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Message from the Chair

I hope this edition of the newsletter finds everyone in good spirits after the summer, despite the continued impasse in the war in Ukraine and the ever-increasing impact of climate change. As we now approach the autumn the committee has planned several interesting events around education and training. We will continue the pilot of last year introduce the branch to the academic courses the universities of the 32 counties to attract new, younger members. In training we will be increasing the number of courses as we seek to broaden the relevance of the branch and appeal to a wider audience.

A priority this year is to raise the profile of the branch, particularly through our flagship events. In this regard we are grateful for the support of our event sponsors including KROLL and Philip Lee for the Annual Dinner, Addleshaw Goddard and Yendall Hunter for the Annual Conference, together with FTI Consulting for the Annual Lunch. I would also like to extend thanks to those who assist us in the hosting of our various events including Byrne Wallace, the RIA, the IAA and the RIAI. Naturally, we will seek to build upon and continue these important sponsor relationships into the future. We have an interesting programme of



Peter O'Malley

lectures and seminars planned for the autumn, culminating with a regional seminar on 30 November to be held at the Horse & Jockey Hotel in Kilnoe, Co. Tipperary. I do hope that this event, with panellists discussing relevant ADR themes, will be fully supported by our members in the west and south-west of the country. Further information on all the forthcoming events can be found in 'Dates for your diary.'

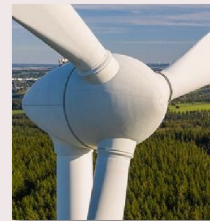
As I write, I am pleased to report a strong sale of tickets for the Annual Dinner on 3 November. We will have many honoured guests in attendance, including a contingent from the Ciarb Scottish Branch and guests from London. I expect that the remaining tickets will be quickly taken up, so I do urge anyone who would like to attend to please book early – thank you and best wishes.

Dates for your diary

12th September – 5.30pm

Lecture

'Lessons learned from Procurement & Construction of Onshore and Offshore Wind Projects,' Thomond Park, Limerick, a joint event with the Society of Construction Law.



28th September – 5.00pm

Seminar

Lecture: 'Limitation of Actions and Time Bars – essential and current issues.' Martin Canny BL together with a supporting panel of speakers, RIAI, 8 Merrion Square, Dublin 2.



12th October – 6.00pm

Lecture

Presentation of two papers 'Adjudication – the only game in town' by Dan Daye MRIAI and 'Construction adjudicator fees – Are they unreasonable?' by Peter O'Malley MRIAI with supporting discussion panel at the Irish Architectural Archive, Merrion Square, Dublin 2.



5th July 2023 – 6.00pm

Seminar

'Claims for delay and prolongation costs – Improving outcome for both parties.' A seminar presented by a range of speakers, at the offices of KROLL, 24 Stephen's Green, Dublin 2.



3rd November 2023 – 7.00pm

Annual Dinner

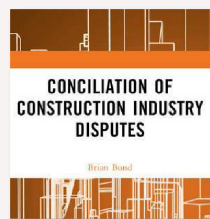
Westin Hotel, College Green, Dublin where the guest of honour is the Former Taoiseach, Bertie Ahern, who will speak on '2023 – the 25th Anniversary of the Good Friday Agreement.'



24th November – 6.00pm

Seminar

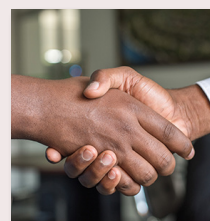
'Conciliation and the nec4 Contract – are they compatible?' and launch of new book on conciliation by Dr Brian Bond, a joint event with Engineers Ireland, 22 Clyde Road, Dublin 4.



30th November – 3.00pm

Regional event

'Introduction to Alternative Dispute Resolution (ADR) in construction,' with a panel of speakers discussing current topics at the Horse and Jockey Hotel, Kilnoe, Co. Tipperary.



Tickets for all the events will be available on our website www.ciarb.ie where we hope you will support with your attendance.

