

# ARBITRATION NEWS

The Newsletter of the Irish Branch of The Chartered Institute of Arbitrators



Irish  
Branch

**CIArb**

Issue 26 December 2007

## CHAIRMAN'S ADDRESS



*Joe Behan,  
Chairman Irish Branch*

Since the AGM in April 2007 we have delivered a range of events which have been extremely well supported by you, the members.

First off, we had the Annual Golf outing in June, which attracted over 70 participants to this new look event held in Powerscourt. The teams played for the Inaugural Dan McCrystal Trophy which was won by O'Connor Farage O'Brien with a fantastic winning score.

In the autumn we held a course on Award Writing, which was lead by Dr. Nael Bunni. Dr. Bunni is a very generous contributor to the Branch and the event was fully booked out.

On the courses side, we have held two Introduction to Arbitration courses in association with the Insurance Institute of Ireland. We have also run an Introduction to Mediation Course for the Health Service Executive in Tullamore. All of these courses were fully attended and a testament to the continued desire of people to have good quality courses put in place. I would particularly like to thank all the tutors involved on these courses for giving so generously of their time, which were all held during the working week.

We had a visit from our President Mr. Hew Dundas, who gave a lecture in the Mansion House, attended by over 75 people and afterwards a presentation was made to all the new Fellows and a wine reception followed.

On the day that Hew Dundas was in Dublin, we also met a delegation from the Scottish Parliament and I am grateful to John O'Brien and Rowena Mulcahy for giving up their time to assist me with this delegation in the promotion of Arbitration and a new Arbitration Act in Scotland.

In October we held a workshop on Consumer Arbitration. The workshop took place on a Saturday morning and was fully booked.

In early November we held an International Conference on Dispute Resolution in the College of Physicians. That week was historic for the Branch given that it was the first time ever that the Trustees met in Dublin. They met for two days, following which

the Branch Officers from around the world held a one day meeting. The course of events included dinner in No. 10 Ormond Quay, a wine tasting event and the Branch Officers Dinner held in the Shelbourne Hotel attended by Dr. Ian Paisley and his wife. It was the Baroness Paisley's Birthday and there was celebration in full on the night with a traditional Irish band providing the entertainment.

The two-day Conference and Gala Dinner was a huge success, the highlight of which was the lunchtime address given by Dr. Ian Paisley. The magnificent group Anuna provided the entertainment for the Gala Dinner. We had visitors from the five continents of the world in Dublin for this conference.

The Branch is extremely grateful to all the speakers and

### Items of Interest in this Issue ...

- **Chairman's Address**
- **New Fellows**
- **Membership**
- **Events**
- **Article by Hew Dundas**
- **Legal Brief**
- **Diary**

*/Cont. on Page 2/*



**Dr. Ian Paisley was Guest Speaker of the International Conference on ADR held by the Irish Branch of the Chartered Institute of Arbitrators on 3 & 4 November 2007.**

**More information on Page 3.**

## /cont./ Chairman's Address

*/Cont. from Page 1/*

facilitators who gave up their time freely to the Branch for this conference. This conference was a major undertaking for the Branch and the sub-committee involved in putting the event together are to be congratulated for such a memorable event which received a tremendous appreciation from all who attended.

We have just had our Annual Dinner in the Westin Hotel with our guest of honour being the Chief Justice. He gave us a very entertaining and interesting talk which was very favourably received by all who attended. For the first time ever we had live entertainment, the singer Liz Ryan provided the entertainment and was a fantastic success. It was one of the most memorable annual dinners ever held.

I am looking forward to the New Year, when we will be holding an Introduction to Arbitration Course on the 19<sup>th</sup> January 2008 following an Introduction to Mediation Course on the 26<sup>th</sup> January 2008. Both of these courses are being held in the Grand Hotel, Malahide, Co Dublin.

In February we are holding an Introduction to Mediation Course which will be run by the Northern Chapter at a venue to be agreed.

We are currently setting up an Accredited Mediation Course for June 2008, which will be held in Dublin.

A number of other additional events are planned and will be announced in the New Year. Interviews will be held in the New Year for the new panel of assessors for the NRA/IFA Scheme. An announcement will also be made in relation to the new Government Contracts where we have been appointed as a nominating body. It is also our intention, in the New Year, to undertake a conciliator training course in association with Engineers Ireland.

