Is Domestic Arbitration fit for Purpose?

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Introduction

The opening line of a paper I gave at this conference in 2013 suggested that arbitration had been "for many years, the preferred means of dispute resolution for construction disputes".

In international arbitration, the statement holds. Arbitration is the default mechanism for resolution of international commercial disputes, many of which are construction related disputes. As regards domestic arbitration, however, this audience will know that construction disputes are less frequently referred to arbitration than they were in the past. Almost a decade since the enactment of the Arbitration Act 2010, there is cause to assess the health of the current environment for domestic arbitration in Ireland. This review is against the backdrop of committed efforts by Arbitration Ireland and others to promote Ireland as a seat for international arbitration.

The difficulty in addressing this question is that the information relevant is not generally public information. There are some established channels through which arbitration is taking place, which are examined hereunder, and efforts have been made to canvass the opinion of relevant organisations and practitioners. A particular difficulty attaches to assessing arbitrations outside those established channels.

Accepting the relatively sparse nature of data available, what follows is an attempt to set out what we know of the arbitration environment domestically, and to chart the main channels of arbitration drawing on available data and making reasoned inferences therefrom.

In posing the question whether domestic arbitration is fit for purpose, this paper addresses the following topics:

I. Why parties in Ireland choose arbitration
II. What are the main channels for domestic arbitration in Ireland?
III. Possible reasons for the decline in volume of domestic arbitrations
IV. What can we learn from institutional arbitration?

I. Why parties in Ireland choose arbitration

Some of the factors motivating parties to arbitrate international disputes do not arise in the domestic context – for example, a reluctance to submit to the courts of the jurisdiction of an opponent or the need to identify a neutral forum.

There are nonetheless many other reasons why parties in Ireland may choose arbitration as a means of resolving their disputes. The ability of the parties to appoint arbitrators who have particular expertise in the subject matter of the dispute is obviously a particular advantage. Construction disputes have a reputation for being technical and long drawn out, to the extent that deference has been shown to expert arbitrators (under the old legislative regime) by the Supreme Court in *Galway County Council v. Samuel Kingston*, per O'Donnell J:-

> *"There are many areas where specialist arbitrators enjoy considerable advantages over reviewing courts and it is correct that courts should acknowledge this and approach the determination of such arbitrators with something which can, I think, properly be called deference. That normally occurs however where proceedings necessarily touch on an area within the arbitrator's specialist expertise, and not where, as here, issues of law are involved."*[1]

Foremost among the considerations usually cited for choosing arbitration are confidentiality, flexibility, and the final and binding nature of the arbitral award.

[1] *Galway County Council v Samuel Kingston Construction Limited* [2010] 3 I.R 95, at para 30

Confidentiality

One of the major advantages of arbitration is that it is usually (but not always) a private process which the parties themselves and the arbitrator are obliged to keep confidential. The parties may be attracted by an expectation that the commercially-sensitive issues which – necessarily – arise in the course of dispute resolution will not be aired in public, as would be the default position in litigation in open Court. Of course, the fact that an arbitration is held in private does not actually guarantee secrecy. The existence and subject matter of the arbitration may be disclosed in a number of situations. An obvious example is an arbitration related court application.

Flexibility

Article 19 of the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') states that the parties are free to agree on the procedure to be followed in the arbitration and that failing such agreement the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. In principle, the arbitrator is readily available to the parties and accordingly preliminary issues and the hearing itself can be arranged without unnecessary delay and subject to a process tailored to the particular dispute in question. Parties have an opportunity to make submissions on procedural issues, notably at a preliminary conference.

Final and Binding

Another major attraction for parties is the fact that an arbitrator's award is final and binding. There is no appeal against an arbitrator's award, which brings certainty to the commercial interests at play. In certain circumstances, a party may apply to set aside an arbitrator's award. However, if that that application is refused by the High Court, there is no appeal against that decision.

A good example of the approach of the Irish courts to arbitral awards can be seen in the recent decision of *Ryan v O'Leary*[2] which addressed an application to set aside an award brought under Articles 34 of the Model Law. Mr. Justice Barniville, the current designated arbitration judge, [at paragraph 34], noted the policy of the 2010 Act and the Model Law to uphold the finality of awards, and concluded that the grounds to set aside an award must be construed narrowly, and that the jurisdiction under Article 34 should be exercised in a sparing manner.

