



Irish  
Branch

**CI Arb**



*Law Society of Ireland*

## SEMINAR REPORT

# THE ARBITRATION BILL 2008

SATURDAY, 31 JANUARY 2009

Prepared by Darren Lehane BL,

Rapporteur.

## TABLE OF CONTENTS

|   |    |
|---|----|
| 1. Introduction .....                                   | 3  |
| 2. Background .....                                     | 4  |
| 3. Presentation of the Issues .....                     | 5  |
| 4. Panel Discussion .....                               | 12 |
| A. Transitional Arrangements – Section 3 .....          | 12 |
| B. Time Limits – Section 12.....                        | 14 |
| C. Examination of Witnesses – Section 14 .....          | 14 |
| D. Consolidation – Section 16 .....                     | 14 |
| E. Costs and Interest – Sections 20 and 18 .....        | 16 |
| F. Liability of Arbitrators – Section 21 .....          | 18 |
| G. Application to other Arbitrations – Section 28.....  | 18 |
| H. Exclusion of Certain Arbitrations – Section 29 ..... | 19 |
| I. Small Claims .....                                   | 19 |
| K. Special Oversight – Sections 34 - 36.....            | 20 |
| 5. The Role of the High Court in Arbitration .....      | 22 |
| A. Presentation by Mr Colm Ó hOisín SC.....             | 23 |
| B. Presentation by Prof. Bunni.....                     | 29 |
| C. Presentation by Mr Justice Frank Clarke .....        | 30 |
| D. Floor Discussion .....                               | 33 |
| 6. Conclusion.....                                      | 35 |

## 1. Introduction

- 1.1 The Chartered Institute of Arbitrators, the Bar Council and the Law Society held a Seminar on the Arbitration Bill 2008 on Saturday, 31 January 2009 at Engineers Ireland, 22 Clyde Road, Dublin 4.
- 1.2 The Seminar was chaired by Mr. Ciarán Fahy, Consulting Engineer; Chair, Chartered Institute of Arbitrators (Irish Branch) and it analysed the main provisions of the Arbitration Bill 2008. It was divided into two parts.
- 1.3 In Part I, Mr. Michael W Carrigan, Partner, Eugene F Collins Solicitors gave an overview of the Arbitration Bill and identified a number of issues in need of further discussion. These issues included transitional arrangements, consolidation, interest and costs, non monetary claims and small claims, court ordered arbitration and the special oversight/ case stated mechanisms. This was followed by a series of short presentations on these issues. These presentations were delivered by Mr. Sean McCormack, Chartered Valuation Surveyor, President of Society of Chartered Surveyors, Mr. G Brian Hutchinson, School of Law, UCD, Mr. Anthony Hussey, Partner, Hussey Fraser Solicitors, and Mr. James O'Donoghue, Partner, Bluett & O'Donoghue Architects on a number of these areas. At the conclusion of each of these presentations the debate was opened up to the floor and a number of valuable contributions were received.
- 1.4 In Part II, Mr Colm Ó hOisín SC, Chair, Bar Council of Ireland Arbitration and ADR Committee, delivered a presentation entitled '*Section 32: Do we really need Additional Grounds for Setting Aside Arbitral Awards?*' Prof Dr Nael Bunni, Consulting Engineer, delivered a response to this presentation. Then the Hon. Mr Justice Frank Clarke, delivered an address entitled "*The*

*Role of the High Court in Arbitration.*” There then followed a a questions and answers session.

- 1.5 This Report provides a summary of the proceedings. There was lively discussion in relation to some of the topics but in some other areas there was little or no discussion. The range of topics being dealt with obviously imposed certain time constraints and this tended to limit discussion in areas where there was no obvious difference of opinion. While there was little or no contribution from the floor on several of the topics that absence of comment cannot be taken as implicit agreement to the proposals suggested by the various speakers.

## **2. Background**

- 2.1 Mr. Ciarán Fahy, Consulting Engineer; Chair, Chartered Institute of Arbitrators (Irish Branch) opened proceedings by outlining the background to the Seminar.
- 2.2 In June 2008, the ICCA Conference was held in Dublin to celebrate the 50th Anniversary of the signing of the New York Convention on the Recognition of Foreign Judgements. The preparations for the ICCA Conference cast a light on Irish arbitration legislation, and in particular on the Arbitration Act 1954, as amended. It was felt by some many that the legislation was old, and out of step with modern practice. This did not bode well with aspirations to make this jurisdiction a popular venue for international arbitration.
- 2.3 A Seminar on Dispute Resolution was held in April 2007, chaired by then Attorney General, Mr. Rory Brady S.C. and attended by many of the key

players in Irish arbitration. A broad consensus emerged from this seminar that although the Arbitration Act 1954, as amended, had served Ireland well, there were significant areas where it required updating or change. Some felt that this could be achieved by tweaking the legislation through amendment, while the majority of participants at the seminar felt that the best solution was to repeal the existing legislation and replace it with a new Arbitration Act based on the UNCITRAL Model Law.

2.4 The Arbitration Bill 2008 was published to coincide with the commencement of the ICCA Conference by An Taoiseach, Mr Brian Cowen T.D. A commitment was given that the Bill would pass into law in 2009.

2.5 Mr. Ciarán Fahy stated that this Seminar built on the formal submissions on the Bill prepared by the Chartered Institute of Arbitrators (Irish Branch), the Society of Chartered Surveyors. It also built on two seminars, the Seminar on International Arbitration which took place on 3 October 2008 and which was organised by Chambers Ireland in association with the Irish National Committee of the International Chamber of Commerce, and the Seminar on the Arbitration Bill which took place on 8 October 2008 and which was organised by the Commercial Law Centre, University College Dublin.

2.6 Mr. Ciarán Fahy then outlined the purpose of the Seminar. He said that it was designed to provide an opportunity for those involved in arbitration to express their views on the Arbitration Bill 2008. A report would then be prepared which would be widely disseminated and sent to the Government.

### **3. Presentation of the Issues**

3.1 Mr. Michael W Carrigan, Partner, Eugene F Collins Solicitors gave a very brief overview of the Arbitration Bill 2008 and highlighted a number of issues which had been identified by earlier seminars or submissions as warranting further discussion. He stated that the Arbitration Bill 2008 had a

twofold purpose, the first being to update the law relating to domestic and international arbitrations, the second being to consolidate the legislation into one Act.

