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PREFACE

Following the success of the fifth edition, we are pleased to present the sixth edition of *Global Legal Insights – International Arbitration.* The book contains 32 country chapters, and is designed to provide general counsel, government agencies, and private practice lawyers with a comprehensive insight into the realities of international arbitration by jurisdiction, highlighting market trends and legal developments as well as practical, policy and strategic issues.

In producing *Global Legal Insights – International Arbitration*, the publishers have collected the views and opinions of a group of leading practitioners from around the world in a unique volume. The authors were asked to offer personal views on the most important recent developments in their own jurisdictions, with a free rein to decide the focus of their own chapter. A key benefit of comparative analyses is the possibility that developments in one jurisdiction may inform understanding in another. I hope that this book will prove insightful and stimulating reading.

Joe Tirado
Garrigues UK LLP

Ireland

Kevin Kelly & Heather Mahon
McCann FitzGerald

Introduction

Legislation and courts

In Ireland, the Arbitration Act 2010 (the "**2010 Act**") governs arbitration. It adopts the UNCITRAL Model Law (the "**Model Law**"), as amended on 7 July 2006 and applies it to all arbitrations, both domestic and international, commenced in Ireland on or after 8 June 2010. The 2010 Act also gives effect to the Geneva Convention and Protocol 1923, the New York Convention 1958 and the Washington Convention 1965, thereby restating the position under earlier Irish legislation. Section 9 of the 2010 Act states that the High Court is the relevant court for the purposes of that Act.

Arbitration bodies

Arbitration Ireland (The Irish Arbitration Association) comprises members from bodies, firms and persons actively involved in the practice of international arbitration in Ireland. The Chartered Institute of Arbitrators also has an Irish branch. There are also industry-specific bodies which support arbitration, such as Engineers Ireland.

Arbitration agreements

In writing

The 2010 Act applies Option 1 of Article 7 of the Model Law to the requirements of an arbitration agreement. 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*" is interpreted broadly.

In *K&J Townmore Construction Ltd v Kildare and Wicklow Education and Training Board* [2018] IEHC 770, Barniville J set out the principles to be applied in the interpretation of an arbitration agreement.

"(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.

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(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."

Doctrine of separability

The doctrine of separability has been recognised by the Irish courts, *Doyle v National Irish Insurance Co plc* [1998] 1 I.R. 89 and is set out in Article 16(1) of the Model Law.

Principle of competence-competence

Article 16 of the Model Law gives legislative effect to the doctrine of competence-competence, which provides that the arbitral tribunal has jurisdiction to rule on the question of whether it has jurisdiction to hear and determine a dispute. However, this power is not final as an appeal lies to the High Court under Article 16(3). There is no subsequent appeal 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.

In *Bowen Construction Ltd v Kelly's of Fantane (Concrete) Ltd* [2019] IEHC 861, Barniville J described the role of the court in deciding an application in relation to jurisdiction under Article 16(3) of the Model Law. He pointed out that the court is exercising an original and not an appellate jurisdiction. It is not conducting an appeal or a review but a complete *de novo* rehearing on the question of jurisdiction. This is because the court's function under Article 16(3) is "to decide the matter". In doing so, he said that the court applies the "full judicial consideration" approach. He added that the standard to be applied by the court in deciding the question of jurisdiction is the normal standard applied in civil cases, namely, the court must decide the question of jurisdiction on the balance of probabilities. The court may consider such evidence as it sees fit and is not bound by the submissions made to the arbitrator or the evidence before him or her. The court does not exercise any deference to the decision of the arbitrator. The court may have regard to the reasoning and findings of the arbitrator, if they are helpful, but the court is neither bound nor restricted by them.

