[2020] IEHC 315

THE HIGH COURT

[2020 No. 2593 P.]

BETWEEN

NAROOMA LIMITED

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice David Barniville delivered on the 26th day of June, 2020

Introduction

1. This is my judgment on an application by the Health Service Executive (the "HSE"), the defendant in these proceedings, for an order under Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which has force of law in the State by virtue of s. 6 of the Arbitration Act, 2010 (the "2010 Act"), referring the dispute between the parties, which is the subject of these proceedings, to arbitration and staying the proceedings consequent upon such referral.

2. The proceedings are emblematic of the Covid-19 era. They arise in the context of a contract entered into between the plaintiff, Narooma Limited, and the HSE on 27th March, 2020 (the "contract"), the date on which An Taoiseach announced major restrictions on movement and other relevant measures due to the Covid-19 pandemic, known colloquially as the "lockdown". This followed earlier less severe restrictions, including the closing of schools, some two weeks previously.

3. Under the contract, the HSE agreed to purchase from the plaintiffs some 350 ventilators at a cost of almost €7.5 million, as it was at that stage envisaged that a large number of ventilators would be required to treat people who were expected to become seriously ill with the Covid-19 virus. There is no dispute between the parties that the contract was made and signed by the parties late at night on 27th March, 2020, in circumstances of great urgency and at a time when there was perceived to be a very urgent need to secure a supply of ventilators for those falling ill with the virus. Nonetheless, the circumstances on which the contract was entered into were very unusual, to say the least.

4. The plaintiff contends that the HSE was required under the contract to pay for the ventilators on Monday, 30th March, 2020. The HSE did not make that payment. It became concerned about the plaintiff and about the accuracy of representations allegedly made by the plaintiff concerning its status as an authorised agent or distributor for the manufacturer of the ventilators, a medical device manufacturer in China. The HSE sought belatedly to conduct due diligence in relation to the plaintiff.

5. In the absence of payment by the HSE, the plaintiff commenced proceedings on 7th April, 2020 and sought interlocutory injunctive relief. Ultimately, on 10th April, 2020, the HSE's solicitors confirmed to the plaintiff's solicitors that the HSE would not be purchasing the ventilators from the plaintiff for the various reasons set out in that letter. The plaintiff did not proceed with its application for an interlocutory injunction and, on 14th April, 2020, that application was adjourned to the trial of the action.

6. Two things then happened. The plaintiff brought an application to enter the proceedings in the Commercial List and the HSE brought this application to refer the parties to arbitration pursuant to Article 8 of the Model Law. On 30th April, 2020, I listed the latter application for hearing on 11th June, 2020, gave directions in relation to the hearing of the application and adjourned the plaintiff's entry application pending the outcome of the HSE's application.

7. In this application, the HSE maintains that the contract contains an arbitration agreement (in clause 21) and that all issues in the proceedings fall within the scope of that agreement. Consequently, it contends that the court is required to refer the parties to arbitration under Article 8 of the Model Law.

8. The plaintiff resists that application on several grounds. It contends that there is no *"arbitration agreement"* between the parties for the purposes of the Model Law and that, on its terms, clause 21 of the contract merely amounts to an agreement to agree. It further contends that clause 21 of the contract is illusory and meaningless in that it refers to rules of an arbitral institution, the International Chamber of Commerce (the "ICC"), which no longer exist. The plaintiff contends that, if contrary to its principal contention, the court were to find that clause 21 does amount to an arbitration agreement, the agreement is not broad enough to cover all of the issues in dispute between the parties in the proceedings. The plaintiff further maintains that the HSE is debarred from bringing its application under Article 8 on the basis of disparaging statements allegedly made by a solicitor acting for the HSE in a telephone conversation with the plaintiff's solicitor, which were then recorded in a letter from the plaintiff's solicitors to the HSE's solicitors. It is said that those disparaging comments allegedly made by the HSE's solicitor amount to the submission by the HSE of its "*first statement on substance of the dispute*" between the parties for the purposes of Article 8(1) of the Model Law and that the request for the referral to arbitration came after the making of that statement and was, therefore, too late. Finally, the plaintiff contends that, if contrary to its principal contention that there is no arbitration agreement between the parties, the court were to find that such an agreement was made by them, the agreement is *"null and void, inoperative or incapable of being performed"* within the meaning of those terms in Article 8(1) of the Model Law on various grounds.

Summary of Decision on HSE's Application

9. For reasons set out in detail in this judgment, I am satisfied that the HSE has established that clause 21 of the contract is an "*arbitration agreement*" for the purposes of Article 8 of the Model Law and that the issues the subject of the proceedings, as they currently stand, fall within the scope of that arbitration agreement, notwithstanding the case made to the contrary by the plaintiff. I am also satisfied that the plaintiff's contention that the arbitration agreement is illusory or meaningless is not well founded and that the plaintiff has failed to establish that the arbitration agreement is "*null and void, inoperative or incapable of being performed*" for any of the reasons advanced by it. I have also concluded that the HSE is not debarred from bringing the application on the ground advanced by the plaintiff. I will, therefore, make an order under Article 8(1) of the Model

Law referring the parties to arbitration in respect of the disputes the subject of the proceedings and will stay the proceedings as requested by the HSE.

Structure of the Judgment

10. I will first set out the relevant facts. I will then make reference to some of the provisions of the contract, including clause 21, which is said to constitute the "*arbitration agreement*" between the parties. I will then refer to the approach which the court is required to take in considering an application for an order under Article 8 of the Model Law. Next, I will consider the basis on which it is contended that clause 21 constitutes an arbitration agreement and consider the plaintiff's position in that regard. I will then turn to consider the arguments advanced by the parties on the question as to whether the issues in the proceedings fall within the scope of the alleged arbitration agreement. Next, I will consider the case advanced by the plaintiff that the HSE is debarred from obtaining an order under Article 8 by reason of the disparaging comments allegedly made by the HSE's solicitor before the HSE requested the reference to arbitration. Finally, I will consider the various arguments raised by the plaintiff as to why the alleged arbitration agreement is "*null and void, inoperative or incapable of being performed*", such that the order sought by the HSE should not be granted.

The Facts

11. Most of the relevant facts are not in dispute and are evident from the emails and other correspondence which passed between the parties at the time and subsequent to the signing of the contract by both parties on 27th March, 2020. I set out below the facts which are not in dispute between the parties. Where a dispute on fact does exist, I make that clear. Insofar as there is a dispute on certain facts, I am satisfied that such a dispute does not prevent me from determining the HSE's application.

12. As of late March, 2020, the HSE urgently required a supply of ventilators in order to cope with the anticipated increase in the number of people falling seriously ill with the Covid-19 virus. Contact was made between the plaintiff, a company involved in the provision of consulting and engineering services to life science industries and in the provision of medical devices to end users, and the HSE, through the IDA.

13. On 25th March, 2020, Kevin Ward of the plaintiff sent an email to Conor Sheehy of the IDA in relation to ventilator units which the plaintiff could source. In that email, Mr. Ward stated that the plaintiff had tried to contact the HSE regarding the ventilators without success. The email continued:-

> *"Since we have advertised the units and received an overwhelming interest, this has led to final discussions and brokering of deals with the Maltese, Hungarian and Malaysian Government. As you can understand, we most defiantly (sic) would rather the units stay in the country and help during the crisis, however, would realistically need an immediate decision on these in order to stop postpone the final negotiations with the above."*

Mr. Ward then provided certain responses in the email to questions raised by the IDA concerning the plaintiff company, the product specification, the quantity of units available

(800 units with the first of those units ready for delivery on 10th April, 2020), the cost, delivery timelines and transport and logistical options.

14. The HSE decided to purchase 350 ventilators which the plaintiff claimed to be in a position to provide. This expression of interest was notified to the plaintiff by the IDA. In an email from Ms. Ailbhe Earley of the IDA sent to Kevin Ward of the plaintiff and to Martin Quinlivan and John Griffin of the HSE and copied to various other people within the HSE and the IDA) at 17:19 on 27th March, 2020, Ms. Earley referred to an earlier call with Kevin Ward and introduced him to Mr. Quinlivan and Mr. Griffin of the HSE. The email noted that the HSE wished to purchase 350 ventilators. Ms. Earley's email then stated:-

> *"Please send over the contract, which they will sign today. They will issue the payment on Monday."*

The "*they*" is obviously a reference to the HSE.

15. Kevin Ward replied at 17:52 thanking Ms. Earley for the confirmation and querying whether the contract should be directly addressed to the HSE or to the IDA. The email also stated:-

> *"I will have compliance get on to this straight away."*

16. Ms. Earley replied at 17:55 requesting Kevin Ward to address the contract directly to the HSE. At 19:22, Kevin Ward sent the contract in unsigned form and the plaintiff's invoice to Ms. Earley and to Mr. Quinlivan and to Mr. Griffin. That email was copied to other people within the HSE and the IDA as well to John Ward, the plaintiff's managing director. The invoice (which was attached to the contract, at Appendix 03) was addressed to Mr. Quinlivan of the HSE, was in the total sum of €7,485,450.00 and referred to a due date of 27th March, 2020. Those details were also contained in a quotation (which was also attached to the contract, at Appendix 02) which referred to the quotation date as 27th March, 2020. Kevin Ward concluded his email by stating:-

> "*If we can have it* [i.e. the contract] *signed and returned asap."*

17. At 21:09, Mr. Quinlivan sent an email to Kevin Ward, Ms. Earley and Mr. Griffin (copied to the same people as before), attaching the contract as signed by the HSE and requesting Mr. Ward to forward the countersigned contract when received. Mr. Quinlivan concluded his email by stating:-

> *"Payment will be made on Monday 30th."*

18. Kevin Ward sent an email back to Mr. Quinlivan, Mr. Griffin and Ms. Earley (copied to the same parties as were copied on the earlier emails) at 22:57 enclosing the signed contract (which had by then been signed by Kevin Ward, as director of sales of the plaintiff).

19. It is clear that the contract was entered into by the parties in circumstances of great urgency. It does not appear that either side obtained legal advice in relation to the terms

of the contract. The contract was provided in unsigned form by the plaintiff to the HSE at 19:22 on 27th March, 2020, was returned signed by the HSE at 21:09 that evening and was signed on the behalf of the plaintiff and returned to the HSE at 22:57. The contract prepared by the plaintiff. Although not on affidavit, the plaintiff's counsel informed the court at the hearing of the HSE's application that the contract had been prepared on the basis of a template obtained by the plaintiff from a Google search on the internet.

20. While it will be necessary to consider the terms of the contract in more detail shortly, it is said by the plaintiff that the contract required the defendant to make payment in full for the ventilators on 30th March, 2020. It is the plaintiff's case, therefore, that the HSE was required to pay the plaintiff the sum of just under €7.5 million by that date, following which the plaintiff would supply the ventilators on the basis of a delivery schedule contained in the contract. When the money did not arrive on 30th March, 2020, Kevin Ward of the plaintiff sent an email to Ms. Earley of the IDA at 17:03 that day. The email was copied to John Ward and to Conor Sheehy of the IDA. Kevin Ward requested Ms. Earley to call him "*asap*". Ms. Earley replied at 20:00 requesting Mr. Ward to direct all correspondence to Mr. Quinlivan of the HSE. It appears that Kevin Ward spoke to Mr. Quinlivan by telephone at some point that day querying payment. In his email, Mr. Ward stated as follows:-

> *"Thanks for taking my call earlier, did you get onto the person responsible for issuing the payment?*
>
> *I spoke to your accounts and they do not have any payment pending for us? We signed an agreement with the HSE based on receiving the payment today and rescinded a number of contracts in order to keep this (sic) vents in the country.*
>
> *Can you assure me payment will be made in the morning? As you can imagine this is critical to proceeding with the contract."*

21. Mr. Quinlivan replied by email sent at 21:21 as follows:-

> *"In order to proceed with this order the HSE requires written evidence from Aeonmed which confirms that these products have been secured and are available to ship to Ireland. Please note that we intend to seek independent verification in relation to this assurance from our contacts in the Far East.*
>
> *Please submit the required information by 1pm on Wednesday 1 April 2020."*

22. Kevin Ward replied to Mr. Quinlivan's email at 21:52 as follows:-

> *"I presumed this would have been verified before signing a contract and agreeing payment, we had to rescind contracts we already had out with clients and have refused payments over the weekend.*
>
> *Please find our production schedule and also letter of authorisation from Aeonmed, please verify ASAP and confirm payment for tomorrow morning?"*

23. The documents attached to that email were a copy of a "*Manufacturer's Authorization Letter*" dated 22nd March, 2020 and, it appears, a document entitled "*Delivery Instruction*", curiously dated 25th February, 2020. The "*Manufacturer's Authorization Letter"* was stated to come from Beijing Aeonmed Co., ltd ("Aeonmed") and stated as follows:-

> *"We, Beijing Aeonmed Co., LTD manufacturer duly organized under the laws of China. and having its principal place of business at No. 4 Hang feng Road, Fengtai Science Park, Fengtai District, Beijing, China 100070 authorization Narooma Medical company as a distribution agent in European (sic) to supply Aeonmed products."* (underlining in the original)

24. The "*Delivery Instruction"* was also stated to have been issued by Beijing Aeonmed Co., ltd and was addressed to "*To whom it may concern*". It stated:-

> *"With the numbers booming of COVID-19 from all over the world, Government, Organizations and all the companies had aim to made in China for fast delivery and as one of the important suppliers here, Aeonmed are facing heavily insufficient supplement situation.*
>
> *Balance the mission of Aeonmed 'Guard life sincerely' and how to be fair and just to each customer. Our new estimated plane to deliver the ventilators for Narooma Medical are as following…"* (direct quote from the original)

There was then a delivery timetable referring to two models (VG70 and Shangrila 510s), certain quantities and delivery dates. Although the document bears the date "*2020-02-25"* at the bottom, this date was not so far as I can recall adverted to in the papers before me. On the contrary, Mr. Quinlivan, at para. 8 of the affidavit he swore to ground the HSE's application, described the date of the document as being 25th March 2020. As this discrepancy in the date did not feature in the affidavits or in the submissions before me, I make no further comment on it. It does not have a material bearing on the outcome of the HSE's application.