I would like to take this opportunity to wish all our members and their families and Happy and Peaceful Christmas and a Prosperous New Year.

Joe Behan  
Chairman

## News

### 15 More Fellows!

On 31 May 2007 the Branch held its second round of Peer Interviews for Fellowship. This procedure is for members who have attained Membership status via a Diploma course in Arbitration such as that held each year at UCD.

Members who attended on the afternoon of 31<sup>st</sup> were treated to a talk on ethics and the internal workings of the Institute by Roy Sherlock and were later interviewed by Anthony Hussey, John FFF O'Brien and Roy.

The following members attained the status of Fellow: Jack Anderson, Gary Bogle, Thomas Byrne, John Curtin, Lisa Dunne, Siobhan Fahey, Larry Fenelon, Robert Gillan, Mark Hutch, James Kinch, Charles Mitchell, Edmond Murphy, Patrick McOscar, Kenneth O'Connor and Dudley Potter.

We intend to run a similar event in 2008. Those of you who have already expressed an interest in attending the event will be contacted directly; anybody else who is interested in the event, please contact the Branch Office. This is a relatively painless way to attain Fellowship and I would urge everybody who has obtained a UCD Diploma to make effort.

Roy Sherlock

## MEMBERSHIP

**A word of welcome to the following who were recently admitted to the Irish Branch**

Mr. G. Brady (Dublin)  
Mr. G. Connolly (Dublin)  
Mr. J. Bolger (Dublin)  
Mr. J. O'Brien (Dublin)  
Mr. M. Neary (Co Dublin)  
Mr. M. Madden (Dublin)  
Mr. J. Thompson (Derry)  
Mr. M. J. Mollin (Co Offaly)  
Mr. M. J. Hughes (Tyrone)  
Mr. J. Buckley (Co Kerry)  
Mr. A. Bashford (Co Wicklow)

Ms A. Barrett (Dublin)  
Mr. L. F. W. Leader (Cork)  
Mr. S. O'Neill (Co Wicklow)  
Mr. F.E. Harding (Dublin)  
Mr. E. Heavey (Co Kildare)  
Mr. T. Woodbyrne (Co Wicklow)  
Ms J. M. Kelly (Co Dublin)  
Mr. C. Browne (Dublin)  
Mr. R. Moore (Galway)  
Mr. P.G. Grealish (Co Galway)  
Ms H. Eimear (Limerick)

Mr. T. Doran (Dublin)  
Mr. T. J. O'Sullivan (Co Cork)  
Mr. A. J. O'Beirne (Dublin)  
Mr. P.J. Power (Limerick)  
Mr. K. Mooney (Belfast)  
Ms E. Moloney (Cork)  
Ms L. Colley (Kildare)  
Ms A. C. Walsh (Dublin)  
Mr. E. Magee (Dublin)  
Mr. D. Gaffney (Cork)  
Mr. N.P. McGuinness (Belfast)

## EVENTS

# International Conference 2007 *Dispute Management: Practice & Promise*

The Irish Branch of the Chartered Institute of Arbitrators hosted The International Conference 2007 on *Dispute Management: Practice & Promise* on 3 & 4 November 2007 in the Royal College of Physicians, Dublin.

On the first day six of the world's leading ADR practitioners and academics Derek Roebuck (UK), Brian Hutchinson (Ireland), Steve Certilman (USA), Teresa Cheng (Hong Kong), Tony Canham (UK), Nael Bunni (Ireland) made presentations on such topics as The History of Dispute Management, The Future—An Academic View, The North



*Rt Hon Dr. Ian Paisley MP MLA, First Minister of Northern Ireland, was invited by Joe Behan, Chairman Irish Branch, as the Guest Speaker at the International Conference on ADR*

American Perspective, The Asian Perspective, The UK Perspective, The Irish Perspective. The presentations were followed by an open forum debate.



*Joe Behan, Chairman Irish Branch; Dr. Ian Paisley; Hew Dundas, President of the Chartered Institute of Arbitrators*



*Anthony Hussey, Hon. Secretary; Joe Behan, Chairman Irish Branch; Dr. Ian Paisley; Ciaran Fahy, Vice-Chairman; John FFF O'Brien, Public Relations Officer*

The lunchtime was highlighted by an address given by the Guest Speaker Rt Hon Dr. Ian Paisley MP MLA, First Minister of Northern Ireland.

