



ARBITRATION NEWS

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

August 2002

Issue 16

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ICCA

The International Council for Commercial Arbitration ("ICCA") is a leading worldwide organisation devoted to promoting international arbitrations and alternative dispute resolution. ICCA is a non-governmental organisation accredited by the United Nations. Its objectives include: the preparation and conduct of international congresses and conferences; the preparation of authoritative texts; and further development of methods of dispute resolution. Its congresses and conferences attract a large number of participants from around the world. The most recent congress was held in London in May 2002.

ICCA consists of forty persons, referred to as Members, who are recognised specialists in the field of disputology. They are elected by ICCA from various parts of the world and when there is a vacancy, new Members are elected. The officers of ICCA are elected from among the Members.

Its principal publications include a Congress Series comprising papers presented at ICCA conferences, an International Handbook on Commercial Arbitration and a Yearbook on Commercial Arbitration which is published annually on behalf of ICCA by Kluwer Law International. Included in the 2001 publication of the Yearbook (Vol XXVI) is "The Law relating to Arbitration in Ireland" which was written by Dr Nael Bunni, after his election as a Member of ICCA in March 2002. Dr. Bunni who was later elected President of the Chartered Institute of Arbitrators in May 2000 is past Chairman and founding member of the Irish branch.

As the only Member of ICCA from Ireland, the first task assigned to Dr Bunni following his election was to prepare the text of the Law relating to Arbitration in Ireland. The International Handbook can be ordered from Kluwer Law International, P.O. Box 85889, 2508 CN The Hague, Fax No.: 00 31 70 308 1515.

CHAIRMAN'S ADDRESS

The Irish Branch has continued to enjoy a period of expansion in membership in recent years and we now have approximately 202 Fellows, 211 Members and 177 Associates. This reflects the growing interest in arbitration and ADR in Ireland.

The Branch Committee has taken a number of steps to respond to the on-going changes in the world of dispute resolution and we have re-organised the sub-committees and adopted a challenging work program.

While membership has been growing, there remains, in my view, an unacceptable gender *ratio* both within the membership generally and on the Branch Committee. This may to some extent reflect the fact that a large proportion of the membership has traditionally been drawn from the construction industry and lawyers engaged in construction disputes. As arbitration and ADR become more widely used in other areas, this along with changes in the world of construction, will hopefully bring a more equitable balance.

The membership profile still to a great extent reflects the extent to which the construction industry and the legal profession have supported arbitration in the past. Hopefully as Irish society embraces ADR, the membership of the Irish Branch will become a much more diverse congregation. We are always interested in establishing contact with other organisations and we would welcome suggestions from the membership as to how this might be achieved.

Recognising the demand for continuing professional development, the Branch Committee is arranging for a number of lectures during the winter months. The plan is that each of the sub-committees will arrange for a speaker and a topic of interest.

We have had some difficulties ironing out effects of the recent changes to the Charter of the Institute and in particular the consequential changes in the rules of the Irish Branch. It should be emphasised that these are the rules that govern the structure and operation of the Irish Branch and should be distinguished from the Arbitration Rules of the Irish Branch that govern arbitration procedures.

It was decided to postpone the EGM pending clarification of certain matters and there has been on-going communication between the Branch Committee and the administration in London. Essentially there have been three dimensions to the problem.

Firstly there was the question as to which Branch Rules applied to the Irish Branch and how the new Branch Rules were adopted. Was the adoption of the Branch Rules a matter within the powers of, and an issue for the Irish Branch in General Meeting or the Irish Branch Committee or was this reserved to the Council? This would appear to be resolved at this stage and it has been decided that the Branch Rules have been adopted by the Council pursuant to the Charter and there was therefore no requirement for an EGM.

Chairman's Address cont.../

Secondly, the Council adopted Model Rules and it was a matter for each Branch to elect for a defined set of powers. In the course of correspondence, the Branch Committee has indicated to the Council that we wish to have the maximum powers available. This is a matter that may need to be revisited by the Branch in General Meeting.

Thirdly, there was the question of the content of the Branch Rules as adopted by the Council. The Irish Branch may propose amendments to these rules and this may necessitate a general meeting of the branch. The Branch Committee is considering how to approach this to ensure that the membership will have the opportunity to fully debate any issues.

A related issue is the status of Fellows. In the recent changes to the Charter, those Fellows who were members of the Panel in London automatically became Chartered Arbitrators. This was of little benefit to most of the Fellows practicing exclusively in Ireland who had not taken any steps to become members of the Panel. It is hoped to address this anomaly in the near future.

Again due to changes in the membership grades introduced by the Charter, it has been necessary to review the courses being offered by the Irish Branch. We are hoping to hold an Entry Course in the Autumn and a Fellowship Course is at the planning stage. Most of the Associate Members transferred to Membership grade during the transition period, but we are expecting that there will be a demand for a Transfer to Membership Course during the next twelve months. We also must decide how best to provide training and support for those engaged in mediation and other forms of ADR.

