents (including build-only and design-and-build (for both building works and civil engineering works) contracts, a site investigation contract, a framework agreement, a minor works contract, a short-form contract and a contract for early collaboration) for use in public-sector construction procurement.

The most commonly used design-only contracts in Ireland are those contracts that are produced by the regulatory bodies for disciplines such as mechanical and electrical consultancy, civil engineering

and architecture, together with bespoke forms. When used, especially 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 public-sector projects.

The language used for standard form construction contracts is English. The choice of law is typically Irish law and the venue for dispute resolution is typically Ireland.

A new private sector contract, for use in relation to medium to large scale construction projects and for projects which have been designed by the employer, has recently been introduced in the market. This private sector contract is in its infancy and so untested to date.

Payment methods

11 | How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

The Construction Contracts Act 2013 expressly states that a construction contract (as defined under the Act) should provide for a payment claim date (or an adequate mechanism for determining a payment claim date) for each amount due under the construction contract, and the period between the payment claim date for each amount, and the date on which the amount is due.

Contractors and subcontractors are generally paid monthly and typically by electronic payment. They are usually paid based on the progress of the works. Designers and contractors can be paid monthly or based on the achievement of agreed milestones.

Contractual matrix of international projects

12 | What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Projects are typically procured on a build-only or design-and-build model.

In the build-only model, the design and construction elements of the project are separated. In this scenario, the owner engages the contractor to carry out the construction and separately appoints design consultants, who will feed design instructions to the contractor.

In a design-and-build scenario, the construction and design elements are combined so that the owner has a single contract with the main contractor, who then appoints design consultants and sub-consultants.

In both scenarios, if it is a large project the contractor will usually engage subcontractors to carry out works packages (such as water-proofing or lifts).

For more complicated builds or projects that are very time-sensitive management contracting, construction management, mechanical and electrical and turnkey or engineer, procure and construction (EPC) forms of construction contracts can be used. The key feature of an EPC or turnkey contract is that there is a relatively onerous risk transfer to the contractor of price, time and quality.

PPP and PFI

13 | Is there a formal statutory and regulatory framework for PPP and PFI contracts?

The State Authorities (Public Private Partnership Arrangements) Act 2002 provides the legislative basis for PPPs in Ireland. The use of PPPs is subject to an institutional framework and various guidelines, both at national and at EU level. The National Development Finance Agency (NDFA) and the Department of Public Expenditure and Reform's Central Unit both play key roles in the PPP process in Ireland. The Central

Unit provides guidance (such as the December 2019 Guidelines for the use of PPPs) and the policy and legislative frameworks underpinning PPPs. The NDFA acts as financial adviser to the state in respect of all public investment projects valued at over €20 million and procures and delivers PPPs in many sectors (excluding, for example, transport and local authorities).

In 2006, the NDFA developed a template PPP Project Agreement (based largely on the UK PFI model), which includes guidance (eg, on risk allocation). The use of this template, the latest version of which was published in May 2007, is not mandatory for Irish PPP projects. However, most Irish PPP project agreements broadly follow the structure and principles set out in the NDFA template (customised to reflect the nature of the project at hand). To be classified as a PPP contract, a contract must be for a minimum of five years, and there is no upper limit. Generally, PPP contracts tend to be for long periods (25+ years).

Joint ventures

14 Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

The liability in a joint venture scenario will depend on the corporate structure used. Entities entering into joint ventures can choose from a number of structures.

If the joint venture is structured as a company limited by shares or a designated activity company, the liability of members is limited to the amount, if any, unpaid on the shares they hold. If the joint venture is structured as a general partnership, each partner may be jointly or jointly and severally liable for the debts and obligations of the partnership and jointly and severally liable for the wrongful acts and omissions of their co-partners.

