DISPUTES MANAGEMENT PROCEDURE AND STANDING CONCILIATORS: THE PUBLIC WORKS CONTRACTS: CLAUSE 13: SOME OBSERVATIONS

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[01] With the v2.0 release of the Public Works Contracts (PWC), Clause 13.1 was re-assigned to introduce an *inter partes* dispute management procedure (DMP) as provides for a project board and for which the services of a standing conciliator is mandatory on projects in excess of €10 Million. Being something of a hybrid, although disputes boards have been the practice under FIDIC contracts for some years, the DMP has been of questionable success since its introduction to a point that, late in 2018, grumblings began to emerge from the public side that the process may be altered or abandoned. The apparent complaint is that it is largely a talking shop and that too many disputes end up in Clause 13.2 conciliation. Moreover, the appointment process is most opaque with many appointees tendering a low fee for the standing conciliation part under Clause 13.1 but with a handsome fee for acting as conciliator under Clause 13.2.

[02] Of the four major PWC standard forms of contract, the current releases in use by the various public and semi-public authorities, all issued on 27th June 2018, are as below. The so-called minor works form, PW-CF5, currently v2.3 27th June 2018, does not provide for the DMP and a dispute goes straight to conciliation or arbitration[1].

PW-CF1: Building works with design by the Employer	v2.3
PW-CF2: Building works with design by the Contractor	v2.2
PW-CF3: Civil works with design by the Employer	v2.3
PW-CF4: Civil works with design by the Contractor	v2.2

[03] Clause 13 is identical on all four of the major PWC forms. Whilst only Clauses 13.1 and 13.2 are considered in this paper, the full provision is provided at pages 18 to 21 below.

[04] On 22nd January 2016, on which date the Office of Government Procurement (OGP) issued Capital Works Management Framework Guidance Note GN3.1.1v1.0, entitled Dispute Resolution, it also released the PWC v2.0 contracts. Neither the v2.0 release nor GN3.1.1v1.0 took cognisance of statutory adjudication. The anomaly was corrected in the v2.1 release of the PWC major forms and GN3.1.1v1.1[2] all of which were released on 28th June 2016.

[05] Reassigned Clause 13.1 in the v2.0 series, it was billed in GN3.1.1 as a new dispute resolution process by way of interim amendments to the PWC following the Minister for Public Expenditure and Reform's December 2013 review. It was said to facilitate informal dispute resolution to reduce the volume of disputes being referred to the Clause 13 formal disputes resolution machinery. Clause 4.1.4 possibly escaped the OGP's attention as a valid informal means of resolving disputes, or perhaps it was that the practice had arisen whereby little attention was paid to Clause 4.1.4.

[1] Some consider the word 'may' as used in Clauses 13.2.1 and 13.4 means that conciliation is optional.
[2] Accessed https://constructionprocurement.gov.ie, 7th March 2019. GN3.1.1v1.1 is the current issue. A copy is appended to this paper.

[06] Whatever, the DMP procedure was almost bound to be of limited utility and it was of no surprise when it became known late in 2018, that reservations were said to be mounting from the public side that it is not working. In some instances, the process has not been adhered to in that standing conciliators were never appointed, contrary to the express provision in the Form of Tender and Schedule (FTS) which must accompany every PWC contract[3]. The FTS makes such appointments mandatory for projects in excess of €10 Million[4] and that an appointment must be made before the Starting Date[5]. In other instances, it is likely that it is the DMP itself which is at fault, as is discussed below. It is further likely a wide spectrum exists in practice as to how Clause 13.1 is applied.

Sub-Clause 13.1.1: Initiation of Dispute under DMP

[07] For what is said in GN3.1.1 to be an informal process requires a formal commencement notice. Although Clause 13.1 only requires one party to serve notice on the other, if served by the Contractor, it is suggested that a copy of all Clause 13.1 notices should be sent to the Employer's Representative (ER). The main object of a Clause 13.1.1 notice is to ensure that the time bar clock is stopped as regards any and all other relevant provisions in the PWC contracts. Clearly, for so long as a referred dispute remains within the DMP, the subject matter of the notified dispute cannot be time barred.

[08] The opening sentence delimits disputes to those arising under Sub-clauses 10.5.4 or 10.5.5; that is, after a determination of a claim by the ER for which notice would already have had to be served pursuant to Clause 10.3.1, or if an apparent agreement under Clause 10.5.1(2) were to collapse. Of note is the use of the word may, which suggests that the DMP process is optional, despite the words within square brackets in Clause 13.2.1. This view is underpinned by the express wording to Clause 10.5.4 which gives either party the option to serve either a Clause 13.1 notice or a notice of conciliation under Clause 13.2. Clauses 10.3 and 10.5 are at the back of this paper, pages 17 and 18.

[09] It is beyond question that the express option given in Clause 10.5.4 to serve notice of dispute under Sub-clause 13.1, or under Sub-clause 13.2, is in conflict with the words within square brackets in Clause 13.2.1. On one interpretation it could be said that, for any one issue put before a project board, it is a one-day affair as Clause 13.1.2 at (2) infers. Another interpretation is that a meeting of a project board may go beyond one day or that an issue may be deferred to another meeting of a project board at some future date, being within the remit of the parties to agree whatever protocol they may.

[10] For disputes of any substance, it is likely that, after the service of a Clause 13.1 notice, the issue will not have run its course in terms of Clause 10.3.3 (or Clause 9.3) by the date of the next meeting of a project board especially if it is a delay claim. In the author's experience, both prior to and after the v2.0 release, too many public employers have had a divide-and-rule approach by demanding a separate conciliator for almost every Clause 10.3 notice. Whenever this occurs, the unhappy and unjust result is that no one conciliator can look at an extension of time claim in the round in instances where there was more than one Delay Event whether or not it was also a Compensation Event[6].

[3] A corresponding FTS exists for each of the major PWC contracts. For example, FTS1 is for use with PW-CF1, FTS2 with PW-CF2 and so forth; see the author's *Public Works in Ireland*, Clarus Press, 2014, at 1-10 and Chap. 3.
[4] See for example, FTS1 v2.3 06/06/2018 at the Schedule, part 1N.
[5] A defined term in Clause 1.1 with a list of prerequisites before same may occur as provided in Clause 9.1.2.
[6] For Delay Event and Compensation Event see the Schedule, part 1K.

[11] As noted at [7] above, for so long as a project board can retain a referred dispute within its remit, a claim cannot be time barred. Retention of a dispute by a project board for a longer period than a day had to have been in the contemplation of those who drafted GN3.1.1 in which, on Page 16, Item 2.8.4 (Conciliation Process under the Standing Conciliator), is the following statement, but which appears in relation to a standing conciliator acting as conciliator under Clause 13.2:

> "The Parties may agree to have the Standing Conciliator hold regular interval meetings to hear disputes referred to conciliation in bundles. Caution should be exercised here by both Parties to ensure that the number of disputes heard at a single hearing are not so many that they cannot be adequately addressed by the Standing Conciliator. The Standing Conciliator should be requested to advise the Parties on this issue."

[12] A tension exists between a project board dribbling the ball close to the goal as it were as against attempting a striker's dream shot some 20 yards (or working days) from the goal mouth. When the PWC forms were first drafted, one aim was to prevent a build-up of claims of any description, 'measured' or otherwise, at the end of a project. But what is in the greater public interest? Near impoverished contractors with bids for large public works attracting little competitive interest on the one hand, suggested in relation to the National Children's Hospital cost over-run, as against killing off contractors' claims through the abuse of a default time bar and writing-out the common law[7] accompanied with an effective denial of access to the courts on the other[8] (with the exception of a challenge to a decision of an adjudicator). The result is that, some 12 years on, there is still little if any judicial interpretation on the PWC contracts when a crying need exists.

