



A New Era for  
Arbitration in  
Ireland

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## A New Era for Arbitration in Ireland

### The Arbitration Act, 2010

#### Introduction

Ireland has a long history and tradition of resolving disputes by arbitration and its predecessor systems under its ancient laws. Ireland in more recent times has legislated for the arbitral process and now that evolution has taken another step forward with the passing of the **Arbitration Act, 2010 (“the 2010 Act”)** which became operative on the **8<sup>th</sup> June 2010**.

Arbitration is a dispute resolution process which is entered into by the parties by agreement and the Irish Courts have traditionally respected the independence of the arbitral process and have intervened only in circumstances where there were fundamental errors of law on the face of awards or errors in the procedure which if left to stand would result in an injustice. The Court’s ability to intervene in the arbitral process has been dramatically restricted by the 2010 Act and time will tell what approach the Courts will take in cases of seeming injustice where the 2010 Act provides that they shall not interfere. It would appear that the Courts’ willingness to exercise its inherent jurisdiction will be tested if parties seek assistance from the Courts in circumstances other than the limited ones allowed for by the Act. This truly is a new era for arbitration in Ireland and the relationship between arbitration and the Courts has fundamentally changed.

When one reads the 2010 Act and the UNCITRAL Model Law which now applies to all arbitrations in Ireland (with the exception of employment and some consumer disputes) one can not fail to be struck by the number of provisions which apply unless otherwise agreed by the parties. It is essential therefore to be aware of the provisions where the parties can come to an agreement and to be aware of what the default position is. In many cases the absence of agreement is a result of absence of any consideration of a particular aspect of the process and the various aspects will now more than ever be relevant considerations for parties agreeing to adopt arbitration whether at contract stage or once a dispute has arisen. It might be considered that once a dispute has arisen the parties might be more focussed on the various elements of the process and negotiation may be more likely to take place. For example, one radical change is in the ability of the parties to come to an agreement in respect of the costs of the arbitration.

## 1. Arbitration Law and practice in Ireland to date

In Ireland, separate legislation applied to domestic and international arbitrations. Before the 2010 Act, domestic arbitrations were governed by the Arbitration Act 1954 (the “1954 Act”) as amended by the Arbitration Act 1980 (the “1980 Act”) while international arbitrations were governed by the Arbitration (International Commercial) Act 1998 (the “1998 Act”). The 1998 Act adopted the UNCITRAL Model Law (as adopted by the United Nations Commission on International Trade Law on 21 June 1985) (“the Model Law”).

## 2. The New Regime under the 2010 Act.

The 2010 Act applies the Model Law to all arbitrations in Ireland. Where there is a difference between the 2010 Act and the Model Law, the 2010 Act prevails. The main provisions of the 2010 Act (which does not apply to employment arbitrations or arbitrations under the Industrial Relations Acts) and the Model Law are set out below. This summary does not purport to be a definitive description of the 2010 Act or the Model Law and the legislation should always be consulted and advice taken in appropriate cases.

Arbitrations are described as either “international commercial arbitrations” or “non international commercial arbitrations”.

### Commencement of Arbitral Proceedings

An arbitration commences either on the date the parties agree it commences on or on the date when a written request to refer the matter to arbitration is received. The default number of arbitrators is one.

### The High Court

Unless otherwise agreed, the High Court has its usual powers as regards interim measures and the taking of evidence but it should not order security for costs or discovery unless the parties agree. There is no appeal from the High Court’s decision on any matter including a stay application, an application to set aside or an application for recognition or enforcement.

### Powers of an Arbitrator

Unless the parties agree otherwise an arbitrator can:  
require evidence on oath and may administer the oath,

award interest either simple or compound  
award security for costs, applying the usual rules that it can not be order simply because the party is outside the jurisdiction  
order specific performance of a contract (other than for the sale of land)

### Costs

The parties are now free to agree whatever they wish in relation to costs but in default of agreement the arbitrator may award costs. In a non international commercial arbitration an arbitrator can direct that the costs be taxed in the usual way by the Taxing Master or County Registrar. The arbitrator must state his reasons for the costs order and set out what items of fees and expenses are recoverable and who must pay. Costs include inter partes cost, arbitrators fees and expenses (to include the fees of any expert appointed by the arbitrator).

### Consumers

A consumer will not be bound by an arbitration clause where the term was not individually negotiated and where the claim is less than €5,000 unless the arbitration agreement was entered into after the dispute arose. This does not cover amateur sportspersons who may be bound by arbitration agreements in their sporting activities.

