Arbitration Guide
IBA Arbitration Committee

IRELAND

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Arbitration as the preferred method of binding dispute resolution is commonplace in commercial contracts and, in the construction sector, is almost the exclusive method. Insurance disputes in Ireland are also very frequently resolved by arbitration. Traditionally, prior to the complete overhaul and change of Ireland's arbitration law in 2010, arbitration was perceived as being prone to delays. However the combination of the Arbitration Act 2010 (the Act) and the transformation of litigation efficiency in the Commercial List of the High Court over the past few years has completely turned around the culture amongst practitioners and now rapid resolution of cases is the watchword amongst the Irish legal community. One of the principal advantages of arbitration arises from the highly open and international nature of the economy and the almost routine situation whereby a counterparty to a contract is from overseas. The private, independent and internationally enforceable outcome of the arbitral process is particularly appropriate for an economy such as Ireland's.

(ii) Is most arbitration institutional or *ad hoc*? Domestic or international? Which institutions and/or rules are most commonly used?

Most arbitrations conducted in Ireland are domestic in nature, very often *ad hoc*, and in the case of construction disputes, these are routinely conducted under the auspices of the Arbitration Procedure of Engineers Ireland (2011), the Irish professional body for engineers. Given the rapid development of Ireland as an open and international economy, international arbitration is now regularly a feature of dispute resolution with increasing numbers of cases, particularly under the ICC Rules, involving an Irish party or Dublin as a seat.

(iii) What types of disputes are typically arbitrated?

Construction disputes are almost exclusively finally resolved by arbitration. In the commercial sector almost every type of dispute is routinely dealt with by arbitration, particularly those involving joint ventures and the luxury hotel industry.

(iv) How long do arbitral proceedings usually last in your country?

The norm is 12–18 months.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

No.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The Act governs all arbitration taking place in Ireland with no distinction made between domestic and international matters. The Act adopts the UNCITRAL Model Law in its 2006 version virtually unchanged.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

No.

(iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

The Preamble to the Act gives the force of law in Ireland to the following treaties:

- The UNCITRAL Model Law (as amended by the United Nations Commission on International Trade Law on 7 July 2006);
- The Geneva Protocol on Arbitration Clauses - 24 September 1923;
- The Geneva Convention on the Execution of Foreign Arbitral Awards - 26 September 1927;
- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards - 10 June 1958; and
- The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - 18 March 1965.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The UNCITRAL Model Law as adopted by Section 6 of the Act provides in Article 28 that the dispute should be decide in accordance the rules of law chosen by the parties as applicable to the substance of the dispute. Unless otherwise expressed, the designation of a law or legal system by the parties refers to its substantive law, not to its conflict of laws rules. Where the parties have failed to designate a chosen rule of law, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable. If the parties have expressly authorized it to do so the arbitral tribunal can decide *ex aequo et bono* or as *amiable compositeur*. In all cases, terms of the contract take precedence and the

arbitral tribunal shall take into account the usages of the trade applicable to the transaction.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Section 2 of the Act adopts Option I of Article 7 of the UNCITRAL Model Law as the applicable provision for arbitration agreements. Under Article 7 an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise, between them in the scope of a defined legal relationship. The agreement can be contractual and may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

An arbitration agreement must be in writing. However, it will be held to be "in writing" if its content is recorded in writing including by electronic means, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. Furthermore, an arbitration agreement is "in writing" if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

Finally, the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract under the general principles of contract law.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Article 8 of the UNCITRAL Model as adopted by the Act provides that where a dispute which is governed by an operative and enforceable arbitration agreement as defined under the Act comes before a court, the dispute must be referred to arbitration. Where court proceedings have been commenced, arbitration proceedings can commence and an award can be made pending the outcome of the court's deliberation.

(iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the

consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Yes, multi-tier clauses are very common, particularly in the construction sector. While there is no direct authority on enforceability, the practice in Ireland clearly shows a respect for the steps in a tiered clause. Moreover it is rare for parties in Ireland to dispute the contracted-for steps leading to arbitration.

(iv) What are the requirements for a valid multi-party arbitration agreement?

