Summer/Autumn 2025 Newsletter

The Chartered Institute of Arbitrators

ciarb. Ireland Branch

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Message from the Chair: Building Trust in Resolution: Ireland's Next ADR Chapter

Ireland's alternative dispute resolution (ADR) landscape has matured impressively over the past decade. Arbitration, mediation and adjudication are all supported by modern legislation, an engaged judiciary, and an increasingly international professional community. Yet, as several contributors to this newsletter point out, the system's architecture is sound but the wiring remains uneven. Ireland has the laws and institutions; what it needs now is greater emphasis on measurement, innovation and inclusive access.

Mr. Justice David Barniville's commentary of the Arbitration Act 2010 celebrates Ireland's commitment to the UNCITRAL Model Law and its non-interventionist judiciary. This framework gives Ireland coherence and predictability, but stability risks slipping into stagnation. The recent UK Arbitration Act 2025 introduced codified arbitrator duties, summary awards, and emergency arbitrators—features Ireland has yet to emulate.

As Riesenburg and Dowling-Hussey argue, Ireland's near-zero set-aside rate under Article 34 demonstrates strong finality but little flexibility. A limited, opt-in appeal mechanism on a point of law or serious irregularity would strengthen, not weaken, confidence in the system. And while the cost provisions in section 21 of the 2010 Act were intended to give parties freedom, in practice they discourage domestic arbitration—especially in public works contracts. A modest recalibration – making costs follow the event as the default, subject to tribunal discretion – would better align risk with outcome while preserving autonomy..

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As Riesenburg and Dowling-Hussey argue, Ireland's near-zero set-aside rate under Article 34 demonstrates strong finality but little flexibility. A limited, opt-in appeal mechanism on a point of law or serious irregularity would strengthen, not weaken, confidence in the system. And while the cost provisions in section 21 of the 2010 Act were intended to give parties freedom, in practice they discourage domestic arbitration—especially in public works contracts. A modest recalibration – making costs follow the event as the default, subject to tribunal discretion – would better align risk with outcome while preserving autonomy.

Mediation tells a similar story of potential constrained by caution. The Mediation Act 2017 has raised awareness and created cost consequences for unreasonable refusals to mediate, yet its reliance on soft incentives leaves take-up uneven. Ms Justice Nuala Jackson's thoughtful call for judicial mediation—judges trained to mediate but barred from later adjudicating the same case—shows how a court-linked model could offer efficiency without compromising neutrality. What's missing is evidence: Ireland needs pilot programmes with published metrics on settlement rates, time saved, and user satisfaction. The success of arbitration depends not only on the law or the rules governing it, but on the integrity, competence, and impartiality of those who conduct it. The same holds true for mediation—trust must be earned through transparent results.

The Planning and Development Act 2024 highlights how Ireland's legislative ambition sometimes outpaces coherence. As Dodd warns, its broad anti-"buy-off" clauses could criminalise legitimate mediated outcomes, even as other laws promote mediation. Tightening this drafting and introducing pre-planning mediation, as seen in New South Wales and Scotland, would turn a policy paradox into an opportunity. Construction adjudication, meanwhile, has been narrowed by the Timber Frame Projects decision, which excludes common law damages from "payment disputes." Clarity is welcome, but policymakers must ensure that adjudication remains a fast, accessible remedy rather than a procedural cul-de-sac.

This is where the Chartered Institute of Arbitrators (Ciarb) comes in. As the leading global authority in ADR, Ciarb's Irish Branch connects practitioners, government and business, ensuring international standards and ethical professionalism. Yet the Institute must evolve from an educator to a reform driver—publishing diversity and performance data, lowering barriers through scholarships, and embedding digital and sustainable practices. The Irish courts have consistently adopted a supportive approach to arbitration, recognising that party autonomy and finality are key to the arbitral process. The next step is to extend that spirit to every corner of ADR—by proving that Ireland's system not only looks modern on paper but delivers faster, fairer, and cheaper justice in practice.

Catherine Needham BL,
Editor, Chair of Ciarb (Ireland Branch)

Mark Harten BL
Co. Editor, PRO

Ciarb Newsletter

Catherine Needham BL holds a MSc Business and Finance, the Barrister at Law Degree (The Honourable Society in Kings Inns), a Certificate in Commercial Contracts (The Law Society of Ireland), a Post Graduate Diploma in Construction Law and Contract Law (Trinity College Dublin), a Professional Diploma in Arbitration Law (UCD) and is a PhD (Law) Candidate. Catherine is the current Chair of the Chartered Institute of Arbitrators (CIArb) (Irish branch). Catherine is an Accredited Commercial Mediator (CEDR), Family Law Mediator (ARC) and Accredited Fellow Arbitrator (FCiarb).

Dates for your Diary - Upcoming Events

Events, Seminars, Conferences and Educational Courses

Joint Kroll/CIArb Seminar – 23rd October 2025

On 23 October 2025, a joint seminar with Kroll will take place at the offices of Byrne Wallace Shields from 17:30 to 19:00. The subject will be Expert Evidence and ADR.
The event will be chaired by Catherine Needham BL, with a distinguished panel comprising Maebh Gogarty, Bernard Gogarty, Mark Tottenham BL, John Trainor SC, Peter O'Malley, and Mark Wearen (Kroll).

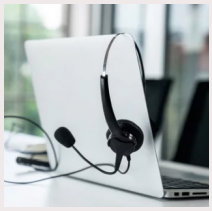
Team Building Day – November 2025 (Date to be confirmed)

The Branch is planning a team building day in September, coordinated by Ms Meg Burke BL. This occasion will provide members with an opportunity to connect in a more informal setting and to strengthen collegial ties.

Global Reach and Young Members' Group – October and November 2025

October and November will also see an ambitious international collaboration. CIArb (Ireland) will partner with CIArb (Australia), CIArb (Zambia), CIArb (Brazil), VIAC, LIAC, and SCL (Astra) (Ireland) to present The New Power Generation – Disputes in the New and Old Sectors: A Primer for Young Resolvers.

This two-part webinar will be hosted remotely by Clifford Chance at 11:00 Irish time (date to be confirmed). The Arbitration Channel (CEO Lauro Parente) has agreed to act as media partner and will broadcast both sessions on its platform.



Webinar I: Construction with Interjurisdictional Comparisons
Opening remarks: Ms Justice Nuala Jackson
Moderator: Ms Justice Nuala Butler
Panellists: Patrick Leonard SC; César Augusto Guimarães Pereira (Global Deputy President and elected President of CIArb for 2026); Niamh Leinwather (VIAC); and Walter Needham (QservGroup).

Webinar II: Renewable Energy
Moderator: Wayne Stewart Martin AC KC, former Chief Justice and Lieutenant-Governor of Western Australia
Panellists: Geoff Farnsworth (President, CIArb Australia); Fiona Egan, Solicitor (SCL Astra); Nakasamba Banda-Chanda (CIArb Zambia and Secretary General of VIAC); Cristina Mastrobuono (Chair, CIArb Brazil Branch); Ema Potočnik (Director, VIAC); Kristian Maley (Counsel, Clifford Chance, Perth, and Chair of CIArb Australia Young Members' Group); Kadidja Sidiba (Deputy Secretary General, LIAC); Gianna Totaro (CEO, CIArb Australia); and Franz T. Schwarz (Partner, Wilmer Cutler Pickering Hale and Dorr LLP, VIAC).

Annual Dinner – 14 November 2025

The Annual Dinner of the Irish Branch will be held on 14 November 2025 in the College Green Hotel, Dublin. The keynote address will be delivered bythe Hon. Mr Justice Gerard Hogan.
Generous sponsorship has been provided by William Fry Solicitors, Hamish Lal Solicitors, Kroll, and Quantex.

Annual Luncheon – 17 April 2026

Looking ahead to 2026, the Annual Luncheon will take place on 17 April 2026 in the College Green Hotel, Dublin. The Chief Justice of Ireland, the Hon. Mr. Justice Donal O'Donnell will deliver the keynote address. Members of both the Irish and Northern Irish judiciary, as well as several past Chairs have already accepted invitations.

Tickets for all the above events will be available on our website www.ciarb.ie where we hope you will support with your attendance. If you have any queries, please contact us on info@ciarb.ie or call us on +353 (0) 1 8175307.

Annual Dinner

Friday 14TH November, 7.00pm

ciarb.
Ireland Branch

Chartered Institute of Arbitrators - Ireland Branch

Join us in the spectacular surroundings of the
'Banking Hall'

Guest Speaker - Hon. Mr Justice Gerard Hogan

Black Tie Event

Single ticket for dinner €165 (includes a half-bottle of wine)
Table of 12 seats discounted to €1,815
Half table of 6 seats discounted to €910
Enquiries: info@ciarb.ie or www.ciarb.ie 01 817 5307

Event Sponsor:

WILLIAM FRY KROLL HAMISH LAL Partners QUANTEX QUANTITY SURVEYING • PROJECT MANAGEMENT • DISPUTE RESOLUTION

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College Green Hotel, College Green, Westmoreland Street, Dublin D02 HR67

Past Events

Trinity College Dublin – 4 April 2025

At the invitation of the Department of Engineering in Trinity College Dublin, the Branch provided arbitrators for the Arbitration Module (Mock Arbitration) of the Postgraduate Diploma in Contract Administration and Construction Law.
The Arbitral tribunal comprised Catherine Needham BL, David O'Leary, and John Mitchell.

Annual Lunch – 11 April 2025

The Annual Lunch was held on 11 April 2025 in the College Green Hotel, Dublin, with 120 members, friends and guests in attendance. Outgoing Chair Dermot Durack opened proceedings, warmly welcoming those present. He highlighted the year's achievements and noted with pride that 10 past Chairs and two former Worldwide Presidents of the Institute were in attendance.

Dermot then introduced Guest Speaker Natalie Ryan of the Lighthouse Charity, our chosen Charity Partner. The Lighthouse Charity provides holistic support to the construction community in Ireland and the UK, addressing emotional, physical and financial wellbeing. A vital element of its mission is the delivery of both reactive and proactive resources, freely available and widely accessible, to strengthen the resilience of the industry.

The event concluded with Dermot presenting a gift to Jennifer Crowther in recognition of her hard work and dedication to the Branch. He then formally handed over the Chain of Office to the incoming Chair, Catherine Needham BL.

Annual McQuillen Lecture – 28 April 2025

On 28 April 2025, the Annual McQuillen Lecture was held in the Law Society of Northern Ireland, Belfast. Prof. Dr Mohammed Abdel Wahab delivered a lecture entitled *The Transformative Effect of AI on International Arbitration: Challenges & Prospects.*

Opening remarks were made by Catherine Needham BL, Chair of the Irish Branch, and Jim Armstrong, Chair of the Northern Irish Chapter. The event generated considerable interest, with more than 80 people attending, including distinguished members of the judiciary such as The Hon. Mr Justice Humphreys and The Hon. Ms Justice McBride.

Prof. Dr Abdel Wahab gave a thought-provoking lecture which examined, in depth, both the merits and the concerns that artificial intelligence will bring to dispute resolution. His address concluded with a lively and wide-ranging question and answer session.

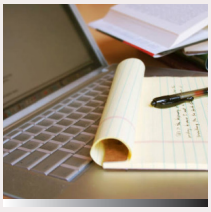
Following the lecture, dinner was hosted in the Merchant Hotel with the speakers, the Irish and Northern Irish Chairs, and NI Chapter Treasurer, Eoghan Devlin.

Arbitrating Trust Disputes Seminar – 30 April 2025

On 30 April 2025, CIArb Ireland, together with The Bar of Ireland ADR Committee and CIArb UAE, hosted the seminar Arbitrating Trust Disputes after Grosskopt v Grosskopt: Views from Cyprus, Dublin & Jersey. The event took place in the Distillery Building, The Bar of Ireland, and attracted 70 in-person and 170 online attendees.

Catherine Needham BL gave the opening remarks, and the seminar was moderated by Leonora Riesenburg. Speakers included Liosa Beechinor BL, Graham Kenny (Partner, Eversheds Sutherland), and Boris Lazic (B Lazic & Co. LLC, Cyprus). The morning concluded with a question-and-answer session.

Adjudication Decision Writing Course – 30 April to 7 June 2025



Between 30 April and 7 June 2025, the Irish Branch delivered an Adjudication Decision Writing Course online. The programme combined a series of lectures with assessments and culminated in a final examination.

The course commenced with opening remarks from Catherine Needham BL. Lectures were delivered by Karen Killoran (Partner, Arthur Cox), Bernard Gogarty, Keith Kelliher, Associate Dean David Christie, Dr Andrey Kotelnikov of Robert Gordon University, David O'Leary, and Peter O'Malley (Past Chair).

Twenty-four participants registered, including students from the Middle East, Saudi Arabia, Lebanon, and one RGU student from Hong Kong.

Annual Conference – 9 May 2025

The Annual Conference was held on 9 May 2025 in the National Gallery of Ireland, with a post-conference reception in the Merrion Hotel. The theme was *Does the Forum Fit the Fuss?*

This flagship event was generously supported by sponsors, in particular Byrne Wallace Shields and William Fry Solicitors. The Conference was a sell-out success, with 150 registered attendees and 110 attending the luncheon in the National Gallery's courtyard. The Chief Justice of Ireland and several other members of the judiciary were present.

Opening remarks were made by Catherine Needham BL, followed by a keynote address from The Hon. Ms Justice Nuala Jackson. The programme comprised six sessions — Infrastructure, Mandatory Mediation, PWC Contract, Adjudication, Arbitration, and ADR. In total, 32 speakers participated, with the Hon. Ms Justice Sara Phelan moderating one of the sessions.

Closing remarks were delivered by Ian Talbot (ICC), Bernard Gogarty, and the President of the High Court, the Hon. Mr Justice David Barniville.

Cork Regional Seminar – 27 May 2025

On 27 May 2025, CIArb Ireland hosted The Dispute Avoidance Process under the PWC – Does it Work? in "Vertigo" at Cork County Hall. Sponsored by RDJ Solicitors, the event drew a capacity audience of more than 80.

The panel featured Peter McCarthy, John Lyden, Aidan Drummond, Fionola McCarthy (Partner, RDJ Solicitors), and Kevin O'Sullivan (Director, Arup Transport Assets & Operations).

Accelerated Route to Fellowship Course – 7–8 June 2025

The Accelerated Route to Fellowship (ARF) Course was held on 7 and 8 June 2025 in the Spencer Hotel, Dublin. Catherine Needham BL provided the opening remarks remotely from Sicily.

The Course Director was Leonora Riesenburg, with Arran Dowling Hussey BL as Course Tutor. This short, in-person, assessment-based course was successfully delivered to participants seeking Fellowship accreditation.

Galway Seminar – 12 June 2025

On 12 June 2025, the Branch, in partnership with the Construction Industry Federation, held Demystifying the Contract in the Galmont Hotel & Spa, Galway.

The panel included Denise Kennedy, Ger Ronayne, Edel Tobin (Royal Institute of the Architects of Ireland), and David McDonagh (Quantex). The event was generously sponsored by Quantex.

UCD Moot Court – 18 June 2025

On 18 June 2025, CIArb Ireland supported the Moot Arbitration for UCD's Professional Diploma in Arbitration and LLM programmes, at the invitation of Professor Brian Hutchinson.

The moot was presided over by Catherine Needham BL, Bernard Gogarty, and Arran Dowling Hussey BL, who acted as arbitrators, helping to cultivate the skills of future ADR professionals.

Joint CIArb/SCL Seminar – 25 June 2025

On 25 June 2025, CIArb Ireland, The Adjudication Society, and SCL hosted a seminar entitled The Arbitration Act – 15 Years On at the Dublin Dispute Resolution Centre in the Distillery Building. The event was well attended, with more than 120 participants.