II. What are the main channels for domestic arbitration in Ireland?

The authors have had informal contact with various organisations for the purposes of ascertaining the current levels of uptake of domestic arbitration in various sectors. In that regard, account should be taken of a number of widely used standard contracts which provide for the referral of disputes to arbitration and a number of schemes which provide supports and services in the resolution of such disputes.

Although arbitration can be appropriate for the resolution of almost any commercial dispute, it is particularly well-established in certain sectors and among certain organisations. There are certain well-known standard form contracts which contain arbitration clauses and which usually provide for appointment of the arbitrator by a particular person or body in default of agreement of the parties. Bodies such as the Royal Institute of Architects in Ireland (RIAI), Engineers Ireland, the Chartered Institute of Arbitrators – Irish Branch (CIArb) and the Law Society offer arbitration services and maintain panels of arbitrators. There are also specific domestic arbitration schemes across a range of sectors including the motor industry, the travel industry, sport and compulsory acquisition of land for transport purposes.

Quite apart from the standard contracts and arbitration clauses, arbitration is very regularly used in insurance contracts to cover indemnity disputes. There is also a variety of other commercial contracts which may include one-off arbitration clauses.

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[2] *Patrick Ryan and Ann Ryan v. Kevin O'Leary (Clonmel) Ltd and General Motors* [2018] IEHC 660, High Court, Barniville J, 23 November 2018

The number of arbitral appointments made by professional bodies is of course only part of the picture. Those bodies are typically only called upon to make an appointment in default of the parties agreeing the arbitrator. One can only hazard a guess at the volume of arbitrations where the parties reach such agreement. It also has to be remembered that many arbitrations will settle, some shortly after the appointment of the arbitrator and others at various stages of the arbitral proceedings.

What follows is my no means comprehensive but is a relatively broad overview.

The Law Society

The Law Society maintains a panel of arbitrators and offers an appointment service. It offers precedent arbitration clauses for use by its members – in two different forms, one for use when the Law Society's Arbitration Rules[3] are being adopted and the other for use when they are not. There is also a standard arbitration clause in the Law Society Conditions of Sale.[4] Law Society arbitration clauses are used in a variety of contracts including in leases and partnership agreements. Enquiries indicate that there has been a significant falling off in the number of arbitral appointments in recent years. From a level of approximately 100 appointments per annum in the period 2000-2009, within the past five years the number of appointments is approximately 25 per year.

The Royal Institute of Architects in Ireland ('RIAI')

The RIAI forms have traditionally been the best-known standard form contracts in the construction sector. The 2017 RIAI Construction Contracts (Yellow Form[5] and Blue Form[6]) incorporate Condition 38, which provides for conciliation as a first option in case of dispute, and at Condition 38B provides that any dispute can be referred to arbitration. Adjudication is also explicitly provided for, being a statutory right under

[3] Issued in March 2016
[4] Clause 47 of the 2019 Edition.
[5] Yellow form" where quantities form part of the contract
[6] "Blue form" where quantities do not form part of the contract

Section 6 of the Construction Contracts Act 2013 and applying to all construction contracts entered into after 25 July 2016.

In terms of volume, it appears that in 2016 there were 28 arbitrators appointed by the President of the RIAI under the four RIAI forms of construction contract. It is believed that in perhaps 50-60% of cases the parties will choose their own arbitrator thereby obviating the need for an appointment by the President. If that figure is correct one might estimate that approximately 60 arbitrations involving RIAI contracts were commenced that year.

In terms of value, the vast majority of disputes appear to be under €1 million, reflective of the overall values of the contracts involved. Only on an occasional basis is a dispute of over €10 million referred. Sources suggest that approximately 60% are employer-main contractor disputes; approximately 30% are subcontractor-main contractor disputes; and the remainder comprises professional indemnity cases where there is an arbitration clause in the client-consultant agreement, and other miscellaneous disputes.