Annual conference – ‘The Construction Contracts Act – 7 Years on’

Maebh Gogarty, Honorary Secretary



The annual conference ‘The Construction Contracts Act 2013 – 7 years on’ took place on Wednesday 5 July 2023, where the venue and refreshments were kindly sponsored and hosted by Byrne Wallace LLP at their offices in Harcourt Street, Dublin. The conference is now a flagship event in the annual diary, being always well supported, where this year’s conference was no different. The conference benefitted from a post pandemic compliment of over 70 in-person attendees with over 100 attending on-line, demonstrating the continuing popularity of the event. Peter O’Malley, the branch Chair, opened the conference and introduced this year’s key-note speaker Mr Bernard Gogarty, the Chair of the Ministerial Panel of Adjudicators under the Construction Contracts Act.

Mr Gogarty opened with a preliminary release of the adjudication referral statistics from the Construction Contracts Adjudication Service (CCAS) for the year ending 30 June 2023, reporting a likely decrease in the number of adjudication appointments made by the CCAS down from 71 in 2021/2022 to circa 52 in 2022/2023. Mr Gogarty then reported on the forum held in June 2022 with both the adjudication panel members and various stakeholders with an interest in the Act. He advised that he had sought submissions on possible changes to the adjudication provisions in the Act, that could be implemented without legislative amendment. Mr Gogarty advised that the service had received a submission from Niall Lawless on a Low Value Dispute Procedure (LVDP), thanking Niall Lawless, the working group and stakeholders for the substantial body of work on this initiative.

Mr Gogarty advised that any further submissions from the Ciarb Members, and others, on various aspects of the Act would be welcomed.

In a change from the past conference format the proceedings comprised of three panel discussions on several primary subjects. The subjects were Panel 1) Low Value Dispute Procedure and proposed legislative/non legislative change discussed by Seamus Duggan, Dymrna Mullaly, Martin Waldron BL, Orla FitzGerald and chaired by Alison Irving. Panel 2) ‘Smash and grab’ adjudications discussed by John Curtin, John Moynahan, James Burke BL, Fergus Cooney and chaired by Keith Kelliher and Panel 3) Costs and the absence of a complaint procedure discussed by Lisa Maloney, Jim Bridgeman SC, Sean O’Flaherty, Keith Kelliher and chaired by Danyal Ibrahim. The panel discussions promoted interesting, healthy debate among the panel members that in turn encouraged engagement and comment from many of the attendees in the room.

The clear message that emerged from the panel one discussion was a need for parity between main contracts and sub-contracts >>>

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“The conference benefitted from a post pandemic compliment of over 70 in-person attendees with over 100 attending on-line, demonstrating the continuing popularity of the event.”

in respect of payment terms. It was felt that whilst there is general support for the legislation, the apparent last-minute addition to the Act has resulted in main contractors now having to at least part-fund project cash flow, because they are required to pay sub-contractors expediently before being paid themselves. There was a general call to recognise and respond to the now prevalent and often punitive extended payment terms now being demanded of main contractors, when drafting main contracts.

The second panel discussion on ‘smash and grab’ adjudication resulted in conflicting positions in respect of the service of ‘Pay less notices’, or the failure of a responding party to serve a ‘Pay less notice’ and the clear divergence from the clarity of the UK position. The Act is silent on the consequences of failure to serve a ‘Pay less notice’, therefore it is for the individual adjudicator to interpret the legislation in the context of the individual case, in the absence of clear jurisprudence on this point.

The third panel discussion on adjudication costs and the absence of a complaint procedure gave rise to considerable debate among the panel members and the audience. The need for a Low Value Dispute Procedure was generally supported, where the procedure being prepared by the working group chaired by Niall Lawless is eagerly awaited. Some concern was expressed amongst the panel that the industry could stifle the use of adjudication if adjudicators costs are not addressed. The panel acknowledged that a solution is not without its challenges, which primarily lie in competition law and concerns to ensure compliance with the requirements of the Competition Authority. Panel three then discussed the lack of a complaint procedure for adjudicators. There was concern expressed by panel members, and anecdotally amongst users of the service, that there is no formal complaint procedure in place, with a consensus that this ultimately left everyone exposed.



