ALTERNATIVE DISPUTE RESOLUTION RATHER THAN LITIGATION? A LOOK AT CURRENT IRISH AND AMERICAN LAWS

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> Discourage litigation. Persuade your neighbor to compromise whenever you can … As a peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough.[1]

I. INTRODUCTION

President Lincoln, himself a lawyer, was addressing his peers, but courts also have the opportunity to encourage settlements. Not only do judges have the opportunity, but they also have a source of motivation, since dockets are increasingly overloaded.

A burgeoning area of American commercial law is alternate dispute resolution (ADR), the term encompassing recognized methods of pre-trial—or a substitute for trial—settlements. The two most-often used methods of ADR are mediation and arbitration, and both avoid much of the cost and time consumption involved with litigation. Although ADR is clearly not a novelty in Ireland, where it is being used increasingly, the applicable law is not yet developed to the extent as is the case in your trans-Atlantic neighbor.

This article will assess the status of the American statutory and judicial perspective on ADR alongside the current situation in Ireland, clarifying the positives and negatives of these ways of resolving legal disputes as compared and contrasted with courtroom litigation. The "rush-to-the-courtroom" syndrome that has been characteristic of Americans appears to the author to have been adopted by our Irish brethren, and both the Oireachtas and the Irish courts might benefit from studying how ADR has given courts in the

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[1] Abraham Lincoln, American President, 1861-1865, Pine, J. (ed.), *Wit and Wisdom of American Presidents*, (Dover Publications, Inc., Mineola, New York, 2002), p. 27.

U.S.A. some much-needed and welcome relief.

Mediation will be summarily explained, but the primary focus is on arbitration. The procedure and finality of the latter equates it more closely with courtroom disposition, but without the expense and time generally associated with litigation.

II. NEGOTIATION, MEDIATION AND ARBITRATION IN GENERAL

The two basic categories of ADR are mediation, also referred to as conciliation, and arbitration. Negotiation is the term referring to the efforts of the parties themselves to resolve an area of contention before resorting to calling in a third party and, as such, naturally precedes ADR or litigation.

Mediation introduces a neutral third party when negotiations have failed. The role of the mediator is not judgmental, nor does he/she take a position on behalf of one party or the other. The underlying principle is to permit the parties themselves to make the ultimate determination resolving the issue, with the mediator's conciliatory assistance. His role, then, is to facilitate, rather than to impose, a settlement. The process of mediation is not adversarial, so it does not resemble an actual trial. This feature has been cited as a negative, since parties are not afforded the protections afforded by rules of evidence and/or constitutional rights.[2]

Moreover, there is no right to counsel during mediation. The advantages echo what in some situations would be deemed disadvantages, so employing mediation is largely dependent upon the circumstances of each case. For example, the simplicity of the mediation process and the breadth of autonomy of the parties to determine the outcome might not be attractive features in the instance where one party is weaker than his counterpart and, thus, possibly coerced into settling in the situation in which he does not have the benefit of counsel and/or rules of evidence. When the disputants are of equal bargaining power and the issue is not particularly acrimonious, they would be more prone to achieve

[2] Significantly, unlike Ireland, where juries are available in civil trials only in defamation cases, American constitutional law assures the right to trial by jury in civil cases when the amount in controversy is at least twenty dollars ($20.00). Constitution of the United States, 1787, Amendment VII (1791).

settlement with the help of a trained neutral, especially when continuing the business relationship is financially advantageous. Most states in the U.S.A. have adopted some form of the Uniform Mediation Act or the Revised Uniform Mediation Act[3] so there is at least a modicum of uniformity in the applicable rules for the interstate company.

Arbitration is the most formal of ADR methods, although there is no right to the American-style jury in civil trials. Additionally, rules of evidence are not applicable, so in this respect, it is somewhat of a hybrid between mediation and litigation. The Federal Arbitration Act[4] does give parties the right to counsel. Significantly, this statute also empowers the arbitrator to compel witnesses to testify and to compel production of documents.[5]

An interesting analogy explaining mediation, arbitration and litigation is that of British legal scholar, Alexander Bevan. His hypothetical is that of two cooks squabbling over which one should be entitled to a single orange. A judge would hear evidence and determine which of the two has the right to the orange, possibly by using obscure and arcane reasoning. An arbitrator might split the orange in two halves, giving each an equally sized piece. A mediator would ask each to explain to him and to the other disputant why he needs the orange. Suppose that the respective statements reveal that one desires to use the peel to make marmalade, and that the other wants the flesh of the fruit for the juice. The mediator then might suggest that they simply agree that the first might have the peel, and the other, the flesh.[6] Significantly, both mediation and arbitration must be entered into by the parties voluntarily, and both insure confidentiality of the process.

