

A review of the Arbitration Act 2010 **By Tara Cosgrove and Fiona Kearns**

Introduction

Arbitration is one of the oldest forms of dispute resolution with its origins being traced as far back as Brehon law. In recent years, it is being employed more and more frequently in Ireland particularly in insurance, construction and property disputes. It is perceived to have a number of potential advantages over Court proceedings including being more cost effective, flexible, speedier and confidential. Another benefit is that the Arbitrator may have specialist knowledge in the area of dispute between the parties.

The recent introduction in Ireland of the Arbitration Act 2010 ("2010 Act") is expected to harmonise existing Irish Arbitration rules and procedures with international standards by adopting the text of the Uncitral Model Law on International Commercial Arbitration ("Model Law") into Irish law. The new legislation will apply to all domestic and international Arbitration agreements and the existing Arbitration Acts 1954 to 1998 have been repealed. The application of Model Law will mean that Irish Arbitration practitioners will be able to refer to international jurisprudence on the Model Law.

The provisions of the 2010 Act do not reflect a radical departure from the rules in force under the existing legislation. However there are a number of new measures introduced which are anticipated will aid the efficient conduct of arbitral proceedings. This article reviews the general procedure followed from commencement to conclusion of arbitral proceedings and highlights the new changes brought in by the 2010 Act.

Application of Act

Section 7 of the 2010 Act provides that arbitral proceedings will commence on the date on which an Arbitration agreement so states or, where no such provision is made, the date on which a written request to refer a dispute to Arbitration is received by the Respondent.

The new Act applies to arbitral proceedings commenced on or after the 8 June 2010. Arbitrations commenced before 8 June 2010 will continue to be governed by the preceding legislation.

Stay on Court proceedings

Article 8 of the Model Law provides (in line with previous legislation) that where Court proceedings have been commenced in a matter which is the subject of an Arbitration agreement, a party can make an application to stay the proceedings in favour of Arbitration any time before the party submits its first statement on the substance of the dispute. The Court shall thereafter refer the parties to Arbitration unless it finds that the agreement is void or incapable of being performed.

As part of the overall trend to encourage alternative dispute resolution, section 32 of the Act also provides that the High Court or Circuit Court may, with the consent of the parties, at any time before or during a trial of civil proceedings adjourn the matter for a specified period to enable the parties to consider whether the dispute might be determined by Arbitration. If the parties agree that the dispute may be dealt with by Arbitration, the court will discontinue the proceedings and make such Order as to the costs of the proceedings as it sees fit. These provisions are intended to promote the use of Arbitration in appropriate disputes.

Appointment of Arbitrator

Unless otherwise agreed by the parties, one Arbitrator will be appointed. The Arbitrator may be selected by the parties or by a third party institution nominated by the parties, failing which a party may request the High Court to nominate an Arbitrator. There is no appeal from a decision made by the High Court. The High Court when making an appointment shall have due regard to any qualifications of the Arbitrator required by the parties and to such considerations which will ensure that an independent and impartial Arbitrator is appointed.

The Arbitrator is obliged to disclose any conflict of interest arising. The parties may challenge the appointment of a particular individual if circumstances exist which give rise to concern as to their impartiality or if they do not possess the relevant qualifications agreed by the parties. Any such challenge must be made within 15 days of the appointment of the Arbitrator. Unless the Arbitrator withdraws or the other party agrees to the challenge, the Arbitrator may make a decision on the merits of the challenge. If the challenge is not upheld, the party may appeal to the High Court within 30 days of the decision. While the appeal is pending, the Arbitrator may continue presiding over the proceedings and make an award.

Consolidation of concurrent Arbitrations

Section 16 of the 2010 Act provides that, where the parties agree, arbitral proceedings may be consolidated with other arbitral claims and be heard concurrently. This change mirrors the practice in Court proceedings and is likely to save costs and improve efficiency.

