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DISPUTE RESOLUTION

Litigation and enforcement in Ireland: overview

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MAIN DISPUTE RESOLUTION METHODS

1. What are the main dispute resolution methods used in your jurisdiction to resolve large commercial disputes?

Commercial disputes are predominantly dealt with through litigation in the Irish High Court, which has jurisdiction to hear all claims with a monetary value in excess of EUR75,000 (EUR60,000 for actions for personal injuries). The Commercial Court (a division of the High Court) deals with certain types of commercial disputes with a monetary value in excess of EUR1 million (*see Question 3*).

While 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) as an alternative or an addition to the court system. Arbitration is recognised as an alternative procedure and has been modernised by the Arbitration Act 2010. The High Court can adjourn proceedings to allow parties to engage in ADR.

In May 2011, the European Communities (Mediation) Regulations (SI 209 of 2011) (Mediation Regulations) were enacted, which brought into effect in national law Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Mediation Directive). These Regulations deal with the use of mediation in cross-border disputes and apply to all Irish courts (*see Question 32*). A new Mediation Bill was published on 13 February 2017 and reached the Committee Stage on 19 July 2017.

COURT LITIGATION

Limitation periods

2. What limitation periods apply to bringing a claim and what triggers a limitation period?

Limitation periods

The following limitation periods apply:

- Contract law: six years from the date of breach.
- Claims for liquidated sums: six years from the date the sum became due.
- Tort claims: six years from the date of accrual of the cause of action.
- Personal injuries under negligence, nuisance or breach of duty: two years from the date of the cause of action accruing or the date the plaintiff first had knowledge, if later.
- Personal injuries under assault and battery: six years from the date of the cause of action accruing or the date the plaintiff first had knowledge, if later.
- Land recovery: 12 years from accrual of the right of action.
- Maritime and airline cases: two years from the date of accrual of the cause of action.
- Defamation: one year from the date of accrual of the cause of action or two years from that date if the court so directs.
- Judicial review: the claim must be brought promptly and in any event within three months of the date of the cause of action (the court can extend this period if there is a good reason).

In certain circumstances the limitation periods are paused or disapplied. For example, in cases involving minors or persons under a disability time will be deemed to run when they reach the age of majority or cease to be under a disability.

The period during which mediation takes place in a cross-border dispute to which the Mediation Directive applies is excluded from the calculation of the limitation periods.

Reform proposals

The Law Reform Commission published a report in December 2011 on limitation of actions in respect of all actions, excluding property claims. The report recommends a uniform, basic, limitation period for "common law actions" (contract, negligence, nuisance and breach of duty). The suggested period is two years, to run from the date of knowledge of the plaintiff, that is, the date that the plaintiff knew or ought to have known of the cause of action. "Knowledge" includes both actual and constructive knowledge. The report also recommends the introduction of a uniform ultimate limitation period of 15 years to run from the date of the act or omission giving rise to the cause of action. It recommends that there should be statutory discretion to extend or not apply the ultimate limitation period. The report was published in December 2011. While the proposed reforms are not binding and have not been implemented to date, the 8 March 2017 Bill includes a reduction of the limitation period in contract claims to two. The Bill has now passed the first stage of the legislative process.

Court structure

3. What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?

The High Court has unlimited monetary jurisdiction and hears civil cases exceeding EUR75,000 (EUR60,000 for actions for

personal injuries) (*see Question 1*). Cases are usually heard by one judge and are heard without a jury, with the exception of defamation and civil assault claims. The Courts and Civil Law (Miscellaneous Provisions) Act 2013, increased the monetary jurisdiction of the Circuit Court to EUR75,000 from the previous limit of about EUR38,000. The rationale behind the change was to reduce case volumes in the Superior Courts.

The Commercial division of the High Court has jurisdiction to handle claims over EUR1 million where the dispute falls into one or more of the prescribed categories of commercial proceedings. However, there is no automatic right for any case to be admitted to the Commercial List and the court retains the ultimate discretion to admit cases, including the admission of commercial disputes that do not meet the threshold.

Other divisions of the High Court include:

- Non-Jury List: claims for breach of contract, professional negligence actions and debt collection.
- Chancery List: injunctions, company law matters, specific performance and rescission actions.
- Admiralty List.
- Common Law List.
- Judicial Review List.
- Competition List.

The answers to the following questions mainly relate to procedures that apply in the High Court.

Rights of audience

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

Rights of audience/requirements

In Ireland the legal profession is split into two main branches: solicitors and barristers. Although barristers tend to be instructed by solicitors to make submissions before the court, all solicitors, who are qualified members of the Law Society of Ireland, have a right of audience before the Irish courts. Lay individuals also have a right of audience in respect of any proceedings issued or defended by them in a personal capacity.

