COMMENTARY ON THE (RELATIVELY) NEW IRISH ARBITRATION LAW:
THE UNCITRAL MODEL LAW IN (ALMOST) PURE FORM

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I. INTRODUCTION

Since 2005 Ireland has embarked upon a steady and, thus far, successful campaign to take its place among the arbitration nations of the World when, in that year, the Bar Council (the professional body for barristers in Ireland) was awarded the right to hold the ICCA Conference for 2008 marking the 50th anniversary of the New York Convention. The work which went into the preparation for and the hosting of ICCA 2008 was the catalyst for several key developments in the field of Irish arbitration:

The passing into law of the Arbitration Act 2010 which swept away all previous arbitration statutes (which were contained in three slightly disparate and somewhat overlapping Acts) and gave the force of law in Ireland, amongst others, to the UNCITRAL Model Law on International Commercial Arbitration (2006 version, including its interim measures provisions);

The founding of Arbitration Ireland, the Irish Arbitration Association which has become the leading umbrella body for arbitration practitioners within Ireland and practitioners overseas with Irish connections. It is not an institute which administers arbitrations, but rather like ASA, the Swiss Arbitration Association, is dedicated to the development and promotion of arbitration in Ireland; and

The opening of the Dublin Dispute Resolution Centre. This is a world-class facility for the holding of arbitrations in Dublin city centre and is within the legal quarter adjacent to many lawyers’ offices and the courts. The Centre was nominated as one of the best developments for 2012 in the Global Arbitration Review awards.

This commentary will focus on the first of these key developments, namely the Arbitration Act 2010 (“the Act”) which is now (as of the time of writing) just under three years old.

II. WHAT DID THE ACT REPLACE?

For many years the Arbitration Act 1954 was the corner-stone of Irish arbitration law and was all but identical to the English Arbitration Act 1950. Indeed Irish arbitration law and practice

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substantially reflected English law, with reliance on English case law and texts, particularly the
classic book on the subject by of Mustill & Boyd. The Arbitration Act 1980 later added the New
York and Washington Conventions to Irish law.

In 1998, Ireland took what then promised to be a major step with the passing of the Arbitration
(International Commercial) Act. This act prescribed the UNCITRAL Model Law on International
Commercial Arbitration (1985 version) for all international arbitrations taking place in Ireland.
Domestic arbitrations continued to be governed by the Arbitration Act 1954. However the day-to-
day reality of practice in Ireland meant that the domestic statute (the Arbitration Act 1954) was
the key law, and with it came the possibility of ‘case-stated’, a procedure which had much
potential for mischief, and occasionally causing mayhem to an ongoing arbitration.

III. THE ACT - OVERVIEW

The Act swept all previous arbitration laws away, and the UNCITRAL Model Law (2006
version) (“the Model Law”) was adopted for all arbitrations taking place in Ireland, without
distinction between domestic and international. English cases and textbooks\(^2\) continue to be relied
upon but only on issues where that country’s Arbitration Act 1996 and the Model Law are
similarly framed. Case law from other Model Law jurisdictions (Canada, Australia and New
Zealand in particular) is now regularly cited in arbitration applications before the Irish courts.

The Act has a simple structure and readily accessible to the reader. There is a short series of
sections which give force of law in Ireland to the Model Law and also continue in force, among
others, the New York and Washington Conventions. The Act makes some very minor changes
and additions to the Model Law (see below). There then follows a series of schedules to the Act
in which one finds the Model Law and the various conventions.

IV. THE CHANGES TO THE MODEL LAW MADE BY THE ACT

The default number of arbitrators is set at one rather than three – this is a change to article 10(2).\(^3\)
This reflects the practice in Ireland that a sole arbitrator is appointed rather than a three-member
tribunal. Of course, if the parties agree to having more members of their tribunal then that is not
an issue.

