

COMPILATION OF PPP TERMS AND CONDITIONS OF CONTRACT

PUBLIC SECTOR VERSION

CLAUSE 56: DISPUTE RESOLUTION PROCEDURE

DBFOM CONTRACT

CONCESSION CONTRACT

DBOM CONTRACT

INTRODUCTION

Most PPP contracts provide for an escalation procedure for resolution of disputes, with initial referral to adjudication. The Accommodation Contract has an initial liaison procedure, a panel of adjudicators, and a fast-track procedure.

SOPC3 GUIDANCE

27. DISPUTE RESOLUTION

27.1 INTRODUCTION

The Contract must specify a procedure for handling disputes under the terms of the Contract.

27.2 DISPUTE RESOLUTION PROCEDURE

27.2.1 *As going through the courts may not be appropriate for the disputes that can arise under a PFI contract, an alternative formal dispute resolution procedure may offer a more efficient and cost-effective method of resolving disputes.*

27.2.2 *A common form of dispute resolution involves a three stage process as follows:*

- *the Authority and Contractor consult with each other for a fixed time period (possibly involving different levels of internal consultation) in an attempt to come to a mutually satisfactory agreement;*
- *if consultation fails, the parties may then (except in the case of certain types of dispute) put their case before an expert to decide. The expert is appointed from a panel (e.g. of construction or operation experts) whose appointment is regulated by the Contract. It may be appropriate in certain circumstances to substitute other forms of Alternative Dispute Resolution (“ADR”) for this type of expert determination. Disputes relating to the mechanics of price variations may go to a financial expert agreed between the parties at the time; and*
- *if either party is dissatisfied with the expert’s decision, it may refer the matter either to arbitration (itself a form of ADR) or to the courts for a final and binding decision. The method of appointing the arbitrator should be set out in the Contract.*

27.2.3 *It is often proposed that a fast-track dispute resolution process is included in the contract to deal with certain pressing issues. The drafting included below reflects the procedure set out in the Housing Grants, Construction and Regeneration Act 1996, so is, by nature, fast track and construction related risk profile of the Project, and the pricing approach adopted in the Contracts and sub-contracts.*

27.3 JOINDER OF SUB-CONTRACT DISPUTES

27.3.1 *The Contractor and its Sub-contractors may request the right to join their disputes into a dispute under the Contract if the same issues are involved. This should generally be resisted by the Authority as it will only increase the time and cost of the process for the Authority. The Authority should not automatically become embroiled in the Contractor's disputes with its Sub-contractors, particularly as the Contractor should in any case ensure that, as far as possible, decisions under the Contract flow down the contractual chain (although see Section 27.4.3 below). This is achieved through proper structuring of the subcontracts and is an issue on which financiers will insist. It may, however, be possible to agree joinder in relation to certain limited matters (such as disputes arising out of the Tests referred to in Section 3.6 (Acceptance and Service Commencement)).*

27.3.2 *The Authority may, also, be willing to adopt a compromise position. This allows the Sub-contractors the right to make written representations to the arbitrator/adjudicator as part of the Contractor's case in a dispute under the Contract where that dispute relates to issues in dispute under the relevant sub-contract. The arbitrator/adjudicator will not determine the sub-contract dispute itself, so in order for his decision on the Contract dispute to be binding on the Contractor and the Sub-contractor, they must separately agree to be bound by the decision of the arbitrator/adjudicator in respect of that matter as between themselves.*

27.4 [NOT USED]

27.5 DELAYS CAUSED BY DISPUTES

27.5.1 *Contractors sometimes try to include disputes between the Authority and the Contractor under the Contract in the list of Relief Events on the basis that they cannot continue work until the dispute is resolved. This issue arises during the construction phase in particular. This is not standard practice and should be resisted. The Contractor (and the Subcontractors) should not be permitted to "down tools" just because a dispute has arisen. If no other course of action can be taken (usually towards the end of the construction phase, but also at critical stages), then the issues involved can give rise to relief.*

27.5.2 *The Contractor must be under an obligation to carry on with the Service in accordance with the Authority's wishes while any dispute is being carried on, even if this involves building or covering over construction works which may need rebuilding or opening up if the dispute is resolved in the Contractor's favour. The Contractor must rely on the expert or arbitrator awarding adequate compensation if the dispute is resolved in the Contractor's favour.*

27.5.3 *The Authority should recognise that if the dispute is resolved in the Contractor's favour, the Authority will typically be liable for the Contractor's costs. These could include any extra costs incurred in rebuilding (such as staff costs and materials costs) and any resulting costs incurred by the Contractor if a delay to Service Commencement results. Delays caused by the Authority failing to comply with the relevant dispute resolution procedure should be taken into account in the arbitrator's determination.*

CORE CONTRACT DRAFTING

56. DISPUTES RESOLUTION PROCEDURE

56.1 Procedure

Except as expressly provided in any other provision of this Agreement, all Disputes shall be resolved in accordance with the provisions set out in [Clause 56 - Schedule]

(Disputes Resolution Procedure).