### Miscellaneous

Neither the arbitrator, nor any body appointing an arbitrator is liable for acts or omissions during the arbitration. An arbitral award is enforceable either by action or leave of the court in the same way as a judgment of the court. A Court may at any time adjourn proceedings to allow the parties to consider whether arbitration might be appropriate.

### The UNCITRAL Model Law

Now that the Model Law applies to all arbitrations in Ireland it might be useful to look at its provisions in general terms. As referred to earlier, the vast majority of the provisions of the Model Law first defer to what the parties may have agreed and then seek to provide rules which will apply where there has been no agreement between the parties. For the purpose of the remainder of this article it is assumed that there has been no agreement on the various issues and the article will describe the process and the arbitrator's powers and duties in those circumstances.

The Model Law contemplates that there may be arbitrations where there may be more than one arbitrator and provides for how such arbitral tribunals should regulate their procedures as regards decision making – generally by majority.

### **Commencement**

An arbitration commences when the respondent receives a request that the dispute be referred to arbitration. A communication is deemed to have been received by a party on the day on which it is delivered to his place of business or ordinary residence.

### **Court Intervention**

No Court intervention in the arbitral process is permitted unless expressly permitted by the Model Law. A party to an arbitration may apply to a Court for interim measures. Where a Court has powers then in Ireland the High Court is the appointed Court and there is no appeal from any of its decisions.

### **Arbitration agreement**

An arbitration agreement must be in writing which includes any electronic form and it may exist by being pleaded in a statement of claim which is not denied by the respondent. An arbitration clause may be incorporated into a contract by reference.

### **Staying Court Proceedings**

An application to Court to stay proceedings must be granted if the application is brought before the party submits its first statement of the substance of the dispute unless the Court holds that the arbitration agreement is void or of no effect.

### **Choice and qualifications of the Arbitrator**

There will be one arbitrator. If there is no agreement on the choice of arbitrator the Court will appoint one having regard to the qualifications which may be necessary and independence and impartiality. There is no appeal from the Court's decision. The arbitrator must disclose any potential conflict of interest which exists when he is invited to accept the appointment or which arises during the arbitration. A party may, in writing, challenge the appointment of an arbitrator within 15 days. The only basis for challenging an arbitrator is impartiality or qualifications. Unless the arbitrator withdraws or the other party agrees with the challenge the arbitrator can make the decision on the challenge himself. If the challenge does not

succeed the party can take the challenge to Court within 30 days but meanwhile the arbitrator may continue with the arbitration up to making an award.

If an arbitrator can not or will not perform his duties without undue delay then his mandate terminates if he withdraws or the parties agree to terminate it or if the Court orders on an application by a party. Where a mandate is terminated then a substitute arbitrator is appointed by following the same procedure as the first time.

### **Arbitrator's jurisdiction**

An arbitrator may rule on his own jurisdiction and an arbitration clause may be treated as an independent term so that an arbitrator would have authority, for example, to decide that the contract containing the arbitration clause is null and void. If a party wishes to assert that the arbitrator has no jurisdiction or that he has exceeded his jurisdiction then they must do so either at defence stage or as soon as the act of alleged exceeding of jurisdiction is alleged to have occurred, respectively. The arbitrator can rule on any such plea and a party may then apply to court within 30 days- during which time the arbitration may proceed.

### **Interim Measures**

An arbitrator can grant interim measures if satisfied that harm not adequately reparable by damages is likely to occur and 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 party will succeed with the claim. Interim measures will be recognised and enforced by the Courts. The High Court retains all its own powers to grant interim measures.

### **Conduct of the Arbitration**

The parties must be treated equally and given a full opportunity to present their cases. The arbitrator can conduct the proceedings as he sees fit within the Model Law and he can determine the admissibility, relevance, materiality and weight of any evidence. All statements, documents or other information supplied by one party to the arbitrator must be communicated to the other party. The arbitrator will decide the place and language of the arbitration. The arbitrator must decide the case on the basis of the law chosen by the parties and in the absence of a choice then he must apply the conflicts of law rules.

## **Pleadings**

Statements of claim and defence must be delivered within time limits set by the arbitrator. A party may amend its pleadings unless the arbitrator considers that inappropriate on the ground of delay. If without showing sufficient cause a claimant fails to deliver his statement of claim on time the arbitrator can terminate the proceedings where the respondent fails to deliver a defence the arbitrator can continue with the case without taking the failure to deliver a defence as an admission.

The arbitrator decides whether to hold an oral hearing or conduct the arbitration on documents only but if a party requests an oral hearing there must be one unless there has been a prior agreement to the contrary. In general, in practice there would usually be an oral hearing. If a party fails to turn up for a hearing or produce documents the arbitrator can proceed to decide the case on the basis of the evidence before him. The arbitrator or a party may seek the assistance of the Court in taking evidence.

