International
Comparative
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International Arbitration 2021

A practical cross-border insight into international arbitration work

18th Edition

Featuring contributions from:

Ashurst LLP
Attorneys at law Ratiolex Ltd
Bae, Kim & Lee LLC
Baker McKenzie
Bär & Karrer Ltd.
BDO LLP
Boss & Young, Attorneys-at-Law
Cadwalader, Wickersham & Taft LLP
Cartier Meyniel Schneller
Charles Russell Speechlys LLP
Costa Tavares Paes Advogados
Dentons Eric Silwamba Jalasi and Linyama
Diana Hamade Attorneys at Law
Dr. Colin Ong Legal Services
ECC
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Zellberg Advokatbyrå AB

CDR Commercial Dispute Resolution
ICLG.com

Ireland


Brian Clarke


Graham O'Doherty

Maples Group

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Ireland adopted the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") with the passing of the Arbitration Act 2010 into law. Ireland applies Option 1 of Article 7 of the Model Law to the requirements of an arbitration agreement. An arbitration agreement must be in writing, which can be as an arbitration agreement within a contract or as a stand-alone agreement to arbitrate. The requirement for an arbitration agreement is interpreted broadly, such that it may be satisfied if its content is recorded in any form.

1.2 What other elements ought to be incorporated in an arbitration agreement?

While not strictly necessary to give effect to an agreement to arbitrate, it is good practice for parties to consider expanding the scope of agreement, so as to avoid potential disputes and delays. While contractual documents containing agreements to arbitrate often contain choice of law clauses applicable to the law applicable to the underlying contract, parties often address choices of law applicable to the conduct of the arbitration itself, the seat of the arbitration, and the language of the arbitration, within their arbitration agreements.

The Arbitration Act 2010 provides for a default position on matters like the number of arbitrators, the question of interest and costs, and the powers of the arbitrator; however, the parties are free to agree on broad procedural and substantive issues such as: the procedure for the appointment of an arbitrator (including a mechanism in default of agreement); the number of arbitrators to be appointed; any minimum qualifications of the arbitrator; the seat of the arbitration; the governing law; the language for the conduct of the arbitration; the costs of the arbitration; specific powers of the arbitral tribunal; or applicable rules. Many parties agree to address these issues by agreeing to conduct the arbitration by reference to a particular set of procedures or rules (*e.g.*, ICDR, ICC, UNCITRAL, etc.). However, this is not strictly required, and in our experience, many parties are content with agreements to arbitrate on an *ad hoc* basis.

The parties to an arbitration agreement are also free to agree to explicitly give the High Court jurisdiction to assist in relation to security for costs and discovery/disclosure, which powers are otherwise excluded by default under section 10(2) of the Arbitration Act 2010.

Finally, Ireland's Arbitration Act allows parties to make express agreements on the issue of costs of arbitration and the arbitral tribunal's power to make awards of costs. Section 21(1) of the Arbitration Act 2010 provides that: "*The parties to an arbitration agreement may make such provision as to the costs of the arbitration as they see fit.*" This provision was specifically included to accommodate agreements, a party to which may reside in a jurisdiction that does not recognise "cost shifting" as being normal in dispute resolution, and which may wish to seek to limit such cost shifting under the agreement. Ireland is a cost shifting jurisdiction, in that costs are typically awarded on the basis that they "follow the event", to be paid by the losing party, absent special circumstances. Crucially, subsection 21(3) of the Act provides that: "*Where no provision for costs is made as referred to in subsection (1) or where a consumer is not bound by an agreement as to costs pursuant to subsection (6), the arbitral tribunal shall, subject to subsection (4), determine by award those costs as it sees fit.*"

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

The Irish courts are strongly supportive of arbitration and have been reluctant to interfere in arbitrations or arbitration awards. As discussed below, the grounds upon which an arbitration award may be challenged, or upon which an Irish court would consider not giving effect to an arbitral award, are extremely limited.

