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Irish High Court on Full Versus Prima Facie Judicial Consideration of Whether an Arbitration Agreement Exists

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If a national court is called upon, in the context of an application to refer parties to arbitration, to determine whether a valid arbitration agreement exists, how probing should the court's examination of the existence or validity of the putative agreement be? Judicial authorities in countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration have split on the question of what standard of judicial review to apply in such cases. Applying Article 8 of the Model Law, some courts have adopted a standard of full judicial review: in deciding whether or not to refer parties to arbitration or to stay national court proceedings, these courts have considered de novo whether or not a valid arbitration agreement exists, rendering a final determination on this issue. In contrast, applying the same provision, other courts have adopted a prima facie review standard; under this standard, a national court only preliminarily determines whether there is a prima facie basis for arbitral jurisdiction and, if so, leaves determination of the jurisdictional issue to the arbitral tribunal, subject to later judicial review of the arbitrators' award and jurisdictional decision.

On November 11, the Irish High Court issued one of its first rulings under Ireland's Arbitration Act 2010, which adopts the Model Law, including Article 8. One of the issues before the High Court was whether to apply full judicial review, or merely prima facie review, to determine whether an arbitration agreement existed. The Court ultimately decided not to resolve that question because it was not a necessary determination in the disposition of the case before it.

In Barnmore Demolition and Civil Engineering Ltd. & Alandale Logistics Ltd., et al., No. 5910P, a construction dispute, the defendants asserted that they were party to an arbitration agreement with the plaintiff based on an unexecuted draft contract containing an arbitration provision and the defendants' contention that the parties had an "agreement in principle." The issue presented to the Irish court was whether, under Article 8 of the Irish version of the Model Law, the parties should be referred to arbitration. Article 8(1) of the Model Law, as also applicable in Ireland, provides that "[a] court before which an action is brought in a matter which is the subject of an arbitration agreement shall . . . refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

In addressing the defendants' argument, the Irish High Court first laid out the definition and form of "arbitration agreement" under the Model Law, and noted that an arbitration agreement has an independent and distinct existence from the underlying contract with which it is associated. The Court then considered whether it had jurisdiction to determine whether a valid arbitration agreement existed between the parties. The Court observed that, although under the doctrine of "Kompetenz-Kompetenz" an arbitral tribunal has the authority to determine whether an arbitration agreement exists, this does not deprive the Court of its jurisdiction to consider that issue as well. In light of this concurrent jurisdiction, the question arises as to what standard a court should apply in exercising its jurisdiction to rule on whether an arbitration agreement exists – namely, whether full judicial review or mere prima facie consideration is appropriate. See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 881-891 (2009).

The text of the Model Law arguably indicates that full judicial review of the jurisdictional issue is appropriate. As noted above, the text of Article 8 provides that a court should refer the matter to arbitration unless it "finds" that the agreement is null, implying that it is up to the court to make such a "finding." Accordingly, courts in the United Kingdom, Germany, some Canadian jurisdictions, New Zealand, and Australia have held that full judicial consideration of whether an arbitration agreement exists is appropriate.

The legislative history of the Model Law also arguably supports such a reading. For example, the drafters of the Law rejected a version of the law that would have courts refer matters to arbitration unless the court found that the arbitration agreement is "manifestly null and void." Such language would have paralleled the 1980 French New Code of Civil Procedure, which provided for prima facie rather than full judicial review. It also would have narrowed the instances in which a court could decline to refer matters to arbitration.

But some other judicial authority and commentary, and some aspects of the drafting history of the Model Law, suggest only that prima facie judicial consideration is appropriate. In particular, proponents of this view have pointed to the deletion of a provision in early drafts of the Model Law that would have permitted a party opposing arbitration to apply for a judicial declaration that no valid arbitration agreement existed. This line of reasoning has persuaded the Indian Supreme Court (albeit in a split decision), as well as courts in some Canadian jurisdictions, Bermuda, and Hong Kong. Under such a standard, the court would only determine whether there is a prima facie case for the existence of an arbitration agreement. If so, the matter would be referred to the arbitral tribunal for any necessary final determination of whether an agreement exists.

Although the Irish High Court in Barnmore observed that there is a "particularly strong case" that the courts should give full judicial consideration, not just prima facie review, of whether an arbitration agreement exists, the High Court nonetheless declined to make a holding as to the proper standard. Instead, the Court stated that a determination of the proper standard to use was unnecessary in the case before it, because under either standard the defendants had failed to show that an arbitration agreement was in place. Reviewing the evidence, the Court found that the defendants

had not even made a prima facie showing that there was an arbitration agreement. Rather, there was only evidence of an unexecuted draft contract that contained an arbitration clause. The contract was never finalized; the parties had no more than an "agreement to agree." There was also no "course of conduct or business dealings between the parties which would lead the Court to conclude that the parties expected or knew that an arbitration clause would govern their dealings."

The Irish High Court thus left for another day the question of full judicial consideration versus prima facie consideration of whether there is an arbitration agreement. Notably, however, the Court suggested a preference for a full review standard, while even the Court's prima facie consideration was fairly detailed and probing; a full consideration may not have been much different. In any event, the split among authorities on this issue regarding the meaning of Article 8 of the Model Law remains for future decisions to address.

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