Sub-Clause 13.1.2: The Project Board and the DMP

[13] **Sub-provision (1)** assumes that a project board has been properly constituted within time. A close inspection of the FTS is necessary. The Schedule, part 1, requires the awarding authority to specify the number of project board members each party to the contract is to have. It states that the parties' members of a project board must be entered by the Employer in the Schedule, part 3A, prior to the issue of the letter of acceptance. If this is not observed by the Employer, it is arguably too late to do so after the letter of acceptance is issued and the Contractor might consider if he wishes to go along with the DMP at all. The Schedule, part 3A, is equally explicit and goes on to state that the preliminary meeting of the project board shall be held prior to the Starting Date. If it is not so held, the obligation is arguably spent and the second option referred to in Clause 10.5.4 becomes the default position; that is, all disputes will be referred to conciliation pursuant to Clause 13.2 without resorting to the DMP.

[14] Remaining with sub-provision (1), whilst GN3.1.1 is not a part of any PWC contract[9], as Clause 1.9.1 makes clear, it is well known that the public side tends to rely on the OGP's guidance notes. GN3.1.1 at Page 7, Para. 1.5 thereto, suggests that, at the

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[7] Clauses 10.1.2 and 10.7.4 must be the two most excessive exclusion clauses in any contract d'adhesion world-wide now protected, *inter alia*, by the *Rock Advertising* line of authority; see [24] below.

[8] Two excellent papers exist as pose different view points: Ciaran Fahy and Fiona Forde BL, *Working with Subclauses 10.6 and 10.7 of the PWC*, read at Engineers Ireland, 26th February 2014; and, Gerard Meehan BL, *Clauses 10.6 and 10.7 of the Public Works Contracts*, read at the CBA Annual Conference, 28th April 2017.

[9] MF1.18 28/06/2018 at Appendix 1 includes Advisory Note 1 thereto: "When completing this appendix the Parties and the Standing Conciliator should have due regard to the Contract and the Guidance Note GN3.1.1, Dispute Resolution, of the Capital Works Management Framework available at http://constructionprocurement.gov.ie."

preliminary meeting of a project board, a protocol for all future meetings should be agreed. The Schedule, part 3A, states that, at the same meeting, the parties shall agree the format and procedure by which all disputes referred to it shall be reviewed. This is desirable yet it might be premature at that point. For one matter, a standing conciliator may not then have been appointed as sub-provision (5) allows, if there is to be one. It is likely that a protocol can be shaped in outline at that point but that it will mutate over time as disputes are referred. One aspect to any such protocol would be to seek the agreement of the board from the outset to retain all referred disputes concerning delay, or those with a time component, until an advanced stage of the performance of the Works, or of a Section, when it ought to be possible to come to an agreement on what would be a reasonable extension of time without a need to invoke Clause 13.2.

[15] In the Schedule, part 3A, the notes below the places for insertion of the parties' members of a project board state that neither the ER nor the Contractor's Representative may be a member of a project board, nor may either attend meetings of a project board unless requested by the board. The same notes further provide that no design team member, or their employees, or employees of the Contractor subordinate to the Contractor's Representative, may be a member of a project board. If any such transgression arises the better time to object is at the preliminary meeting. If not aware until later, one may raise such an objection at that later stage. One could find such an objection itself being escalated to a Clause 13.2 conciliation. An alternative would be to exercise Clause 10.5.5(1) 2 with the same net effect.

[16] One question which may arise is whether or not the text to the notes in the Schedule are part of the Contract or not. In essence they are no more than a footnote. Clause 1.3 (Inconsistencies) and Clause 1.10 (Background Information), which is Clause 1.11 in PW-CF2 and -CF4, provide no guidance. Whilst Schedule notes cannot assume the same stature as a provision of the Contract, some clearly are of relevance at tender stage only being instructions to the awarding authority. All such notes fall away upon the execution of the Contract, having regard to Clause 1.9.1 (Miscellaneous), which is Clause 1.10.1 in PW-CF2 and -CF4. For those Schedule notes which might subsist in whole or in part after a contract is executed, Clause 1.2.1 would be relevant in rendering an interpretation. The said provisions are appended at the back; see pages 15 and 16.

[17] Given that a matter may not be referred to the DMP before the ER has issued a determination pursuant to Clause 10.5.4, or if agreement of a Contractor's proposal made pursuant to Sub-clause 10.5.1 at (2) or (3) were to go awry, it is strange in one sense that the ER, or a person under him[10] being on the Employer's team of consultants, could be asked to attend a meeting of a project board. Once the ER has issued his determination, he is *functus officio* in the matter and an astute ER would do well not to attend. If a contract is properly administered, the ER's reasons for declining a claim should be clear.

[18] Unfortunately, it is all too common the case that an ER fails to take action within the 20 working days provided and relies on the default rejection in Clause 10.5.3[11]. In such instances arising, requiring the ER's attendance, or the attendance of one or more of the Employer's consultants, may be the only means of obtaining some form of accountability out of an ER and those under him. An ER would be within his rights in

[10] Rather than refer to him or her, for the sake of brevity the adopted style is to rely on the Interpretation Act, 2005.
[11]Despite use of the injunctive 'shall', many persons acting in the role of ER have grossly abused Clause 10.5.3 by design and with impunity, behaviour contrary to both the letter and the spirit of Clause 4.1 (Co-operation).

refusing to attend in advance of his issuing a determination as he ought not to be and indeed may not be influenced by either party in making a determination within the first limb of *Sutcliffe v Thackrah* and associated decisions[12]. Some seem to think that *Sutcliffe*, a decision of the House of Lords, is 'old hat' yet that line of authority remains good law paramount to the fair and impartial administration of a construction contract whenever the issue of a determination, certificate or opinion by the ER is required.

[19] As regards attendance at project board meetings by the Employer's consultants, an old advocacy trick is to lure two or more witnesses, especially of opinion and better if for the one party, into disagreeing with each other[13]. Although all communications under Clause 13.1 touching or concerning the activities of a project board are without prejudice as sub-clause (3) provides, any such utterances would nevertheless be of relevance in understanding a determination and the Contractor would still be possessed of the knowledge if a settlement under the DMP did not result. But then, under any professional code of practice, a consultant is obliged to tell the truth and be open and candid in all matters touching or concerning his performance of an appointment, including admitting errors of omission. Quaint one may say, when PI is in the way. At the far end of the spectrum, one could say that the DMP is open season for one or both sides to be feckless as to the truth in whatever degree as suits the moment.

[20] Not referred to in the Schedule, or in GN3.1.1, but a standing conciliator may hold no other brief or commission from either party for the duration of his appointment. This is clear with reference to MF1.18 at Clause 19[14]. A copy of MF1.18 28/06/2016 is at the back of this paper. Hence a standing conciliator could not be a construction professional who holds an appointment as a design team member for either party on any other project. In some cases, schools' contracts in particular, this obligation can be difficult to discern in that the paymaster is more often than not the Department of Education and Science rather than the education and training board identified as the Employer in the Schedule. Not only is it good practice with reference to noted publications[15], but Clause 10.9.3 (Employer's Claims) could be a factor as would destroy the independence and impartiality of a standing conciliator acting under Clause 13.1, or as conciliator under Clause 13.2, if recovery of monies were to be pursued under another contract of which a standing conciliator was the ER, or a person under the ER on the other contract.

[21] There has been at least one instance of which the author is aware where a standing conciliator thought he could depute another person from his firm to attend meetings of a project board. He seemingly thought it would be sufficient that he read the minutes or be provided an account by his employee. Despite Clause 21 to MF1.18[16], this should rarely be entertained, if at all. All such services, whilst not within the *Carltona* doctrine[17], must be performed personally and the escape route MF1.18 Clause 21 provides was not in accordance with best practice and could unintentionally bounce onto Clause 13.2.

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[12] *Sutcliffe v Thackrah* [1974] AC 727 and which distinguished line of authority includes *Perini Corporation v Commonwealth of Australia* (1969) 2 NSWR 530, [1980] 12 BLR 82; refer *Public Works in Ireland* at 8-81 et seq.

