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Why Dublin, Ireland, Should Be Considered As A "Hot Seat" For Future Arbitrations

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Commentary

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By
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[Editor's Note: Hayley O'Donnell BL is an Irish barrister with a general civil practice. She has previously worked with the International Centre for Dispute Resolution in New York and currently sits on the Arbitration Ireland Young Practitioners Committee. Any commentary or opinions do not reflect the opinions of LexisNexis®, Mealey Publications™. Copyright © 2020 by Hayley O'Donnell. Responses are welcome.]

Introduction

The seat of an arbitration, as practitioners will know, is the legal jurisdiction to which an arbitration is tied. The parties' choice of seat is a significant one, as it determines the procedure and rules that govern an arbitration, the national law governing the arbitration (in the absence of clear agreement to the contrary), and the national court that may intervene during the arbitration process.

A number of factors should be considered before the parties to an arbitration choose a seat, and the following is an outline of the reasons why Dublin, Ireland is an excellent choice of seat for international arbitrations.

Legal Framework

The legal jurisdiction in Ireland is common law, similar to the U.K., Hong Kong, Australia, Singapore, Canada and the U.S.A., meaning the courts follow a system of precedent and lower courts are bound by the decisions of superior courts. Ireland is a member of the European Union and is bound by EU legislation and the decisions of the Court of Justice of the European Union.

Ireland has a long-established and dependable judicial system, and the Irish courts have embraced arbitration as a trusted alternative method of resolving disputes. Indeed, the definitive attitude of the Irish courts to arbitration was well articulated by McCarthy J. in *Keenan v Shield Insurance Co Ltd.*[1], in which he stated that:

> *"Arbitration is a significant feature of modern commercial life; there is an International Institute of Arbitration and the field of international arbitration is an ever expanding one. It ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term."*

Importantly, in the past number of decades, Ireland has modernised its arbitration laws to conform to international arbitration practices and is now governed by *"well understood rules governing both domestic and international arbitrations and a well-established regime that regulates the system of arbitration and its interaction with the courts system."*[2]

Arbitration Act 2010

Arbitration in Ireland is governed by the Arbitration Act 2010, which came in to force on 8 June 2010 and adopted the UNCITRAL Model Law in its entirety into the laws of Ireland. The 2010 Act gives force of law to the Geneva Protocol on Arbitration Clauses, the Geneva Convention on the Execution of Foreign

Arbitral Awards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention on the settlement of investment disputes between states and nationals of other states.

The 2010 Act provides for a number of modifications to the Model Law. Some examples of modifications include section 8, which provides that, when interpreting any provision of the Model Law, judicial notice shall be taken of the travaux préparatoires of UNCITRAL and its working group relating to the preparation of the Model Law. Section 9 designates the High Court of Ireland as the relevant court for applications under the 2010 Act for the purposes of the Model Law. The Act nominates the President of the High Court to deal with issues referred to arbitration, and the President of the High Court in turn designates Ireland's arbitration judge, who will hear all arbitration-related applications that come before the High Court, ensuring consistency in adjudication pertaining to the arbitral process. Order 56 of the Rules of the Superior Courts in Ireland provides the procedure for making such applications, which aims to reduce delays in litigation.

Section 10 confers on the High Court the same powers in relation to art. 9 and art.27 of the Model Law, as it has in any other action or matter before the Court except that the High Court shall not make any order relating to security for costs or for discovery of documents, unless the parties agree otherwise.

Section 11 provides that a decision of the High Court in relation to any matter referred to it under the 2010 Act (i.e. those permitted under the Model Law) shall be final and binding, and that there shall be no right of appeal from that decision. Indeed, no appeal is permitted from any court determination of the following: a stay application pursuant to art. 8(1) of the Model Law or art.III(3) of the New York Convention[3]; any determination by the High Court of an application for setting aside an award under art.34 of the Model Law or Ch VIII of the Model Law for the recognition and enforcement of an award made in an international commercial arbitration: or any determination by the High Court in relation to an application to recognise or enforce an arbitral award pursuant to the Geneva Convention, New York Convention or Washington Convention. This effectively means that the High Court is the court of final jurisdiction in relation to all arbitration applications.

