

### LYING CHEATING AND STEALING DOING BUSINESS ABROAD

Irish businesses are not generally familiar with Investment Treaty Arbitration which provides to Investors certain rights and protections in dealings with foreign States and foreign State Agencies. In particular, protection is given to Investors from discriminatory treatment, denials of Justice, expropriation and other forms of improper interference or regulation by the host State.

Ireland has only one Bilateral Investment Treaty and this is with the Czech Republic. Put in perspective, the United Kingdom has 91, the United States has 39 and Kazakhstan has 27 Bilateral Investment Treaties.

When operating overseas, businesses and their lawyers need to understand the idiosyncrasies of doing business in foreign countries, where the legal culture is at times more foreign than the social or business culture. A case in point is one where a Canadian company took on a claim in Mississippi for a few million dollars and ended up losing a claim before a Mississippi jury for \$ 500 million. The Canadian company (the Loewen Group, a funeral home conglomerate) was ruined having become embroiled in a dispute with O'Keeffe, a local Mississippi funeral home operator, over the terms of a funeral insurance contract.

The Mississippi operator, O'Keeffe, was represented by a flamboyant trial attorney, Willie Gary. When Gary took on the case, he said he had no interest in the intricacies of contract law. Rather, he allegedly jumped up and shouted "this case is about lying, cheating and stealing!". Gary flies two jets, The Wings of Justice 1 and The Wings of Justice 2. Gary reportedly begins every trial by saying "I am just a country boy, if I just talk in plain ordinary talk about what happened, you won't hold it against me, will you?" In this case, his populist arguments, unimpeded by a local Trial Judge,



portrayed the Canadian company as a greedy foreign invader out to deceive and cheat grieving consumers of funeral home services. The argument succeeded as the jury initially returned a verdict of \$260 million dollars. After a Court ordered reconsideration, which was requested by the stunned Lawyers for the Canadian company, the jury increased this Award to \$500 million dollars, of which \$400 million was punitive damages. Faced with bankruptcy whether or not it appealed the Award, the Canadian company eventually settled the case for \$175 million.

During the trial, Gary portrayed the Mississippi funeral operators a patriotic war hero "willing to stand up for America". On the other hand, he portrayed the Canadian Managing Director as a man who "wouldn't keep his word, deceived people and would not deal with honour". He went further and placed a one full page colour ad in local newspapers during the trial in which he juxtaposed the Mississippi and American flags on one side of the page and the Japanese and Canadian flags on the other!

In his closing arguments, Gary ignored all details of contract law and simply said the Canadian company broke their word and it was intentional and malicious. He asked the jury for \$105 million dollars in damages, adding, "you may not think that is enough".

When the Lawyers for the Canadian company were hit with the initial verdict of \$260 million dollars, they failed to heed the warning of the local Judge who said "I do not think you want to go back in there".

Any Irish enterprise doing business with foreign Governments and foreign Government Agencies should inform itself on Investment Treaty Arbitration and whether its businesses can be structured in a better way to avail of Bilateral Investment Treaties.

Eamon Harrington

“ Gary reportedly begins every trial by saying “I am just a country boy, if I just talk in plain ordinary talk about what happened, you won't hold it against me, will you?” ”

### TYING THE KNOT - BEWARE OF THE NEW REGULATIONS

The old requirements when getting married were simple - a couple had to give three months written notification of their intention to marry to the Registrar (a Court exemption could be obtained before the proposed marriage date under Section 33 of the Family Law Act 1995 in certain circumstances). This has all changed since the 5th November 2007 with the coming into force of the Civil Registration Act 2004. Part 6 of that Act sets out the new requirements for the registration of a marriage. It also specifies the requirements for a valid marriage, for the delivery of notices of intention to marry and prescribes venues where marriages can now take place.

First and foremost, a marriage will not be valid unless the parties notify in writing the Registrar three months prior to the marriage. The new requirement is that the couple must now attend before the Registrar personally and sign a Declaration within 5 days of the ceremony in addition to lodging a fee of €150.00 (if resident outside the state, notice by registered post is possible). The Declaration which must be signed in the presence of the Registrar states that there is no impediment to the marriage. Following this meeting the couple will be given a completed Marriage Registration Form which must then be given to the person performing their ceremony. If the ceremony does not take place within six months of the date on this form then the process must begin all over again. A marriage will not be officially registered without this form which must be signed by the couple and their two witnesses on the day of the wedding. The onus is now on the couple themselves to return this form to the Registrar to have their marriage officially registered.