3.2 Mr. Carrigan went through the five schedules to the Arbitration Bill 2008. Schedule 5 contained the 1923 Protocol on Arbitration Clauses, schedule 4 contained the 1927 Convention on the Execution of Foreign Arbitral Awards, schedule 3 contained the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and schedule 2 contained the 1958 Convention on the Recognition and Enforcement of Foreign Judgements. These four conventions were adopted and enacted in the Arbitration Act 1954, as amended. Mr Carrigan then examined schedule 1 which contained the UNCITRAL Model Law on International Commercial Arbitration. He outlined the background to the adoption and operation of the UNCITRAL Model Law in Ireland by the Arbitration (International Commercial) Act, 1998. He pointed out that since 1998 two different statutory regimes have applied to arbitrations in Ireland depending on whether a particular arbitration is a domestic or an international arbitration.

3.3 Mr Carrigan pointed out following the enactment of the Arbitration Bill 2008 the UNCITRAL Model Law will apply to both domestic and international arbitrations. The UNCITRAL Model Law is composed of 8 Chapters comprising 36 Articles and it deals with all stages in the arbitration process from the arbitration agreement to the recognition and enforcement of arbitral awards. The Arbitration Bill 2008 adopts the UNCITRAL Model Law, the text of which is set out in schedule 1, in its entirety and incorporates the amendments to the Model Law in the text of the Bill. This has the effect of rendering the amendments readily identifiable.

3.4 Mr Carrigan commented on the following Articles of the UNCITRAL Model Law.

a. Article 1 - Scope of application

Mr Carrigan stated that this is possibly the most important article. It is drafted that it would apply to international arbitration only but there is nothing to stop a country adopting it for domestic arbitration and he pointed out that this has been done, subject to certain amendments, in Germany and New Zealand.

b. Article 5 – Extent of court intervention

Mr Carrigan stated that this provides “In matters governed by this Law, no court shall intervene except where so provided in this Law.” There is no special case procedure allowing for court intervention and in international arbitration practice court intervention is anathema.

c. Art 7 – Definition of Arbitration Agreement

In 2006 the Model Law was amended to provide for two definitions of arbitration agreement. The first, option 1, requires the arbitration agreement to be in writing. Option 2 imposes no such requirement. It is left to the individual State to select which option will apply to it. The Arbitration Bill 2008 proposes to adopt option 1.

d. Article 16 – Competence of arbitral tribunal to rule on its jurisdiction

The adoption of this article was proposed at the April 2007 Seminar and was generally supported.

e. Article 31 – The Form and Content of the Award

This requires the arbitral tribunal to give the reasons upon which the award 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. Mr Carrigan pointed out that this would be a substantial change from the

existing legislation and it was one that was generally supported at the April 2007 seminar.

f. Article 32 - Termination of Proceedings

This gives the arbitral tribunal to terminate the proceedings for want of prosecution. Mr Carrigan pointed out that this would be a substantial change from the existing legislation and it was one that was fully supported at the April 2007 seminar.

g. Article 33 – Correction and interpretation of award; additional award

Mr Carrigan pointed out that this was fully supported at the April 2007 seminar.

h. Article 34 - Application for setting aside as exclusive recourse against arbitral award

Mr Carrigan pointed out that this was relevant to the discussion of section 32 of the Arbitration Bill which would be dealt with in Part II.

3.5 Mr Carrigan then proceeded to examine the text of the Arbitration Bill 2008 itself. He noted that although the Bill proposes to repeal the existing legislation it restates many of the provisions of the Arbitration Act 1954, as amended. He then outlined the provisions of the Bill requiring further comment or debate.

a. Section 3 – the Application of the Act

Mr Carrigan noted that section 3(1) provides that the Bill shall apply to arbitration agreements entered into on or after the commencement of the section. He noted that this would have the effect of creating two different systems for arbitrations. He said that there is a strong argument for having the Bill apply to all arbitrations invoked after the commencement of the section.

b. Section 12 – Time Limits for Setting Aside an Award on the Grounds of Public Policy

Mr Carrigan noted that the time limit for the setting side an award on the grounds of public policy is, in effect, open ended and different from what is contained in Article 34(3) of the UNCITRAL Model Law. The time limit in the Bill is 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned. In the case of the Model Law, the time limit is three months from the date of receipt of the award. This is a much more finite term.

c. Section 14 – Examination of Witnesses

Mr Carrigan suggested that the requirement for witnesses to be examined on oath should be extended to allow them to be examined on oath or affirmation.

d. Section 16 – Consolidation of and Concurrent Arbitration

Mr Carrigan stated that he was unsure why the word “and” was used in the title to the section. He suggested that as currently drafted the section was of little value and consideration should be given to awarding the Arbitrator the power to order consolidation in suitable circumstances.

e. Section 18 – Interest

Mr Carrigan noted that this section replicates section 17 of the Arbitration (International Commercial) Act, 1998. He suggested that since the parties are free to agree on the award of interest that there is an argument that this section could be open to abuse where the contracting parties have unequal bargaining power.

f. Section 20 – Costs

Mr Carrigan noted that this allowed the parties to agree on the allocation of costs whether before or after the dispute has arisen. He stated that this is a significant departure from the 1954 Act and he noted that there is an argument that this section could be open to abuse where the contracting parties have unequal bargaining power. He opined that

there was a strong argument for retaining the existing provisions of the 1954 Act in relation to costs.

g. Section 21 – Liability of Arbitrators

Mr Carrigan stated that while the provision was welcome, it is arguable that as currently drafted it is too broad. He noted that there is no reference to excluding bad faith as there is in the 1998 Act.

h. Section 28 – Application of the Act to other Arbitrations

Mr Carrigan noted that section 48 of the 1954 Act stated that apart from excluded provisions the 1954 Act shall apply to every arbitration under any other Act. It therefore applied, for example, to the statutory arbitration system established by the Acquisition of Land (Assessment of Compensation) Act 1919. Mr Carrigan noted that it was suggested that section 28 be redrafted along the lines of section 48 of the 1954 Act.

i. Section 29 – Exclusion of Certain Arbitrations

Mr Carrigan noted that this section replicates section 5 of the 1954 Act and excludes the application of the Act from certain arbitrations, for example, arbitrations dealing with employment disputes. He said it was questionable whether this exclusion made sense today.

j. Section 30 – Arbitration Agreements and Small Claims

Mr Carrigan stated that there was an issue here in relation to sub section 1 which appears to place an unnecessary limitation on small claims. This states that the Act shall not apply to an arbitration agreement which relates to a claim which does not exceed the monetary limit for the time being specified under rules of court for commencing and dealing with a civil proceeding in respect of a small claim

k. Section 31 – Power of High Court and Circuit Court to refer certain matters to arbitration.

Mr Carrigan noted that this section incorporates sections 49 to 53 of the 1954 Act. He noted that questions had been raised as to what extent any or all of these provisions are now necessary.

l. Section 32 – Additional grounds for setting aside arbitral award in standard arbitrations.

