

Arbitration (Amendment) Bill 2025

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Abstract

The Arbitration (Amendment) Bill 2025 proposes to amend the *Arbitration Act 2010*, to enable effect to be given in the State to certain international agreements concerned with the protection of investment. This Bill Digest presents and examines the principal provisions of the Bill.



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Executive Summary

The **Arbitration (Amendment) Bill 2025** (the 'Bill') was initiated in the Dáil on 1 December 2025 and is scheduled for Second Stage debate in the Dáil on Tuesday, 9 December 2025. It does not substantively diverge from the **General Scheme of the Arbitration (Amendment) Bill 2025** that was published on 4 July 2025. On 23 October 2025, the Library and Research Service published a **Policy and Legislative Briefing Paper on the General Scheme of the Arbitration (Amendment) Bill 2025** (the 'Briefing Paper').

The Bill proposes to insert a new section 25A after **section 25 of the Arbitration Act 2010** (the 'Act') and make consequential amendments to the Act.

The new section 25A would enable effect to be given in the State to certain international agreements concerned with the protection of investment including the **Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States**, the **Advanced Framework Agreement (AFA) between the European Union and its Member States and the Republic of Chile**, and other investment agreements as may be prescribed by order by the Minister for Foreign Affairs and Trade under the proposed new section, after consultation with the Minister for Justice, Home Affairs and Migration.

Most of the provisions of CETA have been provisionally applied and implemented since 21 September 2017. The Advanced Framework Agreement between the European Union and its Member States and the Republic of Chile has provisionally applied from 1 June 2025. At the same time an Interim Trade Agreement between the EU and Chile has been in effect since 1 February 2025.

As provisionally applied, CETA removes 99% of duties applicable to the importation of goods, it gives mutual recognition to certain professional qualifications, and it ensures a baseline of EU standards and geographical indications on goods. Duties still apply to certain agricultural, fish and seafood products. Since CETA has provisionally applied, there has been a significant increase in Ireland's bilateral trade in goods and services with Canada. This trend is mimicked in figures between Canada and the EU. While at a strategic level, the EU Commission notes that CETA has contributed to closer economic relationships between the EU and Canada.

The elements of CETA that have not been provisionally applied are those that fall within the shared competence of the EU and its Member States. These provisions include those relating to portfolio (indirect foreign) investment and the investment dispute settlement mechanisms established through CETA's Investment Court System (ICS). CETA cannot come into full effect until every EU Member State has ratified the Agreement. To date, 10 Member States have not ratified CETA: Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Ireland, Italy, Poland and Slovenia. Ireland's ratification of CETA would not unilaterally bring the investment provisions into effect - CETA would not be fully in force until all EU member states have ratified the treaty.

The elements of the AFA that have been provisionally applied are Chapters 1,2,3 (with the exception of Art. 3.4); Chapters 4,5,6 (with the exception of Art. 6.2); Chapter 7; Article 8.5(1),

subparagraph (b); and Chapters 40 and 41. It is too early to determine the effect of the provisional application of AFA on trade between Ireland and Chile.

Article 29.4.1° of the Constitution authorises the Government to ratify international agreements (treaties) on behalf of the State. The treaty must first be laid before the Dáil unless it is of a purely technical and administrative character ([Article 29.5.1° and 3°](#)). Under [Article 29.5.2° of the Constitution](#), ratification of a treaty that would result in a charge upon public funds must first be approved by a vote of Dáil Éireann. In addition, under Article 29.6 a treaty won't become part of domestic law unless it is directly incorporated in, or by, an Act adopted by the Oireachtas. In 2021, then Deputy Patrick Costello (Green Party) applied to the High Court seeking to prevent the Government and the Dáil from ratifying CETA by way of the procedure outlined in Article 29.5.2°. He argued that ratification would give rise to a violation of the State's legislative sovereignty and juridical sovereignty, and he asserted that CETA could only be ratified by means of constitutional amendment following a referendum. The challenge was rejected by the High Court but went on appeal to the Supreme Court.

The Supreme Court unanimously held that Ireland was not under any obligation to ratify CETA as a result of its EU membership for the purposes of Article 29.4.6° and, accordingly, the question of ratification was not immune from constitutional challenge. The Court then examined the role and impact of CETA's Investment Court System (ICS) for settling investor disputes and of CETA's Joint Committee for overseeing CETA's implementation. On these issues, the judges were quite divided. That said, on one point, a 4:3 majority of judges found that, on the basis of domestic law as it currently stands, the ratification of CETA by the Government and the Dáil in accordance with Article 29.5.2° would be unconstitutional. The majority found that ratification would give rise to the 'almost automatic' enforcement of arbitral awards under section 25 of the [Arbitration Act 2010](#). The 4:3 majority held that this would undermine the juridical sovereignty of Irish courts and thereby breach Article 34 of the Constitution by permitting an international tribunal to make binding decisions enforceable in Irish law.

