CONSTRUCTION LAW PERIODICAL

Editor's Note

Since its inception in April 2013, the Construction Bar Association has provided continuing education to its Members in the area of construction law and, in particular, has held regular members' only and open seminars, meetings, discussions and conferences, with the delivery of incisive and well received papers on forty separate construction law topics which have been gathered together in the CBA codex on the Members' section of the CBA website.

The Association provides a hub for lawyers and construction professionals with an interest in construction law and also seeks to promote awareness of the skills and experience of barristers in relation to construction law and the added value that they can bring through these qualities to the resolution of construction disputes.

In furtherance of these overlapping activities, the Construction Bar Association is very pleased to publish the first edition of The CBA Periodical, which will provide all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.

The CBA hope that over time the Periodical will become a useful and habitual resource to practitioners.

Delargy v Hickey & Anor
(Unreported, High Court, Gilligan, J., 24th June 2015)

Arbitration – Jurisdiction to set aside an arbitral award pursuant to Article 34 of the UNCITRAL Model Law– Waiver of right to apply to set aside an award under the UNCITRAL Model Law – Article 31(2) of the UNCITRAL Model Law – Principles Applicable.

Facts: These proceedings concerned a combined contract for sale and building agreement entered into between the Applicant and the Respondents on 2nd September 2008. Paragraph 11 of the combined agreement expressly provided for arbitration in the event of any dispute between the parties.

The Parties executed a Deed of Indemnity on 7th August 2009 wherein the Respondents covenanted to "*rectify and make good… all the Major Defects in the building notified to the builder during the Defects Period*." Under paragraph 3 of the Indemnity, a number of limitations to the Respondents' liability were set out. In effect, paragraph 3 excluded the Respondents' liability for consequential or incidental loss and further, limited the liability of the Respondents to the costs and expenses of making good any '*major defect*.'

The Applicant took possession of the property in 2009 and shortly afterwards noticed alleged defects. The subsequent arbitration between the Parties concerned a claim for damages arising from the defective construction of the property. It was agreed between the Parties that the arbitration would be conducted by way of written submissions and this was followed by an exchange of pleadings. The pleadings closed on 19th April 2012.

On 4th March 2014 the Arbitrator struck out the defence of the Respondents by reason of their failure to comply with an order of discovery and their refusal to take any further active involvement in the proceedings. On 6th October 2014, the Arbitrator issued his Final Award in favour of the Applicant in the total sum of €101,202.07, inclusive of an award of costs.

The Applicant sought leave of the Court to enter Judgment in the terms of the Award and for leave to enforce the Judgment under Article 35 of the UNCITRAL Model Law ("Model Law"). The Respondents, by way of response, sought to set aside the Award pursuant to Article 34(2)(a)(iii) of the Model Law, which provides that an arbitral award may be set aside by the Court only if "*the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside*."

The Court dealt firstly, with the Respondents' cross-motion to set aside the Award on the basis that the Arbitrator lacked jurisdiction to deal with and award damages in relation to '*major defects*', in circumstances where no jurisdiction existed under the combined agreement to refer a dispute, whose subject was '*major defects*' to arbitration. In this regard the Respondents advanced the argument that the clause in the combined agreement, which addressed the issue of defects, was deleted from the combined agreement and that the combined agreement contained only a provision for referring '*minor defects*' to expert determination. The Respondents argued that the Arbitrator lacked jurisdiction to award sums set in respect of costs and any other items of '*consequential or incidental loss*', which were explicitly excluded by paragraph 3 of the Deed of Indemnity. In this regard, it was argued that the Award or portions thereof, specifically the loss of earnings claim and the interest award, were specifically excluded from the jurisdiction of arbitration.

The Respondents advanced a supplementary attack on the Final Award premised on

Article 31(2) of the Model Law, which provides that the "*award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30*." The Respondents submitted that the Arbitrator failed to provide reasons for the make-up of the Award in contravention of the mandatory nature of this Article imbued by the word '*shall'*.

It was submitted by the Applicant that the refusal of the Respondents to participate in the Arbitration over a period of some years should be the '*critical lens'* through which, the Court should consider the Respondents' party fails to participate in arbitral proceedings, having been given reasonable notice of the proceedings and having been given ample opportunity to present its case, the tribunal does not offend due process or commit a procedural error when it proceeds to determine the proceedings in the absence of the non-participating defaulting party.

