In the matter of the **Arbitration Act 2010** and in the matter of an intended arbitration: **John G. Burns Limited**, Applicant v. **Grange Construction and Roofing Company Limited,** Respondent [2013] IEHC 284, [2013 No. 8 MCA]

High Court 19th June, 2013

Arbitration – Agreement – Jurisdiction of arbitrator to act – Dispute as to existence of agreement – Standard of proof – Principle of incorporation – Arbitration clause in Construction Industry Federation standard form sub-contract – Whether standard form sub-contract incorporated into contract between parties – Whether arbitration agreement existing – Whether arbitrator having jurisdiction to act – Rules of the Superior Courts 1986 (S.I. No. 15), O. 56, r. 3 – Arbitration Act 2010 (No. 1), ss. 6, 9 and Sch. 1 – UNCITRAL Model Law on International Commercial Arbitration 1985, articles 7, 8, 16 and 33.

Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 provides, *inter alia,* that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement".

Article 16(3) provides, *inter alia,* that "[i]f the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request … the court specified … to decide the matter". By virtue of s. 9(1) of the Arbitration Act 2010, the High Court is the "court specified".

The applicant was retained as the main contractor in relation to a certain building project. The respondent was retained by the applicant as subcontractor in connection with the project. A dispute arose between the parties. The respondent requested the President of the Construction Industry Federation ("CIF") to appoint an arbitrator. The respondent informed the CIF, *inter alia,* that the executed contract between the parties was a CIF standard form subcontract. An arbitrator was appointed pursuant to an arbitration clause contained in the CIF standard form subcontract.

The applicant asserted that the President of the CIF did not have jurisdiction to nominate an arbitrator and that no arbitration agreement existed between the parties on the basis, *inter alia,* that the CIF standard form subcontract was never agreed between the parties as governing their contractual relations. The arbitrator ruled as a preliminary question that he had jurisdiction to act as arbitrator. The applicant applied to the court pursuant to article 16(3) of the Model Law to decide the matter of whether or not the arbitrator had jurisdiction to act.

Held by the High Court (Laffoy J.), in deciding the arbitrator had no jurisdiction to act in the matter, 1, that the process under article 16(3) of the Model Law was not an appeal from the decision of the arbitrator. The court might consider such evidence as it saw fit and was not bound by the submissions made to the arbitrator. The court had

untrammelled jurisdiction to consider *de novo* the issue of whether there was an arbitration agreement that bound the parties.

2. That article 7 of the Model Law required that the terms and conditions of any arbitration agreement be incorporated in any contract between the parties in order to be enforceable.

3. That the terms and conditions set out in the standard form CIF subcontract were not incorporated in the subcontract between the parties and there was no arbitration agreement within the meaning of article 7 of the Model Law in place governing their contractual relationship.

Quaere: Whether in deciding a matter under article 16(3) of the Model Law, the court would apply the normal standard in determining matters in civil cases, namely on the balance of probabilities?

Cases mentioned in this report:-

Barnmore Demolition v. Alandale Logistics Ltd. [2010] IEHC 544, [2013] 1 I.R. 690.

British Crane Hire v. Ipswich Plant Hire [1975] Q.B. 303; [1974] 2 W.L.R. 856; [1974] 1 All E.R. 1059.

Lynch Roofing Systems Ltd. v. Bennett & Son Ltd. [1999] 2 I.R. 450.

McCrory Scaffolding Ltd. v. McInerney Construction Ltd. [2004] IEHC 346, [2004] 3 I.R. 592.

Originating motion on notice

The facts have been summarised in the headnote and are more fully set out in the judgment of Laffoy J., *infra.*

By originating notice of motion dated the 10th January, 2013, the applicant sought an order pursuant to O. 56, r. 3(1)(f) of the Rules of the Superior Courts 1986 and s. 9 of the Arbitration Act 2010 deciding on the applicant's plea that the arbitral tribunal did not have jurisdiction pursuant to article 16(3) of the Model Law and that the arbitrator erred in fact and in law in determining that he had such jurisdiction and that he had been validly appointed to act.

The application was heard by the High Court (Laffoy J.) on the 7th June, 2013.

David Dodd for the applicant.

Jonathan FitzGerald for the respondent.

Cur. adv. vult.

Laffoy J. 19th June, 2013

The application

[1] On this application, which was initiated by an originating notice of motion which issued on the 10th January, 2013, the applicant seeks an order pursuant to O. 56, r. 3(1)(f) of the Rules of the Superior Courts 1986 (the "Rules") and s. 9 of the Arbitration Act 2010 (the "Act of 2010") deciding on the applicant's plea that the arbitral tribunal does not have jurisdiction pursuant to article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration 1985 and that the arbitrator erred in fact and in law in determining on the 12th December, 2012, that he had such jurisdiction and that he had been validly appointed by the President of the Construction Industry Federation (CIF).

Factual background

[2] The dispute between the applicant and the respondent has arisen in circumstances where the applicant was retained as the main contractor by the Board of Management of Mount Sackville Secondary School, Knockmaroon, Chapelizod in Dublin in relation to the erection of a two storey extension to the existing Mount Sackville Secondary School and the respondent, which was one of the 40 subcontractors involved in the project, was retained by the applicant as subcontractor in connection with the project.

