

Association For International Arbitration

IN TOUCH



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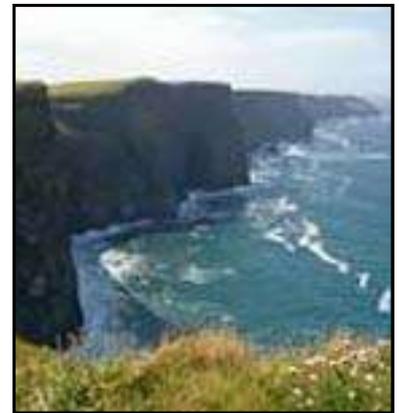
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Ireland: High Court Endorses Use Of ADR

The Report by the group tasked with advising the Irish Government on ways to cut public spending, which was published on 16 July 2009, has significantly endorsed the use of alternative dispute resolution (ADR). The Report, colloquially known as the 'An Bord Snip Nua' Report, referred to the use of Arbitration and Mediation. It states that "any State body wishing to resolve a legal dispute with another State body would be required to inform the relevant Minister who would then be responsible for mediating a solution or arranging for other forms of independent mediation". The Report proposes that legislation should be enacted to implement this if necessary.



Inside this month's issue:

<i>Ireland: High Court Endorses Use of ADR</i>	1
<i>Consultation Results on the Commission's Green Paper on the Brussels I Regulation</i>	4
<i>Arbitration in Colombia: How does it work?</i>	4
<i>Upcomming Event</i>	8

The events of the past month represent a step forward for alternative methods of dispute resolution (ADR). Along with the favourable comments on ADR by 'An Bord Snip Nua', the Irish High Court came out strongly in favour of ADR in general and Expert Determination in particular in a recent injunction application which was before it.

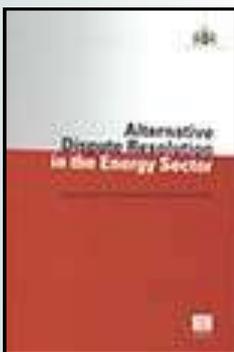
A recent Seanad debate on the Multi-Unit Developments Bill 2009 is also illustrative of the increasingly positive attitude towards Mediation emanating for the government. The Bill contains a provision which provides that the Court may direct the parties to an application under the Bill to participate in a Mediation. It further provides that where a Mediation is directed by the Court, all parties must comply with the direction. Where the Court is satisfied that a party did not comply with a direction to engage in the Mediation process, it may make an order as to costs.

In comments made to the Seanad following a reading of the Bill the Minister for Justice, Equality and Law Reform, Dermot Ahern, stated that "Mediation should be used wherever possible to resolve disputes".

The Minister of State at the Department of Justice, Equality and Law Reform, Barry Andrews, also stated that "there is an enormous appetite now for alternative dispute resolution methods to be employed. That is stitched into this Bill and requires parties to engage to the greatest extent possible".



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Mediation, Arbitration and Expert Determination are all methods of ADR which are acquiring increasing popularity and usage as they are all confidential processes which are conducted in private.

Mediation

Mediation involves a neutral third party assisting parties to reach an agreed resolution to a dispute. In essence Mediation is assisted negotiation and the Mediator does not decide what the solution should be.

Arbitration

Arbitration is supported by a statutory framework and is commonly used in construction disputes. The Arbitrator is effectively the judge and his decision can only be contested before the Courts in very limited circumstances.

Expert Determination

Expert Determination differs from Arbitration in that there is no statutory framework governing Expert Determination. The parties agree to, or the contract might provide for, the appointment of an independent expert who will give a decision within a finite period of time on the issues in dispute. Once the expert has rendered his decision, the matter is virtually at an end as there are very few grounds on which you can appeal an expert's decision to a Court. By and large, if parties opt for Expert Determination as a method of dispute resolution, they are stuck with the expert's decision.

High Court Decision on Expert Determination

On 15 July 2009, Ms Justice Laffoy delivered her decision in a case before the *High Court, Health Service Executive –v- Eamon Keogh trading as Keogh Software*.

Facts

In this case there were two interlocutory applications before the court, one brought by the Plaintiff and the other brought by the Defendant. The Defendant had a contract with the Plaintiff to support and maintain software and systems supplied by the Defendant to the Plaintiff, which were in use in approximately 180 sites around the country in connection with radiology, accident and emergency, hospital billing and environment health and parliamentary affairs.