[13] Bond, Solon and Harper, *The Expert Witness in Court*, Shaw & Sons, 1997, Chap.4.

[14] "The standing conciliator shall not have previously been employed as a consultant or otherwise by the Parties, except as disclosed in writing to the Parties before the signing of this Agreement.", which is a continuing obligation.

[15] Such as the Chartered Institute of Arbitrator's Code of Professional and Ethical Conduct, or the International Bar Association's Guidelines on Conflict of Interest in International Arbitration, October 2014.

[16] "The Standing Conciliator shall not assign, delegate or sub-contract any of his/her duties, without the agreement of the Parties to the Contract."

[17] *Carltona v Commissioners of Public Works* [1943] 2 All ER 560.

[22] **Sub-provision (2)** introduces a supplementary defined term "date of notification". The primary object of the draughtsman was to place yet another time bar, in this case 14 days, which runs from the date of notification, for either party to refer a dispute not resolved under the DMP to conciliation pursuant to Clause 13.2 failing which the ER's determination shall be binding on the Parties. If the Parties agree a protocol which relaxes or redefines the length of a project board meeting, such as suggested at [09] above, especially time extension claims most of which could not be resolved within one calendar day, it would be safest to have the protocol reduced to writing in terms of endeavouring to agree rather than an agreement to agree[18] and signed by the members of the project board. One reason is that a dispute could arise on the interpretation of sub-provision (2) as could include a contention by the Employer that, as the Contractor did not serve a Clause 13.2.1 notice in time (with the contra-contention that there was no date of notification, or that it was unclear), the issue concerned is time-barred.

[23] GN3.1.1, at Item 1.5, Page 7, last paragraph, suggests that, if agreement is not reached by a project board by the end of the meeting after which a dispute is referred to it, the board shall no longer review or discuss the dispute which then moves on to conciliation and that, if the dispute is not referred to Clause 13.2 conciliation within 14 days of the notification by the board to the parties (it does not state in writing) that the board failed to resolve the dispute, the original Clause 10.5 determination of the ER as gave rise to the dispute shall be binding. If followed, this is dispute prone. Not being a part of the Contract, it is not for GN3.1.1 to determine or recommend as to whether a meeting of a project board concludes at the end of the working day on which it meets, or whether it can be carried over to the next working day. It contradicts the earlier statement in the GN3.1.1 at Para. 1.5, Page 5, that "The operating procedure by which the Project Board hears, discusses and resolves disputes referred to it, is at the discretion of the Project Board." It is most unclear why the OGP saw fit to attempt to interfere with the discretion conferred in project boards. If the parties are keen to settle and settlement under the DMP takes more time, this attempted interference should be ignored.

[24] Germane to the discretion provided to a project board, in *Rock Advertising v MWB Business Exchange*[19], the UK Supreme Court reviewed an earlier decision of the UK Court of Appeal as to how written contract conditions may be amended if varied orally or by performance, even where an anti-oral agreement clause exists in the parties' contract[20]. The Court preferred to consider the issue in terms of party autonomy. As contracts bind parties to a course of action, Lord Sumption railed against the notion that parties cannot bind themselves as to the form of a future variation. He went on to quote from two similar international commercial conventions: the Vienna Convention on Contracts for the International Sale of Goods (1980); and, the UNIDROIT Principles of International Commercial Contracts, 4th Ed. (2016)[21]. Both include a like proviso of which, for brevity, the UNIDROIT proviso is at Art. 2.1.18:

> "However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct."

[18] Having regard to the freedom of contract doctrine alluded to at Para. [30] below.
[19] *Rock Advertising v MBW Business Exchange* [2018] UKSC 24.
[20] (*1) Globe Motors Inc and (2) Globe Motors Portugal-Materail Electrico Para A Industria Automovel LDA and (3) Safran USA Inc v TRW Lucas Varity Electric Steering Ltd. and Others* [2016] EWCA Civ 396; *ZVI Construction Co. v The University of Notra Dame (USA) in England* [2016] EWHC 1924 (TCC).
[21] Available at www.unidroit.org (accessed, 7th March 2019).

[25] Addressing entire agreement clauses, for which PWC Clause 1.9.1 is in point, the Court noted Longmore LJ in *North Eastern Properties v Coleman* [2010] 1 WLR 2715 at para. 82: "if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said." and cited seven decided cases since 2013 in which entire agreement clauses were applied. As for collateral agreements, which PWC Clause 13.1.2 envisages, whilst an entire agreement clause will, in the words of Lightman J. in *Inntrepreneur Pub v East Crown* [2000] 2 Lloyd's Rep 611, para 7, "denude what would otherwise constitute a collateral warranty of legal effect.", Lord Sumption considered the true position is that if a collateral agreement can operate as an independent agreement, supported by its own consideration, most entire agreement clauses will not prevent its enforcement citing *Business Environment Bow Lane v Deanwater* [2007] EWCA Civ 622 at para. 43 and *North Eastern Properties* at para. 57 as authority.

[26] Turning to estoppel considerations, Lord Sumption held that the oral variation in *Rock Advertising* was invalid for the want of compliance with the anti-oral clause in the concerned contract. Yet he noted, at para. 16, that a party may be precluded by its conduct from relying on the written word to the extent the other party relied on that conduct. The Court of Appeal's decision in *Flynn v Breccia* [2018] IECA 273 is more apposite in an Irish context. The judgment of Hogan J. solely concerns estoppel by conduct. The Court relied upon the Supreme Court's two-limb test in *Doran v Thompson* [1978] IR 233. The first limb requires the giving of a "clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly" with the second limb being "…and the other party has acted on [the promise or assurance] to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards revert to their previous legal relation as if no such assurance or promise had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance." (*per* Griffin J.).

[27] It is on the *Doran v Thompson* line of authority that the parties would the better elevate any DMP protocol between them to the status of a collateral contract. Whilst sub-provision (3) would suggest that any and all action under the DMP is without prejudice, it is clear sub-provision (4) contemplates that, upon agreement being reached in respect of any matter under the DMP, the parties step outside of it upon entering into a binding agreement. It is valid to contend that such an agreement could be outside of the remit of Clause 13.1.1 in not being a dispute under sub-clause 10.5.4 or 10.5.5. Yet the Schedule, part 3A, expressly enjoins the parties to agree at the preliminary meeting of a project board "the format and procedure by which all disputes referred to it shall be reviewed." Hence any such agreement reduced to writing, with a peppercorn or *quid pro quo*, and signed by the parties would be a collateral agreement of its own right outside of sub-provision (4) or any other provision of the Contract. On this analysis, the parties are not constrained by the Contract as to what might be in such a collateral agreement.

[28] **Sub-provision (3)**, by use of the injunctive 'shall', mandates that all communications of a project board, and communications with a standing conciliator if appointed, are without prejudice. Some standing conciliators have taken the view that they may attend regular site meetings conducted under Clause 4.15. This arises because Clause 9 of MF1.18 requires that the Standing Conciliator "shall ensure his availability for all site visits, meetings, hearings as necessary to perform his duties." Further, Clause 10 of MF1.18 requires the Standing Conciliator to "keep up to date with the Contact, the Works and the contractual relationship between the Parties."

[29] MF1.18 is not in keeping with Clause 13.1 in that it could give rise to unintended complications as, if a standing conciliator attends a progress meeting and speaks in the course of the same, not only could his utterances be influential on the ER prior to the issue of a Clause 10.5 determination by the ER, it could give rise to that part of a site meeting being subject to sub-provision (3); that is, what was said or done would be without prejudice. It could, in addition, inadvertently convert that part of a Clause 4.15 progress meeting, or all of it, into a meeting of the project board with the potential that persons in attendance could, by their mere presence or otherwise, act contrary to the notes to the Schedule, part 3A.