[3] The main contract was created by Articles of Agreement dated the 9th November, 2009, (the "2009 Agreement") made between the Board of Management, referred to as "the Employer", of the one part and the applicant, referred to as "the Contractor", of the other part, which was in the standard form of building contract where quantities form part of the contract issued by the Royal Institute of Architects of Ireland (RIAI) in agreement with the CIF and the Society of Chartered Surveyors (2002 Edition, revision 1, print 3). Clause 16 of the 2009 Agreement covered the situation where provision would be made in the contract documents for work to be executed on site and/or material or goods to be supplied and fixed by a firm to be selected by the designated architect, Kieran Barry of Kieran Barry & Associates ("the Architect"), and such firm was thereby "declared to be a nominated subcontractor employed by the contractor". In

other words, the Architect made the selection but the subcontractor was employed by the main contractor.

[4] The chain of events which led to the respondent being retained as a subcontractor was as follows:-

(a) the respondent submitted a completed standard form of tender (the tender) for the supply and erection of wall cladding, associated stud work and steel supports, flashings and all works incidental thereto in relation to the development, which was dated the 7th December, 2009, and was addressed to the Architect. In the tender it was stated that the respondent understood that the materials, goods and work, the subject of the tender, were or would be "covered by a prime cost or provisional sum in the building contract", which was identified as the RIAI agreement which formed the basis of the 2009 Agreement and was referred to as the main contract, to be entered into by the applicant and further that the respondent would become a "nominated subcontractor under the main contract" and would "enter into a formal subcontract" which would "indemnify the [applicant] against the same obligations in respect of the subcontract as those for which the [applicant] is liable in respect of the main contract" and that it was understood that "the conditions contained in the main contract" would override all conditions to the contrary contained in the subcontract;

(b) there were a number of documents appended to the one page tender. The first was Appendix 1, which was headed "General Conditions and Contract Particulars for Sub-Contract Purposes". The first two paragraphs of Appendix 1 reiterated, although not in the same words, what was stated in the tender, as recorded earlier. For instance, it was made clear that the main contract was based on the standard Articles of Agreement issued by the RIAI which, in fact, had been utilised in the 2009 Agreement. Appendix 1 then went on to set out some of the detail contained in the 2009 Agreement, for example, the identity of the employer and the architect. Appendix 1 then, under the heading "Appendix to main contract", effectively replicated the Appendix in the main contract. That appendix contained details by reference to the 2009 Agreement, for example, the date for possession, the date for completion and such like. The final item in appendix 1 read as follows:-

> "Clause 35(i) Period of Serving Notice of Arbitration: 10 working days".

It was then stated that any "other details of the main contract", if required, might be obtained from, *inter alia,* the architect. It was stated that the subcontractor would be deemed to have made himself familiar with all aspects of the main and subcontracts, which affected his tender. Appendix 2, also appended to the tender, set out facilities which would be made available to the subcontractor free of charge and it was made clear that anything not provided free of charge would be deemed to be provided by the subcontractor in the tender sum. Finally, the respondent attached a breakdown of its tender sum to the tender;

(c) by letter dated the 13th December, 2009, the Architect sent a copy of the respondent's tender to the applicant and, subject to certain matters which are not relevant for present purposes, intimated that the applicant would be requested to enter into a subcontract with the respondent to perform the cladding, *etc.*, subcontract.

(d) by letter dated the 18th December, 2009, to the respondent, the applicant confirmed its intention to enter into a subcontract with the respondent subject to confirmation of certain matters of detail;

(e) what counsel for the applicant characterised as the subcontract and what counsel for the respondent characterised as a contract document was a letter dated the 19th January, 2010, from the applicant to the respondent. In this letter the applicant stated that, as "main contractors", it instructed the respondent "to proceed with all works associated with the supply, delivery and installation complete of the wall, cladding, flat roof coverings, fascias and soffit nominated subcontract". The agreed contract price was set out as *per* the respondent's tender. The position in relation to V.A.T. was set out – V.A.T. was to be accounted for by the Employer directly to the Revenue Commissioners. It was then stated:-

> "All other terms and conditions are based on all tender documents and post-tender negotiations as *per* the letter of nomination dated the 13th December, 2009, and as noted below."

There followed what were described as "additional conditions relating to this order" which numbered 17 in all. For example, it was stated in condition (1) that the commencement date was the 8th March, 2010, and that the works were to be completed in accordance with the main contractor's programme;

(f) it was clearly envisaged that the letter of the 19th January, 2010, would be signed on behalf of both the applicant and the respondent at the foot thereof. It was signed on behalf of the applicant. While

it would appear that it was not signed on behalf of the respondent, as subsequent events clearly demonstrate, the terms set out therein were accepted on behalf of the respondent, although the commencement date of the 8th March, 2010, was not met by the respondent;

(g) by letter dated the 16th March, 2010, the applicant wrote to the respondent noting that the commencement date of the 8th March, 2010, had been later revised during discussions to the 15th March, 2010, "due to knock on delay effects on structional steel and other elements of the construction works due to the failure of" the respondent to produce working drawings and to attend the site and such like. In essence, the letter was a letter of complaint on the part of the applicant in which it was emphasised that the respondent was aware of the main contract programme and the requirement that the contract work be completed in full by August, 2010. The applicant officially requested the respondent to commence on site immediately and gave notice that all and any loss and expense incurred by the applicant in relation to the delay would be detailed and submitted to the respondent as part of the valuation and certification process. That letter clearly suggests that the applicant considered that the parties were contractually bound before that letter issued, presumably, on foot of the letter of the 19th January, 2010;