In that case, he also set out a set of guiding principles in the construction of a reference to arbitration and when ascertaining the scope of the dispute referred to arbitration:

"(1) The words of the notice to refer should not be construed as if they were contained in a statute. The words used should not be analysed in an over legalistic manner.
(2) The relevant point in time for the purpose of ascertaining the scope of the dispute referred to is the time of the reference to arbitration itself.
(3) In determining whether a particular dispute or claim has been referred, it is necessary to look objectively at what has passed between the parties to the reference up to the date of the reference. The words used must be given their natural meaning in their context applying an objective test. The court can and should have regard to the factual background or matrix of fact leading up to the reference to arbitration.
(4) The focus should be on the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds on which the claim has been rejected or not accepted.

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(5) The disputed claim or assertion is not necessarily defined or limited by the evidence or arguments submitted by either side to each other before the reference to arbitration.
(6) It is not necessary to set out in a reference to arbitration all of the grounds or points of defence or response which the respondent may wish to rely upon in resisting the claim. It is open to a respondent to raise any point or argument by way of defence to the claim being made in the arbitration notwithstanding that the point is not referred to in the reference to arbitration. This is a matter of procedural fairness for a respondent.
(7) Procedural fairness works both ways. If it is open to a respondent to raise any defence to the claim notwithstanding that it is not referred to in the reference to arbitration as a matter of procedural fairness, so too should it be open to the claimant to respond to any such defence sought to be relied upon by the respondent. That too is a matter of procedural fairness for the claimant. Provided such response directly arises from the defence raised and concerns an issue which falls within the scope of the arbitration agreement.
(8) A particular dispute may comprise one issue or several issues. Or there may be several disputes between the parties. A dispute or disputes may attract more issues and may become more nuanced as time goes on. In order to identify the dispute or disputes and the issue or issues arising, it is appropriate to consider the exchanges between the parties prior to and up to the point of the notice to refer. It is not necessary for the words used in the notice to refer to be ambiguous before the arbitrator or a court can consider these exceptions.
(9) The court will also have to consider whether the terms of the contract between the parties on its proper construction disapplies any principles or propositions."

In *Achill Sheltered Housing Association CLG v Dooniver Plant Hire Ltd* [2018] IEHC 6, the High Court held that a preliminary ruling by the arbitrator that he had been validly appointed came within the scope of Article 16(3). However, if an arbitrator was incorrect in determining that he had been validly appointed, he had no *locus standi* to decide a challenge to his jurisdiction, let alone to arbitrate a dispute between the parties.

Disputes excluded from the 2010 Act

Section 30 of the 2010 Act clarifies that the 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. Subject to certain exceptions, a "consumer" is a natural person acting outside his trade, business or profession.

Joinder/consolidation of third parties

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 together without the agreement of the parties. Under Section 32 of the 2010 Act, the High and Circuit Courts may adjourn court proceedings which are otherwise properly before the courts to facilitate arbitration if the relevant court thinks it appropriate to do so, provided the parties consent.

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In the case of *Maguire v Motor Services Ltd t/a MSL Park Motors* [2017] IEHC 532, the two plaintiffs brought proceedings seeking damages from the defendants for a breach of contract in relation to the purchase of a new motor vehicle. There was a binding arbitration agreement between one plaintiff, the owner of the vehicle, and the motor dealer who had supplied it. Proceedings between them had been stayed to allow for arbitration. The issue was whether, by virtue of this arbitration agreement, the court should also stay proceedings between that plaintiff and the vehicle manufacturer, and as between the second plaintiff and the vehicle manufacturer. Barrett J held that, while an arbitration agreement can apply to a non-party, they must meet a "sufficient connection" test, which was not met here. He held that the stay of the proceedings between the vehicle owner and the motor dealer was not appealable, but overruled the second stay, as the individual parties had not agreed between them that a dispute would go to arbitration.

Arbitration procedure

Commencement of arbitration

Section 7 of the 2010 Act provides that arbitral proceedings shall be deemed to be commenced on:

(a) the date on which the parties to an arbitration agreement so provide as being the commencement date for the purposes of the commencement of arbitral proceedings under the agreement; or
(b) where no provision has been made by the parties as to commencement of proceedings, the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent.

This provision should be read in conjunction with Section 74 of The Statute of Limitations 1957 which sets out further detail here.

