Dispute Resolution

Contributing editors
Martin Davies and Kavan Bakhda

2018

GETTING THE DEAL THROUGH

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Dispute Resolution 2018

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Latham & Watkins

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Dispute Resolution 2018

Sixteenth edition

Getting the Deal Through is delighted to publish the sixteenth edition of *Dispute Resolution*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bermuda, Ghana, Greece, Korea and United Arab Emirates.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Kavan Bakhda of Latham & Watkins, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
June 2018

Ireland

Claire McLoughlin and Karen Reynolds
Matheson

Litigation

1 Court system

What is the structure of the civil court system?

Ireland's civil court system is composed of five levels, which are regulated by the Courts (Supplemental) Provisions Act 1961. The District Court comprises 64 judges. The business of the District Court is primarily divided into criminal, civil, family law and licensing matters. The civil jurisdiction of the District Court in contract and most other matters is €15,000. It also deals with small claims matters below €2,000. Decisions of the District Court can be appealed to the Circuit Court with some exceptions.

The Circuit Court consists of 38 judges and six specialist judges. The business of the Circuit Court is divided into civil, family and criminal matters. The civil jurisdiction of the Circuit Court in proceedings other than personal injury claims is limited to €75,000 (in personal injury cases it is €60,000). The Circuit Court and High Court have concurrent jurisdiction in the area of family law. The Circuit Court also acts as an appeal court for appeals from the decisions of the Labour Court, Unfair Dismissals Tribunal and the Employment Appeals Tribunal.

The High Court comprises 37 judges. It has full jurisdiction to determine all matters and questions whether of law or fact, civil and criminal. Its jurisdiction extends to the question of the validity of law having regard to the Constitution. Matters before the High Court are normally heard and determined by a single judge; however, more significant matters may be heard by three judges. The High Court acts as an appeal court from the Circuit Court in civil matters and it has the power to review the decisions of certain tribunals. It may also give rulings on questions of law submitted by the District Court. The Commercial Court is a division of the High Court and it deals with various types of business disputes, including cases where the value exceeds €1 million or where the dispute concerns intellectual property. There is no automatic right for any case to be admitted to the Commercial List and the court retains the ultimate discretion to admit cases.

The Court of Appeal, established by the Court of Appeal Act 2014 and comprising 10 judges, occupies an appellate jurisdictional tier between the High Court and the Supreme Court. The Court of Appeal has jurisdiction to hear appeals in civil proceedings from the High Court. It can also hear appeals on questions of whether or not a law is constitutional and decides points of law by cases stated from the Circuit Court.

The Supreme Court comprises the Chief Justice of Ireland and nine judges. It is the court of final appeal in Ireland. The court usually comprises three to five judges, although in exceptional cases seven judges may preside. Where a case concerns the constitutional validity of an Act of the Irish parliament, the Constitution requires that the court consists of a minimum of five judges. Leave of the Supreme Court is necessary in order to bring an appeal from the Court of Appeal. The Supreme Court may hear an appeal on a decision from the Court of Appeal if it is satisfied that the decision involves a matter of general public importance, or the interests of justice require it. It is possible to bring a 'leapfrog appeal' from a decision of the High Court if there are exceptional circumstances warranting such an appeal; for example, where it involves a matter of general public importance.

2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

The vast majority of civil actions are heard by a judge sitting without a jury, with the exception of defamation and civil-assault claims. In such cases, the plaintiff can opt to have it heard by a judge alone. The judge determines the outcome depending on whether the burden of proof has been discharged on the balance of probabilities, based on the parties' evidence and submissions. The judge can ask questions, but this is predominantly the role of the practitioners.

In civil actions heard with a jury, the jury is selected at random and is composed of 12 members of the public. They are sworn to give a verdict on the basis of evidence given in a court case.

Improving the diversity of the judiciary is a live issue at present. The Judicial Appointments Commission Bill 2017 is currently being considered by the Irish parliament in an effort to attract a broader range of candidates to the bench, including women and those from wider socio-economic backgrounds, by changing the selection regime.

