

## **B. NOUVELLES DE L'ARBITRAGE A L'ETRANGER**

### **1. The New Irish Arbitration Act of 1998**

#### INTRODUCTION

On May 20, 1998, Ireland adopted a new Arbitration Act for international commercial arbitration based on the UNCITRAL Model Law on International Commercial Arbitration. Ireland has thus joined the 33 other jurisdictions in 28 countries which have enacted legislation based on the well known UNCITRAL Model statute.

When the Irish Parliament began contemplating a reform of its international commercial arbitration law as contained in the Arbitration Acts of 1954 and 1980, largely inspired by the 1950 and 1979 English Arbitration Acts, it had three options: continue following the English model by adopting legislation akin to the revised 1996 English Arbitration Act; create its own homegrown set of rules governing international commercial arbitration; or, finally, adopt an internationally known standard to govern international commercial arbitration.

Drafting a new arbitration statute in the spirit of the new English Arbitration Act would have had the advantage of continuity. The previous arbitration acts were largely based on their English counterparts, and English precedent has helped shape the Irish law of arbitration. However, Parliament rightly felt that, if Dublin, the capital of one of the fastest growing economies of the EU, was to become a center for international arbitration in its own right, it had to distance itself from the English model and thus step out of London's long shadow in the field of international commercial arbitration. On the other hand, had Ireland decided to craft its own international commercial arbitration act, this might have helped Ireland confirm its own identity as an arbitration friendly jurisdiction, but at the same time would have had the disadvantage of being unknown and untried within the international arbitration community.

By adopting the UNCITRAL Model Law, Ireland has implemented an internationally known and appreciated statute and thus offers the international arbitration community an instantly recognizable legal framework. Moreover, in

implementing the Model Law, it had the advantage of being able to compare how other common law jurisdictions around the world have adopted this law and has been able to draw from the experiences as such diverse jurisdictions as Scotland, India or New Zealand.

## STRUCTURE

The Irish Arbitration Act is divided into three parts and one schedule. Part I is entitled PRELIMINARY AND GENERAL, and contains two sections with provisions about the designation of the statute and references (Sections 1-2). Part II, entitled INTERNATIONAL COMMERCIAL ARBITRATION (Sections 3-16) contains all those provisions which either complement, or modify the provisions of the model law. Part III (Sections 17-18) deals with domestic arbitration only by modifying the rule on allowing arbitrators to fix post-award interest. Finally, the Model Law is attached as Schedule to the Arbitration Act.

Indeed, the Irish legislator decided to import the Model Law by appending the full text, as it was adopted by the UN Commission on International Trade Law. On June 21, 1985, as a schedule to the Arbitration Act. The Model Law therefore appears with all footnotes and recommendations made by UNCITRAL. The necessary adaptations and specifications such as the definition of the competent court (Article 6 ML<sup>1</sup>) are all contained in Part II of the Act.

For civil lawyers this may be a somewhat unfamiliar style of drafting legislation. For example, when Germany incorporated the Model Law into the 10<sup>th</sup> book of the Code of Civil Procedure (Zivilprozessordnung)<sup>2</sup>, it fully integrated the text of the Model Law into the Code of Civil Procedure. The Model Law therefore does not appear as a freestanding text but as an integral part of that Code.

<sup>1</sup> ML = Model Law.

<sup>2</sup> In effect since 1.1.1998.

The principal reason for opting for this method of incorporation was to maintain as much as possible the "international recognizability of the statutory regime governing international arbitration in Ireland."<sup>3</sup>

The Irish method of incorporation may arguably help assure that the Model Law is interpreted as openly and internationally as possible. Section 5 of the Arbitration Act provides that, in the construction and interpretation of the Model Law, the documents of the UN Commission on International Trade Law and its working group relating to the preparation of the Model Law can be consulted to ascertain the effect of any provision of the Model law. The Irish legislator thus treats the Model Law as an international instrument and not as an emanation of its own law-making efforts. This should ensure that the Model Law will be interpreted by Irish Courts with a view towards the legislative intent, to be found not within the confines of a domestic parliamentary debate, but in the exchange of ideas between the international specialists who actually drafted the model statute.<sup>4</sup>

## PART II

The enactment of the Model Law, however, does not represent a complete break with the English tradition, as we will see in looking at the more salient provisions of Part II. To the extent that this part implements or modifies or complements the Model Law, it does so very much on the basis of the 1996 English Arbitration Act.