Irish jurisprudence also demonstrates a strong support for giving effect to parties' agreements to arbitrate and the Irish courts will stay court proceedings in favour of arbitration, where there is a valid agreement to arbitrate. In that regard, the Irish courts tend to adopt a liberal approach to the interpretation of arbitration agreements. Ireland applies Article 8 of the Model Law to the consideration of whether court proceedings should be stayed, and in the face of a valid arbitration agreement that governs the matter in dispute, it is for the party opposing arbitration to establish that the arbitration agreement is null and void, inoperative or incapable of being performed. These grounds have traditionally been narrowly construed by the Irish courts. Where the requirements under Article 8(1) of the Model Law are satisfied, the Irish courts consider it mandatory that they refer the matter to arbitration, and will give full judicial consideration in considering this issue. There is no right of appeal to the High Court's determination in this regard.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Act 2020, adopting and applying Model Law,

applies to any arbitrations commenced after 8 June 2010. Regarding the enforcement of international arbitration awards, Ireland acceded to the New York Convention, which entered into force in Ireland in 1981. Ireland is also a party to the Geneva Convention and the Geneva Protocol. Subject to the provisions of the Arbitration Act 2010, the New York Convention, the Geneva Convention and the Geneva Protocol all have force of law in Ireland.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Yes, the Arbitration Act 2010 governs both domestic and international arbitration proceedings. For arbitrations commenced after 8 June 2010, there is no longer any distinction between the law applicable to domestic and that applicable to international arbitrations.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes. The Arbitration Act 2010 adopted the Model Law, which, subject to a number of very limited amendments to the Model Law (for example, the default number of arbitrators is set at one under the Arbitration Act 2010, whereas Article 10(2) of the Model Law stipulates three), applies in Ireland.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

There is no distinction between the rules applicable to domestic and international arbitrations. Model Law, as adopted by the Arbitration Act 2010, applies to both forms, and no additional mandatory rules apply to international arbitrations sited in Ireland.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

In the context of international trade, contracts and transactions, there are no real limitations on the types of disputes that can be referred to arbitration. The Arbitration Act 2010 does, however, specify that it does not apply to certain employment and labour arbitrations. Further, a consumer is not bound by an arbitration agreement where the arbitration clause was not specifically negotiated and the claim does not exceed €5,000.

As regards whether or not a particular dispute is "arbitrable", this will generally be determined by the wording of the arbitration clause or agreement, if one exists. In construing such terms, the courts have applied general principles of contractual interpretation together with certain additional principles applicable to the interpretation of arbitration agreements.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Irish law recognises and gives effect to the principles of *kompetenz-kompetenz*, and Ireland has adopted Article 16 of the Model Law giving arbitral tribunals the right to rule on its own jurisdiction, including in respect of any objections concerning the existence or validity of the arbitration agreement.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

As noted above, the Irish courts are considered pro-arbitration and will, where appropriate, readily stay proceedings to arbitration in line with Article 8 of the Model Law.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

In accordance with Article 16 of the Model Law, a challenge to jurisdiction of the arbitral tribunal must be raised no later than the submission of the statement of defence or, where it is suggested that the tribunal has exceeded its jurisdiction, as soon as the alleged infringement occurs. Where a tribunal rules on such a challenge, any party may apply to the High Court within 30 days under Article 16(3) of the Model Law on the question of jurisdiction. Pending the hearing of the question by the Court, the arbitration may proceed. The High Court may conduct a full rehearing on questions of jurisdiction (as opposed to an appeal). The Court may, in this regard, consider such evidence as it sees fit, and is not bound by the submissions made to the arbitrator.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

An arbitral tribunal cannot assume or assert jurisdiction over an individual or entity that is not a party to the arbitration agreement. Even if that party is a party to other related arbitral proceedings, an arbitral tribunal has no power to consolidate such proceedings or to conduct concurrent hearings unless the parties agree. Where there is no arbitration agreement, the High Court may only adjourn proceedings under section 32 of the Arbitration Act 2010 to enable parties to consider arbitration if the parties so consent, but it cannot direct the parties to arbitrate a matter.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no limitation periods specific to the commencement of arbitrations. The Statute of Limitation Act 1954, as amended, expressly provides that the Arbitration Act 2010 and any other limitation enactments apply to arbitrations as they apply to actions in the court. As such, the applicable limitation period, and the dates on which a cause of action is deemed to accrue, are those applicable to the cause of action at issue. Generally, claims in contract must be brought within six years of the date of the breach of contract, whereas claims in tort must

be brought within six years of the date on which the damage occurred. Other types of claims may be subject to very specific limitation periods (e.g. defamation and product liability claims).

Limitation periods are considered to be procedural rather than substantive. The limitation period generally operates to bar a remedy rather than extinguish the right.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Under section 27 of the Arbitration Act 2010, notwithstanding that a party to a contract containing an arbitration agreement has been adjudicated bankrupt, provided the official assignee in bankruptcy has not disclaimed that contract, the arbitration agreement shall still be enforceable by or against that bankrupt party. (There is no similar provision, relating to an insolvent company, in the Arbitration Act 2010.)