25. John Ward sent an email to Mr. Quinlivan at 07:11 on 31st March, 2020 (which was again copied to all the persons copied on the earlier emails) which appeared to attach another copy of a letter of confirmation from Aeonmed and the plaintiff's *"delivery plan*" for the ventilator units. In his email, John Ward stated that the plaintiff had "*in good faith allocated the first batch of shipments to the HSE even though you guys were the last to order*". He noted that it would have been in everyone's interest for the information, belatedly requested by the HSE, to have been requested prior to the contract. Mr. Ward stated that the plaintiff had informed its "*overseas buyer on Sunday of the unavailability of the units*" and that this was *"on the basis that a government body would not renege on the contractual obligations agreed*". As regards the independent verification sought by the HSE, Mr. Ward requested that that be done urgently and suggested that the HSE contact the European Director of Aeonmed or else "*Ivy*", the plaintiff's "*direct point of contact"* within that company. Mr. Ward further stated that if the contract was not complied with

by the HSE, the plaintiff would be at a significant financial loss as it had rescinded a contract with an overseas buyer in order to "*facilitate these vents staying in the country".* He stressed *"how critical and in short supply these units are, with people's lives literally on the line, whether these units stay on the frontline in this country or overseas*". Mr. Ward requested confirmation by 9:30 that morning as to whether the HSE would be complying with the contract and, if so, when payment would be made. That confirmation did not arrive.

26. John Ward sent a further email to Mr. Quinlivan at 10:26 on 2nd April, 2020 (again copied to the same people as before) seeking a response to his email of 31st March, 2020, and referring to the urgency of the situation from the plaintiff's point of view. He requested a response from the HSE out of "*professional courtesy".*

27. Mr. Quinlivan responded by email sent at 11:15 that day. He stated that:-

"Our due diligence is ongoing. Unable to proceed until complete."

28. The HSE's position (as stated at para. 10 of the affidavit sworn by Mr. Quinlivan for the purpose of grounding the HSE's application) was that, while the plaintiff did supply a "*purported letter of confirmation*" from Aeonmed and a document which "*purported to set out a delivery schedule",* no direct confirmation was received by the HSE from Aeonmed that the plaintiff was an authorised agent or distributor of that company and no evidence was provided to satisfy the HSE that the plaintiff's representation that it was an authorised agent or distributor was correct. A further account of the defendant's position was set out in a letter from the HSE's solicitors to the plaintiff's solicitors on 10th April, 2020, to which I will turn shortly. I should make clear that it is no part of my function in determining this application by the HSE to make any finding as to the plaintiff's status as authorised agent or distributor for Aeonmed or otherwise and I expressly refrain from doing so.

29. In the absence of payment by the HSE, the plaintiff instructed its solicitors, Murray Flynn, to correspond with the HSE on 2nd April, 2020. Having set out the background from the plaintiff's perspective and having referred to the contract, the plaintiff's solicitors threatened proceedings against the HSE unless confirmation was received that day that payment would made before close of business the following day.

30. It appears that an email was sent by the HSE's solicitors, Philip Lee, on the evening of 3rd April, 2020. That email was referred to in a further letter sent by the plaintiff's solicitors on 6th April, 2020. That letter also referred to a number of telephone calls received by Shane O'Brien, of Murray Flynn, the plaintiff's solicitors, from Philip Lee, of the HSE's solicitors. The letter alleged that on 6th April, 2020, Mr. Lee telephoned Mr. O'Brien and made comments of "*an extraordinarily disparaging nature*" against the plaintiff and *"refused when asked to substantiate the accusation that our clients 'were not trustworthy'"*. The plaintiff's solicitors objected to this manner of communication and the absence of a response to their earlier correspondence and again threatened proceedings.

31. It should be noted that the HSE's solicitors objected in correspondence to averments made by John Ward in the affidavit he swore on 7th April 2020 to ground the plaintiff's application for a interlocutory injunction against the HSE, which they stated were "*not accepted*", as well as to the reference in that affidavit to conversations which it is alleged were without prejudice (see the Philip Lee letter of 10th April 2020). I am taking it, therefore, that the HSE does not accept that the alleged derogatory comments were made, or at least, not in any open sense. I make no finding on that issue on this application. The plaintiff contends that the disparaging comments allegedly made about it by Mr. Lee, as recorded in the plaintiff's solicitors' letter of 6th April, 2020, amounted to the submission by the HSE of its "*first statement on the substance of the dispute*", within the meaning of that term in Article 8 of the Model Law. For that reason, it will be necessary to refer to this letter and to the submissions advanced by the plaintiff in reliance upon it later in this judgment.

32. In the absence of a written response from the HSE, the plaintiff commenced the proceedings the following day, 7th April, 2020. It sought interlocutory injunctive relief against the HSE in a notice of motion also issued that day. That application was grounded on the affidavit sworn by John Ward on 7th April, 2020 referred to above. It was ultimately listed before the High Court on 14th April, 2020.

33. In the meantime, the HSE's solicitors wrote to the plaintiff's solicitors on 10th April, 2020 making several points. They stated that the HSE would not be purchasing any products from the plaintiff and would not be transferring any funds to the plaintiff. It was the HSE's position that the obligation under the contract to provide ventilators to the HSE never came into effect and that, pursuant to clause 13.1 of the contract, it was a *"precondition to obligations under the contract coming into force that the HSE had made the payment for the products. This has not occurred"*. Without prejudice to that position, the HSE's solicitors stated that it was represented by the plaintiff to the HSE and its agents before the contract was entered into that the plaintiff was the authorised agent/distributor of Aeonmed and that a purported "*Manufacturer's Authorization Letter*" from Aeonmed was sent by the plaintiff to the HSE on 30th March, 2020, but that no direct confirmation was received from Aeonmed that the plaintiff was an authorised agent/distributor of that company and no evidence was provided which would satisfy the HSE that the plaintiff's representation that it was an authorised agent/distributor was correct. The HSE's solicitors further pointed out that, in response to a request by Mr. Quinlivan of written evidence from the plaintiff to confirm that the products the subject of the contract had been secured and were available to be shipped to Ireland, the plaintiff sent a "*Delivery Instruction*" on 30th March, 2020, which it was alleged failed to provide the necessary confirmation.

34. Reference was also made in that letter to a without prejudice conversation between Mr. Lee and Mr. O'Brien in which the plaintiff was allegedly requested to have Aeonmed make contact (presumably, with the HSE) to confirm that the plaintiff was in fact an authorised agent/distributor and that Mr. Lee provided Mr. O'Brien with relevant contact details. The letter asserted that no such contact or confirmation was ever made or received.

Reference was also made to advice allegedly received by the HSE from the IDA's Chinese representative, to the effect that Aeonmed's European Director, Mr. Wen Huibin, had confirmed that the plaintiff was not an authorised agent or distributor of Aeonmed and cast doubt on the validity of the authorisation letter provided by the plaintiff. It was stated that the HSE was not satisfied that the plaintiff was an authorised agent or distributor of Aeonmed and was not prepared to accept that the documents provided were evidence that the plaintiff was duly appointed as its authorised agent or distributor. Concern was also expressed in relation to the position of Kevin Ward.

35. Without prejudice to its position that the obligation to provide the ventilators described in the contract never became enforceable, the letter purported to rescind the contract on the part of the HSE, due to the alleged misrepresentation by the plaintiff that it was an authorised agent/distributor of Aeonmed.

36. Without prejudice again to that position, in the event that the plaintiff sought to make a claim under the contract, it was contended that the plaintiff was required to refer the matter to arbitration pursuant to clause 21 of the contract. It was contended that the claim sought to be made in the proceedings had to be advanced pursuant to clause 21 and that the proceedings brought by the plaintiff were an abuse of process. The letter indicated that the HSE would apply to stay the proceedings on foot of the alleged arbitration clause. The letter was exhibited to an affidavit sworn on behalf of the HSE by Murrough McMahon, a partner in the firm of Philip Lee, on 11th April, 2020 in response to the plaintiff's application for interlocutory injunctive relief against HSE.

37. In light of the position adopted by the HSE, as set out in the Philip Lee letter of 10th April, 2020, the plaintiff decided not to pursue its application for interlocutory injunctive relief. Instead, that application was adjourned to the trial of the action on 14th April, 2020. On the same date, the plaintiff delivered its statement of claim. It will be necessary to consider aspects of the statement of claim when considering the scope of the clause in the contract (clause 21), which is said to constitute an "*arbitration agreement*" for the purpose of Article 8 of the Model Law.

38. Following the delivery of the statement of claim, further correspondence was exchanged between the plaintiff's solicitors and the HSE's solicitors. On 16th April, 2020, the HSE's solicitors referred to clause 21 of the contract and called upon the plaintiff to discontinue the proceedings immediately and to agree to refer the dispute to arbitration under that provision, failing which a motion would be issued to refer the parties to arbitration. The plaintiff's solicitors replied on 16th April, 2020. In that letter, they suggested that the position adopted by the HSE's solicitors in their letter of 16th April, 2020 was at odds with the position taken in their letter of 10th April, 2020, where it was allegedly stated that no contractual relationship had come into existence at all. It was suggested, therefore, that there could be no arbitration clause and, in any event, that "*an arbitrator cannot choose their own jurisdiction"* (although it is not at all clear what was meant by that).

39. The HSE's solicitors replied on 17th April, 2020. They disputed the characterisation of their letter of 10th April, 2020. They pointed out that that letter acknowledged that the

contract was signed, but that the HSE's position was that the obligation to provide ventilators never came into effect and that any dispute in that regard was a dispute in relation to the interpretation of clause 13 of the contract which was captured by the arbitration clause contained in clause 21 of the contract. It was stated that the HSE would proceed to apply to stay the proceedings on foot of the arbitration agreement. On that basis, a conditional appearance was entered by Philip Lee on behalf of the HSE.

40. As noted earlier, the plaintiff issued a motion seeking to have the proceedings entered in the Commercial List on 20th April, 2020. The HSE issued its application for an order referring the parties to arbitration under Article 8 of the Model Law, and staying the proceedings on 22nd April, 2020. Both applications were considered by me at a remote hearing on 30th April, 2020. Having heard the parties, I ruled that I should hear the HSE's application under Article 8 first and gave directions for the hearing of that application. I deferred ruling on the plaintiff's entry application until after the Article 8 application had been heard and determined, although I did direct that particulars be sought of the plaintiff's claim and furnished by the plaintiff. Those directions were complied with by the parties. No defence has yet been delivered by the HSE as it has held off doing so pending the determination of this application.

The Contract

41. It is necessary to make reference to some of the terms of the contract entered into between the plaintiff and the HSE in the circumstances described earlier. The contract contains a number of very unusual provisions and bears all the hallmarks of a document agreed to by the parties, without the benefit of any legal advice.

42. While the merits or otherwise of the plaintiff's claims on foot of the contract, and the defences which may be advanced on behalf of the HSE, are matters ultimately to be decided by a court or, in the event that the HSE is successful on this application, by an arbitrator, it is nonetheless appropriate that I refer to some of the provisions of the contract before turning to the clause in the contract which is said to amount to an arbitration agreement for the purposes of Article 8 of the Model Law, namely, clause 21.

43. At the commencement of the document, there is a statement by the parties as follows:-

> *"Both Parties declare an interest in the sale and purchase of goods under the present Contract and undertake to observe the following agreement:"*

44. At clause 1, the plaintiff (the "Seller") "*undertakes to provide"* and the HSE (as "Buyer") undertakes to purchase 350 ventilators (as described in Appendix 01 to the contract) (I note that the ventilators described in clause 1 are referred to as "*VG70*" ventilators, whereas the goods referred in Appendix 01 are described as "*NM70*" ventilators but attach no particular significance to this for the purposes of this application). Clause 1 also refers to the quotation and invoice (which are attached at Appendices 02 and 03). Further details of the goods and the price are set out in clause 1. The price is stated to be €7,485,450.00. The price is referred to again in clause 2, where it is stated that the total price of the products which "*the Buyer undertakes to pay the Seller*" (as detailed in the

invoice at Appendix 03) is the figure just mentioned. Delivery conditions are set out in clause 3 which contains the following:-

> *"Should the Buyer fail to take charge of the goods on arrival, the Seller should be entitled to demand the fulfilment of the Contract and payment of the agreed price."*

45. Clause 5 refers to the "*Means of Payment*". It provides that the HSE "*undertakes to pay the total price which appears in the present Contract"* and that payment of that price shall be by bank transfer (bank details are provided).