The President of the High Court, the Hon. Mr Justice David Barniville, opened proceedings. Catherine Needham BL chaired the seminar, with contributions from Éamonn Conlon SC, J. Niav O'Higgins, Dr David Sharpe KC SC, Siobhan Kenny (Addleshaw Goddard LLP), and Jarleth Heneghan (William Fry). The discussion was moderated by Karen Killoran (Arthur Cox LLP).

CCA Event – 2 July 2025

On 2 July 2025, the Branch hosted The Construction Contracts Act 2013 – 9 Years in the offices of McCann FitzGerald LLP, Dublin. Organised by Danyal Ibrahim, the event featured an extensive line-up of speakers: Catherine Needham BL, Bernard Gogarty, Sean Gallagher, Barrett Chapman, Maeve MacDermott Casement, Siobhan Kenny, Mark Wearen, John Kelly, Jonathan Fitzgerald, Mark Kehoe, Paul Sheridan, Cathal Ryan, Martin Waldron, Keith Kelliher, Claire Graydon, and Maebh Gogarty.

Catherine Needham chaired the event remotely from Sicily. Attendance reached a record 200, both in person and online, making it one of the most successful events of the year.

Third-Level College Presentations – 2025

Throughout 2025, CIArb Ireland committee members continued to deliver Introduction to CIArb Ireland Branch presentations across third-level institutions nationwide. These outreach sessions aim to encourage students and younger professionals to explore the field of alternative dispute resolution and to join the Ireland Branch.

Joint Seminar with The Adjudication Society, CIArb (Ireland) and SCL – 4 September 2025

The CIArb Irish Branch hosted a joint seminar with The Adjudication Society and the Society of Construction Law on 4 September 2025 at the offices of William Fry.

The focus of the evening was "Conciliation versus Adjudication in the Irish Construction Industry". The format took the shape of a fireside chat, designed to encourage frank discussion and real-time debate.

The discussion was moderated by Ms Niav O'Higgins and the panel featured Mr Brian Bond, Mr John Curtin (PJ Hegarty & Sons), Mr Eamonn Conlon and Mr Jarleth Heneghan.

Statutory Adjudication Seminar – 24 September 2025

A seminar devoted to Statutory Construction Adjudication took place on 24 September 2025 at the Irish Architectural Archive, Merrion Square, Dublin.
The panel featured James Burke BL and Jonathan Fitzgerald BL, with Maebh Gogarty presiding as Chair.

Ciarb Ireland Branch Annual Lunch – 11th April 2025

Banking Hall, College Green Hotel

L to R – Sean McCarthy, Damien Keogh Solicitor, SC, Niall Buckley SC, Dr Finola Doyle O'Neill, Dermot Durack BL, Catherine Needham BL, James Bridgeman SC, Meg Burke BL, Danyal Ibrahim, Dermot Malone and Sean O'Flaherty BL

Kevin Hollingsworth, Natalie Ryan and Dermot Durack

Séamus Clarke Sc and Dermot Durack

Robert Rooney, Claire Graydon, Eddie Quigg

Tony Reddy, Richard Stowe and Garry Cooper

Paul Convery, Jarleth Heneghan, Rachel Kelly

Martin Cooney, Joe Kelly

Meg Burke SL, Billy Morrissey, Paula Murphy

Fionnuala Ní Dhúgáin BL, Alison Walker BL and Comfort Odesola BL

Maeve McDermott Casement and Mark Gill

James O'Donoghue, Mark Gill, Jim Halley

Jim Corkery, Mary Corkery, Barry Kelly

Sarah Durack, Laura Hopkins and Conor Kelly

Danyal Ibrahim, Meg Burke BL

Conor Mckeever, Michael O'Shea

Margaret Austin, Peter O'Malley, Joe Behan, Brendan Kilty SC

Brendan Kilty, Billy Morrisey

Conor Mckeever, Eddie Quigg, Michael O'Shea

Joe Behan, Brendan Kilty SC

Annual Conference – 9th May 2025

National Gallery of Ireland

The Hon. Ms Justice Nuala Jackson

The Hon. Ms Justice Nuala Jackson

James Golden, Gerard Monaghan, Damien Keogh Solicitor, SC, Niav O'Higgins

Sean Carr, Lydia Bunni BL

Dermot Malone, James Golden, Niav O'Higgins, Damien Keogh Solicitor, SC, Gerard Monaghan

Lydia Bunni BL, Dermot Durack BL, Dominic Donnelly, Meg Burke BL

Siobhan Kenny, Jarleth Kearney, Martin Cooney and Maebh Gogarty

Joan O'Connor and James O'Donoghue

Patrick Leonard SC, Kate Ahern BL

Siobhan Kenny, Jarleth Kearney, Martin Cooney, Maebh Gogarty

Lydia Bunni BL, Dermot Durack BL, Dominic Donnelly, Meg Burke BL

Siobhan Kenny, Jarleth Kearney, Martin Cooney, Maebh Gogarty

Joan O'Connor, James O'Donoghue, Patrick Leonard SC, Kate Ahern BL

Mary Liz O'Mahony, Tim Bouchier Hayes, Niall Buckley SC

Aidan Redmond SC, Cliona Kimber SC, Mary Liz O'Mahony, Tim Bouchier Hayes, Niall Buckley SC, Laura Donnelly BL

Aidan Redmond SC, Mary Liz O'Mahony, Laura Donnelly BL, Tim Bouchier Hayes, Niall Buckley SC, Cliona Kimber SC

Jarleth Henegahn, Mariana Verdes, The Hon. Ms Justice Sara Phelan

The Hon. Ms Justice Sara Phelan, The Hon. Ms Justice Nuala Jackson, The Hon. Mr Justice David Barniville

Seminar

Ciarb Ireland/Society of Construction Law/Adjudication Society, Joint Event - The Arbitration Act 2010 – 15 Years On[1]

The Hon. Mr Justice David Barnville , President of the High Court

It is always timely to sit back and review the operation of a new piece of legislation – particularly one which was as relatively radical as the Arbitration Act 2010 (the "2010 Act") was – after a number of years of experience of the new regime. So far as I am aware, no such review of the 2010 Act has yet been carried out and no amendments to the Act, save in the limited area of third-party funding of international commercial arbitration proceedings, have been made since it came into effect. Although I am aware that the Government recently approved the terms of the Arbitration (Amendment) Bill 2025, to allow for ratification of CETA (the EU-Canada Comprehensive Economic Trade Agreement) and other similar trade deals with third countries that include investment protection provisions.

As no doubt everyone is aware, in 2021, the Ministry of Justice of England and Wales requested the Law Commission there to carry out a review of the Arbitration Act 1996 to determine whether any amendments were necessary to ensure that the 1996 Act remained fit for purpose and continued to promote England and Wales as a leading destination for commercial arbitrations, in particular. The Law Commission reported in September 2023 and put forward a number of recommended amendments to the 1996 Act. Most (if not all) of those amendments were accepted and the Arbitration Act 2025 received royal assent in February 2025 and came into force on 1 August 2025. It is beyond the scope of these few remarks to provide anything but the briefest summary of the changes which the 2025 Act made to the 1996 Act. The new Act can be said to have refined the 1996 Act by making the following important reforms:

The Hon. Mr Justice David Barnville

(i) It introduced a default rule that the governing law of the arbitration agreement will be the law of the seat of the arbitration unless the parties expressly agree otherwise. This provision (s. 6A) is intended to resolve the uncertainties and complexities which arose from the decision of the UK Supreme Court in *Enka v. Chubb* [2020] UKSC 38, [2020] 1 WLR 4117.

(ii) It codified and put on the statutory footing an arbitrator's duty to disclose circumstances that might reasonably give rise to justifiable doubts as to the impartiality of the arbitrator (as set out by the UK Supreme Court in *Halliburton Co v. Chubb Bermuda Insurance Ltd (formerly Ace Bermuda Insurance Ltd)* [2020] UKSC 48, [2021] AC 1083.

(iii) It expanded the immunity of arbitrators against liability to costs in an application to court for their removal (except in bad faith) and provides for an arbitrator's immunity from liability where the arbitrator resigns (unless the resignation was in all the circumstances unreasonable) (subject to any agreement to the contrary) the aim of these provisions is to ensure arbitrators can act independently without any cost or liability consequences.

(iv) It confers express powers on arbitrators to make awards on a summary basis in relation to a claim (or an issue) if the arbitral tribunal considers that a party has no real prospect of succeeding on the claim or issue or in the defence of the claim or issue.)

(v) It provides for the appointment of emergency arbitrators and for the awards of such arbitrators to be and enforced by the court.

(vi) It amends s. 44 of the 1996 Act which concerns the powers of the court to support arbitration including clarifying that orders can be made in relation to a party *"or any other person"* (thereby confirming the power of an arbitrator to issue orders against third parties).

(vii) It clarifies that if an arbitral tribunal has already ruled in its own jurisdiction, the parties cannot apply to the court under s. 32 the 1996 Act for a separate jurisdictional ruling. They can however challenge the arbitral tribunal's decision under section 67.

(viii) It narrows the scope of challenging awards on jurisdictional grounds under s. 67 by preventing the losing party from introducing new evidence or arguments in an attempt to obtain a full rehearing.

(ix) It allows tribunals to award costs even if they lack substantive jurisdiction, thereby ensuring that if an arbitration is terminated due to lack of jurisdiction, the arbitral tribunal can still order a party to make pay the costs.

In 2023, I was asked to deliver the inaugural Nael G. Bunni Lecture and in that context to look at the 2010 Act – 12 years on. I slightly adapted the theme and gave my lecture on *"the Irish experience of the UNCITRAL Model Law"*. In that lecture I provided a comprehensive review of the relevant cases and developments in the law under the 2010 Act since it came into force. It has to be said that there have not been an enormous number of developments since the delivery of that lecture (25 January 2023).

Before making a few comments on the 2010 Act and how it has been applied by the courts here, I should briefly remind people how the 2010 Act came to be enacted.

The 2010 Act constituted a radical overhaul of Ireland's arbitration legislation. The Act was proposed and largely defined by leading arbitration practitioners in Ireland (including the then Attorney General, Rory Brady SC) and national and international experts working with the Attorney General and the Government.

The 2010 Act incorporates international best practices in the field of international arbitration and applies those to both international and domestic arbitrations.

The most significant change was to provide for the adoption into Irish law of the UNCITRAL Model Law. The 2010 Act also gives force of law in Ireland to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

In addition to giving effect to these international provisions, the 2010 Act introduced a number of other significant changes to the pre-existing legislative regime including changes to the manner in which parties may agree, and arbitrators may determine, the costs of an arbitration. This was and is a controversial issue and I will make a few observations on it at the end of this article.

The Model Law was first adopted by UNCITRAL (the United Nations Commission on International Trade Law) in 1985 and was amended in 2006. It has been described as the *"single most important legislative instrument in the field of international commercial arbitration"* (Gary B. Born, 'International Commercial Arbitration' (3rd Ed.) Vol. 1 (London: Kluwer Law International, 2020) para. 1.04[B](a) p. 139). The Model Law was designed to be implemented into national laws of those countries which decided to adopt it with a view effectively to harmonising the approach taken to international commercial arbitrations, in particular, in those countries. Over 110 countries or jurisdictions have adopted laws based on the Model Law. They include Germany, Denmark, Spain, Norway, Scotland, Australia, Canada, New

New Zealand, Hong Kong and Singapore, as well as a number of states or provinces within countries such as the United States, Australia and Canada.

Ireland adopted the Model Law in the 2010 Act. Section 6 of that Act provides that the Model Law has force of law in the State and applies both to domestic and international arbitrations which have their seat in Ireland. The 2010 Act sets out the text of the Model Law in Schedule 1.

A number of features of the 2010 Act are worth mentioning:

(i) As already noted, the Act adopts as part of Irish Law, the UNCITRAL Model Law which is now the cornerstone of domestic and international arbitration law in Ireland and also implements into Irish Law the New York Convention and the Washington Convention.

(ii) The Act provides for the ease of recognition and enforcement of arbitral awards (including foreign awards). There are very limited grounds for opposing/refusing recognition and enforcement of such awards (under Article 36 of the Model Law). As the Arbitration Judge, I deal with these applications. Most are non-controversial. Some potentially controversial applications have arisen but have generally settled (including an application to enforce an ICC Award made in favour of a Belarussian Company – *Kino Mayak LLC v. IMAX Theatres International Limited* (Record No. 2024/121 MCA).

(iii) The Irish Courts readily grant applications to stay proceedings and to refer parties to arbitration where there is an arbitration agreement (Article 8 of the Model Law). Judgments in the area often draw on and apply case law from other jurisdictions around the world. Most of the judgments under the 2010 Act concern Article 8 applications.

(iv) The Act provides for very limited grounds for challenging/setting aside arbitral awards. These are provided for in Article 34 of the Model Law. There is no entitlement to appeal to the court from an arbitral award. The courts do not "second guess" the arbitrator's decision on the merits. It is interesting to note that a similar approach is taken by other courts who apply the Model Law including, Singapore: see, for example, the recent judgment of *Swire Shipping Pte Ltd v. Ace Exim Pte Ltd* [2024] SGHC 211 (General Division of the High Court of Singapore), Mohan J, 16 August 2024.

(v) The 2010 Act respects party autonomy.

(vi) While public policy does afford a basis for refusing recognition of a foreign award and for setting aside an award, the concept has been very narrowly interpreted by the Irish Courts (see, for example, *Broström Tankers AB v. Factorias Vulcano SA* [2004] IEHC 198, [2004] 2 IR 191 (High Court, Kelly J, 19 May 2004) and *Charwin Ltd T/A Charlie's Bar v. Zavarovalnica Sava Insurance Company D.D.* [2021] IEHC 489 (High Court, Barniville P, 14 July 2021) applying the test in *Parsons & Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974). Public policy was raised initially in response to a number of recent applications to recognise and enforce in Ireland foreign arbitral awards under Article 36 of the Model Law. An example was the *Kino Mayak* case which was an application to enforce the ICC award in favour of a Belarusian company where Canadian sanctions legislation was invoked by way of a public policy objection to enforcement of the award. Another example was *Project Solartechnik Fund Fundusz Inwestycyjny Zamknięty v. Solis Bond Company DAC and Alternus Energy Group* PLC [2025] IEHC 64 (High Court of Ireland, 22 January 2025) where public policy was initially raised as an objection to recognition and enforcement of a Polish arbitral award. The public policy defence relied on the manner in which interest was calculated on the sum claimed. That objection was withdrawn in the course of the application.

(vii) The Act provides for the appointment of a single designated judge in the High Court to deal with most arbitration related matters - the President of the High Court or his or her nominee: s. 9 of the 2010 Act and Article 6 of the Model Law. While neither makes express provision for the President/nominated judge to deal with Article 8 applications, the more recent practice is that those applications are also heard by the President/nominated judge.

(vii) The consequences and advantages of appointing a single designated judge include:

(a) All court applications in arbitration

must be dealt with by that judge.

(b) This ensures continuity, predictability and consistency in court decisions in arbitration related matters.

(c) To date, the nominated arbitration judges have been Kelly J., McGovern J., Sanfey J. and myself.

(d) There is no appeal from most judgments/orders of the designated judge. There is, therefore, a *"one stop shop"* under s. 11 of the 2010 Act: see recent decision of Court of Appeal in *Michael Flatley v. Austin Newport Group Limited & Ors* [2025] IEHC 461 (High Court, 15 August 2025) where the Court of Appeal held that s. 11 operated as a complete bar to the appeal brought by Mr. Flatley from the judgment and order of the High Court (Twomey J.) staying his claim against one of the defendants and referring the parties to arbitration under Article 8 of the Model Law.

(e) The consequence of all of this is that parties are not tied up in endless litigation with challenges on wide grounds with a possibility of appeals. Arbitration related applications can be dealt with and disposed of quickly and without appeal. As mentioned earlier, some other jurisdictions do admit appeals (some on limited grounds: such as an appeal on a point of law under s. 69 of the 1996 Act). It was a policy decision to exclude such appeals in this jurisdiction.

