



ALTERNATIVE DISPUTE RESOLUTION

CORK REGION

ENGINEERS IRELAND

5 October 2010



OVERVIEW

- Introduce Series of 4 Lectures
- Disputes
- Dispute Resolution
 - Litigation
 - Alternative Dispute Resolution
 - Adjudicative
 - Non Adjudicative (Amicable Dispute Resolution)
- Various Processes
- Organisations Involved in Dispute Resolution



NATURE OF DISPUTE

- Conflict/Competing Interests
- Disagreement
- Conflict Management
- Dispute
 - *A claim or assertion made by one party is rejected by the other party and that rejection is not accepted.* EI Arbitration Procedure 2000
 - Intractability
 - Third-party intervention
 - Dispute Resolution



Dispute Resolution

- Litigation
- ADR Alternative Dispute Resolution
 - Arbitration
 - Expert Determination
 - Mediation
 - Conciliation
 - Adjudication
 - Dispute Review Boards
 - Neutral Evaluation
 - Mini Trial
 - Med-Arb or Arb-Med



ADR SPECTRUM

- **Mediation**
 - Contractual, non-adjudicative.
 - Non-binding, not final.
- **Conciliation**
 - As mediation but with provision for a recommendation.
- **Conciliation GCCC**
 - Contractual. Clause 13 of GCCC contract.
 - Recommendation based on contract. If rejected is binding but not final.
- **Adjudication**
 - Contractual or statutory. In UK HGCRA 1996.
 - Adjudicative. Binding but not final.
- **Arbitration**
 - Statutory basis. Arbitration Act 1954 soon 2010.
 - Adjudicative. Final and binding.



Dispute Resolution Clauses

- Traditionally Arbitration
- Stepped clauses from about 1990
 - Conciliation/Arbitration
 - IEI 4th (1995)
 - RIAI (2002)
 - GDLA (2004)
 - EI/ACEI Conditions of Engagement (1992)
 - Mediation/Conciliation/Arbitration
 - CIF Conditions of Subcontract (2008)



Procedure/Rules

- EI Arbitration Procedure 2000
- EI Conciliation Procedure 2000
- EI Conciliation Procedure 2007
- RIAI Conciliation Procedure 1996
- CIF Mediation Procedure 2008
- GCCC Arbitration Rules 2009



ORGANISATIONS

- **CI Arb.**
 - London based worldwide organisation founded in 1915.
 - Approx 13,000 members worldwide and 800 in Ireland.
 - Three separate disciplines arbitration, adjudication and mediation.
 - Three separate grades Associate, Member And Fellow. Also Chartered Arbitrator.
- **EI/RIAI**
 - Both are appointing bodies for arbitrators and conciliators mainly in construction disputes.
 - Both maintain panels of arbitrators and conciliators.
- **SCS**
 - Appointing body of arbitrators and experts mainly in rent review cases.
- **Law Society**
 - Appointing body. Maintains panels of mediators and arbitrators.
- **Arbitration Ireland**
 - Broadly based body set up 8 June 2010 to promote Ireland as centre for International Arbitration.



Engineers Ireland

- **Conditions of Contract.**
 - First Edition 1959.
 - Second Edition 1967.
 - Third Edition 1980 – Revised and Reprinted 1990.
 - Fourth Edition 1995 - Second publication 1998.
- **Procedures**
 - Arbitration 1987 and 2000. 2010 version being drafted
 - Conciliation 1995 and 2000. For public sector contracts in 2007.
- **Dispute Resolution Board**
 - Informal grouping from c 1990. Formalised c 2000 with Nael Bunni as Chairman. New Board for 3 year term from Nov 2009.
 - All details now on web <http://www.iei.ie/services/dispute-resolution/>
 - Two Panels – Arbitrators and Conciliators.
 - Board and Panels open to other professions.



