Ciarb Biannual Newsletter Winter/Spring 2026

The Chartered Institute of Arbitrators

ciarb. Ireland Branch

In this issue:

Message from the Chair - Editorial Note

Catherine Needham BL
Mark Harten BL (Co-editor)

The Winter/Spring 2026 edition of the Ciarb Biannual Newsletter brings together contributions from members of the judiciary, practitioners and academics addressing a wide spectrum of contemporary dispute resolution practice. Collectively, the articles illustrate the ongoing evolution of arbitration and alternative dispute resolution in Ireland and internationally. While ADR is now firmly embedded within modern legal systems, its development continues to generate important questions concerning efficiency, procedural fairness, institutional oversight and the increasing commercialisation of dispute resolution. The contributions in this edition engage with these themes from both practical and analytical perspectives, offering a timely reflection on the trajectory of arbitration and ADR.

The judicial contributions in this issue provide particularly valuable insight into how ADR mechanisms are perceived within the broader framework of the administration of justice.

Catherine Needham BL

In *Keeping Arbitration Expeditious,* The Hon. Ms Justice Patricia M. Lucas examines the increasing tendency for arbitration proceedings to adopt litigation style discovery practices. Her analysis raises a fundamental question for arbitration practitioners: whether arbitration can retain its defining attributes of efficiency and procedural flexibility while responding to the growing expectations of parties and counsel accustomed to court procedures.

Similarly, the judicial interview with The Hon. Mr Justice Anthony Barr reflects on the institutional development of ADR in Ireland. Drawing on his extensive experience across advocacy, tribunal practice and the High Court bench, Mr Justice Barr traces the cultural transformation whereby mediation and arbitration have moved from being viewed as peripheral alternatives to litigation to becoming central features of the dispute resolution landscape. His reflections underscore the importance of professional culture and practitioner engagement in ensuring that ADR mechanisms operate effectively.

The Hon. Mr Justice Mark Sanfey's contribution on Part 4 of the Mediation Act 2017 further illustrates the evolving relationship between the courts and consensual dispute resolution. While mediation remains fundamentally voluntary, the statutory framework increasingly integrates ADR into the litigation process through judicial invitations to mediate and potential costs consequences for unreasonable refusal. Mr Justice Sanfey's analysis highlights the careful balance that must be maintained between encouraging settlement and safeguarding the constitutional right of access to the courts.

The Hon. Ms Justice Nuala Jackson's article *Carrot and Stick,* Exploring Med Arb examines the hybrid dispute resolution process combining mediation and arbitration. The article offers a thoughtful analysis of the potential benefits of med-arb, particularly its capacity to preserve party autonomy while guaranteeing finality. At the same time, it addresses the procedural and ethical challenges inherent in combining the roles of mediator and arbitrator, emphasising the importance of careful procedural design and professional safeguards.

Several contributions examine contemporary developments within arbitration practice itself. Patrick Leonard SC's article on defining the dispute referred to arbitration highlights the importance of procedural clarity at the outset of arbitral proceedings in order to avoid jurisdictional challenges. Eileen Barrington SC's analysis of the Supreme Court decision in *Costello v Government of Ireland* [2022] IESC 44 and the subsequent Arbitration (Amendment) Bill 2025 explores the constitutional tensions that may arise where international arbitration mechanisms intersect with domestic constitutional sovereignty. Mark Tottenham BL's discussion of artificial intelligence and expert evidence provides a timely examination of the risks associated with uncritical reliance on AI-generated research while acknowledging the potential benefits of technological innovation when used responsibly.

The expanding role of third party funding in arbitration is examined from complementary perspectives by Camille Slow KC and by Conor Owens and Megan Fanning FCiarb. Their contributions highlight both the opportunities and challenges created by the rapid growth of litigation funding markets. While third party funding may enhance access to justice and facilitate risk management in complex disputes, it also raises regulatory, ethical and procedural questions. The Irish legislative framework, which has removed traditional prohibitions on funding in international arbitration but has yet to introduce a comprehensive regulatory regime, provides a particularly interesting case study in this regard.

The construction sector continues to generate significant developments in dispute

resolution practice. Karen Killoran, Shane O'Neill and Maeve Crockett examine the High Court's decision in *Tenderbids Ltd v Electrical Waste Management* Ltd [2025] IEHC 139, confirming that the "smash and grab" adjudication mechanism familiar in the United Kingdom does not arise under the Irish Construction Contracts Act 2013. Further contributions by David Arnott and Jennifer Matthew, and by Linzi Hedalen and Kirsti Olson, analyse dispute avoidance mechanisms in NEC contracts, highlighting the increasing emphasis placed on proactive project management and early resolution of disputes within modern construction contracts. Dermot Malone BL's examination of ADR provisions within public-private partnership projects raises broader questions regarding the effectiveness of existing dispute resolution frameworks in complex, multi-party infrastructure projects.

The continuing importance of consensual dispute resolution mechanisms is reflected in the contributions addressing mediation and conciliation. John McDonagh SC outlines the procedural advantages of mediation, while Laura Donnelly BL and Hugh Mohan SC emphasise the practical importance of careful drafting in mediation settlement agreements. Tim Ahern's reflections on conciliation in the public sector highlight the historical development and continuing relevance of conciliatory dispute resolution mechanisms within major infrastructure projects.

The Newsletter also explores emerging areas for the development of arbitration. Keith Walsh's contribution on family law arbitration examines the potential role of arbitration within the evolving Irish family justice system, particularly in the light of the Family Courts Act 2024. The article raises important questions regarding the appropriate balance between party autonomy, judicial oversight and the protection of vulnerable parties in family law disputes.

This edition also includes thoughtful reflections on the development of dispute resolution practice more broadly. Bernard Gogarty considers possible reforms to the Construction Contracts Act 2013 based on practical experience within the construction sector, while Dermot Malone reflects on the development of specialist training in adjudication decision writing.

Finally, the Newsletter pays tribute to several individuals whose contributions have had a profound impact on dispute resolution practice in Ireland and internationally. The memoriam pieces honour the lives and careers of Niav O'Higgins, Ciaran Fahy and Professor Nael G. Bunni, each of whom played an important role in shaping the development of arbitration, construction law and ADR.

Taken together, the contributions in this edition illustrate both the maturity and continuing evolution of arbitration and alternative dispute resolution. ADR mechanisms are no longer merely alternatives to litigation but form an integral component of a broader dispute resolution ecosystem operating across courts, commercial practice and international regulatory frameworks. At the same time, the articles remind us that the legitimacy and effectiveness of these mechanisms depend upon careful procedural design, institutional engagement and the professional responsibility of those who operate within them.

The Ciarb (Ireland) Branch remains committed to fostering this dialogue and to supporting the continued development of excellence in dispute resolution practice.

Catherine Needham BL holds an MSc in Business and Finance, the Barrister-at-Law Degree from the Honourable Society of King's Inns, a Certificate in Commercial Contracts from the Law Society of Ireland, a Postgraduate Diploma in Construction Law and Contract Administration from Trinity College Dublin, and a Professional Diploma in Arbitration Law from University College Dublin. She is currently a PhD (Law) candidate.

Catherine is a practising Junior Counsel at the Law Library, Dublin, specialising in Commercial and Public Law, Media Law, Property Law and Construction Law. She has appeared before the Supreme Court, the Court of Appeal and the High Court.

She is a member of the Arbitration and Alternative Dispute Resolution Committee of the Bar of Ireland, the Construction Bar Association, and the Negotiation Committee of the Bar of Ireland. She also serves as Co-Regional Coordinator of the Society of Construction Law (Ireland).

Catherine is the Chair of the Chartered Institute of Arbitrators (Ireland Branch) and serves as a National Committee Nomination Commission Member with the International Chamber of Commerce (ICC).

She is Co-Editor of The Bar Review and Co-Editor of the Construction, Engineering and Energy Law Journal of Ireland (CEEJ).

Catherine is also a Tutor on the Postgraduate Diploma in Construction Law and Contract Administration at Trinity College Dublin and regularly contributes to arbitration training and mock arbitration exercises.

She is an Accredited Commercial Mediator (CEDR), Family Law Mediator (ARC), and Fellow of the Chartered Institute of Arbitrators (FCiarb).

She has been nominated by the Minister for Housing, Local Government and Heritage to serve on the RIAI Professional Conduct Committee under the Building Control Act 2007, and also serves on the Admissions Board of the Society of Chartered Surveyors Ireland (SCSI) under the Building Control Act 2007

Finally, Catherine has been recently nominated for appointment to the International Centre for Dispute Resolution (ICDR) Panel of Arbitrators, New York.

Mark Harten BL is a barrister and Legal Adviser in the Office of the Ombudsman. He was called to the Bar in 2017 and practised across a broad range of civil litigation, including defamation, personal injuries, judicial review, medical negligence and landlord and tenant law. He has also worked as a law reporter for the Incorporated Council of Law Reporting for Ireland and served in the High Court as both Judicial Assistant (to former Ciarb vice chair, Mr Justice Barr) and Senior Judicial Assistant. He holds first-class degrees from the King's Inns and Trinity College Dublin and, while completing his LL.M. at Trinity, participated in the Willem C. Vis International Commercial Arbitration Moot. He received Best Oralist awards in the Telders and Jessup international law moot court competitions while representing the King's Inns.

Dates for your Diary - Upcoming Events

Events, Seminars, Conferences and Educational Courses

12th–15th April 2026
ICCA Congress 2026

The ICCA Congress 2026 will take place from 12th–15th April 2026 in Madrid, Spain. The Congress theme, "*Balancing Global Harmonisation with Regional Adaptation,*" will explore how international arbitration continues to evolve across jurisdictions while maintaining coherence and consistency in practice. The event will bring together leading arbitrators, practitioners, academics and institutions from around the world for high-level discussion, knowledge exchange and professional networking. The Congress represents one of the most significant global gatherings in the international arbitration calendar.

Catherine Needham BL will attend on behalf of the Ireland Branch.

29th April 2026
ICDR Dispute Resolution Conference

Members of the Branch will be attending the 2026 ICDR Dispute Resolution Conference, to be held in April at New York Law School. The International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association, administers international arbitration and mediation proceedings and plays a significant role in the development of global best practice in dispute resolution. Attendance at this conference will provide an important opportunity to engage with international practitioners and to strengthen the Branch's connections within the global dispute resolution community.

16th April 2026
Annual McQuillan Lecture

The Annual McQuillan Lecture is scheduled for 16th April 2026 in William Fry Offices. The lecture will be delivered by Cesar Pereira CArb FCiarb, President of Ciarb. This distinguished annual event continues to serve as an important forum for reflection and discussion within the Irish and international arbitration community.

17th April 2026
Ciarb (Ireland) Annual Lunch & Branch AGM

The Ciarb (Ireland) Annual Lunch and Branch AGM will take place on 17th April 2026 at the College Green Hotel, Dublin. Sponsorship has been secured from Byrne Wallace LLP, BAM, Quantex and Smyth & Son Solicitors. The Guest of Honour and keynote speaker will be The Hon. Ms Justice Elizabeth Dunne. This flagship gathering remains one of the highlights of the Ciarb (Ireland) calendar.

8th May 2026
Ciarb Conference 2026

The Ciarb Conference 2026 is scheduled to take place on Friday, 8th May 2026 at the National Gallery of Ireland. Planning is currently underway for what promises to be another flagship event in the Branch calendar. The venue has been secured, and further details regarding theme and speakers will be announced in due course.

29th April & 20th May 2026
Construction Adjudication – Decision Writing Course 2026

The Ireland Branch of the Chartered Institute of Arbitrators will deliver a Construction Adjudication Decision Writing course in conjunction with Robert Gordon University in 2026. The course will be delivered online over a six-week period, commencing on Wednesday 29th April and running to Wednesday 20th May, with sessions scheduled from 6.00 p.m. to 8.00 p.m. Examinations will take place on Saturday 30 May and Saturday 6 June.

The programme will be led by experienced practitioners Peter O'Malley, Bernard Gogarty, Karen Killoran and Keith Kelliher, and is delivered in conjunction with Robert Gordon University, Aberdeen. The course is designed to replicate the practical demands of adjudication and is particularly suited to construction professionals and those aspiring to act as adjudicators.

1st June to 5th June 2026
London International Disputes Week 2026

London International Disputes Week (LIDW) will take place in June 2026 in London. This global forum brings together leading practitioners, judges, arbitrators and experts from across the international disputes community. Ciarb (Ireland) will engage with international colleagues throughout the week, strengthening cross-border dialogue and collaboration in arbitration and dispute resolution.

June 2026
Galway Regional event

The Ciarb (Ireland) Branch & Quantex will host a regional seminar at The Hardiman Hotel, Galway in June 2026. The seminar will feature an engaging panel discussion addressing the origins of construction disputes and practical strategies for resolution. The event will provide an excellent forum for professional exchange in a collegiate setting. It will form part of the Branch's continued commitment to regional engagement and outreach.

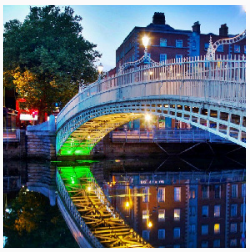
July 2026

Cork Regional event

The Chartered Institute of Arbitrators (Ireland Branch) will host a regional seminar in the Top Floor "Vertigo" venue at Cork County Hall, Carrigrohane Road, Cork in July 2026. The event will include a panel discussion examining the sources of construction disputes and exploring practical approaches to their resolution. It is intended to provide a valuable forum for professional dialogue and knowledge sharing among practitioners.

November 2026

Accelerated Route to Fellowship (ARF)



The Ciarb (Ireland) Branch is pleased to announce that the 15th Accelerated Route to Fellowship (ARF) course since 2014 will take place in Dublin this November. The ARF is an intensive, fast-track assessment designed for experienced arbitration professionals with five or more years' relevant practice. It provides an alternative pathway to Fellowship (FCiarb), allowing candidates to bypass the traditional module route. The programme comprises a two-day in-person workshop, followed by a demanding award-writing assessment completed online within a 48-hour window. Successful completion enables candidates to apply for Fellowship, subject to a separate peer interview. While most participants complete the award-writing assessment immediately after the workshop, candidates may defer submission until early 2027 if required. Over the years, the Dublin ARF has attracted both international tutors and candidates from jurisdictions including Australia, Belgium, England, Hungary, Kenya, Oman and Pakistan. The course has also benefited from collaboration with colleagues from other CIArb branches, including the UAE. Although the majority of candidates are successful, the ARF is rigorous and requires sustained written and oral performance over an intensive assessment period.

The ARF offers an important alternative pathway for experienced professionals seeking Fellowship while balancing professional and family commitments.

Interested members should contact Jennifer Crowther at info@ciarb.ie for further details

AGM & Annual Lunch

Friday 17TH April 2026

ciarb.
Ireland Branch

Chartered Institute of Arbitrators - Ireland Branch

Members, please join us for our AGM at 10:00am at
Byrne Wallace Shields LLP, 88 Harcourt St, Saint Kevin's, Dublin 2, D02 DK18

Followed by lunch for our members and guests in
The Banking Hall at 12:30pm

Guest Speaker -The Hon. Ms Justice Elizabeth Dunne

Free AGM ticket
Single ticket for lunch €118 (includes a half-bottle of wine)
Table of 10 seats discounted to €1062
Half table of 5 seats discounted to €531
Enquiries: info@ciarb.ie or www.ciarb.ie 01 817 5307

Event Sponsors:

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Past Events

23rd October 2025
Joint Ciarb/Kroll Seminar

A joint seminar with Kroll was held at the offices of Byrne Wallace Shields LLP on 23rd October 2025. The topic, *"Expert Evidence and ADR,"* attracted strong attendance from across the dispute resolution and construction sectors, reflecting the continued interest in the role of expert testimony within arbitral proceedings.

The event was chaired by Catherine Needham BL and featured a distinguished panel comprising Maebh Gogarty, Bernard Gogarty, Mark Tottenham BL (Moderator), John Trainor SC, Peter O'Malley and Mark Wearen (Kroll). The seminar provided practical insight into the evolving function of expert evidence in arbitration and alternative dispute resolution. The evening concluded with closing remarks from Martin Cooney, Partner at Byrne Wallace Shields.

1st November 2025
Branch Administrator, 10 Year Anniversary

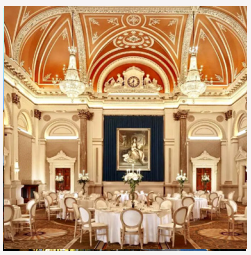
A dinner was held at The Winding Stair Restaurant on 1st November 2025 to mark the 10 year work anniversary of Ms Jennifer Crowther, Branch Administrator. The evening was a warm and well-attended occasion, bringing together colleagues and committee members in recognition of Jennifer's dedication and longstanding contribution to the development and success of the Ciarb (Ireland) Branch

3rd December 2025
XXVIII Dublin Forum on International Dispute Resolution

The XXVIII Dublin Forum on International Dispute Resolution was held online on 3rd December 2025 and featured a distinguished panel discussion entitled "*Who Decides the Seat?*", examining key considerations in the selection of the seat of arbitration.

The panel comprised Moosa Al Azri (Mazri Law, Muscat), Steve Finizio (WilmerHale, London), Pamela McDonald (Pinsent Masons, Doha), Joe Tirado (TiradoADR), and James Bridgeman SC. The event attracted significant international interest and provided valuable comparative and practical insights into an issue of continuing importance in international arbitration.

14th November 2025
Annual Ciarb (Ireland) Dinner



The Annual Ciarb (Ireland) Dinner took place in the Banking Hall, the College Green on 14th November 2025 and was a resounding success, attended by approximately 150 guests, including senior members of the judiciary, the Bar of Ireland, and representatives of key professional bodies. The keynote address was delivered by Mr Justice Gerard Hogan. Judicial attendees included Madam Justice Denise McBride, Ms Justice Nuala Jackson, Mr Justice Alexander Owens, Ms Justice Sanfey and Ms Justice Nuala Butler. The Attorney General of Ireland, Mr Rossa Fanning SC, was also present. Feedback from attendees was overwhelmingly positive, with one guest describing the evening as "a triumph, beautifully organised in every respect."

14th January 2026
SIAC /Ciarb Event

The SIAC/Ciarb Debate 2026 took place on 14thJanuary 2026 at Maxwell Chambers, Singapore, in a hybrid format. The debate examined the motion: "*This House believes that reliance on national ethical rules governing counsel conduct is sufficient to regulate the conduct of counsel engaged in international arbitration.*"

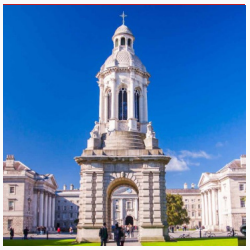
The event featured leading international arbitration practitioners and an engaging exchange of views on ethical standards in cross-border arbitration, concluding with audience participation and networking

27th January 2026
ICC MENA Conference

The 14th ICC MENA Conference on International Arbitration was held on 27th January 2026 in Dubai, bringing together leading arbitration practitioners from across the Middle East and North Africa. The conference provided updates on recent trends, procedural developments, and strategic considerations shaping arbitration practice in the region.

The programme featured a distinguished panel of speakers, robust discussion on emerging issues, and valuable networking opportunities for delegates. An ICC Institute Advanced Training session on *Complex Arbitrations: Focus on Procedural Issues* preceded the conference on 26th January 2026, offering in-depth practical guidance on procedural management in sophisticated arbitral proceedings.

28th January 2026
Nael G. Bunni Annual Lecture



On Wednesday, 28th January 2026, the Nael G. Bunni Annual Lecture was delivered by Kevin Kelly FCiarb, Solicitor and Partner at McCann FitzGerald LLP, in the Martin Uí Chadhain Theatre, Trinity College Dublin. The lecture has become a distinguished fixture in the Irish construction law and arbitration calendar, marking the formal commencement of the Branch's annual programme of events. The event was well attended and provided thoughtful reflection on contemporary issues in arbitration practice.

3rd March 2026
CIArb / ARUP Joint Seminar

The CIArb / ARUP Joint Seminar took place on the 3rd March 2026 at Arup's offices in Dublin, in a hybrid format. Entitled *"Dispute Resolution Trends in Ireland, Is Arbitration Still Relevant?",* the seminar examined developments in NEC and Public Works Contracts. The event was chaired by Catherine Needham BL and the discussion was moderated by Mary Liz O'Mahony and featured contributions from Professor Brian Hutchinson, Sean O'Flaherty and Fergus Monaghan.

9th February 2026
Arbitration Channel, "CIArb Branch Time"

The Arbitration Channel initiative, "CIArb Branch Time," commenced in February 2026 under the CIArb Presidential theme "Trust in a Changing World." Branch Chairs have been invited to participate in this new monthly webinar series, designed to strengthen global engagement and institutional collaboration. The 90-minute pilot webinar, held on 9th February 2026 and featuring Brazil and Nigeria, focused on enhancing cooperation and sharing ADR practices across CIArb Branches.

11th February 2026
University Engagement Programme

As part of the Ciarb (Ireland) University Engagement Programme, visits were held at University College Dublin on 11th February 2026 (Professional Diploma in Arbitration), Trinity College Dublin (Postgraduate Diploma in Construction Law and Contract Administration) on 26th February 2026, Maynooth University on 7th March 2026, and University College Cork on 9th March 2026. Further visits are scheduled for Dundalk Institute of Technology, TU Dublin, and Atlantic Technological University (Letterkenny campus) in late March and early April. Members of the Northern Ireland Chapter have also arranged a visit to Queen's University Belfast during the same period.

These sessions provide students with an overview of Ciarb membership pathways and career opportunities in alternative dispute resolution. The initiative reflects the Branch's continued strategic commitment to attracting and supporting early-career practitioners in arbitration and construction dispute resolution.

10th & 11th March 2026
Introduction to Conciliation Course

The Introduction to Conciliation Course was held on the 10th and 11th March 2026 at the offices of William Fry, delivered over two half-day in-person sessions. The course provided a practical overview of construction conciliation, including its legal framework, procedure and application under Public Works Contracts, and qualified participants for 6 hours of CPD. Speakers included Catherine Needham BL, John T Gibbons SC, Alan Brady BL, Jarleth Heneghan, Dermot Durack, David McDonagh, Fiona Egan, Damien Keogh SC and Danyal Ibrahim.

19th March 2026
Ciarb Ireland and RDJ

Ciarb Ireland and the Society of Construction Law (SCL), in partnership with RDJ, hosted a Construction Law event entitled *"Construction Contracts in Administration"* on 19th March 2026 at RDJ's offices, 85 South Mall, Cork. Registration and light breakfast commenced at 7:30 am, with the briefing running from 8:00 am to 9:00 am.

The panel was moderated by Finola McCarthy, RDJ's Head of Construction, and featured Eoin Long (TLI Group), Stuart Griffin (AECOM) and Shane O'Connor (RDJ). Discussion topics included the duties of the Contract Administrator, common contractual pitfalls, payment certification under the Construction Contracts Act 2013, and best practice in managing and pricing variations. A Q&A session concluded the event.

19th March 2026
Ciarb Scotland Branch

The Scotland Branch of the Chartered Institute of Arbitrators hosted its annual flagship dinner at the Trades Hall of Glasgow, with Susanne Tanner KC as guest speaker on Thursday, 19 March. Catherine Needham BL attended on behalf of the Ireland Branch. The event was well attended and provided a valuable opportunity to engage with colleagues across the dispute resolution community, including representatives from Dentons, Alvarez & Marsal, Turner & Townsend, Pinsent Masons, Kroll, and Morton Fraser MacRoberts. The evening was a successful and engaging occasion.

21st March 2026
Arbitration Ireland

The London Chapter of Arbitration Ireland hosted a luncheon on 21st March 2026 at the Royal Automobile Club, 89 Pall Mall, St James's, London. The keynote address was delivered by Kevin Nash, Director General of the London Court of International Arbitration. The event provided an excellent forum for engagement with leading practitioners in international arbitration.

23rd – 27th March 2026
Paris Arbitration Week 2026

Paris Arbitration Week 2026, the 10th edition of this premier international arbitration forum, took place from the 23rd–27th March 2026 in Paris, France and is widely recognised as the global hub of arbitration practice. The week - long programme connected practitioners, arbitrators, academics and institutions from around the world, featuring a rich calendar of conferences, panels, workshops and networking events that addressed emerging issues in investment and commercial arbitration. PAW fosters learning, sharing and collaboration across the global arbitration community, offering invaluable opportunities for professional engagement and exchange

25th March & 22nd April 2026

Introduction to Construction Adjudication Course

The Introduction to Construction Adjudication Course was delivered live online via MS Teams on 25th March 2026, with a repeat session to be held on 22nd April 2026. The half-day programme (9:30 am–1:00 pm) provided participants with a structured overview of statutory adjudication in Ireland. The course was offered at a standard rate of €350 (Early Bird €275; Students €100). An optional online assessment (€100) was available for candidates seeking Associate Membership eligibility.

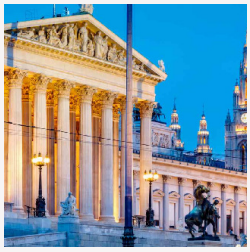
26th March 2026

Ciarb (Ireland), SCL & Beauchamps Joint Event

The Ciarb (Ireland), SCL & Beauchamps Joint Event took place on 26th March 2026. The seminar focused on developments in Public Works Contracts and strengthening dispute avoidance mechanisms. The discussion examined practical and contractual implications for practitioners and industry stakeholders. Speakers included Niall Buckley SC, Jamie McGee, Fiona Egan and Catherine Needham BL.

27th March - 2nd April 2026

33rd Willem C. Vis International Commercial Arbitration Moot, Vienna



The 33rd Willem C. Vis International Commercial Arbitration Moot will take place in Vienna from 27th March to 2nd April 2026. The Vis Moot is one of the leading international arbitration competitions, bringing together law students and practitioners from around the world to engage in advocacy and the study of international commercial arbitration.

The Ireland Branch of the Chartered Institute of Arbitrators is pleased to support and encourage student participation in the Moot, recognising its importance in developing advocacy skills and fostering the next generation of arbitration practitioners. The Branch continues to engage with students and universities in Ireland in promoting international arbitration and supporting emerging talent in the field.

Ciarb Ireland Branch Annual Dinner
14th November, 2025

Banking Hall, College Green Hotel

L to R – Derek O'Reilly BL, Jim Bridgeman SC, Dermot Malone BL, Fiona Egan, Catherine Needham BL, James O'Donoghue, Dermot Durack BL, Jennifer Crowther, Niall F Buckley SC

L to R - Edel Hargaden, Louise Wright, Eloise Heron, Rachel McDaid

Traoloch Collins, James O'Donoghue

Susan Ahern SC, Dermot Durack BL, Joseph Behan

Jennifer Crowther, Sean O'Flaherty, Charlene Harkin

Mark Wearen, Orla Fitzgerald, Brian Barry, Anthony Clifford

Niall F Buckley SC, Barry Donovan BL

Mr Justice Gerard Hogan, Lydon Jonathan McCann SC, Mark Tottenham BL

Edward Quigg, Hamish Lal, Michelle Quigg

Laura Horan, Paul Horan, Damien Kenny, Dermot Durack BL

L to R – Cillian MacNamara, Shane Kelly, Ian Murphy, Tara Fitzpatrick, Gerard Byrne, Andrew Campbell, Ciara Claffey, Callum Gillespie, Paddy Mockler.

Elizabeth Gormley BL, Deirdre Byrne BL, Marian Regan

Damien Keogh SC, Kristin Keogh, Sean Guerin SC

Group photo

Paula Murphy, Gerard Monaghan, Edward Quigg

Rossa Fanning SC, Mr Justice Alexander Owens, Ms Justice Nuala Butler, Mr Justice Gerard Hogan, Catherine Needham BL, Seamus Clarke SC, Fiona Egan, Barry Cahir, Eileen Jackson, Richard Stowe, Ms Justice Nuala Jackson, Kieran O'Brien

Seamus Clarke SC, Fiona Egan, Barry Cahir, Eileen Jackson

John F.F.F. O'Brien

Paul O'Higgins SC, Mr Barra Mc Cabe BL, Kevin Brady, John Trainor SC

Larry Fenelon, Margaret Austin, Orla Fitzgerald

Group Photo

Ms Justice Nuala Jackson, Kieran O'Brien, Rossa Fanning SC

Damien Keogh SC

Mr Barra Mc Cabe BL, Seamus Clarke SC, Dan O'Mahony BL

Ian Murphy, Paddy Mockler, Ciara Claffey

Catherine Needham BL

The Hon. Mr Justice Gerard Hogan
Keynote speaker for Ciarb Annual dinner 2025

Patrick McOscar, Derek C O'Reilly, Jim Armstrong

Dame Justice Denise McBride, Hamish Lal

Gerald Byrne, Angelyn Rowan

Fergus O'Reilly, Emer O'Reilly

Marian Regan, Catherine Needham BL

Orla Fitzgerald, Siobhan Kenny

Pierce Doyle, John Delaney

Barry Cahir, Eileen Jackson

Deirdre Hennessy, Lara Crowley BL

Ms Justice Nuala Jackson,
Catherine Needham BL

Edward Quigg, Michelle Quigg

L to R – James Bridgeman SC, Deirdre Hennessy, Rossa Fanning SC, Catherine Needham BL, Andrew Mckenzie, Dame Justice Denise McBride

Thank you to our Annual Dinner Sponsors

QUANTEX
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Judicial Contributions

Keeping Arbitration Expeditious: Avoiding the Trend toward Litigation-Style Discovery [1]

The Hon. Ms Justice Patricia M. Lucas

Contracting parties who commit to an arbitration clause are foregoing access to the courts and waiving all but the most limited review of an unfavorable decision. They expect, in exchange, to resolve any dispute in an expeditious and streamlined process, less time-consuming and less expensive than litigation would allow.

That's the deal. That's the promise.

However, some administrative rules governing arbitration provide for pre-hearing discovery beyond a voluntary exchange of documents on which a party may rely—often including document requests and sometimes including depositions and even third-party subpoenas. Some jurisdictions have statutes governing pre-hearing exchange of information in arbitration matters. Moreover, arbitration clauses have become more prevalent beyond the traditional commercial context, in consumer and employment contracts, and many disputants as well as counsel have come to expect the opportunity to receive a significant amount of information from the other side before the hearing.

The Hon. Ms Justice Patricia M. Lucas

This article addresses the current health and well-being of the arbitration promise of an expeditious and streamlined process with little to no pre-hearing exchange of information. We review the rules and laws addressing pre-hearing exchange of information, and discuss trends in statutory law and in practice affecting discovery in arbitration. In conclusion, we offer some practical observations about what disputants and counsel can do to keep pre-hearing exchange at a minimum if that is their goal.

1. Governing Rules

Ultimately, arbitration is the process to which the parties have agreed: no more and no less. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[2] The parties can specify the nature and extent of prehearing discovery in which they desire to engage—but most often they do not address the subject at all.

Even if it does address pre-hearing information exchange itself, the arbitration agreement typically will specify administrative rules or procedural law which the parties intend to govern how the arbitration proceeds. The International Bar Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules") allow for limited pre-hearing disclosure. The parties are required under the IBA Rules to submit to the tribunal and the other party, at a time set by the tribunal, all documents on which they intend to rely, and thereafter the parties may attempt to obtain additional documents in the control of the opposing party.[3] However, the "Request

[1] Authored by Hon. Patricia M. Lucas: JAMS arbitrator; Adjunct Professor at University College Dublin Sutherland School of Law; Irish Judicial Council regular faculty member on judicial training courses; Judge of the California Superior Court (ret.); Adjunct Professor at Santa Clara University School of Law (California) in arbitration and mediation; National Institute for Trial Advocacy instructor in International arbitration, arbitration and trial advocacy; member, California Arbitration.

[2] Steelworkers v. Warrior & Gulf Nav. Co. (1960) 363 U.S. 574, 582.