56.2 Joinder

- (a) If any Dispute arising under this Agreement between the Authority and the PPP Co is substantially the same as or connected with or relates to issues raised in a related difference, dispute, claim or question between the PPP Co and the Contractor or the Operator that is subsequently referred to the dispute resolution procedure under the relevant Principal Sub-Contract (the “**Related Dispute**”), then the Authority or the PPP Co may propose that the parties require that such Dispute and the Related Dispute be consolidated and determined such that the Dispute is dealt with jointly with the Related Dispute.
- (b) Notwithstanding any request of the parties under Clause 56.2(a) the provisions of the Dispute Resolution Procedure (including, without limitation, any time limits set out therein) shall continue to apply to all Disputes referred to the Dispute Resolution Procedure.
- (c) Where a Related Dispute is dealt with pursuant to the Dispute Resolution Procedure, the costs of reference of the Related Dispute shall be borne as determined pursuant to the Dispute Resolution Procedure or, in default, equally among the parties to the Related Dispute.
- (d) PPP Co shall procure that any party that is party to a Related Dispute shall comply with the provisions of Clause 57 (Confidentiality).

[CLAUSE 56 – SCHEDULE]

DISPUTES RESOLUTION PROCEDURE

PART 1

Adjudication and Arbitration

1. REFERENCE OF DISPUTE

- 1.1 Either party may at any time notify the other of an intention to refer a Dispute to an adjudicator (the “**Adjudicator**”) under the procedure set out in Part 2 of this [Clause 56 – Schedule] (an “**Adjudication**”). The Adjudicator shall act impartially as an independent expert and not as an arbitrator. The Adjudicator shall perform his duties and reach his decision in accordance with the terms of this Agreement and the Law.

2. EFFECT OF THE ADJUDICATOR’S DECISIONS

- 2.1 The Adjudicator’s decision shall be final and binding unless and until the Dispute is finally determined by arbitration pursuant to paragraph 3 of Part 1 of this [Clause 56 – Schedule] or is resolved by agreement, and both parties shall give effect forthwith to the Adjudicator’s decision unless and until the decision is revised in arbitration or resolved by agreement.
- 2.2 Either party may apply to the courts of Ireland to enforce the Adjudicator’s decision. Nothing in this paragraph shall prevent either party at any time seeking any interim

declaratory or interlocutory relief in aid of an adjudication or in connection with enforcement proceedings including proceedings to enforce an Adjudicator's award.

3. **ARBITRATION**

- 3.1 If either party is dissatisfied with the decision of the Adjudicator then either party may within [●] ([●]) days after receiving notice of such decision, commence arbitration in respect of the Dispute by giving to the other party notice of such Dispute and such Dispute shall be and is hereby referred to the arbitration and final decision of such person as the parties hereunto may agree to appoint as Arbitrator or, failing agreement, as may be nominated on the request of either party by the President for the time being of the Institution of Engineers of Ireland (the "**Arbitrator**").
- 3.2 The Arbitrator shall have power to open up, review and revise any opinion, requisition, certificate, notice, and decision of the Adjudicator in respect of the Dispute and to determine any Dispute which shall be submitted to him and of which notice shall have been given as aforesaid in the same manner as if no such opinion, requisition, certificate, notice or decision of the Adjudicator in respect of the Dispute had been given. Every or any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Acts, 1954 to 1998, or any act amending the same.
- 3.3 Neither party shall be limited in the arbitration to the evidence or arguments previously put before the Adjudicator to obtain his decision.

4. **CONSOLIDATION OF DISPUTES**

If a Dispute has been referred to arbitration in accordance with the procedures set out in paragraph 3 of Part 1 of this [Clause 56 – Schedule] and subsequently one or more further Disputes are referred to arbitration then either party may request that all or a number of such Disputes be consolidated into one reference to arbitration. In such event, the arbitrator first appointed in relation to any of the Disputes proposed to be consolidated ("the **First Arbitrator**") shall, in the absence of agreement by the parties to the contrary, be appointed as arbitrator for the purposes of the conduct of the arbitrations and hearings of all Disputes so consolidated,

provided however:

- (a) in the absence of the agreement of both parties, a Dispute between the parties shall not be consolidated with the referral of other Disputes into one referral to arbitration, where the hearing of such Dispute has opened or where the Arbitrator appointed to determine such Dispute is of the opinion that the arbitration in relation to such Dispute has advanced to such a stage that the consolidation of the referrals to arbitration would cause unreasonable delay to the determination of the issues referred to him; and
- (b) a referral of a Dispute to arbitration shall only be consolidated with other referrals if the First Arbitrator agrees that it is appropriate to do so and that he has necessary competence and skill to arbitrate on all of the issues referred and/or proposed to be referred to him for his determination and award.

