Spring 2021 NEWSLETTER

THE CHARTERED INSTITUTE OF ARBITRATORS – IRELAND BRANCH

THE HOME OF DISPUTE RESOLUTION

March 2021

CIArb
evolving to resolve

As this Newsletter is being published, the skies are blue, spring flowers are blooming in the garden, and we can hear children playing once again in school yards.

We may be only getting back to normality in small steps, but that's ok, small steps are good …… small steps add up and hopefully if we can get a fair wind behind the vaccination programme things can only get better. There are no parades this year either, but we are marking the occasion here with some welcome news and articles leading up the CIArb Ireland Branch AGM 2021, also to be held virtually this year again. See the details and the link for the AGM under Upcoming Events on this page.

Anne Marie Blaney (a former Chair of the Ireland Branch) has penned an inciteful article on Dispute Resolution and Justice, while Paula Murphy, Architect takes a good look back after 20 years as an Arbitrator, with some simple advice for all of us along the way.

Mind you, driven on by the pandemic and akin to the pandemic some would say, adjudication of construction contract disputes has taken off in Ireland. There is an increase in the number of referrals as well as a few trips down to the High Court and a Minister's Panel of Adjudicators has been partly established with a promise of more Adjudicators soon to follow. With this, Tom Wren takes us through the critical issues in Recent Adjudication Cases in the High Court. All in all, interesting times ahead in this evolving arena.

Not only that, but there is an increasing trend in parties wishing to agree on an Adjudicator to decide their construction contract payment dispute. The CIArb Irish Branch website is being updated later this month and will contain details on the CIArb (Irish Branch) Panel of Adjudicators; twenty-one Fellows that the Irish Branch is satisfied have the necessary qualifications and experience to act as Adjudicators in accordance with the Construction Contracts Act 2013. In the meantime, all the Adjudicators names on that Panel are listed on this Newsletter under Adjudication.

Moreover, the new CIArb All Ireland Arbitration Rules have been finalised and will be launched at the 2021 AGM by Martin Waldron, Ireland Branch Chairman; we take the opportunity here to give an overview of the project and the team that grasped the nettle and put in all the hard yards to make this happen.

And finally, lest we forget our past as a Branch and those who came before us. Peter O' Malley FCIArb makes a worthy call on behalf of the Irish Branch Archive. So, while you are still under Level 5 public health restrictions, have a root around.

Indeed, the Spring is in the air and we look forward to connecting with you all at the branch virtual AGM in April and putting our best foot forward as the country looks to reopen.

UPCOMING EVENTS

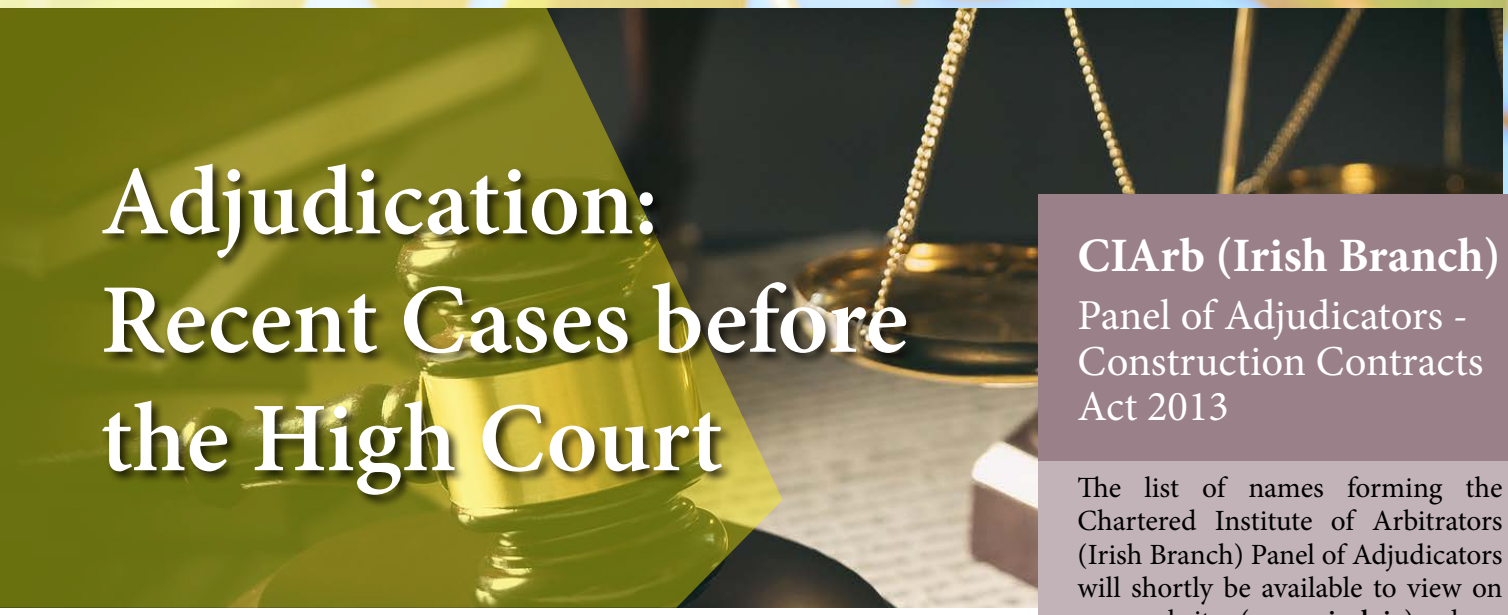
CIArb Ireland Branch AGM
12.30pm, 16th April 2021.
Members will be emailed an Invite on Zoom

