

The Arbitration Act 2010

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1. INTRODUCTION

On June 8, 2010, the Arbitration Act 2010 (the Act) came into force, repealing in their entirety the Arbitration Acts of 1954, 1980 and 1998 (except for arbitrations that had already commenced before that date). A new and vastly different Arbitration Act is now in force in Ireland. The new statute applies to both domestic and international arbitration. Its purpose is to “further and better facilitate [the] resolution of disputes by arbitration”.² Probably the most significant change to arbitration law in Ireland is that the 2010 Act gives force of law to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) in respect of both international arbitration and “other arbitration”,³ i.e., domestic arbitration.

The Act comprises three Parts and six Schedules, one of which is the text of the Model Law as adopted by UNCITRAL on June 21, 1985, with amendments as adopted by that Commission on July 7, 2006.⁴ The three Parts are: Part 1: Preliminary and General; Part 2: Arbitration; Part 3: Reference to Arbitration where proceedings pending before Court.

Part 1 contains five short sections of an introductory nature, including s.3, which deals with the application of the Act and s.4, dealing with the repeal of the Arbitration Acts 1954 to 1998. Part 2 contains ss.6 to 31 inclusive, which are the main subject matter of this paper, and Part 3 contains s.32 which deals with the power of the courts to refer matters to arbitration where those matters are pending before those courts.

2. PART 2 OF THE ACT: ARBITRATION

This Part has 26 sections, which supplement the provisions of the Model Law. Sections 6 and 8 deal with the adoption of the Model Law; the construction of the Model Law; and also the construction of arbitration clauses. The remaining sections are described briefly below.

Section 7(1) deals with the commencement of arbitral proceedings. In accordance with this new provision such proceedings are deemed to have commenced on either the date which the parties provide as the commencement date or the date on which the respondent receives written communication from the claimant requesting a dispute be referred to arbitration. Section 7(2) amends the Statute of Limitations 1957 by substituting for s.74 of that Act an entirely new section as regards the commencement of arbitral proceedings, which reflects what is contained within s.7(1).

Section 9 specifies the High Court for the purposes of arts 6 and 9 of the Model Law. It is also the court of competent jurisdiction for the purposes of arts 17H, 17I, 17J, 27, 35 and 36 of the Model Law.⁵ The president of the High Court or such judge as the president nominates

¹ I wish to acknowledge the very helpful research and assistance of Lydia Bunni, B.L., LL.B, LL.M, MCI Arb in preparing this paper.

² Preamble to the 2010 Act.

³ Preamble to the 2010 Act.

⁴ The remaining Schedules include the text of the 1958 Convention on the recognition and enforcement of foreign arbitral awards, the text of the 1965 Convention on the settlement of investment disputes between states and nationals of other states, the text of the 1927 Convention on the execution of foreign arbitral awards, the text of the 1923 Protocol on arbitration clauses and finally, consequential amendments to other Acts.

⁵ Articles 17H, 17I and 17J of the Model Law deal with the recognition and enforcement of interim measures, the grounds for refusing recognition or enforcement of those interim measures and court-ordered interim

performs the functions of the High Court, and any application to the High Court should be made in a summary manner. Article 6 of the Model Law defines the court or other authority for certain functions of arbitration *assistance* and *supervision* as referred to in arts 11(3), 11(4), 13(3), 14, 16(3) and 34(2) of the Model Law.⁶

Section 10 specifies the powers of the court exercisable in support of arbitration proceedings. In particular, s.10(1) states that the High Court has the same powers in respect of arts 9 and 27 of the Model Law⁷ as it has in any other action before the court. Nevertheless, pursuant to the provisions of s.10(2), unless the parties agree otherwise, the High Court cannot make any order in respect of security for costs or any discovery order. The power to make such an order now therefore rests solely with the tribunal.

An extremely significant section effectively removes any powers that had been given to the Supreme Court under s.53 of the 1954 Act; s.11 provides that the determination of the High Court in certain applications under the Model Law,⁸ the Geneva Convention and the New York or Washington Conventions is final. This effectively removes any right of appeal to the Supreme Court of a decision of the High Court. Opinions on whether this is a good or a bad thing will differ amongst practitioners in the arbitration world. This being such a young piece of legislation, the effects of such a provision have obviously not yet been seen and may not be seen for some years to come.