Mediation

- Assisted negotiation with independent neutral.
- Mediator is a facilitator.
- Confidential and without prejudice.
- Voluntary process.
- Inexpensive and speedy – often one day.
- Joint and private sessions.
- Solutions not constrained by the contract.
- Parties bear their own costs and share costs of mediation.
- Resolution normally put in writing and that is binding.



Conciliation

- Similar to mediation but with the possibility of a recommendation.
- Normally parties set out position in brief submissions prior to hearing.
- Parties cannot resolve matters conciliator must make a recommendation.
- Parties have a set period in which they can reject the recommendation.
- If not rejected the recommendation becomes binding.
- The recommendation is not necessarily based on the contract.
- In Public Sector Contracts the recommendation
 - Must be based on the contract.
 - Is binding but not final.



Adjudication

- Generally statutory but can also be contractual.
- Housing Grants, Construction and Regeneration Act 1996.
- Construction Contracts Bill 2010.
- Adjudicator's decision is binding but generally not final.
- Can apply to all disputes (UK Model) or payment only (Some Australian States).
- Very rapid process. CCB has 7 days to refer and 28 days to decide.
- Sometimes described as rough justice.
- Shifts the balance of power away from the paying party. Original intention was to improve cash flow in the industry following Latham Report.
- Has had a dramatic effect on ADR wherever introduced.



Expert Determination

- Contractual process with decision by Expert.
- Decision normally final and binding. No appeal.
- Expert frequently chosen for expertise in the area of dispute.
- Greater procedural scope than in arbitration. Not the same emphasis on due process.
- Potentially rapid and inexpensive.
- Used in Law Society contracts. Also in high-tech industries.



Arbitration

- Traditional form of ADR. Goes back to Brehon Laws.
- Parties must agree to arbitration – in writing.
- Statutory framework. Arbitration Act 2010.
- Decision of the arbitrator final and binding. No appeal.
- Mimics litigation – tends to be formal, deliberative and can be lengthy and costly.
- Arbitrator must abide by rules of natural justice.
- Suited to transnational disputes.
- Advantages – privacy, speed, cost, convenience, finality, certainty and choice of arbitrator.



2010 ACT - BACKGROUND

- Replaces 1954, 1980 and 1998 Acts, all of which are repealed.
- 1954 Act based on English 1950 Act.
- 1998 Act introduced Model Law for international arbitrations.
- Groundswell for change in 2007.
- Bill published June 2008.
- Passed 24 February 2010.
- Comes into effect 8 June 2010.
- Text of Act at <http://www.oireachtas.ie/documents/bills28/bills/2008/3308/b33b08d.pdf>



2010 ACT – STRUCTURE

- 32 Sections in three parts with six Schedules.
- Schedule 1 is the UNCITRAL Model Law on International Commercial Arbitration.
- Schedule 2 is the 1958 New York Convention.
- S 6 of the Act incorporates the Model Law into Irish Law for all arbitrations where Ireland is the Seat.
- The Model Law is presented in a separate schedule rather than being incorporated into the Act as has been done in other jurisdictions.



New York Convention

- The Corner stone of International Arbitration.
- 16 Articles.
- Deals with recognition and enforcement of foreign arbitral awards.
- All contracting States undertake to do so similar to domestic awards. (Art 3)
- Only 7 grounds for refusal of recognition/enforcement. (Art 5)
- Now more than 140 contracting states.
- Introduced into Irish Law in 1980 Act.



UNCITRAL MODEL LAW

- Not a law but in fact a template for International Commercial Arbitration.
- UNCITRAL Model Law adopted by United Nations Commission on International Trade Law in 1985 and amended in 2006.
- 36 Articles in 8 Chapters.
- Limits court intervention. (Art 5)
- Limited grounds for recourse against award. Arts 34 and 36 mirror NY convention.
- Model Law increasingly used internationally as the basis for countries arbitration law e.g. Germany, Japan, Malaysia, New Zealand, Kenya and others.
- Arbitration Act 1996 in England, Wales and Northern Ireland is based on the Model Law but with significant variation. This Act is now being applied to Scotland.