



AN BILLE EADRÁNA 2008
ARBITRATION BILL 2008

EXPLANATORY MEMORANDUM

General

The purpose of this Bill is to apply the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration to all arbitrations which take place within the State. At present that Law applies in relation to international commercial arbitration only. While repealing the Arbitration Act 1954, the Arbitration Act 1980 and the Arbitration (International Commercial) Act 1998, this Bill will also preserve the obligations which Ireland undertook when it gave the force of law to the Protocol on Arbitration Clauses opened at Geneva on the 24th day of September 1923 (Geneva Protocol), the Convention on the Execution of Foreign Arbitral Awards done at Geneva on the 26th day of September 1927 (Geneva Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958.

The Model Law is divided into a series of Chapters. *Chapter I* concerns general provisions covering, *inter alia*, key definitions and rules of interpretation and the extent of court intervention. *Chapter II* focuses on the form of the arbitration agreement. *Chapter III* deals with the composition of the arbitral tribunal. *Chapter IV* deals with the jurisdiction of the arbitral tribunal. *Chapter IVA* deals with interim measures and preliminary orders. *Chapter V* deals with the conduct of arbitral proceedings. *Chapter VI* deals with the making of an award and the termination of proceedings. *Chapter VII* specifies the grounds on which an award may be set aside. *Chapter VIII* deals with the recognition and enforcement of arbitration awards.

PART 1

PRELIMINARY AND GENERAL

Short title and commencement

Section 1 contains the usual citation and commencement provisions.

Interpretation

Section 2 contains relevant definitions which are self-explanatory.

Application of Act

Section 3 contains transitional provisions. Essentially it specifies that the Act will apply to arbitration agreements entered into on or after the commencement of this section. However, parties may agree that the Act will apply to agreements entered into before the commencement of this section.

Repeals and effect of repeals

Section 4 contains standard repeal provisions the effect of which is to repeal the Arbitration Acts 1954 to 1998 and replace them with this Act.

Expenses

Section 5 is a standard expenses provision.

PART 2

ARBITRATION

Adoption of Model Law

Section 6 provides that the Model Law shall have the force of law in the State and that it shall apply to all arbitration agreements. In this context this includes agreements which encompass international commercial arbitration and all other arbitrations (referred to as “standard arbitrations”).

Commencement of arbitral proceedings

Section 7 applies Article 21 of the Model Law for the purposes of determining when arbitral proceedings are deemed to be commenced. That Article provides that, unless otherwise agreed by the parties, the arbitral proceedings are deemed to be commenced on the date on which a request for a dispute to be referred to arbitration is received by the respondent.

Construction of Model Law and construction of arbitration clauses

Section 8 provides that judicial notice shall be taken of the preparatory works of UNCITRAL and its working group relating to the development of the Model Law and that those works may be considered when interpreting any provision of that Law. There is also a clarificatory provision to the effect that an agreement to submit a dispute to arbitration includes a dispute as to whether there was an agreement at all, unless the parties agree otherwise.

Functions of High Court

Section 9 provides that the High Court is to be the court specified under Article 6 of the Model Law for the performance of certain functions of arbitration assistance and supervision. These functions are laid down in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) of the Model Law and relate to matters such as the procedure for challenging an arbitrator and for setting aside an arbitral award. The High Court is also the relevant court for the purposes of Article 9 (granting of interim measures of protection) and is the court of competent jurisdiction for the purposes of Articles 17H (recognition and enforcement of interim measures), 17I (grounds for refusing recognition or enforcement of interim measures), 17J (court ordered interim measures), 27 (court assistance in taking evidence), 35 (recognition and enforcement of arbitral awards) and 36 (grounds for refusing recognition and enforcement). This section also deals with procedural issues governing the bringing of applications to the High Court.

