

THE COMPLEX
COMMERCIAL
LITIGATION LAW
REVIEW

Editor
Steven M Bierman

THE LAWREVIEWS

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IRELAND

*Julie Murphy-O'Connor, Claire McLoughlin and Karen Reynolds*¹

I OVERVIEW

Ireland is a common law jurisdiction in which the courts are bound by the decisions of superior courts in the court structure.² Almost 230,000 civil law cases were commenced in the Irish courts during 2017.³ Commercial disputes are predominantly dealt with in the Irish High Court. A party bringing a claim in respect of a commercial contract should be aware that a limitation period of six years applies from the date of breach (or 12 years if the contract is executed under seal).⁴

The Commercial Court (a division of the High Court) judicially manages commercial disputes with a monetary value in excess of €1 million. Since the introduction of the Commercial Court in 2004, Ireland has been a forum of choice for commercial disputes and is recognised internationally as an efficient platform for the determination of substantial commercial disputes with approximately 90 per cent of cases decided within one year.

Although the courts remain the ultimate forum for the resolution of commercial disputes, there is a growing trend towards the use of alternative dispute resolution (ADR), in particular mediation and arbitration. The recently enacted Mediation Act 2017 regulates and promotes the settlement of disputes by way of mediation.

II CONTRACT FORMATION

In Ireland, there are four prerequisites that must be satisfied before a contract comes into being: offer, acceptance, consideration and an intention to create legal relations. Other factors that the courts will look at before enforcing a contract include the terms of the contract, the capacity and authority of the parties and whether the contract is illegal or contrary to public policy.

Generally, commercial contracts are in writing; however, the Irish courts also recognise oral contracts. In certain circumstances, statute requires contracts to be performed in a specific format: in the form of a deed in writing or evidenced in writing. By way of example, the Land and Conveyancing Law Reform Act 2009 requires commercial contracts

1 Julie Murphy-O'Connor, Claire McLoughlin and Karen Reynolds are partners at Matheson.

2 The court structure in Ireland is made up of the lower courts (the District and Circuit courts) along with, in order of increasing supremacy, the High Court (which includes the Commercial Court), the Court of Appeal and the Supreme Court.

3 Courts Service Annual Report 2017, available online at <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/AC7C2772ABD0E1F880257FC0003D294C?opendocument>.

4 Section 11 of the Statute of Limitations 1957.

transferring an interest or right in property be executed as a deed. The introduction of the Electronic Commerce Act 2000 allows for contracts to be formed via email and also allows for e-signatures.

i Offer

An offer to contract, whether oral or written, must be unequivocal, unconditional, and express all terms and conditions. An offer expires on acceptance, the making of a counter-offer or rejection.

ii Acceptance or intention to create legal relations

As acceptance of an offer constitutes the creation of legal relations, parties to commercial contracts often include expressions such as 'subject to contract', 'agreement in principal', 'provisional agreement' or 'non-binding heads of terms' during negotiations to distance themselves from this. In commercial contracts, it is presumed that the parties intend to create legally binding contracts unless otherwise stated.

An issue can arise in trading relations known as 'battle of the forms', with each party trying to incorporate its own terms and conditions into the contract. Disputes can arise as to whether the terms and conditions have been accepted by both parties or whether they constitute no more than a counter-offer.

In resolving disputes relating to battle of the forms, two approaches can be taken:

- a* there is no agreement between the parties as the offer has not been accepted; and
- b* there is an agreement whereby the terms of the last form apply.

The Supreme Court⁵ has recently held that a party cannot be bound by terms and conditions that are not contained in a signed contractual document or by terms and conditions that have not been provided to a party.

iii Consideration

Where an offer is accepted and sufficient consideration has passed between the parties, a contract will be deemed to be in existence. Consideration can take any form once it has legal value and is not illegal, vague or impossible to perform. However, consideration in commercial contracts generally takes the form of payment.

iv Proof

The creation of legal relations can be delayed or denied by the input of conditions precedent and conditions subsequent.

