CONCILIATION

How has it served the Construction Industry

and

has it a future?

Paper presented at Engineers Ireland
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OVERVIEW

- Evolution of "Conciliation" and what it has become
- UK and Irish ADR policy divergence in 1996
- Irish Construction Contracts Act 2013
- 25 years experience of conciliating construction disputes
- Survey of experience and opinions of others
- Conclusion on how Conciliation has served the industry
- Some facts about Adjudication in the UK
- Comparison of Conciliation and Adjudication
- Can and should the option of Conciliation be preserved in construction contracts?

Note: A PDF copy of these slides is to be available on Engineers Ireland's website.

Evolution of Conciliation

- Quest for alternatives (ADR) to arbitration since mid 1980s
- "Conciliation" was one of the alternatives – initially consensual and persuasive only

Dr Karl Mackie (Chief Executive of CEDR) wrote in a paper at an ADR Seminar in London in November 1990:-

"Thus we have the distinction between conciliation – where there is no recommendation, and mediation where there is."

He went on to say:

"Unfortunately the terms have to carry a health warning - there is no international agreement on their use and the meaning of the terms is often reversed across countries or dispute sectors "

He was right!

"Conciliation" in standard construction contracts

1988 ICE introduce optional Conciliation in Minor Works Contract – in ICE's 1988 Conciliation Procedure the Conciliator's sole purpose was to issue a Recommendation (a strange interpretation).

1991 ICE 6th Edition - optional Conciliation as in Minor Works Contract

1992 ICE Design & Construct Contract – mandatory Conciliation with (temporarily enforceable) Recommendation

1995 IEI 4th Edition – mandatory Conciliation per new IEI Conciliation Procedure: Conciliator's primary purpose is to broker an agreed settlement – if not achieved Conciliator issues a Recommendation which becomes binding if neither party rejects it within 2 weeks (ICE 1994 Conciliation Procedure, produced collaboratively with IEI, effectively identical).

Late 1990s the RIAI and GDLA contracts introduced mandatory Conciliation as in the IEI 4th Edition and mandatory Conciliation was added to IEI 3rd Edition in its public sector amendments.

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Features of Conciliation (as it evolved)

- Primary purpose is to assist the parties to reach an agreed settlement
- Conciliator may discuss the issues with the parties separately
- Very flexible process which may explore possibilities for settlement not possible in arbitration (or adjudication)
- Quick and informal (42 day aspiration)
- Low cost – no role for advocacy or legal representation
- Parties are (or can be) in control of the outcome - not the case in arbitration (or adjudication) – and relationship damage minimised
- Originally (apart from ICE 1988 Procedure) persuasive only but then Procedures introduced a Recommendation to be issued if an agreed settlement unachievable.
- Recommendation to *"state the Conciliator's opinion as to how the parties can best dispose of the dispute … not necessarily based on any principles of common law or equity"*
- Either party may reject the Conciliator's Recommendation within two weeks (or other period) – if neither does it becomes final and binding.

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Government Policy on ADR in the UK and Ireland

1994 UK Latham Report "Constructing the Team" recommended Adjudication instead of Conciliation, apparently influenced by the provisions in the ICE's 1990 New Engineering Contract (NEC).

1996 UK Housing Grants, Construction and Regeneration Act:
- statutory entitlement to refer disputes to adjudication
- Government "scheme" to provide this service
- Implemented in 1998
- Effectively extinguished Conciliation, as it had then evolved
- Amended by Local Democracy, Economic Development and Construction Act 2009 (implemented in 2011)

1997 Irish "Strategic Review of the Construction Industry" (SRCI) reached the opposite conclusion. It recommended

"the industry should use conciliation as a favoured mechanism for dispute resolution"

with arbitration only to be used ***"as a last resort"***

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ADR Policy in Ireland post 1997 (until 2013)

- Conciliation became the standard method of resolving contractual disputes
- Mandatory conciliation in all standard contracts
- Some other methods also used, notably where FIDIC conditions of contract were employed
- Mediation also increased, especially in sub-contract disputes

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2007 Public Works Contracts

Further evolution of "Conciliation" in Clause 13

- Parties to appoint Conciliator *"who is competent to adjudicate the dispute".*
- Primary purpose to achieve agreed settlement (13.1.5) - if not possible in allowed time Conciliator to issue Recommendation (13.1.8).
- Conciliator may

  "meet the parties separately …. , 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….."