Publication of CIArb All Ireland Arbitration Rules
16th April 2021

Expert Witness Training Course
Course full and starts on 11th March. More Ireland courses to follow soon in 2021

RECOMMENDED ARTICLE

John Farrage O' Brien FCIArb, an active Fellow of the Branch has just published an interesting paper in February entitled '**The Perfect Storm – The Time is now for PWCs to Evolve**', articulating his views on the public works suite of contracts. This paper has received much acclaim and is available to read ***here***.



Adjudication: Recent Cases before the High Court

Three recent cases have reinvigorated interest in adjudication under the Construction Contracts Act, 2013 ('the Act'). As always, the decisions need to be read in full.

The first, O'Donovan v Bunni [2020] IEHC 623, was twice before the High Court which imposed a stay on the reference pending the outcome of judicial review proceedings. Whilst what might in the main be involved is a net issue on a point of law, the awaited judicial review decision may reveal more on the interesting arguments put before the Court in the lifting of the stay applications and the balance of convenience of which MSD v Clonmel Healthcare [2019] IESC 65 has added much to the law.

Next came Gravity Construction v THM [2021] IEHC 19. The 'Unless' order, the treatment of costs under the Legal Services Regulation Act, 2015, and the less than clear offer in the case may well be secondary to the debate Mr. Justice Simons has opened on s.6 (10) of the Act. The debate is whether or not a stay on the execution of an adjudicator's decision may be ordered pending the outcome of a reference to arbitration. Paras. 4 and 32 of the decision are at the crux of the debate which the Court did not have to deal with per se.

If s.6 (10) of the Act is interpreted to facilitate a stay on an adjudicator's decision pending an arbitrator's award, it could considerably dampen adjudication as a means of dispute resolution for all but small value claims (relative to turn-over). Why go to the time and effort of adjudication if a claimant will not receive money until the further expense of an arbitration? For another matter, if s.6 (10) is so interpreted, it would frustrate one of the main objectives of the Act.

The third is Construgomes v Dragados and BAM [2021] IEHC 79, a decision of Ms. Justice Nuala Butler. The action sought to restrain a bank from paying out on a performance bond subsequent to an adjudicator's decision in favour of the plaintiff which had been honoured by the defendants. The plaintiff contended that calling its p-bond would be an impermissible set-off against the adjudicator's decision. On the facts the Court disagreed.

Most interesting was the Court's view that a crossclaim, although not expressly part of the statutory process, is permissible if made within the context of the claim referred to adjudication. The Court further expressed the view that, due to the restrictive time limits in the Act, crossclaims do not have to be brought and will not be lost if not made in the adjudication; that is, considerable doubt exists that the rule in Henderson v Henderson applies to adjudication.