The Legal Services Regulation Act 2015, which was signed into law at the end of 2015, streamlines movement between the two branches of the profession. However, a commencement order is required before this measure comes into force. The Legal Services Regulation Bill initially proposed the ultimate unification of the two branches of the legal profession but this was dropped from the Act.

Foreign lawyers

A foreign lawyer must satisfy the admission requirements of the Law Society of Ireland or the Honourable Society of Kings Inns, which are the professional bodies for solicitors and barristers, respectively, before they can practice in Ireland. Foreign lawyers do not have an automatic right of audience in Ireland. There are different rules for qualification of foreign lawyers in Ireland depending on the jurisdiction in which they are qualified. For example, lawyers from the EU and Commonwealth countries (such as England and Wales, Canada, New Zealand and Australia) are subject to less stringent requirements than lawyers from other jurisdictions.

FEES AND FUNDING

5. What legal fee structures can be used? Are fees fixed by law?

There is no fee scale structure for litigation before the Irish courts. Solicitors' fees are usually charged on a fixed hourly basis. Barristers' fees are usually in the form of fixed fee (brief fee arrangement). "No-win, no-fee" structures are common in personal injury cases. However, fee arrangements that involve a success fee based on a proportion of the damages awarded are not allowed.

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

Litigation is usually funded by the individual parties, but the unsuccessful party is often ordered to pay the majority of the successful party's costs (*see Question 22*).

The Irish Supreme Court has recently reaffirmed an earlier High Court decision that third-party funding (TPF) by an entity with no independent interest in the underlying proceedings is not permissible under Irish law (*Persona Digitial Telephone Ltd and Sigma Wireless Networks Ltd v The Minister for Public Enterprise & Ors [2017] IESC 27*). The Court held by a four-to-one majority that the existing laws in Ireland relating to maintenance **[##(that is, assisting a party to litigation by a person without an interest or motive in the litigation)** and champerty **[##(a type of maintenance which involves an agreement to divide the compensation in return for support by a third party in the litigation)]**remain in force. This is because TPF remains contrary to the common law principles of maintenance and champerty.

Insurance

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

COURT PROCEEDINGS

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

In line with the constitutional requirement that justice must be administered in public, court proceedings are held in public, except for certain limited circumstances set out in legislation. These exceptional cases are held *in camera* (in private) and only those persons directly involved in the case can be present for the hearing. Due to their sensitive nature, family law matters are usually held *in camera*.

Under the Courts and Civil Law (Miscellaneous Provisions) Act 2013, press representatives can attend and report on *in camera* proceedings in certain circumstances. The objective of this measure is to facilitate limited reporting of *in camera* proceedings in cases of particular public interest, while preserving the anonymity of the parties involved.

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

While under no obligation to do so, solicitors usually, as a protective measure in relation to future costs applications, send a warning letter to the defendant before initiating legal action.

If there is more than one potential defendant, an "O'Byrne letter" (named after the case in which it was first recognised) is usually sent, which calls on the potential defendants to admit liability and states that if no liability is admitted, each will be sued and the letter will be relied on in resisting an application for costs by any party found not liable.

In personal injury actions, if the plaintiff does not notify the alleged wrongdoer(s) in writing of the wrong alleged to have been committed within two months of the cause of action accruing, the court may take this failure into account when adjudicating on costs (*see Question 22*).

9. What are the main stages of typical court proceedings?

Starting proceedings

Proceedings are commenced in the High Court by issuing and serving an originating summons. The most commonly issued summons is a plenary summons. Where the action is for the recovery of a specific sum, often a simple debt, a summary summons is issued.

Notice to the defendant and defence

The defendant must enter an appearance within eight days of the service of the summons, either confirming his intention to defend the claim or contesting the court's jurisdiction, and also identifying the defendant's solicitor, if one is retained.

In plenary proceedings, a statement of claim must be delivered to the defendant within 21 days of the appearance being filed. The defendant then has 28 days to deliver a defence and/or counterclaim. A reply to the defence and/or counterclaim can be delivered by the plaintiff within 14 days thereafter.

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

Subsequent stages

The exchange of documents process, known as discovery, begins when pleadings have closed (*see Question 16*). In the Commercial Court, witness statements, expert reports and legal submissions will also be exchanged between the parties following discovery, in line with directions from the judge. A timetable for the exchange of these documents will generally be set down during case management, which is ongoing during Commercial Court proceedings.

Once discovery has been completed, the claim is scheduled for trial.

Role of the courts in progressing the case

The Commercial Court is the only division of the High Court where cases are routinely managed by a judge. Once a case is admitted to the Commercial List, court directions are issued setting out a strict timetable for the exchange of pleadings, discovery and other pre-trial steps. The solicitor for the party making the application to the Commercial List must give an undertaking that the Court's directions will be complied with in full. Cases are regularly listed before the Commercial Court to monitor the progress of the case. There is also a growing emphasis on case management in the other lists of the High Court through applications for directions to the relevant High Court judge or the President of the High Court. Two new statutory instruments introduced on 1 October 2016 have provided for new pre-trial procedures, including in relation to case-management conferences. However, due to a lack of resources, the new case management rules have not yet fully come into force.