5. **PERFORMANCE TO CONTINUE DURING DISPUTE**

- 5.1 Unless this Agreement has already been terminated the parties shall continue to perform their obligations under this Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute for resolution pursuant to this [Clause 56 –

Schedule].

6. **CONFIDENTIALITY**

- 6.1 Subject to paragraph 6.2 of Part 1 of this [Clause 56 – Schedule], the parties, the Adjudicator and the Adjudicator’s appointed advisers, if any, shall keep the fact that any Adjudication pursuant to paragraph 1 of this Part 1 is taking (or has taken) place and the outcome of any such procedure (the “**Confidential Procedure**”) confidential. All documentation, information, data, submissions and comments disclosed whether in writing or otherwise by either party, or the Adjudicator (and if necessary its appointed advisers) for the purposes of the Confidential Procedures either in connection with or in consequence of any Confidential Procedure shall be regarded and treated as confidential.
- 6.2 The obligations of confidentiality extend to any of the parties and/or the Adjudicator (and if necessary his appointed advisers) unless:
- 6.2.1 for the purpose of consulting legal advisers in connection with the Dispute;
 - 6.2.2 for the purpose of consulting any expert or technical consultant in connection with the Dispute;
 - 6.2.3 otherwise required by Law.

[CLAUSE 56 – SCHEDULE]

DISPUTES RESOLUTION PROCEDURE

PART 2

Procedure for Adjudication

1. **REFERENCE OF A DISPUTE TO ADJUDICATION**

- 1.1 Either party may, at any time, give notice (the “**Adjudication Notice**”) to the other party of its intention to refer a Dispute to Adjudication. The Adjudication Notice shall set out:
- 1.1.1 the nature and a brief description of the Dispute;
 - 1.1.2 the names and addresses of the parties involved;
 - 1.1.3 the nature of the relief sought.

2. **APPOINTMENT OF THE ADJUDICATOR**

- 2.1 The Adjudicator shall be selected by agreement between the parties within [•] ([•]) Working Days of service of the Adjudication Notice. If no agreement is reached within such time the party referring the Dispute to Adjudication shall apply for the appointment of an Adjudicator to the President for the time being of the Institution of Engineers of Ireland. When requesting the selection of an Adjudicator the referring party shall supply a copy of the Adjudication Notice to the President for the time being of the Institution of Engineers of Ireland, who shall have regard to the nature of the Dispute which is referred for Adjudication when selecting the Adjudicator who shall be professionally qualified in

the field in which the Dispute arises, and shall endeavour to select the Adjudicator within [●] ([●]) Working Days of receiving the application. If the selected Adjudicator is unwilling or unable to accept the appointment, another Adjudicator shall be agreed upon by the parties or selected by the relevant body in accordance with the procedure set out above (and so on until an Adjudicator is appointed). The Adjudicator shall be appointed on the terms set out in Part 3 of this [Clause 56 - Schedule] or such other terms as may be agreed. No such appointment shall be amended or replaced without the written consent of both parties.

- 2.2 Unless both parties agree no person shall be appointed as an Adjudicator if such a person at the time of appointment is (or within [●] ([●]) years before such appointment has been) a director, office holder or an employee of, or is or has been (within such time) personally engaged in providing services or as a consultant to either party or any Associated Company of the PPP Co or is the holder of shares in either the PPP Co or any Associated Company of the PPP Co. The Adjudicator shall be under a continuing duty to disclose in writing to each party any such circumstances which may arise during the currency of the Adjudicator's appointment or any other fact or circumstance which might call into question his impartiality or independence. If both parties agree, or if on application by either party to the President for the time being of the Institution of Engineers of Ireland and that body so decides, the Adjudicator shall forthwith resign. A replacement Adjudicator shall be appointed in accordance with paragraph 2 of this Part 2 of [Clause 56 – Schedule].