In the afternoon a mock arbitration and mediation took place simultaneously on one stage which were facilitated by David Richbell and Bernard Gogarty.

There was a Gala Dinner on Saturday night with entertainment by *Anuna*, an internationally acclaimed Irish group.

The second day featured workshops in Arbitration / Adjudication and Mediation / Conciliation. The workshops were facilitated by Ciaran Fahy, Niall Lawless, Jim Bridgeman, Larry Fenelon, Tony Canham, Colin Wall, John Horgan, Martin Lang, Petria McDonnell and Richard



*On behalf of the Irish Branch Ciaran Fahy, Vice-Chairman, made a presentation to Dr. Ian Paisley*

Stowe. The topics included Consumer Arbitration In Practice, EU-China Online Arbitration Project, The Future for Intellectual Property Disputes, Sports Arbitration—Growth Industry?, Institutional Appointments in Practice, The Hong Kong Approach, What Does It Take To Be A Successful Practitioner?, Staying Friends and In Business In Construction, Staying Afloat in Maritime Disputes, The Australian Approach.

The conference was a huge success and it concluded a significant week for the Branch given that it was preceded by the Trustees meeting held in Dublin for the first time ever and Branch Officers from around the world meeting.

## EVENTS

### International Conference 2007 *Dispute Management: Practice & Promise*



*Joe Behan, Chairman Irish Branch; Baroness Paisley; Dr. Ian Paisley; Ian Adamson (D.U.P); Ciaran Fahy, Vice-Chairman*



*Baroness Paisley; Dr. Ian Paisley; Joe Behan, Chairman Irish Branch*



*Joe Behan, Chairman Irish Branch; Dr. Ian Paisley; Doug Jones, Chairman Board of Trustees; Michael Forbes-Smith, Director General*



*Dr. Ian Paisley and John Riches*



*Dr. Ian Paisley; Joe Behan, Chairman Irish Branch; Brian Adamson; Anne Doherty*



*Thaw Sing Chong (Malaysia) and Dr. Ian Paisley*

## EVENTS

### International Conference 2007 *Dispute Management: Practice & Promise*



*Joe Behan, Chairman Irish Branch; Dr. Ian Paisley; Baroness Paisley; Ruth Behan*



*Colin Wall, Past President CIARB; Dr. Ian Paisley; Joe Behan, Chairman Irish Branch*



*Dr. Ian Paisley and John FFF O'Brien, PRO*



*Jeffrey Elkinson (Bermuda Branch); Dr. Ian Paisley; Joe Behan, Chairman Irish Branch*



*John Campbell QC; Dr. Ian Paisley; Kate Knight*



*Stuart Le Ruez-Lane; Johnnie McCoy; Dr. Ian Paisley*



*Dr. Ian Paisley and Pratim Kumar Ghose (Thailand)*

# EVENTS

## Annual Dinner

The Annual Dinner of the Branch was held in the Westin Hotel, Dublin. The guest of honour was The Honourable Mr. Justice John L. Murray, Chief Justice. The Branch was delighted to have Mr. Hew Dundas, President of the Chartered Institute of Arbitrators as invited guest as well as the other invited guests: Mr. Aidan Cassells, President of the Insurance Institute of Ireland; Mr. Ken Cribbin, Vice-President of the Society of Chartered Surveyors; Barry Finlay, Junior Vice-President of the Law Society of Northern Ireland; Mr. Robert Ganly, President of the Irish Auctioneers and Valuers Institute; Mr. Bob Hartle, Senior Vice-Chair of the Chartered Institute of Building; Mr. Mark Hudson, Chairman of the Institution of Civil Engineering Surveyors; Ms Laura Magahy, President of the Institute of Directors; The Hon. Mr. Justice Roderick Murphy; Mr. & Mrs. David & Catriona O'Brien; Mr. Henry Toner, The Bar Council of Ireland; Mr. Eamonn Waldron, President of the Association of Consulting Engineers of Ireland.



