

IRELAND

Michael M. Collins SC and Gearoid Carey***

including

ANNEX I: Arbitration Act 2010 (Number 1 of 2010)

Chapter I. Introduction

1. THE LAW ON ARBITRATION

a. Model Law

Ireland's Arbitration Act 2010 (Number 1 of 2010) ("Arbitration Act 2010", or "the Act") is based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law" or "Model Law") in its 2006 manifestation. The Preamble to the Arbitration Act 2010 (see **Annex I** hereto) sets out its scope:

"An Act to further and better facilitate resolution of disputes by arbitration; to give the force of law to the UNCITRAL Model Law on International Commercial Arbitration (as amended by the United Nations Commission on International Trade Law on 7 July 2006) in respect of both international arbitration and other arbitration; to give the force of law to the Protocol on Arbitration Clauses opened at Geneva on the 24th day of September 1923, the Convention on the Execution of Foreign Arbitral Awards done at Geneva on the 26th day of September 1927, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 and to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature in Washington on 18 March 1965; to repeal the Arbitration Acts 1954 to 1998; and to provide for related matters."

The structure of the Arbitration Act 2010 is as follows: the provisions of the Act giving force of law to the various Conventions (as noted in the Preamble) and the UNCITRAL Model Law are first set out, together with some additional provisions and modifications; these provisions are then followed by Schedules in which one finds the text of the Model Law and the Conventions.

The Model Law has been adopted virtually unchanged into Irish law save for certain very minor changes and additions.

* Senior Counsel at the Irish Bar and at Monckton Chambers, London.

** Senior associate solicitor, Matheson, Dublin.

IRELAND

The changes to the Model Law are as follows:

- (1) The default number of arbitrators is set at one rather than three – a change to Art. 10(2).¹
- (2) The reference in Art. 27 of the Model Law (court assistance with the taking of evidence) is extended to include arbitrations with seats outside of Ireland.² Thus, those who might wish to seek evidence located in Ireland in aid of an overseas arbitration can apply to the High Court for such assistance.
- (3) All decisions of the High Court under the provisions of the Model Law are made subject to no appeal to the Supreme Court.³ This approach was particularly inspired by Switzerland's system for court challenges going directly to the Federal Tribunal.
- (4) The time limit for the making of an application to set aside an award based upon a public policy argument in accordance with Art. 34(3) of the Model Law shall be made within fifty-six days from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned.⁴
- (5) Arts. 35 and 36 of the Model Law do not apply in respect of an award rendered in Ireland.⁵ Enforcement by the High Court of an award made in Ireland is pursuant to Sect. 23(1) of the Act by means of a simple application which does not permit the raising of the various grounds in Art. 36 by a defendant. This means that the potential for two bites at the cherry⁶ by a recalcitrant defendant has been completely removed.

There are some additions to the Model Law which are as follows:

- (1) The arbitral tribunal is empowered,⁷ unless otherwise agreed by the parties, to administer an oath to a witness – but this is not a mandatory provision.
- (2) Consolidation of arbitrations is permitted but only upon the consent of the parties.⁸
- (3) The parties can agree on the power of the arbitral tribunal to award interest, or in default of such agreement there is a power to award simple or compound

1. Sect. 13 of the Act.

2. Sect. 15 of the Act.

3. Sect. 11 of the Act.

4. Sect. 12 of the Act.

5. Sect. 23(4) of the Act.

6. First bite: a setting aside application under Art. 34; second bite, resisting enforcement under the same grounds again in Art. 36. If a losing party sits on its hands and does not challenge an award under Art. 34 it will be shut out from complaint when confronted with a High Court enforcement application.

7. Sect. 14 of the Act.

8. Sect. 16 of the Act.

IRELAND

interest from the dates, at the rates and with the rests which are considered fair and reasonable.⁹

(4) The arbitral tribunal can (unless otherwise agreed by the parties) order a party to provide security for costs.¹⁰

(5) The arbitral tribunal has (unless otherwise agreed by the parties) the power to make an award requiring specific performance of a contract (other than a contract for the sale of land).¹¹

(6) The parties are free to make such agreement as to the costs of the arbitration as they see fit whether before or after a dispute breaks out. This provision has been the subject of some interest in the United States given the tradition of such clauses in contracts in that country. In default of agreement on costs or in the absence of an agreed procedural power to award or withhold costs, the arbitral tribunal can determine by award those costs as it sees fit.¹²

(7) There is a full and unqualified protection¹³ from liability in respect of arbitrators¹⁴ and arbitral institutions¹⁵ for anything done or omitted in the discharge or purported discharge of their functions.

(8) An arbitration agreement or the authority of an arbitral tribunal is not discharged by the death of any party.¹⁶

(9) In the event of the bankruptcy of a party there is a prescribed mechanism in order to allow the arbitration to move forward.¹⁷

9. Sect. 18 of the Act.

10. Sect. 19 of the Act.

11. Sect. 20 of the Act.

12. Sect. 21 of the Act. The form of an arbitral tribunal's determination is prescribed in Sect. 21(5) and requires specification of the grounds, the items of recoverable costs, fees or expenses, the amount referable to each and by and to whom they shall be paid.

13. Sect. 22 of the Act.

14. This includes an employee, agent, advisor or tribunal-appointed expert.

15. Sect. 22(3) of the Act.

16. Sect. 26 of the Act.

17. Sect. 27 of the Act:

“(1) Where an arbitration agreement forms part of a contract to which a bankrupt is a party, the agreement shall, if the assignee or trustee in bankruptcy does not disclaim the contract, be enforceable by or against him or her insofar as it relates to any dispute arising out of, or in connection with, such a contract.

(2) Where—

(a) a person who has been adjudicated bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and

(b) any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, and

(c) the case is one to which *subsection (1)* does not apply,

then, any other party to the agreement or the assignee or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement and that

IRELAND

(10) The Act applies to an arbitration agreement under which a State authority is a party.¹⁸

Some further provisions complete the legislative picture:

- (1) The Act continues the pre-existing force of law in Ireland of the New York¹⁹ and Washington²⁰ Conventions and the Geneva Protocol.²¹
- (2) When considering any application under the Model Law, the High Court shall take judicial notice of the UNCITRAL *travaux préparatoires* and its working group relating to the preparation of the Model Law.²²
- (3) The Act appoints²³ the President²⁴ of the High Court (or such judge of the High Court as may be appointed by the President) to deal with all applications²⁵ under the Model Law, save for stay applications.
- (4) Unless otherwise agreed by the parties, the Act specifically prohibits²⁶ the High Court from ordering the discovery of documentation or security for costs when exercising its powers under Arts. 9 or 27 of the Model Law.
- (5) The Act does not apply to an arbitration under an agreement providing for the resolution of any question relating to the terms or conditions of employment or the remuneration of any employees.²⁷
- (6) In relation to consumers, such a party shall not be bound by an arbitration agreement (unless they agree after the dispute has arisen) where the agreement between the parties contains such a term which has not been individually negotiated and the dispute involves a claim not exceeding €5,000.²⁸

court may, if it is of the opinion that having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section ‘assignee’ means the Official Assignee in Bankruptcy.”

18. Sect. 28 of the Act.

19. Reproduced in full in Schedule 2 of the Act.

20. Reproduced in full in Schedule 3 of the Act.

21. Reproduced in full in Schedule 4 of the Act.

22. Sect. 8 of the Act.

23. Sect. 9(2) of the Act.

24. The President is the most senior judge of the Irish High Court.

25. All applications are to be made in a summary fashion (Sect. 9(3) of the Act) which means that evidence in support of the relief sought is tendered by way of affidavit and not by live testimony. The procedural rules of the High Court under the Act (Order 56 of the Rules of the Superior Courts) set out a clear and robust timetable for the filing of affidavits and the speedy disposition of applications.

26. Sect. 10 of the Act.

27. Sect. 30 of the Act.

28. Sect. 31 of the Act. Also, there is a provision in Sect. 31 which specifically excludes the protection afforded to consumers from amateur sportspersons who are parties to arbitration agreements involving their sporting bodies. This is particularly aimed at supporting the arbitration system under the auspices of the Gaelic Athletic Association

IRELAND

(7) The High Court and Circuit Court²⁹ can of their own motion adjourn proceedings to enable the parties to consider whether any or all of the matters in dispute might be determined by arbitration.³⁰

While the Act does contain the entirety of Ireland's arbitration law, there is a provision in another statute which is also relevant. Sect. 17 of the Defamation Act 2009 gives absolute privilege to a statement made in the course of proceedings before an arbitral tribunal where the statement is connected with those proceedings.³¹

The Arbitration Act 2010 relates to both domestic and international arbitration in Ireland without distinction. This was a major innovation of the Act which swept away the previous, and markedly different, regime under Irish law for domestic and international arbitration.

b. Mandatory provisions

The provisions of the Model Law from which parties cannot derogate have not been changed in any way by the Arbitration Act 2010. Examples include:

- The requirement of a proposed arbitrator to disclose to the parties any circumstances which could give rise to justifiable doubts as to his impartiality or independence.
- If a party seeks an interim measure under Art. 17 then it must satisfy the provisions of Art. 17A as regards irreparable harm and reasonable possibility of ultimate success.
- If a party obtains a preliminary order under Art. 17B then the arbitral tribunal must immediately thereafter give notice to all parties and give an opportunity at the earlier practicable time to the party concerned to present its case.
- The arbitral tribunal must decide promptly on any objection to a preliminary order.
- A preliminary order expires twenty days after its issuance save that it may be adopted or modified by interim measure.
- A party seeking a preliminary order must disclose to the arbitral tribunal all relevant circumstances.

which is the major amateur sporting body in Ireland with a very large number of participants.

29. The Circuit Court deals with smaller civil claims and sits in most towns of any size in Ireland. The High Court sits, almost exclusively, in Dublin.

30. Sect. 32 of the Act.

31. The concern noted at 76 Arbitration (CIARB) (2010, no. 4) p. 585, is answered by Sect. 17 of the Defamation Act.

IRELAND

- A party requesting an interim measure or preliminary order is liable for any costs and damages caused if it later transpires that the measure or order should not have been granted.
- Recognition and enforcement of an interim measure by the High Court is mandatory and the party seeking such recognition and enforcement is under an obligation promptly to inform the Court of any termination, suspension or modification of that measure.
- Equal treatment of the parties is mandatory.
- A hearing is to be held if a party requests one from the arbitral tribunal.
- Sufficient notice must be given of any hearing.
- Communications sent by one party to the arbitral tribunal must also be communicated to the other party.
- The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties and, in all cases, shall decide in accordance with the terms of the contract and take into account the usages of the applicable trade.
- The award is to be made in writing and is to be reasoned unless the parties agree otherwise.
- The award must state its date and the place of arbitration.
- The arbitral tribunal must issue an order for the termination of the proceedings when: (1) the claimant withdraws the claim, unless the respondent objects and there is a legitimate interest on its part in obtaining a final settlement of the dispute; (2) the parties agree on the termination of the proceedings; and (3) the arbitral tribunal finds that the continuation of the proceedings has become unnecessary or impossible.
- The only recourse against an award is as set out in Art. 34 of the UNCITRAL Model Law.
- An arbitral award is to be recognized and enforced.

2. PRACTICE OF ARBITRATION

a. Use of arbitration

Arbitration is widely used in the construction sector in Ireland and is found in the sector's standard form contracts, including all State and local authority agreements for works and services in this area. Arbitration is also the norm in most partnership agreements for professional firms (lawyers, accountants and so on), joint venture agreements involving Irish companies, and hotel management agreements (particularly given the importance of tourism for Ireland).

Arbitration is also widely used for consumer contracts in the motor industry, insurance and travel. Many of these have standard-form schemes administered by the Irish Branch of the Chartered Institute of Arbitrators.

IRELAND

Amateur sport, which has a wide following in Ireland through the Gaelic Athletic Association (particularly the indigenous games of Hurling and Gaelic Football), routinely and almost exclusively has its disputes resolved by means of arbitration.

As regards institutions, in the commercial, non-construction sphere, Irish parties routinely either use the international bodies such as the International Chamber of Commerce (ICC) or have *ad hoc* clauses with, some regularity, the President of the Law Society (the professional body for solicitors in Ireland) designated as the default appointing authority. Ireland does not have a long-established commercial arbitration institution which would administer cases, as might be seen in other cities through local chambers of commerce. The tradition has been to reach for the established international bodies instead, or as already stated, agree to *ad hoc* arbitration.

In the case of construction disputes the position is different. Engineers Ireland, the professional body for engineers, has a widely used set of arbitration rules (the most recent version of which is entitled “Arbitration Procedure 2011”). The Royal Institute of the Architects of Ireland is regularly referred to in standard form contracts in the construction sector as the appointing authority.

b. Arbitral institutions

Relevant bodies with a role or interest in arbitration in Ireland are as follows:

Arbitration Ireland (the Irish Arbitration Association) is modelled on the Swiss Arbitration Association formula of not having its own set of rules, but rather is the primary body for the promotion of Ireland as a venue for international arbitration and acts as an umbrella body for all institutions, firms and individuals with an interest in the area. Its institutional membership comprises the Law Society, the Bar Council (the professional body for the Bar of Ireland), Chambers Ireland (the national representative of the ICC), Engineers Ireland and the Irish Branch of the Chartered Institute of Arbitrators. Every major law firm in Dublin is represented and it has a wide range of individual members from the Bar, engineering, surveying and architectural practices.

Arbitration Ireland
145-151 Church Street
Dublin 7
Email: info@arbitrationireland.com
Website: www.arbitrationireland.com

The Law Society of Ireland, the professional body for solicitors in Ireland, has an arbitration committee and is regularly called upon to appoint arbitrators pursuant to many standard-form contracts.

IRELAND

The Law Society of Ireland
Blackhall Place
Dublin 7
D07 VY24
Telephone: +353 1 672 4800
Fax: +353 1 672 4801
Email: general@lawsociety.ie
Website: www.lawsociety.ie

Bar Council of Ireland, the professional body for Barristers in Ireland. It has an arbitration committee and in 2008 was the host body for the ICCA Conference in Dublin marking the 50th Anniversary of the New York Convention.

Bar Council of Ireland
The Law Library
The Four Courts
Inns Quay
Dublin 7
D07 N972
Telephone: +353 1 872 0622
Email: thebarofireland@lawlibrary.ie
Website: www.lawlibrary.ie/Home.aspx

Chambers Ireland, the national representative in Ireland of the ICC. Chambers Ireland is the leading representative for the business community in Ireland.

Chambers Ireland
3rd Floor
Newmount House
Lower Mount Street
Dublin 2
Telephone: +353 1 400 4300
Email: info@chambers.ie
Website: www.chambers.ie

Chartered Institute of Arbitrators – Irish Branch:

Administration Office
The Distillery Building
145 - 151 Church Street
Dublin 7
Telephone: +353 1 8175307
Email: info@ciarb.ie
Website: www.arbitration.ie

IRELAND

Engineers Ireland:

22 Clyde Road
Ballsbridge
Dublin 4
Telephone: +353 1 6651300
Fax: +353 1 6685508
Email: info@engineersireland.ie
Website: www.engineersireland.ie

The latest version of its Arbitration Procedure is effective as of 19 May 2011 and is available at <http://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/employment-services/Arbitration-Procedure-2011.pdf>

The Royal Institute of the Architects of Ireland (RIAI):

8 Merrion Square
Dublin 2
Telephone: +353 1 676 1703
Fax: +353 1 661 0948
Email: info@riai.ie
Website: www.riai.ie

3. BIBLIOGRAPHY

a. Books

Books on the Model Law and international practice are those most regularly used by practitioners.