On a closing note, all concerned with adjudication in Irish Branch are aware of Anthony Hussey's Construction Adjudication in Ireland, Routledge, 2017. Not all might be aware that last year Routledge published Adjudication Practice and Procedure in Ireland, by Damien Keogh and Niall Lawless, another worthwhile addition to one's library.

Tom Wren BCL LLM FCIArb.

CIArb (Irish Branch)

Panel of Adjudicators - Construction Contracts Act 2013

The list of names forming the Chartered Institute of Arbitrators (Irish Branch) Panel of Adjudicators will shortly be available to view on our website (**www.ciarb.ie**), along with a short career profile. These Adjudicators are all fellows of the CIArb, have construction dispute resolution experience and have all completed CIArb accredited adjudication courses or diplomas. The Panel is prepared by the CIArb, Irish Branch. The Branch is satisfied that those on the list have the necessary qualifications to act as Adjudicators. The Branch does not accept any responsibility because an Adjudication is conducted by any member of the Panel. The following are the names on the Panel of Adjudicators, in alphabetical order.

Click on names for email link:

Joe Behan, Engineer
Kevin Brady, Architect
Tom Carey, Engineer
Mel Casserley, Engineer
John Costello, QS
John Deaton, Architect
Dermot Durack, QS
Siobhan Fahey, Engineer
Niall Fenelon, Engineer
Jarlath Kearney, QS
Conor Kelly, Architect
Keith Kelliher, QS
Tadgh McDonnell, Engineer
Niall McGuinness, Engineer
Gerry Monaghan, Engineer
Garett Murphy, QS
William Morrissey, Engineer
Denis O Driscoll, Solicitor/QS
David O Leary, QS
Jude O' Loughlin, Architect
Martin Waldron, Barrister/QS

CIArb - New All-Ireland Arbitration Rules

Overview

The existing Irish Branch arbitration rules were published on 1st April 1990. The rules were devised in the main to meet the needs of arbitration before the 1996 Act in Northern Ireland and the 2010 Act in the Republic.

In March 2019, the CIArb Irish Branch Committee resolved that an Arbitration Rules Sub- Group (AR Sub-Group) should be formed with a mandate to produce new All-Ireland Arbitration Rules capable of use in both jurisdictions.

The All-Ireland Sub-Group was formed with five persons from all four provinces with multi- discipline backgrounds as identified below. (BHMS Solicitors D2 kindly provided facilities for the various meetings of the Sub-Group)

In addition to the All-Ireland mandate, the Sub-Group set for itself a core objective of producing user-friendly rules but which provide as much legal certainty as is reasonably possible and capable of operation within the arbitration acts and the general body of law in the two jurisdictions.

To this end sections of either Act are not referred to in the rules nor are articles of the UNCITRAL Model Law. The approach as taken assumes an arbitrator or representative to be fully familiar with the relevant Act and the law relevant to each appointment. The Rules were developed to be compatible with the various provisions in the Acts and the Model Law.

The Irish Branch obtained support for the initiative of two senior members of the judiciary, one from each jurisdiction who are each closely connected with the administration of commercial law. (Mr. Justice Barniville IRL and Mr. Justice Horner NI) Both have provided introductory comments on the new arbitration rules. The CIArb Membership were invited to an open meeting of the Sub-Group to review the evolving Rules. Various bodies and parties including Arbitration Ireland provided input/ comments in addition.
When published, CIArb hopes that the Rules will provide scope for arbitrations to re-emerge in an All-Ireland setting for the benefit of the users of ADR services.

It is intended that the Rules will be updated on a more frequent basis to address the changing landscape of Arbitration on the island of Ireland.

February 2021

AR Sub-Group:

Paula Mary Murphy
FCIArb., Tipperary, Chair of the Sub-Group Committee member

Adrian Kearney
C. Arb., Belfast, NI Chapter Committee member

Timothy Bouchier-Hayes
FCIArb., Dublin

Conor Kelly
C. Arb., Galway

Tom Wren
FCIArb., Limerick, Hon. Sec. to Sub-Group

Martin Waldron
FCIArb., Dublin, Chairman Irish Branch

20 Years An Arbitrator:
What I would say to my younger self now?

(Disclaimer As this is a form of lessons learnt it is not intended to be taken as Legal Advice.)