(h) the next letter, which has been relied upon by counsel for the respondent in support of the respondent's position, was also a letter of complaint, which was dated the 23rd June, 2010, to the respondent from the applicant complaining of delay on the part of the respondent. In the letter it was stated that on the 26th May, 2010, a further revised realistic programme was tabled by the respondent and accepted by the applicant and the Architect showing a final revised and agreed completion date for the 18th June, 2010. In essence, the complaint was that the respondent had not met the agreed completion date. The paragraph in the letter on which the respondent relies in support of its contention that any dispute between the parties was to be referred to arbitration is the penultimate paragraph in which it was stated:-

> "[The applicant], as main contractor, hereby notifies you under clause 29(a) of the main contract and under clause 7(a) of this subcontract and hereby determines that the work ought reasonably to have been completed by this agreed and extended date of the 18th June, 2010, and accordingly you should pay or

> allow to the main contractor the sum named and the rate stated in the appendix, or part thereof, as 'liquidated or ascertained damages' for the period during which the works shall so remain and have remained incomplete in breach of the said sub-contract."

Clause 29(a) of the 2009 Agreement dealt with damages for non-completion and envisaged the architect, if of opinion that the works ought reasonably to have been completed, to certify that the applicant should pay or allow to the Employer the sum named and the rate stated in the Appendix as "liquidated and ascertained damages", the rate stated in the appendix to the 2009 Agreement being at the rate of €5,000 *per* week. The reference to "clause 7(a) of this subcontract" is not a reference to any of the additional conditions set out in the letter of the 19th January, 2010, and its provenance will become obvious later;

(i) the next letter of complaint from the applicant to the respondent was dated the 13th June, 2011, and was a response to the letter dated the 7th June, 2011, from the respondent to the applicant seeking to have its account discharged within seven days; otherwise it would be issuing legal proceedings. In the letter of the 13th June, 2011, (which it would appear was wrongly dated the 13th June, 2010) the applicant referred to "letters dated the 15th March and the 23rd June, 2010, noting a breach of contract for the performance of the works". I assume that the reference should have been to the letter dated the 16th March, 2010, referred to at (g) above and that the letter of the 23rd June, 2010, is the letter referred to at (h) above. As I understand the position, in June, 2011, the respondent was contending that the applicant had wrongfully withheld from it the sum of €35,065 (excluding VAT), which had been certified by the Architect. In identifying the dispute between the applicant and the respondent at that juncture, the applicant stated as follows:-

> "We wish to confirm that the costs in the sum of €31,121 excluding VAT pertain to the failure of [the respondent] to perform the terms of this nominated subcontract as *per* the order dated the 19th January, 2010. Specifically, this matter is with regard to the timescale contracted to carry out the works and the breach of same critical terms. You obviously disagree with these costs and so we have a dispute between the parties."

The applicant went on to state that it wished to resolve the dispute "by amiable means" and suggested a meeting. It then stated:-

> "Should you continue to refuse to meet [with the applicant] and issue legal proceedings please note that we will put a stay on these proceedings, invoke clause 38 of the subcontract and refer the matter to the dispute resolution mechanism."

There is no clause 38 in the letter of the 19th January, 2010, but clause 38 is the arbitration clause in the 2009 Agreement;

(j) on the 11th August, 2011, the respondent presented an itemised claim dated the 10th August, 2011, to the applicant claiming in total the sum of €76,526.28 and in a letter of the 12th August, 2011, confirmed that the *quantum* items related "to errors, incorrect set out of the building and building not constructed to our drawings in a number of areas by [the applicant]". The response of the applicant was a three page letter dated the 26th August, 2011, wherein the respondent's claim was rejected by the applicant for a variety of reasons, including reliance on condition (17) in the letter of the 19th January, 2010, noting that the previous payment made by the applicant was "in full consideration of the architect's certificate 11 save for the matter in dispute as *per* cost details attached". The applicant stated that it had honoured all payments up to that date, "save for the matter as has arisen in the performance by [the respondent] on this project".

Referral to arbitration by the respondent

[5] The dispute between the applicant and the respondent continued through the remainder of 2011 and into 2012. The next significant feature was that the respondent engaged Ken O'Connor Associates, Chartered Quantity Surveyors, to deal with what was asserted as the failure of the applicant to discharge the balance of the monies due under the subcontract. By letter dated the 15th June, 2012, Ken O'Connor Associates wrote to the applicant asserting, *inter alia*, as follows:-

> "The contract agreed between [the respondent] and [the applicant] provides that any dispute arising between the contractor and subcontractor under the contract shall be referred to arbitration in accordance with clause 26 of the standard CIF subcontract."

The applicant was called upon to concur within 14 days in the appointment of one of three nominated persons as arbitrator, failing which an

application would be made to the President of the CIF to nominate an arbitrator.

[6] The response of the applicant by letter dated the 29th June, 2012, in essence, although this terminology was not used, was that the respondent had no valid claim. However, the applicant did not take the line at that stage that the respondent was not entitled to have the matter referred to arbitration. On the contrary, it stated that it was its company policy to expedite all avenues possible to try to resolve matters in an amicable fashion, prior to, and without recourse to, costly dispute resolution processes. It then requested a meeting with the respondent in accordance with that policy "and prior to concurring with the provision of clause 26 of the executed contract employed".