So far, there are no direct cases on the impact of an insolvency process on the jurisdiction of an arbitral tribunal deriving from the parties' arbitration agreement in Ireland. Absent established jurisprudence in Ireland, we would suggest that the approach adopted by the courts of England and Wales in cases such as *Fulham Football Club (1987) Ltd v. Richards* EWCA [2011] Civ 855 and *Nori Holding Limited v. Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) is likely to be persuasive for an Irish court in this regard.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Absent agreement of the parties, the law applicable to the substance of the dispute will be determined by reference to the choice of law governing the agreement or contract. In those circumstances, the applicable law will generally be determined by principles of private international law, and/or in accordance with any applicable treaty/international convention. For example, matters of contract within the EU are governed by Regulation (EC) No. 593/2008 (Rome I) whereas matters in tort are governed by Regulation (EC) No. 864/2007 (Rome II).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In general terms, Irish law will apply to the questions of whether there is a binding arbitration agreement, and to the conduct of the arbitration where the seat of the arbitration is Ireland. Otherwise, the circumstances where mandatory laws of another jurisdiction could be said to prevail over parties' chosen applicable law are limited, save that there may be circumstances where parties' agreements could be said to be contrary to public policy.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Where an arbitration is sited in Ireland, the formation, validity and legality of an arbitration agreement will be governed in accordance with Irish law.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

No, the parties are free to agree on the number and selection criteria for the appointment of arbitrators. They are also free to select and agree to the appointment of their selected arbitrators to a tribunal; however, most parties provide for a default position mechanism for the selection and appointment of the tribunal, in accordance with Article 11 of the Model Law. Where parties fail to agree on the number of arbitrators or a mechanism of appointment, the default position is that the tribunal will consist of one arbitrator, and that the tribunal will be appointed by the High Court.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In the absence of agreement as to the choice of the arbitrator or the process by which one is appointed, the High Court may, upon the application of a party under Article 11, appoint the tribunal and its decision will be final.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

No, absent an upheld challenge taken in accordance with Articles 12 and 13 of the Model Law. Challenges to the appointment are on the grounds set down by Article 12(2) of the Model Law, *i.e.*, circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties. Otherwise, the High Court is empowered to assist in the appointment of the tribunal where the parties fail to agree or the mechanism to appoint the tribunal fails or is not agreed.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Article 12 of the Model Law provides that, where a person is approached in connection with his or her possible appointment, that person shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. That obligation is a continuing obligation and the arbitrator must disclose such circumstances without delay.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Applying Article 19 of the Model Law, Irish law provides that the parties are free to agree their own procedure. In the absence of agreement, the tribunal may conduct the arbitration in whatever manner it considers appropriate. This procedural freedom is,

however, subject to other provisions contained within the Model Law, such as the obligation that the parties be treated with equality and be given a full opportunity of presenting its case (Article 18).

Often parties will agree as part of their arbitration agreement to adopt a particular set of procedural rules. Subject to the protections requiring equal treatment and the requirements for natural justice in Irish law, applying those protections and basic principles set out in the Model Law (Chapter V), those procedural rules will apply.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no particular procedural steps that must be taken in all arbitration proceedings by force of law in this jurisdiction. As noted above, the procedure is generally left for the parties (or in the alternative, to the tribunal) to govern, subject to the protections and basic principles discussed above.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no rules of professional conduct that are specific to arbitration proceedings. That said, all Irish qualified legal practitioners (*i.e.*, barristers or solicitors) are regulated and are bound by their professional codes of conduct.

Foreign lawyers and counsel would be expected to adhere to their professional codes of conduct, including the relevant codes of the Council of Bars and Law Societies of Europe ("**CCBE**") or the International Bar Council, as appropriate to the particular jurisdiction.

In 1999, Ireland adopted the CCBE's current code, the Code of Conduct for European Lawyers, which is recognised as a consensus of all the Bars and law societies of the EU and the EEA regarding cross-border practices, including in respect of: (i) professional contacts with lawyers of other Member States; and (ii) the professional activities of the lawyer in other Member States, whether or not the lawyer is physically present in that Member State. Both codes have as their basis the principles of good conduct common to all lawyers.

While the Irish regulators will not actively regulate or supervise the conduct of any foreign counsel acting in this jurisdiction, the same basic rules of conduct will nonetheless be expected, as are imposed on Irish-based professionals.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

As per the Arbitration Act 2010 and the Model Law, acting arbitrators are obliged to treat both parties equally, with impartiality, and to give each side the opportunity to put forward its case. They are also obliged, at the outset and on a continuing basis, to disclose any circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence. In addition, any final award is expected to be signed and given in writing.