46. Clause 6 provides for the "*Date of Payment*" and states that the buyer *"agrees to pay for goods as follows: the amount of 30th of March 2020 (sic) as balance of payment in full".* Obviously, there is an error here as, instead of the amount to be paid, the date of payment is inserted.

47. Clause 7 refers to the "*Delivery Period*". It provides that the plaintiff "*undertakes to ship the goods as per the schedule below in receipt of: the signing of the present Contract and receipt of deposit payment via Bank Transfer on 30th March 2020".* The contract does not appear to provide elsewhere for the payment of any deposit and no deposit is specified in clause 7. Clause 7 also sets out the number of units to be delivered in April and May, 2020 (totalling 350 units). There is, however, some disconnect between what is stated here and in the "*Delivery Instructions"* dated 25th February, 2020 provided by the plaintiff to the IDA on 25th March, 2020.

48. Clause 13 of the contract is headed "*Fulfilment of Contract*". It provides as follows:-

> *"The present Contract shall come into force on the date of its signing, after which the Buyer shall not under any circumstances be entitled to cancel any order hereunder without written consent from the Seller. The sole conditions to be met prior to the present Contract coming into force shall be the following:*
>
> *13.1 The Buyer shall have made the appropriate payment in advance, in case it exists…"*

Clauses 13.2 and 13.3 contain further conditions which are not relevant for present purposes.

49. Clause 13 is an unusual term and will no doubt feature prominently at the substantive hearing of the dispute between the parties. The clause is unusual in that it provides that the contract "*shall come into force on the date of its signing*" but goes on to say that certain conditions must be met "*prior to the present contract coming into force*" including that the HSE "*shall have made the appropriate payment in advance, in case it exists"* (whatever that means). I refrain from expressing any view on the meaning and effect of this clause. It is, however, relevant to one of the grounds of objection initially raised by the plaintiff to the HSE's request that the dispute between the parties be referred to arbitration. As I explain shortly, that ground of objection, which appeared in

correspondence and in the replying affidavit of John Ward sworn on 5th May, 2020, fell away in the course of the exchange of written submissions between the parties as to the separate and independent existence of a clause or agreement said to constitute an arbitration agreement.

50. Clause 20 of the contract is headed "*Applicable Law".* It provides as follows:-

> *"The present Contract, its content as well as any unforeseen circumstance arising from it, shall be subject to the applicable laws, and particularly to the United Nations Convention on international goods and sale contracts, and by default to the trade practices established therein."*

51. There was initially disagreement between the parties as to the meaning and proper interpretation of clause 20 in terms of the applicable law. However, both parties ultimately agreed in their written submissions that the law applicable to the contract is Irish law.

52. For present purposes, the critical clause in the contract is clause 21. It is headed "*Resolution of Disputes*" and provides as follows:-

> *"Both Parties, by mutual consent, resolve to refer any dispute to:*
>
> *The Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules. The place of arbitration shall be Dublin, Ireland and the proceedings shall be carried out in the English language."*

53. It is in relation to this clause and its proper meaning and effect that the parties are significantly in dispute. It will, therefore, be necessary for me later in this judgment to address the respective contentions of the parties as to the status of the clause and, in particular, as to whether it constitutes an "*arbitration agreement*" for the purposes of Article 8 of the Model Law and as to the proper interpretation of the clause itself.

54. The contract concludes by stating that: *"By signing the present Contract in duplicate, both Parties express their complete conformity thereto*" and that "*This Contract enters into force the date written above*". That may be intended to be a reference to the date at the very top of the first page of the contract.

55. Both the plaintiff and the HSE have exhibited copies of the contract signed by both of the parties. Kevin Ward is recorded as having signed the contract on behalf of the plaintiff. Martin Shanahan is recorded as having signed on behalf of the HSE.

56. As I mentioned earlier, one of the issues between the parties in the correspondence and in the affidavit sworn in connection with this application, was whether the HSE could rely on clause 21 as constituting an arbitration agreement in circumstances where, as the plaintiff argued, the HSE was maintaining that *"no contractual relationship came into existence at all*", as it was a precondition to obligations under the contract (including the

obligation to provide ventilators to the HSE) coming into force that the HSE had made the payment for the products, which had not occurred (see, for example, the Philip Lee letter of 10th April, 2020 and the Murray Flynn letter of 16th April, 2020; and para. 5 of the replying affidavit of John Ward sworn on 5th May, 2020). However, in the course of the exchange of written submissions, it was agreed between the parties that, by virtue of the doctrine of separability, an arbitration agreement has a separate and independent existence from the underlying or main contract. The parties were agreed that the doctrine of separability was correctly described and applied by Feeney J. in the High Court in *Barnmore Demolition and Civil Engineering Limited v. Alandale Logistics Limited & ors* [2013] 1 IR 690 ("*Barnmore*") (at para. 2, pp. 693-694) and by me in *K & J Townmore Construction Limited v. Kildare and Wicklow Education and Training Board* [2018] IEHC 770 (*"Townmore (No. 1)")* (at para. 45).

57. As a consequence of the agreement between the parties concerning the doctrine of separability, the ground of objection raised by the plaintiff to the HSE's application to refer the parties to arbitration set out in the correspondence just referred to, and at para. 5 of Mr. Ward's affidavit, fell away. It was agreed by the parties that the court must consider the clause or agreement, which is said to constitute an "*arbitration agreement"* within the meaning of that term in Article 8 of the Model Law, as a separate and independent agreement, separate and distinct from the main or underlying contract. The court is, therefore, required to consider clause 21 of the contract without reference to the particular issues raised by the parties concerning the other provisions of the contract such as clause 13.

HSE's Article 8 Application

58. The HSE seeks an order under Article 8(1) of the Model Law referring the parties to arbitration in respect of the dispute the subject of the proceedings. The Model Law has force of law in the State and applies to both international commercial arbitrations and domestic arbitrations where the seat of the arbitration is Ireland, by virtue of s. 6 of the 2010 Act.

59. Article 8(1) 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."*

60. The parties are agreed as to the approach which the court must take in determining an application for a reference under Article 8(1). The approach was summarised by me in *Ocean Point Development Company Limited (In Receivership) v. Patterson Bannon Architects Limited and ors* [2019] IEHC 311 ("*Ocean Point*"). At para. 26 of the judgment in that case, I summarised the approach as follows:-

> *"In order for the provisions of Article 8(1) of the Model Law to be engaged, various requirements must be satisfied. First, an action must have been brought before the court in respect of a dispute between the parties. Second, the action must concern a 'matter which is the subject of an arbitration agreement'. Third, one of the parties must request the reference to arbitration 'not later than when submitting his first statement on the substance of the dispute'. If those requirements are satisfied, the court must refer the parties to arbitration (the word 'shall' is used). The only circumstances in which the court's obligation to refer the parties to arbitration does not arise is where the court finds that the arbitration agreement is (i) 'null and void' or (ii) 'inoperative' or (iii) 'incapable of being performed'. The onus of establishing the existence of one or more of these disapplying factors rests on the party who seeks to rely on them (see Sterimed Technologies International v Schivo Precision Ltd [2017] IEHC 35 (per McGovern J at para. 12, pp. 4-5))."*

61. I repeated those observations in *XPL Engineering Limited v. K & J Townmore Construction Limited* [2019] IEHC 665 ("XPL") (at para. 34) and in *K & J Townmore Construction Limited v. Kildare and Wicklow Education and Training Board* [2019] IEHC 666 ("*Townmore (No. 2)")* (at para. 43). The parties are agreed that that is the approach which must be taken in determining the HSE's application for a reference under Article 8(1) of the Model Law.

62. The parties are also agreed that where the requirements of Article 8(1) are satisfied, the court is under a mandatory obligation to make the reference to arbitration and does not have a discretion whether to refer or not. In a series of cases including *Townmore (No. 1), Ocean Point, XPL* and *Townmore (No. 2),* I approved the following statement made by the High Court (McGovern J.) in *BAM Building Limited v. UCD Property Development Co. Limited* [2016] IEHC 582 ("BAM"):-

> *"The courts in this jurisdiction have long been supportive of the arbitral process and there is a line of recent authority which clearly establishes that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration. If there is an arbitration clause and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then a stay must be granted. See P. Elliott and Company Limited (In Receivership and In Liquidation) v. F.C.C. Elliot Construction Limited [2012] IEHC 361; and Go Code Limited v. Capita Business Services Limited [2015] IEHC 673."* (per McGovern J. at para. 6, p. 3).

63. It is, therefore, agreed by the parties that the approach which I should take in determining the HSE's application for a reference under Article 8(1) of the Model Law is that summarised in *Ocean Point* and in the other cases mentioned above and that, once the requirements of Article 8(1) are satisfied, the court has a mandatory obligation to refer the parties to arbitration under that provision. The parties disagree, however, on the

application of the approach which the court is required to take in a number of fundamental respects.

Summary of Parties' Positions

64. Briefly summarised, the respective positions adopted by the parties are as follows. The HSE contends that proceedings have been brought before the court in respect of a "*dispute*" between the parties. While initially maintaining the position that there was no "*dispute*" between the parties, the plaintiff ultimately accepted that there is such a "*dispute*" (para. 15 of the plaintiff's written submissions). I would in any event have concluded that there is a "*dispute*" between the parties in light of the principles discussed and applied by me in XPL (and summarised at paras. 95 and 96 of my judgment in that case). It is also common case that the dispute is the subject of the action which has been brought by the plaintiff (although there is fundamental disagreement between the parties on whether there exists an arbitration agreement at all and, if there is, whether it extends to all of the claims made by the plaintiff in the proceedings).

65. The HSE maintains that the proceedings concern *"a matter which is the subject of an arbitration agreement*" and that such agreement is contained in clause 21 of the contract. The plaintiff maintains that the proceedings do not concern a "*matter which is the subject of an arbitration agreement".* The plaintiff's position is that, for various reasons, clause 21 of the contract does not constitute an "*arbitration agreement*" as that term is properly understood. The fundamental issue between the parties, therefore, is whether clause 21 constitutes an "*arbitration agreement"* as that term is properly understood under the Model Law.

66. Next, the HSE contends that all of the claims made by the plaintiff in the proceedings fall within the scope of what it contends is the arbitration agreement contained in clause 21 of the contract. The plaintiff's position is that, without prejudice to its contention that clause 21 does not amount to an arbitration agreement, in any event, a number of the claims made by it in the proceedings, including the claims in tort and further claims which it wishes to make against the HSE, do not fall within the scope of the clause. In the event that the court were to conclude that clause 21 does amount to an arbitration agreement, there is, therefore, a significant issue between the parties as to whether the claims made (and intended to be made) by the plaintiff fall within the scope of that agreement.

67. Next, in a submission made for the first time by the plaintiff's counsel in responding to the HSE's submissions at hearing the plaintiff contends that the HSE is precluded from seeking, and the court is precluded from making, a reference to arbitration under Article 8(1) on the basis that the HSE had already submitted its *"first statement on the substance of the dispute"* by the time it requested the reference to arbitration under Article 8(1) and that, as a consequence, it lost its entitlement to do so and deprived the court of the jurisdiction to make the reference. There is, therefore, a significant issue between the parties as to whether or not the HSE had "*submitted*" its *"first statement on the substance of the dispute*" before it requested the reference to arbitration. The plaintiff contends that the disparaging comments allegedly made by Mr. Lee to Mr. O'Brien, which were recorded in Mr. O'Brien's letter of 6th April, 2020, amounted to a submission by the

HSE of its "*first statement on the substance of the dispute*" between the parties. The HSE rejects this argument on several grounds, not least on the ground that the first time it was made was by the plaintiff's counsel on his feet.

68. Finally, the plaintiff seeks, without prejudice to its contention that clause 21 does not amount to an "*arbitration agreement*", to persuade the court that, if it is an arbitration agreement, clause 21 is "*null and void, inoperative or incapable of being performed*". Various reasons are advanced in support of this contention, including the absence of agreement between the parties as to the procedure to be adopted by any arbitrator who might be appointed under clause 21, as well as the reference to non-existent rules in that clause. The plaintiff contends that the disapplying factors in Article 8(1) exist in the present case and that, as a consequence, the court should not refer the parties to arbitration. The HSE disputes this. The presence or absence of such disapplying factors is, therefore, another significant issue between the parties.

The Issues to be Determined

69. It follows from the summary of the respective positions adopted by the plaintiff and by the HSE set out above that I must determine the following issues:-

    (1) Whether clause 21 amounts to an "*arbitration agreement*" within the meaning of that term under the Model Law;

    (2) If it does, whether the claims made by the plaintiff in the proceedings (and those additional claims which the plaintiff has indicated it may bring) fall within the scope of clause 21 of the contract;

    (3) Whether the HSE is precluded from seeking a reference to arbitration by virtue of its alleged submission of its "first statement on the substance of the dispute" prior to seeking the reference; and

    (4) Whether the alleged arbitration agreement contained in clause 21 of the contract is "*null and void, inoperative or incapable of being performed*" for the purposes of Article 8(1) of the Model Law.

70. I will consider each of these issues in turn.

Whether Clause 21 is an "Arbitration Agreement" under the Model Law

71. The HSE maintains that clause 21 constitutes an "*arbitration agreement*" for the purposes of Article 8(1) of the Model Law as that term is defined in Article 7. It contends that, on the basis of the principles applicable to the construction of contracts and those applicable to the construction of arbitration clauses or agreements, clause 21 amounts to an "*arbitration agreement"* for the purposes of the Model Law. It contends that under clause 21, the parties agreed to refer any dispute between them to arbitration.

