

Adjudicated Dispute Resolution: Arbitration and Adjudication



Alternative Dispute Resolution
CPD Seminar
11 October, 2010



G Brian Hutchinson BCL LLM DAL FCIArb BL
Senior Lecturer, School of Law, University College Dublin
Principal, GBH Dispute Resolution Consultancy

Some Dispute Settlement Mechanisms

- Litigation in the Courts
- Private Arbitration
- Conciliation & Mediation
- Mini-Trial
- Expert Adjudication
- Ombudsman
- Negotiation



Another Look

| Adjudicative | Non -Adjudicative |
|---------------------|---------------------------|
| Decision | Facilitative / Evaluative |
| Position | |

| Adversarial | Inquisitorial |
|-----------------------|----------------------|
| Evidence & Submission | Own Assessment |
| Polarising | |

| Consensual | Compulsory |
|-------------------|-------------------|
| Agreement | |



Important Criteria for Selecting Dispute Resolution Method



- Arbitration / Court

- Need to off-set Power Imbalance
- Need for decision on Past Events
- High volume of Disputes
- Need to Compel Participation
- Premium on Speed and Privacy
- Premium on Closure

- Mediation / Conciliation

- Desire to continue relations
- Emphasis on Future Dealings
- Need to Avoid win-lose situation
- Desire to retain control of the process
- Dispute has multiple parties and issues
- Absence of clear legal entitlement

Consensual Dispute Resolution

- Centrality of the Agreement
 - Validity and Interpretation (Jurisdiction)
 - Coverage (Scope)
 - Compliance (Enforcement)



Adjudication

- England and Wales
 - Housing Grants Construction and Regeneration Act, 1996
 - Mandatory Adjudication
 - Scheme for Construction Contracts Regulations, 1998
 - Written Statements to Adjudicator
 - Adjudicator must take initiative on facts and law, deciding impartially without unnecessary delay or expense
 - Given extensive procedural power to investigate, require parties to provide information, hold hearing, etc.



Adjudication

- Ireland – no statutory basis
- The Construction Contracts Bill 2010
 - Private Members, Fergal Quinn
- Basic Principle – payment in full, or else payee has right to suspend work.
- Right to withhold payment – but notice must be given
- Disputes to be adjudicated:
 - Appointment of Adjudicator within 7 days
 - Decision within a further 28 days (extendable)
- Decision binding until finally resolved by litigation, arbitration, or settlement.



Arbitration

- Legislation
 - Arbitration Act, 2010
- Background
 - Arbitration Act, 1954
 - Arbitration Act, 1980
 - Arbitration (International Commercial) Act, 1998
 - Statute of Limitations, 1957
- United Nations Commission on International Trade Law
 - Model Law
 - New York Convention, 1958



Layout of the Act

| Part | Title |
|-------------------|---|
| Part 1 | Preliminary and General |
| Part 2 | Arbitration |
| Part 3 | Reference to Arbitration under order of Court |
| Part 4 | Optional Grounds for Setting Aside Award in Standard Arbitrations |
| Part 5 | Special Oversight in Consumer Arbitrations and in Other Standard Arbitrations where Expressly Agreed |
| Schedule 1 | UNCITRAL Model Law (as amended) |
| Schedule 2 | New York Convention, 1958 |
| Schedule 3 | Washington Convention, 1965 |
| Schedule 4 | Geneva Convention, 1927 |
| Schedule 5 | Geneva Protocol, 1923 |



Preliminary and General

- Section 1 – Commencement
- Section 2 – Interpretation
 - “standard arbitration” – to go.
 - “consumer”
 - S21 – no split costs agreements
 - S31 (new) – standard clauses non binding unless post dispute for <€5,000, not sports.
 - “arbitration agreement” – Art 7 Model Law
 - “state authority” – Act Applies to (s28)



Preliminary & General

- Section 3 – Application
 - Arbitrations under “arbitration agreements” *commenced* after operative date
 - Arbitration under other Enactments (section 29)
 - Applies to Arbitrations under other Enactments
 - Inc Statutory Arbitrations but note 1919 Land (Assessment of Compensation) Act contains own case-stated provisions
 - Excluded Arbitrations (section 30)
 - Industrial Relations; Employment Disputes
 - Interest powers in section 18 do not apply to CPO arbitrations



Arbitration of Small Claims

- New section 30
 - Consumers
 - >€5000
 - Standard Form Agreements non binding unless agreed to post-dispute



Preliminary and General

- Section 4 – Repeals
- Section 5 - Expenses



Part 2 - Arbitration

- Section 6 – Adoption of Model Law
- Section 7 – Commencement of Arbitration
 - Amends s74 of Statute of Limitations
 - As agreed
 - Else upon receipt of written request for arbitration



Arbitration

- Section 8 – Construction of the Model Law and construction of arbitration clauses
 - Note Section 8(3) – expanded scope of arbitration agreement to include disputes about “whether there was a contract or agreement at all” – unless the parties otherwise agree
 - *Fiona Trust & Holding Corporation v Yuri Privalov & 17 Others* [2007] EWCA Civ 20 (illegality); *Parkarran v MP Construction* [1996] 1 IR 83 (repudiation); *Doyle v. Irish National Insurance Company*, 30 Jan 1988 (misrepresentation)