III. SOME AMERICAN PERSPECTIVES

Interestingly, arbitration as a means of settling disputes was established in England over 400 years ago, when Ireland was still subject to British control.[7] Nonetheless, it was the United States that first began to use ADR on a wide basis. It is indeed being used

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[3] The National Council of Courts maintains a website from which information on states that have enacted Model laws or Uniform Acts might be accessed. www.nccusl.org

[4] (1925) 9 U.S.C., sections 1-16.

[5] (1925) 9 U.S.C., sections 6 and 7.

[6] Bevan, A., *Alternate Dispute Resolution* (Sweet & Maxwell, London, 1992), p. 2

[7] Cook and Songate's Case (1588), 4 Leon 31, cited in Merkin, R., *Arbitration Law* 1-1 (Lloyd's of London Press Ltd., 1995).

increasingly in Britain and Ireland, but the system is developed in much more detail in the U.S.A.[8]

Significant in U.S. federal courts are the federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE). A majority of states have adopted many of these federal rules for state civil litigation.

One example is FRCP 68, which addresses pre-court settlements. Jacquelin Nolan-Hadley, expert on ADR in the U.S.A., has written that the purpose of this rule is to encourage settlement of civil suits before they actually go to trial—possibly via mediation.[9] This rule permits a court to impose sanctions on a party who has declined a formal written offer from the defendant to settle if the plaintiff ultimately prevails, but in an amount lower than the proffered settlement. For example, suppose that on 4 January 2003, X (plaintiff) sued Y (defendant) in the amount of $500,000. On March 8 2003, Y offered to settle for $175,000, and X rejected the offer. On 3 February 2004, a jury verdict then awarded X $150,000, a figure lower than the defendant's proposed settlement. The court then is empowered to require plaintiff to pay defendant's costs incurred subsequent to its offer, that is, from 8 March 2003 until the judgment on 3 February 2004. This rule is a powerful disincentive for a plaintiff to proceed with a trial, once he has been offered. It is not a new rule, having been adopted in 1938, but it has been sparingly applied.[10]

The common law makes inadmissible as evidence any offer to compromise in subsequent litigation.[11] The rationale is that such an offer has little, if any, probative value. Under U.S. federal law, the Federal Rules of Evidence (FRE) are relevant, and FRE 408 has expanded this common law rule to exclude not only an offer to settle, but also any "evidence of conduct made in compromise negotiations."[12] It is germane that a majority of American states have adopted some variation of this rule.[13]

Despite this inadmissibility at trial rule, discovery latitude

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[8] Bevan, A., *Alternate Dispute Resolution* (Sweet & Maxwell, London, 1992), p. 2.
[9] Nolan-Hadley, J., *Alternate Dispute Resolution in a Nutshell* (West Publishing Co., St. Paul, Minnesota, 2001).
[10] Nolan-Hadley, J., *Alternate Dispute Resolution in a Nutshell* (West Publishing Co., St. Paul, Minnesota, 2001).
[11] Nolan-Hadley, J., *Alternate Dispute Resolution in a Nutshell* (West Publishing Co., St. Paul, Minnesota 2001), p, 53.
[12] Federal Rules of Evidence 408 (hereinafter FRE).
[13] Nolan-Hadley, J., *Alternate Dispute Resolution in a Nutshell* (West Publishing Co., S. Paul, Minnesota, 2001), p. 54.

remains quite broad. The FRCP permit discovery for "any matter not privileged"[14] that is relevant to a pending action. Importantly, "relevance" where discovery is concerned has considerably more breadth than what is required for admissibility as evidence.[15] The significance is that this enables parties to have the fullest knowledge of the other's evidential artillery during discovery, a fact which should induce settlement and, at times, resort to ADR.