Entities could also protect their investment in a joint venture by setting up an Irish Collective Asset-management Vehicle (ICAV). This form of investment vehicle was created under the Irish Collective Asset-management Vehicles Act 2015. While it is a corporate vehicle (and so the liability of members is limited to the amount, if any, unpaid on the shares they hold), an ICAV does not have normal company status and is not subject to certain requirements such as holding annual general meetings. An ICAV can be established as an umbrella structure with segregated liability between sub-funds, protecting the investment within each sub-fund.

In our experience, joint venture partners may also choose to use an 'unincorporated' joint venture structure, whereby the joint venture partner entities execute the relevant project documentation and enter into a separate joint venture or consortium agreement to apportion liability and responsibility (which is typically dealt with in a shareholders' agreement in an 'incorporated' joint venture).

Tort claims and indemnity

15 Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

Parties are generally free to contract in whatever way they choose, including excluding liability for negligence. However, clauses that seek to exclude liability (exclusion clauses) are interpreted strictly by the courts. This is by virtue of the contra proferentem rule that applies in this jurisdiction, which states that any ambiguity in the meaning of an exclusion clause will be interpreted against the drafter of the contract. Therefore, exclusion clauses must be carefully drafted. Parties should expressly use the term 'negligence' as distinct from other forms of liability.

Liability to third parties

16 Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

Unlike the regulatory and legal regimes in the United Kingdom and the United States, parties are unable to avail of a benefit of any contractual right if they are not a party to the contract. This is because of 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 (eg, tenants, purchasers or funders).

Insurance

17 To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

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 or all of the following insurances:

- 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 or project materials;
- 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;
- 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
- professional indemnity insurance, taken out by any party with design responsibility to cover design liability.

Environmental liability can also be dealt with by insurance products in this jurisdiction. A contractor's liability for damages is a matter for commercial negotiation between the parties involved, but note that for liquidated damages for delay to be enforceable they must represent a genuine pre-estimate of the loss (and not be a penalty). The law does not limit contractors' liability for damages.

More recently, the ability for parties to obtain cover for professional indemnity insurance at the required levels has become very difficult.

LABOUR AND CLOSURE OF OPERATIONS

Labour requirements

18 Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There are no specific local laws that require a minimum amount of local labour to be employed on a particular construction project and this would indeed be in breach of nationality discrimination rules.

However, it would not be unusual to see a requirement to hire only local union members (irrespective of their nationality), depending on the level of trade union representation.

On a general level, non-EEA nationals (excluding nationals of Switzerland and the United Kingdom) require an employment permit to

work in Ireland (subject to certain limited exceptions). The Department of Enterprise, Trade and Employment's policy is to promote the employment of Irish and EEA nationals before offering those jobs to non-EEA nationals. Certain categories of construction and building trades are ineligible for employment permits.

Local labour law

19 | If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

In terms of legal obligations, there are no significant ongoing legal obligations an employer will owe to an employee once the employee's contract of employment has been terminated. Under common law, the employer's duty of confidentiality and good faith will apply post-termination to certain matters. For example, any reference provided by an employer must not contain any false information that would cause harm to the employee. The employer may also have data protection obligations to the employee post-termination (eg, with regard to the retention of records).

Labour and human rights

20 | What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

The same laws apply to the treatment of foreign construction workers as apply to local workers, and they have similar rights to local workers. Foreign workers cannot be treated less favourably compared to local workers on the grounds of nationality (race, colour or ethnic origin) under the Employment Equality Acts 1998 – 2015.

Posted workers (ie, employees who normally work in one EU member state that are sent to work in another member state for a limited period) are entitled to certain minimum terms and conditions of employment when they are sent to work in Ireland under the European Union (Posting of Workers) Regulations 2016 (as amended) (the Irish Regulations). In order to monitor compliance with such requirements, the Irish Regulations require service providers posting workers to Ireland from within the EU to furnish certain information to the Workplace Relations Commission (WRC) no later than the date on which the work begins. Failure to comply with the disclosure requirements can give rise to the imposition of a fine of up to €50,000. Directors, managers or other similar officers of a body corporate may also be personally liable where the offence can be attributed to that person.