In his judgment, Justice Hogan suggested that the Oireachtas might be able to give effect to CETA if it legislated to change the manner in which [section 25 of the Arbitration Act 2010](#) would apply to arbitral decisions made under CETA. The proposed amendment would have to empower the High Court to refuse to give effect to an ICS award if it was found to:

- materially compromise the 'constitutional identity' of the State or fundamental principles of the Irish constitutional order; or
- materially compromise Ireland's constitutional obligation to give effect to, and to preserve the coherence and integrity of, EU law.

Two of the four judges who had found that ratification of CETA, as the law currently stands, would be unconstitutional, agreed with the suggestion of Justice Hogan, stating that hypothetically, it would sway their reasoning on the unconstitutionality of ratification of CETA. As indicated above, three Supreme Court judges did not find that ratification of CETA by the Government and the Dáil, as the law currently stands, would be unconstitutional. However,

they each agreed that the suggested amendment would help to address any constitutional frailty that the majority perceived to affect the ratification of CETA. Justice Charleton dissented (disagreed) stating that it would not be possible to cure the unconstitutionality associated with ratifying CETA via legislative means alone.

The new section 25A(2) that the Bill proposes to insert into the 2010 Act provides that awards made pursuant to an international agreement to which the new section 25A applies (including CETA) will be enforceable in Ireland by leave of the High Court in the same manner as a judgment or order of the High Court with the same effect. The proposed new section 25A(3) provides that such an award is not enforceable in the State if enforcing it would compromise the constitutional order of the State, or the autonomy of the legal order of the EU.

The key legal issues that arise from the Bill centre around:

- What is meant by the term ‘constitutional order of the State’ in the context of prohibiting the enforcement of arbitral awards?
- Did Justice Hogan’s proposal that received the support of a majority of judges, create a constitutionally compliant pathway for legislating around what the majority in the case had otherwise found to be an unconstitutional ratification of CETA?
- Would the Bill be sufficient to address the constitutional frailties of ratification over the long term, or will the legislation lead to further litigation?
- Does the Bill align with Ireland’s international obligations under CETA, the Washington Convention and the Vienna Convention?

Critics of the investment provisions of CETA say that they are unduly favourable to multinational companies. Under this line of argument, CETA is seen to give privileges to investors without demanding they take on sufficient responsibilities in return. The European Commission has stated that the investment protection clauses in CETA and the ICS would help to provide a level of business certainty to investors, looking for effective and expedient resolution of disputes. The Irish government supported this position, suggesting that ratification of CETA would help to secure new markets for local businesses and reaffirm Ireland’s character as a small, open economy that supports free, fair and balanced international trade.

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Glossary and abbreviations

Table 1 Glossary and abbreviations

Term	Meaning
AFA	Advanced Framework Agreement (AFA) between the EU and its Member States and the Republic of Chile
CETA	Comprehensive Economic and Trade Agreement. The trade agreement reached between the EU and its Member States and Canada
Costello Case	The case of Patrick Costello v The Government of Ireland heard in the High Court in 2021 ([2021] IEHC 600), and then on appeal before the Supreme Court in 2022 ([2022] IESC 44).
EU	European Union
ICS	Investment Court System. The proposed Tribunal and Appellate Tribunal in CETA and AFA for the resolution of investor-state disputes.
ICSID	International Centre for the Settlement of Investment Disputes, forming part of the World Bank Group, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention/the Washington Convention). Arbitration proceedings under the ICSID Convention follow the ICSID Rules of Procedure for Arbitration Proceedings.
ICSID Additional Facility	A facility of the ICSID which provides arbitration, conciliation and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention (such as those involving non-State actors, including the EU). It operates under the ICSID Additional Facility Rules.
ISDS	Investor-State Dispute Settlement. A system for the resolution of investor-state disputes based on arbitration and previously included in negotiations for CETA and the Transatlantic Trade and Investment Partnership.

Term	Meaning
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 and entered into force on 7 June 1959. The Convention requires Contracting States to recognise and enforce foreign arbitral awards, and for their courts to give effect to arbitration clauses in private agreements.
UNCITRAL	United Nations Commission on International Trade Law, which is the core legal body of the UN covering international trade law.
Vienna Convention	The Vienna Convention on the Law of Treaties, governing and regulating treaties between states. The Convention was signed on 23 May 1969 and entered into force on 27 January 1980.
Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also known as the 'ICSID Convention')

Source: L&RS

Introduction

The Arbitration (Amendment) Bill 2025 (the ‘Bill’) was initiated on 1 December 2025 and is scheduled for Second Stage debate on Tuesday, 9 December 2025 in Dáil Éireann. The Bill comprises five sections and is accompanied by an [Explanatory Memorandum](#).