GCCC Public Works Contracts

The Government Contracts Committee for Construction (GCCC) Public Works contracts, provide that disputes not resolved by conciliation shall be finally settled by arbitration under the Capital Works Management Framework (CWMF) Arbitration Rules for use with Public Works and Construction Services Contracts (AR1).[7] These detailed arbitration rules were updated in 2014 with a view to minimising delay and expense. They include strict procedural timelines, scaled-back cost provisions, a fast-track 100-day arbitration procedure, a case management procedure, strict timelines for the formation of an arbitral panel once a notice of arbitration is served, and the requirement for notice to be given by the arbitral panel to the Department of Public Expenditure and Reform once it is appointed. The rules provide for a three-member arbitral panel in disputes where the overall sum at issue is in excess of €10

[7] See https://constructionprocurement.gov.ie/wp-content/uploads/Arbitration_Rules.doc

million. Nothwithstanding, this detailed arbitration machinery it appears that there have been very few arbitrations under these rules.

Engineers Ireland

While Engineers Ireland does not currently offer its own standard contract, it has in place detailed arbitration rules, adopted by their Dispute Resolution Board as *Arbitration Procedures 2011*.[8] In addition it offers expedited procedures, the Engineers Ireland *100 Day Procedure 2011*[9] in a modified version of its principal arbitration procedures in order to expedite the disposal of an arbitration. It is understood however that notwithstanding the existence of these sophisticated procedures, there have been few arbitral appointments by Engineers Ireland in recent years.

Chartered Institute of Arbitrators – Irish Branch (CIArb)

The Chartered Institute of Arbitrators – Irish Branch ('CIArb') is best known for its arbitration and other dispute resolution training. It also acts as an appointing body and has also administered a number of arbitration schemes, in particular a scheme for the Society of the Irish Motor Industry ('SIMI'); a scheme for disputes between the National Roads Authority and members of the Irish Farmers Association in relation to the assessment of compensation; and a scheme for disputes between travel agents and consumers.

It is understood from enquiries that the number of appointments made by the CIArb both generally and other these schemes has declined significantly over the last ten years. From a "a high-water mark" of up to 50 referrals, the number of appointments by the CIArb- Irish Branch is currently running at approximately 10 per annum.

[8] https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/employment-services/Arbitration-Procedure-2011.pdf
[9] https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/employment-services/100-Day-Arbitration-Procedure.pdf

Society of Chartered Surveyors

The Society of Chartered Surveyors Ireland (SCSI) also acts as an appointing body for arbitrators and has a particular focus on rent review/property disputes. In 2018 there were 76 applications to the SCSI for appointment of an arbitrator.[10] The previous year (2017) there were 63 such applications.[11] The volume of these arbitration appointments is clearly related to the health of the commercial property market. It appears the office and warehousing and industrial sectors of that market are currently strong.

Construction Industry Federation

The standard Sub-contracts published by the Construction Industry Federation[12] (CIF) contains provision to refer disputes to arbitration. Requests to the CIF for appointment of an arbitrator are relatively infrequent.

Sport

Sport represents a category of arbitration unto itself, particularly in light of Section 31(2) of the Arbitration Act 2010, which deprives amateur sportspersons of the rights enjoyed by consumers not to be bound by an arbitration agreement and to litigate small consumer claims as follows:-

> *"a reference in this section to a consumer shall not include an amateur sportsperson who, in his or her capacity as such, is a party to an arbitration agreement that contains a term concerning the requirement to submit to arbitration."*

In that context, according to Sport Dispute Solutions Ireland ("SDSI"),[13] formerly Just Sport Ireland, upwards of 64 National Governing Bodies for sport have made

[10] A further 14 applications were for the appointment of an Expert.
[11] A further 9 were for the appointment of and Expert.
[12] See, for example, https://cif.ie/images/pdfs/CIFNN.pdf
[13] See http://sportdisputesolutions.ie/

provision for the referral of disputes to SDSI in the governing documents of their sporting organisations, an objective which is set out in the current Programme for Government. SDSI is a not for profit dispute resolution service for Irish Sport offering mediation and arbitration and maintains a panel of qualified professionals. In the period 2008 to 2017 there were 31 arbitrations commenced under the SDSI/JSI Rules.