The Irish Regulations provide for the creation of joint and several liability of the contractor and subcontractor in respect of unpaid wages due to a posted worker in certain circumstances.

A failure to follow such laws may give rise to a claim by the worker under the relevant piece of employment legislation. In addition, if a contractor is the subject of a WRC inspection, this may lead to a fine or prosecution.

Close of operations

21 | If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

If the foreign contractor is still under contractual obligations, there may be payments upon termination of the contract. Termination payments vary from contract to contract but they usually include covering the costs of engaging a replacement contractor to finish the works and for any delay.

Even after a contractor has performed its services, it may still be liable to owners for any defects in the works for six to 12 years after practical completion of the works. The length of time that the contractor will be liable will depend on the contract. Simple contracts contain a default liability period of six years, while deeds have a liability period of 12 years. However, parties are free to contract out of or extend such liability periods.

In addition, the foreign contractor will have obligations to its employees and will need to terminate their employment in accordance with employment legislation in Ireland and pay employees in respect of any contractual and statutory entitlements they have on termination of their employment (eg, statutory redundancy payment).

PAYMENT

Payment rights

22 | How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

Liens over real estate are not possible. In the case of insolvency, contractors may attempt to place a lien over goods or materials delivered to the site until payment is received. Contractors may also attempt to satisfy their debts through retention of title clauses. For this reason, from an employer's perspective, it is important to ensure that contractors who have not been paid vacate the site promptly and the site is secured against trespass.

Contractors are afforded some statutory protection against the risk of non-payment by section 6 of the Construction Contracts Act 2013 (CCA), which states that payment disputes should be settled by the decision of an adjudicator, which is final and binding in certain circumstances. The appointment of an adjudicator will be either agreed by the parties or appointed by the Minister for Public Expenditure and Reform. The adjudicator's decision is only binding:

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

Unless otherwise agreed by the parties, it will be treated as binding on them for all purposes and may be relied on by way of defence, set-off or otherwise in any legal proceedings.

The CCA also provides contractors with the right to suspend works in the event of non-payment.

In some circumstances, a contractor may request a guarantee from the parent company of an owner, guaranteeing the fees that the owner has committed to pay.

'Pay if paid' and 'pay when paid'

23 | Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

Section 3 of the CCA renders ineffective 'pay when paid' clauses except in limited circumstances, such as where a party to a construction contract is in either a bankruptcy or an insolvency process (as appropriate).

Contracting with government entities

24 | Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

Sovereign immunity is implemented into the Constitution by virtue of article 29.3, which provides that:

Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states.

However, sovereign immunity does not apply in respect of commercial or trading activities that would be associated with a contractor seeking payment as addressed in the query.

In *Byrne v Ireland* [1972 IR 241], the Supreme Court allowed an appeal from a plaintiff suing the state for damages following a trip and fall along a pathway that had recently been excavated and refilled by a government agency. The Supreme Court held that immunity from suit did not exist in Ireland and found that the state could be found vicariously liable for the actions of its employees.

More recently, in *Government of Canada v Employment Appeals Tribunal* [1992 2 IR 484], the court noted that it was doubtful that the doctrine of sovereign immunity was ever conclusively established in Ireland but, assuming that it was, that doctrine of sovereign immunity in Ireland has now expired.

Therefore, a government agency would not be successful in asserting sovereign immunity as a defence to a contractor's claim for payment as this relates to a commercial or trading activity.

Statutory payment protection

25 | Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Contractors are afforded some protection by virtue of the payment dispute procedure set out under section 6 of the CCA.

Where a project has been interrupted or cancelled, it is common practice for contracts to provide for employers to pay contractors for any work that is completed until that point.

Where the interruption or cancellation is caused by an insolvency event or financial difficulties, this may be more problematic for contractors. There is no statutory protection in such circumstances. In the case of insolvency, the contractor will be at the mercy of the order of priority of payments to any parties involved.

