

Report into the Operation of the Roles of Standing Conciliator and Project Board

Report prepared for

The Office of Government Procurement

By

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Executive Summary

Introduction and Background

This report is submitted to the Office of Government Procurement (OGP) by Indecon International Consultants. The report concerns an independent review of the roles of Standing Conciliator and Project Board under the Public Works Contract (PWC).

The background to this review was the introduction, in January 2016, of the roles of Standing Conciliator and the Project Board. In late 2018, the Government Contracts Committee for Construction (GCCC), together with the OGP, elected to carry out a review of the roles of Standing Conciliator and Project Board, with the objective of establishing the approach taken to these new roles; how they were being operated in practice; and their success in resolving disputes or, in the case of the Standing Conciliator, avoiding disputes from arising in the first place. Indecon's review addresses these objectives through the gathering and analysis of empirical data on a range of aspects of operation of the roles Standing Conciliator and Project Board.

Summary of Main Findings – Role of Standing Conciliator

Indecon's review of the role of Standing Conciliator entailed a detailed empirical analysis covering a range of aspects of the operation and effectiveness of the role. The main findings are summarised below.

- ❑ Among Standing Conciliators who responded to Indecon's research, analysis of their professional backgrounds revealed a diversity of expertise and experience, with three-quarters indicating that they had expertise in arbitration, while significant proportions of respondents stated that they had qualifications/skills in engineering, quantity surveying legal skills, construction management and project management.
- ❑ The research suggests that there is likely to be a relatively small pool of individuals in Ireland with the expertise and experience required to act as an effective Standing Conciliator, while a subset of these individuals tend to advise on the majority of projects. This raises the issue of the need to ensure an adequate supply of suitably trained specialists in this area in Ireland. There is also an absence of formal qualifications in Ireland required specifically to practice as a Standing Conciliator.
- ❑ An important intended objective of the dispute management procedures is to encourage early engagement between parties, with a view to avoiding potential disputes before they crystallise into actual disputes that require formal procedures. Over half (52.6%) of Standing Conciliators surveyed by Indecon indicated that they had experienced meaningful early engagement between parties prior to utilisation of formal procedures, but a significant minority (26%) indicated that meaningful early engagement between parties was not evident on projects they had worked on.
- ❑ The research also found that engagement of Standing Conciliators on projects tends to be focussed on the later stages of a project, or where a project is at or near completion, with 78-79% of Standing Conciliators stating that they typically had only minor or no involvement following commencement or at the early stages of groundwork on a project. Given that an important intended objective of the dispute management procedures is to encourage early effective engagement between parties, with a view to avoiding potential disputes before they crystallise into actual disputes, the above findings suggest that this is an area where the procedures and guidance could be strengthened.
- ❑ The research also sought views as to whether the current dispute management procedures are working well in practice. The findings indicated that a majority (80%) of Standing Conciliators either strongly agreed or agreed that their role had helped to avoid potential disputes. Levels of agreement were lower, but still significant, among other practitioners, including contractors and employers, or their representatives, that Standing Conciliators had helped to prevent potential disputes from arising.
- ❑ Examples of specific strengths of the role of Standing Conciliator (SC) noted by practitioners interviewed as part of this review included the ability of the SC to engage with, and act as a conduit

between, parties and to foster informal discussion outside the Project Board setting; having the SC fulfil the role of conciliator; the role of the SC as the ultimate issuer of recommendation (i.e., at the end part of a conciliation); and providing the Project Board with formal/informal access to the Standing Conciliator's expertise and experience.

- ❑ Although there was significant variation across respondents, the research also noted that between 41% and 82% of practitioners strongly agreed or agreed that the role of Standing Conciliator had assisted in resolving actual disputes, though other parties were relatively less positive in this regard.

Summary of Main Findings – Role of Project Boards

The main findings from Indecon's analysis of the role of Project Boards are summarised below.

- ❑ In relation to expertise among Project Board members, the research suggested that members had a wide range of areas of expertise, with project management, construction management and quantity surveying the most common areas. However, only a minority of members of Project Boards had legal or arbitration expertise.
- ❑ Interviews with a sample of practitioners revealed a mix of experience in relation to the format of Project Board meetings, with some individuals reporting more formalised structures, with clear agendas, structured discussion, and minute-taking and circulation, while other interviewees indicated more informal approaches, for example, where meetings were generally not held on-site, and agendas generally followed the disputes that arose from Employer Representative (ER) Determinations.
- ❑ In relation to involvement of Standing Conciliators, the research found that, on average, Standing Conciliators had acted as a chairperson on just under 40% of the boards to which they were appointed.
- ❑ In addition, Project Board members indicated that, in 73% of projects on which they were engaged, the Project Board had direct interaction with the Standing Conciliator, suggesting that Standing Conciliators are called on frequently to help resolve disputes.
- ❑ In relation to overall effectiveness, almost two-thirds (64.9%) of Project Board members responding to Indecon's research either strongly agreed or agreed that Project Boards helped in resolving disputes. Standing conciliators were relatively most positive in their assessment, followed by employer/employer personnel, contractor/contractor personnel and contractor representatives.
- ❑ Examples of specific aspects of the role of Project Boards that practitioners believed currently worked well included that Project Boards help to build relationships between senior personnel from the parties; they provide access to the expertise and experience of the Standing Conciliator; they provide an early indication to the parties as to what the Conciliators view is likely to be in formal conciliation on a particular dispute; they provide the ability to discuss issues on a without-prejudice basis; and Project Boards provide a forum for the contract parties to meet on a regular basis during the life of the project, and may also provide a forum to improve relations that may have deteriorated.
- ❑ Among aspects of the role of Project Boards that could be amended to function more effectively, respondents interviewed by Indecon suggested that the Project Board should have the ability to be proactive in addressing future possible disputes before the ER makes their Determination; that the strict single Project Board meeting to resolve disputes presented is not realistic, particularly in the case of complex disputes; and that representatives on the Employer side should be experienced in discussing and resolving construction disputes.

Recommendations

Based on the detailed empirical analysis and assessment undertaken in this review, Indecon has identified a number of recommendations on potential ways to enhance the effective functioning of the Dispute Management Procedures under the Public Works Contract. These recommendations, which are set out in the table below, include potential cross-cutting measures designed to strengthen the capacity to avoid potential disputes, in addition to specific actions to enhance the roles of Standing Conciliator and Project Board, respectively.

Recommendations on Potential Enhancements to Functioning of Dispute Management Procedures under the PWC	
	Cross-cutting Recommendations
1.	In the context of dispute avoidance, greater emphasis should be placed in the PWC on the application of project planning and control, including the identification, management and control of project risks that could develop into potential disputes.
2.	Consideration should be given to appropriate application of aspects of Collaborative Contracting, including Early Contractor Involvement, use of Contractual Targets and Incentives, and Quality Management processes. These approaches would serve to enhance the Dispute Management Procedures through improving collaboration at the early stages of a contract, potentially avoiding disputes later in the project; incentivising the contractor to complete their works in a timely manner and within budget; and maintaining a positive, collaborative relationship between contract parties.
3.	As part of the function of the roles of Standing Conciliator and Project Board, the development and application of early warning systems (for example, along the lines of the NEC4 contract's 'Early Warning Register') should be advanced to incentivise early collaboration by Contract Parties on the identification and management of specified risks, including potential project delays.
4.	The potential to utilise aspects of the International Chamber of Commerce's ADR services should be explored. The ICC offers standard form contracts, as well as a comprehensive variety of dispute resolution services.
	Recommendations re Role of Standing Conciliator
5.	Initiatives should be advanced to expand the pool of individuals in Ireland with the expertise and experience required to practice as a Standing Conciliator on Public Works Contracts. This should include engaging with education and training providers, and professional bodies, to develop a recognised qualification and programme of formal training for individuals who wish to practice as a Standing Conciliator, and to promote the role as a career option for experienced professionals.
6.	Public Works Contract clauses should ensure that the intended role and scope of the Standing Conciliator in respect of dispute avoidance are more clearly emphasised and supported by the Contract Parties. This could include potentially adjusting Clause 13 of the Public Works Contract to formally incorporate a dispute avoidance role for the Standing Conciliator.
7.	To achieve greater consistency in the operation of the role, Guidance Note 3.1.1 should be expanded to set out in greater detail the procedures that should be followed by the Standing Conciliator.
8.	Guidance in relation to the process of appointment of the Standing Conciliator should be strengthened to ensure independence and impartiality of the role.
9.	Consideration should be given to the merits of adjusting the payment structure for Standing Conciliators to incentivise time inputs at the early stages of projects and to maximise the contribution of SCs in assisting Parties to avoid potential disputes. This could include allocating a greater weight to payment on an hourly rate basis and less emphasis on the lump sum component.

Recommendations on Potential Enhancements to Functioning of Dispute Management Procedures under the PWC (<i>continued</i>)	
	Recommendations re Role of Project Board
10.	To place greater emphasis on the avoidance of disputes, consider strengthening the role and remit of the Project Board to include the ability to regularly review a project and discuss potential disputes in advance of an ER Determination, and to mitigate potential risks and subsequent claims. This should include consideration of the merits of introducing a contractual requirement to proactively mitigate dispute risks and attempt to achieve dispute resolution.
11.	To ensure consistency in relation to their effective and efficient operation, enhanced guidance is needed in relation to the operating procedure by which the Project Board hears, discusses and resolves referred disputes. The guidance should, among other aspects, emphasize the need for the Project Board members to constructively engage in finding agreement/resolution (including possible negotiation outside contract parameters), to cooperate with the Standing Conciliator, and require boards to reach decisions on referred disputes within pre-defined timescales. The guidance should also be supported by the provision to Project Board members of appropriate training in contract dispute management and resolution, and Project Board operation.
12.	Guidance on establishing and constituting the Project Board should emphasise the importance of appointing representatives of Contract Parties who have the required knowledge and expertise in the construction industry, in commercial decision making and negotiation, and in dispute resolution methods; are fully familiar with the role and objectives of the Project Board and of the Standing Conciliator; and are ideally decision-makers in their company/organisation and have the authority to engage in meaningful discussions with the other party and the Standing Conciliator at Project Board meetings. In addition, ideally at least one member of the Project Board should be independent of the Contract Parties (this may or may not be the Standing Conciliator).
13.	Consider the merits of giving the Standing Conciliator a more formal, but impartial, role in Project Board meetings. This could include requiring that the Standing Conciliator always chairs the Project Board, or alternatively, permitting the Standing Conciliator to attend Project Board meetings in an observer-only capacity, to build knowledge of issues on-site and/or between the Contract Parties' site teams.
14.	For larger and/or more complex projects, the option should be considered of allowing the Standing Conciliator to appoint an independent external expert, who has prior experience of Project Boards, knowledge of similar contracts and of potential value ranges for settlement of similar disputes, who can attend Project Board meetings in an observer-only capacity and subsequently advise the Standing Conciliator.

Overall Conclusion

Indecon's review of the roles of Standing Conciliator and Project Board under the Public Works Contract's Dispute Management Procedures has shown that, while individual perceptions can be greatly coloured by the experience on different projects, overall, the roles have generally been well-received. This included significant levels of agreement among practitioners and contract parties that Standing Conciliators had assisted in resolving actual disputes and helped in avoiding potential disputes, while the research also found a broad consensus among contract parties and Standing Conciliators that Project Boards had helped to resolve disputes that might otherwise have extended into longer and/or more costly outcomes. The review also identified areas where the roles, as well as the design of the Public Works Contract and wider Dispute Management Procedures, could be enhanced to further strengthen their impact and effectiveness, particularly to achieve a greater emphasis on the avoidance of potential disputes.

1 Introduction, Background and Methodology

1.1 Introduction

This report is submitted to the Office of Government Procurement (OGP) by Indecon International Consultants. The report concerns an independent review of the roles of Standing Conciliator and Project Board under the Public Works Contract. Indecon was appointed by the OGP to conduct this review following a competitive tender process.

1.2 Background to Review

The background to this review is that, in January 2016, the OGP published revised forms of Public Works Contract, associated documents and Guidance Notes. These publications were the culmination of a review of the Public Works Contract (PWC), launched in 2013 by the Minister for Public Expenditure and Reform. The review of the performance of the PWC led to the publication, in December 2014, of the 'Report on the Review of the Performance of the Public Works Contract'.

Following the 2014 report, the OGP commenced a year-long development of policy initiatives, which ultimately brought forth the introduction of the roles of Standing Conciliator and the Project Board. The amended forms of contract under the PWC were published in January 2016, but their use was subject to transitional arrangements, as set out in Circular 01/2016. In practice, this meant that the use of the Project Board and the Standing Conciliator was only mandatory for contracts awarded after January 2017, although both provisions were adopted voluntarily on many contracts from January 2016. The Project Board is required on all projects with a value in excess of €5 million, while the Standing Conciliator must be used on projects with a value in excess of €10 million.

In late 2018, the Government Contracts Committee for Construction (GCCC), together with the OGP, elected to carry out a review in an effort to establish the approach being taken to these new provisions, how they were being operated in practice and their success in resolving disputes or, in the case of the Standing Conciliator avoiding disputes from arising in the first place.

1.3 Scope of Review

Reflecting the above objective, this review comprises two overall elements, namely:

- An investigation into the operation of the role of the **Standing Conciliator**, entailing the gathering of empirical data on the operation of the role, from the following categories of practitioner (all of whom have worked on Public Works Contracts PW-CF1 to PW-CF4, which had a Standing Conciliator appointed):
 - Persons who are or were engaged as Standing Conciliator
 - Employers or Employers' Personnel
 - Contractors or Contractors' Personnel
 - Employer's Representatives
 - Contractor's Representatives
 - Design Consultants
 - Persons who are or were appointed to a Project Board

- An investigation into the operation of the role of the **Project Board**, involving the gathering of empirical data on the operation of the role from the following practitioners (all of whom have worked on Public Works Contracts PW-CF1 to PW-CF4, which had a Project Board appointed):
 - Persons who are or were appointed to a Project Board
 - Employers or Employers' Personnel
 - Contractors or Contractors' Personnel
 - Employers' Representatives
 - Contractors' Representatives
 - Design Consultants
 - Persons who are or were engaged as Standing Conciliator

The empirical data gathered through the research was designed to address following headings with respect to each role:

Standing Conciliator:

- i. Range of professional profile amongst appointed Standing Conciliators.
- ii. Range of duties agreed with Standing Conciliators to form part of their role.
- iii. Range of typical pricing structure agreed, (i.e., Lump Sum or Hourly Rate), for Standing role.
- iv. Range of interaction, with Standing Conciliator, by each Party, or their representatives, to avoid disputes, at what stage of a dispute and by whom.
- v. Number of disputes that the Standing Conciliator assisted the Parties in avoiding on specific projects.
- vi. Number of disputes that Standing Conciliator failed to assist the Parties avoid on specific contracts.
- vii. Incidence of involvement of Standing Conciliators with the Project Board in resolving disputes, i.e., advising, issuing opinions, etc.
- viii. Incidence where role of Standing Conciliator is increased or decreased by parties during engagement.
- ix. Recommendations or opinions from all surveyed persons on how the role can be amended to better function and what parts of the role adequately functions as is.

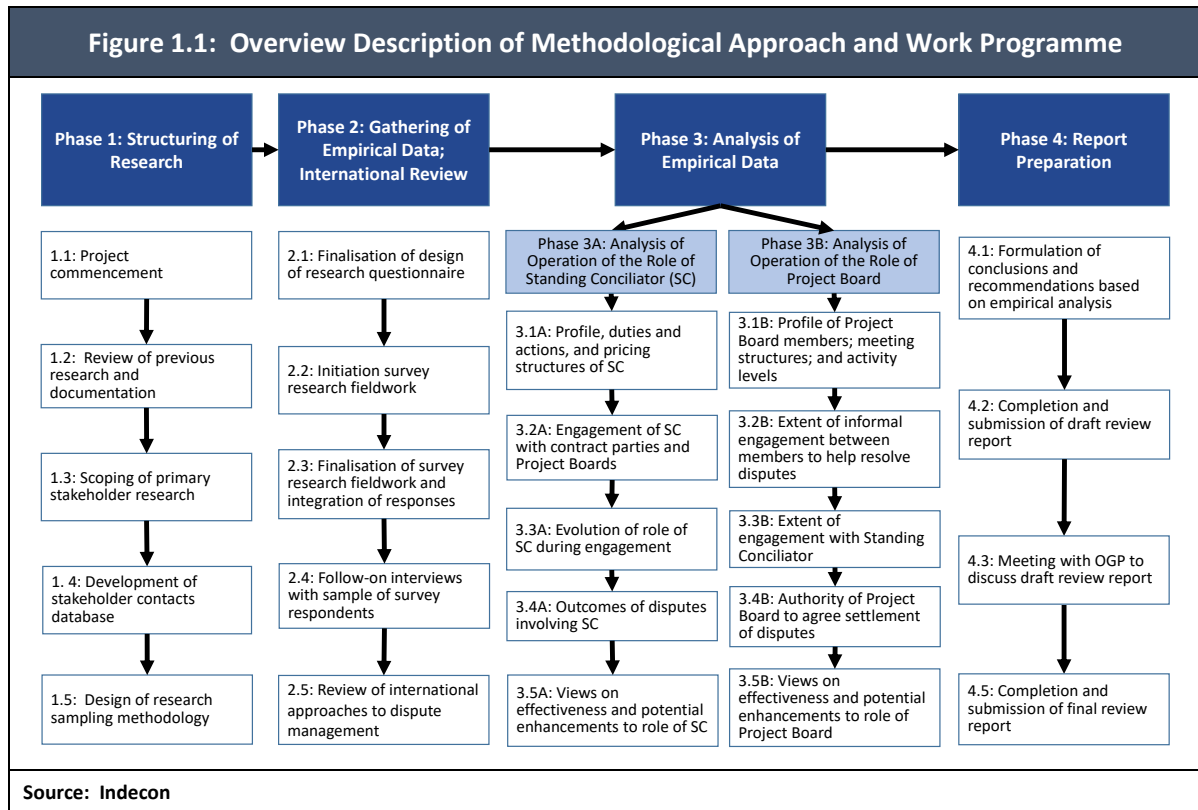
Project Board:

- i. Range of professional profile amongst members of Project Boards.
- ii. Incidence of members of Project Board that are not direct employees of the Parties, and in such cases how this person was appointed to the role and on what terms.
- iii. Range of format of meeting structure agreed by the Parties.
- iv. Incidence of the Project Board engaging with the Standing Conciliator to assist the parties resolve disputes.

- v. Incidence of the Project Board resolving or not resolving disputes referred.
- vi. Incidence of the Project Board Members meeting outside the official Board meetings in order to resolve disputes.
- vii. Incidence of Board Members not having authority to agree settlement of disputes referred.
- viii. Where Board Members had authority, how that authority was recorded and given.
- ix. Incidence of the Project Board discussing issues outside disputes referred.
- x. Recommendations or opinions from all surveyed persons on how the role can be amended to better function and what part of the role adequately functions as is.

1.4 Methodological Approach to Review

A four-phased methodology and associated work programme was applied by Indecon to address the above review brief comprehensively and rigorously. An overview description of the methodological approach and work programme undertaken is presented in the figure below. Key elements of the review process are further described below and overleaf.



Stakeholder Research

This review was informed by the completion of extensive new primary research. A single integrated survey of stakeholders was undertaken, which was designed to capture the inputs of a diverse range of stakeholders with different backgrounds and roles, including individuals who have acted as Standing Conciliators or who have been members of a Project Board.

The design of the detailed research questionnaire was informed by expert inputs from different members of the Indecon review team, as well as review/input by senior OGP officials. The questionnaire captured a wide range of dimensions aligned with the terms of reference for the review, and was structured into three main sections, as follows:

- Questions 1-15 – general questions addressed to all respondents, incorporating questions on respondents’ background and their position/role and involvement as a Standing Conciliator or Project Board member; and seeking respondents’ views on how the Public Works Contracts Dispute Resolution Procedures are operating in practice.
- Questions 16-25 – seeking detailed inputs where respondents have acted as a Standing Conciliator.
- Questions 26-36 – seeking detailed inputs where respondents have been a member of a Project Board.

A copy of the final research questionnaire is provided in Annex 1 of this report. For the purposes of dissemination, the final questionnaire was coded into an online version, using Indecon’s corporate membership of the SurveyMonkey survey research platform.

Invitations to complete the survey were issued on 2nd March 2021 to a total of 199 stakeholder contact points. These contacts were identified with the assistance of the OGP, via the issuance, in December 2020, of an Expression of Interest (EoI) via the European Commission’s ‘EUSurvey’ platform. By 18th June 2021, a total of 127 responses to the survey were received from stakeholders. This equated to an exceptional response of 63.8%. A breakdown of these responses received is presented in the table below. The overall scale and diverse sample achieved provided a strong basis to inform the empirical analysis.

Table 1.1: Stakeholder Survey – Summary of Number of Responses by Category		
	No. of Respondents who worked on Public Works Contracts where a <u>Standing Conciliator</u> was Appointed	No. of Respondents who worked on Public Works Contracts where a <u>Project Board</u> was Appointed
Standing Conciliators / Appointees to Project Boards	49	54
Standing Conciliators	20	20
Appointees to a Project Board	41	47
Employers/Employers Personnel or Reps	59	65
Employers/Employer’s personnel	39	43
Employer’s representatives	28	31
Contractors or their personnel or their representatives, incl. Design Consultants	59	62
Contractor’s representatives	24	24
Contractors/contractor’s personnel	19	20
Design Consultants	29	32
Source: Indecon Confidential Survey re Independent Review of Roles of Standing Conciliator and Project Board Notes: Based on final total of 127 responses received by 18 th June 2021. The above figures do not sum to 127, while sub-categories do not add to the category totals, as respondents may engage in multiple roles.		

Interview programme

The empirical research, which was based on a more detailed questionnaire than initially envisaged, yielded extensive, detailed inputs across a number of dimensions. However, Indecon judged that it would be of assistance to conduct a short series of interviews with a selection of respondents, with a view to clarifying aspects of their responses and also to form a deeper understanding of the roles of Standing Conciliator and Project Board. A total of fourteen interviews were undertaken, across the categories shown in the table below.

Table 1.2: Summary Breakdown of Interview Programme by Category of Interviewee	
Category/Role	No. of Interviews
Standing Conciliator	6
Employer/employer personnel or rep	4
Contractor/contractor personnel or rep	3
Design or cost consultant	1
Total	14

International Review

In addition to the empirical analysis based on the primary research, the review also included the completion of research into international approaches to dispute management. This review highlights a number of salient features of the approaches to dispute avoidance and dispute resolution used in several comparator countries, focussing on the UK, Denmark, Australia and New Zealand, in addition to the dispute services offered by the International Chamber of Commerce in Paris. Due to differences in legal systems and in procurement practices, caution is needed in interpreting any potential lessons from international experience and in attempting to apply different approaches to the Irish context.

1.5 Structure of Report

The remainder of this report is structured as follows:

- Section 2 sets the context by presenting an overview of the development and key features of the dispute management procures under the Irish Public Works Contract. This section also highlights specific recent legislative developments in Ireland, in addition to presenting a summary of the findings from Indecon's review of international approaches to dispute avoidance and resolution.
- Section 3 presents the detailed empirical analysis of Indecon's primary research in relation to the role of Standing Conciliator (SC) under the Public Works Contract's dispute management procedures.
- Section 4 presents the detailed findings of the empirical analysis of the role of the Project Board under the PWC.
- Section 5 integrates the analysis presented in the preceding sections to set out overall conclusions from the research. In addition, this section outlines recommendations on potential ways in which the dispute management procedures under the PWC could be further strengthened.

1.6 Acknowledgements and Disclaimer

Indecon would like to acknowledge the inputs and assistance provided by a wide range of individuals during the course of completion of this review. We would firstly like to express our gratitude to officials in the Office of Government Procurement's Construction Procurement Policy Unit (CPPU), including David O'Brien, Charles Mitchell, Sarah Mahon, Siobhan O'Mahoney, Stephen Lynam, Eileen Dalton, Alexander Fyfe, and Francis O'Reilly, in addition to Michael Farrington (formerly technical adviser in the CPPU), for their valuable assistance and guidance throughout the review process. In addition, we would like to thank members of the Government Contracts Committee for Construction (GCCC) for their feedback on the draft report.

We would also particularly like to acknowledge the large number of individuals, in particular those who have acted as Standing Conciliators or members of Project Boards, who responded to the primary research survey and provided valuable detailed inputs to the review.

Finally, we would also like to thank Gerry O'Sullivan and Dr Will Hughes, advisers to the Indecon team, for their guidance and inputs. The usual disclaimer applies and the analysis in this report is the sole responsibility of Indecon.

2 Overview of Dispute Management Procedures and Developments

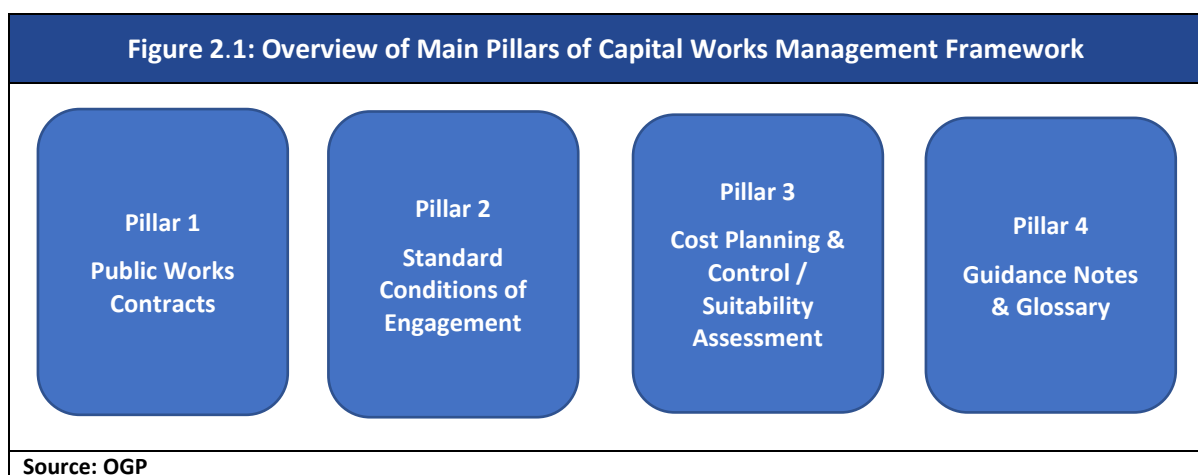
2.1 Introduction

Prior to examining the roles of Standing Conciliator and Project Board in detail, this section sets the context by presenting an overview of the development and key features of the dispute management procures under the Public Works Contracts. We also highlight some specific recent legislative developments in Ireland, in addition to presenting a summary of the findings from Indecon's review of international approaches to dispute avoidance and resolution.

2.2 Overview of Public Works Contract and Dispute Management Procedures

Prior to 2007, forms of contract used for government-funded projects were published by either the Institution of Engineers of Ireland or the Royal Institute of the Architects of Ireland and were based on the Institution of Civil Engineers and Joint Contracts Tribunal standard forms, with minor changes to reflect local conditions.¹ In 2006, the EU introduced regulations governing the award of public authorities' contracts² to give effect to Directive 2004/18/EC. In response to the new requirements, the Irish government introduced a suite of contract forms for both employer-designed and contractor-designed projects, the Public Works Contracts (PWCs). These forms are fixed-price lump-sum contracts with the effect of shifting more contractual risk from the government to the contractors than under the previous forms.³

Over the past decade, the Capital Works Management Framework (CWMF) has been developed to deliver the Government's objectives in relation to public sector construction procurement reform. It consists of a suite of best practice guidance, standard contracts and generic template documents that form the four pillars that support the Framework, as shown below.⁴



¹ Fogarty, H., 2009, "Contractor perspective on the new Irish public works contracts", *Management Procurement and Law*, 162(1):29-34.

² S.I. 329 of 2006, European Communities (Award of Public Authorities' Contracts) Regulations 2006.

³ Fogarty (2009)

⁴ <https://constructionprocurement.gov.ie/capital-works-management-framework/>

The CWMF sets out the different types of Public Works Contracts, with the main categories of contract forms covering:

- ☐ Building.
- ☐ Civil engineering.
- ☐ Minor works, building and civil engineering.
- ☐ Short form of contract.
- ☐ Early collaboration contract.
- ☐ Term maintenance and refurbishment contract.

The following table outlines when the different types of contracts are most appropriate for building and civil engineering projects.