Mr Carrigan noted that this section was probably the section giving rise to the greatest debate. Section 32(1) provides in the case of standard arbitrations that the High Court may set aside or remit to the arbitral tribunal an arbitral award where: (a) there is an error of law on the face of the arbitral award which is so fundamental that it would be unjust not to set aside, or remit to the arbitral tribunal, the award or some part thereof; or (b) the conduct of the arbitral tribunal was so procedurally unfair that it would be unjust not to set aside, or remit to the arbitral tribunal, the award or some part thereof. Section 32(2) allows the parties to a standard arbitration to agree, either in the arbitration agreement, or in writing at any time prior to the commencement of the arbitration hearing, that the High Court shall not have the power to set aside or remit an arbitral award on the additional grounds referred to in subsection (1).

m. Section 34 – Special oversight

Mr Carrigan noted that in consumer arbitrations under section 34 an arbitrator is given the right to state a case for the decision of the relevant court as to an award and a party is given the right apply to the relevant court seeking any of the following: (i) a direction that an arbitral award be remitted to the arbitrator on the grounds that new evidence is available which could be likely to materially alter the decision in relation to the award, (ii) a direction that an arbitrator state a case for the decision of the relevant court as to an award, any part of an award, or any question of law arising in the course of the arbitration.

n. Section 35 – Consumer Arbitrations

Mr Carrigan noted that this section allows consumers to opt out of the provisions of section 34.

- o. Section 36 – Special oversight in other standard arbitrations where agreed.

This applies to other arbitrations and allows parties to opt in.

Mr Carrigan noted that these opt in opt out provisions are regarded by many as unwieldy and unlikely to operate well in practice.

#### **4. Panel Discussion**

##### **A. Transitional Arrangements – Section 3**

4.1 Mr. Ciarán Fahy then asked the members of the panel to address the issues raised by Mr Carrigan and the attendees to comment as appropriate.

4.2 Mr Fahy referred to the transitional arrangements in section 3. He noted that this was something that was commented on by the Chartered Institute of Arbitrators (Irish Branch) and the Society of Chartered Surveyors in their formal submissions on the Bill. He invited Mr Sean McCormack, Chartered Valuation Surveyor, President of Society of Chartered Surveyors to comment on section 3.

4.3 Mr McCormack said that the Bill concentrates on the arbitration agreement whereas the 1954 Act concentrated on the commencement of arbitration proceedings. This will have the effect of having two systems of arbitration law applying at the same time which will lead to confusion. He stated that this is unsatisfactory. He noted that section 3(2) of the Bill allows the parties to agree that the Bill shall apply to an arbitration under an arbitration agreement entered into before the commencement of the section.

However, he stated that it is unlikely that parties will, in the majority of cases, be as proactive as that. He suggested that the section should be much more straightforward and automatic, i.e. the new Bill should apply to all arbitrations. He said that the rent review arbitration process provides a good example of how the current formulation of the section could lead to problems where all leases signed up to the commencement of the section would be governed by the old law in a situation where most commercial leases are for periods of 20- 25 years.

- 4.4 Mr Fahy invited comments from the floor. Prof. Brian Carroll of UCC raised the question of whether there might be a constitutional problem about making this section retrospective given that some arbitral awards might be perceived as penal. Mr Brian O'Connell, Architect, suggested that changing the section to make the Bill to make it retrospective in all cases might run contrary to the intention of the parties who might not have entered into the agreement if they knew that the new Bill would apply. Mr. Anthony Hussey, Partner, Hussey Fraser Solicitors pointed out that most arbitration agreements provide that the Arbitration Acts 1954-1998, or any amendment thereto will govern the arbitration. Mr Anthony Moore BL suggested that it is arguable that the change proposed by amending section 3 to make it retrospective in all cases is procedural in nature rather than substantive and he pointed out that the Constitution allows a greater degree of latitude to changing procedural issues retrospectively. Mr G Brian Hutchinson agreed. Mr Carrigan stated that the Arbitration Act 1954 was made retrospective. Mr Colm Ó hOisín SC stated that the transitional provisions of the English Arbitration Act 1996 rendered the Act applicable to all arbitrations commenced after the commencement of the Act and he felt that was an approach that should be followed in this jurisdiction. In relation to the retrospectivity point, he said that it was not unusual for the law to change peoples expectations. He gave the example of the Statute of Limitations 1991 and the changes introduced to the state of knowledge.

**B. Time Limits – Section 12**

4.5 Mr Fahy then moved on to section 12 and the question of time limits that apply. Mr G Brian Hutchinson stated that article 34(3) of the Model Law gives effectively a 90 day time limit for applications to set aside an award. Section 12 makes an exception to this in the case of applications to set aside an award on the grounds of public policy. He stressed that section 12 does not shorten the time period, what it does is it gives a 56 day time limit from the date the circumstances giving rise to the application were known. He noted this could be longer than the 90 days. Mr Hutchinson stated that rationale for this was a desire to protect public policy. He said that he did not have a view on whether or not it was necessary to give public policy this special protection.

**C. Examination of Witnesses – Section 14**

4.6 Mr Fahy asked Mr Hutchinson to discuss section 14 which dealt with the examination of witnesses. Mr Hutchinson stated that the section does not mention the possibility of witnesses being examined on affirmation. He suggested that this was not really a problem as it was provided for by the Oaths Act 1888. Accordingly there was not statutory lacunae here. But he suggested that nevertheless the section should be ammended to include the words affirmation.

**D. Consolidation – Section 16**

4.7 Mr Fahy asked Mr O'Donoghue to talk about section 16 which dealt with the consolidation of arbitrations. Mr O'Donoghue said that the section only allows consolidation where there is agreement by the parties. He felt that

the section as drafted was superfluous insofar as the parties could agree this without the legislation. He reviewed international practice in this area in particular under the ICC and AAA institutional rules. He concluded that there was no good reason to have the section. He said that the only reason he heard was that it would send a message to the market place that Ireland is amenable to consolidation. He said that he felt that this was not a great argument. He did not like the “why not” argument. He said that it is an interesting area but it is not well developed. He concluded that section 16 should be left out.

4.8 Mr Fahy asked for comments from the floor. Mr Larry Fenelon said that he was reluctant to leave out the consolidation provision. He said that he had an experience of having to do an arbitration under Dutch law and this allowed for consolidation. He said that in those particular proceedings there were two affiliated companies and it would have been a ludicrous situation if there had to be two separate arbitrations. He said that if the court did not have the power to order consolidation no consent would have been provided. He said that his view was that consolidation was quite important particularly as it would send out a message to international business.