Keynote speaker – Bernard Gogarty – Chair of the Ministers Panel of Adjudicators

The conference then ended with some closing remarks from Peter O’Malley, the branch Chair. The branch would like to thank Byrne Wallace LLP for hosting and sponsoring the event together with the panel members for their enthusiastic participation. The last thanks must go to all those who attended in-person and on-line, as it is only with your continued support that this conference continues to be a success. >>>



Members of the audience, L to R – Jim Bridgeman, Bill Houlihan and Jamie McGee



Panel 1, L to R – Orla FitzGerald, Martin Waldron, Seamus Duggan, Dympna Mullaly and Alison Irving – Panel Chair



Panel 2, L to R – John Moynahan, James Burke, Dermot Durack – Panel Chair, Fergus Cooney, and John Curtin



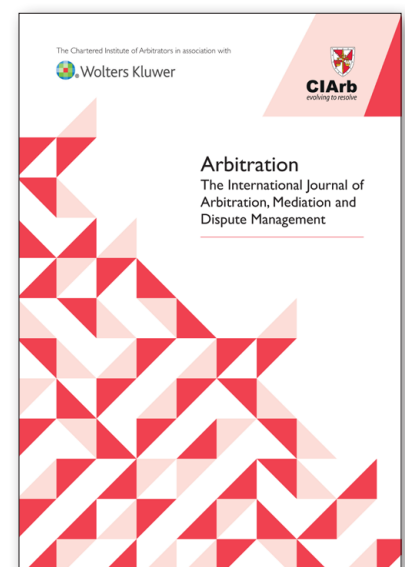
Panel 3, L to R – Jim Bridgeman SC, Keith Kelliher, Danyal Ibrahim – Panel Chair, Lisa Maloney, and Sean O'Flaherty

Call-out for Fellows

If you are an Associate (ACI Arb), or a Member (MCI Arb), you may be eligible to apply for Fellowship of the Institute. Being a Fellow allows you to be considered for appointment as arbitrator for the resolution of disputes, such as for the Society of Irish Motor Industries (SIMI) arbitration scheme that is administered by the branch. This can provide you with invaluable experience, where for many of our membership this has formed the first step in a longer career in dispute resolution. If an application for Fellowship is of interest you can contact Arran Dowling-Hussey, our Branch Trustee, at adhussey@lawlibrary.ie who will be pleased to help.

Recently published academic paper

Authored by one of our members, Dan Daye MRIA, an academic paper entitled '*Adjudication – the only game in town*' has been published recently in '*Arbitration – The International Journal of Arbitration, Mediation and Dispute Management*' Volume 89, Issue 2, 2023. Dan, who is the Chair of the RIAI ADR Taskforce, will be presenting a lecture on his paper on the **12th of October** – see 'Dates for your diary'.



Lecture

The Annual Ken McQuillan Lecture 2023

Dermot Durack – Vice-Chair



The late Ken McQuillan was one of the six founding members of the Ireland Branch of the Chartered Institute of Arbitrators, where each year the branch promotes a lecture in his memory. The lecture this year was given by Professor Dr. Mohamed Abdel Wahab from Egypt, who is the Global Vice President of the Chartered Institute of Arbitrators. Dr Wahab is a partner and Head of International Arbitration, Construction and Energy at Zulficar & Partners in Cairo. Dr Wahab is also the Professor of International Arbitration, Private International Law, and English Contract Law at Cairo University. He has served in over 250 Arbitrations and written and edited numerous books on the subject.

The title of the lecture was “The Future of International Arbitration, between Tradition & Innovation” where the Professor identified and discussed the current context in International Arbitration, together with his observations on sustainability and likely transformative trends. In maintaining its position, Dr Wahab outlined why International Arbitration must maintain its legitimacy (governance & transparency), while at the same time embracing inclusivity (ethnic, cultural, gender & professional), sustainability (protocols, rules & standards) and technology (technology facilitation & AI based applications).

Dr Wahab then discussed the history and the rise of International Courts of Arbitration around the globe. He then outlined the primary factors that have contributed to the success of some, the lack of success for others and why a small number of institutions now dominate the Market. Then Dr Wahab looked at the increasing prevalence of Artificial Intelligence (AI) in the Courts and in Arbitration. He advised how in his view, that this area is likely to grow as younger

people become increasingly more comfortable with embracing emerging technologies. In looking to the future, Dr Wahab suggested that the primary question is will we become dependent solely upon AI, or will it develop more as a hybrid, being AI supported by human intelligence?