72. The plaintiff contends that clause 21 does not amount to an "*arbitration agreement".* It contends that clause 21 merely amounts to an agreement to agree, or not, to resolve to refer a dispute which arises to arbitration and that any such reference to arbitration in the

case of a dispute would have to be by "*mutual consent".* The plaintiff further contends that that was its understanding of the position when entering into the contract. It is maintained on affidavit on behalf of the plaintiff that the plaintiff understood that in the event of any dispute arising between the parties, "*mutual consent*" was required in order for the dispute to be referred to arbitration. The plaintiff says that it does not consent to the reference to the dispute between the parties to arbitration. The plaintiff further points to the absence of any reference to arbitration in the heading given to clause 21 of the contract.

73. The HSE disagrees. It maintains that the plaintiff is not entitled to rely on any alleged subjective understanding of the meaning of clause 21. It further maintains that the interpretation of the clause put forward by the plaintiff would make no sense and would mean that it would never be possible, without a further agreement being made between the parties, for a dispute to be referred to arbitration under the provisions of the clause. The HSE further contends that the terms of clause 21 are clear and unambiguous and mean that the parties agreed, when entering into the contract, that any dispute between them would be referred to arbitration. In the event that, contrary to its principal contention, clause 21 is considered to be ambiguous, the HSE contends that it must be construed in its favour and against the plaintiff, as the plaintiff drafted the contract.

74. The plaintiff has advanced a number of further arguments in relation to clause 21. However, it seems to me that these arguments are directed by the plaintiff more in support of its argument that, if clause 21 does amount to an "*arbitration agreement*" for the purposes of the Model Law, it is "*null and void, inoperative or incapable of being performed*" and that, as a consequence, the court should not make the reference sought by the HSE. I will address those further arguments when considering that issue.

75. In considering whether clause 21 amounts to an "arbitration agreement" for the purposes of the Model Law, it is first necessary to refer to the definition of "*arbitration agreement*" which is to be found in s. 2(1) of the 2010 Act and Article 7 of the Model Law. Section 2(1) of the 2010 Act provides that the term "*arbitration agreement*" shall be construed in accordance with Option I of Article 7 of the Model Law. Under Option 1, Article 7(1) defines "*arbitration agreement*" as:-

> *"…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."*

76. Article 7(2) provides that the "*arbitration agreement"* shall be in writing. Articles 7(3) to (6) contain further provisions in relation to requirement that the arbitration agreement be in writing and are not relevant for present purposes. When Article 8(1) of the Model Law refers to an "*arbitration agreement*", it is referring to an agreement which complies with the requirements of Option I of Article 7 of the Model Law.

77. Therefore, in order for clause 21 to constitute an "*arbitration agreement*", it must satisfy the following requirements:

(1) It must be an agreement by the parties to submit to arbitration all or certain disputes which either have already arisen or which may arise between them in respect of a defined legal relationship, whether arising under a contract or not;

(2) It may be in the form of an arbitration clause in a contract or in the form of a separate agreement between the parties (but it must obviously be one of those); and

(3) It must be in writing.

78. There is no issue between the parties in relation to a number of aspects of these requirements. There is no dispute between the parties that there is an agreement between them and that the agreement is in writing. Nor is there any dispute that an arbitration agreement may be found in a clause in the contract or in another agreement between the parties. There is no other agreement between the parties in the present case apart from the contract which, of course, contains Clause 21. The parties are agreed that an arbitration agreement has a separate and independent existence from the other provisions of the contract between the parties. The issue here is whether clause 21 is such an arbitration agreement. The dispute between the parties in respect of this first issue is whether the parties agreed in clause 21 of the contract to submit to arbitration, "*all or certain disputes which have arisen or which may arise between them*" in respect of the legal relationship between them, whether arising under the contract or otherwise.

79. The parties are also agreed that in approaching the question as to whether clause 21 amounts to an "arbitration agreement" for the purposes of the Model Law, the court must give full judicial consideration to the issue and must not consider the issue merely on a *prima facie* basis. The parties agree that the correct approach for the court to adopt is that stated at para. 47 of my judgment in *Townmore (No. 2)* as follows:-

> *"The parties are in agreement that the approach which the court is required to take in determining whether an arbitration agreement exists is to give full judicial consideration to the issue rather than approaching the question on a prima facie basis. It is now well established that that is the correct approach for the court to adopt in determining whether an arbitration agreement exists: Lisheen Mine v. Mullock & Sons (Shipbrokers) Ltd [2015] IEHC 50 (unreported, High Court, Cregan J., 12th January, 2015) and Sterimed Technologies International Ltd v. Schivo Precision Ltd [2017] IEHC 35 (unreported, High Court, McGovern J., 27th January, 2017). Therefore, that is the approach which I will adopt in determining whether an arbitration agreement exists between the parties for the purposes of Article 8(1) of the Model Law."*

80. I commented on that issue again more recently in *Bowen Construction Ltd ((in Receivership)) v Kelly's of Fantane (Concrete) Ltd ((in Receivership))* [2019] IEHC 861 (at paras. 75-77).

81. I will, therefore, proceed to consider the issue as to whether clause 21 amounts to an "*arbitration agreement*" for the purposes of the Model Law by giving full judicial consideration to the issue, rather than by approaching the issue on a mere *prima facie* basis.

82. The parties are also in agreement that the burden of establishing the existence of an "*arbitration agreement*" for the purposes of an application for a reference under Article 8(1) lies, in this case, on the HSE. At para. 46 of the judgment in *Townmore (No. 2),* I stated:-

> *"As the party seeking to invoke the court's jurisdiction under Article 8(1) of the Model Law, the defendant bears the initial burden of establishing that the various requirements for the application of Article 8(1) are satisfied. In particular, it bears the burden of establishing that the proceedings concern a matter or matters which is or are the subject of an arbitration agreement. If the defendant discharges that initial burden, the burden then shifts to the plaintiff to establish that the arbitration agreement is 'inoperative' under Article 8(1)."*

83. I will approach my consideration of the issue as to whether clause 21 of the contract amounts to an "*arbitration agreement*" on the basis of a full judicial consideration of the issue and on the basis that the HSE bears the burden of establishing that it does.

84. There is very little difference between the parties as to the principles to be applied to the interpretation of clause 21 of the contract, both in terms of the general principles of contractual interpretation and in terms of the principles specifically applicable to the interpretation of arbitration agreements.

85. As regards the general principles applicable to contractual interpretation, the principles to be applied are those set out by Lord Hoffman in *Investor Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 W.L.R. 896 ("*ICS*") which have been discussed, endorsed and applied by the Supreme Court in numerous cases such as *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, *ICDL v. European Computer Driving Licence Foundation Limited* [2012] 3 I.R. 327 and *Law Society of Ireland v. Motor Insurers' Bureau of Ireland* [2017] IESC 31 ("*Law Society*"). It is unnecessary to set out those principles in full in this judgment. One of them has given rise to some controversy between the parties to this application. That is the third principle discussed by Lord Hoffman in *ICS*. That principle was described by him as follows:-

> *"The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way*

> *we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."*
>
> (per Lord Hoffman at p. 913)

86. The plaintiff has also drawn attention to a number of other statements of the approach which the court should take in the interpretation of a contract. They are statements in the judgment of Griffin J. in the Supreme Court in *Rohan Construction Limited v. Insurance Corporation of Ireland PLC* [1988] ILRM 373 ("*Rohan Construction*") (quoted with approval by the Supreme Court in several subsequent cases) and *dicta* of Keane J. in the Supreme Court in Kramer v. Arnold [1997] 3 I.R. 43. Both those passages were referred to and applied to by me in *Townmore (No. 2)* (paras. 75 and 76). In *Rohan Construction,* Griffin J. stated:-

> *"It is well settled that in construing the terms of a policy the cardinal rule is that the intention of the parties must prevail, but the intention is to be looked for on the face of the policy, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning. The Court must not speculate as to their intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances. The whole of the policy must be looked at, and not merely a particular clause*." (at p. 377)

87. It seems to me that the last sentence in that quotation must be applied with care in the case of a clause said to constitute an arbitration agreement, having regard to the separate and independent nature of such an agreement, in light of the doctrine of separability, discussed earlier.

88. In *Kramer*, Keane J. stated:-

> *"…in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."* (at p. 55)

89. The last authority to which I wish to refer on the general interpretation principles is the *Law Society* case. There, in the course of his dissenting judgment, Clarke J. referred to the "*modern approach*" to the construction of contracts as having been described as the "*text in context*" method of interpretation. At para. 10.4 of his judgment, Clarke J stated:-

> *"It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand it is important not to lose sight of the fact that*

the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence."

90. Although he was in the dissent on that appeal, it does not seem to me that these observations of Clarke J. differ substantially from the observations made by O'Donnell J. in the lead judgment on this general point. I will, therefore, apply the general principles set out in ICS as discussed, approved and applied by the Supreme Court and bearing in mind the obligation to construe the contractual provisions in question by reference to the context in which the contract came into existence.

91. It can immediately be seen from the application of those principles that I must exclude from my consideration of the proper interpretation of clause 21 of the contract, the subjective understanding of the plaintiff and its directors in entering into the contract. The fact that the plaintiff and its directors may have believed that it was necessary for a further agreement or subsequent "*mutual consent*" between the parties before any dispute which arose could be referred to arbitration, is entirely irrelevant to the exercise which the court must perform in interpreting the provisions of clause 21 of the contract. The subjective understanding or intention of the plaintiff is irrelevant to the interpretation of the clause.

92. In addition to these general principles of contractual interpretation, there are also some further principles which are specifically applicable to the interpretation of arbitration agreements. Those principles are derived from the decision of the House of Lords in Fiona Trust & Holding Corporation and ors v. Privalov and ors [2007] 4 All ER 951 ("*Fiona Trust*") and the Irish decisions which have cited *Fiona Trust* with approval (including *O'Meara v. The Commissioners of Public Works in Ireland* [2012] IEHC 37 ("*O'Meara*")). I summarised and applied those principles in *Townmore (No. 1)* (at para. 53), *in Townmore (No. 2)* (at para. 48) and in *XPL* (at para. 93).

93. The HSE contends that some of these further principles are applicable to the interpretation of clause 21 of the contract, not only as part of the court's consideration as to whether clause 21 amounts to an "*arbitration agreement",* but also, if it does, in considering the scope of the claims caught by that agreement. I did not understand the plaintiff to dispute the potential application of these further principles (and, indeed, the

plaintiff itself relies on the decision in *Fiona Trust*, although it does ask me to draw different conclusions from the application of all of the relevant principles).

94. I summarised the further principles applicable to the interpretation of arbitration agreements in *Townmore (No. 1)* (and again in *Townmore (No. 2*) and *XPL*) as follows:-

> *"(1) In construing an arbitration agreement, the court must give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration agreement.*
>
> *(2) The construction of an arbitration agreement should start from an assumption or presumption that the parties are likely to have intended any dispute arising out of the relationship which they entered into to be decided by the same body or tribunal. In other words, there is a presumption that they intended a 'one-stop' method of adjudication for their disputes.*
>
> *(3) The arbitration agreement should be construed in accordance with that assumption or presumption unless the terms of the agreement make clear that certain questions or issues were intended by the parties to be excluded from the jurisdiction of the arbitrator.*
>
> *(4) A liberal or broad construction of an arbitration agreement promotes legal certainty and gives effect to the presumption that the parties intended a 'one-stop' method of adjudication for the determination of all disputes.*
>
> *(5)* The court should construe the words 'arising under' a contract and the words 'arising out of' a contract when used in an arbitration agreement broadly or liberally so as to give effect to the presumption of a 'one-stop' adjudication and the former words should not be given a narrower meaning than the latter words. Fine or 'fussy' distinctions between the two phrases are generally not appropriate." (Townmore (No.1) *at para. 53)*

95. The HSE relies particularly on the stress given in those principles to the requirement to give effect to the "*commercial purpose*" of the arbitration agreement, insofar as the language used by the parties permits. It also relies on the promotion of "*legal certainty"* which derives from a liberal or broad construction of an arbitration agreement.

96. Finally, in terms of the interpretation to be given to clause 12 of the contract, the plaintiff relies on the passage from the opinion of Lord Hoffman in *Fiona Trust*, which has been cited with approval and applied by the High Court in a number of judgments including *Townmore (No. 1).* In the passage relied on, Lord Hoffman stated:-

> *"Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which*

> *the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language."*
>
> (per Lord Hoffman at para. 5)

97. In considering the issue as to whether clause 21 of the contract constitutes an "*arbitration agreement*" for the purposes of the Model Law, I will apply the general principles of contractual interpretation referred to earlier, together with those further principles applicable to the interpretation of arbitration agreements which are relevant, namely, the need to give effect to the commercial purpose of the agreement where the language permits and the promotion of legal certainty and will bear in mind the dicta contained in the other judgments relied upon by the parties.