[3] BA Rules, Article 3, Documents.

to Produce" puts a significant burden on the requesting party to identify the documents it seeks and to state why the documents are relevant and can be produced without unreasonably burdening the producing party.[4] Similarly, under the AAA-ICDR rules, the parties must exchange information on which they intend to rely and may apply for production of documents in the other party's possession not reasonably available to the requesting party, on a showing that the documents are reasonably believed to exist and are relevant and material to the outcome of the case.[5] These Rules specifically note that "Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules."[6] The JAMS International Arbitration Rules ("JAMS Rules") give the tribunal broad discretion "at any time during the proceedings … [to] order parties to exchange and produce documents, exhibits or other evidence it deems necessary or appropriate."[7]

2. Statutes and New Developments

In addition to identifying rules which will apply to the proceedings, the arbitration agreement may specify statutes that will govern the conduct of the arbitration. The Irish 2010 Arbitration Act, amended in 2025, like its American counterpart, the Federal Arbitration Act ("FAA"), does not address pre-hearing exchange of information. However, every U.S. state has now developed its own law to address the procedural lacunae in the FAA, including the extent of allowable pre-hearing discovery.[8] The U.S. Supreme Court has repeatedly held that state law governing arbitration is valid so long as it does not contradict the pro-arbitration policy of the FAA by singling out arbitration contracts to impose restrictions to which other contracts are not subject.[9]

In California, often a trendsetter in legal developments and the world's fourth largest economy, case law from the state Supreme Court and a recently enacted statute exemplify a definitive trend in favour of litigation-style discovery. In the context of an employment dispute - where typically only one side will have possession of most of the relevant documents - the California Supreme Court has held that claims involving fundamental substantive rights may be subject to arbitration provided that the agreement allows "adequate discovery [which] is indispensable for the vindication of [statutory] claims."[10]

Following these court decisions, the California legislature recently enacted a significant change incorporating broad prehearing discovery into every arbitration agreement. This new section of the California Arbitration Act provides that, for arbitration contracts made, modified or extended after January 1, 2025, the parties shall have the same right to take depositions and to obtain discovery as if the matter were pending in the state trial court.[11] In addition, the arbitrator has the authority to issue discovery sanctions and penalties, which include evidentiary and terminating sanctions, to the same extent as would a judge in a suit filed in the trial court.[12] Depositions may be taken with the approval of the arbitrator.[13] An arbitrator has authority to issue third-party subpoenas for depositions and pre-hearing access to documents.[14]

This new statutory scheme is truly a sea change. It reverses the default: broad discovery is available in all arbitrations, whereas prior law incorporated discovery procedures only when the parties had so agreed in their contract.[15] While there are limitations on the extent of discovery in the California trial court, those rules when applied in arbitration represent an enormous shift from the historic approach of little to no prehearing discovery. Discovery disputes are time-consuming, and with the prospect of monetary sanctions available to the party prevailing in such a dispute, arbitration may become much more expensive quickly. Significantly, this change applies to every contract containing an arbitration clause—including business contracts. Prior law had incorporated broad discovery procedures in the absence of agreement only when an arbitrated dispute arose out of or resulted from personal injury or wrongful death.[16]

3. Practice Trends

While this new legal development does represent a significant change, it does not come out of the blue. The provisions of the FAA enacted by Congress 100 years ago are considered clearly

[4] The Principles and Practice of International Commercial Arbitration, 2d Ed., Margaret L. Moses, at pp. 176-78.
[5] AAA-ICDR Rules, Rule 24, Exchange of Information.
[6] Id., Rule 24 at section 10.
[7] JAMS Rules, Article 24.
[8] Arbitration: Law, Policy and Practice (2018) Weston, Blankley, Gross and Huber, p. 36.
[9] E.g., Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University (1989) 489 U.S. 468 (affirming validity of the California Arbitration Act).
[10] Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 89, 104; see also Ramirez v. Charter Communications, Inc. (2024) 16 Cal.5th 478, 503-07 (arbitration agreement that limits discovery nevertheless enforceable).
[11] California Code of Civil Procedure section 1283.05(a).
[12] California Code of Civil Procedure § 1283.05(c).
[13] California Code of Civil Procedure § 1283.05(e).
[14] California Code of Civil Procedure section 1282.6.
[15] See superseded version of California Code of Civil Procedure § 1283.1 before 2025 amendment.
[16] See superseded version of California Code of Civil Procedure § 1283.1 before 2025 amendment.

pro-arbitration.[17] The statute requires the courts to defer to arbitration: once the court determines that the parties had an agreement to arbitrate, the court loses jurisdiction except to stay the litigation.[18] In addition to the pro-arbitration provisions of the FAA, the U.S. Supreme Court has issued several decisions over the last 30 years generally considered to be pro-arbitration in that they restrict the states from invalidating or limiting contractual agreements to arbitrate to the extent this would be contrary to the pro-arbitration policy articulated in the statute.[19]

In view of the strong pro-arbitration policy reflected in U.S. law, it is not surprising that arbitration clauses have become commonplace, even outside the traditional context of a business dispute. Many employers now require assent to an arbitration clause as a condition of employment, and consumers routinely agree to arbitration (although not always knowingly) when purchasing a product or downloading an app. The ubiquity of arbitration clauses has caused many advocates and scholars to question whether an approach limiting prehearing exchange of information maitains a proper balance between the two goals of providing low-cost and expedited dispute resolution and of ensuring that the resolution process is truly a fair one.

The increasing frequency with which a dispute is covered by an arbitration clause has resulted in a large population of attorneys well experienced in court litigation now serving as arbitration counsel. These attorneys understandably bring with them to arbitration their experience and assumptions concerning the need for ample discovery before an evidentiary hearing can proceed. Accordingly, they expect and agree to significant written discovery which is normally time-consuming and expensive. It is now the norm for arbitration counsel in the U.S. to agree to written discovery including interrogatories, requests for production, or requests for admissions (although they frequently disagree about the extent of such written discovery).

[17] For example, the FAA authorizes courts to stay litigation in favour of arbitration (9 U.S.C.A. § 3) and allows a request to compel for arbitration to be determined on an expedited basis as a motion rather than as a judgment (§ 6). It provides an automatic right to confirmation of an award not vacated or modified (§ 9) and imposes a shorter time limit on petitions to vacate an award than on petitions to confirm (§§ 10 and 11). It also authorizes appeals from a denial of a stay of litigation or a denial of a petition to compel arbitration, but not from the grant of a stay or an order compelling arbitration (§ 16).

[18] See Kulukundis Shipping Co., S/A v. Amtorg Trading Corp. (2d Cir. 1942) 126 F.2d 978 (reversing trial court order denying motion to assert arbitration clause as bar to court's jurisdiction).

[19] For example: Doctor's Associates, Inc. v. Casarotto (1996) 517 U.S. 681 (state law invalid which required arbitration contracts to have a notice on the first page in underlined capital letters, advising that contract is subject to arbitration); AT&T Mobility LLC v. Concepcion (2010) 536 U.S. 333 (FAA pre-empts state decisional law invalidating class action waivers.

4. Reining In The Trends

Given the increasing expectation among some disputants and counsel that arbitration will allow a reasonably extensive pre-hearing exchange of information, certain specific actions may be prudent for parties who prefer to follow the prevailing practice in international arbitration of little or no exchange beyond providing documents on which they will rely.

First, ensure that the arbitration agreement states clearly the intention of the parties to limit pre-hearing disclosure. If the parties wish to have some information exchange beyond the documents on which they will rely, draft the agreement to identify the nature and extent of that additional exchange and to specify whether or not the parties wish to empower the arbitrator to allow more as the case progresses. Back to principle #1: the arbitration must be what the parties intended it to be when the deal was made.

Second, as always, know your decider. Among the considerations in selecting an arbitrator will be a reputation for honouring the wishes of the parties as framed in the contract and the rules chosen by the parties to govern the proceedings.

Finally, once a dispute has arisen and the parties are working with an arbitrator, the parties should emphasize at every stage their desires concerning the efficiency of the process and their expectations concerning limitations on information exchange. The parties should be proactive in working with the arbitrator to shape the expeditious process they desire.

Arbitration remains attractive as a dispute resolution option because it is designed to be less expensive and less time-consuming. In addition, arbitration features an element of self-determination that court litigation cannot provide: the parties may choose the rules by which the proceeding will be governed. By taking full advantage of that aspect of self-determination in the context of pre-hearing disclosure, the parties can also preserve the efficiency and economy of the process.

Judicial Contributions

Judicial Interview

The Hon. Mr Justice Anthony Barr

Question 1

Having practised on the Dublin Circuit for 17 years before joining the Morris Tribunal in 2002, how did that experience shape your understanding of complex investigations and dispute resolution processes?

My move to the Morris Tribunal in 2002 marked a significant shift in perspective. As counsel to the Tribunal, alongside Peter Charleton and Paul McDermott, we did not act for any party. Our role was entirely non-partisan: to assist the Chair in establishing the facts. This required a fundamentally different mindset from court advocacy, where the focus is on advancing a client's case.

The Tribunal demanded neutrality, rigorous analysis, and scrupulous procedural fairness. A key aspect of its work was safeguarding the *Haughey rights* of witnesses. Where criticism might arise, witnesses were entitled to full disclosure of allegations and adverse evidence, and to a meaningful opportunity to respond. Ensuring those rights were respected was central to our function.

Our examination of witnesses blended elements of examination-in-chief and cross-examination. We were required both to facilitate witnesses in giving a full account and to put challenging evidence to them where necessary. Transparency was equally important: affected parties were given extensive disclosure and the opportunity to seek further documentation.

That experience reshaped my understanding of complex investigations and dispute resolution. It emphasised the importance of neutrality, thorough fact-finding, and procedural fairness. Rather than seeking to prove a case, the objective was to illuminate the evidence fully and allow the facts to emerge through careful, balanced examination.

Question 2

You obtained qualifications in both mediation and arbitration upon returning to the Law Library in 2008. What motivated you to pursue formal accreditation in ADR, and how did you view its potential within the Irish legal landscape at that time?

The Hon. Mr Justice Anthony Barr

By the time I returned to the Law Library in 2008, following six years as counsel to the Morris Tribunal and having taken silk in 2004, I recognised that both the legal landscape and my own professional position had evolved. Re-entering full-time civil practice prompted me to reflect on how I could enhance my skills and add further value to clients.

ADR was clearly gaining prominence, both in Ireland and internationally. I enrolled in the Diploma in Arbitration at UCD in 2006, which provided rigorous training in arbitration law and practice, including procedural principles and award drafting. The anticipated framework of what later became the Arbitration Act 2010 was already influencing discussion, reflecting Ireland's alignment with the UNCITRAL Model Law. The course was demanding and intellectually rewarding, and it deepened my understanding of arbitration as a structured, enforceable dispute-resolution mechanism.

At the same time, I undertook CEDR mediation training in 2008. Even before the Mediation Act was

enacted, it was evident to me that mediation had the potential to transform civil dispute resolution. Litigation had become increasingly costly and time-consuming, and mediation offered a proportionate, confidential and commercially sensible alternative. From a practitioner's perspective, the risks were minimal and the potential benefits significant. Settlement rates were consistently strong, reinforcing its practical value.

My decision to pursue formal accreditation in both arbitration and mediation was therefore strategic and forward-looking. I believed ADR would become an integral component of the Irish legal system, promoting efficiency, fairness and access to justice. That belief has since been borne out by experience.

Question 3

In your view, what were the key challenges in promoting awareness and uptake of alternative dispute resolution within the Irish legal community during the late 2000s and early 2010s?

In the late 2000s and early 2010s, the principal challenge in promoting ADR within the Irish legal community was cultural rather than conceptual. ADR, particularly mediation, was often viewed as peripheral to mainstream litigation. It lacked a clear statutory framework and, for many practitioners, remained secondary to traditional court-based advocacy.

That began to shift with the Mediation Act 2017, which placed mediation on a formal footing. Courts were empowered to invite parties to consider mediation, and unreasonable refusal could carry costs consequences. Solicitors were also placed under a statutory obligation to advise clients about mediation. This marked an important cultural change: while mediation remained voluntary, it became something parties were expected to consider seriously.

Financial realities were also influential. Litigation, particularly in areas such as medical negligence, had become increasingly lengthy and expensive. Mediation offered a proportionate, confidential and commercially sensible alternative. Even where settlement was not achieved, parties lost little; where it succeeded, the savings in cost, time and risk were substantial.

Over time, ADR proved its value not only in commercial disputes but also in family and employment matters, where flexibility and confidentiality are particularly important. What was once met with some scepticism has now become an established and respected part of Ireland's dispute resolution landscape.

In short, the early challenge lay in overcoming professional habit and institutional inertia. Legislative support and practical success ultimately secured ADR's place within the Irish legal system.

Question 4

From your perspective, what distinguishes a successful mediator or arbitrator in practice, particularly in terms of temperament, preparation, and ethical approach?

In practice, the qualities required of an effective arbitrator and those of a skilled mediator, while overlapping in certain respects, differ in important ways.

For an arbitrator, a defining characteristic is the ability to maintain firm control over the arbitral process, particularly during the pre-hearing phase. Unlike a judge, an arbitrator does not benefit from the full procedural infrastructure of the courts, or the automatic authority of court rules. As a result, an arbitrator must be sufficiently decisive and robust to ensure that the process progresses efficiently and is not undermined by delay, obstruction, or tactical manoeuvring by the parties. There must be a clear sense that the arbitration will proceed in an orderly manner and that procedural directions will be enforced.
Equally important is the arbitrator's temperament. The role demands calmness, attentiveness, and impartiality, coupled with the ability to listen carefully to the parties' submissions and evidence. A successful arbitrator will then bring those elements together to reach a reasoned, logical, and well-considered determination within a reasonable timeframe. Preparation, intellectual rigour, and ethical independence are fundamental to maintaining confidence in the arbitral process.

In the case of mediators, different, but no less demanding, skills come to the fore. An effective mediator must be adept at putting parties at ease and creating an environment in which they feel able to tell their story openly and honestly. Very often, particularly in sensitive areas such as medical negligence or personal injury disputes, a party's primary concern is not solely financial compensation but rather acknowledgment, understanding, or an apology. A skilled mediator recognises these underlying interests and allows space for them to be articulated.

That said, mediation also requires firmness at the appropriate stage. While the process may begin in a highly empathetic and facilitative manner, there comes a point, sometimes referred to as the 'reality check', when the mediator must gently but clearly challenge unrealistic expectations. This may involve explaining that certain outcomes are simply not achievable and refocusing the parties on practical

settlement options. Doing so requires confidence, judgment, and a careful balance between encouragement and candour.

Ultimately, the hallmark of a successful mediator is the ability to guide the parties through what can be a long and demanding process, often over an intensive day or more, while maintaining control, fairness, and momentum. Whether acting as arbitrator or mediator, the practitioner must be thoroughly prepared, ethically grounded, and committed to seeing the process through to a meaningful conclusion.

Question 5

As a judge of the High Court, how frequently do issues relating to mediation, arbitration, or adjudication arise before you, and how do the courts currently regard the role of alternative dispute resolution in the administration of justice?

In practice, my direct engagement with arbitration matters is limited. As you will be aware, arbitration issues within the High Court are centralised and assigned to a designated arbitration judge; a role currently held by the President of the High Court. This arrangement exists to ensure consistency and uniformity of approach in arbitration-related matters. Accordingly, applications to enforce arbitration clauses, challenges to arbitral awards, or allegations of arbitral misconduct are generally dealt with by the President, rather than arising before individual judges in the ordinary course. I have therefore not personally adjudicated on arbitration issues, as they are channelled through that specialist jurisdiction.

Mediation, by contrast, occupies a rather distinct position. It operates, as it were, within a 'hermetically sealed' process: the Court is not privy to what occurs during the mediation itself, nor should it be. The confidentiality of mediation is fundamental to its effectiveness. The point at which mediation intersects with the High Court is typically limited to procedural applications.

In particular, the Court may issue a formal invitation to the parties to consider mediation. While the Court cannot compel parties to mediate, it can direct them to engage with the question in a structured way, usually by requiring the parties to correspond within a specified period and indicate whether they are prepared to participate in mediation and, if not, to provide reasons for their refusal. Such an invitation is not merely symbolic. A refusal to engage in mediation without reasonable justification may carry costs consequences at the conclusion of proceedings, even for a party that ultimately succeeds in the litigation.

For that reason, a court-issued invitation to mediate is treated seriously by practitioners and parties alike. I have issued such invitations in appropriate cases. They serve to activate the statutory framework under the Mediation Act, ensuring that alternative dispute resolution is meaningfully considered as part of the overall administration of justice.

In summary, while arbitration matters are dealt with through a specialist judicial channel, mediation plays an increasingly important and recognised role within the court process. The courts regard ADR not as an alternative to justice, but as an integral component of it, capable of delivering fair, efficient, and proportionate outcomes where appropriate.

Question 6

Do you believe there is sufficient judicial encouragement for the use of ADR mechanisms, particularly mediation, within the civil justice system?

In principle, yes. There is judicial encouragement for the use of mediation, albeit with an important practical qualification. Very often, by the time a case comes before a High Court judge for hearing, it has reached the final stage of the litigation process. The parties will typically have completed pleadings, discovery, interlocutory applications, and extensive preparation. At that point, the judge may inquire whether the dispute has been referred to mediation, only to be told that it has not.

In such circumstances, the court is faced with a difficult decision. While one might regret that mediation was not attempted earlier, it is often neither realistic nor appropriate to adjourn a fully prepared hearing, where counsel are briefed, witnesses are present, and authorities assembled, to compel the parties to engage in mediation at that late stage. By then, it is usually too late. The optimal time for judicial intervention is much earlier in the process, either at a pre-trial or case management stage, when mediation can be meaningfully considered without disrupting the efficient running of the litigation.

That said, the courts do have mechanisms to encourage mediation. As already noted, judges may issue formal invitations to the parties to consider mediation; an unreasonable refusal to engage may have costs consequences at the conclusion of the proceedings, even for a successful party. Such invitations are therefore serious and should not be treated lightly.

That said, the courts do have mechanisms to encourage mediation. As already noted, judges may issue formal invitations to the parties to consider mediation; an unreasonable refusal to

engage may have costs consequences at the conclusion of the proceedings, even for a successful party. Such invitations are therefore serious and should not be treated lightly.

I would also note that solicitors are required, when initiating proceedings, to certify that they have advised their clients about the possibility of mediation. One would hope that this obligation is fulfilled substantively rather than as a mere formality. Ideally, clients should receive a genuine explanation of mediation and its potential benefits, rather than the process being reduced to a "tick-box" exercise.

Finally, I do not regard an invitation to mediate as a sign of weakness. On the contrary, in many forms of protracted civil litigation, mediation is both worthwhile and highly cost-effective. It can save significant time, expense, and emotional strain, and for that reason alone it merits serious consideration at an early stage in almost every civil dispute.

Question 7

Given your experience in both advocacy and adjudication, how would you describe the skills crossover between traditional courtroom practice and ADR processes?

The traditional perception of the barrister was, for many years, shaped by jury advocacy. Until 1988 there were civil juries, and criminal jury trials remain central to the public imagination, often epitomised by the dramatic courtroom cross-examination associated with well-known criminal cases. That style of advocacy, involving oral persuasion, witness examination, and rhetorical engagement with a jury, was long regarded as the defining hallmark of a barrister.

While those skills remain critically important in jury trials, particularly in the criminal law area; they are no longer the sole or even dominant form of advocacy in many areas of practice. Much contemporary litigation, such as commercial proceedings and non-jury/judicial review litigation, is predominantly paper-based. These cases typically involve extensive discovery, detailed witness statements, and comprehensive written submissions. Advocacy in such contexts is directed almost exclusively to the judge. It requires clarity of analysis, precision in legal argument, and mastery of written advocacy. Indeed, the non-jury judicial review list is now the largest civil list in the High Court, with significant judicial resources allocated to it (currently 9 judges), reflecting the scale and complexity of this form of litigation.

Against that backdrop, the skills required of advocates have broadened considerably. There is no longer a single model of effective advocacy. Instead, different types of proceedings call for different competencies, ranging from oral persuasion to forensic written analysis.

The skill set required for ADR, and mediation in particular, represents a further evolution. In mediation, the advocate must adopt a fundamentally different role. Rather than advancing a partisan case, the lawyer must be capable of understanding and engaging empathetically with the positions and interests of both parties. This often involves dealing with disputes that are emotionally complex, such as employment or workplace matters, where grievances may have developed over many years and are not easily reduced to a single legal issue.

In that context, the advocate's role is closer to that of a facilitator or problem-solver. The mediator or mediation advocate must be able to stand in the middle, see both sides of the dispute, and resist the instinct to argue exclusively from one client's perspective. This requires judgment, emotional intelligence, and a capacity for balance that is not always demanded in traditional adversarial advocacy.

Accordingly, the modern barrister's skill set is significantly broader than the historical stereotype of courtroom cross-examination. While oral advocacy remains vital in many areas, particularly in jury trials, the profession has increasingly moved towards a model that places substantial emphasis on written advocacy, analytical rigour, and dispute-resolution skills. ADR, and mediation in particular, has reinforced the need for adaptability, empathy, and a more nuanced approach to advocacy—one that reflects the diverse and evolving nature of contemporary legal practice.

Question 8

In your opinion, what role should organisations such as the Chartered Institute of Arbitrators (Ciarb) play in training and accrediting the next generation of dispute resolvers?

I think organisations such as the Chartered Institute of Arbitrators have a critically important role to play in the development, training, and accreditation of future dispute resolvers. Having served on Ciarb committees and as Vice-Chair prior to my appointment to the Bench in 2013, I have seen at first hand the value that the Institute brings to the promotion of arbitration, mediation, and other forms of alternative dispute resolution.

Ciarb plays a vital role not only in educating and training younger practitioners entering the field, but also in supporting more experienced professionals who wish to transition into ADR later in their careers. This breadth of engagement is essential to

to maintaining a strong and diverse pool of dispute-resolution practitioners.

One of the Institute's most significant contributions lies in providing a forum for the cross-fertilisation of ideas across disciplines. Arbitrators and mediators are not drawn exclusively from the legal profession; many are experts in other fields such as engineering, architecture, or quantity surveying. While such practitioners may require a grounding in legal principles, their technical expertise is often precisely why they are selected for particular disputes. CIArb facilitates an environment in which lawyers can learn from non-lawyers, and vice versa, thereby enriching the quality of dispute resolution across the board.

This interdisciplinary engagement also helps practitioners to move beyond professional silos—whether those of barristers, solicitors, engineers, or other specialists—and to gain a broader perspective on dispute resolution practice. In my view, that is of immense value.

In addition, CIArb has an important institutional role in organising seminars, conferences, and structured training programmes that support continuing professional development. Beyond education, the Institute is well placed to engage constructively with the Minister for Justice and with government more generally, advocating for stronger legislative and procedural frameworks to support ADR. This includes promoting appropriate reforms through both legislation and the rules of court.

Taken together, these functions place CIArb in a uniquely strong position to shape the future of dispute resolution in Ireland. Its role in training, accreditation, interdisciplinary engagement, and policy advocacy is not merely beneficial, but essential to the continued development and credibility of ADR within the justice system.

Question 9

How do you foresee technology and artificial intelligence influencing the future of ADR, for example, in areas such as online hearings, digital evidence, or automated decision-making?

That is a very significant question, and one that reflects some of the most profound changes I have observed since I began practice in 1985. While technological progress has been incremental over decades, the most dramatic acceleration occurred following the COVID-19 pandemic in 2020, particularly in relation to remote and hybrid hearings.

The ability to conduct hearings in a hybrid or fully virtual format has transformed dispute resolution. Witnesses and experts can now give evidence from virtually anywhere in the world, provided they have access to a secure online platform. This development has been especially beneficial in reducing cost, delay, and inconvenience, while also enhancing access to justice. It allows proceedings to run more smoothly, efficiently, and importantly more cost effectively.

A particularly practical example can be seen in personal injury litigation. Medical experts increasingly give evidence remotely from hospitals or offices, rather than attending court in person. Their reports are already disclosed in advance; oral evidence and cross-examination can be conducted effectively online. This avoids unnecessary travel, disruption to clinical work, and prolonged waiting times at court, while still preserving procedural fairness. The same advantages apply where witnesses are based abroad, eliminating the need for costly travel and complex scheduling.

In my view, these developments represent a major and enduring improvement in how disputes—whether in litigation, arbitration, or mediation are managed.

Artificial intelligence presents both opportunities and risks. On the positive side, AI has clear potential as a labour-saving tool. It can assist with document management, summarisation, chronologies, and preliminary legal analysis. However, I would sound a note of caution. The process of preparing a case; reading documents, constructing a chronology, analysing evidence, is not merely mechanical. It is often through that intellectual labour that counsel and judges come to understand a case fully. If AI replaces too much of that work, there is a risk that essential preparation and judgment may be diluted.

I am also concerned that AI may exacerbate an existing problem: the increasing length and complexity of legal documents. Over time, pleadings, contracts, and submissions have grown longer rather than clearer. There is a danger that AI will encourage even more prolix drafting—longer pleadings, more elaborate contracts, and excessive particulars in pleadings, rather than disciplined, focused drafting. In my experience, concise pleadings that identify the real issues are far more effective than sprawling documents that obscure them.

These observations apply equally in ADR contexts. While technology undoubtedly enhances accessibility and efficiency in arbitration and mediation, the fundamental disciplines of preparation, judgment, and proportionality remain essential. Technology should support, not replace, careful analysis of a case.

In summary, I think technology and AI will continue to play an increasingly important role in ADR, particularly through online hearings and digital evidence management. Used wisely, they offer enormous benefits in terms of cost, time, and access. Used uncritically, they risk undermining the very skills and judgment that effective dispute resolution depends upon.

Question 10

Having observed the evolution of legal practice over four decades, do you believe that ADR is now sufficiently embedded within Irish legal culture, or is further institutional support required?

I believe ADR, particularly mediation, is now firmly embedded within Irish legal culture. It is widely recognised and routinely used across a broad range of disputes, including complex commercial litigation, medical negligence claims, and cases involving the State. It is no longer seen as peripheral but as an integral component of modern dispute resolution.

Its strengths are especially evident in family and employment disputes, where underlying issues often extend beyond strict legal rights. Litigation tends to produce binary outcomes focused on breach and damages, whereas mediation allows for more flexible, relationship-sensitive solutions. It can address trust, communication, and ongoing working or personal relationships in a way courts cannot.

That said, while ADR is well established, continued institutional support remains important. Ongoing education, procedural reinforcement, and judicial encouragement ensure that mediation and other forms of ADR are used appropriately and effectively. In short, ADR is now embedded, but its development must continue to *be supported thoughtfully and strategically.*

Question 11

What advice would you offer to young barristers or practitioners seeking to develop a career in alternative dispute resolution (ADR) alongside traditional litigation practice?

I would strongly encourage practitioners interested in ADR to obtain recognised qualifications in arbitration, mediation, adjudication or conciliation. Formal accreditation is essential, both for acquiring technical competence and for demonstrating credibility to potential appointing parties.

ADR training emphasises procedural fairness, transparency and ethical discipline. An arbitrator or mediator must avoid any conduct that could give rise to even a perception of bias. Communications must be transparent, with no unilateral engagement, and all parties must be treated equally. These standards closely mirror judicial practice, where fairness and neutrality are paramount.

For those developing an ADR practice, reputation is everything. Independence, professionalism and scrupulous adherence to ethical standards build trust and confidence among users. Over time, that trust forms the foundation of a credible parallel practice alongside traditional litigation.

In short: invest in proper training, uphold the highest ethical standards, and regard procedural fairness not as a technical requirement but as the cornerstone of effective dispute resolution.

Question 12

Finally, reflecting on your distinguished career across the Bar, the Tribunal, and the Bench, to what extent do you consider that principles of alternative dispute resolution have informed your broader judicial philosophy on conflict resolution and procedural fairness?

I believe ADR principles have had a lasting influence on my judicial philosophy, particularly regarding procedural fairness and conflict resolution. My formal training in arbitration and mediation shaped my approach to structured reasoning, clarity in decision-writing, and disciplined analysis. The emphasis on producing reasoned, accessible awards has directly informed how I prepare judgments.

Mediation training reinforced the importance of understanding disputes from all perspectives. Effective resolution requires empathy and genuine engagement with the parties' concerns. In my experience, most disputes are capable of resolution when parties feel heard and treated fairly. While some matters necessarily require judicial determination, many benefit from dialogue and proportionate solutions.

These ADR principles — balance, transparency, fairness, and clarity — have influenced my broader judicial outlook. They underscore the importance of procedural justice and the responsibility of the court to manage disputes efficiently and humanely.

For these reasons, I consider ADR not merely complementary to litigation, but foundational to a modern and responsive system of justice.

Question 13

Turning briefly from legal doctrine, are there any works of legal fiction or narrative non-fiction, aside from academic textbooks, that you have particularly enjoyed or found influential during your career?

Yes, there are several works of legal narrative and fiction that I have found particularly engaging. *East West Street* by Philippe Sands stands out. It weaves personal history with the development of international criminal law, exploring the origins of the concepts of crimes against humanity and genocide. It is both intellectually compelling and deeply moving.

I also greatly enjoyed *A Civil Action* by Jonathan Harr, which offers a vivid account of complex environmental litigation in the United States. It provides valuable insight into the human and financial realities of large-scale civil disputes.

Prima Facie by Suzie Miller is another powerful work. Through fiction, it explores justice, vulnerability and the limits of the criminal justice system in a thought-provoking way.

Finally, for well-crafted legal fiction grounded in credible courtroom practice, Sarah Vaughan's *Anatomy of a Scandal and Reputation* are excellent reads.

Each of these works, in different ways, reflects on the law not only as doctrine, but as a human institution shaped by history, power and lived experience.

Judicial Contributions

The Courts and Part 4 of the Mediation Act 2017

The Hon. Mr Justice Mark Sanfey

Introduction

No reasonable judge requires convincing of the benefits of mediation. The courts have been staunch in their support of mediation and ADR generally as a means of resolving disputes in a swift and economical manner. While mediation is a consensual process, the courts have been given powers under the Mediation Act 2017 to encourage and facilitate mediation. These powers are contained in Part 4 of that Act.

Most judges in civil matters must consider on a regular basis whether they should suggest to the parties that they mediate before they proceed further with the litigation. The circumstances in which such a suggestion might be made differ from case to case, and from list to list. It occurred to me that it might be helpful to practitioners to say something about mediation from a judicial perspective; how judges regard mediation, and encourage and accommodate it where appropriate.

This is not intended as a scholarly article. Rather, I hope that it may give some insight into the perspective from the bench as regards mediation, and the way in which the court may intervene to encourage mediation, and that it may perhaps stimulate debate as to how the courts' powers in this regard might be developed in the future. While I have concentrated on the Commercial Court where I currently preside, I refer in the latter part of this article to approaches taken by the courts to mediation in other civil lists.

The Court's Powers under Part 4:

The role of a court in relation to mediation is set out at part 4 (sections 16 to 22) of the Mediation Act 2017 ('the Act'). Section 16(1) provides that the court

> *"...may, on the application of a party involved in proceedings, or of its own motion, where it considers it appropriate having regard to all the circumstances of the case:*
>
> (a) invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings;
>
> (b) provide the parties to the proceedings with information about the benefits of mediation to settle the dispute the subject of the proceedings."

The Hon. Mr Justice Mark Sanfey

Where the parties decide to engage in mediation, the court can adjourn the proceedings or extend time or "make such other order or give such direction as the court considers necessary to facilitate the effective use of mediation."[1] The power conferred by section 16(1) is "without prejudice to any other discretionary power which the court may exercise at any time during the course of proceedings with a view to facilitating the resolution of a dispute".[2]

Section 17 deals with the report to be made by the mediator to the court "following an invitation by the court under section 16(1) ..." It is notable that the mediator is not empowered to express the reasons

[1] Section 16 (2) (c) Mediation Act 2017.
[2] Section 16(5) Mediation Act 2017.

why the mediation did not result in a settlement, or to express any view as to the reasons for a failure in this regard. Sections 18 and 19 concern the effects respectively of mediation on litigation and prescription periods, and the adjournment of court proceedings to facilitate mediation.

Section 20 provides that, unless otherwise "ordered by a court or otherwise agreed between the parties", the parties must pay the mediator's fees and costs "agreed in the agreement to mediate", or "share equally the fees and costs of the mediation". Those fees and costs "shall be reasonable and proportionate to the importance and complexity of the issues at stake and to the amount of work carried out by the mediator".

Section 21 is as follows:

"In awarding costs in respect of proceedings referred to in section 16, a court may, where it considers it just, have regard to -

(a) any unreasonable refusal or failure by a party to the proceedings to consider using mediation, and

(b) any unreasonable refusal or failure by a party to the proceedings to attend mediation,

following an invitation to do so under section 16(1)."

This section follows a similar approach taken in section 169(1)(g) of the Legal Services Regulation Act 2015 ("LSRA"), which is as follows:

"(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

...(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."