Penalties for non-compliance

The Irish Superior Court Rules stipulate specific time limits regarding the exchange of pleadings and all other steps in the litigation process. Where these time limits are not complied with, the affected party can seek relief from the court through an application to dismiss a claim or a defence, as relevant (*see Question 10*).

INTERIM REMEDIES

10. What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?

A case can be dismissed before trial if there is a default in pleadings and/or a failure to meet procedural requirements.

A defendant can make an application to dismiss a claim or a pleading provided it can show that either:

- There is no reasonable cause of action.
- The action is frivolous or vexatious.

An application for judgment in default of appearance or defence can be made if the defendant fails to deliver the appearance within eight days of service of the claim, or the defence within 28 days of service of the statement of claim. It is also possible to make an application to strike out an action in circumstances where the plaintiff does not take reasonable steps to prosecute the claim once issued. This can arise in circumstances where the plaintiff fails to deliver a statement of claim, but an application to strike out for want of prosecution can be taken at any stage in the proceedings where the plaintiff has failed to progress the case for any substantive period of time, without reasonable excuse.

In addition, an application to strike out a defence or dismiss a claim can be taken against a party who has failed to meet discovery obligations.

Applications to have a pleading or claim struck out are made by notice of motion, supported by a grounding affidavit. The other party can file a replying affidavit, following which the matter is determined at a hearing based on the affidavits.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

The defendant can make an application for security for costs to the High Court. In respect of obtaining an order for security of costs, there are different rules for foreign individuals and for Irish corporations. It is virtually impossible to obtain an order against

an individual based in Ireland, the EU or the territory covered by Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation).

The granting of the order is at the court's discretion, and the court grants such an order only in the following circumstances:

- If the plaintiff is resident outside the jurisdiction, and not within the EU or the European Free Trade Area (EFTA).
- If the defendant has a prima facie defence to the claim and verifies this on affidavit.
- If there are no other circumstances that obviate the need for security for costs.

The defendant applies for security for costs by way of request to the plaintiff. If the plaintiff fails to agree to provide security within 48 hours of receiving the request, the defendant can make an application for security for costs to the court by notice of motion and grounding affidavit.

Security for costs can also be sought against an Irish corporate plaintiff. It is generally easier to obtain an order against a corporate plaintiff than an individual plaintiff as a company has the benefit of limited liability. The defendant must establish a prima facie defence and demonstrate that there is reason to believe that the plaintiff would be unable to pay a successful defendant's costs. The onus then shifts to the plaintiff to establish that the order should not be granted. If an order is granted, the proceedings are stayed until the plaintiff provides the security. If the plaintiff does not provide the required security, its claim is dismissed.

12. What are the rules concerning interim injunctions granted before a full trial?

Availability and grounds

Temporary injunctions are either interim (usually granted on an ex parte basis) or interlocutory (granted on notice). They can be granted on a discretionary basis by the court, provided that the following conditions are met:

- There is a serious issue to be tried.
- Damages are not an adequate remedy.
- The balance of convenience lies in favour of granting an injunction.

An undertaking as to damages and full and frank disclosure must be made in the application for a temporary injunction.

Prior notice/same-day

Interim injunctions are usually applied for without notice to the defendant, on an ex parte basis. However, if time permits, the application should be made on notice to the other side. An ex parte interim injunction is usually granted on the same day but is generally only granted in cases of urgency for a short period of time, typically until the date on which the interlocutory injunction application is to be heard.

Interlocutory injunctions must be applied for with notice to the other side and are only granted after a court hearing has taken place with all parties present. Interlocutory injunctions, while temporary, last until the court makes some further order or until trial.

Mandatory injunctions

Mandatory injunctions are available and the court takes the same factors into account as for prohibitory injunctions (*see above, Availability and grounds*). However, as a mandatory injunction imposes a positive obligation to carry out some act, the court is generally more hesitant to grant it.

Right to vary or discharge order and appeals

An appeal against the grant or refusal of an interlocutory order can be made to the Court of Appeal. This appeal is heard on an expedited basis. Notice of the expedited appeal must be lodged with the court not later than ten days from the date of the order being appealed.

Notice of the application for leave to appeal must be served on all parties directly affected by the application.

13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

Availability and grounds

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

Prior notice/same-day

The application for an order of attachment must be made to the court on notice to the party against whom it is sought. However, in limited circumstances where the matter is urgent, the order can be granted on an ex parte basis. The order can be obtained on the same day where the matter is sufficiently urgent.

Main proceedings

It is possible to obtain an order even if the main proceedings are not being heard in the same jurisdiction.

Preferential right or lien

The plaintiff does not obtain any preferential interest in the subject of the order.