Unless the parties agree otherwise, the powers of an arbitrator include to direct that a party or a witness be examined on oath (or affirmation), order the consolidation of arbitral proceedings, award interest, order security for costs, require specific performance of a contract (save in respect of land), and determine the issue of costs.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

While such restrictions exist in relation to lawyers from other jurisdictions appearing before the Irish courts, no such restrictions extend to Irish-based arbitrations.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Section 22 of the Arbitration Act 2010 provides that an arbitrator "*… shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions*". This immunity extends, as per subsection (2) of that provision, to employees, agents or advisors of an arbitrator, as well as to any expert appointed by the arbitrator pursuant to Article 26 of the Model Law.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, while a general deference to arbitrators is exercised by the courts, there is specific provision contained within the Arbitration Act 2010 for the Irish High Court to deal with certain procedural matters arising in an arbitration. For instance, the High Court may grant interim measures of protection (Article 9) or assist in the taking of evidence (Article 27). However, certain other measures are generally available but may not be taken if such intervention is excluded by the agreement of the parties (for instance, the ordering of security for costs or discovery).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Yes, in accordance with Article 17 of the Model Law, unless otherwise agreed by the parties, the arbitral tribunal may direct interim measures of protection of its own accord to:

a) maintain or preserve the *status quo* pending determination of the dispute;
b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
d) preserve evidence that may be relevant and material to the resolution of the dispute.

Separately, in accordance with Article 9 of the Model Law, and pursuant to section 10 of the Arbitration Act 2010, interim measures of protection in support of an arbitration may be sought from the High Court, either before or during arbitral proceedings.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Section 10 of the Arbitration Act 2010 provides that a party to arbitration proceedings may request that the High Court grant interim protection measures or in assisting with evidence. Absent an agreement of the parties, the High Court is not entitled to make any order relating to security for costs or discovery. There is no limitation on the question as to when the Court can be asked to make an order in support of arbitration, and such orders may be sought before or during arbitral proceedings.

However, in practice, the use of these powers is more likely to be of assistance where, for instance, the arbitration proceedings have not formally commenced, or where the arbitral tribunal has not yet been constituted, or the availability of relief from the tribunal itself is not available, or where it is considered that a party will not comply with an interim measure directed by a tribunal.

In keeping with the courts' general support of, and deference to, the independence of arbitral proceedings, it is submitted that an Irish court would likely approach any request for such ancillary orders, on the basis that it would prefer not to be seen to interfere with an arbitral tribunal's general jurisdiction, but rather as "stepping in" to assist where the tribunal's jurisdiction is lacking, so that the process may remain effective.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, applications to the High Court for interim measures are rare. For the reasons already set out, the Irish courts are very supportive of arbitration and arbitration agreements. Where appropriate measures are sought, and the circumstances are appropriate, there is no reason to suggest that the High Court would not assist and support an arbitration agreement or arbitral proceedings by directing appropriate interim measures. However, given the traditional deference of the courts to the independence of arbitral proceedings, it would seem unlikely that, had an arbitral tribunal already determined that no such relief should be granted, the High Court would, absent very good public policy reasons, grant interim measures in those circumstances. Where measures are available from a tribunal directly and not sought, the High Court would likely take the view that such measures should, in the first instance, more appropriately be sought from the tribunal.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

There is, so far, only one known Irish case that has dealt with the question of an anti-suit injunction in aid of arbitration (*Walters & Anor v. Flannery & Anor* [2017] IEHC 736). While it was determined on the specific facts, the result of that case was that the sought injunction was refused by the High Court. Nonetheless, the court's judgment makes clear that, while the High Court has a discretion to grant anti-suit injunctions restraining proceedings instituted *outside* of the EU, it will only do so where there are obvious reasons to do so. As for any such injunction that would seek to restrain proceedings taking place *within* the EU, the Irish courts recognise that such injunctions are generally prohibited under EU regulations.

Insofar as any restraining of any national proceedings is concerned, Article 8 of the Model Law and the Arbitration Act 2010 provide for a party to an arbitration agreement to bring an application to the High Court, "staying" (*i.e.*, restraining) such proceedings, where the proceedings were initiated in contravention of an arbitration agreement.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The arbitral tribunal may order security for costs, as per section 19 of the Arbitration Act 2010 (unless otherwise agreed by the parties in advance). Section 19(2), however, limits that power to some extent, insofar as the measure is not to be taken solely on the ground that the relevant party is an individual or body corporate with a residency/domicile/place of business situated outside of the jurisdiction.