  [startling breaches of natural justice - not permissible in adjudication]
- Conciliator's Recommendation must be based *"on the parties' rights and obligations under the Contract"*
- May be rejected within 42 days – if not becomes final and binding.
- If rejected and recommended payment must be made provided other party gave notice of arbitration (but as security a bond must be provided).

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Reaction to Clause 13 of the PWCs

- NOT conciliation
- Binding Recommendation will seriously damage the process and make it less successful
- It is a flawed mixture of conciliation and adjudication
- Will fundamentally change how conciliations are run
- Binding Recommendation welcomed by contractors - but not the negating bond.
- Strangely little or no mention of breach of natural justice.

When the dust settled: not much changed - but the natural justice issue remains an issue – as does the bond.

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Construction Contracts Act 2013 changes Government ADR Policy

- Introduced in the Senate by Senator Fergal Quinn at the behest of sub-contractors who had not been paid. Eventually, after a long and tortuous gestation period was eventually enacted in July 2013.
- Based on but not the same as UK legislation
- Act to be implemented on date ordered by the Minister for Public Expenditure and Reform.
- **Creates statutory right to refer payment disputes to adjudication**
- **Payment disputes defined as *"disputes relating to payment"***

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Adjudication under the Construction Contracts Act 2013

- Parties to construction contracts to have a statutory right to refer *"any dispute relating to payment"* to adjudication *"at any time"*. [Section 6]
- The parties to a contract may not *"purport to limit or exclude its application"* [Section 2(5)]
- Within 5 days, Parties may appoint an adjudicator by agreement – if not *"the adjudicator shall be appointed by the chair of the panel selected by the Minister"* [Section 6(3)]
- Adjudicator to reach decision within 28 days – extendable to 42 days with consent of referring party and further extendable by agreement with both parties [Sections 6 (6) & 6 (7)]
- Adjudicator *"shall act impartially"* and *"comply with the code of practice published by the Minister"* [Section 6 (8)]
- Adjudicator's decision is binding ……. at least until overturned by arbitration or court. [Section 6 (10)]

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So - How has "Conciliation" performed?

Will adjudication be better?

Can (or must?) we have both?

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25 years experience of conciliation of construction disputes

- Conducted first conciliation in 1988
- Completed 39 Conciliations of which 37 (95%) [arguably 38 or 97%] resolved the dispute, 31 (84%) of which were settled by agreement
- 6 (18%) Recommendations were accepted
- 2 (5%) Recommendations were rejected, 1 of which was subsequently settled by negotiation (including other issues).
- Sums in dispute ranged from €75K to €23M
- Agreed settlements ranged from €12.5K to €6.6M
- Accepted Recommendations ranged from €270K to €3.7M
- Rejected Recommendation (outcome unknown) €300K

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SURVEY OF OTHER CONCILIATORS

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Survey of 13 Conciliators' Experience in 332 Conciliations

A questionnaire was sent to 23 conciliators. 13* (7 engineers and 6 quantity surveyors) replied. The questionnaire was sent to 4 architects and 3 lawyers, understood to be practising conciliators - none replied.

Table 1

No of conciliations	332	%	% Range
No of disputes resolved	292	88%	100% to 44%
of which No. settled by agreement**	196	67%	100%*** to 37%
And Accepted Recommendations	96	33%	0% to 46%
Rejected Recommendations	40	12%	0% to 56%

*One contributor mainly acts as adviser to parties in dispute and provided figures for this survey from experience in 40 conciliations.