Damages as a result

The plaintiff is responsible for any loss resulting from the freezing of the defendant's assets if the order was not honestly obtained with full and frank disclosure.

Security

The plaintiff must provide an undertaking as to damages, thereby protecting the defendant in the event that it is held that the interlocutory injunction should not have been granted.

14. Are any other interim remedies commonly available and obtained?

Although rare, an order can be granted that allows the plaintiff to access documentation belonging to the defendant and to remove identified items. This is known as an Anton Piller order and is to prevent the defendant from destroying evidence pending the trial of the action.

FINAL REMEDIES

15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

The most common remedy awarded is damages, although the court has discretion to award equitable remedies including specific performance, rescission, declarations, rectification and injunctions.

Damages can be compensatory or punitive, and include:

- General damages: compensation for loss with no quantifiable value, such as pain and suffering.
- Special damages: compensation for precise financial loss, such as damage to property.
- Punitive (exemplary) damages: awarded to punish the behaviour of a defendant (rarely awarded).
- Nominal damages: awarded where the plaintiff has been wronged but has not suffered financial loss.

EVIDENCE

Disclosure

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

The disclosure of documents between the parties in Irish litigation is known as discovery and usually takes place once the pleadings have closed. The rules governing this process are set out in Order 31 of the Irish Rules of the Superior Courts. Each party issues a written request for voluntary discovery from the other party of specific categories of documents now or previously in its possession, power or procurement, relevant to the dispute. This request must comply with the following requirements:

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

If voluntary discovery is agreed, the agreement between the parties has the same effect as a court order. In the absence of agreement, the court can order discovery on applications by the parties.

Once discovery has been agreed or ordered, the documents are disclosed in a two-stage process:

- Parties disclose on affidavit the existence of documents relevant to the proceedings.
- The documents are then made available for inspection, unless exempt from production for reasons of legal privilege (*see Question 17, Privileged documents*). In practice, copies of the documents are usually provided to the other party rather than inspection taking place.

If the parties fail to make discovery as agreed or ordered, applications can be brought to have the claim dismissed or defence struck out and the parties could be liable for an attachment order (*see Question 13*).

Due to the increasing numbers of complex, commercial disputes being litigated in the Irish courts and discoveries involving large volumes of electronically-stored information, there has been a significant growth in electronic discovery (e-discovery). Although e-discovery is subject to the same general principles and rules as traditional discovery, additional practical considerations have emerged regarding proportionality and reasonable efforts in making discovery. These principles have emanated from recent case law involving high-profile commercial disputes.

Privileged documents

17. Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

Privileged documents

There are various types of privilege recognised by Irish law. The most commonly claimed is legal professional privilege, of which there are two forms:

- **Legal advice privilege.** This protects confidential communications between lawyer and client that are created for the sole or dominant purpose of giving or seeking legal advice.
- **Litigation privilege.** This is broader, as it protects confidential communications between lawyer and client made for the dominant purpose of use in connection with existing or contemplated litigation. Litigation privilege covers not only communications between lawyer and client, but also between lawyer or client and a third party, for example, expert witnesses or internal communications within a client organisation.

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

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

Other non-disclosure situations

The court can exercise its discretion in considering claims that discoverable documents should not be produced due to confidentiality or commercial sensitivity. The court looks closely at the precise scope and nature of any confidentiality or commercial sensitivity claim advanced and determines whether the disputed material should be disclosed by balancing the parties' interests against the public interest.

The balance tends to be in favour of retaining confidentiality in cases involving the rights of non-parties, whereas production of the document is generally ordered in cases where only the litigants' interests are concerned. Documentation received by way of discovery is subject to an implied undertaking that the recipient will not use it for any purpose other than the proceedings. In addition, protective measures can be put in place, for example, limiting the parties who have access to the documents to the parties' lawyers or expert witnesses.

"Without prejudice" communications, which are communications between parties to a dispute (or their representatives) and which

are part of a genuine attempt to settle the dispute, are considered privileged and cannot be disclosed or put in evidence without both parties' consent. However, "without prejudice" communications can be disclosed in certain circumstances, for example where:

- There is a dispute as to the existence of a settlement.
- There is a claim that the settlement should be set aside on grounds of fraud, misrepresentation, undue influence or mistake.
- The communication acts as a cloak for illegality.

Examination of witnesses

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Oral evidence

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

The Commercial Court Rules provide that a plaintiff and the defendant must serve on the parties to the proceedings written, signed and dated statements of witnesses of fact and expert witnesses, setting out the essential elements of their evidence or expert opinion. This evidence and expert opinion is often treated as that person's evidence-in-chief at the hearing. Furthermore, new rules introduced by Statutory Instrument 254/2016 give judges in the other lists of the High Court power to regulate how expert evidence can be adduced and the duties of expert witnesses.