Johnnie McCoy; John FFF O'Brien, PRO; Rowena Mulcahy; Anthony Hussey, Hon. Secretary; Joe Behan, Chairman; The Hon. Mr. Justice John L. Murray, Chief Justice; Ciaran Fahy, Vice-Chairman; Aedan McGovern; Michael Murphy; John Glynn

Over 120 people attended the dinner which was most enjoyable and memorable. Wonderful entertainment was provided by Liz Ryan, singer.



Joe Behan, Chairman Irish Branch; Ruth Behan; The Hon. Mr. Justice John L. Murray, Chief Justice; John FFF O'Brien, PRO



Hew Dundas, President of the Chartered Institute of Arbitrators; Joe Behan, Chairman of the Irish Branch; The Hon. Mr. Justice John L. Murray, Chief Justice



Bob Hartle, Senior Vice-Chair of the Chartered Institute of Building; Joe Behan, Chairman Irish Branch; Robert Ganly, President of Irish Auctioneers and Valuers Institute



Joe Behan, Chairman Irish Branch and Aidan Cassells, President of the Insurance Institute of Ireland



Mark Hudson, Chairman of the Institution of Civil Engineering Surveyors; Joe Behan, Chairman Irish Branch; Eamonn Waldron, President of Association of Consulting Engineers of Ireland



Laura Magahy, President of the Institute of Directors and Joe Behan, Chairman Irish Branch



Joe Behan, Chairman Irish Branch; Eamonn Waldron, President of Association of Consulting Engineers of Ireland; Ken Cribbin, Vice-President of the Society of Chartered Surveyors



David O'Brien; Joe Behan, Chairman Irish Branch; The Hon. Mr Justice John L. Murray, Chief Justice

## EVENTS

### Annual Golf Outing

This year's Annual Golf outing was on the Championship course at Powerscourt in Enniskerry, Co. Wicklow which was in magnificent condition as the President's prize was being played the following day. The event was a complete change from previous CI Arb golf outings and proved to be an outstanding success. We had 68 golfers and almost 70 for dinner after the competition. The format was a four-ball team scramble event which proved to be very exciting with fierce competition with only 1.6 strokes separating 1<sup>st</sup> place and 3<sup>rd</sup> place! The following companies entered a team in to this year's event:

Deloitte & Touche, Noonan Services Group, The Royal Institute of Architects of Ireland, Johnston Kennedy, Ascon Ltd, Ferrovia Agroman Ireland, McCann Fitzgerald, Clonmel Enterprises, O'Connor Farage O'Brien, CRH, SIAC Construction, Matheson Ormsby Prentice, Ciaran Fahy Consulting Engineer, Roughan ADR Services, JP Behan Associates, Hussey Fraser Solicitors and Savills Hamilton Osborne King.

The teams were competing for The Daniel B. McCrystal Perpetual Trophy in memory of the late Dan McCrystal, an active and well respected member of the Chartered Institute of Arbitrators. His daughters Aoife and Maeve attended the dinner and presented the solid silver trophy to the winners.

Each team had their photograph taken with our Chairman by a professional photographer on the 1<sup>st</sup> tee and each shall be presented by the Branch with their photograph as a memento of the day. The rain did its best to ruin the day but save for two 10 minute downpours. The evening cleared and the later teams enjoyed the last few holes with panoramic views of the Wicklow mountains drenched in evening sunlight, a perfect end to a perfect day.



*1st Place O'Connor Farage O'Brien team*

**3rd Place:** Deloitte & Touche with 61.2 strokes (Team Handicap 6.8). Team Members: Michael Moran (20) Aidan O'Connell (16), John Doyle (20) and Barry O'Neill (12).

**Ladies Longest Drive:** Nicola Roughan (8) playing on Roughan ADR Services team.

**Mens Longest Drive:** Seamus Fagan (11) from SDCC playing on Clonmel Enterprises team.

**Nearest the Pin:** Paul Brickley (18) playing on Matheson Ormsby Prentice team.

The Branch was delighted for such a huge turn out of teams and intends to increase the amount of teams for next year's challenge for the Daniel B. McCrystal Trophy with a shot-gun start. We shall advise our members of the next prestigious venue in our next newsletter, remember to book early to avoid disappointment.

John FFF O'Brien  
CI Arb golf event coordinator

The results of the competition were as follows:

**Winners:** O'Connor Farage O'Brien with 59.6 strokes (Team Handicap 5.4). Team Members: John FFF O'Brien (12), Brian M. O'Connor (20), Kevin O'Connor (18) and Vincent Downes (4).