On the strict basis that it is *specifically agreed* by the parties, the Irish court may also, under section 10 of the Arbitration Act 2010, grant an order of security for costs (the "default" position is that no such power would otherwise exist).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

At this point, there is no body of case law on the approach of Irish courts to enforcing preliminary relief or interim measures ordered by arbitral tribunals (be they based in Ireland or abroad). However, it is well known (in other contexts) that the Irish courts are very supportive of upholding the integrity and independence of arbitration proceedings. The courts also recognise the need for such a process to be effective, and so, we would anticipate that, absent very good reason (procedural unfairness, the directed orders offend public policy, fraud, etc.), the High Court would likely give effect to such orders where required (and permitted), in order to ensure such efficacy.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Article 19 of the Model Law provides that the parties agree upon the specific procedure to be followed by the arbitral tribunal in conducting the proceedings. If no such agreement exists, however, the tribunal may, subject to other provisions of the Model Law, conduct the proceedings in such manner it considers appropriate. This explicitly includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Under Article 24, the arbitral tribunal may also, subject to any contrary agreement of the parties, generally decide as to whether to hold oral hearings for the presentation of evidence, or alternatively on the basis of documents and other materials.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

While there is no explicit provision in either the Arbitration Act 2010 or the Model Law empowering an arbitral tribunal to order disclosure or discovery, Article 19(2) does empower the tribunal

to conduct the proceedings as it sees fit. Also, most (if not all) procedural rules that may be agreed to be adopted by the parties will include some disclosure or discovery process, and in practice, unless the parties to the dispute agree that disclosure is not warranted, disclosure will generally form part of the proceedings.

The tribunal has no direct power to compel the attendance of any witnesses in order to give evidence. However, under Article 27, it is possible for the tribunal to seek the assistance and authority of the High Court for this purpose, by issuing a subpoena to any such reluctant witness. In practice, however, this is a measure that is rarely used.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

As noted above, Article 27 of the Model Law provides that the tribunal or a party (with the approval of the tribunal) may request the Irish High Court to assist in taking evidence. The High Court can issue a subpoena to the witness in question, for the purpose of his/her attendance at the arbitral proceedings. While this is rare, the circumstances would typically be where the witnesses' evidence is assessed to be important to the determination of the proceedings, and where the witness in question is not willing to attend voluntarily.

In terms of discovery, section 10(2) of the Arbitration Act 2010 confirms that, unless otherwise agreed by the parties, the High Court does not have the power to make any order for discovery of documents in arbitration proceedings.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Section 14 of the Arbitration Act 2010 provides that, unless otherwise agreed by the parties, the arbitral tribunal may direct that a party or witness be examined on oath or on affirmation, and further that the tribunal may administer oaths or affirmations for this purpose. This is not prescriptive, however, and it is recalled that (again subject to the parties' agreement) the tribunal may conduct the proceedings in a manner it considers appropriate, including in relation to the taking of evidence.

As noted above, subject to the parties' agreement, Article 24 of the Model Law confers a discretion on the tribunal as to whether to hold hearings for the presentation of evidence or for oral argument, or whether the proceedings can be conducted on the basis of documents and other materials. One caveat to this is that, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Irish law recognises privilege under a number of different forms. The most common forms of privilege are legal professional privilege, which comes in two forms, known as (i) legal advice privilege, and (ii) litigation privilege. Litigation privilege relates to documents prepared in contemplation of or in relation to legal proceedings (including arbitration), whereas legal advice privilege relates to documents prepared for the dominant purpose of obtaining or giving legal advice. There is often a degree of overlap between the two; however, it is generally accepted that communications between a party and its lawyers (including in-house counsel) will attract privilege if they (i) are for the dominant purpose of receiving or requesting legal advice, or (ii) relate to legal proceedings, whether in being or in contemplation.

In line with the decision in *Azko Nobel v. European Commission* (Case C-550/07 P), it is questionable whether legal professional privilege can be said to apply over communications with in-house counsel in competition proceedings.

Separately, a party may assert what is called "without prejudice" privilege, where the document in question is prepared for the purpose of facilitating settlement or reducing the issues in dispute between the parties.

Privilege can be waived, generally speaking, either by the author/issuer of the document, or by the party for whom the document was prepared. Such a waiver will generally occur where the documents in question, which would otherwise be privileged, are made available to a third party, outside of the intended recipient/recipients (or the communicating parties' agents/advisors).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contains reasons or that the arbitrators sign every page?

