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FOREWORD

Karyl Nairn QC & Patrick Heneghan | Skadden, Arps, Slate, Meagher & Flom (UK) LLP

We are delighted to have been invited once again by Thomson Reuters to edit this fifth edition of Arbitration World, published by its widely recognised legal arm, Sweet & Maxwell (and forming part of their new International Series).

Following the success of the previous publication, we are hoping that this revised and extended fifth edition will serve as an invaluable reference guide to the key arbitration jurisdictions, rules and institutions across the globe.

In the three years since the last edition was published, the arbitral landscape has continued to evolve, with important developments in both the law and practice of arbitration. For example, new arbitration centres have opened in New York, Seoul, Moscow and Mumbai; established institutions such as the LCIA, AAA, HKIAC, ICDR, SIAC, VIAC, UNCITRAL and WIPO have published revised arbitration rules; new arbitration legislation has been enacted in Hong Kong, Australia, Belgium and Austria; while other jurisdictions, such as India, have sought through case law to improve their “arbitration-friendly” credentials.

The global status and popularity of arbitration has also grown since the last edition of Arbitration World. From 2012 to 2014, ICSID saw the highest annual number of filings in its history, notwithstanding the criticisms in certain quarters about the legitimacy of the existing system of investment treaty arbitration. Arbitration is also extending its global reach – arbitral institutions are reporting that the parties to arbitration are more diversified than ever; 156 state parties have now adopted the New York Convention.

To reflect this trend of expansion, we have continued to broaden the scope of Arbitration World. This latest edition has 55 chapters, including 38 jurisdictions and 16 arbitration institutions. We feature 11 new chapters, comprising Belgium, Cayman Islands, Colombia, Egypt, Korea, Malta, Peru, Scotland and the arbitral institutions of CIETAC, SIAC and the SCC.

Arbitration World aims to provide a simple and practical guide to arbitration law and practice for parties and practitioners, enabling its readers to assess the comparative benefits and challenges of arbitrating in various jurisdictions and/or under the auspices of different institutions.

We should like to take this opportunity to express our gratitude to all the authors of Arbitration World, old and new. The popularity of this publication is testament to the quality and expertise of the leading law firms, practitioners and institutions who have committed their time to the project.

We should also like to thank Emily Kyriacou and her team at Thomson Reuters, including Katie Burrington, Nicola Pender and Chris Myers, for their superb management and coordination efforts. We also extend our gratitude to Michele O’Sullivan for commissioning the project all those years ago.

Finally, we wish to pay tribute to our hard-working colleagues at Skadden, Gulnaar Zafar, Ben Jacobs, Sabeen Sheikh, Bing Yan, Anna Grunseit, Judy Fu, Nicholas Lawn, Kam Nijar, Laura Feldman, David Edwards, Ekaterina Churanova, Calvin Chan, Ross Rymkiewicz, Catherine Kunz, Melis Acuner, Emma Farrow, Devika Khopkar, Sara
Nadeau-Seguin, Nicholas Adams, Ahmed Abdel-Hakam, Simon Mercouris, Anna Heimbichner, Joseph Landon-Ray, Simon Walsh, Alex van der Zwaan, Tom Southwell, Christopher Lillywhite and Eleanor Hughes, who have assisted with the review and editing of the chapters featured in this latest edition; Arbitration World has been a true Skadden team effort and we are most grateful for all the support received.

Patrick Heneghan and Karyl Nairn QC, July 2015
# GLOSSARY

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<td>World Intellectual Property Organisation (Arbitration and Mediation Centre)</td>
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IRELAND

Nicola Dunleavy & Gearóid Carey | Matheson

1. EXECUTIVE SUMMARY

1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration-related proceedings in your jurisdiction?

Advantages

• **Limited judicial intervention:** the Irish courts have historically been very reluctant to intervene in the arbitral process or to set aside arbitral awards. The circumstances in which the court may now intervene under the Arbitration Act 2010 are even more limited in accordance with the UNCITRAL Model Law on International Arbitration 1985 (with amendments as adopted in 2006) (the Model Law), which has the force of law in Ireland.

• **Finality of court decisions:** if the court is invoked, there is very limited scope for appeal to the Court of Appeal (and from there to the Supreme Court). In many areas, the initial High Court decision is final.

• **Consistency in judicial approach:** a specifically designated judge will deal with any applications made to the High Court in connection with an arbitration.

• **Speed of judicial process:** any applications in respect of arbitration matters are to be dealt with speedily – within a matter of weeks. There have already been a number of prompt judgments regarding arbitrations under the Arbitration Act 2010 (the average time for a decision from the court is 12 weeks).

• **Availability of interim measures:** under the relevant legislation the tribunal has the power to grant interim measures and, for the purpose of giving effect to such powers, the High Court shall have the same powers as it has in relation to any matter before it.

• **Enforcement:** Ireland is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). An arbitration award in Ireland can be readily enforced in jurisdictions which are party to the New York Convention.