In light of the increasing number of second marriages taking place extra scrutiny is obviously placed by the Registrar in such situations to ensure that the parties have capacity to marry and that they have been lawfully divorced. It is important to be aware that the Divorce must be recognised in this jurisdiction and not all Decrees of

Divorce obtained elsewhere are so recognised. The Act also provides for objections to a marriage and these objections can be lodged in writing to the Registrar. The Registrar will then make such enquiries as he or she thinks fit and the marriage cannot go ahead until the investigation has been carried out satisfactorily.



Another new aspect to the Act is that marriages may now take place in a location other than a Church or Registry Office, subject of course to certain conditions. The marriage can only take place for example at a location which is a public place and which is agreed to by the person solemnising the marriage. The venue must also have been inspected and approved by the HSE in advance. Therefore a couple who wish to get married outside of a traditional venue must first contact the owners of the venue of their choice who must then get approval from the local Registrar as authorised by the HSE. A number of requirements have been set down by the HSE for these venues namely the venue must be a dignified location, it must be a public place and no food or drink must be served during the ceremony and the ceremony must take place indoors.

This Act will no doubt open the door to a wide variety of venues for weddings. It gives options to those who do not opt for the traditional church wedding as they are no longer limited to the drab and dreary Registry Office. We have already seen the first of these ceremonies take place in Killarney since the Act came into force. However it is important to be aware that not all venues may be certified as appropriate venues under the Act and appropriate research and ground work should be done in advance.

Deirdre O'Riordan  
Solicitor



## A WILL - WHY PUT IT OFF?

The thought of making a Will is something we all shy away from. No one likes to think of the inevitable. However, it is something we should take the time to finalise sooner rather than later.

Realistically, no matter what age you are, if you have a child or if you own property, a Will is a “must have”. The main advantages of making a will are as follows:

1. It allows you to decide what happens to your estate. Otherwise, you are effectively leaving it up to existing legislation to decide on your behalf.
2. It allows you to make adequate provision for any children or relatives who may have special needs.
3. You can choose who handles your affairs.
4. It provides a mechanism for appointing guardians for any young children.
5. It allows you to structure your affairs so as to minimise any tax liability payable on death.
6. In general, the costs involved in the administration of a testate (where there is a Will) estate cheaper.

The first step in making a will is to decide who you want to benefit from your estate. Under Irish law there is a general presumption of testamentary freedom. However, there are some significant legal restraints which must be considered.

### 1. Surviving Spouse

A surviving spouse has unique protection. If an individual makes a will and is survived by a spouse and no children, the surviving spouse has a right to one-half of the estate. If an individual makes a will and is survived by a spouse and children, the surviving spouse has a right to one-third of the estate. This is known as the “Legal Right Share”. This legal right share ranks in priority after the rights of creditors of the deceased but before the rights of any other beneficiary. If an individual dies without having made a will and has no children or grandchildren, the surviving spouse is entitled to the whole estate. On the other hand, if an individual dies without having made a will and has children or grandchildren, the surviving spouse is entitled to two-thirds of the estate.

### 2. Children's rights

Unlike a surviving spouse, a child does not have any automatic entitlement to a share in their parent's estate. A child can however, apply to the court on the basis that their mother or father “failed in their moral duty to make proper provision for the child in accordance with his means”. The court will then be obliged to consider the matter from the point of view of a prudent and just parent, taking into account the position of each of the children and any other circumstances.

“ Under Irish law there is a general presumption of testamentary freedom. However, there are some significant legal restraints which must be considered. ”

The second step is to decide on the trusted individuals whom you wish to act as your executors, trustees and guardians where relevant.

### 1. Executors

An executor is the person entitled to take out the grant of probate to the estate and who must administer the estate of the deceased. From the date of death, the whole estate devolves on the executor.

