

ARBITRATION NEWS

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

Issue 28 July 2008



Irish
Branch

CI Arb

CHAIRMAN'S ADDRESS



*Mr Ciaran Fahy, Chairman of the
Irish Branch of the Chartered*

Your new committee had its first meeting on 20 May 2008 and decided to co-opt two additional members—Terence O'Keeffe and Pat Brady with Terence also being appointed Treasurer. This means the new committee numbers 14 in all and for the first time in many years it is all male. This is a disappointing outcome and in my view a disadvantage for the Branch even allowing for the

smaller percentage of females within the Branch; hopefully this lack of committee representation will be put right at next year's AGM.

A list of the committee including officers is included inside this newsletter and in addition the names of the chairmen of the various subcommittees or workgroups has also been given so that members will have an indication of the work being undertaken and who has responsibility for it. The new committee is very representative of the membership since it includes three solicitors, three engineers, two barristers, two surveyors, an architect as well as individual representatives from the insurance industry, Consumers Association of Ireland and a trade association. The committee also has a fresh look with the majority serving on their first or second year on the committee.

The Branch itself is in good condition with sound finances and a settled administration. The membership has grown to just over 750 members of whom over 200 are Fellows and there are now 15 Chartered Arbitrators in the Branch. Membership is spread over a very wide range of primary professions and it is this diversity which gives it its authority and strength. It enjoys a good working relationship with all the other professional bodies within the area of dispute resolution and this is something I am very committed to maintain and, if possible, improve.

The main topic at the moment as the new Arbitration Bill published in June of this year and which I previously circulated to the membership by e-mail. There is an article within the newsletter setting out some thoughts on the Bill and in addition there is a small subgroup working on a Branch submission following receipt of helpful contributions from the members. This Bill is the first major overhaul of Irish arbitration legislation in more than 50 years and thus represents both an opportunity and a challenge

for the Branch.

Since the new committee came into office the Branch has completed advanced training in conciliation and mediation with details given inside this newsletter. In addition, several of the Branch members were actively involved in the very successful ICCA conference held at the start of June. On a more social note I had the pleasure to host a lunch

to honour former chairmen of this Branch and details of this event together with photographs are given inside the newsletter. The current committee is very conscious of the contribution made by the former chairmen not only during the term of office but also subsequent to leaving office and felt it should be marked in some way.

It is very important for the Branch to maintain its training programme particularly in an era when the legislative framework is changing. We have currently organised an entry-level course on arbitration to be held in September and we have also decided to set in place a pupillage scheme which has been requested by a number of our members. Precise details of how this will operate are being worked out to be agreed at our next committee meeting in August.

I would like to congratulate Joe Behan who has been named as one of the Institute's first mediation Fellows and also Anthony Hussey who has recently been appointed sole arbitrator in an international reference by the ICC in Paris. The possibility of becoming a Fellow through training and working as a mediator is a recent innovation within the Institute and one which is strongly to be welcomed. Any member who is interested in pursuing this should contact the Branch or indeed London for further details.

The major social event of the year Annual Dinner has been fixed for Friday 7 November 2008 and I hope to see as many members as possible at that event. I think it is very important that the officers and committee are visible and available to the members at all-time. Consequently please feel free to contact me or indeed any other member of the committee with suggestions or queries and in particular I look forward to meeting you at our events during the course of the year.

Ciaran Fahy

Items of Interest in this Issue ...

- **Chairman's Address**
- **Committee 2008/2009**
- **Membership**
- **NI Chapter**
- **Events**
- **Mediation**
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- **Arbitrator's Problems Answered**
- **Thoughts on Arbitration Bill**

Committee Members 2008/2009



John Glynn; Dermott Jewell; James O'Donoghue; Aedan McGovern; Ciaran Fahy; John FFF O'Brien; Joe Behan; Michael Murphy; Anthony Hussey; James Bridgeman; Larry Fenelon

Committee Members 2008/2009

Ciaran Fahy, Chairman
Aedan McGovern, Vice-Chairman
James O'Donoghue, Hon. Secretary
Terence O'Keeffe, Hon. Treasurer
Larry Fenelon, Public Relations Officer
Brian Anderson
Joe Behan
Patrick Brady
James Brigeman
John Glynn
Anthony Hussey
Dermott Jewell
Michael G. Murphy
John FFF O'Brien

Sub-Committees / Chairmen 2008/2009

Construction:	Anthony Hussey
Consumer Disputes:	Dermott Jewell
Courses:	Aedan McGovern
Insurance Disputes:	Michael Murphy
Mediation:	Joe Behan
NI Chapter:	Brian Anderson
Procedure:	James Bridgeman
Schemes:	Aedan McGovern
Strategy:	John Glynn
Website:	John FFF O'Brien
Young Members:	Larry Fenelon