98. I will also bear in mind the *dictum* of McGovern J. in the High Court in *BAM* where, having referred to the *dicta* of Lord Hoffman in *Fiona Trust*, he stated:-

> "*If there are two possible constructions of an arbitration clause, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."* (at para. 25)

99. The first point to consider is the plaintiff's contention that the fact that the heading to clause 21 does not make any reference to arbitration is supportive of its position that it is not an arbitration agreement. I reject that contention. Clause 21 refers to the "*resolution of disputes*". Arbitration is a means of resolving disputes. The absence of a reference to arbitration in the heading is, in my view, neither here nor there. It is certainly not determinative of the issue. The body of clause 21 contains two references to arbitration and one reference to arbitrators.

100. The real point between the parties on this issue concerns the proper interpretation of the phrase "*both parties, by mutual consent, resolve to reserve any dispute to…"* the dispute resolution procedure (to use a neutral term at this point) set out in the clause. The HSE contends that, properly construed, this means that the parties have already reached agreement or "*mutual consent*" and have already resolved, by means of the contract which they have entered into, to refer "*any dispute"* which may arise between them to arbitration. In other words, it says that the agreement to arbitrate any dispute arising in the future has already been made in clause 21. The "*mutual consent*" has already been provided by the parties in entering into the contract which includes clause 21. The plaintiff's position is that clause 21 is merely an agreement to agree or not. It contends that before any dispute can be referred to arbitration (or whatever dispute resolution process is provided for in the clause), there must be a further "*mutual consent*" by the parties which must be reached when the relevant dispute arises before the dispute can be referred to that dispute resolution process. It argues, therefore, that the precondition required for such reference is the "*mutual consent*" of the parties which is not forthcoming in respect of the disputes the subject of the proceedings.

101. Applying the various principles of construction as discussed earlier, I am satisfied that the proper construction to be given to the words used by the parties, namely, that "*both parties, by mutual consent, resolve to refer any dispute to…"* the dispute resolution process referred to, is that contended for by the HSE. The "*mutual consent*" referred to is that achieved when the parties entered into the contract, including clause 21 on the evening of 27th March, 2020. The parties used the term "*resolve*" in the present tense and not in the future tense. Clause 21 does not say that the parties *"by mutual consent, will resolve to refer any dispute to arbitration"* (emphasis added). In my view, the clear meaning of the words used in clause 21 is that the parties had resolved, at the time they entered into the agreement, to refer any dispute between them to the dispute resolution process referred to. They were not agreeing that a "*mutual consent*" to "*resolve*" in the future to refer such disputes to that process would have to be reached before the reference could take place. The "*mutual consent*" and the decision to "*resolve*" was achieved and made at the time the contract was entered into. Clause 21 is not an agreement to agree or not in the future when a dispute arises. The agreement was made, the mutual consent provided and the resolve made at the time of the signing of the contract. The words are, in my view, very clear.

102. Reading those words in their context makes the position even more clear. The parties were entering into a contract providing for the sale by the plaintiff, and the purchase by the HSE, of a large quantity of ventilators for a very substantial purchase price. In that context, it is perfectly understandable that the parties would have wanted to agree there and then on a dispute resolution mechanism and not merely provide for the possibility of reaching agreement in the future, in the event that a dispute arose between them. In that context, and consistent with the commercial purpose of the contract (and the dispute resolution provision contained in it) and with the requirements of legal certainty, it seems to me that it would make no sense at all for the parties to have agreed that, in the event of a dispute arising in the future, the dispute would be dealt with in accordance with that dispute resolution process only if they were to reach a further agreement that it would. It is hard to see how that could be said to promote, or to be consistent with, legal certainty or with the commercial purpose and objective of the overall contract and the dispute resolution clause itself.

103. In my view, not only is the meaning for which the HSE contends one which is the only meaning open on the words used by the parties in the introductory part of clause 21, but is also the only meaning consistent with the context and commercial purpose of the contract (and the dispute resolution clause), and with legal certainty.

104. The meaning for which the plaintiff contends is, in my view, not open on the words used and would be inconsistent with the context and commercial purpose of the contract (and the dispute resolution clause) as well as being inconsistent with legal certainty. If the plaintiff had wished clause 21 to bear the meaning for which it contends, then different words would have been used by the parties. The words used would have made clear that, in the event of a dispute arising, the parties, by mutual consent, would resolve to refer

the dispute to the dispute resolution process contained in clause 21. However, that is not what they agreed.

105. I do not believe that there is any ambiguity in the words used in the introductory part of clause 21 such that recourse needs to be had to the *contra proferentem* principle of construction. The words used are clear. If I were wrong about that, I would nonetheless reject the contention advanced by the plaintiff as to the possible construction of clause 21 by adopting the approach referred to by McGovern J. at para. 25 of his judgment in *BAM*. Even if there were two possible constructions of clause 25 reasonably open (being the construction for which the plaintiff contends and that contended for by the HSE) (and I do not believe that there are), I would nonetheless prefer the construction which is consistent with business common sense which, in my view, is that advanced by the HSE.

106. Nor, in my view, is it necessary to rely on the principle referred to by the Supreme Court in *McCabe Builders (Dublin) Limited v. Sagamu Developments Limited* [2011] 3 IR 480, on which the HSE relies, that the court should seek to give effect to the *"apparent intentions of parties to enter into binding contracts"*. It is, in my view, unnecessary to rely on that principle in circumstances where the parties did clearly enter into a contract on 27th March, 2020 which contained clause 21 which clearly imposed contractual obligations on the parties.

107. Insofar as the plaintiff contends that the words used were intended to refer to the parties having to reach agreement or not in the future once a dispute arose to refer that dispute to the dispute resolution process provided for in the clause, since it would be necessary to work out the procedure which would be applicable to the process, I reject that contention. First, for reasons which I discuss later in this judgment, I am satisfied that the parties agreed to the currently applicable arbitration rules of the ICC which contains a provision for determining the applicable procedures. Second, and more importantly for present purposes, it is not necessary for the parties to agree the applicable procedures in the agreement in order for that agreement to constitute an *"arbitration agreement"* for the purposes of the Model Law, as Article 19 of the Model Law makes clear that, while the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the relevant arbitration, failing such agreement, the arbitral tribunal may, subject to the provisions of the Model Law, conduct the arbitration "*in such manner as it considers appropriate"*. Article 19(2) also makes clear that that power includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Therefore, the argument that the parties would have to reach agreement on the procedures applicable to any arbitration under clause 21 once the dispute arose and that, as a consequence, clause 21 merely amounts to an agreement to agree in the future, must be rejected.

108. I am satisfied, therefore, that clause 21 of the contract is an "*arbitration agreement*" under Article 8(1) of the Model Law. It satisfies the definition of "arbitration agreement" in Article 7 of the Model Law, in that it is an agreement by the parties to submit to arbitration the disputes referred to which have arisen, or which may arise, between them

in respect of the legal relationship between them. It is not an agreement to agree, or not, to refer such disputes to arbitration in the future.

Whether the Plaintiff's Claims fall within the Scope of the Arbitration Agreement

109. The next issue is whether the claims advanced by the plaintiff in the proceedings fall within the scope of the arbitration agreement contained in clause 21 of the contract.

110. In its statement of claim, the plaintiff alleges that the HSE breached the contract by failing to pay the amount allegedly due under the contract for the purchase of the ventilators. The plaintiff seeks damages in lieu of specific performance of the contract and damages for breach of contract. In addition, the plaintiff contends that the HSE has made "*egregious and unwarranted allegations*" in relation to the plaintiff which were "*formulated and intended to damage the plaintiff's commercial and economic interests*" (para. 26 of the statement of claim). The plaintiff alleges that the HSE, its servants or agents, "*bound the plaintiff to enforceable legal obligations under the contract dated the 27th March, 2020, and then intentionally sought to contract directly with the manufacturer and to the calculated detriment of the plaintiff"*, as a consequence of which the plaintiff has suffered loss and damage, as well as damage to its reputation and commercial standing (paras. 28 and 29 of the statement of claim). The plaintiff has provided particulars of the alleged intentional damage to its business reputation which it claims entitles it to aggravated and exemplary damages. In addition to alleging breach of contract against the HSE, the plaintiff also alleges "*breach of trust and breach of duty*" and alleges that the HSE has "*actively undermined the economic interests of the plaintiff and damaged the trading reputation of the plaintiff with others to include, but not limited to, the manufacturer of the ventilators the subject matter of the contract*" (para. 31 of the statement of claim). It alleges that the HSE has "*undermined the position, standing and relationship between the plaintiff and the manufacturer of the said ventilators and has intentionally and/or negligently and breach of duty caused significant consequential, commercial and reputational damage to the plaintiff"* (para. 33 of the statement of claim). The plaintiff seeks aggravated and/or exemplary damages against the HSE *"for intentional interference with [its] economic interests and damage to its commercial standing and reputation".*

111. Those are the claims made in the statement of claim. The HSE contends that those claims all fall within the scope of the arbitration agreement contained in clause 21 of the contract. The HSE relies on the principles applicable to the interpretation of contracts and arbitration agreements discussed earlier and on the broad terms of clause 21, which provides for the reference of "*any dispute*" to the dispute resolution process provided for in the clause.

112. While not disputing the principles to be applied to the interpretation of the clause, the plaintiff contends that on its proper interpretation it does not cover the claims made in the statement of claim and, in particular, that it does not extend to the tortious claims made of intentional interference by the HSE with the plaintiff's economic interests. The plaintiff relies on the judgment of Clarke J. in the High Court in *Kelly v. Lennon* [2009]

IEHC 320 ("*Kelly*"), to the effect that some aspects of its claim might be covered by clause 21 where as others, such as the claims in tort, are not.

113. The plaintiff also relies on its intention to expand the claims in the proceedings to include a claim in defamation arising from a complaint made by the HSE to An Garda Síochána in relation to the plaintiff, the details of which it is said the HSE has failed to provide to the plaintiff. The plaintiff claims that any such expanded claim to include a claim in defamation against the HSE would not be covered by clause 21. It relies on reports from An Garda Síochána to the Policing Authority under s. 41A of the Garda Síochána Act, 2005 (as amended) for April, 2020 and May, 2020 (the "Garda Reports"). Both of those reports contain a paragraph in very similar terms. The Garda Report for May 2020, for example, contains the following paragraph (on page 31):

> *"Following receipt of a complaint from the HSE alleging an attempt to defraud €7.5 million, an investigation was commenced by the Garda National Economic Crime Bureau (GNECB) in conjunction [with] international partners, including Interpol and Europol. The complaint related to the procurement of ventilators by a registered Irish Company. It was established that the monies had been paid in full. However, following the intervention of GNECB, an application was made to the High Court seeking injunctions and the payment has not been transferred. The investigation remains ongoing."*

A paragraph in similar, but not identical, terms is contained on page 22 of the Garda Report of April 2020.

114. The plaintiff relies on those reports and on an article published in the Irish Times on 7 May 2020 in relation to one or both of the reports as being defamatory of it, as set out in correspondence exchanged between the plaintiff's solicitors, Murray Flynn, and the HSE's solicitors, Philip Lee. While it is not directly relevant to the issues which I have to decide on this application, I should make clear that there are a number of serious inaccuracies in the paragraph contained in the two Garda Reports. Contrary to what is said in the reports, no monies were paid by the HSE. No application was made to the High Court by the HSE concerning the payment of the monies. The only application to the High Court seeking an injunction in relation to the payment of the monies was the application for the interlocutory injunction made by the plaintiff seeking to compel the HSE to comply with the contract and to transfer the monies which the plaintiff claims the HSE was obliged to pay under the contract. The reason why the payment was not made was not because of any injunction granted, as may be implied in the Garda Reports, but because the HSE determined not to pay the monies for the reasons referred to earlier in this judgment.

115. In response, the HSE relies on the contents of the correspondence exchanged between Murray Flynn and Philip Lee and to the fact that what was being threatened in that correspondence was not any amendment to the existing proceedings to expand the claims made in the proceedings to include a claim for defamation, but rather the inclusion of the HSE as a co-defendant in separate proceedings which the plaintiff was threatening to issue against the Irish Times (see for example, the Murray Flynn letter of 10th May,

2020). It appears that those proceedings have not in fact been issued against the Irish Times or the HSE (or, at least, were not issued as of the date of the hearing of the application the subject of this judgment).

116. There is no dispute between the parties as to the principles which must be applied to the interpretation of the relevant part of clause 21 which concerns the scope of the arbitration agreement. Those are the principles derived from *Fiona Trust* and the relevant Irish decisions including *O'Meara* and were summarised by me in *Townmore (No. 1), Townmore (No. 2)* and *XPL*. I will apply those principles in determining the scope of the arbitration agreement contained in clause 21.

117. Before I summarised the principles concerning the interpretation of an arbitration agreement in *Townmore (No. 1*), I described the position which the Irish courts have adopted in relation to the interpretation of arbitration agreements in general terms, at para. 30 of my judgment in that case. I explained that the determination of the scope of an arbitration agreement involves an exercise of contractual interpretation. However, that exercise, while attracting the application of general principles of contractual interpretation, is conducted in a particular context, namely, where the parties have agreed to refer all or some of their disputes to arbitration. The authorities (some of which I have referred to earlier in this judgment) established that a presumption arises that the parties intend that where a contract incorporates an arbitration agreement, it is presumed that the parties intend that all of their substantive disputes be determined by arbitration. That presumption is given concrete effect by the strong support for the arbitral process shown by the Irish courts, particularly, but not only, following the enactment of the 2010 Act. The Irish courts have adopted a broad or liberal approach to the construction of arbitration agreements. This is a concrete example of the significant support which the Irish courts have shown for the arbitral process. The plaintiff does not dispute that but, without prejudice to its principal contention that clause 21 is not an arbitration agreement at all for the purposes of the Model Law, it contends that it is not wide enough to cover all of the disputes between the parties. I do not agree.

