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Contents

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1. General

1.1 Prevalence of Arbitration

Ireland has advanced infrastructure, experienced lawyers and arbitrators to readily accommodate international arbitrations. Although Ireland is experiencing a year-on-year increase in international arbitrations, with Dublin as the nominated seat, its prevalence is not as progressed as the traditional litigation/court model.

1.2 Trends

The current trends in international arbitration include the use of:

- expedited procedures as a way to combat increasing costs of the arbitral process (under the Stockholm Chamber of Commerce Rules for Expedited Arbitration and the International Court of Arbitration Expedited Procedure Rules); and
- provisional and interlocutory measures in arbitration. The power of the arbitral tribunal to grant such measures largely depends on the arbitration agreement. The types of provisional measures that can arise for consideration include the anti-suit injunction, and applications for security for the counterparty's claim or costs.

1.3 Key Industries

There is currently no particular industry in Ireland where use of international arbitration as a dispute resolution process is dominant.

1.4 Arbitral Institutions

As stated in **2.1 Governing Law** below, the Arbitration Act 2010 (the 2010 Act) applies to arbitrations in Ireland and the Act adopted the UNCITRAL Model Law for domestic and international arbitral disputes.

Arbitrators in this jurisdiction are usually appointed under prescribed rules in the governing contract or by agreement between the parties. It is common to see the President of a nominated body (for a technical contract) as the default party for appointing the arbitrator/tribunal without party agreement. As detailed in Section **4. The Arbitral Tribunal** below, failing agreement, the High Court can appoint an arbitrator. It is more common in this jurisdiction to see this occur where there is a sole arbitrator appointed, but where a three-party tribunal is appointed the norm is for the appointment to be subject to a recognised international body such as CiArb, ICC and LCIA or ICDR. This is down to local knowledge and/or the body being prescribed in the governing contract.

2. Governing Legislation

2.1 Governing Law

The 2010 Act applies to arbitrations in Ireland. It applies to international commercial arbitrations and non-international commercial (or domestic arbitrations). The 2010 Act came into force on 8 June 2010 and repealed the existing Arbitration Acts 1954-1998. The Act consolidated the law and adopted the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) in its entirety into Irish law. Section 6 of the Act confirms that the Model Law shall have the force of law in the State and shall apply to international and non-international arbitrations, but subject to the provisions of the Act.

The Preamble to the 2010 Act gives the force of law in Ireland to the Geneva Protocol on Arbitration Clauses, the Geneva Convention on the Execution of Foreign Arbitral Awards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Washington Convention on the settlement of investment disputes between states and nationals of other states.

Incorporating the Model Law and the above conventions into domestic legislation brings the Irish arbitral procedure in line with international practice and procedure.

In 2010, the Supreme Court, in Galway City Council v Samuel Kingston Construction Ltd [2010] 3 IR 95, commenting on arbitration as being one of the oldest and best established alternative method of dispute resolution, stated that "there are now well understood rules governing both domestic and international arbitrations, and a well-established regime that regulates the system of arbitration and its interaction with the courts system".

2.2 Changes to National Law

The Mediation Act 2017 (the 2017 Act) came into force in Ireland on 1 January 2018. The 2017 Act is intended to provide a clear framework for mediation in Ireland and to promote mediation in commercial and civil matters as a viable alternative to court proceedings. The 2017 Act is an important step towards mainstreaming alternative dispute resolution in Ireland. Under the 2017 Act, mediation settlements are given ordinary contractual effect and may be enforced by the courts except where the court is satisfied that particular grounds for refusal of enforcement arise – for example, breach of public policy or undue influence. This provision is similar to the enforcement of arbitrators' awards. Moreover, the Mediation Act imposes an obligation on solicitors to advise all clients that their dispute could be determined by way of mediation prior to issuing proceedings. If the client decides not to proceed to mediation, the solicitor must swear a statutory declaration confirming that the client has been advised of mediation. If no such declaration is supplied, the court will adjourn the case in order to enable compliance.

The Mediation Act is a welcome addition to dispute resolution law in Ireland, as it will hopefully result in disputes being settled in a non-acrimonious, time-efficient and cost-effective manner.

As regard to pending legislation, the Perjury and Related Offences Bill 2018 is currently progressing through the Houses of the Oireachtas (the Irish legislative chamber). The Bill, when enacted, will make perjury a statutory offence. Presently, under Irish law, perjury is a common law offence. The Bill, as currently drafted, will apply to "judicial and other proceedings", which is defined as including "proceedings before any court, tribunal [...] or person having by law power to hear, receive and examine evidence on oath". Under Section 14 of the 2010 Act, the arbitral tribunal has the power to administer oaths and to receive and examine evidence on oath. In its current form, the Bill when enacted will therefore apply to arbitrations. However, changes could be made to the Bill as it progresses through the legislative chamber.

3. The Arbitration Agreement

3.1 Enforceability

Arbitration is available when included in a contractually binding agreement, in which both parties agree to settle their dispute outside of the courtroom. 'Arbitration agreement' is defined at Schedule 1 to the 2010 Act as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

In order to be enforceable, the arbitration agreement must be in writing (Chapter II, Option I, Article 7 to Schedule 1 of the 2010 Act).