Table 2.1: Forms of Contract for Building and Civil Engineering Type Works		
Employer Designed Contracts		
Value of Contract	Nature of Works	Form of Contract
Less than €1 million	Building and civil engineering	PW-CF6 – Public Works Short Form of Contract for public building and civil engineering works
€1-5 million	Building and civil engineering	PW-CF5 – Public Works Contract for minor building and civil engineering works designed by the employer
Over €5 million	Building	PW-CF1 – Public Works Contract for building works designed by the employer
	Civil Engineering	PW-CF3 – Public Works Contract for civil engineering works designed by the employer
Contractor Designed Contracts		
Value of Contract	Nature of Works	Form of Contract
Over €5 million	Building	PW-CF2 – Public Works Contract for building works designed by the contractor
	Civil Engineering	PW-CF4 – Public Works Contract for civil engineering works designed by the contractor
Source: https://constructionprocurement.gov.ie/capital-works-management-framework/		

These Public Works Contracts provide guidance in relation to the law, management, loss damage and injury, as well as other areas such as dispute resolution. The PWCs note that should disputes arise either party may refer the dispute for resolution under sub-clause 13.1. The Indecon review focuses on Public Works Contract forms PW-CF1 through PW-CF4, under which a Project Board and/or Standing Conciliator were appointed.

2.2.1 Review of the Performance of the Public Works Contracts (2014)

In 2014, the OGP published a review of the Public Works Contracts which were introduced in 2007 in response to the occurrence of cost overruns in government construction contracts.⁵

Specific recommendations from the Review included the following:

- (1) Make the bill of quantities the primary reference document for the pricing of public works tenders for projects designed by the contracting authority.
- (2) Introduce a separate tender and subcontract for specialist works contractors.
- (3) Require all projects with a value in excess of €2m to be awarded on the basis of Most Economically Advantageous Tender with a significant weighting for quality.
- (4) Overhaul the dispute resolution procedures for all public works contracts.

The review also identified the following issues for further consideration:

- (1) Risk management – ongoing appraisal from planning/design phase through completion and use of lifecycle costing.
- (2) Encouraging co-operative behaviour – must be contractually incentivised to reach better outcomes.
- (3) Introduction of performance evaluation – milestone evaluations taking place throughout the contract period result in opportunity to improve performance.
- (4) Alternative forms of contract – forms developed by sectoral experts, published by independent bodies, and assistance/guidance provided for those using the contracts (e.g., NEC4, FIDIC).

The conclusions from the review included that:

“...lump sum contracts still have a significant role to play and can be used effectively to deliver the vast majority of publicly funded projects providing that (1) the project is well-defined; (2) that adequate information on the risks associated with the project is supplied in the tender competition; and (3) regular training and information sessions are provided for all those using and working with the contracts.”

An important outcome from the 2014 review was the recommendation that dispute management procedures be overhauled. Specifically, the review proposed:

“...to review the triggers to the formal dispute resolution procedures to permit greater engagement between the parties through escalation up to senior management levels prior to engaging in formal proceedings. It is also proposed to introduce a standing dispute convener for contracts in excess of €10m to provide greater oversight of both parties’ engagement under the contract. In the absence of a properly priced and resourced contract (that the other interim measures are intended to address)

⁵ <https://constructionprocurement.gov.ie/wp-content/uploads/Report-on-the-Review-of-the-Performance-of-the-Public-Works-Contract.pdf>

such measures are unlikely to provide huge relief but may reduce the costs incurred by both parties when disputes arise.”⁶

2.2.2 Dispute Management Procedures introduced in 2016

Following on from the publication of the 2014 review, the OGP commenced a yearlong development of policy initiatives. This, inter alia, led to the introduction of the roles of the Standing Conciliator and Project Board. Revised forms of contract, in addition to supporting guidance notes, were published in January 2016, though their use was subject to transitional arrangements, as set out in Circular 01/2016. In effect, this meant that the use of the Project Board and the Standing Conciliator was only mandatory for contracts awarded after January 2017, although both provisions were adopted voluntarily on many contracts from January 2016. The Project Board is required on all projects with a value in excess of €5m and the Standing Conciliator must be used on projects with a value in excess of €10m. In June 2016, an updated Guidance Note on Dispute Resolution was published by the OGP.⁷ This set out the intended operation of dispute management procedures.

Establishing the Project Board

The initial step in the process is to establish the Project Board (PB), consisting of members nominated by each party to the contract. There must be between one and three members nominated by each party. All members of the PB must have the “capacity and authority to negotiate” binding agreements for their party, and “At least one member from each Party to the Project Board must hold a construction related role within the Party’s organisation, or have a construction related qualification or have a construction related background that could be described as relevant to the project scope.”⁸

Functions of the Project Board⁹

The main function of the Project Board is to review disputed Employer Representative Determinations issued under Sub-clause 10.5.4 and 10.5.5 of the Conditions of Contract and referred to the Dispute Management Procedure under sub-clause 13.1 of the Contract, with an intent to negotiate a resolution without the need to formally refer the dispute to conciliation. The figure below indicates the mechanics of PB procedures including timeframes, required notifications, and possible engagement of a Standing Conciliator (SC).

Table 2.2: Project Board and Standing Conciliator: Dispute Management Procedure for the Resolution of Disputes Under Sub-Clauses 10.5.4 and 10.5.5

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

⁶ Review of the Performance of the Public Works Contract (2014), Op. Cit.

⁷ Office of Government Procurement, Guidance Note 3.1.1, Dispute Resolution. See: <https://constructionprocurement.gov.ie/wp-content/uploads/GN-3.1.1-v1.1-28-06-2016.pdf>.

⁸ GN 3.1.1 at section 1.3

⁹ GN 3.3.1 at section 1.4

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 sub-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 the Project Board members and to the Standing Conciliator, [where appointed], and such communications may not be relied upon by either Party in subsequent dispute resolution proceedings under this Contract, 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 subclause 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 meeting, where one is appointed, either orally or in writing, in an effort to resolve disputes referred.

Source: PW-CF1¹⁰ Note: The clause is the same in PW-CF2, PW-CF3 and PW-CF4

Conciliator/Standing Conciliator

Similar to the above, the Public Works Contracts outline the conciliation, adjudication, and arbitration procedures. A conciliator may be appointed to assist in resolution where the PB has been unable to reach agreement on behalf of the parties. Appointment of a Standing Conciliator is required for contracts valued over €10m and is optional for contracts valued €5-€10m. The purpose of this is to engage the SC in the earliest stages of the contract to facilitate negotiation and agreement throughout the duration of the project. The SC, with the agreement of both parties, may perform the following functions:

- ☐ Attend and/or chair PB meetings.
- ☐ Informally assist parties in resolving any disputes.
- ☐ Offer views, without prejudice, as to likely outcomes of a dispute referred to conciliation.
- ☐ Hold separate meetings with each party to the PB.

Fees for the Standing Conciliator are based on a reserved sum arrangement in the contract. Parties are obligated to share costs of conciliation equally. Where a Standing Conciliator is appointed at the

¹⁰ <https://constructionprocurement.gov.ie/wp-content/uploads/PW-CF1-v2.5-29-07-2021.pdf>

outset of a contract, the SC fees are for engagement at the PB level, i.e., PB meetings and early/informal dispute management.

The role of the conciliator, or Standing Conciliator where appointed, is to adjudicate upon the dispute. Each party will share information and details of the dispute to the conciliator which will allow the conciliator to resolve the dispute. The conciliator will consult with the parties and may do any, or all of the following actions:¹¹

- ☐ Meet the Parties separately from each other or together and consider documents from one Party not sent or shown to the other.
- ☐ Conduct investigations in the absence of the Parties.
- ☐ Make use of specialist knowledge.
- ☐ Obtain technical or legal advice.
- ☐ Establish the procedures to be followed in the conciliation.

The Public Works Contracts indicate a 42-day timeframe for resolution, i.e., if parties are not able to resolve a dispute by agreement within 42 days after appointment of the conciliator, then the conciliator shall issue a written recommendation.¹² Parties may object to the recommendation if dissatisfied, but the recommendation becomes binding in the absence of objections.

Adjudication

The Construction Contracts Act 2013, as detailed in 2.3.1 of this report, contains the statutory requirement for the availability of adjudication *at any time* during the contract period. In other words, whilst the PWCs contain provisions for dispute resolution through Project Boards and Conciliators, the parties retain their rights to escalate a dispute by referring it to statutory adjudication, taking it out of the PB/SC context.

It is important to note that by taking the dispute out of the hands of the PB/SC, the claimant avails of dispute resolution services by the appointment of an adjudicator, either agreed by the parties or, failing agreement, from the Panel, made by the Chairperson and notified in writing by the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment to the parties.¹³

Although the Adjudicator's role is similar to that of the PB/SCs in terms of dispute resolution, the status of the Adjudicator is significantly different to that of the PB/SC in that the Adjudicator is not a representative of either party and comes to the dispute as an impartial, disinterested third party who is required to disclose any conflicts of interest.¹⁴ Decisions made by the Adjudicator are binding; however, they may be referred to arbitration or court proceedings if a party wishes to contest the decision.

¹¹ Ibid.

¹² Ibid.

¹³ <https://enterprise.gov.ie/en/Publications/Publication-files/Code-of-Practice-Governing-Conduct-of-Adjudications.pdf>

¹⁴ Ibid.

Arbitration

The Capital Works Management Framework provides for Arbitration Rules in its AR1 document.¹⁵ The stated purpose of the rules is “to facilitate the fair, expeditious, and efficient resolution of the disputes in arbitration, avoiding delay and unnecessary or disproportionate expense.” The arbitral panel will consist of one arbitrator for disputes valued under €10m, and three arbitrators for disputes over €10m. Where there are three arbitrators, each party selects one arbitrator, and those two select the third arbitrator on the panel.¹⁶ In general, the Irish Arbitration Act 2010 governs the proceedings and is based on UNCITRAL Model Law on International Commercial Arbitration (AR1 section 1.6).

Arbitrators are required to remain impartial throughout the proceedings and may not advise any party in connection with the proceedings (AR1 section 3.6). Expert witnesses and documentary evidence are considered by the arbitral tribunal in accordance with the law regarding burden of proof.

The dispute may be “fast tracked” in arbitration if agreed by the parties and it is important to note that the maximum timeframe for this is 100 days. Disputes not fast-tracked may take longer.

Experience with dispute procedures

While the 2016 Guidance Note on Dispute Resolution set out the intended approach to operation of dispute management procedures, Indecon would note that the extent of practical application of aspects in the guidance may vary in practice. The empirical analysis presented in Sections 3 and 4 of this report examines the actual experience with application of the roles of Project Board and Standing Conciliator in detail.

2.3 Overview of Recent Legislative Developments in Ireland

It is also instructive to consider specific developments that have impacted on, or which may have implications for, the application of dispute management procedures under the Irish Public Works Contracts. Selected specific legislative developments in Ireland are highlighted below.

2.3.1 Construction Contracts Act 2013

The Construction Contracts Act, 2013 imposed new minimum contractual provisions in relation to payments arising under a construction contract. If a payment dispute arises between the parties, either party will have the right to refer the payment dispute for adjudication, which will be concluded within a set timeframe.¹⁷ A Code of Practice was published in conjunction with the 2013 Act, governing the conduct of adjudications under the Act. The Code of Practice sets out the detailed requirements concerning the conduct of adjudication and it is binding on all Adjudicators operating under the Construction Contracts Act, 2013 in accordance with section 6(8) of the Act.¹⁸

¹⁵ <https://constructionprocurement.gov.ie/arbitration-rules/>

¹⁶ AR1, section 3.3.2.

¹⁷ Construction Contracts Act, 2013, Information Booklet, accessed at <https://enterprise.gov.ie/en/Publications/Publication-files/Information-Booklet-Construction-Contracts-Act-2013.pdf>

¹⁸ Ibid.

The 2013 Act sets out a process for parties to issue Payment Claim Notice and a response to a Contested Payment Claim Notice, requiring the initial claim to be filed within five days of the original payment claim date, and the response to be issued within 21 days thereafter. Reasons and cost calculations are part of the claim and response documents. Provisions in Section 5 of the Act grant the right to suspend work for non-payment under a construction contract. Notice must be given seven days before suspending work. Suspension of work is not allowed if 'Notice of Intention to Refer the Payment Dispute for Adjudication' has been served by either party in relation to the amount concerned.¹⁹

According to the DETE Information Booklet (2013), a Notice of Intention to Refer a Payment Dispute for Adjudication must include relevant details of the dispute including nature and amount of dispute and supporting contract documents. Parties may jointly agree to appoint an Adjudicator of their own choice, who may be:

- ☐ a person referred to in the construction contract to perform that role; or
- ☐ a person from the Construction Contracts Adjudication Panel appointed by the Minister of State at the Department of Enterprise, Trade and Employment; or
- ☐ another suitably qualified person.

The selection of an Adjudicator must take place within a tight timeframe, i.e., five days to agree on the selection; two days for the Adjudicator to request disclosures and provide proposed terms of the appointment; and three days for the parties to agree to the appointment. The Adjudicator notifies the DETE of the appointment. If parties cannot agree to an appointment, a party may apply to the Chair of the Construction Contracts Adjudication Panel requesting an appointment.

The main impact of the Construction Contracts Act 2013 with regard to dispute management is that it set out a process for adjudication as a means of dispute resolution. In other words, parties have a statutory right to refer a payment dispute to adjudication at any time during the contract period. This does not impact the possibility to implement other dispute avoidance provisions, provided that they do not interfere with this statutory right. It is essential that any changes which may be adopted to existing contracts forms, or the use of other standard contracts forms, comply with Irish law.

2.3.2 Mediation Act 2017

The Mediation Act 2017 was enacted in October 2017. It provides a comprehensive statutory framework to promote the resolution of disputes through mediation as an alternative to court proceedings. According to the Department of Justice, "The underlying objective of the Act is to promote mediation as a viable, effective and efficient alternative to court proceedings, thereby reducing legal costs, speeding up the resolution of disputes and reducing the stress and acrimony which often accompanies court proceedings."²⁰

Among the main provisions the Mediation Act include the following:

- ☐ Solicitors/barristers are obligated to advise parties in dispute to consider using mediation as a means of resolution.
- ☐ Court may, on its own initiative or on the initiative of the parties invite the parties to consider mediation as a means of resolution.

¹⁹ Ibid. at p. 9

²⁰ <http://www.justice.ie/en/JELR/MediationActInfoNote.pdf/Files/MediationActInfoNote.pdf>

- ☐ General principles for the conduct of mediation by qualified mediators.
- ☐ Confidentiality required for communications between parties during mediation.
- ☐ Provides for the possible future establishment of a Mediation Council to oversee development of the sector.
- ☐ Provides for the introduction of codes of practice for the conduct of mediation by qualified mediators.

While mediation can be an effective and low-cost method of dispute resolution, it is generally most effective in non-adversarial settings with parties whose working relationship has not deteriorated in the event of the dispute. It would be important for parties to engage in mediation at an early stage in order to avoid escalation. If a collaborative working arrangement has been established from the outset of the contract and the contract forms contain detailed specificity, mediation could become unnecessary.

2.3.3 Covid Co-operation Framework Agreement

The recent COVID-19 pandemic necessitated intervention in early 2020 by government relating to closure and subsequent reopening of all businesses deemed non-essential, including construction sites. Relating to government building contracts, the OGP issued a Note on 14 April 2020 indicating that there is “no contractual entitlement to costs associated with the closure of non-essential sites.”²¹ As the extraordinary situation caused by the pandemic would nevertheless negatively impact non-essential sites, the OGP provided a template for a supplemental letter agreement between the parties under which an *ex gratia* payment could be extended by the Employer to the Contractor in respect of certain stipulated costs therein.²² As the situation further developed and sites re-opened after the initial lockdown, the OGP introduced further guidance which established the Covid Co-operation Framework to encourage employers and contractors to solve their own problems relating to costs and delays due to closure and the protocols required for reopening non-essential sites.

Parties entering the Covid Co-operation Framework Agreement (CCF) were encouraged to engage to determine impacts of the closure and to seek agreement on the appropriate way forward. The Framework is based on a burden sharing model, whereby the employer makes a contribution towards any unavoidable cost and delay impacts on the completion of the works. Any measure of relief granted by the employer would be on an *ex-gratia* basis and without prejudice to parties’ contractual rights. Simply put, employers were asked to contribute payment for costs or grant time extensions where this made sense, and these contributions would not be used as evidence against them where disputes might arise. Participation in the CCF was not mandatory, but strongly encouraged by the OGP for public works contractors and incentivised by the “without prejudice” clause.

Elements of the Framework are as follows:

- ☐ Adopting a collaborative and proactive approach within existing budget constraints.
- ☐ Exploratory cooperation meetings to identify impact of the closure and reopening health and safety protocol requirements.
- ☐ Ongoing co-operation meetings to implement solutions to identified impacts.

²¹ See: <https://constructionprocurement.gov.ie/note-on-procurement-and-contractual-matters-associated-with-the-covid-19-response-measures/>

²² Ibid.

- ❑ Review and plan process requires ongoing engagement at regular intervals as agreed by parties to plan and implement work required and any necessary mitigation measures.
- ❑ Burden sharing principles where employer is required to pay reasonable cost and contractor is required to make all reasonable efforts to minimise delay and costs associated with health and safety protocol requirements.

The CCF provided a unique opportunity for parties to engage, by necessity, to find collaborative solutions to a problem that was the fault of neither party, and was unforeseen at the time of contract. Burden sharing principles used in the CCF could be extended to contracts forms more generally, and examples of this type of arrangement can be found in risk-sharing provisions used in collaborative contracts such as the Two Stage Open Book, Cost Led Procurement, and other models. Features of these models are discussed below and in the international review.

2.4 Overview of International Approaches to Dispute Avoidance and Resolution

Over the past decade, governments in other countries have met with similar challenges to Ireland in terms of construction contracts, cost overruns, economic instabilities, and dispute management. Responses to these issues have ranged across the spectrum from dispute avoidance to dispute management to dispute resolution.

Indecon's review of approaches internationally examines the key features of dispute avoidance and dispute resolution methods used in several comparator countries, focussing on the UK, Denmark, Australia and New Zealand, in addition to examining the dispute services offered by the International Chamber of Commerce in Paris. The full review is presented in Annex 2. This section presents a summary of the main findings from the review.

Due to differences in legal systems and in procurement practices, caution is needed in interpreting any potential lessons from international experience and in attempting to apply different approaches to the Irish context. However, review may be informative of potential ways in which the dispute management procedures under the Irish PWC could be enhanced, particularly with the context of the latter's ethos of achieving early engagement between the parties prior to crystallisation of a formal dispute.

Collaborative Contracting

Early Contractor Involvement

Collaborative Contracting, including Early Contractor Involvement, is increasingly used in the UK, Denmark, Australia and New Zealand, among other countries. Under this approach, contractors are engaged early in the planning and design processes, supporting better understanding of project objectives and requirements. Changes can be made to the project specifications at this early stage, with lower risk of disputes as parties are cooperating together for a shared desired outcome.

While the Irish Public Works Contract for Early Collaboration (PW-CF10) contains provisions for early contractor collaboration, the use of the PWCEC is limited to large (e.g., over €100 million) or technically complex projects, and permission to use this form must be sought from the GCCC in advance. If extended more widely, in conjunction with the Standing Conciliator role, features of the PWCEC could be helpful to improving collaboration at the early stages of contracts, potentially serving to avoid disputes further down the project timeline.

Contractual Targets and Incentives

Collaborative contracting also entails the use of contractual provisions such as risk-sharing and target costing, which serve as incentives for parties to complete their works in a timely manner and within budget. The UK-based NEC4 contract model contains a number of such provisions. Similarly, the Australian model uses Incentivised Target Cost Contract pricing methods so as to promote risk-sharing and rewards parties for successful project completion. Denmark recently updated their contracts forms to include provisions for contractor's design and liability for designers, as well as escalation of disputes to progress from (required) negotiation, to adjudication, then arbitration.

Contractual models such as such as cost-led procurement, two-stage open book, and integrated project insurance are also increasingly common, with evidence from the UK, Denmark, Australia and New Zealand to support a reduction in dispute claims at higher levels of escalation to ADR or litigation. These contractual models are described further in Annex 2.

Quality Management

Early Contractor Involvement at the planning and design phase of the project is followed by quality management and/or early dispute resolution procedures as defined in the contract. The point is to maintain a positive, collaborative working relationship between parties throughout the project timeline. Parties are better able to avoid disputes or resolve them early if given the tools and processes to identify potential sources of cost overrun or quality shortfall. This includes regularly scheduled meetings by Dispute Review Boards or Dispute Avoidance Boards (DRBs, DABs) where progress is assessed, and solutions discussed when needed.

The Early Warning Register is a new NEC4 tool which incentivises risk disclosure and early discussion of solutions, by requiring the Project Manager to list these items on the register at the pre-contract stage. Early Warning Meetings take place at the outset of the contract for discussion by all parties to further encourage collaboration.

Dispute management and resolution

The international evidence suggests that the trend towards greater use of collaborative contracting has helped reduce the incidence of full-scale disputes in the construction sector. However, all disputes cannot be avoided, and contractual provisions must still be made for early dispute management, and ultimately, dispute resolution. Comparator countries in our study generally engage Dispute Review Boards or Dispute Avoidance Boards (DRBs, DABs) for early dispute resolution, and reserve statutory rights for parties to remove an escalating dispute from this process and refer it on to arbitration or litigation.

Early Dispute Resolution

Dispute Review/Avoidance Boards in other jurisdictions are comprised of members of professional, impartial boards, and are introduced to projects for purposes of dispute avoidance or early resolution. This contrasts with the Irish model where the Project Board members are selected from parties' own management teams, and often with varying expertise and experience.

The benefit of the PB members having authority to act on behalf of the parties is that they are able to negotiate through the process without having to refer to third parties for assistance. On the other hand, the PB positions lack impartiality whereby members themselves are aligned with each party (with the possible exception of the third member who is agreed by the others).

In contrast to the Irish model, the comparator countries examined in this study do not generally engage (standing) conciliators. The international trend is moving towards streamlining the resolution process and referring disputes to independent, impartial referees.

Alternative Dispute Resolution

Comparator countries are increasingly making use of external ADR service providers, such as the International Chamber of Commerce. The use of specialised, professional dispute resolution services may aid in resolving disputes, particularly on high-value and/or more complex projects. International expertise and professionally certified arbitrators can help reduce resolution timescales and support more transparent determinations, as for example, the ICC conducts strict quality control procedures both during ADR and post-award.

In Denmark, the Building and Construction Arbitration Board is a permanent, independent body responsible for making binding determinations across the sector. 'Speedy resolution' is a simplified, abbreviated form of adjudication which is the most common method of ADR in Denmark, while the ICC's services are also used for ADR on more complex disputes.

3 Empirical Analysis of Operation of Role of Standing Conciliator

3.1 Introduction

This section presents a detailed empirical analysis of Indecon's primary research in relation to the role of Standing Conciliator (SC) under the Public Works Contract's dispute management procedures. The analysis examines the expertise and experience of SCs, their duties and the extent of their interaction with other parties and Project Boards in resolving disputes. Additionally, Indecon examines the pricing structures used by SCs, the evolution of the role during engagements, the effectiveness of the role in the assistance avoiding disputes. Finally, the assessment outlines the views of stakeholders on the overall effectiveness of the dispute management procedures, the aspects of the role SC that are considered to work well, and areas where the role of SC could be amended to function more effectively.

3.2 Range of Professional Profiles amongst Appointed Standing Conciliators

An analysis of the professional backgrounds of Standing Conciliators is shown in the table below. This shows the range and diversity of expertise of SCs, with three quarters indicating they had expertise in arbitration. There was also a strong mix of experience in engineering, quantity surveying and legal skills.

Table 3.1: Area of Expertise of Standing Conciliators	
Area of Expertise	Percentage of Respondents
Arbitration	75.0%
Engineering	45.0%
Legal	40.0%
Quantity Surveying	40.0%
Construction Management	35.0%
Project Management	35.0%
Other	35.0%
Architecture	20.0%
Financial	5.0%
Building Surveyor	0.0%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	
Note: Figures do not add up to 100% as respondents were able to select multiple categories	

An indication of the professional qualifications held by Standing Conciliators is provided by the examples shown in the next table. Many of those responding to Indecon's research, who were appointed to the role of Standing Conciliator, have backgrounds and hold qualifications in engineering, architecture, surveying or law, while a large percentage have qualifications and formal training in one or more of the fields of arbitration, mediation or adjudication. However, of note in this context concerns the absence of formal qualifications in Ireland required specifically to practice as a Standing Conciliator.

Table 3.2: Professional Profile of Standing Conciliators – Examples of Professional Qualifications

Diploma in Architecture; BSc, Architecture; Postgraduate Diploma in Arbitration; Postgraduate Diploma, Construction Law & Contract Admin; MSc, Construction Law
Professional Diploma in Construction Technology; Construction Economics and Management Degree (Quantity Surveying). Post Graduate Higher Diploma in Arbitration. Post Graduate Higher Diploma in Adjudication (Accredited Adjudicator); Accredited Mediator
BSc (Surveying), ASCS, MRCS, FCI Arb, Barrister-at-Law
Chartered engineer; Chartered arbitrator; Accredited mediator
BSc, MSc, PhD, CEng, FICE, FIEI, FISTructE, FCI Arb, FIAE, MConsEI
Civil Engineer
Chartered Engineer, LLB (Hons)
Bachelor's in engineering; Diploma in Arbitration; CI Arb Accredited Mediator
MSCSI, Accredited Conciliator, MCIARB
Bachelor's degree, Civil Engineering; Chartered Engineer; MBA; FCI Arb (Mediation); FCI Arb (Adjudication)
M.Sc, FSCS, FRICS, FCI Arb
Qualifications as Architect, Arbitrator, mediator, conciliator, adjudicator
B. Arch FRIAI Dip Arb (Law) FCI Arb MII
Chartered Engineer
Barrister-at-Law
Chartered Quantity Surveyor & Barrister at Law
BA, BAI (Hons) Civil/Structural Engineering; LLB (Hons); Bachelor of Law; Postgraduate Diploma in Arbitration; Fellow of the Chartered Institute of Arbitrators; Accredited Mediator with the Chartered Institute of Arbitrators
Chartered civil engineer, Fellow of the Chartered Institute of Arbitrators. PhD, geotechnical engineering
Fellow, Society of Chartered Surveyors in Ireland
Architect, chartered arbitrator, barrister (non-practicing)
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

Standing conciliators who responded to Indecon's research reported, on average, over 22 years of experience in dispute resolution more generally (see table overleaf). Relatively speaking, design team consultants and employer/employer personnel tended to have the least experience in dispute resolution, but these cohorts still had 13 or more years of experience on average.

Table 3.3: Experience of Standing Conciliators in Dispute Resolution

	Years of Experience in Dispute Resolution
Average of responses	22.4
Median of responses	20.0
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

However, specific experience as a Standing Conciliator has been limited by the relatively recent introduction of the role in 2016/17, with a majority (55%) indicating that they were first appointed as a Standing Conciliator in 2019 or more recently (see table below).

Table 3.4: Respondent's First Year of Involvement as Standing Conciliator	
First Year in which Respondent Acted as a Standing Conciliator	% Of Respondents
2017 or earlier	30.0%
2018	15.0%
2019	25.0%
2020	25.0%
2021	5.0%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

3.3 Range of Duties Agreed with Standing Conciliators

In considering the duties of SCs, we note that the median number of projects on which respondents indicated that they had acted as a Standing Conciliator was two projects, while the mean across the response sample was 4.6 projects (see table below). Some respondents had acted as a Standing Conciliator on significantly larger numbers of projects.