The judgments of the High Court demonstrate that the Irish judiciary has a very pro-arbitration approach. The Irish Courts have strongly supported the arbitral process. At the time of the Nael G. Bunni Inaugural Lecture, there were over 40 written judgments from the High Court on the 2010 Act and the Model Law. There have probably been about another ten or so since then. The most frequent provision of the Model Law which has arisen for consideration by the Irish Courts is Article 8. Another provision which has given rise to a number of judgments that is Article 16(3), which enables to party to challenge in the courts an arbitrator's decision on jurisdiction. There have been a number of judgments on applications to set aside arbitral awards under Article 34 and others on applications to enforce domestic awards under s. 23 of the 2010 Act, including most recently *Principal Contractors Limited v. Wesley Carter* [2024] IEHC 376 (High Court, Barniville P, 21 June 2024) as well as judgments on applications for the recognition and enforcement of foreign arbitral awards These include, for example, *VTG Entreprenad AB v. Mainline Power Limited* [2024] IEHC 455 (High Court, Barniville P, 10 July 2024) and *Project Solartechnik Fund v. Solis Bond Company DAC* [2025] IEHC 64 (High Court, Barniville P, 22 January 2025). The only appeal attempted was in *Flatley.*

One of the more controversial aspects of the 2010 Act was s. 21 which introduced significant changes to the question of the costs of arbitration and related issues.

Adjudication Society

Under s. 21(1), the parties to an arbitration agreement may make such provisions as to the costs of the arbitration as they think fit. In other words, they can, with one limited exception agree in the arbitration agreement that each party will bear its own costs of the arbitration. The term "*costs*" in this context is expressly defined in s. 21(8) to include costs as between the parties to the arbitration and the fees and expenses of the arbitral tribunal. The one exception to this general freedom given to parties is where one of the parties is a consumer. In such a case, s. 21(6) provides that such a term is deemed to be an unfair term for the purposes of the European Communities (Unfair in Consumer Contracts) Regulations 1995 and 2000.

Provision in the 2010 Act for the entitlement of the parties to an arbitration agreement to agree in advance that each side would bear its own costs in an arbitration was controversial at the time, particularly in relation to domestic arbitrations (including those provided for in construction contracts). Prior to the 2010 Act, it was not possible for such an agreement to be reached between parties to a domestic arbitration agreement. It was only possible for parties to an arbitration agreement to agree how the costs of an international commercial arbitration were to be allocated (s. 11(1) of the Arbitration (International Commercial) Act 1998).

The view in some quarters was that, while this type of provision might be appropriate for international commercial arbitrations, it was potentially dangerous for domestic arbitrations, as contracting entities or the State promoting certain types of public contracts would be permitted to include in those contracts a term under which the party who was successful in the arbitration would not be entitled to recover its costs against the unsuccessful party and would have to bear its own costs. A successful party

to such an arbitration would be in a different position, therefore, to a successful party in proceedings before the court where generally it will recover its costs against the unsuccessful party. Some distinguished writers have expressed the view that this change has had a detrimental effect on domestic arbitration work, in particular, and a significant disincentive to arbitration in respect of domestic disputes in the construction field. Views along those lines have been expressed by, amongst others, Dr. Bunni, with particular reference to the amendment to the public works contract introduced in July 2021, following the coming into force of the 2020 Act. Similar views are expressed by Thomas Wren in 'Public Works in Ireland: Procurement and Contracting' (Clarus Press 2014) paras 17.41–17.45, pp 729–731.

What I will say about this is that (a) it was clearly a policy decision by the Government to make this change to the law and (b) the change was not required by the Model Law. The Model Law does not expressly address the question of the costs of arbitration. It is silent on that issue. It is, however, clear that the Model Law does not preclude arbitrators from making costs awards. Nor does it preclude States which have adopted the provisions of the Model Law from introducing legislative provisions which expressly empower arbitral tribunals to make costs orders (as Ireland and many other countries have done). Nor indeed does it preclude parties to arbitration agreements from agreeing that each would bear in their costs. The issue, if there does continue to be an issue, therefore, is not as a consequence of the Model Law itself.

In any event, and leaving that controversy to one side, in the absence of any agreement under s. 21(1) that the parties should bear their own costs of any arbitration, s. 21(3) provides that the arbitral tribunal can determine by award those costs as it sees fit. There is provision then in s. 21(4) for the adjudication of those costs in the case of a domestic arbitration by the legal costs adjudicator. The principles which an arbitrator will apply in determining whether to award costs will be similar to those applied by the courts in legal proceedings.

While I am not aware of any plans in this jurisdiction to carry out a substantial review of the 2010 Act, unlike the review of the English 1996 Act which is underway by the Law Commission there, the 2010 Act was amended by s. 124 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023 which inserted a new s. 5A into the 2010 Act. This provided for the possibility that third party funding of "dispute resolution proceedings" may, in certain circumstances, be permissible and not treated as contrary to public policy or otherwise illegal or void. The term "*dispute resolution proceedings*" is defined to mean an international commercial arbitration, proceedings arising out of such an arbitration, an appeal from any decision of a court in such proceedings and any mediation or conciliation proceedings arising out of such an arbitration, proceedings or appeal. The section provides that the offences and torts of maintenance and champerty do not apply to "*dispute resolutions proceedings*". A third party funding contract that meets criteria (if any) prescribed under section A(4), insofar as it relates to "*dispute resolution proceedings*", is not to be treated as contrary to public policy or otherwise illegal or void. However, the Minister is given power to prescribe by regulation criteria relating to third-party funding contracts. I am not aware of any such regulations having been made.

[1] Based on the opening remarks delivered by the President of the High Court, Mr. Justice David Barniville, at the joint event organised by CIARB Ireland, the Society of Construction Law, and the Adjudication Society titled 'The Arbitration Act 2010 – 15 Years On' on 25th June 2025.

Conference

Making the Forum Fit the Fuss –
Judicial mediation as a hybrid dispute resolution methodology[2]

The Hon. Ms Justice Nuala Jackson, Judge of the High Court

"[…] Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man […]

Never stir up litigation. A worse man can scarcely be found than one who does this […]"

– *Abraham Lincoln, 1850.* [1]

The fundamental indicia of any dispute resolution methodology are expedition, fairness and impartiality. Of course. there are others including economy, autonomy and enforceability. Allied to these, in certain instances, there may be particular demands of flexibility and confidentiality. The unsuitability of litigation, at least as a first port of call, has often been reflected in judicial dicta. In *Egan v. Motor Services (Bath)* [2007] EWCA Civ 1002 Ward LJ stated:

"What I have found profoundly unsatisfactory, and made my views clear in the course of argument, is the fact that the parties have between them spent in the region of £100,000 arguing over a claim which is worth about £6,000. In the florid language of the argument, I regarded them, one or other, if not both, of them, as "completely cuckoo" to have engaged in such expensive litigation with so little at stake."

Similarly, in *Lombard and Ulster Banking Ltd* **v** *Mercedes-Benz Finance Ltd* [2006] IEHC 168 MacMenamin J noted that:

"It might well have been thought in this era of mediation and alternative dispute resolution that

[1] Abraham Lincoln, *Notes for a Law Lecture* (1 July 1850) in Roy P Basler (ed), *The Collected Works of Abraham Lincoln,* vol 2 (Rutgers University Press 1953) 81.

[2] This article is taken from the Keynote speech delivered in May 2025 at the Annual Conference of the Chartered Institute of Arbitrators (Irish Branch). I wish to acknowledge the assistance of Isobel Houlihan LLB in the preparation of this paper.

an action between two substantial finance houses regarding the financing of a hire purchase transaction of three rather elderly second hand Mercedes tractor truck units would be more redolent of litigation of another era; the more so when the sum originally at stake was just in excess of the lower end of the High Court money jurisdiction. The fallacy of such a presumption is demonstrated by the instant case which was fought out with tenacity and vigour over three days in the High Court."

Having regard to all of the above, when I considered the title of this conference and making "the forum fit the fuss", I wondered whether, having many forms of ADR, we give sufficient attention to hybrid approaches? I do not intend to reach any conclusion on this but simply to attempt to whet the appetite.

In 1976, when Frank Sander[3] delivered his paper "Varieties of Dispute Processing" at the Pound Conference putting forward the notion of "the multidoor courthouse", he warned against "the deadening drag of status quoism". While we have come a long way along the road in a variety of ADR strategies, there is undoubtedly room for more progress and for new initiatives.

Hybrid ADR is a kind of turducken … for the non-culinary, this is a particularly awful fowl-fest involving the combining of turkey, duck and chicken … but it can be parcelled together to look quite attractive. In the current context, a hybrid in the form of judicial or judge-led mediation is being considered. [4]

Judicial mediation

This is not new but it involves a change of mindset especially in common law/adversarial legal systems. For the most part, mediation is conducted outside the court system although often parallel to it. But is there a role for mediation within the litigation process, integrated into it and made part of it? Such dispute resolution methodology is in place and in operation in other jurisdictions. By way of example only:

Croatia

Mediation can be conducted in all regular and specialised first and second instance courts (municipal, county, commercial and the High Commercial Court) in all stages of the proceedings, and therefore for the duration of the appeal proceedings. Mediation is conducted exclusively by a judge of the court concerned who is trained in

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mediation and who is named on the list of judge mediators determined by the President of the Court by annual assignment of arrangements. A judge mediator shall never conduct mediation in a dispute for which he/she is appointed as a judge.

Denmark

Chapter 27 of the Administration of Justice Act sets out rules on court mediation in civil cases pending before a district court, a High Court or the Maritime and Commercial Court. At the parties' request the court can appoint a court mediator to help the parties themselves reach an agreed settlement to a dispute between the parties (court mediation). Section 273[5] provides that a mediator can be a judge or an officer of the court in question who is designated to serve as a mediator, or a lawyer who has been approved by the Court Administration to serve as a mediator in the High Court district concerned. Section 279 restricts the further involvement of the judge mediator in the case subsequent to the mediation with the exception of withdrawing the case from the court and recording the settlement in the event that the mediation is successful and this only with the consent of the parties. [6]

[3] An interesting discussion on the background to this landmark event in ADR history may be found at: Frank Sander & Mariana Hernandez Crespo, A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse, 5 U. St. Thomas L.J. 665 (2008).

[4] I am most grateful to my colleague, His Honour Judge Keenan Johnson, for giving me access to his most useful and informative LLM thesis entitled "An investigation of the factors that facilitate and/or inhibit the use of judge led mediation with a view to informing practice in family law disputes in the Irish courts" (University of Northumbria (2018))

New Zealand

In 2014 Tony Lendrum was appointed a District Court Judge in New Zealand and National Resource Judge for Family and Civil Settlement Conferences, the first full time mediator in New Zealand to be appointed a judge. Between his appointment and 2017 (when he elected to return to mediation practice), he convened approximately 170 settlement conferences with hugely impressive success rates. His role was taken over in 2018 by Judge Jacqueline Moran. A "judicial settlement conference" is a type of mediation conference convened by a judge. It aims to resolve a dispute without the need for a formal court hearing. Lendrum states:

"The involvement of judicial guidance adds a helpful dimension to the parties' assessment of their dispute. This saves considerable time, money and emotion. That is particularly important in family disputes where the interests of children can create significant challenges.

Experience shows that where a party plays a meaningful part in a settlement process, any subsequent agreement is more likely to be adhered to. Accordingly, settlement conferences have a high success rate in finalising cases that would otherwise require significant court time." [7]

In its Report on Alternative Dispute Resolution: Mediation and Conciliation[8] , the Law Reform Commission at paragraph 4.74 states:

"Ireland remains one of a few common law jurisdictions which has not established a court annexed mediation scheme. It is the Commission's view that a voluntary court-annexed scheme would be a positive development in Ireland and it recommends that, in light of the above points,

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[5] Section 273.
§ 1. As mediator, may be designated:
1) A judge or clerk of that jurisdiction which is appointed to act as mediator by the corresponding Court President, or

§ 2. Judges or clerks whom are appointed to act as mediator, cf. paragraph 1, no. 1, may, if agreed between the Court presidents, function as mediator in other jurisdictions than their own.
§ 3. The Danish Court Administration shall lay down detailed rules on the nomination of lawyers as mediators.
[6] Section 279.
§ 1. After the termination of the mediation, the mediator must not act as judge or lawyer in the course of future case handling.
§ 2. Notwithstanding paragraph 1, a judge who has served as mediator may, by request of the Parties, introduce the agreed solution as court settlement in the transcript of the proceedings and decide to withdraw the case from Court.
[7] https://www.districtcourts.govt.nz/about-the-courts/judges-explain-some-of-their-wok/the-constructive-role-of-the-judge-as-a-mediator

a pilot Court annexed mediation scheme should be established in the Circuit Court based on the principles of the voluntary participation of the litigants."

The position in Ireland has been described by Johnson [9] as follows:

"The issue of judge led mediation has never been extensively examined in the Irish context. The Joint Committee on Marital Breakdown (JCMB) in 1986 gave the issue a limited examination and dismissed it.

The LRC in its reports did not address the issue of judges acting as mediators. O'Shea has expressed the view that judges should be trained as mediators, but she has not given a clear indication that they should act as mediators, although the type of case conferencing that she has recommended, does involve a judge using the skills of an evaluative mediator. Coulter has made reference to the fact that judges are trained as mediators in Australia and that the training assists them in dealing with family law disputes. Is she implying that a similar situation should pertain here? She has not made that recommendation in her report. The Law Society favours judges acting as mediators and being trained as mediators. The EU Directive includes judges in the definition of mediators and accepts that judges are appropriate persons to act as mediators. The MB 2017 does not exclude judges acting as mediators, however, none of the debates in the Dail or Seanad on the Bill have averted to the possibility of judges acting as mediators."

In judicial mediation the oft-recited advantages of mediation are maintained with the added costs advantage as it becomes part of the court system. The hallmarks of mediation – voluntariness, self-determination/autonomy, confidentiality are maintained. Obviously such mediation requires judicial training and obviously data would be required on the impact on often already overburdened court systems. Indeed, this has been a basis for the rejection of judicial mediation in certain jurisdictions.[10] However, the early, amicable resolution of cases which might take far longer to litigate may very well result in efficiencies of court time. Models of appropriate mediation can be examined - is facilitative mediation the most suited to this application? Evaluative might be appropriate also or, perhaps, a combination. The appropriate mediation model would be an additional matter for the parties to determine as part of the voluntary process.