In his concluding remarks, Dr Wahab observed that Ireland had all the attributes to be a Centre for International Arbitration. But he stated that we may need to look more closely at our infrastructure, in particular to review the prolonged procedure for granting visas to visitors outside the EU to come to Ireland for business purposes. A special thanks is extended to Professor Dr. Mohamed Abdel Wahab for presenting this year’s Ken McQuillan Lecture. Further thanks are directed to Catherine Needham for Chairing the event and to the Dublin Dispute Resolution Center for hosting us.



Guest speaker
Professor Dr. Mohamed Abdel Wahab

Lecture

The Cathach and the beginnings of arbitration in Ireland

Dermot Durack – Vice-Chair



Brendan Kilty presenting the lecture at the RIA

Brendan Kilty SC, a long-standing member of the branch, gave a lecture on this most intriguing title on 2 June at the Royal Irish Academy (RIA) in Dawson Street where the ancient book known as the Cathach is held. The RIA is an all-island society established under Royal Charter in 1785 and is one of Ireland's leading bodies in the promotion of the sciences and humanities. At circa 1,500 years old, the Cathach is the oldest Irish manuscript in existence and predates the Book of Kells by approximately 250 years. Written on vellum, it is believed that the Cathach is a copy made by Saint Columba (Colum Cille) of an original Psalter (Book of Psalms) that he borrowed from Saint Finnian.

At some point a dispute arose between Saint Columba and Saint Finnian over the ownership of the Cathach. The dispute was referred to Diarmait Mac Cerghaill the King of Tara to Arbitrate. The King decided upon the dispute on the basis that as a calf must belong to its mother, the cow, it must follow that a copy of a book must belong to the original book. The arbitration failed and the controversy led to the battle of Cúl Dreimhne in 561, where an alliance of northern Septs defeated King Diarmait. As a result, St Columba was forced to depart from Ireland and arrived in Iona in 563, it is said exiled as punishment for the lives lost in the battle.

The story of the Cathach continues where at some point between 1062 and 1098 a special Cumdach or shrine was made to contain and protect the vellum manuscript. Later in the Middle Ages it came into the possession of the O'Donnell family. It was then to become more widely known as the 'Cathach' or 'Battler' from the O'Donnell practice of carrying it thrice right-hand-wise

around the field of battle as a talisman. The Cathach was then taken to France at the end of the 1600's, when the book-shrine was refurbished with inscription that included the O'Donnell Coat of Arms. In around 1802, it was brought back to Ireland by Sir Capel Molyneux and given to Sir Neal O'Donnell of Newport, Co. Mayo. The manuscript was re-discovered inside the shrine in 1813 when the Cumdach was opened by Sir William Betham. The book-shrine, with the vellum manuscript inside, was deposited in the Royal Irish Academy by Sir Richard O'Donnell in 1843, where it remains today.

Brendan, who is an exemplary storyteller, utilised the history of the Cathach to enthral us with further gems of Irish History, including Dal Riata, the Brehon Law, Strongbow, and the Ouzel Galley of 1799 which in turn led to the establishment of the Dublin Chamber of Commerce, the forerunner of the Ciarb Ireland Branch.



Tea and coffee after the lecture, L to R – David O'Leary, Tim Bouchier-Hayes, Jude O'Loughlin, Terence O'Keefe, Joe Kelly, Mark Wearen, Alan Brady, and Michael Carrigan.

Special Interest Group – Equality, Diversity, and Inclusion

Lisa Quinn O’Flaherty – EDI SIG Member



In September 2021, following a call out to the general membership, the Equality, Diversity, and Inclusion (EDI) Special Interest Group (SIG) of the Ireland Branch was formed. The SIG’s objective is to consider, improve, and promote equality, diversity, and inclusion. One of the first tasks was to establish whether gaps exist in EDI within the Ireland Branch. A survey was designed and was then circulated to the membership, to gain an understanding of member views and insights. The results were analysed, with the assistance of Ciarb London, where the SIG is now developing a set of actions, informed by the survey results.