[30] **Sub-provision (4)** contains unfortunate wording being couched in the future tense as speaks of an agreement to resolve a dispute rather than the recording of a dispute which has been resolved through the DMP. As framed, it envisages an agreement to agree which is contrary to the freedom of contract doctrine, otherwise known as the *Walford v Miles*[22] doctrine. Even if a *Von Hadzfeldt*[23] agreement (and therefore void or voidable notwithstanding the possibility the Employer could allege the Contractor was in breach for not entering into one), in one sense there is no need for it in that the Parties are already in contract as includes Clause 13. More likely what was intended was that, in the event the parties reach an agreement through the DMP, what was agreed may be reduced to writing and signed by the parties. Whilst the latter is not what sub-provision (4) states, such a course is still open to the parties and would be preferable. What is not safe is for the parties to refer an oral agreement back to the ER pursuant to Clause 10.5.1 at (2).

[31] **Sub-provision (5)** empowers a standing conciliator, if appointed, to draft any agreement made between the parties under the DMP so that it will be binding when executed by the parties. GN3.1.1, at Page 6, Item 1.5 (Running of the Project Board), at the last bullet point thereto, states: "Contacting the Standing Conciliator to request that the Standing Conciliator draft the binding agreement where the Project Board require such a service." This is laudable and places such conduct within the terms of an appointment under MF1.18 even if such a duty is not expressly stated in an appendage to a standing conciliator agreement as MF1.18 Clause 2 provides.

[32] Sub-provision (5) contains a further time bar in two stages. The first stage lapses 14 days from the date of the issue of a draft agreement by a standing conciliator. The second stage is that, after the lapse of the first 14 days, either party may serve a Clause 13.2 notice of conciliation failing which the ER's determination of the matters dealt with in the draft agreement shall be binding. Although oral agreements are equally binding, the wording to this sub-provision would appear to exclude oral agreements and as takes us back to the *Rock Advertising* and *Doran v Thompson* line alluded to earlier above.

[33] A difficulty with sub-provision (5) is that, if any such agreement is not perfected, having been drafted pursuant to Clause 13.1.2, it is a privileged document in the context of all DMP negotiations being without prejudice. Whilst a standing conciliator acting under Clause 13.2 could not but know the contents of any such draft agreement[24], if for any reason a standing conciliator was not appointed, or a Clause 13.2 conciliator was not the standing conciliator who drafted any such unexecuted agreement, that person could not

[22] *Walford v Miles* [1992] 2 AC 128 (H.L.); see McMeel, *The Construction of Contracts*, OUP, 2nd Ed., at 14.21.
[23] *Von Hadzfeldt-Wildenburg v Alexander* [1912] Ch. 284 (which, pre-*Walford*, recognised 'an agreement to agree'.)
[24] Even if he does, he ought not take account of it in the absence of the cross-over in Clause 13.2.5 being applied.

be apprised of its contents, nor could an adjudicator appointed pursuant to the Construction Contracts Act, 2013, or an arbitrator appointed pursuant to Clause 13.4.

[34] Remaining with the without prejudice nature of the meetings of a project board, GN3.1.1, Page 6, Para. 1.5, at the seventh bullet point thereto provides cause for concern unless each party's 'Party Lead' has a command of the process and related law. It states:

> "Disseminating the information on agreements reached, or failure to reach agreements, to the Party, (Employer or Contractor), the Party's representative (sic), design team members, external consultants and advisors, etc."

[35] The potential for loss of confidentiality of the proceedings of a project board which the above extract from GN3.1.1 presents is exacerbated at Page 7 of GN3.1.1, Item 1.5, which states, *inter alia*: "The Party Leads should then contact all necessary persons involved in the project to ensure all relevant information on the dispute is known prior to the meeting of the Project Board."

[36] Notwithstanding Clause 13.1.2 at (3), depending upon what may be agreed as a protocol referred to in GN3.1.1 at Section 1.5 ("The operating procedure of the Project Board hears, discusses and resolves disputes referred to it, is at the discretion of the Project Board."), such dissemination could include opening or other position statements. The 'design team', not being privy to "all agreements to resolve a dispute" as *per* Clause 13.1.2 at (4), would not be so bound unless they are individually required to sign confidentiality agreements in relation to the business of a project board. This view is held because, whether a collateral agreement is entered into between the parties or not, Clause 13 to Standard Conditions of Engagement for Consultancy Services (Technical), COE1v2g (30th Jun/16) will not provide adequate cover. Clause 13 to COE1v2g states:

> "16 Each party agrees to treat the other's documents as confidential [and so far as practicable cause their employees, agents, to do so]"

[37] Of further concern in respect of sub-provision (5) is the second 14-day period referred to at [32] above in that, if going to conciliation on one issue alone does not make financial sense for the Contractor, a disputed determination by the ER may end up being binding.

[38] Still with sub-provision (5), a cross-over exists with this provision and Clause 13.2.5 which begs the question when does the Clause 13.1 procedure end and conciliation under Clause 13.2 begin? Clause 13.2.5 repeats the range of actions open to the conciliator in the pre-v2.0 releases. The cross-over occurs after the fifth sub-clause thus:

> "Where the dispute has been referred to the dispute management procedure and Sub-clause 13.1.2(5) and 13.1.2(6) of the Contract applies, the conciliator, with the agreement of the Parties, may forego the requirements of 13.2.5(1) to 13.2.5(5) inclusive and give the Parties a written recommendation in accordance with 13.2.8."

[39] In the above quotation it is not clear if the words "with the agreement of the Parties" intend to refer to a 'nod' or if the more formal collateral agreement referred to in Clause 13.1.2 at sub-provisions (3) and (4) are necessary. Assuming this potential difficulty is overcome, it may be seen that application of the cross-over procedure not only dispenses with any further action under Clause 13.1 of a dispute so referred, it also disposes of the Clause 13.2 procedure up to and including, Clause 13.2.5. How often the cross-over procedure has been invoked in practice is difficult to know. Given the grumblings on the

public side referred to at [01] above, it is possible that the incidence has been high. Whilst the decision in *Wyse Construction (Limerick) Ireland v Donal Ryan Motor Group (Roscrea) Ltd.*[25] serves as a caution to a contractor who disengages from a Clause 13.2 conciliation, it is submitted that in terms of what began under Clause 13.1 but was subject to a cross-over, the existence of a clear agreement to apply the cross-over mechanism to Clause 13.2 could be crucial if one subsequently wished to place reliance on the *Wyse* decision.

[40] A further difficulty with sub-provision (5) is that it includes the words "or conciliator". If the words within parenthesis in Clause 13.2.1 mean what they say, once notice has been served under it, any and all action under Clause 13.1 DMP ends for all time as regards the dispute or disputes concerned. Hence there could never be an instance where a conciliator not being a standing conciliator could be asked to draft the terms of an oral agreement to be committed to writing pursuant to Clause 13.1.

[41] **Sub-provision (6)** suggests that there could be instances where a standing conciliator has not been appointed. This is in keeping with the Schedule, part N, at the words within square brackets which state that for contract values in excess of €10 Million, it is a mandatory requirement to have a standing conciliator. This is effectively repeated in GN3.1.1 at Page 14, Item 2.8, and which presumably relates to the Clause 1 definition of Contract Sum. Where a standing conciliator is mandatory, the appointment must be made and perfected prior to the Starting Date, although the prerequisite is not reflected in Clause 9.1.2. The position is less clear for contract values less than €10 Million and will largely depend upon a reserved sum having been included in the tender pricing documents or not. The mandatory requirement or the value could change over time.

[42] If a standing conciliator is appointed, there would be little point in incurring the additional expense involved, partly paid for by the public purse, if that person were not to attend meetings of a project board. GN3.1.1 at Item 1.5, end of Page 5, states: "…the Standing Conciliator may be appointed as chair of the Project Board. The Standing Conciliator may not be a member of the Project Board." It might be prudent for a standing conciliator to act as chairman, especially if relations are strained or if the ER is in attendance and attempts to assume a dominant role unhelpful to the resolution of the issues before the project board when his determinations will already be on record.