[7] Ultimately, Ken O'Connor Associates, by letter dated the 26th August, 2012, requested the President of the CIF to appoint an arbitrator. A copy of the relevant contract was sought by the CIF on the 7th September, 2012. In response, by letter dated the 10th September, 2012, Ken O'Connor Associates informed the CIF that the executed contract between the parties was "the CIF form of subcontract (for use with the RIAI main contract form) 5th Edition 1989", but that the applicant had not returned a copy of the executed form to the respondent. That statement was not correct, because no such subcontract had been executed by the parties. However, the letter further stated that "the executed contract" was referred to by both the Architect and the applicant in various correspondence and the following items of correspondence were attached: the letter of the 13th December, 2009, referred to at para. 4(c) above; the letter of 23rd June, 2010, referred to at para. 4(h) above; and the letter of 29th June, 2012, referred to at para. 6 above, the manner of inclusion of which will be outlined later.

[8] By letter dated the 14th September, 2012, on behalf of the President of the CIF, Ken O'Connor Associates was informed that Mr. Joe Behan of J.P. Behan & Associates had been appointed arbitrator to deal with the dispute between the applicant and the respondent "pursuant to clause 26 of the subcontract for use [with] the RIAI main contract form, 5th Edition dated October 1989". On the same day the applicant was notified of the appointment.

[9] By letter dated the 26th September, 2012, the applicant's solicitors, having asserted that no arbitration agreement existed between the applicant and the respondent, sought clarification from the President of the CIF as to the dispute which was referred to in the letter of the 14th September, 2012. The response on behalf of the President of the CIF, which was dated the 1st

October, 2012, was that the CIF had sought clarification from Ken O'Connor Associates to ensure that there was jurisdiction to appoint an arbitrator and that CIF had received copies of correspondence between the parties referring to clause 26 and which also indicated the existence of a dispute. The applicant's solicitors persisted in the view that the President of the CIF did not have jurisdiction to nominate an arbitrator. Further, their position was that there was no arbitration agreement in existence between the parties and that the matter should be dealt with by the courts.

[10] Mr. Behan recognised that there was a fundamental issue in relation to his appointment. Both sides, the respondent through Ken O'Connor Associates, and the applicant through its solicitors, engaged in correspondence with Mr. Behan, which included a long letter of the 28th November, 2012, from Ken O'Connor Associates citing case law. By letter dated the 12th December, 2012, the arbitrator informed both sides that, having considered the submissions made by both parties, he was satisfied that he had jurisdiction to act as arbitrator in the matter, having stated:-

> "I note that there is no signed contract between the parties. I also note that there is no agreement to arbitrate between the parties."

Ken O'Connor Associates took issue with the second sentence in that quotation by letter dated the 30th January, 2013, and, invoking article 33 of the Model Law, sought an order "correcting any clerical error, typographical error or error of a similar nature which may be contained in the tribunal's award of the 12th December, 2012", specifically referring to the second sentence quoted above. The response of the arbitrator was that the request was out of time. However, by that stage the applicant had initiated this application.

Standard form of subcontract

[11] The CIF standard form subcontract, a blank copy of which has been put before the court, which the respondent contends governs the relationship of the applicant and the respondent, is described on the front sheet as a subcontract for use with the RIAI main contract form. The version put before the court is the 5th edition, obviously published in October, 1989. At the commencement it is recited as being supplemental to "the main contract", the parties to which are to be identified. Counsel for the respondent drew the court's attention to clause 7 because "clause 7(a) of this subcontract" was referred to in the applicant's letter of the 23rd

June, 2010. Clause 7 deals with completion and sets out the obligation of the subcontractor to complete the works by reference to the period specified in Part III of the Appendix and provides that, in the event of default of the part of the subcontractor, "he shall pay to the contractor any loss or damage suffered or incurred by the contractor and caused by the failure of the subcontractor as aforesaid of which loss or damage the contractor shall at the earliest opportunity give notice to the subcontractor that the same has been suffered or incurred". Clause 7(b) deals with the situation where delay is attributable to the contractor or where the contractor may obtain an extension under the main contract, in either of which events the contractor shall apply for a fair and reasonable extension of the period for completion under the main contract, having received notice from the subcontractor. It would not be unreasonable to infer that the author of the letter of the 23rd June, 2010, believed that clause 7 of the CIF standard form subcontract governed the relationship of the applicant and the respondent.

[12] The arbitration clause in the CIF standard form subcontract is clause 26 which provides for the appointment of an arbitrator by the President of the CIF at the request of either party, if both sides have failed to agree such appointment. Clause 26 contains two *provisos* which clearly link the standard subcontract to the main contract.

[13] However, it was to clause 38 of the main contract (*i.e.* the 2009 Agreement) that the applicant referred in the letter of the 13th June, 2011, erroneously as it contends. Clause 38(a) of the main contract envisages a dispute being referred to a conciliation process first and then to arbitration in accordance with clause 38(b). Under clause 38(b), if the parties fail to agree as to who shall be the arbitrator, the appointment may be made, at the request of either party, by the President for the time being of the Royal Institute of Architects of Ireland after consultation with the President of the CIF. Again, it would not be unreasonable to infer from the letter of the 13th June, 2011, from the applicant that the author believed that the relationship of the applicant and the respondent was governed by an arbitration clause, although the reference to "clause 38 of the subcontract" was clearly erroneous; clause 38 is to be found in the 2009 Agreement.