The [General Scheme of the Arbitration \(Amendment\) Bill 2025](#) (the ‘General Scheme’) received government approval on 27 May 2025¹ and was published on 4 July 2025. On 28 July 2025, the Tánaiste and then Minister for Foreign Affairs and Trade, Simon Harris announced that the Oireachtas Joint Committee on Foreign Affairs and Trade had agreed to his request to waive pre-legislative scrutiny on the General Scheme.²

On 23 October 2025, the Library and Research Service published a [Policy and Legislative Briefing Paper on the General Scheme of the Arbitration \(Amendment\) Bill 2025](#) (the ‘Briefing Paper’). The Briefing Paper explores the heads of the bill and outlines the legal and policy context of the proposed legislation. In substance, the Bill does not diverge from the General Scheme. Therefore, the material in that paper will not be reproduced in full. It is recommended that readers read the Briefing Paper alongside this Bill Digest.

Purpose of proposed legislation

The stated purpose of the Bill is to amend the [Arbitration Act 2010](#) (the ‘Act’) to enable effect to be given in the State to certain international agreements concerned with the protection of investment; and to provide for related matters. According to the Government’s [Autumn Legislative Programme](#), the proposed legislation represents an:

“... essential enabling condition for the ratification of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and other similar Free Trade Agreements with third countries that include investment protection provisions.”

The Bill is designed to rectify the constitutional irregularity associated with the proposed ratification of CETA by the Government, following the adoption of a resolution approving ratification in the Dáil under the law as it currently stands. The constitutional irregularity was raised by the Supreme Court in *Costello v Government of Ireland*³ when it considered the ratification of CETA by the Government and the Dáil.⁴

¹ See ‘[Bill to clear way for Canada trade deal](#)’, *Law Society Gazette*, 27 May 2025.

² ‘[Tánaiste welcomes update to the proposed amendments to the Arbitration Act which will enable the ratification of CETA](#)’, *Press Release*, 28 July 2025 (last updated 29 July 2025).

³ [2022] IESC 44.

⁴ [Tánaiste welcomes update to the proposed amendments to the Arbitration Act which will enable the ratification of CETA](#), *Press Release*, 28 July 2025 (last updated 29 July 2025, last accessed 1/10/2025). See also D Murray, ‘[Tánaiste seeks fast-track of bill to ratify Ceta and other trade agreements as US relationship sours](#)’, *Business Post*, 5 July 2025.

Background

In the Costello case, questions were raised regarding whether the ratification of CETA, as the law currently stands in the State, would give rise to a breach of the Constitution. To assist in understanding the relevant judgments in the High Court and Supreme Court, some of the Constitutional provisions discussed in the case are explained below.

Article 29.4.1° of the Constitution authorises the Government to ratify international agreements (treaties) on behalf of the State. The treaty must first be laid before the Dáil unless it is of a purely technical and administrative character (**Article 29.5.1° and 3°**). Under **Article 29.5.2° of the Constitution**, ratification of a treaty that would result in a charge upon public funds must first be approved by Dáil Éireann. In addition, under **Article 29.6** a treaty won't become part of domestic law unless it is directly incorporated in, or by, an Act adopted by the Oireachtas. Under **Article 29.4.4°**, Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples. **Article 29.4.6°** provides that no provision of the Constitution shall invalidate laws enacted, acts done or measures adopted by the State, which are necessitated by the obligations of Ireland's membership of the EU. **Article 34.1** provides that "[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution...". **Article 34.5.6°** provides that the decision of the Supreme Court shall in all cases be final and conclusive.

The Costello case

In 2021, then Deputy Patrick Costello (Green Party) applied to the High Court to prevent the Government and the Dáil from ratifying the parts of CETA subject to shared competences between the EU and its Member States. In his claim, Costello questioned the constitutional power of the Government, following Dáil approval, to ratify CETA. He argued that ratification of CETA could mean that the State would be ceding sovereign legislative power. He asserted that the State could be made liable in damages for loss suffered by investors resulting from the passing of the legislation. It was argued that this potential liability could have a 'chilling effect' on the power of the Dáil to pass environmental legislation. Costello also queried whether there was a constitutional requirement to make ratification of the investor court provisions contained in Chapter 8 of CETA subject to a referendum.⁵ Costello also submitted that the ratification of CETA would breach **Article 34 of the Constitution**. The High Court rejected his arguments.