Article 7(3) of Model Law stipulates an arbitration clause is valid "if its content is recorded in any form, irrespective of whether the arbitration agreement has been concluded orally, by conduct, or by other means". Article 7(6) of the Model Law states that an arbitration clause can be incorporated from another source providing it is in writing and reference is such as to make the clause part of the contract.

Although an arbitration clause must be in writing, the Irish courts are adopting an increasingly liberal approach to this definition. The Irish courts accept that general words of incorporation will be effective to incorporate a term from another contract and, following the approach of the *Travaux Préparatoires* of the UN Commission on International Trade Law, reference to a written contractual document containing an arbitration clause is sufficient to establish the validity of the arbitration agreement and specific mention of the arbitration clause is not necessary. Section 8 of the 2010 Act provides that judicial notice shall be taken of the *Travaux Préparatoires* and its working group relating to the prepara-

tion of the Model Law, and that the *Travaux Préparatoires* may be considered when interpreting the meaning of any provision and shall be given such weight as is appropriate in the circumstances.

In Mount Juliet Properties Ltd v Melcarne Developments Ltd & Or [2013] IEC 286, Laffoy J found that the standard forms of appointment of the Institute of Engineers Ireland, including the standard form arbitration agreement, had been incorporated into the parties' respective contracts by general words of reference in preceding correspondence between the parties. The court held that reference to the arbitration clause contained in letters sent between the parties sufficiently met the requisite standard of incorporation by reference.

The Irish courts consider an arbitration clause valid where the parties involved have been put on notice of a standard form contract containing an arbitration clause, irrespective of express knowledge of the arbitration clause.

The Mount Juliet case is a warning to businesses contracting on the basis of standard form industry contracts to be aware of the contents of such contracts and the presence of ADR clauses. Irish courts will not accept ignorance as a defence and will enforce arbitration clauses and adjourn or stay court proceedings where appropriate.

3.2 Arbitrability

The 2010 Act and the arbitration agreement will largely determine whether a dispute is 'arbitrable'. The 2010 Act does not apply to employment disputes or to consumer disputes where the parties' contract in standard terms and the contract is valued under EUR5,000.

3.3 National Courts' Approach

In Re Via Networks (Ireland) Ltd [2002] 2 IR 47, the court noted that when parties enter into an arbitration agreement, they are expressly waiving the right to have issues that arise resolved in any forum other than the arbitral tribunal.

In Mount Juliet Properties Ltd v Melcarne Developments Ltd & Ors [2013] IEHC 286, Laffoy J found that the standard forms of appointment of the Institute of Engineers Ireland, including the standard form arbitration agreement, had been incorporated into the parties' respective contracts by general words of reference in preceding correspondence between the parties. The court held that reference to the arbitration clause contained in letters sent between the parties sufficiently met the requisite standard of incorporation by reference.

In light of the fact that an arbitral tribunal and a court can both rule on the existence of an arbitration agreement, the High Court has recently addressed the standard of review required by the court; full judicial consideration or a prima facie analysis of the presence of an arbitration clause. In Lisheen Mine v Mullock and Sons (Shipbrokers) Ltd and another [2015] IEHC 50, Cregan J conclusively decided that the courts should adopt a full judicial consideration approach.

The case concerned a dispute relating to a purported contract for the carriage of goods by sea. The court refused the defendant's application to stay proceedings to proceed with arbitration, as the charter party agreement containing the arbitration clause had not been concluded.

Cregan J preferred the full judicial approach, and noted "a finding that an arbitration agreement exists on a prima facie basis means that the issue may have to be re-argued before the arbitrator as to whether an arbitration clause exists on a conclusive basis". He highlighted the cost element of a future appeal, and ultimately decided the presence of an arbitration agreement is a question of law and in this instance was best answered by the courts.

Cregan J's judgment is a comprehensive statement of the law and a clear indication that the courts in Ireland will determine arbitration clauses on a full judicial basis. It follows Barnmore Demolition and Civil Engineering Ltd v Alandale Logistics Ltd & Ors [2010] IEHC 544 where Feeney J stated there is "a particularly strong case for the argument that any review as to the very existence of the arbitration agreement should be on the basis of full judicial consideration". However, on the facts of that case, the court was not required to so decide.

3.4 Validity

Under the doctrine of separability, the Irish courts can sever the invalid part of an agreement from the arbitration clause. The application of the concept of the separability of an arbitration agreement from the main contract can be found in the High Court decision of Doyle v National Irish Insurance Co Plc [1998] 1 IR 89 and most recently in K&J Townmore Construction Ltd v Kildare and Wicklow Education and Training Board [2018] IEHC 770. The principle of separability is provided for in Article 16(1) of the Model Law.

4. The Arbitral Tribunal

4.1 Limits on Selection

Article 11(2) of the Model Law provides that the parties are free to agree on a procedure of appointing the arbitrator(s) subject to Article 11(4) and Article 11(5).

In the case of three-party arbitral tribunals, Article 11(3) provides that that each party will appoint an arbitrator and that the two party-appointed arbitrators will appoint the third arbitrator. Article 11(3) (b) sets out that in circumstances where one arbitrator is to be appointed and the parties cannot agree on appointment under the applicable appointment procedure, they can apply to the High Court, which is empowered to make an appointment.