The federal judiciary in the U.S.A. has taken a pro-active role in encouraging pre-trial settlements, and federal judges have made ample use of FRCP 16, which authorizes them to conduct pre-trial conferences. This enables the judge to control the litigation at an early stage. As a neutral, the court can thereby communicate to both parties the direction the case is taking. However, there has been some concern that some courts might overuse this power and coerce the parties (or one of them) to agree to a settlement during such a conference. For example, the Seventh Circuit Court of Appeals (the appellate level court in the American federal system, between the trial court and the Supreme Court) has upheld the right of federal magistrate (a sub-judge in a federal district, or trial level, court) to compel a defendant to send a corporate representative who is authorized to settle a dispute to a called pre-trial conference.[16] In his dissenting opinion, Judge Posner was particularly troubled over what he viewed as an excess of power to regulate procedure that the majority vested in the lower court, predicting that this position would encourage "judicial high-handedness."[17]

IV. SOME PERSPECTIVES ON IRELAND

The need for ADR is perhaps most evident to those on the bench. Americans are notoriously litigious, but the Irish seem to be in a race for the dubious distinction of being even more so. Ireland now is statistically the most litigious country in Europe, and she is now second only to the U.S.A. worldwide with having the greatest numbers of lawyers per capita.[18]

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[14] Federal Rules of Civil Procedure 26(b) (hereinafter FRCP).

[15] Nolan-Hadley, J., *Alternate Dispute Resolution in a Nutshell* (West Publishing Co., St. Paul, Minnesota, 2001), p. 54.

[16] *G. Heilman Brewing Co., Inc. v. Joseph Oat Corp.* (7th Cir. 1989) 871 F.2d 648.

[17] *G. Heilman Brewing Co., Inc. v. Joseph Oat Corp.* (7th Cir. 1989) 871 F.2d 648 at 657 *per* Posner, J., dissenting.

[18] McCaughey, G., "Time Running Out on Injury Frauds" *The Irish Independent*, 31 May 2004, p. 12, at col. 1-5.

It is perhaps axiomatic that lawyers beget litigation, often taking valuable court time for specious causes. An illustrative example occurred recently in Richmond, Virginia, the author's situs. In early July 2004, the trial of a bitter action filed by the widower of a physician who had committed suicide shortly after Christmas in 1999 was finally concluded. The lawsuit against the medical practice where she had worked at the time of her death alleged that her colleagues had created an extraordinarily stressful situation that precipitated her decision to take her life. As expected, the plaintiff's lawyer attempted to persuade the defendant to settle at an early stage. Having competent counsel, the defendant wisely decided to persevere and rejected the settlement offer. After months of costly depositions, filing of motions and *subpoenas duces tecum* and expert witness fees at trial, the judge dismissed the case for failure to produce substantial evidence to sustain a verdict for the plaintiff. This was in a state court, so the Virginia circuit court judge did not have the sweeping powers of federal courts to call for pre-trial hearings that conceivably might have persuaded the plaintiff to withdraw with prejudice, or, in the alternative, to try mediation or arbitration. Such costly use of the court's time and resources on the part of the defending party might have been avoided in a federal forum where ADR is much more frequently used.

In Ireland, personal injury cases alone comprise about one-half of the workload of solicitors and barristers.[19] Tánaiste Mary Harney's brain-child, the Personal Injuries Assessment Board (PIAB) is a patent effort to curb litigation. The PIAB is now a statutory authority, effective 1 June 2004. Its function is to assess personal injury damages so as to preclude the parties from having to pay court costs and the fees of their respective solicitors and barristers. Predictably, both the bar and the Law Society have impugned the creation of this board as usurping parties' right to effective counsel. It is submitted that a more efficacious decision would be to vest courts with the American federal court-style authority to use the pre-trial conference and/or refer the parties to some form of ADR, preserving their right to legal counsel (who may not, however,

[19] Bruce, H., "Are Lawyers Starting to Feel the Pinch?" *The Irish Independent*, 27 May 2004, p. 18 at col. 1-6.

participate in a mediation procedure).