As to the issue of jurisdiction, the Applicant submitted that the Applicant's points of claim were sufficiently broadly drafted to encompass a claim for consequential loss, such as loss of profits; that the Respondents, in their points of defence, failed to elicit any concern in relation to jurisdiction or the mandate of the Arbitrator and after delivering points of defence within the Arbitration, took no further part in the Arbitration. Indeed, it was not until the Applicant brought her application for the entry of judgment and the enforcement of the Award that the Respondents raised a variety of issues, which they say resulted in decisions on matters beyond the scope of the Arbitration. In this regard, it was submitted by the Applicant that the theory of waiver was of dominant application whereupon the Respondents should not be allowed to complain of an error in due process, having made no substantive act of participation in the arbitration. It was submitted by the Applicant that the lack of objection to procedures is frequently considered to constitute a waiver of the right to raise such objection at the post-award stage.

The Applicant further submitted that the grounds to set aside and resist enforcement under Articles 34 and 36 of the Model Law were discretionary in nature and that the Arbitrator had sufficiently articulated the reasons for his decision, in the circumstances of the case.

Held: The High Court (Gilligan, J. on the 24th June 2015) in refusing the Respondents application, found:

- The Respondents' application to set aside on the ground of excess of jurisdiction under Article 34(2)(iii) was '*wholly misconceived*'.
- The application for setting aside an arbitral award pursuant to Article 34(2)(a)(ii) is infrequently invoked and less frequently accepted by national courts to set an award aside. *Snoddy & Ors v Mavroudias* [2013] IEHC 285; *Lesotho Highlands Development v Impregilo SpA* [2006] 1 AC 221; and *Parsons & Whittemore Overseas Co Inc v Societe Generale de I'Industrie du Papier (RAKTA)* (1974) 508 F 2d 969 (2nd Circuit) considered.
- The relevant grounds for referring the process back to an arbitrator, or in setting aside the arbitrator's award are to be construed narrowly. The Respondents bear the burden of proof in circumstances where there is a presumption that an arbitral tribunal has acted within its mandate.
- There is a public policy ground in issue in relation to the desirability of making an arbitration award final in every sense of the term.
- The grounds to set aside under Article 34 of the Model Law and/or resist entry and enforcement under Article 36 of the Model Law are discretionary in nature. Furthermore, if the Court was to determine that the Respondents had met the burden of establishing a breach of Article 34 of the Model Law, the Court may set aside or remit the final award. The use of the word '*may*' in both Articles 34 and 36 of the Model Law, reserves the decision to the discretion of the Court as it deems fit and appropriate in all the circumstances of the case.
- A party waives his right to apply to set aside an award under the Model Law where it refuses to take part in arbitral proceedings. In this regard, the Respondents in this case forfeited their right to raise any objections after the Final Award was delivered in circumstances where they walked away from the arbitral proceedings.
- If an Applicant fails to prove that an award should be set aside, then Articles 35 and 36 of the Model Law require the Court to recognise and enforce the award. Under Article 34(4) of the Model Law, when asked to set aside an award, the Court may, where appropriate and so requested by a party, suspend proceedings and remit the award to the arbitral tribunal in order to give the arbitrator an opportunity to resume the proceedings or to take an action to eliminate the grounds for setting aside the award.
- The *travaux preparatoires* (of which Irish courts are permitted to take judicial notice when interpreting provisions of the Model Law, pursuant to section 8(1) of the Arbitration Act 2010), suggest that the power to remit an award '*would enable the arbitral tribunal to cure certain defects which, otherwise would necessarily lead to setting aside of the award*.'
- A Court may remit an award where there was a patent error of calculation; where an award was ambiguous or uncertain; where the arbitral tribunal itself sought to rectify an error; and, in certain circumstances, where new evidence had become available. *CIE v Spencer Dock Development Company Ltd* [2011] IEHC 185 considered.
- The discretionary nature of Articles 34 and 36 of the Model Law allows the Court to take all material facts of the case into account when deciding to set aside an award in full or remit part of an award back to the arbitrator in order to cure alleged defects.
- It would be against the spirit in which the Model Law was constructed to allow any party to an arbitral process simply opt out of the proceedings, by way of strategy or opportunism, and then come back in after the fact, complaining of an error of due process.
- In relation to the alleged failure on the part of Arbitrator to give reasons, whilst the Court did accept that the Arbitrator could have expanded on the reasons for his Award, it pointed to the factual reality of the situation: the Respondents' points of defence had been struck out, and judgment was entered in favour of the Applicant in a form and format which would not be dissimilar to the reasons which might ordinarily be given in a default judgment handed down by the Court.
- The Court did not propose to attempt to second guess the findings as arrived at by the arbitrator, the arbitrator having indicated that he had read and considered all documentation.
- The circumstances of the case did not give rise to a situation where the Court would exercise its discretion and set aside the Award or refer the Award or part thereof back to the Arbitrator. The Court in this regard was influenced by the fact that the Respondents failed to comply with the order for discovery, were on notice that their points of defence had been struck out, were advised of the procedural course which the Arbitrator intended to pursue, were aware of the general nature of the claim raised by the Applicant, had the benefit of legal advice, and effectively took a deliberate decision not to participate in the arbitral process.
- This was not the case of 'an unfortunate procedural mishap.'*McCarrick v Gaiety (Sligo) Limited* [2001] 2 IR 266 considered.

