



Irish
Branch

CI Arb

ARBITRATION NEWS

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CHAIRMAN'S ADDRESS



Mr. Dermot Roughan, The
Chairman of the Irish
Branch of The Chartered
Institute
of Arbitrators

We will all become more familiar with the terms Dispute Adjudication Boards (DABs) or Dispute Review Boards (DRBs). The terms are to be found in the FIDIC contracts and the DRBF Practice and Procedures Manual 2004.

These boards are generally formed for construction projects at the commencement of the works and usually comprise three individuals of a technical and / or legal background. Two of the board

members are party appointed and the third is often selected by the other two to act as chair of the board, something like the ICC model.

Bodies such as the World Bank and Caltrans are known to use this form of dispute avoidance technique. The Californian Department of Transportation has used DRBs on 225 completed projects with another 165 on-going ones. The total spend on these projects is of the order of \$ 9 billion.

What role is there for lawyers in this process? A recent American view as propounded by Kurt Dettman is that the legal input is minimised while the engineering aspect of construction disputes is maximised. In fact the DRB manual limits the role of lawyers in the process e.g. the use of motions, cross-examination and the like are not permitted, while attendance and participation of lawyers at the hearings is restricted.

Dettman however does see a role for the legal profession in permitting sufficient lawyer involvement to ensure that both parties get ample opportunity to present their positions both factual and legal. Also having lawyers assist the parties in clearly articulating the applicable contractual or legal principles may assist the DRB in analysing and writing about the issues, especially where the DRB does not contain a lawyer.

Switching from the international scene to the domestic market, I often wonder whether there is a mechanism whereby the privacy of awards could be examined

with a view to sharing the experience with others.

It is laudable in one sense in that the process is noted for its doctrine of confidentiality, which is much valued by the parties. In another sense the outcome, if known within the profession, could give guidelines to others who may be struggling with similar references that are not likely to result in litigation and be open to all. One wonders if there is some way of camouflaging the result without breaking the confidentiality of the process and causing possible embarrassment to either one of the parties. It is my opinion that the reading of the court reports is one of the special ways that one can glean information on the workings of an arbitration, although there is not an abundance of cases to research. The other great learning experience is to engage in mock arbitrations, although there again they are not too plentiful. The Irish Branch is actively pursuing the procurement of a script for such a production within the medium term.

I am pleased to reiterate my comments made in the RDS recently concerning the venue for the Annual General Meeting. It is proposed to hold it in the Shelbourne Hotel on Wednesday 25th April 2007 at 6.00 pm. The one proviso of course is that the Hotel will be open for business after its refurbishment programme.

Finally I wish to thank the members of the Branch for attending the Annual Dinner in the RDS in such great numbers and also thanks are due to the committee and office administrator for their efforts in ensuring that the evening was a success. May I wish you all the greetings of the season.

Dermot F Roughan,
Chairman

Items of Interest in this Issue ...

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23 New Fellows!

On 6th September 2006, on the initiative of Roy Sherlock, Trustee for Europe, the Branch held its first 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 the Royal College of Physicians on the afternoon of 6th September were treated to a talk on ethics and the internal workings of the Institute by Roy Sherlock, and were later interviewed by Roy, Bernard Gogarty, Kevin Kelly, Joe Behan and Anthony Hussey.

The following members attained the status of Fellow:

Mark Blake, Tony Boylan, Gavan Carty, James Clarke, Eoin Cotter, Patrick D'Helft, John Glynn, Richard Hammond, Robert Hartle, Andrew Hehir, Julian Kahn, Vincent Martin, Emily McCormack, John O'Brien, Brian O'Connor, James O'Donoghue,

Denis O'Driscoll, John O'Flaherty, Helen O'Reilly, Sinead Ryan, Catherine Trenaman, Patrick Walsh, Dominic Wilkinson.

Most participants stayed on for Colin Wall's lecture and for the reception afterwards. A number of the successful participants attended the David Cornes lecture at the RIAC on 19th October 2006 at which they were presented with their Certificates. The remainder will hopefully by now have received their Certificates of Fellowship in the post.

We intend to run a similar event in early February 2007. Those of you who have already expressed an interest in attending the event will be contacted before the end of the year; anybody else who is interested in the event, please contact the Branch office. I would urge everybody who has obtained a UCD Diploma in Arbitration to apply for Fellowship of the Institute.

Roy Sherlock

Northern Ireland Chapter

Introduction to Arbitration Course

The NI Chapter recently organised their first ever CIArb course, An Introduction to Arbitration. This was kindly sponsored by the Irish Branch and organised by Chris Callan through London, because of the relevance of the 1996 Arbitration Act to the province.