3 Limitation issues

What are the time limits for bringing civil claims?

The time limits for bringing civil claims are primarily set out in the Statute of Limitations Acts 1957 and 1991, the Civil Liability Act 1961 and the Civil Liability and Courts Act 2004.

The limitation period for contract and general tort claims is six years from the date of the cause of action. In personal injury claims this period is two years commencing when the claimant knew or ought to have known of the cause of action. In defamation cases, the limitation period is one year, or up to two years if extended by the court. In judicial review matters, the claim must be brought promptly and in any event within three months of the date of the cause of action, though this period can be extended by the court if there is a good reason.

Limitation periods operate as a defence and not a bar to proceeding with an action. Therefore, a standstill agreement to suspend a time limit should be enforceable so long as the agreement is not disputed.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

There is no obligation in Ireland to take any pre-action measures before commencing litigation. However, solicitors usually, as a protective measure in relation to future costs applications, send a warning letter to the defendant before initiating legal action.

If there is more than one potential defendant, an 'O'Byrne letter' is usually sent, which calls on the potential defendants to admit liability and states that if liability is not admitted, each defendant will be sued and the letter will be relied on by the plaintiff in resisting an application for costs by any party found not liable.

In personal injury actions, if the plaintiff does not notify the alleged wrongdoer(s) in writing of the wrong alleged to have been committed within two months of the cause of action accruing, the court may take this failure into account when adjudicating on costs. Most personal injuries (other than medical negligence actions) involve an application for assessment by the Personal Injuries Assessment Board, under

the Personal Injuries Assessment Board Act 2003. This Act requires a claimant to obtain an authorisation from the Personal Injuries Board before issuing proceedings.

5 Starting proceedings

How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

In the High Court, proceedings are usually commenced by plenary summons but can also be commenced by a summary summons, special summons or by way of personal injuries summons. This is governed by Orders 1-3 of the Rules of the Superior Courts (RSC).

Circuit Court proceedings are commenced by way of a civil bill pursuant to Order 5, rule 1 of the Circuit Court Rules (CCR). In the District Court, proceedings are commenced by a claim notice pursuant to Order 40, rule 4(1) of the District Court Rules (DCR).

The originating document should be served on the defendant within 12 months from the date of issue, otherwise it will need to be renewed. The means of service is determined by the applicable court rules. In High Court actions, personal service is usually required, though the court can authorise substituted service where it is not possible to effect personal service. In the lower courts, service is normally effected by registered post. Proceedings can be served on a company by post to the company's registered office.

Leave of the court is not required to effect service in another EU member state for civil and commercial proceedings over which an Irish court has jurisdiction, pursuant to EU Regulation 1215/2012 (Brussels 1 Recast). Service can be effected through a country registrar as transmitting agency or, alternatively, as prescribed by the local rules in the place of service.

The courts generally manage their caseload effectively with few capacity issues. The exception to this is the Court of Appeal, which currently has a significant backlog of cases. As a result, most appellants wait over a year before their appeal is heard.

6 Timetable

What is the typical procedure and timetable for a civil claim?

Once the proceedings are commenced, the defendant must enter an appearance, either confirming his or her intention to defend the claim or contesting the court's jurisdiction, and also identifying the defendant's solicitor if one is retained. In plenary proceedings, a statement of claim must be delivered to the defendant within 21 days of the appearance being filed. The defendant then has 28 days to deliver a defence or counterclaim. A reply to the defence or counterclaim can be delivered by the plaintiff within 14 days thereafter.

Following receipt of the statement of claim, the defendant can raise queries on it, known as a notice for particulars, to assist with the preparation of its defence. A reply to the notice for particulars is usually required within 21 days, failing which an application can be made to the court for an order directing delivery of replies. Equally, a plaintiff can raise a notice for particulars on the defence. It is also open to the plaintiff to deliver a reply to the defence. Once these steps are completed, the pleadings are said to have closed.

Once pleadings are closed, the exchange of documents, known as discovery, takes place. Once discovery is complete, the claim is listed for trial.