On appeal from the High Court, the Supreme Court held, with a majority of four judges to three, that the ratification of CETA by the Government and the Dáil would be unconstitutional.⁶ The majority found that ratification of CETA in this manner would infringe juridical sovereignty and

⁵ *Costello v Government of Ireland* [2021] IEHC 600, at [5] per Butler J.

⁶ *Costello v Government of Ireland* [2022] IESC 44.

breach Article 34 by permitting an international tribunal to make binding decisions that are automatically enforceable in the State.

However, Justice Hogan suggested that the unconstitutionality of ratification might be corrected by the Government and the Oireachtas “...if certain legislative changes were to be made” to the *Arbitration Act 2010*.⁷ Six out of the seven Supreme Court judges agreed that legislative changes could rectify the (perceived) constitutional failings associated with ratification.⁸

Hogan’s opinion stipulated that the changes to the legislation would have to empower the High Court to refuse to give effect to an award handed down by CETA’s Investment Court System (ICS) if that award were found to:

- Materially compromise the ‘constitutional identity’ of the State or fundamental principles of the Irish constitutional order; or
- Materially compromise Ireland’s obligation (reflected in *Article 29.4.4° of the Constitution*) to give effect to, and to preserve the coherence and integrity of, EU law.⁹

Of the seven judges, Chief Justice O’Donnell, and Justices MacMenamin and Power, did not find that ratification of CETA under the law as it currently stands would be unconstitutional. However, they each agreed that the suggested amendment would help to address the constitutional frailty perceived by the majority. Justices Dunne and Baker agreed with the suggestion of Justice Hogan, stating that hypothetically, it would sway their reasoning on the unconstitutionality of ratification of CETA. Justice Charleton stood out as the dissenting voice, stating that it was impossible to cure the unconstitutionality associated with ratifying CETA via legislative means alone.¹⁰

Strategic and economic benefits of the provisional application of CETA

In an answer to a Parliamentary Question on 8 September 2025, the Tánaiste and then Minister for Foreign Affairs and Trade, Deputy Simon Harris, referred to the Arbitration (Amendment) Bill 2025.¹¹ He highlighted a significant increase in Ireland’s bilateral trade in goods and services with Canada since CETA was provisionally applied in September 2017:

“Irish businesses have benefitted from the elimination of tariffs on almost all key exports, access to the Canadian procurement market, the easing of regulatory barriers, and more transparent rules for market access.

⁷ See judgment of Hogan J in *Costello v Government of Ireland* [2022] IESC 44.

⁸ *Costello v Government of Ireland* [2022] IESC 44.

⁹ *Costello v Government of Ireland* [2022] IESC 44 at [233] per Hogan J.

¹⁰ *Costello v Government of Ireland* [2022] IESC 44 (Summary) at pp 4-5.

¹¹ Simon Harris TD, Tánaiste and Foreign Affairs and Trade, *Response to Parliamentary Question No 52 on Trade Relations*, *Dáil Éireann Debate*, 8 September 2025.

In 2024, Ireland's goods exports to Canada stood at €4.1 billion, more than a fourfold increase (436%) on the pre-CETA export levels of €0.9 billion in 2016. Services exports grew by 253% from €1.4 billion in 2016 to more than €3.7 billion in 2023, while services imports have grown from €0.3 billion in 2016 to more than €1.7 billion in 2023."¹²

The figures below are reflective of how CETA has changed the trading relationship between Canada and the whole EU block. A study published by the European Commission in June 2025 noted:

"Direct benefits resulting from the CETA since the start of its provisional application in 2017 include a 71% increase in bilateral trade in goods and services between the EU and Canada (from €72.2 billion in 2016 to €123 billion in 2023); a 64% increase in EU goods exports and a 81% increase in EU services exports to Canada; and increased the EU's gross domestic product (GDP), which has become €3.2 billion higher each year (€1.3 billion each year for Canada's GDP)."¹³

At a strategic level, according to the European Commission, CETA has also contributed to a closer economic relationship between the EU and Canada.¹⁴ The European Commission asserts that it has helped the EU, its Member States and Canada to increase economic security for their supply chains and promote more sustainable development.¹⁵

Previous related legislation

The [*Arbitration Act 2010*](#) is an Act passed with the intention to:

- further and better facilitate resolution of disputes by arbitration;
- to give the force of law to the Washington Convention, the New York Convention and related international agreements on arbitral awards;
- to allow for the recognition and enforcement of foreign arbitral awards in the State; and
- to repeal previous legislation.

¹² Simon Harris TD, Tánaiste and Foreign Affairs and Trade, [Response to Parliamentary Question No 52 on Trade Relations](#), *Dáil Éireann Debate*, 8 September 2025.

¹³ European Commission, '[CETA evaluation shows strong economic and social benefits](#)', *Press Release*, 16 June 2025.

