International Arbitration

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CONTENTS

Ireland

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Introduction

"*The realisation, in the words of Lord Simon of Glaisdale…, that litigation, while certainly preferable to personal violence, is not in itself an intrinsically desirable activity, has encouraged the search for other methods of dispute resolution each of which has attracted it adherents and enthusiasts. One of the oldest and best established of these systems is that of arbitration.*"[1]

Legislation and the UNCITRAL Model Law

There has been a good history of arbitration being supported in Ireland. The Arbitration Act, 1954 was passed "*to make further and better provision in respect of arbitrations*" and gave effect to the Geneva Convention of 1927 on the execution of foreign arbitral awards. The Arbitration Act 1980 gave effect to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards and certain provisions of the Washington Convention of 1965 on the settlement of investment disputes. The Arbitration (International Commercial) Act, 1998 adopted the UNCITRAL Model Law for international commercial arbitration.

However, the 1954, 1980 and 1998 Acts have been repealed and the legislation which governs arbitration proceedings in Ireland now is the Arbitration Act 2010 (the "**2010 Act**") which applies to all arbitrations, both domestic and international. The law governing international arbitration is based on the UNCITRAL Model Law and the 2010 Act adopts the UNCITRAL Model Law, as amended on 7 July 2006.

The UNCITRAL Model Law is reproduced in its entirety as a schedule to the Act. Section 6 of the 2010 Act provides that, subject to the provisions of that Act, "*the Model Law shall have the force of law in the State*".

The 2010 Act (and, through it, the UNCITRAL Model Law) applies to all arbitrations commenced in Ireland on or after 8 June 2010. It restates that effect is given to the Geneva Convention and Protocol 1923, the New York Convention 1958 and the Washington Convention 1965.

Courts

There is no special national court for international or domestic arbitrations. Section 9 of the 2010 Act states that the High Court is the relevant court for the purposes of the Act.

Arbitration agreements

In writing

The 2010 Act applies Option 1 of Article 7 of the UNCITRAL Model Law (the "**Model Law**") to the requirements of an arbitration agreement. An arbitration agreement is defined

as "*[a]n agreement ... to submit to arbitration ... disputes which have arisen or which may arise ... in respect of a defined legal relationship whether contractual or not*". The arbitration agreement must be in writing, whether in the form of an arbitration clause in a contract or in the form of a separate agreement. An agreement will be in writing if its content is recorded in any form, notwithstanding that the arbitration agreement or contract may have been concluded orally, by conduct or other means. "*In writing*" includes electronic data interchange, email, telegram, telex or telecopy. It may be in the exchange of the claim and the defence and it may be incorporated by reference.

Disputes excluded from the 2010 Act

Section 30 of the 2010 Act clarifies that the 2010 Act does not apply to:

(i) disputes regarding the terms or conditions of employment or the remuneration of employees;

(ii) arbitrations conducted under Section 70 of the Industrial Relations Act 1946; or

(iii) arbitrations conducted by a property arbitrator appointed under Section 2 of the Property Values (Arbitration and Appeals) Act 1960.

Consumer disputes, where the arbitration clauses are not individually negotiated and where the disputes are worth less than €5,000, are only arbitrable at the election of the consumer. A "*Consumer*" is a person acting outside his trade, business or profession.

Arbitrator's jurisdiction

An arbitrator is permitted to rule on the question of his or her own jurisdiction pursuant to Article 16(1) of the Model Law. This provides that the "*arbitral tribunal may rule on its own jurisdiction*", which includes any questions regarding the existence or validity of the arbitration agreement, thereby granting the arbitrator primary responsibility for deciding whether he or she has jurisdiction to decide the dispute. However, this power is not final as an appeal can be made to the High Court under Article 16(3), and there is no appeal allowable from the High Court's decision. An assertion that the tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence, as per Article 8 of the Model Law.

In *Mayo County Council v Joe Reilly Plant Hire Limited*,[2] the High Court refused an application for a direction pursuant to Article 16(3) of the Model Law, and Order 56 Rule (1) (3) (f) of the Rules of the Superior Courts, that an arbitrator had no jurisdiction to adjudicate upon a claim made by the respondent against the applicant. The dispute arose in respect of the costs of works carried out by the respondent on behalf of the applicant. The contract between the parties contained an arbitration clause, which gave the arbitrator a broad power to hear a dispute of any kind, whether arising during or after the completion of the works or after the determination of the contract. The applicant did not dispute that there was a valid arbitration clause in the contract, but argued that the clause was no longer operative, as the respondent had accepted payment under the contract, and as such, there had been accord and satisfaction.