Court powers exercisable in support of arbitral proceedings

Section 10 provides that for the purpose of giving effect to Articles 9 or 27 of the Model Law the High Court shall have the same powers as it has in relation to any other matter which might come before the court. However, unless the parties agree otherwise, the High Court will not have the power to make any order relating to security for costs or discovery. These matters will be dealt with solely by the arbitral tribunal.

Determination of court to be final

Section 11 sets out a range of applications where the determination of the court is to be final. This includes an application to any court to stay proceedings because the matter in dispute is the subject of an arbitration agreement, and an application to the High Court for the recognition and enforcement of an arbitration award granted in another jurisdiction.

Time limits for setting aside awards on grounds of public policy

Section 12 provides that an application to the High Court to set aside an award on grounds of public policy can, unless the parties agree otherwise, only be made within a period of 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably have become known to the party concerned. (Under Article 34(3) of the Model Law a three-month deadline applies which runs from the date that the party making an application has received the award.)

Default number of arbitrators

Section 13 provides that, unless the parties agree otherwise, the arbitral tribunal is to consist of one arbitrator.

Examination of witnesses

Section 14 allows for the examination of witnesses on oath.

Taking evidence in State in aid of foreign arbitrations

Section 15 will enable an Irish court to assist in taking evidence where the arbitral proceedings are taking place in another country.

Consolidation of and concurrent arbitrations

Section 16 provides that the parties to an arbitration agreement may agree that arbitral proceedings shall be consolidated with other arbitral proceedings and that concurrent hearings shall be held on such terms as may be agreed. The arbitral tribunal has no power to order the consolidation of proceedings or concurrent hearings unless the parties agree to confer such power upon the tribunal.

Reference of interpleader to arbitration

Section 17 deals with the situation which can arise where a person has property in their possession in which they have no interest and, in anticipation of being sued in relation to that property, that person compels the rival claimants to the property to *interplead*, i.e. to take proceedings between themselves in order to determine entitlement. If the court is of the view that the issue in dispute is the subject of an arbitration agreement between the claimants it is empowered to direct that the issue be determined in accordance with that agreement.

Interest

Section 18 deals in some detail with the question of interest in relation to an arbitral award. It is open to the parties to agree on the powers which the arbitral tribunal is to have in relation to this matter. Absent such agreement, the section specifies the powers which

the tribunal has to award interest and makes it clear that the tribunal may grant interest on any amount awarded by it in respect of any period up to the date of the award.

Security for costs

Section 19 deals with the power of the arbitral tribunal to order security for costs.

Recoverability of costs, fees and expenses of tribunal

Section 20 enables the parties to an arbitration agreement to make such provision in relation to the costs of the arbitration as they see fit. Failing such agreement, the arbitral tribunal has full discretion in relation to this matter. In the case of an arbitration other than an international commercial arbitration there is the possibility for the costs of the arbitration to be taxed either by a Taxing Master of the High Court or a County Registrar.

Restriction on liability of arbitrators etc.

Section 21 makes it clear that an arbitrator shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions. Similar provisions apply in relation to institutions or persons involved in the appointment or nomination of an arbitrator. It is also provided that a witness who gives evidence in proceedings before an arbitral tribunal shall have the same privileges and immunities as witnesses have in proceedings before the High Court.

Effect of award

Section 22 provides for an award made by an arbitral tribunal to be enforceable in the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court and for that award to be binding on the parties between whom it was made. It is made clear that nothing in the section affects the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention.

New York Convention, Geneva Convention and Geneva Protocol

Section 23 contains the limited number of provisions which are necessary to give effect to Ireland's international obligations under the above-named agreements. These matters were previously provided for in the Arbitration Act 1954 and the Arbitration Act 1980.

Non-application of provisions of Act to Washington Convention, save in certain circumstances

Section 24 contains the provisions necessary to give effect to Ireland's international obligations under the above-named Convention. Equivalent provisions were previously contained in the Arbitration Act 1980.