A request to complete the EDI Survey was sent out to all members of the branch. Many respondents were Fellows, aged between 45 and 65, who identify as white Irish. 80% of the respondents were male which reflects the membership profile of the branch. Approximately two-thirds of the respondents are involved in the construction sector, being primarily male. Approximately one-third of the respondents work in the legal sector, where there is a more balanced male/female split. The feedback from the survey was in the main positive, although a small minority gave dissenting views. The immediate past Chair Tom Carey presented an overview of the survey results at the 2023 Annual General Meeting last April.

Some respondents believe that males are more favoured within the branch, and others believe that females are more favoured. Some respondents requested that successful female arbitrators should be showcased. As only 20% of the branch membership is female, this may

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“The EDI SIG has now considered all the findings of the respondents, where these findings will inform the basis of activity for the SIG over the coming years”

encourage more women to see ADR as a viable career option. Most respondents from a non-white Irish ethnic background stated that they have not experienced discrimination within the branch.

Some respondents felt that there is too much of a Dublin-centric focus, particularly in relation to branch events. Others felt that younger members would benefit from mentoring. A number of respondents felt that the branch would benefit from a greater diversity of membership, which could be achieved through improved access for those from socially disadvantaged backgrounds. Some respondents would like to see greater transparency in arbitral appointments, and EDI focussed decision-making as a policy of the branch.

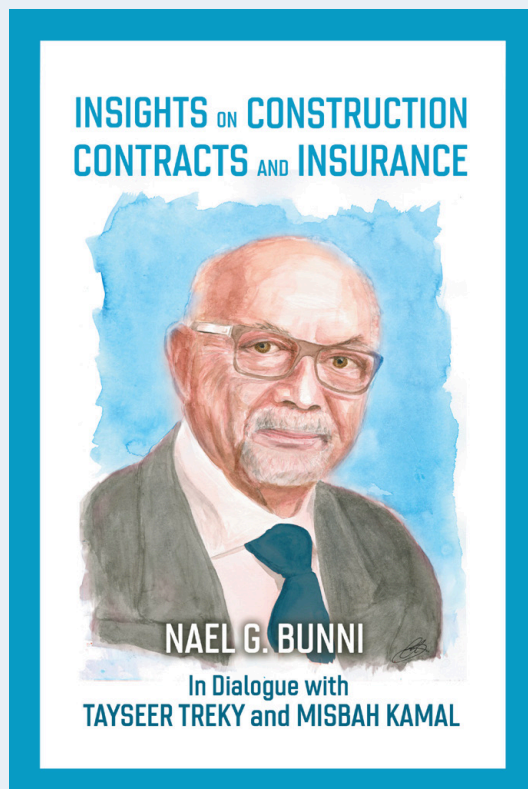
The EDI SIG has now considered all the findings of the respondents, where these findings will inform the basis of activity for the SIG over the coming years. A call out for further members to join the SIG has now been actioned, as an important opportunity to contribute to the continued promotion of equality, diversity, and inclusion within the branch.

New book publications

Peter O'Malley – Chair



It is a pleasure to be able to report that two of our most distinguished and long-standing members, Dr Nael Bunni, our Branch Patron, and Dr Brian Bond have each completed and are about to publish a new book, on topical ADR subjects. I am sure these books will be of interest to those members looking ahead to the end of the year, being not too far away, for an engaging read over the festive period. The books 'Construction Contracts and Insurance' by Dr Bunni and 'Conciliation of Construction Industry Disputes' by Dr Bond are also relevant to those of our student membership who want to learn more about these two important subjects.



The first of these books is entitled '**Nael G. Bunni in Dialogue with Tayseer Treky and Misbah Kamal: Insights on Construction Contracts and Insurance**'. The book provides an interview conducted by Mr. Tayseer Treky and Mr. Misbah Kamal, the idea for which was born after they translated Dr Bunni's successful 'Risk and Insurance in Construction' into Arabic in 2017.