Table 3.5: Average Number of Projects on which Respondents Served as Standing Conciliator	
	Standing Conciliator
Average Number of Projects	4.55
Median Number of Projects	2.00
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

3.4 Pricing Structures Agreed for Standing Role

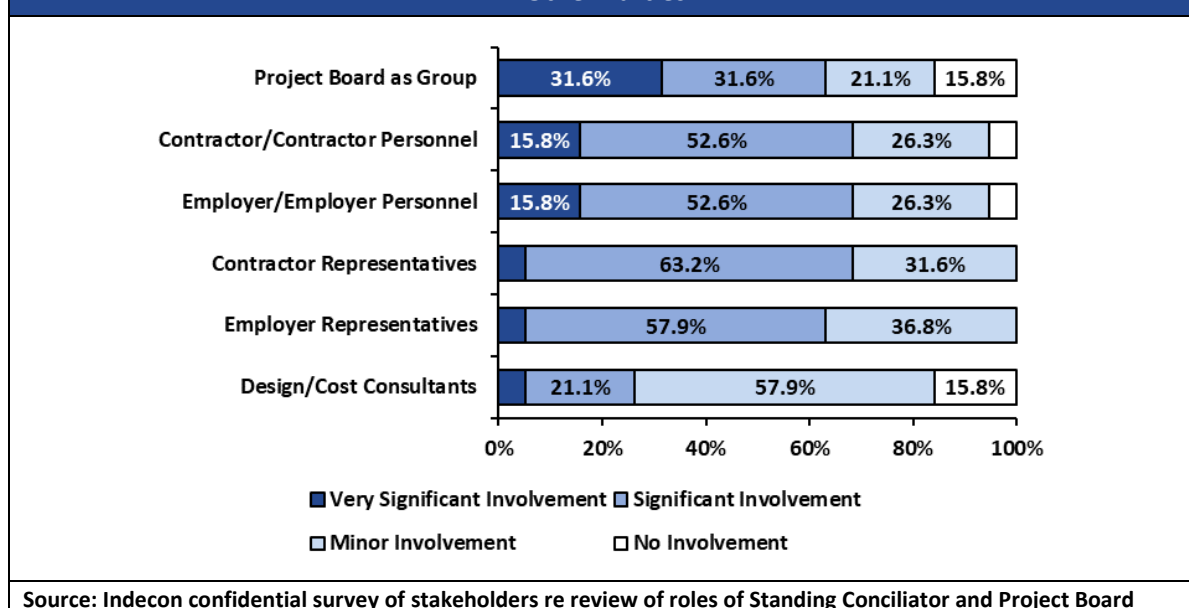
It is instructive to consider the typical methods of payment received by Standing Conciliators for their engagement on projects. Indecon's research found that the plurality (48%) of respondents indicated that they were paid for their role on a lump sum fee basis, while 30% stated that they were paid on an hourly rate basis. It is also notable that a significant proportion (22%) were remunerated through a combination of a fixed fee for their role in chairing a Project Board and an hourly rate for any special additional work they undertook (see table overleaf).

Table 3.6: Pricing Structure Agreed by Standing Conciliators for Project Engagements

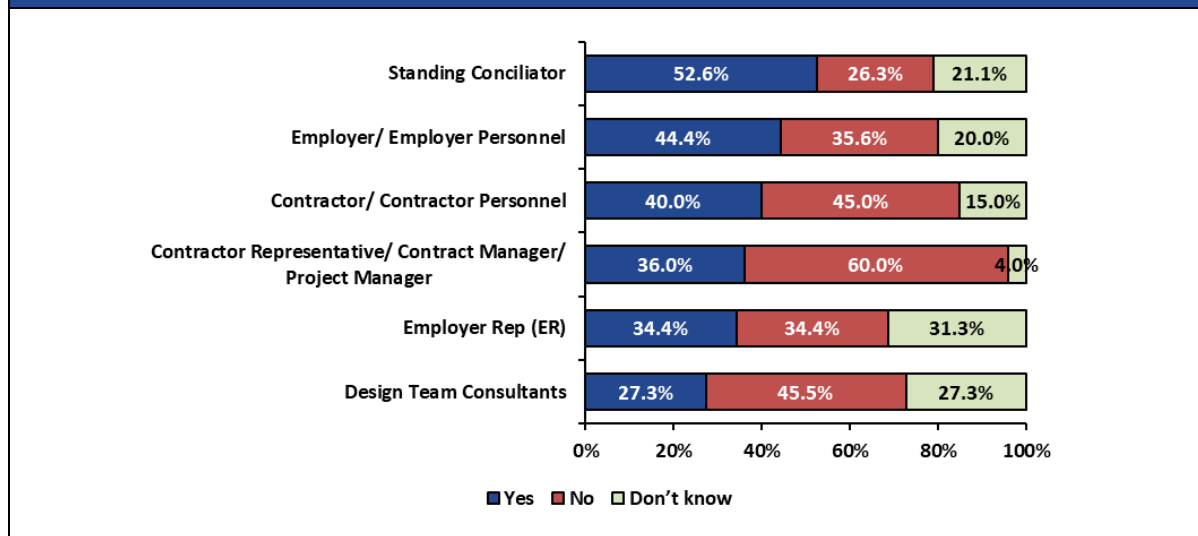
	% Of Responses
Lump Sum Fee:	47.9%
Hourly Rate:	29.7%
Combination with fixed fee for Board role and hourly rate for special additional work:	22.4%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

3.5 Range of Interaction between Parties and Standing Conciliator

We also asked respondents to indicate what level of interaction they typically had with various other parties. The main form of engagement of Standing Conciliators (with 63% of respondents citing very significant or significant involvement) is in relation to Project Boards. In addition to this role, over two-thirds of respondents on average indicated that they had very significant or significant involvement with contractors/contractor personnel, employers/employer personnel and contractor representatives. Only a minority of Standing Conciliators had very significant or significant involvement with design/cost consultants (see figure below).

Figure 3.1: Views of Standing Conciliators on Level of Interaction they have Typically had with Other Parties

In examining the overall views on dispute resolution procedures, we note that the survey research found that over half (52.6%) of Standing Conciliators indicated their view that there is meaningful engagement prior to utilisation of formal procedures, while 26% suggested that there is not meaningful prior engagement. By comparison, contractor representatives, employer representatives and design team consultants were relatively less positive on this aspect (see figure overleaf).

Figure 3.2: Comparative Views on whether Current Formal Dispute Resolution Procedures are Resulting in Meaningful Early Engagement between Parties Prior to Formal Dispute Procedures

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

The following table outlines some comments provided by selected survey research respondents interviewed by Indecon, regarding the extent of early meaningful engagement between parties prior to engaging in formal dispute resolution procedures.

Table 3.7: Views of Interviewees regarding level of Meaningful Early Engagement between Parties prior to Engaging in Formal Dispute Procedures

"The Standing Conciliator role is excellent for forcing the dealing of issues or potential arising up front and immediately. The Project Board has its function and place too - particularly to get an overview of the project and the issues arising. The project Board in my experience does work where (a) the Standing Conciliator Chairs the meetings and (b) where no final decisions are made in respect to claims at the Board but proactive and mutually considered rapid progress of claims through the Conciliation process can be facilitated through the working of the board."

"Unfortunately, on many projects the Project Board Meetings are seen as a mere formality. I am unsure if this is due to public purse issues arising or not, but I have anecdotally heard this is the case."

"I am of the opinion that as industry becomes more familiar with the concept, the benefits are better understood and therefore more meaningful engagement between the Parties is evident."

"The current formal dispute resolution procedures under the PWC are not resulting in a meaningful engagement between the parties because that engagement is only required to happen under the Contract at a late stage in the manifestation of a dispute."

"In most instances, but not all, where issues arise the input of the Standing Conciliator and the existence of the Project Board results in meaningful engagement and resolves the majority of issues arising."

"Informal Project Board meetings have been more beneficial to the project as potential issues were discussed and resolved thus avoiding them becoming formal dispute issues. The Informal Project Board engagement supports a more collaborative working relationships between the parties."

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

3.6 Outcomes of Disputes involving a Standing Conciliator

An important aspect concerns the outcomes of disputes that involve Standing Conciliators. Indecon's research asked those who had acted as Standing Conciliators to indicate the average percentage outcomes of potential disputes they were involved in which fell into different categories. While there was a wide variation in reported experience, the research found that, on average, between 25% (median) and 40% (mean) of disputes were typically resolved without a claim under sub-clause 10.3 of the Contract, while a similar proportion were referred to the Project Board. Between 10-26% of disputes on average proceeded to conciliation under sub-clause 13.2, while on average between zero and 12% of disputes proceeded beyond conciliation (i.e., adjudication, arbitration or litigation).

Table 3.8: Outcomes of Disputes Involving Standing Conciliators		
	% of (Potential) Disputes – Mean of Responses	% of (Potential) Disputes – Median of Responses
Potential dispute was resolved without a claim under sub-clause 10.3	39.8%	25.0%
Dispute was referred to Project Board	37.3%	26.3%
Dispute proceeded to conciliation under sub-clause 13.2	26.1%	10.0%
Dispute proceeded beyond conciliation	12.3%	0.0%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board		
Note: Figures do not add up to 100% as respondents were able to select multiple options.		

Of the potential disputes on which respondents had been involved as a Standing Conciliator, where these disputes were resolved without the involvement of the Project Board, the research has found that, on average, it took between five and 11 weeks to resolve such disputes (see table below).

Table 3.9: Average Length of Time for Potential Disputes That Were Resolved Without the Involvement of the Project Board	
	Number of Weeks
Average of responses	11.13
Median of responses	5.00
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

Respondents who had acted as a Standing Conciliator indicated that on average for between 7.3% (median) to 27.8% (mean) of disputes, it was not possible to assist the parties to avoid a potential dispute being referred to the Project Board (see next table).

Table 3.10: Percentage of Disputes where it was not possible to resolve the dispute before sending to Project Board

Average of responses	27.82%
Median of responses	7.25%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

3.7 Extent of Engagement with Project Boards in Resolving Disputes

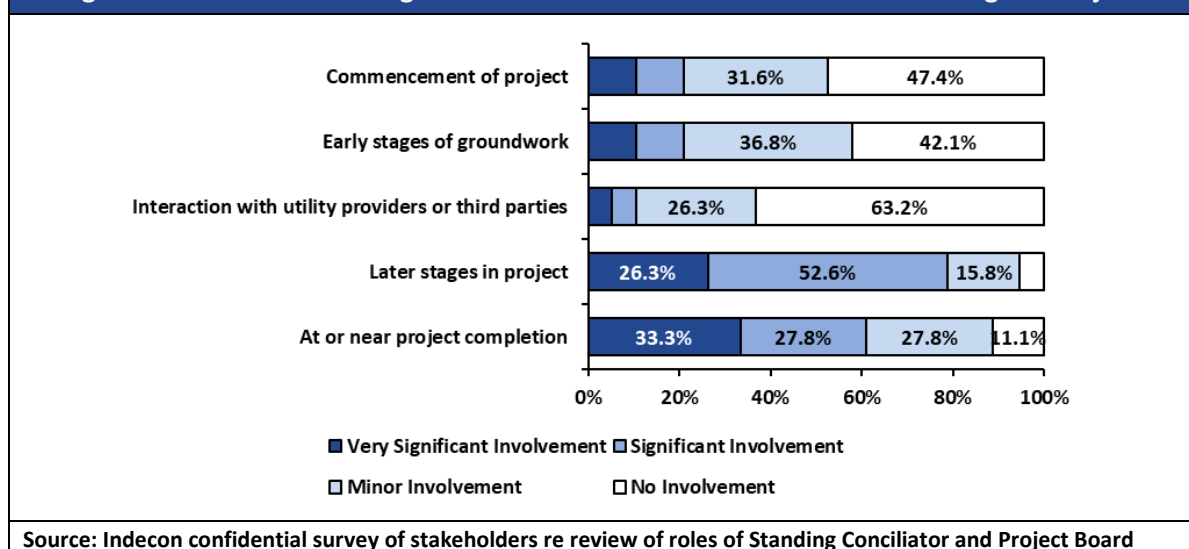
In relation to the extent of engagement of Standing Conciliators with Project Boards, the research found that, on average, in just under 19% of project cases, the Standing Conciliator monitored and advised on projects, but he/she was not involved with the Project Board. However, on average, in 54% to 58% of projects, the Standing Conciliator either attended meetings of, and/or advised, the Project Board. Typically, only a minority (17% and 20% respectively) of projects involved the Standing Conciliator issuing either informal or formal opinions.

Table 3.11: Nature of Involvement of Standing Conciliators with Project Boards

	Average (Mean) % of Projects
Monitored and advised on projects, but no involvement with Project Board	18.8%
Attended meetings of Project Board	58.2%
Advised Project Board	54.4%
Issued Informal Opinions	16.7%
Issued Formal Opinions	19.9%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	
Note: Figures do not add up to 100% as respondents were able to select multiple options.	

3.8 Evolution of Role of Standing Conciliator during Engagement

The engagement of Standing Conciliators on projects tends to be focussed on the later stages of a project, or where a project is at or near completion, with between 61% and 79% of respondents who had acted as a Standing Conciliator indicating that they typically had significant or very significant involvement at these stages (see figure overleaf). Of note from the perspective of avoidance of disputes, the research found that 78-79% of Standing Conciliators stated that they typically had only minor or no involvement following commencement or at the early stages of groundwork on a project. Also, close to two-thirds (63%) of responding Standing Conciliators indicated that they generally had no interaction with utility providers or other third parties during projects.

Figure 3.3: Views of Standing Conciliators on Level of Interaction at Each Stage of Projects

The research also finds that while there is some evidence of projects requiring a greater than initially anticipated involvement of the Standing Conciliator, in general respondents report no change in their required level of engagement (see table below).

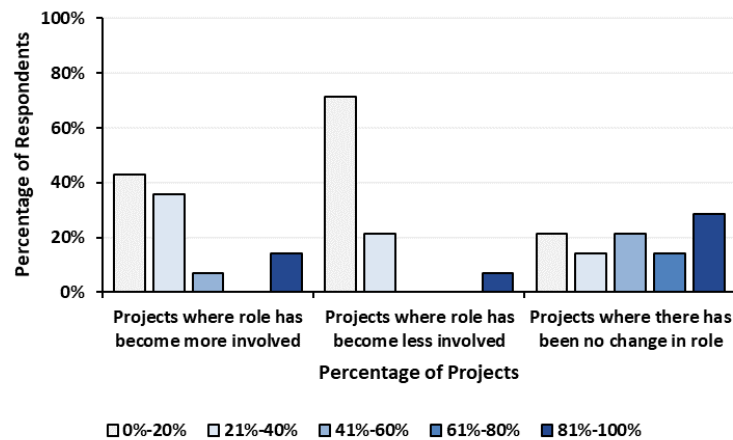
Table 3.12: Incidence of Changes to Role of Standing Conciliator by Parties During Engagement

	Number of Projects where role has become more involved:	Number of Projects where role has become less involved:	Number of Projects where there has been no change in role:
Average of responses	1.43	0.62	2.86
Median of responses	1.00	0.00	1.00

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

Over 40% of the overall number of survey respondents indicated that, in over 60% of projects they had engaged on, there had been no change in role of the SC. The majority of respondents (70%) indicated that in less than 20% of projects the role of SC had become less involved (see figure overleaf).

Figure 3.4: Projects where Role of Standing Conciliator Has Changed or Stayed the Same



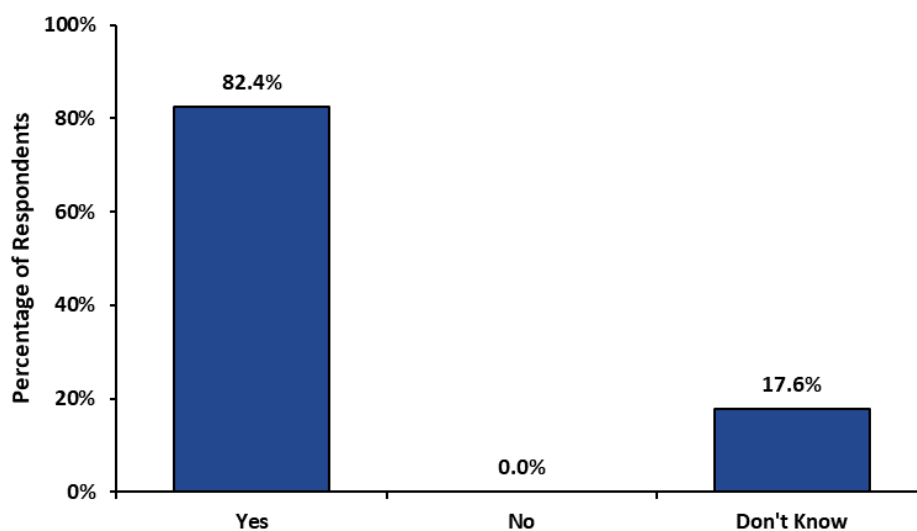
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

3.9 Views on Effectiveness and Potential Enhancements to Role of Standing Conciliator

Whether role of Standing Conciliator has helped reduce timescale for resolution of disputes

The vast majority (82%) of respondents who had acted as a Standing Conciliator were of the view that their involvement had helped reduce the timescale involved in resolving disputes (see figure below).

Figure 3.5: Views of Respondents on whether the role of Standing Conciliator has helped reduce the timescale for Dispute Resolution

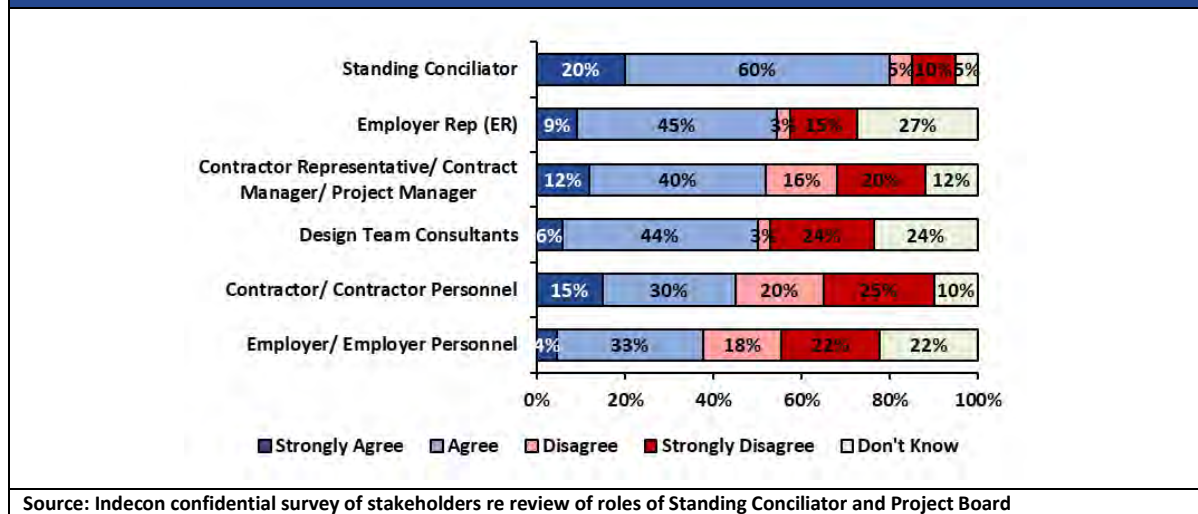


Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

Whether Standing Conciliators have helped prevent disputes from arising

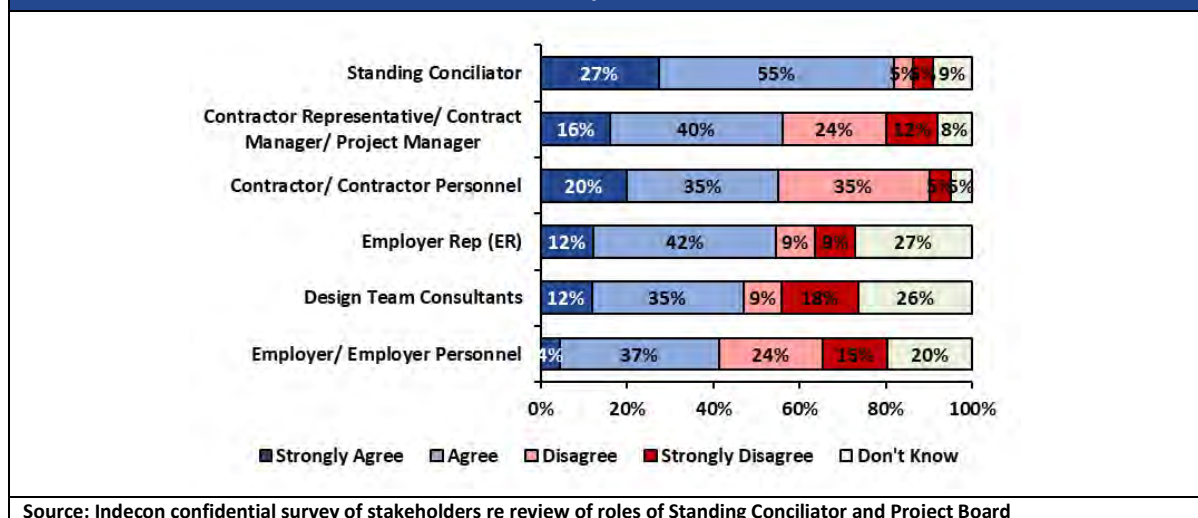
We also sought the views of all respondents as to whether the potential benefits of the current procedures are working well in practice, by indicating their agreement or otherwise on certain pre-specified potential benefits. While a significant proportion of respondents did not express a view on these potential benefits, the research found that the majority of Standing Conciliators either strongly agreed or agreed that Standing Conciliators have helped to avoid disputes from arising (80%) and have assisted in resolving potential disputes (81.8%). Employers/employer personnel and among contractors/contractor personnel, in particular, were not in as strong agreement (see figure below).

Figure 3.6: Comparative Views on whether Standing Conciliators have helped Prevent Disputes from Arising



While a high proportion (82%) of Standing Conciliators believed their role had assisted in resolving actual disputes, other parties were relatively less positive in this regard (see figure below).

Figure 3.7: Comparative Views on whether Standing Conciliators have Assisted in Resolving Disputes



Views on aspects of Standing Conciliator role that operate well and should not be changed

The following table presents the views of selected practitioners interviewed by Indecon on the aspects of the role of the standing conciliator that they believe are working well. One strength mentioned by multiple stakeholders was the ability of the SC to engage with parties in an informal setting.

Table 3.13: Views of Selected Interviewees on Aspects of Role of Standing Conciliator that Currently Operate Well and Should Not be Changed
"Their role as ultimate issuer of recommendation (i.e., at the end part of a conciliation); having a standing conciliator obviates the need to inform the conciliator on the contract, parties, background, etc... and this is undoubtedly a good thing."
"The ability of the standing conciliator to act as a conduit between the parties and to foster discussion to create an informal level."
"Copying in on all project documents, ability to attend site meetings and visit site at SC discretion is essential to the function of the SC role. The preference is that there is a digital project repository/ platform with SC rights to access all areas, and current documents scheduled to be copied to SC remain to be copied by email or other agreed means (this is essential to ensure the SC does not "overlook" or "miss" any such document."
"The ability to engage with both parties, or, if necessary, with one party, to give an objective and independent assessment of a given situation as it arises, and before one party forms a subjective view, operates well. Offering independent observations, in an informal setting, as to the possible consequences to a particular course of action, in advance of the action being taken."
<p>"1. Having the Standing Conciliator fulfilling the role of Conciliator.</p> <p>2. Providing Standing Conciliator with contract documents, allowing him attend site meetings, circulating correspondence etc all as per 2.8 of Guidance Note 3.1.1.</p> <p>3. Regular formal / informal access of Project Board to Standing Conciliator's experience and expertise.</p> <p>4. Facility to offer views on upcoming disputes."</p>
"There will be efficiencies in having the Standing Conciliator, as they will know the history and dynamics of the project."
"No experience of Standing conciliators, albeit we did have multiple conciliations using the same conciliator on some contracts. There is benefit in having backing conciliator knowledge in disputes ahead of any formal process."
"Bringing the Parties together in an informal setting. Giving the Parties a platform and opportunity to state their position."
Source: Interviews with selected respondents to confidential survey research

Views on Aspects of Standing Conciliator Role that could be Enhanced

Among the selected practitioners interviewed by Indecon, individuals also shared views regarding aspects of the role of SC which they believed could be amended to support more effective functioning. A range of suggestions were offered, which are summarised in the table below.

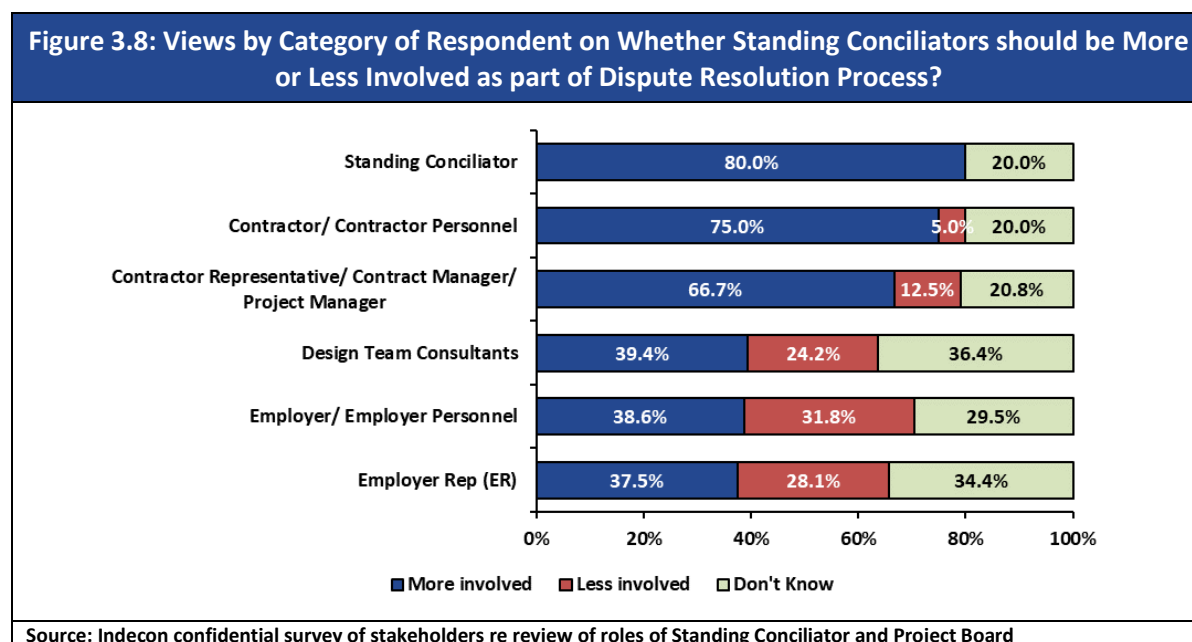
Table 3.14: Views of Selected Interviewees on how the Role of Standing Conciliator could be Amended to Function Better
<p>"There are certain essential requirements for the role of the Standing Conciliator to work properly, including the following:</p> <ol style="list-style-type: none"> 1. The Standing Conciliator should be involved with the Parties from an early stage of the manifestation of a dispute. 2. The Standing Conciliator should be alerted to the occurrence of an argument developing into a potential dispute as soon as that argument occurs and not much later. He/she only needs the correspondence relating to that argument and should not be over-burdened with other correspondence between the Parties that has nothing to do with the argument that has not yet been put to him/her. 3. His/her role can only be successful if the Parties' Representatives appointed on the Project Board are keen to avoid the crystallization of a dispute and are able and willing to recognize each other's points of view. 4. The Standing Conciliator should chair the meetings between the Parties. 5. These meeting should take place at frequent intervals - much shorter than 60 days."
<p>"There is a problem with a sole standing conciliator on too large a project where many matters have been referred. There needs to be provision for a team in certain instances; or the appointment of additional ones where the need arises."</p>
<p>"1. Perhaps make it compulsory for project teams to co-operate significantly better with the Standing Conciliator.</p> <p>2. Consideration should be given to measures to reduce pushback from project teams to role of the Standing Conciliator</p> <p>3. Would it be worth making it mandatory that the Standing Conciliator Chairs the Project board?</p> <p>4. Project teams appear to struggle with the degree of interaction, both formal and informal, between the Standing Conciliator and the Project Boards particularly in the area of dispute avoidance and in the early resolution of issues which could become disputes. Perhaps Clause 2.8 in the Guidance Note could be reviewed to deal with this difficulty?"</p>
<p>"Ensure the Standing Conciliator has no conflict of interest(s). Allow the Standing Conciliator to make a recommendation on a disputed event (if even only informally at Project Board level). Allow the Standing Conciliator to permit attendance (by invitation) of any personnel (other than the Project Board Reps) from either Party or even an external advisor to attend a Project Board meeting."</p>
<p>"We don't see any real benefit for the project in paying the SC a significant retainer to just be available and up to date with the project. It would be far better value to pay for any time incurred by the SC in attending PB meetings, helping settle differences and resolving formal disputes at an agreed rate.</p> <p>The Contract needs to be redrafted in Section 13 to clarify better the role of the PB and the ability of the SC to settle disputes before the formal conciliation process is triggered."</p>
<p>Source: Interviews with selected respondents to confidential survey research</p>

It is noteworthy that the majority of Standing Conciliator respondents (80%) were of the view that SCs should be more involved as part of the process of dispute resolution, compared to 42% amongst all other respondents.

