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The International Comparative Legal Guide to:

International Arbitration 2017

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Ireland


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1 Arbitration Agreements

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

The Arbitration Act 2010, which applies to arbitrations commenced in Ireland from 8 June 2010, applies Option 1 of Article 7 of the UNCITRAL Model Law to the requirements of an arbitration agreement. It provides that the arbitration agreement shall be in writing, whether in the form of an arbitration clause in a contract or in the form of a separate agreement. The concept of the agreement being in written form is broadly interpreted. An agreement will be in writing if its content is recorded in any form, notwithstanding that the arbitration agreement or contract may have been concluded orally, by conduct or by other means. Electronic communications can satisfy the requirement that the arbitration agreement be in writing if useable for subsequent reference. An arbitration agreement will also be considered to be in writing if it is contained in an exchange of a claim and defence in which the existence of an agreement is alleged and not denied.

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

Various matters which facilitate the progress of the dispute before the arbitrator should be included in the arbitration agreement. To avoid delays and other difficulties after the dispute arises, it is often best to have a reasonably detailed arbitration agreement in place before any dispute.

The parties should consider making provisions for setting the number of arbitrators (the Arbitration Act 2010 sets one arbitrator as the default number), their qualification(s) and other criteria relevant to their appointment, as well as how they are to be chosen. The agreement should also set out a default mechanism if the parties cannot agree on the arbitrator, such as referring the question of who is to be appointed to a relevant professional body. Equally, the parties should consider whether they wish to make provisions for a replacement arbitrator if the appointed arbitrator cannot continue, for whatever reason. They should also consider whether they wish to make express provisions to adopt particular procedures or rules regarding the conduct of the arbitral proceedings. In addition, they might consider whether to give the High Court jurisdiction in respect of security for costs and discovery (which are otherwise excluded from the High Court's jurisdiction under Section 10(2) of the Arbitration Act 2010). The arbitration agreement might also specifically address the question of interest and costs, although there are default positions set out in the Arbitration Act 2010. A statement as to the venue for any arbitration and the language in which it is to be conducted is helpful.

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

Historically, Irish courts have been very supportive of arbitration and this approach is continuing under the Arbitration Act 2010. Indeed, under the Arbitration Act 2010, the possibility of appeal is limited, which is indicative of the legislative support for arbitration. The Irish courts have displayed a strong policy of staying court proceedings in favour of agreements to arbitrate. Article 8 of the Model Law sets out the relevant principles that are applied in Irish law. If an action is brought before the court in a matter which is the subject of an arbitration agreement, the court shall refer the parties to arbitration if a party so requests, unless the court finds that the agreement is null and void, inoperative or incapable of being performed. A party seeking a stay of court proceedings and a referral of the dispute to arbitration must act without delay and, in any event, not later than when submitting his first statement on the substance of the dispute.

2 Governing Legislation

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

The Arbitration Act 2010 applies to all arbitrations commenced after 8 June 2010 and it applies the UNCITRAL Model Law. The Arbitration Act 2010 itself entered into force as from 8 June 2010. It also applies to the enforcement of arbitration proceedings where the arbitration commenced after that date.

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

The Arbitration Act 2010 applies to both domestic and international arbitrations.

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

Yes, the law governing international arbitration is based on the

UNCITRAL Model Law. The Arbitration Act 2010 adopts the UNCITRAL Model Law, as amended in 2006. The UNCITRAL Model Law is reproduced in its entirety as a schedule to the Act. Section 6 of the Arbitration Act 2010 provides that, subject to the provisions of that Act, "the Model Law shall have the force of law in the State". The Act clarifies the functions of the High Court, the court's powers in support of arbitration proceedings, the tribunal's powers in relation to the examination of witnesses, consolidation of arbitral proceedings and the holding of concurrent hearings, awards of interest, and costs, as well as the question of provision of security for costs.

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

The Arbitration Act 2010 (and, through it, the UNCITRAL Model Law) is applicable to all arbitrations commenced in Ireland on or after 8 June 2010.

3 Jurisdiction

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

As a general principle, unwritten arbitration agreements do not fall within the scope of the Arbitration Act 2010. More specifically, Section 30 of the Act clarifies that the Act does not apply to disputes regarding the terms and conditions of employment or the remuneration of employees, or to arbitrations conducted under Section 70 of the Industrial Relations Act 1946. The Arbitration Act 2010 also does not apply to arbitrations conducted by a property arbitrator appointed under Section 2 of the Property Values (Arbitration and Appeals) Act 1960. Under the Arbitration Act 2010, consumer disputes, where the arbitration clauses are not individually negotiated and which are worth less than €5,000, are only arbitrable at the election of the consumer.