The Court stated that the fact of accord and satisfaction was not a basis to challenge the arbitrator's jurisdiction (though it may instead constitute a defence to the claim made by the respondent in the arbitration). It was held that in circumstances where the existence of an arbitration clause is not in dispute, the courts will be very slow to interfere with the arbitrator's ruling on his own jurisdiction.

Article 14 of the Model Law provides that if "*an arbitrator becomes de jure or de facto unable to perform his functions, or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or the parties agree upon termination*". The High Court may decide upon the termination of the mandate, but the decision of the High Court is not subject to appeal.

Validity of an arbitration agreement

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 (*BAM Building Ltd v UCD Property Development Company Ltd*[3]). However, an element of judicial confusion persisted for a time as to the correct standard to be adopted in deciding whether to uphold an arbitration clause.

In the case of *The Lisheen Mine v Mullock & Sons (Shipbrokers) Ltd*,[4] the Court considered the standard to be applied to this question. Previous cases had suggested quite a low threshold to be met by a party seeking to have proceedings referred to arbitration (*P Elliot & Co Ltd (In Receivership and In Liquidation) v FCC Elliot Construction Ltd*[5]). However, Cregan J held that the issue as to whether a valid arbitration agreement exists should be given "full judicial scrutiny", as opposed to being considered on a mere *prima facie* basis. He felt that the courts were the most appropriate venue in terms of efficiency and cost, given that the determination as to whether an arbitration agreement exists is a question of law.

This position has been followed in the case of *Sterimed Technologies International v Schivo Precision Ltd*.[6] McGovern J held that the onus is on the defendants to establish the existence of the arbitration agreement. If it discharges that burden then the onus shifts to the plaintiffs to show that the arbitration agreement was null and void if the court proceedings are not to be stayed. The High Court stayed proceedings pending the outcome of the arbitration in Charlotte, North Carolina. Similarly, McGovern J stayed proceedings under Article 8(1) of the Model Law in *BAM Building Ltd v UCD Property Development Company Ltd*[7] on the basis that the dispute between the parties was the subject of an arbitration agreement.

Challenge to arbitrator

Article 12 of the Model Law provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality, independence, or if he does not possess the qualifications agreed upon by the parties. The arbitrator's decision in respect of the challenge can itself be challenged by application to the High Court under Article 13 of the Model Law. The decision of the High Court is not subject to appeal.

Arbitration by agreement only

Irish law will only allow an arbitral tribunal to assume jurisdiction over individuals or entities where the parties so agree. Section 16 of the 2010 Act provides that an arbitrator may not direct that different proceedings be consolidated or heard at the same time without the agreement of the parties.

The High and Circuit Courts have power, under Section 32 of the 2010 Act, to adjourn court proceedings otherwise properly before the courts to facilitate arbitration if the relevant court thinks it appropriate to do so, provided the parties consent.

For arbitrations conducted in Ireland under the 2010 Act, Irish law governs the formation, validity and legality of arbitration agreements to the extent set out in that Act.

Arbitration procedure

Commencement of arbitration

Section 74 of the Statute of Limitations 1957 (as amended by the 2010 Act) sets out the manner in which arbitral proceedings are to be commenced. They are deemed to be

commenced on the date on which the parties to an arbitration agreement so provide as being the commencement date or, where no provision has been made by the parties as to the commencement, the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent. Section 74(2) makes provision for when a written communication is deemed to have been received. Article 21 of the Model Law provides that arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The applicable limitation period will depend on the particular cause of action in law which is the subject matter of the dispute. The limitation period for contractual claims where the contract is under hand is six years from the date of the commencement or accrual of the cause of action, and 12 years where the contract is under seal, unless the parties have agreed a different limitation period (which they may do).

