Review of the Administration of Civil Justice

a submission in support of arbitration

Note N^{o} 1.0

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1. Preface.

We hear about delays in bringing commercial dispute cases to the Circuit and High Courts. We understand some of these cases take years to get to hearing. The situation is unsatisfactory. From a tactical standpoint, it does not serve contemporaneous modes of business or users well. From a strategic perspective and especially with post Brexit looming, it reflects poorly on the systems and infrastructure that this country, as an open economy, needs to be able to apply and be seen to apply to facilitate commerce.

We say that much can be done to reduce delays and improve the disposal of disputes by using means which are already in place.

We suggest that some commercial disputes that would traditionally be queued into litigation should be actively considered for arbitration before litigation commences.

We believe that if there is a buoyant and reliable domestic arbitration system in operation, that this would provide a basis upon which to develop an important line of international arbitration activity in Ireland.

2. Background.

Over the course of the last two decades, there has been broad and consistent support voiced for ADR in Ireland by the powers that be. The courts are generally seen as positively inclined towards the choice of arbitration by parties in dispute and support it as and when challenges to it arise in court. Government has also supported ADR. A new Arbitration Act came into being based on the Model Law. The Mediation Bill and the Construction Contracts Act sought to provide statutory means by which mediation and adjudication could be applied in certain situations. There appears to be a willingness, as witnessed by the request to make submissions to the instant Review, to encourage developments to improve the administration of justice wherever necessary. Removing delays from the system is a critical element of the proper administration of justice.

There has been a growth in the number of institutions and associations who purport to educate their members and promote various systems of dispute resolution. The memberships of these organisations are not small and they typically comprise hundreds of professionals and interested persons from all quarters of society. These organisations do administer panels to undertake work as arbitrators, mediators, conciliators, independent experts, adjudicators, dispute board members etc. etc.

We sense, too, that commercial transactions between domestic Irish parties, between Irish and international parties and between international parties in Ireland must have multiplied several fold in the same period and it would surely follow that there has been an attendant increase in the number of disputes that have arisen.

We read that there is a real readiness and preference to use arbitration for the disposal of commercial disputes throughout the EU[1] and that such a system is referred to far more in Europe than in Ireland or the UK. Again, unfortunately, we do not have the figures to hand but we suggest it could be very useful and interesting to make a comparison between the number of arbitrations versus court litigation for commercial disputes that typically take place year on year in the two major common law jurisdictions in the EU versus what occurs in Germany, Scandinavia and, say, Switzerland.

In summary on the above points, we believe we can already reasonably say with some degree of confidence and based on observations today that there is a need to be able to process more commercial disputes through something, be it either the courts or ADR. There is ample legislation and means on paper in place through which commercial disputes can be queued through various forms of ADR. There are ADR associations who empanel suitably qualified individuals to undertake ADR tribunal work. So, we know there is a marketplace (a surfeit of cases), a demand (delays in the courts systems being able to address these in a timely fashion) and a means to match the demand (institutional and ad hoc panels of tribunals) but something is not right. Despite the above marketplace seemingly having all the correct attributes, the dispute resolution market does not actually function in a way that uses all the available systems of dispute resolution.

To the best of this author's knowledge, there are very, very few arbitrations[2], mediations or adjudications taking place in Ireland in recent times and yet the courts are 'chock a block'. You could be forgiven for thinking that, with all these alternative dispute resolution systems around, that the courts with their current resources should be freer to deal with whatever volumes of cases might be queued through them. But this is patently not the case. There is, seemingly, no capacity in the Irish courts to deal with the current case load of commercial disputes and arguably, there is significant capacity available in the ADR machinery to address the same demand that goes underutilised.

3. Discussion – the superficial level.

I think that it is fair to say that until relatively recently, the fact that parties experienced lengthy delays in bringing commercial disputes into the High Court counted for little insofar as parties just had to accept that that was the way it was, the parties had no influence whatsoever in reducing delays, and if it took three years to get a hearing, then so be it.

Today, a more attuned and outward looking business audience would, rightly, ask why there needs to be such delays in the use of the court system for commercial disputes. That same audience, too, should be broadly aware of alternatives to court litigation that are available, but for reasons we will go into later, the alternatives to litigation do not appear to be taken up as much as one might expect.

