



**SUBMISSION  
TO THE  
DEPARTMENT OF JUSTICE, EQUALITY &  
LAW REFORM**

**ON THE ARBITRATION BILL 2008**

---

**DECEMBER 2008**

<b>TABLE OF CONTENTS</b>	<b>PAGE</b>
Overview of the Society of Chartered Surveyors (SCS)	3
Role of SCS Members in Arbitration	5
Role of SCS in Appointment of Arbitrators in the Construction & Property Sectors	6
General Comments on the Arbitration Bill 2008	9
Detailed Observations on the Provisions of the Arbitration Bill 2008	11
Conclusion	14

## **OVERVIEW OF THE SOCIETY OF CHARTERED SURVEYORS**

Dating back to 1895, the Society of Chartered Surveyors is the largest professional body in Ireland representing both the construction and property industries. The Society has strong links with the RICS which represents over 110,000 members across 120 countries worldwide and is one of the most internationally respected and high profile global standards and membership organisations for professionals involved in land, valuation, property, construction and environmental issues.

Representing over 2,200 qualified chartered surveyors and a further 1,000 probationers who are undergoing their assessment of professional competence in order to achieve the gold standard of chartered status, members of the Society are typically professionals employed in the land, property and construction markets through private practice, in central, regional and local government, in public agencies, in academic institutions, in business organisations and in non-governmental organisations.

Their broad areas of expertise include:

- Quantity Surveying
- Building Surveying
- Valuations surveying
- Planning & Development
- Geomatics & Land surveying

Members' services are diverse and can include offering strategic advice on the economics, valuation, law, technology, finance and management in all aspects of the construction and property industry.

Accountable to both members and the public, the Society of Chartered Surveyors has six primary roles:

- Promoting the diverse knowledge of the profession
- Maintaining the highest educational and professional standards
- Protecting consumers through strict codes of practice
- Providing expert advice on property and built environment issues
- Appointing arbitrators and independent experts in commercial rent review disputes
- To act as the State Registration Body for the title of Quantity and Building Surveyor under the Building Control Act, 2007

## **ROLE OF SCS MEMBERS IN ARBITRATION**

Arbitration in the property and construction industry requires practical skills as well as legal knowledge and many Arbitrators in these types of disputes are professionals such as Engineers, Architects, Chartered Surveyors and the like. They are specifically chosen for arbitration appointments because they have a sound knowledge of the subject matter of the dispute, whether it relates to construction, engineering or property. Chartered Surveyors are actively involved in all aspects of the dispute resolution process - representing clients, acting as expert witnesses and being appointed as arbitrators, adjudicators, mediators and/or conciliators and other forms of dispute resolution relating to:

- Commercial rent reviews – retail, office and industrial properties
- Construction projects, both public and private
- Service charges in multi occupied office buildings, shopping centres, retail parks etc.
- Disputes arising under commercial leases and under other Landlord & Tenant relationships.

Chartered Surveyors may also be called upon to deal with disputes arising under complex development agreements and syndicated or other shared property ownership arrangements or at a more domestic level in relation to boundary or other similar disputes between owners of neighbouring properties.

Chartered Surveyors also represent landowners, Local Authorities and the NRA in relation to the valuation of land being compulsorily acquired for road schemes and other infrastructural projects under the National Development Plan and other programmes.

## **ROLE OF SCS IN APPOINTMENT OF ARBITRATORS IN THE CONSTRUCTION & PROPERTY SECTORS**

Banking and investment depend on the effective operation of the construction and property sectors with which they are closely linked. An efficient and equitable dispute resolution system, such as is provided for in construction contracts and commercial leases, is important for stability and is a crucial element of the funding and finance arrangements which underpin long-term investment decisions.

The President of the Society of Chartered Surveyors is typically requested to make arbitration appointments in both property and construction disputes. As outlined previously, there is a variety of other circumstances in which appointments will require to be made.

### **Construction Disputes:**

Chartered Quantity Surveyors with their particular skill base are active in the area of construction disputes. They are appointed as mediators, conciliators and arbitrators and are also instructed in the role of advisors, experts and in some case advocates; this may be in arbitration or adjudication or in alternative forms of dispute resolution.