Accordingly, the Respondents did not discharge the onus of proving that the Award of the Arbitrator should be set aside or that the Award or any part thereof, should be referred back to the Arbitrator. The reliefs sought by the Respondents were refused and the Court proceeded to hear submissions as regards the Applicant's claim for judgment and for an order enforcing the award.

Claire Cummins B.L.

OCS One Complete Solution Ltd v Dublin Airport Authority Plc
[2015] IESC 6, (unreported, Supreme Court, Clarke J., 30th January 2015).

European Union – Public Procurement – Contract Award – Contract for Services – Standstill Period – Automatic Suspension – Jurisdiction of Irish Courts – Interpretation – Interim Measure – Directive 2007/66/EC – Remedies Directive – Article 8 – European Communities (Award of Contracts by Utility Undertakings)(Review Procedures) Regulation 2010 - Notice to Vary – Directive 89/665/EEC – Directive 92/13/EEC – European Communities Act 1972

Facts: These proceedings are an appeal of the decision of Barrett J. in the High Court. The Applicant/Respondent ("*the Applicant*"), a utilities provider, was granted leave to seek judicial review of the decision of the Respondent/Appellant ("*the Respondent*") to award the tender in a procurement process to the Notice Party, Maybin Support Services (Ireland) Limited t/a Momentum Support ("*the Notice Party*"). The Respondent commenced a procurement process in May 2012 seeking a contractor to provide utilities services at Dublin Airport. The Applicant was the incumbent contractor with the Respondent. The Applicant competed in the procurement process and the tender was rejected. The successful tenderer was the Notice Party. Subsequently the Applicant challenged the rejection of its tender in the procurement process by way of judicial review proceedings. The Applicant separately applied to the High Court under Regulation 8(1)(b) of the European Communities (Award of Contracts by Utility Undertakings)(Review Procedures) Regulation 2010 for a suspension to the conclusion of the contract with the Notice Party on the basis that a conclusion of a contract could not occur while proceedings challenging the procedure to award the contract were live before the courts. It was the substance of the application under Regulation 8(1)(b) that was the subject of the High Court and Supreme Court hearings. The Applicant, at first instance, alleged that there was a failure on the part of the Respondent to comply with European and Irish law in the procurement process. Barrett J., in the High Court, sought to determine the legal effect of the existence of a challenge to the procedure to award a contract and the extent to which this challenge could be considered a barrier to the conclusion of a contract in the procurement process.
Arising from this issue four main points had to be addressed:

i. What was the effect of challenging the procedure to award a contract after the standstill period?
ii. Does a challenger have an entitlement to apply to restrain a contracting authority from concluding a contract where a challenge was commenced outside the standstill period? Alternatively, did an application to restrain a contracting authority from concluding a contract need to be successfully initiated in order to restrain the contracting authority?
iii. Do the Courts have jurisdiction to permit a contracting authority to conclude a contract?
iv. Arising from issue (iii), was there a criteria for this permission and how was this criteria to be applied?