Conditions precedent suspend the coming into existence of a contract until a specific event has occurred. Examples include the renewal of leases, the production of documents or obtaining the relevant consents from a regulatory authority.

Conditions subsequent arise after a contract has been executed, but the contract is not enforceable until a specific event has occurred.

⁵ *Noreside Construction Limited v. Irish Asphalt Limited* [2014] IESC 68.

v Privity of contract

The effect of the doctrine of privity of contract is that only the parties to a contract can enforce its terms, even where a third party stands to benefit from the contract. Specifically, this means that:

- a* a person is unable to enforce any rights under a contract to which such a person is not a party;
- b* a person who is not a party to a contract will not have any contractual liabilities imposed on them; and
- c* contractual remedies are only available to compensate parties to a contract and not third parties.

Certain exceptions to the rule have developed over time, to include agency, collateral contracts and assignments.

In 2008, the Law Reform Commission published a final report recommending reform in this area with the introduction of the Contract Law (Privity of Contract and Third Party Rights) Bill 2008. The Bill is similar to the United Kingdom's Contract (Rights of Third Parties) Act 1999 and provides for three instances where a third party should be entitled to enforce a contract:

- a* where the intention of the parties was to give the third party a right to enforce;
- b* where the contract expressly states that the third party has a right of enforcement; and
- c* where the contract permits a third party to rely on exclusions or limitations on liability.

However, 10 years on from the Law Reform Commissions' recommendation, the Bill has yet to be proposed by the government.

vi Modifications to contracts

In certain circumstances, modifications to contracts are necessary (e.g., to extend the contract's duration or to change terms such as payment, delivery or receipt of the product). Commercial contracts normally contain a variation clause that restricts amendments to the contract unless it is in writing and signed by all parties. The English Court of Appeal had found that parties were free to agree to vary the terms of a contract orally or by conduct and not solely by writing as per the variation clause included in the contract.⁶ However, most recently the UK Supreme Court declined to give effect to an oral modification to a contract and held that any amendments should be agreed in accordance with the terms of the terms of the contract.⁷ It remains to be seen whether this decision will be followed by the Irish courts.

III CONTRACT INTERPRETATION

i Governing law principles

Generally, parties will include a governing law clause in their contracts. If not, if both parties are resident in Ireland, the governing law of the contract is Ireland, but may be changed with the consent of both parties.

⁶ *Globe Motors, Inc v. TRW Lucas Varity Electric Steering Limited and Another* [2016] EWCA 396.

⁷ *Rock Advertising Limited v. MWB Business Exchange Centres Limited* [2018] UKSC 24.

However, disputes often arise where one party is not resident in Ireland. Where there is an express absence of a choice of law provision, the European Union regulation (EC) 593/2008 of June 2008 (Rome I) applies to contracts entered into on or after 17 December 2009.⁸ The governing law, according to Rome I, is the law of the country where the party who is to perform the contract has its habitual residence or its central administration. Rome I applies where one of the parties is Irish resident, regardless of where in the world the other party is resident.

ii Interpretation

Irish case law stresses that contract interpretation involves broad principles rather than strict rules. The test is an objective one and the classic approach is to construe the plain and ordinary meaning of the words contained in it. However, recent case law suggests that the courts will not only look at the plain and ordinary meaning of the words (textualism) but will also look at the factual matrix and the circumstances in which the contract was drafted (contextualism), particularly where contracts are ambiguous.⁹

The UK Supreme Court has recently confirmed that textualism and contextualism are not conflicting paradigms and should both be used as tools where appropriate in the circumstances of a particular contract to ascertain the objective meaning of the language used in the contract.¹⁰

Parol evidence may be admissible to explain the subject matter and construction or correct a mistake in commercial contracts. It will not, however, be used to explain or prove the validity of a contract.