¹⁴ European Commission, [Study in support of an ex-post evaluation of the Comprehensive Economic and Trade Agreement \(CETA\) between the EU and its Member States and Canada](#), June 2025 at p. 274.

¹⁵ European Commission, [Study in support of an ex-post evaluation of the Comprehensive Economic and Trade Agreement \(CETA\) between the EU and its Member States and Canada](#), June 2025 at p. 274.

Regulatory Impact Analysis/Assessment (RIA)

No Regulatory Impact Analysis was published for the Bill. However, a Regulatory Impact Assessment (RIA) on the proposed ratification of CETA was conducted in April 2021 by the then Department of Enterprise, Trade and Employment. The RIA did not quantify the projected economic benefit of ratifying CETA. The RIA did note that ratification of CETA (and similar free trade agreements) would support the internationalisation of Irish firms, helping to secure new markets for Irish business, and promoting investment protections through an international arbitration mechanism.¹⁶

Public consultation

There was no public consultation conducted before or after the publication of the General Scheme.

Pre-legislative scrutiny

The Oireachtas Joint Committee on Foreign Affairs and Trade waived pre-legislative scrutiny of the proposed legislation on 28 July 2025, following a request by the Tánaiste, and then Minister for Foreign Affairs and Trade, Simon Harris.¹⁷

¹⁶ Department of Enterprise, Trade and Employment, *Regulatory Impact Assessment: Proposed Ratification of the Comprehensive Economic and Trade Agreement between the EU, its Member States and Canada (CETA)*, 28 April 2021 (last accessed 01/10/2025).

¹⁷ 'Tánaiste welcomes update to the proposed amendments to the Arbitration Act which will enable the ratification of CETA', *Press Release*, 28 July 2025.

Legal and policy context

As noted in the [Briefing Paper](#), there are a number of legal questions that have remained unanswered since the publication of the General Scheme.

Did the Costello case create a clear precedent?

Although the majority found the proposed ratification of CETA to be unconstitutional, the reasoning of the majority judges was not entirely consistent.¹⁸ Meanwhile, the dissenting judgments all held that the High Court already has an inherent power to review awards that pose a risk to the constitutional order of the State, based on the separation of powers principle and the nature of the courts as the constitutional arbiter of the State. They concluded therefore that any international award that is fundamentally incompatible with the Constitution could not be enforced.¹⁹

One commentator, Professor of Constitutional Law at Trinity College Dublin, Oran Doyle, has noted that there was no clear majority reasoning in the case, which for him meant that the decision of the Supreme Court could not be relied upon as good precedent. He stated:

“This division on the Supreme Court ... makes it difficult to gauge the immediate implications of Costello and impossible to formulate any legal principle for which Costello can be cited as authority.”²⁰

Overview of approaches in other jurisdictions

The elements of CETA that have not been provisionally applied are those that fall within the shared competence of the EU and its Member States. These provisions include those relating to portfolio (indirect foreign) investment and the investment dispute settlement mechanisms. To date, ten member states have not ratified CETA: Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Ireland, Italy, Poland and Slovenia.²¹ A mixed competence treaty cannot come into full effect until every Member State has ratified the agreement. It follows that the ratification

¹⁸ *Costello v Government of Ireland* [2022] IESC 44 (Summary) at pp 4-5.

¹⁹ *Costello v Government of Ireland* [2022] IESC 44 at [166] per O’Donnell CJ; *Costello v Government of Ireland* [2022] IESC 44 at [184] per MacMenamin J.

²⁰ Prof O Doyle, ‘[Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland](#) [2022] IESC 44’ in *European Constitutional Law Review* 19(4), December 2023, pp 715 – 737.

²¹ Council of the European Union, ‘[Observations: Ratification Details](#)’, *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*.

of a mixed competence investment treaty by Ireland would have no immediate effect on the application of the treaty until all Member States have ratified it.²²

Projected benefits of ratifying CETA

In June 2025, the EU Commission published an evaluation study on CETA. That study suggested the failure by all Member States to fully ratify the investment protection aspects of CETA may have hampered the potential growth of certain industries, such as with the case study of extraction of raw materials, for which investment protection is said to make a real difference.²³

The Tánaiste and then Minister for Foreign Affairs and Trade, Simon Harris TD, has stated the Government's position on the ratification of CETA, as follows:

“The Government is strongly in favour of ratifying CETA. The global economy is changing in ways that are making trade more important than ever before. As a small, open economy, Ireland fully supports free, fair and balanced international trade. Ratifying CETA is firmly in the interests of workers, taxpayers and businesses throughout Ireland, the EU and Canada. Hundreds of thousands of jobs are dependent on Ireland being open to trade and a supporter of free trade agreements. Equally, we must remain open and competitive for FDI.