In 2005, the Gaelic Athletic Association (GAA) adopted an Arbitration Rule and a Disputes Resolution Code. It also established a Disputes Resolution Authority (DRA) to implement the Code, independent of the GAA. The DRA maintains a panel of Arbitrators (Solicitors, Barristers, Arbitrators and other qualified persons) from which it establishes Arbitration Tribunals to deal with disputes referred to it and publishes all its decisions and awards.[14] As can be seen from the DRA's website there is a reasonably large bank of decisions that have been given since the establishment of the DRA. In some years the number of published decisions runs into double figures.

III. Possible reasons for the decline in volume of domestic arbitrations

On the basis of the above description of existing channels for domestic arbitration, and bearing in mind the limitations of the exercise, there is some evidence that the volume of cases has fallen over the last number of years. Anecdotal evidence also suggests that parties in construction-related disputes are less inclined to consider arbitration as an option.

The reported shrinking of the domestic arbitration market in recent years is a phenomenon which is not unique to Ireland. Following the introduction of the Arbitration Act 1996 in the UK, for example, a generalised decline was observed in the use of arbitration by reference to CIArb (English branch), the Royal Institute of British Architects (RIBA), the Institution of Civil Engineers (ICE), and the Royal Institute of Chartered Surveyors (RICS), such decline having "bottomed out"

[14] See www.sportsdra.ie/statements-decisions/

according to the local CIArb data.[15] A more recent study specific to construction arbitration in England and Wales suggested a continued decline in construction arbitration, but noted that the rate of that decline had slowed.[16]

In Ireland, several reasons are cited for the observed decline in the size of the market.

Cost and Duration

There is certainly a perception that arbitration is too expensive. It really depends what type of arbitration is involved. There are, as mentioned earlier, a number of schemes where arbitration costs are capped. In some cases, such as the DRA scheme of the GAA, the arbitrator is not paid any fee at all. Clearly a cost criticism cannot be levelled at all types of arbitration. However, it is certainly the case that in a fully contested commercial arbitration the cost can be substantial. With the increased availability of other forms of alternative dispute resolution, parties have increasingly had recourse to mediation, conciliation, and adjudication which involve shorter, less formal procedures, less preparation for parties and legal representatives and less costs overall. By comparison with these modern, less formal means of dispute resolution, arbitration can appear clumsy and cumbersome.

There cannot be any real complaint if mediation, conciliation or adjudication have reduced the volume of arbitration. Speedier outcomes and reduced costs are good for the parties. However, mediation and conciliation do not always produce a resolution. There needs to be a credible backstop available if these other forms of dispute resolution are unsuccessful.

At times domestic arbitration hearings can be excessively long, even where the amounts at issue may be relatively modest. In some cases, arbitrators are too passive. An arbitrator is entitled to ensure that the procedure adopted at the

[15] See, e.g. Reynolds, M. (2014) *An overview of the use of arbitration in England*, Centre for Socio-Legal Studies, University of Oxford

[16] Fisher, W.H. (2017), *The use of arbitration in the construction industry in England and Wales: an evaluation of its continuing role following the Arbitration Act 1996*, University of Wolverhampton

arbitration is proportionate to the nature and value of the dispute. That means an arbitrator can in most situations insist that there is a timetable for the hearing and that the examination of witnesses and legal submissions are concluded within that timetable. Arbitrators can and should sit for longer hours than the courts. It is not necessary to slavishly follow court procedures. Arbitration procedures can be more flexible, whilst remaining fair and impartial.

Confidence in the quality of Arbitrators

It is possible that the decline in arbitral awards reflects a lack of confidence in the quality of arbitral appointments. War stories relating to bad experiences before arbitrators can very quickly gain circulation even though that may obscure the fact that many other arbitrations are working satisfactorily. It is clearly incumbent upon those bodies that make appointments to try and ensure that high standards are at all times maintained. It may also be the case that not enough is done to promote the good experiences that parties have of arbitration.

Part of the problem, of course, may be that there is considerable inconsistency between the style of different arbitrators, and no real guarantee of what the users might expect. It is of importance at this point to recognise that almost all domestic arbitration is ad hoc. That is to say, it is not administered by any arbitral institution. In most cases it will not be governed by any arbitral rules of procedure save those under the Arbitration Act. That means a lot depends on the individual arbitrator. It also means there can be a very considerable differences in the way the arbitration is conducted.