Section 3 contains definitions, the provision specifies *inter alia*, that "arbitration agreement means an arbitration agreement concerning international commercial arbitration" which means that the Act will only apply to international commercial arbitration and not to domestic arbitration, except for the provisions of Part III.

<sup>3</sup> David BYRNE, SC, The Attorney General, in: "Ireland's Place in International Commercial Arbitration", *The Bar Review*, July 1998.

<sup>4</sup> In this context Howard HOLTZMANN and Joseph NEUHAUS' A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary; (Kluwer 1994), will be of prime relevance.

The High Court is designated as the proper judicial authority to hear arbitration related questions, particularly concerning interim measures, assistance to arbitral tribunals in taking evidence and the recognition or setting aside of arbitral awards (Section 6).

The High Court's powers in support of international commercial arbitration are dealt with in Section 7 of the Act. This provision contains a fairly detailed catalogue of the kind of measures the High Court can take under Article 9 ML, (Arbitration and interim measures by court) and Article 27 ML (Court assistance in taking evidence). However, this list is not exhaustive since the Arbitration Act provides that the Court generally has the power to make any decision which it could make if the arbitration were a High Court proceeding (Section 7(1) *in fine*). Moreover, the relatively detailed list of Court powers in aid of arbitration may not be construed to narrow down the arbitral tribunal's authority to make decisions in this respect, as according to Section 7 (3)(b) "*nothing in that section shall be taken to prejudice any power of an arbitral tribunal to make orders in respect of any of the matters mentioned in subsection (1).*"

There is always the risk that the residual powers of the Court to assist arbitral tribunals are misused by a party seeking to involve the opponent in ancillary court battles outside of the tribunal's control and thus open a second front against the adversary in the arbitration. The danger is most acute if the *lex arbitri* allows parties to apply for the assistance of the courts without permission of the arbitral tribunal.<sup>5</sup>

<sup>5</sup> One illustration of how such an open-ended provision can become dangerous is the use that has been made of Section 1782 of the U.S. Judicial Code. This provision, which allows foreign tribunals and parties to apply to the district Court in which one of the parties to the arbitration resides, to obtain testimony, discovery of documents or other elements of fact, has been used successfully by non-American parties in foreign arbitrations to subject their US opponents to full fledged US discovery. In one case known to the author, discovery against non-parties in the U.S. was ordered by three US District Courts even in the face of a procedural decision by the Tribunal sitting in London not to grant such extensive discovery in the arbitration. Cf David RIFKIN and Barton LEGUM: "Attempts to Use Section 1782 to Obtain US Discovery in Aid of Foreign Arbitrations"; *Arbitration International* Vol. 14, Nr. 2, pages 213 ff.

To the extent that the provisional measures solicited concern the taking of evidence, Article 27 ML specifies that parties may request the Court's assistance for the taking of evidence with permission of the Tribunal. However, many of the types of interim or conservatory measures listed in Section 7 will not fall under Article 27 ML, and can be requested by a party without the involvement of the Tribunal. It will be for the High Court to decide how readily it will grant such measures in exercise of the powers conferred to it by Section 7. A party may try to obtain from the court measures of interim relief which it would not necessarily get from the arbitral tribunal. Since the powers conferred in Section 7 are powers which the High Court exercises in "support of international commercial arbitration proceedings", it would be judicious that, whenever possible, there be some form of consultation between Tribunal and Court before the latter decides upon a request for such interim relief.