1 Establish that your appointment is in order and that the appointing authority, where relevant, have jurisdiction to do so under the Contract (or have been properly given so).

2 Invite any jurisdictional challenges from the parties early on (by the claim or defence) and use your powers (Kompetenz , kompetenz) to determine your jurisdiction or not. Formally record your finding. Be live to the fact that later challenges may arise and determine these as they arise (relatively rare).

3 Try to have the parties agree to adapting a set of Rules and /or Procedures The CIArb All Ireland Rules (about to be launched), UNCITRAL or Engineers Ireland Procedures will assist in providing structure to the provisions of the Act. Early adaption is key.

4 The Contract, together with the Act and, if adapted, any Rules are vitally important in trying to manage the process and to ensure you act you within your remit and should always be within easy reach and frequently checked. Disputes have unique attributes/ characteristic and these should inform your interpretation of provisions of the Act and Contract. It important that you do not assume interpretations due to your familiarity of Contracts /Act etc.

5 If you have been selected or appointed/nominated as Arbitrator due to your specific expertise, you need to ensure that this is brought to bear and the parties are benefitting from the selection. If you are bringing your expertise to bear in a manner not submitted to by the parties or anticipated by them in your appointment, you need to ensure you give the parties opportunities,as appropriate to address this prior to making your decision. This is a delicate balancing act as one cannot be seen to make a case or to have prejudged an issue.

6 The Preliminary Meeting(s) are extremely important for setting out the timetable and procedures. Managing /Controlling Communications and number of exchanges at this early stage is vital if costs are to be controlled. Having the named parties at the first meeting can assist this aim as one of these will eventually be paying for some, if not all of the costs. (Unnecessary repetition / multi-copying/multiple submissions can be significantly reduced with effort).

7 The Judiciary on the island of Ireland are very supportive of Arbitration and the intents of the Model Act (supported by the Arbitration Act 2010 & the 1996 Act NI), the extensive powers of the Arbitrator should be used against this background and in an effort to run a more efficient dispute resolution vehicle.

8 Whilst the right to fair procedures and to be heard needs to be born in mind, the rights of a party to an Award, set against an agreement to Arbitrate also has to be considered when deciding any extensions etc. Remember the parties agreed to Arbitrate.

9 Develop tools to ensure that you do not pre-determine the matter, the ability properly handle non–substantive issues/distractions etc as they arise is key to arriving at a decision based on the evidence at the conclusion of the Hearing.

10 When you are ready to issue your Award, carry out due diligence checks on the Award, triple check names, dates amounts etc particularly on the Operative Part, set the time for slips etc. ensure signature witnessed etc. Ensure the Award is correctly named, Interim Final etc. Leave a couple of days before issuing and do a final check after a minimum of a days break.

11 It is important that Costs have been dealt with (address them at the end of the hearing if possible inviting submissions). Remember The Arbitrator can tax the Costs if agreed to by the parties.

12 Be ready with your own outstanding costs, frequently the matters settle at a very late stage and the Costs of the Arbitration should be dealt with as part of this process. (Your terms should have included a provision that you can tax your own costs.

13 Offer to prepare a Consent Award which will assist the parties in sending their costs for taxation as appropriate.

14 Arbitrations are exhausting, due to their confidential nature one rarely can get feedback on the process, after two weeks or so carry out a self audit/lessons learnt on the most recent Arbitration.

Paula M Murphy FCIArb MRIAI MII Committee Member & All Ireland Arbitration Rules Sub–Group Chair She is a practising Architect based in Tipperary.

Dispute Resolution and Justice

Introduction

Spring is a time of change and hope. Inspired by these intentions, here is a conversation about dispute resolution and legal justice. This article draws on words of Max Abrahamson to challenge norms and perhaps inspire reflection, debate, and action.