MEMBERSHIP

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

Mr. E. Earle (Tipperary)
Mr. D. Byrne (Co Dublin)
Mr. D.J. Sherlock (Dublin)
Mr. D. Garvey (Dublin)

Ms E. Duffy (Dublin)
Mr. E. P. Sweeney (Dublin)
Mr. A. T. Ryan (Co Dublin)
Mr. J. O'Callaghan (Co Cork)

Mr. J. McMullin (Westmeath)
Mr. E. Mac Mahon (Dublin)
Mr. P.W. Spencer (Co Galway)
Mr. D. J. O'Connor (Dublin)

Northern Ireland Chapter

New Officers

Following this year's AGM Brian Anderson stepped down as the Chapter's Treasurer, having held the post since the Chapter's inception. He has passed the baton to Mr. Vincent Campbell who is a welcome and able successor. The rest of the officers remain in their existing posts for the coming year.

Mediation

Mediation is at the forefront of our coming events with a mediation talk in Belfast scheduled for September and a mediation course in the pipeline for early 2009.

Events

The Chapter has been corresponding with the Northern Ireland assembly and are endeavouring to meet with them to put the CI Arb firmly on the map. It is hoped that a CI Arb President's visit to the assembly might be organized for later in the year.

BRANCH EVENTS

Conciliation Training



Mr Ciaran Fahy, Chairman Irish Branch, and Mr Jim Browne, President Engineers Ireland

A two day training course on Conciliation under the new Public Works Contracts was organised by the Irish Branch in conjunction with Engineers Ireland and held on 19 and 20 May 2008 with assessment carried out over the following two days 21 and 22 May. A total of 24 candidates attended, the majority of whom are members of the Irish Branch, and it represented a significant spread of professional backgrounds. Course director was Dr Nael Bunni and the proceedings were chaired by Anthony Hussey the Irish Branch Hon Secretary. In addition the faculty comprised Eamon Conlon of A&L Goodbody, Max Abrahamson of McCann FitzGerald, Tim Ahern NRA, Ruth Behan mediator, Brian Bond consulting engineer, Ed Ryan consulting engineer and James O'Donoghue architect.

The course involved intensive training in the new public sector contracts using the recently published Engineers Ireland Conciliation Procedure 2007. In the assessment each candidate was videoed during a mock conciliation session and these videos are currently being assessed with results expected shortly.

Mediator Training Course



Aedan McGovern; Ciaran Fahy; David Richbell; Terry Jones; Joe Behan

The Branch organised a five-day intensive training course for mediators which took place at the Grand Hotel in Malahide on 19/21 June and 27/28 June with assessment taking place over a further 2 days on 4/5 July 2008. The training was carried out by MATA with David Richbell as course director assisted by Terry Jones, Joe Behan, Fergus Armstrong, David Gill and John Madden as faculty. The course is intended to give aspiring practitioners a detailed grounding in theory and practice of mediation and it leads to the CI Arb qualification of Accredited Mediator.

The course was attended by 18 candidates from a wide range of disciplines and in all 17 of them attended the as-

essment days. The results of that assessment are currently being finalised in London and will be sent to the individual candidates within the near future.

On 20 June the Chairman and Vice-Chairman attended a dinner sponsored by the Branch for the candidates and teaching faculty.



BRANCH EVENTS

Chairman's Lunch

On Friday 18 July 2008 the current Chairman Ciarán Fahy hosted a lunch for former Chairmen of the Branch. There have been 22 former chairmen as set out in the attached list and of these five are deceased. 10 former chairmen were able to attend the function which was organised by the Branch to honour former chairmen for their commitment and support of the Branch not only during their term of office but subsequently on an ongoing basis.

The current Chairman spoke of the current status of the Branch and thanked the former chairmen for their role in building it up to what it is today. In addition Max Abrahamson as the first chairman in (1982/1985) spoke as did Bill McLaughlin (1992/1993) who travelled from London to attend the event. The lunch was a great success and was obviously enjoyed by all.