These rules also introduce to Ireland the concept of "hot tubbing". Hot tubbing is a debate between experts, where two or more parties intend to call experts who may contradict each other in their reports or statements. Under the new rules, the Court can require the experts to meet privately to discuss their proposed evidence (without the presence of any party or any legal representative).

Right to cross-examine

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

Third party experts

19. What are the rules in relation to third party experts?

Appointment procedure

Experts are appointed by the parties, rather than the court.

Role of experts

The role of the expert is to assist the court by providing an honest and unbiased opinion on technical aspects of a dispute. The Commercial Court encourages parties' experts to consult with each other to reach agreement on any matters that can be narrowed with a view to agreeing the evidence which will be relied on at trial.

Right of reply

An expert can reply to the other party's expert report when giving oral evidence and can be cross-examined on their own evidence and/or their reply.

Fees

Each party is responsible for their own expert's fees. However, experts' fees can be included in a claim for costs from the unsuccessful party (*see Question 22*).

APPEALS

20. What are the rules concerning appeals of first instance judgments in large commercial disputes?

Which courts

Previously, an appeal of a High Court decision was made to the Supreme Court. However, on 28 October 2014, a new Court of Appeal was established, assuming most of the appellate jurisdiction of the Supreme Court. The Supreme Court remains an appellate court, however, the circumstances in which an appeal can be made to the Supreme Court are much more limited. An appeal can be made to the Supreme Court from a decision of the Court of Appeal where the Supreme Court is satisfied that the matter is of general public importance or the appeal is in the interests of justice. An appeal can only be made to the Supreme Court directly from a decision of the High Court where there are exceptional circumstances warranting the appeal, the matter is of general public importance or the appeal is in the interests of justice.

The Supreme Court has final appellate jurisdiction unless the case before the Supreme Court involves an issue of interpretation of EU law, in which case it must be referred to the European Court of Justice.

Grounds for appeal

A decision can be appealed on a point of law or fact. However, it would be unusual for the superior courts to alter any findings of fact made by the High Court. Hearings of appeals from the High Court are conducted by re-examining the High Court documentary evidence and the admission of new evidence is rarely permitted. Witnesses are not called to the superior courts, except in exceptional circumstances.

Time limit

Strict time limits apply to appeals to the Court of Appeal and the Supreme Court. Any party wishing to appeal a High Court decision to the Court of Appeal must lodge a notice of appeal within 28 days from the date the order is perfected. The date of perfection is the date of preparation of the order or judgment by the High Court Registrar. A party wishing to appeal a decision of the High Court or the Court of Appeal to the Supreme Court must seek leave to appeal no later than 28 days from the perfection of the order. Leave to appeal is a process of obtaining the consent of the Supreme Court to the appeal and is done by way of written submissions. There is typically no oral hearing in respect of the leave application.

An expedited process is available in urgent cases, whereby a party seeking priority can make an application to have the appeal fast-tracked in the Court of Appeal. More stringent time limits apply to this process. The application is made on notice to the other side and there is no requirement for written submissions. The Court of Appeal hears the application based on the parties' oral submissions.

CLASS ACTIONS

21. Are there any mechanisms available for collective redress or class actions?

There is no specific Irish legislative provision dealing with class actions or multi-party litigation. The closest procedures are representative actions and test cases.

There are limitations with representative actions. For example, damages cannot be awarded and there are specific rules requiring the members of the class to have substantially the same interest. The preferred option is the test case, which arises where there are numerous separate claims arising from the same circumstances. The first case is the test case as it effectively becomes the benchmark by which the remaining cases are resolved. Although technically the subsequent plaintiffs and defendants, not being parties to the original litigation, are not bound by the result, the test case has an effect by virtue of the doctrine of precedent. Therefore, the benefits of the original ruling may be extended to cases involving factual situations identical to those of the test case. Subsequent litigation is often settled on the basis of the test case outcome.

The Law Reform Commission published a report in 2005 on multi-party litigation, which recommended a formal opt-in procedural structure be put in place to deal with multi-party litigation. To date, the recommendation has not been implemented.

On 11 June 2013, the European Commission published a Recommendation (*OJ 2013 L 201/60*) calling on all member states to adopt collective redress systems for both injunctive and compensatory relief. Although member states are encouraged to implement the principles set out in the Recommendation, the Recommendation is not binding.

The Recommendation deals with "mass harm situations", where two or more persons (natural or legal) claim to have suffered harm from the same illegal activity carried out by another person (natural or legal) in breach of EU rights. The Recommendation, which will likely form the basis for future implementing legislation, addresses a number of issues in collective redress including standing to bring a representative action, funding, cross-border disputes, ADR, damages, and legal costs and lawyer fees.

COSTS

22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

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

- Party-party costs, which relate directly to the litigation.
- Solicitor-client costs, which are the costs owed by the client to the solicitor under contract.