But there are challenges:

(a)Can judges mediate? The Californian case of *Travelers Casualty and Surety Co v. The Superior Court of Los Angeles County* 24 Cal Rptr 3d 751 (Cal. Ct. App. 2nd District Rubin J. 2005) is an interesting example of circumstances which perhaps answer this in the negative. The case involved a civil action involving approximately 90 plaintiffs, victims of child sexual abuse, claiming against four RC Church dioceses in California. A mediator judge was appointed but there was a difficulty in valuing the injuries alleged. The mediator held a "valuation hearing" after which the mediator "rendered findings". There was additionally a dispute between the defendants and their insurers as to whether or not insurance coverage was applicable to the claims. The mediator judge determined that the valuation hearing would, additionally, allow the insured to use the valuation order as the basis for an insurer bad faith hearing should the insurers withdraw and disclaim liability. The insurer challenged this determination both on jurisdictional grounds and on the basis that the confidentiality of the mediation was infringed. Rubin J. of the California Court of Appeal defined mediation as "*... essentially a process where a neutral third party who has no authoritative decision making power intervenes in a dispute to help the disputants voluntarily reach their own mutually acceptable agreement."* It was determined that the mediator judge had exceeded "*the neutral, non-factfinding role of a mediator".*

Certilman[11] in his 2007 discussion of this case in discusses the different skills required for mediation and adjudication:

"The skills and demeanour of mediators are often at opposite ends of a continuum from those of judges. Where a judge is decisive, a mediator must be diplomatic. Where a judge must control the courtroom, a mediator reads the prevailing winds and attempts to steer the rudder. Where a judge speaks from a position of authority, a mediator offers suggestions which are often best made with a touch of humility. For mediators, unlike judges, expressing an opinion on the merits is a card played late in the game, if at all. Mediators can ill afford the potentially show-stopping risk of alienating the party whose merits are held in lesser regard." [12]

Can training bring a judge to recognise the self-determination inherent in the mediation process? Certilman opines:

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[8] LRC 98 - 2010
[9] Op cit pp. 33-34
[10] Consideration of the German experience is useful in this regard.
[11] 73 Arbitration 24 – 30
[12] p. 28

"For courts which will continue to use their judges as mediators, the question becomes: what can be done to ensure that sitting judges keep self-determination on the front page of their playbook and avoid the allure of social engineering? Clearly, training is the cornerstone of any system which utilises judges as mediators.[13] *While many judges have had some training in the field, "experience tells us that a far larger number will not have had any formal ADR training." Such training must be no less comprehensive than that given non-judges; judicial training and experience offer little overlap with the fundamentals taught in comprehensive training courses for effective mediation. Additionally, and*

"8.11 This type of service would again be another aspect of "in court" mediation. It involves a judge or someone with judicial authority trying to mediate between the parties on specific legal issues. One of the difficulties with this type of mediation is that the parties may be intimidated by the status of the mediator and the surroundings in which the mediation takes place. Most people see judges as persons who make decisions. This, in itself, could make it difficult for persons who attend a mediation meeting with a judge, to understand that it is up to them to reach a solution. It is very easy, particularly in the case of a judge, who is not skilled or suited to the task, for such mediation to become a form of

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complicating matters, mediator training programs for judges have an additional task of raising awareness of the non-adjudicative nature of the process and training judges to temporarily suspend their judicial demeanour and approaches which serving as mediators. In essence, judges must learn how to identify which of their judicial skills must be deactivated and stored away while their mediator hat is on." [14]

However, examining the issue from a slightly difference perspective, perhaps one of judicial suitability rather than competence, the Report of the Joint Committee on Marriage Breakdown (1985), a parliamentary committee examining judicial mediation, concluded against it on the ground that the parties would tend to be intimidated by the status of the mediator and the surroundings in which such mediation would take place:

adjudication. It must be very doubtful whether it would be possible for sufficient time to be set aside in a court system for effective mediation to take place. As one commentator has noted—
"A strong case can be made for keeping mediatory forms of intervention quite separate from the places and personnel of the law".6
This is particularly the case in this country where many who have been involved in situations of marital breakdown, see the courts, for better or for worse, as hopelessly adversarial in nature and have little confidence in their ability to deal in any reasonable manner with marital breakdown." (emphasis added)

Perhaps this must be considered as being of its time. Mediation was little utilised in Ireland at the relevant time and its promotion within the court system was unformed. The landscape is now fundamentally altered in this regard. Alternative dispute resolution

[13] There is clear evidence of considerable mediation training in the case of the Irish judiciary albeit that much such training often pre-dates their judicial appointment. Johnson references the fact that a number of judges have undertaken mediation training and also references membership of GEMME, the European Association of Judges for Mediation.
[14] p. 29

is frequently endorsed by courts and mediation awareness is much advanced, such awareness being promoted by legislation, legal practitioners (and others) in the ADR arena and by judges. In truth neither of the asserted obstacles (status and surroundings) would appear to have relevance today. Indeed, the view expressed must be contrasted with the more recently expressed views of Tony Lendrum recited above.

This brings us to another issue:

(b)Can the same judge mediate and adjudicate (in the same dispute) or ought these roles be discharged by different judges? Three roads of travel arise for consideration here -

(i) What if the mediation is successful? If the court has no role thereafter save to rule the settlement in order to have it enforceable as a court order there would not appear to be any particular obstacle to the judicial mediator making such an order by consent of all involved and impacted by the agreement reached. In the Danish legislation discussed previously, it is provided that the judicial mediator may remove the matter, once settled, from the court list and, effectively, note the resolution achieved. However, the issue is one of the enforceability of the mediated agreement. It would not appear that there should be any obstacle to a judicial mediator ruling the settlement achieved to convert it to an enforceable order. As with all issues in mediation, the matter comes down to what the parties in the exercise of their self-determination in the resolution of their disputes wish to occur.

(ii) What if the mediation is not successful? The position would appear to be clear here also. Having been involved in the confidential mediation process, it would be most undesirable to have further involvement in the resolution of the dispute in a different capacity. The openness (with the guardrails of confidentiality) which parties are entitled to have in their discussions with the mediator and in their negotiations with a view to resolution would strongly support the irreconcilability of a duality of roles in such circumstances.

(iii) What if the mediation is successful but another layer of court involvement is mandated thereafter? An example might be an infant ruling. Another example is in the case of divorce. This situation particularly and uniquely arises in Irish divorce law where the Constitutionally enshrined requirement of 'proper provision' mandates that, not only the parties, but the court must be satisfied that such provision exists before a decree is granted. There is no doubt that spousal autonomy ought to be afforded appropriate respect. There is legislative endorsement of ADR methodologies[15] and spousal autonomy has also been endorsed in caselaw[16] and is clearly a legitimate circumstance to which regard may be had under section 20 of the Family Law (Divorce) Act, 1996. As stated by Jordan J. in **R. v M.** [2023] IEHC 748 at paragraph 29:

"(b) The " spousal autonomy" described by Hogan J. in Gorry v Minister for Justice and Equality [2017] IECA 282 as a " core constitutional value" protected by Article 41.1.2 surely indicates that a failure to respect the settlement arrived at by the parties and in particular to respect their right to determine their own living arrangements post-divorce, if they do qualify for a Divorce as here by satisfying the requirements of Section 5 (1)(a), (b) and (c), would be an affront to their constitutional protections and rights."

However, notwithstanding such respect and weight as ought to be afforded to such autonomy, the granting of the decree is dependent upon judicial oversight of proper provision. In this instance, the independence and impartiality of such oversight would appear to have an integral role in the constitutional/legislative framework.

The difficulties inherent in the same judicial personage acting as judge mediator and judge in any particular case are often obvious and do not require much consideration to determine them to be inappropriate and beyond sub-optimal. If further consideration is required, reflection upon the issues which arose in *PIA McAdams v Robinson* Case No. 21-1087 (4th Cir., decided Feb. 10, 2022) is instructive.

This was a complex class action involving alleged breaches of consumer protection laws in relation to class members' mortgage loans. A settlement was negotiated but one of the class (not being a party in the case directly concerned in the settlement) was dissatisfied with it. The mediating judge was also the magistrate who approved the class settlement. The dissatisfied class member (who was not a named party in the class action lawsuit, and had sued Nationstar, the mortgage company, in a separate class action) appealed unsuccessfully. The objections related to the substantive settlement terms but also to the duality of role of the Magistrate Judge, being

1.The mediator role—in helping the parties named in the lawsuit achieve a mediated settlement; and

2.deciding judge role—in approving the mediated settlement, (i) by agreement of the named parties, but (ii) over objection of a class member who did

[15] Sections 6 – 8, Family Law (Divorce) Act, 1996
[16] Gorry v Minister for Justice and Equality [2017] IECA 282

not agree.

There is little discussion of the conflict argument in the appeal court judgment but there is an informative and thought-provoking discussion by Melissa Jacoby in "Other Judges' Cases" NYU Annual Survey of American Law Vol. 78:39 (2022) where the author has commented:

"Mediating judges have largely slipped through the cracks of widespread academic discussion … Yet, some practices create the perception or the reality of judicial overreach in ways that elude standard accountability measures."

(iii) Confidentiality of mediation
(iv) Court Resources

So best model would appear to be to limit the role of the mediation judge to mediation only with all subsequent court involvement, however consensual or minimal, being dealt with by a different judge.

Judicial mediation has not gained a foothold in Ireland, but ought it to be considered? The short answer is probably yes. The somewhat longer answer is that no judge who has sat in a family law (or any other) court room for a contentious hearing, regardless of the circumstances of the parties, can

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Further issues of concern that arise and which would require to be addressed include:

A. Levels of disclosure in mediation privilege issues;
B. The relationship between mediator and parties very different to relationship of judge and parties;
C. Openness in the mediation curtailed if parties have an eye on the possible litigation impacts in event of failure (similar to therapy vs assessment);
D. Involvement of a judge in the mediation process may have caused impressions to be formed – conscious and unconscious bias; pre-determination; exhaustion. References to judges being able to exclude matters from their thinking are somewhat artificial and superhuman in nature.
E. In addition, there are other issues which arise including:

(i) Meeting the parties in private caucus;
(ii) Judicial immunity

fail to be aware of the stress, trauma, frustration and often pure exhaustion, which is palpable. Very often these are feelings which have been experienced over years as the litigation trundles along … no route of travel which might assist in alleviating this can be ignored; any route of travel which might assist in alleviating this must be welcomed as socially imperative.

DISPUTE AVOIDANCE

JOHN M. E. LYDEN
FSCSI, FRICS, FCInstCES, MRIN, MCIArb, MEWI,
Chartered Quantity Surveyor, Conciliator, Mediator, Arbitrator.

For over 30 years, I have been dealing with a wide range of disputes in the construction industry. So, I have seen a variety of issues that generate construction disputes. Nobody is perfect, and some projects are prone to generate disputes. But good practice and anticipation by employers and contractors will help to avoid or minimise disputes.

Most disputes do not arise instantly. They start off as a difference of opinion and eventually they harden into formal disputes. The best time to avoid or minimise disputes is before they become formal ones.

Several disputes have their genesis at pre-contract stage such as incorrect or incomplete employer design or careless assumptions made by tendering contractors. To avoid trouble later, an employer needs to focus on its essential needs and to consider what is practical in a local construction market.

Many disputes involve unforeseen ground conditions shortly after work starts on site. The Public Works Contract, clause 1.10 Background Information, purports to absolve the employer of any liability for errors in information about ground conditions.

However, a thorough site investigation prior to any substantial design and the disclosure of the findings of that site investigation to the contractor is essential to minimise unforeseen delays and extra costs. It greatly helps to avoid disputes.

Contractors need to carefully evaluate whatever site investigation reports are furnished to them and they need to examine the site themselves insofar as is practicable during the tender period.

The employer and designer need to establish a clear design brief. To minimise disputes, avoid conceptual novel designs. Specify clearly defined, well-established construction details – 'if it aint broke don't fix it'

Dispute avoidance

A major source of disputes is where an employer delegates a lot of detailed design to a contractor without a clear structure and in a haphazard manner. Vague wording in specifications about performance requirements is a recipe for disaster.

Early consultation with local authorities and utility companies will help to identify both permit requirements and the nature of existing or planned third party services and utilities. Many disputes are caused by delays in connections to existing water/ sewage systems or late diversion of power and communications cables either underground or over ground.

Choose a list of suitable contractors. Asking contractors to work outside of their comfort zone is asking for trouble. Choose a contractor with the right skill set and experience.

Contractors when tendering should carefully ensure that they understand what they are being asked to build. If a specification has unusual terms, clarify what it means.

In one dispute, a note said 'universal loading' will apply to floor slabs. The contractor allowed for local pads under heavy equipment. But the employer argued that 'universal loading' meant that everywhere in the ground floor slab it had to support the heaviest equipment wherever the employer wanted to move it after construction.

Good communication is essential to avoid problems. One dispute involved a cotton fabric plant which requires a high humidity environment. The employer did not spell that out to local consultants in Ireland who thought that they were designing a standard steel portal frame building with cladding and standard interior services. Because of poor communication, the building fabric and services could not cope with the condensation produced by the high-humidity environment required for cotton processing.

By far the most important way to avoid disputes is co-operation: listening to the other party's concerns, being flexible and not making minor technical or contractual issues into major dramas. It clearly involves some 'give and take' rather than being dogmatic. As the Chinese leader Deng Xiaoping said:

'I don't care if the cat is black or white so long as it catches mice'

Co-operation is not simply good practice and common sense – it normally is a legal requirement. Indeed, it is a fundamental principle of construction law.

The Public Works Contract, clause 4.1 Co-operation, provides that the parties "shall support reciprocal co-operation for the Contract purposes" including the "negotiation of agreements provided for in the Contract"

Where the contract contemplates the use of a Standing Conciliator, the parties should agree a suitable candidate and discuss with that person how best to use their limited time to minimise and to avoid disputes. Rather than flooding that person with volumes of irrelevant contract documents they should only give them short extracts that are directly relevant to the potential disputes at hand.

Use the assistance of a Standing Conciliator before disputes crystallise and harden. As Standing Conciliator, I have helped parties to get over log jams and stand-offs and to move forward with constructive solutions before disputes have hardened. At an early stage, I can often give a preliminary view on issues of principle or suggest how claims should be quantified.

Be aware of cultural differences. In some countries, people are used to resolving issues in a very structured formal manner. But people from other countries cannot relax in that environment and they are much more comfortable and effective doing business in an informal setting including enjoying relaxed meals in congenial premises.

And it is not just national cultures. Process engineers look at a project in a totally different way to structural engineers. Civil engineers worry about keeping the river away from the site and are not too concerned about how a structure looks. Architects pay great attention to spatial relationships, orientation, natural lighting and quality of finishes. They assume that the engineers will find a way to make the structure work. Understanding other peoples' perspectives is often the key to dispute avoidance.

Try to avoid personality conflicts. Sometimes, with the best will in the world, people from different backgrounds and with different expectations simply cannot work together. I have seen major disputes resolved simply by a change in each party's site teams.

To avoid disputes, ascertain the other party's key concerns and work constructively to address them. Contractors need design details in plenty of time to organise sub-contractors, order long delivery materials and equipment.

Employers need to manage their budget and liaise with the eventual occupiers of the building so contractors should flag in good time increased costs, variations and delays to programme.

Many disputes that are referred to conciliation could have been settled at a much earlier stage if the parties had co-operated and adopted a more flexible approach.

To contractors I would say only pursue the relatively few strong claims – drop those that have flimsy foundations.

To employers I would say don't deny obvious facts and don't try to defend the indefensible. By the way – fighting every claim tooth and nail does not save public money – aggressive defences generate enormous legal costs and very often the taxpayer has to bear those legal costs.

If you have a good claim or a strong defence, set it out clearly with appropriate back-up. I have seen claims, which would not have escalated into

formal disputes, if the claims had been fully thought through and well presented. Avoid scoring points. Try to make claims objective without attacking anyone personally.

The Public Works Contract, clause 10.3, has strict time limits for the submission of claim notices and detailed submissions. This can propel claims to become disputes prematurely that have to be dealt with in conciliation or arbitration.

Where the contract is less prescriptive, disputes can be avoided by discussing claims, or defences, informally before documents are submitted formally and attitudes harden.

The key to dispute avoidance is good communication. Face to face meetings are an important part of dispute avoidance despite the convenience of online meetings. They allow the key players to pick up important non-verbal cues that do not come across in an online video format.

Family Law Arbitration in Ireland

Lessons learned from Family Law Arbitration in England and Wales, Australia and Canada: A Comparative Perspective

Cathy Smith SC and Denise Waldron BL

Family law arbitration has gradually emerged as a viable complement to court proceedings and mediation across several common law jurisdictions. While the traditional emphasis has been on consensual processes such as mediation and negotiation, arbitration offers parties a binding resolution outside the courtroom while preserving many of the efficiencies and privacy benefits associated with alternative dispute resolution (ADR). This article traces the evolution and current status of family law arbitration in England and Wales, Australia and Canada. These jurisdictions provide useful comparative models as Ireland and others consider formalising family law arbitration.