• **Location:** Ireland is well placed as a venue for international commercial arbitration and is easily accessible from Europe and North America.

• **Neutrality:** as a neutral country with a common law tradition, Ireland is particularly suited to international arbitration. The government, courts and legal profession are very supportive of the arbitral process.

Disadvantages

• **Certain matters are excluded:** arbitration is specifically excluded as a dispute resolution mechanism for certain disputes, such as employment disputes, and a tribunal may not order specific performance as a remedy in respect of a contract for the sale of land.

• **Limited to parties:** the tribunal has no jurisdiction over parties who are not subject to the arbitration agreement. Thus, without consent of the party/parties involved, a tribunal may not compel a third party/parties to be joined to arbitration proceedings or to make discovery, nor can related claims be joined into one arbitration.
IRELAND

- **Consumers:** consumers are not bound by arbitration agreements where they have not been individually negotiated and where the dispute involves a claim for less than EUR 5,000.

- **Disclosure/discovery:** Irish arbitration procedure typically involves discovery limited to specific categories of documentation relevant to matters in dispute. This is certainly more extensive than might prevail in civil law jurisdictions, but not as extensive as, say, the US.

1.2 **How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number**

Ireland is highly supportive of arbitration, so should be viewed as a 5.

2. **GENERAL OVERVIEW AND NEW DEVELOPMENTS**

2.1 **How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in your jurisdiction?**

Arbitration has traditionally been used as the dispute resolution mechanism for a variety of commercial and public sector disputes. A common type of dispute referred to arbitration are those arising under construction contracts. M&A sale and purchase agreements and certain Irish public sector agreements also provide for arbitration as the dispute resolution mechanism. Holiday and insurance disputes are also frequently subject to arbitration agreements, but section 31 of the Arbitration Act 2010 has reduced the impact of such choice of arbitration by providing that a consumer is not bound by an arbitration agreement where it has not been individually negotiated and where the claim is for less than EUR 5,000.

The Arbitration Act 2010 has brought important changes to Irish arbitration law. Prior to the enactment of the Arbitration Act 2010, different regimes existed under Irish law for domestic and international arbitrations. However, since the coming into force of that legislation on 8 June 2010, this distinction has been removed and a uniform regime, premised on the Model Law, applies to all arbitrations conducted in Ireland.

One particularly novel development is the provision, at section 32 of the Arbitration Act 2010, of the power for the High Court or Circuit Court, if it thinks it appropriate and the parties consent, to adjourn court proceedings to enable the parties to consider whether any or all of the matters in dispute might be resolved through arbitration.

2.2 **Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?**

The Arbitration Act 2010 applies the same legislative regime to domestic and international arbitrations. The legislation essentially adopts the Model Law for that purpose, although with some minor variations, and applies default provisions to certain aspects of the arbitral process in the event that the arbitration agreement is silent. For example, the default number of arbitrators is one, the default appointing authority is the High Court and the default position is that a written, reasoned award shall be delivered. One significant development under the new legislation is that the parties may now, prior to any dispute having arisen, make such provision as to the costs of the arbitration as they see fit.
2.3 Principal laws and institutions

2.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?

The Arbitration Act 2010 came into force on 8 June 2010 and repealed all previously existing legislation dealing with arbitration in Ireland. With some minor modifications, the Arbitration Act 2010 gives the Model Law the force of law in Ireland and provides that it shall apply to all arbitrations conducted in Ireland, whether domestic or international in nature. It also applies the New York Convention, the Convention on the Execution of Foreign Arbitral Awards 1927 and the Protocol on Arbitration Clauses (1923) as the law of the state, as well as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention), although the Arbitration Act 2010 does impose specific restrictions on proceedings brought in respect of the ICSID Convention.

The Law Society of Ireland and the Bar Council of Ireland both support arbitration, and the heads of those professional bodies are often designated as appointing authorities. The Chartered Institute of Arbitrators also nominates arbitrators and promotes arbitration in Ireland. Arbitration Ireland, the name of the Irish Arbitration Association, also seeks to promote both arbitration in Ireland and Ireland as a venue for international arbitrations. There are also more industry specific bodies, such as Engineers Ireland (which has its own Arbitration Procedure) and the Royal Institute of Architects of Ireland, which also promote arbitration.

2.3.2 Which are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

Under the Arbitration Act 2010, no provision is made for the use of institutions or agencies to assist in the administration or oversight of international and domestic arbitrations. The arbitration process is designed to be freestanding, unless the parties themselves choose to apply institutional rules or make provision for the involvement of a particular body in the process, whether for appointments or otherwise.

2.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?

Under section 9 of the Arbitration Act 2010, the Irish High Court is the relevant court for determining various matters provided for under the Model Law, namely Articles 6, 9, 17H, 17I, 17J, 27, 35 and 36. The Act further provides, in section 11, that there is no appeal from a decision of the High Court in respect of an application to stay proceedings under Article 8 to set aside an award under Article 34 or to recognise and enforce an award. In many other respects, the Model Law itself precludes the appellate jurisdiction of the High Court.