There is however a subtle but important difference between section 21 of the Act and section 169(1)(g) of the LSRA. The former provision empowers the court to penalise in costs a party who, following a section 16(1) invitation by the court, unreasonably refuses or fails to consider using mediation or unreasonably refuses or fails to attend mediation, presumably having considered using mediation and agreed to do so. Section 169(1)(g) appears to envisage an invitation by the court to "settle the claim" – not just to consider mediation – and empower it to depart from the "costs follow the event" principle where a party is unreasonable in refusing to engage in settlement discussions or mediation.[3]

Mediation Rules of Court

The procedures underpinning part 4 of the Act are set out in Rules of the Superior Courts (Mediation) 2018.[4] The rules provide for a new Order 56A; it is notable that the order permits the court to "invite the parties to use another ADR process to settle or determine the proceedings or issue...", with all the powers of extending time or making other orders to facilitate the effective use of that alternative process as would apply to mediation under the Act.[5]

Commercial Court Mediation Rules

The Commercial Court commenced operation on 12 January 2004. To facilitate its functions, Order 63A of the Rules of the Superior Courts was enacted.[6] Order 63A, rule 6 grants a number of specific powers to the court at the initial directions hearing, *i.e.* after the court has been satisfied that the matter before it falls within the definition of "commercial proceedings" and is suitable for entry in the commercial list. Among the extensive powers granted by rule 6 is the following:

"(1) Without prejudice to the generality of rule 5 of this Order, a Judge may, at the initial directions hearing –

(a) of his own motion and after hearing the parties, or

(b) on the application of a party by motion on notice to the other party or parties returnable to the initial directions hearing, give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule:

...(xiii) on the application of any of the parties or of his own motion, that the proceedings or any issue therein be adjourned for such time, not exceeding twenty-eight days, as he considers appropriate to allow the parties time to consider whether such proceedings or issue ought to be referred to a process

[3] See *Gary Keville Transport Limited v MSC (Mediterranean Shipping Company) Limited* [2022] IEHC 544. I refer to this case in the section "Mediation and Costs" below.
[4] SI 13/2018.
[5] SI 13/2018, Rule 10(1).
[6] Rules of the Superior Courts (Commercial Proceedings) 2004, SI 2/2004.

> of mediation, conciliation or arbitration, and where the parties decide so to refer the proceedings or issue, to extend the time for compliance by any party with any provision of these Rules or any order of the Court."

This sub-rule was included in the original version of Order 63A, and notwithstanding numerous revisions of that order, remains unchanged in the order to this day. It anticipates section 16 of the 2017 Act. However, while it does permit the court to facilitate an ADR process by adjourning proceedings, it is notable that the adjournment to consider whether the proceedings "ought to be referred to a process of mediation, conciliation or arbitration…" is not to exceed 28 days, a requirement that is absent from the Act or the mediation rules. This presumably reflects the nature of the Commercial Court, in which proceedings are heavily case-managed in order to ensure expedition in the proceedings. Indeed, it is difficult to see why parties would need as much as 28 days simply to decide whether or not to avail of the ADR option, although the process of agreeing a suitable third party as mediator and the terms of that party's engagement can sometimes cause genuine difficulty.

Mediation and the Commercial Court

On 17th January 2024, a ceremony was held in the Four Courts to mark the twentieth anniversary of the Commercial Court. All speakers at the event paid tribute to Mr Justice Peter Kelly, former President of the High Court, who – as Mr Justice Denis McDonald observed in his introductory remarks – "almost singlehandedly was responsible for the establishment of the Commercial Court in 2004…". In a stimulating and entertaining address, Mr Justice Kelly spoke generally about the factors which informed the creation of the court and the fashioning of statutory provisions in order to give effect to its aims.[7]

In relation to mediation, Mr Justice Kelly stated as follows: -

> "Many innovations were made in the Commercial Court, but I want to mention a few in particular. The first was the introduction of the virtually unknown concept of alternative dispute resolution. It had achieved a minor amount of attention by 2004 but sufficient to warrant its inclusion as a tool in the Commercial Court toolbox with a view to bringing disputes to a satisfactory conclusion…. The power was used to good effect in many cases…. But ADR has its limitations and it is, I believe, a mistake to view it as a panacea. If it is not used judiciously, it can be a source of simply more delay and more expense. Anecdotal evidence suggests that it may well be overused with poor results ensuing." [8]

Mr Justice Kelly went on to state that: -

> "…The power conferred on the Court in respect of ADR was not a compulsive power and that was deliberate policy. The Court was given jurisdiction to adjourn a case for up to 28 days to enable the parties to consider alternative dispute resolution…. I've always been strongly of the view…. that the notion of mandatory alternative dispute resolution is not a good one. Parties have to be open to the possibility of ADR if it is to work. Otherwise, it's a waste of time and money."[9]

Mr Justice Kelly referred to the decision of the Court of Appeal in England and Wales in *Halsey v Milton Keynes General NHS Trust*[10], and cited certain dicta of Lord Dyson which suggested that the approach adopted in the Commercial Court Rules of not providing for compulsory ADR "received indirect endorsement at Court of Appeal level in England"[11]. He noted the contrary approach now adopted by the Court of Appeal in England in *Churchill v Merthyr Tydfil County Borough Council* [12], and stated that the "move from encouragement to compulsion is one that I hope will not be followed".[13]

How mediation is approached in the Commercial Court

As practitioners know, there is no automatic right of inclusion for litigants in the commercial list. In order to obtain an order entering proceedings in the commercial list, those proceedings must fall within the definition of "commercial proceedings" in rule 1 of Order 63A. A party to such proceedings then makes an application for entry in the list pursuant to Order 63A, rule 4(2); the applicant must include a "certificate of the solicitor for the applicant to the effect that the proceedings are appropriate to be treated as commercial proceedings within the meaning of rule 1…".

Most applications under Order 63A, rule 4(2) are successful; often the respondent party will consent to the application in order to avail of the court's extensive powers of case management which are designed to ensure efficiency and expedition

[7] For a transcript of proceedings see Ceremony to Mark the 20th Anniversary of the Establishment of the Commercial Court Transcript of Proceedings < https://clai.ie/wp-content/uploads/2024/04/Commercial-Court-Ceremony-final-transcript.pdf>

[8] Ibid.

[9] Ibid.

[10] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA 576.

[11] Supra, note 7.

[12] *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416.

[13] Supra, note 7.

of the litigation. The hearing of the application is usually treated as the "initial directions hearing" required by Order 63A, rule 4(6), and the parties will typically have agreed a tentative set of directions for approval by the court as to delivery of pleadings or the making of further applications.

A conspicuous feature of the Commercial Court is that papers are required by practice direction to be lodged by the moving party in advance of an application before the court.[14] The judge hearing the application will have read the papers in advance. The court therefore is aware prior to the hearing of the nature of the dispute and may form a tentative view as to how the litigation should proceed, including whether or not an ADR procedure such as mediation should be considered by the parties. Section 16(1) of the Act provides that the court can raise the issue of mediation with the parties of its own motion. This can happen as early as the initial directions hearing. On occasion, it is intimated to the court that one or other party wishes to make an application for an adjournment of the proceedings under s.16(1) so that the desirability of mediation can be considered, although this rarely happens at the initial directions stage.

At the entry stage, the court will usually have seen the correspondence between the parties prior to the issue of the proceedings and the application for entry. It may be that the possibility of mediation has been raised by one of the parties and rejected by the other. On the other hand, it will sometimes be clear that the plaintiff wishes to press on with the proceedings, but might not be averse to a mediation process which can be conducted swiftly and economically. Likewise, a defendant may also see the possible benefit of mediation, but does not want to be the first to promote the idea of a mediated dispute, fearing that it may be seen as a concession of the merit of the plaintiff's case. In such circumstances, a suggestion from the bench that the parties consider mediation is often welcome; the parties have the "cover" of being asked to consider mediation by the court rather than having to be the party raising the issue.

Mediation from the point of view of the parties

What mindset do the parties bring to the issue of mediation at the outset of Commercial List proceedings, which will normally concern commercial disputes of a value in excess of €1m, and usually of a considerably higher value? Firstly, the plaintiff will be well aware of the respective merits of mediation and litigation as a means of resolving the dispute. Section 14 of the Act requires that a practising solicitor must, prior to issuing proceedings on behalf of a client, advise the client to consider mediation "as a means of attempting to resolve the dispute the subject of the proposed proceedings", and in particular, provide the client with information about "(i) the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and (ii) the benefits of mediation…". Section 14(2) of the Act requires the solicitor to ensure that the originating document by which the proceedings are instituted is accompanied by a statutory declaration by the solicitor evidencing that they have performed the obligations imposed on them under section 14(1). Recent decisions of the High Court have enforced the obligation to provide such a declaration strictly, holding that the litigation may not proceed in the absence of such a declaration.[15]

Secondly, parties involved in commercial disputes will often be sophisticated and experienced litigants who are well aware of the pros and cons of mediation, and will readily engage with the concept if they consider it an appropriate means of dealing with a particular dispute. It may be that the positions of the parties are too entrenched for mediation to be a realistic option. However, even if the pre-proceedings correspondence suggests that there is an unbridgeable gap between the parties, the possibility of mediation should always be kept under review by the parties.

I have found that litigants who firmly rejected mediation at the outset sometimes become more amenable to the concept at certain points of the litigation process. It may be that the parties have a better understanding of their respective positions at the close of pleadings, which I consider should always be drafted in a proactive and informative way so that the opposing party is clear as to exactly what is in issue. The next step after the close of pleadings is usually discovery; as this is a process which, in commercial proceedings in particular, more often than not causes considerable delay and exorbitant expense, the parties would do well to "take a breath" at the close of proceedings and revisit the question of whether mediation might not be a better option. Litigation should not be a ruinously expensive runaway train which proceeds inexorably to a destination which may suit neither party.

As with the close of pleadings, it can often be the case that seeing the other side's discovery documentation brings a new perspective to the case. Documents may emerge which materially affect a party's view of the strength or weakness of its own case. Once again, this is an appropriate point at which the parties need to keep the

[14] See Practice Direction HC122 Commercial Court List.

[15] See *Byrne v Arnold* [2024] IEHC 308; *V Media Doo & First Click Marketing Operations Management Ltd v TechAds Media Ltd* [2025] IEHC 430.

option of mediation in mind before commencing preparations for what may be a lengthy and costly trial.

Willingness to encourage mediation

The courts, and the Commercial Court in particular, will generally facilitate attempts to resolve disputes by mediation wherever possible. However, there are some aspects of the court's position in this regard which must be approached with care.

The "USP" of the Commercial Court is its promotion of expedition and efficiency in litigation by case management, supported by a wide range of powers to direct the litigation as set out in Order 63A and High Court Practice Direction 122. Parties apply for entry of proceedings to the list in order to avail of the court's facilities in this regard. It is important that the court's ability to facilitate mediation under Part 4 of the Act does not interfere unduly with its ability to ensure expedition in a given case.

The court, before raising the issue of mediation under section 16(1), must satisfy itself that the parties are not implacably opposed to mediation. It may be that the correspondence available to the court reveals that the parties have considered and rejected the possibility of mediation. In such circumstances, an invitation to consider mediation – at the outset of the proceedings in any event – is unlikely to be productive. There is always the possibility that one or both parties may feel that, as the invitation has issued from the court, it must be accepted and to do otherwise would be to run the risk of incurring the court's displeasure.

It must be remembered that mediation is a voluntary process in this jurisdiction. As Mr Justice Kelly said in an influential article in 2010, "...it is not possible to force people to go to mediation and if one does so, it is unlikely to be successful".[16] Both parties must be open to the idea that mediation might be the means of resolving their dispute. I agree with Mr. Justice Kelly that it is "a waste of time and money" if one party enters a mediation without a *bona fide* intention to commit to the process with a view to making it work.[17]

Section 16 primarily involves an invitation by the court to the parties to "consider mediation as a means of attempting to resolve the dispute." Any party who has already considered this issue and, for its own perceived reasons, has not considered mediation appropriate, should have no hesitation in informing the court of its position, while perhaps acknowledging that the suitability of mediation would be kept under review by that party as the litigation progresses.

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[16] The Hon. Mr Justice Peter Kelly, "*Alternative Dispute Resolution and the Commercial Court*" (2010) 2 *Arbitration and ADR Review* 92, at 93.

[17] *Supra,* note 7.

Expedition in the mediation itself

In deciding whether or not to invite the parties to consider mediation pursuant to its powers under section 16, the court will wish to ensure that the mediation is conducted quickly and efficiently. As we have seen, the rules of court provide that the parties have a period "not exceeding 28 days" to consider whether the proceedings or an issue be referred to mediation; in practice, I would expect the parties to make this decision within a week, or two at most. I would then expect the parties, if they have not already done so, to agree without delay on the choice of a suitable mediator and a date on which the mediation is to convene.

There is a large number of skilled mediators well equipped to provide mediation services in commercial and other areas of the law. Both the Bar Council and the Law Society deal extensively with ADR on their respective websites, which can be used to identify an appropriate mediator. Most mediators have standard terms of engagement which they will supply upon request. The court will generally expect opposing parties who intend to "put their best foot forward" in the mediation to agree the appointment and convene the mediation promptly. Foot-dragging or unreasonable reluctance by a party to agree a mediator may be construed as a reluctance to engage seriously with the process; in such circumstances the court may give directions for the resumption of the litigation.

It is also important that parties should not get bogged down in the mediation process itself, and that both the parties and the mediator bear the need for expedition of the mediation in mind. The choice of a mediator or their terms of engagement can sometimes be a cause of undue delay. As Mr Justice Kelly pointed out in his 2010 article:

> "...Some particular mediators have become very popular. They have an acknowledged expertise and success rate. Thus parties seek to obtain their services. Their diaries grow full with consequent delays in getting mediations on for hearing. I have, therefore, on occasions been confronted with the situation where I could offer a trial of the action faster than the mediator could arrange the mediation".[18]

In circumstances where the proceedings have been adjourned to facilitate a mediation, it is the practice of the court to have the matter mentioned before the court at regular intervals to ensure that the mediation is progressing. Although the court does not enquire into any matter of substance before the mediator, it may require some assurance from the parties that progress is being made and that the parties continue to consider that the process is worth pursuing.

Mediation and costs

It appears from its wording that section 21 applies only where there has been an invitation by the court pursuant to section 16(1), and the situation would appear to be the same with section 169(1)(g) of the Legal Services Regulation Act 2015, in that an invitation by the court to "settle the claim (whether by mediation or otherwise)" must be made for the sub-section to apply.

In relation to the applicability of section 169(1)(g), in the Court of Appeal decision in *Word Perfect Translations Services Limited v Minister for Public Expenditure & Reform*, Donnelly J stated as follows:

> "61. Although it is an obvious observation, it is still worthwhile to begin by noting that s.169(1) does not contain within it an express reference to any requirement to conduct litigation in *the most cost-effective manner possible*". If the trial judge was correct that the 2015 Act was the impetus for the proposition that the starting point for any costs order was to review the winning parties conduct to ensure the litigation was conducted in the most cost-effective manner possible, then one would have thought that such a departure from the generally applicable position that costs follow the event would have been expressly stated. Instead, section 169(1) commences with the direct statement that 'a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise...'".[19]

In the earlier decision of the High Court in *Mascarenhas v Karim* [2019] IEHC 333, Jordan J noted that:

> "44. Although the respondents have suggested a willingness to engage in mediation from an early stage the fact of the matter is that they have frustrated two attempts at mediation in the same way as they endeavoured to evade service of the original proceedings. Whilst indicating a willingness to engage in mediation they issued the six separate motions – and later the first named respondent issued a separate and wholly unmeritorious motion to have his name struck from the proceedings".[20]

[18] *Ibid,* at 95.

[19] *Word Perfect Translations Services Limited v Minister for Public Expenditure & Reform* [2023] IECA 189, at [61]. [Emphasis in original].

[20] *Mascarenhas v Karim* [2019] IEHC 333, at [44].

The reported decision does not indicate how the court dealt with the costs of the matter. However, in rejecting the appeal of the High Court decision by the defendants in the same case, the Court of Appeal (Costello J as she then was) dealt with the costs as follows:

> "279. My preliminary view is that the applicant has been entirely successful within the meaning of … s.169 of the Legal Services Regulation Act 2015 and he is entitled to his costs against both appellants, jointly and severally, to be adjudicated in default of agreement. However, he was less than candid with the High Court and this Court as to the deterioration in his immigration status and thus the crucial matter of his right to reside and work in the State. This is a matter to which the court may have regard when ruling on costs (s.169(1)(a) and (c)). I would normally therefore reduce the applicant's costs by 10% as reflecting an appropriate sanction for this conduct. However, the appellants have equally conducted the litigation in a manner which this Court cannot condone and they twice refused the opportunity to resolve the dispute by mediation. For this reason, I would not in fact make any deduction from the costs of the applicant in conducting the two appeals…". [21]
>
> There is no suggestion in either the High Court or Court of Appeal judgments in *Mascarenhas* that there had been a section 16 or section 169 (1) (g) invitation by the court. Notwithstanding that, it is notable that the Court of Appeal was prepared to take into account the fact that the appellant "twice refused the opportunity to resolve the dispute by mediation" in the exercise of its discretion as to costs in considering "conduct before and during the proceedings" and "the manner in which the parties conducted all or any part of their cases" (the criteria in section 169(a) and (c) which the court is entitled to take into account in considering any departure from the maxim "costs follow the event").[22]

In *Gary Keville Transport Limited v MSC (Mediterranean Shipping Company) Limited & Anor,* the court considered section 169(1)(g) in circumstances where the plaintiff's application for an interlocutory injunction had been refused. The defendant sought its costs of the application; among the grounds advanced by the plaintiff was that the defendant should not be entitled to its costs due to an alleged refusal to mediate the dispute. Dignam J stated as follows:

> "51. GKT argues that after Allen J *'hinted'* at mediation in October 2021 GKT's solicitor wrote an open letter suggesting mediation but there was no reply at all to this between the 28th October and 3rd December. MSC pointed out that there was in fact a settlement meeting and that GKT can not rely on the fact of a mediation not having taken place when a settlement meeting occurred. I think this is correct. The section expressly countenances efforts to settle being taken by way of mediation or settlement discussions and where the latter occurred and where there is no evidence that either party did not bona fide take part I cannot conclude that either party was *'unreasonable in refusing to engage in the settlement discussions or mediation'".*[23]

Compulsory mediation?

There is currently no basis upon which parties to a dispute in court can be forced by the court to mediate rather than litigate that dispute.[24] The court can invite the parties to mediate, and there may be costs implications arising from a failure to do so. However, litigants cannot be ordered by the court to participate in what is in essence a consensual process.

The position is different in England and Wales. The Court of Appeal in *Halsey*[25] took the view that a court could not compel a party to engage in ADR, as to do so would infringe rights under Article 6 of the European Convention on Human Rights ("…in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…").

However, the Court of Appeal in *Churchil*l held that the view of the court in *Halsey,* particularly as expressed by Lord Dyson at paragraphs 9 to 10 of the court's judgment, was "not part of the essential reasoning in that case"; it was held that:

[21] *Mascarenhas v Karim* [2022] IECA 48, at [279].
[22] *Ibid.*
[23] [2022] IEHC 544, at [51]. [Emphasis in original].
[24] Save for the rarely used section 15 of the Civil Liability and Courts Act 2004, which enables the court to direct the holding of a "mediation conference" in a personal injury action. Section 22 of the Mediation Act 2017 enables the court to exercise this power "upon its own initiative".
[25] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA 576.

"The court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost"[26].

In his judgment on behalf of the court, Sir Geoffrey Vos MR went on to say that he "decline(d) to lay down fixed principles as to what will be relevant to determining the questions of a stay of proceedings or an order that the parties engage in a non-court-based dispute resolution process..."[27]. While there was some discussion in *Dyson and Churchill* of the circumstances in which compelling parties to mediate might occur, the Court of Appeal in *Churchill* effectively left it to courts to decide in an individual case whether it might be appropriate to compel parties to mediate; as the Master of the Rolls put it: -

> "It would be undesirable to provide a checklist or a score sheet for judges to operate. They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective"[28]

An analysis of the trend in England and Wales or a detailed discussion of the merits or otherwise of compulsory mediation are well outside the scope of this article. In any event, the landscape as regards mediation is somewhat different in this jurisdiction. The Supreme Court has recognised a right to litigate as a constitutional right; it has defined the right as "the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law"[29] It may well be that section 16 of the Mediation Act was drafted with this in mind, in that an order compelling parties to mediate rather than inviting them to consider that option might infringe the parties' constitutional rights. There is also no guarantee that an Irish court would take the same view as the Court of Appeal in *Churchill* as to whether compulsory mediation would infringe Article 6 of the ECHR.

[26] *Churchill v Merthyr Tydfil Bureau Council* [2023] EWCA Civ 1416, at [74 (ii)]. For an interesting analysis of the decision in *Churchill* and its implications, see Dominic Spenser Underhill, "The British Courts and Compulsory ADR- How Did *That* Happen?" (2024) 5 *Amicus Curiae* 608.

[27] *Ibid,* at [74 (iii)].

[28] *Ibid,* at [66].

[29] *Tuohy v Courtney* [1994] 3 IR 1 at [45].

Mediation in other civil lists

The suitability of mediation to a dispute and the possibility of the court making an invitation pursuant to section 16(1) of the Act are considered in most of the lists dealing with civil cases. I set out below some general observations and remarks in relation to the part mediation plays in the operation of such lists.

Chancery List

Order 63C was enacted on 5th April 2016 by the Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016.[30] It sought to provide similar provisions and case-management powers for the Chancery and Non-Jury lists as had been provided to the Commercial List by Order 63A, with a view to making the conduct of trials more expeditious and effective. However, the provisions of the order have not yet been implemented; as the Review of the Administration of Civil Justice stated in October 2020, "...currently, by court direction, the rules have no practical effect, pending the provision of the appropriate and necessary resources"[31]. In any event, Order 63C does not have any equivalent provision to Order 63A, rule 6(xiii), although the provisions of the Act apply generally to the cases which are in the list.

While the possibility of adjourning proceedings to facilitate ADR is often considered in the Chancery list and suggested by the court, the relatively lower value of cases – compared to those in the Commercial Court – often causes the parties to be reluctant to add another layer of cost to what may already promise to be an expensive outing in the courts.

Non-Jury List

As indicated above, Order 63C, which applies to proceedings in the Non-Jury list, has not been activated. Mediation is suggested to the parties by the court where appropriate, and is often found to be particularly appropriate where the case is essentially a family or partnership dispute. The list however covers a vast range of different types of disputes, many of which would not be suitable for mediation. Bank repossession or debt recovery cases, which are typical of the list, usually involve intensive settlement negotiations rather than a formal mediation process. As with the Chancery list, the typically lower value of claims in cases in the list means that mediation may involve an extra layer of cost and delay to the litigation which is not warranted in the circumstances.

[30] SI 255/2016.

[31] Review of the Administration of Civil Justice Report, October 2020 at [4.12].

Mediation is heavily encouraged in the Hague Luxemburg Convention ("HLC") List. This list concerns cases of international child abduction.[32] Mediation is encouraged in this list, where it is preferable that the health, safety and custody of a child be the subject of decisions by its parents – even if they agree on nothing else – rather than the court.

Personal injuries list

In personal injury and clinical negligence litigation, mediation now operates within a framework that combines a practice direction and statutory provisions.

High Court Practice Direction 131 establishes mediation as a pre-trial step in clinical negligence actions by requiring any party seeking a trial date to undertake to offer mediation within three weeks of the trial date being fixed and, if the offer is accepted, to participate in mediation within six weeks thereafter.33 Even if the offer is declined, the applicant must still agree to mediate within six weeks of any subsequent offer from the other party prior to the trial. If mediation is undertaken, the parties are further required to participate constructively and comply with reasonable directions from the mediator, with the obligation dispensed with only where the court is satisfied that mediation would not assist settlement.[34]

As can be seen, the practice direction establishes a form of conditional mandatory mediation. It obliges an applicant for a trial date to make a timely offer of mediation, and where the offer is accepted, obliges all parties to participate properly in the process. It does not compel a party to accept an offer of mediation, and it allows the court to dispense with the requirement entirely where mediation is plainly futile.

Since the introduction of the practice direction, mediation is now routinely used in almost all clinical negligence cases in the High Court. It has also been widely adopted in personal injury litigation, particularly in high value, or multiple plaintiff/ defendant cases.

Parallel to these rule-based changes and cultural shift by practitioners towards mediation, the court retains its statutory power under the Act to invite parties in any civil proceedings to engage in mediation together with its surprisingly less well-known but more striking power under section 15 of the Civil Liability and Courts Act 2004 to direct the holding of a "mediation conference" in a personal injury action.[35] These powers are rarely availed of in practice.

Family law

In high net worth matrimonial disputes, mediation is encouraged by the court as a matter of course and occurs more often than not. Ideally such mediation would take place as early in the process as possible, and early engagement by the parties is encouraged.

Planning and environment list

The Act is of little relevance to the planning and environmental list as judicial review is excluded from its operation: see section 3(1)(f) of the Act. Notwithstanding that, mediation is encouraged by the court where it has a realistic potential to resolve a dispute.

Concluding comments

The great value of mediation lies in its flexibility. The procedure can be tailored to meet the demands of a particular dispute. It can address litigation between parties as a whole, or can be used to address key discrete issues, the resolution of which may lead to meaningful negotiation and ultimate settlement. It can bring the expertise of a specialist mediator to bear on issues which might require detailed expert evidence at trial. If parties are prepared to approach a mediation in good faith, it should be capable of being completed quickly and economically.

Where a mediation of court proceedings is successful, it brings about a resolution to the dispute which the parties can live with. Enormous savings in legal costs can be achieved. The parties can draw a line under the dispute and get on with their lives and businesses; a successful mediation brings closure.

Is the atmosphere in commercial and other civil disputes conducive to a willingness on the part of practitioners to look favourably on mediation as a means of resolving disputes? My own view is that the perception of mediation has improved greatly over the last twenty years or so. It was once regarded as a sign of weakness if, after a mutually aggressive face-off between the parties in correspondence or pleadings, one of the parties suggested mediation of the dispute; that party

[32] This area if law is governed by the Hague Convention on the Civil Aspects of International Child Abduction and Council Regulation (EC) No. 2019/1111.

[33] HC131 Clinical Negligence Actions - Applications for Trial Dates pursuant to pursuant to Section 11(12) and Section 11(13) Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

[34] *Ibid.*

[35] Section 15 Civil Liability and Courts Act 2004, as amended by s.22 of the Mediation Act 2017.

would be deemed to have "blinked first", and shown weakness.

I do not believe that this would be the perception in most litigation today, particularly in commercial disputes. If the plaintiff's solicitor has discharged his or her Section 14 duties, the plaintiff at least has an understanding of the benefits of mediation as a means of resolving the dispute. One wonders if a similar obligation could be placed on a defendant's solicitor, with a declaration by the solicitor that section 14 advice has been given to their client a precondition of delivery of a defence or replying affidavit.

In commercial disputes in particular, litigants are often very familiar with the concept of mediation, and may well have a shrewd idea in a given case as to whether it would have a chance of success. Disputes in the Commercial Court almost invariably involve well-resourced clients who get expert advice and will presumably be open to the prospect throughout the litigation of achieving effective and cost-efficient settlement. Given that the cases in the Commercial List are almost invariably of high value, the extra cost and expense of engaging a mediator may be less likely to deter the parties from mediating their dispute than might be the case in disputes of a lower value.

In courts where cases are of lower value than those in the Commercial Court, successful mediation may be more difficult to achieve. It may be seen as imposing a costly and unnecessary procedure on top of what is already expensive litigation. While we have all seen situations where mediation has resolved seemingly intractable disputes, the pessimism of parties as to the prospects of settlement may make them reluctant to mediate. The option of settlement negotiations is always there for litigants; it may be difficult to persuade litigants that incurring the extra cost of an independent third party who would broker a settlement is worth the expense and delay involved.

It does seem to me however that there has been a "culture shift" in the perception of mediation, in which it has come to be recognised as a mechanism which, given the right circumstances, may be very effective in resolving a dispute. The Act itself has played a major role in this regard. Mediation is now a statutorily-recognised procedure, and the Act imposes obligations on practitioners and the court to facilitate it when appropriate. Much work has been done by bodies such as the Chartered Institute of Arbitrators to promote awareness of mediation. Appropriate training as a mediator is now readily available to practitioners. The benefits of mediation are now well understood by practitioners, who can work together in an appropriate case to deploy it to the benefit of their respective clients.
I think the primary obligation to consider whether mediation is appropriate in a given case must rest with the legal advisers to the parties, who may have lived with the dispute for a considerable period before it came to court. The parties may have corresponded with each other, airing their respective grievances at length. There may have been extensive attempts by the parties to come to some arrangement, to no avail. By the time the parties get to court, it can be the case that there is no realistic prospect of settlement, whether by mediation or otherwise, at least in the early stages of the litigation.

If the court enquires about whether the parties have considered mediation, it may be met with a firm response that the parties do not consider it appropriate, at least at the present time. In such circumstances, it is not appropriate for the court to impose its view on the parties that they should "give it a go". A section 16(1) invitation by the court of its own motion to adjourn the proceedings should probably only be made in one of two circumstances: firstly, where one of the parties wishes to mediate, but the other party either refuses or is reluctant to do so. Adjourning for a couple of weeks will allow the parties to at least correspond about the possibility of mediation, and come to an informed and definitive position.

Secondly, there will be instances where the parties are so entrenched in their positions that they are almost oblivious to the possibility of compromise. It is sometimes the case that the respective solicitors have attempted to persuade the parties to mediate, but their efforts have fallen on deaf ears; any judge who has ever had to deal with oppression proceedings pursuant to section 212 of the Companies Act 2014 involving family members or quasi-partnerships has probably encountered this situation. The court and/or practitioners may be of the view that a mediator who would provide a reality check for the parties and "knock heads together" would offer the best chance of progress. In such a situation, a court may be justified in insisting on inviting the parties to consider mediation and adjourning the proceedings, perhaps expressing some views about the desirability of mediation in the particular circumstances. Practitioners sometimes welcome this approach, as they may feel that the advice to consider mediation may carry more weight with the parties when it comes from the bench rather than their advisers.

While a court has to be astute to recognise situations where either a suggestion or a section 16(1) invite to consider mediation might be appropriate, in my view this should be done selectively, on a case by case basis. If a pro-mediation speech is recited by rote on every

occasion when a new matter comes before the court, it may lessen the impact of the message. A well-judged intervention by the court in a suitable case is likely to have more impact. However, it may be that in lists, such as the family or personal injuries lists, involving litigants who are unlikely to have much familiarity or previous experience with court procedures, any perceived advantages of mediation may have to be explained more carefully or regularly.

Finally, as we have seen, the court has no power to compel the parties to mediate. Since *Churchill,* the position is different in England and Wales. While there is some discussion in this jurisdiction as to whether a court should have such a power, I do not sense that there is any clamour among practitioners for Irish courts to have this power. The implications of *Churchill* are being teased out in litigation across the water. I think that we should see how the situation develops in that jurisdiction before giving serious consideration to such a fundamental change. For the moment, I am happy to agree with Mr Justice Kelly that mediation is essentially a consensual process and should remain so.

Judicial Contributions

Carrot and Stick – Exploring Med Arb

The Hon. Ms Justice Nuala Jackson[1]

"Speak softly and carry a big stick"
Theodore Roosevelt[2]

Introduction

When we break down ADR into its constituent parts, the primary focus must be on resolution. A dispute has arisen, there are a variety of different ways in which the protagonists can approach it but the fundamental end result is to resolve it. When analysis of the various different possible routes to resolution is undertaken, common themes emerge – autonomy; speed; cost; bespoke-ness; finality; enforceability; confidentiality. Each of the various alternative methodologies towards resolution have their merits and demerits when analysed through the prism of these themes. But, of course, there is no need to be purist. The various methodologies can be intermingled, extracting the elements of each which best suit the particular situation and which, most importantly, result in resolution. Previously in this publication, I discussed judicial mediation, a concept with which we are unfamiliar in this jurisdiction but which has broad acceptance in others, living at the cross-roads between litigation and mediation. Intent on furthering this examination of the, depending on your perspective, adulteration or enhancement of individual methodologies, I now turn to look at Med-Arb – the hybridisation of mediation and arbitration.

Med-Arb Defined

Med-Arb is the ultimate carrot and stick (sometimes called mediation with a bite!)[3]. The essence of it is to afford parties the voluntariness and autonomy of mediation and mix it with voluntary submission to the dictation of arbitration. Landry summarises the advantages of the fusion stating:

The Hon. Ms Justice Nuala Jackson

"Where traditional mediation is unlikely to be successful, med-arb can be viewed as a superior alternative to either orthodox arbitration or the trial process because the med-arb method "pays strict adherence to the axiom that the best agreement is an agreement which the parties themselves reach." The basic premise being that under the threat of arbitration, the participants will try harder to reach a voluntary agreement."[4]

I often think the mediator's role can be compared with that of an orchestra conductor – he plays no instrument himself and contributes not (or should not do so) to the general din, but rather he quietly directs the entire production, bringing the different sections together, with ebbs and flows, gently directing all to the crescendo and finale. All of this works smoothly and well until the strings and the percussionists fall out and the wind section takes the opportunity to assert control. This is where it may be necessary for our mediator-like von Karajan to assert himself and morph into a

[1] Judge of the High Court, Adjunct Professor School of Business and Law, UCC, Committee Member GEMME Ireland
[2] Minnesota State Fair, September 2, 1901

[3] Landry, Sherry, *"Med-Arb: Mediation with a Bite and an Effective ADR Model"*, 63 Def. Counsel J. (1996) 263

[4] Ibid pp. 264-5.

deTerminator, making decisions which are not followed by choice but by order - Med-Arb.[5]

Origins

Combining consensuality with finality and enforcability, this hybrid is attributed to Sam Kagel in resolving the California Nurses Strike in the 1970s. In the Monthly Labor Review in 1973, Kagel, citing a number of successful uses of this model in a variety of types of dispute, stated:

> *"The important fact in med-arb is that it is voluntarily accepted, even though in this two-level technique the parties agree to be bound by the med-arbiter's decision if a direct settlement is not made."*[6]

He continued:

> *"The parties are not fooled by the fact that they know that the med-arbiter has the authority to make the decision if the parties failed to work out their own arrangement. It is precisely that knowledge, however, that is the incentive for the parties to reach their own agreement. It is that knowledge which is the incentive to reasonableness."*

An interesting and informative analysis of the history and development of the med-arb process was detailed by Bartel in 1991, the process having its roots in labour arbitrations in the US; the impartial chairman being intermingled with the umpire system.[7]

Weisman, writing in 2013, stated :

> *"Med-Arb gives parties the best that mediation and arbitration have to offer, providing incentives to resolve issues promptly, efficiently and in a less costly manner. Facing the prospect of an adverse, non-appealable determination in arbitration, parties have an incentive to resolve their disputes at mediation: the few studies examining Med-Arb have generally found that parties were substantially more motivated to settle in mediation because they wanted to avoid the loss of control that would come in the arbitration phase."*

He continued:

> *"It is important to note that Med-Arb is not a "one size- fits-all" kind of process; each Med-Arb should be tailored to the circumstances of the dispute and needs of the parties and should be undertaken only with the parties' full, voluntary consent."*[8]

How has it Developed?