In previous communications over the last six months with the Office of the Supreme Court, we have asked if there has ever been a reference by an Irish Court of any commercial dispute to arbitration under the Arbitration Act 2010; Section 32 'Power of High Court and Circuit Court to adjourn proceedings to facilitate arbitration'. We don't know the answer to this question but at one remove, it would look easy to suggest that if the courts find themselves busy, that when they see what might look

[1] Various surveys undertaken between 2005 – 2016 by Queen Mary University of London, School of International Arbitration; http://www.arbitration.qmul.ac.uk/research/2018/ , the 2018 survey to start with.

[2] In 1998, the author undertook an informal national survey of the number of arbitrations (commercial disputes, compulsory property disputes, institutional schemes) that had taken place in recent previous years in Ireland. The number obtained from as wide a canvassed base of parties we could identify as having links with arbitration operations was around 20 and thereby the best educated guess for the total number happening was about 30 per annum. While there are lots of qualifications to the above survey and because much else has changed since, the anecdotal evidence is that in the last several years even fewer than this number is being undertaken today.

like a case and parties that could be amenable to being directed to arbitration, that that would be an option we should be seeing more practical application of. Indeed, in our correspondence with the Office of the Supreme Court since 2017, we pointed out that there is this established facility within the Arbitration Act to refer, at the judge's discretion, a case to arbitration.

This is a mechanism by which certain sorts (indeed, any in theory) of commercial disputes might very well be referred off the Courts list as a means by which to channel a dispute through another system and outside the Courts. We assume that this mechanism came into being to give parties an option to refer something elsewhere if the judge thought it appropriate to advise the parties that such options existed and possibly also to the extent of directing parties in that direction. However, not only do we not hear of this mechanism being used even as a means by which to make a suggestion to the parties but, and I stand corrected on this, I have never heard of it being used in any context whatsoever including where parties proceeding to pursue a case through arbitration at the behest of a judge.

We do occasionally read of judges making recommendations to parties to 'try' mediation[3] but never of arbitration.

So, while it looks like we have a perfectly appropriate if not actually a specifically designed mechanism in place by which to refer disputes to arbitration, we don't use it.

There is a mechanism by which some burden on the Court lists and delays for parties could indeed be alleviated and so, at one level, we believe the reference of some disputes to arbitration should certainly be channelled in this way.

4. Discussion – a deeper perspective.

4.1 Court initiated arbitration.

There is a mechanism by which commercial disputes can be referred to arbitration but the reality appears to be that this does not happen.

There is nothing new or novel in Section 32 of the Arbitration Act 2010. Indeed, Section 49 of the 1954 Act articulates a similar accommodation. I suspect that neither of these has ever been invoked. It's not, therefore, that no one has ever heard of the possibility of referring disputes to arbitration; it's just that it seems as if it consciously has never been done.

In the past, perhaps, the Courts list was more manageable and such terms to refer a case at the initiative of the Court to arbitration may not have been exercised on account of there having been far less busy court schedules. But interestingly, neither do we hear of any referrals in the past arising out of an opinion of a judge that such and such a dispute might have been more amenable to arbitration. Today, we know that there could be a tangible impetus to refer something off the Courts list on the grounds of alleviating a busy Courts schedule, but to the best of our knowledge this still does not happen. We also still don't hear of recommendations by judges for parties to consider arbitration on the basis that the circumstances looked like they might be more suitable for sending the dispute in that direction.

[3] To say that we are no fan of the use of mediation for commercial disputes in Ireland would be an understatement - we have seen it abused by parties who know full well there is no redress for dilatory or bad faith tactics. Quite why we in Ireland never pursued the use and development of Conciliation seems a genuine pity. Unless a full report on party behaviour and mediator recommendations can be referred to in Court later, the use of mediation in Ireland risks being a total waste of everyone's time and simply reduces to being a condition precedent step to inevitable litigation. We should all be deeply suspicious about promoting mediation as just another interim step because it does not serve parties well in its current guise.

So, there is clearly a deeper reluctance on the parts of judges and the Courts Service generally, to refer disputes to arbitration. This, in spite of a pressing need to reduce delays in the Courts system and a slew of cases and parties that really should be amenable to being addressed by arbitration.