118. I am satisfied that, applying the general principles of contractual interpretation, as well as the further particulars applicable to the interpretation of arbitration agreements, as discussed earlier, the words used by the parties in clause 21 of the contract are wide enough to cover all of the issues raised between the parties in the proceedings, on the basis of the pleadings as they stand at this point in time. The parties agreed to refer "*any dispute*" to the dispute resolution process referred to in the clause. It is accepted by the plaintiff that there is a dispute between the parties. The wording of clause 21 could not be any wider or more clear, in my view. It states that it covers "*any dispute".* I find that it means what it says.

119. The principles of interpretation which must be applied to the interpretation of clause 21 require me to give a broad interpretation to the clause. I must also start on the basis that there is a presumption or assumption that the parties intended all of the disputes arising between them in the course of their relationship to be covered by the dispute resolution

process provided for in the contract. If the parties had intended that certain disputes which might arise between in the course of their relationship would be referred to arbitration but that others could be the subject of court proceedings, the parties could have provided for this in the contract. However, they did not do so. They agreed to refer "*any dispute*" to the dispute resolution process referred to in the clause.

120. I am satisfied that that description is wide enough to cover not only the plaintiff's claims in contract, but also its claims in tort. The judgment of Charleton J. in the High Court in *O'Meara* makes clear that an arbitration clause or agreement may cover all disputes between the parties to the agreement, whether they concern a claim in contract or in tort. The arbitration clause in that case referred to "*all disputes which arise between the parties in connection with [the] lease or the subject matter of the lease*…". Charleton J. held that that clause was wide enough to cover the claims made in the proceedings in contract and in tort. He cited with approval the comments made by Lord Hoffman at paras. 6 and 7 of his opinion in *Fiona Trust* (which were summarised by me in my summary of the relevant principles at para. 53 of my judgment in *Townmore (No. 1)),* in reaching that conclusion. As Charleton J. was satisfied that the claims in contract and tort made in that case were covered by the arbitration clause, which referred to "*all disputes"* between the parties in connection with the relevant lease, so to am I satisfied that the agreement between the plaintiff and the HSE to refer "*any dispute*" to the dispute resolution process referred to in clause 21 covers the claims made by the plaintiff in the proceedings in contract and in tort.

121. While the plaintiff relied on the judgment of Clarke J. in the High Court in Kelly in support of its contention that the clause could be interpreted such that the parties could have agreed to refer some of the issues between them to arbitration, while at the same time agreeing that other issues had to be dealt with by way of court proceedings. However, that case is of no assistance to the plaintiff. As discussed in my judgment in *Ocean Point* (at paras. 68 to 73), the arbitration clause at issue in *Kelly* expressly provided for arbitration in limited circumstances only. The parties had agreed, therefore, that only some of their disputes would be resolved at arbitration. In *Kelly*, a dispute arose between the plaintiffs, who were the purchasers, and the defendant, who was the vendor, under a contract for the sale of certain lands. The plaintiffs contended that the contract had come to an end and brought proceedings seeking a declaration to that effect and a return of the deposit. The defendant disputed that claim and maintained that the contract continued in effect and remained capable of enforcement. The defendant also maintained that the dispute was covered by an arbitration clause contained in the contract of sale and sought to have the proceedings stayed under s. 5 of the Arbitration Act, 1980. Clarke J. carefully analysed the issues which would require to be determined between the parties by a court or by an arbitrator. He concluded that two of the issues were matters purely for the court, but that one of the issues clearly fell within the scope of the arbitration clause. The issue which he had to decide was the proper course to be taken where some, but not all, of the issues which arose in proceedings were the subject of a valid and binding arbitration clause and where, as in that case, those issues related not to standalone causes of action themselves, but were components of the matters that would need to be determined by

the court in order to come to a proper decision on a single cause of action which, in that case, concerned the continued validity of the contract (see para. 6.8 of the judgment).

122. In considering that issue, Clarke J. stated (at para. 7.1) that:-

> *"…the starting point must be to give full recognition to the fact that the parties have agreed between themselves in the contract to refer any questions under [the contract] to arbitration. A court should not seek to go behind that decision of the parties. In those circumstances it does not seem to me that there could be any legitimate basis for the court taking on the role, which the parties had agreed to refer to an arbitrator, of determining any issues which arise under* [the relevant provision of the contract at issue]."

123. However, Clarke J. noted that in order for there to be a final determination as to the continuing existence of the contract, it was necessary that some issues be decided by the court and some by an arbitrator. That fact, while unusual, arose by reason of the terms of the contract which provided for arbitration in limited circumstances only. It was, therefore, necessary for the court to determine what it should do when faced with the situation, as arose in that case, where there was a single cause of action, the proper resolution of which required a determination potentially of some issues over which the court had jurisdiction and some issues which the parties had agreed to refer to arbitration. Clarke J. held that, in such a situation, the court had a discretion as to the proper course of action to adopt and that that discretion should be exercised in such a way as to ensure, insofar as possible, a speedy resolution of all of the issues which arose between the parties, while at the same time ensuring that the court did not "*trespass on determining any issue which has been properly made the subject of an arbitration agreement between the parties*." (para. 7.4). The court emphasised that the discretion to which it was referring did not extend to the court *"taking over the jurisdiction to determine any issue properly referred to arbitration",* but rather that discretion concerned the approach which the court should take in determining how the various elements of the case (being those which were properly within the jurisdiction of the court and those validly referred to arbitration) *"should be sequenced so as to maximize the likelihood of a speedy and just resolution of all issues between the parties"* (para. 7.5).

124. The reason why Clarke J. had to grapple with the issue of sequencing in that case was because the parties had expressly provided that some disputed issues between them would be resolved at arbitration, whereas others would require to be determined by the court. That is not the case with clause 21 of the contract. The parties did not agree that some of their disputes would be determined by the court and others by arbitration. They agreed that "*any dispute*" between them would be dealt with in accordance with the procedure provided for in clause 21.

125. I am satisfied, therefore, that all of the claims made by the plaintiff in the statement of claim, including the claims for breach of contract and in tort, fall within the scope of clause 21 and (subject to the other objections raised by the plaintiff) are required to be

referred to the dispute resolution process provided for in the clause, which is arbitration under the applicable rules of the ICC.

126. As regards the plaintiff's reliance on a further potential claim in defamation against the HSE arising from its complaint to An Garda Síochána, the Garda Reports and the article in the Irish Times, that claim does not form part of the proceedings between the plaintiff and the HSE. While the plaintiff refers in its written submissions to the potential expansion of the proceedings to include a claim in defamation against the HSE, the correspondence which refers to the potential claim in defamation against the HSE refers to the joinder of the HSE as a co-defendant in threatened proceedings against the Irish Times and not any amendment of the proceedings which are the subject of the present application to include a claim in defamation. The issue, therefore, does not arise on this application. I refrain from expressing any view on whether a claim in defamation of the type intimated by the plaintiff against the HSE would be covered by the provisions of clause 21 of the contract.

Whether HSE is precluded from seeking reference: Submission of First Statement on Substance of Dispute

127. When making his oral submissions at the hearing in response to the HSE's application, counsel for the plaintiff sought to raise for the first time an additional ground of objection to the HSE's application. The argument sought to be advanced was that the HSE was precluded from seeking the reference to arbitration, and the court was precluded from making the reference, as the HSE had submitted its "*first statement on the substance of the dispute"* between the parties prior to seeking the reference. It was contended that that "*statement*" was made by Mr. Lee of the HSE's solicitors by means of disparaging comments in relation to the plaintiff, which were allegedly made in a telephone conversation with Mr. O'Brien of the plaintiff's solicitors on 6th April, 2020, subsequently referred to in a letter from Murray Flynn to Philip Lee of that date.

128. Counsel for the HSE objected to the plaintiff seeking to raise this ground of objection on the basis that it had not been mentioned in correspondence, on affidavit or in the written submissions exchanged between the parties before the hearing. That was not disputed. I ruled that I would permit the plaintiff's counsel to make his argument on the point and let counsel for the HSE respond and that I would then consider whether it was open to the plaintiff to raise this additional ground of objection, not having done so before the hearing.

129. It is quite correct that the plaintiff did not raise this ground of objection in correspondence, on affidavit or in its extensive written submissions prior to the hearing. It was raised for the first time by the plaintiff's counsel in responding to the HSE's application at the hearing. Ordinarily, a party ought to be precluded from raising a point in circumstances where it had not been raised previously, as that would generally be unfair to the opposing party. The whole point about giving directions in relation to the exchange of affidavits and written submissions is that the parties can set out in advance the points to be argued at the hearing. That is not to say that, in exceptional circumstances, a party may not be permitted to advance a new argument at the hearing

which had not been signalled in the submissions or other documents prior to the hearing. Ultimately, however, the court's task is to ensure that the hearing is as fair as possible for both parties. I am conscious that under s. 11 of the 2010 Act, there is no appeal from my decision on the HSE's application. I have decided, therefore, to permit the plaintiff to rely on this new ground of objection and to consider it in this judgment. Had I felt that the HSE was prejudiced to any significant extent in dealing with the point, I would have adjourned the hearing to allow further affidavits and written submissions to be filed. However, counsel for the HSE was in a position fully to address the argument in her reply. I was satisfied that it was not unfair or unjust to permit the new ground of objection to be raised in the particular circumstances. However, generally a court will be slow to permit fresh points to be made where careful directions have been made requiring the parties to set out their case on affidavit and in written submissions.

130. The plaintiff contends that comments allegedly made by Mr. Lee in a telephone call with Mr. O'Brien on 6th April, 2020 amount to the submission by the HSE of its *"first statement on the substance of the dispute"* between the parties and that this predated any request by the HSE for a reference to arbitration. It is important to note precisely what is said to amount to the "*first statement on the substance of the dispute"* by the HSE. As I understand it, counsel was referring to comments allegedly made by Mr. Lee which were then referred to by Mr. O'Brien in the Murray Flynn letter of 6th April, 2020. In that letter, having referred to various telephone calls between Mr. Lee and Mr. O'Brien on 3rd April, 2020 and 5th April, 2020 in relation to a response to previous correspondence from the plaintiff's solicitors, Mr. O'Brien stated:-

> *"Your office's Mr. Philip Lee has today, yet again telephoned the writer and made comments of an extraordinarily disparaging nature against our client, and refused when asked to substantiate the accusation that our clients 'were not trustworthy'. How such accusations can be made on behalf of the HSE absent any correspondence is egregious.*
>
> *Please note that we do not consider it appropriate that, given the seriousness and urgency of this matter, which is only increasing, that this matter be dealt with by way* [of] *unrecorded and undocumented telephone call.*
>
> *Given the extraordinary and serious nature of this accusation made by your client regarding ours, we require your client's concerns and position to be set out in writing. The actions of your client would appear to be for the sole purpose of further delay and the avoiding of contractual obligations notwithstanding that this contract was entered [into] without any doubt as to the obligations thereunder…"*

131. In response to a question I raised of counsel for the plaintiff, counsel confirmed that his contention was that the comments allegedly made by Mr. Lee as recorded in the Murray Flynn letter of 6th April, 2020 constituted the *"first statement on the substance of the dispute*" by the HSE. Counsel went on to note that a further letter of 8th April, 2020 was sent by the plaintiff's solicitors and that a response was ultimately sent by the HSE's

solicitors on 10th April, 2020. In the meantime, the plaintiff had brought its application for an interlocutory injunction which was supported by an affidavit sworn by John Ward on 7th April, 2020. In the course of that affidavit, Mr. Ward referred to various telephone conversations which he alleged to have taken place between Mr. Lee and Mr. O'Brien on 3rd April, 2020, 5th April, 2020 and 6th April, 2020 (see paras. 26 to 30 of John Ward's affidavit). At para. 30 of that affidavit, Mr. Ward referred to the alleged conversation between Mr. Lee and Mr. O'Brien on 6th April, 2020 at which it is alleged that Mr. Lee stated that *"he had been instructed and/or was of the view that the plaintiff and/or your deponent and/or other employees 'were not trustworthy' or 'could not be trusted'"* and that he had been advised *"that when asked to do so, that no detail or reasons for such accusations and assertions were provided*." It must again be recorded that in the Philip Lee letter of 10th April, 2020, which referred to the basis on which it was alleged that the HSE was not obliged to pay for the ventilators, and in which reference is made to the requirement to refer the dispute to arbitration, it was also stated that Mr. Ward's affidavit contained "*averments which are not accepted*" and "*reference to conversations which were clearly without prejudice in nature*". On the basis of the position adopted in the Philip Lee letter of 10th April, 2020, the only affidavit sworn on behalf of the HSE in response to the interlocutory injunction application was a very short affidavit of Murrough McMahon sworn on 11th April, 2020, which referred to and exhibited the Philip Lee letter of 10th April, 2020. That affidavit did not expressly address the issue of the comments allegedly made by Mr. Lee. However, in light of the contents of the letter of 10th April, 2020, I have proceeded on the basis that Mr. Lee disputes what is alleged and disputes the plaintiff's references to the conversation, which he maintains was without prejudice, in open correspondence and on affidavit.