Order 99 of the Rules of the Superior Courts contains a comprehensive code dealing with the award, assessment and taxation of costs. Generally, the costs of every proceeding in the Superior Courts are awarded at the court's discretion and therefore, no party can recover costs without a costs order. However, costs generally follow the event (that is, the unsuccessful party is ordered to pay the successful party's costs). Costs are usually awarded on a party-party rather than solicitor-client basis, which means that costs reasonably incurred by the successful party in prosecuting or defending an action are recovered, but other legal fees incurred are not. The court can make costs orders to take account of a party's conduct, including:

- Open settlement offers made.
- The parts of the case in which the otherwise successful party has not succeeded.

Where a payment into court has been made by the defendant (known as a lodgement), which was not taken up by the plaintiff and the plaintiff fails to obtain an award in excess of the sum lodged, the plaintiff must bear its own costs from the date of lodgement and the defendant's costs from that date, unless otherwise ordered.

The court can penalise a party who receives an award that does not meet the court's jurisdictional threshold (that is, EUR75,000 in the High Court or EUR60,000 depending on the type of case and EUR15,000 in the Circuit Court) by awarding the typical costs of a lower court action, if it believes the application should have been brought in that court. In addition, the court can take into account a refusal to participate in ADR (arbitration excepted) by a party when making an order as to costs.

Cost sanctions can also be awarded in Commercial Court proceedings where either party fails to comply with any directions issued by the court (*see Question 9, Role of the courts in progressing the case*).

23. Is interest awarded on costs? If yes, how is it calculated?

Interest on costs is payable from the date on which costs are agreed or have been taxed. The applicable rate was recently lowered to 2% per annum, effective from 1 January 2017.

ENFORCEMENT OF A LOCAL JUDGMENT

24. What are the procedures to enforce a local judgment in the local courts?

Once a judgment is obtained it should be served on the defendant. The judgment can also be registered in the High Court Register of Judgments which is available for public inspection. The threat of publicity can serve to induce payment.

Where a judgment debtor fails to discharge its debts, a number of enforcement methods can be employed. Any judgment, irrespective of court jurisdiction, can be enforced in the District Court. The following enforcement methods are available:

- If the debtor has property, a judgment mortgage can be registered against the property.
- An execution order allows the seizure of goods by publicly-appointed sheriffs.
- An instalment order requires the debtor to make payments at regular intervals determined by the court.
- If the debtor fails to pay sums according to the terms of an instalment order, a creditor can apply for a committal order, which involves arrest and imprisonment.
- Where it appears that the debtor has no assets but is owed a debt by a third party, a creditor can seek an attachment order in respect of that debt.
- A receiver may be appointed to a sell a debtor's property and pay the sale proceeds to the creditor.

- Bankruptcy proceedings may be commenced against an individual debtor.
- A petition for the winding-up of a debtor company may be presented to the High Court.

CROSS-BORDER LITIGATION

25. Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

The courts generally recognise an express choice of governing law in civil and commercial contracts between parties in EU member states, under Regulation (EC) 593/2008 on the law applicable to contractual obligations. In the case of non-EU member states, the courts will recognise a choice of law under common law rules, subject to the following qualifications:

- The court can apply overriding mandatory provisions of Irish law (for example, statutory employment law rights under the Irish unfair dismissals legislation).
- The application of foreign legal provisions may be refused if the application is manifestly incompatible with Irish public policy.

26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The courts respect a choice of jurisdiction in a commercial contract in accordance with the provisions of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation), which replaced Regulation (EC) 44/2001 and was transposed into Irish law under The European Union (Civil and Commercial Judgments) Regulations 2015, S.I. No. 6 of 2015. The Recast Brussels Regulation applies to judgments in proceedings commenced on or after 10 January 2015. The key provisions of the Recast Brussels Regulation are as follows:

- If there is a jurisdiction clause, priority is given to the court specified in the jurisdiction or choice of law clause and the "first in time" rule regarding exclusive jurisdiction clauses has been removed.
- If there is no jurisdiction clause in place, the appropriate jurisdiction depends on the nature of the dispute.

The Irish courts can accept jurisdiction to determine a dispute where the choice of jurisdiction is not exclusive or where both parties agree to the Irish courts accepting jurisdiction.

Where the defendant is not domiciled in a contracting state to the Recast Brussels Regulation, common law rules apply and Irish courts can claim jurisdiction where Ireland is the most appropriate forum for the claim.

27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

If the foreign party is EU-based, Regulation (EC) 1393/2007 on the service in member states of judicial and extrajudicial documents in civil or commercial matters (Service of Documents Regulation) applies.

Proceedings can be sent directly by post, provided that the terms of the Service of Documents Regulation are observed. Otherwise, proceedings can be sent to the Master of the High Court, with a request for service by the designated transmitting agency in the country of origin. If any particular method of service is requested, the Master of the High Court should be satisfied that it is compatible with Irish law and procedure. If he is not so satisfied he can direct personal service. If the documents being served are not in English, a translation must be served.