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

Yes. Article 16 of the Model Law governs the situation and provides that the "arbitral tribunal may rule on its own jurisdiction", which includes any questions regarding the existence or validity of the arbitration agreement. Any assertion that the tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence. A plea that the tribunal is exceeding the scope of its authority should be raised as soon as the matter arises in the proceedings. The Arbitration Act 2010 designates the High Court as the relevant court for the purposes of Article 16(3) and any subsequent challenge to a tribunal's determination on jurisdiction.

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

As set out above at question 1.3, the Irish courts are supportive of agreements to arbitrate. Where an arbitration agreement exists, the courts are obliged under Article 8 of the Model Law to refer the parties to arbitration, if an application by a party is brought no later than submitting the first statement on the substance of the dispute and provided that the written arbitration agreement is not null and void, inoperative or incapable of being performed. No appeal is permitted in respect of a decision of the High Court under Article 8.

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

In relation to jurisdiction, see question 3.2 above.

Article 14 of the Model Law provides that if an arbitrator becomes *de facto* or *de jure* unable to perform his functions, or for other reasons fails to act without undue delay, his mandate terminates if he withdraws or the parties agree upon termination. However, if a controversy remains, the High Court may decide upon the termination of the mandate. Equally, Article 12 of the Model Law provides that an arbitrator may be challenged if circumstances exist that give rise to doubts as to his impartiality, independence, or if he does not possess the qualifications agreed upon by the parties. That latter issue, in particular, could touch upon issues of competence. If the challenging party does not agree with the tribunal's decision in respect of the challenge, the High Court can be asked to decide under Article 13.

There is no Irish case law in respect of the standard to be applied by the tribunal in considering such a challenge. However, although there is no definitive statement, there is authority in respect of the standard of review which the High Court is to adopt when it is faced with deciding upon the existence of an arbitration agreement under Article 8. In such cases, it appears that the court should reach its decision based on a full consideration of the position on hearing both sides. For a tribunal considering its jurisdiction, it would be prudent to adopt the same standard and not the alternative *prima facie* basis in taking the applicant's case at its highest and assuming that all evidence is true.

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

None at all. The tribunal cannot exercise any jurisdiction over a party who is not a party to the arbitration agreement. Moreover, the tribunal cannot order the consolidation of arbitral proceedings or concurrent hearings unless the parties agree (Section 16, Arbitration Act 2010). The courts cannot give a tribunal jurisdiction over individuals or entities that are not a party to an arbitration agreement. However, pursuant to Section 32 of the Arbitration Act 2010, the courts can adjourn court proceedings to facilitate arbitration if it thinks it appropriate to do so and the parties consent.

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

The Statute of Limitations Act 1957 (as amended) applies to arbitration in the same way as it applies to actions taken in the courts. Therefore, the limitation periods for the commencement of arbitrations are those limitation periods applicable to causes of action in the courts. The applicable limitation period will depend on the particular cause of action in law which is the subject matter of the

dispute. As a general principle, the limitation period for contractual claims is six years from the date of commencement or accrual of the cause of action. Section 7 of the Arbitration Act 2010, clarifies when arbitral proceedings are deemed to have commenced, amending the Irish Statute of Limitations. It should be noted that, unlike a court (which views these rules as procedural), an arbitral tribunal does not have any power to extend the limitation periods laid down by the Statute of Limitations. In such circumstances, any limitation issue falls to be determined by the law governing the underlying dispute. However, under Irish law, should that apply to the underlying dispute, the parties may, by agreement, circumscribe and foreshorten the limitation periods applicable to their dispute. Accordingly, the arbitration agreement itself may impose a limitation period for the commencement of arbitration.

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

Section 27 of the Arbitration Act 2010 provides that where an arbitration agreement forms part of a contract to which a bankrupt is a party, the agreement shall be enforceable by or against him if the assignee or trustee in bankruptcy does not disclaim the contract.

4 Choice of Law Rules

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

Generally, and in the first instance, the law applicable to the substance of the dispute is determined by reference to the choice of law governing the agreement. If there is no express choice of law, the arbitrator may determine the governing law by reference to applicable international standards (such as the Regulation 593/2008/EC on the Law Applicable to Contractual Obligations – the "Rome I Regulation").