Introduction

Alternative dispute resolution has gained considerable traction in family law over the past three decades. While mediation has been widely integrated into family justice systems, the uptake of arbitration has been more gradual. Arbitration offers a hybrid model—combining elements of informal process with binding outcomes—yet its appropriateness in the family law context has historically been debated due to concerns about power imbalances, children's welfare, and enforceability. In Ireland, an additional complicating factor arises due to the Constitution.

However, with increasing pressure on family courts, and growing demand for efficient and private dispute resolution, family arbitration is now firmly on the policy agenda in many jurisdictions. This article analyses the evolution of family arbitration in England and Wales, Australia, and Canada. It also considers the emerging landscape in Ireland where legislative reform is currently under discussion and argues that Ireland would benefit from a similar scheme.

England and Wales: Structured Innovation Through Professional Leadership

The development of family law arbitration in England and Wales has been largely practitioner-led. The creation of the Institute of Family Law Arbitrators (IFLA) in 2012 marked a pivotal moment. This initiative brought together four professional bodies:

- The Chartered Institute of Arbitrators (CIArb)
- The Family Law Bar Association
- Resolution (formerly the Solicitors Family Law Association)
- The Centre for Child and Family Law Reform

Initially limited to financial disputes, including property division, spousal maintenance, and pensions, the scheme was expanded in 2016 to include private law children's issues (e.g. parental contact and residence), although public law involving state intervention remains excluded.

Judicial endorsement followed soon after. In S v S [2014] EWHC 7 (Fam), Mostyn J affirmed that courts should give significant weight to arbitral awards made under the IFLA scheme unless contrary to public policy. He described arbitration as "a perfectly proper method of resolving disputes" and underscored the parties' autonomy in selecting this process. Judicial support in England and Wales was reinforced by the Court of Appeal in its 2020 decision in Haley v Haley [2020] EWCA Civ 1369.

The model in England and Wales benefits from clear procedural rules, rigorous accreditation, and increasing judicial familiarity. Interestingly, it was not necessary to legislate expressly to facilitate the scheme or to amend existing family law legislation.

Australia

Unlike England and Wales, Australia embedded family arbitration into statute through the Family Law Act 1975 (Cth). Sections 10L to 10P expressly provide for arbitration of financial and property disputes following separation or divorce. The legislative framework applies nationally to married and de facto couples under federal jurisdiction.

Eligible arbitrators must be legal practitioners with at least five years' experience and accreditation in family law. Awards made by registered arbitrators are binding and may be registered with the Federal Circuit and Family Court of Australia (FCFCA).

Awards may be set aside on limited grounds (e.g. fraud, procedural unfairness, or error of law). The process is strictly voluntary unless ordered by the court, which remains rare. Notably, arbitration does not extend to parenting or children's matters, which is a significant limitation in providing holistic family dispute resolution.

Although the statutory framework is robust, family arbitration in Australia remains underutilised. Professional associations in Australia such as the Family Section of the Law Council of Australia continue to advocate for expanded training, awareness campaigns and streamlined procedures.

Canada

Canada's federal structure means family law arbitration is governed at the provincial level, with the most developed model found in Ontario. The Arbitration Act 1991 (ON) governs arbitration generally, while the Family Law Act 1990 contains specific provisions regulating family arbitration agreements.

Arbitration in Ontario can resolve both financial and parenting issues, provided appropriate safeguards are in place. Arbitration awards are enforceable as court orders, subject to judicial review on fairness or legal error grounds.

Professional bodies such as the Family Dispute Resolution Institute of Ontario (FDRIO) and ADR Institute of Ontario (ADRIO) play a central role in training, accrediting, and supporting family arbitrators.

Other provinces, such as British Columbia, have followed Ontario's lead by integrating family arbitration into legislation (e.g. Family Law Act 2011 (BC)), although with varying procedural requirements and scope. In general, arbitration is seen as a flexible and legitimate complement to other ADR mechanisms, though uptake remains uneven across regions.

These jurisdictions illustrate a spectrum of legislative models and professional responses. The model in England and Wales highlights the strength of a professionally driven court-endorsed scheme. Australia reflects the limits of statutory provision without corresponding practice development, while Canada shows the potential for tailored provincial frameworks with strong procedural protection

Ireland

In July 2024, The Chartered Institute of Arbitrators (CIArb) Ireland, alongside the Law Society, the Bar of Ireland, and the Family Lawyers Association, held a Family Law Arbitration Conference in the Dublin Dispute Resolution Centre featuring Mr Justice Barniville, President of the High Court, and panels comprised of Irish and international contributors, reflecting on the English experience.

The July 2024 Conference was a milestone for family arbitration in Ireland—moving the long-running conversation on family arbitration from concept to potential practice. With judicial endorsement, multi-stakeholder collaboration, and insights from experienced UK practitioners, it set the stage for legislative initiatives, structured accreditation, and practical pilot schemes in the near future.

In 2025, a Family Law Arbitration Subcommittee was convened, comprising representatives from the Bar of Ireland, the Law Society of Ireland, and the Subcommittee is currently drafting Heads of Bill aimed at amending the Family Law Act 1995 and the Family Law (Divorce) Act 1996 by introducing provisions to formally recognise arbitration as an alternative method of resolving family law disputes. The proposed amendments would require courts to give due consideration to arbitral awards in relevant proceedings, thereby promoting alternative dispute resolution and bringing Irish family law into closer alignment with international best practices, in recognising the autonomy of the parties in seeking to resolve their family disputes. The proposed legislative approach aims to take account of Ireland's particular constitutional position, which differs from the other jurisdictions considered in this article.

Conclusion

The evolution of family law arbitration in England and Wales, Australia, and Canada demonstrates that the most successful models integrate judicial endorsement, professional accreditation, and public education, creating systems that balance autonomy with fairness and enforceability.

As Ireland and other jurisdictions consider formalising family law arbitration, these international models provide valuable insights into how to design and implement arbitration schemes that are both effective and aligned with the values of family justice.

The members of the Family Arbitration Subcommittee, including members of the CIArb will continue to work collaboratively towards the aim of legislating for a Family Arbitration Scheme in Ireland in the near term.

Irish Arbitration Act In Review: 15 years on

Leonora Riesenburg[1] & Arran Dowling-Hussey BL[2]

Ireland has a large branch of the Chartered Institute of Arbitrators (CIArb), with 650 members, and has been active for more than 40 years. For a country of its size on a per capita basis (adjusting for differences in population), the CIArb's Irish branch is more active than those in some comparable countries where the Institute has a presence. Likewise, the *Bar of Ireland's* ADR Committee, the *Law Society of Ireland's* ADR Committee and the dispute resolution sections of other professional bodies (such as the *Royal Institute of Architects of Ireland* ('RIAI') and *Engineers Ireland*) are strong advocates for promoting alternative dispute resolution in this jurisdiction. Their interests are represented internationally by *Arbitration Ireland*, which for some years has successfully run events in cities such as Paris, London and New York. *Arbitration Ireland* also organises the well-established and popular Dublin International Arbitration Day, which is well attended by many members of the arbitration community from outside of Ireland. Individual Irish arbitrators are well known internationally. Notably, Irish arbitrators Joe Behan, James Bridgeman S.C., Dr. Nael Bunni, are well known internationally. Notably, Irish arbitrators Joe Behan, James Bridgeman S.C., Dr. Nael Bunni, Jeffrey Elkinson and John Tackaberry K.C. have served as International Presidents of CIArb (although Elkinson and Tackaberry did so as members of CIArb branches outside of Ireland.)

When surveying this arbitration landscape, it is natural to review and assess the effectiveness of Ireland's arbitral legislation. However, undertaking such a review can be difficult for reasons explored below. This challenge remains true when examining the Irish Aribtration Act 2010 (the 2010 Act), which is now 15 years old.

Nevertheless, we will offer some comments on the 2010 Act, including suggestions for changes that might be made. One measure of the success of arbitral legislation is whether it has led to an increase in the use of arbitration. There is little empirical evidence available to directly answer this question. We have – while conscious of the limitations of such gap by asking a number of arbitrators practising an exercise – attempted to bridge this statistical gap by asking a number of arbitrators practising in Ireland for their views on this point. (Each arbitrator's contribution is quoted directly below, limited to the remarks they provided.)

Arbitrators can be appointed on an ad hoc basis or by an institution. Whether an ad hoc arbitration occurs will, in the first instance, only be known by the parties. In some instances, there may be an application to the High Court in support of the arbitration and/or an application under Article 34 of Schedule 1 of the 2010 Act seeking to set aside of the

[1] Leonora Riesenburg is a Chartered Arbitrator practising from Dubai. She has been Ciarb's Course Director in 2024 and 2025 for its Accelerated Fellowship In International Arbitration course. She can be contacted at riesenburg@intadr.com

[2] Arran Dowling-Hussey is the co-author of Arbitration Law (2008, 2014 and 2018) which has been cited and approved by the Irish Superior Courts. He can be contacted at adhussey@4-5.co.uk

award made. We suspect, however, (albeit without statistical proof), that most arbitrations – whether institutional or ad hoc – never involve any application to the High Court. As far as we know, there is no central record of the number of arbitrations where an institution/ default appointing body has appointed an arbitrator. We therefore rely on the views of those active in the field.

Eamonn Conlon S.C, speaking in June 2025 at an event run by the CIArb, the Society of Construction Law and the Adjudication Society on the 15th anniversary of the legislation, commented on the 2010 Act's impact:

'*The Act has not been successful in encouraging use of arbitration by Irish parties, or in encouraging the use of Ireland by non-Irish parties to arbitration agreements. Fundamentally, Ireland doesn't have a strong domestic arbitration culture. The 2010 Act, if anything, probably made domestic arbitration less popular, which deteriorated the arbitration culture.*'

Conlon's perspective suggests that the 2010 Act has not achieved one of its implicit goals of boosting arbitration activity in Ireland.

Finality of Arbitral Awards and Challenge Rates

One area that stands out when reviewing the 2010 Act is the paucity of successful challenges to arbitral awards. While no one wants to undermine the process by allowing an unsuccessful party in an arbitral reference to routinely frustrate the winner by dragging them into to court, it remains a fact that in other jurisdictions some awards are set aside. It seems that the degree to which Article 34 set-aside applications 'get over the line' in Ireland is very low indeed. Dowling-Hussey BL commented in 2023:

'From 2010 to 2023 there have been around 45 applications to the High Court in Dublin under the 2010 Arbitration Act. No contested application to set *aside an Award has, it seems yet been granted. Most recently in 2022 an Award was set aside before the then assigned arbitration judge Mr. Justice Sanfey,* ***New twist in rent dispute over fast food restaurant in Limerick - Limerick Live (limerickleader.ie),*** *but one of the parties though served did not appear. As a result, there is no judgment in relation to this uncontested application which in the circumstances was understood to be relatively brief. Some years earlier an Award was set aside on consent before Mr. Justice McGovern. It may be that other Awards have been set aside on consent but anecdotally it would seem that we are in hen's teeth territory.*[3]'

Whilst there have been further applications since 2023 – including one or two further awards that have been set aside – it would seem that the percentage of awards set aside is no more than 2–3%. By comparison, to take one other European Union country, Poland's set-aside rate seems to be around 7.5%. In some other countries the figure is higher again. What effect, if any, does this have? Arbitration is usually a consensual process where the parties have chosen to arbitrate in hopes of obtaining well-established potential advantages, such as:

- Confidentiality
- Flexibility
- Cheaper
- Finality

However, we wonder whether some parties choose not to arbitrate in Ireland because the process is too final. Over the last fifteen years, as noted above, virtually no arbitral awards have been set aside by the courts. No process is fail-safe. Allowing a greater margin of judicial discretion to remedy those rare instances when an arbitral award does not meet best practice has a certain logic to it.

To address this concern, Dublin-based arbitrator Eamonn Conlon S.C. proposed an opt-in mechanism for limited court review in domestic arbitrations, inspired by the approach used in Hong Kong:

We have good courts, which locals and many foreigners are happy to use. Consideration should be given to an opt-in domestic regime, perhaps along the lines of the Hong Kong 2011 Arbitration Ordinance—prompted by the domestic shipping and construction sectors, I understand. Restoring a degree of court review, on a voluntary basis, could make parties more likely to be happy with sole

[3] Hen's Teeth ? Successful Article 34 Applications before Dublin High Court | LinkedIn (accessed July 31, 2025)

[4] How often are arbitration awards set aside? Analysis of Polish case law shows that they rarely are - Linklaters (accessed July 31, 2025)

arbitrators and 'technical' (non-lawyer) arbitrators. And it is (more) respectful of party autonomy.'

The 2010 Act has seen some updates in recent years. Notably, it was amended to allow for third party funding of arbitrations. In addition, and in response to a Supreme Court decision on the constitutionality of an E.U. trade deal with Canada, further amendments are expected when the Arbitration (Amendment) Bill 2025 becomes law. It is not clear that any further amendments to the 2010 Act are likely in the short term.

The Hong Kong 'opt in' approach, as suggested by Conlon, is one potential reform worth considering for, inter alia, the determination of preliminary questions of law by the court; to challenge arbitral awards on grounds of serious irregularity and to appeal against arbitral awards on questions of law. It does not follow that parties would automatically choose to avail themselves of all of these options. Nonetheless, specific sectors may find it more attractive to arbitrate if the perceived risks were mitigated by the availability of such review steps.

CIArb Ireland would welcome members' thoughts on these issues. Readers are encouraged to share their views by contacting info@ciarb.ie.

Mandatory Mediation:
Not Mandatory But Strongly Encouraged

Laura Donnelly BL and Hugh Mohan SC

The Mediation Act 2017 ("the 2017 Act") obliges parties to consider mediation. Mediation under the 2017 Act is defined 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". Importantly, section 6(2) provides that "Participation in mediation shall be voluntary at all times." The discretionary nature of the process is therefore clear from the Act. Mediation has become increasingly emphasised and encouraged.

Mediation is not universal as there will be instances where determination is needed from the Courts. This was made clear in Derbar Developments v. Companies Act [2022] IEHC 709. The case concerned an application to restore Derbar Developments (Westport) Limited to the register of Companies pursuant to the Companies Act 2014. The application was opposed by one of its directors who raised the issue of non-compliance with section 14 of the 2017 Act, which obliges practising solicitors to advise the applicant to consider mediation as an alternative to court proceedings. Mr. Justice Sanfey held:

> *"...it does not seem to me that s.14 of the Mediation Act 2017 has any relevance to the current application, which is simply an administrative application to restore a company to the Register. It does not involve the resolution of a dispute in proceedings, such as is envisaged in s.14(1)(a) of that Act. It may well be that there will be 'disputes' between the applicant and the respondent in the future which would benefit from mediation; however, the question of mediation at this stage does not arise.'*

In addition, a Court will not invite parties to consider mediation where the dispute is not amenable to mediation or capable of significantly narrowing the issues, as illustrated in Atlantic Shellfish Limited v. Cork County Council [2015] 2 IR 575.

Mediation and the Courts costs implications

Section 14 of the 2017 Act imposs an obligation on a solicitor, when issuing proceedings, to ensure that the originating document is accompanied by a statutory declaration sworn by the solicitor which confirms that they have advised their client to consider mediation and provided information about mediation and its benefits and advantages. Mr Justice Kennedy in Byrne v. Arnold [2024] IEHC 308 reduced an award of costs due to the solicitor for the plaintiff on account of the failure to file a statutory declaration. The Court acknowledged the obligation on to adjourn the proceedings where no statutory declaration has been filed as per section 14(3). There was no satisfactory explanation as to why this had not been done prior to the hearing. The Court dismissed the argument that the urgency of the proceedings justified this default.