The reference in article 27 of the Model Law (court assistance with the taking of evidence) is
extended to include arbitrations with seats outside of Ireland.\(^4\) This allows the mechanism for
evidence-taking with the authority of the High Court in Dublin to be deployed in aid of an
overseas arbitration. This is not a route to discovery, notwithstanding the fact that Ireland is a

\( ^2 \) The first book on the Act is B. MANSFIELD, Arbitration Act 2010 and Model Law: A Commentary
(Dublin, Clarus Press, 2012).
\( ^3 \) Section 13 of the Act.
\( ^4 \) Section 15 of the Act.
common law jurisdiction. Irish law in relation to the taking of evidence in aid of a foreign proceedings is confined to oral testimony of witnesses who have personal knowledge of factual matters in issue and can only be compelled to bring documents in their possession which touch upon their testimony – this, as a matter of experience and practice, is a restriction which catches parties and lawyers from ‘enthusiastic’ discovery regimes unawares from time to time.

All decisions of the High Court under the Act cannot be appealed to the Supreme Court.\(^5\) Thus, there is no delay in relation to any High Court decision under the Act and this ‘one-stop-shop’ was inspired by the approach in Switzerland where international arbitral awards are subject only to challenge at one instance before the Federal Tribunal.

The time limit for the making of an application to set aside an award based upon a public policy argument per article 34(3) of the Model Law shall be made within 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.\(^6\)

Articles 35 and 36 (enforcement) of the Model Law do not apply in respect of an award rendered in Ireland.\(^7\) Enforcement by the High Court of an award made in Ireland is pursuant to section 23(1) of the Act by means of a simple application which does not permit the raising of the various grounds in Article 36 by a defendant. This means that the potential for two bites at the cherry\(^8\) by a recalcitrant defendant has been completely removed.

### V. The Additions Made to the Model Law by the Act

The arbitral tribunal is empowered,\(^9\) unless otherwise agreed by the parties, to administer an oath to a witness – but this is not a mandatory provision.

Consolidation of arbitrations is permitted but only upon the consent of the parties.\(^10\)

The parties can agree the powers of the arbitral tribunal to award interest; or in default of such agreement there is a power to award simple or compound interest from the dates, at the rates and with the rests which are considered fair and reasonable\(^11\).

The arbitral tribunal can (unless otherwise agreed by the parties) order a party to provide security for costs\(^12\).

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\(^5\) Section 11 of the Act.
\(^6\) Section 12 of the Act.
\(^7\) Section 23(4) of the Act.
\(^8\) First bite: a set aside application under Article 34; second bite, resisting enforcement under the same grounds again in Article 36. If a losing party sits on its hands and does not challenge an award under Article 34 it will be shut out from complaint when confronted with a High Court enforcement application.
\(^9\) Section 14 of the Act.
\(^10\) Section 16 of the Act.
\(^11\) Section 18 of the Act.
The arbitral tribunal has (unless otherwise agreed by the parties) the power to make an award requiring specific performance of a contract (other than a contract for the sale of land).\textsuperscript{13}

The parties are free to make such agreement as to the costs of the arbitration as they see fit whether before or after a dispute breaks out. In default of agreement on costs or in the absence of an agreed procedural power to award/withhold costs, the arbitral tribunal can determine by award those costs as it sees fit.\textsuperscript{14}

There is a full and unqualified protection\textsuperscript{15} from liability in respect of arbitrators\textsuperscript{16} and arbitral institutions\textsuperscript{17} for anything done or omitted in the discharge or purported discharge of their functions.

An arbitration agreement or the authority of an arbitral tribunal is not discharged by the death of any party.\textsuperscript{18}

In the event of the bankruptcy of a party there is a prescribed mechanism in order to allow the arbitration to move forward.\textsuperscript{19}

The Act applies to an arbitration agreement under which a state authority is a party.\textsuperscript{20}