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

As a general principle, none, save that certain provisions of local law will be mandatory in terms of the existence or otherwise of a binding arbitration clause, and the conduct of the arbitration itself. However, the principal difficulty that might arise is where the agreement between the parties, in respect of which the dispute arises, may be said to be contrary to the public policy of the seat of the arbitration (for example, if the subject matter involves fraud or corruption).

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

If the arbitration is being conducted in Ireland under the Arbitration Act 2010, Irish law governs the formation, validity and legality of arbitration agreements to the extent set out in that Act.

5 Selection of Arbitral Tribunal

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

There are no limits on the parties' autonomy to select arbitrators or the criteria for selection. The parties are also free to agree upon the number of arbitrators to form the tribunal. Given that agreement upon the arbitrator(s) can be difficult to reach, many agreements provide for a default mechanism, which typically involves an application by either party to the president of a named professional body requesting that he or she appoint an arbitrator. If the parties make no choice as to the number of arbitrators or mechanism of appointment, the default position is a tribunal of one arbitrator, with that arbitrator to be appointed by the High Court.

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

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

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

The courts cannot intervene in the selection of arbitrators, save under Article 11 in circumstances where the parties cannot agree upon an arbitrator and do not provide for an alternative default mechanism in their agreement. The High Court can also determine whether an arbitrator may continue to act where a challenge is brought under Articles 13 or 14 of the Model Law.

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

Article 12 of the Model Law provides that where a person is approached in connection with appointment as an arbitrator, they are obliged to disclose any circumstances that are likely to give rise to justifiable doubts as to impartiality or independence. The duty to make such disclosure is ongoing and an arbitrator is obliged to disclose any such circumstances throughout the arbitral proceedings.

6 Procedural Rules

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

Article 19 of the Model Law confirms that the parties are entitled to set their own procedure and, failing agreement on that, it is for the tribunal to conduct the arbitration in such manner as it considers appropriate. However, pursuant to Article 18, there is a requirement that the parties be treated equally and each party is to be given a full opportunity to present their case. More generally, Chapter V of the Model Law sets out the basic principles regarding the conduct of arbitration proceedings in general terms.

In general, it will be for the parties to determine the procedure they want adopted, particularly through the adoption in the arbitration agreement of specific institutional or trade association rules. However, if no rules are chosen and the parties cannot subsequently agree upon how the procedure is to be conducted, the tribunal can set

the procedure, which will generally be done at a preliminary meeting between the parties and the tribunal, following which the tribunal will issue an order for directions. Article 24 of the Model Law provides that, subject to any contrary agreement by the parties, the tribunal shall decide whether to hold oral hearings, or whether the proceedings shall be conducted on the basis of documents and other materials.

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

No, save that as a basic principle, the tribunal is required to conduct the proceedings in a manner which treats each side equally and in accordance with the basic principles of natural justice, that both parties should be heard and that the tribunal should not be biased. As set out above in question 6.1, Chapter V of the Model Law sets out, in general terms, the basic principles regarding the conduct of arbitration proceedings. Very often the conduct of the hearing will depend on the nature and size of the dispute and the approach of the tribunal.

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

None, save that Irish qualified legal practitioners (whether barristers or solicitors) would be expected to abide by their relevant professional conduct obligations. These rules or obligations would not be applicable to practitioners not holding an Irish legal qualification, but it would be expected that their own rules of professional conduct would be applicable to them.

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

Arbitrators are expected to treat both parties equally, with impartiality, and to give each side the opportunity to put forward their case. Article 18 of the Model Law sets out that obligation in express terms. Pursuant to Article 12, arbitrators are also obliged, at the outset and on a continuing basis, to disclose any circumstances that are likely to give rise to justifiable doubts as to their impartiality or independence.

Unless the parties agree otherwise, the tribunal has the power to direct that a party to an arbitration agreement or a witness be examined on oath or affirmation and the tribunal can administer oaths for that purpose. Subject to the agreement of the parties, the tribunal may also: order the consolidation of arbitral proceedings or concurrent hearings; award interest; order security for costs; require specific performance of a contract (save in respect of land); and determine costs. The arbitrator is also expected to render a reasoned award in writing.