The *contra proferentem* rule provides that where a contractual clause is ambiguous, it should be construed strictly against the party who provided the wording. The Supreme Court recently stressed that there must be an element of ambiguity in respect of the relevant clause for the rule to apply.¹¹

iii Implied terms

Where a contract lacks any of the essential requirements such as offer, acceptance, consideration and intention to create legal relations, the courts, having regard to the overall context of the agreement, may imply terms into the contract. Implied terms are provided for by case law and certain statutes, such as the Sale of Goods Acts 1893–1980.

In a recent Court of Appeal decision, the court held that in implying terms into a commercial contract, the terms must:

- a be necessary to give business efficacy;
- b be so obvious that it is implied; and
- c give effect to the parties intentions.¹²

8 Contracts that are entered into before 17 December 2009 are subject to the Contractual Obligations (Applicable Law) Act 1991. Under the Contractual Obligations Act 1991, the governing law of a contract is that of the country in which the principal place of the business of the party performing the contract is situated.

9 *Law Society v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31.

10 *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24.

11 *McMullan Brothers Ltd v. McDonagh* [2015] IESC 19.

12 *Tolan v. Connacht Gold Co-operative Society Ltd* [2016] IECA 131.

This followed on from an earlier decision where the court found that an agreement was so imprecise and lacking in substance it fell short of business efficacy.¹³

IV DISPUTE RESOLUTION

i Thresholds

When parties decide to litigate contractual disputes, they will typically commence proceedings in the High Court, which has jurisdiction to hear claims with a monetary value in excess of €75,000.¹⁴

The Commercial Court is a division of the High Court and is a specialised court that deals with commercial disputes with a monetary value in excess of €1 million. The Commercial Court is designed to provide an efficient and effective mechanism through close case management for dealing with commercial litigation cases.

ii Jurisdiction

Irish courts will generally uphold an exclusive jurisdiction clause, where the clause is valid and has been freely entered into, unless there are compelling circumstances to the contrary. Ireland is bound by Article 25 of the Brussels I Recast Regulation¹⁵ and by the Hague Choice of Forum Convention implemented by the Choice of Court (Hague Convention) Act 2015. Exclusive jurisdiction clauses are generally also enforced at common law.

iii Arbitration

Arbitration clauses have become commonplace in commercial contracts. Irish arbitrations continue to be governed by the Arbitration Act 2010 (the 2010 Act), which applies Option 1 of Article 7 of the UNCITRAL Model Law to the requirements of a valid arbitration agreement. The main legal requirement for a valid clause or agreement is that it is in writing, and this requirement is interpreted broadly. As a result, electronic communications can satisfy this requirement. Arbitration is extensively used for commercial contracts disputes, particularly in the fields of construction, insurance and holding contracts.

The Irish courts are very supportive of arbitration agreements. Under the 2010 Act, the possibility of appeal is limited and the courts have displayed a strong policy of staying court proceedings in favour of agreements to arbitrate.

iv Mediation

Equally significant in terms of ADR is the recent enactment of the Mediation Act 2017 (the 2017 Act). Of particular importance for practitioners is the introduction of an obligation to advise clients to consider mediation as an alternative to court proceedings. Should a client elect not to proceed to mediation before litigating, a solicitor must give a statutory declaration confirming that the client has been advised as to the option of mediation.

13 *Cadbury Ireland Ltd v Kerry Co-operative Creameries Limited* [1982] ILRM 77.

14 The Circuit Court has jurisdiction to hear claims with a monetary value of not more than €75,000. The District Court has jurisdiction to hear claims with a monetary value of not more than €15,000.

15 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Where parties elect to go to mediation, they will usually sign an agreement to mediate, which appoints the mediator and sets out the agreed framework for the mediation. Signing this agreement effectively stops the clock for bringing claims under the statute of limitations until 30 days after termination of the mediation.¹⁶

As the 2017 Act only came into force at the beginning 2018, it remains to be seen whether it will lead to an increase in mediation and a reduction in litigation.