**Runners Up:** Ferrovia Agroman Ireland with 60.9 Strokes (Team Handicap 6.1). Team Members: Kieran O'Brien (9), Noel Skelton (12), John McKenna (20), and Oisín Rouane (20).



*3rd Place Deloitte & Touche Team*

## Events

### Presidential Visit



The Branch was honoured with a visit from the President of the Chartered Institute of Arbitrators, Hew Dundas. Hew addressed a

gathering that included recent Fellows and members at the Oak Room of the Mansion House by kind permission of the Rt. Hon. The Lord Mayor. After his speech, Hew answered questions from the floor. The Branch Chairman presented a letter of commendation to each new fellows of the Institute. A summary of Hew's presentation is printed below.



**Top Left to Right:** Rowena Mulcahy; Johnmie McCoy; Roy Sherlock; John FFF O'Brien; Brian Anderson; Aedan McGovern; Anthony Hussey; Michael Murphy; Mary Griffith  
**Bottom Left to Right:** Joe Behan, Chairman Irish Branch and Hew Dundas, President of the Chartered Institute of Arbitrators

## Article

### Expert Determination: a More Effective Way of Resolving Disputes

By Hew R. Dundas

Chartered Arbitrator DiplCarb CEDR-Accredited Mediator, International Arbitrator, Mediator and Expert Determiner



The origins of arbitration lie in mediæval times where, for example, two cloth merchants in dispute over the sale and purchase of a bale of cloth would invite a mutually-respected colleague to decide the issue. Since those days, arbitration has acquired a great deal of 'baggage' particularly by way of rules and procedures with the consequence that arbitration can be (and too often is) slow and expensive. Businessmen often want (if their lawyers would allow them) a quicker, cheaper alternative. ED is one such alternative, offering a very powerful solution to the majority of commercial disputes. A major key to, and advantage of, ED is speed: determinations can be made in minutes/days/weeks as required. Soccer referees and other sporting decision-makers make instant decisions all the time – this is essential for the flow of the game – and there is no difference in principle with commercial disputes. Importantly, the English law of ED is well-developed with a line of leading authorities establishing its bases and defining its limits; the law is all common law, there being no relevant statute.

In ED, a third party neutral selected by the parties decides the dispute, whether factual, valuation or legal; the ED-er is selected for, and expected to use, his expertise and can do so in a manner denied to an arbitrator. Any matter can be referred to ED whereas certain matters are not arbitrable. If the parties agree on any procedure, the ED-er is obliged to follow it, otherwise he has a free hand (this is the preferable/recommended approach). An arbitrator is obliged by law to decide matters on the basis of submissions and evidence put before him, whereas the ED-er, subject to any express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusions regardless of any submissions or evidence adduced by the parties themselves. There is no requirement for the rules of natural justice or due process to be followed in ED in order for that determination to be valid and binding between the parties.

The Determination can be reasoned or unreasoned, the latter being the recommended approach to eliminate any ground of challenge, a key reason for choosing ED being to extinguish grounds for challenge. The Determination is enforceable as a matter of contract, and thereby through

the courts, in contrast to an arbitral award which can be enforced in the same manner as a judgment of the court; while this might appear to be a major flaw in ED, the English courts will, as a matter of public policy and absent exceptional circumstances, hold the parties to their contract in this regard. Determinations are impervious to challenge except on grounds of fraud (e.g. bribery of the ED-er) or, only if the parties agree, manifest error; the matter is construed narrowly and includes any departure from the ED-er's instructions so that if the Expert values a Company's shares instead of its loan stock, or tests crude oil quality by an ASTM procedure instead of the API one specified by the parties, the determination will be set aside, otherwise the Determination is unchallengeable. In a recent case, the author, acting as ED-er, was requested to answer a question the only possible answers to which were "yes" and "no"; this one word Determination is (absent fraud) incapable of challenge.

In conclusion, ED offers a far faster, lower-cost alternative to arbitration, offering a legally-binding decision almost impervious to challenge; while lawyers may relish the availability of a right of challenge, in the author's extensive commercial experience, users/clients do not. ■

## Events

### Award Writing Course



On the 28<sup>th</sup> September 2007 Dr. Nael Bunni presented an Award Writing course in the Grand Hotel in Malahide, Co Dublin. The course was a full day event and was excellently presented by Dr. Bunni, who shared his considerable expertise and experience in this area.