FORCE MAJEURE

Force majeure and acts of God

26 | Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

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. In response to the covid-19 pandemic, 'epidemic' and 'pandemic' are increasingly being included in force majeure clauses.

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 automatic termination of the contract or by a party giving notice of the termination. However, the relevant

event must have had an adverse impact upon performance of the contracting party and cannot be used as an excuse to end the contract.

DISPUTES

Courts and tribunals

27 | Are there any specialised tribunals that are dedicated to resolving construction disputes?

There are no specialised tribunals dedicated to construction disputes.

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 certain construction contracts entered into after 25 July 2016. Otherwise, parties are generally free to agree in contract how their disputes will be resolved.

Dispute review boards

28 | Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Dispute review boards can be used where the contract so provides. Conciliation is often used in public works contracts (which are used for infrastructure projects funded by the state). Conciliation involves an independent third party encouraging active engagement between the parties. A standing conciliator will be appointed to act in all disputes in a public works contract with a value over €10 million and, if a dispute is referred to the standing conciliator, it will issue a recommendation if there is no agreement between the parties within the agreed time limit. This recommendation will become binding unless either party expresses their dissatisfaction with the recommendation in accordance with the contract within the agreed time limit.

Under certain contracts where a party has been awarded a sum of money by a conciliator's recommendation and puts a financial bond in place, that party is entitled to be paid the sum awarded by the conciliator and to hold that sum pending the outcome of the next stage of the contractual dispute resolution process. If there is no agreement by conciliation, the dispute is dealt with by the next stage of the contractual dispute resolution process.

Mediation

29 | Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Yes, the use of mediation has gained acceptance.

The Mediation Act 2017 (which came into force on 1 January 2018) aims to further promote mediation as an attractive alternative to court proceedings. It obliges solicitors before issuing court proceedings to advise their clients to consider mediation and to provide information on the mediation services available and the possible advantages of mediation. It also allows refusal by a party to consider the use of mediation to be taken into account when determining costs at the end of legal proceedings.

Mediators are often practising solicitors but there is no requirement that they are solicitors or barristers. There is independent training and certification for mediators from a number of bodies.

Confidentiality in mediation

30 | Are statements made in mediation confidential?

The format of mediation is subject to agreement between the parties and the mediator. It is standard practice for mediations to be held on a confidential, without prejudice, basis and for parties to be prohibited from using another party's material in subsequent litigation.

Arbitration of private disputes

31 | What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Arbitration is preferred to court litigation in construction disputes. Arbitration clauses are often included in construction contracts. The Arbitration Act 2010 (as amended) (the 2010 Act) applies to all arbitrations commenced after 9 June 2010, and the UNCITRAL Model Law has the force of law in Ireland (subject to the 2010 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 (eg, 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 for the arbitration. 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.

As the effects of Brexit do not extend to arbitration, UK-based arbitration clauses will continue to have full effect. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Ireland, EU member states and the UK are signatories, governs the enforcement of arbitral awards and maintains the status quo in this area. This may result in arbitration becoming an even more attractive option for dispute resolution than litigation.

Governing law and arbitration providers

32 | If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

The International Chamber of Commerce Arbitration Rules are utilised in Ireland, and the London Court of International Arbitration is also gaining some prominence. For construction in Ireland, there is a preference for the governing law to be Irish law and for the seat of the arbitration to be in Ireland.

Dispute resolution with government entities

33 | May government agencies participate in private arbitration and be bound by the arbitrators' award?

Yes, government agencies may participate in private arbitration and be bound by the arbitrators' award.

Arbitral award

34 | Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

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 2010 Act).

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 in article 36 of the Model Law and in the New York Convention).

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 SARL v Oao Tomskneft Vnk Otkrytoye Aktsionernoye Obshchestvo 'Tomskneft' Vostochnaya Neftyanaya Kompania* [2014] IEHC 115, in which the authors acted for the successful party, the respondent).