Some arbitrators may be very proactive, call early procedural meetings, impose a timetable and apply pressures to ensure an early hearing date and the prompt delivery of an award. Other arbitrators may have a more relaxed attitude and, to some extent, allow the parties to dictate the pace of the arbitration, including the length of the hearing.

It is not satisfactory for the users of arbitration to be faced with such uncertainty as to how an arbitration will proceed. There should be clear norms in place, including

early procedural hearings, if necessary, by telephone. There should be procedural directions issued appropriate to the nature of the case, and every effort made to bring the matter to a conclusion in a reasonably early timeframe.

Of course, procedures may vary, depending on the type of dispute. The procedures should always be proportionate to the nature of the dispute and the amount at issue.

Appointing authorities should be giving guidance to arbitrators as to how it is expected that an arbitration will be conducted and the overall timeframe for the arbitration, including the amount of time from the closing of the proceedings to the issuing of an award. As I have mentioned already, a number of the institutions (for example, the Law Society, Engineers Ireland) have already introduced arbitration rules. It is open to question, however, how often such rules are actually used. The multiplicity of different rules may in itself be a concern in that no one definitive norm has had the opportunity to become established.

As to how arbitrators can gain the requisite experience in a market in which the volume of domestic arbitrations has declined, as noted above, something of a “Catch 22” situation emerges. With lower numbers of arbitrations proceeding, it follows that there is a lack of opportunity to develop as an arbitrator. Opportunities for learning and development are available in the context of membership of CIArb and participation in training courses offered by the Institute, and in various academic institutions: UCD, Trinity and others. However, those who undertake that training or obtain qualifications frequently find that it is no guarantee of subsequent arbitral appointment.

Preference for Litigation

If there are doubts about the standards of domestic arbitrators, parties may see litigation as preferable to arbitration. Of course, the critical time for making the decision between arbitration and litigation is at the time of the making of the contract. Whilst there may be some anecdotal evidence that parties have been less likely to include arbitration clauses in their domestic contracts, it is hard to gauge whether this is a general trend. The establishment of the Commercial Court in 2004 with its

fast track procedures, and some general improvements in the efficiency of procedures in the Courts generally, have perhaps made litigation more attractive than previously for some parties. Ultimately, however, arbitration and litigation are different creatures, each with their own advantages and disadvantages. Arbitration for instance offers a potential for finality which litigation with the possibility of two layers of appeals cannot offer.

Once there is an arbitration clause in a contract, the parties are bound by that clause. If a party seeks to ignore that clause, there is very likely to be an Article 8 application by the defendant for the matter to be referred to arbitration. As we know, the Irish courts have consistently upheld arbitration agreements unless the agreement is found to be null and void, inoperative or incapable of being performed. As Barniville J's decision in the recent case of *Townmore Construction*[17] makes clear, an arbitration clause should be construed broadly, and a court must start from the presumption that the parties intended all of the disputes arising between them in the course of their relationship to be covered by the arbitration agreement. If the parties intended to refer certain disputes to court proceedings, it is necessary for the parties to do so by providing for this clearly in the contract.

A party may, however, be estopped from relying on an arbitration clause if: i) it made an unequivocal promise or representation that it would not rely on the arbitration clause; and ii) the party seeking to oppose the reference to arbitration has acted on the basis of the representation.

The 2010 Act

Some suggest that the entry into force of the Arbitration Act 2010, and the subsequent lack of recourse to case stated procedure, has played a hand in a diminution of domestic arbitration. The basis for this argument is somewhat unconvincing. The case stated procedure was very rarely of any real assistance, but instead provided considerable potential for a party to frustrate and delay its opponent from obtaining the relief to which it was entitled. It might be said that it was merely 'a

[17] *K&J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* [2018] IEHC 770

comfort blanket' to parties and arbitrators, but one which was in reality of very little benefit.

The 2010 Act provides a modern legal framework for domestic arbitration. It underscores the autonomy of the parties in choosing arbitration. It provides for a designated arbitration judge and provides that the determination of the High Court on key arbitration applications are final. The Model Law, which is given the force of law for both domestic and international arbitrations in the 2010 Act also provides clear and practical standards for the conduct of an arbitration. It is hard to see therefore how the 2010 Act can be blamed for any decline in the volume of domestic arbitration.