Sr. Stan writes, "Our horizons are broadened, we can believe in the future, knowing that our lives will bring us all sorts of surprises as long as we leave space for new things to emerge, as long as we are open to the signs of the times."

Creating that space for new things to emerge, let us delve a little into Max Abrahamson's views, in an interview that I deeply value. Here is a nudge to reflect, question and consider justice. Generously sharing his wisdom, he described the meaning, of ADR (alternative dispute resolution). Max also said, in his opinion, ADR organisations can assist lawyers to become effective participants in ADR. He shared thoughtful views, evolved during an accomplished career. For me, these are the two aspects, that I delve into here, bringing something from the stuff that has shaped me, to this article.

The System

One challenge, he faced in his career, was to stand back... "*and see a system that traps lawyers and judges who are individually doing estimable work*," and to advise people who have suffered injustice not to use it. Here, he considered, is an opportunity for dispute resolution organisations to assist lawyers to become effective participants in ADR, underpinned by mutual respect. There is a recognition of the potential for combined cooperative effort. He mentioned how experts of many kinds including lawyers, could combine depth and breadth of knowledge, experience and judgement, training, and practice, to deliver positive ADR benefits.

The more complicated a dispute, he considered, the more confusing oral adversarial combat may become. The symbolisation he ascribed to wigs is powerful. He sees wigs, "*as symbols of gulfs between solicitors, barristers, parties where information continues to be lost.*"

He described the practical and emotional upset and stress on parties, and sometimes witnesses, by reduction, "*of their special concerns to briefs by one lawyer 'made up' quickly by another, with either duplicate specialists, or a generalist as the lawyer.*"

Campaigners highlighted the issue of missing detail, in one environmental justice case, set in a Special Area of Conservation. I am reminded that over two centuries ago, construction concluded on the Four Courts building. Within its walls, oral adversarial combat is habitual. Two centuries also represents the natural growth of the Invisible Tree within Rostrevor Oakwood, County Down. Its predicament, highlighted by Colum Sands, and RARE (Rostrevor Action Respecting the Environment), illustrates how information within a planning process and adversarial litigation, got lost. Environmental justice efforts were explained by Colum... "A tree can't speak back to those who threaten it so we are being its voice. Raising awareness has been paramount and engaging the public has been a priority."

Rostrevor Oakwood, Co. Down, is an area of outstanding natural beauty, protected as a Special Area of Conservation. Within planning documentation, and an environmental survey for construction work, a tree was omitted, threatened with damage. Council planners recommended refusal of planning permission, supported by 5000 objection letters and six councillors approved the development. A CrowdJustice campaign was used to raise the funds to take a High Court Judicial Review, which whilst unsuccessful, highlighted environmental and conservation concerns.

The Woodland Trust holds an annual Tree of the Year competition and the Invisible Tree was voted Northern Ireland's Tree of the Year, 2019. In terms of the experience seeking environmental justice within the legal system, a short film, 'Rhyme for Justice?' tells the story while capturing some incredibly special scenery. The link here, courtesy of Environmental Justice Network Ireland, also links films that help stimulate debate about environmental justice, societal wellbeing, and policymaking. The film is their response to their experience seeking justice. It is a rare visual message about a collective justice experience within the system.

There is encouragement too, for environmental mediators. The outcome from interviews with thirty-one of mediation's 'founders', about what first attracted them to mediation and why they stayed active in the field revealed that mediators working on public policy matters, including environmental disputes, were most positive 'about the opportunity for creativity in their work.'

Flexibility, Diversity and Customisation of Justice with ADR

Reflecting on flexibility, diversity and customisation benefits, Max shared:

"*I used to think that justice required that the winner hits a bullseye. But with help from ADR a more realistic target with many rings of different significances is practicable.*"

Alternative dispute resolution, or appropriate dispute resolution, often used, means flexibility. For my current work, this means mediation, restorative practice, nvc and peacebuilding underlined with a curiosity about trauma informed practice. For your work, if you are a resolver, we perhaps overlap, having comparative process skills, while too, you hold alternative skills, expertise and curiosity. The value is in having availability of trained resolvers with many types and combinations of expertise, as Max described, that offer flexibility

and diversity for justice outcomes. Resolution can be customised to individual circumstances and different types of disputes.