Table 3.15: Views of Respondents on Whether Standing Conciliators Should be More or Less Involved as Part of the Process		
Views of Standing Conciliators		
	Percentage of Total	Excluding don't knows
Less involved	0.0%	0.0%
More involved	80.0%	100.0%
Don't Know	20.0%	-
Views of Other Respondents		
	Percentage of total	Excluding don't knows
Less involved	26.7%	39.1%
More involved	41.6%	60.9%
Don't Know	31.7%	-

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

Contrasting the above with a more detailed analysis by category of respondent, it is noteworthy that between two-thirds and 80% of standing conciliators, contractors and contractor personnel, and contractor representatives who responded to the survey research were of the view that standing conciliators should be more involved as part of the process. By contrast, 37-39% of design team consultants, employer/employer personnel and employer representatives were of this view, although higher proportions within these categories did not express any view.



3.10 Summary of Main Findings

Indecon's review of the role of Standing Conciliator in the dispute management procedures under the Public Works Contracts entailed a detailed empirical analysis covering a range of aspects of the operation and effectiveness of the role. The main findings from the analysis are summarised below across the dimensions examined.

Professional Profile and Experience of Standing Conciliators

- ❑ Of importance concerns the background and expertise/experience of different categories of personnel who are involved in different aspects of dispute management. Among Standing Conciliators who responded to Indecon's research, analysis of their professional backgrounds revealed a diversity of expertise. Many indicated backgrounds and qualifications in engineering, architecture, surveying or law, while a large percentage have qualifications and formal training in one or more of the fields of arbitration (notably, three quarters of respondents indicated that they had expertise in arbitration), mediation or adjudication.
- ❑ In relation to experience, on average, Standing Conciliators reported 20-22 years of experience in different aspects of dispute resolution more generally. However, specific experience as a Standing Conciliator has been limited by the relatively recent introduction of the role in 2016/17, with a majority (55%) indicating that they were first appointed as a Standing Conciliator in 2019 or more recently.
- ❑ Indecon's interviews with selected respondents to the survey research suggested that there is a relatively small pool of individuals in Ireland with the expertise and experience required to act as an effective Standing Conciliator, and that a subset of these individuals tends to advise on the majority of projects. This may reflect a range of factors, including the specialised nature of the role, the backgrounds and qualifications of individuals, and perceptions with regard to individuals' track record in this area. However, it raises the issue of the need to ensure an adequate supply of suitably trained specialists in this area, who have the skillsets and experience required to provide consistent quality support in the role of Standing Conciliator. Also, of note in this context concerns the absence of formal qualifications in Ireland required specifically to practice as a Standing Conciliator.

Duties of Role and Extent of Early Engagement between Parties

- ❑ In relation to the extent of duties carried out by Standing Conciliators, the research found that the median number of projects on which respondents had acted as a Standing Conciliator was two projects, while the mean across the response sample was 4.6 projects, indicating a wide range and that some respondents had acted as a Standing Conciliator on significantly larger numbers of projects.
- ❑ The main form of engagement reported by Standing Conciliators is in relation to Project Boards (with 63% of respondents citing typically very significant or significant involvement). On average, over two-thirds of Standing Conciliators surveyed indicated that they typically had very significant/significant engagement with contractor personnel/representatives and employer personnel/representatives. Only a minority stated that they had significant interaction with design/cost consultants.

- ❑ An important intended objective of the dispute management procedures is to encourage early engagement between parties, with a view to avoiding potential disputes before they crystallise into actual disputes that require formal procedures. In this context, the empirical research found that over half of Standing Conciliators surveyed indicated that they had experienced meaningful early engagement between parties prior to utilisation of formal procedures, though a significant minority (26%) indicated that meaningful early engagement between parties was not evident on projects they had worked on. By comparison, Project Board members were more likely to indicate that they had not experienced meaningful early engagement between parties on projects.

Pricing Structures used by Standing Conciliators

- ❑ Regarding the pricing structures/methods of payment used by Standing Conciliators, Indecon's research found that almost half (48%) of respondents indicated that they were paid on a lump sum fee basis, while 30% stated that they were paid on an hourly rate basis. It is also notable that a significant proportion (22%) were remunerated through a combination of a fixed fee for their role in relation to the Project Board and an hourly rate for any special additional work they undertook.

Extent of Involvement with Project Boards in Resolving Disputes

- ❑ In relation to the extent of engagement of Standing Conciliators with Project Boards, the research found that, on average, in just under 19% of project cases, the Standing Conciliator monitored and advised on projects, but he/she was not involved with the Project Board. However, on average, in 54% to 58% of projects, the Standing Conciliator either attended meetings of, and/or advised, the Project Board. Typically, only a minority (17% and 20% respectively) of projects involved the Standing Conciliator issuing either informal or formal opinions.

Evolution of Role of Standing Conciliator during Engagement

- ❑ The engagement of Standing Conciliators on projects tends to be focussed on the later stages of a project, or where a project is at or near completion, with between 61% and 79% of respondents who had acted as a Standing Conciliator indicating that they typically had significant or very significant involvement at these stages. Of note from the perspective of early engagement to help avoid disputes from crystallising, the research found that 78-79% of Standing Conciliators stated that they typically had only minor or no involvement following commencement or at the early stages of groundwork on a project. Also, close to two-thirds (63%) of responding Standing Conciliators indicated that they generally had no involvement/interaction with utility providers or other third parties during the course of projects.
- ❑ In addition, the research also suggests that, while there is some evidence of projects where the parties involved requested a greater than initially anticipated involvement of the Standing Conciliator, in general Standing Conciliators reported that there had been no change in their required level of engagement during projects.

Outcomes of Projects Involving a Standing Conciliator

- ❑ An important aspect concerns the effectiveness of Standing Conciliators in assisting the avoidance of disputes. While there was a wide variation in reported experience, the research found that, on average, between 25% (median) and 40% (mean) of disputes were typically resolved without a claim under sub-clause 10.3 of the Contract, while a similar proportion were referred to the Project Board. On average, 10-26% of disputes proceeded to conciliation under sub-clause 13.2, while on average between zero and 12% of disputes proceeded beyond conciliation (i.e., adjudication, arbitration or litigation).
- ❑ Of the potential disputes on which respondents had been involved as a Standing Conciliator, where these disputes were resolved without the involvement of the Project Board, the research has found that, on average, it took between five and 11 weeks to resolve such disputes.
- ❑ Respondents who had acted as a Standing Conciliator also indicated that, on average, for between 7.3% (median) to 27.8% (mean) of disputes, it was not possible to assist the parties to avoid a potential dispute being referred to the Project Board.
- ❑ The vast majority (82%) of respondents who had acted as a Standing Conciliator were of the view that their involvement had helped reduce the timescale involved in resolving disputes.

Views on Effectiveness of Role of Standing Conciliator

- ❑ The research also sought views as to whether the current dispute management procedures are working well in practice. The findings indicated that a majority (80%) of Standing Conciliators either strongly agreed or agreed that their role had helped to avoid potential disputes, while almost 82% were of the view that they had assisted in resolving disputes (81.8%). However, higher percentages of contractors and employers, or their representatives, indicated disagreement with the view that Standing Conciliators had helped to prevent potential disputes from arising.
- ❑ Also noteworthy is that, while a high proportion (82%) of Standing Conciliators believed their role had assisted in resolving actual disputes, other parties were relatively less positive in this regard.
- ❑ While there is variance across categories of practitioner, overall, the research found that close to half (48%) of respondents to the research were of the view that Standing Conciliators should be more involved as part of the dispute management process.
- ❑ Among a diverse sample of stakeholders who were interviewed by Indecon as part of this review, specific aspects of the role of Standing Conciliator which interviewees mentioned as working well, and which should not be changed, included the ability of the SC to engage with, and act as a conduit between, parties and to foster informal discussion outside the Project Board setting; having the Standing Conciliator fulfil the role of conciliator; the role of the SC as the ultimate issuer of recommendation (i.e., at the end part of a conciliation); and providing the Project Board with formal/informal access to the Standing Conciliator's expertise and experience.

- Interviewees also shared views regarding aspects of the role of SC which they believed could be amended to support more effective functioning. These views included the following suggestions:
- That the SC should be involved with the Contract Parties from an early stage of the manifestation of a dispute.
 - That the SC should be made aware of any issues that could develop into a potential dispute as soon as such issues emerge.
 - Whether there is a merit in having more than one SC on larger and more complex projects, or where the need arises.
 - Whether there could be a merit in making it mandatory that the Standing Conciliator chairs the Project Board.
 - Whether there could be a merit in making it compulsory for project teams to co-operate significantly better with the Standing Conciliator, as well as possible measures to reduce pushback from project teams to role of the Standing Conciliator.
 - That the Guidance Note on Dispute Resolution (including Clause 2.8) should give greater clarity and direction regarding formal and informal interactions between the Standing Conciliator and the Project Board, particularly in the area of dispute avoidance and in the early resolution of issues which could become disputes.
 - To consider the merits of adjusting the remuneration of the Standing Conciliator to give more weight to time incurred in attending Project Board meetings, helping to settle differences and resolving formal disputes.

4 Empirical Analysis of Operation of Role of Project Board

4.1 Introduction

This section presents an empirical analysis of the findings of Indecon's primary research in relation to the operation of the role of Project Board under the Public Works Contract. The analysis examines, *inter alia*, the professional profile of members of Project Boards; the incidence of members of Project Boards who are not direct employees of the contract parties and how they were appointed; the extent of active operation of Project Boards; the format/structure of Project Board meetings; the extent of appointment of party representatives; the incidence of Project Board members meeting informally to resolve a dispute; the extent of engagement with the Standing Conciliator to avoid disputes; the authority of Project Board members to agree settlement of disputes; and the views of respondents on the effectiveness of, and potential enhancements to the role of Project Boards.

4.2 Professional Profile and Experience of Project Board Members

Project Board Members had a wide range of areas of expertise, with project management, construction management and quantity surveying the most common areas, as shown in the following table. Only a minority of members of Project Boards had legal or arbitration expertise.

Table 4.1: Area of Expertise of Project Board Member	
Area of Expertise	Percentage of Respondents
Project Management	54.4%
Construction Management	49.1%
Quantity Surveying	45.6%
Engineering	40.4%
Other	15.8%
Financial	14.0%
Legal	12.3%
Architecture	12.3%
Arbitration	12.3%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	
Note: Figures do not add up to 100% as respondents were able to select multiple areas of expertise	

Project Board members who responded to Indecon's research reported a range of duration of experience. Relatively speaking, design team consultants and employer/employer personnel tended to have the least experience in dispute resolution, but these cohorts still had 13 or more years of experience on average.

Table 4.2: Project Board Members – Years of Experience in Dispute Resolution		
Role	Mean – Years	Median – Years
Project Board members, of which:		
Contractor Representative/ Contract Manager/ Project Manager	17.1	20.0
Contractor/ Contractor Personnel	17.0	15.0
Employer Rep (ER)	15.6	14.5
Design Team Consultants	13.8	11.5
Employer/ Employer Personnel	13.0	10.0
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board		

44% of Project Board members who responded to Indecon’s research indicated that they had first been appointed to a board prior to 2019, while 55% were first involved as a Project Board member in 2019 or more recently.

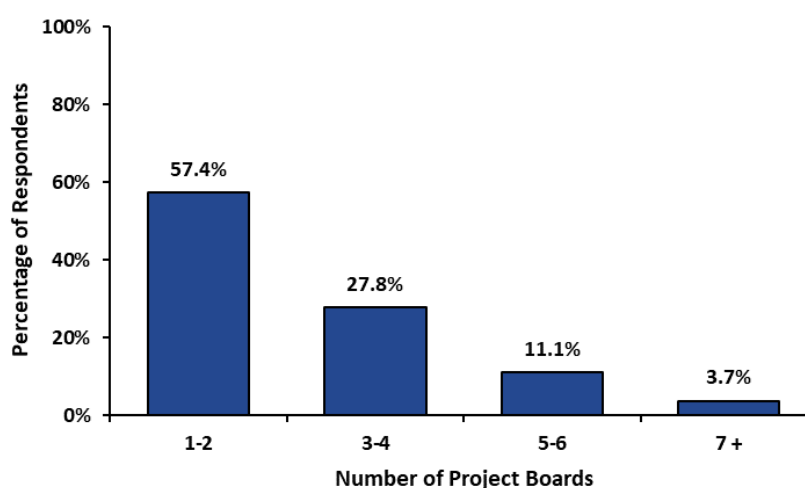
Table 4.3: Respondent’s First Year of Involvement as a Project Board Member	
Year	Acted as a Project Board Member
2017 or earlier	19.0%
2018	25.9%
2019	34.5%
2020	13.8%
2021	6.9%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

On average across respondents, Project Board members had served on 2.7 projects, while the median was two projects, indicating that there were a number of respondents who had been involved on a larger number of boards (see table overleaf).

Table 4.4: Average Number of Projects where Respondents served as a Project Board Member

	Number of projects
Average Number of Projects	2.74
Median Number of Projects	2.00
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

As shown in the following figure, the majority (57.4%) of respondents who had acted as a Project Board member indicated that they had been a member of one or two boards, while almost 28% indicated they had been on three or four boards, and 15% had been members of five or more Project Boards.

Figure 4.1: Number of Projects as a Project Board Member

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

Extent of Appointment of Party Representatives

Among respondents who indicated that they were or had been a member of a Project Board (excluding as a Chair), the median average number of members representing each party on these boards, based on their three most recent projects, was two members (see following table).

Table 4.5: Average Number of Members (Excluding Chair) Representing each Party on Project Board in Three Most Recent Projects

	Project 1	Project 2	Project 3	Total
Average of responses	2.51	2.44	2.62	2.51
Median of responses	2.00	2.00	2.50	2.00
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board				

The following table shows the average number of Project Boards which had a Standing Conciliator acting as a chair of the board. On average, the SC acted as a chairperson on just under 40% of the Project Boards.

Table 4.6: Number of Project Boards on which Standing Conciliator Acted as Chair or as a Board Member

	Projects where SC Acted as Chair of Project Board
Average number	0.90
Average percentage	37.9%
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

4.3 Incidence of Project Board Members who are not Direct Employees of Parties

The following table contains a selection of comments from respondents who were not direct employees of parties on the Project Board. The table contains their responses as to how they were appointed to the Project Board.

Table 4.7: Methods of Appointment where Project Board Member is not a Direct Employee of a Contract Party

"I am an employee of the Sanctioning Authority and was nominated by the Employer."
"Request by Parties to be Chairperson of the PB."
"Recommended by the legal representative of the Employer and accepted by Employer who proposed to the contractor as 1 of 2 (the other person was directly employed by the Employer), and we were accepted as the 2 nominees for the Employer on the PB."
"Retired public sector architect appointed by employer."
"Appointed by Employer as one of his representatives on PB."
"Was acting as a claims advisor to the Employer, and subsequently was requested to assist as a PB member. After this was successful, personal recommendations followed for further appointments."
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

4.4 Extent of Active Operation of Project Boards

In relation to the activity of Project Boards, respondents to Indecon's survey who were members of a Project Board indicated that, on average, 78% of the boards on which they had been involved were active (and had a dispute referred), while 22% of Project Boards were not active.

Table 4.8: Average Percentage of Project Boards Which Were Active

	Percentage where Project Board active:	Percentage where Project Board not active:
Average	78%	22%

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

4.5 Range of Formats of Project Board Meeting Structure agreed by Parties

In relation to the range of formats of Project Board meeting structures agreed by contract parties, Indecon's interviews with a sample of respondents to the survey research provides an indication of typical meeting formats. These findings are summarised in the table below.

Table 4.9: Selection of Responses as to Typical Format of Project Board Meetings

"Meetings were formal: dates agreed, agenda provided, chaired by me, structured discussion, minutes kept and circulated, regular updates provided to Standing Conciliators."
"Simple agenda and minute format."
"Varied - where the Employer was the chair, the meetings I was involved in were relatively informal and did not have an agenda of minutes. In the instance I am chair I set an agenda."
"Format generally informal, generally not on site. Agendas generally followed the disputes that arose from ER Determinations."
"Formal sit-down meetings were the norm, some were follow-on meetings from normal site progress meetings, but designated as Project Board Meetings with persons not required leaving the meeting. Portions were agreed to be minuted, or sections were agreed to be not minuted. Actions may require outside engagement, man to man. This was productive. I have experience, however, of them being a total waste of time, where they were called but the Employer was not interested and did not even show up."
"Agreed as part of Terms of Reference Agenda of Project Board Meeting No. xxx and project details 1 Previous Minutes 2 Items for Discussion 3 Next Meeting: A member of the xxx team will chair and take the minutes of the next meeting. "
"Pre-arranged phone calls, Meetings, (Physical & Virtual), scheduled to discuss particular dispute matters."

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

4.6 Extent of Informal Engagement between Project Members to Resolve a Dispute

Respondents who were members of a Project Board also indicated that the board had met informally outside an official board meeting to help resolve on average 1-2 disputes in which they were involved (see table below).

Table 4.10: Number of Disputes where Project Board Members Met Informally to Resolve a Dispute	
	Number of Disputes where Project Board Members Met Informally in Order to Resolve a Dispute
Average of responses	2.24
Median of responses	1.00
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board	

4.7 Extent of Engagement with Standing Conciliator to Avoid Disputes

Project Board Members were also asked to identify the number of disputes where the Board had interacted with the Standing Conciliator to assist the parties to resolve disputes. While there was wide variation across respondents, depending on the number of Project Boards they were members of, respondents typically dealt with a much higher number of disputes where the Board had directly interacted with the Standing Conciliator to assist parties to resolve the dispute, than where no such interaction took place (see following table). This finding suggests that the services of Standing Conciliators were called on frequently to help resolve disputes.

Table 4.11: Number of Disputes where the Project Board has Interacted with Standing Conciliator to Assist Parties to Resolve Dispute		
	Number of disputes where Project Board has directly interacted with the Standing Conciliator:	Number of disputes where Project Board had no direct interaction with the Standing Conciliator:
Average of responses	20.50	1.69
Median of responses	2.00	0.00
Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board		

Respondents also indicated that in 73% of projects on which they were engaged, the Project Board had direct interaction with the Standing Conciliator (see table overleaf).

Table 4.12: Average Percentage of Project Boards Which Had Direct Interaction with Standing Conciliator

	Average percentage of disputes where Project Board has directly interacted with the Standing Conciliator:	Average percentage of disputes where Project Board had no direct interaction with the Standing Conciliator:
Average	73%	27%

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

4.8 Authority of Project Board Members to Agree Settlement of Disputes

The research also asked respondents who were members of a Project Board to indicate the percentage of disputes where Board members' terms of reference restricted the Boards' authority to settle disputes. Again, there was a wide variation of responses on this issue, with a number of high outliers (indicating up to 100% of the disputes in which they were involved). However, the mean percentage of disputes reported by respondents where this issue arose was 19%, while the median was zero – suggesting that in the majority of cases, this was not a significant issue.

Table 4.13: Percentage of Disputes Where Project Board Members' Terms of Reference Restricted the Boards' Authority to Settle Disputes

	Percentage
Average of responses	19.4%
Median of responses	0.0%

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

Indecon also gathered information on how authority was recorded when Project Boards had the authority to agree settlements. The following table contains a selection of responses from individuals that Indecon interviewed to expand upon their survey responses.

Table 4.14: Selection of Responses as to How Authority Was Recorded When Project Boards Had Authority to Agree Settlements

"Authority was provided to the Boards at the time the Boards were set up in summer 2019. In hindsight, the specifics of this authority weren't specifically set out and agreed initially, which probably caused difficulties later on in the process."

"Authority was not an issue that ever arose as all matters were ultimately referred and formally documented by ER recommendation and Change order or through conciliator recommendation."

"Minutes at the initial meeting confirm authority of members."

"Recorded by formal Settlement Agreements in writing and signed by the Parties."

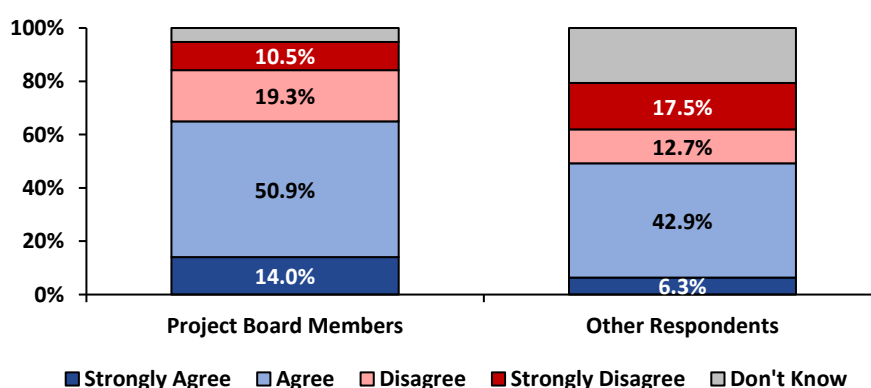
"The SC, mediated a settlement, and recorded the agreement in a Deed of Settlement."

"It would be recorded as minutes of the meeting and would then be given formally by ER through contractual mechanism."

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

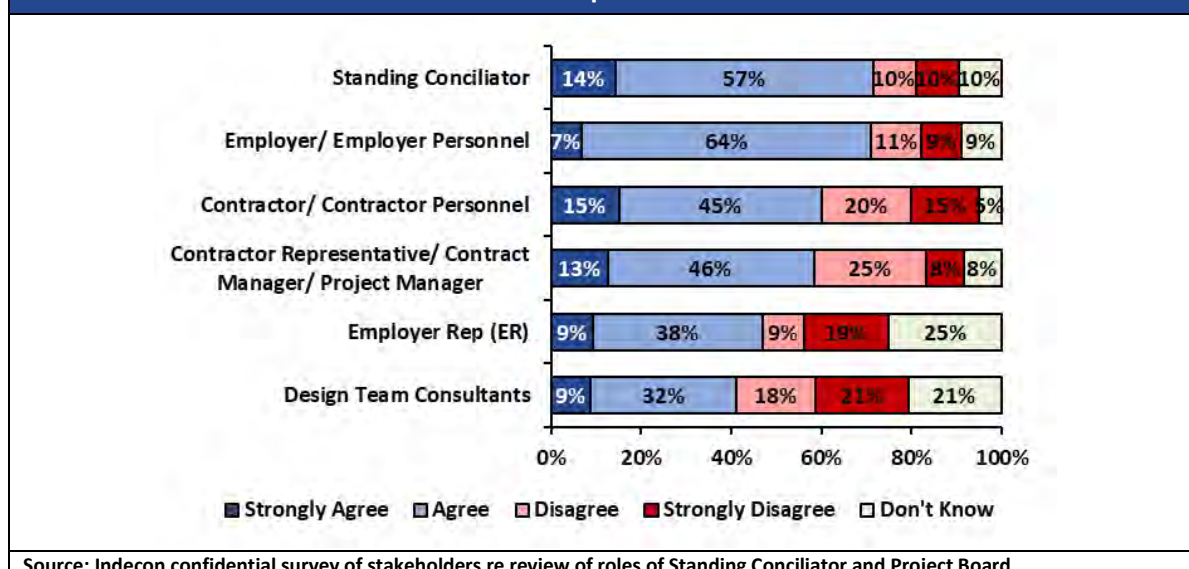
4.9 Views on Effectiveness and Potential Enhancements to Role of Project Board

Almost two-thirds of Project Board members felt that Project Boards had helped in resolving disputes, compared to just under half of all other respondents to Indecon's research.

Figure 4.2: Views of Respondents on Whether Project Boards Have Helped in Resolving Disputes

Source: Indecon confidential survey of stakeholders re review of roles of Standing Conciliator and Project Board

Standing Conciliators were relatively most positive in their assessment of the effectiveness of Project Boards in assisting to resolve disputes, as outlined in the next figure. There were relatively higher proportions of contractors/contractor personnel, employers/employer personnel and design team consultants who registered disagreement that Project Boards were effective.

Figure 4.3: Comparative Views on Effectiveness of Project Boards in Helping to Resolve Disputes

The table below presents perspectives shared by selected practitioners interviewed by Indecon, in relation to whether or not the current procedures are working well in practice.

Table 4.15: Views of Selected Interviewees on Whether Current Procedures are Working Well in Practice

"[Both roles] play a part, but in the first instance it needs to be clear the Standing Conciliator does not avoid disputes arising. What the Standing Conciliator and Project Board do is to mitigate the issues for both parties (issues like progress, quality and funding). They proactively advance the issues arising enable the works to progress, avoid an excess of paperwork and prevent escalation or conflict arising."

"The objective input of the Conciliator/Project Board brings a positive dynamic to the project."

"In my experience, the Standing Conciliators are not fulfilling their role as mediators before going straight to working towards a recommendation. In many instances there is not even a veiled attempt, but merely a procedural meeting where dates for exchange of submissions is agreed."

"As an external PB member, ensuring the Party PB members appreciate they retain control in resolving the dispute at PB level with the latitude if they so wish to step outside the terms of the Contract. This is particularly important in circumstances where the Contract Documents are the cause of referrals."

"There has been no formal disputes or potential disputes referred to the Standing Conciliator [in respect of the projects on which I have been involved], so I do not know how effective their involvement would be in the avoidance or resolving of a dispute. Project Boards have proactively assisted in resolving disputes through the informal Project Board discussions."

"Our experience is that because there is now a Project Board and Standing Conciliator available, the ER and / or his Design Teams are less likely now to agree any disputed claims because it is too easy to refer it to the SC and PB and let them sort it out. This has the effect of prolonging the resolution of differences instead of speeding it up."

Source: Interviews with selected respondents to confidential information request

The following table includes views expressed by selected respondents interviewed by Indecon in relation to aspects of the role of Project Boards that they believe currently work well and should not be changed.

Table 4.16: Views of Selected Interviewees on what Aspects of the Role of Project Boards Currently Operate Well and Should Not be Changed
<p>"1. Helps to build relationships between senior personnel from the parties. 2. Provides access to the parties to the expertise and experience of the Standing Conciliators. 3. Should speed up the conduct of the formal conciliation process. 4. Allows the respective project teams to concentrate their energies and skills on the works on site rather than on disputes 5. Provides an early indication to the parties as to what the Conciliators view is likely to be in formal conciliation on a particular dispute."</p>
<p>"The Project Boards that I did attend resolved the issues brought to the Board, in my view, this was assisted by the informal nature of the meetings."</p>
<p>"Getting the appropriate senior management from Contractor and Client into a room regularly and from the start is good. We would have done something similar on all our contracts previously in a less formal fashion, but it enabled an understanding of the issues and the often-disparate views and concerns of the parties."</p>
<p>"Informal Project Board meetings which demonstrate collaborative working between key stakeholders. They allow potential issues to be addressed so that they can be eliminated or their impact minimised. 3 members on both parties (contractor and employer) Chairperson rotated between the contractor and employer. Attendance of standing conciliator only when requested by Project Board."</p>
<p>"Ability to discuss issues on a without prejudice basis."</p>
<p>"Project Board Representatives are from senior positions within their organisations. Provides a forum for the Parties to meet on a regular basis during the life of the project. May provide a forum to improve relations that may have deteriorated."</p>
<p>"It's good that there is a forum in place for the senior representatives of the Employer and Contractor to meet regularly."</p>
<p>Source: Interviews with selected respondents to confidential information request</p>

Views shared by interviewees on how the role of Project Board could potentially be enhanced are set out in the table below.

Table 4.17: Views of Selected Interviewees on how the Role of Project Boards could be Amended to Function Better
"The client needs to have the benefit of risk analysis beforehand so they can agree disputes within parameters without the fear of ending up before PAC; as things stand, they can't possibly agree where they have already disputed the claim."
"[Address the] limitation preventing involvement [of the Project Board] until after an ER determination has been disputed. Frequently, lack of effective decision-makers on the public sector side."
"The strict single Project Board meeting to resolve disputes presented to it [by ER Determination], is not realistic, particularly in the case of complex disputes. Where I have chaired Project Board meeting, I changed the procedures to allow the Project Board to deal with each dispute in the manner best suited to resolve each dispute, with good outcomes."
"Project Board composed of only construction professionals with necessary experience and knowledge and the relevant authority to make decisions."
"Generally, the mantra seems to be that the PB can only discuss/address ER Determinations under sub-clause 10.5 that are in dispute. The PB should also be proactive in addressing future possible disputes (after the issuing of a Notice under sub-clause 10.3), before the ER makes its Determination. Encourage workshops between the Parties at project level and give direction/guidance accordingly."
"The representatives on the Employer side should be experienced in discussing and resolving construction disputes as otherwise there is very little that they can bring to it."
Source: Interviews with selected respondents to confidential information request

4.10 Summary of Main Findings

This section presented a detailed empirical analysis of the role of Project Boards under the Public Works Contracts, across a number of dimensions. The main findings from the analysis are summarised below and overleaf.