International Commercial Arbitration (Second Edition), Born (Kluwer Law International 2014) is one of the principal resources, as is *Redfern and Hunter on International Arbitration*, Redfern, Hunter, Blackaby and Partasides (6th Edition, OUP 2015). *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Holtzmann and Neuhaus (Kluwer 1995) is a key publication given that the High Court is required to take judicial notice of the UNCITRAL *travaux préparatoires* and its working group relating to the preparation of the Model Law.³² Practitioners also frequently refer to *Fouchard, Gaillard & Goldman on International Commercial Arbitration*, Gaillard and Savage, eds. (Kluwer Law International 1999).

The leading Irish texts on the Arbitration Act 2010 are *Arbitration Law, 2nd Edition*, Dowling-Hussey and Dunne (Thomson Reuters 2014) and

32. Sect. 8 of the Act.

IRELAND

Arbitration Act 2010 and Model Law: A Commentary, Mansfield (Clarus Press 2012).

b. Articles

A series of articles on Ireland's Arbitration Act 2010 were published at 76 Arbitration (CIARB) (2010, no. 4) (see footnote 31 above).

Reichert, Klaus, SC

“Ireland – The Arbitration Act 2010”, *Les Cahiers de l'Arbitrage* (2011, no. 1) p. 197

c. Journals and periodicals

International journals and periodicals carrying articles on the Model Law are regularly referred to by practitioners in Ireland, particularly:

- Arbitration International (the London Court of International Arbitration (LCIA) Journal)
- Arbitration (the CIARB Journal)
- European International Arbitration Review (Juris)
- International Arbitration Law Review (Sweet & Maxwell)
- Journal of International Arbitration (Kluwer Law International)

Domestically, the periodicals of The Law Society (Gazette) and The Bar Council (Bar Review) carry articles on arbitration from time to time. The Commercial Law Practitioner, a broadly focussed Dublin-based journal (Round Hall Thomson) regularly carries articles on Irish arbitration law.

Awards are not published.

Chapter II. Arbitration Agreement

1. FORM AND CONTENTS OF THE AGREEMENT

a. Arbitration clause and submission agreement

Sect. 2 of the Arbitration Act 2010 (see **Annex I** hereto) provides that “arbitration agreement” shall be construed in accordance with Option I of Art. 7 of the UNCITRAL Model Law. Thus, as long as there is a written agreement providing for arbitration, in accordance with Option I of Art. 7 of the UNCITRAL Model Law, it does not matter whether that agreement relates to an existing dispute or a dispute that may arise in the future. Indeed, Art. 7(1) refers to “disputes which have arisen or which may arise” between the parties.

IRELAND

b. Form and contents

Option I of Art. 7 of the UNCITRAL Model Law confirms that the arbitration agreement shall be in writing. It will be sufficient if the content of the arbitration agreement is recorded in any form, irrespective of whether it has been concluded orally, by conduct or by other means. The requirement that the arbitration agreement be in writing is met by an electronic communication so long as the information contained within it is accessible so that it might be useable for subsequent reference. Equally, an exchange of statements of claim and defence will constitute a written arbitration agreement if the existence of the agreement is alleged by one party and not denied by another.

c. Model clause

Almost all international arbitration conducted in Ireland is done so under the auspices of one of the major arbitral bodies, principally either the ICC or the International Centre for Dispute Resolution (ICDR). Thus, the use of those and other institutional standard form arbitration agreements is recommended.

Examples of *ad hoc* clauses are as follows:

- UNCITRAL (sole arbitrator; Appointing Authority Bar Council)

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the Chairman for the time being of the Bar Council of Ireland. The number of arbitrators shall be one. The place of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English.”

- UNCITRAL (sole arbitrator; Appointing Authority Law Society)

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the President for the time being of the Law Society of Ireland. The number of arbitrators shall be one. The place of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English.”

- UNCITRAL (three arbitrators; Appointing Authority Bar Council)

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the Chairman for the time being of the Bar Council of Ireland. The number of arbitrators shall be three. The place of

IRELAND

arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English.”

– UNCITRAL (three arbitrators; Appointing Authority Law Society)

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the President for the time being of the Law Society of Ireland. The number of arbitrators shall be three. The place of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English.”

– Pure *ad hoc* Arbitration (Three Arbitrators; Appointing Authority Bar Council)

“Any controversy or claim arising out of or in connection with this Agreement shall be settled by arbitration. The place of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English. There shall be three arbitrators, appointed as follows:

- (a) each party shall appoint an arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator who shall act as chairman of the tribunal;
- (b) if either party fails to appoint an arbitrator within 30 days of receipt of notice of the appointment of an arbitrator by the other party, such arbitrator shall at the request of that party be appointed by the Chairman for the time being of the Bar Council of Ireland;
- (c) if the two arbitrators to be appointed by the parties fail to agree upon a third arbitrator within 30 days of the appointment of the second arbitrator, the third arbitrator shall be appointed at the written request of either party by the Chairman for the time being of the Bar Council of Ireland.”

– Pure *ad hoc* Arbitration (Three Arbitrators; Appointing Authority Law Society)

“Any controversy or claim arising out of or in connection with this Agreement shall be settled by arbitration. The place of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English. There shall be three arbitrators, appointed as follows:

- (a) each party shall appoint an arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator who shall act as chairman of the tribunal;
- (b) if either party fails to appoint an arbitrator within 30 days of receipt of notice of the appointment of an arbitrator by the other party, such arbitrator shall at the request of that party be appointed by the President for the time being of the Law Society of Ireland;

IRELAND

(c) if the two arbitrators to be appointed by the parties fail to agree upon a third arbitrator within 30 days of the appointment of the second arbitrator, the third arbitrator shall be appointed at the written request of either party by the President for the time being of the Law Society of Ireland.”

– Pure *ad hoc* Arbitration (Sole Arbitrator; Appointing Authority Bar Council)

“Any controversy or claim arising out of or in connection with this Agreement shall be settled by arbitration. The place of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English. The Arbitration Tribunal shall consist of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within 30 days after a request for arbitration is made by any party, appointed on the application of any party by the Chairman for the time being of the Bar Council of Ireland.”

– Pure *ad hoc* Arbitration (Sole Arbitrator; Appointing Authority Law Society)

“Any controversy or claim arising out of or in connection with this Agreement shall be settled by arbitration. The place of arbitration shall be Dublin, Ireland. The language to be used in the arbitral proceedings shall be English. The Arbitration Tribunal shall consist of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within 30 days after a request for arbitration is made by any party, appointed on the application of any party by the President for the time being of the Law Society of Ireland.”

2. PARTIES TO THE AGREEMENT

a. Restrictions

There are no restrictions as to persons, whether physical or legal, who may resort to arbitration. However, there are restrictions in the Arbitration Act 2010 with regard to types of disputes that are susceptible to arbitrations (see Chapter II.3.a below).

b. Bankruptcy

Sect. 27 of the Arbitration Act 2010 governs the situation where an arbitration agreement forms part of a contract to which a bankrupt is a party. In such circumstances, unless the assignee or trustee in bankruptcy disclaims the contract, the agreement shall be enforceable by or against the bankrupt insofar as it relates to any dispute arising out of, or in connection with, such a contract. Where the person adjudicated bankrupt had become a party to the arbitration agreement prior to the commencement of the bankruptcy, and any matter to which the agreement applies requires to be determined for the purposes of the bankruptcy, then any other party to the agreement, or the assignee or trustee in

IRELAND

bankruptcy, can apply to the court having jurisdiction over the bankruptcy proceedings for an order directing that the matter be referred to arbitration.

c. State or State agencies

There is no restriction on the State or State agencies resorting to arbitration, and there are no special or specific requirements.

d. Multi-party arbitration

There are no special rules for multi-party arbitration, whether in respect of appointment or otherwise. It is not possible to join a third party unless it agrees to being a party to the arbitration. Equally, while there is provision under Sect. 16 of the Arbitration Act 2010 for the arbitral tribunal to consolidate proceedings, it is only possible to do so where all of the parties agree.

3. DOMAIN OF ARBITRATION

a. Arbitrability

Sect. 30 of the Arbitration Act 2010 provides that disputes in respect of the terms or conditions of employment or remuneration of employees are not arbitrable; the Act also does not apply to arbitrations conducted under Sect. 70 of the Industrial Relations Act 1946. In addition, arbitration agreements with consumers (where the contracts are not individually negotiated and where the dispute involves a claim not exceeding € 5,000) are not binding on consumers. Sect. 20 of the Arbitration Act also contains a restriction on arbitrability. That section provides that an arbitral tribunal may make an award requiring specific performance of a contract with the exception of “a contract for the sale of land”. It seems therefore to be the case that a contract for the conveyance of title to land cannot be the subject of a specific performance claim before an arbitral tribunal.

b. Filling gaps

Unless an arbitrator determines that he or she is properly entitled to imply terms based on applicable legal principles, he or she is not otherwise permitted to fill gaps in a contract. The Arbitration Act 2010 does not contain any such restrictions, thus it is, as already stated, a matter of the applicable substantive law.

c. Adapting contracts

As with filling gaps, it is a matter for the applicable substantive law as to whether or not adaption of contracts is possible. The Arbitration Act 2010 contains no restrictions in this regard.

IRELAND

4. SEPARABILITY OF ARBITRATION CLAUSE

Art. 16 of the UNCITRAL Model Law applies and confirms that an arbitral tribunal may rule on its own jurisdiction and, in doing so, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. To that extent, the arbitration clause is separable from any larger contract of which it may be part. In such circumstances, a decision by the tribunal that the main contract was never concluded, was null and void or was missing an essential element does not impinge upon the validity of the arbitration clause itself or the tribunal's jurisdiction to make a ruling with regard to the validity of the main contract.

5. EFFECT OF THE AGREEMENT (SEE ALSO CHAPTER V.4 – JURISDICTION)

a. Role of court

A court will stay an action and refer the parties to arbitration where one party expressly invokes the arbitration agreement. Under Art. 8 of the UNCITRAL Model Law, the court has no option but to do so unless it finds that the agreement is “null and void, inoperative or incapable of being performed”.

b. Scrutiny by court

In determining whether a stay should be granted, the court can only inquire as to whether the agreement is null and void, inoperative or incapable of being performed, although in considering those issues it can undertake a full review, somewhat limited to affidavit evidence and submissions thereon. Sect. 8 of the Arbitration Act 2010 requires judicial notice to be taken of the *travaux préparatoires* of UNCITRAL and its working group relating to the preparation of the Model Law. Thus, international thinking on these provisions will be considered by Irish courts when deciding whether an arbitration agreement is null and void, inoperative or incapable of being performed.

In one of the first decisions under the Act, the High Court considered the appropriate standard of review to be applied when determining whether or not a party that had commenced litigation is a party to an alleged arbitration agreement for the purposes of Art. 8 of the Model Law.³³

In *Barnmore Demolition and Civil Engineering Limited v. Alandale Logistics Limited & ors* ([2010] IEHC 445) Mr. Justice Feeney had to decide an application brought by two of the defendants to stay the litigation pursuant to Art. 8 of the Model Law. They alleged that there was an arbitration agreement in place between the parties. The plaintiff's position was that there

33. Discussed by Gary Born at <<http://kluwerarbitrationblog.com/blog/2010/12/13/irish-high-court-on-full-versus-prima-facie-judicial-consideration-of-whether-an-arbitration-agreement-exists/>>.

IRELAND

was no such agreement in existence. The issue which was canvassed by the parties before the High Court was whether there should be a full trial or investigation by the judge on whether there was such an agreement (which is a comparable position to that found in England), or whether the Court should conduct a prima facie review.

The factual background to the case stemmed from works carried out at the new terminal at Dublin Airport. At the outset of Mr. Justice Feeney's judgment he refers to the concept of the separability of arbitration agreements which is found in Art. 7, Option 1 of the Model Law (which was adopted in the Arbitration Act 2010). The decision in *Lesotho Highlands Development Authority v. Impregilo SpA* in that regard, with its famous passage ("It [i.e., the separability of the arbitration agreement] is part of the very alphabet of arbitration law"), is described by Mr. Justice Feeney as being equally applicable to the position in Ireland. He then turns to a description of the provisions of the Model Law in Art. 16 concerning *kompetenz-kompetenz*. This brings him to the core issue in the application before him described as follows:

"[T]he entitlement of both the Court and the arbitral tribunal to rule on the existence of an arbitration agreement has given rise to extensive discourse. In light of the fact that both a court and the arbitral tribunal have jurisdiction to consider and rule on the existence of an arbitration agreement the issue arises as to the standard of judicial review which should be applied by the Court in exercising its jurisdiction on this matter under the Model Law. This matter is summarised in the textbook by Gary B. Born entitled '*International Commercial Arbitration*' at Chapter 6, p. 881 where he deals with the issue of prima facie versus full judicial consideration of interlocutory jurisdictional challenges under the Model Law. He states:

"When a party seeks an interlocutory judicial determination of jurisdictional objections, prior to any arbitral award on the subject, there is uncertainty regarding the standard of judicial review that should be applied by a court under the Model Law, and many judicial authorities strongly suggest that full judicial review of the jurisdictional objection is appropriate, at least in some circumstances. In contrast, as also discussed below, some judicial authority, and some aspects of the Model Law's drafting history, suggest that only prima facie interlocutory judicial consideration is ever appropriate."

Mr. Justice Feeney considered the position in England where a full judicial review is undertaken when the gateway issue of jurisdiction is raised at such a stage, namely whether the parties ever entered into an arbitration agreement. He then also took into account the views of Born (Chapter 6, p. 885) as follows:

IRELAND

“... the weight of better reasoned national court authority in UNCITRAL Model Law jurisdictions has interpreted Article 8(1) as permitting full judicial consideration (rather than only prima facie review) in either all or some cases involving interlocutory challenges to the existence validity or legality of the arbitration agreement (but not as to the scope of that agreement which is treated differently)”.

Ultimately Mr. Justice Feeney did not have to decide between the two approaches as, following a careful analysis, he found that even on a prima facie standard the defendants did not succeed in showing that there was an arbitration agreement in place between the parties. He took, by way of example, on the prima facie standard the legal test applied by Irish courts in deciding whether an application to summarily dismiss a case at the conclusion of a plaintiff's case (“whether assuming that the tribunal of fact was prepared to find that all the evidence of the plaintiff was true, and in other words treating the plaintiff's case at its highest, whether in those circumstances the tribunal of fact would be entitled to arrive at the conclusion that making those assumption ... the defendant had a case to meet”). The stay was refused and the litigation proceeded further before the High Court.

The standard of review has arisen in other cases and it is only in the most recent that a definitive view has been adopted, the preceding cases being somewhat inconclusive.