Section 12 deals with time limits for setting aside an award on grounds of public policy. Although Article 34(3) of the Model Law provides that the time limit shall be a period of three months from the date on which the party making that application has received the award, s.12 provides for a different time limit of 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned in the case of public policy. Whilst the time period of 56 days is shorter, the potential arguments behind the date on which time begins to run are infinitely wider and mean that the relevant arbitration files will have to be kept for 56 days beyond infinity.

Pursuant to art.10 of the Model Law, where the parties have not decided on the number of arbitrators, the default number “shall be three”. However, by s.13 the default number of arbitrators has been changed to one. The reasoning behind this is presumably that the Model Law has been aimed mainly at international commercial disputes where a tribunal of three would be the norm. The Irish legislature, however, in adopting the Model Law, had to take into consideration domestic disputes which have traditionally involved a sole arbitrator and may not warrant more.

measures, respectively. Article 27 of the Model Law deals with court assistance in the taking of evidence; arts 35 and 36 deal with the recognition and enforcement of awards and the grounds for refusing recognition and enforcement respectively.

⁶ Article 11 of the Model Law deals with the appointment of arbitrators; art.13 with the challenge procedure; art.14 with the competence of an arbitral tribunal to rule on its jurisdiction; art.16 with the jurisdiction of an a tribunal; and art.34 with the application for setting aside as the exclusive recourse against an award.

⁷ Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement for a party to apply to the High Court *either before or during* arbitral proceedings for an interim measure of protection and for the High Court to grant such a measure. Article 27 of the Model Law provides that either the arbitrator or a party *with the approval of the arbitrator* may request the court’s assistance in the taking of evidence.

⁸ Stay applications under art.8(1), any application for the setting aside of an award under art.34 of the Model Law, or any application for the recognition and enforcement of an award made in an international commercial arbitration.

Sections 14 to 16 deal with the power of the tribunal to examine witnesses and administer the oath; the taking of evidence in a place other than the state and the consolidation of and concurrent arbitrations.⁹

Section 17 legislates in respect of a reference of interpleader¹⁰ to arbitration. Whilst s.17(1) is similar to its corresponding provision under the 1954 Act (s.13), there are provisos which have been added by the 2010 Act. In particular, s.17(2) states that a court “shall” not direct that an issue between the parties be determined in accordance with an arbitration agreement where “the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed”.

The Model Law does not deal with interest. Therefore, s.18 adds this important provision in respect of arbitration to the adopted provisions of the Model Law. The issue of interest in domestic Irish arbitration had been unclear until the addition of s.17 of the 1998 Act.¹¹ Section 18 of the 2010 Act follows the wording of s.17 of the 1998 Act, in that it provides that, unless the parties agree otherwise, the arbitrator “may award simple or compound interest from the dates of the award (or any later date) until payment, at the rates and with the rests that it considers fair and reasonable”.¹² The words “fair and reasonable” in the 2010 Act have replaced the words “meets the justice of the case” in the 1998 Act.

Section 19 expressly provides the tribunal with the power to make an order directing a party to provide security for the costs of the arbitration. Whilst this is not a new power per se, the previous Arbitration Acts did not contain a similar provision and the arbitrator’s power to make such an order was derived from s.22(1) of the 1954 Act, which stated “Nothing in subsection (1) of this section shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters mentioned in the said subsection.”

Section 20 deals with the power of the arbitrator to direct specific performance of a contract. The wording of s.20 maintains the status quo set by s.26 of the 1954 Arbitration Act in that “an arbitral tribunal shall, unless otherwise agreed by the parties, have the power to make an award requiring specific performance of a contract (other than a contract for the sale of land)”.

Section 21 deals with the recoverability of costs, fees and expenses of a tribunal. Section 21(1) provides that the parties are free to agree as to the costs of the arbitration. Where there is no agreement between the parties, then s.21(3) leaves the matter of the costs between the parties to the tribunal, and s.21(5) provides that any award as to costs made by a tribunal should specify first the grounds for such an award, then the items of recoverable costs, fees or

⁹ Section 16 Act is similar to the 1998 Act s.9, which had been modelled on English Arbitration Act 1996 s.35.