Professional Profile and Experience of Members of Project Boards

- ❑ In relation to expertise among Project Board members, the research suggested that members had a wide range of areas of expertise, with project management, construction management and quantity surveying the most common areas. However, only a minority of members of Project Boards had legal or arbitration expertise.
- ❑ In terms of experience, relatively speaking, design team consultants and employer/employer personnel tended to have less experience in dispute resolution (with a median of 10-11.5 years of experience), whereas contractor personnel and representatives had between 15 and 20 years of experience, while employer representatives responding to the research reported, on average, 15 years of experience in dispute resolution.

- ❑ 44% of Project Board members who responded to Indecon's research indicated that they had first been appointed to a board prior to 2019, while 55% were first involved as a Project Board member in 2019 or more recently.
- ❑ The majority (57.4%) of respondents who had acted as a Project Board member indicated that they had been a member of one or two boards, while almost 28% indicated they had been on three or four boards, and 15% had been members of five or more Project Boards.
- ❑ While Project Boards are typically comprised of members who are direct employees of the contract parties, contract parties may also appoint non-employee, external representatives to participate on their behalf. An example of this was where an individual was appointed by the parties to act as chair of a Project Board.

Extent of Active Operation of Project Boards

- ❑ In relation to the activity of Project Boards, respondents to Indecon's survey who were members of a Project Board indicated that, on average, 78% of the boards on which they had been involved were active (and had a dispute referred), while 22% of Project Boards were not active.

Appointment of Contract Party Representatives

- ❑ The research found that the median average number of members of Project Boards representing each contract party, based on respondents' three most recent projects, was two members (excluding the chair).

Project Board Meeting Structures and Extent of Informal Interaction

- ❑ Indecon's interviews with a sample of respondents revealed a mix of experience in relation to the format of Project Board meetings, with some individuals reporting more formalised structures, with clear agendas, structured discussion, and minute-taking and circulation, while other interviewees indicated more informal approaches, for example, where meetings were generally not held on-site, and agendas generally followed the disputes that arose from ER Determinations.
- ❑ Respondents who were members of a Project Board indicated that the board had met informally (i.e., outside an official board meeting) to help resolve a dispute, on average, on one dispute in which they were involved.

Appointment of and engagement with Standing Conciliators

- ❑ In relation to involvement of Standing Conciliators on Project Boards, the research found that, on average, Standing Conciliators had acted as a chairperson on just under 40% of the boards to which they were appointed.
- ❑ While there was a significant variation, respondents typically dealt with a much higher number of disputes where the Project Board had directly interacted with the Standing Conciliator to assist parties to resolve a dispute, than where no such interaction took place.

- ❑ Project Board members responding to the research also indicated that, in 73% of projects on which they were engaged, the Project Board had direct interaction with the Standing Conciliator, suggesting that Standing Conciliators are called on frequently to help resolve disputes.

Authority of Project Board members to agree settlement of disputes

- ❑ In some cases, Project Board members' terms of reference may restrict a Board's authority to settle disputes. However, while there was a wide variation of responses, in the majority of cases, this was not a significant issue.
- ❑ Where Project Boards have the authority to agree settlements, the indications provided by the sample of respondents interviewed by Indecon suggested that these were recorded in writing by formal settlement agreements and signed by the parties; the Standing Conciliator mediated a settlement and recorded the agreement in a Deed of Settlement; a settlement was recorded as minutes of the meeting and would then be given formally by the ER through a contractual mechanism; or authority was not an issue that arose, as all matters were referred and formally documented by ER recommendation and change order, or through conciliator recommendation.

Effectiveness of Project Boards in Resolving Disputes

- ❑ In relation to overall effectiveness, almost two-thirds (64.9%) of Project Boards members responding to Indecon's research either strongly agreed or agreed that Project Boards helped in resolving disputes. Standing Conciliators were relatively most positive in their assessment of the effectiveness of Project Boards, followed by employer/employer personnel, contractor/contractor personnel and contractor representatives.
- ❑ Among the aspects of the role of Project Boards that respondents to Indecon's research believed currently worked well and should not be changed included that: Project Boards help to build relationships between senior personnel from the parties; they provide access to the parties to the expertise and experience of the Standing Conciliator; they allow the respective project teams to focus energies and skills on the works on-site rather than on disputes; they provide an early indication to the parties as to what the Conciliators view is likely to be in formal conciliation on a particular dispute; provide the ability to discuss issues on a without-prejudice basis; and Project Boards provide a forum for the contract parties to meet on a regular basis during the life of the project, and may also provide a forum to improve relations that may have deteriorated.
- ❑ Respondents were also asked to share their views regarding where the role of Project Boards could be amended to function more effectively. Among the aspects/issues highlighted by a sample of individual respondents interviewed by Indecon included that the Project Board should have the ability to be proactive in addressing future possible disputes (after the issuing of a Notice under sub-clause 10.3) before the ER makes their Determination, rather than only be able to discuss/address ER Determinations under sub-clause 10.5 that are in dispute; that the strict single Project Board meeting to resolve disputes presented is not realistic, particularly in the case of complex disputes; and that representatives on the Employer side should be experienced in discussing and resolving construction disputes.

5 Overall Conclusions and Recommendations

5.1 Introduction

The empirical analysis and consultations undertaken by Indecon to-date provides extensive new evidence on the role of the Standing Conciliator and the Project Boards. In addition, the international review provides an overview of a range of different dispute resolution and avoidance approaches utilised in different jurisdictions internationally. This section integrates the detailed assessment presented in the preceding sections to develop overall conclusions and to identify potential policy changes that could further strengthen the roles of Standing Conciliator and Project Board.

5.2 Key Conclusions from Research

Role of Standing Conciliator

To be effective in their intended role, Standing Conciliators must possess the professional expertise, experience and overall credibility to foster proper engagement between Contract Parties and to assist the Parties in the avoidance of disputes or of costly and lengthy formal dispute resolution procedures, and to help establish agreement upon issues before they crystallise into a dispute. Indecon's empirical research found a diversity of backgrounds, qualifications and expertise among respondents who had acted as Standing Conciliators, many of whom had particular expertise in arbitration, mediation and adjudication. However, while many reported extensive career experience in dispute resolution more generally, the evidence indicated a wide variance in actual experience as a Standing Conciliator, with respondents on average having been appointed as a Standing Conciliator on between two and five projects, but with a subset of individuals having acted as a Standing Conciliator on a significantly larger number of projects.

Indecon's interviews with selected respondents to the survey research suggested that there is a relatively small pool of individuals in Ireland with the expertise and experience required to act as an effective Standing Conciliator, and that a subset of these individuals tends to advise on the majority of projects. This may reflect a range of factors, including the specialised nature of the role, the backgrounds and qualifications of individuals, and perceptions with regard to individuals' track record in this area. However, it raises the issue of the need to ensure an adequate supply of suitably trained specialists in this area, who have the skillsets and experience required to provide consistent quality support in the role of Standing Conciliator. Also, of note in this context concerns the absence of formal qualifications in Ireland required specifically to practice as a Standing Conciliator.

Just over half of those who had acted as a Standing Conciliator indicated their view that the current formal dispute resolution procedures are resulting in meaningful engagement between parties prior to utilisation of formal procedures, though a significant minority stated that this was not evident on projects they worked on. Among Project Board members, while just under half stated that they had observed meaningful early engagement between parties, a noticeably high proportion (39%) said they had not seen such engagement.

The evidence also suggested that the engagement of Standing Conciliators on projects tended to be focussed on the later stages of a project, or where a project is at or near completion, with only minor or no involvement following commencement or at the early stages of groundwork on a project. In addition, generally Standing Conciliators also reported that there had been no change in their required level of engagement during the course of projects they worked on.

Given that an important intended objective of the dispute management procedures is to encourage early effective engagement between parties, with a view to avoiding potential disputes before they crystallise into actual disputes, the above findings suggest that this is an area where the procedures could be strengthened, including the guidance on the operation of the role of Standing Conciliator.

The pricing structures/payment methods used by Standing Conciliators, the largest proportion (just under half of respondents) were paid on a lump sum fee basis, while 30% were remunerated on an hourly rate basis. A significant proportion (22%) of Standing Conciliators were paid through a combination of a fixed fee for their role in relation to the Project Board and an hourly rate for any special additional work they undertook. An important issue in relation to pricing and payment structures is that these are designed appropriately to incentivise early-stage involvement of the Standing Conciliator, with a view to maximising their effectiveness in helping to avoid disputes.

An indication of the impact of the role of Standing Conciliator can be had by examining the outcomes of disputes on which a Standing Conciliator was appointed. The research found a wide variation in reported experience, which was heavily influenced by the experience on individual projects. Typically, between 25% and 40% of disputes were resolved without a claim under sub-clause 10.3 of the Contract, while a similar proportion of disputes were referred to the Project Board. From 10-26% of disputes on average proceeded to conciliation under sub-clause 13.2, while on average between zero and 12% of disputes proceeded beyond conciliation (i.e., to adjudication, arbitration or litigation). Standing Conciliators noted that it was not possible in a significant percentage of cases (28% on average) to assist the parties to avoid a potential dispute being referred to the Project Board.

A somewhat mixed picture emerges from the research in relation to whether the intended benefits of the current dispute procedures are evident in practice. Overall, half of respondents believed that the involvement of Standing Conciliators had helped in avoiding disputes from arising, while 55% were of the view that their role assisted in resolving potential disputes. Nonetheless, a significant minority (of mainly Contract Parties and/or their representatives) disagreed or strongly disagreed that Standing Conciliators provided these benefits. Also, while the largest proportion (48%) of respondents indicated their view that Standing Conciliators should be more involved as part of the dispute management process, a significant minority believed that they should be less involved. Overall, while these views are likely to be heavily coloured by respondents' experiences on individual projects, the fact that over half of all respondents considered that Standing Conciliators had helped in avoiding or resolving disputes does appear to provide strong support for their role.

Among the diverse sample of respondents to the survey research (including Contract Parties and/or their representatives, as well as Standing Conciliators) who were interviewed by Indecon as part of this review, specific aspects of the role of Standing Conciliator which interviewees believed worked well and should not be changed included: the ability of the SC to engage with, and act as a conduit between, parties and to foster informal discussion outside the Project Board setting; having the Standing Conciliator fulfil the role of conciliator; the role of the SC as the ultimate issuer of recommendation (i.e., at the end part of a conciliation); and providing the Project Board with formal/informal access to the Standing Conciliator's expertise and experience.

Interviewees also shared their views regarding aspects of the role of SC which they believed could be amended to support more effective functioning. Specific suggestions included:

- ☐ That the SC should be involved from an early stage of the manifestation of a dispute.
- ☐ That the SC should be made aware of any issues that could develop into a potential dispute as soon as such issues emerge.
- ☐ The possible merit in having more than one SC on larger and more complex projects, or where the need arises.

- ❑ The possible merit in making it mandatory that the SC chairs the Project Board.
- ❑ Whether there could be a merit in making it compulsory for project teams to co-operate significantly better with the Standing Conciliator, as well as possible measures to reduce pushback from project teams to role of the Standing Conciliator.
- ❑ That the Guidance Note 3.1.1 on Dispute Resolution (including Clause 2.8) should give greater clarity and direction regarding formal and informal interactions between the Standing Conciliator and the Project Board, particularly in the area of dispute avoidance and in the early resolution of issues which could become disputes.
- ❑ To consider the merits of adjusting the remuneration of the Standing Conciliator to give more weight to time incurred in attending Project Board meetings, helping to settle differences and resolving formal disputes.

Role of Project Board

Indecon's detailed examination of the operation of the role of the Project Board under the dispute management procedures found that Project Board members typically held a wide range of expertise, including in the areas of project management, construction management and quantity surveying. However, only a minority of members of Project Boards had legal or arbitration expertise.

In terms of experience, relatively speaking, design team consultants and employer/employer personnel tended to have less experience in dispute resolution (averaging 10-12 years of experience), whereas contractor personnel/representatives and employer representatives tended to have between 15 and 20 years of experience in dispute resolution.

Variance in experience with Project Boards was also evidenced by the finding that the majority (57.4%) of respondents indicated that they had been a member of one or two boards, while 28% stated that they had been on three or four boards, and 15% had been members of five or more Project Boards.

Project Boards are typically comprised of two members from each Contract Party, who are generally direct employees of one of the Parties. However, the Parties may also appoint representatives to participate on their behalf. An issue noted by a significant number of respondents was that such representatives can often lack the expertise and experience required to participate effectively in Project Boards.

Indecon's interviews with a sample of respondents also revealed a range of experience in relation to the format of Project Board meetings, with some individuals reporting more formalised structures, with clear agendas, structured discussion, and minute-taking and circulation, while other interviewees indicated more informal approaches, for example, where meetings were generally not held on-site, and agendas generally followed the disputes that arose from ER Determinations.

The assessment also suggested infrequent interaction between Project Board members on an informal basis (i.e., outside of an official board meeting) to help resolve disputes.

In relation to involvement of Standing Conciliators on Project Boards, the research found that, while there was a significant variation, respondents typically dealt with a much larger number of disputes where the Project Board had directly interacted with the Standing Conciliator to assist parties to resolve a dispute, than where no such interaction took place.

Project Board members responding to the research also indicated that, in 73% of projects on which they were engaged, the Project Board had direct interaction with the Standing Conciliator, suggesting that Standing Conciliators are called on frequently to help resolve disputes.

The Standing Conciliator may, with the agreement of Contract Parties, act as chair of, or be invited to attend, the Project Board meetings. Indecon's empirical research found that, on average, Standing Conciliators had acted as the chairperson on just under 40% of Project Boards. A number of respondents also raised the possible merits of making it mandatory that the Standing Conciliator always chairs the Project Board, based on the view that this could bring greater impartiality and objectivity, and more effective board interaction and decision-making.

In some cases, Project Board members' terms of reference may restrict a Board's authority to settle disputes. However, while there was a wide variation of responses, in the majority of cases this was not identified as a significant issue. Where Project Boards generally have the authority to agree settlements, the indications provided by respondents interviewed by Indecon suggested that these were recorded in writing by formal settlement agreements and signed by the parties; the Standing Conciliator mediated a settlement and recorded the agreement in a Deed of Settlement; a settlement was recorded as minutes of the meeting and would then be given formally by the ER through a contractual mechanism; or authority was not an issue that arose, as all matters were referred and formally documented by ER recommendation and change order, or through conciliator recommendation.

In relation to overall effectiveness of Project Boards, the majority (57%) of respondents to Indecon's research either strongly agreed or agreed that Project Boards helped in resolving disputes. Standing Conciliators were relatively most positive in their assessment of the effectiveness of Project Boards, followed by employer/employer personnel, contractor/contractor personnel and contractor representatives.

Among the aspects of the role that respondents believed currently worked well and should not be changed included that Project Boards:

- ☐ help to build relationships between senior personnel from the parties.
- ☐ provide access to the parties to the expertise and experience of the Standing Conciliator.
- ☐ allow the respective project teams to focus energies and skills on the works on-site rather than on disputes.
- ☐ provide an early indication to the parties as to what the Conciliators view is likely to be in formal conciliation on a particular dispute.
- ☐ provide the ability to discuss issues on a without-prejudice basis.
- ☐ provide a forum for the contract parties to meet on a regular basis during the life of the project and may also provide a forum to improve relations that may have deteriorated.

Among the aspects/issues highlighted by respondents in relation to areas where the role of Project Boards could potentially be amended to function more effectively, included the following suggestions:

- ☐ that the Project Board should have the ability to be proactive in addressing future possible disputes before the ER makes their Determination, rather than only be able to discuss / address ER Determinations under sub-clause 10.5 that are in dispute.
- ☐ that the strict single Project Board meeting to resolve disputes presented is not realistic, particularly in the case of complex disputes.
- ☐ that representatives on the Employer side should be experienced in discussing and resolving construction disputes.

5.3 Recommendations

Based on the detailed empirical analysis and assessment undertaken in this review, Indecon has identified a number of recommendations on potential ways to enhance the effective functioning of the Dispute Management Procedures under the Public Works Contract. These recommendations, which are set out in the table below, include potential cross-cutting measures designed to strengthen the capacity to avoid potential disputes, in addition to specific actions to enhance the roles of Standing Conciliator and Project Board, respectively.

Table 5.1: Recommendations on Potential Enhancements to Functioning of Dispute Management Procedures under the PWC	
Cross-cutting Recommendations	
1.	In the context of dispute avoidance, greater emphasis should be placed in the PWC on the application of project planning and control, including the identification, management and control of project risks that could develop into potential disputes.
2.	Consideration should be given to appropriate application of aspects of Collaborative Contracting, including Early Contractor Involvement, use of Contractual Targets and Incentives, and Quality Management processes. These approaches would serve to enhance the Dispute Management Procedures through improving collaboration at the early stages of a contract, potentially avoiding disputes later in the project; incentivising the contractor to complete their works in a timely manner and within budget; and maintaining a positive, collaborative relationship between contract parties.
3.	As part of the function of the roles of Standing Conciliator and Project Board, the development and application of early warning systems (for example, along the lines of the NEC4 contract's 'Early Warning Register') should be advanced to incentivise early collaboration by Contract Parties on the identification and management of specified risks, including potential project delays.
4.	The potential to utilise aspects of the International Chamber of Commerce's ADR services should be explored. The ICC offers standard form contracts, as well as a comprehensive variety of dispute resolution services.
Recommendations re Role of Standing Conciliator	
5.	Initiatives should be advanced to expand the pool of individuals in Ireland with the expertise and experience required to practice as a Standing Conciliator on Public Works Contracts. This should include engaging with education and training providers, and professional bodies, to develop a recognised qualification and programme of formal training for individuals who wish to practice as a Standing Conciliator, and to promote the role as a career option for experienced professionals.
6.	Public Works Contract clauses should ensure that the intended role and scope of the Standing Conciliator in respect of dispute avoidance are more clearly emphasised and supported by the Contract Parties. This could include potentially adjusting Clause 13 of the Public Works Contract to formally incorporate a dispute avoidance role for the Standing Conciliator.
7.	To achieve greater consistency in the operation of the role, Guidance Note 3.1.1 should be expanded to set out in greater detail the procedures that should be followed by the Standing Conciliator.
8.	Guidance in relation to the process of appointment of the Standing Conciliator should be strengthened to ensure independence and impartiality of the role.
9.	Consideration should be given to the merits of adjusting the payment structure for Standing Conciliators to incentivise time inputs at the early stages of projects and to maximise the contribution of SCs in assisting Parties to avoid potential disputes. This could include allocating a greater weight to payment on an hourly rate basis and less emphasis on the lump sum component.

Recommendations on Potential Enhancements to Functioning of Dispute Management Procedures under the PWC (<i>continued</i>)	
	Recommendations re Role of Project Board
10.	To place greater emphasis on the avoidance of disputes, consider strengthening the role and remit of the Project Board to include the ability to regularly review a project and discuss potential disputes in advance of an ER Determination, and to mitigate potential risks and subsequent claims. This should include consideration of the merits of introducing a contractual requirement to proactively mitigate dispute risks and attempt to achieve dispute resolution.
11.	To ensure consistency in relation to their effective and efficient operation, enhanced guidance is needed in relation to the operating procedure by which the Project Board hears, discusses and resolves referred disputes. The guidance should, among other aspects, emphasize the need for the Project Board members to constructively engage in finding agreement/resolution (including possible negotiation outside contract parameters), to cooperate with the Standing Conciliator, and require boards to reach decisions on referred disputes within pre-defined timescales. The guidance should also be supported by the provision to Project Board members of appropriate training in contract dispute management and resolution, and Project Board operation.
12.	Guidance on establishing and constituting the Project Board should emphasise the importance of appointing representatives of Contract Parties who have the required knowledge and expertise in the construction industry, in commercial decision making and negotiation, and in dispute resolution methods; are fully familiar with the role and objectives of the Project Board and of the Standing Conciliator; and are ideally decision-makers in their company/organisation and have the authority to engage in meaningful discussions with the other party and the Standing Conciliator at Project Board meetings. In addition, ideally at least one member of the Project Board should be independent of the Contract Parties (this may or may not be the Standing Conciliator).
13.	Consider the merits of giving the Standing Conciliator a more formal, but impartial, role in Project Board meetings. This could include requiring that the Standing Conciliator always chairs the Project Board, or alternatively, permitting the Standing Conciliator to attend Project Board meetings in an observer-only capacity, to build knowledge of issues on-site and/or between the Contract Parties' site teams.
14.	For larger and/or more complex projects, the option should be considered of allowing the Standing Conciliator to appoint an independent external expert, who has prior experience of Project Boards, knowledge of similar contracts and of potential value ranges for settlement of similar disputes, who can attend Project Board meetings in an observer-only capacity and subsequently advise the Standing Conciliator.

5.4 Overall Conclusion

Indecon's review of the roles of Standing Conciliator and Project Board under the Public Works Contract's Dispute Management Procedures has shown that, while individual perceptions can be greatly coloured by the experience on different projects, overall, the roles have generally been well-received. This included significant levels of agreement among practitioners and contract parties that Standing Conciliators had assisted in resolving actual disputes and helped in avoiding potential disputes, while the research also found a broad consensus among contract parties and Standing Conciliators that Project Boards had helped to resolve disputes that might otherwise have extended into longer and/or more costly outcomes. The review also identified areas where the roles, as well as the design of the Public Works Contract and wider Dispute Management Procedures, could be enhanced to further strengthen their impact and effectiveness, particularly to achieve a greater emphasis on the avoidance of potential disputes.

Annex 1 Copy of Research Questionnaire

Confidential Information Request re Independent Review for the Irish Government's Office of Government Procurement on the Roles of Standing Conciliator and Project Board
<p>Introduction</p> <p>Please complete the confidential information request below, which will be an important input to the Review of the Roles of the Standing Conciliator and the Project Board. The Office of Government Procurement and Indecon are very appreciative of your assistance with this important Review. Your participation will provide you with a unique opportunity to input to national policy in this area. Please note all individual responses will be treated as strictly confidential and will be aggregated in anonymous form with the responses from other individuals.</p> <p>Questionnaire sections: Please note that Questions 1-15 below should be completed by <u>all</u> respondents.</p> <p>Then:</p> <ul style="list-style-type: none"> - Questions 16-25 should be completed if you ever acted as a Standing Conciliator, <p>and/or,</p> <ul style="list-style-type: none"> - Questions 26-36 should be completed if you were ever a member of a Project Board. <p>Note re definitions:</p> <p>A "Dispute" concerns any difference between the parties under or in connection with the contract which is formally referred either to the Project Board or to conciliation/arbitration/adjudication/court.</p> <p>A "Potential Dispute" concerns any difference between the parties under or in connection with the contract that has arisen in advance of any formal reference to the Project Board, conciliation/arbitration/adjudication/court.</p> <p>Background</p>

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Q1. Please indicate which best describes your position. Please select one or more categories as appropriate:

- ☐ Engaged or were engaged as a Standing Conciliator
- ☐ Employer or Employer Personnel
- ☐ Employer Representative
- ☐ Contractor or Contractor Personnel
- ☐ Contractor Representative
- ☐ Design/Cost Consultant
- ☐ An external appointee to a Project Board (i.e. Not a Direct Employee of Either Party to a Dispute)

Q2. Please indicate if you have served as a Standing Conciliator and/or as a member of a Project Board, and if so, the number of projects you have been involved with to-date for each role.

Number of Projects where you have acted, or are acting, as Standing Conciliator:

Number of Projects where you are or have been a Member of Project Board:

Q3. Please indicate the year in which you were first involved as:

(a) a Project Board member:

(b) a Standing Conciliator:

Views on How the Public Works Contracts Dispute Resolution Procedures are Operating in Practice

Q4. Do you think the current formal dispute resolution procedures are resulting in meaningful engagement between the parties through escalation up to senior management prior to engaging in more formal dispute resolution proceedings?

- ☐ Yes
- ☐ No
- ☐ Don't Know

Please feel free to elaborate below on the reasons for your assessment:

Q5. Please indicate your views on whether the potential benefits of the current procedures are working well in practice by indicating your agreement or otherwise with the following statements concerning disputes (i.e. ER decisions referred to a Project Board):

	Strongly Agree	Agree	Disagree	Strongly Disagree	Don't Know
Standing Conciliators have helped avoid disputes from arising	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Standing Conciliators have assisted in resolving potential disputes	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Project Boards have assisted in resolving disputes	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please feel free to elaborate below on the reasons for your assessment:

Views on Enhancement of Role of Standing Conciliator

Q6. Please indicate what aspects of the role of Standing Conciliator you feel currently operate well and should not be changed:

Q7. Please indicate any opinions or recommendations you may have on how the role of Standing Conciliator can be amended to function better:

Q8. Do you think that in general Standing Conciliators should be more or less involved as part of the process?

- ☐ Less involved
- ☐ More involved
- ☐ Don't Know

Views on Enhancement of Role of Project Boards

Q9. Please indicate what parts of the role of Project Boards you feel currently operate well and should not be changed:

Q10. Please indicate any opinions or recommendations you may have on how the role of Project Boards can be amended to function better:

Other Comments

Q11. Please outline any other comments or suggestions you may have on the current dispute management resolution procedures:

Confidential Background Information for All Respondents

Q12. Please indicate the overall number of years of experience you have had in dispute resolution:

Q13. In considering your professional profile, please indicate your main areas of expertise. Please select one or more boxes:

- ☐ Legal
- ☐ Financial
- ☐ Engineering
- ☐ Architecture
- ☐ Construction Management
- ☐ Project Management
- ☐ Building Surveyor
- ☐ Quantity Surveying
- ☐ Arbitration
- ☐ Other (please specify)

Q14. Please indicate your main professional, or other, qualifications:

Q15. We may follow up with you to clarify or further discuss your inputs. If you would be willing to share your contact details, please provide your name and e-mail address below (note: your details will be treated as strictly confidential and will be used only for the purposes of this research):

Name:

E-mail address:

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* Q16. Have you acted as a Standing Conciliator?

☐ Yes

☐ No

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Details re your Role as Standing Conciliator

Q17. Please indicate what level of interaction you typically have had in your role as Standing Conciliator with the following parties:

	Very Significant Involvement	Significant Involvement	Minor Involvement	No Involvement
Project Board as Group	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Contractor/Contractor Personnel	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Contractor Representatives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Employer/Employer Personnel	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Employer Representatives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Design/Cost Consultants	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Q18. Please indicate the level of interaction you typically have in your role as Standing Conciliator at each stage of projects:

	Very Significant Involvement	Significant Involvement	Minor Involvement	No Involvement
Commencement of project	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Early stages of groundwork	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Interaction with utility providers or third parties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Later stages in project	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
At or near project completion	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Q19. On Projects where you have been involved as Standing Conciliator, please indicate the average percentage outcomes of potential disputes you have been involved which fall into the following categories (if you are unable to identify an average %, please provide a range-based estimate, i.e., between X and Y %, for each category):

Potential dispute was resolved without a claim under sub-clause 10.3:

Dispute was referred to Project Board:

Dispute proceeded to conciliation under sub-clause 13.2:

Dispute proceeded beyond conciliation:

Other (please specify):

Q20. Of the potential disputes which you have been involved within your role as Standing Conciliator, which have led to a resolution without the involvement of the Project Board, please indicate the length of time taken between the date you were first made aware of the potential dispute and the agreement on resolution. Please list the topics of each of the most recent six potential disputes which you have been involved with which have been resolved and the timing of resolution in each case:

Potential Dispute 1:

Potential Dispute Topic:

Length of Time for Resolution:

Potential Dispute 2:

Potential Dispute Topic:

Length of Time for Resolution:

Potential Dispute 3:

Potential Dispute Topic:

Length of Time for Resolution:

Potential Dispute 4:

Potential Dispute Topic:

Length of Time for Resolution:

Potential Dispute 5:

Potential Dispute Topic:

Length of Time for Resolution:

Potential Dispute 6:

Potential Dispute Topic:

Length of Time for Resolution:

Q21. Please indicate your view on whether your role as Standing Conciliator has helped reduce the timescale for resolution of potential disputes:

☐ Yes

☐ No

☐ Don't Know

Q22. Please indicate the average percentage of potential disputes, if any, which you have been involved with where it was not possible to assist the parties to avoid a potential dispute being referred to the Project Board:

Q23. Please indicate the number of projects, if any, where your role as a Standing Conciliator has been changed by parties during engagement:

Number of Projects where role has become more involved:

Number of Projects where role has become less involved:

Number of Projects where there has been no change in role:

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Q24. Please outline details of the nature of your involvement with the Project Board in resolving disputes:

Please indicate the average percentage of cases where you have:

(i) Monitored and advised on projects but had no involvement with Project Board:

(ii) Attended meetings of Project Board:

(iii) Advised Project Board:

(iv) Issued Informal Opinions:

(v) Issued Formal Opinions:

Other (please specify):

Q25. Please indicate how you were paid for your role as Standing Conciliator:

% of Engagements by Payment Approach:

Lump Sum Fee:

Hourly Rate:

Combination with fixed fee for Board role and hourly rate for special additional work:

Other (please specify):

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* Q26. Have you been a member of one or more Project Boards?