In addition to an autobiographical narrative and views on the insurance market, with a particular focus on Iraq in the 1960s, and with special reference to international construction and engineering, the dialogue covers complex and difficult issues in construction insurance and associated problems under the following chapters:

Chapter 1: The Formative Years in Iraq

Chapter 2: The Seed and Development of Construction Insurance in Iraq

Chapter 3: Ireland as Home and Place of Work

Chapter 4: The World of Construction Insurance Underwriting: selected issues

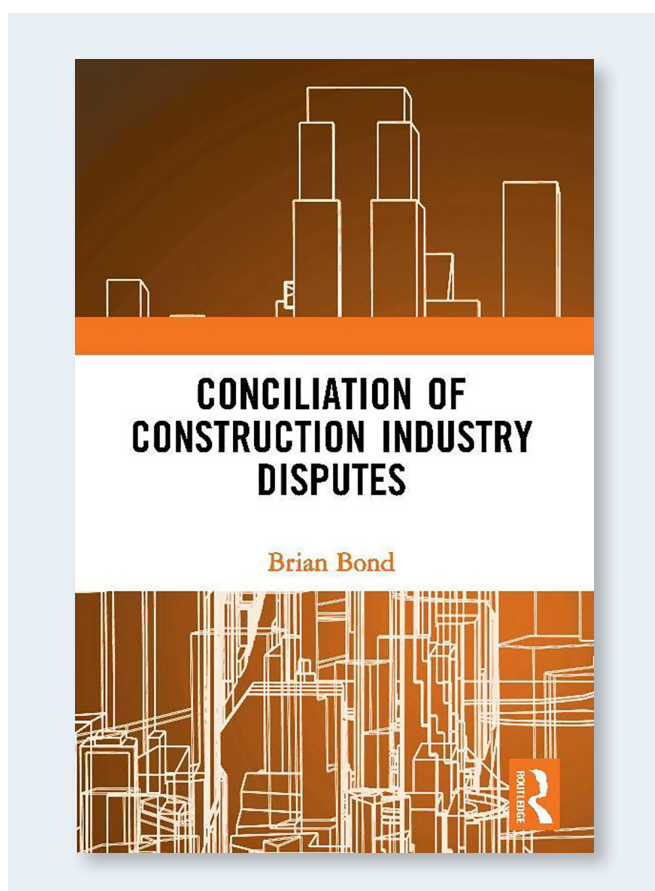
Chapter 5: The World of Construction Insurance Underwriting: additional questions

Chapter 6: Arab Construction Insurance Markets

Chapter 7: 'Order out of Chaos' – Loss Adjustment

Chapter 8: The International Construction Insurance Scene

Further information can be found on the following website, from which the book can also be purchased: www.naelbunni.com



The second book '**Conciliation of Construction Industry Disputes**' by Dr Brian Bond describes conciliation as it has evolved and been practised in Ireland for the past 25 years and provides readers with practical guidance on this alternative dispute resolution (ADR) method. Conciliation combines advantages of both mediation and adjudication and has been very widely practised in Ireland over the last 25 years. It is low-cost, quick and has been hugely successful. It continues to be the most used and preferred method of resolution of disputes in Irish construction contracts despite the introduction of statutory adjudication.

The book includes a comparison of the various methods of ADR and will assess how conciliation fits into them, noting the pros and cons of each. Conciliation is described in detail and the reasons for its success will be analysed.

This book provides comprehensive guidance on how conciliation should be conducted to maximise its chance of being successful. Drawing on his wide experience of resolving disputes by conciliation, Brian Bond illustrates the problems which can be encountered and how they may be overcome. This book, set out in the following chapters, will be useful reading for all involved in construction contracts, construction managers, lawyers and legal advisers, conciliators, those aspiring to become conciliators and anyone looking for an alternative dispute resolution method to resolve a construction contract dispute.

1. The Construction Industry and its disputes
2. Third party involvement in the resolution of construction contract disputes
3. Resolutions imposed by a third party
4. Consensual resolution of disputes
5. Conciliation of Construction Contract Disputes in Ireland
6. The use of other Alternative Dispute Resolution Methods in the Irish Construction Industry
7. The role of the Conciliator's Recommendation in Irish conciliation
8. Choosing and appointing the conciliator
9. The Initial Meeting
10. Conducting the conciliation
11. The Conciliator's Recommendation
12. Multi-Party Disputes
13. Conciliation and the Law
14. Summary and Conclusions

This book will be launched at the forthcoming joint event with Engineers Ireland on 24 November, see 'Dates for your diary' and is available for pre-order using this link: [Here](#)

Viewpoint

Third party funding is now permitted under Irish law – or sort of!