[14] However, despite what, in the absence of evidence to the contrary, might reasonably be inferred, in the grounding affidavit on this application sworn on the 9th January, 2013, by Gareth Brady, a director of the applicant, it was averred that the standard CIF standard form subcontract for use with the RIAI main contract form "was never agreed between the parties as governing their contractual relations". Later, Mr. Brady averred that at the time of the contract, meaning, presumably, the subcontract between the

applicant and the respondent, "there was no reference to the CIF form of subcontract in any correspondence passing between the parties". Further, the references in the letters of the 23rd June, 2010, and the 13th June, 2011, were made in error. Mr. Brady averred that he "inadvertently referred to the clauses in the Construction Industry Federation subcontract without checking back to the contract between the parties of the 19 January, 2010".

[15] The replying affidavit on behalf of the respondent was sworn by Gregory Crinion, a director of the respondent, on the 14th February, 2013. Mr. Crinion has referred to the letter of the 13th December, 2009, from the architects, which he called the "letter of nomination", and he has specifically averred as follows:-

> "The letter of nomination also sets out the terms of the RIAI main contract which form part of the subcontract between [the applicant] and [the respondent] including, but not limited to the period for the serving of notice of arbitration in case of dispute of 10 working days.
>
> Arising from the foregoing I say that [the respondent] understood and assumed that the standard terms and conditions of the RIAI *(sic*) standard form subcontract would form part of the subcontract to be entered into between [the respondent] and [the applicant]."

Mr. Crinion also averred that on the basis of over 26 years' experience as a subcontractor in the construction industry, the use of the standard terms and conditions of the "RIAI (*sic*) standard form subcontract" in the contractual arrangements between a main contractor and a subcontractor is customary "where the employer and the main contractor are using the RIAI main contract form". Further, he averred that such customary incorporation "is particularly habitual where the subcontractor is made a nominated subcontractor under condition 16 of the RIAI main contract". Mr. Crinion averred that at all material times he believed that any disputes arising between the applicant and the respondent in the context of the subcontract would ultimately be settled by arbitration, which is the usual and customary dispute resolution mechanism employed in such subcontracts.

[16] Mr. Crinion's reference to the "terms of the RIAI main contract" in what he described as the "letter of nomination" of the 13th December, 2009, "including, but not limited to the period for service of notice of arbitration in case of dispute of 10 working days" appears to be a reference to Appendix I attached to the tender and, in particular, to the part thereof which replicated the Appendix to the 2009 Agreement, specifically the last item thereof, which is quoted at para. 4(a) above. The item in the Appendix was intended to stipulate a period of time if it was intended to vary standard clause 35 in respect of the relevant timeframe. However, para. (i)

of clause 35 was not varied, because it stipulated when the architect was to issue the final certificate "unless the architects receive a notice of arbitration within ten working days or such other period as may be stated in the Appendix". All one can say in relation to Appendix I attached to the tender is that, in referring to clause 35(i) of the main contract, *i.e.* the 2009 Agreement, it did refer to arbitration. However, when one looks at the context in which the word "arbitration" appears, which is governing the relationship between the employer and the main contractor through the involvement of the architect, there is no basis for concluding that what was intended by the reference was that an arbitration clause would be part of the subcontract between the applicant and the respondent.

[17] In his second affidavit sworn on the 5th March, 2013, Mr. Brady disputed Mr. Crinion's contention that it is customary to use the CIF form subcontract where the RIAI form of main contract is used. He averred that, in actual fact, it is often the case that the contract between a main contractor and a subcontractor "is evidenced in correspondence and that there is never any intention to enter into a standard form subcontract". The majority of the contracts he has been involved with in such circumstances have not involved the incorporation or execution of standard form contracts. In the case of the Mount Sackville project, the letters of engagement to the other subcontractors were almost identical or very similar to the letters provided to the respondent, some of which he exhibited. Notwithstanding that averment, it is clear that the CIF standard form subcontract, which the respondent contends applies, is the industry standard where the form of main contract used in the 2009 Agreement is in place. Having said that, the issue here is whether there was an agreement between the applicant and the respondent that its terms would be incorporated in the subcontract between the applicant and the respondent in a manner which complies with the Model Law.

The law

[18] By virtue of s. 6 of the Act of 2010, which commenced on the 8th June, 2010, the Model Law, the text of which is set out in Schedule 1 to the Act of 2010, has force of law in the State. As regards the definition and form of arbitration agreement, the Act of 2010 applies option 1 in article 7 of the Model Law. Article 7(1) defines arbitration agreement as meaning:-

> "… an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An

arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement".

However, it is expressly provided in para. (2) that the arbitration agreement shall be in writing and that is explained in para. (3) as follows:-

> "An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

Paragraph (6) provides:-

> "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

[19] The principal provision of the Model Law at issue on this application is article 16(3). Article 16(1) provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. That reflects the so-called doctrine of "competence-competence". Article 16(2) deals with the time limitation on raising a plea that the arbitral tribunal does not have jurisdiction and is not in issue here. Article 16(3) provides as follows:-

> "The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

What happened in this case is that, in essence, Mr. Behan ruled on jurisdiction as a preliminary question and the applicant brought this application to this court pursuant to s. 9(1) of the Act of 2010, which specifies the High Court for the purpose of article 6.