In accordance with Article 31 of the Model Law, any arbitral award must be in writing, be signed by the arbitrator and state the reasons upon which the award is based (unless the parties have agreed that no reasons are to be given). In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. Article 31 also requires that the award states its date and the place of arbitration. There is no requirement that every page of the award be signed.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Article 33 of the Model Law applies in Ireland. It provides that a party may, within 30 days of receipt of an arbitral award (or other agreed period) and on notice to the other party:

a) request the arbitral tribunal to correct any errors in computation, any clerical or typographical errors or any errors of similar nature in the award; or
b) if so agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the award.

Where the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation, ordinarily within 30 days of receipt of the request but after a longer period if it considers it necessary. Any such correction or interpretation will then form part of the award. The arbitral tribunal may also correct any error on its own initiative, within 30 days or such longer period that it considers necessary.

Finally, unless otherwise agreed by the parties, a party may also request, within 30 days and on notice to the other party, that the tribunal makes an additional award in respect of any claims that formed part of the arbitral proceedings but which were omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make such an additional award within 60 days of the request or such longer period that it considers necessary.

As with the original award, any such correction, interpretation or additional award shall also be in writing, be signed by the arbitrator and state the reasons upon which the same is based (unless the parties have agreed that no reasons are to be given).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

An arbitrating party's scope for appeal or review, from the Irish courts, is particularly limited. There is no scope for any general appeal against an arbitral award under the Arbitration Act 2010, as such.

In line with Article 34 of the Model Law (mirroring the grounds on which recognition and enforcement of an award might be refused set out in Chapter V of the New York Convention and which are also encapsulated in Article 36 of the Model Law), a party may still apply to the High Court to have such an award set aside on one of the following, limited grounds:

a) incapacity of one of the parties, relating to the underlying arbitration agreement;
b) improper notice as to the appointment of the arbitrator;
c) the composition of the arbitral tribunal falling outside the scope of the parties' agreement;
d) the award falling outside the terms of the submission to arbitration; or
e) the award being found to be in conflict with the laws of the State/some other public policy principle.

These grounds do not, however, go to the content or merit of the arbitral decision in question, but rather to the procedural fairness of the arbitral hearing. Further, any application to set aside must be made within three months (i) from the date on which the party making the application had received the award, or (ii) where a request had been made to either correct an error or interpret an aspect of the award under Article 33, from the date on which that request had been disposed of by the arbitral tribunal. Any challenge to the recognition and enforcement of an arbitral award is similarly limited to the grounds identified above and prescribed by Article 36 of the Model Law.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The grounds of challenge are already extremely limited. While, in theory, provided that a party's fundamental right to fair procedures is not unfairly infringed, it may be possible for the parties to agree to do so, it is difficult to see how a party could agree to curtail the application of the grounds set out in Articles 34 and 36, as they necessarily involve the application of fair procedures and due process. However, there are no Irish cases on this particular point. As challenges or appeals on mistakes of law are not supported in Irish law (unlike other jurisdictions), the requirement to do so does not really arise.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, the parties cannot agree to expand the scope of appeal or review, beyond what is already provided for in the relevant legislation.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

As noted in question 10.1, above, while there are limited "setting aside" grounds that go to the procedural fairness of the arbitral proceedings, there is no prospect for a party to appeal an arbitral decision, or to otherwise review the merits of that decision.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes, Ireland acceded to the New York Convention, which entered into force in Ireland in 1981. No reservations have been entered. As set out above, subject to the Arbitration Act 2010, the New York Convention applies. Irish law provides that Article II(2) and Article VII(1) of the New York Convention are interpreted in accordance with the recommendation adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its 39th session concerning the interpretation of those Articles, and Article II(3) of the New York Convention shall be construed in accordance with Article 8 of the Model Law.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

As of the date of writing, no such regional Conventions have been signed and/or ratified in Ireland. As set out above, Ireland is a signatory to the Geneva Convention and Geneva Protocol and, subject to the Arbitration Act 2010, they form part of Irish law.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The courts in Ireland are highly supportive of the arbitral process, including in their approach to the recognition and enforcement of awards. As set out above, the grounds upon which the enforcement and recognition of an award can be challenged are extremely limited (Article 36 of the Model Law), which are similar to the grounds upon which an application to set aside an award may be taken, as per Article 34.