¹⁰ An equitable proceeding brought by a third party requesting a court to determine the ownership of rights of rival claims to the same money and/or property held by that third party.

¹¹ See *Mellowhide Products Ltd v Barry Agencies Ltd* (1983) ILRM 152; and, in relation to arbitrators, *McStay v Assicurazioni Generale S.P.A.* [1991] ILRM 237. In the latter case, the arbitrator determined that, as he had in law no jurisdiction or power to do so, he was not entitled as arbitrator to adjudicate on the claim for interest prior to the date of the award. The Supreme Court held, inter alia, having considered s.22 of the Courts Act 1981 and *Chandris v Isbrandisem-Moller* (1951) KB 240 that it was not proper to express any view as to whether the decision, which the arbitrator had expressly made on his jurisdiction to deal with interest, was or was not correct in law (at 245). The Supreme Court also held (at 244) that the arbitrator did not have any express power to adjudicate on the question of the claimant’s entitlement to interest in respect of any period prior to the award by virtue of the terms of the arbitration agreement. Accordingly, the question of an inherent power to award interest was not decided.

¹² “[R]ests” is an accounting term for the periods used in calculating compound interest.

expenses and finally the amount referable to each party and by and to whom the costs should be paid. This is not a new provision and reflects that contained within s.11(6) of the 1998 Act. However, one important provision is s.21(4) which provides that in *domestic arbitrations*¹³ “the arbitral tribunal shall, on the request of any of the parties to the proceedings made not later than 21 working days after the determination by the tribunal in relation to costs, make an order for the taxation of costs of the arbitration by a Taxing Master of the High Court, or as the case may be, the County Registrar”.

Section 22 deals with the restriction on liability of arbitrators, etc. Section 12 of the 1998 Act restricted the liability of an arbitrator to acts or omissions where there is bad faith and extended this immunity to an employee, agent or adviser of an arbitrator and to an expert appointed under art. 26 of the Model Law. Under the 2010 Act, there is no such restriction and now arbitrators will not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of their functions. It would appear therefore that, even where it is proved that some element of bad faith existed on the part of arbitrators, they will still not be found in any way liable. Of most concern in my opinion however is the fact that the 2010 Act has deleted and/or ignored ss.12(6) and 12(7) of the 1998 Act, to the extent that the privileges and immunities that had been given to witnesses, barristers and solicitors under the 1998 Act are *not* now given to those acting in arbitration proceedings under the 2010 Act. In my view, this is extremely serious and amounts to a significant discrepancy. To give an example, under the old Acts, if a barrister or solicitor before an arbitral tribunal made a potentially defamatory comment about a particular person, that allegedly defamatory comment would not be actionable because under s.12(7) of the 1998 Act, “a person who ... is a barrister or solicitor ... and, ... [who] appears in proceedings before an arbitral tribunal, shall have the same privileges and immunities as barristers and solicitors have in proceedings before the High Court”. This would not be the case for any arbitral proceedings under the 2010 Act, since there is no similar express provision. It might certainly be arguable but there is no telling how the High Court would interpret such a matter. I imagine a strong argument against would be that, if the legislature had meant an equivalent to s.12(7) to be included, it should have been included expressly.

Section 23 deals with the effect of an award, its method of enforcement in the state, the reliance on its binding effect and the non-application of arts 35 and 36¹⁴ of the Model Law to any proceedings which take place within the Irish state.

Section 24 confirms that the New York Convention, the Geneva Convention and the Geneva Protocol have the force of law in the Irish state, whilst s.25 provides that the 2010 Act “shall” not apply to proceedings under the Washington Convention, save ss.11,¹⁵ 14¹⁶ and 15¹⁷ and also s.6¹⁸ (insofar as it gives the force of law to art.8(1) of the Model Law). Section 25(3) further confirms that the Washington Convention has the force of law in the Irish state.

The principal difference between s.25 of the 2010 Act and s.10 of the 1954 Act is the title. Whereas s.10 had the simple and rather blunt title “Death of party”, s.25 has the rather more elaborate “Survival of agreement and authority of arbitral tribunal in event of death”.