It was difficult to gauge numbers of potential delegates when the Chapter decide to organise the course, but in the end we had seventeen attendees from a range of disciplines including property valuation, construction and architecture, as well as a couple of lawyers.

Feed-back from the course was excellent, due in no small part to the excellent Course Director, Kay Linnell, who literally made a flying visit from Southampton on the day. Kay was ably assisted by Fellows Brian Anderson and Ian Kirkpatrick.

"The primary driver for the course was to boost membership in Northern Ireland, and the aspiration of the Chapter that the majority of delegates will soon be elected to Associate following completion of the post-course assessment. There are still a significant number of other professional bodies we will target for the next introductory course including accountancy, insurance, planning and travel. We hope that such bodies will take part in what we expect to be annual event for the Chapter", said Chris.

MEMBERSHIP

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

Mr. R. Keogh (Cork)
Mr. C. P. Finn (Dublin)
Mr. B. Baily (Dublin)
Ms. H. O'Reilly (Co. Offaly)
Mr. L. Hoolahan (Co. Wicklow)

Ms. B. McEvoy (Dublin)
Mr. P.M. Wallace (Co. Dublin)
Ms. E.L. Torpey (Dublin)
Mr. J. V. O'Brien (Limerick)
Mr. J. Doherty (Dublin)

Presidential Visit

On 6th September 2006 Mr. Colin Wall, President of the Institute, who had accepted my invitation to travel from Hong Kong to visit the Irish Branch, presented a paper entitled 'Dangers and Benefits of Evaluative Mediation – Arbitrators as Mediators – an Oxymoron?'

The paper traced reasons for the growth of mediation and noted that many mediation centres had grown out of arbitration centres and, as a consequence, there had been a tendency to adopt evaluative mediation.

There was a common understanding that evaluative mediation was an entirely different process to facilitative mediation and that various mediation providers distinguished between the two mediation procedures even though there was no agreed universal definition of the two processes. The paper explored the views held by some that facilitative mediation was a superior process and Colin spent a considerable period of time dealing with the perceived dangers of evaluative mediation and, in particular, explored the confusion which sometimes arises when mediators change from one process to the other. This phenomenon was looked at in relation to ethical considerations by reference to various mediator codes of professional conduct including those of the Chartered Institute of Arbitrators. It was noted that often there is insufficient protection for parties who rely on an inaccurate evaluation. This difficulty is compounded by the fact that the mediation process itself is confidential and within that process there are also private meetings, sometimes referred to as caucuses, which have an additional level of confidentiality.

The paper indicated that there were clear alternative dispute resolution processes available for parties who required, for whatever reason, a non-binding evaluation of the merits of the dispute and that these distinct processes ought to be preferred to an ill-prepared evaluation in a mediation. One of the main disadvantages of evaluative mediation was noted as a loss of creative win-win solutions, which sometimes



Roy Sherlock, Trustee for Europe; Emily McCormack, Chairman of Young Members' Group Sub-committee, Irish Branch; Joe Behan, Vice-Chairman, Irish Branch; Colin Wall, President of the Chartered Institute of Arbitrators; Dermot Roughan, Chairman, Irish Branch; James Macken, Immediate Past Chairman, Irish Branch; Mary O'Rourke, Chairman of the Safety Statement Sub-committee, Irish Branch; Dudley Potter, Hon. Secretary, Irish Branch

result from facilitative mediations. With evaluative mediations, the focus is quite often only on the legal rights of the parties and the resulting recommendation is often only a suggested monetary settlement.

The paper explored in some detail the fact that some mediators are not good evaluators. Three research papers were considered. Two of the papers from the US analysed the decisions of a number of expert lawyers evaluating outcomes in personal injury cases, where vastly different results were determined from the same facts. Recent research in Australia considered settlements in property disputes and concluded that even in situations where there was very little by way of disputed facts, participants in these evaluations, who were experts in the subject matter of the dispute, produced vastly different monetary recommendations. Colin thought that these dangers were compounded in evaluative mediation where there are often both disputed facts and a shortage of time.

It was noted that there were some advantages of adopting evaluative mediation in situations where cultural expectations demanded it, a restriction of time existed, or in relatively simple disputes, such as those dealt with in court-attached mediation schemes. Despite any perceived disadvantages, however, in the case of construction related disputes in Ireland, evaluative mediation, or conciliation, was generally the most common and most favoured procedure.