3. **PROCEDURE FOR THE ADJUDICATION**

- 3.1 As soon as possible following agreement upon, or receipt of notification of, the selection of the Adjudicator and, wherever possible, having regard to the date of appointment of the Adjudicator, within [●] ([●]) Working Days of the date of service of the Adjudication Notice, the party referring the Dispute to Adjudication shall send a copy of the Adjudication Notice and its written statement of case to the Adjudicator accompanied by copies of any documents upon which the party wishes to rely and, at the same time, shall send a copy of all such materials to the other party.
- 3.2 The other party shall have the right to submit a written response within [●] ([●]) Working Days of receipt of the documents referred to in paragraph 4, together with copies of any documents upon which he wishes to rely, to the Adjudicator, and shall, at the same time, send a copy of all such materials to the referring party.
- 3.3 The Adjudicator shall have full power to take the initiative in ascertaining the facts and the Law. In particular, the Adjudicator shall have power to:
- 3.3.1 request clarification or additional information from either or both of the parties;
 - 3.3.2 make such site visits and inspections as he considers appropriate including for the avoidance of doubt directing that the Works be opened up for inspection;
 - 3.3.3 convene meetings upon reasonable notice to the parties at which both parties shall be entitled to be present;
 - 3.3.4 appoint his own advisers to advise on matters of legal interpretation or expertise outside his own area of expertise on which the parties are not agreed;
 - 3.3.5 open up, review and revise any decision, approval, recommendation or determination made, notice or certificate given by the Authority and/or the Authority's Representative;

3.3.6 make use of his own specialist knowledge.

Without prejudice to such powers a meeting shall be held at the request of either party to give both parties the opportunity to make oral submissions.

3.4 If either party fails to submit any written statement or respond to any request for clarification or information or fail to attend any meetings convened by the Adjudicator, the Adjudicator shall proceed with the Adjudication on the basis of the information supplied by the other party. Any communications passing between a party and the Adjudicator shall be copied to the other party.

4. **THE ADJUDICATOR'S DECISION**

The adjudicator shall reach his decision within [•] ([•]) working days of receipt by him of the adjudication notice or such longer period as is agreed by both parties after the dispute has been referred to the adjudicator. The adjudicator may extend the period of [•] ([•]) working days by up to [•] ([•]) working days with the consent of the party by whom the dispute was referred. If the adjudicator fails to reach a decision within the applicable time-frame his appointment shall cease and a replacement adjudicator shall be appointed in accordance with paragraph 2 above. The adjudicator's decision shall be in writing and shall set out the reasons for his decision.

5. **COSTS**

Each party shall bear its own costs in relation to any reference of a Dispute to Adjudication. The reasonable fees, costs and expenses of the Adjudicator in carrying out the Adjudication shall be borne by the parties in equal shares.

6. **IMMUNITY OF THE ADJUDICATOR**

The parties agree that the Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith, and any employee or agent of the Adjudicator shall be similarly protected from liability.

7. **INVOLVEMENT IN ARBITRATION**

The parties agree that the Adjudicator shall not be called as a witness to give evidence concerning any Dispute in respect of which he was appointed Adjudicator in any arbitration pursuant to this Agreement.

[CLAUSE 56 - SCHEDULE]

DISPUTES RESOLUTION PROCEDURE

PART 3

Terms of Appointment of Adjudicator¹

These terms of appointment of the Adjudicator are made between:

¹

Outstanding details to be inserted upon appointment of Adjudicator.

- (1) [] (the “**Authority**”);
- (2) [name of PPP Co] of [address of PPP Co] (“**PPP Co**”); and
- (3) [name of Adjudicator] of [address of Adjudicator] (“**Adjudicator**”).

WHEREAS

- A. The Authority and the PPP Co (the “**Parties**”) have on the [] day of [] entered into an agreement for [] (the “**Agreement**”).
- B. By Clause 56 of the Agreement provision is made for an Adjudicator to settle, in the first instance, all disputes arising out of or in connection with this Agreement (the “**Adjudication**”).
- C. The Adjudicator has agreed to serve on the terms set out herein.

NOW IT IS HEREBY AGREED as follows:

1. The Adjudicator shall act impartially as an independent expert and not as an arbitrator. The Adjudicator shall be under a continuing duty to disclose in writing to each Party any fact or circumstance which might call into question his impartiality or independence and in particular any appointment as director, office holder, any employment or personal engagement in providing services or acting as a consultant to either Party or any Associated Company of PPP Co or the acquisition of shares in PPP Co or any Associated Company of PPP Co.
2. The Adjudicator shall decide any Dispute referred to him under the Agreement and agrees to conduct the Adjudication in accordance with the provisions of Part 2 of [Clause 56 – Schedule] to the Agreement and the applicable law.
3. The Adjudicator shall have full power to take the initiative in ascertaining the facts and the law. In particular, the Adjudicator shall have power to:
 - (a) request clarification or additional information from either or both of the Parties;
 - (b) make such site visits and inspections as he considers appropriate;
 - (c) convene meetings upon reasonable notice to the Parties at which both Parties shall be entitled to be present;
 - (d) appoint his own advisers to advise on matters of legal interpretation or expertise outside his own area of expertise on which the Parties are not agreed;
 - (e) open up, review and revise any decision, approval, recommendation or determination made, notice or certificate given by the Authority’s Representative;
 - (f) make use of his own specialist knowledge.
- 3.2 Without prejudice to such powers a meeting shall be held at the request of either Party to give both Parties the opportunity to make oral submissions.
4. The Adjudicator shall reach his decision within [●] ([●]) Working Days of receipt by him of the adjudication notice or within the time allowed in accordance with Part 2 of [Clause 56 – Schedule] to the Agreement. The Adjudicator’s decision shall be in writing and shall set out the reasons for his decision.
5. Each Party shall bear its own costs in relation to any reference of a dispute to