☐ Yes

☐ No

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Details re your Role as Member of Project Boards

Q27. Please indicate the total number of Project Boards which you have been appointed to to-date:

Q28. If you are not a direct employee of the parties, please indicate how were you appointed to the Board and by whom:

Q29. For the three most recent projects you have been involved with, please indicate in the table below the number of members (excluding the Chair) representing each party on the Project Board (Min = 1, Max = 3 per party):

Project 1:

Project 2:

Project 3:

Q30. Please indicate the number of Project Boards you have been involved with which had a Standing Conciliator acting as Chair or as a member:

As a Chair:

As a Member:

Q31. Please indicate the number of Project Boards you have been involved with which were active and where a dispute was referred to the Board and the number where the Board was not active:

Number where Project Board active:

Number where Project Board not active:

Q32. Please indicate the number of disputes where you have been a member of a Project Board where the Project Board has interacted with the Standing Conciliator to assist the parties to resolve disputes:

Number of disputes where Project Board has directly interacted with the Standing Conciliator:

Number of disputes where Project Board had no direct interaction with the Standing Conciliator:

Q33. Please indicate the number of disputes where you have been a member of a Project Board and where Board members met informally, i.e., outside of an official Project Board meeting, in order to resolve a dispute:

Number of cases where Board Members met outside official meeting:

Q34. Where you have been a member of a Project Board, please indicate the percentage of disputes where Board Members terms of reference restricted the Boards' authority to settle disputes:

Percentage of disputes where Project Board did not have authority to agree settlement of a dispute:

Q35. Where Project Boards had authority to agree settlements, please provide details of how the authority was recorded and given:

Q36. Please indicate the typical format of meeting structures for Project Boards which you have been a member of. If a range of formats have been agreed, please provide details below. (If you have examples of agenda, please include):

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Thank you very much for taking the time to complete this confidential questionnaire. Your views are very important and are strictly confidential. If you have any queries regarding this, please don't hesitate to contact Peter Kingston at Indecon at email: pkingston@indecon.ie.

Please ensure to select 'Done' at the end of the questionnaire after you have completed your response, to ensure that you successfully submit your response.

Annex 2 Review of International Approaches to Dispute Avoidance and Resolution

Introduction

This annex presents the findings from Indecon's overview of international approaches to dispute avoidance and resolution in the context of construction contracts. This highlights a number of salient features of the approach to dispute avoidance and resolution for public works contracts in selected countries. In the context of the intended ethos of the dispute management procedures under the PWC, namely as an escalation process involving collaboration between the parties prior to crystallisation of a dispute, we have placed a greater emphasis in this review on approaches to dispute avoidance, rather than measures to manage formal disputes once they arise. Because of differences in legal systems and in procurement practices, caution is needed in interpreting any potential lessons from international experience and in attempting to apply different approaches to the Irish context. However, aspects of these approaches may be informative of potential enhancements to how the Irish PWC addresses disputes.

Overview of Recent International Developments

Prior to examining specific approaches in different jurisdictions, it is instructive to provide some context, in terms of the recent international developments in relation to construction disputes. The below overview presents some noteworthy comparative data on common causes of disputes, approaches to dispute avoidance and resolution, and in relation to dispute resolution times. This is based on the latest annual Global Construction Disputes Report, published by Arcadis in June 2021.²³

Common causes of construction contract disputes

The latest comparative research found that the most common dispute cause in construction projects globally during 2020 was where the owner/contractor/subcontractor failed to understand and/or comply with their contractual obligations (see table overleaf). The second most common factor in the UK and continental Europe was errors and/or omissions in the contract. Other top-three causes of disputes include owner-directed changes, failure to make interim awards, and force majeure. These factors have fluctuated on a year-to-year basis, and the COVID-19 pandemic is likely to have influenced these developments.

²³ Global Construction Disputes Report 2021, Arcadis, June 2021. See: <https://www.arcadis.com/en/knowledge-hub/perspectives/global/global-construction-disputes-report>.

Table A 1: Most Common Construction Project Dispute Causes – International Comparative Perspective		
2020 Rank	2019 Rank	Most Common Dispute Cause
North America		
1	1	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2	3	Owner-directed changes
(2) Two-way tie	2	Errors and/or omissions in the contract document
3	*	Third-party or force majeure events
United Kingdom		
1	2	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2	*	Errors and/or omissions in the contract document
3	1	Failure to make interim awards on extension of time/compensation
Continental Europe		
1	3	Owner's failure to properly administer the contract
(1) Two-way tie	*	Owner-directed changes
2	*	Errors and/or omissions in the contract document
3	*	Differing site conditions
Middle East		
1	*	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2	3	Failure to make interim awards on extension of time/compensation
3	2	Owner's failure to properly administer the contract
Source: Global Construction Disputes Report 2021, Arcadis. Notes: * New ranking in 2020, not ranked in top three in 2019. 'Two-way tie' refers to instances where the research found two causes of dispute to have equal rank during that period.		

Given that failure to understand terms of a contract and errors/omissions are common causes of contract disputes internationally, it may be worthwhile to consider the merits of Collaborative Contracting as a means of avoiding or preventing disputes from occurring in the first place. A number of countries have adopted this method for construction contracts. Collaborative Contracting refers to the early project phase in which the specifications of the project are developed as planning and design are undertaken by parties working in tandem. This contrasts with the traditional tender process, whereby the employer provides specifications, and the bidder offers to undertake the works under a fixed-price lump-sum agreement. Failure to understand contract terms and conditions, and changes initiated by the buyer, could potentially be avoided through improved communication and engaging parties in a more cooperative manner from the outset of the project, and by incorporating incentives and risk-sharing provisions in the contract. This could help reduce the likelihood that parties would initiate dispute processes because the incentives provided by the contract are more closely aligned with the interests of each party as they relate to performance of the contract. The recent international trends over the last decade are instructive to consider from the perspective of comparison with the Irish Public Works Contract. Standard forms contracts have been developed in several comparator countries and have been adopted to varying degrees in other countries. These approaches are examined further in this review.

Common methods of ADR in construction contract disputes

It is also useful to consider different methods of Alternative Dispute Resolution (ADR) in the construction sector. The recent comparative research suggests that, in instances where early resolution cannot be achieved, party-to-party negotiation remains the preferred method of ADR globally, while adjudication remains the top method of ADR in the UK. The use of Dispute Avoidance Board/Dispute Resolution Board (DAB/DRB) is common in continental Europe, but not in North America, the UK or the Middle East. It is important to note that while Australia and Ireland were not included in the global Arcadis (2021) report, the use of DAB/DRB is common in these countries, and these are discussed in this review. Other preferred methods in construction contracts during 2020 included mediation and adjudication (see table below).

Table A 2: Most Common ADR Methods in Construction Contract Disputes		
2020 Rank	2019 Rank	ADR Methods
		North America
1	2	Party-to-party negotiation
2	1	Mediation
3	*	Arbitration
		United Kingdom
1	1	Adjudication (contractual or ad hoc)
2	2	Party-to-party negotiation
3	3	Arbitration
		Continental Europe
1	3	Party-to-party negotiation
2	*	DAB/DRB
3	*	Mediation
(3) Two-way tie	*	Adjudication (contractual or ad hoc)
		Middle East
1	1	Party-to-party negotiation
2	2	Arbitration
3	3	Mediation (contractual or ad hoc)
Source: Global Construction Disputes Report 2021, Arcadis. Notes: * New ranking in 2020, not ranked in top 3 in 2019. 'Two-way tie' refers to instances where the research found two methods of ADR as having equal rank during that period.		

The table below indicates the top three factors globally in dispute mitigation and avoidance. The latest Arcadis research indicates that the most important factors in mitigation/early resolution globally, are parties' willingness to compromise; accurate and timely schedules and reviews; and transparency of cost data. Factors underlying effecting dispute avoidance are risk management; contract specifications and reviews; and schedule and progress reviews. It is noteworthy that these tools and procedures are closely aligned with Collaborative Contracting, suggesting that these approaches may help achieve conflict avoidance and mitigation/early resolution of disputes.

Table A 3: Most Important Factors in Dispute Mitigation and Effective Dispute Avoidance – Global Developments

2020 Rank	2019 Rank	Most important factors in mitigation/early resolution of disputes
1	1	Owner/contractor willingness to compromise
2	2	Accurate and timely schedules and reviews by project staff or third parties
3	3	Contractor transparency of cost data in support of claimed damages
		Most effective claims avoidance techniques
1	1	Risk management
2	2	Contract and specification reviews
3	3	Third-party schedule reviews
(3) Two-way tie	*	Constructability reviews

Source: Global Construction Disputes Report 2021, Arcadis.

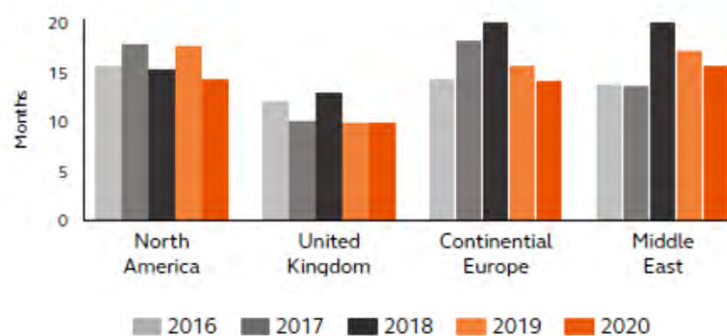
Notes: * New ranking in 2020, not ranked in top three in 2019.

'Two-way tie' refers to instances where the research ranked two factors/techniques to have equal rank during that period.

Dispute resolution timescales

The recent comparative research from Arcadis also examined average dispute resolution times for construction contracts. The research found that the UK has lower average dispute times than in Continental Europe, North America and the Middle East (see figure below). It should be noted, however, that there is likely to be a range of factors contributing to dispute resolution times.

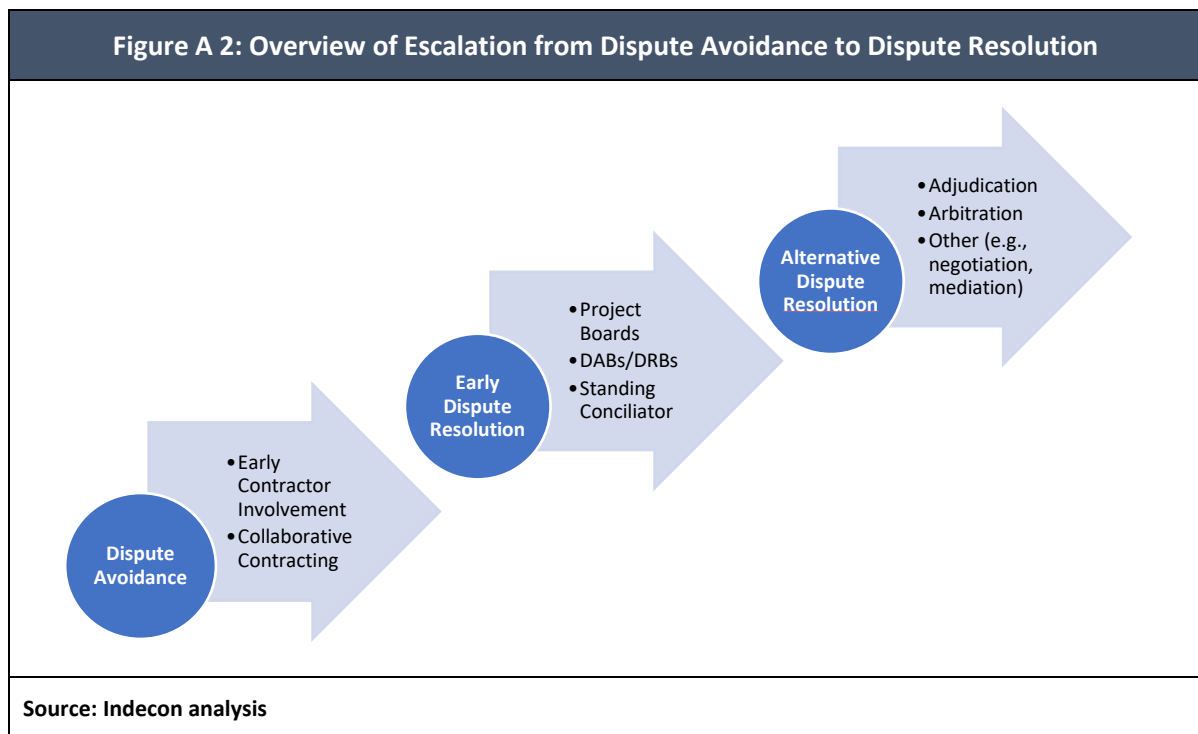
Figure A 1: Average Dispute Resolution Time for Construction Projects – Comparative Recent Trends



Source: Global Construction Disputes Report 2021, Arcadis.

In the following sections, we examine more closely the experience of comparator countries including the UK, Denmark, Australia and New Zealand. This includes information on emerging methods of dispute avoidance, e.g., collaborative contracting; early dispute resolution (e.g., Project Boards and similar); and ADR systems in place (e.g., adjudication, arbitration or other approaches). We also examine contract models and tools such as the NEC4 forms of contract, as well as the International Chamber of Commerce's dispute resolution services.

The figure below provides a general depiction of the processes discussed in the subsequent subsections. It ranges from the earliest phase of the contract where planning and design occur. This is the stage at which dispute avoidance is emphasised, i.e., involving contractors at early stages and including contractual targets and incentives can serve to prevent disputes in the longer term. In the medium term, early dispute resolution may be necessary even where good faith efforts have been undertaken to avoid misunderstandings or unanticipated changes to market conditions. This is where project board-based mechanisms can be effective and is in the range where the terms 'Dispute Avoidance' and 'Dispute Resolution' may overlap. For consistency, we refer to this stage as 'Early Dispute Resolution' in the following subsections. The final relevant phase of the process is Alternative Dispute Resolution (ADR), which occurs when a party escalates the dispute from a project board to another form of resolution that was agreed in the contract or is available by law. The most common methods of ADR are adjudication and arbitration. In all instances, if a dispute goes unresolved, it may be litigated in court. Litigation of disputes is beyond the scope of this review.



United Kingdom

Introduction

This sub-section presents an overview of recent UK experience with regard to government construction contracts, including causes of disputes, dispute avoidance (i.e., prevention of disputes arising and/or early resolution) and formal alternative dispute resolution measures. The UK experience is helpful in the context of this review since the Irish legal system (based on common law) most closely resembles that of the UK. Understanding common causes of disputes and popular methods of dispute avoidance and resolution in the UK jurisdiction could therefore be informative of potential changes to dispute management within the Irish Public Works Contract model.

Collaborative contracting as means of dispute avoidance

In 2020, the UK government published 'The Construction Playbook', which is the government guidance on sourcing and contracting public works projects and programmes.²⁴ The guidance, inter alia, notes that, during the overall preparation and planning stages of procurement, effective contracting is a priority in creating positive, effective relationships between parties and focus on long-term value for all involved. This concept is also referred to as 'Collaborative Contracting'. The guidance encourages use of a 'Conflict Avoidance Pledge' (CAP), whereby parties adopt cooperative procedures to resolve problems as they emerge, so as to prevent escalation into disputes. The CAP embodies collaborative methods and early intervention tools to control costs and support timely project delivery.

The UK Government has issued detailed guidance on three broad categories of contract models/formats that fall under the rubric of Collaborative Contracting discussed below:^{25, 26, 27}

1. Cost-led procurement.
2. Two-stage open book.
3. Integrated Project Insurance.

Cost-led procurement

Cost-led procurement (CLP) is defined as:

"... a method of working from inception to decommissioning that is focused on achieving target costs whilst maintaining, if not improving value. The method drives out waste in all parts of the process while maintaining the key targets of cost, time and quality in customer terms. The key components are target costing, collaboration, risk, value and supply chain management."²⁸

CLP is intended to encourage the use of contractors' experience and knowledge to develop innovative solutions through leveraging design, materials, subcontracting, direct labour and experience to the advantage of the Public Sector Client.²⁹ In this model, the client submits a strategic brief in which outputs/outcomes are clearly specified. Contractors respond to the brief by proposing solutions and

²⁴ See: The Construction Playbook - GOV.UK (www.gov.uk)

²⁵ See: [Cost Led Procurement - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

²⁶ See: [Two Stage Open Book - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

²⁷ See: [Integrated Project Insurance - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

²⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/325012/Cost_Led_Procurement_Guidance.pdf

²⁹ Ibid.

committing to a price and a set of rules under which that price can be achieved as the final account sum. This sum is called the cost ceiling, and a commitment to delivering the project below the cost ceiling from the supply side is critical.

According to government guidance: “The team offering the best solution and cost is appointed and requested to work with key client stakeholders to develop the design and cost in parallel. This procurement method is best suited to projects where costs cannot be exceeded and where there is a highly functional and historically repetitive aspect to the project such as schools, prisons, defence accommodation, roads, water work, etc.”³⁰

Key processes of CLP are as follows:

- **Inception** – Essential that the employer has a clearly stated business case and understands fully the requirements, outcomes and costs.
- **Selection** – Integrated supply teams are selected from a framework and develop bids with the employer; selection is based on cost ceiling and best solutions offered. Constant engagement throughout the process is essential.
- **Design** – Team workshop is held to discuss and agree details re design, develop a working charter or protocol, use of technology, identify whole of life issues, dispute resolution procedures, KPIs, and other.
- **Build and Handover** – work is monitored and reported daily, corrective action taken as soon as necessary. Cost, time and quality are key. Integrated risk, value, and supply chain management are employed. BIM and soft landings implemented to ensure delivery according to business case.
- **Occupancy/Use evaluation** – post project review and cost analysis will inform future projects.

Two-Stage Open Book/Supply Chain Collaboration

Under the Two Stage Open Book model, the employer invites prospective team members to bid for a project on the basis of an outline brief and cost benchmark. Tier 1 Contractors and Consultant teams compete for the contract in the first stage, with bidders being chosen based on their capacity, capability, stability, experience and strength of their supply chain plus their profit/fees/overheads and their other costed proposals as appropriate.

The successful Tier 1 Contractor and Consultant team are appointed to work up detailed proposals on the basis of an Open Book cost that meets the Client’s stated outcomes and cost benchmark as a second stage.

As a result, this model reduces bidding costs, enables faster mobilisation and allows the employer to work earlier with an integrated team, identifying and testing design, cost and risk issues before commencement of works, following full project award at the end of the second stage.³¹

According to the UK Government,³² “Two Stage Open Book creates processes that enable a Client to review and test all assumptions as to design, cost, risk and programme at an early stage, working in conjunction with the Tier 1 Contractor and the Tier 2/3 Subcontractors and Suppliers during the Preconstruction Phase of the project. This review and testing creates new opportunities to achieve savings and improved value in the project as a whole and in specific work/supply packages. It takes place transparently and methodically within specified timescales under Conditional Contracts, and

³⁰ Ibid. at p. 3.

³¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/325014/Two_Stage_Open_Book_Guidance.pdf

³² Ibid.

therefore remains entirely within the Client's control. If the Two Stage Open Book processes are planned and set out in a binding Preconstruction Phase Timetable, they avoid any delays in delivery of the project or programme of work and often lead to significant time savings.”

The Supply Chain Collaboration model is substantively similar to Two Stage Open Book except that it applies to existing frameworks and does not require a new procurement process.

Representative projects completed in the context of the Two Stage Open Book process have saved up to 20% of project costs overall.³³

Integrated Project Insurance

The Integrated Project Insurance (IPI) model of collaborative contracting entails the following three principles:³⁴

- (1) Aligning interests of all team members with the client's functional needs;
- (2) Assuring solutions are achievable, affordable, and delivered in a culture of full collaboration; and
- (3) Insuring the outcomes, including cost overrun, and establishing a pre-determined maximum financial exposure for all parties.

Under the IPI model, an Alliance or “Virtual Company” is established, and its Board is populated by members of each contractor. Integrated Project Insurance collectively insures the employer and all the other members of the alliance, i.e., consultants, manufacturers, construction managers, and their supply chains. IPI replaces professional indemnity insurance (which requires proof of fault) with financial loss cover where the cost overrun plus risk-share is insured. The parties are thus incentivised by their alliance in which their goals and objectives are shared. “Confidence to surrender individual agendas for the collective good is secured by the model's unique insurance of the financial outcome.”³⁵

Each of these contract models provides a framework that supports a collaborative working relationship between all parties, from the early stages of design/planning through to project completion. Terms of the contracts provide cost-risk incentives for timely project completion, such that all parties are encouraged to act cooperatively and in good faith throughout the term of the contract. The use of Key Performance Indicators (KPIs), payment incentives, detailed performance schedules, as well as locally based subcontractors, are common features in collaborative contracts.

In addition, the Royal Institute of Chartered Surveyors (RICS) (2016) has published guidance notes relating to the commercial management of construction.³⁶ This includes a listing of alternative forms of construction procurement and payment mechanisms designed to alleviate problems associated with projects where “elements of the work cannot be accurately or fairly measured at the time of tender.”³⁷ Examples are summarised in the next table.

³³ Ibid. at p. 5.

³⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/326716/20140702_IPI_Guidance_3_July_2014.pdf

³⁵ Ibid. at p. 5.

³⁶ RICS Professional Guidance, UK 2016 “Commercial management of construction” RICS Guidance Note, 1st edition, March 2016 at <https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/construction/black-book/commercial-management-of-construction-1st-edition-rics.pdf>

³⁷ Ibid. at p. 6.

Table A 4: Examples of Alternative Forms of Construction Procurement and Payment Mechanisms – UK Royal Institute of Chartered Surveyors

A. Lump sum contracts: fixed price is tendered and agreed, usually arrived at through computation of a bill of quantities or activity schedule.
B. Remeasurement contracts: where work cannot be adequately quantified at the time of tender, a schedule of rates or estimated/approximate/provisional quantity arrangements can be entered into. Contracting organisation is paid for actual quantities of work undertaken.
C. Target sum contracts: where a target sum is tendered and agreed. The target sum is calculated similarly to a fixed price in a lump sum contract, but the final target is compared to actual costs. Any difference (overspend or savings) will be split between parties at the end of the project.
D. Guaranteed maximum price contracts: similar to target sum contracts but with contractually guaranteed maximum price. Can also be used as a variant to lump sum arrangement with opportunities for lump sum to be increased for changes, subject to an overall limit.
E. Cost reimbursable contracts: where contracting organisation is paid actual costs incurred in delivering the contract plus an agreed profit fee.
F. Management contracts: where contracting organisation is paid to manage the delivery of a project through engagement of a series of trade contractors. Percentage fee, fixed fee or time charge fee will be paid by the client.
Source: RICS Professional Guidance, UK 2016 “Commercial management of construction” RICS Guidance Note, 1st edition, March 2016

NEC4 contract model

The New Engineering Contract (NEC) was first developed in the UK in 1993. It was considered to represent “a radical departure from existing building and engineering contracts, being written in plain language and designed to stimulate rather than frustrate good management.”³⁸ The NEC has since expanded and evolved into a suite of contracts used and endorsed by governments and by professionals in the construction sector worldwide.³⁹ Governments in Australia, New Zealand, and South Africa have increasingly used NEC contracts for national and local government projects, whilst NEC is used for nearly all government procurement construction projects in the UK and in Hong Kong.

NEC4 was introduced in 2017 after consultation with industry and government stakeholders worldwide. This most recent incarnation reflects ongoing changes in the sector and improvements/solutions developed over the 10+ years of implementing NEC3. The NEC4 suite of contracts is highly developed and comprehensive, providing 39 standard forms which were developed to support the changing needs of (NEC3) users, to stimulate good project management, and to improve clarity and simplicity.⁴⁰

³⁸ <https://www.neccontract.com/About-NEC/History-Of-NEC>

³⁹ Ibid.

⁴⁰ NEC4 The Next Generation: an explanation of changes and benefits. Accessed at: [NEC-NextGenerationWhitepaper.pdf.aspx \(neccontract.com\)](https://www.neccontract.com/About-NEC/History-Of-NEC)

Historically, the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996), which applies to most UK construction contracts, gives contract parties a statutory right to take any dispute to adjudication. This has resulted in relatively rare use of Dispute Boards in the UK. However, the new NEC4 provides forms to enable the use of Dispute Avoidance Boards, whilst maintaining compliance with the HGCRA 1996 right to resort to adjudication.⁴¹

Two new forms of contract under the NEC4 are the Design Build Operate (DBO) contract and the Alliance Contract consultation form (ALC).⁴² The NEC4 DBO combines responsibilities for design, construction, operation and/or maintenance procured from a single supplier, which helps the client to achieve a ‘whole-life’ delivery solution for the project.⁴³ The ALC is designed for clients with complex projects who choose to fully integrate the delivery team, i.e., a multiparty contract. It is a single collaborative contract, whereby all parties “work together in achieving client objectives and share in the risks and benefits of doing so.”⁴⁴ ALC is based on an integrated risk and reward model. This may be helpful in terms of dispute avoidance because all parties are bound by the collaborative nature of the contract, and their common interests tend to reduce potential grounds for disputes.

In addition to the new forms above, the NEC4 also contains changes to various features within the suite of NEC contracts overall. Some of these are discussed below as they relate to collaborative contracting, dispute avoidance and dispute resolution.⁴⁵

Collaborative Contracting/Dispute Avoidance

☐ Early Contractor Involvement (ECI):

- The contractor is appointed at an early stage to engage in planning and development of designs/proposals. This forms a collaborative environment and helps to identify potential problems/risks at an early stage. Design improvements and innovations can be introduced. According to NEC: “This approach supports improved team working, innovation and planning and is now widely recognised as beneficial.”⁴⁶

☐ Quality Management:

- Contractors are required to issue a quality management system and plan at the outset.

☐ Risk Management⁴⁷ and the Early Warning Register:

- NEC4 has updated the Risk Register from NEC3 and renamed it Early Warning Register (Clause 16). This differs from a traditional Risk Register in that it requires listing of a “Description of the Risk” and “Actions which are to be taken to avoid or reduce the risk.” This is included at the tender stage similarly to the traditional Risk Register.

⁴¹ [Dispute boards—use in different forms of contract | Legal Guidance | LexisNexis](#)

⁴² Op. Cit. NEC4 Whitepaper

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ <https://www.neccontract.com/ECI>

⁴⁷ Patterson, R., (2020) “NEC Contracts: best practice tools for risk allocation and management” at <https://www.neccontract.com/getattachment/About-NEC/News-Media/NEC-and-Risk-Management-with-Richard-Patterson/Richard-Patterson-Risk-Management-Paper.pdf?lang=en-GB>

- The Early Warning Register must be recorded by the Project Manager and this is discussed by parties at Early Warning Meetings in the initial phase of the contract. This provides opportunities for parties to collaborate on risk management in a proactive way and prompts early discussion of solutions, and can be amended by agreement during the meeting period.
- If a risk is not listed on the Early Warning Register “which an experienced contractor could have given”, and becomes the subject of a dispute (i.e., Compensation Event), then any subsequent compensation event is assessed as if it had been given early warning (and the Project Manager had been given the opportunity to deal with the event in another way) (Clause 63.8).
- It is important to note that the Early Warning Register does not form part of the project contract, nor does it allocate risks. Its purpose is to highlight potential risks, possible solutions, and places responsibility on the Project Manager early in the process to carefully consider these issues and discuss with the employer.

☐ Contractor’s proposals:

- Either party may propose changes to improve the outcome of the project. For example, the contractor may identify a change to the scope of the project which will result in reduced costs, or acceleration of the completion date. The project manager may accept and instruct, not accept, or request a quotation before making a decision.
- The contractor may propose changes to the scope of the project which reduce the cost of an asset over its lifetime; if accepted by the project manager, the contractor shares in the cost savings it initiated.

☐ Contractor’s design option (Design and Build):

- Further provisions intended to encourage/support design and build contracts, such as contractor’s professional indemnity insurance. The contractor’s design duty is aligned with industry standard preferred by insurers to maintain skill and care standards used on the project.

☐ Defined Cost and Schedules of Cost Components and Fee:

- All NEC4 contracts include Schedules of Cost Components which are used to determine Defined Cost. All contracts within the NEC4 suite now use Defined Cost in the same manner so the approach is consistent throughout the project team and supply chain.