4.9 Another speaker pointed out that the requirement for agreement rendered the section meaningless. Mr Fahy agreed and said that the real issue was whether (a) it should be left out or (b) it should be changed in some way to give an arbitrator some sort of power to compel consolidation. A number of speakers said that a provision allowing the arbitrator to order consolidation would prove useful in construction disputes. Mr Hutchinson stated that section 16(2) was useful in that it precluded the arbitral tribunal from ordering the consolidation of proceedings or concurrent hearings unless the parties agree to the making of such an order. He suggested keeping section 16(2) and deleting section 16(1). Mr Jim Bridgeman said that we did not have enough information about international practice to make a recommendation in relation to this section.

## **E. Costs and Interest – Sections 20 and 18**

4.10 Mr Anthony Hussey, Partner, Hussey Fraser Solicitors then dealt with the issues of costs (section 20) and interest (Section 18).

4.11 He said that section 30 of the 1954 Act was a very good provision. Section 30(1) provided that any provision in an arbitration agreement to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof shall be void, and this Part shall, in the case of an arbitration agreement containing any such provision, have effect as if that provision were not contained therein. Section 30(2) provided that nothing in subsection (1) invalidates any such provision as is mentioned in subsection (1) when it is part of an agreement to submit to arbitration a dispute, which has arisen before the making of that agreement. Mr Hussey was of the view that any other provision was open to abuse. He said that the stronger party to the contract would put in a term stipulating that each party to an arbitration would bear their own costs. He said that this would act as a disincentive to arbitration. He gave the example of the tendering situation in construction agreements where there is an inequality of bargaining power between the employer and the sub contractors.

4.12 He said that the exact same point arises in relation to interest. He accepted however that section 18 of the Bill is a re-enactment of section 17 of the 1998 Act but he said that a stronger party should not be entitled to impose on a weaker party a disentitlement to interest.

4.13 Mr Fahy asked for comments from the floor. Mr Colm Ó hOisín SC said that this boils down to the issue of whether the Arbitration Bill respected the

autonomy of the parties to agree on the question of costs or interest or not. An agreement that both sides should bear their own costs is common in the US. He said that this section would accommodate this practice. He said the issue of inequality of bargaining power, duress and abuse of bargaining power are not matters for the Bill and it would be a mistake to deal with that issues in the Bill.

4.14 Mr Bernard Gogarty said that the section has to recognise the reality of practical commercial life and that stronger parties will exploit that stronger position by dealing with costs and interest in advance. He was of the view that stronger parties were already exploiting their position by insisting on ICC Arbitration clauses for relatively small contracts and thereby effectively precluding the weaker party from any effective remedy. Mr Ó hOisín SC stated that Mr Gogarty's point was related to the point made by Mr Hussey. He said that this was a very fundamental objection to arbitration which went against the spirit of the New York Convention and its recognition of the parties agreement to arbitrate.

4.15 Mr Anthony Hussey said that the Bill in section 33 already allows for a period of waiver and provides for an opt out in a consumer arbitration. Mr Colm Ó hOisín SC said that this was peculiar to consumers and similar provisions should not apply to non-consumer arbitrations. Mr Anthony Hussey said that the 1954 Act already did it in relation to costs. He asked why we need to change this. Mr Larry Fenelon said that there was a divergence of views here. He said that regard should be had to the reality that 95% of arbitrations are small arbitrations and many would not take those arbitrations if they had to take a hit on costs. Mr Colm Ó hOisín SC said that prohibiting a party from making an agreement on costs or interest would not prevent the stronger party from forcing a weaker party to agree to an arbitration clause.

4.16 Mr Fahy said that this is a philosophical point. The consumer provisions are designed to protect the perceived weaker party, namely, the consumer. He said that Mr Colm Ó hOisín SC was rejecting the idea of affording the same protection to non-consumers. Mr Klaus Reichert BL said that the impetus for this provision stems from the position that arose under section 60 of the 1996 Act when the English courts struck down arbitration agreements that stated that each side would bear their own costs as being void for public policy. He stated that this has put a lot of people off London as a venue and they are looking for an English speaking common law jurisdiction to do their business. These people are very keen on this provision. He said that if the section is removed we could lose business.

#### **F. Liability of Arbitrators – Section 21**

4.17 Mr James O'Donoghue then examined section 21 which deals with the liability of arbitrators. He said that this is a very short provision which is very broad. He noted that the English 1996 Act provides immunity but excludes it in cases of bad faith. He noted that Article 14 of the Model Law mentions failure or impossibility to act. He suggested that the section be amended along the lines of the English 1996 Act.

#### **G. Application to other Arbitrations – Section 28**

4.18 Mr Sean McCormack then examined section 28. This states that subject to section 29, the Bill shall apply to an arbitration under any other enactment in so far as its application is not incompatible with the provisions of the enactment concerned. He said that he would prefer to see the section beefed up along the lines of section 48(2) of the 1954 Act. This provides that "(2) Parts I and II of this Act (except the excluded provisions) shall apply to every arbitration under any other Act as if the arbitration were

pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far as Part II of this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised thereby.”

## **H. Exclusion of Certain Arbitrations – Section 29**

4.19 Mr Fahy then asked Mr Hutchinson to deal with section 29 which deals with the exclusion of certain arbitrations. Mr Hutchinson said that in short section 29 excludes certain disputes, an example being employment disputes. He said that this is anomalous. He said that the question is whether we need to continue this exclusion. He said that he did not have a view on this but it felt that it was strange to have a number of different types of arbitration denied the benefit of the legislation. Mr Pat Brady said that he had a theory that the exclusion relates to section 70 of the 1954 Act which provides for arbitration under the industrial relations legislation which as far as he was aware has never been used since 1954. He opined that it seemed inconsistent with the policy of ADR to exclude certain types of arbitration from the benefit of the legislation.

## **I. Small Claims**

4.20 Mr Fahy moved on to section 30 which deals with small claims. Mr O'Donoghue said that there were two subsections. Section 30(1) states that the Bill shall not apply to an arbitration agreement which relates to a claim which does not exceed the monetary limit for the time being specified under rules of court for commencing and dealing with a civil proceeding in respect of a small claim. Section 30(2) defines an unfair term. He discussed the meaning of the phrase “*consumer*.” He reviewed the European case law in

relation to unfair terms and noted that in some cases the seller will have to explain to the consumer the consequences of an arbitration clause.