The Courts today hold universal sway over pretty much all commercial disputes in Ireland. It may even be timely to ask if this is appropriate or in the public interest in the long term, given that resources seem to be stretched to the limit. Perhaps, it could be argued, that much of the Courts time and energy could be better spent in such areas of the law that do really require specialist legal knowledge such as in the areas of family, property and company law etc. and that the resolution of commercial disputes would be much better addressed through an altogether different but dedicated tribunal system such as arbitration. Perhaps this is an argument for another day but there may be more than a kernel of sense in fundamentally broadening if not reallocating other means by which to dispose of commercial disputes?

4.2 Legal Advisors.

As with judges and the Courts Service, we must also assume that it is common knowledge among solicitors and counsel that there is an ability to refer cases from the Courts list to arbitration either by application of the parties or at the initiative of the judge.

By the time a case is listed for hearing in the Courts, it is presumed that the legal advisors have proceeded to that stage in the full knowledge that arbitration was available and that steps to litigation have been deliberately chosen ahead of pursuing arbitration.

So, even in the event of a Court making a suggestion or providing a direction to the parties to explore or undertake arbitration, this reference by the Court will only take place in a situation where the legal advisors have already, presumably, considered the option and rejected it. This, in and of itself, is not regarded by many as a problem on the basis that the default is always to process a dispute by litigation and the existence of alternative options, such as arbitration, is simply dismissed as a non-runner. This almost certainly reflects the reality of the Irish dispute resolution market quite well because we do not hear of preamble discussions in the Courts about referring cases to arbitration or of cases being queued through ad-hoc arbitrations[4].

If the legal representatives (and the judges, who used to act as party legal representatives) do not raise the possibility of using arbitration, then what else should we expect other than to see all commercial disputes queued into litigation[5]?

Clearly, need to ask ourselves why there is such reluctance by legal advisors to use arbitration. To answer that might take some unravelling and varying the status quo will involve a step change in culture of the Irish legal practitioner world but if an appreciable number of commercial dispute cases are to be successfully channelled into arbitration, some fundamental rethinking about a willingness to recommend and use arbitration will have to happen.

In addition, even when arbitration does occur, there is also a strong temptation in Ireland to confuse litigation and arbitration such that the latter is merely regarded as a private form of litigation where

[4] Whatever about being able to get a picture of how many cases get referred to arbitration by the Courts, we can never realistically get a good understanding of how many cases get directed to ad hoc arbitration because of the privacy aspects of this process.....however, our instinct is that the number of ad hoc arbitrations in Ireland is very low and if it does happen, we venture to say it is probably far more likely to be party driven rather than at the suggestion of the legal representatives.

[5] We go into this a great deal more in Section 9 of the download available at http://www.rbtr8.ie/wp-content/uploads/Arbitration-a-modern-perspective-for-business-November-22nd-16.pdf .

the tribunal is a senior lawyer or retired judge, the party representatives are from the legal profession and the process which takes place is in all its form and procedure identical to what happens in Court[6]. This of itself is not fatal if it works (eventually) for the parties but it inevitably gives rise to a terrible misapprehension about what arbitration could do for parties and makes that process indistinguishable from litigation.

It could be an overly sweeping statement to say that the legal professions are not educated in arbitration theory and practice but it is hard to avoid thinking that there is more than a grain of truth in this. Very, very little of any undergraduate degree course in Ireland addresses ADR and even then, it is usually as a 'one off' elective and within which arbitration barely gets a mention. This means that there is a cadre of people always coming into the legal practice market not even with the basics of arbitration and that, in combination with an inculcation in litigation and court ways, rote and procedure, means there is not even the scantest prompt for that community to look at arbitration as a distinct, utterly different process and serious alternative to litigation. This problem, alas, ails the arbitration system globally and not just in Ireland. Some heroic efforts at the margins have gone into providing education about arbitration at post graduate level in Ireland[7] and elsewhere but formal education of this sort should, at a minimum, be required for all legal practitioners on the basis that that profession does hold itself out as the predominant service providers in the field. It is somewhat of an irony that other professions seeking to have involvement in arbitration are at pains to obtain specific qualifications in arbitration.

If there is to be a serious and viable arbitration environment in Ireland, the legal professions will need to be better educated as to what arbitration is.

The challenge is to educate and inform the legal professions of the basic advantages of arbitration so that they may inform clients accurately as to their options and to ensure, among other things, that what takes place as arbitration is arbitration.