Following the 2010 Act, it is certainly more important than ever to ensure the quality of arbitral appointments. Parties who decide to go to arbitration are putting their faith in the arbitrator, as opposed to in any Court proceedings which they might attempt to initiate subsequently. In *Ryan v O'Leary*,[18] Barniville J set out the approach of the Irish Courts in applications for set aside of awards under Article 34 of the Model Law:-

> *Two important principles which can be derived from the Irish cases are as follows. First, the cases stress the importance of the finality of arbitration awards. Second, they make clear that an application to set aside an award is not an appeal from the decision of the arbitrator and does not afford the court the opportunity of second-guessing the arbitrator's decision on the merits, whether on the facts or on the law.*

IV. What can we learn from institutional arbitration?

As mentioned, one of the features of domestic arbitration is that it is *'ad hoc'*, in other words, it is not administered by any arbitral institution. In contrast, institutional arbitration is the norm in international arbitration.

[18] *Patrick Ryan and Ann Ryan v. Kevin O'Leary (Clonmel) Ltd and General Motors* [2018] IEHC 660 at para 30-31

While there may be a decline in the size of the market in Ireland – and in the UK – over the past decade, the same is not true of the international arbitration sector. In stark contrast to the domestic situation, international arbitration appears to be holding its ground.

The International Chamber of Commerce, arguably the front-runner in any discussion of institutional arbitration, reports 810 new cases filed in 2017 a 7% decrease from 966 cases in 2016.[19] While the ICC attributes this decline to a one-off phenomenon – 135 cases in 2016 relating to a set of very small claims in a collective dispute – some commentary has cast doubt on assumptions of continuing growth of arbitration and about the ascendancy of institutional arbitration.[20]

On either analysis, it is the case that ICC offers a quality dispute resolution service, backed by the ICC's experience and expertise as a trusted institution, which operates a recognised and respected process according to an accepted set of arbitration rules.[21]

There are some clear advantages to institutional arbitration. In the first place, the rules of institutions, such as the ICC, are very well tried and tested. The rules are quite prescriptive and make it clear what is expected of an arbitral tribunal and of the parties. Arbitral institutions, such as the ICC, are substantial bodies with large secretariats which have considerable experience in administering arbitrations and a corporate memory going back over many years to deal with a multitude of issues which may arise. That expertise within the secretariat of an institution can be extremely helpful to the arbitral tribunal in dealing with procedural issues that may arise in the arbitration. Arbitral institutions, such as the ICC, also have considerable expertise in the selection of arbitrators. They may well consider the track record of a given arbitrator for efficiency in previous arbitrations. Of course, the nationality of the arbitrator may be important. The ICC insists that a sole arbitrator and the president

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[19] *2017 ICC Dispute Resolution Statistics*, ICC Dispute Resolution Bulletin 2018 Issue 2, p.4
[20] See, for example, Clanchy, J. *Arbitration statistics: a reality check*, 26 July 2018: https://blogs.lexisnexis.co.uk/content/dispute-resolution/arbitration-statistics-a-reality-check
[21] *ICC Rules of Arbitration*, March 2017

of an arbitral tribunal must always be of the same nationality as that of the parties. It has the advantage, of course, of national committees in many different jurisdictions which can nominate a suitable candidate.

Arbitral institutions are very conscious of maintaining their reputation and therefore issues of speed and cost, and quality of decision-making, are priorities and are of reputational significance to the institution. The ICC is particularly focused on ensuring that an arbitration will be conducted expeditiously. It sets out time limits for delivery of a final award. Typically, a sole arbitrator is expected to submit a draft award within two months and a three-member arbitral tribunal within three months after the last substantive hearing on matters to be decided in the award or the filing of the last written submissions.[22] Delays on the part of arbitrators will typically result in a reduction in the amount of the fees payable to the arbitral tribunal. In the case of expedited procedural provisions, an arbitral tribunal must render the final award within six months from the case management conference which happens at the outset of a case.