7 Case management

Can the parties control the procedure and the timetable?

The court timetable is ultimately controlled by the judge; however, the parties often agree the timetable between themselves. The Commercial Court is the only division of the High Court where cases are routinely managed by a judge. Once a case has been admitted to the Commercial list, court directions are issued, setting out a strict timetable for the exchange of pleadings, discovery and other pre-trial steps. There is also a growing emphasis on case management in other lists of the High Court through applications for directions to the relevant High Court judge. Two new statutory instruments introduced on 1 October 2016 have provided for new pre-trial procedures, including in relation to case management conferences.

8 Evidence – documents

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Parties are obligated to preserve relevant documents and evidence pending trial. The disclosure of documents between the parties in Irish litigation is known as discovery, and it usually takes place once pleadings have closed. Each party issues a request for voluntary discovery from the other party for specific categories of documents now or previously in its possession, power or procurement, relevant to the dispute. This request must comply with the following requirements:

- the parties must stipulate the exact categories of documents that they require;
- requests must be confined to documents that are material to the issues in dispute and necessary for the fair disposal of the proceedings or for saving costs; and
- a reasonable amount of time must be provided for discovery to be made.

If voluntary discovery is agreed, the agreement between the parties has the same effect as a court order. In the absence of agreement, the court can order discovery on applications by the parties. Once discovery has been agreed or ordered, the documents are disclosed in a two-stage process. First, the parties disclose on affidavit the existence of documents relevant to the proceedings. The documents are then made available for inspection, unless exempt from production for reasons of legal privilege. In practice, copies of the documents are usually provided to the other party rather than inspection taking place. If the parties fail to make discovery as agreed or ordered, applications can be brought to have the claim dismissed or defence struck out.

Increasingly, complex commercial disputes are being litigated in Ireland, resulting in a significant growth in electronic discovery. As a result, additional practical considerations have emerged regarding proportionality and reasonable efforts in making discovery. Rules introduced by Statutory Instrument No. 93 of 2009 make provision for parties to seek electronically stored information from one another in searchable form. In addition, a discovery audit file is typically maintained by the parties to record decisions taken in respect of relevance and privilege. The cost of complying with discovery orders can approach 50 per cent of the total cost of the litigation.

9 Evidence – privilege

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

There are various types of privilege recognised by Irish law. The most commonly asserted are legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications between lawyer and client that are created for the sole or dominant purpose of giving or seeking legal advice. Litigation privilege is broader, as it protects confidential communications between lawyer and client made for the dominant purpose of use in connection with existing or contemplated litigation. Litigation privilege covers communications between lawyer and client, and between lawyer or client and a third party.

The Irish courts have made a distinction between communications involving legal advice, which are privileged, and communications involving mere legal assistance, which are not. Legal advice from in-house counsel is privileged, except for communications in relation to European Commission competition law investigations (following the *Azko-Nobel* judgment of the European Court of Justice).

Where privilege is claimed, the party must individually list each document in the affidavit of discovery and describe the privilege claims in relation to each document so that the basis for the claim of privilege can be considered and evaluated. Any claim of privilege is open to challenge by the other side.

10 Evidence – pretrial

Do parties exchange written evidence from witnesses and experts prior to trial?

Generally speaking, parties are not required to exchange written evidence or statements prior to trial. However, the Commercial Court

Rules provide that a plaintiff and the defendant must serve on the parties to the proceedings written, signed and dated statements of witnesses of fact and expert witnesses, setting out the essential elements of their evidence or expert opinion. This evidence or expert opinion is often treated as that person's evidence-in-chief at the hearing. Furthermore, new rules introduced by Statutory Instrument 254/2016 give judges in other lists of the High Court power to regulate how expert evidence can be adduced and the duties of expert witnesses. These rules also introduce to Ireland the concept of 'hot tubbing'. Hot tubbing is a debate between the experts, where two or more parties intend to call experts who may contradict each other in their reports or statements. Under the new rules, the court can require the experts to meet privately to discuss their proposed evidence (without the presence of any party or any legal representative).