Adjudication.

6. The Parties shall be jointly and severally liable for the fees and the reasonable costs and expenses of the Adjudicator in carrying out the Adjudication as follows:
- (a) The Adjudicator shall be paid a fee at the [hourly/daily] rate of Euro [] in respect of all time spent upon or in connection with the Adjudication (including travelling time).
 - (b) The Adjudicator shall be reimbursed in respect of all disbursements reasonably and properly incurred upon or in connection with the Adjudication including the cost of secretarial services, telephone calls, courier charges, faxes, travel expenses, hotel and subsistence cost upon production of a receipt in respect of such disbursements.
 - (c) The Adjudicator shall be paid a fee advance of Euro []. The Adjudicator shall be entitled to deliver an invoice in respect of the fee advance immediately following his appointment to each of the Parties in the amount of their respective share. This fee advance shall be deducted from the final statement of any sums due under items (a) and (b) above. If the final statement is less than the fee advance the balance shall be refunded to the Parties.
 - (d) The Adjudicator [is] [is not] currently registered for VAT.
 - (e) Where the Adjudicator is registered for VAT it shall be payable at the rate applicable at the date of any invoice.
 - (f) All payments shall become due [•] ([•]) Working Days after receipt of the Adjudicator's invoice. Thereafter interest shall be payable at [•]% ([•]percent) per annum above the applicable Euribor rate (to be determined in the same manner as the Agreement) for every day the amount remains outstanding.
7. The Parties agree that the Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and any employee or agent of the Adjudicator shall be similarly protected from liability. The Parties undertake to each other and to the Adjudicator that the Adjudicator shall not be called as a witness to give evidence concerning any Dispute in respect of which he was appointed Adjudicator in any arbitration proceedings pursuant to the Agreement.
- 7.1 The Parties and the Adjudicator and the Adjudicator's appointed advisers, if any, shall keep the fact that the Adjudication is taking place and its outcome confidential, and all documentation, information, data, submissions and comments disclosed whether in writing or otherwise by either Party to the Adjudicator (and if necessary its appointed advisers) either in connection with or in consequence of the Adjudication shall be regarded and treated as confidential (the "**Confidential Material**"). Such Confidential Material shall remain the property of the Party disclosing the same and all copies shall be returned to such Party on completion of the Adjudication. The obligations of confidentiality do not extend to the Parties or the Adjudicator for the purpose of:
- (a) consulting legal advisers in connection with the Dispute;
 - (b) consulting any expert or technical consultant in connection with the Dispute; or
 - (c) as otherwise required by law.

- 7.2 The Adjudicator's appointment shall be terminated:
- (a) if he fails to act in accordance with the terms and procedure as set out in this Appointment;
 - (b) by reason of misconduct of the Adjudicator;
 - (c) if he is unable for whatever reason to perform his obligations under this Appointment;
 - (d) at any time at the joint election of the Parties.

7.3 Where the termination of the appointment is due to the default or misconduct of the Adjudicator, the Parties shall not be liable to pay the Adjudicator's fees costs and expenses and any fee advance paid at the date of termination shall be refunded to the Parties within [●] ([●]) Working Days of the date of termination.

7.4 For all purposes relating to this Appointment the Parties' and the Adjudicator's addresses are as follows:

- (a) the Authority: []
- (b) the PPP Co: []
- (c) the Adjudicator: []

7.5 This Appointment shall be governed by, and shall be construed in accordance with, the laws of Ireland.

Signed by, for and on behalf of the Authority

in the presence of:

Signed by, for and on behalf of the PPP Co

in the presence of:

Signed by, for and on behalf of the Adjudicator.....

in the presence of:

ACCOMMODATION CONTRACT DRAFTING

[●] DISPUTE RESOLUTION PROCEDURE

[●].1 Any Dispute arising in relation to any aspect of this Agreement or the Project shall,

except where otherwise specifically provided be subject to the provisions of this Clause [●].