Top Left to Right: Johnnie McCoy; Joe Behan; John O'Reilly; William McLaughlin; Dermot Roughan; Michael Moran;

Bottom Left to Right: Dr. Nael Bunni; Rowena Mulcahy; Ciaran Fahy; The Hon Mr Justice Roderick Murphy; Max Abrahamson



Chairmen of the Branch

Max Abrahamson	1982-1985
Wilfrid Cantwell (RIP)	1985-1986
Nael G. Bunni	1986-1989
Michael D'Alton	1989-1990
Michael Carrigan	1990-1991
Ercus Stewart	1991-1992
William McLaughlin	1992-1993
Tim Sullivan (RIP)	1993-1994
Ken McQuillan (RIP)	1994-1995
Bernard Gogarty	1995-1996
Anne Bunni	1996-1997
Roderick Murphy	1997-1998
John O'Reilly	1998-1999
Michael Moran	1999-2000
David Keane (RIP)	2000-2001
Roy Sherlock	2001-2002
James Bridgeman	2002-2003
Johnnie McCoy	2003-2004
Rowena Mulcahy	2004-2005
James Macken (RIP)	2005-2006
Dermot Roughan	2006-2007
Joe Behan	2007-2008
Ciaran Fahy	2008-2009

Golf Outing 2008

Following the huge success of last years inaugural 4 ball scramble challenge for the Dan McCrystal Perpetual Trophy, this years annual golf outing was again held at the magnificent Championship Course at Powerscourt Golf Club in Enniskerry Co. Wicklow.

We had an outstanding turnout of golfers of all capabilities supporting the branch's major social event of our busy calendar competing for the solid silver trophy. This year we had a shotgun start at 2.30pm which on the one hand meant there were no delays for dinner but on the other, players had to form a queue for the showers as we all finished together!

The weather turned out to be superb and the competition proved to be mighty as only 1.6 shots separated 1st place from 3rd place.

The following companies / members entered a team in this year's event:

Deloitte & Touche, McCann Fitzgerald, O'Connor Farage O'Brien, Irish Cement, Matheson Ormsby Prentice, Ciaran Fahy

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BRANCH EVENTS

/Cont./ Golf Outing 2008

/Cont. from Page 4/

Consulting Engineer, Roughan ADR Services, Joe Behan, Hussey Fraser Solicitors, Savills Hamilton Osborne King, ResQS, Maguire Associates, Tobin Consulting Engineers & CIARB Member's team Jim Halley, Michael Carrigan & Kevin Brady.

The results of the competition were as Follows:

Winners: Maguire Associates with an outstanding score of 58.7 strokes and a Team handicap of only 3.3 strokes. Team Members: John Hughes (1), Conor Murphy (10), Cathal Maguire (12) and Tommy Cunniffe (10)



2nd Prize winners—O'Connor Farage O'Brien team

Runners Up: O'Connor Farage O'Brien (defending champions) beaten by ½ shot with a net round of 59.2 strokes and a team handicap 4.8 strokes. Team Members: John FFF O'Brien (12), Brian M O'Connor (20), Myles J Wilson (11) and Vincent Downes (5)

3rd Place: Tobin Consulting Engineers had an excellent net round of 60.3 strokes with a team handicap 8.7 strokes only 1.6 shots behind the winners. Team Members: Sean Finlay (24) Donal Blair (28) Nigel Hennigan (22) and J. McCullough (13)



Longest Drive: Mark Ryan, Savills Hamilton Osborne King team



1st Prize winners—Maguire Associates team



3rd Prize winners—Tobin Consulting Engineers team

Longest Drive: Mark Ryan (Scratch Golfer) playing on Savills Hamilton Osborne King team

Nearest the Pin: Tommy Cunniffe (10) playing on Maguire Associates team

Conversations at the 19 hole were rich with promises of serious contenders and fierce competition at next years event!! Many thanks to all who participated it was a fantastic day and the hospitality afforded to the Branch by Powerscourt Golf Club was impeccable yet again. Many thanks to all the loyal company teams and members that supported the CIARB Golf this year and I hope to see more new faces join us at next years outing which I'm sure will be just as exciting.

John FFF O'Brien
CIARB golf event coordinator

Events

ICCA Conference

The International Conference for Commercial Arbitration (“ICCA”) held its annual conference in Dublin, on Monday, 9th June and Tuesday, 10th June 2008. The conference was hosted by the Bar Council of Ireland. This was the first time that ICCA had held its conference in Ireland. 2008 was also the 50th anniversary of the New York Convention. In all, some 800 delegates attended, of which 670 delegates were from overseas, representing 53 different countries.

On Sunday, 8th June, an opening ceremony and reception was held in the State Apartments at Dublin Castle. The Taoiseach, Brian Cowan used the opportunity to announce that the government intended to repeal the Arbitration Acts 1954 to 1998, and replace them with one codifying Act. Since 1998 the UNCTRAL model law has been incorporated into the Irish Law on international arbitration. Under the proposed legislation, the model law will also govern domestic arbitrations. The Taoiseach stated that the new bill should be law before the end of the year.