¹³ International commercial arbitrations are specifically excluded.

¹⁴ Article 35 of the Model Law deals with recognition and enforcement and art.36 deals with the grounds for refusing recognition or enforcement.

¹⁵ s.11: Determination of Court to be final.

¹⁶ s.14: Examination of Witnesses.

¹⁷ s.15: Taking of Evidence in State in aid of arbitration.

¹⁸ s. 6: Adoption of Model Law.

The provisions regarding arbitration in the event of bankruptcy (s.27) remain the same as those contained in s.11 of the 1954 Act. Section 28 provides that the 2010 legislation applies to arbitration under an arbitration agreement to which a state authority is a party. Section 29 deals with the application of the 2010 Act to arbitrations commenced under any other Acts, whilst s.30 legislates for certain agreements where the Act does not apply, i.e. any question as to the terms or conditions of employment or remuneration of any employees and an arbitration under s.70 of the Industrial Relations Act 1946. Section 30(2) goes on to state that s.18¹⁹ will not apply to an arbitration conducted by a property arbitrator appointed under s.2 of the Property Values (Arbitration and Appeals) Act 1960.

The final section, s.31, deals with arbitration agreements, consumers and small claims.

3. PART 3 OF THE ACT: REFERENCE TO ARBITRATION WHERE PROCEEDINGS PENDING BEFORE COURT

Section 32 provides the power for the High Court and Circuit Court to adjourn proceedings already pending before them, in order to facilitate arbitration where the court determines that the case is an appropriate matter for arbitration *and* both parties consent to the matter being decided by arbitration.

4. THE MODEL LAW AND ITS EFFECT ON DOMESTIC ARBITRATIONS

Whilst not intending to go through the Model Law article by article, I believe that there are a number of provisions which are of such importance that it is necessary to discuss them individually in order for the reader to fully comprehend the changes that the adoption of the Model Law into domestic arbitration law has brought about.

In the early part of 2007, professionals involved in arbitration in Ireland felt that a change in the domestic law of arbitration was necessary and that such a change should be implemented by June 2008 when the International Council for Commercial Arbitration (ICCA) Conference was scheduled to take place in Dublin. A group prepared a draft Bill that was circulated between the interested professional institutions in Ireland. That draft was however badly prepared and a number of qualified arbitrators, supported by the construction institutions, objected to it.

In April 2007, at the suggestion of the then Attorney General of Ireland, Rory Brady, Engineers Ireland (the IEI) hosted a symposium to examine whether legislative change was needed.²⁰ It had been hoped that, through discussion involving all interested bodies, a general consensus could be reached. The symposium was divided into two sessions, the first relating to arbitration and the second dealing with conciliation and mediation. All the speakers in the first session agreed that some change in the domestic law of arbitration was necessary. However, Dudley Solan, solicitor, was of the opinion that, whilst certain changes were needed, the extent of those changes should be limited so as to ensure that the High Court maintained a certain supervisory role over arbitrations in Ireland. Michael Collins SC pointed out that changes were certainly needed to the Arbitration Acts 1954 to 1998, since the Acts as they stood were in breach of Ireland's obligations under its membership of the European Union. He concluded:

¹⁹ The Act s.18: Interest.

²⁰ The symposium was held on April 28, 2007 at the IEI's premises in Dublin. The Arbitration Panel was: Dudley Solan, Brian Hutchinson, Michael Collins and myself. It was chaired by the then Attorney General for Ireland, Rory Brady. The rapporteur for the arbitration session was Michael Carrigan.

“It would appear to be unwise, in light of our obligations pursuant to Community law, to continue to provide distinct legal treatment for domestic and international commercial arbitration in this jurisdiction. Equally, however, it seems that few would favour any significant departure from the UNCITRAL Model Law in respect of international commercial arbitration in Ireland.”²¹

In my paper²² I made a number of proposals for reform, which included the obligation to give a reasoned award; the right to dismiss for want of jurisdiction; the power of the arbitrator to amend; and the right to dismiss for want of prosecution or on grounds of delay, all of which the 2010 Arbitration Act has addressed. Brian Hutchinson concurred with the observations made by the other speakers and stressed the following changes that he considered were required for domestic arbitration law in Ireland:²³ consolidation of the three Arbitration Acts 1954, 1980 and 1998 and in this connection, he also referred to the Statute of Limitation 1957, with regard to commencement of arbitration; codification or restatement to include decisions of the Superior Courts; modernisation to bring it up to the present practice in arbitration; reform, as I had proposed.