It is not possible to know the extent that voluntary use of ADR has increased in Ireland. According to Michael W. Carrigan, solicitor and partner in the Dublin firm of Eugene F. Collins informed the author that the confidential nature of ADR makes any statistical information unavailable.[20] Inexplicably, although confidentiality is also assured in the U.S.A., there are nonetheless some relevant numbers of the exponential increase of ADR. Between 1972 and 1995, the American Arbitration Association reported that the number of cases submitted to arbitration increased 70%. During that same time period, the increase in the use of ADR in commercial disputes (*i.e.*, excluding instances such as domestic disputes, in which ADR is fairly widely used) was an impressive 250%.[21] Another figure cited is on the effectiveness of mediation. Some 85% of all employment disputes submitted to this ADR process in the U.S.A. are reportedly successfully settled.[22]

V. QUALIFICATIONS FOR MEDIATORS AND ARBITRATORS IN THE U.S.A.

No state requires a law degree as a prerequisite to qualification as mediator or arbitrator. The proviso is that there are restrictions in some states that limit mediation and arbitration to lawyers in some specified types of disputes. The American Bar Association's Dispute Resolution Center of the Dispute Resolution has reported that it knows of no source that lists which subject areas and in which states such legal training is required.[23]

An example of a state law incorporating mediation qualification requirements is Massachusetts. The statute requires (1) at least thirty (30) hours of mediation training, and (2) either (a) four (4) years of professional mediation experience or (b) accountability to a dispute resolution organization which has been in existence for at least three

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[20] Correspondence from Mr. Carrigan, 1 June 2004.

[21] See Bass, S., "The Expanding Role of Arbitration and Judicial Concern: a Need to Redefine Ground Rules" (Dec. 1995) 46 (12) *Labor Law Journal* 715 at n. 2, citing Hirshman, "The Second Arbitration Trilogy: The Federalization of Arbitration Law" (1985) 71 *Virginia Law Review*, n. 7.

[22] Bayard-Harris, B., "Mediation in Employment Cases: Negotiated Ecstasy or Agony?" *Virginia Bar Association Employment and Labor Law Section Annual Conference*, Williamsburg, Virginia, 15 September 2000.

[23] The source is an e-mail to the author from Gina Viola Brown, Dispute Resolution Center, American Bar Association Section of Dispute Resolution, 24 May 24 2004.

(3) years.[24]

VI. CURRENT STATUS OF THE TWO BODIES OF LAW

A. The United States

Two basic laws are relevant. First, the Uniform Mediation Act has been adopted by a majority of states.[25] A "uniform" or "model" act in American law is generally drafted by a panel of experts, including those named by the American Bar Association and the national Council of Uniform State Laws. The purpose is to recommend that states adopt this draft, or a variation of it, in order to attain some degree of interstate uniformity in a subject matter where it is needed. Importantly, these are state, rather than federal, statutes.

The second pertinent statute is federal legislation. The Federal Arbitration Act[26] was enacted in 1925. This law allows stays of litigation proceedings when an issue has been referred to arbitration and for orders compelling arbitration if a party has not complied with an earlier agreement to use this resolution procedure in the event of dispute.[27] Congress has revised this law on several occasions, most recently in 2000. As of 1995, 35 of the 50 states had adopted some form of the FAA at the state levels.[28]

Congress' first statutes providing for ADR were in the area of labor law, initially in the railroad industry. The first such law was the Arbitration Act, 1888.[29] This law contained provisions for both arbitration and mediation in railway disputes, but there were no arbitration under the law during its ten-year existence. It was replaced by the Erdman Act, 1898[30] and the Newlands Act, 1913[31] the latter having created a three-member Board of Mediation and Conciliation (BMC). All these statutes were repealed and supplanted

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[24] Massachusetts Legislature General Acts, ch. 233, section 23C, noted in Nolan-Hadley, J., *Alternate Dispute Resolution In A Nutshell* (West Publishing Co., 2001), pp. 85-86. Note: The author is at a loss to explain the reader's likely question of how one might attain the four years of experience if he is not yet qualified. This appears to be a classic "catch-22" situation.

[25] See Cole, S.R., McEwan, C.A., and Rogers, Nancy H., *Mediation Law: Policy, Practice*, Appendix B (2001, 2d ed.) and 2001 Supp. (Clark Boardman College, Deerfield, Illinois) for listing of states that have adopted the Uniform Mediation Act or Revised Uniform Mediation Act.

[26] (1925) 9 U.S.C., sections 1-16.

[27] (1925) 9 U.S.C., sections 2, 3 and 4.

[28] Uniform Arbitration Act (Uniform Laws Annotated, Supp. 1992) at p. 1.

[29] (1888) Ch. 1063, 25 Stat. 501.

[30] (1898) Ch. 370, 30 stat. 424.