Section 10 deals with interest and establishes that arbitral tribunals may award both pre- and post-award interest, which can be simple or compound. Here, the Irish Arbitration Act has addressed a question which for continental lawyers may be self evident, but is not for arbitrators from Ireland and the UK. The problem arose under the 1950 English Arbitration Act.<sup>6</sup> Under that statute, arbitrators were not allowed to fix the rate of post-award interest, but could only decide whether the amount awarded carried post-award interest or not. If the award had to be enforced, it would be transformed into a judgment and automatically bear the statutory interest rate of a judgment debt. This has been corrected by Section 49 of the 1996 English Arbitration Act, which very much resembles Section 10 of the Irish Arbitration Act.<sup>7</sup>

Arbitral costs and fees are regulated in Section 11 which is subdivided into 11 sub-sections. Costs are defined in Section 11(3) as "*including the costs between the parties and the fees and expenses of the arbitral tribunal.*" These costs will presumably also contain the administrative expenses of an institution

<sup>6</sup> Section 20, 1950 English Arbitration Act.

<sup>7</sup> By expressly stipulating that arbitrators could decide post-award interest, the Irish legislature has avoided the pitfall which the Scottish Parliament fell into when enacting the Model law in Scotland. In applying the latter and in the absence of any express empowerment by the Act, the Courts in Scotland decided that arbitrators in Scotland could not decide on the rate of post-award interest.

if the arbitration is conducted under institutional rules, because Section 11(2) foresees that the parties' choice of institutional arbitration rules implies acceptance of the institution's definition as to what constitute recoverable costs and its manner of allocating such costs.

In the matter of the arbitrators' fees, the Irish Arbitration Act follows the 1996 English Arbitration Act by giving the High Court fairly extensive powers to review the arbitrators' determination of their own fees. This, however, only applies in arbitrations conducted under no institutional or other rules, or under such rules which do not contain a schedule of fees. If parties have, i.e. chosen to arbitrate under the ICC Rules or those of an other institution with a fee schedule, they must live by their agreement according to Section 11(2). When the arbitrators fix their fees without reference to an agreed scale, the act provides for the possibility for the High Court to review the fees within 30 days of the award having been rendered (Section 11[9]). This provision should afford the parties some protection from too greedy arbitrators. To a certain extent, it corrects the unequal bargaining position in which parties find themselves when having to negotiate the fees of the arbitrators with the tribunal.

Arbitral institutions and arbitrators will take comfort from the fact that Section 12 of the Act excludes liability of arbitrators and institutions for all acts or omissions which were not done in bad faith. This provision echoes Section 74 of the English Act and represents a trend in international commercial arbitration which can be seen from the fact that some newly minted institutional arbitration rules contain such disclaimers.<sup>8</sup>

According to Article 34(3) of the Model Law, an application to set aside an award must be brought within three months of the award having been received by the party wishing to have it set aside. Section 13 of Part II significantly varies that rule for cases in which the setting aside is requested on the grounds of public policy. For such cases the three-month time-limit does

<sup>8</sup> Article 34 of the ICC Arbitration Rules, Article 35 of the AAA International Arbitration Rules or Article 31 of the LCIA Rules, to mention a few.

not apply. Since Section 13 does not foresee another time-limit, one must conclude that a party could apply for the setting aside of an award on the public policy defense at any time. This, of course, is quite dangerous, although it is unlikely that the High Court will set aside awards rendered in Ireland easily.

## CONCLUSIONS

Ireland has emerged as one of Europe's most vibrant economies. It is therefore not astonishing that it wishes also to take its place among international centers when it comes to providing arbitration services.

Having adopted the UNCITRAL Model Law, Ireland has given itself legislation which international arbitration practitioners know and appreciate. Its highly trained judiciary has been arbitration friendly for a long time, so that the law will be applied with the greatest deference to the independence of the international arbitral process. If one adds to this the fact that the Irish bar is highly developed and competent, one finds a perfect legislative and institutional framework within which to conduct international arbitral proceedings.

Moreover, a highly modern arbitration facility in Dublin was inaugurated in February of this year. These factors combined clearly evidence a concerted will to make Dublin into an international arbitration center.

If one adds to the favorable institutional setting, the fact that Ireland also has a very modern communications infrastructure, one can conclude that Dublin should be able to meet even the most sophisticated needs of international commercial arbitration at prices well below those of other major arbitration centers in Europe, making it an attractive and cost effective alternative to the more traditional venues of arbitration.

Christopher Koch