Procedural rules

Article 19 of the Model Law provides that the parties are entitled to set their own procedure and, failing agreement on that, it is for the arbitrator to conduct the arbitration in such manner as it considers appropriate. Chapter V of the Model Law sets out provisions regarding the conduct of arbitral proceedings covering such matters as equal treatment, determination of rules of procedure, place of arbitration, commencement, language, statements of claim and defence, hearings and written proceedings, default of a party, experts appointed by the tribunal and court assistance in taking evidence.

The parties will determine the procedure they wish to follow, particularly through the adoption in the arbitration agreement of specific institutional or trade association rules. However, if no rules are chosen and the parties cannot subsequently agree upon how the procedure is to be conducted, the arbitrator can set the procedure, which will generally be done at a procedural meeting between the parties and the tribunal, following which the tribunal will issue an order for directions. This meeting can be conducted in person or remotely, for example, by telephone. Sometimes, the parties can agree all of the procedures and provide an agreed note to the arbitrator. Article 24 of the Model Law provides that, subject to any contrary agreement by the parties, the tribunal shall decide whether to hold oral hearings, or whether the proceedings shall be conducted on the basis of documents and/or materials. If there is any question about conflicting evidence, an oral hearing is preferable so that witnesses can be examined and cross-examined.

Arbitrators are expected to treat both parties equally, with impartiality, and to give each side the opportunity to put forward their case. The maxims "*audi alteram partem*" and "*nemo index in causa sua*" ("*always hear both sides*" and "*no-one should be a judge in his own cause*" respectively) are basic principles of fair procedures which arbitrators should follow. Article 18 of the Model Law sets out that obligation in respect of fair procedures in express terms.

Oath or affirmation

Unless the parties agree otherwise, the tribunal has the power to direct that a party to an arbitration agreement or a witness be examined on oath or affirmation, and the tribunal can administer oaths for that purpose (Section 14 of the 2010 Act). Subject to the agreement of the parties, the tribunal may also: order consolidation of arbitral proceedings or concurrent hearing where the parties agree to the making of such an order (Section 16); award interest (Section 18(2)); order security for costs (Section 19); require specific performance of a contract (save in respect of land) (Section 20); and determine costs (Section 21(3)). The arbitrator is also expected to render a reasoned award in writing.

Privilege of documents

Documents will be exempt from production if they can be said to fall into a recognised category of privilege. The usual types of privilege in this context are legal professional privilege applying to documents prepared in contemplation of legal proceedings ("litigation privilege") and documents prepared for the purpose of giving or obtaining legal advice ("legal advice privilege"). Generally, communications between a party and its lawyers, whether external or in-house, will attract privilege if they are for the dominant purpose of receiving or requesting legal advice or relate to legal proceedings, whether in being or in contemplation. There is a limited exception in respect of in-house lawyers who cannot claim legal professional privilege protection when the company is under investigation by the European Commission in competition proceedings. Without prejudice communications, which are used in the context of trying to reach settlement or narrowing issues in dispute, are exempt from production, subject to limited exceptions. They need not be stated to be "without prejudice" if their purpose is to reach a settlement; also, stating that they are "without prejudice" will not protect them if they are not truly aimed at the purpose of reaching a settlement. In general terms, privilege in documents may be waived by the party who prepared the document or the party for whom it was prepared, and care should be taken by clients and advisors not to waive privilege inadvertently.

Confidentiality

There is no express statutory provision in the 2010 Act that arbitration proceedings are to be confidential or that the parties are subject to an implied duty of confidentiality. However, in practice there is English authority (which is of persuasive effect in the Irish courts) to the effect that the existence and content of arbitration proceedings usually remain confidential. The implied duty of confidentiality was affirmed by the English Court of Appeal in *Ali Shipping Corp v Shipyard Trogir*.[8] This was the first case where confidentiality was considered by the Court of Appeal, which confirmed that a general duty of confidentiality was implied at law. It recognised that the boundaries of this duty had not yet been delineated, and recognised a number of exceptions to the duty, such as consent, court order, or leave of the court. In situations where preservation of the confidentiality of the arbitration is deemed crucial to both parties, it is advisable to explicitly detail the extent of the obligation in the arbitration clause.