The Society as a member of the Construction Liaison Committee with the main organisations representing the design professions and construction industry has representation on that committee's dispute resolution committee which is currently drafting standards, training and protocols for the use of dispute resolution process in the industry.

The Society through its membership of the aforesaid committee was proactive in the introduction of alternative dispute clause options (ADR) into the

current construction contracts, which have been followed by Government in applying similar clauses in its construction contracts.

**Property Disputes:**

When rent reviews arise under commercial leases the landlord and the tenant will usually have chosen Arbitration as the method for resolving a dispute in relation to the assessment of the revised rent. Very often leases specify that the Arbitrator will be a Chartered Surveyor and whilst frequently the parties may be able to agree upon a suitable third party to act as Arbitrator the majority of commercial leases provide that in default of agreement the Arbitrator will be appointed by the President of the Society of Chartered Surveyors.

The reasons for this are the unique skills which Chartered Surveyors bring to the methodology of valuation, especially in the application of the specific provisions of the lease or contract to the special circumstances of the particular property.

The President of the Society of Chartered Surveyors makes in excess of 500 appointments per annum – the majority of which are appointments as Arbitrator, with a smaller number of Chartered Surveyors being appointed to act as “Independent Expert”. In addition, it is estimated that more than 500 arbitration appointments in rent review disputes are made by the parties through agreement.

By way of comparison, the President of the RICS in the UK appoints approximately 10,000 third party Surveyors (Arbitrators and Independent Experts) per annum.

The SCS is cognisant of the responsibility involved in making appropriate appointments of Arbitrators for a variety of property and construction disputes and as such maintains a panel of skilled and experienced Arbitrators from which the President may appoint. Members of the SCS Panel are required to undertake assessments of competence and engage in ongoing professional development in order to retain his/her membership of the Panel.

In the light of these various factors the Society is in a unique position to provide informed and experienced comment on the practical implications of the Arbitration Bill 2008 and the impact of its provisions which will have an effect on all types of Arbitrations in varying industries and sectors.

The comments in this submission will focus on the impact of the Bill on the construction and property sectors.

## **GENERAL COMMENTS ON THE ARBITRATION BILL 2008**

The Society of Chartered Surveyors welcomes the proposals to consolidate and modernise the law relating to Irish domestic Arbitration.

The SCS has carefully studied the Bill, both as to the UNCITRAL model law as contained in Schedule 1 of the Bill and the special provisions drafted to incorporate the Model Law into Irish Law contained in Sections 1 – 36 of the Bill.

The SCS considers that by virtue of its language and the manner in which it is drafted the UNCITRAL Model Law is straightforward, easily readable, readily understood and its provisions are consistent with good Arbitration practice. The SCS also recognises that the UNCITRAL Model Law is a widely accepted framework for the regulation of Arbitration.

It is also noted that the courts in Ireland have consistently shown support for the Arbitral process and have respected the integrity of Arbitration if parties have chosen Arbitration as their method of resolving disputes under their contract or lease. It is vital that Arbitration Law as it applies to domestic Arbitration in Ireland works well and is improved, as appropriate.

It is essential in integrating the Model Law into Irish Law that the changes improve the effectiveness of the Arbitral process and not render the process slower, more complex or cumbersome or indeed more costly for the parties.

By way of a general recommendation, the SCS believes that the incorporation of a set of guiding principles for the Arbitration Bill 2008, similar to those as set out in the UK Arbitration Act, 1996, and the Scottish Arbitration Bill, 2008, would be helpful and set the context of the Bill from the outset, as follows:

- a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
- c) in matters governed by this Act the court should not intervene except as provided.

It is also clear from the experience in other jurisdictions, both common law and civil law, that the effectiveness of arbitration is greatly assisted by the availability of appropriate Arbitration Rules. The SCS recommends that the Department of Justice, Equality & Law Reform encourages by dialogue with the principal stakeholders, the development of appropriate Arbitration Rules for domestic arbitration in Ireland.