[20] The court was referred to three authorities of the courts in this jurisdiction, which I will consider in chronological order, only the last of which addresses the Act of 2010 jurisdiction.

[21] The earliest is the decision of the High Court (Morris P.) in *Lynch Roofing Systems Ltd. v. Bennett & Son Ltd.* [1999] 2 I.R. 450. The application under consideration in that case was an application under s. 5 of the Arbitration Act 1980 (the "Act of 1980") for an order staying the proceedings on the basis that there was an arbitration agreement between the parties. As here, the dispute was between a main contractor (the defendant), and a subcontractor (the plaintiff). The defendant, which was seeking to

stay the proceedings, claimed that at the time of the negotiation of the contract, the price and the fact that the standard conditions of contract RIAI (April, 1998 edition), which contained an arbitration clause, would apply to the contract, were agreed between the parties. A letter was later sent to the plaintiff confirming the contract as agreed and specifying that it would be subject to a written receipt of the conditions and terms detailed on Form CBS/ACC (which form incorporated the standard conditions of contract RIAI). The letter also stipulated that failure to respond would be viewed as acceptance of the conditions. No response was received from the plaintiff, which went on site and commenced the subcontract works. The position of the plaintiff was that at no time during the negotiation of the contract was the existence of an arbitration clause brought to its attention. Morris P. held in favour of the defendant and granted a stay on the proceedings. In so doing, Morris P. applied the principle enunciated by the Court of Appeal in the United Kingdom in *British Crane Hire v. Ipswich Plant Hire* [1975] Q.B. 303. Morris P. at p. 453 quoted the finding in the case as set out in its headnote, which factually was not concerned with the incorporation of an arbitration clause, that:-

> "where parties to a contract of hire were both in the trade and of equal bargaining power the conditions habitually imposed in such contracts would be incorporated into the contract on the basis of the common understanding of the parties that the usual conditions would apply; and that since the conditions set out in the plaintiffs' printed form formed part of the contract the plaintiffs were entitled under those conditions to the cost of recovering the crane …"

Morris P. applied that principle of incorporation to the facts before him and held that, as the plaintiff subcontractor was sufficiently familiar with the trade, it must be assumed that it was accepted that the general conditions of a building contract, which contained an arbitration clause, would apply. In any event, he was satisfied that, having regard to the agreement reached at the negotiations and the letter from the defendant which followed it, the plaintiff must have contemplated that the contract would be governed by the appropriate building contract and, therefore, would include an arbitration clause.

[22] The next authority cited was a decision of the High Court (Peart J.) in *McCrory Scaffolding Ltd. v. McInerney Construction Ltd.* [2004] IEHC 346, [2004] 3 I.R. 592. This was also an application under s. 5 of the Arbitration Act 1980 to stay the proceedings on the ground there was an arbitration agreement governing the relationship of the parties. Once again, the defendant was the main contractor and the plaintiff was the subcontrac-

tor. The letter of appointment sent by the defendant informed the plaintiff that it intended to enter into a signed contract which incorporated the GDLA 82 conditions of contract, which contained an arbitration clause. No follow up written contract was ever signed by the parties but the plaintiff commenced the tasks agreed between the parties. The defendant contended that there was a valid and subsisting arbitration agreement, which governed the dispute between them, as a result of the reference to GDLA 82 conditions of contract in the letter of appointment, but the plaintiff contended that the letter of appointment did not incorporate the arbitration agreement in that form. Peart J., in making an order staying the proceedings, followed the decision in *Lynch Roofing Systems Ltd. v. Bennett & Son Ltd.* [1999] 2 I.R. 450 and held that it did.

[23] Both of those decisions pre-dated the commencement of the Act of 2010. The final authority, the decision of the High Court in *Barnmore Demolition v. Alandale Logistics Ltd.* [2010] IEHC 544, [2013] 1 I.R. 690, post-dated the commencement of the Act of 2010. The application before Feeney J. was for an order under article 8 of the Model Law, which provides as follows:-

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Once again, it was the defendant main contractors who were arguing that there was an arbitration agreement with the plaintiff subcontractor and that an order should be made under article 8 of the Model Law referring the parties to arbitration. The judgment of Feeney J. is of considerable significance in that it analyses the standard to be applied by a court in determining whether there is an arbitration agreement under article 8: whether it is on a full judicial review basis; or on a *prima facie* or arguability basis. However, on the facts of the case, Feeney J. found it was unnecessary to make a determination as to whether a *prima facie* or a full judicial consideration should apply, because the defendants had not satisfied either test. In addressing the factual situation, Feeney J. followed the approach adopted by Peart J. in *McCrory Scaffolding Ltd. v. McInerney Construction Ltd.* [2004] IEHC 346, [2004] 3 I.R. 592 stating that, when the court comes to consider the terms of an agreement to arbitrate, the court should do so with due regard to business realities and should not seek too much in aid by way of technicality, where it is clear on what basis the plaintiff went upon the site and commenced the work.