The application under Regulation 8(1)(b) was heard by Barrett J. in the High Court. The decision of Barrett J. was appealed by the Respondent on the following basis. Barrett J., in the High Court, held in response to points (i) and (ii) that the existence of a challenge in being before a Court was a barrier to the conclusion of a contract by the contracting authority. In disputing these findings on appeal the Respondent argued that the act of bringing an application pursuant to Regulation 8(1) suspended the conclusion of the contracting process. The Respondent argued that a specific interlocutory application must be brought in circumstances where the standstill period has passed. The Respondent argued that the existence of a minimum standstill period, such as that set out in Regulation 8, meant that an automatic prohibition on concluding the contract was inconsistent the concept of a minimum standstill period. The Applicant argued that Regulation 8(2) imposed an automatic suspension and, notwithstanding the risk that an Applicant incurs when bringing an application pursuant to Regulation 8(1) outside the standstill period, the wording of the Regulation does not confine the bringing of applications outside of the standstill period where the contract has not concluded. The Applicant argued that this interpretation of the Regulations and Remedies Directive was consistent.
Barrett J. held in deciding point (iii) that a jurisdiction existed that permitted the Court to allow the contracting authority to conclude the contract. The Applicant, on appeal, argued that Regulation 8(2)(b) allows the courts to intervene and lift the automatic suspension prior to the final determination in an application for review. In relation to this aspect of Barrett J.'s decision the Applicant served a notice to vary the decision, specifically in relation to the court's jurisdiction to conclude the contract. The Applicant argued that this section of the Regulation was not relevant to the decision as the Applicant had brought the application pursuant to Regulation 1(b) whereas Regulation 2(b) specifically relates to applications brought under Regulation 8(1)(a).

The Respondent argued, on the contrary, that Regulation 8 granted the courts the jurisdiction to lift the application. The Respondent further argued that the remedies Directive did not present any restriction on the courts lifting the suspension.
In respect of point (iv) Barrett J. held that the Respondent was precluded from entering into a contract with the Notice Party while the substantive proceedings were in being. The basis for this finding was a consideration of the applicable criteria used in England, Wales and Northern Ireland in respect of lifting suspensions in interim matters.
The Supreme Court upheld the overall decision of the High Court; however, the decision was based on different considerations, in particular in respect of finding (ii) and (iii). A written decision was delivered by the Supreme Court on 30 January 2015.

Held by the Supreme Court (Clarke J., Laffoy J., and Dunne J.) in dismissing the appeal, that:

- The existence of the automatic barrier to concluding the contract pertains without any necessity to bring a specific application to the Court for a suspension. The bringing of the application pursuant to Regulation 8(1) is sufficient to invoke a suspension to concluding the contract in question notwithstanding the fact that the application falls outside of the standstill period.
- The reference to a '*minimum'* standstill period in the Regulation and the Remedies Directive does not suggest a fundamental time in which an application should be brought but rather, permits a period in which every contracting party can be assured of the opportunity to review the procurement procedures.
- Regulation 8(1) has two interacting suspension periods. Firstly, an automatic suspension for the duration of the standstill period. Secondly, an automatic suspension arising when a party applies under Regulation 8(1). Neither form of suspension requires that an application must be brought within the standstill period, however the challenger runs the risk of the contract concluding if the application is brought outside the standstill period. Article 2(3) of Directive 92/13/EC mirrors this interpretation. Article 2(3) precludes the conclusion of a contract "*before the review body has made a decision on the application either for interim measures or for review*".
- Therefore, the Court held that in an application brought pursuant to Regulation 8(1) of the Regulation for the purpose of reviewing a decision of a contracting party to award a contract to a

particular tenderer, the contracting party is precluded from concluding the contract until the determination of the challenge by reason of the Court's interpretation of Regulation 8(2).