Establishing jurisdiction where neither party has a connection to Ireland is key to enforcing foreign arbitral awards in Ireland. In that regard, the Irish courts have held that there must be practical or material benefit to be gained in enforcing a judgment or an award in Ireland and must have previously refused to enforce an arbitral award, in circumstances where the arbitration and the performance of the underlying contract had no connection with Ireland, and the party against whom enforcement was sought had no assets in Ireland and no real likelihood of having assets in Ireland.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The Arbitration Act 2010 stipulates that an arbitration award

shall, unless otherwise agreed, be treated as binding and precludes the possibility of an appeal against any determination by the High Court in relation to an application to recognise or enforce an arbitral award. The only remedy available is an application to the High Court to set aside the award under the limited grounds set out in Article 34(2) of the Model Law.

However, where there are overlapping issues arising in both the arbitration award and separate proceedings, the subsequent court or tribunal would have to satisfy itself that it is not reopening issues that have already been decided while balancing the litigant's Constitutional right of access to the courts.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The High Court has long accepted and recognised the wholly exceptional and limited nature of the public policy exception. Indeed, the Court has expressly adopted the often-cited US decision in *Parsons & Whittemore* to the effect that enforcement should be denied on the basis of the public policy exception "*only where enforcement would violate the forum state's most basic notions of morality and justice*". The courts have considered that they would only be justified in refusing enforcement if there was "*some element of illegality, or that the enforcement of the award would be clearly injurious to the public good, or possibly that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public*".

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

There is no express requirement in the Arbitration Act 2010 that arbitration proceedings are to be confidential or that the parties are subject to an implied duty of confidentiality. However, it is submitted that in line with English case law (which is persuasive before Irish courts), the confidentiality of arbitration has long been recognised and is reflected in practice in Ireland. In general terms, the parties to an arbitration and the tribunal are under implied duties to maintain the confidentiality of the hearing, documents generated and disclosed during the arbitral proceedings, and the award. This implied duty of confidentiality was affirmed by the English Court of Appeal in *Ali Shipping Corp v. Shipyard Trogir* [1999] 1 WLR 314. However, this presumption is by no means absolute or guaranteed and the Court of Appeal recognised a number of exceptions to the duty, such as consent, a court order or leave of the court. The parties to an arbitration may therefore seek to address the uncertainties surrounding the scope of the obligation by inserting a specific provision in the arbitration clause or, failing that, they may conclude a separate confidentiality agreement at the outset of an arbitration. This tends to happen more often than not in practice.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes. As the Arbitration Act 2010 is silent on confidentiality, there is no express prohibition on parties seeking to refer to or rely on information disclosed in arbitral proceedings in subsequent proceedings. The parties are, however, free to explicitly detail a specific provision prohibiting the use of such information at the outset of an arbitration.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Under the Arbitration Act 2010, the arbitral tribunal may determine and award damages in the same manner as an Irish court and, therefore, can award the full range of common law and equitable remedies permitted by the law applicable to the dispute that is the subject of the arbitration, including specific performance of a contract (other than a contract for the sale of land).

While exemplary or punitive damages may be awarded in limited circumstances by the Irish courts, such awards are restricted to claims in tort and have only ever been made in exceptional cases where the court wishes to both punish and deter the defendant from engaging in highly reprehensible conduct, including violations of Constitutional rights. Following the authorities, it would seem that the making of such awards by an arbitral tribunal could only ever arise in similar circumstances.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Section 18(1) of the Arbitration Act 2010 provides that the parties to an arbitration agreement may agree on the arbitral tribunal's powers regarding the awarding of interest. Unless otherwise agreed, section 18(2) permits the tribunal to award simple or compound interest from the dates agreed and at rates it considers to be fair and reasonable. It can determine such interest to be payable on all or part of the award in respect of any period up to the date of the award, or on all amounts claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award in respect of any period up to the date of payment. The availability of interest may also be available under the EU Late Payment in Commercial Transactions regime.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Subject to a specific exception for consumers under section 21(6) of the Act, the Arbitration Act 2010 enables the parties to make such provision with regard to the costs of the arbitration as they see fit. This includes the right to limit the award of costs. Furthermore, an agreement of the parties to arbitrate subject to the rules of an arbitral institution shall be deemed to be an agreement to abide by the rules of that institution as to the costs of the arbitration.