The 2010 Act does not stipulate that arbitrators must have specific qualifications; however, they are generally experts in their respected fields.

Section 13 of 2010 Act stipulates that arbitrators shall be chosen (by an institutional body or, failing their nomination, by the High Court) based on their relative expertise, independence and impartiality. Parties can opt for more than one arbitrator once this is stated in the initial arbitration agreement. Section 13 deviates from the Model Law, which provides in Article 10(2) that an arbitral tribunal shall consist of three arbitrators unless otherwise agreed. This was intended by Irish legislators to reduce unnecessary costs associated with the process and to encourage parties to consider Ireland as their seat for a cost-effective and efficient arbitral process.

4.2 Default Procedures

In practice, the arbitration agreement will include a default procedure where the parties cannot agree upon the selection of an arbitrator. This default procedure normally provides that nominating bodies will be asked to select the arbitrator, and this will usually be incorporated as a provision within the contract governing the dispute. (Common nominating bodies in Ireland include the Law Society of Ireland, the Bar Council of Ireland, etc)

4.3 Court Intervention

As mentioned above in **4.1 Limits on Selection**, the parties are free to agree on a procedure of appointing the arbitrator(s). Where there is default in compliance with the agreed appointment procedure, the court can be requested to take the necessary measures to secure the appointment. In the absence of an agreed appointment procedure, the court can order the appointment at the request of either of the parties (Article 11(3) and Article 11(4) of the Model Law).

4.4 Challenge and Removal of Arbitrators

Parties to the dispute can only challenge the nomination of the arbitrator in writing within 15 days of their appointment. The only grounds to challenge the appointment of an arbitrator are "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties" (Article 12(2) of the Model Law).

Article 13 of the Model Law provides that the parties are free to agree on the procedures for challenging an arbitration.

4.5 Arbitrator Requirements

The 2010 Act does not stipulate that arbitrators must have specific qualifications, however, they are generally chosen as experts in their fields.

Article 12(1) of the Model law imposes a mandatory duty on the arbitrator to disclose conflicts of interest. It provides: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him".

Where there is a breach of this duty, the appointment of the arbitrator can be challenged under Article 12(2) of the Model Law.

The International Bar Association's Guidelines on Conflicts of Interest in International Arbitration are available to arbitrators when making decisions about prospective appointments and disclosures. The Guidelines, although not binding, have been largely followed by international arbitration practitioners, and they can assist in assessing the impartiality and independence of arbitrators. The Guidelines provide that the arbitrator shall be "impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final awarded has been rendered or the proceeding has otherwise finally terminated".

There is also a duty on arbitrators to act impartially during the course of the arbitration proceedings. The duty is to avoid actual bias, objective bias, and apparent bias. Where the arbitrator acts partially, his or her appointment or the arbitral award may be challenged under the Model Law.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

See reply at **3.2 Arbitrability**, above.

5.2 Challenges to Jurisdiction

Under Article 16(1) of the Model Law, an arbitrator/arbitral tribunal in Ireland can rule on their own jurisdiction. The well-established *kompetenz-kompetenz* rule applies to international and domestic arbitrations in Ireland with the introduction of the Model Law, and empowers arbitrators to rule on their own jurisdiction, including any objections in respect of the presence of a valid arbitration agreement.

5.3 Circumstances for Court Intervention

As mentioned above, Article 16(1) of the Model Law allows an arbitral tribunal to decide upon challenges to its jurisdiction. Under Article 16(3) of the Model Law, there is a right of appeal to the High Court for parties who dispute the arbitrator's determination of jurisdiction. That challenge must be made within 30 days of the arbitrators ruling.

Guidance on the approach the courts will adopt in applications under Article 16(3) was given in John G Byrne Limited

v Grange Construction and Roofing Co Ltd [2013] 1 IR 707. Laffoy J held that the High Court in an Article 16(3) application the court may consider such evidence as it sees fit, and is not bound by the submissions made to the arbitrator. In this case, Laffoy J held that there was no arbitration agreement within the meaning of the Model Law in place governing the contractual relationship of the parties.

Mayo County Council v Joe Reilly Plant Hire Limited [2015] IEHC 544 concerned the applicant's challenge to the arbitrator's jurisdiction to adjudicate a claim between the parties in relation to costs of work on the grounds that the respondent accepted payment and therefore there was accord and satisfaction. The court dismissed the challenge. The court held that where the existence of an arbitration clause is not in dispute, the courts would be very slow to interfere with the arbitrator's ruling on his own jurisdiction having regard to the *kompetenz-kompetenz* principle.

In Achill Sheltered Housing Association CLG v Dooniver Plant Hire Limited [2018] IEHC 6, McGovern J had to determine whether or not the dispute referred to arbitration fell within the terms of the arbitration agreement. The respondent argued that the application was premature, as the arbitrator merely found that he had been validly appointed and had not dealt with the challenge to his jurisdiction. The court held that Article 16(3) permits the court to review a preliminary ruling by an arbitral tribunal that it has jurisdiction, and that the preliminary ruling by the arbitrator that he had been validly appointed came within the scope of Article 16(3).