Furthermore, it is the case that only once ratification of CETA by all Member States and Canada has taken place that efforts to upgrade provisions of the agreement can be taken forward, including regulatory enforcement mechanisms with regard to labour and environmental protection. This is yet another reason to ensure the swift ratification of CETA.”²⁴

²² Simon Harris TD, Tánaiste and Foreign Affairs and Trade, [Response to Parliamentary Question No 141 on Trade Agreements](#), *Dáil Éireann Debate*, 29 July 2025.

²³ European Commission, ‘[CETA evaluation shows strong economic and social benefits](#)’, *Press Release*, 16 June 2025; European Commission, [Study in support of an ex-post evaluation of the Comprehensive Economic and Trade Agreement \(CETA\) between the EU and its Member States and Canada](#), June 2025 at p. 308.

²⁴ Simon Harris TD, Tánaiste and Minister for Foreign Affairs and Trade, [Response to Parliamentary Questions No 139-141 on Trade Agreements](#), *Dáil Éireann Debate*, 29 July 2025.

Legislative proposal

The Arbitration (Amendment) Bill 2025 contains five sections.

Purpose of the Bill

The stated purpose of **the Bill** is to amend the *Arbitration Act 2010* (the ‘Act’) to enable effect to be given in the State to certain international agreements concerned with the protection of investment; and to provide for related matters.

How would the Bill achieve its stated purpose?

In its current form, the *Arbitration Act 2010* (the ‘Act’) already allows for the enforcement of standard foreign arbitral awards in Ireland, subject to the relevant jurisdictional threshold being met. **Section 23 of the Act** provides that the procedure applicable to enforcing a foreign arbitral award is the same as for a domestic award. The rules are set out in **Order 56 of the Rules of the Superior Courts**.

The constitutional frailty arises because **section 25 of the Act** provides that certain provisions of the Act do not apply to arbitration awards made under the Washington Convention²⁵, which has force of law in the State subject to the provisions of the Act. **Section 24 of the Act** provides that the New York Convention also has force of law in the State, subject to the provisions of the Act. However, unlike the New York Convention, which allows enforcement of arbitration awards to be refused on grounds of public policy, Article 54 of the Washington Convention requires Ireland to enforce the monetary obligations imposed by an award as if it were a final judgment of an Irish court.²⁶ Therefore, as stated by Justice Hogan in the Costello case, awards made by an investment court system (ICS) (as incorporated into CETA and the AFA) are therefore almost automatically enforceable within the State, under the Washington Convention. To Justice Hogan, this would breach Irish sovereignty as established by **Article 5 of the Constitution** and it would also breach **Article 34.5.6° of the Constitution** establishing the Supreme Court as Court of Final Appeal in Ireland.²⁷ The provisions of the Act that were designed to give effect to conventional arbitral awards would be broadened and:

²⁵ The Washington Convention is the name commonly used for the **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** 575 UNTS 159, Washington DC, 1966. It is also referred to as the ICSID Convention.

²⁶ **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (ICSID Convention or Washington Convention) 575 UNTS 159, Washington DC, 1966, Article 54; See also, **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** (New York Convention) 330 UNTS 3, New York, 1959, Article V(2)(b).

²⁷ *Costello v Government of Ireland* [2022] IESC 44 at [132], [152] and [229] per Hogan J.

“...pressed into service for a different purpose entirely, namely, to give effect on a more or less automatic basis to the decisions of the [ICS]”.²⁸

Although no single clear line of reasoning was adopted, the Supreme Court held, by a majority of four judges to three, that ratification of CETA by the Government and the Dáil would be unconstitutional as it would interfere with Ireland’s juridical sovereignty.²⁹ However, the Court, with a majority of six judges to one, agreed with the opinion of Justice Hogan that the current legislative framework could be changed to allow for constitutionally lawful ratification, without recourse to a referendum.³⁰

Justice Hogan stated:

“While not wishing to be prescriptive, it would be necessary at a minimum to move from the present virtually automatic enforcement procedure to a situation where the High Court, when called upon to give effect to a CETA Tribunal award (as distinct from an ordinary commercial arbitration award) under either the ... [Washington] or New York Convention and s. 25 of the 2010 Act, was expressly empowered by that new legislation to refuse to give effect to that award where it considered that:

- (a) the award materially compromised the constitutional identity of the State or fundamental principles of our constitutional order, or
- (b) the award materially compromised our obligation (reflected in Article 29.4.4 of the Constitution) to give effect to EU law (including the Charter of Fundamental Rights and Freedoms) and to preserve its coherence and integrity.”³¹

The Bill proposes amending the Act in a similar manner. However, instead of using the term ‘constitutional identity of the State or fundamental principles of our constitutional order’ it uses the term ‘the constitutional order of the State’.