** includes agreed settlements where a confirmatory Recommendation was subsequently issued as back-up for the Employer.

***100% related to 1 conciliator who had done only 4 conciliations. Next highest was 84%.

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REJECTED RECOMMENDATIONS

Conciliators were not asked what happened to the disputes for which a Conciliator's Recommendation was rejected – unlikely to know.

Many such disputes are subsequently resolved without recourse to arbitration – the avoidance of which is the reason for ADR.

Conciliation's real success rate is a lot higher than 88% given in Table 1 above

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13 Conciliators' Experience - Durations of Conciliations

Table 3

Number of Conciliations	332	
Number completed in 42 days or less	81	24%
	Max	Min
Overall minimum durations	4 days	70 days
Overall maximum durations	42 days	1063 days
Percentage completed within 42 days	0%	100%
Time spent meeting the parties when outcome was agreed settlement	1	25
Ditto average range	1	7.5
Time spent meeting the parties when Recommendation had to be issued	1	30
Ditto average range	1.8	10.8

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13 Conciliators' Experience - Range of Values of 332 Conciliations

Table 2

	Min	Max
Sums in dispute	€28K	€160M
Sums in dispute excluding exceptionally large dispute	€28K	€23M
Agreed settlements	€12.5K	€43M
Agreed settlements excluding exceptionally large dispute	€12.5K	€6.6M
Accepted Recommendations	€10K	€3.9M
Settlement sum as % of sum claimed	4%	90%

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SURVEY OF PARTIES

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Survey of Parties in Conciliation

Questionnaires were sent to parties who have used conciliation as follows:

Table 4

	Number sent out	Replies received
Employers	14	8*
Main Contractors	18	15**
Sub-Contractors	15	9

Part 1 sought statistical information

Part 2 sought experience and opinions.

* All from the public sector

**Two replies were from advisers to contractors

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Quantitative Replies from Parties in Conciliation

Table 5: Employer / Main Contractor Disputes

	Employers		Contractors	
	No.	%	No.	%
Conciliations	58		186	
Disputes Resolved	54	93%	160	86%
of which resolved by agreement	34	59%	93	58%
and resolved by Recommendation*	19	33%	67	42%
Rejected by Employer	2		17	
Rejected by Contractor	3		9	
Rejected but settled without arbitration	3		20	
Referred to arbitration	2	3%	6**	3%
No. which avoided arbitration	56	**97%**	180	**97%**

* May include Recommendations issued as back-up where the settlement had been agreed
** 5 were from one contributor

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Quantitative Replies from Parties in Conciliation

Table 6: Main Contractor/Subcontractor Disputes

	Main Contractors		Subcontractors	
	No.	%	No.	%
Conciliations	26		10	
Disputes Resolved	24	92%	9	90%
of which Resolved by agreement	19	79%	5	55%
And Resolved by Recommendation	5	21%	4	45%
Rejected by Contractor	0		1	
Rejected by Subcontractor	2		0	
Rejected but settled without arbitration	1		0	
Referred to arbitration	1	4%	1	10%
No. which avoided arbitration	25	**96%**	9	**90%**

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Parties' Replies to Questions

Q 1: Were you <u>generally</u> satisfied with Conciliation as a method of resolving disputes?

Employers (8)	Main Contractors (15)	Subcontractors (9)
6 : Yes (2 with caveats) 1 : Not always 1 : No	13 : Yes generally 2: No	4 : Yes 2 : No 3 : No opinion

Q 2: If you were dissatisfied was it with (a) the process or (b) how the Conciliation was conducted?