Section 12 amends the time limit specified in art.34(3) of the Model Law by providing that an application to the High Court to set aside an award on the grounds of public policy may be made within 56 days from the date when the circumstances giving rise to the application became known or ought to have become known to the party concerned, rather than the three-month period from the date when the party concerned received the award as specified in art.34(3). While parties can apply to the High Court to set aside an arbitral award, the circumstances permitting such applications are very limited, and the Irish courts have narrowly interpreted those grounds, generally tending to support the arbitral process and uphold the decision of the arbitrator.[4]

Section 13 amends art.10 of the Model Law by providing that, unless the parties agree otherwise, the arbitral tribunal shall consist of one arbitrator rather than three. This provision was likely drafted as such in order to reduce costs, and to incentivise parties to consider Ireland as a cost- effective seat.

Section 19, unless otherwise agreed by the parties, gives the arbitral tribunal the power to order a party to provide security for costs, section 21 provides that the parties may make such provision as to the costs of the arbitration as they see fit, and section 22 provides for the immunity of arbitrators, including the person or body appointing them and certain other persons engaged in the arbitration proceedings, in respect of anything done or omitted to be done in the discharge of their duties.

The support of the judiciary

The Irish courts, when given the opportunity, have shown an unwillingness to intervene to the detriment of the arbitral process. Indeed, there is a very strong presumption in favour of upholding an arbitrator's award that has been reiterated in numerous cases,[5] and the Irish courts will readily grant a stay to any litigation proceedings where they are satisfied *prima facie* that there is an arbitration agreement. Indeed, as mentioned by McGovern J. in *BAM Building Limited v. UCD Property Development Company Limited*:

> *"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."*[6]

Further, the judiciary have narrowly interpreted challenges to the recognition or enforcement of awards. The Irish courts are experienced in taking measures supportive of arbitration in Ireland , such as mandatory stays on court proceedings where an arbitration clause is not null and void, inoperative and incapable of being performed; and limiting grounds for setting aside or refusing to enforce an award. The Irish courts are also adopting an increasingly liberal approach to the definition that an arbitration clause must be in writing, and have held that reference to an arbitration clause contained in letters sent between parties meets the requisite standard for incorporation of the arbitration clause.[7]

It is clear that the legal framework in Ireland, and the consistent support of the judiciary of the arbitral process means that Dublin, if chosen as the seat, is a location where parties can be guaranteed that the arbitral process and the enforcement of arbitration awards will be respected.

Social and Political Advantages

Economic Support

Ireland is an open economy and offers a stable, profitable, English-speaking base to serve the international market. Ireland is home to many American, Asian and European companies, over 1,200 of which serve the global market from their bases here, with many either having their global or European headquarters located in Dublin. In Ireland, they find a favourable tax environment, competitive operating costs and a highly skilled, educated, productive and flexible workforce.

Ireland is also well prepared for the e-commerce age through the liberalisation of its communications services market, investment in broadband infrastructure and one of the most e-commerce-friendly regulatory environments in Europe.

Neutrality

As a neutral country, Ireland is particularly suited to international arbitration. Many international arbitrations involve disputes between parties from the developing world, states or state bodies, and multinational corporations. Accordingly, where preference for a neutral country as the seat of the arbitration is important, Dublin, Ireland, is an ideal choice.

Post-Brexit

The UK's decision to leave the EU, and the single market, has caused many parties to international contracts to consider a different choice of law and/or dispute resolution clause, in particular submission to court jurisdiction, for various reasons.

For example, Ireland is now the only member of the European Union that operates a court system that is both English speaking and based on the common law.

As mentioned, section 11 of the 2010 Act provides that the decision of the High Court in relation to any matter referred to it under the 2010 Act (i.e. those permitted under the Model Law) shall be final and binding, and that there shall be no right of appeal from that decision. This is in contrast to the potential for an appeal in England and Wales. An appeal to the Court of Appeal of England and Wales is open to parties in a number of situations, and thereafter the Supreme Court, adding delay and costs to the arbitral process and potential difficulties in respect of the recognition and enforcement of such court orders post-Brexit.

There have been significant efforts to make Dublin an attractive centre for dispute resolution post-Brexit. For example, a recently launched Brexit Legal Services Implementation/Co-ordination Group, which supports the effective realisation of the joint initiative of the Bar of Ireland and the Law Society (Ireland's legal services governing bodies) of promoting Ireland as a leading global hub for international legal services. This initiative was launched in October 2019 and forms part of the Irish Government's response to Brexit, and ultimately recognises that Ireland, as the only

English speaking, common law jurisdiction in the European Union, will be uniquely placed to provide international legal, litigation and arbitration services, within the EU.