In fact, the Arbitration Act 2010 has responded positively to all the points raised at the Symposium but did not heed Dudley Solan’s aspirations, see Section 5 below.

Article 8 of the Model Law: “Arbitration agreement and substantive claim before court”

Historically in Irish law, where an arbitration agreement was found to exist between the parties, Irish courts, unless satisfied that it was “null and void, inoperative or incapable of being performed or that there [was] not in fact any dispute between the Parties”, would make an order staying any court proceedings regarding that dispute pending the outcome of the arbitration.²⁴

There is however no corresponding provision in the 2010 Act and so it is now necessary for practitioners to rely on the procedure set down under art.8 of the Model Law should such an issue arise, which states:

“Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued and an award may be made, while the issue is pending before the court.”

Article 8 is similar to the provision contained in the 1980 Arbitration Act in that, first, there had to be an arbitration agreement (note that it is not necessary to prove that a dispute exists), and secondly, the court *shall* (i.e., the court has no choice) stay the court proceedings unless the arbitration agreement (not the contract between the parties, just the arbitration clause itself) is null and void, inoperative or incapable of being performed.

²¹Michael M. Collins “The UNCITRAL Model Law and the Domestic Law of Arbitration”, paper presented to Dispute Resolution Symposium, Dublin, April 28, 2007 p.13.

²² Nael G. Bunni, “The need for change in Arbitration Law in Ireland”, paper presented to Dispute Resolution Symposium, Dublin, April 28, 2007.

²³ G. Brian Hutchinson “The Reform of Ireland’s Domestic Arbitration Law”, paper presented to Dispute Resolution Symposium, Dublin, April 28, 2007 pp.1–4.

²⁴ Section 5 of the Arbitration Act 1980.

Article 16: “Competence of arbitral tribunal to rule on its jurisdiction”

Since June 8, 2010, a tribunal has had the right to dismiss a party’s claim for want of jurisdiction. This right is also known within the arbitration world as Kompetenz-Kompetenz, which amounts to a power of arbitrators to review their own jurisdiction and to rule on that issue, including any objections with respect to the existence or validity of the arbitration agreement. Before the 2010 Act, if the issue of jurisdiction did arise in domestic arbitration, it was a matter for the courts to determine whether or not an arbitrator had the requisite jurisdiction to deal with the dispute between the parties. There was a general feeling that leaving this power with the courts showed a lack of trust in the arbitration clause in the first place and, secondly, demonstrated a lack of trust in arbitrators.

With the adoption of art.16 of the Model Law, arbitrators now have the power to determine their own jurisdiction. Article 16 states:

“Article 16. Competence of arbitral tribunal to rule on its own jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

There are a number of fundamental principles behind such an all-encompassing power. First, the power is there to ensure that an arbitration agreement can survive, by preventing parties from delaying the commencement of arbitral proceedings and referring such a matter as the arbitrator’s jurisdiction to the High Court, which would invariably take a number of months. Secondly, the presence of such a power makes it abundantly clear that arbitrators are to have the powers that such law confers on them.

For those who are uncertain about giving arbitrators such power, it is important to bear in mind that under art.16(3), there is an appeal to the High Court of arbitrators’ decisions *that they have jurisdiction*. For those sceptical about the adoption of the Model Law into domestic law, this provision will provide some comfort as it will ensure that the High Court will get the last say on the fundamental issue of whether or not the parties have consented to have their dispute resolved by arbitration, generally and in particular to the issue where jurisdiction has been challenged.

Article 25: “Default of a party”

Prior to the enactment of the 2010 Act, there was no provision under Irish law allowing arbitrators to dismiss a party’s claim for want of prosecution or on grounds of persistent delay. Now however, under art.25 of the Model Law, arbitrators have that power. Article 25 states:

“Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.”