One particular characteristic of ICC arbitrations is the scrutiny of awards. All draft awards must be submitted to the ICC secretariat for approval by the ICC Court. This vetting process does not interfere with the independence of the arbitral tribunal but maximises the legal effectiveness of the award by identifying defects and errors and helping to ensure that the awards are of a consistently high quality.

That scrutiny process is unique to the ICC. That is not to say that other institutions do not sometimes engage in a more informal vetting of awards to ensure that any errors are identified before the award is published.

While full-scale institutional arbitration may not be feasible for small and medium size disputes, the ICC Expedited Procedure Rules offer a streamlined arbitration with reduced scales of fees under the aegis of the ICC. This procedure is applicable in cases where the amount in dispute does not exceed US$2 million— unless the

[22] See ICC note to parties in arbitral tribunals on the conduct of the arbitration under the ICC rules of arbitration (1 January 2019).

parties decide to opt out or the ICC Court of Arbitration considers it inappropriate in the circumstances of the dispute. The Expedited Procedure Rules apply to arbitration agreements concluded after 1 March 2017.[23]

Under these rules, the ICC Court has the discretion to appoint a sole arbitrator, or a tribunal of three arbitrators if appropriate in the circumstances. In all cases, the Court will invite the parties to comment in writing before taking any decision and shall make every effort to make sure that the award is enforceable at law.

The Expedited Procedure Rules operate a simplified procedure, wherein no Terms of Reference[24] are required and the case management conference is to take place within 15 days after the date on which the file was transmitted to the arbitral tribunal. The arbitral tribunal, in its discretion, may decide on the basis of documents only, without recourse to oral hearing. The arbitral tribunal may limit the number, length and scope of written submissions and written witness evidence. The final award is rendered within six months from the case management conference.

It is certainly the case that there is an additional layer of costs in institutional arbitration which does not exist in *ad hoc* arbitration. Nonetheless, the administrative fees charged by the institution are typically a relatively small percentage of the overall costs of the arbitration and that may well be a price worth paying to ensure a better quality of arbitration.

As regards costs and duration of institutional arbitration (which includes that costs of the arbitral tribunal), in 2017,the London Court of International Arbitration ('LCIA') published a report analysing cost and duration of arbitrations in the four years between 1st January 2013 and 31st December 2016.[25] That report has indicated that, from a sample of 224 cases over the period, the median arbitration costs are USD

[23] See Article 30 of the *Arbitration Rules 2017* and Appendix VI ("Expedited Procedure Provisions"): by agreeing to arbitration under the Rules, the Expedited Procedure Provisions shall take precedence over any contrary terms of the arbitration agreement

[24] This is a document normally required in ICC Arbitration. It is drawn up by the arbitral tribunal and includes a summary of the claims made by each party and the relief sought.

[25] *LCIA Facts and Figures - Costs and Duration 2013-2016*: https://www.lcia.org/media/download.aspx?MediaId=596

$97,000, with median tribunal fees of USD $82,000 and median LCIA administrative charges of USD $17,000.[26]

Summary information available from the LCIA suggests as follows: an average LCIA arbitration lasts a total of 16 months and costs USD 97,000.[27] On average, arbitrators take 3 months to produce awards. Cases with amounts in dispute under USD $1 million are swiftly resolved, with a median duration of 9 months, and over 70% decided within 12 months. Three-member tribunals tend to handle larger cases. Three-member tribunal cases are not, however, proportionally more expensive or lengthy.

There is certainly a significant level of competition between arbitral institutions. Individual institutions are never slow to publicise what they perceive to be their own strengths. The LCIA, for instance, claims that its arbitration costs (tribunal costs and LCIA's administrative costs) are lower than the estimated costs of the compared institutions across all amounts in dispute. Its 2017 report on costs and duration includes a comparison of costs between five institutions – LCIA, SCC,[28] SIAC,[29] HKIAC,[30] and ICC.[31] It is notable that in disputes involving cases with a value of less than $1m, the range of arbitration costs was between $32,000 and $42,000. In disputes where a value between $1m and $10m was at issue, the range of arbitration costs was $79,000 to $145,000. Where the value of the dispute was between $10m and $100m, the range for arbitration costs was between $185,000 and $427,000. Finally, in disputes where the amount at issue was greater than $100m, the costs ranged from $323,000 to $826,000. None of these figures of course includes the costs of the parties.