[●].2 Resolution through liaison

[●].2.1 If a Dispute arises in relation to this Agreement or the Project the Operator and the Minister (being represented by the Operator's Contract Manager and the Minister's Contract Manager respectively) shall use their best endeavours to resolve the Dispute within [●] ([●]) Working Days.

[●].2.2 If any Dispute is resolved by the Operator's Contract Manager and the Minister's Contract Manager pursuant to Clause [●].2.1 [above] a written memorandum, (a **Memorandum of Resolution**), shall be prepared jointly and signed by the Operator's Contract Manager and the Minister's Contract Manager. The Memorandum of Resolution shall confirm that the resolution is in full and final settlement of the Dispute and shall record all matters in issue and all material factual details of the Dispute and the terms of resolution and a copy shall be supplied to both the Operator and the Minister.

[●].2.3 If the Operator's Contract Manager and the Minister's Contract Manager fail to resolve any Dispute pursuant to Clause [●].2.1 within [●] Working Days of the referral of the Dispute for resolution under Clause [●].2.1, either Party may refer the Dispute to an adjudicator (the **Adjudicator**) appointed in accordance with Clause [●].3 (Adjudication), (the **Adjudication Referral**). The referral shall be in the form of a memorandum, (a **Memorandum of Referral**), prepared jointly and signed by the Operator's Contract Manager and the Minister's Contract Manager. If the Operator's Contract Manager and the Minister's Contract Manager are unable to agree the form of the Memorandum of Referral within [●] ([●]) Working Days of the date upon which they failed to resolve the relevant Dispute either or both of them may submit a Memorandum of Referral pursuant to this Clause [●].2.3. The Memorandum of Referral shall record all matters in issue and the material factual details of the Dispute.

[●].3 Adjudication

[●].3.1 As soon as reasonably practicable and before the longstop dates referred to in this Clause [●].3.1, the Parties shall jointly appoint a panel of experts, (the **Adjudication Panel**), which shall be comprised of [●] ([●]) experts, [●] ([●]) of whom shall be competent to adjudicate in relation to matters of a construction nature, (the **Construction Expert (s)**), [●] ([●]) of whom shall be competent to adjudicate upon matters concerning operational issues, (the **Operational Expert(s)**), [●] ([●]) of whom shall be competent to adjudicate upon matters relating to financial matters, (the **Financial Expert(s)**), and [●] ([●]) who shall be competent to adjudicate upon legal matters, (the **Legal Expert(s)**). The Parties shall ensure that:

[●].3.1.1 the Construction Expert is appointed within [●] ([●]) days from the date hereof;

[●].3.1.2 the Operational Expert is appointed prior to the Final Certification Date;

[●].3.1.3 the Financial Expert is appointed within [●] ([●]) days from the date hereof;

[●].3.1.4 the Legal Expert is appointed within [●] ([●]) days from the date

hereof; and

- [●].3.1.5 in the event that the Parties shall fail to appoint any expert to the Adjudication Panel on or before the relevant dates referred to in this Clause [●].3.1, the matter shall be referred to the Chairman for the time being of the Chartered Institute of Arbitrators – Irish Branch who shall nominate the required expert(s). The Parties shall then appoint such nominee(s) to the Adjudication Panel.
- [●].3.2 Each member of the Adjudication Panel shall:
 - [●].3.2.1 be wholly independent of the Operator, the Minister and any relevant Sub-Contractor;
 - [●].3.2.2 be appointed in writing and confirmation of his agreement to act in accordance with this Clause [●] shall be secured in writing;
 - [●].3.2.3 if any member of the Adjudication Panel resigns, dies or becomes seriously ill or unavailable for any significant period at any time during the course or his appointment, the Operator and the Minister shall jointly appoint a replacement expert to the Adjudication Panel as soon as practicable; and
 - [●].3.2.4 if the Minister and the Operator are unable to agree on the identity of any replacement expert to be appointed to the Adjudication Panel or as to whether any Adjudication Referral should be made to the Construction Expert(s), the Operational Expert(s), the Financial Expert(s) or the Legal Expert(s); then the expert shall be appointed by the Adjudication Panel or a determination made by the Adjudication Panel as to which expert is the most appropriate to adjudicate the Adjudication Referral within [●] ([●]) Working Days of a written request by either Party.
- [●].3.3 Within [●] ([●]) Working Days of his appointment in relation to any Dispute the Adjudicator shall require the Parties to submit in writing their respective arguments. The Parties in making their claims shall in their response to the Adjudicator provide all supporting evidence relating to the Dispute. The Adjudicator shall, in his absolute discretion, resolve whether a hearing is necessary in order to resolve the Dispute. The Adjudicator shall be master of his own proceedings and shall have the power to call for such additional documents and evidence from the Parties as he shall, in his absolute discretion, require.
- [●].3.4 In any event, the Adjudicator shall provide to both Parties his written decision on the Dispute, within [●] ([●]) Working Days of the relevant Adjudication Referral, (or such other period as the Parties may unanimously agree). The Adjudicator shall state in writing his reasons for his decision at the same time that he provides the Parties with his written decision.
- [●].3.5 Unless and until the Dispute is finally determined by arbitration or by a written agreement between the Parties, the Adjudicator's decision shall be binding on both Parties, who shall forthwith give effect to the decision. If either Party does not comply with the Adjudicator's decision, the other may bring legal proceedings to secure such compliance.
- [●].3.6 The Adjudicator's costs arising out of any Adjudication Referral shall be borne as the Adjudicator shall specify or, in default, equally by the Parties. Save where otherwise determined by the Adjudicator, each Party shall bear its