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 may set their own procedure. When determining the procedure they wish to follow, parties may choose to adopt specific institutional or trade association rules into the arbitration agreement. If the parties can agree all of the procedures, they may provide an agreed note to the arbitrator. Failing agreement, it is for the arbitrator to conduct the arbitration in such manner as he or she considers appropriate. If the arbitrator is setting the procedure, this 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.

Chapter V of the Model Law sets out detailed provisions regarding the conduct of arbitral proceedings. Article 24 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. The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request the court's assistance in taking evidence.

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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.

Under the 2010 Act, 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. Subject to the agreement of the parties, the 2010 Act also provides that the tribunal may: order consolidation of arbitral proceedings or concurrent hearing where the parties agree to the making of such an order; award interest; order security for costs; require specific performance of a contract (except in respect of land); and determine costs. The arbitrator is also expected to render a reasoned award in writing.

Privilege

Privileged documents will be exempt from production. The usual types of privilege claimed are: legal professional privilege applying to documents prepared in contemplation of legal proceedings ("litigation privilege"); and documents prepared for the purpose of seeking or giving legal advice ("legal advice privilege"). Generally, communications between a party and its lawyers, whether external or in-house, are treated in the same way. There is a limited exception in respect of in-house lawyers in certain European competition matters. Without-prejudice communications, used when trying to reach settlement or narrow the issues in dispute, are exempt from production, subject to limited exceptions. In general terms, privilege may be waived by the party entitled to claim that privilege, and care should be taken not to waive privilege inadvertently.

Confidentiality

The 2010 Act does not provide 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* [1999] 1 WLR 314. It 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 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.

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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.

Challenge to an arbitrator

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 ongoing and an arbitrator is obliged to disclose any such circumstances throughout the proceedings.

Article 12 also 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. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

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.

Termination of an arbitrator's mandate

Under Article 14 of the Model Law, if an arbitrator becomes 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 if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court to decide on the termination of the mandate. Where the mandate of an arbitrator terminates, a substitute arbitrator is appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

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.

Interim relief

Preliminary relief and interim measures

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 an interim measure of protection from the High Court. However, unless otherwise agreed, the court may not rely on Article 9 of the Model Law to order discovery of documents or security for costs; those are matters to be addressed by the arbitrator. However, the arbitrator's power to order security for

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the costs is subject to certain qualifications. 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.

Anti-suit injunction

There is no Irish case law on anti-suit injunctions in aid of arbitration. In a European context, anti-suit injunctions were prohibited by the ECJ 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. However, in *Gazprom OAO v Lithuania* Case [2015] C-536/13 that court ruled that an anti-suit injunction issued by an arbitral tribunal to prevent court proceedings in breach of an arbitral agreement was enforceable in the EU, and that such an injunction was not covered by the Brussels I Regulation but rather the New York Convention. The court did not overrule its previous position in respect of a court's jurisdiction to grant anti-suit injunctions, but rather distinguished a court-issued injunction from one granted by an arbitral tribunal.

Where Irish court proceedings are involved and an arbitration agreement exists, rather than seeking an anti-suit injunction, a party may apply under Article 8 of the Model Law to stay any Irish court proceedings. The courts in this jurisdiction have long been supportive of the arbitral process.

In *Ocean Point Development Company Ltd (In Receivership) v Patterson Bannon Architects Ltd* [2019] IEHC 311, Barniville J explained how Article 8 operates in practice before the Irish courts. He said:

> "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…"

Notwithstanding the requirement on the court to refer a dispute to arbitration under Article 8(1), Barniville J raised the question of whether it might be open to an Irish court to refuse to make the order where there had been prejudicial delay in bringing the application. However, he did not rule on the issue. He also set out detailed guidelines on how the court should approach the interpretation of the term "dispute" in an arbitration agreement in order to determine whether a "dispute" existed between parties in the context of an application for a referral under Article 8(1) of the Model Law.