Undoubtedly, the search for new and better alternatives in the dispute resolution sphere has been influenced by the excessive legalisation of arbitration. Arbitration, a private dispute resolution process, emerged to counteract the negatives of litigation, a system which is often slow, expensive and subject to procedural rules, in respect of the selection of which the parties have had no input or control. The impetus for the emergence of Med-Arb was to allow the flexibility of mediation the modify and mollify the increasingly cumbersome and rules based system that is modern arbitration. Pappas calls this out stating:

> *"Despite litigation's downward trend, discontent with arbitration has never been more widespread due to : (1) arbitration's increasing similarity to litigation, (2) the rise of mediation, and (3) the enforcement of binding arbitration clauses in standardised adhesion contracts. Arbitration now includes many of the features of a trial court including prehearing motion practice, prolonged discovery, extensive hearings to avoid claims of procedural injustice, and the erosion of the finality of arbitration awards."*[9]

He continues:

> *"Due to arbitration's trend toward litigiousness, mediation is quickly becoming the ADR "process of choice." First, mediation provides parties with a high degree of control over both the process and the agreement. Second, the process is customizable and the scope of the discussion may extend beyond the dispute into communications and relationship issues. The solutions crafted can transcend the typical forms of adjudicated relief into more creative, durable solutions."*[10]

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[5] For a useful general discussion of Med-Arb, reference is made to Elliott, David, *"Med/Arb: Fraught with Danger or Ripe with Opportunity?"* Alberta Law Review, Vol. XXXIV, No. 1 (1995) pp. 163 – 179.

[6] Kagel, Sam, *"Combining Mediation and Arbitration"*, 96 Monthly Lab. Rev. 62 (1973)

[7] Bartel, Barry C., *"Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential"*, 27 Willamette L. Rev. 661 (Summer 1991), p. 661.

[8] Weisman, M., *"Med-Arb: The Best of Both Worlds"* (Spring 2013) 19 Dispute Resolution Magazine 3

[9] Pappas, B.A., *"Med-Arb and the Legalization of Alternative Dispute Resolution"*, Harvard Negotiation Law Review, Vol 20: 157, Spring 2015 at pp. 161-2.

[10] Ibid pp. 162 -3.

Baril and Dickey[11] state:

> *"With many of the formalities of court adjudication, arbitration is criticized as "slow, expensive, formalistic, and unnecessarily adversarial" (Blankenship 35, Bartel 393). The growth of mediation in the 1970s and its extension to a wide range of commercial disputes resulted in the "growing interaction" of arbitration and mediation (Hoellering 23-24)."*

Suitable Applications[12]

Frank Sander coined the phrase "Fitting the Forum to the Fuss"[13] and this is especially important when more complex, hybrid methodologies, with their own particular challenges and strengths, are invoked. Suggested applications include:

(a) "Win-win" situations – where there is a genuine legal issue at stake which can be parked at the mediation stage, instead focussing on the business/financial elements of the dispute and the future relationship of the parties;

(b) it is particularly useful in cases involving complex interrelated issues where arbitration might be expected to be lengthy. It can efficiently be applied to get some issues off the table in advance;

(c) family law? There is relatively little research in relation to med-arb in the area of family law disputes and, indeed, the use of extra-judicial binding processes in the context of Irish divorce legislation (which requires the Court and not just the parties to be satisfied in relation to proper provision prior to the granting of a decree) presents significant obstacles to the use of arbitration in this arena. However, Barsky[14] examines the potential benefits and risks, having regard to efficiency, expedition, self-determination and decision-making.

(d) disputes concerning Wills – often complex problems involving numerous issues and blended families. Significant degrees of emotionality, desire for privacy and may involve non-legal issues which litigation cannot resolve. However, finality is essential. Mediation will tick many of the boxes in terms of most appropriate resolution methodology – confidentiality, cost and time effective, flexible and can promote the preservation of relationships. But on the down side, mediation may fail.

> *"Med-Arb offers a structured and efficient approach to estate dispute resolution by ensuring a final resolution, unlike mediation, which may break down without a binding outcome. The process encourages good faith negotiation, as parties are incentivized to engage seriously in settlement discussions knowing that arbitration will follow if mediation is unsuccessful."*[15]

Advantages

(i) Speed, economy and bespoke aspects retained;[16]
(ii) Finality - resolution is guaranteed;
(iii) Creativity/flexibility of process is retained;
(iv) The decision making authority becomes an extra tool or leverage in the mediation process;
(v) If the mediation is not successful, the time has not been wasted as the information gleaned will be useful in the arbitration phase
(vi) The trusted mediator "*is in as good a position as anyone to make a decision on the dispute in the arbitration phase …*"[17]

What are its Challenges?

(i)Role duality

> *"The potential to save time and money for disputants needs to be weighed against several concerns about Med-Arb, mainly in common law countries, to the effect that linking mediation and arbitration in the same third party neutral threatens to distort both aspects of the process, inhibiting disputants' bargaining creativity and forthrightness, tainting the Med-Arb practitioner's interventions, and threatening the validity and enforceability of the arbitral award."*[18]

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[11] Baril, M.B. and Dickey, D., *"MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?" https://www2.mediate.com/pdf/V2%20MED- ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf (at p. 3)*

[12] Elliott, David C., *"Med/Arb: Fraught with Danger or Ripe with Opportunity?"*, Vol. XXXIV No. 1 (1995) Alberta Law Review 163 (at p. 165) references some high profile successes using Med-Arb

[13] Frank E.A. Sander and Stephen B. Goldberg, *"Fitting the Forum to the Fuss; A User-Friendly Guide to Selecting an ADR Procedure"*, Harvard Negotiation Journal, January, 1994.

[14] Barsky, A., *"Med-Arb": Behind the Closed Doors of a Hybrid Process"*, Family Court Review, October 2013 51(4)

[15] Abruzzi, M., *"An exploration of the use and value of Med-Arb to deal with the challenges in estate disputes"* ADR Perspectives, ADR Institute of Canada Vol 12, No 2(May 2025), p. 5. The use of med-arb in this context is also comprehensively discussed in Vorys, Y., *"The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes."* Ohio State Journal on Dispute Resolution Vol 22:3 2007 pp. 871 -898.

[16] Elliott (ref. fn 12): *"All the flexibility possible in mediation and all the flexibility available with an arbitration process is available …"* (p. 165)

[17] Elliott, Ibid, p. 164

[18] Limbury, Alan, *"Med-Arb: Getting the Best of Both Worlds", International Mediation Institute https://imimediation.org/wp-content/uploads/2017/09/hybrid-processes-2010-article-by-alan-limbury.pdf* at p. 2

The demands inherent in a sole neutral assuming both roles have been widely discussed and present most significant challenges when evaluative (as opposed to facilitative) mediation is in play. This is discussed by *Ruckteschler and Wendelstein*[19] who reference relative consensus that an arbitrator can act as mediator if the parties agree but also point to a lack of guidance upon the arbitrator role continuing after mediation has failed. They query if consent pre-mediation survives a failed mediation or is renewed consent post such failure required? The problems inherent in the use (or non-use) of confidential information received during the mediation is discussed further below. The authors conclude that the preferrable situation is for separate professionals to assume both roles and that *"it may help the mediation process more if a third person takes a fresh and completely unbiased approach to the dispute."* However, if duality of role is desired, the kernel of the issue seems to be clear rules, agreements and consents: *"... clear rules regarding his/her return to the role as arbitrator if the mediation fails, and regarding the methods the arbitrator-mediator can apply, are indispensable. Otherwise, the arbitration process will be in jeopardy and all potential (efficiency) advantages of the hybrid proceedings are in danger of being lost completely."*

(ii) Where the same ADR professional is used, is the arbitral award, indeed, the arbitration itself, being placed in jeopardy? The definition of arbitrator misconduct is wide (ref. *London Export Corp. Limited v. Jubilee Coffee Roasting Co Limited* [1958] 1 WLR 27; *Sea Containers Limited v. ICI Pty Ltd.* [2002] NSWCA 84). The grounds upon which an arbitral award will not be enforced or may be set aside include excess of authority, procedural irregularity, public policy and arbitrator impartiality (ref. UNCITRAL Model Law, Articles 34(2)(a)(iii) (award dealing with dispute not contemplated within the terms of submission to arbitration) and 36(a)(iv) (composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties) and New York Convention, Article V(1)(d) (composition not in accordance with parties' agreement) and Article V(2)(b) (contrary to public policy)) .[20] Limbury[21] opines (at p. 3):

> *"Allowing an arbitrator to receive private representations during the mediation phase creates an appearance of bias and may actually bias the arbitrator when determining the dispute."*[22]

(iii)Corruption of confidentiality and inhibition of parties

Concerns in relation to confidentiality may arise in two distinct ways – Sussman[23] references *"an essential element to a successful mediation [being] parties reveal their true interests and perspectives on the dispute. If the parties know that the mediator will serve as the arbitrator if the mediation fails, they may not confide in the mediator and instead try to "spin" the would-be arbitrator to achieve a better result."*

The second concern arising in relation to confidentiality is in the sphere of information which the mediator may receive when in private caucus with one of the parties which is not to be revealed to the other side. An essential element and part of the essence of flexibility in mediation, but problematic in the context of follow-on arbitration.

(Iv)Lethargy due to fall back availability of binding decision.

(v)Does coercion taint the mediation settlement if achieved?

These concerns are very real but most can be resolved by a duality of ADR professional.[24] Supporting the requirement of a separate mediator and arbitrator, Fuller opined:

[19] Ruckteschler, Anika Wendelstein, in *"Efficient Arb-Med-Arb Proceedings: Should the Arbitrator also be the Mediator?",* Journal of International Arbitration Vol 38, Issue 6 (2021) pp. 761 – 774. This article contains a most useful comparative analysis of legislation, institutional rules and "soft law" in a broad range of jurisdictions.

[20] Arbitration Act, 2010 as amended

[21] Limbury, A., *"Med-Arb: Getting the best of both worlds",* International Mediation Institute, *https://imimediation.org/wp-content/uploads/2017/09/hybrid-processes-2010-article-by-alan-limbury.pdf.*

[22] He references the South Australian case of *The Duke Group (In Liq.) v. Alamain Investments Ltd and Ors* [2003] SASC 272 as indicative of the difficulties which may arise.

[23] Sussman, Edna, *"Developing an Effective Med-Arb/Arb-Med Process"*, The Neutral Corner, Vol. 2, 2018 pp. 1 – 3.

[24] Of course, such duality of professional comes at a cost in terms of efficiency, financial and procedural, and speed of resolution.

> *"Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract."*[25]

Sussman[26] suggests that the challenges may be met by eliminating caucus sessions from the mediation, having the arbitration proceed first (with the award sealed pending the mediation) or by having the dispute co-mediated by the party-appointed arbitrators with the chair of the arbitration panel thus untainted by the mediation process. There is no doubt that process refinement will be required if a single ADR professional is being used for both methodologies and advance design of such process is vital. Elliott[27] addresses the issue of designing a Med-Arb process with four stages requiring to be considered:

- What is to be the ordering of the processes? Which model is proposed?
- How is the role of the neutral(s) to be defined and what appointments are required?
- Refinement of process (is mediation to be time limited? Is private caucusing to be permitted? If so, how is such information to be dealt with in the next stage?
- Who should be appointed?

In relation to the coercion or pressure tactics argument, Baril and Dickey offer the following advice to ADR professionals involved in this process:

> *"…, they must give clients sufficient understanding and information to make well-informed decisions about the risks and trade-offs inherent in this choice of process (Hoffman 35)…. They must have "the skill and experience necessary to exercise this power appropriately" and avoid ethical dilemmas such as undue pressure or improper use of confidential information (Blankenship 35-37)."*[28]

The Future

Of course, consistent with the theme of this paper, med-arb is flexible and many variations[29] are possible:

- Med-arb same ADR professional ('same neutral'[30]) (sometimes Plenary only med-arb – no *ex parte* or private engagement with the parties)
- Med-arb different ADR professional or overlapping med-arb (including med-arb opt out or optional withdrawal – calling for a new arbitrator after the mediation)
- Med-arb diff-recommendation by mediator
- Co-med-arb – the mediator and the arbitrator hear the parties' presentations together with the mediator then attempting to settle the dispute while the arbitrator is ready to re-enter if settlement efforts are unsuccessful
- Non-binding med-arb[31]
- Med-arb show cause – *"a tentative award is made to give the parties an opportunity to show cause as to why the dispute should not be so resolved";*[32]
- MEDALOA – mediation and last offer arbitration – *"the arbitrator does not reach an independent decision on the merits but instead must choose between the parties' final offers";*[33]
- Braided med-arb – mediation continues during arbitration stage
- Arb-Med/Arb-Med-Arb (the determination is kept confidential by the arbitrator while mediation proceeds) … followed by the Big Reveal![34]

[25] Fuller, L., *"Collective Bargaining and the Arbitrator",* in Proc. Of the 15th Ann. Meeting of the Nat'l Acad. Of Arb. 8 at pp. 29-30.
[26] Sussman, Edna, *"Developing an Effective Med-Arb/Arb-Med Process",* NYSBA New York Dispute Resolution Lawyer Spring 2009, Vol 2, No. 1 pp. 71-74
[27] Elliott, David C., *"Med-Arb: Fraught with Danger or Ripe with Opportunity?"*, Vol. XXXIV No. 1 (1995) Alberta Law Rev. 163 at p. 175. "
[28] Baril, M.B. and Dickey, D., *"MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?" https://www2.mediate.com/pdf/V2%20MED-* p. 3

[29] A useful (indeed, fascinating) tabular list of these variations may be found in Baril, M and Dickey, D., *"MED-ARB: The Best of Both Worlds or Just a Limited ADR Option?"* https://www2.mediate.com/pdf/V2%20MED- Appendix A (which the authors ascribe to Blankenship 2006 and Merrill 2007).
[30] Parties and their ADR professional proceed to arbitration if mediation is not successful. Pappas, Brian A., *"Med-Arb and the Legalization of Alternative Dispute Resolution" Harvard* Negotiation Law Review Vol. 20:157.
[31] Limbury, Alan L., *"Med-Arb: getting the best of both worlds"* International Mediation Institute (September 2017)(p. 2) says this is rarely used due to there being no certainty of resolving the dispute.
[32] Limbury Ibid p. 2
[33] Limbury, Ibid p. 2
[34] The website of CIArb, Irish Branch states: *"These hybrids, as the titles suggest, involve a fusion of Mediation and Arbitration skillsets. In the former, issues are narrowed through Mediation for determination by Arbitration and in the latter, visa versa for mediation of remaining unresolved issues. Neither technique has taken off in Ireland." https://www.ciarb.ie/services/other.298.html* , demonstrating that there is clear scope for development in this area.

Conclusion

> *"With the enormous surge of interest in dispute resolution in both the public and private sectors, lawyers must be prepared to advise on and initiate a broader range of conflict avoidance and dispute resolution processes, especially those which offer less adversarial, less costly and less time consuming alternatives. Effective dispute resolution depends largely on flexible, carefully designed systems to accommodate the particular needs of the parties. This element has been given little attention by the legal profession for too long. Clients are awakening to the possibilities, and lawyer must be ready to respond to the alternatives, including the dangers and the opportunities of med/arb."* [35]

However, the success of any hybrid dispute resolution process depends fundamentally on the skill, training and professional judgment of those tasked with administering it. The roles of mediator and arbitrator require distinct competencies and professional sensibilities. It is essential to ensure that professionals involved have appropriate training and skill sets. This is not as simple as it first appears based upon the very different roles being carried out. Sussman ably demonstrates this when she states:

> *"The mediator's role requires skills of a psychologist, while the arbitrator's role requires skills of a judge."* [36]

The integration of these roles within the Med-Arb framework therefore demands careful procedural design, transparency and appropriate safeguards. As Limbury[37] states:

> *"... the extent to which mediators learn to arbitrate, arbitrators learn to mediate, lawyers learn to recommend the most suitable ADR process for their clients' disputes, and clients learn to choose lawyers with the requisite skills ...".*

Med-Arb represents an important example of how dispute resolution processes continue to evolve. When carefully designed and supported by appropriately trained practitioners, it offers a flexible and effective mechanism, capable of responding to the increasingly complex needs of modern commercial (and other) disputes. As dispute resolution continues to evolve, Med Arb may prove to be not merely a hybrid innovation, but an important model for the next generation of flexible and effective dispute resolution systems.

[35] Elliott, David C., *"Med/Arb: Fraught with Danger or Ripe with Opportunity?"*, Vol. XXXIV No. 1 (1995) Alberta Law Review 163 (at p. 179)
[36] Sussman, Edna, *"Developing an Effective Med-Arb/Arb-Med Process"*, NYSBA New York Dispute Resolution Lawyer Spring 2009, Vol 2, No. 1 pp. 71-74 (at p. 73)
[37] Limbury, Alan L., *"Med-Arb: getting the best of both worlds"* International Mediation Institute (September 2017)(at p. 7)

What Dispute Has Been Referred to Arbitration? Procedural Step to Avoid Disputes As to the Jurisdictional of the Tribunal

Patrick Leonard SC FCiarb

Summary

Whether a reference to arbitration commences by a letter referring a dispute to arbitration, or perhaps follows a motion to stay proceedings in favour of arbitration, issues will often arise as to the exact nature of the dispute that has been referred to arbitration. Although arbitrators have, under the principle of *kompetenz-kompetenz*,[1] the right to determine what their jurisdiction is, this represents one of the rare areas where the Model Law allows a review on the merits to the High Court.[2] In order to avoid disputes, it is therefore essential that the arbitral tribunal ensures that the ambit of the reference to arbitration is clearly defined at the outset.

Commencing the Arbitration

In Ireland, most arbitration is *ad hoc,* and a reference to arbitration is often commenced by a simple letter referring a dispute to arbitration and suggesting the nomination of one or more persons to be the arbitrator. Equally, many arbitrations are preceded by the issue of court proceedings, and the subsequent threat or issue of a motion seeking to refer the dispute to arbitration.

In institutional arbitration, the applicable institutional rules often require a party to set out in a detailed way the dispute that is being referred to arbitration. For example, *Article 4(3) of the ICC Arbitration Rules (2021)* provides the following in relation to a Request for Arbitration:

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"The Request shall contain the following information:

a*) the name in full, description, address and other contact details of each of the parties;*

b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;

c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;

d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

[1] Article 16(1) of the *Model Law* provides that: *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."*

[2] Article 16(3) provides that: *"If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the (High Court) to decide the matter, which decision shall be subject to no appeal."*

e) any relevant agreements and, in particular, the arbitration agreement(s);

f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;

g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and

h) all relevant particulars and any observatio ns or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute."

Article 5(1) of the ICC Arbitration Rules (2021) then goes on to provide that the Respondent's Answer to the Request for Arbitration should provide the following information:

"a) its name in full, description, address and other contact details;

b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;

c) its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;

d) its response to the relief sought;

e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and

f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute."

Similarly, according to *Article 1.1 of the LCIA Rules (2020)*, the Request for Arbitration must include the following details:

"(i) the full name, nationality and all contact details (including email address, postal address and telephone number) of the Claimant for the purpose of receiving delivery of all documentation in the arbitration in accordance with Article 4; and the same particulars of the Claimant's authorised representatives (if any) and of all other parties to the arbitration;

(ii) the full terms of the Arbitration Agreement (excepting the LCIA Rules) invoked by the Claimant to support its claim, together with a copy of any contractual or other documentation in which those terms are contained and to which the Claimant's claim relates;

(iii) a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant against any other party to the arbitration (each such other party being here separately described as a "Respondent");

(iv) a statement of any procedural matters for the arbitration (such as the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities) upon which the parties have already agreed in writing or in respect of which the Claimant makes any proposal under the Arbitration Agreement;

(v) if the Arbitration Agreement (or any other written agreement) howsoever calls for any form of party nomination of arbitrators, the full name, email address, postal address and telephone number of the Claimant's nominee".

Article 2.1 of the LCIA Rules (2021) requires the Respondent to the arbitration to identify:

"(ii) confirmation or denial of all or part of the claim advanced by the Claimant in the Request, including the Claimant's invocation of the Arbitration Agreement in support of its claim;

(iii) if not full confirmation, a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the defence advanced by the Respondent, and also indicating any counterclaim advanced by the Respondent against any Claimant and any

cross-claim against any other Respondent;

(iv) a response to any statement of procedural matters for the arbitration contained in the Request under Article 1.1(iv), ***including the Respondent's own statement*** *relating to the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities and any other procedural matter upon which the parties have already agreed in writing or in respect of which the Respondent makes any proposal under the Arbitration Agreement".*

Therefore, at the outset of an institutional arbitration, the parties have clearly delineated what they say the dispute between them is.

In contrast, in *ad hoc* arbitration, the process often commences with an exchange of *inter partes* correspondence, which may go on for a period time, followed by a letter which calls on the respondent to agree to the appointment of an arbitrator and only a brief description of the dispute. In some cases, there is no referral to arbitration and the claimant issues a simple plenary summons, which leads to a motion to refer the dispute to arbitration. As plenary summonses are almost always simple in form, it may not be clear what the true nature of the dispute is from the claim for relief in the summons. This is particularly so in cases where the respondent counterclaims, and the defence to that counterclaim may raise new issues.

Legal requirements for a notice to refer to arbitration

The principal legal authority in relation to this matter is **Bowen Construction Limited (in Receivership) v Kelly's of Fantane (Concrete) Limited (in Receivership).**[3] In that case, the President of the High Court identified the legal requirements for a valid notice to a refer a dispute to arbitration. In particular, he noted that the authors of Russell on Arbitration (24th Ed.) (2015) state as follows:

"5-027 Identifying matters in dispute. Whilst it is not a requirement of the statute, the notice of arbitration should identify the matters in dispute and indeed there may be a contractual requirement to do so. Care should be taken to identify all the matters in dispute which are to be determined in the arbitration. This is because the tribunal will have jurisdiction to decide only those matters actually referred, and if there is doubt about whether a particular matter has been included, a tribunal's jurisdiction to deal with it will be open to challenge. Consequently, it is advisable to include in the notice of arbitration some general wording which embraces all the outstanding matters in dispute between the parties, as well as specific wording identifying clear and discreet issues to be decided which can be described in the notice."

In addition, the President referred to the Irish text, Hutchinson *"Arbitration and ADR in Construction Disputes" (2010),* where the author states that:

"6-11 In every case, the notice must provide sufficient details so as to identify the dispute or disputes to which it relates with sufficient particularity. The leading cases Interbulk Limited v. Ponte DEI SOSPIRI Shipping Co (The "Standard Ardour") [1988] 2 Lloyd's Rep 159, where Saville J. held that the notice must not only 'require' the recipient to appoint or concur in the appointment of an arbitrator, but, further said (emphasis added):-

'In my view, when the question arises whether an arbitral tribunal constituted as in the present has jurisdiction to determine a particular dispute or claim it is necessary to look objectively at what passed between the parties to the reference, and on that basis to determine whether or not any particular matter is included in the reference… It is not sufficient for a party privately to seek to invest his arbitrator with power to determine a particular claim unless this is also made clear to the other party'

6-12 Thus, it is not possible to defeat the time limits by issuing a 'general' notice to refer in respect of an unknown dispute so as to constitute a valid reference for a dispute not yet arisen…

6-13 Once sufficient detail has been provided in the notice, however, it is not essential that it be an exhaustive catalogue of all the issues in dispute in issue between the parties – further issues can be introduced at a later stage provided they are founded in the same fact pattern and contractual claim *(Panchaud Freres S.A. v. Etablissements General Grain Co [1970] 1 Lloyd's Rep 159)."*

[3] [2019] IEHC 861

Principles applied by the High Court in construction of a reference to arbitration

In many cases, the party which commences an arbitration will not sufficiently address its mind to the ambit of the arbitration when drafting the request for arbitration. Even in cases where details of the dispute are set out, it is clear from the decision of the President in *Bowen*, that pre-notice correspondence may be considered by an arbitrator (and on review by the High Court) in determining the jurisdiction of the arbitral tribunal. In particular, the President held that:

> *"[148] The following seem to me to be the guiding principles in the construction of a reference to arbitration and in the ascertainment of the scope or ambit of the dispute referred to arbitration:-*
>
> *(1) The words of the notice to refer should not be construed as if they were contained in a statute. The words used should not be analysed in an over legalistic manner.*
>
> *(2) The relevant point in time for the purpose of ascertaining the scope of the dispute referred to is the time of the reference to arbitration itself.*
>
> *(3) In determining whether a particular dispute or claim has been referred, it is necessary to look objectively at what has passed between the parties to the reference up to the date of the reference. The words used must be given their natural meaning in their context applying an objective test. The court can and should have regard to the factual background or matrix of fact leading up to the reference to arbitration.*
>
> *(4) The focus should be on the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds on which the claim has been rejected or not accepted.*
>
> *(5) The disputed claim or assertion is not necessarily defined or limited by the evidence or arguments submitted by either side to each other before the reference to arbitration.*
>
> *(6) It is not necessary to set out in a reference to arbitration all of the grounds or points of defence or response which the respondent may wish to rely upon in resisting the claim. It is open to a respondent to raise any point or argument by way of defence to the claim being made in the arbitration notwithstanding that the point is not referred to in the reference to arbitration. This is a matter of procedural fairness for a respondent.*
>
> *(7) Procedural fairness works both ways. If it is open to a respondent to raise any defence to the claim notwithstanding that it is not referred to in the reference to arbitration as a matter of procedural fairness, so too should it be open to the claimant to respond to any such defence sought to be relied upon* by the respondent. That too is a matter of procedural fairness for the claimant. Provided such response directly arises from the defence raised and concerns an issue which falls within the scope of the arbitration agreement.
>
> (8) A particular dispute may comprise one issue or several issues. Or there may be several disputes between the parties. A dispute or disputes may attract more issues and may become more nuanced as time goes on. In order to identify the dispute or disputes and the issue or issues arising, it is appropriate to consider the exchanges between the parties prior to and up to the point of the notice to refer. It is not necessary for the words used in the notice to refer to be ambiguous before the arbitrator or a court can consider these exceptions.
>
> (9) The court will also have to consider whether the terms of the contract between the parties on its proper construction disapplies any principles or propositions."

Formal joint submission to arbitration

In fairness to the claimant in *Bowen,* it had set out a relatively lengthy account of the dispute which it was referring to arbitration in its notice. However, even in that case, there was a dispute which led to the decision of the High Court. In many cases, however, the dispute is only briefly sketched out in the letter referring the dispute to arbitration, and issues then arise as to what was or was not referred, by reference to the pleadings in the arbitration, the pre-dispute *inter partes* correspondence and the notice to refer. In many cases, particularly in construction or insurance, a failure to include a particular issue in the dispute referred to arbitration can have serious consequences. It may be too late to refer a separate dispute to arbitration, whether because of contractual or statutory limitation periods.

As it is not in the interest of the parties, or indeed, the arbitral tribunal for there to be a dispute as to the jurisdiction of the tribunal, or the matters that have been referred, arbitral tribunals may seek to ensure that the parties agree a joint submission to arbitration at the very outset of the process. Indeed, Article 23(1) of the ICC Rules (2021) makes express provision for this, providing that:

"… the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;

b) the addresses to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;

e) the names in full, address and other contact details of each of the arbitrators;

f) the place of the arbitration; and

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono."

The ICC Arbitration Rules provide for the Terms of Reference to be signed by the parties, and then go on to say that:

"no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."

Where parties are asked to prepare a joint submission to arbitration, setting out what is agreed to be the dispute referred to arbitration, and perhaps the agreed powers of the arbitrator, this will often be in a form similar to the Terms of Reference provided for in the ICC Arbitration Rules.

At one time, this was often seen in *ad hoc* arbitration, but appears to have somewhat fallen into abeyance in recent times/4 Although the agreement of a joint submission to arbitration does not prevent disputes arising during the course of the arbitration, it is very likely to reduce the possibility of such disputes arising. If this modest additional step can reduce disputes in the arbitration, and the possibility of review by the Court, it will reduce the ultimate cost and prevent delay. At the very least, the tribunal should ask the parties to consider this at the first procedural meeting, or in early correspondence.

[4] See, for example, *Delargy v Hickey* [2015] IEHC 436

Arbitration: Jurisdiction, Procedure & Reform

Costello and the Arbitration (Amendment) Bill 2025

Eileen Barrington SC

In *Costello v. The Government of Ireland*,[1] the Supreme Court held that the ratification of the EU-Canada, Comprehensive Economic and Trade Agreement ("CETA") would be unconstitutional. The Court, by a 4:3 majority, held that ratification would breach "Irish juridical sovereignty". The problem was that CETA provided for Tribunals ("CETA Tribunals") which would enjoy the power to make binding arbitral awards against Ireland. Those awards would then be "*virtually automatically enforceable*" in the High Court pursuant to the provisions of the Arbitration Act 2010 ("the 2010 Act"). The majority of the Supreme Court (Charleton J. dissenting) held that the potential interference with the juridical sovereignty of the State by the quasi automatic enforcement of CETA Tribunal awards applying a parallel system of law to State measures could nonetheless be cured. Such a cure would avoid a referendum on whether ratification of CETA was constitutionally permissible. The Bill providing for the "cure" has recently been published.

The *Costello* Problem

The Supreme Court held that CETA created a parallel or supranational system for the determination of disputes against the State and involving the public law of the State, outside the constitutional framework and in breach of Article 5 of the Constitution and the juridical sovereignty of the State. In particular, the problem was that CETA Tribunal awards were given domestic effect by section 25 of the 2010 Act. That Act in turn gives effect to the ICSID and New York Conventions which provide for of the recognition and enforcement of arbitral awards. While there was nothing inherently wrong with the 2010 Act, the issue was that it was being "*pressed into service*" for a different purpose entirely, i.e., to give effect on a more or less automatic basis to the decisions of the CETA Tribunal. This amounted to a considerable broadening of the scope and purpose of section 25 of the 2010 Act.

The solution the Supreme Court envisaged was to amend the 2010 Act. Hogan J. held that:

[1] [2022] IESC 44

Eileen Barrington SC

> *"It is open to the Oireachtas to…spell out in legislative form the defences to the enforcement of such a final judgment of the CETA Tribunal in the manner tacitly contemplated, for example, by Article 54(1) of the ICSID Convention. If, therefore, the range of domestic defences in respect of applications to enforce ICSID… concerning CETA Tribunal awards currently provided for in the 2010 Act were legislatively broadened … then in principle ratification of CETA following the enactment of such legislation might lawfully proceed".*

What did Hogan J envisage by way of amendments?

Hogan J held that *"while not wishing to be prescriptive"* it would be necessary *"at a minimum"* to move from the present virtually automatic enforcement procedure to a situation where the High Court, when called upon to give effect to a CETA Tribunal award, was expressly empowered by

that new legislation to refuse to give effect to that award where it considered that:

(a) The award materially compromised the constitutional identity of the State or fundamental principles of our constitutional order; or
(b) The award materially compromised the State's obligation to give effect to EU law and to preserve its inherence and integrity.

It was impossible, he indicated, to provide an exhaustive definition of the circumstances in which this domestic bulwark would come into play. It would, he said, *"embrace circumstances where the High Court considered that the CETA award proposed to be enforced was at odds in some material way with … the juridical autonomy of the State".*

The High Court could not be deprived of its capacity to supervise CETA Tribunal awards on the grounds that they respect *"the constitutional identity and values of the State".*

The outcome of the appeal was that the Court declared that the Constitution precluded the ratification of CETA as Irish law stood at the time. However, the envisaged amendments of the Arbitration Act 2010 would permit ratification without breaching the Constitution. This meant that a referendum could be avoided.