Section 16 of the 2017 Act provides that the Court can either on an application of a party involved in proceedings or its own motion '(a) invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings;'. In *I.E.G.P. Management CLG v. Cosgrave* [2022] IEHC 175, Ms Justice Butler acknowledged that this provision might seem 'relatively toothless' as it is an invitation and not

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Section 16 of the 2017 Act provides that the Court can either on an application of a party involved in proceedings or its own motion '*(a) invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings;'*. In I.E.G.P. Management CLG v. Cosgrave [2022] IEHC 175, Ms Justice Butler acknowledged that this provision might seem *'relatively toothless'* as it is an invitation and not mandatory in nature. Butler J. continued *'Indeed, the subsequent sections which make provision for the adjournment of the proceedings, the suspending of the Statute of Limitations and the potential extension of time limits prescribed by rules of court are all premised on a positive decision being made by the parties to engage in mediation and implicitly accept that they are not compelled to do so just by virtue of the fact that the court has invited them to consider it'*.

Ms Justice Butler emphasised the link between the Court's invitation to mediate under section 16 of the 2017 Act and the cost implications which could follow under section 21 of the Act. Section 21 provides that:

'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)'.

It should also be noted that section 169 of the Legal Services Regulation Act 2015 sets out factors which can influence an award of costs including where parties were invited to settle by mediation or an unreasonable refusal to engage in mediation.

The Court recent emphasis of mediation

In the Matter of Maxela Limited [2025] IEHC 11 concerned an application for a modular trial in shareholder oppression proceedings. After the refusal of the application for a modular trial, Mulchay J. encouraged the parties to mediate their dispute:

'I note that in 2023, mediation of the dispute between the parties had been agreed but did not take place for reasons which are not entirely clear. The applicant's stated reasons for then electing not to engage in mediation are not compelling. In circumstances where the ongoing relationship between the parties will have to be addressed irrespective of the outcome of these proceedings, I strongly encourage the parties to reconsider engaging in mediation as an alternative to pursuing lengthy litigation, which may not resolve all the issues between them. There will, potentially, be costs consequences should they fail to do so.'

In the same vein, *In the Matter of the Estate of Francis Fallon (Deceased)* [2025] IECA 79, the Court of Appeal, after setting aside the High Court Order, recommended to the parties to mediate the outstanding issues.

As stated in the Law Reform Commission's report on Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) at paragraph 1.14:

'not all cases are suitable for resolution by ADR, just as the court based adversarial process is not suitable for all cases. The decision to use ADR should be made on the basis of a range of factors including how best to serve the specific interests of the parties and how best to ensure that justice is accessible, efficient, and effective for the parties involved.'

A careful and reasoned approach is therefore required when considering whether to accept or refuse an invitation to mediate. While the process remains voluntary, the courts have made clear that refusals to mediate may have significant costs consequences.

The New Planning Act and ADR

Stephen Dodd SC

The Planning and Development Act 2024, adopted on the 17th October 2024, is third-largest enactment in the history of the State, with 678 sections divided into 26 Parts, with seven schedules. It is yet to fully commence, with the Department of Housing in March 2025 publishing a timeline for commencement in four blocks, envisaging full commencement by 2026. One of the reasons for this delay is that the updated Planning and Development Regulations have also to be prepared and adopted to accompany the Act.

Whether such an ambitious enterprise is a monumental folly and waste of resources – where a more surgical targeted reform of the existing legislation would have sufficed and was preferable – remains a matter of debate. While the new Act is certainly better structured than the previous Act – which had been amended piecemeal as to be unwieldy – new language, even if perceived to be an improvement, may bring new interpretations which are not always obvious on a surface reading until tested in practice. The Act, as whole could not be described as radical overhaul of the planning system. Nonetheless some of the notable themes in the Act include:

- Increased emphasis on long term strategic plans, in particular national planning policy in the form of National Planning Statement, with which local authorities must act consistently when adopting development plans. The lifespan of development plans is also extended from 6 to 10 years.

- More restrictive rules for judicial review, with locus standi generally confined to persons directly or indirectly materially affected, or who made submissions during the process. Strict requirements are also imposed on unincorporated associations before they can bring proceedings (including a resolution by 75 % of members).

- Reconstitution of An Bord Pleanála as An Coimisiún Pleanála, with a separate Government Board and Planning Commissioners.

However, the new Act does not include any significant innovation, comparable to the previous 2000 Act, where the 'big idea' was mandatory social and affordable housing for housing development. One area where the Act could have broken new ground, was making provision at some level for ADR in planning disputes. Thus despite the Act's gargantuan and tentacular reach, there is no mention of ADR. The Act also replicates, without any changes, the role of statutory arbitrator in the assessment of compensation such as for compulsory acquisition, who continue to be appointed under the Property Values (Arbitrations

(Arbitrations and Appeals) Act 1960. Many practitioners have long called for the reform of this office, with the establishment of a formal body such as the Upper Tribunal (Lands Chambers) which operates in England and Wales. Instead, statutory arbitrators continue to be appointed in an ad hoc manner, meeting effectively in private, with no published decisions and little public scrutiny. This is particularly unfortunate in a system where the acquiring authority must pay a claimant's costs (unless very rarely disallowed due to not meeting an unconditional offer), which often leads to disproportionate costs often dwarfing somewhat modest awards.

The 2010 Law Reform Commission in its 2010 report, *"Alternative Dispute Resolution: Mediation and Conciliation"*, recommended consideration of ADR, in particular mediation, in the context of planning disputes. Referring to a UK report on mediation in planning, it observed at para. 10.32:

"…. in light of the findings in the Mediation in Planning Report, the Commission considers that there may be a role for a more structured dispute resolution process, such as mediation, in the planning application process. For this reason, the Commission recommends that local planning authorities should consider whether a more formal approach to resolving issues in the planning process, such as the introduction of a mediation scheme, is appropriate".

However, by way of defence, it is fair to say that planning disputes and, more generally, environmental law disputes, due to their public law nature involving the public interest, do not easily fit the model as appropriate for ADR. There are clearly constraints in terms of public law requirements which cannot be agreed or privately wished away by parties to an ADR process. This view was reflected in *Atlantic Shellfish v. Cork County Council* [2015] 2 IR 575, which concerned complex litigation regarding pollution of an oysters fisheries, with claims against the local authority and the State, exercising regulatory functions relating to planning, waste management and foreshore licences. The Court of Appeal (Irvine J.) observed at para. 42 that *"….it nonetheless remains the case that there will always be litigation which by reason of the nature of the dispute is not readily amenable to ADR."* Irvine J also stated at para. 44:

"I do not believe it is unreasonable for the party against whom complex legal claims have been made, and which may have ramifications that extend well beyond the confines of the proceedings and their parties, to maintain their entitlement to have those issues resolved by the court, as is the position of the State defendants in this case who seek clarification as to the obligations and consequences that flow from the grant of a foreshore licence".

However, a particular irony is that this complex litigation was in fact resolved following a mediation, after the parties later agreed to mediation, having previously resisted the same.

In addition to continued statutory neglect in the Planning Acts, the Mediation Act 2017 also does not particularly assist insofar as section 3(f) thereof excludes from its scope "proceedings in the High Court by way of judicial review or of seeking leave apply for judicial review", which includes planning judicial reviews. However, notwithstanding the lack of statutory encouragement, and despite the constraints imposed by legislative and public law requirements, mediation and even successful mediations of planning disputes, are not uncommon. Scenarios where resolution has been found following a mediation process include:

- Judicial reviews taken by residents against large apartment developments, where the developer agrees to lodge a new application, perhaps of reduced size or with community facilities, and the residents agree not to object to the new application.
- In judicial reviews of the exercise of compulsory acquisition powers by a state or local authority, which agree to not serve a notice to treat and effectively modify the scheme or provide accommodation works to meet the needs of the challenger.
- Section 160 planning injunction proceedings between private parties.

The experience of other jurisdictions shows that ADR, in particular mediation, does have a role in resolving planning and environmental disputes. Since 1991, the Land and Environment Court of New South Wales has offered a free mediation service to all parties appearing before the court. New Zealand's Environment Court facilitates a similar scheme. In the United States and Canada, where class or representative actions are more common, the notion of environmental justice through mediation has a long history. Equally in the United Kingdom, Government recognition of ADR is reflected in several studies and official guidance. The Government's Killian Pretty Review of 2008 recommended the greater use of ADR to try to end the adversarial approach of planning and provide a speedy alterative to appeal. The English Planning Inspectorate's 2010 Report Mediation in Planning concluded that while there will always be areas where mediation will not provide a solution, mediation nonetheless could provide an effective tool to tackle a wide range of planning issues. Scotland's "Guide to the Use of Mediation in the

Planning System in Scotland", published in 2009, continues to offer guidance.

Regrettably, however, no initiative regarding the ADR in planning – whether by some form of recognition in the new Act or guidelines – has been taken in Ireland. In fact, the new Act contains a new provision which, inadvertently, may prove an obstacle to successful mediation of litigation of planning disputes. I refer to section 588 of the 2024 Act (which has yet to commence) concerning a requirement for a mandatory declaration for withdrawing submissions or legal proceedings. This provision is to be understood in the light of the previous section 587 which provides for a general prohibition on requesting payment in consideration of not opposing development. Section 587(2) provides that:

> *(2) A person (in this section also referred to as the "requester") shall not request another person to—*
>
> *(a) make a payment of any sum of money or benefit in kind to the requester or any person named by the requester, or*
>
> *(b) do any other thing for the purpose of the conferral of a financial or other economic benefit on the requester or any person named by the requester,*
>
> *in consideration of the requester or any other person agreeing to—*
>
> > *(i) withdraw a submission or observation under Part 4 or 6 in relation to an application for permission,*
> >
> > *(ii) withdraw, or otherwise not continue to proceed with, an appeal to the Commission from a grant of permission, or*
> >
> > *(iii) withdraw, or otherwise not continue to prosecute, proceedings for judicial review of a grant of permission.*

Section 587(3) makes it a criminal offence to breach the provision and section 587(7) provides that the High Court is required to dismiss proceedings for judicial review of a grant of permission where this is breached and where it is in the interests of justice. It is hoped that the reference in section 587(2)(a) to "benefit in kind" or (b) to "financial or other economic benefit" is not interpreted widely to constrain developers/challengers from arriving at bona fide solutions in terms of a proposed development which enhance, for example, an adjoining landowner's property. However more problematic again is section 588(5) which states:

> *(5) A notification by a person to the High Court that he or she is withdrawing proceedings for judicial review of a grant of permission shall be accompanied by a declaration in such form as may be prescribed made by the person that the withdrawal of the proceedings is not for the purpose of securing the payment of any consideration to, or* ***the doing of any other thing for the benefit of, any person.***

Under section 588(6) a person who fails to comply with this requirement is guilty of a criminal offence. The reference to the "doing of any other thing for the benefit of, any person" is not expressly confined to financial or other economic benefits, but much more widely encompasses any other "thing" for the benefit of any person. Clearly if a mediation is to arrive at a resolution this may entail some "benefit" to the party taking proceedings. It would therefore be very unfortunate if this was perceived or interpreted as constraining bona fide solutions arriving at between developer or public authority and litigant or group of litigants, such as enhanced community facilities or landscaping which on one view, could be interpreted as being a "thing" for the benefit of a person.

The mischief of the two sections would appear to be primarily aimed at parties extracting some illegitimate benefit such as monetary gain in exchange for withdrawing submissions or proceedings and so effectively abusing the process. Both sections 587 and 588 were introduced by way of amendment during the Bill's passage through the

Oireachtas and may not have the due level of scrutiny in terms of potential unintended consequence which such a provision might otherwise have warranted. Nonetheless, the wording of the sections is overbroad and on a literal interpretation go beyond the same such elements of abuse. There may be arguments about remoteness of benefits in terms of benefit to "person", but it is entirely unsatisfactory situation to having to resort to these types of contentions. All this has the unfortunate consequence of creating an uncertainty and risk in arriving at solutions through mediation, in particular where the sections create criminal offences. It also creates a potential tension with the free flow of request or discussion, which mediation is designed to facilitate, and indeed its interaction with issues of confidentiality in the mediation process. While ultimately a Court may take a narrow view of these sections, parties may not be willing to take such risks in the light of the criminal sanctions for their breach

As regards possible initiatives which the new Act could have advanced, apart from recognizing a potential role for ADR, one idea might have been to create a facility of a mediation type process as part of pre-planning meetings with a local authority prior to the lodging of a planning application. This could entail, formal meetings where representatives of the community or other stakeholders are invited to pre-planning meetings with developers and local authority. This would shift matters to the start of the process as opposed to the end of the process in the adversarial context of legal proceedings. Such a facility would need to be properly resourced.

Overall, therefore, the new Act unfortunately does not advance the cause of ADR in planning disputes and, if anything, may undermine the same. Nonetheless, it is hoped that even if not placed on a statutory footing, the Government could advance Guidelines or recognise the potential significant role which ADR may play in resolving fraught planning disputes.

Mediation: The Seal of the Confessional?

Aidan Redmond SC

One of the principal selling points of mediation is the assurance generally given to disputing parties that any engagement, whether oral or documentary, is undertaken on a without prejudice basis. The without prejudice rule is so well established in the common law world that there is a presumed understanding of the rule that does not require elucidation by lawyers. It is common therefore to find all manner of communication marked without prejusice without the involvement of lawyers and predicated upon a presumed shared understanding between sender and receiver of the status of the relevant communication.

In Cutts-v-Head [1984] Ch 290 Oliver LJ stated:

"That the rule rests, at least in part, upon public policy is clear… And the convenient starting point of the enquiry is the nature of the underlying policy. It is that parties should be encouraged, so far as possible, to settle their disputes without resorting to litigation and should not be discouraged by the knowledge that anything that is said in the course of those [negotiations]…may be used to their prejudice in the course of the proceedings. They should be encouraged, fully and frankly, to put their cards on the table. The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course negotiations for settlement being brought before the court of trial as admissions on the questions of liability. The rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing from being given in evidence."

This statement makes clear why the without prejudice rule is as important in the context of mediation as it is in litigation.

Nevertheless it is very important to be cognizant of the fact that there exist exceptions to the without prejudice rule of which any party entering into a mediation process needs to be aware.

In *Unilever-v-Proctor & Gamble* [2000] 1 WLR 2436 Robert Walker LJ stated:

"There are numerous occasions on which, despite the existence of without prejudice negotiations, that the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.

(1) When the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible.

(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud, or undue influence....

(3) Even if there is no concluded compromise, a clear statement... made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel.

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'... but that... should be applied only in the clearest cases of abuse of a privileged occasion.

(5) Evidence of negotiations may be given... to explain delay or apparent acquiescence.

(6) ... whether the claimant had acted reasonably to mitigate his loss in ... conduct and conclusion of negotiations for compromise of proceedings...

(7) The exception... for an offer expressly made 'without prejudice except as to costs'

(8) in matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation...'

In *Oceanbulk Shipping-v-TMT* [2010] 3 WLR 1424 (SC) Lord Phillips recorded another exception:

"When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted 'without prejudice'. This principle applies both in the case of a contract that results from the without prejudice negotiations and in the case of any other subsequent contract concluded between the same parties."

Lord Clarke, in the same case, emphasised that the "Unilever" list was not to be treated as exhaustive leaving open the possibility of a further exceptions. For present purposes however any party entering a mediation process in the sure and certain belief of inflexible confidentiality needs to be disabused of that notion!

The Pentagon Food Group Limited & Ors-v-Cadman Limited [2024] EWHC 2513

This was an action brought arising out of a settlement reached at mediation where the plaintiffs sought damages for breach of the settlement agreement and or misrepresentation. As HHJ Tindal said:

"It raises an interesting question about express and implied terms in settlement agreements and liability for representations made during mediation and their admissibility as exceptions to the without prejudice rule..."

