# Kluwer Arbitration Blog

## Supreme Court Blocks Ireland Ratifying CETA

Éamonn Conlon (Éamonn Conlon SC Arbitration & ADR) · Monday, January 30th, 2023

By a 4-3 majority, the Irish Supreme Court held in *Costello v Government of Ireland* that the Constitution precludes Irish ratification of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its member states. Inevitably, the decision has been compared with *Achmea* and CJEU *Opinion 1/17*. This post looks at the legislative cure the Supreme Court suggested (more defences to enforcement), and implications for the Energy Charter Treaty.

### CETA's ISDS Arrangements

CETA sets up a permanent bilateral Tribunal and Appellate Tribunal for investor claims, until a multilateral investment tribunal and appeal mechanism replace them. It relies on the legal machinery of investor-state arbitration, especially for enforcement, dealt with in art.8.41. Investors can make claims under the ICSID Convention and Rules, leading to an ICSID Convention award enforceable in Ireland under s.25 Arbitration Act, with High Court leave. Other claims lead to a New York Convention award, enforceable under s.24 Arbitration Act, again with leave.

### Costello's Claim

Patrick Costello, a member of Dáil Éireann (House of Representatives), sought a ruling that ratifying CETA would require a referendum amending the Constitution, which, he said, CETA infringed. The ground accepted by a majority of the Supreme Court was that the CETA tribunals would administer justice, a job the Constitution gives to the Irish courts.

At first instance Butler J rejected the claim, holding that CETA would not impinge on Irish judicial functions, because its tribunals would apply public international law, not Irish law.

On appeal the Supreme Court disagreed. The decisive consideration was that CETA awards would be (almost) automatically enforceable in Ireland. 'This takes a CETA award back from the international plane to the domestic legal system', said Dunne J in the lead judgment.

For O'Donnell CJ and Power J, dissenting, whether CETA tribunals were trespassing on the exclusive domain of Irish courts did not depend on whether their awards were enforceable,

especially since enforceability came from domestic law—the Arbitration Act, applicable to all arbitrations—not from CETA. But for the majority, it was the *combined* effect of CETA and ss24 & 25 Arbitration Act that led to an unconstitutional transfer of judicial power.

**A Makeshift Pontoon Bridge over the Rubicon**

Hogan J (in the majority) considered that there was nothing wrong with s.25 insofar as it generally seeks to give effect to the ICSID and New York Conventions. The Arbitration Act had been:

'conscripted into service as a means of giving effect to the awards of CETA Tribunals…as a sort of makeshift pontoon bridge by which a CETA Tribunal award is enabled to cross that legal Rubicon from the realm of international law into an enforceable judgment recognised as such by our own legal system on a more or less automatic basis.'

The difficulty in Hogan J's view was that s.25 of the Act

'designed as it was to give effect to conventional arbitral awards in respect of standard commercial arbitration—has been pressed into service for a different purpose entirely, namely, to give effect on a more or less automatic basis to the decisions of the CETA Tribunal. This amounts in substance to a considerable broadening of the scope and purpose of s.25 of the [Arbitration] Act for which there has to be the appropriate legislative base in the manner that Article 15.2.1 of the Constitution requires.'

Article 15.2.1 of the Constitution vests the 'sole and exclusive power of making laws for the State' in the Oireachtas (Parliament). Reinforcing this, Article 29.6 of the Constitution sets up a dualist system under which treaties do not become domestic law 'save as may be determined by the Oireachtas'.

But s.25 applies only to ICSID awards, not conventional awards in standard commercial arbitration. As mentioned, it is s.24 that gives effect to enforcement under the New York Convention. It is hard to see how applying s.25 to CETA awards broadens the scope or intent of s.25. At least for Hogan J, the offending characteristic appeared to arise from the conferral on CETA Tribunals of 'jurisdiction to pronounce on State liability arising from the general public law of the State.' That would condemn all investor-state arbitration, the ICSID Convention, and s.25 as a whole.

