The All-Ireland Arbitration Rules, AR20, and why the industry needs a voluntary costs-limitation scheme to make arbitration competitive

by Tom Wren BCL LLM FCIArb.

Overview

In 2019, the Committee of the Irish Branch of the Chartered Institute of Arbitrators gave a mandate to an Arbitration Rules Sub-Group to draft new arbitration rules capable of use in both jurisdictions; that is, in the Republic under the Arbitration Act, 2010, and in Northern Ireland under the Arbitration Act, 1996. The mandate reflected the fact that Irish Branch is an all-Ireland endeavour and includes an active Northern Ireland Chapter without which Irish Branch would be considerably reduced in stature.

The all-Ireland CIArb. membership, was canvassed for persons willing to serve on the AR Sub-Group. Five persons with multi-discipline backgrounds from all four provinces came forward. Following six working meetings aided by BHSM Solicitors, Dublin, who made its board room available for the purpose, and a review of the draft on behalf of Arbitration Ireland, the AR Sub-Group reported back to the Committee in 2020, which, with one exception discussed below, endorsed the new rules ('AR20') as did the Institute's headquarters in London.

Delayed by Covid-19, AR20 was announced in the CIArb. Irish Branch Spring 2021 newsletter. AR20 is available at the Irish Branch's webpage, www.arbitration.ie.

Need for New Rules accommodating the UNCITRAL Model Law

CIArb. Irish Branch saw a need for new rules because its previous arbitration rules, AR90, were devised to meet the needs of arbitration before the United Nations Commission on International Trade Law (UNCITRAL) Model Law[1] for arbitration took hold. The purpose behind the UNCITRAL Model Law was to promote greater uniformity and to assist the enforcement of arbitrators' awards between jurisdictions under international conventions such as the New York Convention, 1958.

The UNCITRAL Model Law[2] is now the standard-bearer for the conduct of arbitration world-wide including the EU Member States. It is enshrined in the current arbitration acts in both jurisdictions on the island. Some countries opted to insert the UNCITRAL Model Law in their domestic arbitration acts to a greater degree than others. In this respect, there are some differences between the legislative regimes as between Northern Ireland and the Republic. For this reason, AR20 does not refer to the articles in the UNCITRAL Model Law.

Key Objectives of AR20

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

The means adopted for the achievement of this aim was that the rules would avoid legalese as much as possible aided by the use of break-out schedules to provide the necessary level of legal detail required for practitioners and parties' legal advisors to meet any contingency as may arise in arbitration.

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[1] Well explained by Arran Dowling-Hussey and Dereck Dunne, *Arbitration Law*, 3rd Ed., Roundhall, 2018, at Para. 1-111.

[2] Barry Mansfield, *Arbitration in Ireland*, 2nd Ed., Clarus Press, 2018, is especially helpful in terms of the UNCITRAL Model Law.

A second key objective was to facilitate the achievement of a just, expeditious and final determination of a dispute at a minimum of cost to the parties consistent with the standards to be expected of an arbitrator. In this endeavour, the AR Sub-Group devised an arbitration costs (as distinct from parties' costs) limitation scheme referred to in the draft rules as Schedule G, discussed below. For some reason, and I have my suspicions, Schedule G was pulled by the Committee before AR20 was approved.

The All-Ireland Mandate

The over-arching mandate was encapsulated in Rule 1 to AR20 which states:

> **"Rule 1: References Under These Rules: All-Ireland Application**
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> Wherever a reference is made to 'Act' or 'the Act' it shall mean a reference to either the Arbitration Act, 2010, if the arbitration is to be conducted under the laws of Ireland or it shall mean a reference to the Arbitration Act, 1996, if the arbitration is to be conducted under the laws of Northern Ireland, whichever is applicable."

The effect, whilst consistent with the aim of user-friendly rules, is that sections of either Act are not referred to in the rules nor, as mentioned above, are articles of the UNCITRAL Model Law. The AR Sub-Group deliberately took this decision as to attempt to refer to sections of both arbitration acts would have resulted in an unwieldy document with too much opportunity for confusion. The approach as taken stresses the need for an arbitrator to be fully familiar with the relevant Act and the law relevant to each appointment.

