# THE HIGH COURT

**[2015 No. 149 MCA]**

**IN THE MATTER OF THE ARBITRATION ACT 2010 AND**

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**PATRICK O'LEARY TRADING AS O'LEARY LISSARDA**

**PLAINTIFF**

**AND**

**JOHN RYAN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 18th day of December, 2015**

**1.** This is an application for an order pursuant to Article 34 of the UNCITRAL Model Law setting aside an arbitral award made on 16th January, 2015, on the grounds specified in Article 34(2)(a)(ii) and Article 34(2)(a)(iii) of the Model Law. The courts in this jurisdiction are supportive of the arbitral process and the Model Law is now part of our domestic law and applies both to domestic and international arbitration. The right to challenge an arbitral award is extremely limited and is to be found in Article 34.

**2.** The relevant text of the Model Law states that Article 34(2):-

> *"(2) An arbitral award may be set aside by the court specified in Article 6 only if:*
>
> *(a) the party making the application furnishes proof that:*
>
> *(i) ...*
>
> *(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

*(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside..."*

**3.** The respondent has informed the court that the arbitrator has not, until recently, been given notice of the proceedings and that he should be a notice party. I am satisfied that the position of the arbitrator has been supported by the respondent in these proceedings and all relevant arguments made in support of the arbitrator's award have been made. In view of my conclusions which I will outline shortly, I discern no prejudice to the arbitrator in not being heard in this application.

**4.** A preliminary issue concerning whether or not the applicant's motion to set aside the award under Article 34 of the Model Law is time barred was withdrawn at the hearing.

**5.** The applicant acknowledged that the application to set aside the award under Article 34 of the Model Law is not a proceeding in the nature of an appeal against the arbitral award on the merits. It accepted that an application to set aside an arbitral award under Article 34 is in the nature of a review to ascertain whether any of the grounds upon which the arbitral award may be set aside under that Article are made out. The applicant also accepted that the grounds upon which an arbitral award may be set aside are limited to the grounds specified in Article 34 and that the award may

not be set aside on the basis that it is incorrect either in fact or in law. (*Snoddy v. Mabroudis* [2013] IEHC 285 Laffoy J.).

**6.** The applicant sets out a number of grounds upon which the award should be set aside. The first ground under Article 34 (2) (a) (ii) of the Model Law is based on an alleged failure or refusal of the arbitrator to comply with or deal with the applicant's request for discovery as set out in the letter of 2nd September, 2014, and/or the failure or refusal of the arbitrator to direct the respondent to make discovery in the terms set out in a letter of 2nd September, 2014. In the course of the hearing it was accepted by counsel for the applicant that there is no power to make an order of discovery set out in the Model Law and that the question of discovery was not raised before the arbitrator. In fact the affidavit of the applicant solicitor grounding this application doesn't even refer to the issue of discovery. Counsel for the applicant concedes that no application for discovery was made and insofar as the applicant relies on a letter of 2nd September, 2014, from its solicitors to the arbitrator that does not amount to an application for discovery. I reject this challenge to the arbitrator's award.

**7.** The next challenge is made on the grounds of an alleged failure or refusal by the arbitrator to consider and/or take into account the point of defence pleaded by the applicant in his statement of defence and counterclaim dated 8th November, 2013, concerning past refunds of VRT and VAT obtained by the respondent in respect of previous vehicles purchased by him under the Disabled Drivers Scheme in determining whether the respondent was entitled to an award in his favour. This application is grounded upon Article 34 (2) (a) (ii) and/or (iii) of the Model Law.

**8.** It was a matter for the arbitrator as to how he should approach this evidence and what weight he should give to it. The applicant has not established any ground

under this heading which would satisfy the test required under Article 34 (2) (a) (ii) or (iii) of the Model Law and I reject this ground of challenge.

**9.** The next challenge to the arbitrator's award is based on the manner in which the arbitrator dealt with the issue of previous offers of settlement made by the applicant to the respondent and is based on Article 34 (2) (a) (ii) and/or (iii) of the Model Law.

**10.** In the course of the arbitration award the arbitrator stated:

> *"Having formally closed the arbitration hearing, an issue arose as to the net financial effect of the offers which had been made by the Respondents, it being suggested by Mr. O'Leary that had the Claimant accepted the offer, at the end of the day, following money in and money out, the claimant would have been financially better off than the original transaction of purchase. Mr. O'Leary sought to suggest that he had made this clear to the claimant in June 2012. However I ruled that it had not been put to the claimant that that had been explained to him at the time and it was never put to the claimant in the course of the hearing".*

**11.** It is clear that the arbitrator addressed his mind to this issue and it was a matter for him as to whether or not he attributed any significance to the offer such as it was. In the end it doesn't appear to have been a factor in the award or in the adjudication on costs. The complaint now made against the arbitrator in this regard effectively amounts to an attempt to appeal the arbitrator's decision which is not permissible. While the applicant presents this argument on this point as concerning a matter of natural justice it doesn't appear to me to be anything of the kind. I reject this challenge to the award. If the arbitrator was factually incorrect in finding that the

matter of the prior settlement offers was not put to the respondent during the arbitration this doesn't alter the position.

**12.** The final challenge is based on an alleged failure on the part of the arbitrator to make an award on the applicant's counterclaim. I accept the submissions made on behalf of the respondent that the real issue in the arbitration was whether Mr. Power, a representative of the garage (the applicants) gave the impression to the respondent that he could recover VAT on the vehicle which was sold. If the arbitrator did not deal with the counterclaim as pleaded it does not render the award incomplete so as to require it to be set aside under Article 34 (2) (a) (iii) of the Model Law. Essentially what the applicant complains of is that the arbitrator did not give any award on the counterclaim. However, if this perceived omission was of concern to the applicant there were two options open to it. In the first place the arbitrator at the conclusion of his award, stated "if any issue arises, I give the Parties liberty to apply to me". Secondly by virtue of Article 33 (3) of the Model Law it was open to the applicant on notice to the respondent within 30 days of receipt of the award to request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitration hearing took place on 16th December, 2014, and the award was published on 16th January, 2015. The report was received by the parties on 12th February, 2015. No steps were taken by the applicant to have the award corrected or an additional award made. Instead on the very last day before the three month period provided for under Article 34 (3) for challenging an award had elapsed this challenge was brought by the applicant. Having regard to the failure of the applicant to take any steps under Article 33 within the time permitted it is too late now to bring a challenge of this nature against the refusal to make an order on the counterclaim. The alternative remedy available to the applicant was not availed of

and I am satisfied that any failure to deal with the counterclaim in the particular circumstances of this case does not amount to a valid ground of challenge under Article 34 (2) (iii) and I refuse to give relief under this heading.

**13.** I am unable to find anything in the arbitration award which was in violation of the rules of natural justice sufficient to justify setting it aside. A reading of the award shows that the arbitrator set out in great detail the evidence which he heard from both parties to the arbitration and he sets out clearly the basis of his award. I find no evidence of any want of fairness or breach of natural justice in the manner in which the arbitration was conducted. The respondent in the arbitration was given every opportunity to call witnesses and cross examine witnesses called on behalf of the applicant. The arbitrator's award was made within the scope of the arbitration and on matters submitted to arbitration.

**14.** The plaintiff has failed to establish any basis, within the scope of Article 34 to have the arbitral award set aside. I refuse the relief sought.

Approved 18-12-15

R. J. McG.