Events

/Cont./ Presidential Visit

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Mr. Wall's paper concluded by noting that some mediators, lacking impasse breaking skills, reverted to making a recommendation in order to satisfy their own ego and settlement rate. Further he concluded that some arbitrators do make good mediators and conciliators but it is essential that they are firstly properly trained in facilitative mediation techniques and that it is extremely dangerous for non-trained or poorly-trained arbitrators to act as mediators without

such training. Mediators accredited by the Chartered Institute of Arbitrators, or trained in the specific skills of both facilitative and evaluative commercial conciliation by institutes such as the IEI (in order to become IEI Panel Members), would usually have the necessary and appropriate skills to conclude a successful mediation. The formal paper was concluded with a lively question and answer session.

Roy Sherlock

ANNUAL DINNER

The Annual Dinner of the Irish Branch was held on the 24th of November, 2006 in the Library of the RDS, Ballsbridge, Dublin 4.

This prestigious black tie dinner moved to the new venue of the Library at the RDS this year so as to accommodate a greater number of members and guests with over 170 places available.

Guest speaker was Ray McLaughlin, one of Ireland's best-known rugby personalities, a chemical engineer and chief executive of The Crean Group plc. The welcome address was made by Dermot Roughan, the Chairman of the Irish Branch of the Chartered Institute of Arbitrators. The dinner was preceded by a drinks reception.



Roy Sherlock, Trustee for Europe; David Ashton, Chairman, London Branch; Dermot Roughan, Chairman, Irish Branch



Dan McNerney; Dermot Roughan, Chairman, Irish Branch; Ray McLoughlin, Guest Speaker



Ray McLoughlin, Guest Speaker; Dermot Roughan, Chairman, Irish Branch; Martin Wilson, President, Institute of Chartered Accountants



Dermot Roughan, Chairman, Irish Branch; Attracta Wilson, Senior Vice-President, The Law Society of Northern Ireland

Events

/Cont./ ANNUAL DINNER



Ciaran Fahy, Hon. Treasurer, Irish Branch; Dermot Roughan, Chairman, Irish Branch; Beata Butnoriute, Administrator; Joe Behan, Vice-Chairman, Irish Branch; Dudley Potter, Hon. Secretary, Irish Branch



Dudley Potter, Hon. Secretary, Irish Branch; Petria McDonnell, Chair of the Arbitration Committee, The Law Society of Ireland; Colm O hOisin, Chairman of the ADR and Arbitration Committee, Bar Council



Joe Behan, Vice-Chairman, Irish Branch; Eamonn Waldron, Vice-President, Association of Consulting Engineers of Ireland; Ciaran Fahy, Hon. Treasurer, Irish Branch



Dermot Roughan, Chairman, Irish Branch; Eamonn Waldron, Vice-President, Association of Consulting Engineers of Ireland; Ciaran Fahy, Hon. Treasurer, Irish Branch; Joe Behan, Vice-Chairman, Irish Branch



Dermot Roughan, Chairman, Irish Branch; Christine Williams, Chairman, Chartered Institute of Building; Joe Behan, Vice-Chairman, Irish Branch



Roy Sherlock, Trustee for Europe; Dermot Roughan, Chairman, Irish Branch; Donal French-O'Carroll



Dermot Roughan, Chairman, Irish Branch; Petria McDonnell, Chair of the Arbitration Committee, The Law Society of Ireland; Dudley Potter, Hon. Secretary, Irish Branch



Ken Cribbin, Chairman of QS Division, Society of Chartered Surveyors; Ciaran Fahy, Hon. Treasurer, Irish Branch

EVENTS

Golf Outing

The Annual Golf Outing of the Branch took place on the 8th September, 2006 in the Greystones Golf Club, Co Wicklow.

John Lambert won the 1st Prize - 35 points; the winners of the 2nd and 3rd Prizes were Mr. John Younge and John O'Shea - 33 points.

Other nominations were:

Best Front nine score: P. O'Donoghue - 16 points (last 3 holes)

Best Back nine score: Pierce Power - 19 points

Ladies Prize: Aine Connolly - 31 points

Nearest the Pin: Pierce Power

Longest Drive: John FFF O'Brien



Aine Connolly, McCann Fitzgerald Solicitors; Dermot Roughan, Chairman, Irish Branch; John Younge



Aine Connolly, McCann Fitzgerald Solicitors; Dermot Roughan, Chairman, Irish Branch; John F.F.F. O'Brien, Irish Branch



Dermot Roughan, Chairman, Irish Branch; P. O'Donoghue



Aine Connolly, McCann Fitzgerald Solicitors; Dermot Roughan, Chairman, Irish Branch; Pierce Power

Lecture

The Young Members' Sub-committee organized an evening lecture in October.