- In considering the jurisdiction of the Court to lift the suspension, the Court took cognisance of the use of the wording '*interim measures*' in Article 2 of Directive 92/13/EEC as inserted by Article 2 of the Remedies Directive. The general understanding of '*interim measures*' is at variance with the concept of '*interim measures*' in public procurement cases. '*Interim'*, in the latter sense, is more aptly interpreted as describing the interim stage in the procurement process, such as where a challenger is seeking to remain in the procurement process having been allegedly refused an opportunity to continue, rather than an interim measure as is more readily understood in the litigious context, such as an interlocutory application.
- Taking this distinction into consideration and having regard to the Remedies Directive, the Court held that Regulation 8 of the Regulation distinguishes between interim measures and applications to review. Thus, there is a distinction between bringing an application for the suspension of a procedure (Regulation 8(1)(a)) and a claim for a review of a decision to award a contract (Regulation 8(1)(b)).
- The Court took the view that Regulation 8(2)(b), which states: *"(2) If a person applies to the Court under paragraph (1), the contracting entity shall not conclude the contract until—(b) the Court gives leave to lift any suspension of a procedure…"* is applicable in scenarios where an order lifting the suspension of a procedure is sought, rather than applications for review as set out in Regulation 8(1)(b). The Court concluded that '*suspension of a procedure*' should be construed as meaning whether or not the procedure leading to the award of the contract should go ahead or be suspended.
- Finally, the Court held that the interpretation of the Regulation in this manner is consistent with Ireland's obligations under the Remedies Directive. The Court's assessment of the construction of the Regulation does not require a Member State to have in place a measure granting jurisdiction to the review body to permit the conclusion of a contract where that contract is the subject of a challenge.
- The Remedies Directives does not require a Member State to have in place a measure giving jurisdiction to a review body (the High Court) to permit the conclusion of a contract while a challenge to the procedure for awarding the contract is pending before the review body. Article 2(4) is concerned with the Court's authority to suspend a review rather than jurisdiction to restrict the conclusion of the contract.
- The principles set out in *American Cyanamid v Ethicon Ltd.* [1975] A.C. 396*,* as applied in the Courts of England and Wales in applications for an order to lift a suspension, did not require consideration by the Supreme Court. These principles were of limited value as there is no provision in the Regulation requiring the application of equivalent principles used in interlocutory proceedings in public procurement cases.

Accordingly, the Court dismissed the Respondent's appeal and allowed the issues raised in the Applicant's notice to vary.

Sinead Drinan B.L.

***Sam Snoddy & Others v. David Mavroudis* [2013] IEHC 285, (unreported, High Court, Laffoy J., 19th June 2013)**

Arbitration – Arbitration Act 2010 – UNCITRAL Model Law on International Commercial Arbitration – Limited jurisdiction to set aside an arbitral award – Whether award made in excess of jurisdiction under Article 34(2)(a)(iii) of the Model Law – Error in contractual interpretation not grounds for setting aside an arbitral award – Jurisdiction to remit the matter to the arbitrator pursuant to Article 34(4) – Jurisdiction conferred by Article 33.

Facts: These proceedings concern an application to set aside a portion of an interim arbitral award delivered on 6th December 2012 in a dispute between the parties. The relevant portion of the arbitral award related to the payment of architectural fees by the Applicant to the Respondent.

The Applicants and the Respondent entered into an agreement dated 21st August 2007 (the 2007 Agreement) whereby the Applicants appointed the Respondent to act as architect in connection with a project identified in that agreement. These proceedings, and the portion of the arbitral award under challenge, concerned only one aspect of the 2007 Agreement; namely the a provision of Appendix 1 which states as follows: "*TIME CHARGE RATE AGREED FOR ABNORMAL/ADDITIONAL SERVICES: senior staff €100/Hour, or part thereof, services to be authorised and agreed in writing by both parties before commencement*."

In October 2010, disputes having arisen between the parties in relation to, *inter alia*, the payment of fees for additional work, the Respondent sought to have the matter referred to arbitration pursuant to an arbitration clause in the 2007 Agreement. In the absence of agreement between the parties, the High Court appointed an arbitrator. The claims referred to the arbitrator that were relevant to these proceedings were:

i. as a result of changes in design standards/legislation in respect of sustainability, the architect had to, and did, provide additional design works in the course of preparing and completing a validated planning permission application;
ii. the architect had to, and did, carry out 524 hours additional work which was beyond the scope of that included in the unit rate to satisfy further information requests from the planners in Carlow County Council; and
iii. the architect was required to, and did, complete 524 hours for abnormal/additional services relating to the requests for further information, at the contract rate of €100/hour plus VAT, and that gave an additional sum due of €52,400 plus VAT.