[31] (1913) Ch. 6, 38 Stat. 103.

by the Railway Labor Act, 1926[32] which replaced the old BMC with a three-member National Mediation Board (NMB). The Railway Labor Act (RLA) was amended in 1936 to extend its coverage to the airline industry. The statute also created an arbitration board, the National Railroad Adjustment Board (NRAB), comprised of an equal number of management and union representative (seventeen of each) and a neutral in the event of the inevitable tie. Either party might invoke a hearing before the NRAB, which governs the railroad industry, but not airlines. One major significance of the RLA is that it is the oldest federal law with mediation and arbitration provisions that is still in force.

The labor-management statute for the remainder of the private sector is the 1935 Wagner Act, amended by the 1947 Taft-Hartley Act.[33] This law endorsed the use of mediation and/or arbitration in the drafting of and enforcement of collective bargaining agreements.

ADR in individual labor disputes is fostered in the several federal workplace anti-discrimination statutes, including Title VII of the 1964 Civil Rights Act (prohibits discrimination on the grounds of race, color, religion, national origin, and sex); the 1967 Age Discrimination in Employment Act; and the 1973 Rehablitation Act and 1990 Americans with Disabilities Act.[34]

In the union setting, the Taft-Hartley Act proved quite effective in the enforcement of out-of-court relations. The first case on arbitration under this statute to reach the United States Supreme Court was *Textile Workers Union v. Lincoln Mills of Alabama*[35] involving an employer who refused to arbitrate pursuant to a collective bargaining agreement clause. The Supreme Court held that section 301(a) of Taft-Hartley, the provision that empowered federal courts to enforce union contracts, was substantive law as well as procedural. This meant that the statute vested the federal courts with jurisdiction to compel arbitration when both parties had so agreed.[36] Only three years later, in three same-day decisions known as the *Steelworkers Trilogy* the Supreme Court solidified this favorable

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[32] (1986) 45 U.S.C.A. sections 151-163, 181-188.
[33] (1947) Ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.).
[34] 42. U.S.C. section 2000e (Title VII), 29 U.S.C. sections 621 *et seq.* (ADEA), Pub. L. No. 93-112, 87 Stat. 355 (Rehabilitation Act), and 42 U.S.C. sections 12101-12213 (Americans with Disabilities Act).
[34] (1957) 353 U.S. 448 (S.C.).
[35] (1957) 353 U.S. 448 (S.C.).
[36] (1974) 415 U.S. 36 (S.C.).

view on enforcing arbitration agreements under Taft-Hartley.[37] The first case involved an employer that refused to arbitrate per the terms of the collective bargaining agreement on the ground that the issue in dispute was outside the parameter of the contract. The Court held that the question of whether an issue was in fact arbitrable was itself an issue for an arbitrator to decide. The second *Trilogy* case was similar, except that that the collective bargaining agreement contained a clause excluding from the arbitration provision "all matters which are strictly a function of management." The Court held that whether a decision fell within this strictly-management prerogative concept was to be decided by the arbitrator. In the final *Triology* case, the Court held that an arbitrator's award is specifically enforceable by the courts, and is not appealable in the absence of the arbitrator's fraud, blatant failure to apply the terms of the collective bargaining agreement, or decision contrary to settled law.

In the Court's first venture into individual rights in *Alexander v. Gardner-Denver*[38] a 1974 case, the justices seemed to deviate somewhat from its earlier pro-arbitration position. The plaintiff was a black worker who had been dismissed after several warnings for his inept performance. He filed a grievance under the collective bargaining agreement's arbitration dismissal-for-cause-only clause, and later amended his complaint to include also a claim under the non-race discrimination clause. After a hearing, the arbitrator concluded that his termination had been on work-related grounds and that there had been no anti-race animus on the part of the employer. He then filed a race discrimination action under Title VII, and the federal district court dismissed the action by reason of the finality of the arbitrator's decision. In a move surprising to employment lawyers, the Supreme Court reversed. Writing for a unanimous court, Justice Powell emphasized the distinctions between arbitration and Title VII litigation. The arbitrator determines parties' rights under a contract, while a court decides his statutory rights. The opinion stressed Congress' paramount purpose in enacting Title VII. Moreover, there are no strict rules of evidence

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[37] *United Steelworkers of American v. American Manufacturing Co.* (1960) 363 U.S. 564 (S.C.); *United Steelworkers of American v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574 (S.C.); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593 (S.C.).