The lecture entitled "Mediation. Where is it now?" was presented by Mr. David Cornes, an experienced engineer and full time Independent Mediator, a Fellow of the Chartered Institute of Arbitrators and of the Institute of Civil Engineers. He is a member of Arbitration Advisory Panel, CI Arb's Mediation Strategy Group and a legal representative of the UK Standing Committee on Structural Safety, SCOSS.

The Lecture was open to all members and non-members. It was followed by a wine reception and networking opportunity.



Roy Sherlock, Trustee for Europe; David Cornes, speaker; Joe Behan, Vice-Chairman, Irish Branch

Diary

Event	Details
Annual Lunch	9 th March, 2007. Further details will follow.
Annual General Meeting	25 th April, 2007. Further details will follow.
Annual Kenneth McQuillan Lecture. Speaker—Sir Michael Latham	Further details will follow.

THE INTERNATIONAL COUNCIL OF COMMERCIAL ARBITRATION CONFERENCE Dublin 8th to 10th June, 2008



Michael M. Moran is an in-house Solicitor with Deloitte & Touche and a practicing arbitrator. He is also a past Chairman and Hon. Treasurer of the Irish Branch and is currently a member of the Law Society of Ireland Arbitration & Mediation Committee

The International Council for Commercial Arbitration (ICCA), the leading world-wide organisation devoted to promoting international arbitration and other forms of dispute resolution, is holding its bi-annual Conference in Dublin in 2008. This will be taking place in the Burlington Hotel, Dublin between 8th and 10th June, 2008. A large number of participants from all parts of the world who have made significant contributions to the development and improvement of dispute resolution theory and practice are expected to attend. Online registration will commence in 2007 and early booking is recommended. For more information about the ICCA Dublin Conference in 2008, visit www.iccadublin2008.org.

ICCA, which was founded in 1969, has official status as a non-governmental organisation (NGO) accredited by the United Nations, and in that capacity has actively participated in the preparation of the UNCITRAL Arbitration Rules, the Conciliation Rules, the Model Arbitration Law and other UNCITRAL projects.

ICCA is governed by Council Members, who are recognised specialists in the field of dispute resolution and who serve in their individual capacities. ICCA's Statement of Purposes and Procedures, provides that the Members "shall be elected from various parts of the world, from different legal and economic systems, and from developed and developing nations". There are presently 42 Members, including Honorary Officers and 12 Advisory Members, coming from 31 countries. Dr. Nael Bunni, former President of the Institute and former Chairman of the Irish Branch, is the only member of ICCA from Ireland. Persons who have served as Members for long periods are eligible to be designated life time Advisory Members.

In order to achieve its objectives, ICCA regularly convenes Congresses and Conferences for presentation of papers and discussion of topics concerning both the theoretical and practical aspects of international dispute resolution. In 2006, ICCA held its 18th Congress on

the topic of "International Arbitration 2006: Back to Basics?", in Montreal, Canada.

Coinciding with the Conference is the fiftieth anniversary of the coming into being of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", more commonly referred to as "The New York Convention", which was done at New York on 10th June, 1958. The Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention came into force on 7 June 1959 and currently 139 parties are bound by the Convention through ratification, succession or accession. The Convention has been the subject of numerous commentaries. Commentators have pointed out that without the Convention, it would be difficult to do business in to-day's borderless world.

The New York Convention was given effect in Ireland by the Arbitration Act, 1980. As has been seen from recent case law, the Irish courts are very supportive of enforcement of awards under the New York Convention. The evidence a party must produce to enforce a foreign award (Section 8 of 1980 Act) must be:-

- (a) the duly authenticated original award or a duly certified copy of that award, and
- (b) the original arbitration agreement or a duly certified copy of that agreement, and
- (c) in any case where the award or the arbitration agreement is in a language other than one of the official languages of the State, a translation of the award or the agreement, as the case may be, certified by an official or sworn translator or by a diplomatic or consular agent.

Many corporations prefer international arbitration to resolve their cross border disputes and acknowledge that the advantages of international arbitration clearly outweigh the disadvantages.

In the light of the above, attendance at the ICCA Conference in 2008 is a must for anyone who is interested in developing their knowledge of international arbitration.

*Michael M. Moran, Solicitor, Dip.Arb.Law,
Dip.Int.Law, FCI Arb.*

Notes on cases and materials

Byrne v Byrne, Macken J, High Court, 3.3.2005, 2004 No 1628 SS, 2005, IEHC 55

Background: Both parties, as shareholders in a private limited company, agreed that if a dispute arose between them the initial recourse would be to an arbitrator or mediator. The parties disagreed on interpreting the relevant clause of the agreement. The arbitrator stated a case to the court as to whether the arbitration award would be final and binding under the Arbitration Acts 1954-1988 and specifically s. 27 of the 1954 Act.