V BREACH OF CONTRACT CLAIMS

i Breach of contract

A breach of a contract may occur if a party fails to perform as agreed, does something that it has agreed not to do, or if either party has prevented further performance of its obligations under the contract without legal excuse. The level of liability resulting from a breach of contract normally depends on the consequences of the breach.

ii Proof of breach

In order to permit recovery of damages from a defendant or equitable relief for breach of contract, three basic elements of the claim must be proven:

- a* the existence of a legally enforceable contract between the claimant and the defendant;
- b* a failure by the defendant to adhere to the requirements, terms and conditions of the contract; and
- c* the suffering of a loss by the plaintiff a result of the non-adherence.

The main element of a breach of contract cause of action is the non-fulfilment of one or more of the defendants' obligations under the legally enforceable contract. This may occur through an action or an omission.

Whether a particular act or omission constitutes a breach and the entitlements flowing therefrom will depend on the terms of the contract and the nature of the obligations arising thereunder. The materiality of the breach will depend on the individual contract, with some contracts applying an obligation to exercise due care and skill and others a standard of absolute or strict liability.

iii Specific performance

An order of specific performance is an equitable remedy to a breach of contract and compels a party to perform its obligations under the contract. As specific performance is based on the duty to perform a contract, a prior breach of contract is not required as a prerequisite to an order. Failure to obey an order for specific performance can result in the offending party being in contempt of court.

An order for specific performance is at the discretion of the court to grant it. Examples of where an order will not be granted include:

- a* where damages are an adequate remedy;
- b* contracts that require ongoing supervision; and
- c* open contracts.

16 Section 18 of the 2017 Act.

It is important that a plaintiff considers whether an order for specific performance is appropriate to a particular contract as compelling performance from an unwilling counterparty may increase the risk of defective performance. Additionally, where an order is not granted, damages may be awarded against the party seeking relief.

iv Right to terminate in the event of a breach

A breach of an innominate or intermediate term does not automatically entitle the innocent party to terminate the contract.

A right to terminate arises where there has been:

- a* a fundamental breach – a breach so serious that it terminates the rights and obligations of the innocent party;
- b* a repudiatory breach – a breach so serious it terminates the contract immediately; and
- c* a statutory breach – a breach provided for under statute.

In order to rely on a statutory breach, any preconditions set in statute must be complied with. An example of this is the Sale of Goods Act 1893, which imports terms relating to title, description and merchantability into commercial contracts.

The most common form of breach in commercial contracts arises where there has been a fundamental breach, a principle that was developed by the courts with a view to limiting the operation of exemption clauses, the rationale being that no party could exclude or restrict his or her liability for such a breach.

VI DEFENCES TO ENFORCEMENT

Parties to commercial contracts continuously try to find ways to circumvent contractual obligations. The legal arguments advanced are broad and vary from arguments that no contract was formed to doctrines of impossibility or impracticality. Common defences to enforcement include the following.

i Duress or undue influence

As agreements are based on consent, an agreement that is reached as a result of threats or undue influence (usually by the counterparty) is liable to be set aside. This argument has arisen in a number of cases involving the enforcement of guarantees. The principles in relation to what measures a bank should take in cases of undue influence previously outlined by the High Court¹⁷ are only relevant where actual undue influence has arisen. In a 2016 Court of Appeal decision,¹⁸ the court found that there was no evidence to support a claim that a wife had executed a guarantee under the undue influence of her husband, placing emphasis on the fact the wife was an experienced businesswoman who had regularly dealt with Ulster Bank. A key factor for the court to consider in determining whether undue influence has occurred is whether the guarantor in question had any material interest or involvement in the business or derived a commercial benefit therefrom.

17 *Ulster Bank v. Roche & Buttimer* [2012] IEHC 66.