Expert Determination Clause

There was an expert determination clause in the relevant contract between the Plaintiff and the Defendant which provided that the Independent Expert's decision would be final and binding on all parties to the agreement and would not be subject to appeal to a court in legal proceedings except in the case of manifest error.

The appointment of the expert was to be by mutual agreement between the parties or failing mutual agreement, the expert was to be appointed by the president of the Law Society.

Applying Supreme Court principles from *Via Networks* case

Judge Laffoy applied the principles recognised in the Supreme Court case of *re Via Networks (Ireland) Limited [2002] 21/R/47* which involved an arbitration clause. The Court stated in that case that when parties enter into an arbitration agreement, they are expressly waiving the right to have issues that arise between them, resolved in any forum other than the arbitral tribunal. The Supreme Court also stated that the High Court enjoyed an inherent jurisdiction to stay proceedings having regard to the existence of the arbitration clause.

Judge Laffoy held that the Plaintiff's application concerned a matter which was reserved exclusively to the determination of the independent expert. Judge Laffoy stated that in applying the principles recognised in the *Via Networks* case there was



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no reason for the parties to depart from the dispute resolution mechanism provided for in the agreement.

Distinguishing Shelbourne Hotel case

Judge Laffoy stated that Shelbourne Hotel Holdings Limited v Torriam Hotel Operating Company Limited [2008] IEHC 376, did not support the Plaintiff's contention that notwithstanding the existence of a binding dispute resolution mechanism, the Court should intervene and order interlocutory relief.

In the Shelbourne Hotel case, the plaintiff (the owner of the hotel) brought proceedings to force the defendant (the company managing and operating the hotel), to comply with the provisions of the Management Agreement which regulated their contractual relationship. The plaintiff sought permanent injunctive relief to compel the defendant to grant access to the plaintiff to the books and records and the business and the staff of the hotel in accordance with its rights under the Management Agreement.

The Management Agreement contained an arbitration clause. In the proceedings, the defendant issued a motion seeking to stay the proceedings pursuant to Section 5 of the Arbitration Act 1980 pending arbitration.

Kelly J held that there was a valid arbitration agreement which could be performed and could address the dispute between the parties, but there was no arbitration agreement which covered the interlocutory application before him. Accordingly, he stayed the action but not the motion and granted the interlocutory injunction.

The Management Agreement contained a provision to the effect that either party may seek injunctive or equitable relief (including restraining orders and preliminary injunctions) in any court of competent jurisdiction. It further provided that referral to arbitration would be without prejudice "to preliminary or interim injunctions or enjoining orders granted by such court". Kelly J concluded that interlocutory applications were not captured by the arbitration clause.

Court Rulings

The Court did not accept the plaintiff's argument that there would be undue delay in obtaining a decision from the independent expert. Judge Laffoy stated that "In all probability, bringing that process [expert determination] to conclusion is more expeditious than procuring a determination on a contested interlocutory application in this Court".

The Court dismissed the respective applications for interlocutory relief. Judge Laffoy made an order staying the issues arising, pending the completion of the dispute resolution procedure as provided for in the agreements.

Commentary

Companies should actively consider providing for a method of ADR in their agreements. Mediation and Expert Determination in particular, can be cost effective methods of resolving disputes outside of the Courts. The Irish Courts are increasingly in favour of ADR and if parties have provided for a dispute resolution process in their agreements, outside of litigation, the Irish Courts will generally enforce the ADR clause.

Joe Kelly and Siobhán Kirrane

A&L Goodbody



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Consultation Results on the Commission's Green Paper on the Brussels I Regulation

The consultation on the report and green paper on the review of Regulation 44/2001 "concerning jurisdiction and the recognition and enforcement of judgements in civil and commercial matters" concerning the interface between regulation and arbitration (Question 7 of the Green Paper) has generated an unanimous reply from the arbitration community.

The idea of deleting the exclusion of arbitration from the Regulation has been considered unnecessary and inopportune. In addition, the proposal would certainly affect the proper functioning of the New York Convention (1958), among other things, and its scope would cause, in practice, numerous difficulties.

In conclusion, the arbitration community has urged the Commission to maintain the arbitration exclusion in the Regulation.

[Read all the different contributions.](#)



Arbitration in Colombia: How does it work?

Colombia is the 26th largest nation in the world with 1,138,914 km² and it has the 29th largest population in the world (around 45 million people), being the second largest in South America, after Brazil. Also, Colombia is the third largest Spanish-speaking country in the world after Mexico and Spain.