- 4.21 Mr. Fahy said that many people felt that it makes no sense to create a threshold beneath which the Bill cannot apply. He gave the example of small cases which should be arbitrated and also non-monetary awards eg sports disputes. He said that the second issue is the situation where an arbitration agreement will not be binding on the consumer if the amount at stake is less than the jurisdiction of the small claims court. He pointed out that in some jurisdictions that it is open ended. There is no limit. He asked for views. There were no strong views.
- 4.22 Mr Hutchinson said that section 30(1) seemed to him to be an accident and he did not know what it was doing there. He suggested that it seemed to be trying to save money by ensuring that disputes below a certain amount would not trouble a court.

**J. Court Ordered Arbitration – Section 31**

- 4.23 Mr Hutchinson then discussed section 31. This gives the High Court and the Circuit Court the power to refer certain matters to experts for arbitration. His view was that the courts already have an inherent power to deal with this. He said that this looks peculiar in a modern arbitration Act. He felt that there was no necessity for the section. He said that it is anachronistic and should be omitted.

**K. Special Oversight – Sections 34 - 36**

- 4.24 Mr Anthony Hussey dealt with section 34 which provides for special oversight.. This allows for points of law to be stated by arbitrators for decision by the court on the arbitrator's own volition. He stated that it did not provide for a case stated mechanism where the parties agree without the arbitrator. He said that the section was open to misuse where arbitrators

would refer all matters of law to the court because they might feel unwilling to deal with issues of law. One participant did not agree with this. Mr Hussey felt that there should be a requirement for the agreement of both the parties to the referral to the court. He said that the section also provides for a situation where one party can apply to the court for a direction that the arbitrator direct a case stated. He felt that this should be done away with as open to abuse and shows a distrust on the part of the legislator for arbitrators. He said that sub section 3 provides for new evidence. He had no particular view on this.

4.25 One participant disagreed with the requirement for agreement. He said that he had never encountered such a situation. Mr Husey said that he was aware of at least one case where parties were in agreement.

4.26 Mr Hutchinson said that the ability to examine new evidence already exists in Irish law. It is one of the grounds on which an arbitration can be remitted back to the arbitrator. However in this instance the difficulty is that no time limit is specified for the production of new evidence.

4.27 Mr Brian Hutchinson said that sections 35 and 36 deal with the application of the special oversight mechanism to consumer arbitrations and standard arbitrations respectively.

4.28 Section 35(1) provides that unless the parties agree otherwise special oversight shall be available in all consumer arbitrations, regardless of whether the parties to an arbitration agreement purport to exclude special oversight or rights or facilities analogous thereto. Section 35(2) defines the "relevant court" which is determined by reference to the monetary limit of the jurisdiction of the courts. Section 35(3) provides that unless the parties

otherwise agree during the period for waiver, an appeal shall lie, in accordance with law, from any decision of a court under this section.

4.29 Section 36 deals with non-consumer standard arbitrations. This provides that the parties to a standard arbitration agreement which is not a consumer arbitration within the meaning of section 33 may agree to include in an arbitration agreement all or any of the provisions of special oversight specified in section 34. Section 36(3) provides that the “relevant court” for the purposes of special oversight, shall be the High Court, unless: (a) the parties, either in the arbitration agreement or prior to commencement of the arbitration hearing, agree to specify another court, and (b) the total monetary value of the subject matter of the dispute between the parties is within the monetary jurisdiction of the court so specified having regard to the monetary jurisdiction of that court. Mr Hutchinson noted that there was no reference to an appeal. However, he suggested that as section 11 does not apply to this section so you could imply an appeal.

4.30 He suggested that these sections are unwieldy and asked whether they were necessary particularly as the Bill already protects consumers from unfair terms. However, he accepted that there was a need for a case stated mechanism for standard non-consumer arbitrations.

4.31 Mr Fahy asked for comments from the floor. One commentator noted that the advantage of arbitration was certainty in relation to section 36. He said that the possibility of all these appeals does render its duration uncertain. Mr Fahy stated if special oversight applied particularly in consumer arbitrations it could drag out the proceedings by applications and subsequent appeals to the court/.

## **5. The Role of the High Court in Arbitration**

5.1 Mr Colm Ó hOisín SC, Chair, Bar Council of Ireland Arbitration and ADR Committee, delivered a presentation entitled '*Section 32: Do we really need Additional Grounds for Setting Aside Arbitral Awards?*' Prof Dr Nael Bunni, Consulting Engineer, delivered a response to this presentation. This was followed by the keynote address which was given by Mr Justice Frank Clarke and which was entitled "*The Role of the High Court.*"

**A. Presentation by Mr Colm Ó hOisín SC**

5.2 Mr Ó hOisín SC stated that he queried whether or not the additional grounds for setting aside an award set out in Part IV of the Bill are, in fact, necessary. He argued that rather than assuaging any concerns that domestic arbitration practitioners might have, Section 32 creates confusion and perpetuates a ground for review which is undesirable and anathema to the central principles enshrined in the Model Law. He argued firstly that the setting aside of an arbitral award on the grounds of procedural unfairness is already adequately dealt with in the various grounds under Article 34(2)(a) of the Model Law, and secondly that it is regressive to perpetuate an '*error of law on the face of the arbitral award*' as a ground for setting aside a domestic arbitration. He also stated that in his view there were no compelling grounds for distinguishing between the role of the Court in international arbitration and domestic arbitration. He made the point that there was no particular reason why an arbitration between a contractor in Fermanagh and an employer in Leitrim should have different rules and a lesser potential for court interference than an arbitration between a contractor in Cavan and an employer in Leitrim.

5.3 He then referred to the wording of section 32 of the Arbitration Bill 2008. This states as follows: -

*"(1) Without prejudice to the generality of Article 34 and, in addition to the grounds laid down in paragraph (2) of that Article, the High Court may, in the case of a standard*

*arbitration, set aside or remit to the arbitral tribunal an arbitral award where:*

*(a) there is an error of law on the face of the arbitral award which is so fundamental that it would be unjust not to set aside, or remit to the arbitral tribunal, the award or some part thereof;*

*(b) the conduct of the arbitral tribunal was so procedurally unfair that it would be unjust not to set aside, or remit to the arbitral tribunal, the award or some part thereof.*

*(2) The parties to a standard arbitration may agree, either in the arbitration agreement, or in writing at any time prior to the commencement of the arbitration hearing, that the High Court shall not have the power to set aside or remit an arbitral award on the additional grounds referred to in subsection (1).*

*(3) This Part shall not apply to international commercial arbitrations.”*

5.4 He stated that the effect of this section was that in every domestic arbitration, unless the parties agree otherwise, an appeal will lie to the Court either to set aside or to remit the award either on the grounds of error of law or procedural unfairness.