\textsuperscript{12}Section 19 of the Act.
\textsuperscript{13}Section 20 of the Act.
\textsuperscript{14}Section 21 of the Act. The form of an Arbitral Tribunal’s determination is prescribed in section 21(5) and requires specification of the grounds, the items of recoverable costs, fees or expenses, the amount referable to each and by and to whom they shall be paid.
\textsuperscript{15}Section 22 of the Act.
\textsuperscript{16}This includes an employee, agent, advisor or tribunal-appointed expert
\textsuperscript{17}Section 22(3) of the Act.
\textsuperscript{18}Section 26 of the Act.
\textsuperscript{19}Section 27 of the Act:
(1) Where an arbitration agreement forms part of a contract to which a bankrupt is a party, the agreement shall, if the assignee or trustee in bankruptcy does not disclaim the contract, be enforceable by or against him or her insofar as it relates to any dispute arising out of, or in connection with, such a contract.
(2) Where— (a) a person who has been adjudicated bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and (b) any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, and
(c) the case is one to which subsection (1) does not apply, then, any other party to the agreement or the assignee or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement and that court may, if it is of the opinion that having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.
(3) In this section “assignee” means the Official Assignee in Bankruptcy.
\textsuperscript{20}Section 28 of the Act.
VI. FURTHER PROVISIONS OF THE ACT

The Act carries on the pre-existing force of law in Ireland of the New York\textsuperscript{21} and Washington\textsuperscript{22} Conventions and the Geneva Protocol.\textsuperscript{23}

When considering any application under the Model Law the High Court shall take judicial notice of the UNCITRAL travaux préparatoires and its working group relating to the preparation of the Model Law.\textsuperscript{24}

The Act appoints\textsuperscript{25} the President\textsuperscript{26} of the High Court (or such judge of the High Court as may be appointed by the President) to deal with all applications\textsuperscript{27} under the Model Law, save for stay applications.

Unless otherwise agreed by the parties, the Act specifically prohibits\textsuperscript{28} the High Court from ordering the discovery of documentation or security for costs when exercising its powers under article 9 or 27 of the Model Law.

The Act does not apply to an arbitration under an agreement providing for the resolution of any question relating to the terms or conditions of employment or the remuneration of any employees.\textsuperscript{29}

In relation to consumers, such a party shall not be bound by an arbitration agreement (except if they agree after the dispute has arisen) where the agreement between the parties contains such a term which has not been individually negotiated and the dispute involves a claim not exceeding €5,000.00.\textsuperscript{30}

\textsuperscript{21} Reproduced in full in Schedule 2 of the Act.
\textsuperscript{22} Reproduced in full in Schedule 3 of the Act.
\textsuperscript{23} Reproduced in full in Schedule 4 of the Act.
\textsuperscript{24} Section 8 of the Act.
\textsuperscript{25} Section 9(2) of the Act.
\textsuperscript{26} The most senior judge of the Irish High Court and second only to the Chief Justice in the judicial hierarchy.
\textsuperscript{27} All applications are to be made in a summary fashion (section 9(3) of the Act) which means that evidence in support of the relief sought is tendered by way of affidavit and not by live testimony. The procedural rules of the High Court under the Act (Order 56 of the Rules of the Superior Courts) set out a clear and robust timetable for the filing of affidavits and the speedy disposition of applications.
\textsuperscript{28} Section 10 of the Act.
\textsuperscript{29} Section 30 of the Act.
\textsuperscript{30} Section 31 of the Act. There is also a provision in section 31 which specifically excludes the protection afforded to consumers from amateur sports persons who are parties to arbitration agreements involving their sporting bodies. This is particularly aimed at supporting the arbitration system under the auspices of the Gaelic Athletic Association which is the major amateur sporting body in Ireland with a very large number of participants.
The High Court and Circuit Court\textsuperscript{31} can of their own motion adjourn proceedings to enable the parties to consider whether any or all of the matters in dispute might be determined by arbitration.\textsuperscript{32}

Finally, while the Act contains the entirety of Ireland’s arbitration law, there is a provision in another statute that is also relevant. Section 17 of the Defamation Act 2009 gives absolute privilege to a statement made in the course of proceedings before an arbitral tribunal where the statement is connected with those proceedings.