See III.i above.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

As long as the agreement comports with Article 7 of the UNCITRAL Model Law, it is enforceable under the Act.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

Yes, however in line with other common law jurisdictions, Irish law of contract formation is quite strict in binding a non-signatory. Clear evidence of consent would be required in order to make a case for the extension of an arbitration clause to a non-signatory.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

The Act does not apply to an arbitration under an agreement relating to the terms or conditions of employment or the remuneration of any employees, although the parties can always agree under contract or otherwise to refer non-statutory disputes to arbitration. Also, the arbitrator does not have the power to order specific performance for a contract for the sale of lands.

Arbitrability issues do not arise in practice since restrictions on arbitration are so few in number. Normally, a party raising an arbitrability challenge would do so at the earliest possible stage as a jurisdictional point under Article 16 of the UNCITRAL Model Law, as adopted under the Act. If the point were lost by the objecting party it could then apply to the High Court under Article 16(3) of the UNCITRAL Model Law to have the matter decided.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

See III.ii above. Article 8 of the UNICTRAL Model Law as adopted under the Act sets out the procedure for seeking a stay of court proceedings. The application to stay must be brought no later than the making of the first statement on the merits before the courts. A party's participation in the court proceedings, if confined to seeking a stay pursuant to Article 8 of the UNCITRAL Model Law, is not deemed to be a waiver of the right to arbitrate. However, any unconditional participation beyond that point is a waiver of the right to arbitrate.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Article 16 of the UNCITRAL Model Law as adopted by the Act applies the principle of *competence-competence* to the law governing arbitrations in Ireland and provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void does not automatically invalidate the arbitration clause.

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

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Irish High Court specified in Article 6 to decide the matter, which decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The scope of the High Court's control of a jurisdictional issue brought before it under Article 16(3) of the UNCITRAL Model Law, is a question which has not

yet been finally determined by the Irish courts. However, the Act does prescribe that the High Court shall deal with all applications before it under the Act in a 'summary manner' which is a term of art in Irish civil procedure for a rapid resolution of the matter on affidavit evidence only and not, save in exceptional circumstances, based upon live witness testimony.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Article 11 of the UNCITRAL Model Law, as adopted by the Act, sets out the relevant law for the appointment of arbitrators. Under that law, the parties are free to agree on a procedure of appointing the arbitrator or arbitrators. Failing such agreement in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Irish High Court or another other authority specified in the Act. Failing such agreement in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the Irish High Court.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Article 12 of the UNCITRAL Model Law as adopted by the Act provides that when a person is approached in connection with his possible appointment as an arbitrator, he must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. This is a continuing obligation and applies if any such circumstances arise during the course of the arbitration. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. However, in the case of an arbitrator appointed by a party, or in whose appointment it has participated, that party can only challenge for reasons of which it becomes aware after the appointment has been made.

Article 13 of the UNCITRAL Model Law as adopted in full by the Act provides, inter alia, that the parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of that article. Where no such agreement has been made, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal, or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless

the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a party is unsuccessful it has a 30 day period from the date of notification to request the Irish High Court to decide on the challenge.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

There are no limitations on who may serve as an arbitrator. The ethical duties of an arbitrator regarding disclosure of conflicts of interest are set out in Article 12 of the UNCITRAL Model Law as adopted under the Act. Arbitrators are required to treat parties equally in accordance with Article 18 of the UNCITRAL Model Law.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no specific rules or codes concerning conflicts of interest for arbitrators; however the IBA Guidelines are widely used.

VI. Interim Measures

(i) Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

The most important point for practitioners to note is that the Act adopted, in whole and without modification, the 2006 changes to the UNCITRAL Model Law.

Article 17 as adopted by the Act provides that, 'unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.' While there is no formal requirement as to the form of such a decision, Article 17 provides that an interim measure is a temporary measure in the form of an award or in another form, issued prior to the award by which the arbitral tribunal orders 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; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17A as adopted by the Act sets out the conditions for granting interim measures which are to be satisfied by the requesting party including a likelihood

of irreparable harm to the applying party that outweighs any potential harm to the other party and a reasonable probability of success on the merits.

Articles 17B and 17C as adopted by the Act deal with preliminary orders and 17D sets out the specific measures applicable to interim measures and preliminary orders.

Article 17H provides for the recognition and enforcement of interim measures by the Irish High Court. Accordingly, the Irish High Court will recognize such measures, irrespective of the country in which it was issued. Under Article 17I, recognition or enforcement of an interim measure may be refused only:

> '(a) At the request of the party against whom it is invoked if the court is satisfied that:
>
> > (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
> >
> > (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
> >
> > (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
>
> (b) If the [Irish High Court] finds that:
>
> > (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
> >
> > (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.'