Principal provisions of the Bill

The Bill consists of five sections.

Section 1 is a standard provision that defines “Principal Act” as meaning the *Arbitration Act 2010*. Sections 2 and 3 are technical clauses setting out consequential amendments to **sections 9** and **23 of the Act** to include reference to the proposed new section 25A. Section 5 is a standard provision stating the short title and providing for the commencement of the Bill.

²⁸ *Costello v Government of Ireland* [2022] IESC 44 at [132], [152] and [229] per Hogan J.

²⁹ *Costello v Government of Ireland* [2022] IESC 44.

³⁰ *Costello v Government of Ireland* [2022] IESC 44.

³¹ *Costello v Government of Ireland* [2022] IESC 44 at [233] per Hogan J.

Section 4 of the Bill

Section 4 is the substantive provision of the Bill. It proposes to amend the Act by inserting a new section 25A after the existing [section 25](#).

The new section would apply to CETA, AFA and any other international agreement prescribed by order of the Minister for Foreign Affairs and Trade under the new section 25A, made after consultation with the Minister for Justice, Home Affairs and Migration. Any order would need to be laid before each House of the Oireachtas as soon as possible after it is made. Once laid, either House may pass a motion to annul the order within a period of 21 sitting days, whereby the order would be annulled as of the date of the motion without prejudicing any action completed before the annulment date.

The proposed new section 25A refers to awards made pursuant to an applicable international agreement that requires the enforcement of the award in the State. If the Bill is passed and comes into effect, these awards will be and can only be enforceable in Ireland by leave of the High Court following the same procedure as any other order or judgment of the High Court with the same effect. Where leave is given, judgment may be entered for the award. However, an award can never be enforceable in the State if enforcing the award would compromise:

- the constitutional order of the State, or
- the autonomy of the legal order of the European Union.

The proposed new section provides that there would be no appeal to the Court of Appeal on the High Court's determination, but the Supreme Court may accept an application for an appeal in accordance with [Article 34.5.4° of the Constitution](#). Article 35.4.4° concerns the Supreme Court's appellate jurisdiction in respect of cases involving questions concerning the constitutionality of any law.

Potential implications and implementation issues

Some issues have been highlighted in academic commentary on the Costello case that could potentially have an impact on the implementation of the Bill, if enacted. These are set out below.

Constitutional order of the State and autonomy of EU law

The Bill uses the terms 'constitutional order of the State' and 'legal order of the European Union' without defining the terms. So, it is not entirely clear how these terms will be interpreted.

Only two judges referred to the concepts of constitutional identity and constitutional order in the Costello case. They both appeared to link the concepts to, among other things: democracy, a separation of powers, state and judicial sovereignty, and the protection of fundamental

rights.³² If this is accepted, then the question then switches to what is meant by these other terms.

In its [Opinion 1/17](#), the full court of the Court of Justice of the European Union considered the question of what type of award might compromise the autonomy of the legal order of the European Union. It held that the dispute settlement mechanisms in CETA and the consequential awards are compatible with EU law.³³ The Court also held that CETA operates outside the EU legal system and the dispute resolution mechanisms are precluded from giving rulings as to the interpretation of EU law.³⁴

Are there questions that remain unanswered?

Professor Doyle stated that the question of which ICS awards could be constitutional and which ones could be unconstitutional remains unanswered by the Costello judgment.³⁵ In other words, the Bill, if enacted, might only have the effect of deferring the question of which ICS awards would materially compromise the constitutional order of the State. It would be up to the High Court to establish precedent on the matter over time.³⁶

Is there need for a referendum?

Another commentator, Seán Rainford, a PhD researcher at Dublin City University, has highlighted that there is a further issue that needs to be considered. Would the use of a legislative amendment to deal with what has been found by the Supreme Court to be an unconstitutional intrusion on Irish judicial sovereignty be an encroachment on the prerogative of the People of Ireland to define the constitutional boundaries of the Oireachtas as set out in [Article 6 of the Constitution](#)?³⁷ Although the Supreme Court in the Costello case did not consider this specific question, the 6:1 support of the Justice Hogan's suggestion could be taken to imply that the Supreme Court would have answered this question in the negative. Further discussion of this topic can be found in the [Policy and Legislative Briefing Paper on the General Scheme of the Arbitration \(Amendment\) Bill 2025](#).

³² See Prof O Doyle, '[Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland \[2022\] IESC 44](#)' in *European Constitutional Law Review* 19(4), December 2023, pp 715 – 737.

³³ [Opinion 1/17](#) ECLI:EU:C:2019:341 at [189]-[245].