Interim measures

Unless otherwise agreed by the parties, an Arbitrator has the power to grant interim measures. An interim measure is any temporary measure directed to be taken before a final award is made by the Arbitrator. They are usually granted to maintain the status quo of the parties prior to the final determination of the dispute or to prevent the dissipation of any assets likely to be used to satisfy a subsequent award or to preserve evidence relevant to the dispute.

The Arbitrator must be satisfied before making an interim order that harm not adequately remedied by damages is likely to occur, that such harm outweighs the harm which might be done to the other party if the measure is granted and that there is a reasonable possibility that the requesting party will succeed with the claim.

By virtue of the 2010 Act, an Arbitrator now has virtually the same powers as the Courts in granting interim relief which will undoubtedly aid the efficient conduct of Arbitrations. Any interim measures ordered may be recognised and enforced by the High Court.

Security for Costs

Under the 2010 Act an Arbitrator will have the power to order a party to provide security for the costs of an Arbitration unless there is an agreement to the contrary between the parties. This is a useful power as previously parties to an Arbitration were required to apply to Court to seek security for costs under section 22 of the Arbitration Act 1954 which led to increased costs and delays.

Conduct of Arbitration proceedings

Failing agreement by the parties, the Arbitrator may determine various matters relating to the conduct of the Arbitration proceedings including whether an oral hearing is required, the location of the hearing, the appointment of an expert, the manner in which evidence will be given (either on oath or on affirmation) and the language to be used.

The parties are obliged to exchange a Statement of Claim and Defence within the timetable directed by the Arbitrator. In the event that the Claimant fails to deliver its Statement of Claim, the Arbitrator may terminate the proceedings. If the Respondent fails to deliver its Defence, the Arbitrator will continue the proceedings without treating the failure as an admission of liability.

If the parties during the arbitral proceedings settle the dispute, the Arbitrator will terminate the proceedings and may record the terms of the settlement in the form of an arbitral award.

Award

The Arbitrator is now obliged to give a written reasoned award although this was commonly occurring in practice. A signed copy of the award is given to both parties.

Within 30 days of receipt of the award, a party may on notice to the other side request the Arbitrator to correct any clerical or computational errors in the award or request an interpretation of a specific point of the award. If the Arbitrator considers the request justified, he shall provide the required information within 30 days of receiving the request. The Arbitrator may also correct any error on his own initiative within 30 days of the award.

Costs & Interest

The preceding legislation did not allow parties to make a prior arrangement that each party would bear its own costs in the Arbitration. Any such agreement was only binding if it was reached after the dispute had arisen. Under the new legislation, parties to an Arbitration agreement may make such a prior arrangement. Where the parties cannot agree or no provision for costs is made, the Arbitrator can determine how the costs are to be apportioned. Furthermore, the parties may now agree the extent of the Arbitrator's power to award interest. It is important that before signing an Arbitration agreement the parties check to ensure what the position is in relation to the payment of costs and interest.

The power of the Courts to intervene

One issue which has traditionally given rise to much concern and debate is the extent of the Courts' involvement in the arbitral process. Arbitration is intended to be a separate and distinct dispute resolution vehicle and the Courts have therefore been wary in the past of interfering with an Arbitrator's award except in the most necessary of cases. To do otherwise would undermine the participating parties' expectation that an Arbitrator's decision is final and binding and reduce the effectiveness of the arbitral system as a whole.

Prior to the introduction of the Arbitration Act 2010, the Arbitration Acts 1954 to 1998 and common law purported to allow for limited circumstances in which an aggrieved party could challenge an arbitral award in the High Court. In brief, the High Court's powers to review an Arbitrator's award arose where there was an error apparent on the face of the award (e.g. monetary miscalculation) or where an error of law was evident on the face of the award in which case the matters were referred back to the Arbitrator. In addition, the High Court could set aside an award where the Arbitrator had

misconducted himself or the proceedings or an award had been improperly procured. Examples of misconduct from the case law include refusing to hear evidence on a material issue or adopting procedures placing a party at a clear disadvantage.