Employers (8)	Main Contractors (15)	Subcontractors (9)
1 : (a) The process 3: (b) How it was conducted 1 : Both 2 : N/A	4 : (a) The process 9: (b) How it was conducted 1 : Both 1 : N/A	0 : (a) The process 1 : (b) How it was conducted 1 : Both 7 : N/A or no opinion

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Parties' Replies to Questions

Q 3: Reasons for dissatisfaction with the Process

Employers (8)	Main Contractors (15)	Subcontractors (9)
Conciliation favours the Contractor. Encourages contractors to swamp ER with correspondence & exaggerated claims - to end up in conciliation. Tendency towards splitting the difference. Many issues get only cursory consideration.	Too slow – other party can drag out the process (2) Level of proof required is excessive No way of ensuring conciliator is competent or unbiased (3) Government "screening" conciliators "unbalances" the process (2) Daunting for inexperienced site staff	Process favours parties experienced in conciliation Compromise applied rather than merits of the case Tendency to "split the difference" Way for Contractor to get discount

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Parties' Replies to Questions

Q 4: Reasons for dissatisfaction with how the conciliation was conducted

Employers (8)	Main Contractors (15)	Subcontractors (9)
Incompetent conciliator (4) Conciliators tend to have sympathy for contractors Not all issues addressed Contractor allowed "to bring too much to the table" Conciliation too soon	Too slow – conciliator allowed delay Incompetent conciliator Legal representation Government "vetting conciliators" Biased conciliators Not having people in authority present Parties separated too soon – not enough interaction	Lack of standardised approach Incompetent conciliator - documents and facts were ignored

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Parties' Replies to Questions

Q 5: Which is better (a) non binding Recommendation or (b) binding recommendation as in PWCs

Employers (8)	Main Contractors (16)	Subcontractors (9)
2 : Binding 2: Makes no difference 6: Did not answer	4 : Binding 1 : Non binding 10 : did not know	4 : Binding 5 : No opinion

Q 6: Would you prefer Adjudication, as in the Construction Contracts Act, to Conciliation?

Employers (8)	Main Contractors (15)	Subcontractors (9)
1 : No 1 : Maybe if it is quicker 1 : Depends on the dispute 1: Probably 4 : Don't knows	2 : Yes 7 : No 1 : Depends on the dispute 5 : Don't knows	5 : Yes 3 : No 1 : No opinion

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Parties' Replies to Questions

Q 7: Do you consider the 28 day time frame for adjudication in the Construction Contracts Act (although extendable) is too short?

Employers (8)	Main Contractors (15)	Subcontractors (9)
4 : Yes 1 : Can be extended for big disputes 2 : No 1 : Don't know	9 : Yes 6 : Depends on the dispute	2 : Yes 4 : No 2 : Depends on the dispute

Q 8: Adjudication is a quick process often based on documents only. Do you think it appropriate for the adjudicator not to meet the parties?

Employers (8)	Main Contractors (15)	Subcontractors (9)
2: Yes 3 : No 3: Maybes	15 : No	5 : No 1 : yes 1 : Depends on dispute

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Parties' Replies to Questions

Q 9: It is claimed that Conciliation, being flexible, need not be adversarial, usually reaches an agreed settlement and causes minimum damage to the relationships between the parties. Do you agree?

Employers (8)	Main Contractors (15)	Subcontractors (9)
5 : Yes 1 : No 2 : Sometimes	12 : Yes 4 : No	3 : Yes 1 : No 5 : No opinion

Q 10: Would you be in favour of conditions of contract continuing to provide for Conciliation as an option (albeit the under the Act either party may refer a payment dispute to adjudication at any time)?

Employers (8)	Main Contractors (15)	Subcontractors (9)
6 : Yes 1 : No 1 : Probably No	13 : Yes 1 : No 1 : Not sure	4 : Yes 1 : No 2 : Not sure

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Parties' Replies to Questions

Q 11: What method of ADR do you think is best for construction disputes?