[43] **Sub-provision (7)** concerns a project board seeking advice or opinion from a standing conciliator. Unlike the contractual requirement imposed on conciliators pursuant to Clause 13.2.8, a standing conciliator is not obliged to provide any such advice or opinion strictly based on the parties' rights and obligations under the Contract. Such an approach would be stifling to the achievement of progressive solutions under the DMP. This is alluded to in GN3.1.1, at Page 17, Item 2.8.5, last but one bullet point:

> "The Standing Conciliator may, with the agreement of both Parties, either on his/her own initiative or at the request of either Party, informally assist the Parties in resolving any disputes."

[44] It must be queried if a standing conciliator should offer views, orally or in writing, as to the likely outcome of a dispute to be referred to conciliation when that person may have to subsequently write a recommendation when acting as the Clause 13.2 conciliator. Caution is needed having regard to the fact the conciliator is limited to offering solutions

[25] *Wyse Construction (Limerick) Ireland v Donal Ryan Motor Group (Roscrea) Ltd*., Unrep., 30th March 2012, High Court (MacMenamin J.).

within the confines of the PWC conditions. Baker notes, with reference to the *Glencot* decision, that an element of risk exists if a dispute adjudication board (DAB) member enters into informal discussions and that FIDIC attempted to address the issue that a DAB shall not be bound in any future resolution process by any views given informally[26]. Whilst a DAB is a different animal it may still be a signpost.

Standing Conciliators' Fees

[45] Possibly the greatest over-reach on the part of the OGP concerns the standing conciliator's fees. As is stated in GN3.1.1, Page 15, at Part 2.8.2:

> "A reserved sum[27] shall be included in the Pricing Document, by the Employer, to cover the Contractor's share, (nominally 50%), of the fee for the Standing Conciliator in performance of their (sic) duties. Once the successful main contract tenderer is identified, agreement between the Parties shall be reached on the appointment of the Standing Conciliator prior to the issue of the Letter of Acceptance. At this point the Contractor's share of the fee agreed with the Standing Conciliator for the performance of their (sic) duties, other than conciliating a dispute under Clause 13.2, will be inserted in place of the Reserved Sum and the Contract Sum calculated accordingly. The rate against this item entry shall include;
>
> 1. the fee charged by the Standing Conciliator in ensuring they (sic) establish and maintain a standing knowledge of the relationship between the Parties prior to the crystallisation of the dispute;
> 2. the fee charged by the Standing Conciliator in attending and/or chairing Project Board Meetings, this will be agreed by the Parties prior to the award of the Contract.
> 3. any other duties agreed by the Parties and charged by the Standing Conciliator in performing their (sic) duties.
>
> The rate shall not include any fee charged by the Standing Conciliator in conciliating any dispute referred under clause 13.2. In this case the Standing Conciliator shall identify their (sic) fee for acting as a conciliator for the particular dispute referred under sub-clause 13.2 and the fee will be shared between the parties in the manner set out in the conditions; see sub-clause 13.2.
>
> If the parties cannot agree the appointment of the Standing Conciliator in advance of the award of the contract, then the sum stated as the reserved sum shall stand as the Contractor's sole entitlement for their share of the fee for the Standing Conciliator's services. The reserved sum shall be included in the Contract Sum and shall not be adjustable via Change Order nor compensation event (not capitalised). If the Contractor's share of the fee sought by the Standing Conciliator, appointed by the nominated body in the Schedule Part 1N, exceeds the sum in the

[26] Ellis Baker, *Is it all necessary? Who benefits? Provision for multi-tier dispute resolution in international construction contracts*, Society of Construction Law, Paper 154, January 2009, pps.13-14; *Glencot Development & Design Ltd. v Ben Barrett & Son (Contractors) Ltd.* [2001] EWHC 15 (TCC), [2001] BLR 207 (HHJ Humphrey Lloyd).

[27] Reserved Sums are referred to in Guidance Note 2.3.3 at Section 1.6, page 12, concerning tendering to specialist works contractors. Treatment of Reserved Sums for standing conciliators is brief; see ITT W1 v2.2 and W1a v1.2, and ITT W2 v2.2 all dated 6th June 2018, at 8.4 and FTSv2.2 and v2.3 series at Parts 1N and 3A. Neither PWC Clause 5.4 nor Clause 11 make any provision as to how such sums are to be treated because any and all adjustments to be made must be carried out prior to the parties entering into contract.

Contract Sum, then the Contractor will pay 50% of the excess fee without entitlement to recoup costs from the Employer."

[46] To state the obvious, whilst MF1.18 Clause 6 provides for joint and several liability for the standing conciliator's fees, anyone contemplating acting as a standing conciliator needs to carefully consider the scope of services expected for what is likely to be, but may not necessarily be, a lump sum fee. Treatment at the cross-over mentioned earlier at [38] above and the exclusion from such a lump sum when acting as conciliator under Clause 13.2 will need careful consideration in the conciliator's terms of reference.

[47] In essence it would appear that as regards the standing fee, use of the term standing conciliator is a misnomer in that the fee is to include all services except when acting as conciliator. How a prospective standing conciliator is to derive a fees proposal would require one to know in advance (most unlikely):

(i) whether or not the Contractor will utilise the optional Clause 13.1;
(ii) how many disputes will arise during the contract and their complexity;
(iii) whether or not he will be called upon to draft the DMP protocol;
(iv) whether standing meetings will in fact be held at 60-day intervals as provided in Clause 13.1.2 at (1) and if the standing conciliator is to be the chairman of the project board, or otherwise be called to attend its meetings;
(v) whether a meeting of the project board can be more than one working day;
(vi) whether the parties will agree to interim meeting days of the board at intervals of less than 60 days;
(vii) whether or not he is to attend site meetings and their frequency;
(viii) how many agreements the standing conciliator may be called upon to draft pursuant to Clause 13.1.2 at (5);
(ix) how many times the standing conciliator may be called upon to act under the cross-over procedure referred to at [38] above and whether or not it is clear that in such instances the exclusion will apply i.e. an additional fee outside of the lump sum fee and whether a discount may be expected due to the lesser standing input required upon the invoking of the cross-over procedure or not;
(x) the level of project correspondence to be routinely read to maintain a standing knowledge of the relationship between the parties;
(xi) how many times the standing conciliator will have to confer with the parties or will be requested to do so as GN3.1.1, Page 14, Para. 2.8;
(xii) how many times the standing conciliator will be asked to provide advice or opinion as Clause 13.1.2 at (7) provides over the life of the project; and,
(xiii) how much of a lump sum fee would be recoverable if the Contractor did not utilise optional Clause 13.1 at all but that the standing conciliator still set aside time for the services on a monthly basis throughout the contract calendar and declined undertaking other work to fulfil his standing obligations.

[48] Attempting to place a standing conciliator's services under a lump sum fee as provided in MF1.18 Clause 5 is misguided thinking. By contrast, when the exception applies, the remuneration for acting as conciliator may be on an hourly basis as has been long-established since conciliation first took root in Ireland in the mid- to late-1990s and as Clause 13.2 provides. The same must be incorporated into the standing conciliator's contract, to be signed by all parties in circumstances where considerable pressure may

exist so that the letter of acceptance can be issued to the Contractor. MF1.18 Clause 7 further provides for the standing conciliator to act as Clause 13.2 conciliator, but the three parties may also execute an agreement using MF1.16 (Appointment of Conciliator) if and when a Clause 13.2 conciliation arises under the cross-over procedure[28].

[49] Whether through use of the cross-over procedure under Clause 13.2.5, or by means of a direct reference to conciliation under Clause 13.2, the standing conciliator would need to make clear that all services provided under Clauses 13.2.7 to 13.2.10. inclusive, fall inside of the exception i.e. not part of the lump sum fee (if so agreed).

[50] Lest it be said that this part of the commentary is negative in character, disputes boards, of which DABs are the better known, have a good record in some jurisdictions and have been the subject of some useful papers as have explored the benefits and some disadvantages[29]. FIDIC and ICE provide for the use of such boards with published rules of engagement which generally involve a panel of construction professionals and/or lawyers, sometimes just a sole member, external to the parties as avoids position taking (or should do so) and whereby decisions are only temporarily binding.