3. ARBITRATION IN YOUR JURISDICTION – KEY FEATURES

3.1 The appointment of an arbitral tribunal

3.1.1 Are there any restrictions on the parties’ freedom to choose arbitrators?

There are no restrictions on the parties’ ability to choose arbitrators, whether by reference to their qualifications, number of arbitrators or other characteristics. An arbitrator does not need to have any local legal qualification or be a member of the local Bar.
3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?
Under Article 11(2) of the Model Law, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of that Article. Under paragraph 11(4), where, under an appointment procedure agreed by the parties, one party fails to act as required, where the parties or two arbitrators are unable to reach an agreement expected of them under such procedure or where a third party fails to perform any function entrusted to it under such procedure, unless another mechanism has been agreed, the High Court shall take the necessary measure.

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?
If the parties make no provision for a default appointment mechanism in the event that they cannot agree upon an arbitrator, the High Court is designated as the default appointing authority. Where the parties have chosen three arbitrators, the appointment process is governed by Article 11(3) of the Model Law.

3.1.4 Are there requirements (including disclosure) for “impartiality” and/or “independence”, and do such requirements differ as between domestic and international arbitrations?
Under Article 12 of the Model Law, a person approached in connection with possible appointment as an arbitrator is obliged to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, which term has not yet been the subject of a determination by the Irish Courts. However, there is jurisprudence to the effect that questions of bias in decision-making should be determined on an objective standard and any consideration of such a test would likely be on that basis.

Furthermore, this obligation is a continuing one, in that any circumstance that may call into question an arbitrator’s impartiality or independence during the currency of the appointment must be disclosed to the parties. There is no difference between domestic and international arbitrations in this regard.

3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?
Under Article 13(1) of the Model Law, the parties are free to agree on a procedure for challenging an arbitrator. If no such agreement is reached, a party who intends to challenge an arbitrator is required to send a written statement of the reasons for the challenge to the arbitral tribunal under Article 13(2) of the Model Law, within 15 days of becoming aware of the constitution of the tribunal or after becoming aware of any circumstances that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If such challenge is not successful, the challenging party may request the High Court to determine the challenge under Article 13(3) of the Model Law within 30 days of learning of the unsuccessful determination.

In addition, under Article 14 of the Model Law, if the arbitrator becomes de jure or de facto unable to perform his or her functions or otherwise fails to act without undue delay, the mandate terminates if he or she withdraws from office or if the parties agree on termination. However, if a controversy remains regarding any of those grounds, a party may request the High Court to decide on the termination of the mandate.

In addition, Article 15 of the Model Law deals with the appointment of substitute arbitrators. It provides that where an arbitrator’s mandate terminates under Article 13 or 14, an arbitrator withdraws, or his or her appointment is
terminated for any reason, a substitute arbitrator shall be appointed according to the rules applicable to the appointment of the arbitrator being replaced.

3.1.6 What role do national courts have in any such challenges?
As identified above, if a tribunal declines a challenge to an arbitrator under Article 13(2) of the Model Law, the High Court may be requested to determine that challenge within 30 days of notice of the refusal. Similarly, under Article 14, if a controversy remains over whether an arbitrator has become de jure or de facto unable to perform his or her functions, or otherwise fails to act without undue delay, the High Court may be asked to determine the question.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?
Section 22 of the Arbitration Act 2010 provides that an arbitrator, and any employee, agent or advisor of an arbitrator, shall not be liable for anything done or omitted in the discharge or purported discharge of his or her functions. There is no bad faith exception to this immunity from suit.

3.2 Confidentiality of arbitration proceedings
3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?
The Arbitration Act 2010 contains no express provision to the effect that arbitration proceedings are confidential or that the parties are subject to an implied duty of confidentiality. However, arbitrations conducted in Ireland customarily remain confidential (a position supported by English authority, which is persuasive in Ireland). In practice, the arbitration agreement itself (or at least the arbitrator’s appointment agreement) is likely to set out an express provision with regard to confidentiality. However, it should be borne in mind that any applications to the court in support of an arbitration are necessarily heard in open court and not in camera. Notwithstanding that, the authors are aware that applications have been made that certain hearings, for example, in respect of Mareva (or asset freezing) injunctions, be held in camera, although the prospects of success for such applications are slim without exceptional circumstances.

3.2.2 To what matters does any duty of confidentiality extend (for example, does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?
The confidentiality duty set out in an agreement would usually extend to the existence of the arbitration, pleadings, documents produced, the hearing and the award. Discovery of documents is generally understood to be subject to an implied undertaking not to use the documents discovered for any purpose save for the case in respect of which they were discovered.

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?
Although a party is not expressly prohibited from seeking to rely on information disclosed in an arbitration in other proceedings, it could, depending on the scope of and parties to those other proceedings, be contrary to an implied duty of confidentiality. As detailed above, discovery of documents is generally understood to be subject to an implied undertaking not to use those documents for any other purpose save that for which they were discovered.
3.2.4 When is confidentiality not available or lost?