The conference was held in the Croke Park Conference Centre. Speakers included Dr. Gerold Herrmann, President of ICCA, and Mr. Paul Gallagher S.C., Attorney General. A

number of working groups were held which were chaired by, among others, Professor Gabrielle Kaufmann-Kohler, Geneva, Karlos Nehring Netto, San Paolo, Professor Dr. Ivan Szasz, Budapest, V.V. Veeder, Q.C., London, Dr. Werner Melis, Vienna, and Professor Dr. Karl-Heinz Bockstiegel, Cologne. The topics covered in the working groups included multi-party disputes, consolidation of claims, summary disposition, provisional measures, and recent developments in international arbitration.

The conference ended with a gala dinner on Tuesday evening. This was held in the magnificent surroundings of Powerscourt House & Gardens in Enniskerry, Co. Wicklow. The conference provided a wonderful opportunity for those attending to meet people from many different countries who were involved in arbitration. The event was also an important and valuable opportunity to showcase Ireland as a venue for international arbitration, and to make those involved in such arbitration aware of the facilities and expertise available within the country.

Aedan McGovern

Mediation—Fellowship Training

This Branch actively supports mediation and has over the last few years provided training programmes on three different levels.

With the new pathways to Fellowship, it is now possible to become a Fellow of the Chartered Institute of Arbitrators through the mediation route.

The Branch has run a number of introduction to mediation courses which entitles the successful candidates to become Associates of the of the Institute. In addition it has run two mediation accreditation and assessment courses, the successful completion of which entitles candidates to become members.

The second such course was recently undertaken over two weekends in June 2008 for mediation training and two days over one weekend in early July 2008 for the assessment procedure. The results of this course are due soon and all candidates will be personally informed from London. This course was very successful and had seventeen participants and in addition there were two candidates from the previous course who re-sat the assessments. This particular course is viewed

by the institute as the Rolls Royce of mediation training courses.

Within the Branch, we ran two mediator skills training courses which have been very well attended. They have been used both by practitioners for skill enhancement and for trainees as an additional tool for familiarising themselves with the process to enable them to attend successfully at assessment.

The Branch intends to run another mediator skill training programme within the near future and would welcome an expression of interest from those who wish to take part in either any of the three training programmes which are run. You can simply contact the branch by way of e-mail or letter.

The Northern Ireland Chapter intends to run an introduction course to mediation in early 2009. Those interested in attending should contact the Chapter directly.

Joe Behan
Chairman Mediation Sub-Committee

Social Events—Annual Dinner 2008

The Annual Dinner this year will take place on Friday 7 November 2008 in the College of Physicians Kildare Street. The annual dinner is the most significant social event organised by the Branch each year and the venue in the College of Physicians is particularly attractive. Further details will follow in due course but members should put the date in their diary.

EU Directive on Mediation in Civil and Commercial Matters —Ref. 2008/52/EC

INTRODUCTION

According to an EU-wide survey, 4 out of 10 Irish people feel that they would be at a disadvantage in legal proceedings in another EU country. Lack of knowledge of rules of procedure in the other country, language barrier and the cost of legal proceedings factored most in the minds of those surveyed.

The EU recognises that increased access to civil justice abroad is a further key element of European integration and trade. The purpose of the *EU Directive On Mediation In Civil And Commercial Matters* is to facilitate access to cross-border dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.

IN FORCE

On 23 April 2008, the European Parliament formally approved the Council's common position on the new Mediation Directive. On 21 May 2008 the Directive was adopted and was published in the Official Journal on 24 May 2008 and came into force 20 days after that date.

The Directive will now have to be transposed into Irish law within 36 months

after the date of adoption.

When Member States transpose the Directive, they will have to decide whether they want to limit their implementing legislation to cross-border cases or whether they also want to apply the provisions of the Directive to internal cases.

THE KEY COMPONENTS:

Member States are obliged to encourage the **training of mediators** and the development of, and adherence to, voluntary **codes of conduct** and other effective quality control mechanisms concerning the provision of mediation services.

Judges in the EU are now empowered with the right to suggest that the parties attend an information meeting on mediation and, if the judge deems it appropriate, to invite the parties to have recourse to mediation.

Parties are now enabled to give a post-mediation settlement agreement a similar status to a court judgment by rendering it **enforceable** by way of judicial approval.

The Directive also ensures that mediation takes place in an **atmosphere of confidentiality** and that information

given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation. To this end, the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties.