In *P. Elliot & Co. Ltd. v. FCC Elliot Construction Limited* ([2012] IEHC 361), which involved a complicated history of legal and commercial relationships, the question arose as to whether the defendant who had requested the Court to refer the matter to arbitration was entitled to invoke an arbitration agreement where, strictly, it was not a party to it. The dispute arose under a consultancy contract which formed part of a suite of contractual documents, some of which contained an arbitration agreement. In support of its application, the defendant relied on authorities which favoured a “common sense approach to relations between entities” and argued for a broad construction of the arbitration clause. The plaintiff / respondent contended the opposite position, with which the Court agreed. It held that in the relevant agreement the parties had expressly agreed to give the Irish court jurisdiction over disputes arising and had also provided for Irish governing law to apply. This was a choice the Court would respect. Although the Court did not consider the standard of review in any great detail, Mr. Justice Mac Eochaidh did cite Canadian authorities (*Pacific Erosion Control Systems Ltd. v. Western Quality Seeds* [2003] BASK 1743); which in turn applied Hinkson J. in *Gulf Canada Resources Limited v. Arochen International Limited* [1992] BCJ 500) to the effect that:

“The test formulated is that a stay of proceedings should be ordered where: (i) it is arguable that the subject dispute falls within the terms of the arbitration agreement; and (ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement.”

IRELAND

Although the Court did not further elaborate on the nature of the test, the standard of whether it is “arguable” that the dispute fell within the scope of an arbitration agreement does appear to imply a prima facie standard of review. While it is fair to observe that Mr. Justice Feeney in *Barnmore* seemed to have a preference for a full judicial review of the jurisdiction and objection, since Mr. Justice MacEochaidh expressly stated that he had not been directed to any Irish decision dealing with the interpretation of Article 8, it seems clear that he was not referred to *Barnmore*.

The standard of review was also raised in *Mount Juliet Properties Ltd v. Melcarne Developments Ltd & Others* ([2013] IEHC 286) where Miss Justice Laffoy referred the parties to arbitration having ruled that, since Art. 8 was framed in mandatory terms, she had no discretion save where the arbitration agreement or clause is null and void, inoperative or incapable of being performed. In coming to that conclusion, she did acknowledge that the parties had addressed her on the relevant standard to be applied by the Court in making a determination under Art. 8(1). She also observed – noting both *Barnmore* and *Elliot* – that there were competing tests on whether the Court should refer parties to arbitration – namely, whether there should be full judicial consideration or whether the test is that an arguable case or that a prima facie case has to be made out. However, she felt that she did not need to express any view on which standard to apply as she felt that, irrespective of the threshold to be met, the applicants had satisfied them both (converse to the position in *Barnmore*). However, it is regrettable that, since both *Barnmore* and *Elliot* were cited to her, Miss Justice Laffoy did not express a more definitive preference for one standard over the other.

In *John G Burns Ltd. v. Grange Construction & Roofing Co. Ltd.* ([2013] IEHC 284), in a judgment delivered on the same day as the *Mount Juliet Properties* decision, Miss Justice Laffoy dealt with an application brought to the High Court under Art. 16(3) of the Model Law for an order to the effect that the tribunal did not have jurisdiction. She referred to *Barnmore* and commented that:

“The judgment of Feeney J. is of considerable significance in that it analyses the standard to be applied by a court in determining whether there is an arbitration agreement under Article 8: whether it is on a full judicial review basis; or an a prima facie or arguability basis. However, on the facts of the case, Feeney J. found it was unnecessary to make a determination as to whether a prima facie or a full judicial consideration should apply, because the defendants had not met either test.”

Although Miss Justice Laffoy only referenced *Barnmore* with regard to the standard of review, she made no clear or express statement to the effect that a full judicial consideration is the applicable standard (whether ante- or post-review) under Irish law.

IRELAND

However, the uncertainty has been resolved by the decision of Mr. Justice Cregan in *The Lisheen Mine*³⁴ ([2015] IEHC 50) where one of the defendants sought an order pursuant to Article 8 to stay the court proceedings in favour of arbitration. Mr. Justice Cregan acknowledged at the outset that there was a debate as to whether the applicable standard to be applied was a prima facie basis or a full judicial consideration basis. He cited *Barnmore* at length, as well as tracts of Mr. Justice Mac Eochaidh's decision in *Elliot*, noting that *Barnmore* had not been opened to the judge in that case. He also acknowledged (but did not cite from) the *Mount Juliet Properties* and *John G Burns Ltd* cases. In addition, he looked at relevant English authorities, in particular, Waller LJ's decision in *Al Naimi v. Islamic Press Agency Inc*, which he quoted to the effect that:

“it cannot be in the interests of the parties to have to return to the court to get a definitive answer to a question which could and should be decided by the court before the arbitrator embarks upon the meat of the reference. Such a course would mean that the arbitral proceedings would not be conducted without unnecessary delay or expense. On the other hand the court must bear in mind that it must not act so as to deprive the party of the benefit of the contract that it has made whereby disputes are to be referred to arbitration.”

Mr. Justice Cregan also cited academic commentary from Hutchinson approvingly:

“there is a potential efficiency in having the matter decided immediately and finally by the courts rather than adding the costly procedural layer of constituting an arbitral tribunal to first decide the matter, particularly when the tribunal's ruling may well be referred back to the court in due course.”³⁵

Ultimately, Mr. Justice Cregan came to the view that the more appropriate approach for a court to follow was to give full judicial consideration to the issue of whether there is an arbitration agreement between the parties, explaining his rationale as follows:

“1. Firstly, it seems to me to be unsatisfactory that a court having heard the matter fully argued before it, should only consider on a prima facie basis whether an arbitration agreement exists. If it were to do so, then it would be

34. *The Lisheen Mine (Being a Partnership Between Vedanta Lisheen Mining Limited and Killoran Lisheen Mining Limited) v. Mullock and Sons (Shipbrokers) Limited and Vertom Shipping and Trading BV*.

35. “The Existence of the Arbitration Agreement and the Kompetenz-Kompetenz Principle in Irish Law”, 80 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (2014) p. 71 at p. 75, quoted by Cregan J. at para. 133 of his judgment.

IRELAND

leaving open the essential question of whether there is an arbitration agreement between the parties on a final and conclusive basis. 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. It is unsatisfactory for the court, for the arbitrator and indeed for the parties themselves. This is entirely wasteful of costs.

2. Secondly, if the court only conducts the analysis to a prima facie review level, and it leaves the matter open to the arbitrator, and if the arbitrator decides that there is or is not an arbitration agreement then that decision itself is open to challenge by way of appeal on a point of law. This means that the courts could be faced with the prospect of having to decide the issue again. It also means that in a worse case scenario the parties might have to fight the issue on no less than three separate occasions. This cannot be in the interests of proper case management.

3. Thirdly, the question of whether there is an arbitration agreement is a question of law which is best decided by a court. The court in this (and other) jurisdictions are well used to considering whether on the basis of the affidavit evidence before the court there is a valid and concluded contract in existence between parties. Moreover if there are disputed facts on affidavit then oral evidence can be heard before a court to resolve such conflicts of facts.”

c. Timing of objection to jurisdiction

A party should raise any challenge to the competence of the court to hear the dispute as soon as possible and, in any event, must do so not later than when submitting his first statement on the substance of the dispute in accordance with Art. 8(1) of the UNCITRAL Model Law.

d. Role of tribunal

Art. 16 of the UNCITRAL Model Law provides that an arbitral tribunal may rule on its own jurisdiction and any plea that the tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence. The arbitral tribunal may rule on such a plea as a preliminary question or in an award on the merits. If it determines the matter as a preliminary issue, a party may request the High Court to decide the matter within thirty days of that party receiving notice of the arbitral tribunal’s ruling.

e. When Art. II(3) of the New York Convention does not apply

Art. II(3) of the New York Convention does apply. Assuming it would not, however, Sect. 6 of the Arbitration Act 2010 provides that the UNCITRAL Model Law shall have the force of law in the State and shall apply to all arbitrations. Art. 8 of the UNCITRAL Model Law deals with the prosecution of a substantive claim before a court and outlines the court’s obligation to refer

IRELAND

the matter to arbitration without identifying where that arbitration might be held. Accordingly, the same principles should apply and, unless the court determines the agreement is null and void, inoperative or incapable of being performed, it should refer the parties to arbitration, even if that arbitration is abroad. The time limit would therefore be the same as set out in Chapter II.5.c above.

Chapter III. Arbitrators

1. QUALIFICATIONS

a. Qualifications

There are no specific qualifications required to be an arbitrator under the Arbitration Act 2010 (see **Annex I** hereto). In practice, however, the parties would seek that the arbitrator(s) would have particular qualifications and it would generally be expected that they have relevant arbitration experience. This is a matter of widespread practice in Ireland, but is not a legal requirement. Also, there are the requirements in Art. 12 of the UNCITRAL Model Law regarding impartiality and independence which, if not confirmed by the arbitrator, could give rise to a sustainable challenge to his or her appointment.

b. Restrictions

There are no restrictions on being appointed as an arbitrator, whether by reference to nationality, residence or the membership or admission to a particular bar. In particular, there is no restriction on foreigners being appointed as arbitrators. It would not be permissible, as a matter of the Irish Constitution, for a sitting Irish judge to be an arbitrator and, in practice in Ireland, retired Irish judges tend not to seek appointment as arbitrators.

c. Disclosure obligations

Art. 12 of the UNCITRAL Model Law obliges an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. The duty to disclose such circumstances continues from the time of appointment throughout the arbitral proceedings.

2. APPOINTMENT OF ARBITRATORS

If the parties cannot agree on the arbitrator and do not make provision for a default mechanism, the default appointing authority is the High Court of Ireland. In appointing any arbitrator, the decision of the High Court is not

IRELAND

subject to appeal, although, by Art. 11(5) of the UNCITRAL Model Law, it is obliged to have regard to any qualifications required of the arbitrator by the parties' agreement and such considerations as are likely to secure the appointment of an independent and impartial arbitrator, including the advisability of a nationality different from those of the parties.

If a party fails to cooperate in the appointment of the arbitrator(s), so long as the tribunal has been validly appointed by the High Court, the tribunal can continue the proceedings and make an award on the evidence before it.

3. NUMBER OF ARBITRATORS (SEE ALSO CHAPTER V.2 – MAKING OF THE AWARD)

In the absence of a choice by the parties, the default number of arbitrators shall be one. This change from the default number of three in the UNCITRAL Model Law was made by Sect. 13 of the Arbitration Act 2010 reflecting the long-standing practice in Ireland for a sole arbitrator to be appointed. There is no restriction upon the parties choosing any number of arbitrators, although the default mechanism appears to envisage the tribunal being constituted by either one or three members, and, for practical reasons, it would be imprudent to seek to have an even number of arbitrators on the tribunal.

4. CHALLENGE TO ARBITRATORS

a. Grounds for challenge

The only grounds for challenge of an arbitrator's appointment are set out in Art. 12 of the UNCITRAL Model Law, which provides that a party may challenge an arbitrator where circumstances exist that give rise to doubts as to his impartiality or independence, of which the party becomes aware only after the appointment has been made.

b. Procedure

Art. 13 of the UNCITRAL Model Law provides that the parties may agree upon a procedure for challenging an arbitrator. Most often one would see provisions for dealing with challenges pursuant to a choice of institutional rules. Thus, if the parties have chosen a particular set of institutional rules with a challenge procedure provided for, that will be the method of challenge. If no procedure is agreed, the party who intends to challenge the appointment shall send a written statement of the reasons for the challenge to the arbitral tribunal within fifteen days of becoming aware of either the arbitral tribunal being constituted or the circumstances that give rise to the basis for challenge. Unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the arbitral tribunal will decide on the challenge.

IRELAND

If such challenge is not successful, within thirty days of receiving notice of the decision rejecting the challenge, the challenging party may request that the High Court decide on the challenge. Sect. 8 of the Arbitration Act 2010 requires *judicial notice* to be taken of the *travaux préparatoires* of UNCITRAL and its working group relating to the preparation of the Model Law. Thus, international thinking on these provisions will be considered by the High Court.

c. Reasoned decision

The arbitral tribunal is mandated by Art. 13(2) of the UNCITRAL Model Law to decide on the challenge, but that article does not prescribe whether the decision is to be reasoned or not, or indeed what form it should take. The likely approach and safer approach will be for the arbitral tribunal to provide a written and reasoned decision. If the parties have chosen institutional arbitration, then the institutional rules apply. Thus, if ICC or ICDR procedures are applicable, no reason is furnished, but if the LCIA is chosen, a reasoned decision of a division of the LCIA Court is furnished.

d. Appeal

Art. 13(3) of the UNCITRAL Model Law provides that the court or other authority (in Ireland, the High Court) shall decide the matter, but such an application must be made by the losing party thirty days after having received notification that the challenge was not successful.

5. TERMINATION OF THE ARBITRATOR'S MANDATE

An arbitrator's mandate will terminate if any challenge to his appointment is successful (as outlined above), or where, under Art. 14 of the UNCITRAL Model Law, he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, and he withdraws from office or if the parties agree on termination.

If the arbitrator does not withdraw from office or if the parties cannot agree on termination, the High Court can be requested by any party to decide on the termination of the mandate if controversy remains under any of the grounds under Art. 14 of the UNCITRAL Model Law. While no time limit is put by the UNCITRAL Model Law on the bringing of such an application to the High Court, one would have to bear in mind the waiver provisions of Art. 4, which require objections to be made without undue delay.

Art. 15 of the UNCITRAL Model Law directs that, where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed. The substitute arbitrator is appointed according to the same rules that were applicable to the appointment of the arbitrator being replaced. Thus, if the parties chose institutional arbitration, the mechanism for appointment of a

IRELAND

substitute arbitrator provided in those rules comes into play; if no specific provisions for the appointment of an arbitrator were agreed, the High Court, by way of default, makes the appointment.

6. LIABILITY OF ARBITRATORS

Sect. 22 of the Arbitration Act 2010 clarifies that an arbitrator shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions. This immunity also applies to the body which has appointed the arbitrator, as well as to any employee, agent, advisor or expert appointed by the arbitrator. The immunity involved is absolute and there is no carve-out for liability in the event bad faith is demonstrated.

There are no reported cases on liability, as it rarely arises in practice because of the terms of the arbitrators' appointment that are typically used and because arbitrators also typically have professional indemnity insurance in place with regard to the discharge of their duties as arbitrator. However, given the breadth of Sect. 22 of the Arbitration Act 2010 it does not seem that this will be an issue in Ireland.

Chapter IV. Arbitral Procedure

1. PLACE OF ARBITRATION (SEE ALSO CHAPTER V.3 – FORM OF THE AWARD)

a. Determination

Art. 20(1) of the UNCITRAL Model Law provides that:

“The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.”

Thus, it is in the first instance for the parties either expressly to agree that Ireland (or, most often, Dublin) is the seat for any arbitration, or agree to a set of rules which allows for that choice to be made at a later date (e.g., the ICC Rules). If there is no such agreement, then the second limb of Art. 20(1) comes into play. This provides that, absent agreement by the parties, the place of arbitration shall be determined by the tribunal.

b. Legal consequences

The seat (or place) of the arbitration shall determine which law governs the conduct of the arbitration. The law of the designated seat shall be applicable irrespective of where the arbitration, or any aspect of it, may be physically

IRELAND

conducted. This is envisaged by Art. 20(2) of the UNCITRAL Model Law, which provides that the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

2. ARBITRAL PROCEEDINGS IN GENERAL

a. Mandatory requirements

Art. 19 of the UNCITRAL Model Law provides as follows:

“(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

Therefore, the parties can choose the procedure, failing which the tribunal has a breadth of discretion in terms of the conduct of the arbitration.

Art. 18 provides: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” Such provision is entirely consistent with Irish constitutional norms in respect of fair procedure, which would apply to an arbitration with its seat in Ireland.