In relation to non-EU member states, Ireland is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965.

28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

Evidence can be taken voluntarily from a witness in one jurisdiction for use in proceedings in another jurisdiction. For a witness to be compelled to give evidence, the applicable rules depend on whether the other jurisdiction is within or outside the EU.

Within the EU

To compel evidence from a witness in an EU member state, Regulation (EC) 1206/2001 on co-operation between the courts of the member states in the taking of evidence in civil or commercial matters allows the court of one member state to request the court of another member state to take evidence for use in proceedings in the court of the former member state.

If a party to litigation in another member state seeks evidence from a witness resident in Ireland, that request is made to the Circuit Court (the designated requested court) or the Courts Service (the designated Central Body). The Circuit and District Court Operations Directorate accepts forms from member states in English, and only by post, fax or e-mail (*European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 (S.I No. 126/2013)*).

If the order is granted, a subpoena to examine a witness (*subpoena ad testificandum*) is issued.

Outside the EU

Ireland is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. The taking of evidence in Ireland for use by a tribunal or court in a non-EU member state is regulated by the Foreign Tribunals Evidence Act 1856 (1856 Act). Under the 1856 Act, an Irish court can, on the application of a foreign tribunal, direct that a witness in Ireland, over which it has jurisdiction, attend to give evidence for use in the foreign proceedings. Proceedings must be ongoing before a request for evidence can be made (*1856 Act*).

A letter of request must be issued from the foreign court to the Irish court requesting assistance by directing the Irish witness to attend before it to give evidence. Alternatively, a request can be forwarded by an Embassy of the state where proceedings are

pending to the Irish Department of Foreign Affairs, which arranges for a High Court application to be made by the Chief State Solicitor. The application is typically made on an ex parte basis and is then served on the witness. The examination is overseen by an examiner appointed by the Irish court and is subject to Irish evidential rules.

Enforcement of a foreign judgment

29. What are the procedures to enforce a foreign judgment in the local courts?

The enforcement of judgments in civil and commercial matters between EU member states (including Denmark) is regulated by Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation). The enforcement of judgments between EU member states and European Free Trade Association (EFTA) countries (Iceland, Norway, Switzerland and Liechtenstein) is regulated by the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (New Lugano Convention). The Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012 was enacted on 10 March 2012, which gives full effect to the updated 2007 Lugano Convention.

The procedure involves an application to the Master of the High Court, made ex parte on affidavit together with:

- The original judgment or a certified copy.
- A standard form certificate provided by court officials in the member state in which judgment was given, containing details of the judgment.

The Master of the High Court declares the judgment enforceable if the requirements of the Recast Brussels Regulation are met. After that, the judgment has the same force and effect as a judgment of the High Court.

To enforce a judgment from a non-EU/EFTA country it is necessary to rely on Irish common law rules of enforcement, including the following:

- The judgment must have been obtained from a court of competent jurisdiction, which had the requisite jurisdiction in respect of the particular claim.
- The judgment must be for a definite sum and be final and conclusive.
- The judgment must not have been obtained by fraud or granted in breach of the principles of natural justice.
- Enforcement of the judgment must not be contrary to Irish public policy.

The application is brought by summary summons for a liquidated amount, that is, the value of the award under the foreign judgment.

ALTERNATIVE DISPUTE RESOLUTION

30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

Arbitration, mediation and conciliation are popular mechanisms for resolving disputes outside the court procedure.

Arbitration

Arbitration mirrors traditional litigation and is extensively used for commercial contract disputes, particularly construction, insurance and holiday contracts. The mechanism for appointing an arbitrator is usually set out in the contract's arbitration clause. An arbitrator's award is final and binding.

The Arbitration Act 2010 standardised and modernised the law applicable to arbitration by applying the UNCITRAL Model Law to both domestic and international arbitrations.

Mediation

Mediation is a facilitative, non-adversarial, non-binding process where an independent third party mediator acts as a "go-between" to facilitate settlement between the parties. Mediation can be agreed by the parties by including a term in the contract in which they agree to refer any dispute in the first instance to mediation. Alternatively, when a dispute arises, the parties can agree to submit to mediation. Mediation is commonly used in employment disputes. A new Mediation Bill was published on 13 February 2017 and at the time of writing has passed the Second Committee Stage (*see Question 1*).

Conciliation

Conciliation is similar to mediation but distinguishable by the fact that the independent third party acts as an evaluator rather than a facilitator. A conciliator is more likely to suggest terms of settlement or offer an opinion on the merits of the case. In some proceedings, the parties may invite the conciliator to issue a written recommendation in this regard. Conciliation is often used in Irish domestic construction disputes.