The significance of mediation is described by Ken Cloke, ... "Mediation is justice coming full circle, a return to ancient tribal principles of wisdom, compassion, honesty, self-revelation, healing, and forgiveness."

Customising Dispute Resolution, for Justice

Believing in justice means ascertaining justice needs, challenging negative habits and taking action to change outcomes for the better. Asking how it is to put myself in the shoes of the person seeking justice, since that could be me, and promoting his or her good, is an ethical approach. Forefront in my thoughts, are justice needs arising from complex medical negligence claims, in particular cervical cancer misdiagnosis claims and surgical mesh implant claims affecting women.

With our combined expertise and skills as dispute resolvers, how can we respond with careful effectiveness to assist dispute resolution process design and resolution?

Max recognised dispute resolvers, as helpers, "*Surely a resolver may take account of the fact that the parties have asked him/her for help, and require help from their champions in return, not games.*"

Here, I pay tribute to Mrs Joan Lucey, who died from cervical cancer on 19th February 2021, whilst litigating her claim against the HSE, Clinical Pathology Laboratories Inc., and MedLab Pathology Limited. Solicitor, Ernest Cantillon, said he had been pressing for mediation since November 2020. Mrs Lucey died hours after the defendants agreed to begin mediation. I pay tribute to all women affected by the Cervical Cancer controversy, to those working for fairness and just outcomes, and to those who have died. I pay tribute to a 46-year-old mother of four with terminal cancer, who was forced to give evidence in a High Court trial on 25th January 2021, that settled for a seven-figure sum on 26th January 2021, without an apology.

The lived justice, that is needed, I suggest, invites our intentional focus. I think about survivors of symphysiotomy, a barbaric operation performed on about 1500 women between 1944 and 1980s, described by a UN Rapporteur as 'a form of violence against women, that could amount to torture.' Survivors said, "restitution was a long time coming, being delivered in the form of a government payment scheme which came across as more of a whitewash of the issue as opposed to actual relief for the survivors." I think of Ireland's mistreatment of mothers and children through forced adoption and institutionalisation, and justice for women in Magdalene laundries.

Customising resolution and justice needs - an example from New Zealand.

'Healing after Harm-a Restorative Approach to Incidents', is a recorded webinar, in which Jo Wailling, presents the evaluation of the New Zealand restorative inquiry approach to addressing surgical mesh harm, with focus on process and impact assessment. New Zealand has a no fault no blame system. Multiple factors can cause harm in the healthcare environment. Instead of starting from a position recognising multiple perspectives, there are competing stories. Wailling notes that before the restorative inquiry there was an adversarial dynamic in which patients had to fight to be heard, to be believed. The inquiry's two phases, listening and understanding, then planning and acting, resulted in nineteen actions. The recognition in this approach, is that people are often grieving, and deeply traumatised. Restorative inquiry values are suited. These restorative values are active participation, respectful listening and communication, truthfulness, accountability, empowerment and equal concern. Justice needs, can be uncovered that result in action and recovery. Those justice needs are described as substantive, procedural and psychological. These break down into the actual harms that need to be remedied; the process of interacting, communicating and making decisions and the way one is acknowledged, respected and treated throughout the process.

Justice, within the Wailling evaluation, is 'lived justice' rather than having justice 'done' to people. "Justice which is lived and experienced, may not be pleasant. . . but we will know it has happened because we will have lived it rather than having it done to ourselves." (Zehr,2005)

Conclusion

Perhaps, through this article, prompted by Max Abrahamson's wisdom and words, there is an impetus for action.

Ken Cloke talks about moving beyond the idea that mediation is an 'alternative' to litigation, and about making it a more 'appropriate' form of dispute resolution in most cases than litigation. Reform of Ireland's opt-in mediation model for litigated cases may be far down the line, so for now, a close analysis of the debate and stakeholder experiences in regions with mandated mediation, such as Italy could offer worthwhile insight. Non mandatory measures which are also non- legislative measures to promote voluntary participation in mediation need greater attention. Examples set out in the European Parliament's 2014 study include mediation advocacy, development and implementation of pilot programmes, public campaigns, mediation pledges for industry and national mediation ambassadors or champions.