5.5 He accepted that there was an opt out clause in section 32 but he stated that in his view, it was difficult to imagine many parties including a reference to Section 32 in their arbitration clause. He thought it unlikely that there would be many cases where the parties would agree in writing prior to the commencement of the arbitration hearing to exclude Section 32. He said that the party seeking relief in the arbitration proceedings will often want to get a final award at the earliest possible opportunity and in many cases the party defending the arbitration will want to postpone matters for as long as

possible and that therefore the respondent is very unlikely to want to shut off any additional grounds for challenge and delay.

5.6 Mr Ó hOisín SC then examined the procedural unfairness ground in section 32(1)(b). He took the view that the paragraph was unnecessary because it appears to ignore the grounds set out in Article 34 of the Model Law. He said that the apparent overlap between Section 32(1)(b) and Article 34 could also lead to unintended results in that the courts might well take the view that procedural unfairness described in Section 32(b) must be in addition to the grounds laid down in paragraph 2 and must mean a broader range of circumstances than that envisaged in Article 34. Therefore, he submitted that rather than being restricted, therefore, Section 32(1)(b) could open the door to a much wider range of procedural challenges than is necessary.

5.7 Mr Ó hOisín SC then examined the grounds for setting aside an award under Article 34 of the Model Law, namely

- Article 34(2)(a)(i) - Incapacity of one of the parties or invalidity of arbitration agreement,
- Article 34(2)(a)(ii) - Lack of due process,
- Article 34(2)(a)(iii) - Issues of jurisdiction,
- Article 34(2)(a)(iv) – Composition of tribunal or procedure not in accordance with arbitration agreement or the relevant law.

He stated that it was clear that there is a reasonable degree of supervision over arbitral awards on the grounds of procedural unfairness and jurisdiction. Therefore, he stated that in his view there did not appear to be any real justification for including an additional procedural unfairness ground for domestic arbitration as currently set out in Section 32(1)(b).

5.8 Mr Ó hOisín SC then examined Section 32(1)(a) which deals with an error of law on the face of the award. He noted that this ground was established by the common law and was retained by the Arbitration Act 1954. However, he argued that it was a relic of an older attitude to arbitration, which does not sit well with the Model Law. He accepted that the Irish

Courts had been quite restrained in the use of this ground but he stated that this did not change that position.

5.9 He referred to the decision of Mr. Justice Frank Clarke in the case of *Limerick County Council v. Uniform Construction Limited [2007] 1 IR 30* which he stated provided a very helpful and comprehensive review of the jurisdiction to set aside on the grounds of error of law on the face of an award. He summarised the principles established in that judgement as follows:

- At common law, the Court can either remit or set aside an award if there is an error of law on its face,
- The jurisdiction should only exercised where the award an error of law so fundamental that the Courts cannot stand aside and allow it to remain unchallenged or where the award is clearly wrong.
- There may also be a statutory power to remit or set aside on the grounds of error of law under Sections 36 and 38 respectively of the Arbitration Act 1954 but any such statutory power is no greater than the common law jurisdiction. He submitted that it is therefore irrelevant whether the jurisdiction to remit or set aside for error of law arises under Statute or at common law.
- There is a limitation on the jurisdiction of the Court to set aside or remit an award for error on the face of the award where the specific question of law in respect of which the error is alleged to have been made has been referred to the arbitrator for his determination. However, he stated that there is a distinction between a specific legal issue referred to an arbitrator and the variety of legal issues which would necessarily arise in many arbitrations.
- An error on the face of an award means that *“there can be found in the award, or in a document actually incorporated with it some legal proposition which is the basis of the award and which is erroneous.”* (Halsbury, Laws of England, (4<sup>th</sup> Edition, Vol. 2, 1973) para. 623.)
- A Court cannot conclude that an arbitrator has been in error in his construction of a contract unless it is open to the Court to look at all the materials, which would have been properly taken into account. If

it is therefore necessary to look at a whole series of contractual documents and construe them by reference to each other and by reference to the evidence in order to reach a conclusion as to whether there was an error, then it may be that the error cannot be said to be of the obvious and fundamental variety which is necessary for the Court to intervene.

5.10 Mr Ó hOisín SC stated that notwithstanding the repeated expressions of the principle of judicial restraint, in his view to allow any jurisdiction to review on the grounds of an error of law is undesirable and has the potential to undermine the integrity of the arbitral process.

5.11 He then referred to the fact that the UK Arbitration Act of 1996 retained jurisdiction, albeit in a far more restricted way than would apply under our new Bill. Notwithstanding this it has and continues to be a fertile area for challenge of arbitral awards in the UK. He reviewed the operation of section 69 of the 1996 Act and noted that despite the restrictions contained in section 69 there are still quite a significant number of applications brought in the English Courts for leave to appeal to the Court on a question of law arising out of an award.

- In 2004 there were 104 applications to the Court under Sections 67, 68 and 69 of which 53 (51%) related to Section 69.
- In 2005 there were 152 applications of which 88 (58%) arose under Section 69.
- In 2006 there were 85 applications of which 51 (60%) were under Section 69.
- In 2007 there were 112 applications of which 81(72%) were under Section 69.
- In 2008, there were 111 applications of which 61(55%) were under Section 69.

- 5.12 He pointed out that section 32 of the Bill is less restrictive than section 69 and he suggested that it would appear to offer considerable potential for court challenges to awards.
- 5.13 In conclusion, Mr Ó hOisín SC stated that he accepted that there is no doubt a concern by some that domestic arbitrators should not be given complete autonomy and that there should be scope to appeal their findings on the law. However, he stated that the problem with this is that in making the arbitration agreement the parties have agreed to submit their dispute for a final and binding decision by the arbitrator. The identity of the arbitrator is obviously important so in making that decision the parties should obviously reflect carefully on their choice of arbitrator (that is one advantage of arbitration over litigation where unfortunately one cannot choose a judge). It has been suggested that the more limited grounds for court interference will lead to a reduction in the number of parties choosing arbitration. He stated that he was not convinced by this argument. He asked what party would choose arbitration if they knew it was going to lead to a long drawn out challenge to the award with a possible appeal to the Supreme Court and all the attendant costs and delays?
- 5.14 He said that it is far more important that the Model Law introduces for the first time a default requirement that reasons be given for awards. The parties can still agree that no reasons be furnished. However, he suspected that in most areas of arbitration that will not happen very often. A reasoned award improves the parties' ability to assess the competence of the arbitrator. It is up to all the professional bodies with an interest in arbitration to ensure that there are proper lists of skilled, competent and experienced arbitrators available to parties to overcome any concerns the parties might have. Usually, one side or the other is unhappy with the award an arbitrator gives (sometimes both are unhappy). The dissatisfied party will always seek to take advantage of any potential for a review of the award. The dissatisfaction of any particular party does not mean to say that the arbitrator was wrong. Exactly the same thing happens in court – the only difference being that in court one is usually entitled to appeal.