\section{VII. Experience under the Act – staying litigation}

The Act is quite clear as regards the law on stay applications before the Irish courts when there is an arbitration agreement: the orthodox and international standard found in either Article II of the New York Convention or Article 8 of the Model Law applies without any variation. Either can be invoked by a party seeking a stay of litigation, however, in practice, since the passing of the Act the normal and usual approach is to rely upon Article 8 of the Model Law:

\begin{quote}
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.
\end{quote}

The other pertinent issue in such circumstances is what, as a matter of Irish law and the Act in particular, constitutes an ‘arbitration agreement.’ The definitions section of the Act (section 2) requires the term ‘arbitration agreement’ to be construed in accordance with option 1 of Article 7 of the Model Law. Option 1 provides:

\begin{quote}
Article 7. Definition and form of arbitration agreement
\end{quote}
(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; ‘electronic communication’ means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option 1 is drawn in wide terms and eliminates debate as to whether electronic communications can constitute “in writing.”

So much for what the Act says. Stay applications are, in the main, routine matters before the Irish courts and are dealt with fairly readily (and usually rapidly) by means of a two-stage process: first, a written application requesting a stay is filed with the court backed up by an affidavit exhibiting the relevant agreement (there may then be further exchanges of affidavit evidence if the party that has commenced the litigation wishes to contest the matter or the evidence filed); second, there is an oral argument phase before the court. In practice, stay applications tend to be quite short as there is usually little real debate as to whether or not there is an arbitration agreement; once the arbitration agreement has been put before the court and it appears to cover the matters at issue in the litigation, a stay is mandatory. This is neither surprising nor indeed
particularly unusual for any well-developed legal system that has adopted the Model Law (or has similar principles in its arbitration regime).

Perhaps the more interesting question relates to the situation in which the party that brings the litigation decides to put up a spirited fight against the stay application. These fall into two broad theoretical categories: (a) that there is, in fact, no arbitration agreement in place between the parties; or (b) that the arbitration agreement is null and void, inoperative or incapable of being performed.

A. Barnmore Demolition Case

The first of these categories was the subject of one of the first cases heard and decided under the Act. The High Court considered the appropriate standard of review to be applied when determining whether or not a party that has commenced litigation is a party to an arbitration agreement for purposes of Article 8 of the Model Law.  

In *Barnmore Demolition and Civil Engineering Limited v Alandale Logistics Limited & Ors*, Mr. Justice Feeney had to decide an application brought by two of the defendants to stay the litigation pursuant to Article 8 of the Model Law.

The defendants bringing the application to stay the proceedings alleged that there was an arbitration agreement in place between the parties. The plaintiff’s position was that there was no such agreement in existence. The issue canvassed by the parties before the High Court was whether there should be either a full trial or investigation by the judge on whether there was such an agreement (which is comparable to the English position) or whether the court should conduct a prima facie review.

The factual background to the case stemmed from works carried out at the new terminal at Dublin Airport. The judgment refers to a thicket of correspondence back and forth about contractual entities, incomplete forms of contract, who was paying whom, conditions, authority, and alleged ratification, among other matters.

At the outset, the judgment discussed the concept of the separability of arbitration agreements, which is found in Article 8, Option 1 of the Model Law. The House of Lords decision in *Lesotho Highlands Development Authority v Impregilo SpA & Ors* in that regard, with its

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famous passage on separability, was described as being equally applicable to the position in Ireland.

Mr. Justice Feeney then examined the provisions of the Model Law in Article 16 concerning competence-competence, which brought him to the core issue in the application before him:

The entitlement of both the Court and the arbitral tribunal to rule on the existence of an arbitration agreement has given rise to extensive discourse. In light of the fact that both a court and the arbitral tribunal have jurisdiction to consider and rule on the existence of an arbitration agreement the issue arises as to the standard of judicial review which should be applied by the Court in exercising its jurisdiction on this matter under the Model law. This matter is summarised in the textbook by Gary B. Born entitled *International Commercial Arbitration* at Chapter 6, p. 881 where he deals with the issue of prima facie versus full judicial consideration of interlocutory jurisdictional challenges under the Model Law. He states: ‘When a party seeks an interlocutory judicial determination of jurisdictional objections, prior to any arbitral award on the subject, there is uncertainty regarding the standard of judicial review that should be applied by a court under the Model Law. As discussed below, the text of the Model Law, and many judicial authorities, strongly suggest that full judicial review of the jurisdictional objection is appropriate, at least in some circumstances. In contrast, as also discussed below, some judicial authority, and some aspects of the Model Law’s drafting history, suggest that only prima facie interlocutory judicial consideration is ever appropriate.’

Ultimately Mr. Justice Feeney did not have to decide between the two approaches as, following a careful analysis, he found that even on a prima facie standard the defendants did not succeed in showing that there was an arbitration agreement in place between the parties. He took, by way of example, on the prima facie standard the legal test applied by Irish courts in deciding whether an application to summarily dismiss a case at the conclusion of a plaintiff’s case:

. . . whether assuming that the tribunal of fact was prepared to find that all the evidence of the plaintiff was true, and in other words treating the plaintiff’s case at its highest, whether in those circumstances the tribunal of fact would be entitled to arrive at the conclusion that making those assumption . . . the defendant had a case to meet.

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36 “It is part of the very alphabet of arbitration law, as explained in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, 724-725, per Hoffmann LJ (now Lord Hoffmann) and spelled out in section 7 of the Act, that the arbitration agreement is a distinct and separable agreement from the underlying or principal contract.” Id., opinion of Lord Steyn.

37 This standard does not apply to arbitrators. There is no reference in the Act to summary dismissal; this was an approach used by Mr. Justice Feeney for the purpose of Article 8.
The stay was refused and the litigation continued.

The issue, therefore, as to the standard of judicial review under a contested application pursuant to Article 8(1) of the Model Law remains to be determined as a matter of Irish law. The sense one gets from this decision is that the views of Born in favor of a full judicial review may well carry the day if the matter arises in the future. However, the approach of a full judicial review in all circumstances does have its powerful critics, most notably David Joseph, QC. Joseph advocates a more nuanced approach whereby the difference should be recognized between a stay in respect of an arbitration agreement subject to the same law as that of the court, and a stay in respect of an arbitration agreement subject to a different law (ie, an overseas seat).

This seems to reflect an approach which would be more sensitive to the wide diversity of international standards for the conclusion of arbitration agreements. It is hoped the High Court will adopt in future.

For present purposes, Mr. Justice Feeney’s decision has interesting features, particularly given that it was one of the very first decisions of the High Court under the Act. It demonstrates a very high degree of receptiveness to leading international authority (Born and *Lesotho Highlands*), and was rendered expeditiously: oral arguments concluded on 4 November 2010, and only seven days later Mr. Justice Feeney rendered a detailed judgment.

**B. P. Elliott & Company (in receivership & in liquidation) Case**

This case concerned a stay application by a defendant (FCC Elliott Construction Ltd) to Irish litigation brought by P. Elliott & Company (which was then in receivership and also in liquidation – a rather unfortunate, but not unknown, set of affairs for an Irish company involved in construction). The defendant’s argument was based on an ICC arbitration clause with a Geneva seat.

Mr Justice Mac Eochaidh stated the following useful point of principle:

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39 [2012] IEHC 361
48. I have not been directed to any Irish decision dealing with the interpretation of Article 8 of the Model Law but the provision has been adopted in many countries and some guidance maybe found from foreign court decisions.