Arbitrators

The essence of arbitration as a private means of resolving a dispute is that the parties may choose their arbitrator, and they can decide on whether to have one or more arbitrators. In the absence of agreement on appointment, or a default mechanism, the 2010 Act provides that the number of arbitrators shall be one. Given that agreement upon the identity of the arbitrator can be difficult to reach, especially when a dispute has arisen on some aspect of the substance of the agreement, it is prudent to include a mechanism for the appointment by an agreed nominating professional body, with provision that the parties will be bound by the choice made by such nominating professional body. There is no equivalent to the guides which are commonly used in international arbitration such as *Smit's Roster of International Arbitrators*, although members of the Chartered Institute of Arbitrators have their details displayed on the Institute's website.

If the parties' method for selecting an arbitrator does not produce a result, the High Court will, pursuant to Article 11 of the Model Law, appoint the arbitrator on application to it.

The High Court may intervene in the selection of an arbitrator where the parties cannot

agree upon an arbitrator and have no default mechanism in their agreement for appointment, or where there is a challenge under Article 13 of the Model Law.

Bias and conflicts of interest

The arbitrator should not be biased and this is enshrined in Article 12 of the Model Law, which provides that where a person is approached in connection with appointment as an arbitrator, they are obliged to disclose any circumstances that are likely to give rise to justifiable doubts as to impartiality or independence. The duty to make such disclosure is on-going and an arbitrator is obliged to disclose any such circumstances throughout the proceedings.

Immunity

Section 22 of the 2010 Act provides that an arbitrator "shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions". Such immunity also extends to any agent, employee, advisor or expert appointed by the arbitrator. This followed the old common law position from the case of *Redahan v Minister for Education and Science*[9] that arbitrators enjoy immunity from suit in negligence except in cases of bad faith.

Interim relief

Preliminary relief and interim measures

An arbitrator in Ireland is permitted to award preliminary or interim relief, and need not seek the assistance of the High Court to do so.

Article 17 of the Model Law provides that, unless otherwise agreed by the parties, and upon the application of one of the parties, the arbitrator has the power to order interim measures of protection as may be considered necessary and to make a preliminary order. The arbitrator can order a party to:

(a) maintain or restore the status quo pending the termination of the dispute;

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) preserve evidence that may be relevant and material to the resolution of the dispute.

The arbitrator does not need to seek the assistance of the court to make any of these orders. However, Article 9 of the Model Law, along with Section 10 of the 2010 Act, provide that, before or during arbitral proceedings, a party may itself also request from the High Court an interim measure of protection. However, unless otherwise agreed, the court may not rely on Article 9 of the Model Law to order security for costs or discovery of documents; those are matters to be addressed by the arbitrator.

Anti-suit injunction

There is no Irish case law on anti-suit injunctions in aid of arbitration. It would seem, however, that the position under EU law has recently changed. Anti-suit injunctions were prohibited by the Court of Justice of the European Union in *Paul Turner v Felix Fareed Ismail Grovit [2004] Case No C-159-02* and *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) and Generali Assiarazioni Generali SpA v West Tankers Inc [2009] C-159-07*, on the basis that they were inconsistent with the Brussels Convention and the principle of mutual trust between member courts. In the recent case of *Gazprom OAO v Lithuania*,[10] the Court of Justice of the European Union ruled that an anti-suit injunction issued by an arbitral

tribunal to prevent court proceedings in breach of an arbitral agreement is enforceable in the EU and that such an injunction is not covered by the Brussels I Regulation. It was held that proceedings for the recognition and enforcement of an arbitral anti-suit award are covered by national and international law, such as the New York Convention and not by the Brussels I Regulation. The Court did not overrule its previous position in respect of a court's jurisdiction to grant anti-suit injunctions, but rather it distinguished a court-issued injunction from one granted by an arbitral tribunal. As a result, some commentators have suggested that it is arguable that arbitral tribunals now have greater anti-suit powers than judges in EU Member States' courts. The position adopted in the *West Tankers* case may now be open to question, because in the *Gazprom* case the Advocate General observed that the prohibition on anti-suit injunctions in *West Tankers* may now be untenable due to revisions in the Brussels I Regulation, which came into force in 2015 (Regulation 1215/2012).

Where Irish court proceedings are involved and an arbitration agreement exists, rather than seeking an anti-suit injunction, a party may bring an application under Article 8 of the Model Law effectively to stay any Irish court proceedings. Article 8 of the Model Law provides that "*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*" (discussed above).