Employers (8)	Main Contractors (15)	Subcontractors (9)
2 : Conciliation	8 : Conciliation	3 : Adjudication
1 : Conciliation "if pain equally inflicted"	2 : Conciliation / Mediation	1 : Conciliation / Mediation
2 : both Conciliation and Adjudication have their merits depending on the dispute	1 : Conciliation if Adjudication does not have oral hearing	1 : Conciliation
3 : Not knowledgeable enough to have an opinion	1 : Adjudication	1 : Depends on dispute
	1 : DAB	1 : "If not Conciliation then arbitration"
	1 : Depends on complexity of dispute	2 : Did not answer
	1 : "Adjudication followed by Conciliation"	

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MEDIATION

- "Conciliation" in the 1980s was what we now call Mediation
- Sole purpose is to achieve an agreed settlement – THE BEST POSSIBLE OUTCOME
- The least damaging of ADR methods to relationships
- With a good Mediator mediation can be very successful
- Mediation is understood to be extensively and successfully used in resolving Main Contractor – Sub-Contractor disputes
- Mediation is mandatory in the CIF PWC Sub-Contract (before mandatory Conciliation)
- In the surveys Mediation was reported to have resolved 6 disputes where the Conciliator's Recommendation had been rejected
- Oddly (since Mediation is mandatory in the CIF PWC Sub-Contract) the 9 Sub-Contractors who contributed, reported only 4 Mediations, 3 of which resolved the dispute.

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SURVEYS CONCLUSIONS

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Conclusions drawn from the Surveys (1)

- Conciliation has been very successful at resolving disputes and avoiding arbitration – maybe 97% success rate
- The majority of settlements are by agreement (but not uniformly so)
- Very few conciliated disputes go on to an arbitration hearing
- Conciliators vary significantly in how they run conciliations and in the results they get
- There is great variability among Conciliators in the percentage of their settlements which are agreed
- Some Conciliators are slow and seem to pay scant regard to the 42 day time frame in the PWCs and the Procedures
- Whether the dispute was resolved by agreement or by accepted Recommendation seems to be unrelated to the variables (the sum in dispute, the total time taken, time spent meeting the parties, the settlement value)

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Conclusions drawn from the Surveys (2)

- The parties generally satisfied with Conciliation but there was some dissatisfaction and some reservations
- Dissatisfaction mostly with the way conciliations were conducted
- Reasons for dissatisfaction included:
  - Slowness
  - Perceived bias
  - Government screening of Conciliators
  - Cursory consideration of some issues
  - Tendency to split the difference rather than deal with merits
  - Separating parties too much and too soon
  - System encourages exaggerated claims
- It appears some conciliators are incompetent
- There is a preference for binding Conciliator's Recommendations

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Conclusions drawn from the Surveys (3)

- Employers not generally in favour of replacing conciliation with adjudication but felt that adjudication might be better in some cases and would probably be quicker
- Most main contractors favoured conciliation but for simple disputes adjudication could be better
- Subcontractors seem to favour adjudication. It was notable, however, how little experience the replying subcontractors had of conciliation – only 10 conciliations between the 9 who replied and 4 had none.
- General agreement that the time frame for adjudication is too short for many disputes - but it can be extended.
- Adjudication without a "hearing" would be unacceptable to main contractors and to most subcontractors. Employers had mixed views.
- Conciliation causes minimum damage to the relationship between the parties.

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Conclusions drawn from the Surveys (4)

- The majority of all parties - Employers, Main Contractors and Subcontractors - would like contracts to retain Conciliation as an optional method of resolving disputes (with the statutory right to refer disputes to adjudication unaffected)
- Employers and Main Contractors – Majority - Conciliation is best
- Subcontractors – 3 felt adjudication would be best and 3 favoured conciliation or meditation.

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ADJUDICATION

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Adjudication as it has evolved in the UK 2013 Report

Number of Appointments & Challenges

Peak in 2000 and 2001	About 2000
May 2012 to April 2013	1252
Challenges to jurisdiction	30%

Parties in dispute

Main Contractor / Employer	**31%**
Sub-Contractor / Main Contractor	43%
Other	26%

Adjudicators

Quantity Surveyors (largest group), Lawyers (next), Engineers, Architects, etc.