In personal injuries cases, Order 39 RSC places an obligation on the parties to exchange schedules listing all expert witnesses' reports within one month of service of the notice of trial, and thereafter to exchange the reports listed.

11 Evidence – trial

How is evidence presented at trial? Do witnesses and experts give oral evidence?

In Ireland, evidence at trial is normally given orally by witnesses on oath or affirmation. However, the court, in cases involving affidavit evidence, can at any time order that particular facts be proved by affidavit, or that the affidavit of any witness should be read in court.

Witnesses are subject to cross-examination following examination in chief. Cross-examination can be carried out on affidavit evidence, although a notice to cross-examine must be served in advance, and this is subject to appeal by the court.

The Irish courts are beginning to move towards technology-assisted litigation. While still in its infancy, the process involves all parties scanning documents and using tablets to conduct trials, dispensing with the need for large volumes of paper.

12 Interim remedies

What interim remedies are available?

Either party to a dispute can seek an injunction. They can be granted on a discretionary basis by the court, provided that there is a serious dispute to be tried; damages are not an adequate remedy; and the balance of conveniences lies in favour of granting an injunction. An undertaking as to damages and full and frank disclosure must be made in the application for a temporary injunction.

Interim injunctions are usually applied for without notice to the defendant on an ex parte basis. An ex parte interim injunction is usually granted on the same day but is generally only granted in cases of urgency for a short period of time. Interlocutory injunctions are made on notice, and last until the court makes some further order or until trial.

The court, at its discretion, may make an interim attachment order to preserve assets pending judgment. An application for such an order can be brought where it can be established that the defendant has assets within the jurisdiction and there is a risk of those assets being dissipated with the intention of evading judgment prior to the hearing of the action.

Although rare, an order can also be granted that allows the plaintiff access to documentation belonging to the defendant and to remove identified items. This is known as an *Anton Piller* order and is to prevent the defendant from destroying evidence pending the trial of the action. Such remedies are available in Ireland in aid of civil and commercial proceedings in other EU member states under article 35 of Brussels 1 Recast.

13 Remedies

What substantive remedies are available?

The most common remedy awarded by the Irish courts is damages, although the court has discretion to award equitable remedies including specific performance, rescission, declarations, rectification and injunctions. Damages can be compensatory or punitive, and include general damages, which are compensation for loss with no quantifiable value, such as pain and suffering; special damages, which are compensation for precise financial loss, such as damage to property; punitive (exemplary) damages, which are awarded to punish the behaviour of a party (rarely awarded); or nominal damages, which are awarded where the plaintiff has been wronged but not suffered financial loss.

Interest is payable on money judgments at the rate of 2 per cent per annum.

14 Enforcement

What means of enforcement are available?

The following enforcement methods are available:

- if the debtor has property, a judgment mortgage can be registered against the property;
- an execution order allows the seizure of goods by publicly appointed sheriffs;
- an instalment order requires the debtor to make payments at regular intervals determined by the court;
- if the debtor fails to pay sums according to the terms of an instalment order, a creditor can apply for a committal order, which involves arrest and imprisonment;
- where it appears that the debtor has no assets but is owed a debt by a third party, a creditor can seek an attachment order in respect of that debt;
- a receiver may be appointed to sell a debtor's property and pay the sale proceeds to the creditor;
- bankruptcy proceedings may be commenced against an individual debtor; and
- a petition for the winding-up of a debtor company may be presented to the High Court.

15 Public access

Are court hearings held in public? Are court documents available to the public?

In line with the constitutional requirement in Ireland that justice must be administered in public, court proceedings are held in public, except for certain limited circumstances set out in legislation. These exceptional cases are held 'in camera' (in private) and only those persons directly involved in the case may be present for the hearing. Due to their sensitive nature, family law matters are usually held in camera. Court documents are not accessible to the public before they have been opened in court. However, once opened in court, non-parties are generally entitled to request access to them.

16 Costs

Does the court have power to order costs?