The Applicant, in its Amended Statement of Defence and Counterclaim, denied that it owed the sum claimed on the grounds that the Respondent was not required to, or did not, carry out the additional 524 hours of additional work and, further, that the Applicant had not authorised in writing the additional hours prior to commencement thereof by the Respondent.

The arbitrator delivered an interim award on 6th December 2012. In reaching his determination on the claim for payment for additional services, the arbitrator had regard to the provision in Appendix 1 regarding payment for additional services. The arbitrator found that, on the basis of expert evidence, 500 hours was a reasonable period for dealing with the further information requests and that those hours qualified for payment at the rate for "*abnormal/additional services*". The arbitrator found that, as a matter of fact, while no written authorisation had been obtained, one of the Applicants was aware that the additional services were being carried out. Further, the arbitrator found that "*a written instruction was not a condition precedent to entitlement to payment*". The arbitrator also found that the rate of €100 specified in the 2007 Agreement for "*abnormal/additional services*" was inclusive of VAT at 21% in

circumstances where all other fees payable under that agreement were expressed to be exclusive of VAT. Accordingly, the applicable hourly rate was €86.24 per hour exclusive of VAT. The arbitrator therefore determined that fees in the sum of €41,320 (500 hours at €86.24 per hour) were due to the Respondent in respect of additional services.

Following the delivery of the award the Applicant requested the arbitrator to interpret the phrase "*a written instruction was not a condition precedent to entitlement to payment*" in the award, in the context of the contractual provision relating to payment for additional services. The arbitrator stated that, in accordance with Article 33(1)(a), he could not consider the request as the Respondent had not agreed to same.

Thereafter, the Applicant instituted these proceedings to have that part of the arbitrator's interim award dealing with payment for additional services set aside. The Applicant submitted that the 2007 Agreement provided that the Respondent was only entitled to the payment of fees for additional services if the services were commencement. Therefore, it was submitted that the arbitrator could not have made the award as the Applicant was not contractually bound to discharge the fees charged for additional services. The Applicant also argued that since the number of hours and the hourly rate differed from what was in the 2007 Agreement, the arbitrator had not relied on contractual principles but rather had applied the equitable principle of *quantum meruit* in making the award. The Applicant submitted that the arbitrator had not been expressly authorised to decide the claim on the basis of equitable principles pursuant to Article 28(3) and, therefore, had exceeded his authority on the reference to him.

Accordingly, the Applicant submitted that the part of the award dealing with the claim for payment for additional services should be set aside on the excess of jurisdiction ground set out in Article 34(3)(iii). Article 34(3)(iii) provides that an award may be sat aside if the Applicant can prove that "*the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside"*.

Alternatively, the Applicant submitted that the matter should be remitted to the arbitrator in accordance with Article 34(4) or that the arbitrator should be directed to interpret the portion of the award as requested by the Applicant.

Held by the High Court (Laffoy J.), in dismissing the application, that:

- The arbitrator determined the element of the Respondent's claim relating to payment for additional services by application of the terms of the 2007 Agreement and in accordance with what he considered to be the correct contractual principles. The Court rejected the argument that the arbitrator had impermissibly relied upon the equitable principle of *quantum meruit* in making the award.
- The issue to be determined was, if the arbitrator erred in the application of contractual principles in making the award in relation to payment for additional services, whether the Applicant was entitled to any relief under the Model Law. The Court did not express a view on whether the arbitrator had so erred.
- There has been little judicial comment in this jurisdiction on the Articles of the Model Law invoked by the Applicant. The Court noted that Section 8 of the Arbitration Act 2010 provides that judicial notice shall be taken of the *travaux préparatoires* of the United Nations Commission on International Trade Law and its working group relating to the preparation of the Model Law and that the *travaux* may be considered when interpreting any provision and shall be given such weight as is appropriate in the circumstances.
- The High Court has a very limited jurisdiction, under the Arbitration Act 2010 and the Model Law, to set aside an arbitral award. The Court cited with approval a passage from Mansfield's *Arbitration Act 2010 and Model Law: A Commentary* referring to the *travaux préparatoires* and concluding that *"an award may not be set aside for some reason not specified in the Model Law as a result of the courts' inherent jurisdiction*". The exclusive recourse against an arbitral award is that provided for in Article 34 of the Model Law.
- The excess of authority ground in Article 34(2)(a)(iii) is modelled on the corresponding provision in Article V(1)(c) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The excess of authority ground must be narrowly construed and it does not sanction the Court second-guessing the arbitrator's construction of the parties' agreement: *Lesotho Highlands Development v Impregilo SpA* [2006] 1 AC 221 and *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier* (RAKTA) (1974) 508 F 2d 969 (2nd Circuit) considered.
- In reality, the Applicant in these proceedings was asking the Court to second-guess the arbitrator's construction of the 2007 Agreement. Should the Court accede to such an application it would be usurping the arbitrator's role. Accordingly, the Court found that the application to have part of the award set aside on the ground of excess of jurisdiction under Article 34(2)(a)(iii), was wholly misconceived.
- Article 34(4) of the Model Law permits the Court to remit the matter to the arbitrator in order to enable the arbitral tribunal to cure certain defects which would otherwise lead to the setting aside of the award. The Court considered the *travaux préparatoires* in this regard. The jurisdiction to remit under Article 34(4) is, therefore, dependent on the Court being satisfied that a ground has been proved for setting aside the award. Since the Applicant in these proceedings had failed to do so the Court had no power to remit the matter to the arbitrator.
- Article 33 of the Model Law confers no jurisdiction on the Court to compel a party to an arbitration to seek, or an arbitrator to give, an interpretation of a specific point or part of an award.
- *Obiter*: The Applicant, by seeking an order compelling the arbitrator to make the interpretation sought, was attempting to re-visit the merits of the arbitrator's award. The aspect of the award in respect of which interpretation was sought did not require clarification.

Accordingly, the Court refused the reliefs sought by the Applicant and dismissed the application.

Sonja O'Connor B.L.

Wyse Construction (Limerick) Ireland v. Donal Ryan Motor Group (Roscrea) Limited
[2011] No. 2648S (unreported, High Court, MacMenamin J., 30th March 2012)

Conciliation – Arbitration – non-engagement/withdrawal of party during conciliation proceedings – reliance on non-engagement – absence of signature on document to appoint Conciliator – Principles applicable in granting summary judgment

Facts: This case involved a motion for summary judgment arising from a Conciliator's Recommendation directing the Defendant pay certain sums to the Plaintiff on foot of a building contract entered into between the Parties. In accordance with the terms of that Contract, the Plaintiff undertook to carry out construction works on the Defendant's business premises. Following completion of these works, as certified by the Engineer, two Interim

Certificates issued by the Engineer to the Plaintiff, certifying the amount of €41,832.22 and €27,463.92 as being due and owing to the Plaintiff. In accordance with the Conditions of Contract, these Certificates should have been honoured within 7 working days. The Defendant failed to honour the Certificates, alleging that there were defects in the works carried out. The Plaintiff subsequently threatened to initiate summary High Court proceedings against the Defendant to recover the sums certified. However, the Defendant in response referred the Plaintiff to a dispute resolution clause within the Contract, which provided that if a dispute arose between the Parties, it should be referred to conciliation. In the event of the conciliation procedure not succeeding it was open to either party to refer the dispute to arbitration in accordance with a separate clause in the contracts for works.

The Parties subsequently agreed to proceed to conciliate the dispute between them. In the interim, the Defendant instructed different Solicitors to act on its behalf. The Parties, through their legal representatives, could not reach agreement on the identity of the Conciliator to be appointed, and in accordance with procedure envisaged in the Contract, the President of the RIAI appointed a Conciliator to the dispute.

The Defendant did not at any time object to the nomination of the Conciliator appointed or to the Conciliation procedure itself. Further, neither the Defendant nor Solicitors acting on its behalf engaged with the Conciliator. No hearing was held in the Conciliation proceedings, and the Conciliator proceeded to issue a Recommendation based on the evidence presented in the Plaintiff's opening statement alone. The Conciliator, in his Recommendation, directed that the Plaintiff be paid:

i. the sum of €41,832.22 by the Defendant pursuant to Certificate No. 10 issued by the Engineer on 22nd February, 2010;
ii. the sum of €27,463.92 pursuant to Certificate No. 11 issued by the Engineer on 22nd February 2010, and
iii. the sum of €5,066.87 in respect of the Conciliator's fees.