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 (provided that the reason for any omitted signature is stated). In general, it should also set out the reasons

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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 (except 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. Section 18 is without prejudice to any other power of the arbitral tribunal to award interest.

Fees and costs

Section 21(1) of the 2010 Act provides that, subject to an exception for consumers, 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, that each side will bear its own costs.

An agreement of the parties to arbitrate subject to the rules of an arbitral institution is deemed to be an agreement to abide by the rules of that institution as to the costs of the arbitration.

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. This is subject to the *proviso* that in a domestic arbitration, the parties can request that the costs be measured by the Legal Costs Adjudicator.

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

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amount referable to each, as well as by whom and to whom they shall be paid. "Costs" includes costs as between the parties, and the fees and expenses of the arbitral tribunal including any expert appointed by the tribunal.

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, *Shelley-Morris v Bus Atha Cliath* [2003] 1 I.R. 232.

Challenge to an arbitration award

There are two important principles which can be derived from the Irish cases in this area. First, the cases stress the importance of the finality of arbitration awards. Second, they make clear that an application to set aside an award is not an appeal from the decision of the arbitrator and does not afford the court the opportunity of second-guessing the arbitrator's decision on the merits, whether on the facts or on the law, *Ryan v Kevin O'Leary (Clonmel) Ltd* [2018] IEHC 660.

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. The limited grounds upon which such an application may be made are set out at Article 34(2) 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 applicant must bring its application within one of the grounds in order to succeed, *Snoddy v Mavroudis* [2013] IEHC 285. In *Delargy v Hickey* [2015] IEHC 436 the court stated that the grounds for setting aside an award "are to be construed narrowly and the onus in this regard is on the moving party". In *Hoban v Coughlan* [2017] IEHC 301, it was stated that the basis on which an award can be set aside under Article 34 of the Model Law is "very limited and it is a jurisdiction which the court should only exercise sparingly". The challenged decision must be one that was made on the merits of the case, and it must meet the

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formal requirements of Article 31. This can include a partial award if these criteria are met but procedural rulings and orders made during the course of the arbitration are not amenable to challenge under Article 34, *FBD Insurance Plc v Samwari Ltd* [2016] IEHC 32.

Public policy

The leading Irish case on public policy in the context of a challenge to an arbitral award confirms that the relevant public policy 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* [2004] IEHC 198. The judge said he would refuse enforcement only where 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*". He 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 the approach in other jurisdictions. At 56 days, time limits for setting aside awards on grounds of public policy are shorter than in other cases.

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

There is no divergence in the rules on the enforcement of domestic and non-domestic awards (Article 35 of the Model Law). Article 36 of the Model Law applies in relation to the grounds for refusing recognition or enforcement of an award.

Section 23(1) of the 2010 Act deals with awards (other than awards under the Washington Convention). It 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 award shall, unless otherwise agreed by the parties, be treated as binding for all purposes on the parties between whom it was made, and may be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Ireland. The 2010 Act expressly states that section 23 does not affect the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention.

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. The vast majority of challenges to the award of an arbitrator are rejected, and the strong presumption is in favour of upholding an arbitrator's award.

Investment arbitration

Ireland is a contracting party to the Energy Charter Treaty.

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.

The Arbitration Act 2010 applies to all arbitrations, including treaty arbitrations. Certain provisions of the Arbitration Act 2010 do not apply to proceedings under the ICSID Convention. These are set out in Section 25 of that Act.

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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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Heather holds a degree in Law and German and an M.Litt from Trinity College Dublin, and qualified as a barrister in 2000. She was in practice at the Bar from 2000–2006. Heather then took up a position with the Office of Parliamentary Counsel to the Government, with responsibility for legislative drafting. She later held a position in the senior management of the Law Reform Commission, with responsibility for a long-running legislation project in the Commission. She has lectured at third level in a number of areas and is a fluent German speaker. She is the author of the Irish legal textbook *Pre-emptive Remedies in Commercial Litigation*. She is currently a senior associate with McCann FitzGerald.

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