4.3 Perception of arbitration in the business community.

It speaks of the culture now deeply embedded across much of commerce, especially in Ireland and the UK, that the administration of disputes between parties is automatically farmed out to legal representatives and since the legal representatives do not promote arbitration, there is little or no awareness of arbitration as an alternative to litigation among parties.

If the legal representatives do tell parties about arbitration, it will be to recount to them that in their experience, arbitration is as long and as costly as litigation. Given 4.2 above, this is hardly surprising and, perversely, is probably a perfectly accurate account of much of what passes for arbitration in many quarters today.

The picture as may be more readily available to lay parties is not improved by a steady increase in the reporting of problems associated with the prohibitive costs and delays associated with the issuance of awards in arbitration at international levels and particularly so when undertaken under the auspices of such august administered arbitration bodies as the ICC. This all poses a tremendous challenge to the

[6] The author was told of a recent construction 'arbitration' involving a quantum of just less than € 10 m where the two substantial teams of legal representatives were seeking to book a hearing time of 6 (six) weeks of 6 - 8 hours every business day in order to read into the record and hear expert witness testimony, among other things. The tribunal (a senior lawyer) eventually acquiesced to 3 weeks. It could be suggested that some arbitration experts could not countenance or even justify 3 days for such a case.

[7] Brian Hutchinson's Diploma in Arbitration course given at the UCD Sutherland School of Law is a superbly prepared and delivered programme given by people who are passionate about the power and potential of arbitration.

perception of arbitration generally among the business community, limited as it already is, and even though some of the bad press is probably of that institution's own making insofar as it now oversees a legal centric and loaded process, the service product now on offer from quarters such as ICC arguably departs substantially from what arbitration should be about.

Parties, typically, are probably inclined to rely on their legal representatives in the first instance and few, sadly, will be aware of the existence of arbitration much less have any appreciation of the power of the system to provide finality and resolve disputes with despatch.

The business community needs to be told about arbitration as arbitration should be done.

The challenge is to promote the existence of arbitration and all the pros and cons of the system so that parties can make informed decisions about what dispute resolution method might suit their circumstances best.

Of course, arbitration need not use lawyers at all and there is a growing appreciation in commerce that the management of disputes 'in house' is and should be no different than dealing with every other operational aspect and challenge to a party's business activities and could be done perfectly well, if not better, through an appropriately guided, administered arbitration service.

4.4 Professional institutions.

In Ireland, there are bodies that represent arbitrators[8] either as a distinct activity (CIArb, Irish Branch; Arbitration Ireland) or have sub committees or other groupings that address arbitration as an activity among their member base in some way (to include Engineers Ireland, SCSI, RIAI, CIF, Law Society, Bar Council, Chambers of Commerce Ireland etc.).

Some of the above empanel arbitrators and have formal or informal processes by which such panels are populated and vetted; some exist for some degree of promotional purposes only, one or two have formulated sets of rules and procedures for arbitration and can act as nominating bodies. Some of this work is certainly laudable, all or most of it voluntary and given in good faith, but most of it is to very little practical end. Nearly all of these organisations have panels of some tens of arbitrators[9] yet if any of them nominate more than a handful of arbitrators every year, that would be as much as they could do in relation to practical arbitration activity. More attention, it would sometimes seem, is paid to arranging golf outings and dinners. In truth, many of these same organisations have strayed far from the path for why they were set up in the first place and empanelling people to effectively do nothing seems pointless.

More importantly, none of them (with the possible exception of Arbitration Ireland and CIArb) actively promote arbitration as an effective dispute resolution system into where it matters - the business community. Indeed, what promotion does occur is solidly aimed at a practitioner (and predominantly legal professional) audience and as best as anyone would tell, this will not have the slightest beneficial effect of informing the target business community about the existence or potential of arbitration as an alternative to litigation. Some do indeed organise quality events that are important for CDP, information dissemination and networking which is all very well but it is fair to say that the

[8] We focus on arbitration in this paper. The same and other bodies may also welcome other ADR practitioners, empanel them and play some limited role in initiating an ADR process.
[9] And memberships into the 100's.

amount of promotion of arbitration as a powerful service product into a relevant audience is close to nil[10].

Not only that, while it is patently clear that no amount of people on panels will increase arbitration activity one whit, so it also would seem that the one place which could today refer work to such panels also chooses not to. Judges and the Courts Service will be aware of the existence of arbitration panels and should also know that these are not overburdened with work; yet, there is obviously some deep reluctance in these quarters to the idea of referring some commercial disputes in this direction.