The principle of party autonomy is an important feature of arbitration law in Ireland and arbitrations arise as a creature of agreement between the parties. It is not open to tribunals to disregard procedures agreed by the parties. Art. 19 confirms that the parties are free to agree procedures and that it is only failing such agreement that the tribunal may conduct the arbitration as it considers appropriate.

b. Exchange of written pleadings

Art. 23 of the UNCITRAL Model Law details the principles applicable to the delivery of statements of claim and defence. It provides as follows:

“(1) 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, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral

IRELAND

proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.”

Accordingly, it is envisaged that there should be an exchange of written pleadings before the hearing.

c. Oral hearing

The parties can agree whether or not to hold oral hearings. If the parties have made no such decision at the outset, then the tribunal can decide whether to hold oral hearings or whether to conduct the proceedings on the basis of documents or other materials. This is provided for in Art. 24(1) of the Model Law:

“Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.”

Should oral hearings be held, Art. 24(2) provides: “The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.”

In addition, Art. 24(3) states:

“All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.”

Arbitrators may also decide on the basis of written evidence only, without hearing the parties in person, if the parties have agreed that they may do so or, if there is no agreement on the question between the parties, the tribunal may decide to do so. Art. 24(1) further provides: “Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.”

3. EVIDENCE

a. General

Art. 19(1) of the UNCITRAL Model Law provides: “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”

IRELAND

Art. 19(2) goes on to state:

“Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

Therefore, the tribunal does have power to determine the admissibility, relevance, materiality and weight of any evidence submitted by the parties.

Pursuant to Art. 19, absent agreement of the parties on procedures to be followed, the tribunal is not bound by the rules of evidence prevailing in the courts of Ireland and may conduct the arbitration as it considers appropriate. It is therefore not bound by the rules of evidence applicable before the Irish courts.

b. Witnesses

Witnesses may be sworn in before arbitrators. Sect. 14 of the Arbitration Act 2010 (see **Annex I** hereto) provides:

“Unless otherwise agreed by the parties, the arbitral tribunal may for the purposes of the arbitral proceedings concerned—
(a) 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, and
(b) administer oaths or affirmations for the purposes of the examination.”

Art. 27 of the UNCITRAL Model Law provides for court assistance in taking evidence in the following terms:

“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”

There is no express provision in the Arbitration Act 2010 covering the hearing or cross-examination of witnesses. The practice in Ireland as regards the tendering of evidence-in-chief varies considerably. Traditionally, direct examination, reflecting court practice, was also the norm in arbitration. However, witness statements, whether full or in skeleton form have now become widely used. As a general principle, cross-examination is allowed.

c. Documentary evidence

Although there is no express provision, the production of documents as part of the arbitral process is envisaged by Arts. 24 and 25 of the Model Law. Indeed,

IRELAND

Art. 25 provides that if any party fails to produce inter alia documentary evidence, the tribunal may continue the proceedings and make the award on the evidence before it.

d. Document disclosure

Typically, the procedure to be adopted by arbitrators in Ireland will include the possibility of discovery or disclosure of documents, but not as a matter of mandatory law. As a general principle, documents are produced in a manner which is analogous to discovery in Irish court proceedings, whereby one party identifies specific categories of documents it wishes to have discovered to it in respect of the underlying dispute. If agreement on the provision of those documents is not possible, the arbitral tribunal determines the question based upon relevance and materiality to the outcome of the dispute. It should be noted that discovery in Irish civil court procedure is of a much less onerous nature than might be seen in the United States.

4. TRIBUNAL-APPOINTED EXPERTS (SEE CHAPTER IV.3 FOR PARTY-APPOINTED EXPERT WITNESSES)

a. Power of the tribunal

Arbitrators may appoint experts to give advice on specific (technical) matters. Art. 26(1) of the UNCITRAL Model Law provides:

“Unless otherwise agreed by the parties, the arbitral tribunal
(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.”

Therefore, the tribunal may appoint its own expert(s) unless the parties have already agreed that they may not do so.

b. Role of the parties

Unless the parties have already agreed that the tribunal may not appoint its own expert(s), the tribunal does not need to obtain the consent of the parties and can exercise its discretion in deciding whether to appoint an expert.

There is no express obligation on the tribunal to consult the parties beforehand regarding the questions which will be submitted to the expert, but the due process requirement arising under Art. 18 of the UNCITRAL Model Law would suggest that the parties should be given prior notice of the questions to be put to the expert on behalf of the tribunal.

IRELAND

c. Applicable rules

No specific rules apply to tribunal-appointed expert witnesses. Typically, all expert witnesses, even if party appointed, are supposed to be independent and have an overriding duty to the court or tribunal rather than to the party which appointed them.

There is no express obligation that the expert's report be in writing. Indeed, Art. 26(2) refers to the "delivery of his written or oral report". However, it would be unusual for an expert not to prepare a written report setting out his findings or opinions.

There is no express requirement, but again the due process requirement of Art. 18 would appear to mandate the provision of a copy of the expert's opinion to the parties prior to the hearing.

Art. 18's due process principles would also appear to require that the parties be given an opportunity to examine the arbitrator's expert. In addition, Art. 26(2) provides:

"Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue."

5. INTERIM MEASURES OF PROTECTION (SEE ALSO CHAPTER I.1 – LAW ON ARBITRATION)

a. Categories of interim measures

Chapter IV.A of the UNCITRAL Model Law (2006 amendments) regarding interim measures are adopted in full by the Arbitration Act 2010.

There would seem to be no reason why arbitrators could not make a decision regarding perishable goods, for example. This would seem especially so where, under Art. 17A, a party seeking an interim measure is able to satisfy the tribunal that "harm not adequately reparable by an award of damages is likely to result if the measure is not ordered...".

There would not appear to be any limitation on the power of the arbitrators to order a party to give a bank guarantee to do so. Indeed, Art. 17(2)(c) specifically provides that the tribunal may order a party to "provide a means of preserving assets out of which a subsequent award may be satisfied".

b. Attachments

Attachments, in the sense of an order to commit a person to prison for failure to comply with an injunction or other such order, can only be ordered by the courts. An attachment in the sense of an injunction seeking to restrain dealing with an asset can be ordered by an arbitral tribunal.

IRELAND

c. Form of interim award

A decision on interim measures should be given in the form of an interim or partial award, which awards are capable of enforcement.

6. REPRESENTATION AND LEGAL ASSISTANCE

There are no limitations or restrictions upon who may represent a party before an arbitral tribunal in Ireland and a power of attorney in favour of a legal representative is not required. By contrast, representation of a party before the courts in Ireland is limited to Irish-qualified legal practitioners.

There is no obligation that the representative of a party before an arbitral tribunal be a lawyer.

7. DEFAULT

Default of a party is specifically provided for, such that if a party, after due notice, fails to appear before the arbitral tribunal, it may render a binding award. This applies to both claimant and respondent default. Art. 25 of the UNCITRAL Model Law governs the position and provides:

“Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.”

In *O Cathain v. O Cathain* ([2012] IEHC 223) Mr. Justice Hedigan upheld an award where the tribunal had continued with the hearing and rendered an award where one of the parties had refused to participate. He found that the applicant had been afforded every opportunity by the arbitrator to make his case and refused to do so. He observed that the applicant did not have a monopoly over the right to fair procedure, the respondent (in the court proceedings) had an entitlement to have the matter dealt with expeditiously, and the arbitrator was right to insist that the hearing proceed.

IRELAND

8. CONFIDENTIALITY OF THE AWARD AND PROCEEDINGS

a. Confidentiality of arbitral proceedings and award

There is no provision in respect of the confidentiality of the proceedings and/or award. The convention is, however, that the proceedings are conducted in private and that they are understood to be confidential to the parties. This understanding is widely shared amongst practitioners in Dublin but it has not been tested before the courts. A further factor which should be borne in mind is that the Irish Constitution requires all litigation, save in specific circumstances which are not relevant to arbitration, to be conducted in public. Therefore, any arbitration-related application to the High Court would bring the dispute into the public domain.

b. Confidentiality of arbitration-related court proceedings

The mere filing of documents does not make them documents of public record.

Hearings for recognition and enforcement are not, however, confidential. Under the Irish Constitution, on the explicit basis that justice is to be administered in public, only very limited types of proceedings are permitted to be conducted in camera. Hearings in respect of the recognition and enforcement of arbitral awards do not fall into any category of proceedings which may be conducted in camera.

Judgments on recognition and enforcement are published; it is not possible to remove names or information contained in those judgments.

Ireland does not have any specific privacy legislation.

Chapter V. Arbitral Award

1. TYPES OF AWARD

a. Types of award

No distinction is made in the UNCITRAL Model Law, or in any of the provisions of the Arbitration Act 2010 (see **Annex I** hereto), as between interlocutory, interim, partial and final awards, save that Art. 32 of the UNCITRAL Model Law provides that the arbitral proceedings are terminated by a “final award”.

b. Enforcement of interim awards

In the sense that an interim award is a partial final award, and finally adjudicates upon the matters which it addresses, then it is enforceable pursuant to Sect. 23 of the Arbitration Act 2010, which provides:

“(1) An award (other than an award within the meaning of *section 25* [authors’ note: irrelevant for present purposes]) made by an arbitral tribunal

IRELAND

under an arbitration agreement 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 with the same effect and where leave is given, judgment may be entered in terms of the award.

(2) An award that is referred to in *subsection (1)* shall, unless otherwise agreed by the parties, be treated as binding for all purposes on the parties between whom it was made, and may accordingly be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in the State.

(3) Nothing in this section shall be construed as affecting the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention.

(4) Articles 35 and 36 shall not apply in respect of an award in arbitral proceedings which took place in the State.”

Similarly, a party wishing to challenge such an award pursuant to Art. 34 of the UNCITRAL Model Law may do so. Indeed, given the provisions of Sect. 23(4) of the Arbitration Act 2010, if a losing party does not challenge such an award within the time limits provided by Art. 34 of the UNCITRAL Model Law, it cannot later resist enforcement pursuant to Art. 36.

2. MAKING OF THE AWARD

a. Decision-making

The method by which an arbitral tribunal of three (or more) arbitrators arrives at its decision is addressed by Art. 29 of the UNCITRAL Model Law headed “Decision-making by panel of arbitrators”:

“In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. (...)”

b. Dissenting opinions

There is no provision either prohibiting or allowing a dissenting opinion in the Arbitration Act 2010. In the absence of any particular prohibition, there appears to be no reason why an arbitrator could not issue a dissenting opinion. A part of Art. 31(1) of the UNCITRAL Model Law is relevant to bear in mind in this regard, namely that

“In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.”

IRELAND

c. Time limits

No time limits are set by the Arbitration Act 2010 for the making of an award. However Art. 14(1) of the UNCITRAL Model Law is important to note:

“If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.”

3. FORM OF THE AWARD

Art. 31 of the UNCITRAL Model Law provides as follows as regards the form and contents of award:

“(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.”

No requirements are articulated for adequacy of reasons (see Art. 31(2) of the UNCITRAL Model Law).

Art. 31(1) of the UNCITRAL Model Law provides for the signatures of the arbitrators to the award:

“(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.”

The award must include the date and place of arbitration (Art. 31(3)). Concerning correction and interpretation of a failure to include these elements, Art. 33(1) and (2) of the UNCITRAL Model Law provide, in relevant part, as follows:

IRELAND

“(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(...)

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.”

4. JURISDICTION (SEE ALSO CHAPTER II.5 – EFFECT OF THE AGREEMENT)

a. Power of arbitrators

Arbitrators may rule on their own jurisdiction. Art. 16 of the UNCITRAL Model Law provides as follows:

“(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

b. Form of jurisdictional decision

As provided by Art. 16(3), a decision on jurisdiction can be made either by preliminary ruling or in an award on the merits.

IRELAND

c. Appeal

Art. 16(3) of the UNCITRAL Model Law prescribes a thirty-day time limit for attacking the decision on jurisdiction. The party which has challenged jurisdiction and lost the point before the arbitral tribunal cannot wait until the final award or partial final award.

As regards a decision by an arbitral tribunal declining jurisdiction, the provisions of both Art. 5 and Art. 16(3) of the UNCITRAL Model Law are relevant. Art. 5 provides that: “In matters governed by this Law, no court shall intervene except where so provided in this Law.”

Art. 16(3) of the UNCITRAL Model Law only provides for a court decision where the arbitral tribunal has decided that it has jurisdiction. The High Court, by reason of the clear direction contained in Art. 5, can only embark upon an arbitration- related application if there is provision made in the Model Law. The Model Law does not provide for a review of a negative jurisdiction ruling by an arbitral tribunal.

d. Timing of objection

As noted above, Art. 16(2) of the UNCITRAL Model Law provides that: “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.”

In principle, failure to raise this plea timely constitutes a waiver of a party’s right to raise such a plea, due to the clear requirement to raise a plea promptly as provided in Art. 16(2) of the UNCITRAL Model Law. However there is the possibility, by reason of the final sentence in that article, of the plea being raised at a later time, but only if the arbitral tribunal considers the delay to be justified.

Art. 34(2)(b)(i) of the UNCITRAL Model Law remains in place as a discretionary ground for the setting aside of an award if the High Court finds that the subject matter of the dispute is not capable of settlement by arbitration under Irish law.

e. Role of court

The Model Law does not have a provision for an initial declaratory action on jurisdiction (as found, for example, in the English Arbitration Act 1996).

If the court has been approached for a decision, the arbitrators are not obliged to suspend the arbitral proceedings.

5. APPLICABLE LAW

a. Domestic arbitration

Arbitrators may be given the power to decide as *amiables compositeurs* or *ex aequo et bono* (see Art. 28(3) of the UNCITRAL Model Law).

IRELAND

The power to decide as *amiable compositeur* or *ex aequo et bono* differs considerably from a decision according to law. While the matter has not been decided by the High Court, one can draw views from other jurisdictions with similar provisions. These, in general, suggest that when deciding *ex aequo et bono*, the arbitrator pursues a concept of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.

In practice, it is very rare in Ireland for such powers to be expressly granted to an arbitral tribunal.

b. International commercial arbitration

If the parties have not agreed on the applicable law, Art. 28(2) of the UNCITRAL Model Law provides that: “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

6. SETTLEMENT

Art. 30 of the UNCITRAL Model Law sets out the provisions for an award following a settlement:

“(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.”

The possibility for the refusal by the arbitrators of such a request is provided for in Art. 30(1) by the use of the phrase “and not objected to by the arbitral tribunal”.

If an award is made upon agreed terms, then the requirement for reasons is waived by reason of Art. 31(2) of the UNCITRAL Model Law.

There is no prohibition in the Model Law on the arbitrators assisting the parties in settlement negotiations during the arbitration. However, great caution would have to be exercised by both the parties and the tribunal so as to ensure that, in the event that a settlement is not reached, nothing was said or done which could subsequently impugn the proceedings. Examples might include *ex parte* caucusing with one side or the disclosure of without prejudice positions.

Art. 30(2) of the UNCITRAL Model Law makes it very clear that an award on agreed terms has the same status and effect as any other award on the merits of the case and can therefore be enforced or set aside like a normal award.

IRELAND

7A. CORRECTION AND INTERPRETATION OF THE AWARD

By way of introduction to this section, Art. 33 of the UNCITRAL Model Law sets out the circumstances for correction and interpretation of award or the rendering of an additional award as follows:

“(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.”