☐ Additional Compensation Events:

- Clients can alter the standard risk profile. A new event has been added to this feature where contractor is compensated for costs of preparing multiple quotations, not all of which are accepted.

Dispute Resolution

- ❑ Consensual Dispute Resolution:
 - Senior representatives from each party engage in a four-week period for negotiation of an arising dispute prior to any formal proceedings. This is intended to improve chances of dispute avoidance or early resolution.
- ❑ Dispute Avoidance Board (optional):⁴⁸
 - Parties nominate a DAB at the outset of the project. DAB makes regular progress visits throughout the project and is familiar with all aspects. If a party refers a dispute to the DAB, discussions are held to help find a solution. If unresolved at that stage, the DAB provides a recommendation. Escalation to arbitration or litigation is only possible if the recommendation is not accepted by the parties.
- ❑ Finality of assessments:
 - Procedures designed to reach agreement on final amounts due under the contract, checking and agreeing on defined cost and disallowed cost as the work progresses instead of at project completion. This helps to address and minimise any cost or payment related disputes as they arise.

Early dispute resolution boards

In cases where disputes arise despite careful planning and use of dispute avoidance methods, guidance is also provided in UK Construction Playbook for dispute resolution, and specific tools and processes are included in standard form contracts. These include Dispute Avoidance Boards, Dispute Adjudication Boards, and Dispute Resolution Boards (which share similarities to the Project Boards under the Irish PWC). The general purpose of these boards is to provide monitoring, feedback, advice and opinions as to the ongoing design and build processes and to assist the parties in understanding and fulfilling their contractual obligations. At the early project stages, this is referred to as “dispute avoidance” whereas it may become “early dispute resolution” when issues arise which require a third party to intervene. If a dispute is not resolved by the board, then the next step is escalation to formal ADR proceedings, which may further be escalated to litigation in court.

The recent (2021) jointly launched Chartered Institute of Arbitrators (CI Arb) Business Arbitration Scheme and the Joint Contracts Tribunal (JCT) Dispute Adjudication Board (DAB) Rules⁴⁹ provide an example of an approach designed to adopt dispute avoidance protocols within contracts. The purpose of a DAB is to assist parties in the avoidance of disputes while a project is ongoing. International best practice approach to DABs is that they are appointed to follow the project and assisted avoiding disputes, whereas in the UK, an adjudicator is appointed once a formal dispute has arisen. By contract, since 2017, the FIDIC contract has included standing DABs, based on the rationale that a key function of an adjudicator should be on the avoidance of disputes, and to only make binding decisions if necessary. This is consistent with the wider UK and international trend towards ‘facilitative contracting’ and greater appreciation of the value to all contracting parties where they seek to support each other in achieving project goals. However, it is important to note that the current FIDIC model is rarely used for UK domestic construction contracts but is favoured for large-scale international projects.

⁴⁸ Separate provisions are available under NEC4 to accommodate contracts that fall under the HGCRA 1996 as well as those to which HGCRA 1996 does not apply.

⁴⁹ See: <https://www.jctltd.co.uk/docs/DAB2021-extracts-JCTCI Arb-Dispute-Adjudication-Board-Rules.pdf>.

Alternative Dispute Resolution

Adjudication

Construction contract disputes escalating beyond the scope of contractual provisions are predominantly resolved by adjudication in the UK. This is primarily because, if parties do not agree to ADR terms in their contract, or if their terms fall short of legislative requirements, then statutory law applies. The process typically takes 28 days but can be extended to 42 days if necessary. This relatively brief timeframe is seen to give parties finality without months-long delay, whilst also allowing sufficient time for thorough consideration by the adjudicator.

Under Section 108 of the Housing Grants, Construction and Regeneration Act (HGCRA), 1996 (as amended by the Local Democracy Economic Development Act 2009), parties to construction contracts have a statutory right to refer disputes to adjudication at any time (even if other forms of dispute resolution or court proceedings are already ongoing).⁵⁰ Section 108 of the Act requires that construction contracts must provide specific timetables for notification, referral, and decision on the dispute; adjudicators must be impartial; and the decision of the adjudicator is binding (unless finally determined by legal proceedings). A number of organizations⁵¹ have drafted sets of adjudication rules which satisfy these minimum conditions and which parties may choose to incorporate into their contracts. The role of the adjudicator is to be on hand throughout the construction contract, in order to make expedient decisions on disputes in the contract. This extends to any dispute, not just payment, and may take place after a project has been completed.

Arbitration

Recent trends in the UK discussed above, e.g., DAB rules, suggest that traditional arbitration involving a legally binding determination after a dispute has fully evolved and losses incurred is becoming less necessary. Collaborative contracting coupled with more comprehensive focus on dispute avoidance and early resolution seem to have reduced the need to take disputes to arbitration.

When disputes remain unresolved after all contract provisions for ADR have been unsuccessful, arbitration remains the right of parties in the UK under the HGCRA 1996.

The Joint Contracts Tribunal (JCT) standard form contracts had typically included arbitration as ADR mechanism; however, in May, the JCT published the Dispute Adjudication Board Documentation 2021 to allow parties to establish and operate a dispute board that can provide both recommendations (non-binding advice) and binding decisions (acting as adjudicator) in compliance with HGCRA requirements.⁵² The JCT contracts are typically used on larger, long-term UK-based projects. Similarly, as previously discussed, the NEC4 standard form contracts have recently been widely adopted in the UK, thus reducing the need for arbitration via dispute avoidance terms in the contracts themselves.

Party-to-Party Negotiation

Party-to-party negotiation has also recently become a popular ADR method in the UK construction sector.⁵³ Advantages of this method can include cost and time efficiency, and maintenance of good working relationships between parties. Disadvantages can include imbalance of bargaining power between parties, undue delay, and deterioration of working relationships between parties.

⁵⁰ UK General Public Acts, 1996 c. 53, Part II, Adjudication, Section 108. See <https://www.legislation.gov.uk/ukpga/1996/53/section/108>

⁵¹ See, e.g., Construction Industry Council (CIC) Model Adjudication Procedure; Institution of Civil Engineers (ICE) Adjudication Procedure; Technology and Construction Solicitors' Association (TCSA) Adjudication Rules; and Centre for Effective Dispute Resolution (CEDR) Rules for Adjudication.

⁵² [Dispute boards—use in different forms of contract | Legal Guidance | LexisNexis](#)

⁵³ Op. Cit. Arcadis (2021)

UK – Ireland Comparison

It is instructive to compare key features of the Irish dispute management system with those of the UK in the context of construction contracts for public works.

Dispute avoidance can be thought of as the preventive methods used to stop contractual disputes arising in the first instance. More specifically, collaborative contracting is regarded as the most comprehensive method of dispute avoidance, as well-designed contracts contain provisions that provide clear, detailed instructions and contingencies for all parties. When parties fully understand and accept contractual risks and incentives, the causes and likelihood of disputes are reduced, as discussed above.

It is important to consider a variety of tools and methods for progressing projects in a cooperative, productive manner. Collaborative contracting begins with Early Contractor Involvement (ECI). ECI has developed recently in the UK and elsewhere, in conjunction with the collaborative contracting models (e.g., NEC4, FIDIC) that contain detailed provisions for project planning and design, risk sharing, and options to be considered in the early project phase, e.g., cost-led procurement, two-stage open book, and integrated project insurance. Better understanding can be reached between parties if they work more closely, and in more detail, as opposed to the more traditional fixed-price lump-sum contract which is most commonly used in Ireland.⁵⁴

Fixed-Price Lump-Sum Contracts vs. Collaborative Contracts

In the UK, the NEC4 standard forms contracts provide for more detailed collaboration at the planning stages, and flexible risk-sharing arrangements which incentivise cooperation and timely completion of works, ultimately providing more certainty as to overall project costs. RICS (2016) guidance and the Construction Playbook also contain detailed risk-sharing/incentive provisions, which may be useful for consideration in the Irish context. By contrast, whilst the Irish Public Works Contracts contain provisions for planning, cost control, and risk management, these elements are designed to address disputes as they arise in the context of a fixed-price lump-sum contract. The PWCs contain separate and distinct standard forms for works designed by either the contractor or the employer. The Public Works Contract for Early Collaboration (PWCEC) (PW-CF10) contract form contains provisions for early contractor collaboration and provides for basic target pricing in the context of a competitive dialogue at the pre-tender phase of the project. This allows the employer to “scope out” the scale and complexity of planning and design requirements and gives flexibility to pricing agreements for costs that may not be fully ascertainable at the pre-tender stage. However, Early Contractor Involvement is limited under the PWCEC to large (e.g., over €100 million) or technically complex projects, and permission to use this form must be sought from the GCCC in advance. Indecon’s understanding is that the PWCEC has not yet been used on contracts. Early engagement and target pricing mechanisms allowed under PW-CF10, if extended more widely, could be helpful to improving collaboration at the early stages of contracts involving lower values and complexity, potentially serving to avoid disputes further down the project timeline.

⁵⁴ PWC Guidance Note 1.5.2 (2016), Cost Control: Price Variation Clauses. [GN-1.5.2v1.0-22-01-2016.pdf \(constructionprocurement.gov.ie\)](https://www.constructionprocurement.gov.ie/GN-1.5.2v1.0-22-01-2016.pdf)

Early Dispute Resolution

Where disputes arise despite the parties having gone through a careful, collaborative contracting phase, dispute resolution tools and procedures are standard in construction contracts due to the complex nature of projects and fluctuating markets for goods and services in the sector. The UK NEC4 contract model allows parties to nominate a Dispute Avoidance Board (DAB) at the outset of a contract, members of which are responsible for monitoring progress and offering guidance and solutions as they arise. DAB members are experts in the field and must act impartially.

Ireland's PWCs provide for Project Board involvement during the construction phase. However, they do not allow members of the design team to participate on Project Boards as this may result in conflicts of interest. As Board members are nominated by each party within 30 days of the contract and have expertise in the field, members may not be wholly impartial in their dealings, as their own interests may be closely aligned with each party.

Ireland's use of Standing Conciliators is unique among public works contracts internationally. Where PBs are unable to resolve a dispute, parties may escalate the issue to the SC, who makes a recommendation. This is an "extra layer" in the dispute resolution process and leaves decision making in the hands of an individual at this stage. In the UK, by contrast, unresolved disputes at the DAB level may be escalated to adjudication or arbitration, which are more formal procedures conducted by impartial, licensed and regulated officials operating "at arm's length" from the contracting parties.

ADR

In both Ireland and the UK, adjudication is the most common ADR method used by parties who are unable to prevent or resolve disputes at the earlier phases discussed above. In both jurisdictions, adjudication is available by law to parties at any time, e.g., if they are not happy with the DAB or PB/SC process or outcome. This is an important requirement that must be met under law, even if modifications are made to the PWCs. In Ireland, further options of escalation to arbitration or litigation are limited to parties who have fully completed the adjudication process. This requirement may add time costs to ongoing disputes.

The International Chamber of Commerce (ICC, Paris) has been used for dispute resolution in the UK on large-scale, internationally staffed projects where, for example, time delays are not accepted. The ICC provides extensive ADR services, including impartial expert professionals for making determinations within tightly defined timeframes. This is important for consideration in Ireland for large-scale, more complex and high value projects, such as for example, major hospitals, airports, public transport infrastructure, etc.

A summary comparison of selected key features of dispute avoidance, early resolution and ADR approaches in the UK and Ireland is presented in the table below.

Table A 5: UK – Ireland Comparison of Dispute Avoidance and Resolution in Construction Contracts	
UK	Ireland
Early Contractor Involvement is encouraged by government guidance in The Construction Playbook 2020 and by NEC4. This is a key element of Collaborative Contracting (below).	Early Contractor Involvement is limited under the Public Works Contract for Early Collaboration (PWCEC) to large (e.g., over €100 million) or technically complex projects, and permission to use the PWCEC must be sought from the GCCC in advance.
Collaborative Contracting: NEC4 engages Early Contractor Involvement such that project specifications and design are planned by parties working together and solutions/options may be offered up front. More collaboration is involved during planning stages, leading to better understanding of terms and conditions by all parties. Risk sharing provisions and incentives are included. The 'Early Warning Register' serves to incentivise early collaboration by all parties on specified risks.	PWC Guidance Note 2.2 relates to Planning and Control of Capital Costs . This document addresses risk management and cost control at the design phase, including risk assessment, cost control, risk and contingency management, and change management. These measures are intended to manage and control risks. However, they are not designed to prevent adverse events in the same ways as collaborative contracting.
A Dispute Avoidance Board may be nominated at the outset of the project contract. The DAB monitors progress and offers assistance to avoid disputes as they arise. Options to further escalate disputes to adjudication/arbitration remain under statutory law.	Project Board members are nominated by each party at the outset of the contract. Members must have capacity and authority to negotiate and enter binding agreements for purposes of early dispute resolution. PB members must not be members of the design team.
Standing Conciliator is not generally utilised in UK government construction contract (NEC4) dispute processes.	Standing Conciliator may be nominated at the outset of the contract. Parties may refer disputes unresolved by the PB to the SC. SC issues binding recommendation which can be disputed in further proceedings. (See PWC Guidance Note 3.3.1, Section 2.8.) Recommendation will be given no later than 42 days after commencement of the dispute.
Adjudication, Negotiation and Arbitration are the top three methods of ADR in the construction sector in the UK. The ICC has been used for large scale projects where delays must be avoided.	Adjudication is available by law to parties at any time, i.e., escalation from the PB/SC level. Arbitration or litigation are methods of last resort once the above avenues of resolution are exhausted. Arbitration is governed by the Arbitration Act 2010 which relates to a variety of state authorities including but is not limited to the Commissioners of Public Works. The arbitral tribunal may appoint experts to assist on technical issues.
Source: Indecon research	

Denmark

Denmark is a civil law jurisdiction. The primary source of Danish law is statutory law and government orders authorised by law, supplemented by customary law and case law.

Construction contracts in Denmark are typically based on the 'General Conditions for building and construction works and supplies.' Similar to the FIDIC suite of contracts, they come in different forms mainly based on how much design work the contractor is obliged to perform, or whether it is purely a consultancy contract similar to the FIDIC white book. Like FIDIC, they are agreed documents and not statutory - although most public employers are obligated to use them. The General Conditions include formal dispute resolution procedures which the parties have to go through before they can commence arbitration.

In general, national construction projects use standard form contracts and disputes are referred to the Building and Construction Arbitration Board as Denmark's permanent dispute resolution body. The majority of construction disputes are ultimately decided by arbitration. The arbitration tribunal usually consists of three members, one legal expert and two construction experts. They are chosen based on their qualifications in the field of the dispute in question, and their decision is binding on the parties. A timetable for the resolution process is agreed upon at the initial meeting of the tribunal, based on the complexity of the claim, available evidence, and response time required.

In larger and more complex claims, the arbitration panel can be expanded to five members, three of whom must be legal experts. In some instances, the International Court of Arbitration (ICC) or the Danish Institute of Arbitration are used, e.g., very complex national claims or international disputes.

Collaborative Contracting as means of Dispute Avoidance

The Danish construction conditions of contract were revised during 2018 and implemented on 1 January 2019. These are broadly similar to, but less inclusive than NEC4 and FIDIC contracts forms. The intention behind the revisions was to improve cooperation at early project stages and reduce the number of escalated disputes. General Conditions to the standard form contracts were updated to include several provisions as "previous general conditions did not meet the reality of the 21st century."⁵⁵ New provisions include:

- ☐ Contractor's design;
- ☐ Liability for designers;
- ☐ Escalation of disputes:
 - Negotiation is required prior to escalation to adjudication; and
 - Adjudication is required prior to escalation to arbitration.

Larsen and Gronlund (2020) note that the Danish provisions are more in line with current standards such as the FIDIC and NEC suites of contracts, however, the clauses leave "some ambiguity to be resolved by case law in the future."⁵⁶ The end result of this may be that the reduction in disputes is not as great as Danish lawmakers had hoped, and some disputes will certainly escalate to litigation.

⁵⁵ Larsen, K. and Gronlund, A., (2020) "Brining the Danish general conditions into the 21st century" CONSTRUCTION LAW INTERNATIONAL Vol. 15 Issue 1, March 2020.

⁵⁶ Ibid at p. 41

Early dispute resolution boards

Dispute Avoidance Boards are common in Danish construction contracts. Their function is broadly similar to the Project Boards under the Irish PWC. Members are nominated by the parties and monitor progress from the start of the contract and offer assistance to parties when issues arise before they become hardened disputes.

Alternative Dispute Resolution approaches

Arbitration versus 'Speedy Resolution'

In Denmark, a large majority of construction contract disputes (that are not settled amicably) are typically settled via arbitration. Disputes are settled by an arbitration tribunal appointed by the Danish Building and Construction Arbitration Board (AB), and the decisions made by such tribunals are final. If the parties have not agreed on an AB Standard, or if the arbitration agreement therein has been deviated from, disputes will be settled by the Danish courts. It is important to note that the tribunals consist of a professional arbitrator (i.e., with arbitration expertise) appointed by the chairman of the presidency of the arbitral tribunals and two expert (i.e., with building/construction related expertise) arbitrators to be appointed by the Arbitration Board depending on the nature of the individual case. The arbitrators must act impartially and must disclose any conflict of interest in a particular case. Parties may challenge the nomination of an arbitrator if evidence "gives rise to justifiable doubts as to the impartiality or independence of the arbitrator or as to the qualifications of an expert arbitrator."⁵⁷ Furthermore, the tribunal may be expanded by two additional expert arbitrators or reduced to one expert arbitrator as may be appropriate under the specific circumstances of a case, i.e., simpler cases may be resolved by a single arbitrator to save time and costs whilst more complex cases may require additional experts to reach resolution. This model differs from Irish arbitration tribunals in that the appointed Irish arbitrators themselves may not be experts in the building/construction sector and may need to appoint experts for purposes of assisting the tribunal in analysis and resolution of claims. In general, arbitration claims take 4-5 months for resolution, whilst claims resolved under 'speedy resolution' take 30-35 days.

It may be requested that some types of disputes (that cannot be settled amicably) be settled by an umpire (adjudicator) to achieve a faster resolution. Only some types of disputes can be brought before the umpire, unless the dispute concerns a claim with a value of less than DKK 200,000, and the parties must first have attempted to settle the dispute by negotiation. The decisions made by the umpire are binding but can be brought before an arbitration tribunal.

The General Conditions include formal dispute resolution procedures which the parties have to go through before they can commence arbitration. Before the parties can commence any form of dispute resolution, they are obliged to try and resolve and settle the dispute through negotiation. If this does not lead to an amicable negotiated settlement, the parties have the option to go through mediation/conciliation, arbitration or a procedure known as 'Speedy Resolution'. The latter is very similar to a Dispute Resolution Board and is the most likely way of settling a dispute before arbitration. As the new General Conditions only entered into force in January 2019, experience with the 'Speedy Resolution' is scarce at this juncture.

⁵⁷ Rules of arbitration procedure for disputes relating to building and construction (VBA' arbitration rules 2010) accessed at: <https://voldgift.dk/wordpress/wp-content/uploads/2014/09/C-Voldgiftbehandling-2010-Eng.pdf>

Other ADR methods

The Danish Building and Construction Arbitration Board can also provide simplified arbitration, expert determination, informal dispute assessment, and mediation services. The Board sets its own rules and guidelines for these procedures and can appoint the independent third parties that assist in them.

Large, complex national project contracts will often include provisions for a Dispute Avoidance Board, established for the duration of the project to address issues and render opinions on potential disputes as they may arise throughout the project.

Mediation is now expected to be used more frequently than before. If a party requests mediation, the other party is obliged to participate, and arbitration cannot be initiated while the mediation process is pending. Both in case of disputes and in order to establish proof of a matter, a party may request the Danish Building and Construction Arbitration Board or the Danish courts to appoint an expert appraiser to provide a technical assessment. The expert appraiser can inspect the work, register his/her findings (“inspection”) and make a technical assessment based on his/her inspections (“survey”). It is not the expert’s task to express his/her opinion on legal matters. After having received the expert appraiser’s assessment, it is often possible to reach an out-of-court settlement. However, the expert’s assessment is not binding on the parties.

Denmark – Ireland comparison

In this section, we compare key features of the Irish dispute management system with those of Denmark in the context of construction contracts for public works.

Danish construction contract law was updated as of January 2019 to include dispute avoidance methods via General Conditions that are similar to NEC4 discussed above. As in the UK, the Danish government recognised a need to provide more detailed guidance and forms so as to provide clear and detailed instructions and contingencies, thereby reducing the likelihood of disputes. As with the UK, Danish construction contracts also include elements of collaborative contracting, which begins with Early Contractor Involvement.

Fixed-Price Lump-Sum Contracts vs. Collaborative Contracts

In Denmark, the General Conditions standard forms contracts provide for more detailed collaboration at the planning stages and flexible risk-sharing arrangements which incentivise cooperation and timely completion of works, ultimately providing more certainty as to overall project costs. These provisions include contractor’s design, liability for designers, and dispute escalation processes of negotiation, adjudication, and arbitration. As previously noted, Early Contractor Involvement is limited under the Irish PWCEC to large (e.g., over €100 million) or technically complex projects, and permission to use this form must be sought from the GCCC in advance.

It is useful to note that the Danish forms contracts are not as comprehensive in their terms as the NEC4 suite of contracts, and this may result in greater use of litigation for the resolution of some matters, as compared to the UK or other jurisdictions utilising NEC4.

Early Dispute Resolution

The Danish model allows parties to nominate Dispute Avoidance Boards at the outset of the contract, members of which are responsible for monitoring progress and offering guidance and solutions as they arise. This is broadly similar to the UK DABs and Irish Project Boards. Parties are expected to negotiate with the help of the DAB in order to resolve emerging disputes – this is referred to as dispute avoidance or early dispute resolution when parties engage to find solutions to potential problems before triggering a formal dispute resolution process.

ADR

In Denmark, arbitration or “Speedy Resolution” (an abbreviated, simplified form of adjudication) is the most common ADR method used by parties who are unable to prevent or resolve disputes at the earlier phases discussed above. Arbitration tribunals are staffed by licensed, independent professional experts who are knowledgeable in both arbitration generally and construction more specifically. In Ireland, further options of escalation to arbitration or litigation are limited to parties who have fully completed the adjudication process. This requirement may add time costs to ongoing disputes. The International Chamber of Commerce’s ADR services have also been used for dispute resolution in Denmark on large-scale projects where parties have agreed to this process.

The table overleaf presents a comparison of key features of dispute avoidance, early resolution and ADR approaches in Denmark and Ireland.

Table A 6: Denmark – Ireland Comparison of Dispute Avoidance and Resolution in Construction Contracts

Denmark	Ireland
Early Contractor Involvement is encouraged by government guidance. Standard forms contracts have recently been adopted to focus on dispute avoidance, but some elements remain ambiguous and may require common law resolution in future.	Early Contractor Involvement is limited under the Public Works Contract for Early Collaboration (PWCEC) to large (e.g., over €100 million) or technically complex projects, and permission to use the PWCEC must be sought from the GCCC in advance.
Collaborative Contracting: As of January 2019, Danish construction contracts contain General Conditions that are broadly similar in nature to those of NEC4 and FIDIC. These provisions include contractor's design, liability for designers, and dispute escalation processes of negotiation, adjudication, and arbitration.	PWC Guidance Note 2.2 relates to Planning and Control of Capital Costs . This document addresses risk management and cost control at the design phase, including risk assessment, cost control, risk and contingency management, and change management. These measures are intended to manage and control risks; however, they are not designed to prevent adverse events in the same ways as collaborative contracting.
Dispute Avoidance Board may be nominated at the outset of the contract. The DAB monitors progress and offers assistance to avoid disputes as they arise through negotiation . This is broadly similar to the Irish PBs. Options exist to further escalate disputes to "speedy resolution" or arbitration (see below).	Project Board members are nominated by each party at the outset of the contract. Members must have capacity and authority to negotiate and enter binding agreements for purposes of early dispute resolution. PB members must not be members of the design team.
Standing Conciliator is not generally utilised in Denmark government construction contract dispute processes.	Standing Conciliator may be nominated at the outset of the contract. Parties may refer disputes unresolved by the PB to the SC. SC issues binding recommendation which can be disputed in further proceedings. A recommendation will be given no later than 42 days after commencement of the dispute.
Negotiation is required by law prior to any other ADR methods (i.e., through the DAB). Speedy Resolution consists of abbreviated adjudication process used for smaller claims and faster outcomes. Arbitration is run by the Building and Construction Arbitration Board to ensure impartiality and fairness. Tribunals consist of impartial experts in the building/construction sector; parties may challenge members if "justifiable doubts" are shown re impartiality and independence. Danish Institute of Arbitration licenses and oversees arbitrators. ICC is sometimes used for large projects.	Adjudication is available by law to parties at any time, i.e., escalation from the PB/SC level. Arbitration or litigation are methods of last resort once the above avenues of resolution are exhausted. Arbitration is governed by the Arbitration Act 2010 which relates to a variety of state authorities including but is not limited to the Commissioners of Public Works. The arbitral tribunal may appoint experts to assist on technical issues.
Source: Indecon research	

Australia

In Australia, the statutory process of dispute resolution can vary slightly depending on the state. However, ADR processes in construction contracts are generally via a Dispute Resolution Board, Dispute Adjudication Board, or a Mediator (accredited by the Mediator Standards Board).

We present below a synopsis of salient features of the statutory processes of mediation and Dispute Resolution/Avoidance Board mechanisms used in construction contracts in Queensland. The state operates a number of ADR processes, including Dispute Boards/Dispute Resolution Boards/Dispute Review Boards or Dispute Adjudication Boards, as well as a Dispute Mediation Service.

Collaborative Contracting as means of dispute avoidance

Recently, rapid growth in the Australian construction sector has led to an increase in use of the collaborative contracting process. This process results in avoidance of disputes ultimately resolving issues as they arise throughout the contract period and includes recent use of NEC4 in some instances (see NEC4 discussion above). Thus, the quantity of construction contract disputes in Australia has decreased significantly over the past several years. The risk allocation model is usually fixed-price/fixed-time as there is great demand for large infrastructure projects. The Incentivised Target Cost Contract (ITCC) risk allocation gives the balance of power to the construction contractor. Terms of the ITCC often include open book, relaxed price, relaxed time, KPIs, and risk/reward provisions. A major benefit of this process over the traditional procurement process is that it removes the opportunity for the incumbent project participants to charge monopoly prices for additional work.

Queensland's Cooperative Research Centre for Construction Innovation ("CRC") is a national organisation funded in part by both government and industry. It was established in 2001 at Queensland University of Technology as a joint venture under the Australian government's Cooperative Research Program. The CRC has developed a Dispute Avoidance Checklist, the key features of which can be summarised as follows:

1. Identify Need: Client must clearly identify and articulate the needs to be satisfied by project; designers & other advisers should have a clear understanding, and be able to suggest design concepts and options.
2. Project Team Selection: Greater certainty is achieved when design & construction works well as a team & has good track record. Complex projects offered more certainty when head contractor/key subcontractors work together.
3. Scope of Work: Scope of work & functionality to be delivered must be clearly documented, including timeframe for completion.
4. Adequate Finance: Sufficient funding must be available & budget should include prudent contingencies for possible time & cost changes, or changes in functionality.
5. Risk Management: A thorough risk register should be shared between parties, clearly identifying risks as well as responsibilities for management.
6. Procurement Strategy: Must include considered analysis of available options & client's key strategic drivers.

Early dispute resolution boards

Dispute Resolution/Adjudication Boards in Australia generally

The contractual DRB or DAB derives its jurisdiction from the contractual agreement between the parties. The statutory DAB exists under the Security of Payments legislation in the various states and territories of Australia to decide disputes that arise from contractual claims made by construction contractors for progress payments throughout the course of a project. An adjudicator appointed under the statutory regime is vested with statutory jurisdiction and makes a binding decision on the dispute unless overturned by the courts.

The board commonly comprises three independent, impartial members. Each contracting party nominates one member who must be acceptable to the other party. The nominees, once accepted, choose the third member to be the chairperson of the board. The parties select members for appointment due to their particular expertise which is relevant to the project and their role on the board.

An aggrieved party may refer a dispute to a DRB established under the construction contract in line with Dispute Resolution clause of the contract, or as directed by a court. In all cases, parties must refer all disputes to the board as a condition precedent to invoking any other dispute resolution process including arbitration or litigation.