The Dissent on the Cure

Mr. Justice Charleton dissented on the issue of the possibility of curing the unconstitutionality.

First, he observed that once CETA was fully ratified, enforcement of CETA Tribunal awards would become necessitated by the obligations of EU membership. A legislative change to the 2010 Act could not override the obligations of EU membership.

Second, even if a refusal to give effect to a CETA Tribunal award were permissible as a matter of EU law, the existence of such additional grounds for refusal, nowhere envisaged in the ICSID or New York Conventions, would operate *"as a fundamental contradiction of the [CETA] treaty itself".* A contradiction of the CETA treaty would give rise to issues under international law and in particular the Vienna Convention on the Law of Treaties.

The Waiting Game

In the three years since the making of the final orders in *Costello,* there has been much debate as to what an amendment of the 2010 Act would look like.

Rainford[2] queried whether the phrase *"constitutional identity"* would be omitted from any amendment, in favour of more concrete and specific criteria. Another possibility he envisaged was that an amendment would simply allow the Irish Court to refuse enforcement of a decision which *"violate[d] the Constitution in general"*

More fundamentally, he questioned whether it was not best for the people to determine by way of a referendum what the constitutional identity of the State was, arguing that this might *"be the best method of protecting Ireland's unique constitutional identity".* A fundamental *"grundnorm"* of Irish constitutional jurisprudence is that the people are sovereign. Ireland's constitutional identity arguably therefore envisages that the people should determine what is consistent with the juridical sovereignty of the State. Was it appropriate, he asked, that the Courts should determine what the notion of constitutional identity entailed?

Leonard[3] argued that an amendment such as that proposed by Hogan J. conflicted with the obligation on contracting states in Article 54 of the ICSID Convention to treat an ICSID award *"as if it were a final judgment of a Court in that State".* The Supreme Court was effectively creating an *ordre public* defence to enforcement of CETA awards.

The Arbitation (Amendment) Bill 2025

On 1st December 2025, the Government published the Arbitration (Amendment) Bill 2025 ("the Bill"). The long title of the Bill describes its effect as being to amend the Arbitration Act *"to enable effect to be given in the State to certain international agreements concerned with the protection of investment".*

The Bill proposes inserting a new section 25A into the 2010 Act. That section states that it applies to CETA4 and any international agreement prescribed by order of the minister made under section 25A(v).

[2] Irish Judicial Studies Journal, Volume 6, 2024

[3] ICSID Review, Vol 38, No 2 (2023), p. 286

[4] And also to the Advanced Framework Agreement between the EU and its Member States on the one part and the Republic of Chile on the other.

Section 25A(3) then sets out the critical provision:

> *"(3) For the avoidance of doubt, it is hereby declared that an award made by a body empowered to make awards pursuant to an international agreement to which this section applies is not, and never was, enforceable in the State if enforcing the award would compromise—*
>
> *(a) the constitutional order of the State, or*
>
> *(b) the autonomy of the legal order of the European Union."*

Thus, the Bill envisages the possible refusal by the Irish High Court of an application to give effect to a CETA Tribunal award where enforcing **the award would compromise** *"the constitutional order of the state".*

It is noteworthy that the parliamentary draftsperson has not adopted the language of *"constitutional identity"*. As observed above, Hogan J. envisaged that enforcement be refused where an award compromised *"the constitutional identity of the State or fundamental principles of [the] constitutional order".*

This prompts a number of questions: Is the constitutional order the same thing as the constitutional identity? What exactly is outruled by the constitutional order or identity?

More fundamentally, this amendment highlights the question as to how defences to enforcement can cure a systemic problem. If the problem is that CETA Tribunals breach the juridical sovereignty of the State where they are deciding on public law issues, then many, if not most, awards will be unenforceable.

All of these questions are ones that, in the absence of a challenge to the Bill once enacted, will have to be determined once an application is being made to give effect to any CETA Tribunal award.

Further, any party seeking to enforce an award may adopt Charleton J.'s reasoning to contend that the 2010 Act, as amended, is in itself contrary to EU law as the duty of sincere cooperation requires CETA, once it comes into force, to be given effect within the State. What happens then if there is a determination by the CJEU that the 2010 Act is incompatible with EU law? If the 2010 Act is incompatible with EU law but is required to render ratification lawful domestically, then any Irish ratification becomes retrospectively unlawful. The only possible solution then to a constitutional conundrum is a referendum.

Conclusion

Once the Bill is enacted, there may well be further litigation, whether in the context of an enforcement application or otherwise, to determine the precise scope of the 2010 Act and its compatibility both with the Irish Constitution and with EU law.

The Expert or the Algorithm: Who Wrote This Report?

Mark Tottenham BL

It was inevitable that there would be a case where an expert witness turned out to have relied on Artificial Intelligence (AI) to write his report. Still, when the first serious case came to light, it was even more toe-curling than might have been expected.

The expert in question was an AI specialist, and a professor at Stanford University. The case, Kohls v. Ellison (US District Court, Judge Laura M Provinzino, 10 January 2025), was a challenge to the constitutionality of Minnesota's law, banning the use of AI-generated content to influence elections. The applicants claimed it was an unjust attack on their right to freedom of speech. An application was brought for an injunction. In response, the Attorney General for the State of Minnesota filed a report by the expert, which expressed the opinion that free speech was insufficient to counteract AI-generated 'deepfakes'.

But the report contained 'hallucinations', that is to say there was a reference to two journal articles that simply didn't exist. The applicants applied to have the testimony excluded. In acceding the application, the judge commented:

"The irony. [The professor], a credentialed expert on the dangers of AI and misinformation, has fallen victim to the siren call of relying too heavily on AI—in a case that revolves around the dangers of AI, no less."

She went on to make a point of particular relevance to expert witnesses:

"One would expect that greater attention would be paid to a document submitted under penalty of perjury than academic articles. Indeed, the Court would expect greater diligence from attorneys, let alone an expert in AI misinformation at one of the country's most renowned academic institutions."

However, she was not entirely critical of AI, and her later comments are also of interest:

"To be clear, the Court does not fault [the professor] for using AI for research purposes. AI, in many ways, has the potential to revolutionize legal practice for the better. … But when attorneys and experts abdicate their independent judgment and critical thinking skills in favor of ready-made, AI-generated answers, the quality of our legal profession and the Court's decisional process suffer."

Mark Tottenham BL

Anybody who has experience of using AI chatbots will be struck by a number of things. The fluency and confidence of the language is extraordinary, so that it is easy to feel you are communicating with a person. The speed of the search and reply is even more striking, in that the written reply to a query is much faster than a person could have spoken it.

But the fluency conceals a serious risk. Not only will the chatbot generate false articles and cases. It will sometimes generate false quotations from genuine articles or cases. This can be extremely dangerous.

Usually, if a case or article is quoted in another case or article, the reader can operate on the

assumption that the writer has reproduced the quotation correctly. No such assumption can or should be made with AI research. Everything must be checked. Failure of an expert witness to carry out the appropriate checks can only be described as professional negligence, and should be treated with the same seriousness as plagiarism.

But, as Judge Provinzino commented, there are positives, and AI has the potential to revolutionise legal practice for the better. AI has several applications, and the following lessons should be borne in mind by any expert witness seeking AI assistance:

1. The named expert witness is responsible for every line in the report. Whether there is assistance from junior colleagues, research assistants or AI, the writer must ensure that they can stand over the content under oath.

2. No confidential or privileged information should be entered into a chatbot, unless it is a bespoke service with the appropriate guarantees from the provider.

3. When AI is used for professional research, it should be treated like Wikipedia. It may be a useful starting point, but every assertion must be verified, and every sourced carefully checked.

4. AI can provide a very good first draft of a report. But the writer needs to be careful not to allow their own voice to be taken over by the generic voice of the machine.

5. Similarly, AI can review the contents of a report and suggest different language or phraseology. This can be particularly useful when writing on technical subject for a lay audience - such as when an expert witness is writing for lawyers and judges. But the writer needs to be sure that the 'translation' of the technical language is correct.

6. AI can be used to check a report for weaknesses and omissions. In fact, I suspect that this will become one of its most important uses for expert witnesses. If you simply ask the chatbot: "What have I left out of this report?" Or "How can I improve this report?", it is likely that the AI will come up with some very useful suggestions.

I asked ChatGPT 5.2 to write a short concluding paragraph to this article, and this is what it wrote (unedited):

"The lesson from Kohls v. Ellison is not that AI has no place in expert work, but that its use sharpens, rather than dilutes, professional responsibility. Courts are not hostile to technology; they are hostile to uncritical reliance on it. AI can assist experts, enhance clarity, and improve analysis—but only where it remains firmly under human control. The expert who delegates judgment to an algorithm does not merely risk embarrassment; they risk undermining the very confidence on which expert evidence depends."

I couldn't have put it better myself.

Chile as a forum for International Arbitration? Grounds urging annulment in Chile's *Australis* Case

Dr John Frances Martin BL

A commercial dispute in Chile has turned heads across the world of International Arbitration and elicited written opinions from some of its biggest names. In an arbitral award published in August and currently under appeal, a majority arbitral tribunal at the Santiago Centre of Arbitration and Mediation (CAM) ordered sellers of Chilean salmon farming business Australis Seafoods SA to pay $217 million in restitution to the claimant, China's Joyvio group. The Company, sold to the Chinese agribusiness for over $920 million in July 2019, is one of Chile's major salmon producers and accounts for over 30% of the country's salmon exports.

In a petition filed in August 2023, the Joyvio argued that they bought Australis in the expectation that the company could produce 100,000 tons of salmon per annum complying with environmental regulations. However, they stated that in the years that followed the sale *"the image of Australis portrayed by the sellers and respondents fell apart and the sellers' deception was revealed"*.[1]

In or around early 2021, and subsequent to the sale, a change in the application of Salmon farming regulations in Chile made it close to impossible for the company to produce its former yields. Prior to the change, Chilean authorities permitted higher yields than projected at harvest provided that authorized stocking numbers were observed. If higher yields were achieved by over-stocking, an overproduction infringement would occur. However, after the change in early 2021, the Chilean environmental authorities began to consider producing higher yields per se as a violation, even when the number of salmon stocked was within the authorised limit.

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Additionally, this overproduction was now categorised as a serious offence.

The terms of the share purchase agreement (SPA) stipulated a 12-month window for claims for breach of the terms of the SPA. The sale having been concluded in July 2019, by the time of the change of regulation in 2021 the Claimant was barred for bringing an action for breach of contract under the SPA. Accordingly, to circumvent the agreed limitation period, Joyvio sought from the CAM Arbitral Tribunal a finding that the Sellers had fraudulently concealed information about the company's historical and projected salmon harvests, and fraudulently breached the terms of the SPA through violation of the applicable salmon production regulations.[2] On this basis, Joyvio sought retroactive termination of the SPA and damages for the opportunity cost incurred

[1] *Chinese Co. Looks To Enforce $217M Salmon Farming Award,* Law360 (August 19, 2025, 6:07 PM EDT). The Tribunal's Arbitral Award is available online at https://jusmundi.com/en/document/decision/es-joyvio-group-co-ltd-v-isidoro-quiroga-laudo-thursday-22nd-may-2025. Case documents, including the Arbitral Award, other filings and expert reports are publicly available via the PACER platform filed with the Southern District of Florida as Case No. 1:25-cv-23690-KMM (captioned FOOD INVESTMENT SPA ET AL V. ISIDORO QUIROGA MORENO ET AL), and via the website of the Chilean judiciary, https://www.pjud.cl/, under "Consulta de Causas", as case number: Civil - 17067 – 2025.

[2] CAM Award, at para. 159; Petition, at para 23.

by the purchase, calculated at $489,532,127. In the alternative, they sought damages in the amount allegedly paid in excess of the company's true value, and the opportunity cost allegedly arising from overpaying.[3]

CAM Arbitral Award

Four principal issues fell to be considered by the tribunal. *First*, whether the environmental authority's change of criteria pre-dated the sale; *second,* whether the Sellers fraudulently concealed information regarding salmon harvests; *third,* whether the Seller falsely represented that there were no present, future, or contingent liabilities on foot of alleged non-compliance with regulations; and fourth, whether the Sellers deliberately made false representations about the company's compliance with said regulations.

In its written judgment extending to 250 pages, the arbitral tribunal found that Chilean environmental authorities changed their sanctioning and enforcement criteria only after the SPA had been executed and the Buyers acquired Australis, and that until then the company had been compliant.[4] The tribunal further found that there was no evidence of *"fraudulent conduct"* or *"malicious intent"* in concealing information about the company's historical and projected stocking and harvesting, and that the company only became aware of the potential for future sanctions for exceeding harvest limits after the Buyers had acquired the company.[5] The tribunal found no basis for the claim that Australis had made false representations with regard to present future or contingent liabilities, and with regard to alleged false representations regarding company's regulatory compliance, the Tribunal concluded that although Australis' harvests were higher than the maximum production estimated on the environmental permits, this was no violation until the change in criteria two years after the sale.[6] The Tribunal however did find that some executives had discussed within the company the risk of a change in regulatory enforcement, and that though the company's excess production was in no way concealed, it was not expressly presented as a future potential regulatory risk, and as such was in breach the SPA, for making incomplete representations.[7]

In light of the foregoing, the tribunal rejected Joyvio's principal and alternative reliefs sought, refusing retroactive termination of the SPA, and similarly in the alternative damages, there being no evidence of fraudulent breach of the terms of the SPA.[8]

However, in an unprecedented step, having held that termination or damages for breach of contract was inappropriate, the CAM Arbitral Tribunal nevertheless resolved to award what it termed *"restitution"* of what it calculated as the company's excessive valuation at sale. Stating that what the Claimants *"call 'compensation' … is, simply, ordering restitution…"* the Tribunal ordered that *"the so-called 'compensation' should be calculated in relation to the amounts paid in excess by the buyers… with respect to the maximum annual tonnages of production that the buyers had in mind, compared with those that could effectively be harvested in compliance with the limit of the RCA* [the environmental agency]".[9] The Tribunal stated that it did this, retroactively applying to 2019 the regulatory change that occurred in 2021, so that *"the true will of the parties could precisely prevail"*,[10] and calculated that the value of Joyvio's overpayment Australis at $217,211,355.00, to be repaid in "restitution" to the Claimants,[11] a remedy they had never sought.

Annulment Proceedings

The Tribunal's decision is now before the Chilean Court of Appeal in proceedings seeking annulment of the arbitral award. The petition grounding the appeal stresses that *"despite the fact that the Arbitral Tribunal rejected each of the grounds of the claim… [and] found there was no concealment of information, no deceit, no fraudulent breach, as well as acknowledging that there was no fraudulent misrepresentation… and that the damage claimed was due to a change in criterion of the authority after the transaction, and… that 'all the clauses of the contract are valid and applicable, including that of the indemnity limit"* the CAM Arbitral Tribunal ignored same in a blatant excess of authority *(ultra petita)*, disregard of due process, and basic breach of public order.[12] Their Petition for annulment of the award rests on three grounds:

First, the Petitioners assert, under Article 34(2)(a)(ii) of the Model Law, that they were denied the right to be heard on points determinative of the outcome of the case: *"the Award contains 'surprise decisions' that were neither requested*

[3] Statement of Claim (31 August 2023), at para 34.
[4] CAM Award, at paras. 216, 340, 641.
[5] CAM Award, at paras. 216, 226, 268, 287, 330, 372, 380-381, 444.
[6] CAM Award, at paras. 194, 272, 277, 287, 364.
[7] CAM Award, at paras. 212, 214, 217, 383-386, 647-648.
[8] CAM Award, at paras. 293, 502, 518, 688-693.
[9] CAM Award, at para. 650-651.
[10] CAM Award, at para. 331.
[11] CAM Award, at para. 657.
[12] Petition, at para 2.

by the claimants, nor discussed by the Parties, nor previously warned by the Arbitral Tribunal. In simple terms, the Petitioners were condemned without first being heard. This is a violation of the most basic principle of due process."[13] The petition explains that the parties never addressed the tribunal on the appropriateness or otherwise of an order of restitution – *"while the Respondents successfully defended themselves and presented evidence with respect to the actions actually brought by the Claimants, they were unable to do so with respect to a remedy that was simply not requested in the complaint"*.[14] Similarly, the Petitioners argue that despite accepting the validity of the SPA's one-year time limit for bringing an action for damages for breach of the SPA, and finding that *"it is not possible to impute fraud"* by the Sellers, the Arbitral Tribunal ignored the agreed limitation period by ordering what it termed *"partial restitution"* rather than damages, a remedy never sought by the claimants, and deciding that the SPA could not legitimately impose a one-year time limit for claims for breach of the SPA when the Chilean statute of limitations allows for four years – but again without inviting submissions on the question.[15] The petitioners characterise this failure to invite submissions as *"a manifest and extremely serious violation of the fundamental principles and rules of Chilean law" and the "judicial guarantee of due process recognized by the American Convention on Human Rights".*[16]

Second, the Petitioners assert as grounds for nullity that the tribunal made determinations in excess of the jurisdiction conferred under Arbitration Agreement, in other words, deciding *ultra petita.* Article 34(2)(a)(iii) of the Model Law permits nullification of an arbitral award where "*the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".* Here, the Petitioners argue that as the Claimants sued for retroactive termination and/or damages, it was not open to the CAM Tribunal to consider an alternative award of 'partial restitution': *"none of the pleadings requested what was ultimately resolved by the Award… therefore the Award is vitiated by the alleged defect, causing its nullity".*[17] The Petition cites the granting of unsolicited relief by an arbitral tribunal one of the clearest examples of excess of authority under Article 34(2)(a)(iii) of the Model Law.[18]

Third, and finally, the Petition argues as grounds for nullity under Article 34(2)(b)(ii) of the Model Law (adopted as LACI in Chile), that the award is contrary to public policy, or *"what in classical private international law is called international public order both in its procedural and substantive dimension, because it violates the procedural principles of contradiction and congruence, and the substantive principle of pacta sunt servanda".*[19] In this regard, the petition identifies four limitation of liability clauses *"which the Award itself recognises as binding on the Parties"* but which the Tribunal refused to apply: the limitation of indemnity to 5% of the sale price, the exclusion of indemnity for loss arising from a regulatory change, the exclusion of losses calculated by reference to profit or earnings, and limitation period of twelve months for bringing a claim for breach of the SPA.[20] The petition concludes by warning the Chilean Court of Appeals that *"the Award should be annulled in order to safeguard basic notions of morality and justice that are part of the international public order, so that Chile may continue to be a serious arbitration venue and that arbitrators may perform their work in an adequate manner."*[21]

Several world-leading authorities in the International Arbitration space have lent their assistance to the Petition. Yves Derains, former Secretary General of the International Court of Arbitration of the International Chamber of Commerce, in an expert report filed in support, states that *"the Arbitral Tribunal deliberately substituted a claim for compensation based on contractual provisions for a purchase price adjustment independent of such provisions. The Arbitral Tribunal set aside the discussion between the parties and, without notice to them, proceeded to conduct its own analysis, based on different legal grounds".*[22] He concludes that *"there can be no doubt that the Award would be annulled in almost every country in the world."*[23] José Maria Alonso, President of the Madrid Arbitration Centre, in a further expert report supporting the Petition, explains that the CAM Award *"resolved issues not submitted to the arbitral tribunal's decision…, violated procedural public policy by granting claims not requested by the Claimants… and by failing to give Respondents the opportunity to present allegations, evidence and defenses thereto…, and also violated substantive public policy… by contravening the principle of pacta sunt servanda, resolving without any justification or logic the non-application of valid and binding contractual clauses."*[24] In a final supporting expert report, Gary Born, Chair of International Arbitration in WilmerHale and author of *International*

[13] Petition, at para 23.
[14] Petition, at para 34.
[15] Petition, at para 33-35.
[16] Petition, at para 36.
[17] Petition, at para 39-42.
[18] Petition, at para 43-45.
[19] Petition, at para 47.
[20] Petition, at para 61-65.
[21] Petition, at para 70.
[22] Yves Derains, Legal Report (10 September 2025), at para 50.
[23] Yves Derains, Legal report (10 September 2025), at para 51.
[24] José Maria Alonso, Legal Report (26 September 2025), at para 74.

Commercial Arbitration (3rd ed. 2021), possibly the leading authority in the International Arbitration space, describes the Tribunal as having *"strayed unusually far from the parties' contract and* the law",[25] their decision as having committed *"egregious due-process violations"*,[26] and the Award as *"in many respects among the most egregiously flawed rulings that I have ever seen".*[27] Born asserts that *"this is one of those cases that the annulment of the arbitral award… is justified by public policy and beneficial for international arbitration".*[28]

Viewed from an international perspective, in addition to their legal and commercial interest, the annulment proceedings currently before the Chilean Court of Appeal are an example of how annulment of an arbitral award, though the courts are generally reluctant to do so, can be necessary to secure the integrity of the arbitral system and the reputation of a state as a forum for International Arbitration.

The Judgment of the Chilean Court of Appeal is awaited.

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[25] Gary Born, Legal Report (25 September 2025), at para 94.
[26] Gary Born, Legal Report (25 September 2025), at para 95.
[27] Gary Born, Legal Report (25 September 2025), at para 97.
[28] Gary Born, Legal Report (25 September 2025), at para 94.

The Use and Regulation of Third Party Funding in Modern Arbitration

Camille Slow KC

What is Third Party Funding?

The basic premise of Third Party Funding ("TPF") is simple: a TPF arrangement is where an entity unrelated to the dispute provides funding to a litigant to cover legal fees and disbursements in exchange for, usually, a proportion of the recovery realised in the litigation or arbitration. The degree of funding provided will vary on a case-by-case basis but will often include paying for some or all of the solicitors' and, where applicable, barristers' fees, expert costs, tribunal fees and disbursements and even security for costs. By its nature, TPF creates a party imbalance in that it is likely to be unavailable to defendants without a substantial, viable, counterclaim, since the arrangements are predicated on the anticipated recovery of receipts from successful litigation.

TPF provides access to justice to those who would otherwise not have the means or opportunity to pursue legitimate claims. However, in doing so, it commercialises and marketises litigation as a means to pursue profits (rather than recover losses) and, in an arbitral context, inserts additional entities into what is intended to be a private forum for dispute resolution.

Camille Slow KC

Global Adoption and Market Trends

Regardless of differing views as to its desirability, TPF is an increasingly important feature of the arbitration landscape. According to research nester[1] the litigation funding market is worth approximately USD 19.3 billion globally and is anticipated this will more than double to over USD 50 billion over the next decade. Whilst these figures should be treated with caution, given the lack of publicly available information concerning commercial agreements and confidential arbitral proceedings, they likely provide at least a broad indication of scale and growth. It is therefore unsurprising that lawmakers and arbitration institutions across the world are increasingly looking at ways to manage and regulate the use of TPF in both litigation and arbitration contexts.

Asia-Pacific, and Latin America are increasingly adopting TPF arrangements.

Historical Context and Policy Considerations

The concept of TPF is relatively new and somewhat alien to common law jurisdictions, where the age-old principles of maintenance and champerty reflected and implemented a public policy against parties with no legitimate interest in litigation supporting (financially or otherwise) the bringing of that litigation. However, in a modern context—where justice is often the preserve of the wealthy—these principles have had to compete against the public interest of providing access to justice, and the latter has largely prevailed. This has been invariably achieved by taking a broad view of whether the funder's interest in the litigation is to be properly considered "legitimate".

[1] Litigation Funding Investment Market Size, Growth Trends 2026-2035

Judicial and arbitral support for TPF has its roots in access to justice, but TPF has developed far beyond these objectives. It is no longer always a means to provide financial support to those who would otherwise be unable to arbitrate. Instead, funding agreements can be, and increasingly are, used as a means to reduce risk and manage cash flows in the face of long-running and expensive arbitral proceedings or to spread risk through portfolio funding. Economic uncertainty and high legal costs create an environment primed to embrace TPF.

Regulatory Developments

In an arbitration context, TPF was, until relatively recently, largely unregulated and thus left to the applicable principles of substantive law and the discretion of tribunals. In the last five years or so, this landscape has changed and there is increasing recognition that TPF is a sufficiently significant feature of modern arbitration that rules and procedures are required to regulate its use. This has resulted in something of a self-fulfilling prophecy: regulation has followed a rise in the use of TPF, but that very regulation has, in turn, increased confidence in the acceptance of TPF and further fuelled its growth. Most major arbitration institutions have some level of regulation over TPF and most mandate funder involvement and identity disclosure as a minimum.

In response to this increasingly nuanced landscape, the Chartered Institute of Arbitrators (CIArb) has recently issued its 2025 *Guideline on Third-Party Funding in Arbitration.* This comprehensive (if somewhat long) document aims to clarify the function and consequences of TPF in arbitral proceedings. The guidance is in two parts:

- **The funding process**: Offers a practical overview of the mechanics of third-party funding, reviewing how the merits and terms of funding agreements are to be evaluated.

- **Arbitration involving a funded party:** Addresses procedural and case management considerations, such as disclosure requirements, conflicts of interest (including hurdles for arbitral institutions), the treatment of security for costs, and the recoverability of funding costs.

CIArb explicitly positions the Guideline as a general overview. Practitioners are expressly cautioned that individual cases will turn on the specific rules of the arbitral seat, the applicable arbitration rules, and the relevant national legislation. Nonetheless, for those who have the time and inclination to consider the 2025 Guideline, it provides a useful overview of the landscape and treatment of TPF in modern arbitration.

Other recent developments include the Singapore International Arbitration Centre's 2025 rules introducing Rule 38, specifically directed at TPF arrangements. Also in 2025, the EU published its paper on *Mapping Third Party Litigation Funding in the European Union 2025.* This is another lengthy document, which mainly examines the present landscape and use of TPF but is widely expected to be a precursor to cross-border harmonised regulation of TPF in the EU.

This increase in regulation brings greater predictability and transparency for the benefit of both parties. Defendants should have more confidence in their rights to understand how the arbitration is being funded and on what terms, so that issues arising as a result of TPF can be aired. For the party with the TPF agreement, they will be able to judge, with greater certainty, that the agreement will be permissible and how its use will impact the arbitral proceedings. This is likely to give funders greater confidence to enter into agreements in the knowledge they are likely to be respected. However, this comes at a price: it is likely to be increasingly difficult to hide the existence of TPF and to preserve confidentiality of its terms, including potentially sensitive pricing and commercial provisions. This could negatively impact the desirability or availability of TPF in some contexts.

Practical Implications for Practitioners

As practitioners, it should go without saying that it is important to check the rules of the court or institution you appear before, to understand what obligations fall on the parties in relation to TPF in any given case. Although the rules vary between institutions, TPF will typically involve some or all of the following features:

- A party should disclose the existence and identity of the third-party funder in its originating Statement of Case or, if the agreement is not in place at that time, as soon as practicable after concluding the arrangements.

- If there are any changes to the funding arrangements previously disclosed, these should be notified to the Tribunal and Registrar (and often the opposing parties) as soon as possible thereafter.

- Once a Tribunal is constituted, the third-party funder's identity generally cannot give rise to a conflict with a Tribunal member. In the event that such a conflict arises, the party may be directed to withdraw from the TPF agreement.

- The Tribunal may order the disclosure of any documents relating to TPF, including their terms, the funder's interest in the outcome and whether they have assumed any liability for third-party costs.

- The mere fact that a funding agreement has been identified is not, of itself, indicative of the financial status of a party. This makes sense in the context of TPF no longer being the preserve of those who have no other funding available. However, the rules do not generally preclude the right to rely on the fact that the claimant has entered into a TPF agreement, where appropriate, as part of a wider body of evidence tending to show impecuniosity.

- The rules often provide that the existence and terms of the agreement can be taken into account when ordering costs. As with the broad discretion that many tribunals enjoy when it comes to costs, this is usually a broad power for the tribunal to take such account of the agreement as they think fit.

- Measures and sanctions can be imposed if the obligations in relation to TPF are not complied with. These sanctions often expressly include sanctions as to costs.

Key takeaway: The TPF landscape is changing and developing. There are many opportunities to explore different models of TPF to benefit clients with access to arbitration or risk/cash flow management. Practitioners who may traditionally be averse to such arrangements need to embrace the opportunities they offer to clients. However, any party contemplating such arrangements, or facing an opponent who has entered into one, should check the regulatory rules to which they are subject and relevant national legislation, rules/policies of the seat of the arbitration, and substantive rules of the applicable law at the first opportunity. These should then be kept in mind throughout the course of the proceedings. Parties considering such arrangements should be aware that a TPF arrangement is unlikely to remain confidential and that sanctions could be applied in the absence of required disclosures. The existence of TPF is likely to impact the management of arbitral proceedings and could be a relevant factor in an application for security for costs and any orders ultimately made, particularly as to costs.

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Third Party Funding in International Arbitration (and its Lack of Regulation in Ireland)

Conor Owens & Megan Fanning FCiarb

Conor Owens

Megan Fanning FCiarb

Third-party funding (in arbitration) has been a topical issue in Irish law over the past ten years, and understandably so. It serves a great purpose to parties in ensuring access to justice and allowing parties to allocate risk in its disputes. However, there are of course legitimate concerns surrounding the practice and, as discussed below, other jurisdictions have introduced, and continue to introduce, measures to ensure regulation of the area. Ireland has yet to introduce any regulation of the practice and, for now, there is uncertainty on third-party funding in practice.

Taking a look back at third-party funding traditionally: the doctrine of maintenance prevents a person with no interest in the litigation / arbitration from interfering or assisting with the litigation and the related doctrine of champerty deals with the funding of such a litigation / arbitration and benefiting from any winnings.

Traditionally, and for litigation it is still the case, the rules of maintenance and champerty disallowed third-party funding of disputes.

The logic behind both, but in particular champerty, was highlighted by Lord Denning in *Re Trepca Mines* (No. 2) [1963] 1 Ch. 199 where he said: *"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses…"*

This has a continued relevance in litigation in Ireland and the seminal case in the area is *Persona Digital Telephony Ltd v Minister for Public Enterprise & Others* [2017] IESC 27 wherein the Supreme Court held that third party funding remained prohibited due to the torts of maintenance and

champerty. The Supreme Court declined to make a definitive determination on the issue, indicating that the matter properly falls within the remit of the Oireachtas.

Subsequently, the Oireachtas enacted the Courts and Civil Law (Miscellaneous Provisions) Act 2022, which formally removed the relevant tort in the context of international commercial arbitration. This reform was implemented by way of an amendment to the Arbitration Act 2010 through the insertion of a new section 5A, thereby placing the matter on a clear statutory footing. Section 5A disapplies the tort of maintenance and champerty to "dispute resolution proceedings" which are defined as:

> (a) an international commercial arbitration
>
> (b) any proceedings arising out of an international commercial arbitration before a court of competent jurisdiction performing any of the functions provided for in the Model Law
>
> (c) any appeal from a decision of a court referred to in paragraph (b)
>
> (d) any mediation or conciliation proceedings arising out of an international commercial arbitration, proceedings or an appeal referred to in paragraph (a), (b) or (c).

This insertion into the Arbitration Act 2010 marked good progress in the area of third party funding and aligned with other jurisdictions. However, from being entirely prohibited to now being fully permitted with no regulation, the Irish legislator has potentially gone from one extreme to another with third-party funding in international commercial arbitration. The Minister for Justice is permitted, under section 5(4) of the Arbitration Act, to impose criteria relating to transparency in relation to funders and recipients. However, it has not done this to date.

The lack of regulation to the legislation creates practical uncertainty as there is no obligation on a funded party to disclose the very fact that they are being funded.

It is important in international commercial arbitration that both tribunals and counterparties have knowledge of such funding. One such reason is that of conflicts of interest between the arbitrator and the funder. For example, an arbitrator may have a financial stake in the funding company or with reference to other disputes where the arbitrator is acting as counsel and its client has instructed the same funder.

A further reason is the issue of costs. If a non-funded party has knowledge that a party is being may infer that the funded party is reliant on such funding to progress its claim and that it may not be able to afford the proceedings itself. A non-funded party may seek to raise a security for costs application if it has knowledge of funding.

On the question of costs and third-party funders, many funders have internal policies that require funded parties to take out After the Event Insurance which provides coverage for adverse costs reduced grounds upon which to proceed with a security for costs application. There have been various developments on the issue of costs in the context of third party funding, for example:

- the English Courts have held that a funder can be held directly liable for costs:

> *"While we do not dispute the importance of helping to ensure access to justice … it [is] unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate cost consequences if the litigation they are supporting does not succeed."*
>
> *(Arkin v Borchard Lines* [2005] EWCA Civ 655, at 38).

This was developed even further in recent years to the extent that a funder's liability may stretch beyond the funding actually provided *(Chapelgate Credit Opportunity Master Fund Ltd v Money* [2020] EWCA Civ 246).