5.4 Timing of Challenge

Under Article 16(3) of the Model Law, a challenge under any procedure agreed upon by the parties or a challenge to the jurisdiction of the arbitral tribunal, must be made within 30 days after having received notice of the decision rejecting the challenge.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

In John G Byrne Limited v Grange Construction and Roofing Co Ltd [2013] 1 IR 707 the High Court held that in Article 16(3) applications, the court may consider such evidence as it sees fit, and is not bound by the submissions made to the arbitrator: "The Court has untrammelled jurisdiction to consider de novo the issue whether there is an arbitration agreement which binds the parties". In this case, Laffoy J held that there was no arbitration agreement within the meaning of the Model Law in place governing the contractual relationship of the parties.

5.6 Breach of Arbitration Agreement

Under Article 8 of the Model Law, where court proceedings are brought in a matter that is the subject of a valid arbitration agreement, the court must refer the matter to arbitration and stay the court proceedings, unless the agreement is null and void, inoperative or incapable of being performed. Article 8 replaces Section 5 of the Arbitration Act 1980.

Case law has established that where the requirements of Article 8(1) of the Model Law are met, the court must make the reference to arbitration; see K&J Townmore Construction Ltd v Kildare and Wicklow Education and Training Board [2018] IEHC 770.

Where the matter sought to be referred to arbitration falls within the scope of the arbitration agreement, the court will stay court proceedings. This will require an examination on a 'full judicial consideration' basis, as to whether the circumstances required for a stay under Article 8 are met. Such an approach was adopted by the High Court in Kellys of Fantane Limited v Bowen Construction Limited and another [2017] IEHC 357, where an application for a stay was refused. The Court held that the agreement between the parties provided for certain matters to be dealt with by the courts, and certain matters to be dealt with by the arbitrator.

Under Section 11 of the 2010 Act, it is not possible to appeal a court's decision in a stay application under Article 8 of the Model Law.

5.7 Third Parties

Arbitration will only bind parties where there is a valid arbitration agreement. Where there is no such agreement, there can be no arbitration.

The courts will not stay court proceedings and refer to arbitration, where the parties are not bound by an arbitration agreement. In P Elliot & Co Limited v FCC Elliot Construction Limited [2012] IEHC 361 the plaintiff had entered in a joint venture agreement (JVA) for the building of a new hospital. The plaintiff was also party to a related consultancy agreement in relation to the provision of services to the defendant. The JVA contained an arbitration clause. The consultancy agreement had no arbitration clause. The plaintiff went into liquidation, and instituted proceedings against the defendant for payment under the consultancy agreement. The defendant denied liability, and also contended the matter should be referred to arbitration. The High Court refused to stay proceedings where the parties had omitted an arbitration clause from the consultancy agreement. The High Court also referred to the absence of discretion open to a court in a stay application once the matter falls within the arbitration agreement.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under Article 17 of the Model Law, interim measures and preliminary orders can be granted by the arbitral tribunal on the conditions set out in Article 17.

Section 19 of the 2010 Act empowers the arbitral tribunal to order security for costs, unless the parties agree otherwise.

Interim measures awarded by the arbitrator will be recognised and enforced by the courts.

6.2 Role of Courts

Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement for a party to request interim measures of protection from the High Court, before or during arbitral proceedings.

Under Article 17J of the Model Law, the High Court has the power to grant interim measures of protection and assistance and this applies even where the seat of the arbitration is in another jurisdiction outside of Ireland.

The Irish courts, in considering applications for interim relief under Article 9 and Article 17J of the Model Law, will apply the principles set out by the Supreme Court in Campus Oil Ltd v Minister for Industry and Energy (No 2) [1983] IR 88 in applications for interim or interlocutory injunctive relief; see Osmond Ireland on Farm Business Ltd v McFarland [2010] IEHC 295.

Despite the increased power of arbitrators, the High Court still retains power in respect of ancillary duties, including issuing witness subpoenas, ordering third-party discovery, and recognising and enforcing arbitral awards. Under Article 27 of the Model law, the High Court can grant assistance in the taking of evidence.

Under Section 10(2) of the 2010 Act, the High Court's powers are curtailed, as it provides that the High Court is not at liberty to order security for costs or discovery of documents unless previously agreed by the parties.

In ESB v Boyle & another [2019] IEHC 475, the High Court (Twomey J) considered the effect of the 2010 Act on the proceedings, which were judicial review proceedings arising from a claim of compensation by the notice party against the ESB. A property arbitrator under the Acquisition of Land (Assessment of Compensation) Act 1919 (the 1919 Act) was appointed. The ESB sought an order from the court directing the arbitrator to state a case to the High Court on an alleged point of law in respect of the calculation of the compensation.

The court referred to the 2010 Act, and in particular Article 5 of the UNCITRAL Model Law, which is adopted into Irish law by Section 6 of the 2010 Act, as prima facie inconsistent with the 1919 Act, insofar as Article 5 states that no court shall intervene in matters governed by the Model Law. However, Section 29 of the 2010 Act also states that it shall apply to every arbitration under any other act "except in so far as this Act is inconsistent with that other Act". Since the entitlement of the High Court to intervene in a property arbitration under the 1919 Act is inconsistent with Article 5, the Court found that Article 5 of the Model Law does not apply to property arbitrations under the 1919 Act and that therefore a decision made by a property arbitrator under the 1919 Act may be subject to judicial review.