Arbitration

- Section 9
 - Note “Nominated” Judge
- Section 10
 - No security for costs or discovery in relation to court applications for interim relief (Article 9) or taking of evidence (Article 27) – unless agreed.
- Section 11
 - No Appeal from
 - Stay (Article 8)
 - Set Aside (Article 34)
 - Recognition or Enforcement (Article 35)



Arbitration

- S12 – Time limits (56 days from date of discoverability) for setting aside awards on grounds of public policy
- S13 – Default number of arbitrators - 1
- S14 – Examination of Witnesses
 - Oath
- S15 – Taking evidence in State in Aid of Foreign Arbitration



Arbitration

- Section 16 – Consolidation and Concurrent Arbitrations
 - Agreement required
 - S9 1998
- Section 17 – Interpleader
 - S13 1954



Arbitration

- Section 18 – Interest
 - Repeating s10 1998 & s34 (as amended)1954
 - Note s34 (7) 1954:
 - (7) This section shall not apply to an arbitration conducted by a property arbitrator appointed under section 2 of the Property Values (Arbitration and Appeals) Act, 1960.



Arbitration

- Section 19 – Security for Costs
- Section 20 – Specific Performance



Section 21 - Costs



- Sub (1) & (2) – agreement / rules
- Sub (3) & (5) – arbitrator discretion in absence of agreement. *Itemised reasons required to be given.*
- sub (4) – Special Provisions for Taxation of Costs in Domestic Arbitrations:
 - In “an arbitration which is not an international commercial arbitration”
 - On application by either party within 21 days of the determination on costs “shall make an order for the taxation of costs of the arbitration by a Taxing Master of the High Court....”
- Sub (6) – special protection for consumers

Arbitration

- Section 22 – Restriction on Liability of Arbitrators, etc.
- Section 23 – Enforcement of Award
- Section 24 – Applies New York Convention, Geneva Convention and Geneva Protocol
- Section 25 – Applies Washington Convention
- Section 26 – Survival of Agreement
- Section 27 – Bankruptcy



Part 3 – Reference to Arbitration under Order of Court



- New Section 31
 - Court can adjourn for such period as thinks fit to enable the parties to consider arbitration
 - High Court or Circuit Court
 - If thinks fit and with agreement of the parties
 - No specific provisions on costs

Part 4 – Optional Additional Grounds for Setting Aside an Award in Standard Arbitrations

- Set-Aside or Remit
- Error of Law / Procedurally Unfair
- Deleted in Proposed Amendments at Report Stage



Part 5 – Special Oversight

- What is it?
 - Arbitrator's power to State a Case
 - Party power to request remission where new evidence
 - Party power to request arbitrator to be directed to state a case
- Deleted in proposed amendments at Report Stage



Features of the UNCITRAL Model Law

- “International Commercial Arbitration” – §1
- Limits on Court Intervention – § 5
- Stay of Litigation - § 8
- Arbitral Autonomy
 - Challenge Procedure – § 13
 - Kompetenz / Kompetenz - §16
 - Master of Procedure - §19
- Interim Measures - § 17
- Arbitral Proceedings - § § 18-27
 - Statements of Claim and Defence - §23
 - Strike out for want of prosecution / Ex Parte Procedure - §25
 - Appointment of Experts by Tribunal - §26



Features of the UNCITRAL Model Law

- Majority Decisions - §29
- Consent Awards - §30



Form and Content of Awards - §31



- Writing
- Signature
- Reasons upon which it is based, unless agreed otherwise
- Date
- Place of Arbitration

Correction and Interpretation of Awards, and Additional Awards

- §33
- 30 days



| On Request | Own Initiative |
|--|--|
| Clerical, Typographical, Computational | Clerical, Typographical, Computational |
| Interpretation of specific points | |
| Additional Award on Claims presented but omitted | |

Recourse and Enforcement

§34 – Set Aside

§35 – Recognition and Enforcement

On proof

Incapacity of Party or Invalidity of Agreement

Want of notice or unable to present case

Excess of scope or jurisdiction

Irregularity in composition of tribunal or arbitral procedure

Award not yet binding

Of own volition

Inarbitrability

Public Policy



Thank You



G Brian Hutchinson BCL LLM DAL FCI Arb Barrister-at-Law
Arbitrator and Accredited Mediator
Dispute Resolution Consultant
Senior Lecturer, School of Law, University College Dublin
Programme Director, Diploma in Arbitration, UCD

Roebuck Castle, UCD, Belfield, Dublin 4, Ireland
Tel: +353 1 716 8756
E-mail: Brian.Hutchinson@ucd.ie

G B Hutchinson Dispute Resolution Consultancy
55 Belleville, Blackhorse Avenue, Dublin 7, Ireland
Tel: +353 1 443 4360
E-mail: brian@gbh.ie
<http://www.gbh.ie>