Early Dispute Resolution in Queensland

In Queensland, parties are required to participate in a dispute resolution process with the Queensland Building and Construction Commission (QBCC) before making a commercial or domestic building dispute application to Queensland Civil and Administrative Tribunal (QCAT). A letter from the QBCC advising of the outcome of this process must be provided when commencing a QCAT application. Failure to participate in a QBCC dispute resolution process before filing an application for a building dispute may result in the dismissal of the application. Adjudication can be accessed on the QBCC website⁵⁸ for complete instructions and forms. Decisions are based on expert technical determination. Fees range from A\$60 for contracts valued under A\$10,180 to A\$776 for contracts valued from A\$763,500 – A\$1.109m, and 0.07126% of progress payment amount for contracts over A\$1.109m, capped at A\$5,972. Application for adjudication must be made within the required timeframes as follows:

- ☐ If you receive a payment schedule and disagree with it – within 30 business days after the payment schedule was given;
- ☐ If you receive a payment schedule but are not paid in full by the due date – within 20 business days after the due date; and
- ☐ If you are not paid in full by the due date and do not receive a payment schedule – 30 business days after the later of:
 - (i) the day of the due date for the progress payment to which the claim relates; or
 - (ii) the last day the respondent could have given a payment schedule under section 76 of the Building Industry Fairness (Security of Payment) Act 2017.

⁵⁸ See <https://www.qbcc.qld.gov.au/adjudication/what-adjudication>

Alternative Dispute Resolution methods

DABs

In Australia, if the dispute resolution is by the Dispute Adjudication Board, the board will consist of a panel of neutral third-party experts usually nominated by an Authorised Nominating Authority (ANA) relevant to the jurisdiction of the dispute. A board may require experts to provide opinions or support a party's position in a dispute. Resolution timescales are stipulated in the contractual framework that governs the role of the board. The board is expected to resolve disputes in a timely and equitable manner.

The Australian Dispute Resolution Board Foundation (DRBF)⁵⁹ reports that just under 80% of DAB projects have been completed without a single referral to the DAB for a decision, compared with the industry norm of less than 40% completed without off-site dispute resolution processes being involved. It also reports that where referrals have occurred, DAB decisions have been accepted or led to party-to-party settlements in 98% of cases without further dispute resolution processes. The base cost of a DAB in Australia is generally 0.1 – 0.2% of the total project cost for a project over A\$100 million. Considering the legal costs alone of a fully escalated dispute, A\$200,000 per annum for membership with the DRB Foundation to avoid disputation can be viewed as 'insurance' against the costs of disputation.

In relation to rights of appeal of decisions, depending on the contractual agreement between the parties, the board may be empowered to make non-binding recommendations, awards that are binding for a period of time, awards that are binding but appealable, or final and binding decisions. If the dispute resolution is by the Dispute Adjudication Board (DAB), the resolution is binding on all parties as a term of the contract, unless and until overturned by a formal dispute process such as arbitration or court proceedings.

Mediation

Mediation is a less common, though well-regulated form of ADR in the Australian construction sector. Under this method, an aggrieved party approaches a mediator who is accredited with the Australian Mediator Standards Board (MSB) voluntarily or as agreed under the Dispute Resolution clause of the construction contract or as directed by the court. If voluntarily, mediation can only take place if the other party agrees to it. If by court order, mediation can take place with or without the consent of the parties.

The mediator assists in managing the process of dispute and conflict resolution and ultimately facilitates the participants to agree upon the outcomes, when appropriate. The mediator does not advise upon, evaluate or determine disputes, but may advise on or determine the process of mediation whereby resolution is attempted or reached.

In relation to typical timescales for dispute resolution, these can vary significantly, ranging from three or four hours and up to a maximum of two days (the latter may be extended if both parties agree to an extension). Rights of appeal of decisions do not apply, as mediation is a process that facilitates participants to reach their own decision. Parties have rights to agree or disagree upon an outcome; it is not forced on them. Where legal rights are involved, they must be aware of the legal implications of their agreement on their legal rights, including lien waiver, where applicable.

⁵⁹ Note: The DRBF is a not-for-profit organisation dedicated to promoting the avoidance and resolution of contract disputes using the unique and proven Dispute Board (DB) method. Services are available to members only. Construction sector use of services is common, however the DRBF has members from various commercial sectors. See: <https://www.drbf.org.au/concept/faqs>.

Australia – Ireland comparison

In this section, we compare key features of the Irish dispute management system with those of Australia in the context of construction contracts for public works.

Australian construction contracts are often, though not always, based on the NEC4 suite of contracts for public works. Early Contractor Involvement and Collaborative Contracting are encouraged by the government, although specifics of contractual terms and dispute resolution processes differ somewhat by region.

The trend towards Collaborative Contracting in Australia involves the increase application of the Incentivised Target Cost Contract (ITCC). Contractual pricing provisions under the ITCC may include open book, relaxed price, relaxed time, KPIs, and risk/reward provisions. This model places incentives on both parties to successfully complete the project and reduces incentives to engage in disputes. A comprehensive Dispute Avoidance Checklist was developed under Queensland government's Cooperative Research Programme.

Fixed-Price Lump-Sum Contracts vs. Collaborative Contracts

In Australia, there has been a trend towards use of Collaborative Contracting, specifically with the use of the Incentivised Target Cost Contract. This includes contractual pricing provisions such as: open book, relaxed price, relaxed time, KPIs, and risk/reward provisions. This model emphasises incentives on both parties to successfully complete the project and reduces incentives to engage in disputes.

Early Dispute Resolution

The Australian model allows parties to nominate Dispute Avoidance Boards or Dispute Review Boards at the outset of the contract. DAB/DRB members are independent and impartial and are nominated by the relevant Authorised Nominating Authority in the jurisdiction. The Queensland Building and Construction Commission handles disputes at the early stage in Queensland only on the basis of expert technical determination and can be referred on to the Queensland Civil and Administrative Tribunal for independent, efficient resolution. This is in contrast to the Irish dispute resolution process which involves the Project Board and possible referral to the Standing Conciliator, who is nominated early in the contracting phase and is familiar with the dispute as it goes through the Project Board process.

ADR

Dispute Review Boards can issue recommendations or awards on the basis of the contract, i.e., binding or non-binding. Dispute Avoidance Boards issue final, binding awards that are appealable only at court. Mediation is a less common method of ADR but is well regulated by the government's Mediator Standards Board. This ensures impartiality and fairness on the part of the mediator.

The ICC has been used for dispute resolution in Australia on large-scale projects where parties have agreed to this process. The ICC provides extensive ADR services of all types and provides impartial expert professionals for making determinations in tightly defined timeframes. This is important for consideration in Ireland for high value public services projects, i.e., state-of-the-art hospitals, airports, public transport, etc.

The table below presents a comparison of key features of dispute avoidance, early resolution and ADR approaches in Australia and Ireland.

Table A 7: Australia – Ireland Comparison of Dispute Avoidance and Resolution in Construction Contracts	
Australia	Ireland
Early Contractor Involvement is encouraged by government guidance. NEC4 is often used in Australia.	Early Contractor Involvement is limited under the Public Works Contract for Early Collaboration (PWCEC) to large (e.g., over €100 million) or technically complex projects, and permission to use the PWCEC must be sought from the GCCC in advance.
Collaborative Contracting Recent trend towards “collaborative contracting” includes Incentivised Target Cost Contract (ITCC). Contractual pricing provisions under the ITCC may include open book, relaxed price, relaxed time, KPIs, and risk/reward provisions. This model emphasises incentives on both parties to successfully complete the project and reduces incentives to engage in disputes. CRC Dispute Avoidance Checklist was developed under government’s Cooperative Research Programme.	PWC Guidance Note 2.2 relates to Planning and Control of Capital Costs . This document addresses risk management and cost control at the design phase, including risk assessment, cost control, risk and contingency management, and change management. These measures are intended to manage and control risks. However, they are not designed to prevent adverse events in the same ways as collaborative contracting.
Dispute Adjudication/Review Board (DAB or DRB) members are independent and impartial and are nominated by the relevant Authorised Nominating Authority in the jurisdiction. In Queensland, the Building and Construction Commission handles disputes at the early stage in Queensland only on the basis of expert technical determination and can be referred on to the Queensland Civil and Administrative Tribunal for independent, efficient resolution.	Project Board members are nominated by each party at the outset of the contract. Members must have capacity and authority to negotiate and enter binding agreements for purposes of early dispute resolution. PB members must not be members of the design team.
A Standing Conciliator is not generally utilised in Australian government construction contract dispute processes.	A Standing Conciliator may be nominated at the outset of the contract. Parties may refer disputes unresolved by the PB to the SC. SC issues binding recommendation which can be disputed in further proceedings. Recommendation will be given no later than 42 days after commencement of the dispute.
DRB can issue recommendations or awards on the basis of the contract, i.e., binding or non-binding. DAB issues final, binding awards that are appealable only at court. Mediation is a less common method of ADR but is well regulated by the government’s Mediator Standards Board to ensure fairness and impartiality.	Adjudication is available by law to parties at any time, i.e., escalation from the PB/SC level. Arbitration or litigation are methods of last resort once the above avenues of resolution are exhausted. Arbitration is governed by the Arbitration Act 2010 which relates to a variety of state authorities including but is not limited to the Commissioners of Public Works. The arbitral tribunal may appoint experts to assist on technical issues.
Source: Indecon research	

New Zealand

In New Zealand, the Construction Contracts Act 2002, as amended by Construction Contracts Amendment Act 2015, provides the process for dispute resolution.⁶⁰ Similar to Australian legislation, the intent behind this legislation is to protect payments due under construction contracts as well as to provide a timely and cost-effective process for dispute resolution.

According to the New Zealand government Building Performance agency, the range of dispute resolution options includes self-resolution, formal complaints, mediation/arbitration/adjudication, and Disputes Tribunal/courts.⁶¹

Collaborative Contracting as means of dispute avoidance

Contractors and government bodies in New Zealand have begun to use NEC4-based contracts in recent years. In addition, dispute avoidance is closely related to the dispute resolution process, in that Dispute Review Boards are established at the outset of a construction contract for the purpose of assisting the parties throughout the process, to informally advise, recommend or make decisions as needed.⁶²

Early dispute resolution boards

In New Zealand, DRB members are licenced, experienced professionals in the construction sector and are well-positioned to identify problems as they develop, and to engage with parties to solve them before they become full-blown disputes.⁶³

The DRB process is generally informal and as such, the parties' working relationship is sustained in a non-adversarial manner.⁶⁴ If a party is dissatisfied with the DRB recommendations, it can escalate the dispute to adjudication, arbitration, mediation or litigation.

Alternative Dispute Resolution

Adjudication

The NZ adjudication process entails the use of a Building Disputes Tribunal (BDT), which operates under the Adjudication model of ADR.⁶⁵ According to its website: "The tribunal is an independent, nationwide specialist dispute resolution service provider to the building and construction industry in New Zealand, has had over 25 years' experience delivering fully administered end-to-end dispute resolution services including appointing adjudicators and administering adjudication proceedings in more than 1,000 adjudications under the Act."⁶⁶ Any party to the contract may refer a dispute to adjudication without the agreement of the respondent. Once a claim is made, the Building Disputes Tribunal appoints an adjudicator immediately, and the timeframe for each step of the process is tight so as to minimise overall time and cost of resolution. Timely submission of claim and response are absolutely critical to the process, as the adjudicator is prohibited by law from basing a determination

⁶⁰ NZ Construction Contracts Act 2002 (Public Act 2002 no 46) See <https://www.legislation.govt.nz/act/public/2002/0046/latest/DLM163059.html> and NZ Construction Contracts Amendment Act 2015 (Public Act 2015 No 92) See <https://www.legislation.govt.nz/act/public/2002/0046/latest/DLM163059.html>

⁶¹ <https://www.building.govt.nz/resolving-problems/>

⁶² Gillies, N. and Hesketh, H. (2014) "Rebuilding New Zealand: A Case for Dispute Resolution Boards", AMINZ Conference, Determinative Stream, 2014.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ See <https://www.buildingdisputestribunal.co.nz/process-options/>

⁶⁶ <https://www.buildingdisputestribunal.co.nz/adjudication/>

on evidence submitted outside the time limits.⁶⁷ Adjudication is binding but can be challenged by subsequent arbitration or court proceedings.

It is important to note that the determination of the adjudicator is scrutinised by the BDT before it is issued to the parties. This is intended to reduce the occurrence of computation errors and can identify any errors of substance or inconsistencies. As this process is conducted after making the determination but prior to its issuance, it ensures that the adjudicator's independence and autonomy are intact during the resolution process itself.⁶⁸

Mediation

Mediation is also available in NZ construction contract dispute resolution. The NZ dispute resolution process of mediation can be summarised as follows:⁶⁹

- ☐ Parties must agree to participate and agree on the selection of a mediator;
- ☐ Resolution is not guaranteed;
- ☐ Mediator facilitates discussion but makes no decision;
- ☐ Can be effective and is least adversarial process so long as parties participate in good faith;
- ☐ Does not involve court; and
- ☐ Usually the least costly option.

Arbitration

Arbitration is similar to mediation in many ways. However, the main difference is the binding nature of the outcome. The arbitration process in NZ can be summarised as follows:⁷⁰

- ☐ Requires parties to agree to participate and on the selection of an arbitrator;
- ☐ Arbitrator renders a legally binding decision;
- ☐ Can be used to all types of disputes;
- ☐ Gives parties some control over process, time and confidentiality;
- ☐ Resembles a court process but is private; and
- ☐ Costs are typically higher than mediation and can approach costs of formal court proceedings.

⁶⁷ NZ CAA Sec. 46(1)(b)

⁶⁸ <https://www.buildingdisputetribunal.co.nz/adjudication/adjudication-process/>

⁶⁹ <https://www.building.govt.nz/resolving-problems/resolution-options/mediation-arbitration-and-adjudication/>

⁷⁰ <https://www.building.govt.nz/resolving-problems/resolution-options/mediation-arbitration-and-adjudication/>

New Zealand – Ireland Comparison

New Zealand construction contracts are often, but not always, based on the NEC4 suite of contracts for public works. Early Contractor Involvement and Collaborative Contracting are encouraged by the government. The trend towards Collaborative Contracting in New Zealand has coincided with a marked reduction in contract disputes since 2015.

Fixed-Price Lump-Sum Contracts vs. Collaborative Contracts

In New Zealand, as in Australia, there has been an increasing trend towards application of Collaborative Contracting. NEC4 contracts have been adopted in many situations in New Zealand and has resulted in a reduction of escalated disputes.

Early Dispute Resolution

The New Zealand model allows parties to nominate a Dispute Review Board at the outset of the contract. Similar to the process in Australia discussed above, DRB members are independent and impartial, and are nominated by the relevant Authorised Nominating Authority in the jurisdiction.

ADR

Dispute Review Boards can issue recommendations or awards on the basis of the contract, i.e., binding or non-binding. The New Zealand Building Disputes Tribunal is used for adjudication when the DRBs are not able to resolve disputes. The tribunal operates adjudication proceedings and is staffed by independent, professional adjudicators with technical knowledge in the sector.

The table overleaf compares key features of dispute avoidance, early resolution and ADR approaches in New Zealand with those under the PWC in Ireland.

Table A 8: New Zealand – Ireland Comparison of Dispute Avoidance and Resolution in Construction Contracts	
New Zealand	Ireland
Early Contractor Involvement is encouraged as NEC4 is often used in NZ.	Early Contractor Involvement is limited under the Public Works Contract for Early Collaboration (PWCEC) to large (e.g., over €100 million) or technically complex projects, and permission to use the PWCEC must be sought from the GCCC in advance.
Collaborative Contracting Recent trend towards collaborative contracting insofar as NEC4 is utilised. This has coincided with a decline in the number of formal disputes in the construction sector in NZ since 2015.	PWC Guidance Note 2.2 relates to Planning and Control of Capital Costs . This document addresses risk management and cost control at the design phase, including risk assessment, cost control, risk and contingency management, and change management. These measures are intended to manage and control risks; however, they are not designed to prevent adverse events in the same ways as collaborative contracting.
Dispute Review Board (DRB) members are licensed, experienced professionals, independent from the parties to the contract.	Project Board members are nominated by each party at the outset of the contract. Members must have capacity and authority to negotiate and enter binding agreements for purposes of early dispute resolution. PB members must not be members of the design team.
Standing Conciliator is not generally utilised in New Zealand construction contract dispute processes.	Standing Conciliator may be nominated at the outset of the contract. Parties may refer disputes unresolved by the PB to the SC. SC issues binding recommendation which can be disputed in further proceedings. A recommendation will be given no later than 42 days after commencement of the dispute.
DRB can issue recommendations or awards on the basis of the contract, i.e., binding or non-binding. Adjudication is available for parties to escalate, operated by independent Building Disputes Tribunal. Determination is binding but can be challenged in court.	Adjudication is available by law to parties at any time, i.e., escalation from the PB/SC level. Arbitration or litigation are methods of last resort once the above avenues of resolution are exhausted. Arbitration is governed by the Arbitration Act 2010 which relates to a variety of state authorities including but is not limited to the Commissioners of Public Works. The arbitral tribunal may appoint experts to assist on technical issues.
Source: Indecon research	

International Chamber of Commerce ADR Services

The International Chamber of Commerce (ICC), which is based in Paris, is a large global organisation representing the interests of businesses at the international level with the WTO, UN, and G20.⁷¹ The ICC provides dispute resolution services, including the International Court of Arbitration and the International Centre for ADR (providing mediation and other forms of ADR). The ICC International Court of Arbitration is responsible for the following:⁷²

- ☐ Confirming, appointing & replacing arbitrators;
- ☐ Deciding on any challenges made against them;
- ☐ Monitoring arbitral process for efficiency & fairness;
- ☐ Scrutinising & approving all awards;
- ☐ Setting, managing & adjusting fees; and
- ☐ Overseeing emergency proceedings before the start of arbitration.

The ICC publishes its detailed manuals containing ICC Arbitration Rules and ICC Mediation Rules regularly, reflecting current best practices and setting forth clear procedures.

FIDIC contract forms

As international projects of large scale often involve FIDIC contract forms, ICC services are often used for dispute resolution in those cases. We discuss the FIDIC contract model further below.

FIDIC stands for 'Fédération Internationale des Ingénieurs-Conseils' which, translated from French, means the International Federation of Consulting Engineers. It represents the consulting engineering industry both globally and domestically. FIDIC produces standard forms of contract for civil engineering projects that are widely recognised and used for international projects rather than on UK-based projects.⁷³ A basic description of dispute avoidance boards under FIDIC is provided below.

The most recent version of FIDIC (2017) has enhanced the role of the Dispute Adjudication Board and renamed it the Dispute Avoidance/Adjudication Board. The objectives of the new DAAB rules are stated in Rule 1 to be: '(a) to facilitate the avoidance of Disputes that might otherwise arise between the Parties; and (b) to achieve the expeditious, efficient and cost-effective resolution of any Dispute that arises between the Parties.'⁷⁴ The pre-2017 version of FIDIC only provided for DAB if/when disputes arose; the current model allows parties to request the pre-established DAAB for informal discussions or assistance at any time.

According to FIDIC, "It has been brought to FIDIC's attention in recent years that, unfortunately, it has not been uncommon for a reluctant party to try to obstruct the appointment of the dispute board by failing to agree member(s) or having agreed a member, by failing to agree his/her fees or to sign the DAB agreement. To avoid such difficulties, Sub-Clause 21.1 allows for the appointing entity stated in the Contract Data (if nothing is stated, the President of FIDIC) to appoint the DAAB member(s), to set the fees, and a DAAB agreement will be deemed to have been signed with the Parties."⁷⁵

⁷¹ <https://iccwbo.org/about-us/who-we-are/>

⁷² <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/>

⁷³ [FIDIC contracts 2017 onwards—overview - Lexis®PSL, practical guidance ... \(lexisnexis.com\)](#)

⁷⁴ [Dispute boards—use in different forms of contract | Legal Guidance | LexisNexis](#)

⁷⁵ https://fidic.org/sites/default/files/press%20release_rainbow%20suite_2018_03_1.pdf

In line with other models such as NEC4, this embodies a greater focus on dispute avoidance in the 2017 suite of contracts and the DAAB is given a specific dispute avoidance role in Clause 21.3.⁷⁶ The DAAB is appointed at the outset of the contract and remains in place for its duration.

Additionally, the 2017 version gives particular weight to DAAB decisions by allowing a party to terminate the contract if the other party fails to comply with a DAAB decision and the failure constitutes a material breach of contract.⁷⁷ Whilst this is a practical means of incentivising dispute resolution, it appears that this provision does not comply with the HGCRA 1996, which requires that arbitration is to be available to parties *at any time*. This is the reason FIDIC contracts are rarely seen on UK-based projects.

Further escalation of FIDIC contract disputes will be referred to the International Chamber of Commerce (ICC Paris) for ADR processes, e.g., arbitration.

Range of ADR services offered by ICC

The ICC International Centre for ADR offers a range of dispute resolution options apart from arbitration. These include mediation, expert appraisal and dispute boards. The ADR centre is separate from the Court of Arbitration so as to maintain confidentiality. ICC Mediation procedures can be summarised as follows:⁷⁸

1. Request for Mediation filed;
2. Centre acknowledges receipt once complete with fee;
3. Centre invites parties to provide further comments/documentation;
4. Mediator selected by parties or appointed by ICC;
5. Parties pay provisional deposit;
6. Centre transfers files to Mediator & invites him/her to contact parties;
7. Initial meeting with Mediator and parties;
8. Mediator communicates rules to parties;
9. Mediation conducted via meetings, calls, exchange of written documents; and
10. Mediation ends with settlement.

It is noteworthy that the ICC has been selected by FIDIC as the trusted dispute settlement body to decide on challenges filed against its Dispute Adjudication/Avoidance Boards (DAAB) Members.⁷⁹

⁷⁶ [Dispute boards—use in different forms of contract | Legal Guidance | LexisNexis](#)

⁷⁷ Ibid.

⁷⁸ <https://iccwbo.org/dispute-resolution-services/mediation/procedure/>

⁷⁹ <https://iccwbo.org/media-wall/news-speeches/icc-decide-daab-challenges-2017-fidic-contracts/>

FIDIC Contracts are notable for:

- ☐ Parties constitute a Dispute Avoidance and Adjudication Board (DAAB);
- ☐ All disputes must go through the DAAB process and may only be submitted to arbitration if this process fails;
- ☐ Any challenge brought by parties against a DAAB Member will be decided by ICC and administered by the ICC International Centre for ADR;
- ☐ The Centre administers all non-arbitration proceedings filed at ICC; and
- ☐ This includes mediations (as well as other amicable dispute resolution proceedings administered under the ICC Mediation Rules), DOCDEX proceedings, expertise proceedings under the ICC Expert Rules and dispute board proceedings under the ICC Dispute Board Rules.

Standard ICC Arbitration Clause⁸⁰

Under the ICC's arbitration clause, "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

The parties may also wish to stipulate in the arbitration clause:

- ☐ the law governing the contract;
- ☐ the number of arbitrators;
- ☐ the place of arbitration; and/or
- ☐ the language of the arbitration.

The standard clause can be modified to take account of requirements of national laws and any other special requirements that the parties may have. Parties should always verify compliance with their jurisdictional requirements, e.g., mandatory arbitration.

Costs

ICC fees are determined on a sliding scale according to the contract amount in dispute, starting with administrative fees of US\$5,000 and arbitrator's fees of US\$3,000 for contracts up to \$50,000. Fees are capped at a percentage of dispute amount.

⁸⁰ <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>

ICC – Ireland comparison

The table below illustrates key features of the ICC ADR services in comparison to Ireland's PWC system. The ICC offers standard forms contracts as well as a comprehensive variety of dispute resolution services as discussed above. The main benefit of an organisation like ICC handling dispute claims is its experience, expertise, and impartiality as well as strictly defined timescales and fees. The ICC is often used for large, complex projects due to its high level of service and ability to handle complex international claims.

Table A 9: ICC – Ireland Comparison of Dispute Resolution in Construction Contracts	
ICC	Ireland
<p>The ICC offers a broad range of dispute resolution methods and services which are designated by the parties at the contracting stage. Rules and procedures are updated regularly in line with best practice.</p> <p>The International Court of Arbitration and the International Centre for ADR make up the ICC. The ICA confirms, appoints, and supervises members so as to ensure fairness and impartiality. It scrutinises all awards – which may be adjusted - before payment.</p> <p>The International Centre for ADR offers mediation, expert appraisal, and dispute boards services. Each of these services are similarly staffed by impartial experts who are bound by ICC procedures and rules. Unresolved disputes in the ADR category can be referred to the ICA for arbitration. Determinations are binding but can be challenged in court.</p>	<p>Early Contractor Involvement is limited to projects valued in excess of €100m and permission must be sought from the GCCC in advance. (See PW-CF10.)</p>
	<p>PWC Guidance Note 2.2 relates to Planning and Control of Capital Costs. This document addresses risk management and cost control at the design phase, including risk assessment, cost control, risk and contingency management, and change management. These measures are intended to manage and control risks; however, they are not designed to prevent adverse events in the same ways as collaborative contracting.</p>
	<p>Project Board members are nominated by each party at the outset of the contract. Members must have capacity and authority to negotiate and enter binding agreements for purposes of early dispute resolution. PB members must not be members of the design team.</p>
	<p>Standing Conciliator may be nominated at the outset of the contract. Parties may refer disputes unresolved by the PB to the SC. SC issues binding recommendation which can be disputed in further proceedings.</p> <p>Adjudication is available by law to parties at any time, i.e., escalation from the PB/SC level. Arbitration or litigation are methods of last resort once the above avenues of resolution are exhausted. Arbitration is governed by the Arbitration Act 2010 which relates to a variety of state authorities including but is not limited to the Commissioners of Public Works. The arbitral tribunal may appoint experts to assist on technical issues.</p>
Source: Indecon research	

Summary of Main Findings

This section presented an overview of international approaches to dispute avoidance and resolution in the context of construction contracts, focussing on the experience in the UK, Denmark, Australia and New Zealand, and the dispute resolution services offered by the International Chamber of Commerce in Paris, comparing key features with the Irish Public Works Contract. As noted at the outset, due to differences in legal systems and in procurement practices, caution is needed in interpreting any potential lessons from international experience and in attempting to apply different approaches to the Irish context. However, the table below summarises some key findings from the review, which may be informative of potential ways in which the dispute management procedures under the Irish PWC could be enhanced, particularly with the latter's ethos of collaboration between the parties prior to crystallisation of a dispute.

Table A 10: Summary of Selected Key Findings from Review of International Approaches to Construction Dispute Avoidance and Resolution	
(1)	Collaborative Contracting, including Early Contractor Involvement, is increasingly used in the UK, Denmark, Australia and New Zealand, among other countries. Under this approach, contractors are engaged early in the planning and design processes, supporting better understanding of project objectives and requirements. Changes can be made to the project specifications at this early stage, with lower risk of disputes as parties are cooperating together for a shared desired outcome.
(2)	Collaborative contracting also entails the use of contractual provisions such as risk-sharing and target costing, which serve as incentives for parties to complete their works in a timely manner and within budget. The UK-based NEC4 contract model contains a number of such provisions. Similarly, the Australian model uses Incentivised Target Cost Contract pricing methods so as to promote risk-sharing and rewards parties for successful project completion.
(3)	While the Irish Public Works Contract for Early Collaboration (PW-CF10) contains provisions for early contractor collaboration, the use of the PWCEC is limited to large (e.g., over €100 million) or technically complex projects, and permission to use this form must be sought from the GCCC in advance. If extended more widely, in conjunction with the Standing Conciliator role, features of the PWCEC could be helpful to improving collaboration at the early stages of contracts involving lower values and complexity, potentially serving to avoid disputes further down the project timeline.
(4)	Contractual methods such as such as cost-led procurement, two-stage open book, and integrated project insurance are also increasingly common, with evidence from the UK, Denmark, Australia and New Zealand to support a reduction in dispute claims at higher levels of escalation to ADR or litigation.
(5)	The Early Warning Register is a new NEC4 tool which incentivises risk disclosure and early discussion of solutions, by requiring the Project Manager to list these items on the register at the pre-contract stage. Early Warning Meetings take place at the outset of the contract for discussion by all parties to further encourage collaboration.
(6)	Dispute Review/Adjudication Boards in other jurisdictions are comprised of members of professional, impartial boards, and are introduced to projects for purposes of dispute avoidance or early resolution. This contrasts with the Irish model where the PB members are selected from parties' own management teams, and often with varying expertise and experience.
(7)	Use of external ADR service providers such as the International Chamber of Commerce could aid in resolving disputes, particularly on high-value and/or more complex projects. International expertise and professionally certified arbitrators could reduce resolution timescales, support more transparent determinations, as the ICC conducts strict quality control procedures both during ADR and post-award.