Colombia is considered the most industrially diverse member of the five-nation Andean Community (Venezuela, Colombia, Ecuador, Peru and Bolivia). Besides, Colombia has four major industrial centers--Bogota, Medellin, Cali, and Barranquilla, each located in a distinct geographical region. Colombia's industries include textiles and clothing, particularly lingerie, leather products, processed foods and beverages, paper and paper products, chemicals and petrochemicals, cement, construction, iron and steel products, and metalworking.

Colombia is a standing middle power with one of the most important economies in Latin America. Recently, Colombia has signed and ratified Bilateral Investment Treaties (BITs) with Spain, Chile, Peru and Mexico (these agreements include arbitration under ICSID). Also, Colombia is in the negotiation or ratification process for investment treaties with USA, Canada, the European Free Trade Association (EFTA) and the European Union, among others. Having in mind the increasing role of Colombia in the international context, the purpose of this article is to have some basic understanding about arbitration in this country.



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Background

Arbitration is recognized under article 116 of the Colombian Constitution. However, the legislation is contained in a diverse set of laws and decrees. The most important rules are Decree 2279 of 1989, Law 446 of 1998, Law 270 of 1996, Law 80 of 1993, Law 963 of 2005, for national arbitration, and Law 315 of 1996 for international arbitration. Most of these norms have been compiled under [Decree 1818 of 1998](#).



Colombia signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without any reservation and it was incorporated under Law 39 of 1990. Also, Colombia signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and it was incorporated under Law 267 of 1996.

Scope

The regulation permits arbitration only of conflicts involving disposable patrimonial rights. Therefore, like in many different legal systems which have incorporated the same "formula", the interpreter is responsible for qualifying the issues subject to arbitration.

Example I: Employment Disputes

The law expressly provides the possibility for arbitration in employment disputes (Article 130 of the Labour Procedure Code). This article was considered constitutional by the Colombian Constitutional Court in a judgment of the year 2000 (C-330 of March 20, 2000). Nevertheless, it is important to signal that the Constitutional Court decided that if one of the parties (the employee) does not have the means to afford the arbitration proceedings (this could be proved through affidavit or sworn statement), he is entitled to ask for "poverty protection". In this case, the other party (the employer) has to pay for the arbitration process and the State will assign a lawyer to the party asking for legal protection. If the employer does not want to pay for the arbitral proceedings, the matter will have to be decided by a competent judge.

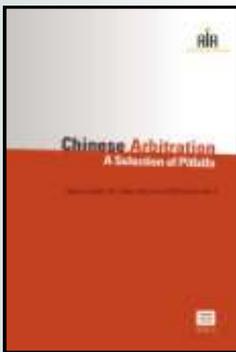
Example II: Contracts with the State

The law expressly provides the possibility for arbitration in contracts where the State (at the national, regional or local level) is one of the parties and the other party is of private nature, either national or international.

The dispute should be limited to economic issues which are normally subject to "negotiation". This is called administrative arbitration (Law of Administrative Contracts – Law 80 of 1993 articles 69 and 70). Nevertheless, the lawfulness of unilateral administrative decisions made by the State in relation with an administrative contract could only be review by the competent judges (Administrative Judges). The same about the issues related to the existence or validity of an administrative contract (contract involving the State as one of the parties).



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Distinction between National and International Arbitration

There is a clear distinction between national and international arbitration. In fact, national arbitration is governed by Colombian law either for the substantive issues or for the procedural aspects while in international arbitration the parties are free to agree on the substantive law and the procedural rules. The concept of international arbitration is based on the UNCITRAL Model Law but it is important to stress that apart from that the Model Law has not been adopted in Colombia.

Arbitration Agreement and Separability

In Colombia, there is a distinction between an arbitration clause and an agreement to arbitrate. The *arbitration clause* is a clause incorporated in the text of a contract or in a document attached to the contract, in which the parties agree to submit to arbitration the disputes that may arise in relation with that legal relationship. On the other hand, the *agreement to arbitrate* is an agreement by the parties to submit to arbitration a dispute (present and specific) which has arisen between them.

In the case of the *arbitration clause*, the agreement must be in a document. It could be in the text of the contract itself or in a separate document attached to the contract. If the arbitration clause is in a separate document than the contract itself, the attachment should express the name of the parties and mention specifically the contract to which is attached.

In the case of the *agreement to arbitrate*, it could be contained in any kind of document. In any case, the document should have at least the following information: i) name and domicile of the parties; ii) the differences and conflicts submitted to arbitration; and iii) the indication of the legal process pending, if there is one.