Confidentiality is lost where a party discloses or releases information to a third party or to the public which would ordinarily be subject to confidentiality. In order for confidentiality to be maintained, all parties need to keep the proceedings and documentation produced in respect thereof confidential. As stated above, confidentiality is generally lost once any applications are made to court.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

Under Article 8 of the Model Law, if an action is brought before a court on a matter which is the subject of an arbitration agreement, the court is obliged to refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. A party who seeks such a stay must do so not later than when submitting its first statement on the substance of the dispute.

There is also provision in section 32 of the Arbitration Act 2010 for the High Court or Circuit Court to adjourn court proceedings to enable the parties to consider whether any or all of the matters in dispute should be dealt with by way of arbitration. The court may do so only if it thinks it would be appropriate and if the parties to the proceedings consent.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

If the arbitration has been commenced, it should be for the tribunal to determine whether or not it has jurisdiction over the dispute, including any objections to the existence or validity of an arbitration agreement. Under Article 16(3) of the Model Law, the tribunal may rule on an objection to its jurisdiction as a preliminary issue or in an award on the merits. If the tribunal makes its ruling as a preliminary issue, a party may request the High Court within 30 days of notice of the ruling to decide the matter. If the ruling is part of an award on the merits, a party may request the High Court to set aside the award under one of the bases set out in Article 34 of the Model Law, which includes issues as to the tribunal’s jurisdiction. See also Section 3.6.3 below.

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

The Irish courts are generally very supportive of arbitration and, if there is a valid arbitration agreement, they will expect the parties to arbitrate their dispute (assuming that the subject matter is properly arbitrable). If there is a valid arbitration agreement and an application is made under Article 8 of the Model Law by a party to stay any Irish court proceedings in breach of that agreement within the specified time limits, that party should succeed in the application. Whilst there is no Irish jurisprudence on point, it seems, based on EU authority, that the possibility of seeking an anti-suit injunction only exists in respect of proceedings in a non-EU jurisdiction.

In a recent decision (13 May 2015), the CJEU ruled in Case C-536/13 in respect of a preliminary ruling sought by Lithuania that EU member states are not obliged to recognise anti-suit injunctions issued by the courts of other member states (although they are obliged to recognise those issued by arbitral tribunals).
3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

As detailed above, the Irish courts are very supportive of arbitration and, if there is a valid arbitration agreement, they will expect the parties to arbitrate their dispute (assuming the subject matter is properly arbitrable). The Irish courts are therefore reluctant to interfere in the arbitral process. If court assistance in the arbitral process is required and applications under the Arbitration Act 2010 have to be made, such applications are generally dealt with speedily (although this can still slow down the arbitral process to a degree).

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

No. The initial requirements are that (i) the subject matter be properly arbitrable (subject matter which is not arbitrable is detailed in the Arbitration Act 2010) and (ii) the arbitration agreement between the parties is valid, and not null and void, inoperative or incapable of being performed. Thereafter, the proceedings should be recognisable and enforceable once they are conducted in accordance with the procedure agreed and/or determined by the tribunal, subject to the overriding obligation of the tribunal to treat the parties fairly. There is no requirement that the parties’ representatives, legal or otherwise, have a power of attorney.

3.4 Procedural flexibility and control

3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

Under Article 19 of the Model Law, the parties are free to determine their own procedure. They may, for example, decide to use institutional rules to govern the arbitral proceedings. If they do not agree on a procedure to be adopted, under Article 19(2) of the Model Law, the arbitral tribunal may conduct the arbitration as it sees fit, subject to the provisions of the Model Law. This power includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

Under Article 20(1) of the Model Law, the place or seat of the arbitration can be chosen by the parties. If they fail to agree upon a seat, then it shall be determined by the tribunal having regard to the circumstances of the case, including the convenience of the parties.

The arbitral hearings do not have to be heard at the seat. As set out in Article 20(2) of the Model Law, unless otherwise agreed by the parties, the tribunal may meet at any place it considers appropriate for consultation among its members, hearing witnesses, experts or the parties, or for inspecting goods, other property or documents.

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

Unless the parties agree upon a procedure under Article 19(2) of the Model Law, the tribunal may conduct the arbitration as it considers appropriate. However, this is subject to Article 18 of the Model Law, which directs that the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case. This
accords with the basic principles of fairness and constitutional justice under which the Irish legal system operates in any event. Accordingly, in complying with Article 18, the tribunal should ensure that it acts in accordance with fundamental principles of justice, such as *audi alteram partem* (both sides shall be heard equally) and *nemo iudex in causa sua* (impartiality). Not only are these enshrined under the Irish Constitution, but, through the European Convention on Human Rights Act 2003, Ireland has also incorporated the European Convention on Human Rights and Fundamental Freedoms (Article 6 of which provides that the right to a fair trial requires that there be procedural fairness) into domestic law.