Brendan Kilty SC



Independent for 100 years, and a republic for much of that time, Ireland still applies 400-year-old legislation. In 1634 Charles I enacted the Maintenance and Embracery Act. Not a lot of people are aware of this, as Ireland's national collective memory of this period is dominated by stories of Cromwell's massacres, with thousands of Irishmen and Irishwomen sold to plantations in Jamaica. The sovereign saw that there was nothing within his realm that kept his loving subjects in more quietness, rest, peace, and good concord than the just and due administration of his laws. But his ambition to keep his subjects quiet and peaceful was being undone by the mischief of maintenance and champerty whereupon great perjury had ensued, much unquietness, oppression, vexation, trouble, and wrongs had followed.

Champerty arises where persons with no actual interest in a case fund the case in return for a share of the upside. Many litigants could not otherwise vindicate their good name. Third party funding has been prohibited since 1634. In 2017 the Supreme Court ruled third party funding remained a civil wrong and potentially a criminal offence here even though it has been permitted elsewhere for years. So, despite the constitutional right to property and European law protecting small business, champerty remained unlawful in Ireland even where it was necessary to advance a case of immense public importance.

In an extraordinary break with that 400-year practice, the Irish legislature has just passed legislation permitting champerty (funding for a share of the success) in international arbitrations

in Ireland. This change is a manifest boon to the impecunious international arbitration claimant in Ireland. But while the legislation was signed into law by the President earlier this year there is no indication as to when it will be 'commenced' and become operative. That means that it is the law but, er, it's not yet the law. Unfortunately, the welcome change has not been extended to Irish domestic arbitrations.

In essentially similar situations, essentially similar claimants are being treated differently. An impecunious Dublin/Belfast (i.e., international) arbitration claimant can have access to all the champerty he wants while a similarly impecunious domestic arbitration claimant (e.g., Dublin only) faces criminal liability for accessing similar funding in similar circumstances for similar purposes. This distinction is based on the pedigree of location and is constitutionally doubtful. While I welcome the positive benefits to claimants (and, of course, their counsel) in international arbitrations in Dublin, it seems to me that this imbalance and bias based on the pedigree of location causes the very domestic vexation Charles I had sought to avoid.

Newsletter contributions

As members of the Ciarb Ireland Branch this is *your* newsletter. If you have an interesting contribution on any aspect of dispute resolution that you feel should be included, please submit it to info@ciarb.ie where it will be considered for inclusion. The next newsletter issue is planned for the end of November.

Committee Members 2023 – 2024

Chair:
Peter O'Malley
Architect

Vice-Chair:
Dermot Durack
Quantity Surveyor

Honorary Secretary:
Maebh Gogarty
Solicitor

Honorary Treasurer:
Catherine Needham
Barrister

Immediate Past Chair:
Tom Carey
Engineer

Adrian Kearney
Surveyor

Paula Murphy
Architect

Meg Burke
Barrister

Jim Bridgeman
Senior Counsel

Peter McCarthy
Quantity Surveyor

Greg Daly
Engineer

Nuala Jackson
Senior Counsel

Sean O'Flaherty
Barrister

**Northern Ireland
Chapter Chair:**
Jarlath Kearney
Quantity Surveyor

**Supported by:
Branch Patron:**
Dr Nael Bunni
Engineer

Branch Trustee:
Arran Dowling-Hussey
Barrister

Branch Administrator:
Jennifer Crowther

Special Interest Groups (SIG's)

Within the branch there are several Special Interest Groups (SIG's). The SIG's are an important part of branch activity, providing a platform for members to pursue a particular interest in the wider sphere of dispute resolution. The individual SIG's are listed here.

Most of the members of the branch committee have been, and continue to be, involved in one or more of the SIG's. If you would like to become involved in one of the SIG's, please let us know or send an e-mail to info@ciarb.ie advising of your interest.

Adjudication SIG
Arbitration SIG
Dispute Avoidance SIG
Education and Training SIG
Environment and Climate SIG
Equality, Diversity, and Inclusion SIG
Family Law SIG
International Arbitration SIG