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

There are restrictions with regard to lawyers not admitted in Ireland representing clients before the Irish courts. However, it is clear that these restrictions do not apply in relation to lawyers from other jurisdictions representing clients in arbitration proceedings in Ireland.

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

Section 22 of the Arbitration Act 2010 provides that an arbitrator "shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions". Such immunity also extends to any agent, employee, advisor or expert appointed by the arbitrator, and appointing authorities are similarly immune arising from anything done or not done by an arbitrator. It should be noted that the immunity conferred by Section 22 is general and sweeping in nature and is not qualified by reference to any 'bad faith' proviso.

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

Yes. Pursuant to Section 10 of the Arbitration Act 2010, the High Court has the power to deal with procedural issues under Articles 9 and 27 of the Model Law. Accordingly, it can grant interim measures of protection (Article 9) and it can assist in the taking of evidence (Article 27). However, without the agreement of the parties, it cannot make any order for security for costs or for discovery of documents.

7 Preliminary Relief and Interim Measures

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

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

(a) maintain or preserve the *status quo* pending determination of the dispute;

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) preserve evidence that may be relevant and material to the resolution of the dispute.

Accordingly, the arbitrator does not need to seek the assistance of the court. However, Article 9, in combination with Section 10 of the Arbitration Act 2010 provides that, before or during arbitral proceedings, a party may itself also request from the Irish High Court an interim measure of protection. This can be important where a party subject to the order is not a party to the arbitration agreement such that the tribunal has no jurisdiction over that party.

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

Pursuant to Section 10 of the Arbitration Act 2010, a party may seek

an interim measure of protection from the High Court under Article 9 of the Model Law before or during the arbitral proceedings. The powers of the High Court can be more important than those available to the tribunal, particularly where the arbitration has not yet commenced or where the tribunal has yet to be constituted, or where a party fears non-compliance with an interim measure that might be ordered by the arbitrator (such as where that party is not a party to the arbitration agreement and not subject to the tribunal's jurisdiction). However, an application to the High Court for such purpose would not prejudice the jurisdiction of the arbitral tribunal.

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

In practice, applications to the High Court for interim relief in the context of arbitration proceedings are rare. However, the High Court is empowered to grant same and, if the facts of the case warrant it, will grant same.

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

There is no Irish case law on anti-suit injunctions in aid of arbitration. However, based on EU law authority, it would seem that the possibility of seeking an anti-suit injunction only exists in respect of proceedings in a jurisdiction outside the EU. Where Irish court proceedings are involved and an arbitration agreement exists, rather than seeking an anti-suit injunction, a party may bring an application under Article 8 of the Model Law effectively to stay any Irish court proceedings.

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

Pursuant to Section 10 of the Arbitration Act 2010, the High Court shall not make any order for security for costs unless otherwise agreed by the parties.

For the arbitral tribunal, Section 19 of the Arbitration Act 2010 provides that unless agreed otherwise by the parties, the tribunal may order a party to provide security for the costs of the arbitration. However, qualifications with regard to the bases upon which such security might be ordered by a tribunal are set out at Section 19(2) of that Act. In particular, a tribunal may not order security solely because an individual is resident, domiciled or carrying on business outside of Ireland, or, in respect of a corporate, it is established, managed or controlled outside of Ireland.

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

The enforcement before the Irish courts of preliminary relief and interim measures ordered by arbitral tribunals – whether in Ireland or in other jurisdictions – is rare and there is no body of case law to which reference can be made. However, the Irish courts are supportive of arbitration and it is likely that preliminary relief or interim measures ordered by a tribunal by means of an award would be enforced. It is difficult to conceive that an Irish court would not enforce any interim measure of protection or preliminary order which is otherwise permissible under Article 17 of the Model Law (as addressed above in question 7.1).

8 Evidentiary Matters

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

Under Article 19 of the Model Law, in the absence of an agreement by the parties regarding the procedure to be followed in conducting the arbitral proceedings, it is for the tribunal to conduct the arbitration in such a manner as it considers appropriate and the arbitral tribunal is empowered to determine the admissibility, relevance and weight of any evidence.

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

Chapter V of the Model Law sets out the basic principles regarding the conduct of international arbitration proceedings, but has no specific provision regarding discovery/disclosure. In the absence of agreement by the parties, Article 19(2) provides that the tribunal may conduct the arbitration as it sees fit. Article 25 of the Model Law provides, *inter alia*, that unless otherwise agreed by the parties, if a party defaults and fails to produce documentary evidence, the tribunal may continue the proceedings and make its award on the evidence before it. As set out previously, an arbitral tribunal has no jurisdiction over a third party, whether to make disclosure or otherwise.