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court-ordered provisional relief remain in force following constitution of the arbitral tribunal?

Article 9 of the UNCITRAL Model Law as adopted provides that it is not incompatible 'with an arbitration agreement' to apply to the High Court 'before or during arbitral proceedings, for an interim measure of protection and for a court to grant such measure'.

Article 17J of the UNCITRAL Model Law as adopted under the Act provides that the Irish High Court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

Whether or not the High Court will grant, for example an injunction to keep the *status quo* in place pending the outcome of the arbitration will depend on the normal test for interlocutory injunctions by which one, in practice, must show merit, a serious question to be tried and inadequacy of damages.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Article 27 of the UNCITRAL Model Law as adopted under the Act provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request from the High Court assistance in taking evidence and the High Court may grant the request within its competence and according to its rules on taking evidence.

Also, Section 15 of the Act permits the High Court to assist in taking evidence pursuant to Article 27 of the UNCITRAL Model Law even if the seat is not in Ireland.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

There are no specific rules governing discovery in relation to arbitration but the general approach one sees in domestic cases broadly mirrors discovery as might be seen in the High Court. This is a much more limited discovery process than might be seen in the United States of America and is confined to precise categories of documentation for which relevance and necessity can be demonstrated. In international arbitration it is routine practice in Ireland for parties to use the IBA Rules on the Taking of Evidence in International Arbitration and the Redfern Schedule system.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

There are no limits but see VII (i) above.

(iii) Are there special rules for handling electronically stored information?

No.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

No. There are no provisions in the Act prescribing any rules for confidentiality of arbitration. In practice arbitration in Ireland is conducted privately.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no express powers conferred upon the arbitral tribunal in the Act to protect trade secrets and confidential information. However the extensive powers in respect of interim measures and preliminary orders set out in Chapter IV of the UNCITRAL Model Law easily encompass the making of such protective measures if the circumstances warrant.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? Is so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Yes. Normally the tribunal is guided, but not bound by, the IBA Rules.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The arbitral tribunal is subject to the due process provisions of Article 18 of the UNCITRAL Model Law as adopted under the Act wherein each party is given equal treatment and a full opportunity to be heard. Also Article 19 of the UNCITRAL Model Law prescribes the rules of procedure applicable. It provides that the parties are free to agree on the procedure to be followed by the arbitral

tribunal in conducting the proceedings and in the absence of such an agreement the arbitral tribunal may, subject to Model Law, conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Witness statements with cross-examination is common; however direct oral testimony is still used in smaller cases. Arbitrators in Ireland traditionally question witnesses (without prior disclosure of witness statements) at the end of examination by counsel but no particular practice is prescribed.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no such rules in relation to the appearance of witnesses. Section 14 of the Act provides that the arbitral tribunal may direct that a party to an arbitration agreement, or a witness who gives evidence in proceedings before the arbitral tribunal, be examined on oath or affirmation.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses?

No. The weighing of such testimony and its persuasiveness is a matter for the arbitrators.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Expert testimony is usually presented in the form of a written report. There are no formal requirements for independence and/or impartiality of an expert witness.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

Tribunal appointed experts are not common in Ireland. The arbitrators can, in accordance with Article 26 of the UNCITRAL Model Law, appoint an expert.

There are, however, no requirements that such an expert be selected from a particular list.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

It is not used in practice; however a regular feature is the grouping of expert testimony after the conclusion of the fact testimony.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

No such rules exist and arbitral secretaries are not common.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Article 31 of the UNCITRAL Model law as adopted under the Act prescribes that an award must be made in writing and signed by the arbitrator or the majority of the arbitrators where there is more than one arbitrator, provided that the reason for any omitted signature be stated. An award given in Ireland must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 of the Model Law. The award must be dated and state the place of arbitration which shall be deemed to have been the place where the award was made. A signed copy must be delivered to each party.

There are no restrictions, save for the inability to direct specific performance in respect of a contract for the sale of lands, to the relief which may be granted.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Irish law provides for punitive or exemplary damages; however, the scope for doing so is limited. Doubling or trebling damages, such as may be seen in the United States of America, is unknown and probably contrary to public policy.