Arbitrators are therefore allowed to provide an interpretation of their award (see Art. 33(1)(b) of the UNCITRAL Model Law).

The interpretation of an award must, by necessary implication, be made in writing and according to Art. 33(1) of the UNCITRAL Model Law forms part of the award.

The time limit for requesting or issuing a correction or interpretation is thirty days from the receipt of the award unless otherwise agreed by the parties (Art. 33(1) of the UNCITRAL Model Law).

IRELAND

7B. ADDITIONAL AWARD

Arbitrators who omitted to decide one of the issues submitted to them (e.g., to decide on interest claimed by a party) may render an additional award pursuant to Art. 33(3) of the UNCITRAL Model Law (see Chapter V.7A above).

Art. 33(5) of the UNCITRAL Model Law provides that any additional award should comport with the requirements of Art. 31 of the Model Law.

Who shall pay the costs of rendering an additional award is not expressly dealt with in the Model Law, but would, by necessity, form part of the decision of the arbitral tribunal pursuant to Sect. 21 of the Arbitration Act 2010 as regards costs.

8. FEES AND COSTS

a. Types of fees and costs

Sect. 21 of the Arbitration Act 2010 defines “costs” as including costs as between the parties and the fees and expenses of the arbitral tribunal (which includes the fees and expenses of any tribunal-appointed expert). Also of relevance is Sect. 21(2) of the Arbitration Act 2010, which provides that: “An agreement of the parties to arbitrate subject to the rules of an arbitral institution shall be deemed to be an agreement to abide by the rules of that institution as to the costs of the arbitration.”

b. Deposit

The Arbitration Act 2010 makes no specific provision empowering an arbitrator to require a deposit or security for his or her fees and expenses. However, as a matter of practice, arbitrators routinely either obtain sufficient deposits in advance from the parties or inform them, when an award is ready, that upon payment the award will be released.

As already noted in Chapter I above, Irish parties, particularly in cases away from the construction sector, use the main international institutions such as the ICC. The requirement for advances on costs as set out in such rules are buttressed by Sect. 21(2) of the Arbitration Act 2010.

In the construction sector, particularly the widely used Arbitration Procedure 2011 of Engineers Ireland, one sees provisions such as the following:

“Rule 33. Arbitrator’s fees and expenses

33.1 The fees and expenses of the Arbitrator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the Arbitrator and any other relevant circumstances of the case.

IRELAND

33.2 Promptly after appointment, the Arbitrator shall provide the parties with terms of appointment including the basis for the Arbitrator's fees and expenses.

33.3 The Arbitrator shall be entitled to withhold delivery of an award pending payment of the Arbitrator's fees. The Arbitrator may require a deposit from one or more parties as security of costs during the arbitration proceedings to cover the anticipated fees and expenses. If such advance payments are not made, the Arbitrator may direct the suspension or termination of the arbitration proceedings at any time, on giving reasonable notice, until the payments are made. On completion of the arbitration, the Arbitrator shall render an account to the parties of the deposits received and return any unexpended balance to the parties."

The deposit is usually split between the parties. If a party does not comply with the request for deposit, the compliant party is invited to make a substitute payment.

c. Fees of arbitrators

If a set of institutional rules with provision for determination of the fees of the arbitral tribunal has not been agreed upon by the parties, then Sect. 21 of the Arbitration Act 2010 empowers the arbitral tribunal to make a decision on its fees. Such a determination must specify: (1) the grounds on which the arbitral tribunal acted; (2) the items of fees or expenses; and (3) by and to whom they shall be paid.

Hourly rates are the norm for arbitrators, but one often sees daily rates.

d. Assessment of costs

The issue of costs is an area where the Arbitration Act 2010 makes a distinction between domestic and international arbitration. Where the arbitration is domestic (i.e., it does not fall within the meaning of international arbitration provided in Art. 1 of the UNCITRAL Model Law) then the assessment of costs can find its way to what is called a Taxing Master. This is a court officer who assesses the quantum of legal costs pursuant to Irish law – and reasonably incurred costs plays a role in such assessment. However, for the purposes of international arbitration in Ireland, this is of no relevance and the arbitral tribunal is empowered to determine the matter, save that, pursuant to Sect. 21(5) of the Arbitration Act it must specify: (1) the grounds on which it acted; (2) the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each; and (3) by and to whom they shall be paid.

e. Allocation of costs

The tradition of costs following the event is well established in Irish law and practice. However, it is important to note Sect. 21(1) of the Arbitration Act 2010, as it provides that "The parties to an arbitration agreement may make such provision as to the costs of the arbitration as they see fit."

IRELAND

This means that arbitration agreements which specify that the parties are to bear their own costs regardless of the outcome of the case are valid as a matter of Irish law. This contrasts with the position under the old Irish domestic statute (Arbitration Act 1954) and, for example, Sect. 60 of the English Arbitration Act 1996.

With regard to apportionment of costs where parties have won on some claims and lost on others, much depends on the individual arbitrator and it is not possible to say that this approach is more common than a broad brush apportionment of costs.

9. NOTIFICATION OF THE AWARD AND REGISTRATION

There is no requirement that the award be registered or deposited with a court. With respect to institutional arbitration, there is also no requirement that the original of the award be deposited at the arbitral institute.

10. ENFORCEMENT OF DOMESTIC AND INTERNATIONAL AWARDS RENDERED IN IRELAND (SEE ALSO CHAPTER VI – ENFORCEMENT OF FOREIGN ARBITRAL AWARDS)

a. Leave for enforcement

In relation to enforcement, the following provisions of Sect. 23 of the Arbitration Act 2010 are applicable:

“(1) An award (other than an award within the meaning of *section 25*) made by an arbitral tribunal under an arbitration agreement 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 with the same effect and where leave is given, judgment may be entered in terms of the award.

(2) An award that is referred to in *subsection (1)* shall, unless otherwise agreed by the parties, be treated as binding for all purposes on the parties between whom it was made, and may accordingly be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in the State.

(3) Nothing in this section shall be construed as affecting the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention.

(4) Articles 35 and 36 shall not apply in respect of an award in arbitral proceedings which took place in the State.”

The authority deciding the application for leave for enforcement is the High Court.

IRELAND

b. Procedure

The application is made by the winning party to the High Court with notice to the losing party. The application is made in open court and an opportunity is afforded to the parties to make oral submissions.

The structure of the Arbitration Act 2010 does not allow a losing party to invoke Art. 36 of the UNCITRAL Model Law to resist enforcement in the case of an award made in Ireland.

The losing party, in the case of an award made in Ireland, must seek to set aside the award pursuant to Art. 34 of the UNCITRAL Model Law and within that Article's time limits. If it fails to do so, as it will not be able to invoke Art. 36 to resist enforcement, the consequences of the award will be visited upon the losing party.

The decision on enforcement may not be appealed.

11. PUBLICATION OF THE AWARD

Arbitral awards are not published in Ireland. The issue of publication in the public interest has not arisen.

Chapter VI. Enforcement of Foreign Arbitral Awards

1. ENFORCEMENT UNDER CONVENTIONS AND TREATIES

a. Treaty adherence

The Arbitration Act 2010 (see **Annex I** hereto) continues in force in Ireland the following treaties and conventions:

- (1) The Protocol on Arbitration Clauses opened at Geneva on the 24th day of September 1923;
- (2) The Convention on the Execution of Foreign Arbitral Awards done at Geneva on the 26th day of September 1927;
- (3) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 (the "New York Convention");
- (4) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the "ICSID Convention").

b. Procedure

Under Order 56, Rule 3(1) of the Rules of the Superior Courts, an application to enforce a foreign award is made by way of originating notice of motion.

In terms of procedure, Order 56, Rule 6 details the specific requirements. It provides that each originating notice of motion under Order 56 shall be

IRELAND

grounded by an affidavit sworn on behalf of the moving party, which shall set out the basis on which it is alleged that the Court has jurisdiction to grant the relief sought. Copies of the notice of motion, grounding affidavit and the exhibits thereto are to be served on the other party at least fourteen days prior to the hearing date. The respondent may put in a replying affidavit, to set out concisely the grounds relied upon to resist the application, which affidavit is to be served within seven days of the service of the originating notice of motion and grounding affidavit. The applicant is entitled to respond on affidavit within a further seven days. Order 56, Rule 7 provides that, unless the Court directs otherwise, the application shall be heard and determined on affidavit evidence alone.

Order 56, Rule 5 further provides that every originating notice of motion issued pursuant to Order 56 shall be returnable before, and be heard and determined by the President of the High Court, or a judge to be designated by the President.

c. Extent of court review

In terms of basic evidentiary requirements, Art. 35(2) of the UNCITRAL Model Law provides that:

“The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in the official language of this State, the court may request the party to supply a translation thereof into such a language.”

Subject to receipt of those, and compliance with the provisions of Order 56 of the Rules of the Superior Courts, in considering any application for the recognition and enforcement of an arbitral award, the Court can only refuse recognition and/or enforcement on the bases set out in Art. 36(1) of the UNCITRAL Model Law (or Art. V of the New York Convention in virtually identical terms), as follows.

“(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided

IRELAND

that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.”

Recent case law has confirmed that an overarching question with regard to the enforcement of foreign arbitral awards is that Irish courts should first satisfy themselves that they have jurisdiction in Ireland over the parties where neither party had any connection with Ireland and where the party against whom enforcement of the award was sought had no assets in Ireland.

The leading authority is *Yukos Capital SARL v. OAO Tomskneft VNK* ([2014] IEHC 115) which judgment was delivered by Mr. Justice Kelly. Yukos Capital had succeeded in an ICC arbitration in 2007 and sought enforcement of the award in Ireland shortly prior to the expiry of the six-year limitation period for doing so. At the time of seeking enforcement of the arbitral award in Ireland, enforcement proceedings had already been pursued unsuccessfully in Russia and the Netherlands. At the same time as commencing enforcement proceedings in Ireland, Yukos Capital also commenced enforcement proceedings in Singapore. The respondent, Tomskneft, filed a conditional appearance in the enforcement proceedings to challenge the jurisdiction of the Irish courts to allow enforcement. Tomskneft’s submissions largely focused on the scope of the court’s entitlement to decline jurisdiction and it argued that Ireland’s enforcement obligations under the New York Convention should be interpreted in light of the normal limitations on courts’ jurisdiction. In particular, it relied on US authorities relating to the need to establish jurisdiction as a requirement of the “due process” provisions of the US Constitution, and it identified specific authority to the effect that the jurisdiction of the court in light of analogous provisions of the Irish Constitution needed to be established as a precursor to enforcement of an arbitral award pursuant to the New York Convention. Reliance was also placed by Tomskneft on English case law on the question of personal jurisdiction over a party for the purpose of enforcement of a judgment.

IRELAND

Mr. Justice Kelly found these arguments compelling and he relied in particular on the English authority of *Tasarruf v. Demeril* in holding that the presence of assets was not in itself a requirement for leave to serve enforcement proceedings out of the jurisdiction. However, in exercising the discretion to permit service out of the jurisdiction in enforcement proceedings, *Tasarruf* identified that there must be some solid practical benefit in doing so. Based on the evidence before the Court, Mr. Justice Kelly found that Yukos Capital's argument amounted to "a forlorn hope based on little or no evidence that at some stage in the future assets may become available against which execution could take place in this jurisdiction". Ultimately, Judge Kelly concluded that allowing Yukos Capital to make a fourth attempt to enforce the award would not bring about any solid practical benefit. Accordingly, the decision establishes that a solid practical benefit to the enforcement proceedings must be demonstrated before the Irish Court will exercise its exorbitant jurisdiction over any party outside of the State.

The decision has since been applied in two subsequent cases. In *Albaniabeg Ambient ShpK v. Enel SpA and Enelpower SpA* ([2016] IEHC 139) Mr. Justice McDermott applied the "solid practical benefit" test as applied in *Yukos v. Tomskneft* to a case where enforcement of a foreign judgment (from Albania) was pursued in Ireland. More recently, in *Avobone NV v. Aurelian Oil & Gas Limited* ([2016] IEHC 636) Mr. Justice McGovern applied that same test in declining a jurisdictional challenge and allowing enforcement of an arbitral award, where he considered that the applicant had demonstrated that there was a solid practical benefit to the enforcement proceedings in Ireland.

d. Appeal

It is not possible to appeal from the High Court on the issue of enforcement of a foreign award.

e. Court decisions on the New York Convention

The most relevant Irish court decisions are *Brostrom Tankers AB v. Factorias Vulcano SA* [2004] 2 IR 19 and *Kastrup Trea-Aluvinduet A/S v. Aluwood Concepts Ltd* [2009] IEHC 577. The case law with regard to jurisdictional challenges to enforcement is identified above.

Decisions from other jurisdictions (in practice mainly Common Law) on the interpretation of the New York Convention are persuasive (but not binding) authorities to which the Irish courts would have regard. The *ICCA Yearbook Commercial Arbitration* (published by Kluwer) is also of considerable assistance.

IRELAND

2. ENFORCEMENT WHERE NO CONVENTION OR TREATY APPLIES

If no convention or treaty applies, it is still possible to enforce a foreign award in Ireland. Art. 35(1) of the UNCITRAL Model Law provides:

“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.”

Order 56 of the Rules of the Superior Courts prescribes the only mechanism by which an application may be made for recognition and/or enforcement of arbitral awards, irrespective of the country in which they were made. The same mechanism therefore applies to the recognition and/or enforcement of foreign awards where no convention or treaty applies.

Under Irish law, Sect. 11 of the Statute of Limitations provides that an action to enforce an arbitral award shall not be brought after the expiry of six years.

Leave for enforcement in the country where the award was made is not required.

The case law with regard to the jurisdiction of the Irish courts to determine enforcement proceedings is equally applicable to enforcement applications where no convention or treaty applies.

3. RULES OF PUBLIC POLICY

Violation of public policy is a stated ground on which the Irish courts may refuse to recognize or enforce an arbitral award. Art. 36(1)(b)(ii) of the Model Law provides that recognition or enforcement may be refused, irrespective of where the award was made, where the court finds that such recognition or enforcement would be contrary to Irish public policy. However, as was made clear in *Brostrom Tankers AB v. Factorias Vulcano SA* by Mr. Justice Kelly, the public policy ground is very narrowly construed (emphasis added):

“I am satisfied that a broad interpretation such as is contended for by the defendant would defeat the Convention’s purpose of permitting parties to international transactions to promote neutral dispute resolution. The issue is dealt with in this fashion in Redfern and Hunter under the heading ‘Public Policy’. This is at Paragraph 10(46), and I quote:

‘Recognition and enforcement of an arbitral award may also be refused if it is contrary to the public policy of the enforcement state. It is understandable that a state may wish to have the right to refuse to recognise and enforce an arbitration award that in some way offends the state’s own notions of public

IRELAND

policy. Yet, when reference is made to public policy, it is difficult not to recall the skeptical comment of the English judge who said more than a century ago: “It is never argued at all but where other points fail.” Certainly, the national Courts in England are reluctant to excuse an award from enforcement on grounds of public policy. Indeed, according to one learned commentator: ‘There is no case in which this exception has been applied by an English Court. Indeed, in most countries this pro-enforcement bias of the New York Convention has been faithfully observed.’

I am of opinion that I would only be justified in refusing enforcement if there was, (as is stated Cheshire and North’s *Private International Law* in the 13th Edition):

‘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.’”