There was a very lively debate during the course of the day and active participation from all attendees. The course was fully subscribed and the feedback received from the participants was excellent.



### Consumer Arbitration Workshop

The Branch organised a workshop for arbitrators in relation to the SIMI Scheme and the Travel scheme which was held at the Alexander Hotel on the 13<sup>th</sup> October. The workshop was attended by forty-seven members and a number of requests were received in addition for the documentation distributed.



The session was opened by the chairman, Joe Behan. Ciaran Fahy spoke briefly about the new rules and fees applicable to each of the schemes and concerning the actual practicalities of running an arbitration. Anthony Hussey spoke about the legal aspects, including the ramifications of the Package Holidays and Travel Trade Act 1995, Section 17 of the Arbitration Act 1998 (interest on awards) and drew attention to the fact that many arbitrations conducted under the holiday scheme are in fact to be regarded as international arbitrations. Contributions from the speakers were short. Most of the workshop comprised contributions from the floor and questions from the floor to the speakers. Many interesting and diverse issues arose. Those attending broke down fairly evenly as between experienced arbitrators in these schemes and those yet to be appointed. All concerned judged the workshop to be very useful.



### Scottish Executive visit to Dublin



*John FFF O'Brien; Rowena Mulcahy; Hamish Goodall; Joe Behan; Alison Dewar; Paul Cackette*

On 19 September 2007 three officials from Civil Justice, Law Reform and International Division of Scottish Executive visited Dublin to meet representatives from the Irish branch of the Chartered Institute of Arbitrators.

Mr. Paul Cackette, the Head of the Civil Justice, Law Reform and International Division of the Scottish Executive's Civil and International Justice Directorate, Ms Alison Dewar and Mr. Hamish Goodall, both forming the team of Bill which they were instructing to be introduced in the new session of the Scottish Parliament to modernize and reform Scots law on arbitration, met Mr Joe Behan, Chairman, John FFF O'Brien, PRO and Rowena Mulcahy to discuss the proposed new Scottish Arbitration Act and arbitration in Ireland.

## Legal Brief

**Cooper v Cork City Council**, High Court, 2004/1955SS [2006] IEHC 353 Land acquisition- Compensation –Property arbitration- Planning condition - Case stated

**Background:** An Bord Pleanála granted permission for fewer apartment units than the number applied for. A claim was made to the property arbitrator for the consequent loss, under the Planning Act, 1990. The arbitrator made an award in the form of a special case for the High Court's opinion on a net point of construction of a planning condition related to a claim for compensation: do the provisions of s.12(2) and one or more of paras 6(b), 10(a) & (b), 12, 18, 19 of the Fourth Schedule of the 1990 Act preclude the arbitrator from awarding compensation to claimant under s.11 of the 1990 Act? The court considered the planning inspector's report, the Cork City Development Plan Review, counsels' submissions and cases as listed below on interpreting planning documents and on wider statutory interpretation.

**Held** by Murphy J on 8 November 2006 that the question posed by the arbitrator in the case stated should be answered in the negative. The arbitrator is not precluded by s.12(2) of the 1990 Act from awarding compensation pursuant to s.11 of that Act. Courts now adopt a purposive approach and seek to give effect to legislative purpose.

*These notes are not intended as legal or other professional advice which should be obtained if considered necessary.*

**ANTHONY P QUINN**, Barrister, FCI Arb, Dip Arb Law, Dip Intl Arb Law

## DIARY

Event	Details
Introduction to Arbitration Course	<b>Saturday 19 January 2008</b> , The Grand Hotel, Malahide, Co. Dublin. Fee €499.00. For booking please contact the Branch Office.
Introduction to Mediation Course	<b>Saturday 26 January 2008</b> , The Grand Hotel, Malahide, Co. Dublin. Fee €499.00. For booking please contact the Branch Office.
Introduction to Mediation Course run by the Northern Ireland Chapter	February 2008. Further details will follow.



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 IMI Conference Centre, Sandyford Road, Dublin 16 [www.imi.ie](http://www.imi.ie)