18 *Ulster Bank (Ireland) Limited v. Walter DE Kretser and Gillian Fox* [2016] IECA 371.

ii Duty to ensure independent legal advice

As an ancillary argument to undue influence, parties to finance agreements frequently argue that lenders are under an obligation to ensure that they receive independent legal advice. The argument was recently considered by the Court of Appeal in a case that involved a father who guaranteed the debts of his son who subsequently defaulted and was subject to enforcement proceedings.¹⁹ The father argued that there was an arguable defence to the claim against him under the guarantee as the creditor had been on notice of the familial relationship between him and the debtor and the creditor was under a duty to ensure that he got independent legal advice. He had received advice from his son's solicitor in this case, and not a separate solicitor. The court found that in circumstances where no evidence was presented by the guarantor to support an argument that he had been subject to undue influence, there was no positive duty on the lender to ensure that he obtained independent legal advice or otherwise ensured that he had freely entered into the guarantee.

iii Public policy and illegality

Contracts that are contrary to public policy are unenforceable. The Supreme Court²⁰ has recently confirmed the modern criteria that the court will consider when deciding whether or not to enforce contracts tainted with a degree of illegality by virtue of statutory breaches.²¹ Members of the Quinn family and companies within the Quinn group had given guarantees in respect of loans by Irish Bank Resolution Corporation (IBRC) to other companies within the same group. The Quinn family argued that they should not be liable for the guarantees on the loans because of regulatory and statutory breaches on the part of IBRC. The court noted that in certain cases a finding of illegality may result in an unjust windfall for a party. The court considered whether or not the public policy aspect of an illegal activity should automatically render a contract unenforceable. In this instance, it was held that the contracts in question were enforceable notwithstanding issues of illegality affecting them.

iv Force majeure clause

Force majeure clauses exist to exclude liability where exceptional, unforeseen events beyond a party's control prevent the performance of its obligations. As there is no doctrine of *force majeure* in Irish law, it is at the contractual parties' discretion whether they wish to rely upon *force majeure* and can do so by inserting a provision in their contract.

v Frustration

The Supreme Court has held that frustration arises where a supervening event occurs without the default of either party, and for which the contract makes no provision.²² The event must

19 *ACC Loan Management v. Connolly* [2017] IECA 119.

20 *Quinn v. IBRC Ltd* [2015] IESC 29.

21 The statutory breaches in this instance were under Section 60 of the Companies Act 1963 (now section 82 of the Companies Act 2014) in relation to the prohibition of the giving of financial assistance by a company for the purpose of an acquisition of any shares of the company and the Market Abuse Regulations (Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse).

22 *Neville Sons Ltd v. Guardian Builders* [1994] IESC 4.

so significantly change the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated, so as to make holding them to its stipulations unjust.

Frustration takes place only after a contract has been entered into, and means that the contract ceases to have effect from a particular date onwards. As such, it discharges an otherwise valid contract.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Misrepresentation

Misrepresentation claims are common in Ireland, particularly in relation to commercial contracts in the financial services industry. Much of the recent case law on this topic arises in the context of mis-selling of financial products, mismanagement of investment funds and allegations of reckless lending.

In order to be actionable, a misrepresentation must be a false statement of fact, not of opinion or future intention or law. A misrepresentation may be fraudulent, negligent or innocent. The plaintiff will not succeed unless he or she can show that the misrepresentation was made with the object and had the result of inducing him or her to enter the contract.

A fraudulent misrepresentation is established where it is found:

- a that a party has made a representation knowing that it is not true or with reckless indifference as to whether it is true or not; and
- b a counterparty relies on such representation in deciding to enter into a contract.

Notwithstanding carefully drafted contracts, it is not generally possible to exclude liability for fraudulent misrepresentation.

ii Covenant of good faith and fair dealing

Under Irish law, there is no implied covenant of good faith and fair dealing in the context of commercial contracts. A 2017 Court of Appeal decision²³ confirmed this in a case concerning a dispute regarding the acquisition and sale of shares in a company and the contractual interpretation of a shareholders' agreement. The court held that the shareholders' agreement was not the type of contract to which a general duty of good faith applies in accordance with established Irish authority. The court did, however, accept that there could be certain types of commercial agreement to which such a duty applies, such as partnership agreements and insurance contracts.