3.4.4 Evidence

3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?

It is for the parties to agree upon a procedure, including the tendering of pleadings and evidence. If the parties do not agree on an approach to procedure, or if they do not adopt procedural rules, then Article 19(2) of the Model Law provides that the tribunal may conduct the arbitration as it sees fit.

Article 23 of the Model Law envisages written statements of claim and defence. The statement of claim should state the facts supporting the claimant’s case, and the defence should set out the respondent’s position in respect of those particulars. Article 23 of the Model Law also provides that the parties may submit with their pleadings all documents they consider to be relevant.

Article 24 of the Model Law further states that, unless the parties agree, the tribunal can decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. Article 25 provides that, in the absence of cause being shown, a failure by the claimant to communicate its statement of claim will result in the tribunal terminating the proceedings. Failure by a respondent to communicate a defence will result in the tribunal continuing the proceedings without the statement of defence. Finally, in the event that any party fails to appear at the hearing or produce documentary evidence, the tribunal may continue the proceedings and make an award on the evidence before it.

Typically, although not always, the standard arbitral procedure will reflect litigation with an exchange of pleadings, then discovery with witness statements and/or oral testimony. In this regard, section 14 of the Arbitration Act 2010 provides that the tribunal may direct that a party or witness be examined on oath and the tribunal is empowered to administer the oath.

There is no express statement as to the rights and privileges of witnesses and limitations on production of documentary evidence in arbitrations under the Arbitration Act 2010. However, it would be expected that the same principles would apply as in litigation. That being so, it would be expected that documents falling within recognised categories of privilege would be exempt from production. In this regard, legal professional privilege is the most common form of privilege to apply to disputes being arbitrated, which privilege in turn is broken into legal advice privilege and litigation (or, perhaps more correctly in the context, arbitration) privilege. The latter form of privilege relates to documents prepared in contemplation of or in relation to legal proceedings, whilst the former involves documents prepared for the purpose of giving or obtaining legal advice. Correspondence in relation to good faith negotiations to resolve some or all of the matters in dispute may be expressed to be, or might properly be characterised as being subject to, “without prejudice privilege”. Such documents are also exempt from production.
The International Bar Association Rules on the Taking of Evidence in International Arbitration (revised in 2010) can be, and are, adopted by tribunals in Ireland. Even if the arbitration agreement makes no provision for them, the tribunal can suggest their use to the parties, or the parties can do so to the tribunal.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?

Although Chapter V of the Model Law sets out the basic principles in respect of the conduct of arbitration proceedings, it has no specific provisions in respect of disclosure/discovery. Unless the parties have agreed on an approach to be adopted, it is for the tribunal to determine. If discovery is to be made, whether premised upon the parties’ agreement or the tribunal’s direction, such discovery is typically conducted in the same way as discovery in litigation. Categories of documentation are sought and, if discovery is refused by the other party, the tribunal decides whether the category sought should be produced. Article 25 of the Model Law provides that, inter alia, unless otherwise agreed by the parties, should a party default and fail to produce documentary evidence, the tribunal may continue the proceedings and make its award on the evidence before it.

3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?

If there is no agreement on the procedure to be adopted, under Article 24 of the Model Law, it is for the tribunal to decide whether to hold oral hearings or to conduct the proceedings on the basis of documents and other materials. If oral evidence is to be given, the process broadly replicates the process for litigation. The witness called gives evidence in chief orally, or his or her witness statement may be permitted to stand as evidence in chief. The witness is then subject to cross-examination on the evidence in chief/witness statement, and may face re-examination after the cross-examination. This process accords with the Irish law principles of procedural justice and fair procedures, enshrined under both the Irish Constitution and the European Convention on Human Rights Act 2003.

3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations, or between orders sought as against parties and non-parties?

A tribunal only has jurisdiction over parties to the underlying contract. The failure of a party witness to attend to give evidence or of the party to furnish documentation is a matter of how the party presents its case, and the tribunal is empowered under Article 25 of the Model Law to continue the proceedings and make an award on the evidence before it.

With regard to third parties, over which the tribunal has no power, the assistance of the High Court must be sought in order to obtain third party discovery or compel non-party witnesses. If compliance by another party with the tribunal’s directions on discovery and/or witness evidence is not forthcoming, an opposing party may seek a High Court order to compel witness evidence and/or documents.

With regard to the court’s powers of compulsion, under section 10(2) of the Arbitration Act 2010, unless the parties agree otherwise, the High Court has no power to make any order for discovery of documents. Therefore, unless the parties provide otherwise and give the High Court such a power, discovery cannot be compelled. With regard to
witness evidence. Article 27 of the Model Law provides that the tribunal, or a party with the approval of the tribunal, may request assistance from the High Court in the taking of evidence. If the High Court has the power to do so, it should be willing to grant the request and compel the evidence sought if it can properly be shown to be important for the determination of the matters in issue.