- The Indian courts have criticised the above approach and held in *Tomorrow Sales Agency Private Ltd v SBS Holdings Inc and others* FAO(OS)(COMM) 59/2023, that third-party funders cannot be held liable for costs as they are not party to the arbitration agreement. The Delhi High Court set aside an order which directed the third-party funder to provide security and disclose their fixed assets and banks accounts for the amount awarded under an arbitral award. The Delhi High Court set aside the order and flagged that consent is the cornerstone of arbitration.

- In Nigeria, via its Arbitration and Mediation Act 2023, states that where a respondent has brought an application for security for cost based on the disclosure of the third-party party funding, the tribunal may allow the funded party or its counsel to put on affidavit whether under the funding arrangement, the Funder has agreed to cover adverse costs order and the affidavit shall be a relevant consideration to the decision of the arbitral tribunal on whether to grant security for costs.

The most common regulatory response for third-party funding is mandatory disclosure. While England and Wales do not have any such requirements, other jurisdictions have mandated it, such as Singapore and Hong Kong.

In 2017, Singapore introduced the Civil Law (Amendment) Act 2017 and the Civil Law (Third Party Funding) Regulations 2017. These abolished the torts of maintenance and champerty and expressly permitted third party funding of international arbitration. While these instruments themselves do not impose regulations on third-party funding (they remove the torts of maintenance and champerty and define what funding is permitted), the Legal Profession (Professional Conduct) Rules 2015 do impose disclosure obligations on the legal practitioners, not the clients. Legal practitioners must disclose to a court or tribunal, and to every other party in the proceedings, the existence of any third-party funding contract related to the costs of those proceedings; and the identity and address of any third-party funder involved (Section 49A of the Legal Profession (Professional Conduct) Rules 2016.

Hong Kong amended its Arbitration Ordinance (Cap. 609) (Part 10A (sections 98U-98W)) by way of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 which expressly abolishes the tort of maintenance and champerty and permits third-party funding. Unlike Singapore, the obligation is on the funded party themselves to inform the parties and tribunals that a funding agreement has been made and must disclose the name of the third-party funder.

Hong Kong is continually evolving the regulation of third-party funding – its Secretary for Justice issued a Code of practice for TPF in December 2018 and in December 2022, a new Part 10B of the Arbitration Ordinance and the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D) came into force.

Arbitral institutions have also embraced regulation for third-party funding. The Singapore International Arbitration Centre (SIAC) Rules 2025 require a funded party to disclose the existence of the funding agreement and the funder (rule 38.1) and parties are disallowed from entering into a funding agreement which "may give rise to a conflict of interest" (rule 38.3). The SIAC Rules 2025 also grant tribunals broad powers and may order disclosure of details of the agreement, including whether the third-party funder has committed to undertake adverse costs liability.

The Hong Kong International Arbitration Centre first introduced disclosure rules in its 2018 rules and carried these through into the latest 2024 rules. Parties must disclose the existence of a funding agreement, the identity of the funder and any subsequent changes to that information (rule 44.1).

The ICC 2021 Rules introduced a new article 11(7) that requires each party to promptly inform the Secretariat, the tribunal and other parties, of the existence and identity of any non-party which is funding the claims or defences and has an economic interest in the outcome of the arbitration.

While the Irish legislation currently has certain shortcomings in terms of regulation, it can be said that parties can elect arbitral rules to apply which do contain criteria. However, the LCIA, one of the arbitral institutions under which Irish arbitrations are often conducted, remains silent on the topic in its 2020 Rules.

Of course, there are several soft law approaches, with CIArb itself publishing its Guidelines on Third Party Funding in 2025. There are also the IBA Guidelines on Conflicts of Interest for issues of same. However, while helpful for tribunals and parties alike, they are just that, guidelines.

Abolishing the torts of maintenance and champerty was a crucial step for Ireland's development in international arbitration. Further steps may well be sensible in terms of regulation and it may be that introducing further regulation would better align Ireland with international best practice and strengthen its position as a seat of arbitration. Now, the next question is, what type of regulation should be introduced and how far it should go?

Construction law update: "Smash and grab" adjudications do not arise under the Construction Contracts Act 2013

Karen Killoran, Shane O'Neill and Maeve Crockett

Karen Killoran

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The High Court confirmed that a paying party's failure to respond to a payment claim notice under a construction contract does not entitle the payee, by default, to an adjudicator's decision directing payment of the amount in the notice. This differs from the situation in the UK, where legislation provides for such a default decision. Adjudications seeking such default decisions are sometimes referred to as "smash and grab" adjudications.

In Tenderbids Ltd t/a Bastion v Electrical Waste Management Ltd [2026] IEHC 5, the contractor served a payment claim notice under a construction contract for a metal waste recycling facility. The employer did not deliver any response. An adjudication followed, but an application to enforce the adjudicator's decision was dismissed for the reasons we outlined in our briefing: *Construction Law Update: Court declines to enforce Adjudicator's Decision.*

The contractor served a fresh notice of intention to refer a payment dispute for adjudication. It alleged that the employer failed to issue a response to the payment claim notice and that this resulted in the full value of the notice falling due for payment on the payment due date. Failure by the employer to pay was identified as the "payment dispute" being referred for adjudication.

The adjudicator decided that, because the employer had not issued a payment claim response notice within the 21 days required under the *Construction Contracts Act 2013* (the "**Act**"), the contractor was entitled to payment in full.
The High Court disagreed. It dismissed the contractor's enforcement application. It considered three main issues.

1. There was a valid referral of a "payment dispute"

The Act gives a party to a construction contract the right to refer for adjudication any dispute relating to payment arising under the construction contract (a "**payment dispute**"). The Court found that the contractor at all times asserted a right to a payment under the construction contract read in conjunction with section 4 of the Act, and so the dispute met the definition of a "payment dispute" and was properly referred to adjudication.

2. As an exception, new arguments could be considered at enforcement stage, given the issue to be decided

The employer participated in the adjudication and made a concession to the contractor's argument that there was a "default direction to pay". Normally, a party would be held to concessions it made during the adjudication. However, on this occasion, the Court allowed the employer to raise a new argument in the interests of addressing the "default direction to pay" issue, which went to the architecture of adjudication itself. Any unfairness arising from allowing new arguments could be balanced by an appropriate costs order.

3. No default direction to pay

Section 4 of the Act allows the payee under a construction contract to notify a payment claim to the paying party. If the paying party contests the amount due and payable, they are required to deliver a response to the payment claim notice within 21 days of the payment claim date. Section 4 is silent as to what is to happen if the paying party does not deliver a response.

The Court stated that it was not appropriate to imply into the Act: (i) an obligation to pay the amount specified in a payment claim notice unless a response is delivered by the paying party within time, and (ii) an entitlement on the part of the payee to a default decision in the amount specified in the payment claim notice.

The Court found, therefore, that the adjudicator erred in law in determining that the employer's failure to deliver a response triggered an entitlement by the contractor of payment in full for the amount in the payment claim notice. Error in law is not normally a ground to dismiss an enforcement application. However, in this case, the error went "to the very core of the adjudication process" and compromised its fairness. The adoption of a default direction to pay would prevent a paying party from defending a claim in adjudication on its merits. This would be contrary to the principle of natural justice that a party who is adversely affected by a decision enforceable under statute, (albeit on a provisional basis only), is normally entitled to be heard on the merits. It was not open to an adjudicator to derogate from fair procedures without legislative authority.

The judgment definitively settles an issue central to adjudication under Irish law. It is also a reminder that English case law on adjudication must be approached with some caution and cannot simply be "read across" to the Act in Ireland.

Adjudication first under NEC Option W2: why UK parties choose it, how courts implement it, and the importance of the notice of dissatisfaction

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The United Kingdom's Housing Grants, *Construction and Regeneration Act 1996 ('the Construction Act')*, as amended, gives parties to qualifying construction contracts a statutory right to refer disputes to adjudication "at any time." NEC's drafting aligns with that regime. Under NEC3 and NEC4, W2 is the option used where the Act applies. The contract offers an optional senior-representatives step but does not make it a condition precedent to adjudication, precisely because that would conflict with the statutory "at any time" right to adjudicate.

Where the Act does not apply, NEC uses W1 and can make senior-representative discussions a condition precedent, and NEC4 introduces W3 for dispute avoidance boards in contexts without statutory adjudication.

In short, UK users select W2 because it is designed to operate alongside the UK's Construction Act rather than against it, a point confirmed by authorities that uphold conditions tied to the later tribunal stage, without fettering the statutory right to adjudicate.

The NEC wording is familiar. Under NEC3 and NEC4, W2.4 provides that *"a Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract."* The effect is that adjudication is the first step on any road to a court or arbitral decision. Two recent Scottish cases examine this issue and illustrate how the courts enforce the parties' agreement to adjudicate first.

Fraserburgh Harbour Commissioners v McLaughlin & Harvey Ltd

Fraserburgh is the starting point in Scotland for how courts handle an action raised before adjudication. The case arose from an NEC3 ECC project in which the pursuers alleged defects and sued for substantial damages without first going to adjudication. To further complicate matters, the tribunal in the Contract Data was specified as arbitration. The defenders argued that clause W2.4 created a contractual bar: neither court proceedings nor arbitration could competently be invoked unless the dispute had first been decided by the adjudicator.

In the Outer House, Lady Wolffe upheld that plea and dismissed the action, treating W2.4 as a mandatory condition which had not been met. The court took the view that the court or arbiter should not entertain proceedings before adjudication, with the immediate consequence that the pursuers' claim could not continue.

On appeal, the Inner House reversed the dismissal and set down the approach which now governs. The appeal court reaffirmed that contractual ADR obligations do not oust the court's jurisdiction or the basic principle of access to the courts. The proper way to implement the parties' W2 agreement in Scotland, is to suspend the action while parties adjudicate on the issue, rather than throw the case out on competency grounds. That preserves parties' ability to return to court if a party remains dissatisfied after the adjudicator's decision is delivered.

Two practical notes flow from Fraserburgh. First, parties should expect Scottish courts to hold them to their W2 bargain by requiring adjudication to be undertaken before any judicial decision is made on the merits. Secondly, the Inner House's course avoids collateral prejudice when claims have to be raised quickly due to being close to time bar.

Greater Glasgow Health Board v Multiplex Construction Europe Ltd

Lord Tyre's decision in Multiplex demonstrates how the Fraserburgh approach operates on a large project with multiple issues and parties. The Health Board sued the main contractor, its guarantors and consultants over a wide range of alleged defects in the Queen Elizabeth University Hospital. The contracts selected Option W2, and none of the issues in the action had been taken to adjudication.

The defenders argued that, given the parties' agreement to adjudicate first, the court should not entertain the action as raised. The pursuer resisted, suggesting that the multiplicity and complexity of the issues and parties meant adjudication was not a realistic forum for moving matters forward and invited the court to allow the action to run or, at least, to preserve it for prescription purposes.

The court rejected the notion that complexity somehow took the dispute out of adjudication's reach. Lord Tyre held that the correct approach was to sist the action to allow adjudication to occur, thereby implementing the parties' decision to take adjudication first as the gateway to any judicial determination.

The opinion underscores that W2 is not a mere aspiration. If a party litigates before adjudicating, the Scottish courts will pause the litigation and require parties to adjudicate, however complex the underlying dispute may be. The court recognised that the pursuer had raised proceedings in the face of looming time bar but declined to address the prescription point explicitly. However, the court's handling illustrates why, in real projects, parties may still decide to raise an action and then ask for a sist while adjudication takes place; raising an action can protect against time-bar in a way that adjudication cannot.

The notice of dissatisfaction under W2.3/W2.4

Where a party is dissatisfied with the adjudicator's decision and wishes to proceed to tribunal, the contract requires a notice of dissatisfaction ("NOD"). The NEC wording varies slightly between editions and project-specific amendments, but it generally provides that a party must notify dissatisfaction within a stated period, often four weeks, failing which the adjudicator's decision becomes final and binding and cannot be referred to the tribunal.

English authority in *Transport for Greater Manchester v Kier Construction Ltd* confirms that courts strictly enforce these notice requirements. In that case, the court held that a NOD must be served at the correct contractual address, determined under clause 13 by reference to the "last address notified" by the recipient, and must unambiguously state dissatisfaction and the intention to seek final determination by the tribunal. The decision shows that the NOD sits within the contractual bar - a tribunal cannot determine the dispute unless the contractual pre-conditions for lifting that bar have been met.

If no NOD is served, the adjudicator's decision becomes final and binding under the contract, and the tribunal cannot decide the dispute. Even where proceedings have been commenced and stayed , the court will likely enforce that outcome, because the parties have agreed to a bar that can only be lifted by the NOD. Procedural accuracy is key.

Conclusion

Option W2 is chosen in the UK because it aligns naturally with statutory adjudication and allows parties to commit to adjudication before any tribunal determination. Scottish courts have implemented that commitment by enforcing the contractual bar embedded in W2. Where tribunal proceedings are raised prematurely, the court enforces the bar by directing parties to adjudicate and suspending the action until the contractual preconditions for tribunal determination have been met.

Where prescription is imminent, parties may, and often should, raise proceedings to protect time, but they remain bound to adjudicate first and, if dissatisfied with the adjudicator's decision, to serve a valid notice of dissatisfaction in time, or the tribunal stage will be closed. English decisions confirm strict enforcement of notice and service requirements. So the key is to adjudicate first because the courts will require it; protect limitation or prescription where necessary by raising and seeking a sist or stay; and if dissatisfaction remains after adjudication, comply exactly with the contract's notice machinery on the way to final determination.

NEC4: Dispute Avoidance and Early Resolution

Linzi Hedalen & Kirsti Olson (with Alysha McMillan)

Linzi Hedalen

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Introduction

Few would disagree that the construction industry in both the UK and Ireland has traditionally been adversarial.

By the 1990s, it had become clear to the UK government that construction projects in the UK were generating a significant number of disputes, which were incapable of being resolved quickly, leading to excessive poor performance in the industry and multiple insolvencies.

A review by Sir Michael Latham in 1994 led to the introduction (in the Housing Grants, Construction & Regeneration Act 1996) of new compulsory payment processes and a fast-track dispute resolution process (adjudication) for construction disputes. Ireland followed suit, albeit later, with the Construction Contracts Act 2013.

Although these statutory processes have had a substantial impact, in terms of positive project outcomes there is no substitute for the parties actively working together while the job is onsite, to identify and resolve problems at an early stage before a formal dispute process is necessary.

The NEC standard forms of contract aim to encourage such behaviour. Used extensively in the UK since 1993, the dispute resolution procedures in the current NEC4 suite of contracts operate as only one part of a live project management framework. There is little opportunity to defer issues for later debate. Parties must address points of disagreement as they arise, in order to maintain their rights, keep the project moving and minimise any disruption to the project timeline or costs.

Why is this relevant? In Ireland, the NEC has been used for many years, but its prominence is increasing. With investment from and the presence of large multinational companies, the country is seeing a surge in major construction and infrastructure projects and is pivoting to using the design and build contract packages.

The whole ethos of the NEC4 is collaboration, underpinned by an express obligation on both parties to act in a spirit of mutual trust and co-operation – important then for the Irish market to understand exactly how it works and how to avoid disputes where possible.

Structure of the NEC4

The NEC4 Engineering and Construction Contract, by way of example, is not a single self-contained contract but there is a consistent structure, as follows:

- *Core clauses*: These clauses appear in every contract and cover the fundamental aspects of the relationship.
- *Main Option clauses*: Options A to F – the Options provide different pricing strategies, from lump sum to cost reimbursable approaches.
- *Disputes*: The parties decide what methods they will use to resolve their disputes (the W clauses).
- *Secondary Options clauses*: There are various bespoke clauses which cover points like price adjustment for inflation and limitation of liability (the X clauses).
- *Jurisdiction-specific clauses*: These adapt the contract to local law (the Y clauses).
- *Bespoke clauses*: The parties can add in their own provisions to address project-specific requirements (the Z clauses).
- *Contract Data*: This is split into two parts. Part 1 is completed by the client. Part 2 is completed by the Contractor. These sections contain project-specific information.
- *Schedule of Cost Components*: This lists the costs for which the Contractor is entitled to be paid – a detailed breakdown.

The NEC4 is therefore a flexible modular standard form, which becomes a workable agreement when a suitable payment option is chosen and when the contract is populated with project-specific information and paired with supporting documents.

Mutual trust and co-operation

The foundation of all NEC contracts is the requirement for the parties, the Project Manager and the Supervisor to act "*in a spirit of mutual trust and co-operation*" (Clause 10).

Over time it has become clear that this is not just an expression of warmth, but a legally enforceable obligation. In *Northern Ireland Housing Executive v Healthy Buildings (Ireland)* Ltd [2017] NIQB 43, LJ Deeney found that it was a cardinal principle of contractual interpretation that one should look at the whole agreement, expressing the view that the refusal of a consultant to hand over his timesheets and records for work done was *"entirely antipathetic to a spirit of mutual trust and co-operation"*.

In *Van Oord UK Limited v Dragados UK Limited* [2021] CSIH 50 (a Scottish case about the dredging of Aberdeen Harbour), the Inner House said that the obligation to act "*in a spirit of mutual trust and co-operation*" was *"not merely an avowal of*

of aspiration" but instead reflected and reinforced the general principle of good faith in contract. In that case, the court concluded that Clause 10.1 and Clause 63.10 (the compensation event clause being relied upon) were counterparts: *"Unless Dragados fulfils its duty to act 'in a spirit of mutual trust and co-operation', it cannot seek a reduction in the Prices."*

The obligation to act *"in a spirit of mutual trust and co-operation"* accordingly sets the stage, creating a different contracting culture to many of the other traditional construction contract forms.

Dispute avoidance, early detection and dispute resolution

As well as ensuring that parties work together to deliver the project in spirit, the contract also ensures that the parties work together in practice, leaving little room for procrastination, delaying of information and leaving matters unresolved. The NEC4 is separate from other contracts, proactively encouraging early detection of issues, early discussions and preferably early decisions and resolutions.

Programming

One key example of this practice is the fact that the programme sits at the heart of the contract, intended to support good project management and prompt assessment of compensation events, which should in theory help to reduce disputes.

Clause 31 sets out the key requirements for the programme. It must show, amongst other things, the order and timing of activities, float time, time risk allowances and contractual key dates.

Where programme submissions and updates break down, disputes tend to follow because NEC4 links several entitlements and assessments back to the programme logic and relies on strict response times, including deemed acceptance in some circumstances.

As an example of the core element of the programming, there are a number of compensation events linked to the Accepted Programme such as:

- Clause 60.1(2) – Failure to allow access by the date shown in the Accepted Programme;
- Clause 60.1(3) – Client failure to provide information by the date in the Accepted Programme;
- Clause 60.1(5) – the Client or others do not work within the times shown on the Accepted Programme.

Therefore, ensuring the Accepted Programme is up to date and reflective of onsite conditions and progress is critical.

The importance of the programme is further emphasised by Clause 50.5 which provides that if there is no programme in the Contract Data, one quarter of the Price of Work Done to Date is retained in assessments of the amount due until the Contractor has submitted a first programme to the Project Manager for acceptance.

If the programme is not submitted, then the Project Manager can use their own assessment of what the programme should be in assessing those compensation events.

The criticality of being paid and being assessed for compensation events hinging on the Accepted Programme may seem unfair, but it reaches back to the ethos of the NEC4 which is to provide a highly effective contract that actively manages the project and performance, rather than simply assigning blame when things go wrong. Parties are therefore encouraged to actively manage the programme and keep it up to date, which should help to keep matters on track or raise warnings if delays creep in.

Early warnings

The early warning regime is one of the NEC's most distinctive features, designed to compel the parties to identify and address potential issues quickly, before they impact the project.

Clause 15 requires the Contractor and the Project Manager to give an early warning by notifying the other as soon as either becomes aware of any matter which could increase the price for the work, delay completion or impair the performance of the works in use.

Early warnings must be logged in the Early Warning Register, a live document, which is constantly being updated. Early Warning Meetings must take place regularly so that the parties can discuss how the effects of each matter on the register will be addressed, what solutions can be adopted and what actions each of the parties will take going forward.

Essentially, these Early Warning Meetings bring together the key players to discuss identified risks, so that they can decide how those risks are going to be managed and mitigated. This collaborative approach to risk management is intended to prevent problems from escalating.

What are the consequences of the Contractor failing to send an early warning notice? Essentially, the Contractor assumes the financial risk of the event in question. Under Clause 11.2(26) in Option C, for example, costs incurred by the Contractor simply because the Contractor did not give an early warning (which the contract required them to give) will be disallowed. Under Clause 63.7, compensation events will be assessed as if the early warning had been given. The Contractor will therefore have to pay for any failure on their part to allow for an opportunity to mitigate the consequences.

No longer can the Contractor afford to store up any problems until the end of the project.

Compensation events

Though the early warning regime should be followed, it is not the same as, and does not equate to, the notification of a compensation event, which is the mechanism for awarding extra time and/or money to the Contractor for unexpected changes under the NEC4.

Compensation events are listed in Clause 60.1 and can be supplemented in the Contract Data, with 21 events being included.

Compensation events should not come as a surprise to the parties when they are notified, as they should have been captured in the early warning regime.

There is no automatic award of time or money for a compensation event. It depends on notification and assessment under the contract, and either party may notify the other of an event. Where the contractor notifies a compensation event, where "it believes that the event is a compensation event AND the project manager has not notified the event to the Contractor", it must do so within eight weeks of "[b]ecoming aware that the event has happened". If the Project Manager has not received the notification within eight weeks of the event occurring, the Contractor is not entitled to additional time or money even if it makes a compelling case.

The eight-week period operates as a time bar tool, proactively managing the contract and ensuring operational discipline. It avoids compensation events building up as the project progresses and forces the parties to deal with matters as they arise. This in itself is a helpful tool to avoid disputes as parties must face issues rather than hiding them away for a fight or leverage later.

There can, of course, be room for interpretation of when the Contractor becomes aware of the event which can lead to disputes. However, the likelihood of disputes should be reduced if parties adhere to the provisions and procedures for notifying and assessing compensation events.

Dispute resolution

If the administration of the contract through programming, early warnings, compensation events and acting in the spirit of mutual trust and co-operation still cannot prevent a dispute from arising, then the dispute resolution provisions are invoked. NEC4 adopts a tiered dispute resolution philosophy, intended to problem solve as quickly and collaboratively as possible, whilst adhering to the ethos of the contract. The dispute resolution route depends on the Option selected – either W1, W2 or W3.

- Option W1 is where adjudication is the method of dispute resolution and there is no statutory right to adjudicate at any time.

- Option W2 is used when adjudication is the method of dispute resolution and there is a statutory right to adjudicate at any time.

- Option W3 is used when a Dispute Avoidance Board is the method of dispute resolution and statutory adjudication does not apply.

Senior Representatives: an embedded escalation step (Options W1 and W2)

In respect of both Options W1 and W2, there has been the introduction by the NEC4 of the concept of referrals to Senior Representatives in an attempt to resolve the dispute before matters are escalated. Whilst the level of a Senior Representative is not defined, such a person must be in a position to have authority to settle.

Under the NEC4, the party referring a dispute notifies the Senior Representatives, the other party and the Project Manager. Each party then submits to the other their statement of case within one week of the notification. This statement of case is limited to 10 sides of A4 paper together with supporting evidence. The Senior Representatives attend as many meetings as needed to try to resolve the dispute over a period of no more than three weeks. If the dispute is not resolved in this timeframe, parties may proceed to the next step, for which timely notice must again be given. Commercially, the Senior Representative stage is designed to resolve issues while they are still manageable and before legal costs and complex positions damage delivery and working relationships.

Adjudication

The enforcement of the Senior Representative stage is conditional on the applicability of statutory adjudication. If statutory adjudication applies to the contract, then Option W2 should be chosen, where the Senior Representative stage is then optional, with both parties having to agree to refer the dispute to those representatives. Whereas, if statutory adjudication does not apply and Option W1 is chosen, the Senior Representative stage should be carried out before the dispute is referred to adjudication.

Further, where there is provision for adjudication, both Options W1 and W2 provide similar wording that "*a Party does not refer any dispute under or in connection with the contract to the tribunal unless it has first been referred to the Adjudicator in accordance with the contract*".

In *Fraserburgh Harbour Commissioners v McLaughlin & Harvey Ltd* [2021] CSOH 8, the Scottish court confirmed the tiered nature of the NEC dispute provisions as requiring the contractual "ladder" to be followed and ruled that the proceedings prematurely raised in court should be sisted (stayed) until the case had been referred to adjudication.

Again, the aim of the dispute resolution provisions is to ensure a measured response and for procedure to be followed in order to reduce the risk of disputes escalating too quickly. The requirement to adjudicate before being able to proceed to the tribunal affirms this point and, whilst some might see it as a barrier to justice, it is likely that adjudicating first allows parties to gain an independent perspective before deciding whether to incur time and expense pursuing a costly litigation or arbitration.

Dispute Avoidance Board (Option W3)

Beyond reactive dispute resolution, NEC4 can incorporate standing dispute avoidance support through Option W3, which provides for a Dispute Avoidance Board (DAB) that is appointed at the outset of the project, becomes familiar with the work, visits the site periodically and issues recommendations aimed at preventing disputes from manifesting.

The DAB process is the embedded avoidance layer for Option W3. The DAB assists the parties in resolving potential issues before they become disputes, as well as making recommendations to resolve issues. The DAB can also take proactive steps in requesting information to review if they foresee potential disputes.

For Ireland, statutory overlay is key. Section 6 of the Construction Contracts Act 2013 gives a party to a construction contract the right to refer any dispute relating to payment to adjudication, exercisable at any time by notice of intention to refer. Optional Clause Y(IR)1 has been drafted for use in Ireland on contracts which are subject to the Construction Contracts Act 2013 and provides for the use of Option W2 in dispute resolution.

Conclusion

NEC4's approach to problem solving and risk mitigation is structured and systematic. The process begins long before a formal dispute is declared through mandating specific project management behaviours.

The need to maintain an up-to-date and accurate programme, operate early warning processes and issue timely notices within strict timeframes (with an awareness of time bars and deemed consequences for failure to serve on time) all add up to a comprehensive contract-based forward-thinking approach to risk management.

Further, when matters do reach the point of a formal dispute, the process within the NEC4 contract is geared towards resolving matters as early as possible.

Ireland's growing use of NEC4 standard form contracts on major public infrastructure projects means that employers, contractors and project managers in the jurisdiction must invest early in NEC4-specific capability. Training teams on notices discipline, properly resourcing programme management, encouraging active compensation event administration and using the early warning process as a genuine way of mitigating risk will ultimately contribute to a successful outcome for all concerned.

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ADR Provisions in Public Private Partnerships – Are They Fit for Purpose?

Dermot Malone BL FCiarb

1.The UK PFI Sector

The UK government's Private Finance Initiative ("PFI") pioneered the use of public private partnerships (PPPs) for large scale infrastructure delivery. The model was subsequently used as a template for many jurisdictions across the globe, including Ireland. Accordingly, it provides a useful benchmark to consider if the alternative dispute resolution ("ADR") provisions embedded in individual projects have operated as hoped and if they are fit for purpose.

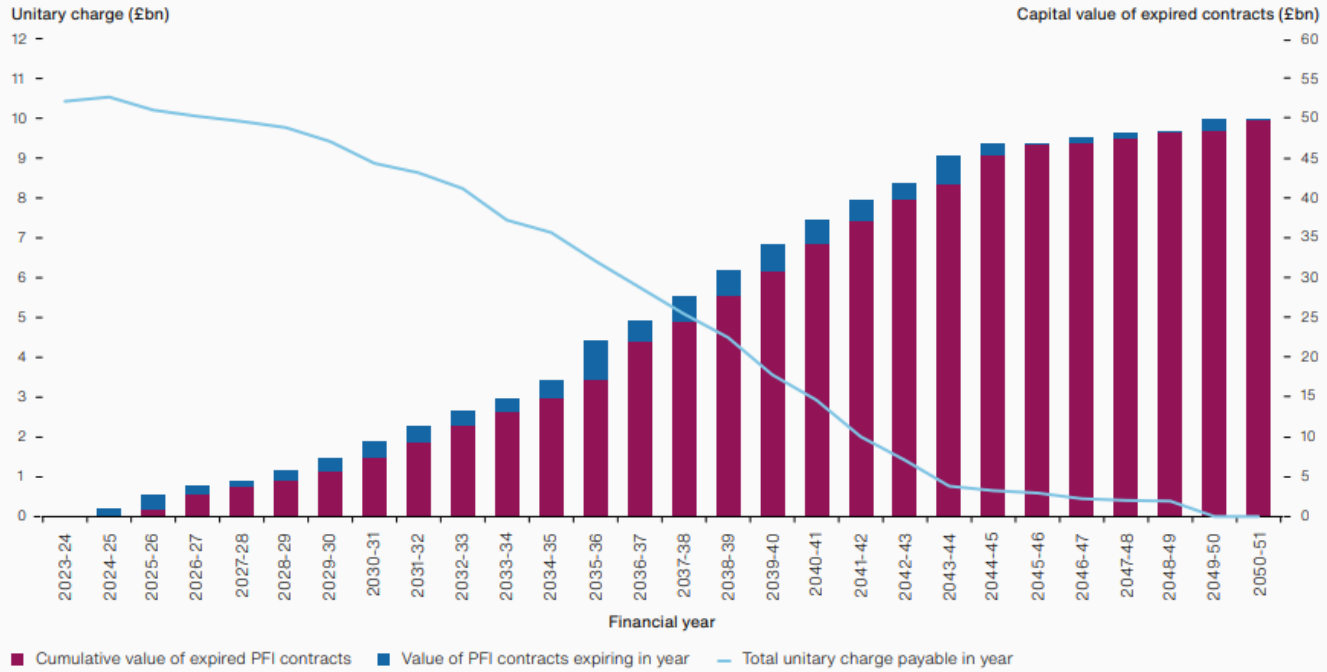
The PFI model was utilised to deliver c. 700 infrastructure assets in the UK between the mid-1990s and 2018. While the model is no longer in use, public sector bodies are still obliged to pay c. £136bn in charges up until 2053 for c. 665 ongoing contracts. In the next decade, c. 300 projects are due to expire and will require to be handed back to the procuring authority.

The graphic below shows the payment obligation profile across the estate of PFI infrastructure.

Figure 3

The expiry profile of Private Finance Initiative (PFI) assets from 2023-24 to 2050-51

More than 300 PFI contracts are due to expire within the next decade, with a significant number of assets being transferred to the public sector



Notes

1 The cumulative value of expired contracts represents the assets which will become part of the government's operating capital budget – meaning that the government needs to prepare for PFI contracts expiring each year and budget for the newly inherited assets.

2 When the public sector procures an asset using PFI, a private company – a special purpose vehicle (SPV) – is formed and it raises finance from debt and equity investors to pay for construction. Once the asset is constructed and available for use, the taxpayer makes 'unitary charge' payments to the SPV over the contract term, usually 25 to 30 years. This charge includes debt and interest repayments, shareholder dividends, asset maintenance, and in some cases other services like cleaning. These payments will be agreed at the start of the contract and some or all of them will be linked to inflation.