Security for costs

An order for security for costs can be a significant advantage to a party facing a claim in arbitration, and equally may become an obstacle for a claimant in bringing forward its claim. Pursuant to Section 10(2) of the 2010 Act, the High Court is not allowed to make any order for security for costs, unless the parties agree otherwise; rather an application is to be made to the arbitrator.

Section 19 of the 2010 Act provides that unless agreed otherwise by the parties, the arbitrator may order a party to provide security for the costs of the arbitration. However, qualifications with regard to the basis upon which such security might be ordered by the arbitrator are set out at Section 19(2) of that Act. In particular, the arbitrator may not order security solely because an individual is resident, domiciled or carrying on business outside of Ireland or, in respect of a corporate, it is established, managed or controlled outside of Ireland.

Arbitration award

Making an award

Article 31 of the Model Law provides that the award shall be in writing, be signed by the arbitrator (or, if there is more than one, the majority of the arbitrators) and also set out the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. The award shall also state its date and the place of arbitration. Copies of the award as made are to be delivered to the parties.

If an award also deals with costs, the tribunal must also deal with the requirements set out in Section 21 of the 2010 Act. Usual practice for an arbitrator, in domestic arbitrations, is to obtain payment of any outstanding fees before making the award available to either party. This is usually achieved by writing to both parties to inform them that the award may be taken up upon the discharge of the outstanding fees and expenses. As both parties will usually be jointly and severally liable for the arbitrator's fees and expenses, if they cannot come to an agreement to split the fees as an interim approach, one or other party will typically pay the fees and expenses and then obtain the award. The question of costs

(including who is ultimately liable for the arbitrator's fees and expenses), if not dealt with in the award, will be dealt with subsequently at either a hearing or by submissions or both, leading to an award on costs.

In a situation where the arbitrator delays unduly in making his or her award, it is possible for either party to apply to the High Court pursuant to Section 9(1) of the 2010 Act and Article 14 of the Model Law to terminate the mandate of the arbitrator for failure to render the arbitral award without undue delay.

Remedies

The law applicable to the dispute will dictate the remedies that may be sought in arbitration. Subject to that, an arbitrator may determine and award damages as an Irish court would and may order any of the common law and equitable remedies including specific performance of a contract, save that without the agreement of the parties, it may not award specific performance relating to a contract for the sale of land pursuant to Section 20 of the 2010 Act.

Interest

Section 18(1) of the 2010 Act states that the party to an arbitration agreement may agree on the arbitral tribunal's powers regarding the award of interest. Unless otherwise agreed, Section 18(2) permits the tribunal to award simple or compound interest from the dates agreed, at the rates and with the rests that it considers to be fair and reasonable. It can determine such interest to be payable on all or part of the award in respect of any period up to the date of the award, or on all amounts claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award in respect of any period up to the date of payment.

Fees and costs

Section 21(1) of the 2010 Act provides that, subject to an exception for consumers (Section 21(6) of the 2010 Act regarding unfair terms), the parties may make such provision with regard to the costs of the arbitration as they see fit. The parties may, therefore, agree in advance of any dispute as to how costs will be dealt with (for example, each side will bear its own costs).

If there is no agreement pursuant to Section 21(1), or if the consumer exception applies, the tribunal shall determine, by award, those costs as it sees fit. In making a determination as to costs, the tribunal is obliged to specify the grounds on which it acted, the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, as well as by whom and to whom they shall be paid. The general principle in respect of costs for domestic arbitrations is that the costs are at the discretion of the arbitrator, who will exercise his/her discretion in the same manner as would a court, which is that costs usually "follow the event", and the loser pays unless there is some reason not to make such an order, such as the existence of an effective *Calderbank Offer* for an amount greater than the amount awarded by the arbitrator, or where the successful party grossly exaggerates its claim.[11]

Funding litigation

Irish law still retains the common law principles of maintenance and champerty, which generally preclude those with no legitimate interest in proceedings taking part in the proceedings or obtaining any benefit therefrom. However, contingency fees are, subject to limits and rules on methods of calculation, permissible under Irish law. Success fees and fee arrangements involving payment contingent on success are permitted.