[51] Time appears to have been called, or may about to be, by public side users of the DMP. Its possible discontinuance could not be based on a back-lash due to contractors contending that Clause 13.1 is optional, or whether or not practitioners have found that acting as a standing conciliator is financially or otherwise a good experience, but could be how the expanded disputes resolution provisions in the PWC contracts are perceived in terms of outcomes as compared with statutory adjudication (still too early to say) and how the parties are being facilitated by the practitioners.

Closing Comments

[52] One might ask why the DMP is perceived in some quarters not to be working. It is not clear how anyone can make objective deductions without statistical data or any data. For arbitration conducted under Clause 13.4, there is a reporting requirement in ARv1.2 at Rule 6.3.1 as there is in statutory adjudication with reference to Rule 39 of the Code of Practice Governing the Conduct of Adjudications[30]. It would be premature for the DMP to be jettisoned or altered without some form of informed study of historical records suitably anonymised and released. Any such study could be limited to reporting the number of appointments as against the number of recorded written settlement agreements under Clause 13.1. Raw data must be in the possession of the OPW and the Dept. of Education and Science. With many housing projects awarded by the various housing agencies in 2018, all now under the Housing Finance Agency which insisted upon amendments to the standard PWC conditions, such data should require to be kept by that state agency. Reliance upon a rumour mill is not good enough.

[53] It is all too easy on the public side to say No and one can do so with impunity. There is, in addition, the misplaced perception for a public employer to say Yes would be not to "support" the ER, or one of its appointed consultants who might have a beef or other on an issue or, dare it be said, against a particular contractor, with downstream potential for negative consequences in the Employer's relations with its team, come what may its future relationship with the Contractor.

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[28] See MF1.18 28/06/2018 at the menu to Clause 7 thereof.

[29] Gaitskell, *Trends in Construction Dispute Resolution*, Society of Construction Law, 129, December 2005; Bailey, *Current Issues with FIDIC dispute adjudication boards*, Society of Construction Law, Paper D176, January 2015.

[30] Code of Practice (Revised) as published by the Dept. of Jobs, Enterprise and Innovation on 25th July 2016.

[54] Another possible failing is that parties are unwilling at the outset of a contract to devote the time and effort in producing and executing a written Clause 13.1 protocol, a task which an informed standing conciliator could impress upon the parties.

[55] A still further possibility is the deportment of standing conciliators' fees. No transparent competition exists. In a 'competition' last year, the author submitted a standing conciliator fees proposal for a project with an award value in excess of €20 Million. The standing conciliator component of the fee proposal was slightly under €4,000/month of the contract, to be extended for any extension of time as might be awarded. The hourly rate proposed for any Clause 13.2 conciliation was €50.00/hour up to Substantial Completion but that the standing conciliation fee would remain payable. If beyond Substantial Completion, the proposed fees for a Clause 13.2 conciliation was at €125.00/hour. The proposal was considered but was not successful. Shortly thereafter, a client asked the author to review four standing conciliator fees proposals on another project with an award value between the Directive threshold and the mandatory €10 Million in the Schedule. In all four proposals the standing conciliator part was unsustainably low, averaging at €1,250.00/month but the Clause 13.2 fees averaged at €200.00/hour. One could reasonably conclude that some, to earn a fee, could have a financial interest to ensure that all disputes are moved from Clause 13.1 to Clause 13.2 at the earliest opportunity.

[56] Lastly, over the past 24 months, the author asked a government department and at least three awarding authorities, including housing agencies, as to how they appoint standing conciliators and if any written procedures exist. One person bluntly advised the author not to expect any guidelines from the overseeing government department. The housing agencies were evasive.

[57] Overall, the impression gained by the author is that the standing conciliator appointment process, not being subject to Directive 2014/24/EU, is far too opaque and susceptible to a jobs-for-the-boys approach with no oversight of standing conciliators' performance or reporting obligations, a situation inherently inimical to the achievement of value for money of which the tax-paying public pays half.

Tom Wren BCL LLM FCIArb.
Ardpatrick, Co. Limerick
11th March 2019

EXTRACTS FROM THE PWC CONTRACTS

The following extracts are taken from PW-CF1 and -CF3, v2.3. Whilst the wording is identical in all four v2.3 standard forms, note that what is Clause 1.9 (Miscellaneous) in PW-CF1 and -CF3 is Clause 1.10 in PW-CF2 and -CF4 v2.3; and, what is Clause 1.10 (Background Information) in PW-CF1 and -CF3 is Clause 1.11 in PW-CF2 and -CF4 v2.3.

1. **THE CONTRACT**

1.2 **Interpretation**

1.2.1 The parties intend that the Contract be given purposeful meaning for efficiency of public benefit generally and as particularly identified in the Contract.

1.3 **Inconsistencies**

1.3.1 Except where the Contract states otherwise, the document in the Contract are to be taken as mutually explanatory of each other if possible. If there is an inconsistency between the documents, they take precedence as follows:

First, the Agreement, even if it has not been executed

Second, the attached Schedule and the Letter of Acceptance and any post-tender clarifications listed in it

Third, the Contractor's completed form of tender (excluding other documents in the tender)

Fourth, these Conditions

Fifth, the Works Requirements

Sixth, the Pricing Document

Seventh, the Works Proposals, if there are any

Eight, any other documents in the Contract

1.3.2 If either party becomes aware of any inconsistency between terms of the Contract, it shall promptly inform the other party.

1.3.3 If there is an inconsistency between figured and scaled dimensions, the figured dimensions prevail.

1.3.4 If the Works Requirements include a Bill of Quantities, and the Bill of Quantities is inconsistent with any other Works Requirements, the other Works Requirements prevail.

Where inconsistencies are found to exist between the Works Requirements and the Pricing Documents the Works Requirements take precedence with respect to the Works to be completed and a compensation event shall arise in accordance with the Schedule, Park 1K(17).

1.9 **Miscellaneous** (this appears as Clause 1.10 in PW-CF2 and -CF4)

1.9.1 The Contract and the documents referred to in it supersede all previous representations, arrangements, understandings and agreements between the Parties about the subject-matter of the Contract, and set out the entire agreement between the Parties about the subject-matter of the Contract. Neither party has relied on any other oral written or oral presentation, arrangement, understanding or agreement.

1.9.2 All the terms of the Contract are severable, and if any part is unenforceable, illegal or void, it is to that extent considered not to form part of the Contract, and the enforceability, legality and validity of the rest of the Contract will not be affected.

1.9.3 The Contract may only be changed by a document in writing signed by an authorised representative of each Party.

1.9.4 The rights of a Party will not be prejudiced or restricted by any indulgence or forbearance extended to the other Party, and no waiver by a party of any breach will waive any other breach.

1.10 **Background Information** (this appears as Clause 1.11 in PW-CF2 and -CF4)

1.10.1 In this sub-clause 1.11 Background Information means any information made available on, before or after the Contract Date to the Contractor or to anyone on the Contractor's behalf by the Employer or by anyone acting on the Employer's behalf in connection with the Contractor's tender for the Contract, which information is not included in this Contract. Background Information also includes any information stated to be 'Background Information'.

1.10.2 The Contractor acknowledges and agrees as follows:

(1) The Employer has no liability whatsoever to the Contractor in contract, tort, under statute, or on any other basis whatsoever (including negligence and breach of statutory or other duty) in connection with Background Information.

(2) The Employer has not made and does not make any warranty, representation, or undertaking in connection with Background Information.

(3) The Employer has not authorised anyone to make any warranty, representation, or undertaking on the Employer's behalf in connection with Background Information.