### 2. Trustees

If there is a trust set up in the Will, for example, if there are children under the age of 18, the trustee is the person who must carry out the wishes of the Settlor (ie. the person setting up the trust)

### 3. Guardians

The role of the Guardian is to be in effect in loco parentis to the child for whom he is appointed guardian

The role of an executor, trustee and guardian is a very onerous one. Therefore, it is important to choose someone who is trustworthy and capable of carrying out their role effectively.

### General Overview on the main Tax Issues:

- **Capital Gains Tax (CGT)** - There is no CGT where an asset passes directly to a beneficiary under the provisions of a Will. However, CGT may be payable if the value of the asset increases between the date of death and the date of disposal
- **Stamp Duty** - Stamp duty does not arise where an asset passes to a beneficiary under a Will
- **Capital Acquisition Tax (CAT)** - CAT is a tax charged on gifts and inheritances. CAT is charged at 20% on the value of the gift or inheritance. At present, there are maximum tax free thresholds depending on the relationship between the person who provided the gift or inheritance and the person receiving the gift or inheritance. Prior gifts and inheritances received from a person in the same group since 5th December 1991 are aggregated with current benefits for the purposes of determining whether the relevant threshold amount is exceeded. There is no CAT on gifts or inheritances between spouses. There are a number of reliefs and exemptions which can be explored to maximise tax efficiency.

The 2008 thresholds are as follows:

- **Group A** (including son /daughter) - €521,208
- **Group B** (including brother/sister/niece/nephew/grandchildren) - €52,121
- **Group C** - (including Strangers in blood) - €26,060
- **Discretionary Tax** - is a specific tax charged on certain types of trusts

Finally, it is important to note that even if you have made a Will previously, it may be time to update. The following a number of points to keep in mind:

- A Will is automatically revoked by a subsequent marriage. However, a Will is not revoked by Divorce.
- If you own property in another country and have executed a foreign Will, care should be taken to ensure that such foreign Wills do not inadvertently revoke any Irish Will.
- There is a presumption that when a Will which was last known to be in the possession of the testator (the person making the Will) cannot be found after death, that the testator destroyed it. Therefore, make sure that your Will is in a safe place.
- If you are not married and you leave part of your property to your partner, they will be treated as a stranger-in-blood, will be classed as a Group C and taxed accordingly.

We at Comyn Kelleher Tobin would be happy to advise you in relation to the options available to you to suit your requirements.

Patrice O'Keeffe  
Solicitor



## RECENT STAMP DUTY CHANGES

In the Budget at the end of 2007, the Minister made some significant changes in relation to residential property. This led to the introduction of a simplified system incorporating an exemption of €125,000 and the rate bands reduced to just two from six. Property over €125,000 but less than €127,000 is now exempt from stamp duty. These changes apply to both owner-occupiers and investors and a summary of the changes is set out hereunder;

1. residential property transactions not exceeding €125,000 are entirely exempt;
  2. residential property transactions between €125,000 and €1,000,000 are charged at 7% on the part in excess of €125,000;
- and
3. residential property transactions in excess of €1,000,000 are charged at 9% on the part in excess of €1,000,000

The changes became effective on 5 December 2007 and any instruments stamped after the 5th November under the old rates should be entitled to a refund of the difference of the amount of duty payable between the old rates and the new rates.

The stamp duty exemption available to both first-time owner-occupiers and owner-occupiers of new property under 125sq metres continues to apply as does the exemption for first-time

buyers of second hand houses. Changes were also introduced in relation to the 'clawback' of stamp duty on such reliefs/exemptions if the property is rented within 5 years. There was a reduction in the clawback period from five years to two years on all properties acquired after the 5 December 2007. Where property was acquired before that date but rented out after the 5 December 2007 no clawback will arise where the property is owned over three years.

Finally, where a parent transfers, leases or conveys a site to a child for the purposes of building their principal residence, there was an increase in the exemption threshold from €254,000 to €500,000 from the 5 December 2007. Similar changes have been made to the equivalent CGT exemption.

No changes were made in relation to commercial and agricultural property. For any information on stamp duty contact our Conveyancing Department.

Emma Comyn, Partner

“ residential property transactions between €125,000 and €1,000,000 are charged at 7% on the part in excess of €125,000; ”

## COMPANY WEBSITE AND EMAIL INFORMATION REQUIREMENTS



Last year disclosure rules for certain company documents were extended to websites and email correspondence. The regulations introducing this amendment (The European Communities (Companies) (Amendment) Regulations 2007) provided that any company which does not display the required information on their website or emails will be guilty of an offence.