Source: National Audit Office analysis of HM Treasury data

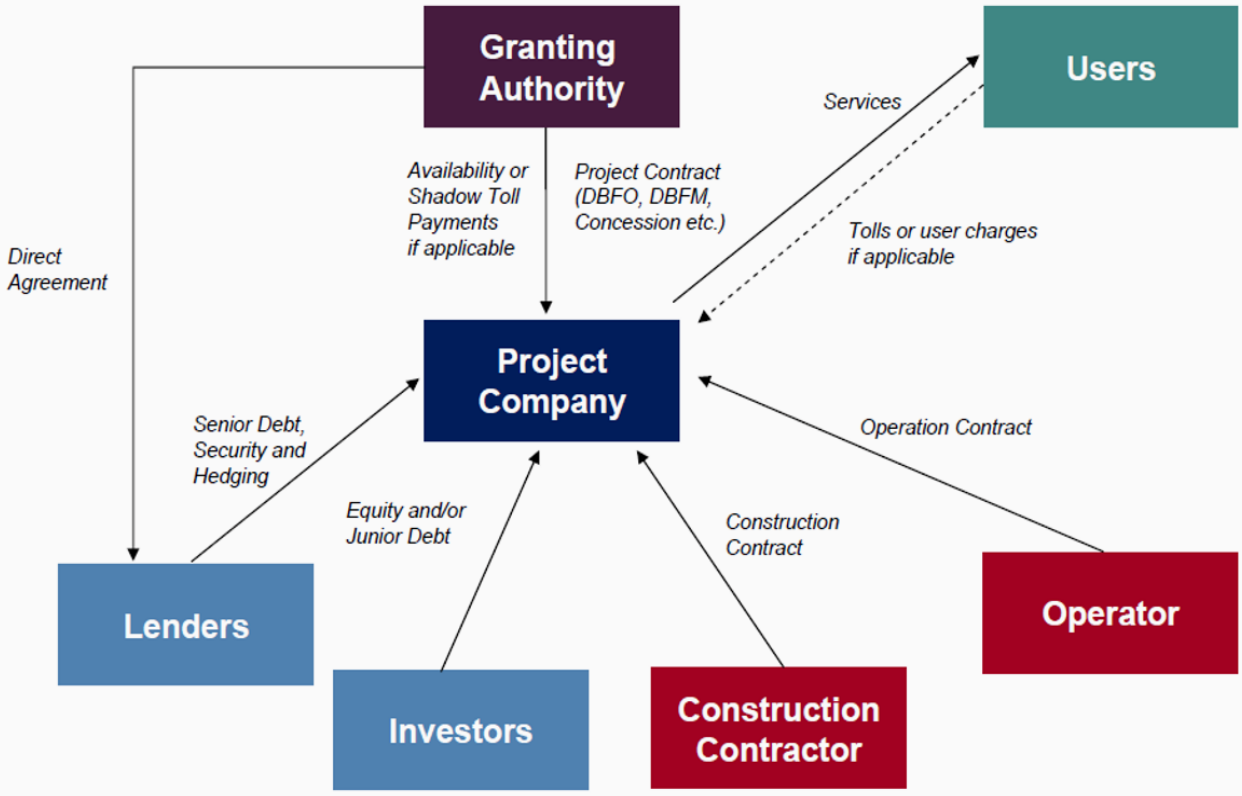
(National Audit Office, Lessons learned: private finance for infrastructure, Part 4, page 33)

In almost every PFI (and PPP) the project agreement ("PA"), that is the contract between the procuring authority and the project company (a special purpose vehicle established to deliver the project), will include bespoke dispute resolution procedures. Typically, sequential and escalating processes are set out: good faith negotiations, mediation, adjudication, followed by arbitration (with arbitration stipulated for certain dispute types, such as compensation on termination in certain circumstances).

The graphic below shows a typical contractual structure for a PFI (or PPP) transaction.

Dermot Malone BL FCiarb

Typical Structure



The principal contracts, the Design & Build ("D&B") contract and Operations & Maintenance ("O&M") contract will typically have a drop-down mechanic which will adopt or mimic the relevant provisions in the PA, including the dispute resolution provisions. The deal documentation will sometimes go on to provide mechanisms for the determination of what are usually characterised as "related disputes" (e.g., consolidation of related disputes/ parallel but discrete adjudications with same adjudicator/name borrowing with indemnity for SPV/interface agreement between Project Company, D&B + O&M parties). Often the D&B and O&M subcontractors' entitlements, not just for payments, are made co-extensive with Project Company's corresponding entitlements under the project agreement by way of equivalent project relief provisions.

Anecdotal evidence, along with both private industry and public sector sponsored reports, all support a view that the rate of occurrence and complexity of disputes in the existing estate of PFI projects is increasing steadily. Resolving these related disputes in an efficient manner is now one of the greatest challenges facing the UK PFI sector.

2. Estimate of number of formal disputes at any given time

In any body of infrastructure estate, there will be a number of disputes underway at any given time. A normal run rate of "common" construction disputes (initiated before the latent defects period expires) or disputes related to quality of services provision is expected.

However, since 2020, many UK Public Sector authorities (and particularly those in the healthcare sector) began appointing external advisors to scrutinise PFI contracts. In many instances, the advisors advocated the application of an aggressive stance (anecdotally on the back of contingent fee arrangements) on contractual obligations, service failure points, performance deductions and on hand-back requirements.

While many may say rigorous application of contractual provisions is exactly what the public sector should be doing, this ignores a reality that, in many instances, the private sector project managers and the public sector service users had negotiated and agreed (often without documenting same) changes to the operation of the project on the ground to suit the needs of the users. A rigorous application of the contractual requirements meant all of the negotiated changes would necessarily have to be reversed, leading to inevitable disputes.

In many instances, it transpired that provision of services was not well specified in the PA, or was not sufficiently flexible to deal with inevitable changes. Provisions related to hand-back of the asset to the public sector is also often poorly defined in the documents. Altogether, there is a fertile ground for disputes within what, at inception, was intended to be a collaborative partnership arrangement.

3. White Frasier

In 2023, the UK's Infrastructure and Projects Authority procured an independent report, the White Frasier, ("WF Report") report, on status of behaviours, relationships and disputes across the PFI sector. The report includes extensive analysis of the sector and its issues and points to failures by both public and private sector.

The WF Report (section 3A) provides a useful indication of the quantum of disputes underway at the time of writing the report and the portion of those referred to formal dispute resolution.

The report estimated that the number of PFI projects engaged in disputes was less than 10% of the total number of operational PFI projects; and of those PFI projects, less than 10% were referred to formal dispute resolution. This implies that across the PFI estate, c. 65 projects have ongoing disputes and of these, c. six or seven were in formal proceedings at any one time. Anecdotal evidence would suggest this rate is increasing.

The estimate covers disputes arising from contract management between the public authority and the Project Company but also encompasses supply chain disputes (e.g., involving D&B or O&M providers) that impact the project.

At this point it should be acknowledged that the overwhelming majority of the disputes in the PFI estate are resolved without ever becoming "formal" disputes. The disputes are typically resolved through negotiation and/or mediation. Equity providers, lenders, hedge providers, D&B, O&M and the public sector counterparts are typically continuously engaged in managing a multitude of issues in such a way that a dispute never crystalises. This is to the involved parties' credit, and it is also indicative that the ADR provisions in the transaction documentation are working as intended: there as a backstop only when needed.

The WF Report went on to recommend that a "PFI Dispute Resolution Forum" be established with jurisdiction to hear any type of PFI dispute, that Adjudicators be able to call for support from a panel of non-legal PFI experts (e.g., engineers and financial advisors) and that a database of accredited "PFI mediators" is developed. The WF Report also argued against public authorities should not engage their advisers on a "contingent fee" basis.

To the author's knowledge, none of the recommendations have been adopted or implemented thus far, but it is understood the UK public sector is no longer appointing advisors on a "contingent fee" basis.

4. PFI Disputes in the courts

Another way of considering if the ADR provisions in PFI contracts are fit for purpose is to consider the extent of PFI disputes that end up in formal litigation. If the ADR provisions work as intended, then it would obviate the ability or utility of seeking to further litigate in the courts. Anecdotal evidence would signal that the number of PFI disputes being litigated in the courts is increasing. The below case notes provide a flavour of the nature of disputes emerging.

Lancashire Schools SPC Phase 2 Ltd v Lendlease Construction (Europe) Ltd [2024] EWHC 37

The granting authority, Lancashire County Council, brought an application to set aside service of the claim against it and/or to strike out the claim. The council argued that the court should decline jurisdiction, since the claim had been brought in breach of a contractual requirement that all disputes must first be determined by adjudication.

The UK Technology and Construction Court held that adjudication was a mandatory step in the dispute resolution process but nonetheless allowed the litigation to continue.

The judge noted the burden is on the party resisting a stay to demonstrate why it should not be granted, but that when exercising its discretion the court will have regard to the public policy interest in upholding the parties' commercial agreement and in furthering the overriding objective in assisting the parties to resolve their disputes.

The principal reason the stay was not granted was that the dispute was essentially a multi-party one and the judge held it was doubtful that a bilateral adjudication between project company and the authority would satisfactorily resolve matters all matters between them, even allowing for the fact that the adjudication process included provision for the downstream contractors to have some input into the process. In addition, the potential for the wider dispute (with other parties) to be resolved by a multi-party mediation could be affected by sending the dispute between Project Co and the authority down a different track.

Surrey County Council v Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015

Surrey County Council issued a claim against Suez in relation to delays that had arisen in the completion of their Ecopark project. The council sought declarations to identify the contractual completion date, longstop date and a declaration that Suez had failed to meet the requirements for an acceptance certificate. In each case, the court was also asked to determine whether, in consequence, the council was entitled to terminate their agreement based on Suez's default.

However, Suez successfully applied to stay court proceedings for arbitration.

The council sought to argue that the arbitration clause was inconsistent with or superseded by subsequent Deeds of Variation, such that some disputed aspects were to be determined by arbitration and other by court proceedings. The High Court declined to accept this and held to the commercial sense of resolving in one forum all substantive disputes about matters arising from the obligations under the one contract.

Lendlease Construction (Europe) Limited v AECOM Limited [2023] EWHC 2620

Following the judgment in St James Oncology SPC v Lendlease Construction (Europe) Ltd [2022] EWHC 2504 (TCC) which found Lendlease, as the main contractor for the design and construction of a new Oncology Centre at St James' University Hospital in Leeds, liable to pay the employer damages for mechanical, engineering and fire safety defects in the works, Lendlease sought to recover some of its losses from its mechanical and electric consultant, Aecom.

The Court held that the alleged defect claims were statute-barred as 12 years had passed since both the date of breach of contract and the date of first damage.

One interesting point is that the duty owed by Lendlease (which mirrored that owed to the Trust under the Project Agreement) was an absolute obligation to achieve compliance with the applicable standards. Aecom's contractual standard was to exercise all reasonable skill and care to achieve the applicable standards, but the judgment held that despite this lower contractual standard, the failure of the design of the works to achieve the required standards amounted to negligence.

Essex County Council v UBB Waste (Essex) Limited [2020] EWHC 1581

Essex County Council (Essex CC) was awarded damages of c. £9 million as a result of the defective construction of a waste treatment facility under a PFI contract and were granted a declaration which entitled them to terminate the contract.

Whilst accepting that there was a term of good faith to be implied into the 25-year PFI contract, he rejected the notion of a general principle which required contractual termination rights to be exercised within a reasonable time and held that no such term was to be implied into this contract.

Resource Recovery Solutions (Derbyshire) Ltd (In Administration) v Derbyshire County Council [2023] EWHC 708 (TCC)

RRS entered into a PFI project agreement with Derbyshire County Council and Derby City Council in 2009 to develop an integrated waste management system, including a New Waste Treatment Facility ("NWTF") in Derby. The agreement was set to expire in 2042 but was terminated due to contractor default after RRS failed to pass contractual acceptance tests for the NWTF by the contractual long stop date.

The dispute centered around clause 58 of the contract), which assessed the sums owed between RRS and the Councils following termination.

RRS valued the 'Adjusted Estimated Fair Value' at £186m owed to RRS, while the Councils valued it at no greater than £9m owed to the Councils.

The Councils brought an application for summary judgment on two issues of contractual interpretation related to clause 58. The court ultimately refused summary judgment on both issues, deeming that they should be resolved during a trial. It is understood the matter was ultimately settled by negotiation.

5. Concluding Remarks

All parties negotiating PFI (and PPP) contracts expend significant effort at the outset, but it is unrealistic to expect any long term contract to foresee every eventuality that will arise. Successful PFI (and PPP) projects (over their full lifetime) therefore require the parties to collaboratively work together to successfully navigate changes that inevitably arise over its life.

In the early years, ADR provisions in PFI deals proved sufficient to the task, and recourse to formal litigation was rare in the sector. However, as the number and complexity of disputes in PFI projects increases, and as more "related disputes" arise, more of these disputes are expected to end up in formal litigation.

It appears to the author that the basic ADR provisions are clearly fit for purpose in dealing with discrete disputes between two parties. However, where such disputes involve multiple parties across multiple contracts, and in the absence of any pre-agreed ADR provisions for dealing with such cross-contract or "related disputes", the ADR provisions in the PA with corresponding but unlinked drop-down provisions in the D&B and O&M contracts are proving insufficient.

In reality, the issues that have emerged in the UK PFI sector are likely to emerge in other jurisdictions that have followed or mimicked elements of the PFI model to deliver a PPP programme of infrastructure delivery.

The failure by UK authorities thus far to establish the White Frasier Report's recommended PFI Dispute Resolution Forum may well be an expensive missed opportunity. It is also a proposal that should be given serious consideration in other jurisdictions with existing and ongoing PPP programmes.

The Benefits of Mediation as a Method of Alternative Dispute Resolution

John McDonagh SC

The purpose of this article is to provide an outline of the benefits of mediation as a mechanism of dispute resolution when compared to litigation.

Mediation has existed for thousands of years in one form or another. In recent times it involves a neutral and independent third party - the mediator - providing assistance to the parties in finding a resolution to a dispute which is acceptable to each. He or she has no advisory or determinative role in the resolution of the dispute but facilitates and assists the parties in reaching a mutually acceptable agreement. The process has recently been afforded statutory recognition in this country in the Civil Liability and Courts Act 2004 and the Mediation Act 2017 ("the 2017 Act").

In order to flesh out the fundamental aspects of the process a small number of paragraphs have been assigned to each in order to provide a short synopsis to assist readers to better understand what the process entails, and why it might be considered as a particularly useful method for resolving disputes without recourse to litigation. Due to space constraints it is not possible to provide more detail.

John McDonagh SC

It is important to understand from the start that the parties are not bound by any positions taken during a mediation until a final agreement is reached and signed, at which point it becomes an enforceable contract. The aim of the process is to achieve a resolution of the dispute which is acceptable to both sides.

Definition

Mediation is defined in section 2(1) of the 2017 Act as "a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute".

Confidentiality

This aspect of the process is critical and is key to the success of mediation as a means of dispute resolution alternative to litigation, hearings in the course of which will be in public. The primary reason for protecting confidentiality is to enhance trust both in the process and in the neutral third party and thereby encourage the respective parties to be frank and open with the mediator. This will enable the mediator to better understand the respective positions and enable he or she to better facilitate and assist in the resolution of the dispute.

The process is confidential as between the participants, preventing third party knowledge of the dispute and any attempt to settle it, and also in terms of all matters disclosed in the process. All matters discussed between each party and the mediator in private are confidential between them, and may not be disclosed to any other party without express consent.

In order to ensure confidentiality clauses are generally inserted into mediation agreements executed at the commencement of the process. Confidentiality is essential to the mediation process

because without it parties would not be willing to make the kind of concessions and admissions to the mediator that enable him or her to best assist the parties in arrival at a mutually acceptable solution. It is of such fundamental importance that section 10 of the 2017 Act contains specific provisions in relation to it. These include that no communications, records or notes relating to the mediation can be disclosed in any proceedings in a court or otherwise save for exceptions specified in the section.

Self-determination

Mediation gives the parties in dispute full control over the outcome of the process. This is frequently not possible in litigation, as in the absence of the parties settling their disputes it is the judge who determines the matter.
Mediation is based on the underlying concept of party autonomy which permits the parties to retain virtually all of the power over the resolution and outcome of their dispute. The parties' ability to make voluntary, uncoerced and informed decisions is a fundamental aspect of the process. The content and outcome of the mediation is the responsibility of the parties. Unlike litigation nobody can impose a determination or resolution which is not acceptable to both. Their participation is voluntary and either party is free to withdraw from the process at any time until agreement has been reached to settle the dispute. Most mediation agreements will include a term that such agreement is to be recorded in writing and signed by both parties.

Efficiency in costs

A fundamental aspect of mediation is that it will in the vast majority of cases be substantially cheaper than full-blown litigation. Mediation does not come free of charge. The expenses include the mediator's fee, the cost of preparatory work undertaken and overheads for the mediation itself. The fee and overheads are frequently shared between the parties, but how the costs of the mediation are ultimately dealt with is a matter for agreement between the parties.
Mediation may be suggested by a court and under section 21 of the 2017 Act an unreasonable refusal or failure to consider or attend mediation may have negative costs consequences. Section 169 of the Legal Services Regulation Act 2015 contains a similar provision.

In many cases the best time to mediate can be before the litigation begins. It is not a sign of weakness to suggest it. It is a sign of common sense.

It is important to note that the potential benefits of mediation must be balanced against the reality that it can be an additional layer of expense on top of litigation where it does not lead to a resolution of the dispute. But the reality is that the success rate in mediations is substantial even in disputes which appear intractable, and the risk of incurring the expense of an unsuccessful mediation is generally outweighed by their success rates. Occasionally there will be parties involved in mediations who have chosen to partake for improper strategic purposes rather than with the intention of enter into good faith bargaining, but these instances are rare.

Efficiency in time

Another aspect in favour of mediation is the length of time it takes to set one up compared to getting a case on for hearing in court in standard litigation. The delays involved in litigation are well known. In general organising a mediation will take much less time as the parties do not have to comply with extensive rules of court and the delays involved in getting trial dates once pleadings are finally closed and procedural and interlocutory matters have been attended to, both of which can entail long frustrating delays.

Flexibility

An important advantage of mediation is its flexibility in achieving consensual and mutually satisfactory resolutions which are not available in traditional adversarial litigation. Procedurally the parties are free to decide which person to choose as mediator, to determine the procedure that will be followed, to decide on up to what point they will partake in the process, to decide whether the outcome is acceptable or not, and whether they will sign the final agreement and thereby give it contractual effect.

A useful feature of mediation flexibility to be borne in mind is that one may be held at any place and at any time, subject to agreement. This freedom is not available where courts are involved.

A further aspect which demonstrates the superiority of mediation in terms of flexibility is that the final agreement may contain a wide range of novel outcomes which would not normally form part of a court agreement and which may provide solutions that better suit each party's needs.

Neutrality and impartiality

The principles of neutrality and impartiality are fundamental to the success of mediation. These concepts include issues such as the mediator not having a particular interest in the outcome of the dispute, a lack of bias towards either of the parties, a lack of prior knowledge of the dispute and/or the parties, the absence of the mediator making a judgement about the parties and their dispute,

and/or the parties, the absence of the mediator making a judgement about the parties and their dispute, and that he or she will be fair and even-handed. If the mediator is unable to maintain a neutral stance he or she should withdraw from the case. He/she must not act without having disclosed any circumstances that may, or may be seen to affect his or her independence or give rise to conflict of interests.

Quality and transparency of procedure

Those who choose to have recourse to mediation are entitled to expect that the mediator is competent, has adequate training and expertise in the process, and that their services will be up to standard. The transparency of the process should be guaranteed. The costs involved in submitting a dispute to mediation should be readily ascertainable before the process commences.

Reality check

A reason for considering mediation rather than going straight to litigation is that it provides an opportunity to reality check one's case before a court does so. Generally claimants will, if for no other reason but tactical reasons, present their claims at their height and will frequently come to believe that the claim is as good as that presented. Such a belief can reduce the likelihood of a sensible resolution, particularly if the first reality check occurs when the litigation has proceeded a long way down the line.

The 2017 Act tries to encourage a claimant to have the claim subjected to assessment by an entirely objective independent third party – the mediator – before the cost in money and time involved in litigation is incurred.

The reality is that advisers, both legal and other professionals, frequently tend, out of loyalty to their client to adopt views of their cases that are overly optimistic and fail to advert to flaws which an objective independent appraisal would reveal. Occasionally they are advised only what they want to hear and the benefit of input from an objective entirely independent party can go a long way to bringing common sense to bear on difficult situations.

Enforceability of mediated agreements

Section 11 of the 2017 Act provides that a mediation settlement has effect as a contract between the parties except where it is expressly stated to have no legal effect until it is incorporated into a formal legal agreement or contract to be signed by the parties. In order to accommodate the concept of expedition, which is important in the context of mediation as an efficient and relatively inexpensive process of dispute resolution, provision is made In the Rules of Court for summary applications to enforce the terms of mediation settlements.

Finally, from a business perspective, mediation as a method of resolving business disputes can be attractive where there may be a desire to save or maintain business relationships. The process avoids cross-examination and direct confrontation between both sides' personnel and the opposing sides' legal representatives. Such encounters can give rise to substantial acrimony and generate a perception of deliberate blood-letting during the course of fully fought court cases, which will take place in public. This can give rise to ill feelings and bitterness which may dissuade parties from further engaging in business following such public hearings.

I hope this article will be of some benefit to people who might wish to resolve disputes by means of a process other than litigation. Mediation can be seriously considered as a potential avenue to resolve the vast majority of disputes as opposed to engaging in potentially damaging and costly litigation. In this regard it is noteworthy that the Oireachtas in passing the 2017 Act saw fit to include in section 14 an obligation on solicitors, prior to issuing proceedings on behalf of a client, to advise the client to consider mediation as a means of attempting to resolve the dispute.

Settlement Agreements in Mediation: The Importance of Drafting

Laura Donnelly BL & Hugh Mohan SC

Laura Donnelly BL

Hugh Mohan SC

The recent decision from the High Court of England and Wales in *Zaloumis v Steele* [2025] EWHC 1858 KB serves as a helpful reminder to practitioners to ensure mediation settlement agreements are drafted with accuracy.

In this case a dispute arose between a son and father, claimant and defendant respectively, for damages for breach of contract. The dispute arose from an agreement which was reached between the parties pursuant to mediation in December 2021 - January 2022. It was agreed that the Defendant would pay the sum of £200,000 to the Claimant.

The Claimant claimed because of delays he lost the benefit of the contract with his manufacturer. The Claimant argued that he lost out on licensing agreements, employment, distribution and investment opportunities.

The Claimant argued during mediation he made it clear any agreement reached for payment of monies by the Defendant, that time would be a critical factor. In early 2022, an agreement was reached with the Defendant to pay the sum of £200,000 to the Claimant within 30 days of the date of the agreement.

On 26th January 2022 a Settlement Agreement was drafted. The Settlement Agreement was signed on 8th February 2022 by the Defendant and signed by the Claimant on 11th February 2022. The agreement was predicated on the date of the agreement being 26th . Therefore, payment under the terms of the agreement was that the sum of £200,000 was to be paid by 25th February 2022.

On 7th March 2022 the Defendant set up a standing charge for payments to the Claimant. By 30th March the total sum of £200,000 was paid.

The Claimant had understood that the 30-days for payment under the agreement was from the date of the Settlement Agreement and not from the date it was signed. After signing the settlement agreement, the Claimant entered commercial contracts for his products to be manufactured.

The issue which arose was whether the time limit was from the date of the agreement or from the date of signing. The Defendant accepted the payment was late and therefore there was a breach of contract by not meeting the deadline agreed.

The Defendant alleged the Claimant did not show any urgency with regards to the Settlement Agreement. The Defendant denied being aware that the Claimant would suffer loss of orders if the full settlement monies were not paid by 26th February 2022.

The Defendant argued that during the hearing the Claimant had not called the mediator as a witness. There was no written record of any of the matters told to the mediator. Email correspondence from June 2022 was put before the Court between the Claimant and the mediator in which the mediator declined to comment on closed mediation save to say that all of the Claimant points, which he asked to be communicated to the Defendant, were communicated during the mediation. The mediator, in a subsequent email, confirmed he did not withhold information from either party.

The Court found the Claimant failed to establish that the Defendant possessed the necessary knowledge at the time that the contract was made for the Defendant to be liable for the loss of profits. It was noted by the Court that when the settlement agreement was signed on 11th February 2022 the Claimant had not yet entered the commercial contract in which he claims was dependent on receiving the settlement monies on time.

The Court was of the view as the Settlement Agreement was reduced to writing *'the Claimant had the opportunity to set out in terms not only a date for payment, but also the consequences of late payment and the parameters of the Defendant's responsibility'.*

The Court noted that when the Defendant began paying the monies in instalments if the Claimant needed the full amount either by the end of February or start of March he would have reacted accordingly *'protesting to the mediator and the Defendant that payment by instalments was unacceptable, and that the whole deal was off and the settlement agreement was null and void because its purpose, namely to pay for the manufacturing, had been thwarted.'*

The Court noted the Claimant continued to receive and accept the payments until he received the full amount. This implied that he was accepting that the settlement agreement remained valid. The Court was of the view that this was inconsistent with the Claimant case. The Court held there was a breach of contract in that monies payable under the settlement agreement were paid late but no damage arose from the late payment.

This case is a reminder to ensure that all terms and conditions of a settlement are accurately reflected in the agreement. Where a payment of monies is required within a certain time it should be clear from the agreement the date upon which the monies are to be paid. As can be seen from this case, the agreement was ambiguous as to when the payment was to be received. Practitioners should carefully consider whether settlement agreements set out the full details of what is required and expected by each party.

Mediation & Conciliation

Conciliation in the Public Sector

Tim Ahern

Background

In the early 1990s the then IEI Disputes Committee under the chairmanship of the late Dr. Bunni took an in depth review of the Irish Construction Industry and the available Alternative Dispute Resolution (ADR) processes.

This Committee appreciated the situation in Ireland where the involvement of Engineers in all aspects of the award and delivery of public works was a major factor. With this in mind it adopted the philosophy that "Engineering disputes are best resolved by Engineers not Lawyers"(Max Abrahamson).

In drafting a new dispute resolution process the Committee saw the advantages of both Mediation and Adjudication as effective mechanisms, but sought to devise a process that might encompass the best of both and would facilitate all parties in the achieving cost effective dispute resolution. The IEI Conciliation Procedure as published in 1995 clearly set out some fundamental concepts, namely:

1. The primary aim of conciliation is to give the parties the opportunity to explore ways of settling disputes with the assistance of an independent impartial person. Failing this, the Conciliator makes a Recommendation as to how in his/her opinion the dispute might best be settled.

2. The Conciliator, under the IEI Procedure, is allowed to communicate privately with each party and need not reveal to the other party what he/she has been told, a process not available to an Arbitrator or Judge.

3. The proceedings are "without prejudice" and may not be used in any subsequent arbitration or litigation.

4. Any Recommendation only becomes binding if not rejected by either party within a specified timeline. The decision to have "rejection" rather than "acceptance" as the determining decision was quite deliberate.

5. The Conciliator is not be required to give reasons for his/her Recommendation unless requested by both parties and he/she chooses

Tim Ahern

I chooses to do so. The Recommendation shall not disclose any information which any party has provided in confidence. An "Explanation" may be provided as a separate document. This "Explanation" is not akin to an Arbitrator's "Reasons" and calls on very different skills in drafting.

I am convinced that the adoption of the above concepts were (and continue to be) key to the success of the process.

Early experience

In general, the public sector was slow to adopt this new uncharted procedure. In the late 1990s, as NRA's Head of Engineering, with GCCC approval as a "pilot programme", I incorporated Conciliation into all NRA Design & Build (DB) contracts over €30m and also introduced the concept of Standing Conciliator.

Others public bodies soon followed on the NRA experience and despite the early sceptics Conciliation went on to become the favoured dispute resolution process in the Public Sector with an extremely high success rate.

Partly based on this positive feedback, the Public Works Contracts launched in 2007 included a Conciliation process and, in the 2016 review, included the Standing Conciliator role.

Standing Conciliator

The introduction of the Standing Conciliator role must be recognised as one of the most significant developments in the public works contracts. It is primarily aimed at emphasising dispute avoidance. Since 2016 it is now mandatory to have this role in all public works contracts over €10m in value (and optional to include this role in contracts under €10m in value).

However, it is a role where there is very little guidance available to practitioners. The prescribed GCCC Form of Appointment (MF1.18) has an appendix marked "Duties" but this is blank and the accompanying Guidance Note is silent on the content. My understanding is that Engineers Ireland has not published a Standing Conciliator Procedure to date.

A Standing Conciliator may be required to issue a number Recommendations over the life of a project. To a large extent these Recommendations are designed to establish the ground rules to be followed and to give the parties confidence in the accessibility of a consistent third party. This helps avoid repeat challenges on the same issue and the practice of "conciliator shopping". These Recommendations, and in particular any explanations, must be very carefully drafted.

Primary purpose of Conciliation is to reach a solution

The intention is to assist the parties in the avoidance of the costly and lengthy formal dispute resolution processes.

In essence the initial phase of any Conciliation is a Mediation process where the emphasis is on finding areas of compromise and agreement. However for a variety of reasons one party or the other can find it difficult to make the last step to reach final agreement and may feel more comfortable with a third party Recommendation bridging the remaining gap.

The necessity to "reject" a Recommendation rather that "accept" is critical. Before rejecting a party must consider the costs associated with going to arbitration/courts, the risk of being wrong and the task of explaining why in the event of a less favourable and more costly arbitration they rejected the opinion of the expert impartial Conciliator they appointed in the first instance.

In the case of Standing Conciliator Recommendations they must bear in mind that the Standing Conciliator will continue to act as Conciliator on any future formal disputes arising under the Contract.

Recommendation

As emphasised in the 1995 IEI Procedure "The Recommendation is not comparable to the award of an Arbitrator or the judgment of a Court."

Very often one or both parties may be inclined to request a written explanation to accompany the Recommendation. In such cases I normally ask them to consider and discuss with me the following:

a) Ambiguities and weaknesses identified, and the consequential compromises made based on risk assessment of rights and obligations.

b) Whether relationships on site may have been a contributory factor.

c) Whether poor quality contract documents may have been a contributory factor

d) Maintaining future working relationships.

e) Third party scrutiny of Recommendation.

If having considered these aspects both parties still require an explanation I will normally oblige.

Training

The Industry has a poor record in setting up training courses for aspiring Conciliators and Standing Conciliators. I am somewhat concerned that too much emphasis is put on drafting arbitration style Recommendations and too little on the mediation style people management skills required to establish real dialogue. The skill in the writing of a Recommendation that meets each party's requirements is rarely addressed. Some Conciliators see Recommendation writing as an opportunity to demonstrate their depth of knowledge and expertise. Too often I have seen practical Engineering solutions rejected by third parties, not familiar with the project, on the basis of issues unnecessarily raised in the Recommendation/Explanation. The whole purpose of the process is to achieve settlement and this includes the drafting of a Recommendation that meets the parties' requirements to ensure it is not rejected.

Over the years the Procedure has been modified to reflect changes in the system but the fundamentals have not changed. The experience of appointed Conciliators/Standing Conciliators has been excellent and has generated increasing confidence in the process from both Contracting Authorities and Contractors alike. (The recent publication by GCCC of the Indecon Report confirms this.)

Tim Ahern: Head of Engineering NRA, former member of the GCCC, founder member of the IEI Disputes Committee, and with extensive experience as a Conciliator/Standing Conciliator on some 100 projects (covering civil, building, water, marine, canal, railway, airport, housing, sports facilities projects .

This commentary is largely, but not exclusively, based on his experience with Public Sector Projects both as an Contracting Authority, Sanctioning Authority and Conciliator/Standing Conciliator.

The EU/Mercosur Deal: The Dispute Resolution Angle

Hugh Hogan BL

Introduction

The various controversies flowing from the ratification of the EU/Mercosur Free Trade Agreement (Mercosur) continues to be one of the most controversial topics in current affairs discourse. Domestically, much of the debate has concerned fears about the potential that Irish farmers might be undercut by lower quality meat products from South American farmers with minimal attention (thus far) devoted to the deal's other provisions. In many respects, this debate has been fought on completely different parameters to the debate that arose the last time an EU free trade agreement that was in the process of ratification, i.e., the EU/Canada Free Trade Agreement (CETA). CETA was an issue that was fraught with controversy in Ireland for many reasons. However, perhaps chief amongst them were the concerns in relation to Investor-State Dispute Settlement (ISDS) mechanism whereby a CETA tribunal could make binding findings in disputes without any recourse to domestic courts.

Hugh Hogan BL

What sorts of disputes does Mercosur envisage requiring arbitration?

In contrast, the terms of Mercosur that cover dispute resolution are broadly more in keeping with dispute resolution provisions that have been common to previous EU trade deals. The biggest difference is that, unlike CETA, Mercosur makes no provision for disputes between investors and states instead disputes within the parameters of Mercosur deal will be handed on a state-state basis.

However, when disputes do arise, they will ultimately be settled through the use of arbitration panels. But the use of the panels will be a last step: in the first instance parties will be encouraged to enter into a consultation as per Article 21.5, and were this to fail they would be expected to enter into medication as per Article 21.6. If mediation were also to fail, then in the final instance the dispute would be resolved through an arbitration panel as per Article 21.7.

It should also be mentioned that under Article 21.4, it is envisaged that there are essentially only two distinct types of that might dispute arise:

> *(a) concerning the interpretation and application of the provisions of this Agreement (hereinafter referred to as "covered provisions"), except if otherwise expressly provided; or*
>
> *(b) concerning an allegation by a party that a measure applied by the other party nullifies or substantially impairs any benefit accruing to it under the covered provisions in a manner adversely affecting trade between the parties, whether or not such measure conflicts with the provisions of this Agreement, except if otherwise expressly provided.*

To put it in simpler terms, it seems that there is scope for an arbitration panel to hear a dispute that either relates to an alleged violation of the provisions of Mercosur, or an alleged impairment of the rights of a party under the provisions of Mercosur.

When the above-mentioned alternatives to mediation have been tried and not led to breakthroughs, the onus will fall on the complaining party to make a request for an arbitration hearing. The complaining party will have to provide valid reasoning as to why they are seeking to initiate arbitration proceedings, in addition they will have to specify whether the issue within the dispute pertains to the parameters of type A or type B under Article 24. It is important to note, however, that the complaining party is entitled to make a request for arbitrations of both types concurrently on a no-prejudice basis. Equally a complaining party is also entitled to make a request for an arbitration that will simultaneously hear a dispute of both types, and when such a request is made a single arbitration panel will be established to address such a request.