[38] (1974) 415 U.S. 36 (S.C.).

in an arbitration hearing.[39] The Court eschewed the principle that a union contract might be construed to waive individual workers' rights. The effect was to deter companies from including non-discrimination clauses in collective bargaining agreements, since *Alexander* essentially gave a worker in such case two forums, before both an arbitrator and later, a judge, in the event the arbitration award had been against him. Rather than being a more expeditious and less costly process, post-*Alexander* arbitration would require an employer to undergo both arbitration and a trial. *Alexander* was generally deemed to be an aberration from the Court's consistent deference to arbitrators. Nevertheless, it represented a setback to the progress made in ADR and a hard knock for management.

In 1991, the Court decided *Gilmer v. Interstate/Johnson Lane Corp*.[40] a decision which resurrected the Court's previous view on the finality of arbitration decisions. The plaintiff, a securities representative whose registration with the New York Stock Exchange had necessitated his signing an agreement to arbitrate any future employment dispute, nonetheless filed a legal action under the Age Discrimination in Employment Act. This time the Court expressed a "healthy regard for the federal policy favoring arbitration"[41] and held that the plaintiff's agreement to arbitrate waived his right to sue. Absent a clear showing that Congress had intended to prohibit such a waiver, the Court saw no ambiguity in the working of his agreement to arbitrate rather than litigate.

Management's post-*Gilmer* euphoria was dimmed somewhat by the 1998 decision of *Wright v. Universal Maritime Service Corp*.[42] The collective bargaining agreement in at issue in *Wright* contained a general and sweeping clause that mandated arbitration for "all matters affecting wages, hours, and other terms and conditions of employment …" Despite this provision, plaintiff filed an action against the employer under the Americans with Disabilities Act. The Supreme Court upheld his right to sue because the arbitration clause did not specifically waive this particular statutory right. In the words of the Court, the language must be "clear and unmistakable"[43] language it did not find in the agreement in *Wright*. The principle to

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[39] Interestingly, at that time, there was no right to a jury trial in Title VII actions, so this was not a factor in the Court's distinctions.
[40] (1991) 500 U.S. 20 (S.C.).
[41] (1991) 500 U.S. 20 at 27 (S.C.).
[42] (1998) 525 U.S. 70 (S.C.).
[43] (1998) 525 U.S. 70 at 80 (S.C.).

be learned from *Wright* is not to err on the side of lack of specificity in clarifying exactly what types of disputes the employee is agreeing to arbitrate.[44]

The *crème de la crème* of Supreme Court decisions favoring arbitration in employment disputes came in 2001. In *Circuit City Stores, Inc. v. Adams*[45] the issue was whether the FAA applied to agreements to arbitrate employment disputes. Large companies that required new hires to sign agreements to arbitrate breathed an almost audible collective sigh of relief when the Court held in the affirmative. This federal law specifies the finality of arbitration decisions, and its applicability means that an interstate company might enforce a standard clause in any state in which it employs workers. The potential savings in time and money for management because of the *Circuit City* decision are enormous.

A synthesis of these decisions indicates that—provided the waiver of statutory rights is clear and definitive - an arbitration agreement will be enforced by the American federal judiciary, whether in the collective bargaining agreement or individual contract context. ADR, then, is a quite viable tool for giving relief to crowded court dockets.

B. Irish law

Much like American law, the loser in an arbitration hearing in Ireland has no right to appeal except for similar circumstances—*i.e.*, fraud, misconduct of the arbitrator, or fundamental legal error. Also similar is the right to obtain judicial enforcement of a arbitration award. The Arbitration Act, 1954 provides by leave of the High Court for enforcement, the same as for a court order or judgment.[46] The procedure is via special summons.[47]

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[44] Note that the court his held that, even if an employee had effectively waived his right to sue on an employment issue, the Equal Employment Opportunity Commission (EEOC) nonetheless might sue on his behalf. That is, the waiver does not bar the EEOC. (The EEOC is the federal agency charged with enforcing the employment anti-discrimination statutes. It was given the right to be the party plaintiff by 1972 amendment to Title VII.), see *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 (S.C.). This was a 6-3 decision in which Justice Scalia's dissent was particularly caustic. He viewed the majority's position as a circuitous reinstatement of the plaintiff's right to sue despite the waiver, since any relief the EEOC might obtain would inure to the employee's benefit.

[45] (2001) 523 U.S. 105 (S.C.). The plaintiff who had signed the arbitration agreement that waived his right to sue had filed an action against his employer under the Americans With Disabilities Act.