Whilst considering whether there was a need for a specific enhanced form of mediation privilege beyond without prejudice privilege HHJ Tindal noted:

"The authorities do not- at least yet- support the view that 'mediation privilege' is distinct from 'without prejudice' privilege. Nevertheless, the contractual and formal context of mediation means that it is a particularly clear... example of 'without prejudice privilege' which can be enhanced by the parties' mediation contract and conduct by the imposition of superadded duties of confidentiality. These can even be raised by the mediator if they are called upon to give evidence, even if the parties both waive 'without prejudice privilege' ..."

For those who have engaged in a mediation process resulting in a settlement reduced to writing in the early hours of the morning, when everybody is exhausted and slightly emotional, the following words of HHJ Tindal should be carefully noted:

"... Whilst there is no doubt that the settlement contract was facilitated with skilled professional assistance on both sides, it was, as I explained earlier, concise not detailed, as is typical of such agreements drafted at the end of a long day's mediation, particularly in circumstances where they have to be in writing in order for the mediation to lead to an effective settlement. In those circumstances, the evidential context of the agreement is perhaps more important than it would be in a complex commercial contract negotiated over a period of weeks in granular detail. Contextual interpretation of the kind discussed in "Wood" may well be appropriate for settlement agreements signed at a mediation where things are drafted quickly and shortly to pin down an oral agreement..."

HHJ Tindal went on to emphasise:

"... As confirmed in Oceanbulk that evidential context can include matters which would otherwise be without prejudice, including statements made in the course of the mediation. Therefore, when interpreting the settlement, I [am] satisfied I can take into account the circumstances in which it was produced, even though that was in mediation..."

Conclusion

Parties entering mediation will often assume that the without prejudice privilege applies to their communications, both oral and written, such that they can communicate freely and without fear of their words coming back to haunt them. Whilst this is generally true, it is of vital importance that the parties entering the process are aware that there are exceptions to the rule which could result in without prejudice communications being considered in an open court post mediation. What was of peculiar importance in the Pentagon case was the willingness of the court to consider without prejudice material to assist the resolution of an issue of interpretation of a settlement agreement reached at mediation whilst relying upon the presumed circumstances at mediation of the conclusion of the settlement agreement to justify the consideration of the said without prejudice material.

Parties should therefore adopt the practice of taking a careful note of what is said and heard and delivered in writing at a mediation because the one thing of which I am certain, after nearly 40 years of litigation, is that human recollection is flawed, subjective and fades with time.

Trust Disputes, Grosskopf v Grosskopf:
Light At End of Arbitral Tunnel?

Boris Lazic & Arran Dowling-Hussey BL

Introduction

1. In the matter of *Grosskopf v Grosskopf* [2024] EHWC 291 (Ch) (*"Grosskopf v Grosskopf"*), the High Court ("the Court") reaffirmed the position (of English courts) that where parties agree to arbitration, the courts will enforce the arbitration agreement and stay the proceedings before it. This is the position even if a remedy requested from the Court falls beyond the powers of arbitrators.

The remedy

2. The remedy sought by the claimants in *Grosskopf v Grosskopf* was the appointment of a judicial trustee by the Court. The Court's power vests in section 1(1) of the Judicial Trustees Act 1896 which envisages that:

"Where application is made to the court by or on behalf of… a beneficiary, the court may in its discretion appoint a person … to be a trustee of that trust… in place of all or any existing trustees."

Summary of Facts

3. The parties, both the Claimant (Chaim Grosskopf) and the Defendants (Yechiel Grosskopf and Jacob Moshe Grosskopf), and Jacob Moshe Grosskopf), are beneficiaries of a settlement trust set up on 22 March 1974 ("the Trust") by Myer Grosskopf ("the Settlor"). The Trust was created for the benefit of the Settlor's children, among others. The Defendants are the current trustees of the Trust. One of the original trustees was Malka Grosskopf, the wife of the Settlor. The Settlor passed away on 15 November 2016.

4. The Claimant had concerns over the management of the financial affairs of the Trust. On 14 June 2017, by way of an arbitration agreement ("the Arbitration Agreement"), the parties submitted to the jurisdiction of the Beth Din of the Federation of Synagogues sitting in London ("the Tribunal") on matters concerning:

"… a claim about (the) full disclosure of the estate/ assets of the late R'Myer Grosskopf (the Settlor)."

The First Interim Award

5. The Tribunal issued four interim awards. By way of the first award the Tribunal ordered the Defendants to provide, inter alia, (i) a report reflecting the current estate of the Settlor (together with information on any disposals) and (ii) updates on a quarterly basis.

The Second Interim Award

6. Due to the Claimant's dissatisfaction with the information provided, he sought a full investigation into the financial affairs of the Trust. On 20 October 2017 the Tribunal made a further award ordering the Defendants to provide detailed accounting of the assets owned by the Trust and a clear plan for the management of the Trust going forward.

The Third Interim Award

7. Thereafter, the Claimant refused to sign a further agreement submitting to the jurisdiction of the Tribunal on all claims arising out of the estate of the Settlor. On 22 January 2018, the Tribunal, following a hearing which the Claimant did not attend, issued the third award. The award in question noted, amongst other things, that all the relevant information pertaining to the assets of the Trust had been provided to the Claimant. The Claimant then resorted to the Court.

The First Claim

8. In his first claim before the High Court ("the First Claim"), the Claimant sought detailed information on the financial affairs and management of the Trust and its assets. In a written judgment given on 6 November 2018, Master Price held that the First Claim was within the scope of the Arbitration Agreement and adjourned the proceedings. The proceedings were subsequently stayed following a consent order resulting from the Defendants' appeal.

The Fourth Interim Award

9. As a result, the parties continued with the arbitration and on 6 April 2021, the Tribunal issued the fourth (interim) award. The key points of the award were that the parties would submit to the jurisdiction of the Tribunal in all disputes concerning the estate (of the Settlor) and the Trust and that no evidence of impropriety had emerged from the disclosure.

The Claim

10. Following this the subject matter Claim was issued on 5 December 2022, where the Claimant invited the Court to appoint a judicial trustee.
11. In determining the application, Master Clark considered the following issues:

(i) What are the matters in issue in the claim?
(ii) Has the Court or the Tribunal decided that the matters in issue in the claim fall subject of the Arbitration Agreement?
(iii) If the answer is no, then does the Court consider the matters in issue to fall subject of the Arbitration Agreement?
(iv) If the answer to question (iii) is no, then does the remedy sought by the Claimant, which the Tribunal cannot grant, have the effect of making matters of the subject claim inarbitrable?

12. The matters in issue concerned the Claimant's complaints regarding the sale of certain Trust property, the granting of loans by a company owned by the Trust and directors' remuneration.
13. As to whether the matters in issue fall within the scope of the Arbitration Agreement, Master Clark stated that Master Price had already decided the issue in the First Claim and held that they do. The Arbitration Agreement extended to deciding whether a full financial investigation of the Trust was needed. The same was decided in the fourth award of the Tribunal.

Is the Claim inarbitrable?

14. The final point the Court had to consider was whether the inability of the Tribunal to grant the specific remedy sought, rendered the claim inarbitrable. As pointed out in para. 2, it is only the court that has power to appoint a judicial trustee.
15. In its submissions the Claimant posited the arguments that an arbitrator will lack the powers conferred on the court by statute, there were other persons not party to the arbitration proceedings with vested interests similar to the Claimant, the Defendants/Respondents as trustees could not be ordered by the Tribunal to appoint new trustees, as the power vested with Malka Grosskopf (an original trustee) and the High Court had a supervisory jurisdiction over the Trust to ensure that it was properly administered.

The decision

16. In deciding on the matter, Master Clark stressed that there is no statutory prohibition of trust disputes being resolved out of court. Further, Master Clark added that grounds on the need to appoint a judicial trustee may be resolved by arbitration. The Court's supervisory role is not exercised on its own initiative, but ought to be invoked. Otherwise, private trusts are left to operate outside of court.
17. Although the Tribunal does not have the power to directly appoint a judicial trustee, it has the power to seek the Defendants to step down and seek the appointment of new trustees from Malka Grosskopf. If that fails, then the interested party (a beneficiary) may seek the remedy from the Court.
18. In its finding the Court did not see that an agreement between a beneficiary and a trustee to step down would prejudice the rights of other beneficiaries. Plainly, their rights are not affected by the change of trustee, and they could still invoke the Court's supervisory power.
19. Due to the absence of English authorities dealing directly with this point, Master Clark referenced the Australian case of *Rhinehart v Welker* [2012] NSWCA 95 where it was held that the inability of an arbitrator to grant all the relief sought does not result in the dispute being inarbitrable.
20. Also, Master Clark compared the dispute of

the beneficiary and trustee to that of shareholders in a company. In a winding up petition it is only the court that can make the order; however the shareholders' dispute may be resolved by arbitration *(FamilyMart China Holding Co Ltd v Ting Chaun (Cayman Islands) Holding Corporation* [2023] UKPC 33).

21. Hence, Master Clark held that the claim is arbitrable.

Comments

22. The decision in *Grosskopf v Grosskopf* enshrines the spirit of section 9 of the Arbitration Act 1996. English courts will give prevalence to arbitration where parties have reached such an agreement. Also, the courts will encourage alternative dispute resolution under its overriding objectives. Master Clark followed *Rhinehart v Welker (*2012) NSWCA 95, as there was no previous English authority on the point, in finding that the fact that the Arbitral Tribunal was asked for an order that can only be granted by the High Court did render the claim in arbitrable. The courts of England and Wales will not bar arbitration claims bearing on the administration of trusts. The arbitral tribunal will not be able to appoint a judicial trustee but can have other remedies open to it. This is an area of law where further development should be expected.

Note

Members of 4-5 Gray's Inn Square Chambers ADR group regularly act in arbitrations, mediations as Counsel, or mediator, in a range of disputes (including trust disputes) in many jurisdictions including England and Wales, UAE and Singapore. Chambers can also support training in arbitration (and other ADR methods). Queries as to the professional availability of members of the group can be directed to Deputy Senior Clerk, Stephen Somerville on:

+44 (0)20 7404 5252

or by email to:

clerks@4-5.co.uk

The Growing Role of ADR in Ireland

Ian Talbot

Strategic Importance for Small Businesses

For organisations such as Chambers Ireland and ICC Ireland, the summer months are largely dedicated to preparations for the Government's October budget. This annual focus is particularly significant in 2025, as it coincides with a review of the National Development Plan. Delivery of the plan is crucial for our future economic prosperity but necessitates substantial budgetary commitments. Our policy priorities are shaped by the needs of small businesses, which require robust infrastructure—energy, public transport, water, and waste management—to support essential housing development. At a more granular level, concerns persist regarding cost inflation, regulatory burdens and legal expenses

.

Legal Costs, Time and the Need for ADR

While there is no single solution to the macro and micro challenges facing businesses, certain measures can ease the pressure. On the legal front, our focus is an ongoing call for increased resources for the Courts Service, alongside the promotion of alternative dispute resolution (ADR). Underfunding of the courts is not unique to Ireland; similar issues affect countries across Europe, including Italy, France, Spain, and Poland, where delays in resolving civil and commercial disputes are commonplace. Ireland, however, allocates the lowest percentage of GDP to its judicial system among European nations—just 0.07% compared to a median of 0.31%—resulting in higher costs for businesses. This reality underscores the pressing need for effective ADR mechanisms as well as properly resourced Courts.

Chambers Ireland, ICC Ireland and CIArb: Advocating for ADR

The CIArb – Irish Branch has played a leading role in promoting ADR, a cause strongly supported by Chambers Ireland and ICC Ireland through a long-standing, greatly valued and productive partnership. Across its network of 36 affiliated Chambers—some tracing their origins to the 18th century—there is an enduring emphasis on the value of ADR in resolving disputes efficiently. This tradition includes the Dublin Chamber's historic connection to the Ouzel Galley arbitration in the early 1700s. More recently, Chambers Ireland partnered with Eurochambres on the EU co-funded Mediation Meets Judges project following the introduction of the Mediation Directive and backed the Mediation Act 2017. The organisation welcomed last year's ruling in Byrne & Ors -v- Arnold by Mr Justice Kennedy, further highlighting the imperative of seeking mediated solutions where possible. ICC Ireland and Chambers Ireland have

been proactive in organizing events and initiatives to promote ADR. For instance, the recent Renewable Energy Event in January 2025 and a forthcoming practitioners' visit to Paris in the autumn provide excellent opportunities for professionals to engage with ADR practices and learn from international experience.

The International Court of Arbitration and ICC's Global Reach

The ICC's International Court of Arbitration in Paris has established itself as a reliable and effective forum, with 831 arbitration cases filed and 1,789 ongoing as of 2024. The Court's commitment to alternative dispute resolution is further evidenced by its Mediation Rules, Dispute Boards, and Expedited Procedures Provisions, which provisions have managed 865 cases since 2017. The broader ICC network, representing over 45 million companies in more than 170 countries, is instrumental in advancing rules-based international trade and responsible business conduct. ICC Ireland benefits from strong support from the Court in Paris, further cemented by recent visits from both current and former Court Presidents, Claudia Salomon and Alexis Mourre, who have demonstrated eagerness to collaborate with Irish practitioners.

The Practical Necessity of ADR

Collectively, these initiatives underscore the increasing recognition of ADR as a practical necessity rather than a mere alternative. The growth of complex supply chains, cross-border business and regulatory complexity has made out-of-court dispute resolution invaluable. ADR eases the burden on the courts, while providing parties with a more flexible, confidential, and often faster path to resolution. It also allows commercial relationships to be preserved, proceedings tailored to the needs of the parties, and, frequently, significant savings in both cost and time.

Embracing ADR as Best Practice

The Irish business community is increasingly integrating ADR into contractual agreements, particularly within the construction, technology, and energy sectors. This shift is accompanied by a growing pool of skilled mediators, arbitrators, and legal professionals dedicated to enhancing Ireland's reputation as a centre for effective dispute resolution.

Trade Agreements

Trade is at the heart of the mission of Chambers of Commerce, underpinning their advocacy for open markets and robust frameworks that facilitate business growth. With that emphasis, we are closely monitoring developments in major trade agreements such as CETA (the EU–Canada Comprehensive Economic and Trade Agreement). The design and effectiveness of dispute resolution mechanisms have proved especially contentious and we keenly awaiting clarity on how this will be resolved to maximise the positive impact of trade while safeguarding business certainty and cross-border cooperation.

In conclusion, the importance of arbitration and ADR in Ireland cannot be overstated. As businesses navigate the complexities of the modern economy, the need for efficient and effective dispute resolution mechanisms is paramount. The ICC and Chambers Ireland will continue to work with the CIArb to profile and champion these practices and encourage their use, ensuring that Ireland remains at the forefront of ADR innovation and excellence.

Ian Talbot is Chief Executive of Chambers Ireland and Secretary General of ICC Ireland. Previously he worked with PwC, JPMorganChase and Citigroup.

Decisions, Decisions...

Andrew McVea

This summer, CIArb as part of its extensive programme of events, courses and training partnered with Robert Gordon University to offer an inspired short course and qualification in Adjudication Decision Writing.

The course attracted students from the breadth and span of the globe and from a variety of disciplines: engineers, arbitrators, public servants and lawyers alike dialled in each week to benefit from the bountiful knowledge of speakers including Peter O'Malley, Catherine Needham BL, Karen Killoran and Bernard Gogarty.

The objective of the course was to familiarise the students with the statutory framework, skills and best practice in the discipline of adjudication decision writing with the intention of writing clear, reasoned, compliant and – importantly – enforceable adjudication decisions. The course catered for interested students and would-be adjudicators and was directed towards statutory adjudication pursuant to the Housing Grants, Construction and Regeneration Act 1996 (and the Scheme for Construction Contracts) in the UK and the Construction Contracts Act 2013 (and the Code of Practice Governing the Conduct of Adjudications) in Ireland.