In Ireland, there are two main categories of costs in litigation:

- party–party costs, which relate directly to the litigation; and
- solicitor–client costs, which are the costs owed by the client to the solicitor under contract.

Generally, the costs of every proceeding in the superior courts are awarded at the court's discretion and, therefore, no party can recover costs without a costs order. However, costs generally follow the event (the unsuccessful party pays the successful party's costs). Costs are usually awarded on a party–party basis, which means that costs reasonably incurred by a successful party in prosecuting or defending an action are recovered, but other legal fees incurred are not.

The court can penalise a party who receives an award that does not meet the court's jurisdictional threshold by awarding the typical costs of a lower court action, if it believes the application should have been brought in that court.

The defendant can make an application for security for costs to the High Court. There are different rules for foreign individuals and for Irish corporations. It is virtually impossible to obtain an order against an individual based in Ireland, the EU or the territory covered by Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation). The granting of an order is at the court's direction and will only be granted where the defendant has a prima facie defence to the claim and verifies this on affidavit.

17 Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

'No win, no fee' arrangements (where payment is contingent on a successful outcome) are well established in Ireland. However, lawyers are prohibited from charging fees as a percentage of damages awarded in a case. The Irish Supreme Court has recently reaffirmed an earlier High Court decision that third-party funding by an entity with no independent interest in the underlying proceedings is not permissible under Irish law (*Persona Digital Telephone Ltd and Sigma Wireless Networks Ltd v The Minister for Public Enterprise & Ors* [2017] IESC 27). The court held that the existing laws in Ireland relating to maintenance (that is, assisting a party to litigation by a person without an interest or motive in the litigation) and champerty (a type of maintenance that involves an agreement to divide the compensation in return for support by a third party in the litigation) remain in force.

18 Insurance

Is insurance available to cover all or part of a party's legal costs?

Insurance to cover litigation costs is generally not readily available in the Irish market. While insurance is available in the London market, the premium required for this form of insurance is often prohibitively expensive.

19 Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Irish law does not facilitate class actions. However, multiparty or multiplaintiff litigation does occur and is often brought by way of representative actions or test cases. The preferred option is the test case, which arises where there are numerous separate claims arising from the same circumstances. The first case is the test case as it effectively becomes the benchmark by which all remaining cases are resolved. Although not binding, the test case has an effect by virtue of the doctrine of precedent. Subsequent litigation is often settled on the outcome of the test case.

20 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

See question 1.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

The enforcement of judgments in civil and commercial matters between EU member states (including Denmark) is regulated by the Brussels I Regulation and the provisions of the recently recast Brussels I Regulation. The enforcement of judgments between EU member states and EFTA countries (Iceland, Norway, Switzerland and Liechtenstein) is regulated by the 2007 Lugano Convention.

The enforcement procedure involves an ex parte application to the Master of the High Court. The Master of the High Court declares the judgment enforceable if the requirements of recast Brussels I are met. After that, the judgment has the same force as a judgment of the High Court and can be enforced as outlined in question 14.

To enforce a judgment from a non-EU/EFTA country, it is necessary to rely on Irish common law rules of enforcement. The application is brought by summary summons for a liquidated amount, that is, the value of the award under the foreign judgment.

22 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Within the EU

Regulation (EC) No. 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters allows the court of one member state to request the court of another member state to take evidence for use in proceedings in the court of the first member state. The request is made to the Dublin Metropolitan District Court or the Circuit and District Court Operations Directorate. If the order is granted, a subpoena to examine a witness is issued.

Outside the EU

Under the Foreign Tribunals Evidence Act 1856, an Irish court may, on the application of a foreign tribunal, direct that a witness in Ireland, over which it has jurisdiction, attend to give evidence for use in the foreign proceedings. A letter of request must be issued from the foreign court to the Irish court requesting assistance. Alternatively, a request may be forwarded by an embassy of the state where proceedings are pending to the Irish Department of Foreign Affairs, which arranges for a High Court application to be made by the Chief State Solicitor.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Yes. The Arbitration Act 2010 (2010 Act) applies the UNCITRAL Model Law to both domestic and international arbitrations.