Further, if should be noted that under the International Chamber of Commerce (the ICC) Arbitration Rules (the ICC Rules), parties can seek urgent temporary relief, including the appointment of an emergency arbitrator. So, where the arbitration agreement selects the ICC Rules as the dispute resolution mechanism, the ICC Rules will apply.

6.3 Security for Costs

Under Section 10(2) of the 2010 Act, the High Court when exercising its power under Article 9 or Article 27 of the Model Law, is not at liberty to order security for costs.

Section 19 of the 2010 Act empowers the arbitral tribunal to order security for costs, unless the parties agree otherwise. The jurisdiction to order security for costs against a party arises where:

- the party is an individual who is domiciled, habitually resident or carrying on business outside Ireland; or
- the party is a body corporate established outside Ireland or whose central management and control is situated outside Ireland.

7. Procedure

7.1 Governing Rules

The Model Law gives the parties to an arbitration wide discretion on how the arbitration proceedings should be conducted. Under Article 19 of the Model Law, the parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing agreement, Article 19(2) provides that the arbitral tribunal can conduct the arbitration in such manner, as it considers appropriate.

7.2 Procedural Steps

See **7.1 Governing Rules**, above.

7.3 Powers and Duties of Arbitrators

Under Article 19 of the Model Law, the parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing agreement, under Article 19(2), the arbitral tribunal can conduct the arbitration in such manner, as it considers appropriate.

Under Article 25 of the Model Law, where a claimant fails to communicate his statement of claim, the arbitrator shall terminate the proceedings. Where the respondent fails to communicate his statement of defence, the arbitral tribunal shall continue with the proceedings, without treating the failure as an admission of the allegations. Finally, where a party fails to appear or fails to produce documentary evidence, the arbitral tribunal can continue with the proceedings and make an award.

7.4 Legal Representatives

There is no requirement for parties to be legally represented at an arbitration. However, in practice, at a minimum an Irish-qualified solicitor is usually engaged by the parties, and it is common practice for barristers to also be retained by parties who are involved in arbitration in Ireland.

There are no particular qualification requirements for legal representatives appearing in arbitrations in Ireland. It is not unheard of for foreign-qualified lawyers to represent parties in an arbitration in Ireland, either with or without Irish qualified lawyers also being retained.

8. Evidence

8.1 Collection and Submission of Evidence

Under Section 14 of the 2010 Act, the arbitral tribunal can direct that a party to an arbitration agreement or a witness who gives evidence in proceedings before the arbitral tribunal be examined on oath or on affirmation. Note the comments at **2.2 Changes to National Law** above in relation to the proposed law to create a statutory offence of perjury which it appears will apply to arbitration proceedings – the Perjury and Related Offences Bill 2018. Under the proposed Bill, a person who commits an offence under the Act (eg, gives false statement under oath) is liable on summary conviction to a EUR10,000 fine and/or up to 12 months imprisonment, and on indictment to a fine of up to EUR100,000 and/or up to ten years' imprisonment.

The parties will most likely agree in advance the dates for delivery of pleadings in the proceedings. Article 23(1) of the Model Law provides that within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought. Similarly, the respondent is required to state his defence unless the parties have otherwise agreed. With their pleadings, the parties may submit all relevant documents and may refer to other evidence they will submit. The parties can amend their pleadings in the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate and this will ultimately be subject to the directions issued by individual tribunals or arbitrators.

An issue arises as to whether and when arbitrators have the jurisdiction to order discovery. Section 10(2) the Arbitration Act 2010 provides a limited jurisdiction to order discovery, stating: "When exercising any powers in relation to Articles 9 or 27, the High Court shall not, unless otherwise agreed by the parties, make any order relating to security for costs of the arbitration or make any order for discovery of documents".

Therefore, under Section 10, an arbitrator's jurisdiction to make an order for discovery is limited to where both parties agree to discovery being made. This raises the question, absent such an agreement, does an arbitrator have power to order discovery to be made? This question arose for consideration in O'Leary T/A O'Leary Lissarda v Ryan [2015] IEHC 820. As a result of the arbitrator refusing to order discovery, the applicant instituted a constitutional challenge under the Irish Constitution. The applicant relied on Article 18, Schedule 1 of the Arbitration Act 2010, incorporating the Model Law. Article 18 deals with the equal treatment of the parties, and states: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

In reaching his conclusion, McGovern J did not find it necessary to fully consider the submissions regarding discovery, as the applicant had accepted that there was no explicit power set out in the legislation to order discovery. Consequently, the court did not need to consider the issue any further.

There is no doubt that the ordering of discovery in arbitration (or in court proceedings) can have the effect of increasing the time and costs of the process. However, Dowling-Hussey in 'Alternative Dispute Resolution: A Road Wrongly Travelled? Irish Arbitrators and Discovery' argues that this case demonstrates that it remains unclear whether Irish arbitrators have power under the 2010 Act to order discovery of their own volition; but it does seem that this is not likely to be the case.

8.2 Rules of Evidence

The rules of evidence are those which apply under the Rules of the Superior Court in Ireland.