Limitation periods

35 | Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

Generally, the time limits for bringing a claim under a construction contract are governed by the Statute of Limitations Act 1957 (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] IESC 83, Mr Justice McKechnie set out that the limitation period runs from when the damage (not the defect) becomes 'manifest' (ie, 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.

ENVIRONMENTAL REGULATION

International environmental law

36 | Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Ireland attended the United Nations Conference on the Human Environment of 1972, at which the Conference proclaimed the Stockholm Declaration of 1972. The Stockholm Declaration of 1972 does not form part of Irish law.

Irish environmental law is primarily derived from EU law. There are also over 300 environmental statutes and regulations in Ireland. The following are some key pieces of legislation that provide for the preservation of the environment and wildlife while advancing infrastructure and building projects.

- 1 The Birds Directive 79/409/EEC and Habitats Directive 92/43/EEC, which have been transposed into Irish law, set out requirements primarily aimed at preserving sites that have been designated as specially protected under EU law. These Regulations may

require an 'appropriate assessment' to be carried out in relation to certain plans and projects before those plans and projects are granted consent.

- 2 The 2011 Environmental Impact Assessment Directive (2011/92/EU), as amended by the 2014 Environmental Impact Assessment Directive (2014/52/EU), which have been transposed into Irish law, require authorities to carry out an assessment of certain projects that are likely to have a significant effect on the environment before granting consents (eg, before granting planning permission or certain environmental licences).
- 3 The Planning and Development Acts 2000 – 2020 contain requirements to assess the impact of proposed developments on the environment or protected sites as part of the planning process and before development consent is granted. These include the requirements in points (1) and (2) above.

Local environmental responsibility

- 37 | What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Environmental statutes and regulations in Ireland (of which there are over 300) generally target 'polluters' being based on the 'polluter pays' principle. The identity of the 'polluter' is generally defined by reference to the person who 'causes' or 'permits' pollution to occur, who controls the polluting activity, or who 'holds' waste on land. Typically, Irish environmental statutes and regulations impose liability on one or more of the following categories of person:

- a licence or permit holder or operator;
- the owner of land or a premises or a landlord (although note that the definition of 'owner' varies and the term is often not defined in legislation);
- the occupier or person in control of a premises or activity;
- the waste holder;
- a person causing or permitting polluting matter to leave a premises;
- directors, managers, secretaries or other officers; and
- shareholders.

Under the Environmental Liability Regulations, an operator of an activity may be liable for any damage to protected species and natural habitats or imminent threat of that damage. The 'operator' is defined as the person who operates or controls the activity or the person to whom decisive economic power over the activity has been delegated.

There are also various common law actions that may be used by third parties to limit, prevent, or to secure compensation for environmental damage. Where these actions are taken, a claimant may recover damages for losses suffered on a compensatory basis, which may not be possible under statute. Essentially, any polluter in the chain of polluters could be a mark in such a claim. Liability at common law for environmental damage could arise under the following heads of tort: negligence, nuisance, the rule in *Rylands v Fletcher*, trespass and breach of statutory duty.

CROSS-BORDER ISSUES

International treaties

- 38 | Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

No, Ireland is not a signatory to any such (tax) treaties relating to the protection of investments of a foreign entity in construction and infrastructure projects.

Tax treaties

- 39 | Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Ireland has signed comprehensive double taxation treaties with 74 countries, 73 of which are in effect. The agreements cover direct taxes, which are income tax, universal social charge, corporation tax and capital gains tax.

Irish tax treaties typically follow the approach adopted in the Organisation for Economic Co-operation and Development model tax treaty (though the specific provisions will vary across the different treaties). None of Ireland's double taxation treaties would prevent a contractor from being taxed in another jurisdiction, though the provisions could provide sole taxing rights to one jurisdiction in specific circumstances, depending on factors such as the type (and source) of the income, profits or gains at issue and the residence status of the contractor.

Currency controls

- 40 | Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

No, Ireland has no such currency controls.

Removal of revenues, profits and investment

- 41 | Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

No, Ireland has no laws that restrict removal of revenues, profits or investments from the jurisdiction.