The application of the law to the facts

[24] The question which the court has to determine is whether, as he found, Mr. Behan has jurisdiction to act as an arbitrator in the dispute between the parties. The core issue in the determination of that question is whether there exists an arbitration agreement within the meaning of article 7 of the Model Law between the parties in relation to the dispute. Mr. Behan, having ruled on the matter, *de facto* as a preliminary question, that he has jurisdiction, the court's function under article 16(3) is "to decide the matter". For present purposes, I am assuming that, in deciding a matter under article 16(3), the standard to be applied by the court is the normal standard in determining matters in civil cases, on the balance of probabilities, but without definitively deciding that issue. It is appropriate to record, however, that counsel for the respondent pointed to the fact that the court's jurisdiction is "to decide the matter", acknowledging that the process is not an appeal from the decision of Mr. Behan. He acknowledged that the court may consider such evidence as it sees fit and is not bound by the submissions made to Mr. Behan. In other words, the court has untrammelled jurisdiction to consider *de novo* the issue of whether there is an arbitration agreement which binds the parties.

[25] The determination of Mr. Behan contained in the letter of the 12th December, 2012, is fundamentally illogical. It is true that there is "no signed contract between the parties", in the sense that there is no single document setting out the terms and conditions of the subcontractual arrangement, which is signed on behalf of both parties. However, if there is no agreement to arbitrate between the parties, then Mr. Behan has no jurisdiction to arbitrate on foot of his appointment by the President of the CIF. Of course, it may be that, as is implicit in the letter dated the 30th January, 2013, from Ken O'Connor Associates to Mr. Behan, that there is a clerical error or a typographical error or some error of a similar nature in the letter of the 12th December, 2012. Even if there is, Mr. Behan has not set out in the letter of the 12th December, 2012, on what basis he is satisfied that he has jurisdiction to act as arbitrator, and in particular, what aspects of the submissions made to him and the case law contained in the submissions support that conclusion. Therefore, this court must go back to first base.

[26] At the point in time at which the respondent commenced the works it subcontracted to execute, which cannot be identified from the evidence before the court with precision but which would appear to have

been some time in April or May, 2010, the documents which evidenced the agreement entered into between the parties were the following documents:-

(a) the tender submitted by the respondent and the attachments to it, including Appendix 1 and Appendix 2;
(b) the Architect's letter of the 13th December, 2009, confirming the intent to nominate the respondent as a subcontractor in relation to wall cladding, *etc*.;
(c) the letter of the 18th December, 2009, from the applicant to the respondent confirming the intention of the applicant to enter into a subcontract with the respondent and seeking confirmation of various matters; and
(d) the letter dated the 19th January, 2010, which refers to and incorporates the tender documents and the letter of nomination dated the 13th December, 2009.

Counsel for the applicant was correct in emphasising there is no reference whatsoever in the foregoing documents to the contractual relationship of the applicant and the respondent being governed by the CIF standard form subcontract. While there is clearly no express reference to it, moreover, in my view, there is nothing in that documentation from which it can be implied that the intention was that the CIF standard form subcontract would apply. On a plain reading of the letter of the 19th January, 2010, in conjunction with the documents referred to in it, the terms whereof are effectively incorporated in it, it seems clear that the intention was that all of the terms and conditions applicable to the parties' relationship were to be found in the documents referred to in it and in the letter itself.

[27] Accordingly, looking at the position as at the 19th January, 2010, the relevant documentation strongly suggests that the entire contract between the parties is contained in that documentation. That is supported by the fact that throughout the letter of the 19th January, 2010, there are references to "this contract" and "this subcontract". Apart from that, the CIF standard form subcontract is a very complex document which, on its face, is envisaged to be adapted to apply to particular agreed circumstances. While, at the hearing, the parties did not conduct any comparison between the terms set out in the letter of the 19th January, 2010, and in the CIF standard form subcontract, even a cursory comparison suggests that the intention was that the terms and conditions governing the parties' relationship were spelt out in the letter of the 19th January, 2010, and the documents referred to in it, when read in the context of the 2009 Agreement. To take one example, retention is dealt with in condition (14) in the letter of 19th January, 2010, where it is stated:-

> "Retention will be held at 3% until practical completion whereby it will be reduced to 1.5% until completion of the defects liability period and release of the final architect's certificate."

That provision obviated the necessity to apply provisions such as clause 11 and Part VI of the Appendix to the CIF standard form subcontract to the arrangement between the applicant and the respondent.

[28] In reaching the conclusion that, when the respondent commenced the subcontract works, the letter of the 19th January, 2010, read in conjunction with the documents referred to in it, on its face, constituted the contract between the applicant and the respondent, I have not overlooked the submissions made by counsel for the respondent that the conditions in the letter of the 19th January, 2010, and in the documents referred to in it do not give the complete picture. Counsel referred, for instance, to condition (15), which stated that failure on the part of the respondent to co-operate with the applicant in the provision of information, shop drawings for approval and all other documentation in a prompt manner would be "treated as delay to the main contract resulting in delay remedies" being sought by the applicant, submitting that the documentation contained no guidelines in relation to the delay mechanism. Counsel for the respondent also pointed to the narrative at the commencement of the letter dated the 23rd June, 2010, in which the applicant aired its complaints in relation to delay on the part of the respondent in producing an acceptable programme for the subcontract works, which involved the date for completion of the works being extended, although the respondent had never formally requested an extension of time. Counsel for the respondent also pointed to an assertion by the applicant in the letter of the 26th August, 2011, that the respondent had not applied for an "extension of time" in accordance with the contract clauses. It is true that there was no provision in the letter of the 19th January, 2010, combined with the documents referred to in it, such as the provision contained in clause 7(b) of the CIF standard form subcontract, under which a subcontractor is required to give notice in writing to the contractor if completion is delayed, whereupon the contractor is obliged to grant a fair and reasonable extension for completion. However, that does not mean that a contractual arrangement based solely on those documents was unworkable or that it was necessary to apply the provisions of some standard form of contract to the contractual relationship of the parties, so as to give rise to an inference that there must have been a mutual agreement between the parties that the CIF standard form of subcontract would apply.