132. Apart from objecting to the plaintiff's entitlement to raise this objection at this stage, the HSE contends that there is no merit to the objection. It makes a number of points. First, it says that the Murray Flynn letter of 6th April, 2020, which makes reference to Mr. Lee's alleged comments, predated the commencement of the proceedings. The proceedings were not issued until 7th April, 2020. Therefore, apart from anything else, the HSE contends that the comments referred to in the letter could not amount to a submission of a statement on the substance of the dispute before the court.

133. Second, the HSE contends that the letter in question is not its letter, but a letter sent by the plaintiff's solicitors, Murray Flynn. It does not amount to the submission by the HSE of the substance of its defence.

134. Third, it makes the point that objection was taken on behalf of the HSE in the Philip Lee letter of 10th April, 2020 to correspondence referring to without prejudice conversations (the dispute between the parties in relation to the alleged without prejudice nature of the conversations was referred to by John Ward in his affidavit of 7th April 2020 grounding the plaintiff's application for the interlocutory injunction).

135. Fourth, the HSE relies on my judgment in XPL in support of its contention that the Murray Flynn letter of 6th April, 2020 does not amount to the submission of a statement on the

substance of the dispute by the HSE. It was not a submission by the HSE to the court. It did not have the sufficient indicia of formality. It did not address the substance of the dispute between the parties.

136. In my view, the HSE is correct. I am satisfied that the comments attributed to Mr. Lee referred to in the Murray Flynn letter of 6th April, 2020 do not amount to the submission by the HSE of the "first statement on the substance of the dispute" by the HSE. I am proceeding on the assumption, for the purpose of considering the argument, that the comments were made (although I make no finding to that effect and I have noted the position adopted by the HSE in the Philip Lee letter of 10th April, 2020). I have reached that conclusion on the substance of the point for several reasons. First, in order to constitute the submission by a party of a statement on the substance of the dispute, the submission must be made in the context of an action which is before a court. The comments relied on as referred to in the Murray Flynn letter of 6th April, 2020 were not contained in any submission by the HSE in respect of an action before the court. The action did not commence until the following day. The action was not before the court on 10th April, 2020.

137. Second, the statement said to constitute the "*first statement on the substance of the dispute*" must be submitted by the party who is alleged to have made that statement to the court as part of a formal document, such as a pleading or affidavit. Even then, as the decision in *XPL* makes clear, not all affidavits or pleadings amount to a *"first statement on the substance of the dispute"* so as to preclude an application for a reference to be made. The comments referred to in the Murray Flynn letter of 6th April, 2020 are not contained any document, whether formal or otherwise, submitted by the HSE to the court in respect of an action before the court. They are not contained in any submission at all by the HSE, still less a submission by it to the court in respect of an action before the court.

138. Third, the formal document containing the statement said to constitute the "*first statement on the substance of the dispute*" must actually refer to the "*substance of the dispute*". The comments referred to in the Murray Flynn letter of 6th April, 2020 do not refer to the substance of the dispute. Assuming, for the purpose of the argument, that the comments were made by Mr. Lee, in no way do they amount to a statement on the "*substance of the dispute*". The comments themselves, as recorded in the letter, made no reference to the substance of the dispute.

139. Fourth, the whole purpose of the requirement in Article 8(1) for the request for the reference to arbitration to be made "*no later than when submitting* [the] *first statement on the substance of the dispute*" is that a party cannot, on the one hand, participate in the action before the court while, on the other hand, seek to refer the dispute to arbitration. That is why a party who wishes to have a dispute referred to arbitration must, either before or at the same time as making a formal statement on the substance of the dispute between the parties, request that the parties be referred to arbitration. Otherwise, that party will be taken to have waived its entitlement to request the reference to arbitration and will be precluded from seeking the reference. The submission

of the "*first statement on the substance of the dispute*" must, however, involve some form of participation by the party who is alleged to have submitted such a statement in the court proceedings. That was not the case with respect to the comments allegedly made by Mr. Lee before the proceedings were commenced.

140. The plaintiff did not open any authority in support of this ground of objection. The HSE did refer to my judgment in XPL. In that case it was contended by the plaintiff that the defendant had submitted its "*first statement on the substance of the dispute*" when a replying affidavit was sworn on behalf of the defendant in response to the plaintiff's application for liberty to enter final judgment. The plaintiff contended that the defendant was required to request the reference to arbitration, by making an application to court, no later than when that replying affidavit was provided. I did not agree. At paras. 49 and 50 of my judgment in XPL, I considered some of the authorities on the point, including Mansfield "*Arbitration in Ireland: Arbitration Act, 2010 and Model Law: A Commentary* (2nd Ed.) (2018) and Dowling-Hussey and Dunne: *Arbitration Law* (3rd Ed.) (2018). I considered the averments in the replying affidavit relied upon and noted that it made two preliminary objections. The first was on the basis of the arbitration agreements between the parties. The second concerned an alleged abuse of process, which I concluded was not relevant. I concluded that the replying affidavit did not amount to the defendant's "*first statement on the substance of the dispute*" between the parties. At para. 54 of my judgment in XPL, I stated as follows:-

> *"In order to constitute a statement on the 'substance of the dispute', the particular document relied upon, in this case a replying affidavit, would have to at least refer to the nature of the claim being made and the nature of the defence to that claim, with some discussion as to the claim and defence. A mere reference to the fact of a dispute could not, in my view, amount to a 'statement' on the 'substance' of that dispute."*

141. At para. 55 of my judgment, I stated that the plaintiff was ignoring the fact that the particular statement had to address the "*substance*" of the dispute and not merely refer to the fact of a dispute. I concluded, therefore, in XPL, that the replying affidavit did not constitute a "*statement on the substance of the dispute"* within the meaning of that term in Article 8(1) of the Model Law.

142. The case made by the plaintiff in XPL to the effect that the replying affidavit amounted to a "*statement on the substance of the dispute*" was much stronger than that made by the plaintiff in the present case. The document relied upon was a formal document, a replying affidavit, sworn in proceedings which were before the court, unlike the comments referred to in the letter relied on by the plaintiff in this case.

143. I am satisfied that this ground of objection made by the plaintiff is completely devoid of any merit on so many grounds. I have no hesitation in rejecting it.

Whether Alleged Arbitration Agreement is Null and Void, Inoperative or Incapable of Being Performed

144. The plaintiff advanced a series of arguments in its written submissions and in the course of the hearing of the HSE's application by way of opposition to that application. The fundamental point made by the plaintiff in the written submissions, and at the hearing, was that clause 21 did not amount to an "*arbitration agreement*", as it required a further agreement between the parties to refer the relevant dispute to arbitration. I have ruled against the applicant on that fundamental point.

145. In its written submissions, the plaintiff said the following in relation to the provisions of Article 8(1) of the Model Law under which the court will refuse to make the reference to arbitration where it finds that the agreement is *"null and void, inoperative or incapable of being performed":-*

> "*The position of the plaintiff in respect of arbitration is that there is no valid arbitration agreement and that clause 21 cannot be interpreted as recognising an existing mutual consent to refer the within disputes, or indeed, any disputes to arbitration. It is not the extent of an arbitration agreement that is in dispute, but rather the existence of any arbitration has however asserted or at all."* (para. 41)

146. Notwithstanding that submission, it seems to me that a number of the points advanced by the plaintiff at the hearing could be seen as an attempt by the plaintiff to make the case that the arbitration agreement is "*null and void, inoperative or incapable of being performed*" under article 8(1) of the Model Law.

147. These points are as follows:-

(1) The plaintiff submits that clause 21 refers to rules of the ICC which are no longer in force and that the clause is, therefore, uncertain, meaningless and illusory. The plaintiff relies on passages from McDermott & McDermott "Contract Law" (2nd Ed.) (2017) in support of this argument.

(2) The plaintiff also contends that clause 21 is too vague, as it does not make provision for the rights and duties of the parties and for the powers and authority of the arbitrator, which could only be agreed between the parties where they mutually consent to refer a particular dispute which has arisen to arbitration.

(3) Related to (2), the plaintiff also relies on the alleged absence of procedures for non-party discovery or other similar procedures, whereby evidence could be taken from persons who are not representatives of the parties (see para. 13 of the replying affidavit of John Ward sworn on 5th May, 2020).

148. The HSE disputes each of these points and, in summary, makes the following points in response:-

(1) It contends that there is no uncertainty or lack of clarity as to the arbitral institution referred to in clause 21 and that the provisions of the clause itself

make clear that the parties intended arbitration and no other dispute mechanism process. The clause refers to "*arbitrators*" and the "*place of arbitration*". The HSE submits that, notwithstanding, the reference to out of date rules of the ICC, the clause is still enforceable and requires arbitration pursuant to the current version of the ICC Arbitration Rules.

(2) and (3), The HSE relies on the provisions of Article 19 of the Model Law and Article 19 of the ICC Arbitration Rules in response to the arguments made by the plaintiff concerning the procedures at any arbitration under clause 21. Subject to the provisions of the Model Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in respect of the arbitration between the parties (Article 19(1) of the Model Law). Failing agreement between the parties, the arbitral tribunal is empowered to conduct the arbitration "*in such manner as it considers appropriate*" and its powers include the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 19(2) of the Model Law). The HSE also submits that none of these issues bear upon the enforceability of the arbitration agreement contained in clause 21 and that any disputes in relation to procedures can be dealt with in accordance with the provisions of Article 19 of the Model Law and Article 19 of the ICC Arbitration Rules. It further submits that it is not apparent that any procedural issue will in fact arise between the parties and that the issue has been raised by the plaintiff in a vacuum.

149. I have considered these various points raised by the plaintiff and have concluded that there is no merit to any of these further objections made to the HSE's application. Whether or not these arguments are classified as arguments directed towards the contention that the arbitration agreement contained in clause 21 is *"null and void, inoperative or incapable of being performed"* (in which case the onus would lie on the plaintiff) or whether they are treated as part of the plaintiff's case that no arbitration agreement exists at all (on which the issue the onus lies on the HSE) ultimately makes no difference to my consideration of these various points. While it seems to me that the arguments are in fact directed to the former issue rather than the latter issue, in which case the onus lies on the plaintiff to establish the existence of one or more of the disapplying factors referred to in Article 8(1). However, in the event that I have not fully understood the basis for, or the context of, the points being advanced by the plaintiff, I am prepared to consider these points, in the particular circumstances of this case, on the basis that the onus lies on the HSE effectively to disprove the arguments rather than on the plaintiff.

(1) The Applicable ICC Rules

150. Clause 21 refers to the "*Rules of Conciliation and Arbitration*" of the ICC. It is common case those rules are no longer in existence. As I understand it, the rules came into existence in 1975 and were replaced in late 1997/early 1998. The current rules of the ICC referable to arbitration are the ICC Arbitration Rules (in force as from 1st March, 2017). The ICC has other dispute resolution rules, such as the ICC Mediation Rules (in force as

from 1st January, 2014). It will be recalled that the plaintiff provided the contract which contained clause 21 which referred to the rules of the ICC which are no longer in force (and have not been in force in over a decade). When I asked the plaintiff's counsel how it came to be that the plaintiff proposed a contract which contained a clause referring to rules of conciliation and arbitration which were no longer in force, I was informed that the form of contract had been obtained by the plaintiff on the basis of a Google search. What then is the significance of the fact that the arbitration agreement contained in clause 21 makes reference to out of date rules of the ICC?

151. In my view, the reference to out of date rules of the ICC has no significance to the status of clause 21 as an "*arbitration agreement"* for the purposes of the Model Law and no significance to the enforceability of that arbitration agreement. It is clear from the terms of clause 21 that the parties intended that any dispute between them would be dealt with by arbitration (and not by any other dispute resolution procedure). The parties expressly agreed that one or more "*arbitrators*" would be appointed by the ICC under its rules to conduct the arbitration. The parties also expressly agreed in clause 21 that the "*place of arbitration*" would be Dublin. They further agreed that the "*proceedings*" (which can only have been intended to be a reference to the arbitration proceedings) would be carried out in the English language. In my view, applying the principles of interpretation of contracts, including those applicable to the interpretation of arbitration agreements, discussed earlier, and having regard to the pro-arbitration approach of the Irish courts, it is clear that the parties agreed to arbitration by one or more arbitrators appointed by the ICC under its rules and that the place of arbitration would be Dublin. In order for the agreement reached by the parties to be effective, the parties must have intended that the arbitration would be conducted in accordance with the currently applicable rules of the ICC, namely, the ICC Arbitration Rules. The fact that clause 21 refers to out of date rules of the ICC is not, in my view, fatal. A contrary conclusion would fly in the face of the broad or liberal approach to the interpretation of arbitration agreements discussed earlier and with the pro-arbitration approach of the Irish courts. It would also be nonsensical and would frustrate the clearly expressed agreement of the parties to have their disputes referred to arbitration in accordance with the rules of the ICC, as the arbitral institution selected by the parties.