8.3 Powers of Compulsion

See **6.2 Role of Courts** and **8.1 Collection and Submission of Evidence** above, which identify the power of arbitrators or arbitral tribunals to order production of documents (subject

to the limitations identified) and to compel witness attendance.

9. Confidentiality

9.1 Extent of Confidentiality

In Ireland, the arbitration is conducted in private. Although parties can agree to arbitrate in public, in practice this will rarely happen. In private arbitrations, arbitration proceedings remain confidential between the parties and their representatives.

There is a presumption that information from arbitral proceedings, including the arbitral award, are covered by confidentiality, save where disclosure is required by law, in the public interest and where the parties consent to waiving confidentiality.

10. The Award

10.1 Legal Requirements

The arbitral award should be final and conclusive. Where there are claims and counterclaims, the award should make an explicit award on each such claim (per Murphy J in JJ Rhatigan Co Limited v Paragon Contracting Limited [2009] IEHC 117 (Paragon)).

Under Article 31 of the Model Law, the award must be in writing and signed by the arbitrator(s). Articles 31(2) and 48(3) of the Model Law provide that the award must state the reasons upon which it is based, unless otherwise agreed between the parties. Where the award is reasoned, the reasons should be set out in sufficient detail so as to allow a court to consider any question of law arising (per Murphy J in Paragon). The award must state its date, and the place of arbitration. A signed copy of the award must be delivered to each party.

10.2 Types of Remedies

Section 20 of the 2010 Act allows the arbitral tribunal to award specific performance of a contract, other than a contract for the sale of land, provided the parties have not agreed otherwise.

10.3 Recovering Interest and Legal Costs

Interest

Section 18(1) of the 2010 Act allows the parties to agree on the arbitral tribunal's power to award interest. In the absence of agreement, the arbitral tribunal can, under Section 18(2) award simple or compound interest on terms as it "considers fair and reasonable" on all or part of the award, or the amount claimed at the outset of the arbitration but paid before the award was made.

Under Section 18(3), the arbitral tribunal can award simple or compound interest from the date of the award, or a later date, until payment, at rates it "considers fair and reasonable" on the outstanding amount of any award (including interest and/or costs).

Costs

Section 21(1) of the 2010 Act enables the parties decide how the costs of the arbitration are to be dealt with. Under the normal rules governing litigation in Ireland, costs 'follow the event'. Section 21(1) allows the parties depart from such rules. It is not clear, however, if this section authorises the parties to agree a third-party funding arrangement. Third-party funding arrangements in litigation are not permissible in Ireland, as they offend the laws against maintenance and champerty. For further information on third-party funding, see **13.5 Third Parties**, below.

Where the parties have not agreed on costs, or where a consumer is involved, the arbitral tribunal is entitled to award costs as it sees fit (Section 21(3) of the 2010 Act).

11. Review of an Award

11.1 Grounds for Appeal

The 2010 Act made extensive changes to the procedure previously in place for challenging an award. Parties can only apply to the High Court in very limited circumstances to set aside awards. These are very specific grounds, and include incapacity, invalidity of agreement, failure to give adequate notice for arbitration, inability to present the scope of arbitration, that the dispute is not within the scope of arbitration and it is not capable of settlement by arbitration or is in conflict with public policy.

The High Court's subsequent determination is final and complete. Order 56, Rule 4 of the Rules of the Superior Courts provides that an application to remit or set aside an award under an arbitration agreement shall be made "within six weeks after the award has been made and published to the parties, or within such further time as the Court may allow".

Section 12 of the 2010 Act amends the time limit specified in Article 34(3) of the Model Law by providing that the application to the High Court to set aside an award on the grounds of public policy may be made within 56 days from the date on which the circumstances giving rise to the application became known or ought to have become known to the party concerned, rather than the three-month period from the date when the party concerned received the award as specified in Article 34(3).

Irish courts have narrowly interpreted the above grounds, as illustrated in McIntyre v Allianz PLC [2012] IEHC 551. The High Court dismissed an application to remove the arbitra-

tor involved, and set aside the arbitral award on the basis that the reasons given for the award were sufficient and that there was no real likelihood of bias. The claimant failed to sufficiently raise one of the limited grounds contained in Article 13. In Snoddy v Mavroudis [2013] IEHC 285 (Snoddy) the High Court refused to set aside a finding by an arbitrator on the grounds that the court did not have jurisdiction to second-guess the construction of an agreement by an arbitrator. Laffoy J noted: "If this Court were to set aside the part of the award dealing with the fees for additional services, the Court would be usurping the Arbitrator's role".

Further case law is discussed at **11.3 Standard of Judicial Review**, below.

11.2 Excluding/Expanding the Scope of Appeal

The parties may agree to exclude or expand the scope of appeal or challenge under Irish law, if the agreement does not offend public policy or national law.

11.3 Standard of Judicial Review

The Irish courts apply a deferential approach when determining challenges to decision of the arbitral tribunal. For example, in Snoddy, where Ms Justice Laffoy held that "a strong presumption should exist that a tribunal acts within its mandate", they have still sought to address issues not previously considered by the Irish courts.