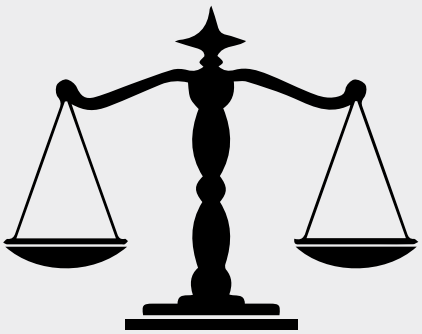
The 'doublespeak bug', referred to by Asst. Prof. Lin Adrian, is the concept that persons and systems that embrace ADR in words, maybe even praise it, do not do so in action; where policy makers and the legal professionals talk about ADR, yet do not allocate resources nor promote ADR. She proposes honest dialogue about hesitations, conflict resolution education and top-level support for mediation alongside legislative efforts.

We can see that mediation is embraced through our policy, legislative and organisational commitments, so now, I hope, collectively we participate in meaningful action. Giuseppe de Palo talks about the right of access to justice. This is not just about entering the legal system without exiting. It is about entering and being able to walk away in a reasonable time with a reasonable solution. There are things that litigants cannot achieve in court that private face to face dispute settlement can achieve.

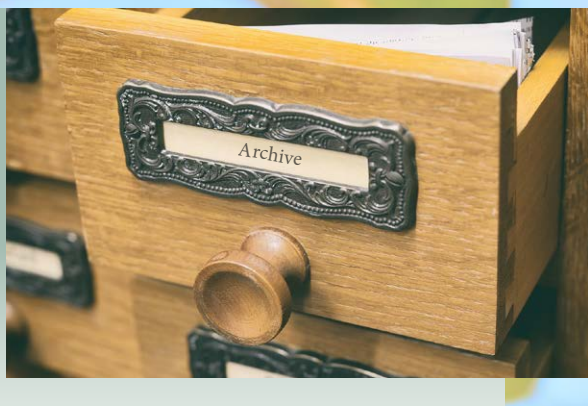
We need thoughtful process design. We need more mediations. We need honest conversations and change.

And wisdom, "In pursuit of knowledge, every day something is acquired. In pursuit of wisdom, every day something is dropped."

Anne-Marie Blaney



A call on behalf of our archive!



Members may be aware that the branch has commenced the archive initiative to source the past records and history of the Irish Branch including our Northern Ireland Chapter. For a number of reasons the past archives of the branch have become dispersed to the point that there is a risk that much of it will be lost forever, therefore the archive initiative is now important and timely.

The initiative is being led by Peter O'Malley who has sought to contact all the past Chairs of the branch in starting to bring together the records that are available. Progress is such that items of interest previously gathering dust on shelves, in boxes or in storage are now being contributed to the branch.
The items of interest would include:

- Any past committee minute books, AGM minutes or accounts.
- Any past branch newsletters.
- Books from the library.
- Any past branch paraphernalia such as event promotion material.
- Any old photographs, digital or hard copy.
- Any records of the social history and then general life and times of the branch since its foundation.
- Any other items of interest relating to the Irish branch or the Northern Ireland Chapter.

The branch library collection comprises many old books some of which are now approaching 100 years of age, for example the 4th Edition of Arbitrations by Banister Fletcher of 1925. Some 'gems' have been unearthed such as the Visitors Book from the inaugural luncheon of the branch from 1982 where it is hoped that all, or most, of the signatures can be deciphered in order to record the attendance at this important event.

When the work is completed we will seek to ensure that there is a permanent home for the archive to ensure retention of the branch history whilst providing a valuable base of research material. It is also hoped that a selection of the material will also be available, such as old photographs and important documents, in a dedicated area of the branch web site. Peter has requested that each of our members just take a moment to reflect on whether you have anything important that could be contributed to the archive. If you anything to contribute please contact Peter directly on 083 020 3000 or by e-mail on peter@omalley.eu.com

"*There is nothing new in the world except the history you do not know*"
Harry S. Truman

CIArb
evolving to resolve

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