We have already raised the possibility that this reservation could be grounded in other reasons but we should also ask if there is something glaringly inadequate in the nature of the various arbitration panels or other sources of arbitrators that render the potential reference to them of arbitrations from the Courts list as any way problematic. If it is perceived that the quality of the people on the panels is not good or that the proposed arbitrators do not suit the circumstances of some disputes, then it follows that there will be a reluctance to even countenance any such process using the people listed on the professional panels; and rightly so. If there is not a root and branch review of the panel system and panellists, we should not even contemplate seeking to develop arbitration as a widely used and attractive alternative to litigation.

The perception of the utility and effectiveness of all existing arbitration panels in Ireland is a critical matter and unless a very high degree of quality and professional selection methods can be confidently articulated by the bodies that operate such panels, then there can be no prospect of ever creating a genuinely useful arbitration environment here.

None of the traditional arbitration bodies administer arbitration[11]. If there is to be any appreciable arbitration activity in Ireland, this supporting aspect will need to be in place. None of the traditional bodies associated with arbitration in Ireland today could, by their nature or structure, offer this sort of support. None are believed to be inclined to or would want to get involved with administering arbitrations.

5. Conclusions.

There are two ways to look at addressing the issue of delays in disposing of commercial disputes in the Courts.

The first is to suggest that there is a mechanism by which a number of commercial disputes could, today, be directed to arbitration. There are almost certainly available arbitrators[12] across the island of Ireland to undertake this work.

The second, which follows directly from the first, is that if there is a healthy and genuinely active arbitration environment established in Ireland that efficiently serves the needs of commerce, then there is the opportunity to develop that activity farther afield. This is, we suggest, an important public interest matter most especially for the post Brexit world. We provide many sorts of specialist professional services around the world and there is no reason whatsoever why we could not be

[10] With the exception of https://www.arbitrationireland.com/ which goes some way to providing a good summary and reasoning behind why Ireland should be regarded as a base for international arbitration; but whether this gets a regular and substantial number of hits from pure business is another question.

[11] The author's company, CVS Doyle Agencies, offers various forms of administered, turnkey arbitration and allied services. This is the only entity in Ireland offering this to the business community.

[12] CVS Doyle Agencies are open for business and are available to undertake arbitration assignments and to provide full arbitration services wherever they are needed.

successful at marketing Ireland as a centre for arbitration as arbitration should be done. Making Ireland a centre for such services would not be easy but it is a perfectly feasible goal.

The arbitral organisations have been notably unsuccessful at encouraging arbitration where it matters and so it will take, in the initial guise of addressing Court capacity issues, an initiative by the Courts to kick start some tangible activity by proactively referring some disputes in the direction of arbitration. This, however, should not be lightly done, as the Government and the Courts should satisfy themselves from the outset that what the Courts direct parties at as an alternative to litigation really is arbitration and not some extracurricular and private litigation.

If momentum can be generated in this way to establish a base level of domestic and genuine arbitration, then steps can be taken as indicated to develop this for the needs of the global world of commerce.

6. Recommendations.

(i) Articulate the situation today. Commission CVS Doyle Agencies to undertake a study of how many commercial dispute cases were directed through the Circuit and High Courts in 2017 and how many commercial arbitrations were undertaken in the same period[13].

(ii) Undertake a pilot programme. Design and develop an initial, pilot programme of commercial arbitrations to be referred from the Courts. Commission CVS Doyle Agencies to submit a proposal[14] to outline how three commercial arbitrations as may be initiated by reference from the Courts in Q3, 2018 would be disposed of.

We wish the group charged with the Review of the Administration of Civil Justice well in their deliberations and we thank those for providing this opportunity to offer our view.

End this note.

[13] In a previous survey in the late 1990's, we arrived at a good approximation of the numbers of commercial arbitrations by canvassing (on a confidential basis) all the usual and likely sources to include those who we know to be active in arbitration, the current nominating bodies, as well as the main legal firms that would generally be associated with providing party advisory services for arbitration.

[14] Browse the Index section of the download http://www.rbtr8.ie/wp-content/uploads/Arbitration-a-modern-perspective-for-business-November-22nd-16.pdf for how an administered arbitration would work in Ireland.