**Cure: More Defences to Enforcement**

To fix this, Hogan J said that CETA could be ratified if the Arbitration Act were amended (a) to extend s.25 to cover CETA awards and (b) to extend the defences to enforcement of CETA awards. At a minimum, the High Court would need express power to refuse leave to enforce awards 'materially compromising the constitutional identity of the State or the fundamental principles of our constitutional order' or materially compromising the State's obligation to give effect to EU law and 'preserve its coherence and integrity.' For example, if the CETA Tribunal refused to follow a CJEU decision directly on point, or rendered an award 'at odds in some material way with the legislative and juridical autonomy of the State', the High Court would have to be given power to

refuse enforcement.

Two of the other three judges in the majority agreed that these changes would allow CETA to be ratified. The three in the minority also agreed; in their view the law as it stands would require an Irish judge to refuse leave to enforce an award that fundamentally infringed the Constitution.

**A Snake Eating its Tail?**

Only Charleton J dissented on the cure. To solve the constitutional problem, he suggested, the discretion to refuse enforcement would have to be so big that it would be like a snake that eats its own tail. That would violate CETA and defeat its purpose, contrary to art.18 of the Vienna Convention on the Law of Treaties.

O'Donnell CJ disagreed: the amendment discussed would be much narrower and the exception to enforcement much more limited than that. It would not violate CETA because (among other things) it would simply allow any defences to enforcement of *domestic court judgments* be raised against enforcement of CETA awards. And CETA art.8.41.4 permits this: 'Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought.'

There is some support in Hogan J's judgment for the Chief Justice's narrow and sanguine reading of the suggested amendment's scope. Hogan J noted that in *Micula v Romania* Lords Lloyd-Jones and Sales said that arts.54(1) & 55 ICSID Convention arguably support allowing ICSID arbitral awards to be resisted using defences to enforcement of a domestic judgment. The Oireachtas could 'build on what was said in *Micula*' and spell out in legislative form the defences to enforcement 'tacitly contemplated' for example by art.54(1) ICSID Convention (which requires states to enforce pecuniary obligations of an award 'as if it were a final judgment of a court in that State').

But Hogan J also said that the Constitution does not permit the Government to ratify CETA while 'the defences to enforcement of a CETA Tribunal award under the ICSID and the New York Conventions respectively remain as circumscribed as they currently are.' This suggests significantly broadening the defences, beyond art.V New York Convention. Perhaps hinting how much broader, he said that the High Court's power to review an arbitral award 'certainly *as things stand* does not extend to a review on the merits'. (Emphasis added)

In reality, any amending legislation will be either unnecessary (as the minority considered) or derogate from CETA (as Charleton J said) to a greater or lesser extent. If it were enacted unilaterally, no one will be able to say for sure which—until the CETA Tribunal decides. But Ireland is unlikely to act unilaterally: it has been vocal in condemning the UK for legislating to amend domestic application of the Protocol on Ireland/Northern Ireland, and will hardly do the same itself with another treaty. Any legislative cure would surely need to be coordinated with a new CETA protocol, political declaration, or CETA Joint Committee interpretive decision.

**Energy Charter Treaty**

Although its economy is highly globalised and it has the second-highest percentage of GDP from

inward foreign direct investment stock in the OECD, Ireland currently is not party to any bilateral investment treaties. Ireland is nonetheless party to the Energy Charter Treaty (ECT). O'Donnell CJ said that if CETA cannot be ratified then the ECT must be equally forbidden.

As the CJEU held in *Komstroy*, the ECT is an integral part of EU law. In *Costello*, the majority considered that compliance with CETA, once ratified, would bind Irish courts to enforce its awards. (That seems a better answer to the point that domestic law, not CETA, makes awards enforceable. For example, it is CETA itself that reads art.8.41.5 CETA—a makeshift lever not unique to CETA—into the New York Convention.) Moreover, in the majority view, after ratification CETA and its Tribunal's awards would be safe from constitutional challenge under Article 29.4.6 of the Constitution, which immunises acts 'necessitated by' the obligations of EU membership. Although Ireland had no EU law obligation to ratify CETA (the judges were unanimous on this), ratification closes the challenge window.

Since the ECT is ratified, the window is closed. It seems that an Irish court would be bound to enforce an ECT arbitral award—subject to the ECT and other EU law but without constitutional impediment.

But a reformed ECT can expect a court challenge to Irish ratification.

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