While this data reflects the reality that institutional arbitration is neither inexpensive nor speedy, practitioners will be aware of domestic arbitrations in Ireland which have

[26] *LCIA Facts and Figures - Costs and Duration 2013-2016,* p.12:
[27] *LCIA Facts and Figures* - Costs and Duration 2013-2016, p.3
[28] Stockholm Chamber of Commerce
[29] Singapore International Arbitration Centre
[30] Hong Kong International Arbitration Centre
[31] *LCIA Facts and Figures* - Costs and Duration 2013-2016, p.20-21

far exceeded the median values in both categories, leaving scope for improvement in this regard.

As I have mentioned earlier, experience has shown that hearings in complex domestic arbitrations can sometimes be excessively long. In international arbitration, hearings are much more likely to be strictly timetabled. Most main hearings are concluded within a week and a hearing that goes beyond three weeks would be very rare. In July 2015, a very large ICC case which was legally seated in Singapore held its main evidentiary hearing in Dublin Dispute Resolution Centre. The facts of the case are in the public domain as there was an application to set aside the award in the High Court of Singapore and a decision was delivered dismissing the application on 26th April 2018.[32] The case concerned a contract relating to the construction of a coal-fired power station in Guatemala. There was a very substantial claim and counterclaim. A team of four sets of lawyers and a very large number of witnesses assembled in Dublin for the duration of the hearing. It was clearly a very complex case and huge sums of money at issue. The main hearing however concluded in 12 days.

There is no question of an arbitral tribunal in international arbitration taking a passive approach and saying that 'a case will take as long it takes'.

If arbitration is to be a realistic and attractive option for domestic disputes, arbitrators will need to be more pro-active in ensuring that there is a proportionate limit put on the duration of a case and appropriate timetabling for the hearing of witness evidence and legal submissions.

Conclusion

In the course of this paper, consideration has been given to why and how parties engage in domestic arbitration of disputes, and the size of the market has been

[32] *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101

scoped, notably by reference to an apparent decline in absolute terms over the past decade. Noting that Ireland is not alone in experiencing such a trend, the possible reasons for such decline have been examined, to include implementation of the Arbitration Act; costs and duration, as compared with newer forms of dispute resolution; a range of issues around consistency, expertise of arbitrators and possible preference by parties to go to Court. The comparative advantages of institutional arbitration were then assessed, noting the relative health of that market, by reference primarily to cost, duration and quality of decision-making, and noting the relevance and possible utility of the ICC Expedited Rules.

By reference to the decline in the overall size of the domestic arbitration market, it appears that parties are "speaking with their feet" in making greater use of conciliation and adjudication as a means to resolve their disputes. It is submitted that this should not be taken as a criticism of arbitration, insofar as these are very different forms of ADR: less adversarial, less formal, which allow the generation of solutions that parties can support. In that regard, arbitration should support those other alternative dispute resolution mechanisms, particularly by reference to the principle of proportionate dispute resolution by which the form of dispute resolution and the expenditure involved should be proportionate to the parties' risk exposure.

Returning to the question of whether domestic arbitration is fit for purpose, it must be explored whether there are other issues at play. It appears from the foregoing that, by reference to cost, duration and quality of decision-making, domestic arbitration is not currently in a position to offer a consistent product which can meet parties' expectations, at least in many commercial disputes.[33] In that regard, something of a paradox emerges in circumstances where we are actively promoting Dublin as a seat for international arbitration, when our domestic arbitration environment is showing some signs of decline.

Such signs, however, are not restricted to the Irish market. The UK appears to have been subject to similar trends. In the context of a burgeoning international arbitration

[33] Different conclusions may well be drawn in relation to disputes in specific sectors such as in the area of sports disputes.

scene globally, and the comparative advantages of institutional arbitration identified above (viz. cost, duration, quality of decision-making), there is reason to believe that, with some domestic changes, and further consideration of whether institutional arbitration is merited in certain domestic disputes, arbitration can continue to offer a distinctly valuable mechanism for domestic dispute resolution.