49. The Supreme Court of British Colombia gave a decision called Pacific Erosion Control Systems Ltd. v. Western Quality Seeds[2003] BASK 1743, in which the defendant applied for a stay of proceedings in favour of arbitration pursuant to s. 8 of the (Canadian) International Commercial Arbitration Act, and pursuant to the inherent jurisdiction of the court (s. 8 of the Canadian International Commercial Arbitration Act provides for stays on proceedings where a court has referred disputes to arbitration pursuant to Article 8 of the Model Law). The learned trial judge referred to the decision of Hinkson J. in the Court of Appeal in Gulf Canada Resources Ltd. v. Arochen International Ltd. [1992] BCJ 500, which, in admirably clear terms, formulated a test for whether a stay of proceedings should be ordered, as follows:

"The test formulated is that a stay of proceedings should be ordered where: (i) it is arguable that the subject dispute falls within the terms of the arbitration agreement; and (ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement."

The judge further stated:

56. I agree with the proposition that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration but directs a court to grant or not to grant a stay, depending on the threshold issue of whether the parties to the proceedings are parties to an arbitration agreement. If they are, and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then the stay must be granted. Contrarily, if the parties are not bound by an arbitration agreement, then the stay, of course, must be refused.

The stay sought in this case was refused as the defendant did not prove, even to the standard of arguability, that it exchanged a promise to arbitrate with the plaintiff. In fact, the relevant contract contained an Irish law clause and an Irish jurisdiction agreement. The fact that there was a related JV agreement amongst other parties for ICC arbitration in Geneva could not trigger a stay of the claims brought before the Irish courts.
C. Rory O’Meara Case

Mr Justice Charleton’s judgment\textsuperscript{40} is of particular importance as it is a strong statement of principle about the breadth of an arbitration clause. In short, the plaintiff bringing the litigation sought to avoid a stay by suggesting that the arbitration clause in a lease could not cover “waste” (namely damage to the leased premises). The judge stated as follows:

9. Upon a brief analysis of the authorities, in this case, it seems to me that, as the wording of the arbitration clause indicates, the plaintiff landlord and the defendant tenant agreed to have all disputes which might arise between the parties in connection with the lease or the subject matter of the lease to be decided by an arbitrator. The clause in my view does not admit of fine distinctions such as the to failure to repair under a covenant and waste as a form of failure to repair. The clause could not therefore be clearer.

VIII. EXPERIENCE UNDER THE ACT – SETTING ASIDE AWARDS

The sole grounds in Ireland by which an award may be set aside are those set out in article 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 or of the arbitral proceedings or was otherwise unable to present his case; or

\textsuperscript{40} [2012] IEHC 317
(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.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.

As already noted the Act does make one slight change to article 34, but only in respect of the limitation period for public policy (“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 first challenge (to this author’s knowledge) to an award pursuant to the 2010 Act and Art. 34 of the Model Law, an allegation that a party was not able to present its case was dismissed by the High Court in unambiguous terms (O’Cathain v. O’Cathain [2012] IEHC 223):

The applicant herein had sufficient time and sufficient documentary evidence to prepare his submissions and defence. At the time of the hearing the applicant had the respondent’s submission for approximately eight months. Instead of engaging with the procedure in a meaningful way the applicant sought to delay matters. The arbitrator had given him every possible opportunity to make his case and he
had refused to do so. He walked out. The applicant did not enjoy a monopoly over the right to fair procedures. The respondent too was entitled to fair procedures and to have this matter dealt with expeditiously. In my view the arbitrator was correct to insist on the hearing continuing. I therefore reject the applicant’s complaint in this regard.

IX. Conclusion

Conclusion on the Act and experience thus far: ‘so far so good’. One useful, and pithy commentary was made by a prominent international arbitration firm:

A. Dublin

1. Ireland is a party to the New York Convention.

2. Ireland has just passed a new Arbitration Act (2010), which is a virtually pure form of the UNCITRAL Model Law. It provides for a dedicated arbitration judge in the High Court, and there is no appeal from the High Court on arbitration matters.

3. Ireland has a high-quality, independent judicial system and a high-quality bar. The necessary facilities in the form of conference space, hotels, and restaurants in Dublin are ample and convenient.

4. Dublin should be considered a low-cost alternative to London, with many of the same advantages, but at lower cost. It might serve as an alternative to London in a situation in which one party wants London but the other party, for whatever reason, resists London itself.  

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