The tribunal has no direct power to compel attendance by witnesses although, as detailed at question 8.3 below, it is empowered to invoke the assistance of the national court in the taking of evidence. This, however, is rare and it is usually reserved for third-party witnesses. It is generally the case that it is for the party on whose behalf any particular witness is to attend to ensure that they do so.

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

Article 27 of the Model Law empowers the tribunal (or a party, with the approval of the tribunal) to request assistance from the court in the taking of evidence. Such court assistance can be very important in respect of potential third party discovery or third-party witnesses. However, by Section 10(2) of the Arbitration Act 2010, the High Court is not empowered to make any order for discovery of documents unless otherwise agreed by the parties.

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

In the absence of an agreement by the parties, Article 19(2) provides that the tribunal may conduct the arbitration as it sees fit and the production of (witness) evidence will therefore be subject to the tribunal's wishes. Moreover, Article 24 of the Model Law provides that subject to any contrary agreement by the parties, the tribunal shall decide whether to hold oral hearings, or whether the proceedings shall be conducted on the basis of documents and other materials.

Where witnesses are to be called, Section 14 of the Arbitration Act 2010 provides that the tribunal may direct that a party or witness be

examined under oath and the tribunal is empowered to administer the oath. Whilst there is no express provision in the Arbitration Act 2010, it would be expected that witnesses before arbitral tribunals would have the same rights and privileges as witnesses in proceedings before the Irish courts.

Where arbitral proceedings involve witness evidence, it would be usual for them to be subject to cross-examination on their evidence in chief, or witness statement, as the case may be. Indeed, the ability to cross-examine a witness accords with Irish constitutional norms as to natural justice and fair procedures.

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

Documents will be privileged, and therefore exempt from production, if they can be said to fall into a recognised category of privilege. The most common privilege arising in the context of an arbitration will be legal professional privilege, which covers documents prepared in contemplation of or in relation to legal proceedings (often known as litigation privilege) and documents prepared for the purpose of giving or obtaining legal advice (often known as legal advice privilege). Generally, communications between a party and its lawyers, whether external or in-house counsel, will attract privilege if they are for the dominant purpose of receiving or requesting legal advice or relate to legal proceedings, whether in being or in contemplation. The exception, from the *Azko Nobel v. European Commission* case, arises in respect of in-house legal counsel who cannot claim legal professional privilege protection when under investigation by the European Commission in competition proceedings. Correspondence aimed at settlement or reducing issues in dispute which is expressed to be, or can properly be characterised as, "without prejudice" communications, is also exempt from production, subject to limited exceptions. In general terms, privilege in documents may be waived by the party who prepared the document or the party for whom it was prepared. Privilege will be waived where privileged documents are made available.

9 Making an Award

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

The legal requirements for an arbitral award are set out in Article 31 of the Model Law, which provides that the award shall be in writing, be signed by the arbitrator (or, if there is more than one, the majority of the arbitrators) and also set out the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. The award shall also state its date and the place of arbitration. Copies of the award as made are to be delivered to the parties. If an award also deals with costs, the tribunal must also deal with the requirements set out in Section 21 of the Arbitration Act 2010, which are detailed in question 13.3 below. There is no obligation that the award be signed on every page by the arbitrators.

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

Article 33 of the Model Law sets out the powers of the arbitral tribunal to clarify, correct or amend an arbitral award.

Within 30 days of receipt of the award (unless another time period has been agreed), a party may: (i) with notice to the other party, request the tribunal to correct any computational, clerical, typographical or similar errors in the award; or (ii) if agreed by the parties, and with notice to the other party, request the tribunal to give an interpretation of a specific point or part of the award. If the tribunal considers the request justified, it shall make the correction or interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

The tribunal may correct any computational, clerical, typographical or similar errors in the award on its own initiative within 30 days of the date of the award.

Unless otherwise agreed by the parties, a party may, with notice to the other party, request the tribunal within 30 days of receipt of the award to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the tribunal considers the request to be justified, it shall make the additional award within 60 days.

10 Challenge of an Award

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

There is no appeal against an arbitral award under the Arbitration Act 2010.

