ACEI ASSOCIATION OF CONSULTING ENGINEERS OF IRELAND

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Advice Note

Net Contribution Clause in Consultant Appointments

This Advice Note provides guidance for ACEI member firms on the legal position regarding the inclusion of a Net Contribution Clause (NCC) in Consultant Appointments for the provision of professional services and in Collateral Warranties.

In the first instance, Member firms are strongly encouraged to insist on the inclusion of a Net Contribution Clause into appointments in order to rebalance the distribution of risk to a manageable level.

ACEI has obtained specific **Legal Advice** on this matter and this advice is summarised in the **Appendix** to this Advice Note.

The Advice clearly concludes that under the law as it stands in Ireland, a court would be likely to give effect to a Net Contribution Clause properly incorporated in an agreement between commercial parties.

The Appendix may be issued to clients and their legal representatives to counter any argument that the Civil Liability Act precludes the effectiveness of such a clause.

Where a consultant enters into an appointment without the benefit of a Net Contribution Clause, it may be subject to the "1% rule" under the Civil Liability Act – 1% established liability can result in the member firm incurring 100% of the cost associated with a claim.

The above risk arises because other concurrent wrongdoers, including contractors, may be much more at fault, but may no longer be trading or may not have the same level of insurance cover or may have exclusions in their policies meaning the claimant cannot recover from them.

The lack of NCCs resulted in the exit of a number of major insurers from the professional indemnity market for engineers, making it more challenging and expensive for Consulting Engineers to obtain adequate cover. One example was where the Managing Director of AIG, one of the largest insurers in the world, gave the following evidence to an Oireachtas Committee as to why AIG stopped writing PI policies in 2015:

"Under the Civil Liability Act, finding even a 1% element of liability means that the engineer or architect, as the case may be, ends up having the whole book thrown at them and the insurer has to stand behind that indemnity..... AIG was in that sector and exited in 2015 as a result of the heavy losses."

It is particularly important that a Net Contribution Clause is included in the Consultant's Appointment where some clients insist on including a "Design Responsibility Matrix" (DRM) in the Consultant's scope. It is agreed in the industry that it is the Contract that ultimately decides on where Design Responsibility and Liability lies. The recently issued ACEI "Scope Change/Risk Transfer Advice Note" should be read in conjunction with this Advice Note.

7th May 2025

Advice Note
Net Contribution Clause; Appendix

The standard ACEI Net Contribution Clause is as follows:

Notwithstanding anything to the contrary contained in this Agreement and without prejudice to any provision in this Agreement whereby liability is excluded or limited to a lesser amount, the liability of the Consultant, if any, for any loss or damage shall not exceed such sum as it would be just and equitable for the Consultant to pay having regard to the extent of their responsibility for the said loss or damage and on the assumptions that:

i all other Consultants and all Contractors and Sub-Contractors shall have provided contractual undertakings on terms no less onerous than those set out in Clause 5.1 to the Client in respect of the carrying out of their obligations

ii there are no exclusions of or limitations of liability nor joint insurance or co-insurance provisions between the Client and any other party referred to in this clause and any such party who is responsible to any extent for the loss and damage is contractually liable to the Client for the loss and damage; and

iii all the parties referred to in this clause have paid to the Client such proportion of the loss and damage which it would be just and equitable for them to pay having regard to the extent of their responsibility for the loss or damage.

In the absence of a Net Contribution Clause, such as the above, the Civil Liability Act, 1961, states that, subject to the provisions of sections 14, 38 and 46 of the Act, concurrent wrongdoers are each liable for the whole of the damage in respect of which they are concurrent wrongdoers. This is often referred to as the 1% rule, where 1% established liability can lead to 100% liability.

ACEI has received legal advice that there does not appear to be any sound reason why a Net Contribution Clause such as outlined above should not be given effect. The advice highlighted Clauses 35(1)(f) and (g) of the Act, which state:

(f) where the plaintiff's damage was caused by two or more persons and such persons would have been concurrent wrongdoers were it not for a contract by the plaintiff with one of such persons before the occurrence of the damage exempting that person from liability, the plaintiff shall be deemed to be responsible for the acts of that person;

(g) where the plaintiff's damage was caused by concurrent wrongdoers and before the occurrence of the damage the liability of one of such wrongdoers was limited by contract with the plaintiff to a sum less than that wrongdoer's just share of liability between himself and the other wrongdoer as determined under section 21 apart from such contract, the plaintiff shall be deemed to be responsible for the acts of that wrongdoer;

The advice stated that the limitation under a Net Contribution Clause is less onerous than either of the above scenarios, in that the liability of the wrongdoer with whom the agreement is reached is only to his just share of liability.

It further noted that such an outcome would be fully consistent with the approach of the courts of Northern Ireland, Scotland, and England and Wales, whose decisions are based on a similar statutory backdrop and would, in the normal way, represent persuasive authorities if opened to an Irish Court.

The legal advice is that, under the law as it stands in Ireland, a court would be likely to give effect to a Net Contribution Clause properly incorporated in an agreement between commercial parties, with respect both to direct contractual claims, and to claims based on tort but arising between the contracting parties and based on the duty of care arising from the contract.

An example of where a Net Contribution Clause is absolutely critical is a Design Responsibility Matrix (DRM). When Member Firms sign a DRM for a project, they should insist on the inclusion of a Net Contribution Clause in both the Engineer's Conditions of Engagement and in any Collateral Warranties.