The Branch has continued in its efforts to promote the use of Arbitration and ADR by Irish commercial parties and in the wider society. In doing so, it has been accepted that one of the most important ways that we can support this development is by providing education, training to our members, and to provide a body of trained and experienced professionals to Irish society and the international community. To this end, we have endeavoured to make arrangements for arbitration schemes in various industry sectors. Over the years, despite huge on-going effort on the part of the Branch Committee — which is by its nature invisible to the broader membership, all in all, negotiations with organisations engaged in construction, travel, insurance, trade and even gaming, has resulted in little success. It would appear that this work has now begun to bear fruit. In addition to the travel schemes that have been in place for a number of years, the Irish Branch is now the nominating body for certain disputes under the Heritage Directive and other schemes are in the pipeline at an advanced stage.

This breakthrough is not only due to the work of the Branch Committee, but much of the credit can also be taken by the wider membership the Irish Branch, who have participated in the many courses in Bolton Street, UCD, Dublin University and the seminars held in Dublin by the ICC and other organisations. The enormous amount of professional development undertaken by our membership in recent years has begun to secure recognition.

Even with these developments, there are relatively few nominations in the hands of the Chairman of the Irish Branch. As members will know from experience, the standard

construction contracts do not provide for nomination of arbitrators by the Chairman of the Irish Branch or use of the Rules of the Chartered Institute of Arbitrators-Irish Branch and most parties or their advisors have over the years not seen fit to amend the arbitration provisions in these standard contracts. Similarly most domestic arbitrations outside the world of construction have traditionally provided for default nomination by bodies other than the Irish Branch of the Chartered Institute of Arbitrators.

One noticeable change, particularly in international field, has been a move towards ADR. This has been reflected in the substances of the changes in the Charter, if not in the name of the Institute. Perhaps it is time to change the name to reflect both the international character of the institute and the fact that our members are becoming increasingly engaged in processes beyond Arbitration. Adjudication and conciliation have become established in the construction industry. Mediation, which has for many years been associated with unhappy differences in family and domestic matters, is increasingly becoming the process of choice for commercial parties. The winds of change would seem to indicate that some form of court annexed mediation will become available in Ireland as it has in other jurisdictions and there will inevitably be a rôle for the expertise of our members in this. The rules of court will have to reflect these and other developments in the area.

These are welcome changes. They do however raise important questions for practitioners. There is the fundamental question of definition. It is usually clear from the written agreement when parties intend to submit their dispute to final and binding determination by an arbitrator under the Arbitration Acts. In such circumstances there is a body of law that sets out the jurisdiction of the arbitrator, the extent to which the process and the neutral him/herself can be challenged or even sued. While issues such as discovery or privilege of documentation may remain the subject of discussion or submissions in the course of a reference, this body of law is nonetheless there for guidance.

When one moves beyond the process strictly circumscribed by the Arbitration Acts, issues of definition arise and without clear and unambiguous drafting and an agreement on generally accepted protocols and norms, misunderstanding can arise. In the absence of clear and unambiguous definition words such as "mediation", "conciliation", "adjudication", "mediator", "conciliator" and "neutral" can mean different things to different people.

Similarly there are questions relating to the extent of disclosure by parties, privilege, costs, the indemnity of the neutrals and the relationship between the process and any contemporaneous or subsequent court proceedings.

These issues have been addressed in other jurisdictions but much work is needed in the two jurisdictions on the island of Ireland, to ensure that there is clarity for disputants and neutrals. There is clearly a challenge for the Irish Branch in providing an agreed set of protocols and norms to support ADR in the domestic context. These protocols must be in line with internationally accepted norms.

James Bridgeman FCI Arb
Barrister at Law
Chairman Irish Branch

Membership

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

Mr. T.J. Kearns	(Co. Dublin)	Mr. D.P. Feely	(Co. Dublin)	Mr. R. Gillan	(Co. Roscommon)
Mr. W.F. O'Leary	(Co. Wexford)	Mr. J.C. Haffey	(Co. Armagh)	Ms. P.M. Murphy	(Co. Tipperary)
Mr. G.N. Barry	(Co. Dublin)	Mr. A. Halpin	(Dublin)	Ms. J. Blennerhassett	(Dublin)
Mr. R.J. Halpin	(Co. Clare)	Mr. P. McCann	(Dublin)	Mr. J. McArdle	(Co. Offaly)
Mr. R.K. Lavelle	(Co. Kildare)	Mr. W. Redmond	(Dublin)	Ms. E. McCormack	(Co. Meath)
Mr. R.J. McCarrick	(Co. Sligo)	Mr. J.P. O'Flaherty	(Dublin)	Ms. M.T. O'Rourke	(Co. Wexford)
Mr. J. Hussey	(Co. Cork)	Mr. M.J. Gaffney	(Co. Tipperary)	Mr. J.K. Callan	(Dublin)
Mr. K.J. Feeney	(Dublin)	Mr. D.M. Jewell	(Dublin)	Mr. N.M. Mathers	(Co. Down)
Mr. D. McCarthy	(Co. Cork)	Ms. Z. Farrell	(Dublin)	Mr. D.E. O'Toole	(Waterford)
Mr. A.J.P. Williams	(Dublin)				

Social Events ... Golf Outing 2002

The third Annual Golf Society Outing took place on Thursday 20th June, 2002 at Rathsallagh Golf Club, Dunlavin, Co. Wicklow, and was kindly sponsored by Deloitte & Touche and McCann Fitzgerald. Twenty-eight members and their guests participated in a very enjoyable round, played in dry and warm conditions.