This ground is not restricted to violation of international public policy (*ordre public international*) where the arbitration qualifies as an international commercial arbitration.

Chapter VII. Means of Recourse

1. APPEAL ON THE MERITS FROM AN ARBITRAL AWARD

a. Appeal to a second arbitral instance

The Arbitration Act 2010 (see **Annex I** hereto) is silent on whether or not the parties can agree to have an appeal from one arbitral tribunal to another arbitral tribunal. In the consultation process held in Ireland prior to the passing of the Act, this issue was discussed as a possible means for the construction industry in Ireland – a major user of arbitration – to have matters of law addressed arising out of a new form of public works contract. Given the UNCITRAL Model Law’s approach to giving primacy to the agreement of the parties, it seems that there should be no impediment to an agreed second-tier arbitral tribunal deciding appeals.

In practice, this approach has not been adopted in Ireland.

b. Appeal to a court

There is no provision for appeal of an arbitral award to court under Irish law.

IRELAND

2. SETTING ASIDE OF THE ARBITRAL AWARD (ACTION FOR ANNULMENT, VACATION OF THE AWARD)

a. Grounds for setting aside

The only bases upon which an award might be set aside are detailed in Art. 34(2) of the UNCITRAL Model Law and they require that:

- “(a) the party making the application furnishes proof that:
- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.”

The court will enter into the merits of the dispute only insofar as necessary to consider the basis upon which it is alleged the award should be set aside by reference to one or other of the grounds under Art. 34 of the UNCITRAL Model Law. Sect. 8 of the Arbitration Act 2010 requires judicial notice to be taken of the *travaux préparatoires* of UNCITRAL and its Working Group II relating to the preparation of the Model Law. Thus, international thinking on these provisions will be considered by Irish courts when deciding a challenge to an award.

In theory, an award might be set aside on the basis of an error in law or in fact only to the extent that such errors can be said to fall within any of the grounds identified in Art. 34 of the UNCITRAL Model Law. However, it would be difficult to conceive of circumstances by which an error of fact or law might be even arguably shoehorned into one or other of the provisions of Art. 34 of the UNCITRAL Model Law.

IRELAND

Whether a violation of the rules of public policy will always constitute a ground for setting aside and thus form, as far as substance is concerned, an exception to the rule “no control on the merits”, will depend on the public policy rule involved and the extent of the violation.

b. Procedure

Any action to be brought in respect of the bases set out in Art. 34 of the UNCITRAL Model Law must be brought as an action for setting aside. However, prior to commencing such an action, and depending on the basis for seeking that the award be set aside, in order to obviate the need for such action, the party involved might first consider requesting the tribunal to correct any errors in computation, or any clerical or typographical or similar errors, or give an interpretation of a specific point or part of the award, or make an additional award as to claims presented in the proceedings, but omitted from the award.

An application to set aside may not be made after three months have elapsed from the date on which the party making the application has received the award. However, where an application to set aside is to be made on the basis that the award is in conflict with the public policy of the State, such application shall be made within fifty-six days from the date on which the circumstances giving rise to the application became known or ought reasonably have become known to that party. Such action is to be brought by way of summary summons, to which the other party shall be defendant.

Art. 4 of the Model Law is a relevant consideration:

“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.”

Although not decided by the High Court, it is believed that the public policy exception could not be overridden or waived by the operation of Art. 4.

Art. 34(4) of the UNCITRAL Model Law provides that, when asked to set aside an award, where appropriate and where requested to do so by a party, the High Court may suspend the setting-aside proceedings in order to give the tribunal the opportunity to resume the arbitral proceedings or take such other action as in the tribunal’s opinion will eliminate the grounds for setting aside.

While the arbitration agreement will not revive if the award is set aside on the basis that the arbitration agreement was invalid, the arbitration agreement revives if not invalid and, subject to limitation issues, a new arbitration may be commenced pursuant to it.

IRELAND

c. Waivers

There is no express provision permitting the parties to exclude one or more grounds for setting aside. Whilst it would certainly not be possible for the parties to extend the grounds on which an award might be set aside, it is arguable (although not definitive) that they could agree to limit those grounds, so long as such limitation was not contrary to constitutional imperatives. Although this has never arisen, it seems unlikely that Irish law would permit a wholesale exclusion of an action to set aside the award. It is arguable (although not definitive) that they could agree to limit some, specific grounds, so long as such limitation was not contrary to constitutional imperatives.

d. Effect of an award that has been set aside

An award that has been set aside should be considered to be null and void and of no legal effect.

3. OTHER MEANS OF RECOURSE

There are no other means of recourse against the arbitral award; the only bases for recourse against an award are as set out in the Model Law. It is made clear by Art. 5 of the UNCITRAL Model Law that the High Court cannot intervene save where provided for.

Art. 5 has, as a necessary consequence, removed from Irish law a long-standing route for challenging an award under the old, and now repealed legislation, of the inherent jurisdiction of the Court. The challenge based upon the inherent jurisdiction of the Court is consigned to Irish legal history and the only route by which an award can be set aside is to be found in Art. 34 of the Model Law. Also, given the exceptionally clear and strong statement of the High Court in *Brostrom Tankers* as regards public policy, albeit in the context of the New York Convention, any purported attempt to reintroduce inherent jurisdiction through the backdoor of Art. 34(2)(b)(ii) of the Model Law should be doomed to failure, and rightly so.

Chapter VIII. Conciliation / Mediation

1. GENERAL

a. Use of conciliation or mediation

The UNCITRAL Model Law on International Commercial Conciliation has not been adopted in Ireland.

As regards mediation there has been a marked increase in use since the mid- 2000s following the establishment of the Commercial Court.³⁶ The procedural rules governing the Commercial Court made provision for mediation as a mainstream alternative to more traditional dispute resolution methods, such as litigation or arbitration. Historically, mediation in particular would have been viewed with some suspicion, but that view has changed. Recent changes to the Rules of the Superior Courts, both in respect of the mediation of domestic disputes and disputes across European Union (“EU”) Member States (the latter reflecting the EU Mediation Directive), have given mediation an increased profile.

As regards conciliation, this has had a long and well-established use in the construction sector. It is frequently used in that sector as a precursor to engagement in traditional arbitration (and, sometimes, though far less frequently, litigation). Mediation more frequently occurs after the litigation or arbitration process has commenced, typically taking place after pleadings have closed or discovery has been undertaken.

b. Rules

For construction disputes, Engineers Ireland has a Conciliation Procedure which is commonly used. Mediations, in particular, are conducted on an *ad hoc* basis, although frequently the CEDR Model Mediation Procedure is adopted where one instructs a CEDR-accredited mediator.

c. Institutes

The following institutions offer their services for conciliation or mediation:

Engineers Ireland
22 Clyde Road
Ballsbridge
Dublin 4
Telephone: +353 1 665 1300
Fax: +353 1 668 5508
E-mail: info@engineersireland.ie
Website: <www.engineersireland.ie>

36. Strictly speaking this is the Commercial List of the High Court, but is universally referred to in Ireland as the Commercial Court.

IRELAND

Irish Commercial Mediation Association
Dermot McEvoy
ICMA Chairman
Eversheds Sutherland
One Earlsfort Centre
Earlsfort Terrace
Dublin 2
Telephone: +353 1 6644238 / +353 86 2242989
Fax: +353 1 6644300
Website: <www.icma.ie>

The Mediators' Institute of Ireland
Unit 2.1
The Distillers Building
Smithfield
Dublin 7
Telephone: +353 1 6099190
Email: info@themii.ie
Website: <www.themii.ie>

There is no conceptual or legal bar to the use of other ADR processes outside of mediation and conciliation, but they are rarely, if ever, invoked by disputants.

d. Adjudication

Under the Construction Contracts Act 2013, adjudication is also available for construction disputes, and a specialized panel of adjudicators has been appointed. A party to a construction contract has a right to refer any dispute relating to payment to adjudication in accordance with Sect. 6 of the Construction Contracts Act 2013. If the parties do not agree upon an adjudicator, he/she shall be selected by the chair of the panel selected by the Minister for Public Expenditure and Reform under Sect. 8. The adjudicator shall reach a decision within twenty-eight days beginning with the day on which the referral is made or such longer period as is agreed by the parties. The adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute and may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts.

The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties, or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision. The decision of the adjudicator, if binding, shall be enforceable either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect; where leave is given, judgment may be entered in the terms of the decision. Each party shall bear his or her own legal and other costs incurred in

IRELAND

connection with the adjudication. Where any amount due pursuant to the decision of the adjudicator is not paid in full before the end of the period of seven days beginning with that day on which the decision is made, the executing party may suspend work under the construction contract.

2. LEGAL PROVISIONS

The Rules of the Superior Courts provide, at Order 56A, dealing with Mediation and Conciliation, that the Courts may stay proceedings to facilitate mediation or conciliation. However, there is no general clause aimed at stimulating attempts to settle through mediation or conciliation prior to the commencement of litigation or arbitration. Although cost consequences may flow from an unreasonable refusal to mediate, the Courts have been slow to impose a stay or to find that refusals to attend warrant the imposition of cost consequences (e.g., *Atlantic Shellfish Ltd v. County Council of Cork* [2015] IEHC 570; *Grant v. Minister for Communications* [2016] IEHC 328).

The Mediation Directive, as transposed into Irish law by the European Communities (Mediation) Regulations 2011, does provide for “confidentiality” of mediations involving disputants from different EU Member States but, in truth, it simply addresses the extent to which evidence of mediation proceedings might be given in other – court or arbitral – proceedings.

A Mediation Bill was first published in 2012 and it is on the government’s legislative agenda for 2017. The stated objective of the Bill is to promote mediation as a “viable, effective and efficient alternative to court proceedings”.³⁷ The legislation is progressing through the Oireachtas (houses of parliament) at the time of writing.

Chapter IX. Investment Treaty Arbitration

Ireland has only ever entered into one Bilateral Investment Treaty (“BIT”) – with the Czech Republic. However, since 2011 that is no longer in force and the prospect of future investment treaties being entered into at a national level (as distinct from EU level) is remote.

Ireland does not employ a model BIT.

Interestingly, there is a curiosity of treaty history still in place from 1950. As between Ireland and the United States there is a Treaty of Friendship, Commerce and Navigation (with significant investor protection provisions), which has the following dispute resolution mechanism in Art. XXIII:

37. See <<http://www.justice.ie/en/JELR/Pages/MediationBill2017>>.

IRELAND

“Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other amicable means.”

While this does not give a right to the individual investor to sue either Ireland or the United States, it is noteworthy in the context of an investor-state chapter and also means that national courts are not the sole and exclusive route for an aggrieved party from either country.

There are no particularities in Ireland’s investment practice.

IRELAND

ANNEX I

ARBITRATION ACT 2010* (Number 1 of 2010)

ARRANGEMENT OF SECTIONS

PART 1. PRELIMINARY AND GENERAL

1. Short title and commencement.
2. Interpretation.
3. Application of Act.
4. Repeals and effect of repeals.
5. Expenses.

PART 2. ARBITRATION

6. Adoption of Model Law.
7. Commencement of arbitral proceedings.
8. Construction of Model Law and construction of arbitration clauses.
9. Functions of High Court.
10. Court powers exercisable in support of arbitral proceedings.
11. Determination of court to be final.
12. Time limits for setting aside awards on grounds of public policy.
13. Default number of arbitrators.
14. Examination of witnesses.
15. Taking evidence in State in aid of foreign arbitration.
16. Consolidation of and concurrent arbitrations.
17. Reference of interpleader to arbitration.
18. Interest.
19. Security for costs.
20. Specific performance.
21. Recoverability of costs, fees and expenses of tribunal.
22. Restriction on liability of arbitrators, etc.
23. Effect of award.
24. New York Convention, Geneva Convention and Geneva Protocol.
25. Non-application of provisions of Act to Washington Convention, save in certain circumstances.
26. Survival of agreement and authority of arbitral tribunal in event of death.
27. Provisions in event of bankruptcy.
28. Full applicability to State parties.
29. Application of Act to arbitrations under other Acts.
30. Exclusion of certain arbitrations.
31. Arbitration agreements and small claims, etc.

* In effect 8 June 2010; official text.

IRELAND

PART 3. REFERENCE TO ARBITRATION WHERE PROCEEDINGS PENDING BEFORE COURT

32. Power of High Court and Circuit Court to adjourn proceedings to facilitate arbitration.

SCHEDULES**

SCHEDULE 1 – TEXT OF UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

SCHEDULE 2 – TEXT OF 1958 CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

SCHEDULE 3 – TEXT OF 1965 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

SCHEDULE 4 – TEXT OF 1927 CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS

SCHEDULE 5 – TEXT OF 1923 PROTOCOL ON ARBITRATION CLAUSES

SCHEDULE 6 – CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

** *General Editor's note:* Schedules 1-5 are not reproduced in this Annex.

IRELAND

ARBITRATION ACT 2010
(Number 1 of 2010)

AN ACT TO FURTHER AND BETTER FACILITATE RESOLUTION OF DISPUTES BY ARBITRATION; TO GIVE THE FORCE OF LAW TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (AS AMENDED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006) IN RESPECT OF BOTH INTERNATIONAL ARBITRATION AND OTHER ARBITRATION; TO GIVE THE FORCE OF LAW TO THE PROTOCOL ON ARBITRATION CLAUSES OPENED AT GENEVA ON THE 24TH DAY OF SEPTEMBER 1923, THE CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS DONE AT GENEVA ON THE 26TH DAY OF SEPTEMBER 1927, THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS DONE AT NEW YORK ON 10 JUNE 1958 AND TO THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES OPENED FOR SIGNATURE IN WASHINGTON ON 18 MARCH 1965; TO REPEAL THE ARBITRATION ACTS 1954 TO 1998; AND TO PROVIDE FOR RELATED MATTERS.

[8th March, 2010]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1. PRELIMINARY AND GENERAL

Short title and commencement

- 1.-(1) This Act may be cited as the Arbitration Act 2010.
(2) This Act shall come into operation 3 months after its passing.

Interpretation

- 2.-(1) In this Act:

“arbitration” means—

- (a) an international commercial arbitration, or
(b) an arbitration which is not an international commercial arbitration;

“arbitration agreement” shall be construed in accordance with Option 1 of Article 7;

“award” includes a partial award;

“consumer” means a natural person, whether in the State or not, who is acting for purposes outside the person’s trade, business or profession;

“Geneva Convention” means the Convention on the Execution of Foreign Arbitral Awards done at Geneva on the 26th day of September, 1927, the text of which is set out in *Schedule 4*,¹

1. *General Editor’s note*: Schedule 4 is not reproduced in this Annex.

IRELAND

“Geneva Protocol” means the Protocol on Arbitration Clauses opened at Geneva on the 24th day of September, 1923, the text of which is set out in *Schedule 5*;²

“Minister” means the Minister for Justice, Equality and Law Reform;

“Model Law” means the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments as adopted by that Commission at its thirty-ninth session on 7 July 2006), the text of which is set out in *Schedule 1*;³

“New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, the text of which is set out in *Schedule 2*;⁴

“State authority” means—

- (a) a Minister of the Government,
- (b) the Commissioners of Public Works in Ireland,
- (c) the Irish Land Commission,
- (d) the Revenue Commissioners,
- (e) a body established by or under any enactment, and financed wholly or partly, whether directly or indirectly, by moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of any Minister of the Government;

“Washington Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature in Washington on 18 March 1965, the text of which is set out in *Schedule 3*.⁵

(2) In this Act—

- (a) a word or expression that is used in this Act and that is also used in the Model Law has, unless the context otherwise requires, the same meaning in this Act as it has in the Model Law, and
- (b) a reference to an Article is a reference to an Article of the Model Law.