UPDATE AND TRENDS

Emerging trends

- 42 | Are there any emerging trends or hot topics in construction regulation in your jurisdiction?

Brexit continues to have a significant impact on the construction industry in Ireland. Logistical issues are at the forefront, with continued uncertainty around the imposition of tariffs and duties as a result of the hard border in place. However, there are also concerns around the ability to use construction products sourced from the UK and the effect of Brexit on the resolution of contractual disputes.

In the context of drafting and negotiating construction contracts, employers are now expressly excluding any allowances in respect of extensions of time and additional fees in relation to Brexit-related difficulties. Clauses that can soften the impact of Brexit, by giving employers a means by which to participate in Brexit-related decisions, are also being included in construction contracts. For example, clauses that

require employer approval in the event that a contractor can't source goods or materials in the European Union without delay or where goods or materials sourced from the United Kingdom do not have an EU equivalent.

With the impact of the covid-19 pandemic, parties operating within the construction industry must be more mindful of their existing obligations under the Safety, Health and Welfare at Work Act 2005 and the Safety, Health and Welfare at Work (Construction) Regulations 2013. The obligations thereunder have a renewed focus since the beginning of the pandemic. These require that businesses must ensure the safety, health and welfare at work of their employees, obligations to a broad category of third parties at workplaces who are not their employees, and carry out hazard identification and risk assessment. Moreover, contractors and sub-contractors have a duty to cooperate and coordinate actions where they share a workplace.

Although not governed by law, it should also be noted that the professional indemnity insurance market has been put under serious pressure in recent years. This is a result of a number of factors, including the fallout from the Grenfell Tower fire, Brexit and the covid-19 pandemic. There are now fewer insurers in the market and those that remain are reducing the amount of cover they are willing to provide or are refusing to provide cover on an 'each and every claim' basis, preferring an 'aggregate claim' basis.

Coronavirus

43 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In Ireland, the legislative response to the covid-19 pandemic has centred on four pieces of legislation:

- the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (the 2020 Act);
- the Health (Amendment) Act 2021;
- the Emergency Measures in the Public Interest (Covid-19) Act 2020; and
- the Criminal Justice (Enforcement Powers) (Covid-19) Act 2020.

There have also been over 150 separate statutory instruments enacted pursuant to these Acts relating to various aspects of the pandemic.

The 2020 Act provides for the enactment of extraordinary measures and safeguards to prevent, minimise, limit or slow the risk of coronavirus infections. Part III of the 2020 Act amended the Health Act 1947 and confers the Minister for Health with powers to make regulations in order to limit and reduce the spread of the coronavirus. In short, akin to measures adopted in jurisdictions globally, the regulatory approach adopted in response to the pandemic provides extensive powers by which the Irish government can impose restrictions on activities within the state. These include lockdowns, restrictions on international and domestic travel, temporary closures of businesses and workplaces, prohibiting events and mass gatherings and any other measures that are deemed necessary by the Minister for Health.

The implementation of any such measures has, throughout the pandemic, been coordinated by the government in consultation with the advice and guidance of various domestic and international bodies such as the National Public Health Emergency Team, the World Health Organization and the European Centre for Disease Prevention and Control. The provisions of much of the legislation have 'sunsetting' clauses that allow for variations in the period for which the measures can be enforced and provide an ultimate expiry date. This has particularly



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affected the construction industry, which has endured varying degrees of suspension throughout the pandemic.

Further, in response to the pandemic, the government has initiated various business relief programmes, such as wage subsidies, loans and tax relief, for businesses affected by the pandemic.

Along with the various governmental programmes and guidance, the Construction Industry Federation published the Standard Operation Procedures Guidelines, which provide guidance on how to deal with the pandemic on a construction site and how to control activities on site to comply with social distancing requirements. Additionally, the Royal Institute of the Architects of Ireland published Proposals for the Reopening of Construction Sites to Promote Suitable Protocols for Working Environments

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