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Adjudication as it has evolved in the UK 2013 Report

Nature of Dispute

Payment/Money	19%
Final Account Value	19%
Interim Payment	14%
EoT	5%
Variations	6%
Withholding	5%
Defective Work	7%
Other	25%

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Adjudication as it has evolved in the UK 2013 Report

Timescales of adjudications

Within 28 days	**53%**
Between 28 and 42 days	35%
More than 42 days	12%

Procedure adopted

Documents only	76%
Interview with one party	0.4%
Interview with both parties	6%
Full hearing	11.6%

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Values in UK Adjudications (April 2013)

No value			7.89%	Cum %
£0	to	£10K	6.02%	13.91%
£10K	to	£50K	25.19%	39.10%
£50K	to	£100K	19.17%	58.27%
£100K	to	£250K	21.05%	79.32%
£250K	to	£500K	12.41%	91.73%
£500	to	£1M	4.51%	96.24%
£1M	to	£5M	3.76%	100.00%

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Natural Justice in Adjudication

- There have been many court cases challenging the adjudicator's jurisdiction and the validity of adjudicator's awards.
- Natural justice, originally thought not applicable, now integral part
- Absence of bias (real or perceived) essential

  Glencot Development & Design Ltd v. Ben Barrett & Son (Contractors) Ltd [2001] EWHC Technology 15 (13th February, 2001)

  Judge Humphrey Lloyd found that because "caucus" meetings took place with an adjudicator there was apparent bias [no actual bias was found]so the adjudicator's decision was set aside.
- Adjudication Society event on 3rd April 2014 (in London) is devoted to this issue
- Because of entitlement to natural justice in the Irish Constitution Irish Courts likely to apply this very strictly.

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How has Adjudication worked in the UK?

- Adjudicators report that it has been a great success – but concede that there have been some incompetent Adjudicators and action is now being taken to improve standards - renewal of membership by regular interviews
- Parties who have used adjudication are not so enthusiastic – some saying they have found it "a lottery" or "a disaster" – and expensive requiring lawyers
- There is no doubt that it has changed the industry and its approach to disputes – and has resolved many disputes involving sub-contractors which previously would not have been resolved
- Smaller bights
- Statistics on success rate (decisions appealed) hard to find

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COMPARISON OF CONCILIATION WITH ADJUDICATION

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Some comparisons between Conciliation and Adjudication (1)

Conciliation	Adjudication (UK experience)
Sums in dispute can be large (up to €160M reported in survey)	60% less than ££100K (€127K) 80% less than £250K (€317K) 96% less than £1M (€1.27K)
Conciliator always meets the parties and may do so separately to explore settlement terms	76% are on documents only. Adjudicator must not meet parties separately.
Very flexible and can achieve settlements unachievable in adjudication or arbitration	Not flexible
Usually settled by agreement	Settlement by agreement not possible.
Written submissions important but meetings with the conciliator can compensate for shortcomings	Written submissions vital – usually the only basis for the decision

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Some comparisons between Conciliation and Adjudication (2)

Conciliation	Adjudication (UK experience)
Intended to be short (42 days) but in complex disputes often extended, by agreement, to be much longer	Short (see table above) but extendable with parties' agreement
Parties can have control of the process	Parties have no control
Not usual to have legal advisers (low cost)	Importance of written submissions so crucial that legal advice usual (expensive)
Relationship usually little damaged	Adversarial - Relationships likely to be damaged
Challenges rare – settlements are usually agreed. Rejected Recommendations rarely go to arbitration.	Numerous cases have been referred to the UK Technology & Construction Court.

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DISPUTES UNDER THE CONSTRUCTION CONTRACTS ACT 2013

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"Disputes relating to payment"

- The Construction Contracts Act 2013 creates a statutory right to refer *"any dispute relating to payment arising under the construction contract"* to adjudication at any time [Sections 6(1) and 6 (2)]
- This is different (and intended to be different) from the UK legislation which covers all disputes (8% of adjudications reported in 2013 had no value)
- The Act does not apply to disputes which are not *"disputes relating to payment"* .
- The Act provides no guidance on the meaning of *"dispute relating to payment"* - that will be a matter for the Courts – perhaps many times

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What about disputes which are not disputes "*relating to payment*"?

