

DUBLIN INTERNATIONAL ARBITRATION DAY 2017

SESSION 5 UPDATE ON RECENT DEVELOPMENTS IN INTERNATIONAL ARBITRATION

Chair: David Barniville SC
Dublin, Ireland



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THREE ISSUES

- (1) Irish Courts continued respect and support for the arbitral process; some recent decisions
- (2) The *Persona* decision: Third party funding: Implications and Recent Developments
- (3) Mediation Act 2017

(1) Irish Courts' Support / Respect for Arbitral Process

- Evident from stay applications (Article 8 of Model Law) and applications to set aside arbitral awards (Article 34).
- High Court Judge (McGovern J.) assigned to deal with arbitration applications – consistency of approach / predictability of respect and support for the arbitral process (both domestic and international arbitrations).

- **Stay applications (Article 8).**

- Resolution of controversy: test as to existence of a valid arbitration agreement: High Court endorses “full judicial consideration” approach and not *prima facie* / arguable test
 - ***Sterimed Technologies International Limited v Schivo Precision Limited*** [2017] IEHC 35
(McGovern J.)
 - ***Kellys of Fantane (Concrete) Limited v Bowen Construction Limited*** [2017] IEHC 357
(McGovern J.)
- Stays often granted under Article 8:
 - ***Sterimed*** (as above) (international arbitration case)
 - Refused in ***Kellys of Fantane*** (domestic arbitration construction case) – respect for parties’ agreement to conciliate.

- Set aside applications (Article 34)
 - Same picture / respect for arbitral process.
 - Very limited grounds to set aside – Article 34 of Model Law.
- Recent case: application to set aside refused: ***Hoban v Coughlan and Riordan*** [2017] IEHC 301 (McGovern J.) (issues: absence of proper notice and absence of reasons).

(2) The Persona Decision / Third Party Funding

- ***Persona Digital Telephony Limited v Minister for Public Enterprise and Others*** [2017] IESC 27 (23 May 2017)
 - Plaintiffs challenging award of mobile telephone licence in 1996.
 - Plaintiffs funding agreement with Harbour Fund.
 - Plaintiffs sought decision that funding agreement not abuse of process and not breaching rules on maintenance and champerty.
 - High Court in 2016: Held agreement amounted to maintenance and champerty and not consistent with public policy in litigation.
 - Supreme Court on 23 May 2017 decided 4:1 to uphold High Court decision but some interesting observations
 - Maintenance and champerty both still torts in Irish law – Maintenance and Champerty Act 1634
 - Funding agreement found to be champertous.
 - Change of law on third party funding in litigation is a matter for legislature not judiciary / various issues raised.

- Moves to legislate: Contempt of Court Bill 2017 published by Government backbencher: would abolish maintenance and Champerty.
- Implications for arbitration?
 - Probably none.
 - Case did not concern arbitration but litigation.
 - No reason to believe that arbitration award would not be enforced in Ireland where one party has funding agreement with third party.
 - Other possible structures include taking equity stake in party
 - Funding of arbitration not give rise to same public policy concerns
 - Unlikely to have implications for arbitration.

(3) Mediation Act 2017

- Mediation Act 2017 enacted 2 October 2017
- Expressly excludes arbitrations under Arbitration Act 2010.
- Imposes obligations on mediators and on parties.
- Imposes obligations on solicitors and barristers.
 - Solicitors must advise clients to consider mediation prior to issuing proceedings and must make a statutory declaration that this has been done.
 - Obligations on barristers similar (where permitted to issue proceedings on behalf of a client not represented by a solicitor).
- Role of court to invite parties to consider mediation etc.