Expert determination

This is a private and confidential method, most commonly used in cases where the only issue that divides the two disputing parties is purely technical, for example, the valuation of a property, share valuation or rent review figures. Expert determination arises frequently in construction disputes but can be used in other commercial litigation. The process involves an independent third party who investigates the disputed issue and issues a final and binding determination.

31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

The Commercial Court has discretion to adjourn a case of its own volition or on the application of the parties for up to 28 days to enable the parties to consider using mediation, conciliation and arbitration. The court can extend the adjournment if the parties decide to refer the proceedings to one of these regimes.

Under Order 56A of the Rules of the Superior Courts, similar rules apply to all High Court proceedings, which can now be adjourned to allow the parties to engage in mediation or conciliation. Under these rules, costs sanctions may be imposed for not availing of mediation or conciliation, unless there is a good reason for the refusal.

32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

The parties are free to decide the manner in which evidence is given, as there is no particular required procedure.

Arbitrations are normally conducted in like form to judicial proceedings with the exchange of pleadings and evidence in the traditional adversarial fashion, subject to the normal rules on privilege (*see Question 17*). The parties can agree to follow either:

- The procedural rules of a particular arbitral institution (such as the London Court of International Arbitration or the International Chamber of Commerce).
- Their own bespoke procedure.

The High Court may assist with taking evidence where, for example, the attendance of Irish-based witnesses can be compelled through a subpoena or evidence from witnesses overseas.

Arbitrations are typically conducted in private, and arbitral proceedings are confidential.

Mediations and conciliations generally involve the production of position statements, which set out the parties' versions of the dispute to the mediator or conciliator. Separate and private communications can take place with individual parties in an attempt to facilitate settlement, unlike in the case of arbitration where communications are held in the presence of all parties.

Evidence given and documents furnished in mediation or conciliation proceedings are normally subject to without prejudice privilege, resulting in a duty to maintain confidentiality. However, this depends on the precise terms agreed by the parties before engaging in the process. A well-drafted agreement is vital to ensure confidentiality.

The issue of privilege and confidentiality in mediation or conciliation has yet to come before the Irish courts. However, the European Communities (Mediation) Regulations 2011 set out arrangements for the confidentiality of mediation procedures used in any cross-border dispute to which the Mediation Directive applies. Legislation to implement the Mediation Directive is currently progressing through the Irish Parliament (*see Question 1*).

33. How are costs dealt with in ADR?

Costs in ADR can be agreed between the parties at the outset or in the case of arbitration through adoption of the relevant institutional rates. In the absence of an agreement, costs generally follow the event. Therefore, the unsuccessful party is directed to pay the costs of the successful party, including the costs of the arbitrator, mediator or conciliator and any experts. An agreement regarding costs can also form part of the ultimate agreement reached.

34. What are the main bodies that offer ADR services in your jurisdiction?

There is no statutory body offering ADR services in Ireland. Major commercial disputes are often resolved using lawyer mediators who are members or employees of the:

- Centre for Effective Dispute Resolution (CEDR) (*www.cedr.com*), Ireland accredited.
- Irish Commercial Mediators Association (ICMA) (*www.icma.ie*).
- Mediators Institute of Ireland (MII) (*www.themii.ie*).

There are also six government-nominated ADR bodies in Ireland, operating in specific sectors:

- The Chartered Institute of Arbitrators, Irish Branch; Arbitration Scheme for tour operators (*ciarb@arbitration.ie*).
- The Advertising Standards Authority of Ireland (ASAI) (*info@asai.ie*).
- The Financial Services Ombudsman Bureau (*enquiries@financialombudsman.ie*).
- Office of the Pensions' Ombudsman (*info@pensionsombudsman.ie*).
- The Direct Selling Association of Ireland (*info@dsai.ie*).
- The Competition and Consumer Protection Commission (CCPC) (*www.ccpc.ie*), which has been designated as the competent authority to resolve consumer disputes under the Alternative Disputes Resolution Directive (Directive 2013/11/EU on alternative dispute resolution for consumer disputes).

PROPOSALS FOR REFORM

35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

There are a number of key instruments/initiatives due to be brought into effect. Some of the more notable developments in this regard are as follows:

- The Mediation Bill 2017 has been published and has passed the Second Committee Stage of the legislative process. The Bill is intended to provide a clear framework for mediation in Ireland and promote generally the use of ADR in civil and commercial matters. Under the Bill, solicitors will be required to advise clients, prior to initiating proceedings, to consider mediation and sign a certificate accordingly, confirming that they have been so advised.
- The Civil Liability (Amendment) Bill 2017 proposes to provide for damages in catastrophic injuries cases to be awarded in the form of periodic payments. This Bill has been introduced in the Upper House of Ireland's legislature, Seanad Éireann, and has reached the Committee Stage of the legislative process.
- The Courts (Consolidation and Reform) Bill proposes to replace the existing 240 Courts Acts with a single instrument to regulate court proceedings. The Bill is currently in its initial stages and publication of the first draft is awaited.