own costs arising out of the Adjudication Referral, including legal costs and costs and expenses of any witnesses.

[●].3.7 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an expert and the provisions of the Arbitration Acts 1954 to 1998 and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his decision.

[●].3.8 The Adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement. He may use his own knowledge and experience. He may visit the Site and/or the Facility. He may, (acting reasonably), require the Parties to submit any information, or to conduct tests, and the Parties shall do so. He may, having first notified the Parties as to likely costs, obtain from other persons information and advice, including information and advice on relevant legal and technical matters.

[●].3.9 All information, data or documentation disclosed or delivered by a Party to the Adjudicator or to another party in consequence of or in connection with the appointment of the Adjudicator shall be treated as confidential, but may be offered as evidence in any subsequent court proceedings. The Adjudicator shall not, save as permitted by Clause [●] (Information and Confidentiality), disclose to any person, (other than the Parties), any such information, data or documentation and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Adjudicator's work. All communications between the Adjudicator and a Party shall be copied to the other Party.

[●].3.10 The Adjudicator shall not be held liable for anything done or omitted in the discharge or purported discharge of his function as adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator shall be similarly protected from liability.

[●].4 Consideration of Sub-Contractor Disputes

[●].4.1 If any Dispute arising under this Agreement raises issues which relate to:

[●].4.1.1 any Dispute between the Operator and the Building Contractor arising under the Building Contract or otherwise affects the relationship or rights of the Operator and/or the Building Contractor under the Building Contract, (a **Building Contract Dispute**);

[●].4.1.2 any Dispute between the Operator and the FM Co. arising under the FM Contract or otherwise affects the relationship or rights of the Operator and/or FM Co. under the FM Contract, (a **Facilities Management Contract Dispute**),

then the Operator may include as part of its submissions made to the Adjudicator pursuant to the Adjudication Referral, submissions made by the Building Contractor or FM co., as appropriate.

[●].4.2 Any submissions made pursuant to Clause [●].4.1 shall:

[●].4.2.1 be made within the time limits applicable to the delivery of submissions by the Operator; and

[●].4.2.2 concern only those matters which relate to the Dispute between the Minister and the Operator under this Agreement or the Project.

However, for the avoidance of doubt, the Adjudicator shall also be entitled to make decisions in relation to the Building Contract and the FM Contract.

[●].4.3 In any Adjudication Referral where submissions include submissions made by the Building Contractor or FM Co. the Adjudicator's costs shall be borne, (as between the Operator and the Minister) as the Adjudicator shall specify, or in default, [●] by the Minister and [●] by the Operator. Save where otherwise determined by the Adjudicator, each Party shall bear its own costs arising out of the Adjudication Referral, including legal costs and costs and expenses of any witness.

[●].4.4 The Minister shall have no liability to the Building Contractor or FM Co. arising out of or in connection with any decision of the Adjudicator pursuant to any Adjudication Referral or in respect of the costs of the Building Contractor or the FM Co. in participating in the resolution of any Dispute under this Agreement.

[●].4.5 The Operator shall not allow the Building Contractor or the FM Co. access to any document relevant to the issues in Dispute between the Minister and the Operator save where:

[●].4.5.1 the document is relevant also to the issues relating to the Building Contract Dispute or the Facilities Management Contract Dispute, as the case may be; and

[●].4.5.2 the evidence able to be presented by the Building Contractor or the FM Co. relating to such document is relevant to the issues which are the subject of the Dispute between the Operator and the Minister; and

[●].4.5.3 the Operator has delivered to the Minister a written undertaking from the Building Contractor and/or FM Co, (as appropriate), addressed to the Minister that they shall not use any such document otherwise than for the resolution of the relevant Dispute pursuant to this Clause [●] and that they shall not disclose such documents or any information contained therein to any person other than the Adjudicator or any professional adviser engaged by the Building Contractor or the FM Co. (as appropriate), to advise in connection with the Dispute.