In accordance with Clause 9 of the Contract both Parties could reject the Recommendation within ten working days after its issuance, failing which, the Recommendation would become "*final and binding on the parties*". The Defendant did not reject the Recommendation. Accordingly, following the expiration of the ten day period allowed for in the Contract, the Plaintiff called on the Defendant to comply with the Conciliator's Recommendation since it was deemed, in accordance with the terms of the Contract, to be "*final and binding*". The Defendant failed to do so and accordingly the Plaintiff issued summary proceedings in the High Court seeking Judgment in the amount awarded to it by the Conciliator in the Recommendation.

The Defendant filed a number of Affidavits in response to the Plaintiff's application, accepting that a Certificate of Practical Completion had issued by the Engineer but alleging that there were sub-standard works, incomplete works and further, remedial works required. An Affidavit, with no supporting evidence, sworn by the Defendant's Engineer implied that Interim Certificates of Completion No. 10 and 11 had only been issued as a result of harassment and coercion at the hands of the directors of the Plaintiff company. The Defendant further denied having any knowledge of the conciliation procedure in the contract on the basis that the Engineer had never explained the said procedure to it.

The Defendant argued that the Recommendation issued by the Conciliator was null and void and of no legal effect since conciliation could only be embarked upon after both Parties had sanctioned the appointment of a conciliator. Further, the Defendant also disputed the validity of the Recommendation on the basis that it had been issued by the Conciliator in the absence of any representation from the Defendant. No submissions were made by the Defendant as to why it had refused to engage in the process, despite specifically advocating its use at the outset of the dispute. The Defendant requested that the Motion be transferred to Plenary Hearing so that the Defendant could counterclaim for the incomplete and/or damaged works alleged to have been carried out by the Plaintiff.

Held by the High Court (MacMenamin J.) in granting the Plaintiff's application, that:

- The Defendant is estopped from relying on its own non-engagement in the Conciliation process when it ostensibly allowed the Conciliation to proceed and did not raise any objections at any stage, or indeed, within the ten-day window provided for within the Contract.
- The absence of the Defendant's signature from the Conciliator's form of appointment is not fatal to the said appointment, as the Conciliator had merely stated it would be "*preferable*" if both Parties signed the form of appointment.
- A party cannot be entitled to rely on its own failure to engage with the conciliation process in an effort to negate that process. The Court could not and should not countenance such a situation.
- The Defendant is bound by the conciliation procedure embodied in the Conditions of Contract.
- The Court has no jurisdiction to remit the Defendant's asserted '*counterclaim*' in respect of incomplete works and defects to plenary hearing as the contract between the Parties provides that if a dispute arises, that dispute should be referred to conciliation and failing that, arbitration.
- In adopting the principles set out by Mr. Justice McKechnie in *Harrisrange Limited v. Duncan* [2003] 4 IR 1, the Court held that the Plaintiff was entitled to Judgment in the sum claimed for the following reasons:
  i. The Defendant through its then Solicitor suggested the Conciliation process.
  ii. This suggestion was never withdrawn even when the Defendant changed Solicitors.
  iii. The Conciliation proceeded. At no time did the Defendant raise any objection to the procedure or to the steps being taken by the Conciliator.
  iv. At no time did the Defendant participate in the decision making process or make any submissions.
  v. The first occasion when the Defendant's concerns were raised was *after* the conciliation process was complete.
  vi. It was within the power of the Defendant to raise whatever point it wanted during the course of the Conciliation process. It did not do so.
  vii. The Defendant was bound by the Articles of Agreement and the Conciliation Procedure and body therein.
  viii. To remit the matter for plenary hearing would clearly be at variance with the terms of the Articles of Agreement ,which specifically bind the Parties to the conciliation and arbitration. These are precisely the terms that were agreed to by the Parties. The court cannot work outside of these terms.
  ix. In light of the fact that the Defendant did not avail of the Conciliation procedure and did not proceed to arbitration, the Defendant must be taken to be bound by the Conciliator's Recommendation.

Whilst the Court granted the Plaintiff's application, in considering the justice of the case, the Court granted the Defendant a stay on the execution of its judgment to allow the Defendant to initiate its own proceedings on the basis that, albeit at a late stage, it had formulated a substantive defence supported by surveyors reports which in these proceedings were not suitable for the Defendant to put forward.

Anita Finucane B.L.