- Extensions of time, quality of work, foreseeability of ground conditions, foreseeability of underground services/obstructions
- Is an event a compensation event or not? Is a claim time barred? Are Contracharges allowable? etc., etc.
- Some argue that all disputes ultimately come down to money and therefore all disputes are *"payment disputes"*.
- The Courts may not take this view – especially because the words *"disputes relating to payment"* clearly envisage and exclude other disputes
- It could well be that a dispute on establishing the amount due to be paid (which takes up virtually all of the time in conciliation) would be deemed not to be *a "dispute relating to payment"*

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Contracts and the Construction Contracts Act 2013

- All standard forms of contract have to be amended to comply with the Construction Contracts Act (none do at present).
- There is a widespread belief (apparent in a number of survey replies) that existing ADR clauses must be replaced by adjudication. This is wrong.
- Contracts must acknowledge the statutory right to refer *"payment disputes"* to adjudication and should provide that appeals be referred to arbitration
- Contracts must have a dispute resolution clause for the resolution of disputes which are not *"payment disputes"*.
- If they do not do so, ADR will not apply to such disputes – back to arbitration or the Courts.

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CAN CONCILIATION CLAUSES BE RETAINED IN CONTRACTS

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Retaining ADR clauses in contracts

- Conciliation has worked very well for the last 20 odd years.
- The survey confirmed the SRCI Report conclusion Conciliation is the best method of ADR.
- Therefore existing Conciliation clauses should be retained.
- Mediation, as an option, could also be included
- The parties can choose to use conciliation (or mediation) instead of adjudication
- Conciliation should therefore be retained in contracts as an option for *"payment disputes"* and as mandatory for other disputes – but care must be taken not to *"purport to limit or exclude"* the application of the Act

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How will optional conciliation work?

- If the dispute is a *"dispute relating to payment"* it can only be conciliated if the parties agree (and continue to agree)
- Either party may at any time refer a payment dispute to adjudication but if it is agreed to use conciliation (or mediation), such action should be deferred to allow the conciliation to take place.
- With the continuing good will of the parties conciliation can take place and be allowed to resolve the dispute
- The risk of one party referring the dispute to adjudication may "sharpen up" the conciliation process.

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CLOSING REMARKS

- Conciliation in Ireland has been very successful - a overall success rate of perhaps 97%
- Conciliation is quick (likely to become quicker) and is at low cost
- **An agreed settlement is the best possible outcome. This is only achievable through Conciliation or Mediation**
- While the overall proportion of settlements by agreement is 67%, it could be higher as is demonstrated consistently by some conciliators
- Adjudication will probably be quicker (and more costly) than Conciliation and is suitable for small or relatively straight forward disputes
- For large disputes (typical in conciliations) adjudication is not as suitable as conciliation

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"GOING FORWARD"

We must

- Ensure that all contracts retain conciliation - optional for payment disputes and mandatory for other disputes
- Opt for Conciliation (or maybe Mediation) where agreement to do so is possible – particularly necessary for large complex disputes
- Appoint only competent conciliators and adjudicators

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Finally

- **Thank you** to all who contributed to my surveys – I know it took some time to complete the questionnaires
- **Thank you** for listening

- Any questions / comments?

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POSTSCRIPT – ARISING FROM DISCUSSION

- Several contributors advocated Mediation, one suggesting that It could be more a more attractive alternative than Conciliation, avoiding the time consuming Conciliator's Recommendation.
- Mediation can indeed be very successful but it is not recommended that it be the sole alternative offered in contracts, particularly for public sector contracts

because

- Where the Employer is from the public sector an agreed settlement generally requires a back-up document from the Conciliator. To satisfy this need, Conciliators regularly write Recommendations with reasons (or Conciliation Reports). This would not be part of a Mediation process.

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