At common law, the Court also had an inherent jurisdiction to set aside or remit an award where there was an error of law on the face of the award. This power was qualified by McCarthy J in *Keenan –v- Shield Insurance Co. Limited* (1988) IR 89 which emphasised that the jurisdiction should be limited to “*an error of law so fundamental that the courts cannot stand aside and allow it to remain unchallenged*”.

These powers were evident in the recent Supreme Court decision in the case of *Galway City Council v. Samuel Kingston Construction Limited and Geoffrey F. Hawker* (2010) IESC 18. The case concerned a dispute between Galway City Council and a construction company in respect of a €6.3 million contract for the redevelopment of Eyre Square. Ultimately the Supreme Court set aside the Arbitrator’s award in favour of the construction company on the grounds that the Arbitrator had “misconducted” the Arbitration and further directed that the Arbitration proceed before a new Arbitrator.

The new legislation purports to further limit the grounds on which the High Court is entitled to review an Arbitrator’s award. Under the Act a party may apply to the High Court in the following circumstances:-

- a party to the Arbitration was under some incapacity ;
- the Arbitration agreement is not valid under the law which the parties subjected it to;
- a party was not given proper notice of the appointment of the Arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- the award deals with a dispute not falling within the terms of the submission to Arbitration, or contains decisions on matters beyond the submission, provided that if the decisions on matters submitted to Arbitration can be separated from those that were not so submitted, only that part of the award which contains decisions on matters not submitted may be set aside;
- the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties, unless the agreement was in conflict with a provision of the new Act which the parties could not derogate from;
- the subject matter of the dispute is not capable of settlement under the law of the State; or
- the award is in conflict with public policy.

An application for setting aside must be made within three months from the date on which the party making the application received the award. In the event that an application is made on the grounds that the award is in conflict with the public policy of the State, the Applicant is granted a period of 56 days in which to make the application 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.

The High Court may when requested to set aside an award, adjourn the application for a period of time to give the arbitral tribunal the opportunity to resume the Arbitration or to take such other action as may eliminate the grounds for setting aside. Section 11 of the 2010 Act determines that there is to be no appeal from a decision of the High Court to set aside an award.

The initial Arbitration Bill had included a provision allowing for optional additional grounds for setting aside or remitting awards in domestic non-commercial Arbitrations. The parties could agree to give the High Court the power to set aside or remit an award where there was an error of law on the face of

the arbitral award or the conduct of the arbitral tribunal was procedurally unfair. Section 34 of the Arbitration Bill also included a provision granting “special oversight” powers to the High Court in certain circumstances. Both provisions, due to their controversial nature, were removed prior to the finalisation of the Act.

The right of the Court to set aside an award made by an Arbitrator has always been a sensitive power. The Judiciary have recognised it as so and attempted in the past to balance the public interest in seeing that justice is done in each case with the fact that Arbitration is intended to be a dispute resolution process independent from the Courts. The new legislation further limits the High Court’s power to review a decision made by an Arbitrator. It remains to be seen how the new provisions will be interpreted by the Courts and how they will exercise their inherent jurisdiction in cases of apparent injustice which do not fall strictly within the grounds prescribed by the 2010 Act.

Conclusion

The 2010 Act introduces certain new provisions which will assist the conduct of arbitral proceedings such as the power of the Arbitrator to order interim measures and security for costs, the ability of the parties to agree a prior arrangement for the payment of costs and the restriction of the Courts intervention in the arbitral process. The increased array of powers given to Arbitrators and further restriction of the Court’s role will make the choice of Arbitrator critical. Parties must ensure that a sufficiently competent and experienced Arbitrator is appointed. It is hoped that the new legislation will streamline the current arbitration legislation and make Ireland a more attractive venue for domestic and international disputes.

This article also appears on our website at www.beale-law.com where you will find many more articles on disputes and dispute resolution. If you have any questions about this Act or about Arbitration or disputes generally please contact Tara Cosgrove at (01) 7759546 or t.cosgrove@beale-law.com or Fiona Kearns at (01) 7759535 or f.kearns@beale-law.com.

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