Appointments and Panel Maintenance

If AR20 applies to a contract where the parties are in dispute, in the absence of agreement on the appointment of an arbitral tribunal by the Parties (normally one arbitrator), AR20 provides that the tribunal will be appointed by the Irish Branch Chair. An appointment fee of €475.00 plus VAT is required if the application for an appointment is issued in the Republic and £425.00 plus VAT if issued in Northern Ireland.

Prior to drafting this article, I would have said that, to maintain the standard required of arbitrators and to promote fairness in appointments, a list or lists of suitable arbitrators for appointments in one or both of the jurisdictions should be kept and managed by CIArb. Irish Branch who would be charged to keep the Branch Chair appraised of those available for appointment with the consent of such persons. Whilst I remain of the view that the CIArb. is the best placed institute for the education and training of arbitrators, I believe the silos which exist as between the different institutes need to be broken down. If a way were to emerge, the Joint Liaison Committee ('JLC') for the Construction Industry, might consent to have a role as to whom would be held suitable for admission to an industry-wide arbitration panel or panels and what body would be the custodian.

Should such a role for the JLC emerge, a pressing need already exists for a voluntary costs limitation scheme. I would hope that CIArb. Irish Branch would deliver as much for the industry in the short to medium term.

Genesis for the Limitation of Arbitration Costs

In my opinion, the genesis arose out of two illuminating papers read to the Construction Bar Association's Annual Conference, 2019, by Anthony Hussey[3] and by Colm Ó hOisín and Cormac Hynes[4] and the subsequent authors' discussion after presentation. It is a gross over-simplification of the

[3] Anthony Hussey, *Conciliation v Adjudication – Is the tide turning?*, CBA Annual Conference, 29th March 2019.
[4] Colm Ó hOisín and Cormac Hynes, *Is Domestic Arbitration fit for Purpose?*, CBA Annual Conference, 29th March 2019.

authors' papers but, reduced to bare essentials, it could be said that one advocated that adjudication will predominate; the other posited the death of arbitration by costs-lead strangulation.

Allied to the idea of an arbitration costs limitation scheme, my recollection is that the AR Sub-Group was conscious that many in the CIArb. Irish Branch and wider afield have invested heavily in their careers by progressing up through the CIArb.'s examination structure to achieve Fellowship status or are working towards that goal. Yet few have had opportunity to develop practical experience as an arbitrator and arbitration as a dispute resolution means now has serious competition.

The central aim of a cap on arbitration costs would be to make arbitration more attractive to users of dispute resolution services and as a ladder to progression but not at the sacrifice of standards. Whilst the AR20 Sub-Group's Schedule G was not perfect, if implemented, with or without modification, it would presage a new beginning for arbitration which obtained a bad name primarily because of costs.

If arbitration on the island is to have a future, it must be made competitive. Conciliation, as various studies have shown, most notably that undertaken by Dr. Brian Bond in 2014[5], has proven to be a successful means of disputes resolution in the construction industry. Unfortunately in the Republic, a retrograde step was introduced in the public works contracts ('PWC') whereby a contractor, having won a recommendation, must provide a bond before payment. In terms of the PWC, conciliation is now less attractive in that, if a contractor refers a payment dispute to adjudication under the Construction Contracts Act, 2013, and wins, the contractor does not have to provide a bond.

Recently in the Republic, in *Gravity Construction v THM* [2021] IEHC 19, the Hon. Mr. Justice Simons opened an interesting debate on s.6(10) of the Construction Contracts Act, 2013, as to whether a stay on the execution of an adjudicator's decision may be ordered pending the issue of an arbitrator's award. If s.6(10) is so interpreted, adjudication will also stand to lose its attractiveness and the need for a final, binding and cost-effective award of an arbitrator will become more acute.