As of March 2019, Ireland signed a Host Country agreement with the Hague-based Permanent Court of Arbitration (PCA), which will provide a basis for PCA activities, in particular international arbitration, to take place in Ireland.

Further, the International Swaps and Derivatives Association Inc. (ISDA) in 2018 published an Irish version of its 2002 ISDA Master Agreement. Post-Brexit, this will enable parties to continue to transact derivatives under the laws of a Member State that is a common law jurisdiction.

Practical Advantages

Skilled people

There is a pool of skilled, highly regarded, experienced professionals living and working in Dublin who regularly act in international arbitrations. These professionals have expertise in the field and regularly represent clients in international and domestic arbitrations, and before international tribunals. A significant number of solicitors and barristers are arbitrators and have been prominent both in supporting and in participating in the arbitral process, with a significant number of Irish lawyers accepting appointments in international arbitrations each year. Their knowledge of different legal systems and various institutional rules, along with their in-depth understanding of technical issues and diverse industries, provides a tailored assistance that takes into account the various contexts from which disputes emerge.

Location and Accessibility

Dublin is easily accessible from Europe and North America, with numerous direct daily flights with short flying times. Dublin Airport, located just 12km north of the city centre, is one of Europe's best-connected airports, with more than 44 airlines flying to over 180 destinations. Major European centres are within two hours' flying time of Dublin. Completion of new road and sea routes is bringing Europe within even easier access, and competitive air travel now links Irish business with the world. Dublin is similarly serviced with direct flights from the Middle East, Far East and North America.

Facilities and Hearing Venues

Dublin offers excellent hearing facilities, supported by highly developed telecommunications, broadband and audiovisual services, all available at competitive rates. Necessary support services are also available, such as experienced legal stenographers and simultaneous translation.

Dublin has a number of venues particularly suited to international arbitrations, and has its own dedicated international arbitration centre. These venues have adequate space for parties to an arbitration, including hearing rooms, break out rooms and on-site technology services.

Costs

Dublin is a cost-effective location for parties to conduct an international arbitration in comparison to other nearby jurisdictions. Further, section 13 of the Arbitration Act 2010 amends art.10 of the Model Law by providing that, unless the parties agree otherwise, the arbitral tribunal shall consist of one arbitrator rather than three.

Conclusion

Dublin has established itself as an attractive centre for international arbitration over the past number of years. Ireland's legal system, arbitration law and judicial attitude demonstrate that the Irish courts are experienced and efficient in taking measures supportive of arbitration in Ireland.

Ireland's non-legal factors of neutrality, and convenience of location, and cost also make Dublin, Ireland, an ideal location for arbitration.

Arbitrating in Dublin offers a familiar legal framework in the form of the UNCITRAL Model Law, a pool of experienced arbitrators and lawyers, and all the conveniences one would expect of a modern, cosmopolitan city.

Dublin has clearly positioned itself as an attractive arbitral seat and should be seriously considered as a choice for future international arbitrations. Importantly, Ireland is a location where the arbitral process and the enforcement of arbitral awards will be respected, and where parties, their advisers and arbitrators will have the security of the highest standard of arbitration law.

Endnotes

1. [1988] I.R. 89 at p.96.
2. *Galway City Council v. Samuel Kingston Construction Ltd.* [2010] IESC 18.
3. *Maguire v. Motor Services Ltd. t/a MSL Motor Services* [2017] IEHC 532.
4. *Snoddy v. Mavroudis* [2013] IEHC 285.
5. *Brostrom Tankers AB v Factorias Volcano SA* [2004] 1 I.R. 191; *FBD Insurance plc v. Samwari* [2016] 2 I.R. 474.
6. [2016] IEHC 582 at para.6, p.3. This statement was more recently approved by Barniville J. in *K&J Townmore Construction Limited v. Kildare and Wicklow Education and Training Board* [2018] IEHC 770.
7. *Mount Juliet Properties Ltd. v. Melcarne Developments Limited & Ors.* [2013] IEHC 286. ■

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