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (that is, bilateral or multilateral investment treaties)?

The Arbitration Act 2010 applies to all arbitrations, including treaty arbitrations. However, certain provisions do not apply to proceedings under the ICSID Convention, and these are detailed at section 25 of the Arbitration Act 2010.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

There are no qualification requirements. International counsel are free to appear before arbitral tribunals constituted in Ireland. Any party may wish to appoint local counsel to advise on local law, should it govern the underlying dispute, and particularly should the assistance of the High Court be required at any stage during the arbitral proceedings.

3.5 The award

3.5.1 Are there provisions governing an arbitral tribunal’s ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?

Under Article 25 of the Model Law, and unless agreed otherwise by the parties, it is open to the tribunal to:

- Terminate the proceedings if the claimant fails to communicate its statement of claim.
- Continue the proceedings in the case of the respondent’s failure to communicate its statement of defence.
- Continue the proceedings and make an award on the evidence before it in circumstances where either party fails to appear or to produce documentary evidence.

There are no provisions regarding what happens where a party seeks a last-minute adjournment of the hearing. However, a tribunal must always act fairly with the interests of all parties in mind. Accordingly, whether it is appropriate to grant an adjournment will depend on the circumstances and, particularly, on why the adjournment is sought. There may also be cost consequences for a party who obtains an adjournment.

3.5.2 Are there limits on arbitrators’ powers to fashion appropriate remedies, for example, punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?

As a general principle, no. However, a tribunal is limited in what it can direct by way of remedies by reference to what the law governing the dispute permits. Under the Arbitration Act 2010, it is expressly provided in section 20 that, unless agreed otherwise by the parties, a tribunal can order specific performance in respect of a contract (except in respect of a contract for the sale of land).
3.5.3 Must an award take a particular form? Are there any other legal requirements, for example, in writing, signed, dated, place stipulated, the need for reasons, method of delivery?

The formal requirements of an award are detailed in Article 31 of the Model Law. Accordingly, the award shall be in writing and be signed by the arbitrators or arbitrator. In an arbitration with more than one arbitrator, it is sufficient if the majority of the arbitrators sign it, so long as the reason for any omitted signatures is given. The reasons upon which the award is based must be stated, unless the parties have agreed otherwise (Article 31(2), Model Law). It should also state the date it is given and the place of arbitration. After the award is made, a copy signed by the arbitrators shall be delivered to each party. However, there are no specific requirements with regard to the method of delivery.

3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

Section 21(1) of the Arbitration Act 2010 provides that the parties to an arbitration agreement may make such provision as to the costs of the arbitration as they see fit. If the parties make provision for costs as part of their agreement, the tribunal has no jurisdiction to upset that decision. However, section 21(6) of the Arbitration Act 2010 provides that any such pre-agreement of costs shall not be binding upon a consumer.

However, if the parties have not determined how they wish the costs of the arbitration to be dealt with, or if one of the parties is a consumer, then under section 21(3) of the Arbitration Act 2010 the tribunal shall determine by award those costs as it sees fit. Where the tribunal does determine costs under that sub-section, it 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.
- By and to whom they shall be paid.

3.5.5 What matters are included in the costs of the arbitration?

Section 21(8) defines costs as including costs as between the parties and the fees and expenses of the arbitral tribunal. Those fees and expenses of the arbitral tribunal include the fees and expenses of any expert appointed by the tribunal. The costs as between the parties are typically understood to be the costs of the external legal representation, independent expert witnesses, the relevant proportion of the institutional costs and other similar disbursements. Costs of corporate counsel and business executives who attend are not typically recoverable, although expenses of witnesses of fact are recoverable.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

Unless agreed by the parties at the outset, costs are at the discretion of the arbitrator. Typically, costs are said to follow the event, such that the successful party can typically expect to recover its costs. However, Irish law on costs awards means that, for more complicated matters, where numerous issues arise, the arbiter of costs should take into greater account which party succeeded on individual issues when determining costs. For domestic arbitrations only, the parties may seek that the costs be sent by the tribunal for "taxation", which is a process by which a court official determines the scale or amount of costs which is properly and reasonably recoverable.
3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

If VAT and taxes are payable by a successful party for legal services, related disbursements and arbitrators’ fees, and that successful party is awarded its costs, it should be entitled to recover the tax and VAT elements of those costs as well in the usual way. However, if a successful party is otherwise entitled to recover VAT from Revenue the party paying costs would not be expected to have to pay such VAT, as it would otherwise constitute a double recovery.

Arbitrators are subject to income tax in the ordinary way and VAT is payable on such fees.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form, content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

To be enforceable, Irish law requires an arbitration agreement to be in writing. Under the Arbitration Act 2010, Ireland has adopted Option I of Article 7 of the Model Law regarding the definition and form of an arbitration agreement. It defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

It further provides that an agreement to arbitrate will be in writing if its content is recorded in any form, whether or not the arbitration agreement has been concluded orally, by conduct or by other means. It will also be in writing if it is an electronic communication so long as it is accessible for subsequent reference.