However, there are limited grounds upon which recourse may be had against an award such that it might be challenged and set aside. These grounds are set out at Article 34 of the Model Law (which mirror the grounds on which recognition and enforcement might be refused as per Article 36 of the UNCITRAL Model Law, which itself mirrors Article V of the New York Convention) and require that:

(a) the party making the application furnishes proof that:

(i) the 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;

(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;

(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.

If satisfied that any of the above grounds are made out, the High Court can set aside the arbitral award. An application to set aside the award must be made within three months of receipt by the applying party of the award.

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

With regard to limiting the scope of challenge by agreement of the parties, the question has not been addressed by the Irish courts. In general terms, the parties should be free to limit the scope of challenge so long as it is properly based on agreement and the specific exclusion is not contrary to public policy.

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

The parties cannot agree to expand the grounds provided for by the relevant legislation.

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

As set out in question 10.1 above, there is no appeal of arbitral awards as such and, therefore, no appeal procedure.

11 Enforcement of an Award

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

Yes. Ireland ratified the New York Convention in 1981 and no reservations have been entered. The relevant legislation is now the Arbitration Act 2010.

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

No, it has not signed or ratified any such regional Conventions.

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

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. Unless there is reason to deny enforcement (the grounds for which are set out at Article 36 of the Model Law and mirror the grounds for recourse against an award set out in Article 34), enforcement is generally not problematic. The High Court has recently (*Yukos Capital SARL v. OAO Tomskneft VNK* – in which the authors acted for the successful respondent) held that the Court would not exercise jurisdiction over an application for enforcement of an arbitral award, where the parties, the arbitration and the performance of the underlying contract had no connection with Ireland, and the party against whom enforcement was sought had no assets in Ireland and no real likelihood of having assets in Ireland. In that case, the Court held that there was little to demonstrate any "solid practical benefit" to be gained by the applicant for enforcement, noting that enforcement proceedings already existed in the courts of France and of Singapore.

Section 23(1) of the Arbitration Act provides that an arbitral award shall be enforceable in the State either by action or by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect. The Arbitration Act 2010 expressly excludes any possibility of an appeal in relation to the recognition and enforcement of an arbitral award.

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

Given that arbitral awards are "binding" on the parties (see Section 23(2) of the Arbitration Act 2010) and that there is no possibility of appeal, awards cannot be re-opened (although there are limited grounds for recourse under Article 34 of the Model Law). However, in circumstances where there may be some overlap between the issues considered in an arbitral award and separate proceedings, it would be for the subsequent tribunal or court to satisfy itself that, in determining its own issues, it would not be trespassing on a properly made award of which it had notice.

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

The leading Irish authority on public policy in the context of enforcement of arbitral awards confirms that the public policy relevant to enforcement actions brought before the Irish courts is the public policy of Ireland, and not that of the seat of the arbitration or where the award has been rendered. In order to be contrary to Irish public policy, such as to warrant refusal of enforcement, the standard is that there must be "some element of illegality, or possibility that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public". The public policy exception is therefore narrowly interpreted under Irish law.

12 Confidentiality

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

There is no express statutory provision in the Arbitration Act 2010 that arbitration proceedings are to be confidential or that the parties are subject to an implied duty of confidentiality. However, in practice, there is English authority which is persuasive as a matter of Irish law to the effect that arbitration proceedings customarily remain confidential. There is also often an express provision in the arbitration agreement itself. The proceedings may not be subject to confidentiality if the parties agree to proceed on that basis, although this would be very unusual. Having said that, court applications related to arbitral proceedings are heard in open court and not in camera. The interaction of a general principle of confidentiality with the Irish constitutional imperative of justice being administered in public has yet to be challenged, so the position under Irish law cannot be definitely stated.

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

Yes. A party is not expressly prohibited from seeking to rely upon

information disclosed in arbitration proceedings in subsequent proceedings.

13 Remedies / Interests / Costs

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

Clearly, the remedies available to a tribunal will be circumscribed by the remedies permitted by the law applicable to the dispute. Subject to that, a tribunal subject to the Arbitration Act 2010 may determine and award damages as an Irish court would and would have at its disposal the full range of common law and equitable remedies, including, unless the parties agree otherwise, the award of specific performance (other than a contract for the sale of land). The availability of punitive or exemplary damages is recognised under Irish law, but such awards are limited to tortious claims in exceptional cases to mark the court's disapproval of outrageous conduct on the part of a defendant. Much of that case law relates to the tortious conduct of employees of the State in performing their duties, sometimes also involving alleged breaches of constitutional rights, which disputes are unlikely to be arbitrated since given their exceptional nature, are unlikely to fall within any arbitration agreement, even if one exists. Save for very exceptional cases, therefore, it is unlikely that, as a matter of Irish law, a tribunal would be faced with a circumstance where it could legitimately award such damages.