[●].5 Final resolution

[●].5.1 Unless the Parties have agreed that the Adjudicator's decision will be final, either Party may, refer the Dispute to arbitration in accordance with clause [●].5.4.

[●].5.2 If the Parties have agreed that the Adjudicator's decision will be final, or if neither Party refers the Dispute to arbitration in accordance with clause 35.5.4 the Adjudicator's decision will be final and binding on both Parties.

[●].5.3 If a Dispute is referred to arbitration under Clause [●].5.4 the Adjudicator's or parties costs which either Party has incurred in the preceding Adjudication Referral shall be open to the arbitrator to redetermination as the arbitrator thinks fit.

[●].5.4 At any time, within [●] ([●]) Working Days after both Parties have received the decision of the Adjudicator together with his reasons pursuant to Clause [●].3.4, the Dispute may be referred by either Party, on notice to such effect in writing to the other Party, for determination by a person with appropriate expertise as the Parties may agree to appoint as arbitrator, or failing agreement within [●] Working Days of the date of such notice, to a person with appropriate expertise as may be appointed at the request of either Party by the Chairman called for the time being of the Chartered Institute of Arbitrators, Irish Branch.

[●].5.5 Any such Dispute referred to arbitration pursuant to Clause [●].5.4 shall be deemed to be a submission to arbitration in accordance with the Arbitration Acts, 1954 – 1998 or any Act amending same. The award of the arbitrator shall be final and binding on the Parties, and shall be the sole and exclusive remedy between the Parties regarding any claims, counterclaims, issues, or accountings presented to the arbitrator except in the following cases:

- [●].5.5.1 where there has been misconduct by the arbitrator;
- [●].5.5.2 where there has been an error on the face of an award;
- [●].5.5.3 where the arbitrator has made a mistake in drawing up his award;
- [●].5.5.4 where new substantial relevant evidence was discovered after the making of the award;
- [●].5.5.5 where it is considered to be inequitable to allow the award to take effect without some further consideration;
- [●].5.5.6 where the arbitrator has been found guilty of misconduct; or
- [●].5.5.7 where the arbitrator or award has been improperly procured.

[●].5.6 Judgement upon any award may be entered in any court having jurisdiction. Each Party shall bear its own expenses, but the Parties shall share equally the expenses of the arbitrator.

[●].5.7 This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in any arbitration proceeding hereunder.

[●].5.8 If the Dispute to be referred to arbitration under this Agreement raises issues which are substantially the same as or connected with issues raised in related disputes between any Party to this Agreement and any other person, the Parties agree that the arbitrator appointed under this Agreement shall have power to make such directions and all necessary awards in the same way as if the procedure of the High Court as to joining one or more Defendants or co-joining Defendants or Third Parties was available to the Parties and to him.

[●].6 Continuing obligations

The Parties shall continue to comply with their respective obligations in accordance with this Agreement without interruption during any adjudication or arbitration proceedings.

[●].7 Fast Track Procedure

[●].7.1 If the Fast Track Procedure applies:

- [●].7.1.1 Clause [●].2 (Resolution through liaison) shall not apply;
- [●].7.1.2 either Party may immediately refer the matter to an Adjudicator by issuing a Memorandum of Referral as set out in Clause [●].2.3; and
- [●].7.1.3 the Dispute shall be dealt with pursuant to Clause [●].2.3 except that the time for submission by the Parties set out in Clause [●].3.3 shall be [●] ([●]) Working Days.

[●].7.1 The Fast Track Procedure shall apply to any Dispute contemplated under the following provisions/schedules of this Agreement:

- [●].7.2.1 Clause [●] (Final Commission Programme);
- [●].7.2.2 Clause [●] (Disputed Invoices);
- [●].7.2.3 Schedule [●] (Design Development Procedure); and
- [●].7.2.4 any other provision which expressly provides for the Fast Track Procedure to apply or where the Parties agree that the Fast Track Procedure should be used.

CROSS REFERENCES

This clause is referred to in the following clauses of the Compendium:

- Clause 3 (Effectiveness of this Agreement)
- Clause 34 (Change)
- Clause 42 (Set-Off)
- Clause 48 (Insurance)
- Clause 53 (Effect of Termination)
- Clause 64 (Governing Law and Jurisdiction)

There are no references to this clause in the Risk Matrix:

Comment: D25 (Dispute Resolution) deals with disputes between those operating and maintaining the asset and those delivering the service. The mechanism for resolving disputes between the Authority and the PPP Co is not one for a Risk Matrix, and does not appear there.