Application of Act

3.—(1) This Act shall not apply to an arbitration under an arbitration agreement concerning an arbitration which has commenced before the operative date but shall apply to an arbitration commenced on or after the operative date.

(2) In this section, “operative date” means the date on which this Act comes into operation pursuant to *section 1*.

Repeals and effect of repeals

4.—(1) Subject to *subsection (2)*, the Arbitration Acts 1954 to 1998 are repealed.

(2) Subject to *section 3*, the repeal of the Acts referred to in *subsection (1)* shall not prejudice or affect any proceedings, whether or not pending at the time of the repeal, in

2. *General Editor’s note:* Schedule 5 is not reproduced in this Annex.

3. *General Editor’s note:* The text of the UNCITRAL Model Law on International Commercial Arbitration is not reproduced in this Annex. It has been reproduced in the *International Handbook on Commercial Arbitration*, Supplement 52, 2008, under UNCITRAL Model Law on Arbitration

4. *General Editor’s note:* The text of the 1958 New York Convention is not reproduced in this Annex. It has been reproduced in the *Handbook*, Supplement 29, 1999, under New York Convention.

5. *General Editor’s note:* Schedule 3 is not reproduced in this Annex.

IRELAND

respect of any right, privilege, obligation or liability and any proceedings taken under those Acts in respect of any such right, privilege, obligation or liability acquired, accrued or incurred under the Acts may be instituted, continued or enforced as if the Acts concerned had not been repealed.

(3) In this section “proceedings” includes arbitral proceedings and civil or criminal proceedings.

Expenses

5.—The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

PART 2. ARBITRATION

Adoption of Model Law

6.—Subject to this Act, the Model Law shall have the force of law in the State and shall apply to arbitrations under arbitration agreements concerning—

- (a) international commercial arbitrations, or
- (b) arbitrations which are not international commercial arbitrations.

Commencement of arbitral proceedings

7.—(1) For the purposes of this Act and for the purposes of section 496 of the Merchant Shipping Act 1894 (as amended by *section 29*) arbitral proceedings shall be deemed to be commenced on—

- (a) the date on which the parties to an arbitration agreement so provide as being the commencement date for the purposes of the commencement of arbitral proceedings under the agreement, or
- (b) where no provision has been made by the parties as to commencement of proceedings as referred to in *paragraph (a)*, the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent.

(2) The Statute of Limitations 1957 is amended by substituting the following section for section 74:

“74.—(1) For the purposes of this Act and for the purposes of any other limitation enactment, arbitral proceedings shall be deemed to be commenced on—

- (a) the date on which the parties to an arbitration agreement so provide as being the commencement date for the purposes of the commencement of arbitral proceedings under the agreement, or
- (b) where no provision has been made by the parties as to commencement as referred to in *paragraph (a)*, the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent.

(2) For the purposes of subsection (1)(b), unless the parties otherwise agree, a written communication is deemed to have been received if it is served or given to the respondent in one or more of the following ways:

- (a) by delivering it to the respondent personally;

IRELAND

(b) by delivering it to the respondent's place of business, habitual residence or postal address;

(c) where none of the addresses referred to in paragraph (b) can be found after making reasonable inquiry, by sending it by pre-paid registered post or by any other form of recorded delivery service addressed to the respondent at his or her last known place of business, habitual residence or postal address.

(3) Unless the parties otherwise agree, where a written communication under this section has been delivered to a respondent in accordance with subsection (2), the communication is deemed to have been received on the day it was so delivered.

(4) For the purposes of subsection (2), a company registered under the Companies Acts shall be deemed to be habitually resident at its registered office in the State and every other body corporate (wherever it is incorporated) and every unincorporated body (wherever it carries out its activities) shall be deemed to be habitually resident at its principal office or place of business.”.

Construction of Model Law and construction of arbitration clauses

8.–(1) Judicial notice shall be taken of the *travaux préparatoires* of the United Nations Commission on International Trade Law and its working group relating to the preparation of the Model Law.

(2) The *travaux préparatoires* referred to in *subsection (1)* may be considered when interpreting the meaning of any provision of the Model Law and shall be given such weight as is appropriate in the circumstances.

(3) Where parties agree that disputes under a contract or agreement or disputes arising out of a contract or agreement shall be submitted to arbitration, this shall include disputes as to the existence or validity of the contract or agreement.

Functions of High Court

9.–(1) The High Court is–

- (a) specified for the purposes of Article 6,
- (b) the relevant court for the purposes of Article 9, and
- (c) the court of competent jurisdiction for the purposes of Articles 17H, 17I, 17J, 27, 35 and 36.

(2) The functions of the High Court–

- (a) under an Article referred to in *subsection (1)*, or
- (b) under *sections 10, 23 or 25*,

shall be performed by the President or by such other judge of the High Court as may be nominated by the President, subject to any rules of court made in that behalf.

(3) An application may be made in summary manner to the President or to such other judge of the High Court as may be nominated by the President under *subsection (2)*.

(4) In this section “President” means the President of the High Court.

Court powers exercisable in support of arbitral proceedings

10.–(1) Subject to *subsection (2)*, the High Court shall have the same powers in relation to Articles 9 and 27 as it has in any other action or matter before the Court.

(2) 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.

IRELAND

Determination of court to be final

11.—There shall be no appeal from –

- (a) any court determination of a stay application, pursuant to Article 8(1) of the Model Law or Article II(3) of the New York Convention,
- (b) any determination by the High Court—
 - (i) of an application for setting aside an award under Article 34 of the Model Law, or
 - (ii) of an application under Chapter VIII of the Model Law for the recognition and enforcement of an award made in an international commercial arbitration, or
- (c) any determination by the High Court in relation to an application to recognise or enforce an arbitral award pursuant to the Geneva Convention, New York Convention or Washington Convention.

Time limits for setting aside awards on grounds of public policy

12.—Notwithstanding Article 34(3), an application to the High Court to set aside an award on the grounds that the award is in conflict with the public policy of the State shall be made within a period of 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned.

Default number of arbitrators

13.—Unless otherwise agreed by the parties, the arbitral tribunal shall consist of one arbitrator only.

Examination of witnesses

14.—Unless otherwise agreed by the parties, the arbitral tribunal may for the purposes of the arbitral proceedings concerned—

- (a) 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, and
- (b) administer oaths or affirmations for the purposes of the examination.

Taking evidence in State in aid of foreign arbitration

15.—The reference in Article 27 to an arbitral tribunal includes a reference to an arbitral tribunal conducting arbitral proceedings in a place other than the State.

Consolidation of and concurrent arbitrations

16.—(1) Where the parties to an arbitration agreement so agree—

- (a) arbitral proceedings shall be consolidated with other arbitral proceedings, including arbitral proceedings involving a different party or parties with the agreement of that party or parties,
- (b) concurrent hearings shall be held,

on such terms as may be agreed between the parties concerned.

(2) The arbitral tribunal shall not order the consolidation of proceedings or concurrent hearings unless the parties agree to the making of such an order.

IRELAND

Reference of interpleader to arbitration

17.–(1) Subject to *subsection (2)*, where in legal proceedings relief by way of interpleader is granted by a court and it appears to the court that the issue between the claimants is one in respect of which there is an arbitration agreement between the claimants, the court shall direct that the issue between the claimants be determined in accordance with the agreement.

(2) A court shall not direct that the issue between the claimants referred to in *subsection (1)* be determined in accordance with the arbitration agreement concerned where the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

(3) Where *subsection (1)* applies but the court does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall not affect the determination of that issue by the court.

Interest

18.–(1) The parties to an arbitration agreement may agree on the arbitral tribunal's powers regarding the award of interest.

(2) Unless otherwise agreed by the parties, the arbitral tribunal may award simple or compound interest from the dates, at the rates and with the rests that it considers fair and reasonable–

(a) on all or part of any amount awarded by the arbitral tribunal, in respect of any period up to the date of the award, or

(b) on all or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award was made, in respect of any period up to the date of payment.

(3) Unless otherwise agreed by the parties, the arbitral tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at the rates and with the rests that it considers fair and reasonable, on the outstanding amount of any award (including any award of interest under *subsection (2)* and any award of costs).

(4) References in this section to an amount awarded by the arbitral tribunal include an amount payable in consequence of a declaratory award by the arbitral tribunal.

(5) This section is without prejudice to any other power of the arbitral tribunal to award interest.

Security for costs

19.–(1) Without prejudice to the generality of Article 19, the arbitral tribunal may, unless otherwise agreed by the parties, order a party to provide security for the costs of the arbitration.

(2) A party shall not be ordered by an arbitral tribunal to provide security for the costs of the arbitration solely on the ground that the party is–

(a) an individual who is domiciled, habitually resident, or carrying on business outside the State, or

(b) a body corporate established under a law of a place other than the State or whose central management and control is situated outside the State.

IRELAND

Specific performance

20.—Without prejudice to the generality of the Model Law, an arbitral tribunal shall, unless otherwise agreed by the parties, have the power to make an award requiring specific performance of a contract (other than a contract for the sale of land).

Recoverability of costs, fees and expenses of tribunal

21.—(1) The parties to an arbitration agreement may make such provision as to the costs of the arbitration as they see fit.

(2) An agreement of the parties to arbitrate subject to the rules of an arbitral institution shall be deemed to be an agreement to abide by the rules of that institution as to the costs of the arbitration.

(3) Where no provision for costs is made as referred to in *subsection (1)* or where a consumer is not bound by an agreement as to costs pursuant to *subsection (6)*, the arbitral tribunal shall, subject to *subsection (4)*, determine by award those costs as it sees fit.

(4) In the case of an arbitration (other than an international commercial arbitration) the arbitral tribunal shall, on the request of any of the parties to the proceedings made not later than 21 working days after the determination by the tribunal in relation to costs, make an order for the taxation of costs of the arbitration by a Taxing Master of the High Court, or as the case may be, the County Registrar; and the Taxing Master, or as the case may be, the County Registrar, shall in relation to any such taxation, have (with any necessary modifications) all the functions for the time being conferred on him or her under any enactment or in any rules of court in relation to the taxation of costs to be paid by one party to another in proceedings before a court.

(5) Where the arbitral tribunal makes a determination under *subsection (3)*, it shall specify—

- (a) the grounds on which it acted,
- (b) the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, and
- (c) by and to whom they shall be paid.

(6) Without prejudice to the generality of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, an arbitration agreement—

- (a) to which one of the parties to the agreement is a consumer, and
- (b) a term of which provides that each party shall bear his or her own costs,

shall be deemed to be an unfair term for the purposes of those Regulations.

(7) Section 3 of the Legal Practitioners (Ireland) Act 1876 shall apply as if an arbitration were a proceeding in the High Court and the Court may make declarations and orders accordingly.

(8) In this section references to—
“costs” include costs as between the parties and the fees and expenses of the arbitral tribunal;
“fees and expenses of the arbitral tribunal” include the fees and expenses of any expert appointed by the tribunal.

Restriction on liability of arbitrators, etc.

22.—(1) An arbitrator shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions.

(2) *Subsection (1)* shall apply to an employee, agent or advisor of an arbitrator and to an expert appointed under Article 26, as it applies to the arbitrator.

IRELAND

(3) An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator shall not be liable for anything done or omitted in the discharge or purported discharge of that function.

(4) An arbitral or other institution or person by whom an arbitrator is appointed or nominated shall not be liable for anything done or omitted by the arbitrator (or his or her employees or agents) in the discharge or purported discharge of his or her functions as arbitrator.

(5) *Subsections (3) and (4)* shall apply to an employee or agent of an arbitral or other institution or person as they apply to that arbitral or other institution or that person mentioned in those subsections.

Effect of award

23.—(1) An award (other than an award within the meaning of *section 25*) made by an arbitral tribunal under an arbitration agreement 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 with the same effect and where leave is given, judgment may be entered in terms of the award.

(2) An award that is referred to in *subsection (1)* shall, unless otherwise agreed by the parties, be treated as binding for all purposes on the parties between whom it was made, and may accordingly be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in the State.

(3) Nothing in this section shall be construed as affecting the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention.

(4) Articles 35 and 36 shall not apply in respect of an award in arbitral proceedings which took place in the State.

New York Convention, Geneva Convention and Geneva Protocol

24.—(1) Subject to this Act—

- (a) the New York Convention,
- (b) the Geneva Convention, and
- (c) the Geneva Protocol,

shall have the force of law in the State.

(2) Subject to this Act, Article II(2) and Article VII(1) of the New York Convention shall be interpreted in accordance with the recommendation adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session concerning the interpretation of those Articles.

(3) Subject to this Act, Article II(3) of the New York Convention shall be construed in accordance with Article 8 of the Model Law.

(4) The Minister for Foreign Affairs may by order declare that any state specified in the order is a party to the New York Convention and, while such order is in force, the order shall be evidence that such state is a party to the Convention.

Non-application of provisions of Act to Washington Convention, save in certain circumstances

25.—(1) This Act other than—

- (a) *sections 11, 14 and 15*, and

IRELAND

(b) *section 6*, in so far as it gives the force of law to Article 8(1) of the Model Law,

shall not apply to proceedings pursuant to the Washington Convention.

(2) In this section, “award” means an award rendered pursuant to the Washington Convention and includes any decision made—

(a) pursuant to Article 49(2) of that Convention in relation to any question which the Tribunal referred to in that Article had omitted to decide in the award, or in relation to the rectification of any clerical, arithmetical or similar error in the award,

(b) pursuant to Articles 50, 51 and 52 of that Convention, interpreting, revising or annulling the award, and

(c) pursuant to Article 61(2) of that Convention in relation to costs.

(3) Subject to this Act, the Washington Convention shall have the force of law in the State.

(4) The Minister for Finance may discharge any obligations of the Government arising under Article 17 of the Washington Convention and any sums required for this purpose; and any administrative expenses incurred by the Minister for Finance as a result of acceptance by the State of the Washington Convention shall be paid out of moneys provided by the Oireachtas.

(5) The pecuniary obligations imposed by an award shall, by leave of the High Court, be enforceable in the same manner as a judgment or order of the High Court to the same effect and, where leave is so given, judgment may be entered for the amount due or, as the case may be, the balance outstanding under the award.

(6) Any person who applies to the High Court under *subsection (5)* for leave to enforce the pecuniary obligations imposed by an award shall lodge with his or her application a copy of the award certified in accordance with Article 54(2) of the Washington Convention.

(7) Where an application is made to the High Court pursuant to *subsection (5)*, the High Court shall, in any case where enforcement of an award has been stayed, whether provisionally or otherwise, in accordance with Articles 50, 51 or 52 of the Washington Convention, stay enforcement of the pecuniary obligations imposed by the award and may, in any case where an application has been made in accordance with any of those Articles which, if granted, might result in a stay on the enforcement of the award, stay enforcement of the pecuniary obligations imposed by the award.

Survival of agreement and authority of arbitral tribunal in event of death

26.—(1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representatives of the deceased.

(2) The authority of an arbitral tribunal shall not be revoked by the death of any party by whom he or she was appointed.