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Section 2(1) of the 2010 Act applies Option 1 of article 7 of the UNCITRAL Model Law to the requirements of an arbitration agreement. It provides that the arbitration agreement shall be in writing (this concept is broadly interpreted), whether in the form of an arbitration clause in a contract or in the form of a separate agreement, and must indicate that the parties submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship.

25 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

In the absence of agreement on appointment or an alternative default mechanism, the 2010 Act provides that the default number of arbitrators shall be one, and article 11 of the Model Law, when read with the 2010 Act, provides that the High Court is the default appointing authority.

Article 12(2) of the Model Law states that 'an arbitrator may be challenged only 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 13(1) of the Model Law provides that parties can agree, if they wish, on a procedure for challenging the appointment. However, where no such agreement exists, the challenging party shall, within 15 days of becoming aware of the grounds for challenge, send a written statement of the reasons for the challenge to the arbitral tribunal (article 13(2)). A party can appeal the decision of the arbitral tribunal to the High Court. The decision of the High Court is final.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

There are no limits on the parties' autonomy to select arbitrators, the criteria for selection or the number of arbitrators to form the tribunal. Given that agreement upon the arbitrator(s) can be difficult to reach, many agreements provide for a default mechanism.

Arbitration Ireland is an association that was set up to meet the needs of complex arbitration. This cross-sector initiative counts as members some of the foremost barristers, solicitors, architects and engineers in the country. A significant feature of Arbitration Ireland is its International Advisory Board comprising international practitioners of the highest calibre.

27 Arbitral procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

Chapter V of the Model Law sets out the basic principles regarding the conduct of arbitration proceedings in general terms. Article 19 of the Model Law confirms that the parties are entitled to set their own procedure and, failing agreement on that, it is for the tribunal to conduct the arbitration in such manner as it considers appropriate. This will generally be decided at a preliminary meeting between the parties and the tribunal, following which the tribunal will issue an order for directions. Article 18 provides for a requirement that the parties be treated equally and each party is to be given a full opportunity to present their case.

28 Court intervention

On what grounds can the court intervene during an arbitration?

In general, the Irish courts do not have jurisdiction to intervene during an arbitration. However, pursuant to section 10 of the 2010 Act, the High Court has the power to deal with procedural issues under articles 9 and 27 of the Model Law. Accordingly, it can grant interim measures of protection (article 9) and it can assist in the taking of evidence (article 27). However, without the agreement of the parties, it cannot make any order for security for costs or for discovery of documents.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Article 17 of the Model Law provides that, unless otherwise agreed, and upon the application of one of the parties, the arbitral tribunal has the power to order interim measures of protection as may be considered necessary and to make preliminary orders. The tribunal can order a party to:

- maintain the status quo pending determination of the dispute;
- 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;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

The party requesting the order must be able to prove that any harm that could be caused cannot be adequately repaired by an award of damages, that such harm substantially outweighs the harm that is likely to result to the other if the measure is granted and that there is a reasonable possibility that he or she will succeed on the merits of his or her claim. Any interim measures are recognised and enforced by the courts.

30 Award

When and in what form must the award be delivered?

The legal requirements for an arbitral award are set out in article 31 of the Model Law, which provides that the award shall be in writing, be signed by the arbitrator(s) and set out the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. The award shall also state its date and the place of arbitration. If an award also deals with costs, the tribunal must also deal with the requirements set out in section 21 of the 2010 Act, which are detailed in question 33.

Update and trends

Mediation Act 2017
The 2017 Act took effect on 1 January 2018. The Act imposes a legal obligation on practitioners to advise their clients to consider mediation as an alternative means of dispute resolution. The Act promotes mediation as a viable and cost-effective alternative to the expensive trial process, allowing for reduced costs for clients. It is hoped that the introduction of the Act will lessen the strain on the courts system and reduce litigation costs.

Developments related to third-party funding
In May 2017, the Irish Supreme Court confirmed in its decision in *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise* that third-party funding of litigation is unlawful, and indicated that any changes to the law in this regard in Ireland would be a matter for the legislature, not the courts.