**DETAILED OBSERVATIONS ON THE PROVISIONS OF THE  
ARBITRATION BILL 2008**

SECTION	COMMENT	RECOMMENDATION
Section 3	<p>The 2008 Bill as drafted envisages that the new Act will apply only to Arbitration agreements entered in to after the Act becomes law.</p> <p>This could create potential difficulties in the future with existing contracts and leases continuing to be dealt with under the 1954 Act while at the same time a much smaller number of newer cases will come within the remit of the new Act.</p> <p>By contrast, the 1954 Act applied to all arbitrations commenced after the date of enactment.</p> <p>Most modern commercial leases are granted for a minimum of 20 years – some may be as long as 30 or even 35 years. This “twin track” approach is likely to lead to the creation of difficulties and confusion for parties and their advisors.</p>	<p>The SCS recommends that a clause similar to sections 6(1) and 8(2) of the 1954 Act be inserted in order to allow for old leases referring to the existing Acts.</p> <p><i>6(1) states as follows: ‘...but shall apply to any arbitration commenced on or after the operative date under an arbitration agreement made before the operative date’.</i></p> <p><i>8(2) states as follows: ‘Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act’</i></p>
Section 12	<p>There appears to be a conflict between the provisions in this section (12) and Article 34(3) of the Model Law.</p>	<p>The SCS recommends that a period of 56 days should be amended to 3 months so as to align with Article 34 of the Model Law.</p> <p>It is further recommended that the phrase ‘<i>unless the parties otherwise agree</i>’ should be removed.</p>
Section 14	<p>This section authorises the arbitral tribunal to administer oaths and direct that a party who gives evidence be examined on oath.</p>	<p>The SCS recommends that this section should provide for evidence to be given on affirmation or such other formal process as is consistent with non Christian beliefs.</p>
Section 16	<p>As drafted, Section 16 is unnecessary in that it is subject to</p>	<p>The SCS recommends that consideration should be given to empowering the</p>

	the agreement of the parties.	Arbitrator to order consolidation of proceedings and concurrent hearings.
Section 18	In circumstances where there may be inequality of bargaining power in the formation of contracts this section as drafted may be open to abuse.	The SCS recommends that the Bill should simply include a provision which enables the Arbitrator to exercise the power to award interest at his discretion.
Section 20	<p>Section 20 (1) makes provision that <i>“the parties to an arbitration agreement may make such provision as to the cost of the Arbitration as they see fit”</i>. Where the bargaining power of parties at the formation of the contract is not equal this may be open to abuse.</p> <p>As regards the taxation of costs – either party or the Arbitrator should have the power to refer the question of the taxation of costs to a Taxing Master of the High Court or as appropriate the County Registrar.</p> <p>Equally the parties may empower the Arbitrator to tax the costs.</p>	<p>The SCS recommends that the provisions contained in Section 30 of the Arbitration Act 1954 be retained as they are appropriate and consistent with good practice.</p> <p>The SCS recommends that Section 20 of the Bill be reviewed and redrafted accordingly.</p>
Section 28	<p>The Arbitration Act 1954 applies to statutory and other Arbitrations, particularly to Compulsory Purchase Arbitrations conducted by the Property Arbitrator although the detailed compensation rules etc. are provided for in the 1919 Acquisition of Land (Assessment of Compensation) Act.</p> <p>The drafting of Section 28 appears to envisage that the Bill would apply to statutory Arbitrations. This is appropriate especially as these circumstances usually deal with the rights of citizens affected by the actions of the State or State Authorities.</p>	The SCS recommends that Section 28 should be redrafted along the lines of Section 48(2) of the 1954 Act, so as to clarify the position and embrace Arbitration under other Acts.

Section 34	Section 34 relates to special oversight.	<p>Section 34(a) is an essential section which is vital to the development of construction and property case-law in allowing important questions of law relating to standard forms of contract etc. to be referred for judicial decision in order that there may be public decisions which will guide practitioners in the construction and property industry.</p> <p>The SCS recommends that a time limit should be inserted in Section 34 (b) – 6 weeks:-</p> <ol style="list-style-type: none"> <li>1. from the discovery of new evidence, and</li> <li>2. from the dispute giving rise to the question of law in the course of the Arbitration.</li> </ol>

## CONCLUSION

In conclusion, the Society of Chartered Surveyors broadly welcomes the Arbitration Bill 2008 and its proposals to consolidate and modernise the law relating to Irish domestic Arbitration and is available to provide further clarifications arising from this submission to the Department should the need arise.