In order to circumvent the common law position, parties to commercial contracts can insert clauses that expressly provide for a duty of good faith and such contracts are enforceable by virtue of the parties having deliberately contracted to include the duty.

iii Promissory Estoppel

Promissory estoppel operates to prevent a party to a contract from relying on his or her strict legal rights where a representation has been made that they will not be relied upon and

23 *Flynn & Anor v. Breccia & Anor* [2017] IECA 74.

the counterparty relies upon the representation to his or her detriment. The High Court²⁴ recently reaffirmed that the doctrine of promissory estoppel has no application to pre-contract negotiations in advance of the creation of any legal rights.

iv Duty to disclose

A duty to disclose requires the parties to a contract to make full disclosure of all material facts during contractual negotiations. The Court of Appeal,²⁵ in recent months, confirmed that as a matter of ordinary contract law, there is no general duty to disclose. However, the court held that where a statement had been made containing an implied representation that no surcharge interest would be charged, the defendant was estopped from later charging surcharge interest on the basis of that implied representation.

VIII REMEDIES

i Damages

The most common remedy awarded in breach of contract litigation is damages (monetary compensation). A contractual claim based on breach of a contractual term is aimed at putting the plaintiff in the position he or she would have occupied if the term had been properly adhered to. Punitive damages are generally regarded as inappropriate in contractual claims.

In terms of measuring damages, a court will consider the following:

- a* expectation interest – putting the plaintiff in the same situation as if the contract had been performed; and
- b* reliance interest – where the plaintiff may have changed his or her position in reliance on the defendant's performance of the contract. Reliance damages are recoverable in cases where it is not possible to estimate the profit the plaintiff could have made had the contract been performed.

In deciding whether to award damages, the court will have regard to the remoteness of damages (i.e., whether the damages arise naturally as a result of the breach of contract) and whether they ought to have been reasonably foreseeable by the parties to the contract in contemplation of a breach of the contract. Only net losses are recoverable and there is a duty to mitigate loss. Reasonable costs incurred in mitigation are also recoverable.

The Supreme Court²⁶ recently reaffirmed the general position that damages for breach of contract do not include damages for distress, upset and inconvenience subject to a limited number of exceptions where peace of mind is the object of the contract. However, where both a breach of contract and a tortious cause of action arise, punitive damages can be awarded in respect of the tortious element of the claim.

ii Limitation of liability

Exclusion clauses can act to limit liability and can operate through a financial cap on liability or exclude certain heads of liability completely. In considering an exemption clause contained

24 *Allied Irish Banks plc v. Kennedy & Anor* [2018] IEHC 381 (note: an appeal has been lodged in respect of this decision).

25 *Sheehan v. Breccia & Ors* [2018] IECA 286.

26 *Murray v. Budds & Ors* [2017] IESC 4.

in terms and conditions available to a party ‘on request’, the Supreme Court²⁷ has held that the clause in question had not been successfully incorporated into the contract and therefore could not be relied upon.

iii Equitable remedies

Equitable remedies can be granted in circumstances where a breach of contract occurs and damages are not an appropriate remedy. The most common forms of relief in relation to commercial contracts are specific performance, rectification and injunctive relief.

An order for specific performance compels the party in breach to fulfil the terms of the contract. Because specific performance is a discretionary remedy, the court will bear in mind the broader justice of the case before granting it.