There are no other formal requirements that the parties must address to ensure a valid arbitration agreement. In practice, however, it is helpful if they detail the number of arbitrators (under the Arbitration Act 2010 the default is one), a default appointing authority in the event that no agreement is reached (under the Arbitration Act 2010 the Irish High Court is the default appointing authority) and any qualifications the arbitrators should have. They should also consider whether to make express provision for particular procedures regarding the conduct of the arbitral proceedings, which may include the adoption of institutional rules. A statement as to the venue for the arbitration and language can also be helpful. The parties should also give some thought to whether they wish to make express provision for interest and costs, although there are default positions under the Arbitration Act 2010. They should also decide whether they wish to give the High Court express jurisdiction in respect of security for costs and discovery, which jurisdiction is otherwise excluded under section 10(2) of the Arbitration Act 2010.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

Under Irish law, arbitration clauses are separable. Article 16 of the Model Law provides that a decision by the tribunal that the contract is null and void shall not necessarily mean that the arbitration clause is invalid. It expressly states that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
3.6.3 Can an arbitral tribunal determine its own jurisdiction (“competence-competence”)? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?

An arbitration tribunal can, under Irish law, determine its own jurisdiction. Article 16 of the Model Law expressly provides that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

Under Irish law, the High Court can deal with the jurisdiction of the tribunal in two instances. The first instance is where an application is made under Article 8 to stay court proceedings brought in breach of an arbitration agreement. In such applications, the court must decide whether or not an arbitration agreement is properly effective. Article 8(2) of the Model Law further provides that where a court action has been brought, arbitral proceedings may nevertheless be commenced or continued. The other instance is where a tribunal is asked to consider its jurisdiction under Article 16 of the Model Law, including the existence or validity of the arbitration agreement. If the tribunal determines that it does have jurisdiction, it can issue that determination as a preliminary award or in an award on the merits. If the tribunal makes the determination as a preliminary award, the High Court can be asked to decide the matter. While such request is pending, the tribunal may continue the arbitral proceedings and make an award.

3.6.4 Is arbitration mandated for certain types of dispute? Is arbitration prohibited for certain types of dispute?

Whilst arbitration is not mandated for certain types of dispute, it is the typical dispute resolution mechanism for disputes under construction and engineering contracts. Under the Arbitration Act 2010, section 30 provides that any dispute regarding the terms and conditions of employment, or remuneration of employees, is not subject to the legislation, nor are arbitrations conducted under section 70 of the Industrial Relations Act 1946. A consumer is also not bound by an arbitration agreement where it has not been individually negotiated and where the amount in dispute is less than EUR 5,000.

Although there is no specific Irish authority on the point, it would appear that an arbitrator has a positive duty to apply prevailing national or EU competition law principles where relevant to the matter before him or her or risk the award being successfully challenged for not complying with public policy. Disputes regarding the use of intellectual property are considered arbitrable, but an arbitrator may not determine the issue of whether a patent or trademark has been validly registered on the basis that broader policy matters are involved.

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?

For claims subject to Irish law, the Statute of Limitation 1957 (as amended) applies to arbitration as it does to court litigation, and the limitation periods in the two types of processes are therefore identical. The limitation period will depend on the underlying cause of action, types of which are exhaustively set out in the relevant legislation. The most common cause of action in the context of arbitrations will be breach of contract claims, which is six years from the date of commencement or accrual of the cause of action. Section 7 of the Arbitration Act 2010 clarifies when, for the purpose of the limitation period, the arbitration is deemed to commence.
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The question of whether the Irish law of limitations applies regardless of the governing law of the claim has not yet been determined. Under section 7 of the Arbitration Act 2010, if the parties do not provide for the determination of commencement in their agreement, the commencement will be the date on which the reference to arbitration is received by the respondent.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?

Under Irish law, privity of contract dictates that the tribunal only has jurisdiction over the parties to the arbitration agreement. Unless any third parties consent, the tribunal has no jurisdiction over them.

The “group of companies” doctrine has never been considered as part of Irish case law on arbitration. Under Irish law (section 16, Arbitration Act 2010), the consolidation of arbitral proceedings or the conduct of concurrent hearings is only permissible where the parties agree.

3.7 Applicable law

3.7.1 How is the substantive law governing the issues in dispute determined?

Typically, the law governing the dispute will have been chosen by the parties in their agreement. Where there is no express choice of law clause, the tribunal will, pursuant to Article 28(2) of the Model Law, determine the governing law by reference to the conflict of law rules which it considers applicable, such as the Regulation 539/2008/EC on the Law Applicable to Contractual Obligations.

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

Certain laws will be mandatory in terms of the existence or otherwise of a binding arbitration clause and the conduct of the arbitration itself. Difficulties can arise where the agreement between the parties may be contrary to the public policy of the seat of arbitration (such as where the subject matter involves fraud or corruption).