Where the arbitral tribunal makes a determination as to costs, it is obliged to specify (a) the grounds on which it acted, (b) the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, and (c) by and to whom they shall be paid. The general principle in Ireland is that costs follow the event, with the losing party discharging the reasonable costs of the successful party.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Awards are not generally exempt from tax in Ireland. However, tax advice should be sought in specific cases as the tax treatment of any award will depend on what the damages relate to.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The Supreme Court in Ireland recently confirmed that professional "for profit" third-party litigation funding is unlawful and that champerty and maintenance are still recognised as torts and criminal offences in Ireland. This is unlike the current position in the UK and other common law jurisdictions where this type of funding is allowed.

However, the Irish courts have confirmed that funding by a third party with a legitimate interest in the proceedings, such as a creditor or a shareholder of a company that is a party to the litigation in question, is permitted under Irish law. In addition, funding litigation on foot of an "after the event" insurance policy is also permitted.

Contingency fees are, subject to limits and rules on methods of calculation, permissible under Irish law. Fee arrangements involving percentages of award are impermissible. As both maintenance and champerty remain criminal offences and civil wrongs in Ireland, there are no professional funders active in the Irish market.

14 Investor-State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, Ireland signed the Washington Convention (ICSID) in 1966, and ratified it in 1981.

14.2 How many Bilateral Investment Treaties ("BITs") or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Ireland is a party to the Energy Charter Treaty but does not have a track record of entering into BITs, and has only entered into one, with the Czech Republic. In line with the approach of the EU Commission, Ireland's approach is not to do so on an intra-EU basis. As Ireland's only BIT with the Czech Republic predates the Lisbon Treaty, it is not directly affected by EU Regulation 1219/2012, which otherwise governs certain BITs entered into by Member States.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example, in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

No; in light of the above, this does not really apply.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

So far, the Irish courts have not been asked to address this issue.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the types of dispute commonly being referred to arbitration?

The majority of significant disputes being referred to arbitration in Ireland continue to be those relating to construction contracts and M&A transactions. It is notable that enquires for the use of Irish law, and for Ireland as a seat for arbitration, have increased over the last 18 months or so in light of Brexit. Increasingly, we are being asked to advise on the use of arbitration sited in Ireland for broader transactions, including finance, asset finance and commercial arrangements with Irish-domiciled investment vehicles. As an English-speaking, neutral, common law country within the EU with a supportive independent judiciary, Ireland seems well placed to increase its share of international arbitrations.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

Arbitration Ireland continues to promote Ireland as a location for arbitration. Irish arbitration bodies tend to be industry-specific, and while some have adjusted their procedures and rules to streamline processes and procedures, it is difficult to say that they represent a broader trend in Irish arbitration.

15.3 What is the approach of the national courts in your jurisdiction towards the conduct of remote or virtual arbitration hearings as an effective substitute to in-person arbitration hearings? How (if at all) has that approach evolved since the onset of the COVID-19 pandemic?

The Irish courts have adapted well in responding to the difficulties caused by the COVID-19 pandemic, and the courts have embraced the use of remote or virtual hearings for all manner of hearings, including complex commercial cases and appeals. Similarly, the use of remote or virtual hearings has been adopted in arbitration, and we are aware of at least three recent, large construction disputes (two international arbitrations) where such hearings have been employed, or where they have been employed in conjunction with limited socially distanced hearings for direct evidence and cross-examination (with limited persons permitted to attend). Given the success with which the courts and arbitrations have proceeded with using the available technology, there is no reason to believe that it cannot be employed even more effectively into the future, even if the COVID-19 pandemic no longer dictates its use.

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Brian Clarke is a partner of Maples and Calder's Dispute Resolution & Insolvency team in the Maples Group's Dublin office. Brian has extensive experience advising both domestic and multinational clients on large and complex commercial disputes, including proceedings before the Commercial Court, as well as all forms of arbitration. He also has experience of different forms of alternative dispute resolution and has represented clients in mediation, conciliation, adjudication and expert determination procedures.

Maples Group
75 St. Stephen's Green
Dublin 2
D02 PR50
Ireland

Tel: +353 86 781 6495
Email: brian.clarke@maples.com
URL: www.maples.com

Graham O'Doherty has extensive experience in commercial disputes, with a particular focus on construction disputes, banking and general corporate matters. He regularly advises and acts in claims involving debt recovery, security enforcement and injunctive relief. Graham is also an experienced advocate, having appeared regularly in arbitrations, adjudications and before the Irish Courts, at all jurisdictional levels.

Maples Group
75 St. Stephen's Green
Dublin 2
D02 PR50
Ireland

Tel: +353 86 410 7179
Email: graham.o'doherty@maples.com
URL: www.maples.com

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