The Model Law is drastically different from the Arbitration Acts 1954–98 for domestic arbitration in that the power given to the arbitrator under the former is now more akin to the “inherent jurisdiction” given to the High Court, since it allows for an outright dismissal of a claimant’s claim under art.25 once the statement of claim is not delivered “within the period of time agreed by the parties or determined by the arbitral tribunal”.²⁵

Article 31: Form and contents of award

Under the Arbitration Acts 1954 to 1998, there was no statutory provision in domestic arbitration obliging arbitrators to issue a reasoned award. There was not even an equivalent to the English Arbitration Act 1979 s.5, which enabled the High Court in England to order arbitrators to state the reasons for their decision so as to enable the High Court to deal adequately with the logic of that award if it were to be an issue. The reasoning behind such a loophole in the Arbitration Act 1954 could perhaps be summarised by the following passage stated by Lord Mansfield when advising his fellow English judges:

“Consider what you consider justice requires and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.”²⁶

This however has all changed with the adoption of the Model Law into Irish domestic arbitrations. Since June 8, 2010, arbitrators are now obliged to issue a reasoned award unless the parties to the arbitration agree otherwise. Article 31 of the Model Law states:

“Article 31. Form and contents of award

- (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.²⁷

²⁵ Article 23(1) of the Model Law.

²⁶ Cited by Bingham LJ “Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitral Award” (1988) 4 *Arbitration International* 141.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1).²⁸ The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.”

The inclusion of this article is of fundamental importance to the acceptability of an arbitral award. Parties to arbitration have a right to be informed as to why they have won or lost their claim. The loser has the right to be told why it lost and the winner, why it did not win all that it asserted. The obligation to give a reasoned award further ensures that there is no arbitrariness in the award itself, thereby ensuring that justice is done.

Article 33: Correction and interpretation of award; additional award

Under the 1954 Act, there had been an extremely limited power to “correct ... any clerical mistake or error arising from any accidental slip or omission”. The power was so limited that it could have been compared directly with the power of an Irish court to correct any errors or omissions in one of its judgments. The idea was that, once arbitrators have issued their awards, they become *functus officio* and consequently no longer have the requisite jurisdiction to make any amendments.

Article 33 of the Model Law states:

“Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31²⁹ shall apply to a correction or interpretation of the award or to an additional award.”

²⁷ Article 30: Settlement.

²⁸ Article 20(1): Place of Arbitration.

²⁹ Article 31: Form and contents of award.

Therefore, under Irish law now, arbitrators have a vast array of powers in relation to the award including the power to extend the time limits within which they can make amendments.

Whilst the 1954 Act was extremely limited in respect of the powers it bestowed on an arbitrator in respect of the award, the Model Law is at the opposite extreme, providing all of the extensive powers quoted above. Whether or not this is a good or a bad thing will invariably depend on how arbitrators interpret it. Now the 2010 Act and therefore the Model Law are in force for domestic arbitrations, parties must be careful in their selection of arbitrators to ensure, first, that they fully understand their powers under the Act and the Model Law, but secondly, and most importantly, that they do not in any way take advantage of or misapply those powers.

Article 34: Application for setting aside as exclusive recourse against arbitral award

This is possibly the most important and most contentious change that has been made to arbitration law in Ireland by the 2010 Act. Whereas previously, under the Arbitration Acts 1954 to 1998, parties to arbitration would have the opportunity to have recourse against and set aside an award under s.38,³⁰ now the only recourse for a party to set aside an award is under art.34 of the Model Law:

“Article 34. Application for setting aside as exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- (2) An arbitral award may be set aside by the court specified in article 6 only if:
 - (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement was not in accordance with this Law; or
 - (b) the court finds that:
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.”

³⁰ Section 38: Power of Court to set aside award on grounds of misconduct.

As can be seen, the circumstances in which the High Court can set aside an award are those listed within art.34, and therefore extremely confined. It is crystal clear from the wording of art.34(2) that the High Court may set aside the award *only if* there is sufficient proof of the matters specified in subparas (i) to (iv) above. There is no room for this list to be expanded under any circumstances, even where there is proof of misconduct by the arbitrator as in the 1954 Act. Therefore, the only provision that is in any way open to interpretation is that contained within art.34(2)(b): whether an award is in conflict with public policy of the state.