[46] Section 41 of the Arbitration Act, 1954.

[47] Rule 4 of order 56 of the Rules of the Superior Courts (Statutory Instrument No. 15 of 1986).

Regarding the contractual agreement to arbitrate, the Oirachtas and the Irish courts have taken a view similar to that of the U.S. Congress in the 1947 Taft-Hartley Act and the Supreme Court in the 1957 *Textile Workers* and 1960 *Steelworkers Trilogy* decisions. The Arbitration Act, 1980 includes a provision[48] that mandates a judicial stay of proceedings in situations where the judge has been informed of an agreement to arbitrate. Even absent an agreement to arbitrate, the same section requires the court to suspend proceedings if so requested by both parties in due time in order that they might pursue arbitration. Although it is not clear how Irish courts will respond if the request is to refer to another form of ADR, such as mediation, the judiciary has to date been generally supportive of the parties' right to choose how their differences are to be settled.[49]

According to Dublin solicitor Michael W. Carrigan, domestic arbitration in Ireland is governed by the 1954 and 1980 Arbitration Acts, international commercial arbitration is covered exclusively by the Arbitration (International Commercial) Act, 1998. Mr. Carrigan also cautions that employment disputes have been addressed by specific statutory sections. Because of the several statutory tribunals established to handle workplace disputes, section 5 of the Arbitration Act, 1954 exempts issues relating to terms and conditions of employment.[50]

As a member of the European Union, Ireland's lawyers and judges should be cognizant of European Commission activity on ADR. A Green Paper presented on April 19 2002, launched a consultation on European ADR practices.[51] The Commission held a public hearing on ADR in February 2003, and I is currently in the process of drafting a directive on mediation within the EU.[52] This is indicative of a growing respect for the use of ADR in EU member states. Additionally, both Ireland and the U.S.A. have subscribed to the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards. This applies to parties in all

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[48] Section 5 of the Arbitration Act, 1980.

[49] Carrigan, M.W., "Settling Disputes the Easier Way" *The Irish Independent*, 4 February 2004, p. 3 at cols. 1-4.

[50] Correspondences from Mr. Carrigan, 1 and 2 June 2004.

[51] The Green Paper on alternate dispute resolution in civil and commercial law KOM (2002) 196, found at www.europa.eu.int/eur-lex/de/com/gpr/de_gpr_month_2002_04.html

[52] Duve, C., "European ADR: Commission's Green Paper Promotes Discussion, Harmonization" (Summer, 2003) *Dispute Resolution Magazine*, 10 (published by the Dispute Resolute Section of the American Bar Association).

countries that are signatories to this treaty, and it is applicable not only to court judgments, but also to arbitration awards where they are enforceable by the courts (such as in Ireland and the U.S.A.).

Finally, the United Nations Commission on International Trade Model Law[53] (UNCITRAL) merits mention. Since this document does not have treaty status, any country adopting it might revise it substantially. The two provisions that cannot be changed provide that (i) in resolving international disputes under the Model Law, the law must be interpreted in light of its international origin in order to promote uniformity and good faith, and (ii) parties must adhere to the procedurally fair treatment principle. Significantly, this document applies only to commercial issues.[54]

VII. WHAT ABOUT COMPARATIVE COSTS AND TIME?

In Ireland, reaction to the PIAB has generated some telling statistics on average costs of litigation. When a plaintiff in a personal injury case seeks €15,000, and both the plaintiff and the defendant use junior, rather than the more costly senior, counsel, the following averages have been reported:

Plaintiff's solicitor:	€2,700	Defendant's solicitor:	€2,400
Plaintiff's barrister:	€514	Defendant's barrister:	€660
Total for plaintiff:	€3,214	**Total for defendant:**	€3,060

Note that this estimated fee for plaintiff's barrister is for preparation and filing of brief only. Court appearance adds another layer of expense.[55]

The estimated costs in American litigation must be addressed according to federal and state courts, where both court costs and attorneys' tend to differ.[56] The author's home state of Virginia will be used as an example of state litigation costs. Note that only plaintiff's