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

Section 18(1) of the Arbitration Act 2010 states that the parties to an arbitration agreement may agree on the tribunal's powers regarding the award of interest. In the event the parties do not agree this, Section 18(2) permits the tribunal to award simple or compound interest from the dates agreed, at the rates that it considers as fair and reasonable. It can determine such interest to be payable on all or part of the award to the date of the award, or on all amounts claimed in the arbitration, but actually paid over before the award to the date of payment. It can also determine such interest to be payable on the sums due under the award from the date of the award to the date of payment. Accordingly, if there is no prior agreement on the tribunal's powers with regard to interest, the tribunal has substantial discretion regarding interest. In practice, the prevailing commercial rate would often be applied.

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

Section 21(1) of the Arbitration Act 2010 provides that, subject to an exception for consumers (Section 21(6) of the Arbitration Act 2010), the parties may make such provision with regard to the costs of the arbitration as they see fit. Therefore, they may agree even prior to any dispute how the costs of the arbitration will be dealt with, potentially removing all power to determine this from the tribunal.

If there is no agreement pursuant to Section 21(1), or if the consumer exception applies, the tribunal shall determine, by award, those costs as it sees fit. In making a determination as to costs, the tribunal is obliged to specify the grounds on which it acted, the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, as well as by whom and to whom they shall be paid. The general principle in respect of costs for domestic arbitrations is that costs follow the event and the loser pays, although for international arbitrations conducted in Ireland, parties often bear their own costs.

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

The nature of the damages can be dependent upon the governing law of the dispute, but, under Irish law, it will depend on what any damages relate to. For example, if the damages relate to work carried out, services rendered or goods supplied, such that the damages are effectively income or remuneration that would otherwise have been received, to that extent, the award may be taxable. It is recommended that specific tax advice be sought in all cases.

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

Irish law still retains the common law principles of maintenance and champerty, which generally preclude those with no legitimate interest in proceedings taking part in the proceedings or obtaining any benefit therefrom. However, contingency fees are, subject to limits and rules on methods of calculation, permissible under Irish law. Success fees and fee arrangements involving payment contingent on success are permitted. Professional litigation funders therefore do not operate in the Irish legal market, although 'after the event' insurance is permissible and service providers are beginning to market such services.

14 Investor State Arbitrations

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

Ireland signed the Washington (ICSID) Convention in 1966. Ireland ratified the Washington Convention in 1981.

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

Although Ireland is a party to the Energy Charter Treaty, it has only ever been a party to one bilateral investment treaty (with the Czech Republic).

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

No, it does not.

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

This question has not been addressed by the Irish courts.

15 General

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

In Ireland, some of the most common types of significant disputes referred to arbitration are those arising under construction contracts. M&A sale and purchase agreements and Irish public sector agreements also sometimes provide for arbitration as the dispute resolution mechanism and significant disputes can arise. Arbitration is also commonly used for certain types of dispute, e.g. holiday disputes, which are generally worth far less. However, Section 31 of the Arbitration Act 2010 provides that a consumer shall not be bound by an arbitration agreement where the arbitration agreement has not been individually negotiated and where the claim is for less than €5,000. In addition, enforcement of awards has become more straightforward, as there is no appeal and the grounds for recourse against an award are very limited.

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

Although Irish arbitration bodies (generally industry bodies) have not adopted any recent steps to address current issues such as time and costs, they are conscious of such issues. These bodies endeavour, wherever possible, to streamline arbitration procedures to permit expeditious arbitral proceedings and they are also active in seeking to make the arbitral process as cost-effective as possible.

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He is admitted as a solicitor in Ireland, Northern Ireland and in England and Wales, having trained and qualified with a leading City of London law firm. Gearóid has worked as a tutor in law at University College, Cork and he also tutors in litigation on the Law Society of Ireland professional practice courses. He has also worked as a Judicial Assistant at the Court of Appeal, London.

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Matheson

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