Held: The relevant clause in the agreement between the parties was ambiguous because it provided for arbitration, which is usually binding, and also mediation, which is not usually binding. The correct interpretation of the clause is that, once the parties have chosen arbitration over mediation, or once an arbitration has been imposed on them, in default of agreement as to one or the other, any award made pursuant to such an agreement is binding on both parties. The answer to the arbitrator's question in the case stated is "yes". The court did not have to consider for the purposes of the judgment the principle of "one stop shop" which interprets arbitration agreements on the basis of settling disagreements in one forum to avoid multiple proceedings.

Cases cited: Keating v New Ireland Assurance 1990] 2 IR 383; Rohan v Insurance Corp of Ireland [1988] ILRM 373; Via Net Works (Ireland) Ltd, [2002] 2 IR 47

Templeville Developments Ltd v Leopardstown Club Ltd & Dun Laoghaire Rathdown Co Co. O'Sullivan J, High Court, 4.5.06, 2002 1304P, 2006 IEHC 129

Background: In an earlier judgment of 10.12.2003, O'Sullivan J granted an injunction preventing the defendants from constructing a ramp which intruded on the plaintiff's rights. The injunction, granted pending the outcome of an arbitration thought to be imminent, was later discharged. Insuperable difficulties about interpreting the arbitration clause were referred to the court. Points included: Power of arbitrator, issues to be referred to him, arbitration clause, meaning of "any dispute", should all disputes arising from particular transaction be referred to the arbitrator, could he select and determine a new site or only determine the acceptability of a proposed new site in contest between the parties.

Held: The arbitrator's jurisdiction included selecting and determining a new site.

Cases cited: Ashville Investments v Elmer Ltd (CA) [1989] 1 QB 488 at p. 503; Doyle v Irish National Ins Co [1998] 1 IR 89; Via Net Works (Ireland) Ltd, [2002] 2 IR 47

Campus & Stadium Ireland Development Ltd v Dublin Waterworld Ltd, High Court, Commercial, Kelly J, 3.6.2005, 2005 No 1466P, 2005 IEHC 201

Background: The State-owned National Aquatic Centre at Abbotstown was leased to the defendants, as tenants on a commercial basis. There were disputes about various matters, especially payments of rent, insurance and VAT. In default of remedies for breaches of lease obligations, a forfeiture notice was issued but not complied with. The defendant sought an order under s. 5 of the 1980 Act to stay legal proceedings. Questions arose about interpreting the arbitration clause.

Held: Disputes about VAT liability were referred to arbitration and disputes about repair and maintenance were referred for expert determination. The plaintiff's proceedings were stayed regarding any relief under those headings. A stay on proceedings was granted for the above but refused under other headings. A strict timescale as provided under relevant clauses of the arbitration agreement should be strictly followed.

Cases: Channel Tunnel Group v Balfour Beatty Ltd, [1993] AC 334, 1 All ER 664 approved.

Campus & Stadium Ireland Development Ltd v Dublin Waterworld Ltd. Gilligan J, High Court, 26.9.2005, 2005/379 SP, 2005 IEHC 334

Background: Further to High Court order of 3.6.2005, as reported above, the dispute about VAT was referred to arbitration. When the defendants failed to pay the amount due under the award, these proceedings were issued under s 41 of the 1954 Act and Order 56, Rule 4F of the Superior Court Rules, 1986, as amended, to enforce the award. The defendants sought to set aside the award on the basis of misconduct. Questions arose as to whether: the arbitrator was required to flag his views in advance of making an award; the arbitrator was entitled to accept part of expert evidence while rejecting other parts; there was a mistake of law or error on the face of the award; any error of law was fundamental.

Held: Although the arbitrator made an incorrect statement about VAT law, that was not a fundamental error of law on the face of the award, nor did it have any significant impact on the arbitrator's decision. There was no basis to set aside the award and the defendant's application was refused.

Cases: Keenan v Shield Insurance [1988] IR 89 and Doyle v Kildare Co Co. [1995] 2 IR 424, followed.

Note: 'Out of hot water', an article by Ian Kehoe in the *Sunday Business Post*, 17.12.06, traced the 'Abbotstown Saga.' Without prejudice as to the contents of the article, members may find it helpful as background information on the Campus cases outlined above.

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

Anthony P Quinn, Barrister, FCI Arb

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