Appeals, however, do not guarantee satisfaction. Litigation may be an instrument of greater precision than arbitration. If the parties have chosen arbitration for whatever reason – be that finality, privacy, cost or the technical expertise of the arbitrator – such choice should be respected and the parties should be held to that agreement.

## **B. Presentation by Prof. Bunni**

5.15 Prof Bunni then delivered a response to the paper delivered by Mr Ó hOisín SC. He prefaced his remarks by stating that in his view this part of the Seminar was a continuation of the debate held at the Symposium on 28 April 2007 and of the papers delivered, the most relevant of which were the presentation by Dudley Solan; the paper delivered by Mr Michael M. Collins SC entitled “The UNCITRAL Model Law and the Domestic Law of Arbitration” and his own paper entitled “The Need for Change in Arbitration Law in Ireland.”

5.16 Prof Bunni summarised the papers delivered by Messrs Solan and Collins at that Symposium and submitted that in his view:

- both domestic and international arbitration laws should be the same.
- section 36 of the Bill is not needed, because of Articles 26(1) and 26(2) of the Model Law.

5.17 Prof Bunni noted that Article 26 of the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to appoint one or more experts to report to it on specific issues determined by it. He stated that Article 26 further provides that the arbitral tribunal may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. He pointed out that of course, such appointment could, and had in his experience, included questions of law. He stated that a Tribunal Expert on matters of law would provide the arbitrator a legal opinion in relation to the question of law which is then shared with the parties who could provide

submissions on the issue in question. He pointed out that Article 26(2) of the Model Law provides that, unless otherwise agreed by the parties, if a party requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his/her written or oral report, participate in a hearing where the parties have the opportunity to put questions and to present expert witnesses in order to testify on the points at issue.

5.18 In relation to section 32 of the Bill, Prof Bunni accepted that an extensive educational programme is badly needed to provide knowledge and training and that consideration should be given to devising a method of communicating to the users of arbitration the advice obtained from the legal experts but it was his view either that:

- Section 32 of the Bill should be deleted, or
- It should be treated as Section 36 is presently treated in the Bill, i.e. allowing the Parties to opt into it should they wish, both in international and in domestic arbitration.

## **C Presentation by Mr Justice Frank Clarke**

5.19 Mr Fahy then invited Mr Justice Frank Clarke to deliver an address on the role of the High Court.

5.20 Mr Justice Clarke noted that the Bill introduced the concept of a single arbitration Judge in a manner similar to the approach that has been adopted in other areas of the law, for example the area of competition law. He stated that the arbitration Judge would deal with all arbitration matters arising out of the Model Law. However, he said that one curious aspect of the Bill is that section 32 does not have a similar provision. Mr Justice Clarke stated that in practice if there is going to be a single arbitration Judge and section 32 survives and there are cases under it those cases would probably go to the arbitration Judge. However, he said that it is strange that when a question about a Model law goes to the High Court the Bill states that it has to go to a particular Judge but section 32 does not

require the same thing. He suggested that if section 32 survives that is something that should be looked at.

5.21 Mr Justice Clarke said that the other interesting quirk in the Bill is the way in which the entire jurisdiction with one exception is conferred on the High Court. The one exception relates to consumer arbitrations. He said that it is curious that the Bill did not contain a similar provision in relation to standard non-consumer arbitrations. He said that he could not see any logic for this. He said that it should not be forgotten that legal proceedings are more expensive in the superior courts. He suggested that this might have the effect of rendering certain court interventions impractical on a cost basis.

5.22 Mr Justice Clarke then moved on to consider the extent to which the High Court should have a role in reviewing or over seeing the results of arbitrations. He prefaced his remarks by stating that it seemed likely that as the Model Law was adopted in more and more countries that a common approach to its interpretation would develop. He noted that section 8 of the Bill allows a court to look at the travaux preparatoires. However, Mr Justice Clarke stated that there is nothing in the Bill about the Irish courts having regard to the way in which other jurisdictions interpret the Model Law. However he accepted that in practice Irish courts would have regard to this jurisprudence.

5.23 He then moved on to consider whether the High Court should be given the power by the Bill to overturn an arbitral decision on the grounds of procedural mishap in addition to the power contained in the Model Law. He suggested that having two provisions dealing with the same thing creates a grave danger of confusion. He said it was not clear to him whether it is intended by the Bill that there should be a wider entitlement in the High Court to set aside awards for procedural irregularity than is contained in the Model Law. He said that if there is not such an intention he agreed with the views expressed by Mr O'hOisin that it is dangerous to include a second section, which seems to imply that there is to be some kind of wider range because why have it at two different places. He said that the natural

reaction of any court looking at two different sections, which are saying things about roughly the same material, is that there would not be two sections unless it was intended that they were different. He said that until there is a definitive decision of the Supreme Court as to the construction of that section there would be significant uncertainty as to whether there is a wider discretion to set aside awards for procedural mishap in Ireland than in those other countries, which have adopted the model law.

- 5.24 Mr Justice Clarke suggested that this uncertainty in itself could give rise to some difficulty. He opined that if the section is not intended to do more than it should be dropped if it is intended to do something more than it needs more thought because putting it in without thinking whether you need it in addition to the Model Law causes difficulty.
- 5.25 He then moved on to consider whether the High Court should have a role in setting aside arbitral awards simply because they are wrong. He said it would be inappropriate as a sitting Judge to express an opinion on this as it is a question of policy but he said that there were some observations that he was able to make.
- 5.26 He said that there was no great appetite on the part of the judiciary to get involved in reviewing arbitrations. He said that this was essentially a philosophical decision, which balanced the right of an individual who has a bad decision and needs to get it reviewed and the public interest in achieving certainty and finality in the arbitration process. He used the analogy of the law relating to delay in the latter context. He said that it had to be remembered that hard cases make bad law and there is a practical reality that parties would use any extra review system as a means of delaying the process. He said that it was easy to identify the really bad cases but he stressed that these did not create the problem; rather it was the mass of cases in what might be termed the grey area.
- 5.27 Mr Justice Clarke said that in his view the requirement of certainty was the stronger argument.