The Directive contains a **rule on limitation periods** which ensures that, when the parties engage in mediation, any such period will be suspended or interrupted in order to guarantee that they will not be prevented from going to court as a result of the time spent on mediation. The Directive thus preserves the parties' access to justice should mediation not succeed.

The full text of the directive is accessible at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

Larry Fenelon

Arbitrator's Problems Answered

The Chartered Institute of Arbitrators – Irish Branch wish to ensure that their members have access to assistance for any problems they encounter in carrying out their role as arbitrators or mediators.

In each forthcoming newsletter we will print questions received from members and in the subsequent newsletter an answer will be available from the various experienced members of the Committee.

The question for this newsletter is: -

"A Chara,

I have been appointed an arbitrator in a consumer arbitration scheme. While I have indicated a timetable for the exchange of pleadings and documents, the Respondent has not adhered to my procedural timetable. I do not wish to seem impartial by putting undue pressure on the Respondent to comply with my Directions. I would welcome the Committee's advice on how to move matters on without compromising my independence.

Is mise,

Mr. Arbitrator"

A response from the Committee will be printed to this common problem in the next issue of the newsletter.

Thoughts on Arbitration Bill

The Arbitration Bill 2008, published by the Government in June 2008, is intended to repeal the three existing Acts (1954, 1980 and 1998) and replace them with a single consolidating Act governing not only domestic but also international arbitrations. This is the most significant change to the legislation governing arbitration since the introduction of the 1954 Act and it will have an impact on the work of every member of this Branch.

The main feature of the Bill is that it extends the use of the UNCITRAL Model Law into all arbitrations both international and domestic, now referred to as standard arbitrations within the Bill. The Model Law was originally incorporated into Irish law in the 1998 Act but was reserved for non-domestic references.

The new Bill incorporates, as schedule 1, the 2006 version of the Model Law which runs to 36 articles set out in eight chapters. The Bill itself contains 36 sections divided into five parts and in addition to adopting the Model Law it modifies it as felt appropriate for use in Irish circumstances.

The Bill has responded to a demand for change within the Irish arbitral community summarised at the April 2007 seminar jointly organised by the Irish Branch and the effect of this is to significantly increase the powers allocated to the arbitrator.

Examples of such changes are as follows:

Jurisdiction. Article 16 of the Model Law allows the arbitrator to decide on or determine his own jurisdiction which is a power not currently available.

Security for Costs/Discovery. Section 10 of the Bill removes authority in this area from the High Court and thus reserves it to the arbitrator.

Termination. Article 25 allows the arbitrator to terminate the reference in a situation where the claimant fails to provide a Statement of Claim. Interestingly this does not go as far as the English 1996 Act or indeed Engineers Ireland Arbitration Procedure 2000 both of which provide for dismissal of the claim in such circumstances.

Reasons. Article 31 requires the arbitrator to give the reasons on which his award is based unless the parties agree otherwise. This will bring the law

into line with what is increasingly practised in this country.

Correction/interpretation of arbitration award. Article 33 increases the arbitrator's authority as regards the correction of his award. It also provides for him, if requested, to interpret the original award or to deal with any element of the claim omitted from the initial award.

Section 30 of the Bill is the one most likely to have a direct impact on the Branch since it contains an exclusion for small claims which means the Act would not extend to claims less than the limit of the Small Claims Court, currently €2000. Such a threshold would significantly impact on the consumer arbitration schemes currently operated by the Branch particularly the travel scheme. This value would obviously increase over time and it is difficult to see the logic of excluding such claims from the protection of the Act. It is possible the Bill was intended to exclude small consumer claims from arbitration and the same section provides that such small claims will be deemed an unfair term unless they have been individually negotiated with the consumer.

Section 34 of the Bill provides for an unusual feature which is referred to as "Special Oversight". This will not apply in international arbitrations while parties in standard (ie non international arbitrations) may include its provisions except in consumer disputes where the parties can only opt out in the early part of the arbitration. Special Oversight contains two provisions the first which allows for a case to be stated to the appropriate Court in relation to an award or a question of law and section 34 gives the arbitrator the authority to state such a case on his own while allowing any party to seek a court direction requiring the arbitrator to state a case. The other provision in Special Oversight allows parties to apply to Court for an award to be remitted to the arbitrator on the basis of new evidence coming to light which could materially affect the decision in the award. Interestingly no time limit is provided for in relation to such new evidence which means in theory at least such an application could be made some considerable time after the award where the amount specified had been paid to the successful party or the arbitrator was unavailable through death or incapacity.

The draft new Bill is available on www.justice.ie while the three Acts which are being repealed can be found on www.irishstatutebook.ie.

Ciaran Fahy