(4) Without limiting anything in this sub-clause 1.10, the Contractor irrevocably and forever waives any liability that the Employer may have to the Contractor in connection with Background Information regardless of any of the following circumstances, and the Contractor acknowledges that the Employer makes no warranty, representation, or undertaking in regard to those circumstances:

(a) whether or not Background Information is correct
(b) whether or not Background Information is complete
(c) whether or not any testing, investigations, surveys, or other work to prepare Background Information was done negligently or in breach of statutory or other duties
(d) whether or not those who carried out any testing, investigation, surveys, or other work to prepare Background Information were properly selected or supervised
(e) whether or not Background Information was suitable for the purposes for which the Contractor or anyone on the Contractor's behalf might use it
(f) whether or not any errors or omissions in Background Information are major or numerous or both
(g) whether or not Background Information represents all the information available to the Employer
(h) whether or not any works described in Background Information are done as described in Background Information or at all
(i) whether or not the Employer had or has other information that might render Background Information misleading
(j) the manner in which Background Information was made available
(k) whether or not the Contractor had adequate opportunity to carry out any testing, investigations, surveys, or other work or otherwise to verify Background Information.

(5) The Contractor has included in the Contract Sum for the risks that the Contractor has agreed to bear under this sub-clause 1.10.

10. CLAIMS AND ADJUSTMENTS

10.3 Contractor Claims

10.3.1 If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such entitlement, give notice of this to the Employer's Representative. The notice must be given according to sub-clause 4.14 and prominently state that it is being given under sub-clause 10.3 of the Contract. Within a further 20 working days after giving the notice, the Contractor shall give the Employer's Representative details of all of the following:

(1) all the relevant facts about the claim

(2) a detailed calculation and, so far as practicable, a proposal, based on that calculation, of any adjustment to be made to the Contract Sum and of the amount of any other entitlement claimed by the Contractor

(3) if the Contractor considers that the programme contingency referred to in sub-clause 9.4 should be used or that there should be an extension of time, the information required under sub-clause 9.3, and, so far as practicable, a proposal, based on that information for any use of the programme contingency or any extension to the Date for Substantial Completion of the Works and any affected Section.

The Contractor shall give any further information about the event or circumstance requested by the Employer's Representative.

10.3.2 If the Contractor does not give notice and details in accordance with and within the time provided in this sub-clause 10.3, except where the Contractor has been required to and has given a proposal complying in full with sub-clause 10.4 [notwithstanding anything else in the Contract] the Contractor shall not be entitled to an increase in the Contract Sum or extension of time or use the programme contingency referred to in sub-clause 9.4 [and the Employer shall be released from all liability to the Contractor in connection with the matter].

10.3.3 If the cause of the claim has a continuing effect, the Contractor shall update the information at monthly intervals

(1) stating the extension of time and adjustment to the Contract Sum claimed for delay and cost already incurred and

(2) so far as practicable, proposing a final adjustment to the Contract Sum and Date for Substantial Completion of the Works and any affected Section and

(3) providing any other information the Employer's Representative reasonably requires.

10.3.4 The Contractor shall keep detailed contemporary records to substantiate any aspect of an event or circumstance about which it has given, or is entitled to give, notice under this sub-clause 10.3, and its resulting costs. These shall include any records the Employer's Representative directs the Contractor to keep. The Contractor shall give the records to the Employer's Representative if so directed.

10.5 Employer's Representative's Determination

10.5.1 If the Contractor has made a claim or proposal under sub-clauses 10.3 or 10.4, the Employer's Representative shall, within 20 working days of receiving it, do one of the following:

(1) direct the Contractor to give additional information or revised proposals, in which case the Contractor shall do so within 10 working days and the Employer's Representative shall reply in accordance with this sub-clause within a further 10 working days, but that reply must not require the Contractor to give additional information or a revised proposal

(2) notify the Contractor and the Employer that the Contractor's proposals are agreed and make any resulting adjustments to the Contract Sum, use of the programme contingency referred to in sub-clause 9.4 or extension to the Date for Substantial Completion of the Works and any affected Section

(3) make a determination of any adjustments to the Contract Sum, use of the programme contingency referred to in sub-clause 9.4 or extension to the Date for Substantial Completion of the Works and any affected Section, and notify the Contractor and the Employer

(4) in response to a proposal under sub-clause 10.4, notify the Contractor that the proposed instruction will not be given.

10.5.2 The Employer's Representative may [but is not bound to] determine an extension of time for a Compensation Event that is a breach of the Contract by the Employer on its own initiative even if the Contractor has not made a claim or proposal under sub-clauses 10.3 or 10.4.

10.5.3 If the Employer's Representative fails to take any of the actions in sub-clause 10.5.1 within the time stated, the Employer's Representative will be taken to have made a determination under sub-clause 10.5.1(3) that there shall be no adjustment to the Contract Sum, no use of programme contingency referred to in sub-clause 9.4, and no extension to any Date for Substantial Completion. The determination will be taken to have been made on the last day of the time provided for in sub-clause 10.5.1.

10.5.4 A determination of the Employer's Representative notified to the Contractor and the Employer under sub-clause 10.5.1(3) or 10.5.2 shall be final and binding on the parties unless, within 28 days after receiving notice of the determination (or, if sub-clause 10.5.3 applies, within 28 days after the determination is taken to have been made), the Contractor or the Employer gives notice to the other under sub-clause 13.1.1 disputing the determination and referring the dispute to either;

1. the dispute management procedure under sub-clause 13.1; or
2. conciliation under sub-clause 13.2.

10.5.5 Notice of an agreement under sub-clause 10.5.1 (2) shall be final and binding on the parties unless, within 28 days after receiving the notice, either:

(1) the Contractor both (a) notifies the Employer's Representative and the Employer that the Contractor disagrees that the notice correctly records agreed terms and (b) gives notice to the Employer under sub-clause 13.1.1 referring the dispute to either;

1. the dispute management procedure under sub-clause 13.1; or
2. conciliation under sub-clause 13.2.

or

(2) the Employer both (a) notifies the Employer's Representative and the Contractor that the Employer does not agree with the terms notified by the Employer's Representative and (b) gives notice to the Contractor under sub-clause 13.1.1 referring the dispute to either;

1. the dispute management procedure under sub-clause 13.1; or
2. conciliation under sub-clause 13.2.

13. DISPUTES

13.1 Disputes Management Procedure

13.1.1 If a dispute arises under sub-clause 10.5.4 or 10.5.5 of the Contract, either Party may, by notice to the other, refer the dispute for resolution under this sub-clause 13.1. The notice shall state that the dispute is given under sub-clause 13.1 of the Contract.

13.1.2 The dispute management procedure for resolution of disputes arising under sub-clause 10.5.4 or 10.5.5 of the Contract consists of meetings of the project Board as detailed in this Clause.

The Project Board:

‘(1) shall meet at least every 60 days to review disputes referred under clause 13.1 and may, by agreement of the Project Board, call an interim Project Board Meeting sooner than the next scheduled date for a Project Board Meeting, to review disputes referred. Where no disputes are referred the Project Board may, by agreement of the Project Board, defer scheduled Project Board meetings until a dispute arises under clause 13.1. There shall be a minimum of 1 member from each Party and a maximum of 3 members from each Party, as named in Schedule Part 3A, at all Project Board meetings;

‘(2) shall ensure that all unresolved disputes at the end of a scheduled Project Board Meeting or interim Project Board Meeting are so notified to the Parties on the next Working Day after the Project Board meeting (“date of notification”). Either Party may refer such unresolved disputes to conciliation [in accordance with clause 13.2] within 14 days of the date of notification to the Parties by the Project Board, otherwise the Employer’s Representative’s determination issued under sub-clause 10.5 shall be binding;

‘(3) shall communicate orally or in writing on a “without prejudice” basis, including all communications between Project Board members and the Standing Conciliator, [where appointed], and such communications may not be relied upon by either Party in subsequent dispute resolution proceedings under this Contract6, other than the signed agreement as set out in sub-clause 13.1.2.(4);

‘(4) shall ensure all agreements to resolve a dispute between the parties are in writing and signed by the Parties. This agreement is binding on the Parties;

‘(5) may, where the relevant appointment has been made, agree to have the Standing Conciliator or conciliator draft the binding agreement to be signed by the Parties. If the agreement is not signed by both Parties within 14 days of the date of issue of the agreement by the Standing Conciliator or conciliator, either Party may refer the dispute to conciliation as per 13.1.2(2) above within a further 14 days. If the dispute is not referred to Conciliation within this further 14 day period the Employer’s Representative determination issued under sub-clause 10.5 shall be binding;

‘(6) may agree to have the Standing Conciliator, where one has been appointed, attend or chair the Project Board meetings;

‘(7) may agree to seek advice or opinion from the Standing Conciliator at the Project Board meetings, where one is appointed, either orally or in writing, in an effort to resolve disputes referred.