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[53] U.N. Doc. A/57/17 (2002).
[54] A good summary of the Model Law can be found in Sekoles, J and Getty, M.B., "The UMA and UNICTRAL Model Law: An Emerging International Consensus on Mediation and Conciliation" (Summer, 2003) *Dispute Resolution Magazine*, 17.
[55] Bruce, H., "Are Lawyers Starting to Feel the Pinch?" *The Irish Independent*, 27 May 2004, p. 18 (Features), cols. 1-6. Author's note: These fee estimates do not address commercial disputes, which are not within the purview of the PIAB.
[56] Federal trial work tends to be more expensive.

costs are mentioned, but the reader must be aware that American courts do not follow the European rule of thumb that the losing party pays the winner's attorneys' fees. To be sure, the loser pays court costs in the U.S.A., but this amount can be a mere drop in the proverbial bucket compared with the fees of the respective lawyers. Consequently, civil litigation can be quite a financial burden, even for the defendant who prevails.

Litigation in the USA[57]

Filing fee, federal court: $150

Filing fee, state (Virginia) court: $66 for lawsuits up to $50,000
$126 for lawsuits for $50,000-100,000
$186 for lawsuits over $100,000

Attorneys' fees:

- average hourly rates for Richmond, Virginia, in firms of 100+ attorneys:
  $125-250 (associates)
  $180-500 (partners)
- average attorneys' fees for civil trial:
  $50,000-85,000 in state court, $75,000-125,000 for federal court

[Note that these estimates are through trial and do not include additional fees in the event of appeal.]

Duration:

- state court—about one (1) year to trial
- federal court—about eight (8) months to trial

[Note: for post-trial motions and appeals, add approximately one-three (1-3) years.]

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[57] The author is grateful to Richmond attorney David Nagle, Leclair Ryan, for the attorneys' fee estimates.

Comparison with arbitration[58]

- No court filing fee
- Average arbitrator's fees: $200-1,000 per day; average total, $570
- Average expenses: $250 [Note that parties have some degree of control over expenses, for example, using a local arbitrator.]

According to Professor Michael Moffitt, Professor of Law and Associate Director of the ADR Program at the University of Oregon, mediators' fees tend to be in line with those of an attorney. This may appear exorbitant, but the time consumed is much less than pre-trial and trial work. Moreover, both arbitrators and mediators tend to charge per diem, rather than per hour. The usual time, according to the FMCS, the average time from the filing with an arbitrator or mediator (including preparatory tasks) is less than seven months. Most hearing last only one-two days, and the mediator's and/or arbitrator's fees would be applicable to the hearing and time spent preparing the decision. Most awards are not lengthy, and, since awards have no value as precedent, the arbitrator need not explain his reasons.

These cost and time estimates reflect the extraordinary savings that ADR affords compared with litigation. This does not infer that courts have no utilitarian function, but rather that some issues should not usurp the courts' time when they might be expediently resolved in another forum.

VIII. CONCLUSION

The consensus among American lawyers is that ethics dictate that considering ADR as an option should be discussed with the client in most situations. While not in the allegorical driver's seat as is the lawyers, members of the bench also are in a position to encourage pre-trial settlements, possibly through the use of ADR, most commonly, mediation or arbitration.

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[58] The source for these figures for the year 1996 is the Federal Mediation and Conciliation Service (FMCS), created by Congress in the 1947 Taft-Harley amendments to the Wagner Act, 1935. This FMCS report is cited in Nolan, D.R., *Labor and Employment Arbitration in a Nutshell* (West Publishing Co, St. Paul, Minnesota, 1998), p. 53.

While mediation may well facilitate resolving commercial disputes in instances where the disputants desire to preserve a working relationship, arbitration has the advantage of bringing the issue to a conclusion. Moreover, the Irish legal position mirrors the American one in that arbitration awards are legally enforceable, and the general rule is that there is no appeal from an arbitrator's ruling.

At the international level and within the European Union in particular, ADR is gaining credibility as meriting legal enforcement. This is especially the case when a lawyer has drafted the document reducing the parties to writing and signed by both.

The American body of law addressing arbitration and mediation is one that has developed over some eighty years, and the courts have generally welcomed this alternative to use of the courtroom as a forum. Since the Irish seem to be on a fast track to becoming as ready to litigate as Americans have been traditionally been, perhaps the time is ripe for similar activity. The Dáil might do well to develop in more detail the law applicable to ADR processes in Ireland, as the American Congress and U.S. Supreme Court have done. The courts in Ireland have considerable powers in directing parties to try mediation, but more cogent and precise legislation would be good news indeed for Irish judges, who—as their American brethren—sorely need relief from over-crowded dockets.