In FBD Insurance v Samwari Ltd [2016] IEHC 32 where FBD Insurance sought to set aside, on public policy grounds, an "interim determination" that, despite entering a creditors' voluntary winding up, the respondent insured was allowed continue the prosecution of the liquidation. FBD Insurance contended that the liquidator appointed under the process should have carriage of the arbitration. The first point that had to be considered was whether an interim determination constituted an award, and therefore was capable of triggering the court's review jurisdiction.

Mr Justice McGovern stated that: "For the court to have jurisdiction under Article 34 to set aside a decision of an arbitral tribunal, the decision must be one which is made on the merits of the case and meet the formal requirements of Article 31". He then proceeded to hold that an interim determination was not an award as it "was a ruling by the arbitrator on a procedural issue as to whether or not the claimant could continue to maintain the proceedings in its own name or whether they would have to be prosecuted by a liquidator". He added, "If the applicant was of the view that the determination as to the status of the claimant company was to be an award (either interim or final), it is difficult to understand how it agreed to the directions, which were made by the arbitrator".

Mr Justice McGovern also confirmed that, even if a determination was reached through an error of law, it was not open to review under Article 34 of the Model Law where the error made did not form part of the arbitral award. The Court endorsed the continuation of a narrow approach be taken to public policy issues in challenges to an arbitral award, relying upon the approach taken in Brostrom Tankers AB [2004] 2 IR 191, which held that a public policy defence to an enforcement application extends only to a "breach of the most basic notions of morality and justice".

A potential problem down the line with the approach taken in FBD is that arbitrators frequently make determinations that impact upon the presentation of each party's case but that are not awards. Given the decision in FBD, parties may be unable to challenge such determinations, even if they are patently incorrect or unfair. Where such determination ultimately impacts on the final award, the award still remains capable of challenge (all be it with difficulty), but a defence will be raised that such a challenge is flawed as it relates to the 'determination' and not the award. Ultimately, the way around this conundrum is for the courts to distinguish the FBD decision on not challenging determinations on the particular facts of that case. Only time will tell how the courts address this issue.

In FBD, McGovern J also made certain obiter remarks in relation to the admissibility of evidence. He noted that certain evidence would not have been admissible before the court, as it was not raised before the arbitrator.

Ms Justice Costello in O'Leary v Ryan [2015] IEHC refused to set aside an arbitral award, when she rejected the grounds for the application, citing the applicant's failure to bring an application under Article 33 of the Model Law for an additional award or to apply to the arbitrator when the arbitrator had said at the conclusion of his award that "if any issue arises, I give the Parties liberty to apply to me". The rationale here is that the failure to exhaust alternative remedies will further mitigate against a party seeking to have an award set aside. This judgment also noted the absence of a violation of the rules of natural justice, a want of fairness or a breach of natural justice as further reasons for grounding its decision not to set aside the award. Although these terms are not embedded in the language used in the Model Law code, they are frequently deployed by the courts in the review of arbitral awards.

In Des Hennessy Building Contractors Limited v O'Beirne [2015], IEHC 596 the court was asked on review of an award to consider if the arbitrator who made the award was duly appointed. The court roundly rejected this argument, noting that that the Model Law does not "facilitate revisiting issues which have been determined in the course of the arbitral process".

Recent jurisprudence in Ireland strongly supports a trend against the challenging of awards. Against this trend it

should be noted that if the grounds of appeal advanced were stronger that another case may seek to more favourably consider setting side an award.

Another recent decision that is worthy of note (although brought under the old regime of the Arbitration Acts 1954–1998) is Fayleigh v Plazaway Limited [2015] IESC 92. Here, the court set aside an arbitrator's award, holding that the arbitrator had misconducted the hearing when he failed to admit 17 folders of documents submitted by the respondent. The arbitrator's rationale was that the folders were not relevant to the dispute, but he had earlier indicated to the parties that he would read the documentation and take the same into consideration. In reaching its conclusion, the court noted that the judicial system has "a high tolerance for arbitral error" and that despite there being "much to be said" for a decision being binding and final, this does not mean all awards are immune from challenge by the courts.

This issue also arose in BAM Building Limited v UCD Property Development Company Limited [2015] IEHC 820 wherein McGovern J observed that Article 8 of the Model Law does not bestow jurisdiction on the Irish courts to refer or not refer matters to arbitration. McGovern J. held that this case falls outside the realm of Article 8 because both parties agreed that there was a valid arbitration clause. This approach has been recently endorsed by Barniville J in K&J Townmore Construction Ltd v Kildare and Wicklow Education and Training Board [2018] IEHC 770 and Ocean Point Development Company Ltd ((in Receivership)) v Patterson Bannon Architects Ltd [2019] IEHC 311.

12. Enforcement of an Award

12.1 New York Convention

The 2010 Act enables Irish businesses to easily obtain an arbitration award against a company in another country, providing the Model Law has been adopted in that jurisdiction or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified. Section 23 of the 2010 Act states that an arbitral award will be recognised as binding and enforceable upon a written application (notice of motion grounded upon an affidavit) to the High Court. Article 31 of Model Law stipulates that the award must be in writing, signed and dated, and that the location of the award must be clearly noted. Reasons for the arbitral award must be listed, unless otherwise specified by the parties involved.