The six-week course consisted of four lectures, required and recommended reading, three coursework exercises and a gruelling assessment. There was an abundance of student engagement throughout the course and the speakers were receptive to questions, a number of which were potentially 'inspired' by real-life conundrums.

The final assessment entailed drafting your own detailed and enforceable adjudication decision over the course of two weeks. The final tranche of documentation and evidence was made available just five hours before the submission deadline, potentially unravelling any budding adjudicator's earlier efforts and nerves.

In retrospect, the course was highly informative and honed my drafting skills but perhaps least expectedly, it bestowed a new appreciation for adjudicators and the time and management pressures they encounter with every appointment.

No rest for the wicked: Recent initiatives to tackle corruption in international arbitration

Cesar Pereira C.Arb FCiarb*

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1. Introduction

International arbitration has not remained immune to one of the most entrenched challenges in global transactions: corruption. While arbitration's hallmarks—confidentiality, procedural flexibility, and tribunal expertise—are typically seen as strengths, they may also create vulnerabilities when disputes involve illicit conduct.

The arbitration community has not been silent. This evolving awareness has prompted efforts to equip arbitrators with clearer rules and a toolkit to identify and address corruption without compromising due process or the enforceability of awards. Two notable responses stand out: the ICC's structured methodology for evaluating red flags of corruption, and Ciarb's global initiative to foster dialogue and develop best practices across jurisdictions in the fight against corruption. They signal an institutional commitment to protecting the legitimacy of arbitration as a forum for ethical and fair dispute resolution.

Against this backdrop, it becomes essential to understand how allegations of corruption concretely affect the conduct and outcome of arbitral proceedings.

2. The intersection between corruption allegations and international arbitration[2]

Corrupt activity by one or both parties can impact arbitration in several ways. Contracts might be obtained through bribery or be designed to facilitate or perpetrate criminal practices. Bribe

* Chartered Arbitrator (C.Arb). Partner at Justen, Pereira, Oliveira & Talamini (São Paulo, Brazil). Deputy President (2025) and President (2026) of the Chartered Institute of Arbitrators – Ciarb. PhD in Administrative Law (PUC-SP, São Paulo, Brazil).

[1] The author thanks his research assistant Lorenzo Galan Miranda for his support in the research and review of this article.

[2] The author has previously addressed the intersection between international arbitration and corruption allegations in: Cesar Pereira & Leonardo Souza-McMurtrie, 'Arbitration. Government Contract. Corruption. Annulment. Bribery. England and Wales High Court [EWHC]. King's Bench, Commercial Court. EWHC 2638 (Comm). Judge Mr Justice Robin Knowles. J. 23.10.2023', Revista Brasileira de Arbitragem, No. 81 (2024): 89-268; Cesar Pereira & Leonardo Souza-McMurtrie, 'Arbitragem e Corrupção: O Que Os Árbitros Podem (e Devem) Fazer?) Desafios da Arbitragem com a Administração Pública', Revista da AGU, Vol. 21, No. 2 (2022): 273-300; Ingeborg Schwenzer & Cesar Pereira, 'International Sales, Arbitration and Corruption: A CISG perspective', Kluwer Arbitration Blog (15 March 2023), available at: <https://legalblogs.wolterskluwer.com/arbitration-blog/international-sales-arbitration-and-corruption-a-cisg-perspective/> (accessed on 31 July 2025).

agreements are generally seen as invalid and unenforceable.[3] Due to their unenforceability, the practical principle in these cases is that "the money stays where it is"—in line with well-known and widely accepted Roman law principle *"in pari turpitudine melior est causa possidentis"*. The arbitral tribunal in the well-known case World Duty Free Company v. Republic of Kenya[4] took that approach towards a contractual claim involving a corruption scheme where both parties had participated. The arbitral tribunal held that claims based on contracts providing for corruption could not be upheld, as prohibition of bribe agreements amounts to transnational public policy. A similar reasoning could be used in commercial cases.

As for the second category, there are three possible outcomes: first, the main contract, obtained through corruption, is declared void; second, the injured party exercises its option between the invalidity of the main contract or its continuity; and third, the main contract is deemed binding and effective, which limits the injured party's rights to other remedies, such as damages or price reduction.[5]

Both pose complex legal and ethical dilemmas for arbitrators. Despite being neither criminal prosecutors nor investigators, they must establish the validity and enforceability of such contracts.

Arbitral tribunals cannot impose criminal sanctions. Their remedies are of a contractual nature—such as declaring contracts void or voidable, awarding damages, or ordering restitution or disgorgement of profits.

Corruption allegations are common in both commercial and investor-state arbitrations, often raised as a jurisdictional objection or a defense to liability. Yet arbitrators typically lack the coercive investigative tools available to courts, and many arbitral rules are silent on how to proceed in the face of suspected or alleged corruption. Such evidentiary and procedural lacuna has long demanded clearer institutional guidance.

In addition, arbitrators and counsel must recognise the nuanced nature of corruption in practice. This reinforces the need for tribunals to make context-sensitive determinations, applying both legal doctrine and sound judgment.

Cesar Pereira

3. **An overview of ICC's approach**

In response to this need, the ICC Commission on Arbitration and ADR launched the 2024 Red Flags or Other Indicators of Corruption in International Arbitration—a key output of its Task Force on Addressing Issues of Corruption.[6] The document provides a practical and structured methodology to help tribunals and parties detect, assess, and address corruption risks in arbitral proceedings.

At its core, the document defines a "red flag" as any fact or circumstance that indicates a potential risk of corruption, particularly involving bribery of public officials. Red flags can emerge in various contexts—during contract formation, project performance, or within evidence submitted during proceedings. Importantly, the document distinguishes between general red flags (e.g., high-risk jurisdictions, opaque procurement systems) and specific red flags (e.g., unexplained payments, involvement of politically exposed persons).

To operationalise the identification and use of red flags, the ICC proposes a three-step methodology:[7] (a) identification—this involves

[3] Olaf Meyer, 'Annulment of contracts', in Mark Pieth & Tina Søreide (Ed.). Elgar Concise Encyclopedia of Corruption Law. Cheltenham, Edward Elgar Publishing (2023): 24–27, p. 25.
[4] World Duty Free v. Kenya, ICSID Case No. Arb/00/7, Final award, Issued on 4 October 2006.
[5] Michael Joachim Bonell & Olaf Meyer, 'The Impact of Corruption on International Commercial Contracts – General Report', in Michael Joachim Bonell & Olaf Meyer (Ed.). The Impact of Corruption on International Commercial Contracts. Cham, Springer International Publishing (2015): 01-36, p. 20.
[6] 'ICC Commission Document on Red Flags or Other Indicators of Corruption in International Arbitration', ICC Dispute Resolution Bulletin, Vol. 2024, No. 2, p. 35-75.
[7] 'ICC Commission Document on Red Flags or Other Indicators of Corruption in International Arbitration', ICC Dispute Resolution Bulletin, Vol. 2024, No. 2, p. 35-75, p. 48.

spotting facts, circumstances, or behaviors that are potentially indicative of corrupt practices, including unusual payment structures, inconsistent documentation, or reliance on third parties with unclear roles; (b) validation—red flags are not, in themselves, evidence of corruption, but they must be factually corroborated and assessed in light of the entirety of circumstances. This includes searching for "green flags" (facts pointing away from corruption) and considering mitigating factors such as compliance programs; and (c) assessment—the tribunal must analyze the red flags within the framework of applicable evidentiary rules. Some red flags may lead to circumstantial evidence, while others could generate direct proof of wrongdoing. The burden of proof remains with the party alleging corruption, although the presence of red flags may justify broader fact-finding or document production.

The guidelines also address procedural effects. For instance, red flags may justify the admissibility of late evidence, support jurisdictional objections, or trigger a reassessment of the standard of proof. They further clarify that arbitrators must balance their duty to resolve the dispute with the imperative to maintain the enforceability of the award, all while preserving procedural fairness.

Perhaps most notably, the ICC urges arbitrators to avoid "unjustified fishing expeditions" or confusing their role with that of prosecutors. Instead, the tribunal must remain neutral, apply the applicable law (including mandatory rules), and focus on legal consequences rather than moral condemnation.

4. Ciarb's call for a collective resolve

The Chartered Institute of Arbitrators (Ciarb) also has maintained a keen eye towards the impact of corruption on the international arbitration practice. It has taken a broader institutional approach in 2025 by launching its Global Anti-Corruption Roundtable Series, a seven-city initiative (London, New York, Singapore, Kigali, Dubai, Rio de Janeiro, and Mexico City) that convenes practitioners, judges, policymakers, and academics in an open, regionally contextualised dialogue.[8]

The roundtables aim to identify: (a) region-specific challenges to preventing and addressing corruption in arbitration and ADR; (b) best practices from various legal traditions and regulatory environments; (c) opportunities for multi-stakeholder collaboration; and (d) concrete policy recommendations for dispute resolvers.

At the heart of Ciarb's initiative lies a recognition that arbitration—often celebrated for its flexibility and confidentiality—must also confront its vulnerabilities to abuse. In regions where court systems are weak or where public procurement is opaque, arbitration risks being used not just to bypass inefficient courts, but also to shield illicit dealings from scrutiny.

The series culminates in a forthcoming white paper synthesizing findings and offering actionable reforms. These may include protocols for disclosure, enhanced training on corruption detection, institutional obligations, and cross-border cooperation mechanisms. As the project leader Cristen Bauer aptly put it: "[c]orruption is a fundamental threat to the integrity of alternative dispute resolution, and addressing it requires a collective, global effort."[9]

Ciarb's approach frames corruption not only as a procedural or evidentiary issue, but as a governance challenge for the arbitration community. Ensuring legitimacy and public trust requires more than doctrinal precision; it demands institutional integrity, cultural change, and systemic safeguards.

In that spirit, each roundtable offers a unique opportunity to share experiences, build consensus on practical solutions, and shape the future of ethical dispute resolution across jurisdictions. This initiative captures regional insights and proposes a truly global conversation to safeguard the integrity of arbitration.

5. Conclusion

Arbitration is not, and it cannot become, a haven for impunity. Yet addressing corruption within arbitration requires more than good intentions. It requires tools, structure, and coordinated institutional leadership.

The ICC Red Flags Document provides arbitrators with a clear methodology to identify and assess potential signs of corruption, enhancing procedural rigour without displacing due process. The Ciarb Roundtable Series builds the momentum for a cultural shift—one that brings together global actors to uphold ethical standards and transparency in ADR.

In a world of growing complexity and scrutiny, arbitration's continued legitimacy depends on its ability to address the spectre of corruption with consistency, clarity and collective resolve.

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[8] 'Ciarb Launches Global Anti-Corruption Roundtable Series', Ciarb News (7 May 2025), available at: <https://www.ciarb.org/news-listing/ciarb-launches-global-anti-corruption-roundtable-series/> (accessed on 31 July 2025).
[9] 'Ciarb Launches Global Anti-Corruption Roundtable Series', Ciarb News (7 May 2025), available at: <https://www.ciarb.org/news-listing/ciarb-launches-global-anti-corruption-roundtable-series/> (accessed on 31 July 2025).

Briefing Note

Drawing The Line: Common Law Damages are Not "Payment Disputes" Under The Construction Contracts Act

Fiona Egan

In a recent decision that will be of particular interest to employers, contractors and subcontractors, the High Court has shed some much needed light on the ambit of the statutory adjudication processes provided for under the Construction Contracts Act 2013 (the **CCA**).

The judgment of Simons J in *Albert Connaughton v Timber Frame Projects Ltd* [2025] IEHC 469 (**Timber Frame Projects**) confirms that the right to refer a dispute to adjudication under the CCA is strictly confined to circumstances in which the dispute relates to a payment which is provided for under the relevant contract. Crucially, it was found that this right to referral does not extend to a claim consequent upon the termination of a construction contract which is not linked to an express contractual provision, ie a common law termination.

The Facts

The parties entered into a construction contract in the form of a quotation and revised quotation for the design, supply and erection of a timber frame structure. The applicant employer made aggregate payments of €124,981 and subsequently purported to terminate that contract for repudiatory breach, at which point most, if not all, of the timber frame had yet to be erected. The applicant then sought to recover the purchase price paid plus its award in its favour. The applicant then sought leave of the High Court to enforce that decision.

The central issue in Timber Frame Projects concerned whether an adjudicator had the appropriate jurisdiction to determine a dispute referred to it under Section 6(1) of the CCA.

The Law

Section 6(1) of the CCA provides that:
"A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a 'payment dispute')."

It was a commonly held view in the construction industry, in the absence of any judicial authority, that "any dispute relating to payment" would likely be interpreted as including claims of any nature, the resolution of which would result in a requirement for one party to make payment to the other.

The Decision

A critical consideration for the court was that it would not lend its authority to enforce an adjudicator's decision unless the underlying dispute is one which is properly amenable to statutory adjudication. It

would undermine the legislative intent were the "pay now argue later" concept to be erroneously extended to disputes other than those identified in the CCA.

In assessing whether the adjudicator had authority to hear the dispute, Simons J addressed the key question of whether the dispute was one "relating to payment arising under the construction contract" as required by the CCA.

In doing so, he noted that the right to refer a dispute to statutory adjudication *"is confined to circumstances where the dispute relates to a payment which is* ***provided for under the contract" (emphasis*** added). While the defence of a claim may necessarily extend the parameters of the dispute beyond this point (e.g. to more substantive arguments such as defective work), Simons J emphasised that such a dispute must have its foundations in a particular term under the construction contract which allows for such a claim for payment to be made.

The typical standard form construction contracts used in Ireland include an express contractual provision relating to the payments which should flow from a termination under the contract (for example Clause 33 of the RIAI form and Clause 15 of the FIDIC Red Book). The termination in this case, however, was a "common law" termination based on a repudiatory breach by the contractor (in this case being a failure to carry out and complete the works which it had been paid to do).

Further to this point (and central to the outcome of the decision) it was held that a "right to refer does not extend to a dispute in relation to a claim for common law damages". The judgment notes explicitly that the concept of a "payment" under a contract is not synonymous with "monetary damages" or "financial consequences". Accordingly, the applicant's claim for common law damages was not a payment dispute referrable under Section 6 of the CCA.

The court confirmed that this interpretation does not preclude all disputes relating to termination from referral to statutory adjudication – the right to refer a payment dispute can arise due to the exercise of a contractual right to terminate.

Takeaways

There was a widely held view in the industry that the term "dispute relating to payment" would be interpreted broadly by the Irish Courts; however, Timber Frame Projects has drawn a line (for now) on the ambit of Section 6 of the CCA. While this clarity is welcome, the question remains open as to whether compliance with Section 4 of the CCA (which regulates the making of, and response to, a payment claim notice) will in any circumstances be a prerequisite to a subsequent referral to adjudication. While Simons J did acknowledge an organic link between the provisions of Section 4 and those of Section 6 which provide for adjudication in the event of a payment dispute, he declined to explicitly consider the issue.

If you would like to discuss the above case and its implications in further detail, please contact Fiona Egan or your usual Beauchamps contact. With many thanks to Andrew Smylie for his contribution.

Fiona Egan

Fiona is a partner in our construction team who specialises in both contentious and non-contentious construction across a range of sectors, including energy, commercial and residential development, manufacturing and logistics. She works with a variety of public and private bodies, including developers, local authorities, utilities, contractors, sub-contractors, lending institutions and investment funds. Fiona offers a 'cradle to grave' service in the development and management of projects, including regulatory and health and safety advice, and the avoidance and resolution of any disputes that may arise.

For more information:
f.egan@beauchamps.ie
www.beauchamps.ie/our-people/fiona-egan

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Graphic Designer: vanessajordan.ie

Administration Office
The Distillery Building
145 - 151 Church Street
Dublin, D07 WDX8

P: +353 1 817 5307
E: info@ciarb.ie
W: www.ciarb.ie