Rectification involves rectifying any error made in a written contract that does not reflect the intentions of what the parties agreed to. The party seeking rectification must establish a ‘common continuing intention’ in relation to a particular provision of the contract agreed between the parties up to the point of execution of the formal contract, which was not subsequently reflected in the contract. A contract can also be rectified on the basis of unilateral mistake where there has been sharp practice on the part of one of the parties giving rise to that mistake.²⁸

Restitution (as an accompanying remedy to rescission – see below), in the sense of the restoration to the innocent party of benefits conferred under the contract, may be used where a contract has been performed in whole or in part by the innocent party, but has been rescinded *ab initio*. Equally, the innocent party must also return what has been transferred under the contract that has been rescinded.

Rescission is a contractual and equitable remedy aimed at undoing the effects of the transaction and can be coupled with restitutionary remedies (see above).

Both mandatory and prohibitory injunctive relief can also be sought in respect of breaches of contract.

IX CONCLUSIONS

The law of contract in the context of commercial contracts in this jurisdiction has been relatively well-settled in most areas, with little divergence between the law of contract in the United Kingdom and in Ireland. Ireland benefits from the Brussels Recast Regulation and Rome Regulation for cross-border contractual disputes in the European Union more generally. This provides a degree of certainty to contracting parties and lends itself to creating a hospitable environment for companies in Ireland, particularly those with trade links across the European Union.

Given the ongoing Brexit negotiations, companies are advised to take steps to ‘future-proof’ any new contracts during the course of drafting, particularly in choice of law or jurisdictional clauses.

Separately, there are likely to be developments in the context of ‘smart’ contracts over the coming months. In March 2018, the Department of Finance published a discussion paper on

27 *James Elliott Construction Limited v. Irish Asphalt Limited* [2014] IESC 74.

28 *Slattery v. Friends First* [2015] IECA 149.

Virtual Currencies and Blockchain Technology,²⁹ which recommended the establishment of an intra-departmental working group to monitor developments in this area. It is anticipated that the working group will draw on the expertise of multiple state agencies with a view to addressing the risks and opportunities presented by virtual currencies and distributed ledger technology.

In light of the increasing digitalisation of the economy, it is inevitable that the law of contract will need to move apace with technological advancements and to give legal recognition to concepts that are already being used in practice.

Trading in, and profiting from, litigation currently falls foul of Ireland's maintenance and champerty laws³⁰ on the basis that it is contrary to public policy, a view upheld by the Supreme Court. There have been three significant Supreme Court decisions in the area of litigation funding in recent times.³¹ However, the Supreme Court has said legislation needs to be urgently enacted to address mounting difficulties with securing access to justice in the civil courts, particularly in the context of complex commercial litigation. The Chief Justice said that if a point is reached where it is clear the legislature is making 'no real effort' to address the problems, the courts may have to fashion a solution, 'undesirable and all as unregulated change might be'.³² More recently, *Moorview Development Limited & Ors v. First Active Plc & ors*,³³ a decision of the Supreme Court, delivered in late July of this year, clarified that the provision of funding by a third party funder with a legitimate interest in the litigation is lawful. However, third-party funders with a legitimate interest may find themselves subject to a costs order, even if not a party to the proceedings, where the party to the litigation that they are funding is not a good mark for costs.

29 Department of Finance, 'Discussion Paper: Virtual Currencies and Blockchain Technology', available online at <https://www.finance.gov.ie/wp-content/uploads/2018/03/Virtual-Currencies-and-Blockchain-Technology-March-2018.pdf>.

30 Maintenance and Embracery Act 1634.

31 In *Persona Digital Telephony Ltd v. The Minister for Public Enterprise* [2017] IESC 27, the Supreme Court upheld the decision of the High Court and Court of Appeal, finding that a litigation funding agreement between the plaintiff and a professional third-party funder from the United Kingdom is unlawful by reason of the Maintenance and Embracery Act 1634. In a landmark judgment delivered in July 2018, the Supreme Court ruled that the assignment of a claim to an unconnected third party with the possibility or profit is trading in claims and such an assignment is unenforceable in Irish law. (*SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44.)

32 *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44.

33 *Moorview Development Limited & Ors v. First Active Plc & ors* [2018] IESC 33.

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