Dinner followed in the evening which was attended by the Chairman who presented the prizes and the immediate Past-Chairman, Roy Sherlock, and his wife, Hilary. Scoring, was Stableford and our congratulations to:-

1st Patrick Curran - 37 Points

2nd Joe Behan _ 35 Points & Back Nine

3rd John Schackleton - 35 Points

The highest scorer on the first nine was Seamus Doody with 16 Points and the highest scorer on the second nine was Sean McDermott with 22 Points and won on the last six.

Our congratulations to Aine Connolly and Elaine Doyle, winner and runner-up respectively of the Ladies Prize.

The date for the 2003 Annual Outing is expected to take place around Thursday 19th June 2003 and the venue is yet to be decided. Details will be published in a future Newsletter.

Congratulations ...

Her Honour Mary Faherty and Her Honour Patricia Ryan have been appointed as Judges of the Circuit Court

Rory Brady SC has been appointed Attorney General.

Dr. Ann Quinn, FCI Arb, has been appointed Lecturer in Planning and Environmental Management at the Dublin Institute of Technology. She is also Deputy Chairman of the Aquaculture Licensing Appeals Board and until her recent appointments she was Deputy Chairman, An Bord Pleanala.

Mr. Oliver Connolly, MCI Arb, Barrister-at-Law, has been appointed the 2002/2003 Hoellering International Fellow by the American Arbitration Association (AAA).

Right of Reply

If you are dissatisfied with any part of the content of "Arbitration News" or require a right of reply, a correction to be made or any other action to be taken, please contact The Editor, Arbitration News, Irish Branch of The Chartered Institute of Arbitrators, 8 Merrion Square, Dublin 2 at your earliest convenience. The Editor is anxious at all times to provide the highest service to members by way of our newsletter. One of the best methods of achieving this is to receive feedback from you, the readers. Messages for the Editor may be left via any of the following: office telephone (01) 662 7867, office fax (01) 662 7891, e-Mails to clarb@arbitration.ie.

Legal Brief

NOTES ON CASES AND MATERIALS

Remitting awards under s. 36(1), Arbitration Act, 1954, to remedy procedural mishaps

Catherine McCarrick, Applicant/Lessee v. The Gaiety (Sligo) Ltd., Respondent/Lessor Herbert J. High Court, 2.4.2001

[2001] 2 ILRM; Irish Times Law Report, 4.6.01

Further to report of the above rent review case in Newsletter No.14 as clarified in No.15, for members' information attention is drawn to analyses of the judgment in two articles:

1. In Commercial Law Practitioner, CLP, October 2001, 221,

Martin Clarke, barrister, focuses on procedural mishaps. Without any fault of the arbitral tribunal something goes wrong with the procedural side and causes injustice to one of the parties.

In the McCarrick case, the arbitration was on written submissions only but the applicant did not meet the deadline directed by the arbitrator. He received the applicant's submissions after notifying the parties that he had prepared his award. Herbert J. held that the circumstances constituted a procedural mishap. He concluded that the possible injustice to the applicant exceeded risk of detriment to the respondent if the award were remitted.

The above article tries to identify the rationale behind recent legal developments and points out the dangers of equating detriment in arbitration with substantial injustice. The article does not contend that the courts' discretion to exercise wider powers to remit awards endangers the advantage of certainty in arbitration. Martin Clarke concludes, however, that this discretion must be exercised in a principled way.

2. In Bar Review, the journal of the Bar of Ireland, vol.7. issue 3, 122, Rory White (barrister) and Ercus Stewart (SC, FCI Arb) also mention relevant cases and outline the scope of s.36 which the courts had interpreted very narrowly. The limits were tested in the McCarrick case in which the applicant applied for the remission because it would be unjust to allow the award to stand when the applicant's submission was not taken into account.

Expanding the traditional grounds under s.36, Herbert J. remitted the award to the arbitrator. The Bar article points out the importance of the court's decision. It established that an award may be remitted where, due to a procedural mishap, in the absence of one party's submission the award was made but allowing it to stand would be inequitable.

Herbert J. developed the law but sounded some cautious notes. Applicants at fault for procedural defects may be penalised by costs. As the Bar article points out, such penalties should deter parties from applying to have awards remitted under the novel ground in McCarrick except in most serious circumstances.

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

Anthony P. Quinn, Barrister, FCI Arb.

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The Editor welcomes your views as expressed in articles or other forms of comment. Please send material to The Editor, Arbitration News, Irish Branch of The Chartered Institute of Arbitrators, 8 Merrion Square, Dublin 2.