(3) Nothing in this section shall affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

Provisions in event of bankruptcy

27.—(1) Where an arbitration agreement forms part of a contract to which a bankrupt is a party, the agreement shall, if the assignee or trustee in bankruptcy does not disclaim the contract, be enforceable by or against him or her insofar as it relates to any dispute arising out of, or in connection with, such a contract.

IRELAND

(2) Where—

- (a) a person who has been adjudicated bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and
- (b) any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, and
- (c) the case is one to which *subsection (1)* does not apply,

then, any other party to the agreement or the assignee or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement and that court may, if it is of the opinion that having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section “assignee” means the Official Assignee in Bankruptcy.

Full applicability to State parties

28.—This Act shall apply to an arbitration under an arbitration agreement to which a State authority is a party.

Application of Act to arbitrations under other Acts

29.—(1) This Act, other than the excluded provisions, shall apply to every arbitration under any other Act as if the arbitration were pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised under that other Act.

(2) The enactments specified in *column (2)* of *Schedule 6* are amended to the extent specified in that Schedule.

(3) In subsection (3) of section 496 of the Merchant Shipping Act 1894, the reference to legal proceedings shall be construed as including a reference to arbitration.

(4) In this section, “excluded provisions” means *subsections (2) and (3)*, *subsection (3) of section 8*, *sections 17, 26, 27, 30 and 31* and *Articles 12 and 13*.

Exclusion of certain arbitrations

30.—(1) This Act shall not apply to—

- (a) an arbitration under an arbitration agreement providing for the reference to, or the settlement by, arbitration of any question relating to the terms or conditions of employment or the remuneration of any employees, including persons employed by or under the State or local authorities, or
- (b) an arbitration under section 70 of the Industrial Relations Act 1946.

(2) *Section 18* shall not apply to an arbitration conducted by a property arbitrator appointed under section 2 of the Property Values (Arbitration and Appeals) Act 1960.

Arbitration agreements and small claims, etc.

31.—(1) Subject to *subsection (2)*, a party to an arbitration agreement who is a consumer shall not be bound (unless he or she otherwise agrees at any time after the dispute has arisen) by an arbitration agreement where—

- (a) the agreement between the parties contains a term which has not been individually negotiated concerning the requirement to submit to arbitration disputes which may arise, and
- (b) the dispute which has arisen between the parties to the agreement involves a claim for an amount not exceeding €5,000.

IRELAND

(2) For the avoidance of doubt, a reference in this section to a consumer shall not include an amateur sportsperson who, in his or her capacity as such, is a party to an arbitration agreement that contains a term concerning the requirement to submit to arbitration.

PART 3. REFERENCE TO ARBITRATION WHERE PROCEEDINGS PENDING BEFORE COURT

Power of High Court and Circuit Court to adjourn proceedings to facilitate arbitration

32.—(1) Without prejudice to any provision of any other enactment or rule of law, the High Court or the Circuit Court may at any time whether before or during the trial of any civil proceedings before it—

- (a) if it thinks it appropriate to do so, and
- (b) the parties to the proceedings so consent,

by order adjourn the proceedings to enable the parties to consider whether any or all of the matters in dispute might be determined by arbitration.

(2) Where a court makes an order under *subsection (1)*, the adjournment shall be for such period as the court thinks fit.

(3) The parties to the proceedings shall, on or before the expiry of the period referred to in *subsection (2)*, inform the court hearing the civil proceedings concerned whether or not agreement has been reached between the parties that any or all of the matters in dispute should be dealt with by arbitration.

(4) Where such agreement has been reached, the agreement shall be treated as an arbitration agreement for the purposes of this Act.

(5) The court, in respect of an agreement referred to in *subsection (4)*—

- (a) where the agreement relates to all of the matters in dispute, shall by order provide for the discontinuance of the proceedings and may make such order as to the costs of the proceedings as it thinks fit, or
- (b) where the agreement relates to part but not all of the matters in dispute, may make such order as to the discontinuance of the proceedings as it thinks fit.

(6) Where no agreement has been reached the court may make such order as it thinks fit in relation to the continuance of the proceedings.

(7) This section is in addition to and not in substitution for any power of a court to adjourn civil proceedings before it.

IRELAND

SCHEDULE 6

CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

Number and Year (1)	Short Title (2)	Provision affected (3)	Amendment (4)
No. 6 of 1957	Statute of Limitations 1957	Section 77	To delete “or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred”.
No. 3 of 1967	Landlord and Tenant (Ground Rents) Act 1967	Section 17	In subsection (5) substitute “ <i>Sections 21 and 23 of the Arbitration Act 2010</i> (and Articles 13 and 14 of the Model Law (within the meaning of the <i>Arbitration Act 2010</i>) as given the force of law in the State by that Act) for “Sections 29, 35, 36, 37 and 41 of the Arbitration Act, 1954”.
No. 1 of 1992	Patents Act 1992	Section 74	In subsection (3) delete “section 35 of the Arbitration Act, 1954 (which relates to the statement of cases by arbitrators for the decision of the Court), shall not apply to the arbitration; but”.
No. 28 of 2000	Copyright and Related Rights Act 2000	Section 367	In subsection (8) substitute “request the court under <i>section 9 of the Arbitration Act 2010</i> to decide on the termination of the mandate of that arbitrator” for “apply to the court for the removal of that arbitrator under section 24 of the Arbitration Act, 1954,”.

IRELAND

AN tACHT EADRÁNA 2010
ARBITRATION ACT 2010

EXPLANATORY MEMORANDUM

General

The purpose of this Act is to apply the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration to all arbitrations which take place within the State. At present that Law applies in relation to international commercial arbitration only. While repealing the Arbitration Act 1954, the Arbitration Act 1980 and the Arbitration (International Commercial) Act 1998, this Act will also preserve the obligations which Ireland undertook when it gave the force of law to the Protocol on Arbitration Clauses opened at Geneva on the 24th day of September 1923 (Geneva Protocol), the Convention on the Execution of Foreign Arbitral Awards done at Geneva on the 26th day of September 1927 (Geneva Convention), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature in Washington on 18 March 1965 (Washington Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 (New York Convention).

The Model Law is divided into a series of Chapters. *Chapter I* concerns general provisions covering, *inter alia*, key definitions and rules of interpretation and the extent of court intervention. *Chapter II* focuses on the form of the arbitration agreement. *Chapter III* deals with the composition of the arbitral tribunal. *Chapter IV* deals with the jurisdiction of the arbitral tribunal. *Chapter IVA* deals with interim measures and preliminary orders. *Chapter V* deals with the conduct of arbitral proceedings. *Chapter VI* deals with the making of an award and the termination of proceedings. *Chapter VII* specifies the grounds on which an award may be set aside. *Chapter VIII* deals with the recognition and enforcement of arbitration awards.

PART I OF ACT. PRELIMINARY AND GENERAL

Short title and commencement

Section 1 contains the usual citation and commencement provisions.

Interpretation

Section 2 contains relevant definitions which are self-explanatory.

Application of Act

Section 3 specifies that the Act will apply to an arbitration commenced on or after the date on which it comes into operation. This will be the case even where the arbitration agreement has been entered into prior to that date. However, the Act will not apply where the arbitration itself has commenced before such date.

Repeals and effect of repeals

Section 4 contains standard repeal provisions the effect of which is to repeal the Arbitration Acts 1954 to 1998 and replace them with this Act.

IRELAND

Expenses

Section 5 is a standard expenses provision.

PART 2 OF ACT. ARBITRATION

Adoption of Model Law

Section 6 provides that the Model Law shall have the force of law in the State and that it shall apply to all arbitrations, irrespective of whether the arbitration agreement in question concerns international commercial arbitrations or arbitrations which are not so classified.

Commencement of arbitral proceedings

Section 7 specifies when arbitral proceedings are deemed to be commenced. Essentially the parties to an arbitration agreement can agree on a commencement date for the proceedings. Where there is no such agreement the arbitral proceedings are deemed to be commenced on the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent. (This reflects the language of Article 21 of the Model Law with the added stipulation that the request be in writing.)

Construction of Model Law and construction of arbitration clauses

Section 8 provides that judicial notice shall be taken of the preparatory works of UNCITRAL and its working group relating to the development of the Model Law and that those works may be considered when interpreting any provision of that Law. There is also a clarificatory provision to the effect that an agreement to submit a dispute to arbitration includes a dispute as to the existence or validity of that agreement.

Functions of High Court

Section 9 provides that the High Court is to be the court specified under Article 6 of the Model Law for the performance of certain functions of arbitration assistance and supervision. These functions are laid down in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) of the Model Law, and relate to matters such as the procedure for challenging an arbitrator and for setting aside an arbitral award. The High Court is also the relevant court for the purposes of Article 9 (granting of interim measures of protection) and is the court of competent jurisdiction for the purposes of Articles 17H (recognition and enforcement of interim measures), 17I (grounds for refusing recognition and enforcement of interim measure), 17J (court ordered interim measures), 27 (court assistance in taking evidence), 35 (recognition and enforcement of arbitral awards) and 36 (grounds for refusing recognition and enforcement). This section also deals with procedural issues governing the bringing of applications to the High Court.

Court powers exercisable in support of arbitral proceedings

Section 10 provides that for the purpose of giving effect to Articles 9 or 27 of the Model Law the High Court shall have the same powers as it has in relation to any other matter which might come before it. However, unless the parties agree otherwise, the High Court will not have the power to make any order relating to security for costs or discovery. These matters will be dealt with solely by the arbitral tribunal.

IRELAND

Determination of court to be final

Section 11 sets out a range of applications where the determination of the court is to be final. This includes an application to any court to stay proceedings because the matter in dispute is the subject of an arbitration agreement and an application to the High Court for the recognition and enforcement of an arbitration award granted in another jurisdiction.

Time limits for setting aside awards on grounds of public policy

Section 12 provides that an application to the High Court to set aside an award on grounds of public policy can only be made within a period of 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably have become known to the party concerned. (Under Article 34(3) of the Model Law a three-month deadline applies which runs from the date that the party making an application has received the award.)

Default number of arbitrators

Section 13 provides that, unless the parties agree otherwise, the arbitral tribunal is to consist of one arbitrator.

Examination of witnesses

Section 14 allows for the examination of witnesses on oath or on affirmation.

Taking evidence in State in aid of foreign arbitrations

Section 15 will enable an Irish court to assist in taking evidence where the arbitral proceedings are taking place in another country.

Consolidation of and concurrent arbitrations

Section 16 provides that the parties to an arbitration agreement may agree that arbitral proceedings shall be consolidated with other arbitral proceedings and that concurrent hearings shall be held on such terms as may be agreed. The arbitral tribunal has no power to order the consolidation of proceedings or concurrent hearings unless the parties agree to confer such power upon the tribunal.

Reference of interpleader to arbitration

Section 17 deals with the situation which can arise where a person has property in their possession in which they have no interest and, in anticipation of being sued in relation to that property, that person compels the rival claimants to the property to *interplead*, i.e. to take proceedings between themselves in order to determine entitlement. If the court is of the view that the issue in dispute is the subject of an arbitration agreement between the claimants it is empowered to direct that the issue be determined in accordance with that agreement. However, the court shall not give such a direction where it finds that the agreement is null and void, inoperative or incapable of being performed.

Interest

Section 18 deals in some detail with the question of interest in relation to an arbitral award. It is open to the parties to agree on the powers which the arbitral tribunal is to have in relation to this matter. Absent such agreement, the section specifies the powers which the tribunal has to award interest and makes it clear that the tribunal may grant interest on any amount awarded by it in respect of any period up to the date of the award.

IRELAND

Security for costs

Section 19 deals with the power of the arbitral tribunal to order security for costs.

Specific performance

Section 20 provides that an arbitral tribunal shall, unless otherwise agreed by the parties, have the power to make an award requiring the specific performance of a contract (other than a contract for the sale of land).

Recoverability of costs, fees and expenses of tribunal

Section 21 enables the parties to an arbitration agreement to make such provision in relation to the costs of the arbitration as they see fit. Failing such agreement, the arbitral tribunal has full discretion in relation to this matter. In the case of an arbitration other than an international commercial arbitration there is the possibility for the costs of the arbitration to be taxed either by a Taxing Master of the High Court or a County Registrar. The Section also specifies that any term in an arbitration agreement to which one of the parties is a consumer, and which provides that each party is to bear his or her own costs, is deemed to be an unfair term for the purposes of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000.

Restriction on liability of arbitrators etc.

Section 22 makes it clear that an arbitrator shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator. Similar provisions apply in relation to institutions or persons involved in the appointment or nomination of an arbitrator.

Effect of award

Section 23 provides for an award made by an arbitral tribunal to 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 and for that award to be binding on the parties between whom it was made. It is made clear that nothing in the section affects the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention. The section also disapplies the recognition and enforcement provisions of Articles 35 and 36 of the Model Law in relation to awards made in arbitral proceedings which take place in the State.

New York Convention, Geneva Convention and Geneva Protocol

Section 24 contains the limited number of provisions which are necessary to give effect to Ireland's international obligations under the above-named agreements. These matters were previously provided for in the Arbitration Act 1954 and the Arbitration Act 1980.

Non-application of provisions of Act to Washington Convention, save in certain circumstances

Section 25 contains the provisions necessary to give effect to Ireland's international obligations under the above-named Convention. Equivalent provisions were previously contained in the Arbitration Act 1980.

IRELAND

Survival of agreement and authority of arbitral tribunal in event of death

Section 26 provides for the survival of the arbitration agreement and for the non-revocation of the authority of the arbitral tribunal in the event of the death of any relevant party – either the party to the agreement or the party appointing the tribunal.

Provisions in event of bankruptcy

Section 27 is intended to protect the efficacy of the arbitration agreement in the event of one of the parties to the agreement being adjudicated bankrupt.

Full applicability to State parties

Section 28 makes it clear that the Act applies to an arbitration under an arbitration agreement to which a State authority is a party.

Application of Act to other arbitrations

Section 29 is a general provision which is intended to ensure that this Act, other than certain excluded provisions, applies to arbitrations under any other enactment except in so far that its application is incompatible with the enactment concerned.

Exclusion of certain arbitrations

Section 30 is an exclusionary provision which deals with arbitrations arising in the industrial relations area. It also makes special provision in respect of property arbitrations.

Arbitration agreements and small claims, etc.

Section 31 provides that, in the normal course, a consumer will not be bound by an arbitration agreement where the disputed claim does not exceed €5,000. Clarification is provided that the section will not impact on arrangements whereby amateur sportspersons agree to submit to arbitration in the event of a dispute arising out of their participation in a particular sport.

PART 3 OF ACT. REFERENCE TO ARBITRATION WHERE PROCEEDINGS PENDING BEFORE COURT

Power of High Court and Circuit Court to adjourn proceedings to facilitate arbitration

Section 32 enables both the High Court and the Circuit Court to adjourn civil proceedings, with the consent of the parties, where it appears that the matter in dispute might appropriately be determined by arbitration.

SCHEDULES

Schedule 1 contains the text of the Model Law. *Schedule 2* contains the text of the New York Convention. *Schedule 3* contains the text of the Washington Convention. *Schedule 4* contains the text of the Geneva Convention. *Schedule 5* contains the text of the Geneva Protocol. *Schedule 6* contains details of the enactments amended by this Act.

Financial implications

The Bill has no significant financial implications for the Exchequer.

An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí Feabhra, 2010.

IRELAND