The High Court examined the provisions of art.34, albeit in respect of the enforcement of a foreign award under the 1998 Act, in *Broström Tankers AB v Factorias Vulcano SA*.³¹ This case concerned an application by a Swedish company (the plaintiff) to enforce an award made in Norway against a Spanish company on the basis that there was an outstanding debt owed to the Spanish company (the defendant) by an Irish company which could be garnisheed if the plaintiff were successful. The defendant argued that the award should not be enforced because it would be contrary to public policy. In determining this issue, the High Court (Kelly J.) stated:

“I am satisfied that there are strong public policy considerations in favour of enforcing awards.... I am quite satisfied that a refusal of an enforcement order on grounds of public policy would not be justified in this case. To do so would extend to a very considerable extent the notion of public policy as it has come to be recognised in the context of the enforcement of an arbitral award. The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of narrow scope. It extends only to a breach of the most basic notions of morality and justice.”

One thing that has to be considered is the effect on a similar situation to the one that arose in the Supreme Court in *Galway City Council v Samuel Kingston Construction Ltd*.³² Would such a situation be subject to art.34(2)(iv) or would it be sufficiently serious as to amount to a conflict with the public policy of the state and, therefore, warrant the setting aside of an award under art.34 of the Model Law? Until a case subject to the 2010 Act comes before the court on an application under art.34, exactly how the High Court will interpret this particular piece of legislation will remain unknown.

5. WHAT’S MISSING FROM THE ACT?

There is no equivalent section to s.35 of the Arbitration Acts 1954 to 1998 and therefore the High Court no longer possesses the power to decide a special case stated by an arbitrator. Similarly, the High Court no longer has the power to direct an arbitrator to state a special case for the opinion of the High Court. The provisions of s.35 were specifically aimed at situations where, if in an arbitration a question of law arose and the resolution of it was necessary for the proper determination of the case, the arbitrator could refer it to the High Court. The thinking behind s.35 was that arbitrators might need help in assessing the legal rights and obligations of the parties. Parties commencing arbitral proceedings after June 8, 2010 must be careful in choosing their arbitrators. They must be confident that they are not only competent to examine the questions of fact and the technicalities of any special expertise involved in the case but also the intricacies of the law. Tribunal experts in law may be called upon more frequently to ensure that the appropriate expertise is available to arbitrators.

³¹ *Broström Tankers AB v Factorias Vulcano SA* [2004] 2 IR 191.

³² *Galway City Council v Samuel Kingston Construction Ltd* [2010] IESC 18 Unreported March 25, 2010 SC O’Donnell J. subsequently relied on in *Campus & Stadium Ireland v Dublin Waterworld* [2010] IESC 25 Unreported April 30, 2010 SC Hardiman J.

In light of *Galway City Council v Samuel Kingston Construction Ltd*, the question must be asked whether the High Court possesses the power to deal with a similar situation in a similar manner. In that case, which is arguably the most important recent decision on the topic of arbitration in Ireland, the Supreme Court was requested to overturn a decision of the High Court refusing to set an arbitrator's award aside. The appeal was based on four grounds of alleged misconduct or error and two instances where it was contended that the arbitrator should be replaced. The alleged errors of law were:

1. The arbitrator decided the issue of delay without hearing evidence of the council's expert.
2. The arbitrator found that the contractor's withdrawal from the works was not a repudiatory breach.
3. The arbitrator erred in his finding in respect of the relationship between the contract agreement and a common law right to terminate; and
4. The arbitrator erred in his finding that the council was in breach of contract.

The council sought the removal of the arbitrator because he fell asleep during the hearing and made inappropriate ex parte contact with one of the parties. The Supreme Court (O'Donnell J.) found that, in respect of ground 1, the arbitrator had indeed misconducted himself:

"I have no doubt that in the end the arbitration was misconducted ... and went significantly awry ... and that it would certainly smack of injustice to allow the award to stand. The exclusion of a relevant witness, without addressing the admissibility of that evidence, and the maintenance of that position on a basis that did not even address the substance of the complaint, is so far removed from the basic procedural fairness that a party is entitled to expect that the decision must be set aside.... In many ways, this resolves the proceedings. Since the award is being set aside on grounds of misconduct ... that itself is a sufficient ground for removing the Arbitrator."