The Office of the Director of Corporate Enforcement has recently stated that it has been monitoring compliance with this change in company law and has found many companies in breach.

The Regulations provide that all limited liability companies registered under the Companies Acts are required to display the following information on their websites, emails and other electronic communications and order forms:

1. The name and legal form of the company.
2. The place of registration and company registration number.
3. The address of registered office.
4. The fact that it is a limited company, where it is exempted from the obligation to use "limited" or "teoranta".
5. Where a company is being wound up, the fact that it is being wound up.
6. If there is a reference to share capital, that reference shall be to paid up share capital.

Every company which has not as yet complied with this change in law should do so now. As the ODCE has stated that it is monitoring company websites then it makes it all the more important to avoid an embarrassing prosecution. For any further information on this or other related matters please contact Conor Lupton, [conor.lupton@ckt.ie](mailto:conor.lupton@ckt.ie).

Conor Lupton, Partner

## CKT AT THE MOVIES

In November, CKT co-hosted with HLB Nathans the Irish Premiere of 'Strength & Honour' at the Cork Opera House. The home grown boxing story was written and directed by Cork man Mark Mahon and the Executive Producer was CKT's own Olann Kelleher. The movie starred veteran actors Michael Madson, Vinnie Jones and Patrick Bergin to name a few. All the stars turned up for the night which was hosted in aid of the Marymount Hospice. The night was a great success and a very proud night for Cork and for CKT.



Katharine Kelleher and Emma Comyn



From left to right Michael Madson, Debbie Moore (CKT), Mark Mahon, Vinnie Jones and Olann Kelleher (CKT).



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Welcome to the Spring Edition of the CKT Newsletter.

We have many interesting Articles in this Newsletter which we hope you will find informative and helpful. For any of those intending taking a walk down the aisle they should read the Article by Deirdre O'Riordan dealing with the new Regulations which came into force under the Civil Registration Act.



Similarly anybody intending on investing in the property market, though currently not as buoyant as recent times, changes have been made to entice the investor and the purchaser back into the market by reducing the Stamp Duty rates on both secondhand properties and new properties for investors/second time purchasers. Again you will find an informative Article by Emma Comyn in our Newsletter setting out the position.

We have another very interesting Article by Patrice O'Keeffe Solicitor with regard to Wills. This is one area where I find most clients just do not want to think about. Please see Patrice's Article and you will see the importance of putting a Will in place. We have many Solicitors here who can assist in this area and I would urge you to read the Article and we would only be too delighted to discuss making a Will with you.

We had a very exciting time at the World Premiere of the Cork born and bred Film Strength & Honour directed by Corkman Mark Mahon and our own Olann Kelleher who was the Executive Producer of same. The World Premiere was held at The Opera House in Cork and all the Stars were in attendance. You will see the pictures of the Solicitors and the Stars in the following pages.

Again we thank you for your interest in this Firm and we look forward to your continued support here at CKT and we wish you all a Happy and hopefully Hot Summer.

*Deborah Moore*  
Deborah Moore  
Managing Partner

## COMPANY ANNOUNCEMENTS



Photograph of Eamon Harrington Partner with the Committee of the Southern Law Association at their AGM. This was Eamon's last official function as President of the SLA. Since then Eamon has been appointed Vice Chairman of the Law Society of Ireland Arbitration and Mediation Committee.



Conor Lupton, Partner

We are delighted to introduce our new Commercial Director, Conor Lupton. Conor has worked in the Commercial department of a Dublin firm of Solicitors and in the corporate legal advisory department of KPMG. Conor's areas of expertise include Mergers and Acquisitions, Re-organisations, Corporate Insolvency and recovery, Company Restorations and other Company and Commercial law issues. Conon can be contacted at conor.lupton@ckt.ie.

**Cork Office:**  
29 South Mall, Cork

**Dublin Office:**  
24/26 Upper Ormond Quay, Dublin 1

Telephone: 021 427 3192  
Fax: 021 427 3801

[www.ckt.ie](http://www.ckt.ie)