13.2 **Conciliation**

[Where Schedule Part 1N so states that a Standing Conciliator shall be appointed, the Standing Conciliator shall take the place of the conciliator under sub-clause 13.2 for all disputes referred to conciliation under sub-clause 13.2]

13.2.1 If a dispute arises under the Contract, [or where a dispute referred to the dispute management procedure has not been resolved], either party may, by notice to the other, refer the dispute for conciliation under this sub-clause 13.2. The notice shall state that it is given under sub-clause 13.2 of the Contract. [No dispute referred to the dispute management procedure may be referred to conciliation without first completing the dispute management procedure.]

13.2.2 Except in the case where a Standing Conciliator has been appointed, [and in such cases the Standing Conciliator shall be the conciliator], within 10 working days of the referral of a dispute to conciliation, the Parties shall jointly appoint a conciliator who is competent to adjudicate upon the dispute and independent of the parties. If the Parties fail to appoint a conciliator within 10 working days of the referral, or if a person appointed refuses to act or becomes unable to act, the conciliator shall be appointed by the appointing body or person named in the Schedule, part 1N, on the application of either Party. If there is a fee for making the appointment, the Parties shall share it equally. If one Party pays the entire fee, it shall be entitled to reimbursement of the other Party’s share from the other Party upon demand.

13.2.3 Each Party shall, within the period set by the conciliator, send to the conciliator and the other Party brief details of the dispute stating its contentions as to the facts and the Parties' rights and obligations concerning the dispute. The conciliator may, for this purpose, suggest further actions or investigations that may be of assistance.

13.2.4 The Parties shall promptly make available to the conciliator all information, documents, access to the Site and appropriate facilities that the conciliator requires to resolve the dispute.

13.2.5 The Conciliator shall consult with the Parties in an attempt to resolve the dispute by agreement. The conciliator may do any of the following, or any combination of them:

(1) meet the Parties separately from each other or together and consider documents from one Party not sent or shown to the other

(2) conduct investigations in the absence of the Parties

(3) make use of specialist knowledge

(4) obtain technical or legal advice

(5) establish the procedures to be followed in the conciliation

Where the dispute has been referred to the dispute management procedure and Sub-clause 13.1.2(5) and 13.1.2(6) of the Contract applies, the conciliator, with the agreement of the Parties, may forego the requirements of 13.2.5(1) to 13.2.5(5) inclusive and give the Parties a written recommendation in accordance with 13.2.8.

13.2.6 The conciliator shall not be an arbitrator and the Arbitration Act 2010 and the law relating to arbitration shall not apply to the conciliation.

13.2.7 The conciliator's terms of appointment shall be those in the Works Requirements or, if there are none, those agreed by the Employer and the Contractor with the conciliator.

13.2.8 If the dispute is not resolved by agreement within 42 days after the conciliator was appointed, [or after referral of the dispute to conciliation where a Standing Conciliator has been appointed], or a longer period proposed by the conciliator and agreed by the parties, the conciliator shall give both parties a written recommendation. The conciliator shall base the recommendation on the Parties' rights and obligations under the Contract.

13.2.9 If either party is dissatisfied with the conciliator's recommendation, it may, within 42 days after receiving a conciliator's recommendation, so notify the other party. The notice shall state that it is given under sub-clause 13.2 of the Contract, and shall state the matters in the dispute and the reasons for the dissatisfaction. If the Conciliator has failed to give a recommendation within 42 days after appointment, either party may give notice of dissatisfaction. If notice of dissatisfaction has been given in accordance with this clause, either Party may refer the dispute to arbitration under sub-clause 13.4.

13.2.10 If neither party gives notice of dissatisfaction within 42 days after receiving the conciliator's recommendation, the recommendation shall be conclusive and binding upon the Parties, and the Parties agree to comply with it. If, in such circumstances, a Party fails to comply with the conciliator's recommendation, the other Party may [without limiting its other rights] refer the failure itself to Adjudication, [where the dispute is a dispute relating to payment], or to arbitration under sub-clause 13.4, and need not invoke this sub-clause 13.2 for this reference.

13.2.11 If the conciliator has recommended the payment of money and a notice of dissatisfaction is given, the following shall apply:

(1) The Party concerned shall make the payment recommended by the conciliator, provided that the other Party first

(a) give a notice, complying with the arbitration rules referred to in sub-clause 13.4, referring the same dispute to arbitration and

(b) gave the paying Party a bond executed by a surety approved by the paying Party, acting reasonably, in the form included in the Works Requirements, or if there is none, a form approved by the paying Party, acting reasonably, for the amount of the payment.

(2) If, when the dispute is finally resolved, it is found that the Party receiving payment on the conciliator's recommendation was not entitled to some or all of the amount paid, then that Party shall repay the amount it was paid and not to be entitled to, together with interest.

(3) When the dispute is finally resolved, interest will be deducted from final payment under the award or judgment.

(4) Interest under this sub-clause is calculated at the reference rate referred to in the European Communities (Late Payment in Commercial Transactions) Regulations 2012 plus 2% per year and runs from the date of original payment to the date of the repayment or final payment.

(5) [This provision for interest is confidential under sub-clause 13.2.12, and in particular shall not be taken into account or referred to in arbitration until all other matters are resolved.

13.2.12 The conciliation shall be confidential, and the Parties shall respect its confidentiality, except when any of the exceptions to sub-clause 4.16 apply, or to the extent necessary to enforce a recommendation that has become conclusive and binding. All documents provided by a Party in connection with a conciliation shall be returned when the conciliation is concluded.

13.3 **Adjudication**

13.3.1 The Parties have recourse to Adjudication in accordance with the Construction Contracts Act 2013.

13.3.2 Where an adjudicator reaches a decision on a dispute referred under the Construction Contracts Act 2013, that same dispute shall not be referred to the dispute management procedure or conciliation under the Contract.

13.3.3 If a dispute between the Parties is referred to Adjudication, any dispute management procedure or conciliation relating to that dispute immediately adjourns. In the event that no decision is reached by the adjudicator, the parties may continue to resolve the dispute under the dispute management procedure or conciliation from the date the dispute was referred to Adjudication. In the event a decision is reached by the adjudicator, the dispute management procedure or conciliation for the dispute shall be terminated. {should have said automatically terminated}

13.4 **Arbitration**

Any dispute that, under sub-clause 13.2, may be referred to conciliation shall, subject to sub-clause 13.2 be finally settled by arbitration in accordance with the arbitration rules identified in the Schedule, part 1N. For purposes of those rules, the person or body to appoint the arbitrator, if not agreed by the Parties, is named in the Schedule, part 1N.

13.5 **Jurisdiction**

Subject to the above provisions of this clause, the Parties submit to the jurisdiction of the Irish courts to settle any dispute that may arise out of or in connection with the Contract or the Works.

13.6 **Agent for Service**

If an agent for service of legal proceedings on the Contractor is named in part 2A of the Schedule, the Contractor confirms to the Employer that it has irrevocably appointed the named person as its agent for the service of all documents relating to legal proceedings, and that failure of the agent to notify the Contractor of receipt of a document will not invalidate any proceedings or the service of the document.

13.7 **Continuing Obligations**

[Despite the existence of a dispute, the Parties shall continue to perform their obligations under the Contract.]