In both jurisdictions adjudication has its merits. One is to be found in Para. 27 of the southern Code of Practice issued pursuant to s.9 of the Construction Contracts Act: "The Adjudicator shall use reasonable endeavours to process the payment dispute between the parties in the shortest time and at the lowest cost." Yet the said requirement does not require an upset amount and users still will not know the bottom line.

<u>AR20 Schedule G Arbitration Costs Limitation Scheme</u>

The thrust of Schedule G was to bring back arbitration into competition with other ADR processes for small to medium disputes leaving higher-value references to arbitration untouched in terms of the capping of costs. To attempt the latter would have been unrealistic in that few, if any, practitioners might be willing to under-write the risk of capping costs for disputes which could run for months with millions and reputations at stake. As drafted by the AR20, Sub-Group Schedule G states:

> **"SCHEDULE G (Rule 28): PROPOSED IRISH BRANCH ARBITRATION COSTS LIMITATION SCHEMES**
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> Pending the canvassing of interested arbitrators with a view to the inclusion of their names on one or more of the below schemes after an assessment of their qualifications and experience by Irish Branch, this Schedule G is in abeyance. When this Schedule G is implemented by Irish Branch upon an announcement by Irish Branch Chairman, an arbitrator who agrees to participate in any of the below Irish Branch costs limitation schemes shall have his fees fixed at the relevant band as set forth in this **Schedule G** which schemes Irish Branch may review and amend from time to time. Any such review shall not apply to an existing appointment under any scheme. Expenses and other costs may be settled and taxed as provided for in the Act.

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[5] Brian Bond, '*Conciliation: How has it served the construction industry and has it a future*?' (IEI, 12th March 2014).

None of the below schemes apply to consumer or statutory arbitrations and they apply only to those arbitrators who are approved by Irish Branch for each scheme and who have agreed to limit their fees pursuant to this Schedule G if appointed.

All monetary values for fixed fees refer to the unit of currency in the jurisdiction where the arbitration takes place. No scheme reduces the standard expected of an arbitrator.

Scheme	Claims Value Range	Maximum Fee	Maximum Period
1	Up to 30,000	3,000.00	28 Calendar Days
2	From 30,001 to 90,000	7,000.00	28 Calendar Days
3	From 90,001 to 150,000	10,000.00	28 Calendar Days
4	From 150,001 to 200,000	15,000.00	28 Calendar Days

Maximum Fee column above does not include accommodation, subsistence, travel costs or VAT.

Maximum Period column is the period measured from the last day of the hearing or, if no hearing, from the day the arbitrator receives the last written submission pursuant to Rule 19, and is the maximum number of days the arbitrator has to write his substantive Award in the reference and to advise the parties that the Award is ready to be taken up.

The **Claims Value Range** column in each scheme is the claim value only without reference to the value of any counter-claim in the reference and which shall be stated in making any request for an appointment of an arbitrator to the Branch Chairman pursuant to Rule 3.3 at (iv)."

In some respects, Schedule G is possibly too simplistic in approach. The ranges, values and time limits were the subject of considerable discussion within the AR Sub-Group and were (and remain) open to amendment.

What the AR Sub-Group recommended is that the schemes be given a chance and that, in the use, or depending upon the level of take-up, feedback would have determined the effectiveness or otherwise of Schedule G within two years. The proposal included that all who would wish to be considered for appointment as arbitrators under the Schedule G schemes would be FCIArb., or C. Arb.

Judicial Support

CIArb. Irish Branch was fortunate to have obtained the support of two senior members of the judiciary, one from each jurisdiction, who are closely connected with the administration of commercial law. Both kindly acceded to providing introductory comments on AR20. My belief is that such support stands to be squandered unless and until a costs limitation scheme is implemented.

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Tom Wren is an ADR practitioner and was a member of, and Hon. Sec. to, the AR20 Sub-Group. Of his own composition, no other member of the AR20 Sub-Group, since disbanded, had a hand in or knowledge of this article before release.