Were similar incidents to those in *Galway City* to arise after June 8, 2010, could the parties apply to the High Court to set aside an award under art.34 of the Model Law?

On the basis of the legislation alone, the only option for a party left in a similar situation to *Galway City Council* would be to attempt to argue the points under art.34(2)(b), which states:

- "(2) An arbitral award may be set aside by the court specified in article 6 only if:
... (b) the court finds that:
(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State."

As has already been mentioned above, the High Court (Kelly J.) in *Broström Tankers AB v Factorias Vulcano SA*³³ has to a certain extent dealt with the public policy provisions under art.34(2)(b)(ii) of the Model Law. The factual intricacies of the case have been discussed above, but I believe that it is important to refer to the following extract of the decision:

"[T]he public policy defence to an enforcement application was of narrow scope and could be invoked only where there was some element of illegality or where the enforcement of the award would be clearly injurious to the public good or where it

³³ *Broström Tankers AB v Factorias Vulcano SA* [2004] 2 IR 191.

would be wholly offensive to the ordinary responsible and fully informed members of the public.”³⁴

Kelly J. also made reference to *Redfern and Hunter*³⁵ in respect of the issue of public policy, which in my view, reaches the crux of the issue:

“Recognition and enforcement of an arbitral award may also be refused if it is contrary to the public policy of the enforcement state. It is understandable that a state may wish to have the right to refuse to recognise and enforce an arbitration award that in some way offends the state’s own notions of public policy. Yet, when reference is made to public policy, it is difficult not to recall the sceptical comment of the English judge who said more than a century ago: ‘It is never argued at all but where other points fail.’”³⁶

The only reason that a party that found itself in a similar situation to that of Galway City Council would rely on the provisions of art.34(2)(b)(ii) is that this would be the only way, *in accordance with the legislation*, that a party could have the award set aside.

It is also important to remember that a party can also seek to rely on the common law. *Galway City Council v Samuel Kingston Construction Ltd*³⁷ is probably the most comprehensive and important decision on arbitration in the recent past in Ireland. It is arguable that even though the legislation does not, some might say, adequately deal with situations where an arbitrator has misconducted proceedings, a party might still apply to the court to set aside an award on the accumulated common law principles set down in past cases. O’Donnell J.’s judgment quotes a large section of the High Court decision (McMahon J.), which is an excellent summary of the law on arbitration in Ireland. All of this case law reflects the evolution of the decisions given by Irish courts in a period of over fifty years and that is to say that the jurisdiction of the High Court to interfere in the arbitral process “is limited and arises only where the error is ‘so fundamental’ that it cannot be allowed to stand ... or ‘clearly wrong’”³⁸. It is of course perfectly arguable that this position still stands in common law. Whether or not the Irish High Court will agree with the above proposition is something that remains to be seen. However, I believe that the use of the words “only if” within art.34(2) will ultimately limit the success of an argument that an award should be set aside on grounds of misconduct following Irish precedent alone. In my view, it would be best to use these common law principles in support of and in addition to the provisions of art.34(2)(b)(ii).

³⁴ *Broström Tankers AB v Factorias Vulcano SA* [2004] 2 IR 191.

³⁵ Alan Redfern, and Martin Hunter, Nigel Blackaby and Constantine Partasides *Law & Practice of International Commercial Arbitration* 3rd edn (London, Sweet & Maxwell, 1999).

³⁶ *Broström Tankers AB v Factorias Vulcano SA* [2004] 2 IR 191.

³⁷ *Galway City Council v Samuel Kingston Construction Ltd* [2010] IESC 18 Unreported March 25, 2010 SC O’Donnell J. Subsequently relied on in *Campus & Stadium Ireland v Dublin Waterworld* [2010] IESC 25 Unreported April 30, 2010 SC Hardiman J.

³⁸ *Limerick City Council v Uniform Construction Ltd* [2007] 1 IR 30.