Arbitral Institutions

The most important arbitration institution is the [Bogota Chamber of Commerce \(BCC\)](#). Also, other important cities like Medellin and Cali have their own arbitration institutions, the Medellin Chamber of Commerce (MCC) and the Cali Chamber of Commerce (CCC). The rules of the arbitration institutions are heavily influenced by the Code of Civil Procedure.

For instance, the reasons for challenging an arbitrator are the same than those incorporated in the Civil Procedure Code for judges. Additionally, the arbitrators could be challenged if they do not fulfill the requirements set by the parties in the arbitration agreement.

The party interested in challenging an arbitrator has a time limit (5 days since the day he/she had knowledge of the "challenge") to submit it. The challenge has to be presented in writing specifying the facts and circumstances on which the challenge is based to the Secretary of the Tribunal.

If an arbitrator is challenged and there is only one arbitrator the final decision about the challenge will be made by a civil judge in the place of the tribunal. The same rule will apply if the challenge is for the majority or all the arbitrators in the process (2 or 3 of the arbitrators). If only one arbitrator is challenged and there are three arbitrators, the process is different. In this case, the "challenged arbitrator" will have 5 days to accept or reject the challenge. If he *rejects* the challenge the other arbitrators will decide about the challenge with a motivated decision.



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Arbitral Proceedings

The arbitration legislation does not give freedom to the parties to establish the rules for the arbitral proceedings. In fact, the proceedings have to be conducted according to the rules established in the Civil Procedure Code and the arbitration statute. Furthermore, the arbitration statute establishes that the Tribunal has the same rights and obligations regarding evidence than those incorporated in the Civil Procedure Code for judges.

Arbitration in Equity

The legislation accepts arbitration in equity and the parties are required to expressly agree about this kind of arbitration. The idea is that arbitration in equity allows the arbitrator to resolve the problem according to common sense and equity. In the case of arbitration in equity, arbitrators are not required to be lawyers which mean that for "arbitration in law" arbitrators are required always to be lawyers.

The final decision has to be motivated and evidence is important. The degree and emphasis could be different compare to arbitration in law, but the two elements (motivation and evidence) have to be present in the final decision. Finally, it is important to mention that the arbitration in equity is not authorized for contractual disputes involving public entities.

The rendering and enforcement of the Award

The award is decided by the majority of the arbitrators. So, if there is an arbitrator who does not agree with the decision he must submit a separate dissenting opinion but he has to sign the arbitration award. There is not an appeal procedure against the award. Thus, the only possibility for a court to set aside the award is an annulment and exceptionally the extraordinary revision action.

Any party could ask for the annulment of the arbitration award 5 days after its notification. The notification is done in the final audience where the main points and resolution of the arbitration award are read out loud. Also, the parties receive a copy of the arbitration award on the final hearing. Therefore, the notification is done that day. The petition should be presented to the chairman of the arbitration tribunal.

The reasons for asking an annulment or an extraordinary revision action are defined in the law and the nature and scope differs from those of an appeal. They refer more to issues related to procedure, evidence and public order than to the substance of the dispute. Therefore, the grounds coincide with those established in the Uncitral Model Law on International Commercial Arbitration. The annulment will be decided by the District Superior Court (Civil Chamber) or the State Council (Administrative Chamber), depending on the public or private nature of the dispute. The extraordinary revision action will be decided by the Supreme Court (Civil Chamber) or the State Council (Full Court), depending on the public or private nature of the dispute.

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Upcoming event:

1-3 November 2009: International Commercial Arbitration in Latin America organized by the International Chamber of Commerce (ICC)

The Association for International Arbitration (AIA) will participate in the 7th Annual Conference about International Commercial Arbitration in Latin America: the ICC Perspective. We want to invite our members and readers interested in Latin America to this important event.

7th annual Miami conference

For the latest issues and trends
in International Commercial Arbitration in Latin America
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**International Commercial Arbitration
in Latin America: The ICC perspective**

1-3 November 2009, Miami, Florida

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Discussion topics

- Round Table: Arbitrating under economic distress
- Report on current practices, legislation and case law
- The breach of the arbitration agreement: a mock case
- Arbitrating natural resources disputes
- Developing international arbitration in Latin America: The Mexican and Brazilian experiences
- The ICC award
- Commercial arbitration in Latin America in the "Treaty Arbitration Era"
- Ethics: Interactive session on international v. local standards in international arbitration

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