New court rules – expert evidence
As a result of the success of the Commercial Court, and in an attempt to increase the cost-efficiency of other civil claims, similar statutory rules relating to case management have been introduced to chancery and non-jury actions in the High Court. The new rules introduce changes to a range of areas, including witness statements and expert evidence. Under the new rules, each party may offer evidence from one expert only in a particular field of expertise on a particular issue. In addition, each party has only 28 days from the date of service of the other side's expert report to raise queries regarding the content of that expert report.

31 Appeal

On what grounds can an award be appealed to the court?

While there is no appeal against an arbitral award under the 2010 Act, an application can be brought to the High Court seeking an award to be set aside. The application must be made within three months of receipt of the award. The grounds upon which such an application can be made are set out at article 34 of the Model Law and include where:

- a party to the arbitration was under some incapacity, or the said agreement is invalid under the law to which the parties have subjected it;
- the party making the application was not given proper notice of either the appointment of an arbitrator or of the proceedings or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by the terms of the arbitration, or contains decisions on matters beyond the scope of the arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
- where the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of the state; or the award is in conflict with the public policy of the state.

If the High Court is satisfied that any of the above grounds are met, it can set aside the award.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Section 23(1) of the Arbitration Act 2010 provides that an arbitral award shall be enforceable in the state either by action or by leave of the High Court in the same manner as a judgment or order of that court.

Section 24 of the 2010 Act gives the New York Convention, the Geneva Convention and the Geneva Protocol force of law in Ireland. Articles 35 and 36 of the Model Law provide for recognition and enforcement of foreign arbitration awards. Unless there is reason to deny enforcement (the grounds for which are set out at article 36(1) of the Model Law), enforcement is generally not problematic.

33 Costs

Can a successful party recover its costs?

Section 21(1) of the 2010 Act provides that, subject to an exception for consumers, the parties may make such provision with regard to the costs of the arbitration as they see fit. Where no agreement exists, or if the consumer exception applies, the tribunal shall determine, by award, those costs as it sees fit. In making a determination as to costs, the tribunal is obliged to specify the grounds on which it acted, the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, as well as by whom and to whom they shall be paid.

The general principle in respect of costs for domestic arbitrations is that costs follow the event and the loser pays, although for international arbitrations conducted in Ireland, parties often bear their own costs.

Alternative dispute resolution

34 Types of ADR

What types of ADR process are commonly used? Is a particular ADR process popular?

Arbitration
See questions 23–33.

Mediation
Mediation is a facilitative, non-adversarial process where an independent third-party mediator acts as a 'go-between' to facilitate settlement between the parties. Mediation is an increasingly popular method for resolving disputes, particularly in the area of financial services. The Mediation Act 2017 commenced on 1 January 2018 and brought in a number of new requirements.

Conciliation
Conciliation is similar to mediation but distinguishable by the fact that the independent third party acts as an evaluator rather than a facilitator. A conciliator is more likely to suggest terms of settlement or offer an opinion on the merits of the case.

Expert determination
This is a private and confidential method, most commonly used in cases where the only issue that divides the two disputing parties is purely technical. The process involves an independent third party who investigates the disputed issue and issues a final and binding determination.

35 Requirements for ADR

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Following the commencement of the Mediation Act 2017, practitioners are now obliged to advise their clients to consider mediation as an alternative to court proceedings. Should a client elect not to proceed to mediation before litigating, a solicitor must give a statutory declaration confirming that the client has been advised as to the option of mediation.

The Commercial Court and the High Court also have discretion to adjourn a case of its own volition or on the application of the parties for up to 28 days to enable the parties to consider using mediation, conciliation and arbitration. Under these rules, costs sanctions may be imposed for not availing of mediation or conciliation, unless there is a good reason for the refusal.

Miscellaneous

36 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Commercial Court is recognised internationally as an efficient platform for the determination of substantial commercial disputes given its strict case management procedures. According to Commercial Court statistics, 90 per cent of cases are decided within one year.

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