12.2 Enforcement Procedure

Arbitral awards can be enforced either under Section 23 of the 2010 Act, or under Order 56 of the Rules of the Superior Courts. The limitation period for enforcement under Section 23, where the arbitration agreement is not under seal, is six years from the date on which the cause of action accrued (Section 11(1) (d) of the Statute of Limitations 1957).

Applications under Order 56, Rule 3(1) (j) for leave of the court to enforce or to enter judgment in respect of an award under Section 23(1) of the 2010 Act are generally made by motion and grounding affidavit on notice to the other side.

Under Article 35(1) of the Model Law an arbitral award, irrespective of the country in which it was made, shall be binding and enforceable in Ireland, subject only to the grounds set out in Article 36 of the Model Law.

12.3 Approach of the Courts

Section 23(1) of the 2010 Act provides that awards made by an arbitral tribunal under an arbitration agreement can be enforced summarily before the Irish courts. Foreign awards will not be recognised or enforced in the State, however, if a party resisting recognition or enforcement successfully invokes the grounds for refusing recognition or enforcement listed in Article36 of the Model Law. However, Article 36 cannot be invoked against Irish awards (Section 23(4) of the 2010 Act).

Arbitration awards are presumed binding on the parties at common law by virtue of an implied agreement by every party to the arbitration agreement to be bound by the award. Section 23(2) of the 2010 Act restates this presumption by providing that an award made by an arbitral tribunal under an arbitration agreement is binding and can be relied upon by the parties in subsequent legal proceedings.

The power of the Irish courts to refuse recognition and enforcement of a foreign arbitration award on the grounds of public policy was considered in Brostrom Tankers AB v Factorias Vulcano SA [2004] 2 IR 191. The case concerned an application to enforce a New York Convention award in an international arbitration under the Irish arbitration legislation. Kelly J stated that the court would be justified in refusing enforcement, only 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".

13. Miscellaneous

13.1 Class-action or Group Arbitration

The Irish legal system does not provide for 'class actions' in litigation and each individual case will be decided on its own merits. Rather, two basic forms of multi-party litigation, which enables a group of individuals to institute proceedings that are intended to deal with that group collectively, can be initiated. In general, under Irish law multi-party litigation can take the form of a 'representative action' or a 'test case'.

The position of class actions in arbitration, as an alternative to litigation, may be regarded differently from the traditional rules governing class-action litigation in Ireland.

13.2 Ethical Codes

As stated in **7.4 Legal Representatives** above, parties can be represented by solicitors or barristers. Solicitors and barristers are subject to the ethical rules imposed on them by their regulatory body – ie, where the solicitor is an Irish solicitor, they are bound by the ethical rules governing solicitors under the Law Society of Ireland Guide to Good Professional Conduct for Solicitors. Irish barristers are obliged to observe the ethics and etiquette of the profession under their Code of Conduct.

13.3 Third-party Funding

In Ireland, third-party funding is generally not permitted. Two recent Supreme Court decisions have confirmed that third-party funding of litigation fall under the torts and crimes of maintenance and champerty, which were established by statutes as far back as the 14th century. In Persona Digital Telephony Limited and Another v The Minister for Public Enterprise, Ireland and Others [2017] IESC27 (Persona) the Supreme Court stated "maintenance may be defined as the giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation. Champerty is where the third party, who is giving assistance, will receive a share of the litigation succeeds".

The Supreme Court held that third-party funding of litigation in return for a share of the proceeds is unlawful. The court found that it is for the law-makers to change the law. In SPV Osus Ltd v HSBC Institutional Trust Services (Irl) Ltd [2018] IESC 44 Clarke CJ repeated his comments in Persona and called upon the legislature to urgently deal with the lack of legislation regulating costs, third-party funded litigation and access to the courts. Clarke CJ emphasised the necessity for legislation establishing a properly regulated scheme of third-party funding to protect access to justice.

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Despite the findings of the Supreme Court, it remains to be seen whether third-party funding in international arbitration may in fact be permissible in Ireland. Arbitration is not litigation whereas the law of maintenance and champerty have been defined as assistance in litigation. Further, in Persona the court expressed its reluctance to apply the laws of champerty and maintenance to international arbitration, stating: "The Court was asked not to be seduced into changing the law in the interests of what the Court may perceive to be just. It may be said that in light of modern issues, such as […] issues arising on international arbitrations […] it might well be appropriate to have a modern law on champerty".

13.4 Consolidation

Section 16(1) of the 2010 Act allows the parties to agree to consolidation of proceedings and to agree on the terms upon which such consolidation is to occur. In the absence of such agreement, consolidation of proceedings is prohibited (Section 16(2)).

13.5 Third Parties

A third party that is not a party to an arbitration agreement or award cannot be bound by the agreement or award. An arbitration agreement under the 2010 Act is construed in accordance with Option 1 of Article 7 of the Model Law, which provides that it is an agreement "by the parties". There is no provision that authorises the agreement to extend to third parties.

Under the pre-existing legislation (Section 27 of the Arbitration Act 1954) an arbitral award was expressed to be "final and binding on the parties and the persons claiming under them". However, that position has changed under the 2010 Act. The binding nature of an award under Section 23 of the 2010 Act is limited, and is expressed to apply to "the parties between whom it was made".