It is also of note that it has been recently held in *Greenclean Waste Management Limited*

v Leahy (No 2)[12] that After the Event Legal Costs insurance does not fall foul of the civil wrong of champerty and maintenance and is, therefore, legal. After the Event Legal Costs insurance is a type of insurance policy that provides cover for the legal costs incurred in bringing or defending litigation. The policy is purchased after a legal dispute has arisen and typically provides cover for a party's own outlay, and the liability to pay the other party's legal costs in the event that the other party obtains an award of costs against it. The facts of the case required the court to consider the effect such insurance has on an application for security for costs. It was found that the existence of After the Event Legal costs insurance could be taken into account in the course of an application for security for costs. The decision of the High Court was subsequently appealed by the defendant. Although the Court of Appeal allowed the appeal, it was satisfied that such a policy could be taken into account if there was a realistic probability that the policy would cover the costs of the defendant.

Challenge to an arbitration award

Challenges to an award

There is no appeal against an arbitral award under the 2010 Act. The exclusive recourse is an application to a court to set aside the award. However, there are limited grounds upon which such an application may be made. These grounds are set out at Article 34 of the Model Law as follows:

"(a) the party making the application furnishes proof that:

(i) the party to the Arbitration Agreement referred to in Article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State;

(ii) the party making application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provision of this Law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject matter is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

If satisfied that any of the above grounds are made out, the High Court can set aside the arbitral award. An application to set aside the award may not be made after three months from receipt by the applicant of the award. Alternatively, if there is a request under Article 33 of the Model Law to correct or interpret an award, or to issue an additional award, the applicant has three months from the date on which that request had been disposed of by the tribunal.

The Irish High Court recently, and for the first time, considered the meaning of 'arbitral award' for the purposes of Article 34. In *FBD Insurance Public Limited Company v Samwari Ltd*,[13] it was noted by the Court that 'arbitral award' is not defined by the Model Law, nor is it defined by the 2010 Act. It was held that in order for the Court to have jurisdiction under Article 34 to set aside a decision of an arbitral tribunal, the decision must be one that was made on the merits of the case and it must meet the formal requirements of Article 31. The Court observed that this must include a partial award if it met these criteria, but that procedural rulings and orders made during the course of the arbitration are not amenable to challenge under Article 34.

Under Irish law, a party may no longer:

- state a case to the High Court on a question of law;
- ask the High Court to remit the award to the arbitrator;
- ask the High Court to remove the arbitrator for misconduct;
- ask the High Court to set aside the award for misconduct; or
- seek relief where the arbitrator is not impartial or where the dispute involves a question of fraud.

In summary, recourse for a disappointed party is, broadly speaking, confined to a complaint that:

- the particular party was unable to present its case; or
- the award is in conflict with public policy.

Enforcement of the arbitration award

Enforcement of an award

Ireland ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1981 and no reservations have been entered. The relevant legislation is now the 2010 Act.

Ireland has not signed and/or ratified any regional conventions concerning the recognition and enforcement of arbitral awards.

Approach of the national courts to recognition and enforcement

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. Hussey and Dunne on "*Arbitration Law*" observe that the vast majority of challenges to the award of an arbitrator are rejected, and the strong presumption in favour of upholding an arbitrator's award has been reiterated in a number of cases, including: *Keenan v Shield Insurance*[14] and *Limerick City Council v Uniform Construction Limited*.[15]

Section 23(1) of the 2010 Act provides that an arbitral award shall be enforceable in the State either by action or by leave of the High Court, in the same manner as a judgment or order of that court with the same effect. The 2010 Act expressly excludes any possibility of an appeal to the Supreme Court in relation to the recognition and enforcement of an arbitral award.

In the case of *Yukos Capital Sarl v OAO Tomskneft VNK*,[16] the Irish High Court set aside an *ex parte* order granting the applicant leave to serve arbitration-related proceedings outside the jurisdiction and to dispense with the requirement for personal service of the proceedings. The High Court refused to assume jurisdiction over the respondent on the grounds that it was not appropriate to do so, having regard to the interests of both parties. There were a number of considerations as to why the High Court in that case refused to deal with

an application for enforcement of an arbitral award. The parties, the arbitration, and the performance of the underlying contract had no connection with Ireland. Further, the party against whom enforcement was sought had no assets in Ireland. The High Court decided that there was no benefit to be gained by the applicant where enforcement proceedings were also under way in the French and Singapore courts.