³⁴ [Opinion 1/17](#) ECLI:EU:C:2019:341 at [199], [200].

³⁵ O Doyle, '[Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland \[2022\] IESC 44](#)' in *European Constitutional Law Review* 19(4), December 2023, pp 715 – 737.

³⁶ O Doyle, '[Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland \[2022\] IESC 44](#)' in *European Constitutional Law Review* 19(4), December 2023, pp 715 – 737.

³⁷ S Rainford, '[Costello v Ireland and an Irish Constitutional Identity](#)' in *Irish Judicial Studies Journal* 7(1), November 2024, pp 70-81.

Ireland's international obligations

Several commentators have suggested that the provisions of the Bill could create issues regarding Ireland's ability to meet its international obligations.³⁸

Article 54(3) of the Washington Convention makes execution of an award subject to the same rules and procedures that apply concerning the execution of judgments in force in the State. Unlike with the New York Convention, there is no right afforded to the competent authority in the State concerned to disallow awards on public policy grounds.³⁹ As the Bill would allow Irish courts to treat certain ICS awards differently to domestic awards if they could materially affect the constitutional order of the State, the enactment of the Bill could create a risk that Ireland would be found to be in breach of its commitments under the Washington Convention if the Bill is enacted and CETA and/or other ICS treaties are ratified.⁴⁰ Moreover, as stated by Justice Charleton, it could be seen to be a contradiction of CETA itself.⁴¹ Finally, **Article 27 of the Vienna Convention on the Law of Treaties** (the 'Vienna Convention') specifically prohibits a party from invoking the provisions of its domestic law as justification for its failure to perform its obligations under a treaty. Therefore, the Bill also has the potential to trigger a breach of Ireland's commitments under the Vienna Convention.⁴²

³⁸ Sonja Heppner, 'A Critical Appraisal of the Investment Court System Proposed by the European Commission' (2016) *Irish Journal of European Law* 19(1), pp 38-63; O Doyle, '**Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland [2022] IESC 44**' in *European Constitutional Law Review* 19(4), December 2023, pp 715 – 737; S Rainford, '**Costello v Ireland and an Irish Constitutional Identity**' in *Irish Judicial Studies Journal* 7(1), November 2024, pp 70-81; M Becker and C Ahlborn, 'Protecting Irish Constitutional Identity on the International Plane: Costello v Government of Ireland', *Trinity College School of Law Legal Studies Research Paper Series*, Paper 2/2024.

³⁹ **Convention on the Settlement of Investment Disputes between States and Nationals of Other States** (ICSID Convention or Washington Convention) 575 UNTS 159, Washington DC, 1966, Article 54; See also, **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** (New York Convention) 330 UNTS 3, New York, 1959, Article V(2)(b).

⁴⁰ O Doyle, '**Constitutional Identity, Legal Autonomy, and Sovereignty: Costello v Government of Ireland [2022] IESC 44**' in *European Constitutional Law Review* 19(4), December 2023, pp 715 – 737. See also S Rainford, '**Costello v Ireland and an Irish Constitutional Identity**' in *Irish Judicial Studies Journal* 7(1), November 2024, pp 70-81; M Becker and C Ahlborn, 'Protecting Irish Constitutional Identity on the International Plane: Costello v Government of Ireland', *Trinity College School of Law Legal Studies Research Paper Series*, Paper 2/2024.

⁴¹ *Costello v Government of Ireland [2022] IESC 44* at [62] per Charleton J.

⁴² See further, Sonja Heppner, 'A Critical Appraisal of the Investment Court System Proposed by the European Commission' (2016) *Irish Journal of European Law* 19(1), pp 38-63.

Conclusion

On 28 July 2025, the Tánaiste and then Minister for Foreign Affairs and Trade, Simon Harris TD, stated:

“The Bill, once passed, will enable the ratification of the EU-Canada Comprehensive Economic and Trade and other similar Free Trade Agreements with third countries that include investment protection provisions, including Singapore, Vietnam, Chile and Mexico.”⁴³

The Bill appears to implement a method of dealing with a perceived constitutional frailty associated with the ratification by the Government and the Dáil of CETA, as first suggested by Justice Hogan in *Costello v Ireland*. The Bill would require the High Court to reject applications for the enforcement of awards deriving from rights under CETA, the AFA or a specified international treaty prescribed by order of the Minister of Foreign Affairs and Trade where the enforcement of the award would compromise the State’s constitutional order or the autonomy of the legal order of the European Union.

However, there could be a number of legal questions that may affect the ongoing operation of the proposed legislation in the event that it is passed and given effect.

⁴³ ‘Tánaiste welcomes update to the proposed amendments to the Arbitration Act which will enable the ratification of CETA’, *Press Release*, 28 July 2025.