Survival of agreement and authority of arbitral tribunal in event of death

Section 25 provides for the survival of the arbitration agreement and for the non-revocation of the authority of the arbitral tribunal in the event of the death of any relevant party — either the party to the agreement or the party appointing the tribunal.

Provisions in event of bankruptcy

Section 26 is intended to protect the efficacy of the arbitration agreement in the event of one of the parties to the agreement being adjudicated bankrupt.

Full applicability to State parties

Section 27 makes it clear that the Act applies to an arbitration under an arbitration agreement to which a State authority is a party.

Application of Act to other arbitrations

Section 28 is a general provision which is intended to ensure that this Act applies to arbitrations under any other enactment only to the extent that its application is not incompatible with the specific provisions of the enactment concerned.

Exclusion of certain arbitrations

Section 29 is an exclusionary provision which deals with arbitrations arising in the industrial relations area and arbitrations arising in the area of ground rents.

Arbitration agreements and small claims, etc.

Section 30 provides that this Act shall not apply to an arbitration agreement which relates to a claim which does not exceed the monetary limit for the Small Claims Procedure of the District Court (current limit €2,000). Such a claim, if it has not been individually negotiated by the parties, is deemed to be an unfair term for the purposes of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000.

PART 3

REFERENCE TO ARBITRATION UNDER ORDER OF COURT

Power of High Court and Circuit Court to refer certain matters to arbitration

Section 31 replicates a provision contained in the Arbitration Act 1954 which deals with the power of the High Court and the Circuit Court to refer a matter to arbitration when the question in dispute consists wholly or in part of matters of account, estimation, calculation or assessment.

PART 4

OPTIONAL ADDITIONAL GROUNDS FOR SETTING ASIDE AWARD IN STANDARD ARBITRATIONS

Additional grounds for setting aside arbitral award in standard arbitrations

Section 32 empowers the High Court in a case other than an international commercial arbitration to set aside or remit an arbitral award where there is a fundamental error of law on the face of the award or where the conduct of the arbitral tribunal was so procedurally unfair that it would be unjust not to so set aside or remit. It is open to the parties to agree that the High Court shall not have these powers.

PART 5

SPECIAL OVERSIGHT IN CONSUMER ARBITRATIONS AND IN OTHER STANDARD ARBITRATIONS WHERE EXPRESSLY AGREED

Interpretation of Part

Section 33 contains the definitions relevant to this Part which is intended to provide additional protections for consumer arbitrations and other arbitrations which are not international commercial arbitrations (in the case of other arbitrations which are not international commercial arbitrations such protections are subject to the express agreement of the parties).

Special oversight

Section 34 preserves the power of the arbitrator to state a case for the appropriate court as to an award. It also allows a party to an arbitration to make an application to that court seeking that an award be remitted to the arbitrator on the grounds that new evidence has emerged which is likely to materially alter the decision in relation to the award or seeking a direction that the arbitrator state a case for the decision of the court.

Consumer arbitrations

Section 35 specifies that special oversight shall be available in all cases of consumer arbitrations unless the parties agree otherwise during the period for waiver which is the period of time between a party first giving notice in writing that they would like a given matter referred to arbitration and the commencement of the arbitration hearing.

Special oversight in other standard arbitrations where agreed

Section 36 allows the parties to an arbitration agreement which is neither a consumer arbitration nor an international commercial arbitration to agree to the inclusion in the agreement of the provisions on special oversight which are specified in *section 34*. It is open to them during the period for waiver to agree to remove or disapply special oversight.

SCHEDULES

Schedule 1 contains the text of the Model Law. *Schedule 2* contains the text of the New York Convention. *Schedule 3* contains the text of the Washington Convention. *Schedule 4* contains the text of the Geneva Convention. *Schedule 5* contains the text of the Geneva Protocol.

Financial implications

The Bill has no significant financial implications for the Exchequer.

*An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí
Meitheamh, 2008.*