The provisions of the Model Law from which the parties cannot derogate have not been affected in any way by the Arbitration Act 2010. Under that Act, the principal mandatory provisions are that the parties cannot agree to broaden the rights of appeal provided for in the Arbitration Act 2010. The parties cannot agree to arbitrate a dispute specifically excluded by the Arbitration Act 2010, nor can they contract out of the consumer/small claims exception in section 31.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1 Can an arbitral tribunal order interim relief? If so, in what circumstances? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

An arbitral tribunal can order interim relief where it considers it appropriate and necessary to do so. Article 17 of the Model Law details the tribunal’s powers in those regards, and confirms (Article 17(2)) that an arbitral tribunal may order a party to:

(a) Maintain or restore 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.

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

Article 17A provides that, when seeking an interim measure under (a), (b) or (c) above, a party must satisfy the tribunal that:

(i) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

(ii) There is a reasonable possibility that the requesting party will succeed on the merits of the claim.

The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. For requests under (d), the requirements detailed in (i) and (ii) apply only to the extent the tribunal determines appropriate.

Parties may also seek from the tribunal a preliminary order directing a party not to frustrate the purpose of the interim measure requested, or to provide that the party seeking the interim measure provide security in connection with the measure.

Separately, section 19 of the Arbitration Act 2010 provides that the arbitral tribunal has a default jurisdiction to order security for the costs of the arbitration.

4.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

The powers of the tribunal to grant interim relief are enshrined in statute, so the courts have not had to limit any such power. There is no authority confirming recognition as of yet.

4.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

Requests to the High Court for interim reliefs in the context of arbitrations are rare. However, if the High Court is empowered to grant the relief sought and the facts of the case warrant it, the reliefs should be granted. The interim reliefs which are available to a tribunal are detailed in Article 17 of the Model Law and, under section 10(1) of the Arbitration Act 2010, the High Court has the same power to issue such reliefs as it has in respect of proceedings before it.

4.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

Article 17J of the Model Law provides that the national court shall have the same power to issue interim measures in arbitration proceedings, irrespective of whether their place is in the state, as it has in relation to court proceedings before it.
5. CHALLENGING ARBITRATION AWARDS

5.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

Although it is not possible to formally appeal an award, it is possible to challenge it by way of an application to set it aside under Article 34 of the Model Law. That Article sets out the bases on which a court may set aside an award and effectively reflects the provisions by which enforcement under the New York Convention might be refused (as reflected by the principles in respect of enforcement and recognition detailed in Article 36 of the Model Law). If the High Court is satisfied that any of the grounds are met, it can set aside the award. However, any application to set aside the award must be made within three months of receipt of the award.

5.2 Can the parties exclude rights of appeal or challenge?

There is no possibility of appeal, as described above. With regard to excluding rights of challenge, although there is no Irish authority on the question, it would appear that 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.

5.3 What are the provisions governing modification, clarification or correction of an award (if any)?

Article 33(1) of the Model Law provides that, within 30 days of receipt of the award, a party may request the tribunal to correct any errors in computation, any clerical or typographical errors or any errors of a similar nature, or to give an interpretation of a specific point or part of the award. In addition, under Article 33(3), the tribunal may be requested to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

6. ENFORCEMENT

6.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

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

6.2 What are the procedures and standards for enforcing an award in your jurisdiction?

Order 56 of the Rules of the Superior Courts provides that any application for enforcement is made by way of an originating notice of motion. This is grounded upon an affidavit sworn by or on behalf of the moving party, setting out the basis on which the court has jurisdiction to grant the reliefs sought. The respondent to the motion may file a replying affidavit, and the applicant may deliver a further response. The timing and costs involved in enforcement proceedings depend entirely on how much resistance to recognition and enforcement the respondent seeks to raise and how much court time is likely to be required for the substantive hearing of the application.

The grounds for resisting enforcement are set out in Article 36 of the Model Law and are identical to those provided for in the New York Convention. Irish case law indicates that the public policy ground is narrowly construed.
6.3 Is there a difference between the rules for enforcement of “domestic” awards and those for “non-domestic” awards?

There is no difference between the rules for enforcement of domestic awards and those for non-domestic awards. As set out in Article 35 of the Model Law, an award, irrespective of the country in which it was made, shall be recognised as binding and, upon application to the competent court, shall be enforced.

One additional factor to be considered is that Ireland’s enforcement obligations under the New York Convention are to be interpreted in light of the normal limitations on the Irish courts’ jurisdiction. In Yukos Capital SARL v OAO Tomskneft VNK [2014] IEHC 115 (in which the authors acted for the successful party, Tomskneft, in asserting that the Irish court did not properly have jurisdiction to deal with the enforcement application), Judge Kelly was at pains to point out that this jurisdictional inquiry is fact specific and entirely separate from the grounds for refusing enforcement under the New York Convention. Accordingly, the question of jurisdiction is a threshold issue for the enforcement of arbitral awards, which threshold is automatically met where a domestic award is being enforced.
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