152. I note the observation made in Mansfield that:-

> *"…international jurisprudence has typically held arbitration agreements to be invalid only in very limited circumstances, such as where the arbitration agreement provided that one of the parties was to act as an arbitrator, or where a party was rendered insolvent and unable to afford to commence arbitral proceedings as a result of the other parties' actions. In contrast, arbitration agreements have been held to be valid in a wide range of circumstances, including where the parties agreed to refer a dispute to a non-existent arbitral tribunal, where an arbitral institution agreed by the parties no longer exists, and where one party alleges that the arbitration agreement was rescinded or superseded…"* (p. 125) (footnotes omitted)

153. The parties referred me to two of the cases mentioned in the footnotes to that quotation from Mansfield. Both provide support for the conclusion which I have reached in relation to this contention advanced by the plaintiff. The first case referred to is the decision of the Court of Appeal for Ontario in *Dalimpex Limited v. Janicki and ors* [2003] 64 O.R. (3d) 737 ("*Dalimpex*"). In that case, a Canadian company and a Polish company entered into an agency agreement which provided that Polish law applied to the agreement and contained an arbitration clause. The arbitration clause provided as follows:-

> *"Any disputes which may arise in connection with interpretation or execution of this agreement will be settled by the College of Arbitrators/Arbitration Court/at the Polish Chamber of Foreign Trade in Warsaw. Decision of this College will be final and binding for both parties. Competence of any state courts is absolutely excluded."*

154. However, after the parties entered into the agreement, the Polish Chamber of Foreign Trade ceased to exist and a new body, the National Chamber of Commerce, was created to take over its functions. It created a new arbitral body, the Court of Arbitration. When the Canadian company commenced proceedings in Ontario, the Polish company applied for a stay and a referral of the underlying disputes to the Court of Arbitration in Poland. That application was dismissed at first instance on the grounds that the arbitrator named in the arbitration clause had ceased to exist (and on the additional grounds that tort claims made in the proceedings fell outside the scope of the arbitration agreement). That decision was overturned on appeal by the Divisional Court which held that the arbitration clause was broad enough to encompass the existing Court of Arbitration (and that the disputes fell within the scope of the arbitration agreement). The Canadian company appealed to the Court of Appeal for Ontario. That Court dismissed the appeal. The Court of Appeal upheld the reasoning of the Divisional Court. It held that it was reasonable to interpret the arbitration clause as encompassing the new Court of Arbitration and that *"since this interpretation fairly provides for arbitration and is consistent with the intention of the parties to submit their disputes to arbitration, it should govern*" (per Charron J.A., para. 37, p. 751). The court was satisfied that the parties intended, by the inclusion of the generic words "*Arbitration Court*" in the clause, *"to import a measure of flexibility in respect of the identity of the arbitration tribunal"* (para. 37, p. 751). In passing, I note that the Court of Appeal also upheld the Divisional Court's conclusion that the tort claims fell within the scope of the arbitration clause.

155. In the present case, the ICC still exists as an arbitral institution. All that has changed is the name of the rules governing arbitrations conducted under its auspices. I am satisfied for the reasons set out earlier, that the parties clearly intended their disputes to be determined by arbitration conducted in accordance with the rules applicable to arbitrations conducted under the auspices of the ICC. The court does not need to go as far as the court went in Ontario by finding that the parties had intended to import a "*measure of flexibility*" in respect of the identity of the arbitral tribunal. There is no issue between the parties here as to the identity of the arbitral institution. It is the ICC, which still exists. I am satisfied that it is reasonable to interpret clause 21 as encompassing the

rules of the ICC which are currently in force and that, as in *Dalimpex*, that interpretation gives effect to the expressly stated intention of the parties that their disputes be resolved by arbitration under the auspices of the ICC and is consistent, therefore, with the intention of the parties and with the pro-arbitration approach of the Irish Courts.

156. The second case referred to by the parties is a decision of the Oberlandesgericht in Karlsruhe, Germany, given on 4th April, 2007 (referred to in the Case Law on UNCITRAL Texts (CLOUT) at Case 871). In that case, a dispute resolution clause contained in an agreement providing for the separation of a partnership between two lawyers provided that all disputes were to be settled by the dispute resolution body of the Bar Association of Karlsruhe. In the event that the Bar Association did not have its own arbitration rules, certain provisions of the German Civil Procedural Law were to apply. Shortly after the parties entered into the separation agreement, they discovered that the Bar Association of Karlsruhe did not have a dispute resolution body. They tried unsuccessfully to agree on an amendment to that provision of the agreement. When a dispute arose under the separation agreement, the claimant commenced court proceedings. The defendant objected. The court of first instance assumed jurisdiction and held that the arbitration clause was inoperable as there was no arbitral tribunal at the chosen Bar Association of Karlsruhe and that it could not be deduced from the agreement whether the parties had agreed to arbitration before a different Bar Association or whether they still wanted arbitration at all. On appeal, the Oberlandesgericht (Higher Regional Court) overturned that decision and refused jurisdiction on the basis of the provision of German Civil Procedural Law which corresponded to Article 8(1) of the Model Law. It appears from the commentary on the decision, that the court concluded that the parties wanted their dispute to be referred to arbitration and not to the state court. It held that the choice of the local Bar Association made clear that the parties intended to have their disputes decided by the dispute resolution body of the nearest Bar Association. As the Karlsruhe Bar Association did not have a dispute resolution body, the arbitration agreement of the parties contained a gap which had to be closed by supplementary interpretation (which the agreement itself also foresaw). The court agreed that if the parties had foreseen the lack of an arbitral tribunal at the local Bar Association, they would have opted for arbitration under the Rules of the Bar Association of Frankfurt, which was the nearest Bar Association with its own dispute resolution body.

157. While it is unnecessary to reach a view as to whether an Irish Court would reach the same conclusion, it does not have to do so, as the facts of the present case are quite different from those at issue in the German case. In that case, the selected Bar Association did not have a dispute resolution body. In the present case, the ICC is the selected arbitral institution and does have arbitration rules which are currently in force. Therefore, it is unnecessary in the present case to go as far as the German Court did in that case.

158. I have no hesitation in concluding that the argument advanced by the plaintiff in relation to the reference to the out of date rules of the ICC in clause 21 is misplaced. The reference to those out of date rules does not, in my view, undermine the validity or

enforceability of the arbitration agreement contained in clause 21. The reference to the out of date rules does not render the agreement uncertain, illusory or meaningless. Nor does it render the agreement *"null and void, inoperative or incapable of being performed".*

(2) and (3) Miscellaneous Arguments Re Procedure at Arbitration/Involvement of Non-Parties

159. I can deal with these arguments quite briefly. As mentioned earlier in this judgment, the parties agreed to arbitration under the auspices of the ICC as the relevant arbitral institution. I have also concluded that the current rules of the ICC, the ICC Arbitration Rules, apply to that arbitration. The fact that the parties did not spell out in any greater detail the procedures to be applied to the arbitration does not, in my view, in any way undermine the validity or enforceability of clause 21 as an "*arbitration agreement*" for the purposes of the Model Law, as contended on behalf of the plaintiff in correspondence, on affidavit and in its submissions.

160. As I mentioned earlier, Article 19 of the Model Law makes clear that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration and that failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate (subject to the provisions of the Model Law). As the parties have agreed to arbitration in accordance with the ICC Arbitration Rules, it is relevant to refer at this point to Article 19 of those rules which provide that:-

> *"The proceedings before the arbitral tribunal shall be governed by the [ICC Arbitration] Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."*

161. The parties have, therefore, made provision in the contract for the rules to be applied to the arbitration between them. The ICC Arbitration Rules apply and, where those rules are silent, it is open to the parties to agree further rules or, failing such agreement, it is open to the arbitral tribunal to settle on the applicable procedural rules. It is not for the court to second guess the parties' agreement in that regard. The absence of any agreement over and above what they have agreed in clause 21 in relation to the procedures applicable to any arbitration between them does not, in my view, undermine the validity or enforceability of clause 21 as an "*arbitration agreement*" for the purposes of the Model Law. Nor does it render clause 21 *"null and void, inoperative or incapable of being performed*" under Article 8(1).

162. While counsel for the plaintiff stated in the course of his submissions that the plaintiff was not relying on arguments similar to those considered by Ryan J. in *Franmer Developments Limited v. L & M Keating Limited and ors* [2014] IEHC 295 ("*Franmer*") (and discussed by me in Ocean Point), at times it appeared that the plaintiff was in fact seeking to advance similar arguments in relation to possible procedural difficulties or hurdles which the

plaintiff might face in an arbitration with the HSE conducted under the ICC Arbitration Rules. It is unnecessary to consider *Franmer* in any great detail. Ryan J. made clear in that case that practical inconveniences or difficulties faced by a party, having regard to the multiplicity of claims, the existence of indemnity claims and the absence of some parties from the arbitration, were not reasons to conclude that the arbitration agreement was "*null and void, inoperative or incapable of being performed"*. The fact that the arbitration would be complex or difficult or inconvenient was not a reason for so concluding. I reached an identical conclusion in relation to similar arguments which were advanced by the party opposing a reference to arbitration in *Ocean Point.*

163. Similarly, while the plaintiff has contended (in correspondence, on affidavit and in its submissions) that procedures such as non-party discovery or the ability to compel the attendance of witnesses who are not employed by the plaintiff or the HSE might not be available in any arbitration conducted under the ICC Arbitration Rules, I am quite satisfied that that is not a reason for the court not to enforce the arbitration agreement contained in clause 21 or to disapply the agreement on any of the grounds set out in Article 8(1) of the Model Law.

164. I have reached that conclusion for a number of reasons which can be briefly stated. First, the role of the court is to uphold and enforce an arbitration agreement which complies with the requirements of Article 8. The court is enforcing the parties' agreement and it would be inappropriate for the court to refuse to do so on the grounds that the parties may not have incorporated into that agreement certain procedural rights and entitlements. That was something within the control of the parties to agree or not to agree as the case may be.

165. Second, the grounds on which the mandatory obligation to refer parties to arbitration under Article 8 may be disapplied, must, in my view, be narrowly construed. The absence of expressly agreed procedures such as those mentioned by the plaintiff, is not, in my view, a reason for concluding that the arbitration agreement is *"null and void, inoperative or incapable of being performed*". That conclusion is supported by *Franmer* and *Ocean Point*.

166. Third, the argument is advanced by the plaintiff on a purely hypothetical basis. No indication is given as to the particular persons or types of documents which might be sought which would be unavailable to the plaintiff in an arbitration against the HSE conducted under the ICC Arbitration Rules.

167. Fourth, the plaintiff overlooks the powers of the court contained in Article 27 of the Model Law (and O. 39 of the Rules of the Superior Courts ("RSC")). Under Article 27 of the Model Law, the arbitral tribunal or a party, with the approval of the tribunal, may request the assistance of the court in taking evidence for the purposes of an arbitration and the court may execute the request according to its rules on taking evidence (which are set out in O. 39 RSC). As the parties did not address arguments on the scope of Article 27 (or O. 39 RSC), it is not appropriate that I express any concluded views on the scope of those provisions in this judgment. However, it may well be that the court has powers under

those provisions to direct that evidence be obtained (whether documentary or otherwise) from non-parties. In the course of the hearing, I drew the attention of the parties to the recent judgment of the Court of Appeal of England and Wales in *A and B v. C, D and E* [2020] EWCA Civ 409 on the application of s. 44 of the Arbitration Act, 1996 (court powers exercisable in support of arbitral proceedings) to non-parties to the arbitration. Again, I express no concluded view on the relevance of that judgment to Article 27 (and O. 39 RSC). However, an issue may arise in future as to whether the reasoning adopted by the Court of Appeal for holding that the court has jurisdiction under s. 44 of the 1996 Act to make an order against a non-party to the arbitration agreement may have relevance to applications to the Irish Courts under Article 27 (and O. 39 RSC). However, ultimately, those issues do not arise as part of this application as they are not relevant to the question as to whether the court should uphold the validity and enforceability of the arbitration agreement in the first place.

168. I am satisfied that no reasons have been advanced by the plaintiff to undermine the validity of the arbitration agreement contained in clause 21 of the contract or to prevent its enforceability on foot of the HSE's application for the reference to arbitration.

Conclusions

169. In conclusion, I am satisfied that clause 21 of the contract between the plaintiff and the HSE is an "*arbitration agreement*" within the meaning of that term in the Model Law. The court is subject to a mandatory obligation to refer the parties to arbitration in respect of the matters covered by that clause. The clause is extremely wide and covers "*any dispute*" between the parties. I am satisfied that all of the claims made in the statement of claim fall within the scope of clause 21. That includes the claims in contract and in tort. The plaintiff has not made any claim in defamation in the proceedings so the issue as to whether such a claim might be covered by the clause does not arise.

170. I have rejected the plaintiff's contention that the HSE should not be permitted to bring this application, or that the court should precluded from granting it, on the grounds that the HSE had submitted its first statement on the substance of the dispute prior to requesting the reference to arbitration. I am satisfied that the HSE did not do so and that the comments allegedly made by the HSE's solicitor (even on the assumption that they were made as recorded in the plaintiff's solicitors' letter of 6th April, 2020 did not amount to such a submission of a statement for the purposes of Article 8(1) of the Model Law.

171. Finally, I have rejected all of the other arguments advanced by the plaintiff in order to resist the order sought by the HSE under Article 8 of the Model Law.

172. In those circumstances, I will grant the relief sought by the HSE, refer the parties to arbitration in accordance with clause 21 of the contract and stay these proceedings.

173. I will list the matter to discuss the precise terms of the final orders to be made at 10.30am on 1 July, 2020.