[29] Of course, as I have already commented, subsequent letters which emanated from the applicant suggest that the applicant considered that some provisions, whether in a standard form of subcontract or otherwise, which were not set out in the letter of the 19th January, 2010, applied to the contractual arrangement between the parties. Mr. Brady has attributed the references in question to error and inadvertence. It was submitted by counsel for the respondent that the various references in the correspondence which passed between the parties indicated a mutual understanding on the part of the parties that the CIF standard form subcontract would apply to the contractual relationship, notwithstanding that Mr. Brady rejected that as a fact on affidavit.

[30] The difficult question for the court is whether what Mr. Brady, on the basis of legal advice, now contends were errors in correspondence from the applicant to the respondent supports the respondent's contention that the terms of the CIF standard form subcontract, in particular, the arbitration clause, were by mutual agreement of the parties incorporated in the subcontract. Working back in time, I attach little weight to the reference to clause 26 in the letter of the 29th June, 2012, to Ken O'Connor Associates, because the context was that the applicant was endeavouring to postpone dealing with the request to agree to the appointment of an arbitrator. As regards the reference to clause 38 in the letter of the 13th June, 2011, that was clearly an error because clause 38 was the arbitration clause in the main contract (*i.e.* the 2009 Agreement), not in the CIF standard form subcontract, although the attitude adopted by the applicant suggested that it considered that arbitration was the appropriate process for resolving disputes. There remains the reference to "clause 7(a) of this subcontract" in the letter of the 23rd June, 2010. As Ken O'Connor Associates correctly recognised, that was a reference to clause 7(a) of the CIF standard form subcontract. Indeed, in its letter dated the 10th September, 2012, to the CIF, in response to the request of the CIF to be furnished with a copy of the relevant contract, Ken O'Connor Associates did not furnish the most important document, the letter of the 19th January, 2010, but did furnish the letter of the 23rd June, 2010, stating that the context of the reference to clause 29(a) of the main contract and clause 7(a) of the subcontract "clearly" showed that the subcontract being referred to was the CIF standard form subcontract, 5th Edition 1989, which, in my view, did not really reflect the true situation. Aside from the fact that Mr. Brady has averred that the reference to clause 7(a) was made in error, the position is that the contract between the applicant and the respondent was already in place by the 23rd June, 2010, and there was no reference in the contract

documentation then in place to any document containing an arbitration clause, so as to constitute an arbitration agreement in writing within the meaning and for the purposes of article 7 of the Model Law.

[31] This case is clearly distinguishable on the facts from the pre-Act of 2010 authorities referred to above, not only because of the unusual circumstance that it is the main contractor, not the subcontractor, who is seeking to avoid having the dispute arbitrated, but also for the following reasons. In *Lynch Roofing Systems Ltd. v. Bennett & Son Ltd.* [1999] 2 I.R. 450, as the facts outlined earlier indicate, the letter confirming the contract as agreed expressly stated that it was subject to conditions and terms detailed, which incorporated the RIAI standard conditions, which contained an arbitration clause. Similarly, in *McCrory Scaffolding Ltd. v. McInerney Construction Ltd.* [2004] IEHC 346, [2004] 3 I.R. 592, the letter of appointment expressly stated that the contract would incorporate certain standard conditions which, again, were identified and contained an arbitration clause. In each of those cases, the subcontractor, by its conduct in commencing and carrying out the subcontract works, implicitly accepted the main contractor's offer to it on the terms specified and then concluded the contract by conduct. In contrast, what the evidence establishes in this case is that the respondent commenced the subcontract works on the basis of the terms outlined in the letter of the 19th January, 2010, which did not provide for the incorporation of the CIF standard form subcontract or any arbitration clause, and that action constituted acceptance of the terms offered by the applicant without any such incorporation and, thus, completion of the contract by conduct.

[32] For the same reason, in my view, the respondent has failed to establish the existence of an agreement by the parties to submit their dispute to arbitration which complies with either paras. (2), (3) or (6) of article 7 of the Model Law. In particular, para. (6) cannot be invoked because there is no reference in any contract document to the CIF standard form subcontract, nor is there any reference to any arbitration clause, in a manner which makes either the CIF standard form subcontract or any such arbitration clause part of the contract between the parties.

Decision of the court

[33] Accordingly, the decision of the court is that the terms and conditions set out in the standard CIF standard form subcontract have not been incorporated in the subcontract between the applicant and the respondent and that there is no arbitration agreement within the meaning of article 7 of

the Model Law in place governing the contractual relationship of the applicant and the respondent. The President of the CIF did not have jurisdiction to appoint Mr. Behan as arbitrator, as he purported to do.

[34] Despite that decision, I feel constrained to make the general observation that it would be infinitely preferable if the dispute between the applicant and the respondent was resolved by some process of alternative dispute resolution, rather than by litigation.

Solicitors for the applicant: *Beauchamps.*

Solicitors for the respondent: *Clarke Jeffers & Co.*

Rebecca Broderick, Barrister