## **Experts**

An arbitrator may appoint an expert and may require the parties to supply that expert with information or documents. The parties may examine the expert on his report.

## **Settlement**

If the dispute settles the arbitrator will terminate the proceedings and may, if requested, may record the terms as an agreed award which has the same status as any other arbitral award.

## **The Award**

An arbitral award must be in writing and it must be signed, dated and state the place in which it is made. The award must set out reasons unless the parties have agreed otherwise. The arbitrator will give a signed copy to each party.

An arbitration ends with the final award or where there is an order for termination for example where a party withdraws their case, the parties agree to terminate or the arbitrator finds it unnecessary or impossible to continue. The arbitrator's mandate terminates with the proceedings.

### **Review of an award**

A party has 30 days within which to ask the arbitrator to correct an error (computational, clerical or typographical) or to give an interpretation of a part of an award. If the arbitrator feels that the request is justified he must furnish the correction or interpretation, which forms part of the award, within 30 days. A party has 30 days to seek an additional award to deal with any claim omitted from the award. If the arbitrator feels that the request is justified he must furnish the additional award within 60 days. The arbitrator may extend the time limits which apply to him. The same requirements (written, signed, dated and so on) apply to additional awards as apply to awards.

### **Limited Recourse to the High Court**

The only recourse against an award is an application to the High Court to set it aside on very specific grounds (incapacity, invalidity of agreement, party not given proper notice of the arbitration or was unable to present his case or the award deals with a matter not within the scope of the submission to arbitration or the subject matter of the dispute is not capable of settlement by arbitration in the State or is in conflict with public policy). An application to set aside must be brought within 3 months unless the ground relied on is public policy in which case section 12 of the 2010 Act sets a limit of 56 days. Where a court is asked to set aside an award it may adjourn the application to allow the arbitrator to resume the arbitration or take such other steps as may eliminate the grounds for setting aside.

Chapter V111 of the Law (Articles 35 and 36) deals with recognition and enforcement of awards. However section 23(4) of the 2010 Act provides that those articles do not apply to awards in arbitrations which took place in Ireland.

### **Recognition and Enforcement of an Arbitral Award**

Article 35 (1) of the Model Law provides that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36 which relates to the grounds for refusing recognition or enforcement of an arbitral award. Article 35 (2) provides that the party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

Article 36 of the Model Law outlines the grounds for refusing recognition or enforcement.

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
  - (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought 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 the country where the award was made; or
    - (ii) the party against whom the award is invoked 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
    - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
    - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
    - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
  - (b) if 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 recognition or enforcement of the award would be contrary to the public policy of this State.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.”

While the Model Law provides that applications to set aside an award may be brought within three months, Section 12 of the 2010 Act restricts the time limit to 56 days where the application is brought on grounds of public policy.

### **Provisions dropped from the Arbitration Bill**

A brief look at some significant changes between the draft legislation and the 2010 Act as passed shows the change in policy which occurred. It had been intended at section 33 of the Arbitration Bill that there would be optional additional grounds for setting aside awards in “standard” (non international commercial) arbitrations. These grounds would have reflected the position adopted by the courts and included circumstances where there was an error of law on the face of an award so fundamental, or where the conduct of the arbitration was so procedurally unfair, that it would be unjust not to set the award aside.

By far and away the most important item to be dropped was the case stated “special oversight” procedure which had appeared at Section 35 of the Bill. It is widely considered that the dropping of this procedure will add greatly to the streamlining of arbitration in Ireland.

In general terms, the Model Law covers all stages of the arbitral process and will modernise and streamline the practice of arbitration. It recognises the parties’ right to design the arbitration process to suit their needs and it minimises the possibility for court intervention which is considered to be an important development in terms of minimising costs and ensuring the finality of the arbitration award.

### **Conclusion**

Given that arbitration is a private forum there is necessarily an absence of authoritative information on how many arbitrations happen in Ireland and how satisfactory a process it is for those involved in it. The expectation is that there will be an increase in arbitrations in the

coming years now that the 2010 Act is in force. Ireland is well placed as a venue for international commercial arbitration due to its location, language and legal framework and the relevant skills and facilities it offers to parties to international disputes. The policy behind the 2010 Act is to severely restrict the grounds for Court interference in the arbitral process and it is considered that this will make Ireland a significantly more attractive venue for international commercial arbitration.

The coming into force of the 2010 Act represents the beginning of a new era for arbitration in Ireland.

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