- 5.28 Mr Justice Clarke suggested that consideration be given to incorporating an internal appeal into the arbitration clauses. He drew the analogy with professional practice tribunals, which have an initial decision making body “the badness tribunal” and an appeal body “the badness appeal tribunal.” He suggested that the various professional bodies involved in arbitration should give consideration to this proposal and noted that it would not be difficult to assemble a panel of experienced individuals to hear appeals, which in many cases could be paper appeals. He said that such a contractual form of appeal also had the advantage that it could be designed in such a way as to be very quick.
- 5.29 Mr Justice Clarke concluded his presentation by indicating that in his view the role of the High Court should be confined to that envisaged by the Model Law.

#### **D. Floor Discussion**

- 5.30 Mr Fahy thanked Mr Justice Clarke for his presentation. Mr Fahy said that section 32 deals with two matters – the first is procedural mishap. Mr Fahy said that it seemed to him that there was general agreement that this is adequately covered in the UNCITRAL Model Law. The second issue is error on the face of the award – is that something that people want to be retained? He asked for comments from the floor
- 5.31 Mr Turlough O’Donnell SC endorsed the views of Mr Ó hOisín SC and Prof Bunni. He said that in his view section 32 should go in its entirety. He also echoed Mr Justice Clarke’s analogy with the law of delay. He said that the Bill should aim to “quiet men’s titles” in arbitrations. He said that it would be a greater injustice to let disputes linger on. However, he said that he was not sure whether he agreed with the idea of an internal appeal. He said that he did not know how this would work. He said that he felt that perhaps

the requirement to provide reasons would reduce the number of bad decisions / arbitrators.

- 5.32 Mr Mark Connaughton SC said that he would be very nervous of a situation where a patently wrong decision could not be reviewed by the High Court. He felt that the second element of section 32 should be retained. He did agree that the idea of a further appeal should be looked into.
- 5.33 Mr Tim Bouchier Hayes said that there is a conflict between looking for a reasoned award on the one hand and then saying that a party cannot do anything about it if he feels that it is wrong. He pointed out that if the section were dropped there would be a situation where there would be an appeal from a judge in litigation but not from an arbitrator. He asked what the objection was when the ground of review in the section is so narrow. He said that it should be remembered that the courts are reluctant to interfere. Mr Ó hOisín SC said that a lot of the focus is on the bad case example but for every really bad case where there is an obvious error there are a lot of grey area cases which would encourage parties who would use the mechanism to try and put off the evil day. He said that it is all about balance but the lesser evil is to leave the arbitral award where it is. Mr Bouchier Hayes did not agree. Prof Bunni said that with education and training of arbitrators the difficulty of bad decisions is removed.
- 5.34 Mr Liam Keane, Solicitor, said that he was a big fan of finality in arbitration awards. He said that it would be disappointing if the arbitration Bill did not apply to sports arbitrations. Mr Justice Clarke said that he did not like the monetary value in section 30.
- 5.35 Another commentator agreed with the suggestion that the relevant court should not necessarily be the High Court, which might exclude a lot of people. He said that the definition of the relevant court in relation to consumer arbitrations should be the same for the entire Bill.

5.36 Mr Brian Hutchinson asked whether if the Seminar was recommending the deletion of section 32 it should also recommend that the Bill be amended to expressly state that the common law power of a court to review in the same circumstances is removed. Mr Justice Clarke suggested that this could probably be implied but he agreed that it would be a good idea to adopt a belt and braces approach in the Bill and expressly mention it. Mr Hutchinson said that if section 32 is removed there is very little reason to have a distinction between standard and international arbitration in the Bill.

5.37 Mr Hussey said that he agreed with Mr Ó hOisín SC and he said that of the last five substantial arbitrations in the construction section that he was aware of, there was an application to set aside the award.

## **6. Conclusion**

6.1 There was no show of hands or other indication of support to establish the consensus view on any of the topics during the seminar. The pressure of time allied to the range of topics to be covered inevitably meant that more time was allocated to discussion of items or topics where there was a more obvious difference of opinion. While there was significant audience participation it appeared clear that some of the attendees at least were there to acquaint themselves with the Bill and did not have any fixed views. As a result this summary should be read with caution and the mere fact that no contrary view was expressed in relation to a particular suggestion does not imply that the view was universally held. Bearing that in mind at the conclusion of the seminar, the chairman Mr Fahy attempted to summarise the deliberations as follows.

- **Section 3 (Transitional Provisions).** The general view appeared to be in favour of changing the section to render it applicable to all arbitrations commenced after the commencement of the new Act.

- **Section 12 (Time Limits for Setting Aside Awards on the Grounds of Public Policy).** There appeared to be general agreement that the time limit should be the same as Article 34 of the Model Law.
- **Section 14 (Examination of Witnesses).** There was agreement that, although probably not necessary, the section should be amended to allow the taking of evidence on affirmation.
- **Section 16 (Consolidation).** There appeared to be an acceptance by the Seminar of the limitations of the section but there seemed to be no consensus to take it out.
- **Sections 20 (Costs) and 18 (Interest).** There were differing views on these sections with no obvious consensus. In particular there was a view that the Bill should seek to protect parties in a weaker bargaining position by disallowing agreement as regards costs and interest beforehand while on the other hand it was argued the Bill should respect the autonomy of the parties and gives discretion in that regard. Mr Fahy suggested a possible compromise of adopting a different approach to standard and international arbitrations.
- **Section 21 (Liability of Arbitrators).** There appeared to be agreement that the immunity as currently drafted in the Bill is too broad.
- **Section 28 (Application to other Arbitrations).** There appeared to be agreement that the section should be re drafted along the lines of section 48 of the 1954 Act.
- **Section 29 (Exclusion of Certain Arbitrations).** There appeared to be agreement that this section is unnecessary and should be deleted from the Bill.

- **Section 30 (Small Claims).** There appeared to be agreement that section 30(1) should be deleted and that section 30(2) should be retained as drafted.
- **Section 31 (Court Ordered Arbitration).** There appeared to be agreement that this section adds nothing to the Bill and should be deleted.
- **Section 34 (Special Oversight).** There appeared to be agreement that this section should be redrafted to require agreement of the parties in relation to case stated. Concerns were raised in relation to the absence of a time limit in to section 34(B)(1) (New Evidence).
- **Sections 35 and 36 (Special Oversight).** There appeared to be a view that these sections were unnecessarily cumbersome with no obvious reason for the difference in approach between consumer and nonconsumer arbitrations. There was also concern that the provision for applications and appeals to court could facilitate time wasting or even abuse in some instances.
- **Section 32 (Optional Additional Grounds for Setting Aside Award in Standard Arbitrations)** There appeared to be general agreement that section 32(1)(b) (Procedural Mishap) was superfluous and a possible source of confusion and thus should be deleted. There was a lively debate in relation to section 32(1)(a) (Error of Law) with a obvious difference of view but the consensus appeared to be that it should be deleted.