In any event, once the format of the arbitration has been identified and valid reasoning has been put forward arrangements will be made to appoint appropriate arbitrators.

Who will the arbitrators be?

It is clear from the provisions of Article 21.8 that there is a clear desire to stress the independent ethos and spirit of the panels that will be established to deal with disputes. In addition to an expectation that members of the panels have specialist knowledge and experience in trade and international law, Article 21.8 (2) also sets out that the following characteristics (amongst others) will be valued in persons selected to sit on panels:

> *(a) be independent;*
>
> *(b) serve in their individual capacity;*
>
> *(c) not take instructions from any organisation or government or be affiliated to any government or governmental organisation of a Party to this Agreement.*

It appears that a conscious effort has also been made to ensure the appearance of balance will be present within the composition of panels. Article 21.8 (3) places a number of obligations on the Trade Committee to ensure people who are potentially appropriate candidates to sit on the panels can be readily identified:

The Trade Committee shall, no later than 6 (six) months after the date of entry into force of this Agreement, establish a list of 32 (thirty-two) individuals who are willing and able to serve as arbitrators. That list shall be composed of the following 3 (three) sub-lists:

(a) one sub-list of 12 (twelve) individuals proposed by the European Union;

(b) one sub-list of 12 (twelve) individuals proposed by MERCOSUR; and

(c) one sub-list of 8 (eight) individuals, proposed by both Parties, who are not nationals of either Party and who shall act as chairperson of the arbitration panel.

The spirit of collegiality and dignity in the creation of the panel is also evident in the terms of Article 21.9 which affords the parties plentiful opportunities to agree amongst themselves regarding the final composition of the panel and its chairperson, and it is made clear that it is only in cases of failure between the parties to agree on composition that the Trade Committee will be called upon to select members of the panel.

How will the arbitration panels work?

The emphasis the arbitration hearings place on accommodating the parties in arriving at an informed, reasonably time efficient and agreeable outcome that is in keeping with common understanding of fair procedure is striking. Pursuant to Article 21.11 the parties will have discretion to decide whether the hearings shall be held in public or not. Once the hearings have been concluded, thereafter the work of resolving the dispute commences.

In arriving at a final arbitral award, the panel is entitled to request the opinion of experts or obtain information from any source of its choosing. When such an opinion or report has been obtained by a panel to assist its decision making, they will be obligated to disclose this report to the parties. Additionally, private individuals or entities are authorised to submit amicus curiae briefs to the panel on the understanding that they will not create an undue burden or delay the proceedings.

If the parties are of the belief that the dispute is one which requires urgent determination, then they are at liberty to make a request that the matter be dealt with under the accelerated timeline. When such a request is made then the panel that has been established to hear the matter will be obliged to come to a determination as to whether an accelerated timeline is appropriate within a period of 10 days from the panel's establishment. If the determination is ultimately made that an accelerated timeline is appropriate, thereafter the panel will have a period of 60 to 75 days from the panel's establishment to deliver the final arbitral award. In all other circumstances outside of the accelerated timeline, the panel will be expected to provide an interim report within 90 days. If they deem it necessary, the parties will have 14 days to request a review of specific aspects of this report. Following the interim report, the panel will ultimately be expected to provide the final arbitral

award within a period of 120 days (in exceptional circumstances this period may be extended to 150 days) of the panel's establishment.

In terms of the manner in which the panels operate, it also noteworthy that the panels are encouraged to make every effort to arrive at a consensus outcome. It is only in circumstances where a consensus is impossible that the panels will move to majority voting.

Furthermore, in this spirit, the panels are prevented from issuing dissenting decisions and are also obliged to keep their voting record confidential in circumstances where majority voting was ultimately required.

The spirit of good faith is also extended to the party that is ultimately on the losing side of the final arbitral award. If it is the case that there is something they don't understand or find ambiguous in relation to the terms of the award, then they are entitled to seek clarification from the panel pursuant to Article 21.16. If the losing side makes such a request then they are expected to make it within 5 days from receipt of the award, and then the arbitrators will be expected to provide said clarification with a period of a further 15 days from the receipt of the request.

What forms of award can the panels ultimately make?

There is an obligation on the final award to contain a series of fundamental elements including findings of fact, applicability of the covered provisions where relevant and an applicable rationale.

In general, in keeping with the above-mentioned description of the forms of dispute that may arise under Mercosur there are also two basic forms of final award that a panel can ultimately make. They are:

- Conformity Rulings (Article 21.4(a))
- Nullification or Impairment Rulings (Article 21.4(b))

It is the case that the award that is ultimately made will be final and binding, the final award will be construed in such a way so as to ensure that there is no expansion of a person's rights, they will not have a direct effect on any person or entity and also the documents will all ultimately be made publicly available.

It should be noted also that the parties will have liberty to have the matter withdrawn before a final award if the parties are in a position to come to a mutually agreed decision which resolves the need for a final award. Equally the parties also have the right to jointly request that the panel suspends its

work for a period of a maximum of 12 months so that the parties can make efforts to progress their dispute between themselves. If the panel is suspended for a period that exceeds 12 months, then its authority shall lapse, however that will not prejudice the right of the complaining party to make a request at a later point that another panel shall be established to address the same dispute.

Final thoughts

Perhaps the best way ultimately to contextualise the arbitration procedures (and hence assess the merits of the procedures) is through comparison with the arbitration procedures that are included within other recently agreed FTAs between the EU and other entities (be they nation states or trading blocs).

To that end, comparison was made earlier in this piece regarding the lack of controversy that has (so far) been present with specific regard to the arbitration element of Mercosur in comparison with other recently agreed EU free trade agreements such as CETA; wherein the terms of the arbitration procedure caused significant controversy owing to the establishment of the ISDS.

Mercosur's arbitration procedure is striking by virtue of the consistent themes the provisions seem to return to in relation to the promotion of good faith and transparency between the parties in the course of their dispute. In keeping with these efforts at transparency is the consistent references made in the provisions to WTO norms and principles in the context of settling arbitration disputes. Arguably also the spirit of good faith is reflected in the fact that complaints can be raised to the Trade Committee within the auspices of Article 21.4 (b), wherein as has been discussed parties can raise complaints which relates to an impairment of their rights under Mercosur rather than only a violation of their rights. Without wishing to substantively assess the merits of the arbitration procedures of the EU-UK Free Trade Agreement, it is noteworthy that much fewer references are made to WTO standards and there is only the possibility of an arbitration in the context of an alleged violation of rights on the part of ones of the parties.

Ultimately, whilst controversial elements do seem to be par for the course in all free trade agreements between large trading blocs it seems for now that little controversy has been aroused in the context of Mercosur's arbitration procedure. Time will tell whether that remains the case, but for now in the context of a spirit of good faith and transparency there is much that appears to augur well.

Family Law & Specialist Arbitration

Family Law and Arbitration

Keith Walsh SC Solicitor

This article draws heavily on the work of the Cathy Smith SC, Denise Waldron B.L., Alison Walker B.L., Rachael McDaid, mediator in finalising the submissions of the working group on Arbitration in Family Law in July 2025 as well as the work of many members of the CIARB, the Family Lawyers Association, the Bar of Ireland and the Law Society since the founding of the working group in 2019.

Keith Walsh SC

Family law reform and promotion of ADR

The Family Courts Act 2024 was enacted on 13th November 2024 but has not yet commenced. It is anticipated that this Act will radically reform the family justice system in Ireland. One of the principal reforms of the Family Courts Act 2024 is the introduction of Guiding Principles for all those involved in the family courts.

The Guiding Principles are divided into those which must be had regard to (1) by the Family Courts and the barristers and solicitors representing parties to family law proceedings or (2) the parties to the family law case. The Guiding Principles relate to children as well as process matters such as delay, encouraging and facilitating consensus, minimising conflict and the use of ADR, active case management practices and how family courts should conduct proceedings.

In relation to the encouragement and facilitation of the parties to the proceedings achieving consensus to resolve their family law disputes without recourse to the courts, an important caveat is contained in both section 8(2)(b), which relates to the court and the lawyers, and section 8(4)(b) of the Act, which relates to the parties to the proceedings, "unless resolution by such means would not be appropriate due to the nature of the proceedings or the risk of adversely affecting the safety of a party to the proceedings or a child to whom the proceedings relate".

Sections 24(3) and 39(4) of the Family Courts Act provide that the Judge of the Family Circuit and Family District Court respectively may upon his or her own motion or upon the request of a party to family law proceedings, at any stage during the proceedings, if he or she considers that mediation or another alternative dispute resolution process would assist in resolving some or all of the issues in dispute, suspend the proceedings to allow the parties to seek to resolve those issues through such means.

These sections are similar to section 16 of the Mediation Act 2017 which permits the Court to adjourn proceedings on its own motion or on the application of one of the parties when the parties decide to engage in mediation. Section 16 of the Mediation Act 2017 is confined to mediation unlike the Family Court which refers to "mediation or another alternative dispute resolution process". However, sections 24(4) and 39(5) of the Family Courts Act 2024 contain additional mandatory safeguards to be considered by the Family Circuit or Family District Court Judge, respectively, before they suspend the court proceedings so as to ensure that any suspension would not have the effect of:

(a) adversely affecting the safety of a party to the proceedings or a child to whom the proceedings relate,

(b) unduly delaying the resolution of the issues in dispute, or

(c) materially increasing the costs of proceedings.

The Family Courts Act 2024 while encouraging the use of consensus and ADR to resolve family law disputes has also imposed stringent safeguards on the promotion and use of ADR in family law disputes.

This reflects the consultation prior to the enactment of the Family Courts Act 2024 as well as the state's obligations under the Istanbul Convention which prohibits the imposition of mandatory alternative dispute resolution processes on family law litigants, including mediation and conciliation, in relation to all forms of violence covered by the Istanbul Convention [Article 48].

Opportunity to introduce Arbitration to family law

The emphasis on ADR in resolving family law disputes provides an ideal opportunity to introduce arbitration in family law and to give effect to the policy objectives promoting and encouraging ADR contained in the Family Courts Act 2024.

How could arbitration be introduced to family law

The working group on Arbitration in Family Law have proposed amendments to section 20 of the Family Law (Divorce) Act 1996 and section 16 of the Family Law Act 1995 which would require courts to consider arbitral awards or determinations when making orders related to financial provision, property or other ancillary matters in judicial separation and divorce proceedings.

These amendments would result in the acknowledgement of the role of arbitration in resolving family law disputes and in promoting alternative dispute resolution mechanisms, thereby enhancing the efficiency and effectiveness of the family justice system and will:

a. Enhance the statues of arbitration in family law proceedings;

b. Promote the finality of alternative resolution processes;

c. Encourage the use of arbitration as a viable and efficient alternative to litigation; and

d. Ensure that arbitral awards receive due consideration in judicial proceedings.

Likely effects of introduction of arbitration to family law cases:

1. **Reduction of Court Caseloads.** By resolving disputes outside the traditional court system, arbitration helps decrease the volume of cases courts must handle. This reduction in caseloads allows courts to allocate resources more effectively, addressing cases that require judicial intervention and thereby reducing overall delay.

2. **Party Autonomy:** By considering arbitral awards, the courts respect the decisions made by parties who have chosen to resolve their disputes through arbitration, thereby upholding the principle of party autonomy.

3. **Judicial Oversight:** While the amendment requires courts to consider arbitral awards, it does not make such awards automatically binding. Courts retain the discretion to assess the fairness and legality of the award, ensuring that the interests of justice and public policy considerations are maintained. In Irish family law, the concept of "proper provision" is central to the granting of a divorce. Under the Family Law (Divorce) Act 1996, a court may only grant a decree of divorce if it is satisfied that proper provision has been made for both spouses and any dependent children. This principle ensures fairness and protects vulnerable parties at the end of a marriage.

4. **Recognition of Arbitration:** The amendment formally acknowledges arbitration as a valid method for resolving disputes related to financial and property matters in divorce cases. This recognition can encourage more parties to opt for arbitration, potentially reducing the burden on the court system.

5. **Consistency with International Practices:** Many jurisdictions, such as England and Wales, have integrated arbitration into their family law frameworks. This amendment brings Irish law into closer alignment with these international practices, promoting consistency and potentially enhancing cross-jurisdictional recognition of arbitration awards.

Conclusion

With the enactment of the Family Courts Act 2024, the time has come for the adoption of arbitration as another form of ADR to be used in family law disputes. With relatively minor amendments to the two principal family law statutes for judicial separation and divorce – the Family Law Act 1995 and the Family Law (Divorce) Act 1996 – and with the support of stakeholders in the family justice system, arbitration could and should be successfully introduced into this jurisdiction for the ultimate benefit of the users of the family justice system.

In Memoriam

Niav O'Higgins

Karen Killoran Partner in Construction and Engineering and Energy and Infrastucture in Arthur Cox Solicitors

Niav O'Higgins passed away on 2 December last year. One of the brightest and most accomplished construction lawyers of her generation, a trail blazer, a fantastic colleague and friend, Niav made a lasting impact on everybody she met. Niav was a member of the profession of whom we should all be very proud.

Niav studied law at the University of Sussex and completed a master's in health and safety law, following which she spent a period living and studying in Italy. Her love of construction law began in the UK when she accepted a training contract at Masons, a construction specialist law firm in London and she later moved to its Dublin office. Niav's interest in construction law stemmed from the fact that it revolves around contracts which she considered to be one of the most dynamic and interesting areas of the law, primarily because it deals with relationships, including relationships that go wrong. The fact that there is something you can see and touch, inhabit or drive over at the end of it all, coupled with the incredible engineering and workmanship feats, really appealed to Niav. It spoke to her creative side.

Niav headed up the Construction and Engineering group at Arthur Cox for over 20 years and under her leadership, the construction team became one of the top construction practices in Ireland. Niav herself was regarded as a leading construction lawyer, or as Legal 500 put it "*without doubt the standout practitioner in her field*".

Niav had a wealth of experience advising clients on projects across a range of sectors, including those undertaken by public and semi-State bodies. She also advised on dispute resolution in the construction sector and was one of only four women on the Ministerial panel of adjudicators established under the Construction Contracts Act 2013.

Niav also established the Health and Safety group in Arthur Cox, which brings together the expertise of practitioners in health and safety from different practice areas in the firm and she also sat on the firm's own health and safety committee. She was very closely involved in the delivery of the Arthur Cox HQ at Ten Earlsfort Terrace.

Niav O'Higgins

During the course of her career, Niav made a wide and lasting impact on all those around her and one of the things that pleased Niav most was acting as mentor to young lawyers who got the construction bug (as she would say), many of whom have gone on to be some of the leading construction lawyers in Ireland, both inhouse and in private practice.

One of Niav's self professed work highlights was working on the Dublin Port Tunnel. Her involvement in that project "blew her away" and she often recounted standing on the tunnel boring machine on a site visit and marvelling at the engineering involved in drilling the tunnel while at the same time, moving rock and securing huge pre-cast concrete arches to the tunnel walls with pneumatic arms.

Niav was a highly regarded and respected adjudicator, a member of the dispute board of Engineers Ireland, and founding member of the Adjudication Society in Ireland.

Niav became ill shortly after her retirement from Arthur Cox in June 2024 and spent a short period of time in the care of Saint Vincent's Hospital and laterally in the Hospice in Harold's Cross.

Niav was an exceptional person who was widely loved and respected in the legal profession and the construction industry in Ireland, the UK and beyond. Despite her many achievements and accolades, she was a humble person who was full of fun with a wry smile and a hearty contagious laugh. She did not take herself too seriously. She was genuinely interested in people and was generous and compassionate. It was a joy and a privilege to have known her and benefited from her wisdom, support and guidance. So many of us would not be who we are today had Niav not impacted our lives.

In Memoriam

Ciarán Fahy BE MBA CEng FIEI FCiarb C.Arb

On behalf of Ciarb Ireland, Gerard Monaghan

The Irish Branch of the Ciarb were greatly saddened to learn of the sudden passing of a former Chair of the Irish Branch, Mr Ciarán Fahy in September 2025.

Ciarán was a civil engineer by profession with over 40 years' experience, having graduated from University College Dublin in 1971. He commenced his professional career as a site engineer with Irishenco, a significant Irish Contractor at the time, on the well renowned ESB Pumped storage scheme at Turlough Hill. Following a number of other site-based roles, he joined the consulting engineering firm of J.B Barrys in 1977, working primarily on the National Gas Project. From 1985 he operated primarily in private practice and in 1990 he co-founded the firm of Fahy Fitapatrick with Michael Fitzpatrick. From the mid-1990s he operated very extensively in litigation in the Irish courts as an expert witness and was very highly regarded in that area by all who knew him.

From 2003 onwards, having undertaken a Diploma in International Arbitration at UCD in 1999, Ciarán became involved in the field of dispute resolution in the construction industry. Ciarán became an accredited mediator in 2005, a Chartered Arbitrator in 2007 and joined the FIDIC President's list of Adjudicators in 2012. From 2009 onwards Ciarán focused exclusively on the field of dispute resolution as an arbitrator, conciliator, mediator and adjudicator. He was widely known and regarded in the construction industry in Ireland and beyond, by both Employers and Contractors alike, as a reliable, neutral and safe pair of hands – someone who was endlessly fair, firm, and pragmatic in all his dealings.

In 2009, Ciarán was elected as Chair of the Irish Branch of the Ciarb, a role which he embraced enthusiastically. Ciarán was extremely proud of his role as Chair and gave generously of his time over the years to the Branch, not least in assisting on regular occasions on the fast-track Fellowship programme for aspiring arbitrators. Subsequent to his role as Branch Chair, in 2010 Ciarán took on the role as Chair of a joint working group comprising the Adjudication Society and the Ciarb in London to prepare Guidance Notes dealing with Adjudication in England, Wales and

Ciarán Fahy

2013 and updated in 2020) are very highly regarded as a reference document for both party users of adjudication and adjudicators themselves, and indeed can also serve as a reference point for statutory adjudication in Ireland as introduced in the Construction Contracts Act 2013.

From 2007 to 2010, Ciarán served as a member of the ICC National Committee for Ireland and became a member of the ICC Commission on Arbitration in 2010. From 2009 to 2015, he was Chair of the Engineers Ireland Dispute Resolution Board and in 2015, served as a member of the Ciarb Practice & Standards Committee.

Ciarán was a regular attendee at Irish Branch events, and particularly the annual lunch and dinner. He was great company, a real raconteur and well liked by all who knew him. Despite dealing with health challenges in the months leading to his passing, Ciarán continued to be in high demand in in the construction industry and particularly as a

Standing Conciliator – which is a testament to the high regard in which he was held. Indeed, on the day before his passing Ciarán, as Standing Conciliator, had chaired a Project Board meeting on a civil engineering project at Glenamuck Road in Dublin and was reported at his removal and funeral to have to been in fine spirits and very focused on the task in hand. From 2017 until his death, Ciarán acted as Standing Conciliator for the National Children's hospital project, a very demanding role yet one which was personally rewarding for him given the strategic importance of the project for the care and welfare of children in Ireland for generations to come.

The Irish Branch offer our condolences to his wife Ann and to all his family.

Ar dheis Dé go raibh a anam.

In Memoriam

Professor Dr Nael Bunni, Chartered Arbitrator, FCiarb (1940–2025)

On behalf of the Ciarb Ireland Branch - Peter O'Malley Ciarb Trustee

It is impossible to adequately capture the life of Professor Dr Nael Bunni in a single short obituary or memoriam. The obituaries of 2 December 2025 on the Ciarb website, that of 24 January 2026 in *'The Irish Times'*, and the following obituary on the *'Engineers Ireland'* website of 3 February 2026 have detailed the many and varied accolades and awards that Professor Bunni received during his lifetime. In 2020, the President of the High Court, Mr Justice David Barniville, described Professor Bunni as having had "*...a quite dazzling career,*" when he received the 'Society of Construction Law – President's Medal.' However, Professor Bunni's engineering career and his wider legacy – particularly in education – have not, perhaps, been fully acknowledged. Accordingly, this memoriam seeks to add to what has already been said by casting light on these two important aspects of his life.

Born in Kirkuk, Iraq in 1940, Professor Bunni's early academic prowess was nurtured at the University of Baghdad and later, on leaving Iraq, at the Queen Mary University of London, where he completed a PhD in structural engineering. In 1968 Professor Bunni relocated to Ireland where, in 1969, he joined TJ O'Connor & Associates, a leading firm of consultant engineers, established in 1937. During his time at TJ O'Connor & Associates, Professor Bunni promoted the concept of space-frame structures. These unique structures, with an innovative appearance formed of interlocking struts, being lightweight and rigid, are highly efficient in spanning large spaces without the necessity of intermediate structural support.

Due to their lightweight nature, space frames need to be lifted and installed with care. In the 2023 book *"Insights on Construction Contracts and Insurance"* by Tayseer Treky and Misbah Kamal, Professor Bunni is extensively interviewed. He discussed one space frame installation at the Artane Shopping Centre in North Dublin where, on completion, "*the whole steel roof structure had to be lifted...where six cranes were required to accomplish this precise task...*" Professor Bunni recounted that during the lift of the space frame structure, *"I saw one of the middle steel members beginning to bend. Luckily, I was able to intervene immediately and the whole operation was stopped". He added that "Had I not decided to not supervise the lifting operation personally the 60m x 36m steelwork roof structure would have come crashing down to the ground."*

Dr Nael Bunni

Apart from the space frame at Artane Shopping Centre, Professor Bunni was responsible for the design and installation of many other unique structures including Kilbarrack Church, Nutgrove Shopping Centre, and The Square in Tallaght. In 1984, the space frame at Artane Shopping Centre won the Association of Consulting Engineers of Ireland (ACEI) President's Award for innovation. Later in 1992, The Square in Tallaght, with its distinctive central glazed pyramid roof structure, won the ACEI President's Award for excellence in design.

In April 1994, after a period of circa 25 years, Professor Bunni left TJ O'Connor & Associates, who he acknowledged as having "*...opened so many doors...*," to establish his own company 'Bunni & Associates,' as his interest in "*...dispute resolution and arbitration at that time far outweighed that of engineering design...*" In this new career, Professor Bunni said that he was fortunate to have "*...worked on many deeply complex and compelling arbitrations and to have collaborated with the world's finest and most prolific arbitrators, conciliators and dispute resolution professionals.*" With this vast breadth of experience, Professor Bunni went on to earn global recognition as one of the foremost construction arbitrators, conciliators, and adjudicators of his generation. In a career of over 50 years, he was appointed in upwards of 150 disputes across more than fifty jurisdictions.

In 1995 Professor Bunni took up the post of Adjunct Professor at Trinity College, Dublin helping to establish what would become the post-graduate Diploma Course in Construction Law and Contract Administration at the School of Engineering. Professor Bunni commented that "*This was a wonderful opportunity for me to once again participate in academic activities ...*" which "*...I enjoy and consider to be very fulfilling.*" The course commenced in 1996, with an annual intake of twenty-four students from a mix of construction disciplines; it continues today as the leading construction law course in Ireland. Many of the circa 750 students who have completed this course recall, with some trepidation, the highlight of the mock arbitration module as being 'truly eye opening' in the subject of construction dispute resolution. The legacy of Professor Bunni will continue through the Nael G. Bunni Medal, an annual award that is presented by Trinity College to the top performing student for excellence in construction law and dispute resolution studies.

Through his many lectures for other institutions, Professor Bunni educated and inspired generations of practitioners of Alternative Dispute Resolution (ADR). His lectures were characterised by intellectual rigour, clarity of thought and an unwavering commitment to principle. He was, above all, a mentor – always generous with his time, exacting in his standards, and steadfast in his unwavering belief that arbitration must serve justice.

Professor Bunni's scholarly contribution was equally profound. His seminal work *'Construction Insurance,'* later to become '*Risk and Insurance in Construction'* is now in its third edition (published in 2022, and is co-authored with his daughter Lydia Bunni. His successive editions of the FIDIC Forms of Contract are regarded as foundational texts in construction law and practice worldwide. Professor Bunni played a pivotal role in the development of the 1999 and 2017 FIDIC construction contract suites, being then awarded FIDIC's highest honour, the Louis Prangey Award, in 2018.

The Ciarb Ireland Branch joins the international ADR community in mourning the passing of Professor Bunni. As the last of seven founding members of the Ireland Branch, former Chair, International President of the Chartered Institute of Arbitrators (2000–2001), Patron of the Ireland Branch and the only recipient of the Branch's Lifetime Achievement Award (2023), Professor Bunni's contribution to arbitration in Ireland and internationally is immeasurable. He is survived by his children, grandchildren, and great-grandchildren, and by a global community of colleagues, students and friends who were enriched by his wisdom and example. In 2020 Professor Bunni was predeceased by his wife Anne, herself a distinguished arbitrator and the first female Chair of the Ciarb Ireland Branch.

Professor Bunni's legacy endures in his writings, in the institutions he strengthened, in the standards he upheld, and in the many practitioners he mentored. The Ciarb Ireland Branch can only reflect upon Professor Bunni's life with deep gratitude and respect.

May he rest in peace.

Reflections on the Construction Contracts Act 2013: Possible Areas for Reform

Bernard Gogarty Solicitor

Following the recent Conference of the Chartered Institute of Arbitrators on the Construction Contracts Act 2013 (the "2013 Act"), it was considered helpful to reflect further on a number of themes and proposals that arose during the course of the discussions.

Many of the issues outlined below were the subject of thoughtful and constructive engagement among participants. While views differed on certain aspects, the discussion demonstrated a strong collective interest in examining how the operation of the Act might continue to evolve in practice.

The observations that follow are therefore offered as contributions to that ongoing dialogue and as points for further reflection within the broader dispute resolution community.

1. *Amendment to Section 6(11):*

Section 6(11) of the 2013 Act provides:

> "The decision of the adjudicator, if binding, shall be enforceable either by action, or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and, where leave is given, judgment may be entered in terms of the decision."

At the time of enactment, the requirement that enforcement proceedings be brought exclusively in the High Court was understandable. Adjudication was a newly introduced statutory mechanism, and centralising enforcement within the High Court ensured consistency and judicial oversight during the formative years of the regime.

However, the jurisprudence of the High Court in relation to adjudication is now substantial and well-developed. In these circumstances, it is arguable that enforcement proceedings in respect of adjudicators' decisions within the monetary jurisdiction of the District or Circuit Court might appropriately be brought in the Circuit Court, with section 6(11) amended accordingly.

Such an amendment arguably would be consistent with the underlying intention of the Oireachtas, particularly in light of the Act's emphasis on facilitating cash flow within the construction industry. The current requirement that relatively modest enforcement applications be brought in the High Court imposes additional procedural complexity and increased costs, particularly affecting small and medium enterprises (SMEs). It may also act as a practical deterrent to the pursuit of adjudication in lower-value disputes.

The argument for reform is strengthened by the recent expansion of the jurisdiction of the Circuit Court to include matters previously reserved to the High Court, including the appointment of examiners to limited liability companies.

2. *Clarification of the Exception in Section 2(1)(b): The 200 Square Metre Threshold*

Section 2(1)(b) of the 2013 Act excludes certain residential construction contracts from the scope of the legislation where:

- The contract relates only to a dwelling;
- The dwelling has a floor area not greater than 200 square metres; and
- One of the parties occupies, or intends to occupy, the dwelling as his or her residence.

While the policy rationale underlying this consumer protection measure is understandable, the 200 square metre threshold has given rise to significant interpretative uncertainty. Practitioners and stakeholders have debated the meaning of "floor area," including whether it refers to:

- External measurement;
- Internal measurement;
- Internal measurement excluding uninhabitable space;
- Whether ancillary structures such as garages or sheds form part of the "dwelling."

Such ambiguity produces avoidable uncertainty and potentially inconsistent application of the 2013 Act.

One possible solution would be to define the 200 square metre threshold by reference to the methodology previously adopted under the Housing (Floor Area Compliance Certificate Inspection) Regulations 2004 (S.I. No. 128 of 2004), which provide a clear and structured approach to floor area measurement. This would introduce certainty and consistency without fundamentally altering the scope of the exception.

More broadly, consideration might be given to whether the current threshold remains appropriate, particularly in circumstances where many contractors constructing one-off dwellings are SMEs dependent upon cash flow. The present exclusion may place such contractors in a position where their subcontractors can invoke adjudication against them, while they are precluded from invoking adjudication against the employer.

3. *Reintroduction of a "Special Case" Procedure on Points of Law*

Section 35 of the Arbitration Act 1954 formerly permitted an arbitrator or umpire to state a case for the decision of the High Court on a point of law. That procedure was abolished under the Arbitration Act 2010 (the "2010 Act"), consistent with the objective of adopting the UNCITRAL Model Law and minimising judicial intervention, particularly in the context of international arbitration.

Shortly after the enactment of the 2010 Act, the Government introduced the suite of Public Works Contracts (PWC), which contain complex and, in some respects, novel provisions relating to delay, compensation events, and adjustments to the contract sum. As these contracts typically mandate arbitration, there has been limited opportunity for authoritative judicial interpretation of key clauses.

It may therefore merit consideration whether a limited statutory mechanism could be introduced within the 2013 Act to permit the referral of specific points of law to the High Court, particularly in relation to the interpretation of PWC provisions, subject to safeguards.

Any such amendment would need to preserve the integrity of the adjudication regime. In particular, it should confirm that adjudicators' decisions on payment disputes remain binding and enforceable pending final determination by arbitration or litigation.

A carefully structured provision of this nature could enhance transparency, consistency and jurisprudential development in relation to the PWC forms, without undermining the efficiency and cash-flow objectives of adjudication.

Conclusion

The 2013 Act has significantly altered the dispute resolution landscape in Ireland, particularly in promoting prompt payment and providing a swift adjudication mechanism.

The proposals outlined above are offered as potential refinements arising from practical experience and professional discussion. They are advanced with respect for the careful balance originally struck by the Oireachtas, and with a view to strengthening clarity, accessibility and consistency in the administration of construction dispute resolution in Ireland.

Consideration of measured reform may serve further to enhance the 2013 Act's effectiveness while preserving its core objectives.

Reflections

Construction Adjudication Decision Writing

Dermot Malone BL FCiarb

In summer 2025, Ciarb Ireland Branch partnered with Robert Gordon University to offer a short course and qualification in Construction Adjudication Decision Writing.

The course was delivered by speakers Catherine Needham BL, Karen Killoran, Keith Kelliher, Bernard Gogarty and Peter O'Malley.

The focus of the course was the statutory framework and best practice in the discipline of writing clear, reasoned, compliant and, crucially, enforceable adjudication decisions. The course covered statutory adjudication pursuant to the Housing Grants, Construction and Regeneration Act 1996 (and the Scheme for Construction Contracts) in the UK together with our own the Construction Contracts Act 2013 (and the Code of Practice Governing the Conduct of Adjudications) in Ireland.

The six-week course consisted of four evening lectures, three coursework assessments on subjects that could be expected in a real adjudication and a final two-stage examination. Participants were given a list of required and recommended reading. The lectures covered the four primary subjects of decision writing, namely: 'Drafting in adjudication', 'Evidence and witnesses', 'Purpose, reasons, and reasoning' and finally 'Structure and issue'.

The challenging two-stage examination required analysing a real-life dispute scenario, delivered in two parts (with the second part being only made available 5 hours prior to the examination deadline). The examination required the consideration, drafting and issuing of an enforceable adjudication decision, which also included a threshold challenge on jurisdiction to be decided upon.

I found the course to be informative, practical and it also gave me an appreciation for the time and management pressures adjudicators encounter with every appointment. I would wholeheartedly recommend the course to others. Fortunately, for those who missed the course last year, it will be run again between the 29th of April and the 6th of June 2026.

Early registration is advised.

Expressions of Interest

Ciarb Ireland Specialist Dispute Resolution Panels and List

Interested parties are warmly invited to apply for inclusion on one of the CIArb (Ireland) specialist dispute resolution panels.

TII Panel – This panel comprises arbitrators and assessors appointed to determine disputes arising in infrastructure and transport projects connected with Transport Infrastructure Ireland (TII).

FTMTA Arbitration Panel – This panel deals with disputes arising in the agricultural machinery and equipment sector, including disputes between members of the Farm Tractor and Machinery Trade Association (FTMTA) and their customers or between members themselves.

Ciarb Adjudication List– This panel consists of adjudicators available for appointment in construction payment and contractual disputes.

Applications should be submitted to Jennifer Crowther, Branch Administrator, CIArb (Ireland) at info@ciarb.ie

Special Interest Groups (SIG's)

(SIGs) play an important role in fostering member engagement and advancing expertise across key areas of dispute resolution. These groups provide a forum for members to contribute to branch activities and professional development. Members of the Branch Committee are actively involved in a number of SIGs, reflecting their significance within the branch.

Current SIGs include Adjudication, Arbitration, Dispute Avoidance, Education and Training, Environment and Climate, Equality, Diversity and Inclusion, Family Law, and International Arbitration.

Members interested in participating are encouraged to contact info@ciarb.ie.

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