In *Avobone NV v Aurelian Oil and Gas Ltd*,[17] the respondents sought the Irish High Court to decline jurisdiction in an enforcement action for an arbitral award granted by the International Chamber of Commerce in London in the jurisdiction of England and Wales, on the basis that the respondents had no assets within the jurisdiction. The Court referred with approval to the judgment of Kelly J in *Yukos Capital*, where he noted that the presence of assets within the jurisdiction was not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce an arbitral award.[18] McGovern J applied the "solid practical benefit test" enunciated by Mustill LJ in *Insurance Corporation of Ireland v Strombus International Insurance Co.* [1985] 2 Lloyd's Rep. 138 at 144, and found that the applicants had established that a solid practical benefit would ensue to them if they were to enforce the arbitral award in Ireland, as it could then apply to garnishee this debt from the Irish parent company.

Public policy

The leading Irish case on public policy in the context of enforcement of arbitral awards confirms that the public policy relevant to enforcement actions brought before the Irish courts is the public policy of Ireland, and not that of the seat of the arbitration or where the award has been rendered (*Broström Tankers AB v Factorias Volcano SA*).[19] In that case, which concerned an application to enforce a foreign arbitral award under the New York Convention (implemented by the Arbitration Act 1980, and now the 2010 Act), Kelly J enforced the award despite arguments that it was contrary to Irish public policy. The judge said (quoting from Cheshire and North's Private International Law), "*I am satisfied that I would be justified in refusing enforcement only if there was … some element [of] illegality, or possibility that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public*". Kelly J made it clear that the Irish courts would take a restrictive approach to the concept of public policy in Article 34 of the Model Law, similar to that in other jurisdictions;

> "The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of a narrow scope. It extends only to a breach of the most basic notions of morality and justice. In this regard, I derive considerable assistance from the decision in *Parsons & Whitmore Overseas Co. Inc. v. Société Général de l'Industrie du Papier* 508 F. 2d 969 (2nd Cir, 1974) [a decision of Circuit Judge Joseph Smith]. In the course of his judgment, Judge Smith says this, and I quote: "Perhaps more probative, however, are the inferences to be drawn from the history of the convention as a whole. The general pro-enforcement bias informing the convention and explaining its supersession of the Geneva Convention points towards a narrow reading of the public policy defence. An expansive construction of this defence would vitiate the Convention's basic efforts to remove pre-existing obstacles to enforcement… We conclude, therefore, that the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."[20]

This decision was mentioned with approval by McGovern J in *FBD Insurance Public Limited Company v Samwari Ltd*.[21]

Investment arbitration

Investor state arbitrations

Ireland signed the Washington (ICSID) Convention in 1966. Ireland ratified the Washington Convention in 1981. Ireland has only ever been a party to one Bilateral Investment Treaty (with the Czech Republic), which was terminated by consent on 1 December 2011.

* * *

Endnotes

1. O'Donnell J in *Galway City Council v Samuel Kingston Construction Limited* [2010] IESC18.
2. [2015] IEHC 544.
3. [2016] IEHC 582 at para 6.
4. [2015] IEHC 50.
5. [2012] IEHC 361.
6. [2017] IEHC 35.
7. [2016] IEHC 582.
8. [1999] 1 WLR (CA (Civ Div)).
9. [2005] 3 I.R. 64.
10. Case C-536/13, 13 May 2015.
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14. [1988] I.R. 89.
15. [2007] 1 I.R. 30.
16. [2014] IEHC 115.
17. [2016] IEHC 636.
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19. [2004] IEHC 198.
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Kevin leads the firm's Construction Group. He has aligned his extensive construction practice, which includes construction disputes, with a recognised expertise in all aspects of public procurement law/tendering. Kevin is a Fellow of the Chartered Institute of Arbitrators. He has considerable experience in leading the construction advice on large-scale building and infrastructure projects, and advising on the resolution of disputes associated with such projects including via court, arbitration, mediation, conciliation and independent expert, particularly with a view to avoiding or minimising conflict during the construction phase and seeking to have subsequent disputes resolved in an efficient and cost-effective manner.

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