As regards interest, Section 18 of the Act provides that the parties may agree on the arbitral tribunal's powers regarding the award of interest and unless agreed the arbitral tribunal may award simple or compound interest from the dates, at the rates and with the rests that it considers fair and reasonable on all or part of any amount awarded by the arbitral tribunal and in respect of any periods.

(iii) Are interim or partial awards enforceable?

Yes.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

There are no express provisions in the Act for dissenting opinions. Article 31(1) of the UNCITRAL Model Law as adopted under the Act provides, in part, that in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

Thus, if an arbitrator dissents and does not sign the award, the reasons, by implication the fact of the dissent, must be stated.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Yes. Article 30 of the UNCITRAL Model Law as adopted under the Act provides that if the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms which shall be made and have the same status and effect as any other award on the merits of the case.

Article 32 of the UNCITRAL Model Law as adopted under the Act provides that arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal for the termination of the arbitral proceedings when: (a) the claimant withdraws his claim, unless the respondent objects and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute; (b) the parties agree on the termination of the proceedings; or (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

It also provides that the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Articles 33 and 34(4) referred to below.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Article 33 of the UNCITRAL Model Law as adopted under the Act provides that within an agreed timeframe or otherwise within 30 days of receipt of the award, a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical, typographical or similar errors. If agreed to by the parties, a request may be made to the arbitral tribunal to give an

interpretation of a specific point or part of the award and if the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request and the interpretation shall form part of the award.

The arbitral tribunal may also correct any clerical, typographical or similar error on its own initiative within 30 days of the date of the award.

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

The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

The Act prescribes a liberal regime for costs and the parties are free to agree such provisions as to the allocation of costs as they see fit in accordance with Section 21 of the Act. Costs following the event is the norm in Ireland but not invariably the case. However if the parties submit to the rules of an arbitral institution they shall be deemed to agree to be bound by the rules of that institution as to the costs of the arbitration.

Where the parties have no advance agreement on costs, the arbitral tribunal shall determine by award those costs as it sees fit but must state the grounds on which it acted, the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each and by and to whom they shall be paid.

(ii) What are the elements of costs that are typically awarded?

'Costs' include costs as between the parties and the fees and expenses of the arbitral tribunal including the fees and expenses of any expert appointed by the tribunal.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Yes. See XI.i above.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Yes. See XI.i above.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

No.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Article 34 of the UNCITRAL Model Law as adopted under the Act sets out the provisions relating to the setting aside of an award (and the time limits) as the exclusive recourse against an arbitration award. An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award. Section 12 of the Act, however, makes a specific provision in respect of the time limit for a public policy challenge. It provides that an application to the Irish High Court to set aside an award on the grounds of public policy must be made within a period of 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned.

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

An award may also be set aside if the Irish High Court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

The procedure for challenge is set out in the Rules of the Superior Courts (the civil procedure rules of the Irish High Court). There are clear deadlines of for the prompt filing of evidence by way of affidavit and the High Court deals with these matters in a summary manner (as already noted). Arbitration applications tend to be dealt with in a matter of weeks rather than months.

While there is no express bar on enforcement while a set-aside application is pending, the practical approach of the High Court is to promptly deal with both applications simultaneously so that time and effort is not wasted.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

No. See XII (i) above.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

No. See XII (i) above. Any decision of the High Court under Article 34 is final and not subject to appeal by the Supreme Court.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

The Irish High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

In relation to awards rendered in Ireland this involves a simple application to the High Court (provided for under Section 23 of the Act). The party seeking enforcement takes an action or applies for leave of the High Court by way of summary procedure on affidavit evidence only. Where leave is given, judgment

may be entered in terms of the award. Such an award shall, unless otherwise agreed by the parties, be treated as binding for all purposes on the parties between whom it was made, and may be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Ireland.

Nothing in Section 23 affects the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention.

A key feature to note is section 23(4) of the Act which does not permit a losing party to invoke Article 35 and 36 of the UNCITRAL Model to resist enforcement of an award rendered in Ireland. Thus, this puts the onus on the losing party to move against any such award pursuant to Article 34 as it will not have a second opportunity to do so at the recognition/enforcement stage.

The process for the recognition and enforcement of foreign awards is governed by either the New York Convention or the UNCITRAL Model Law.

As regards the New York Convention Article III is applicable in Ireland and this provides that each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention. Substantially more onerous conditions or higher fees or charges on the recognition or enforcement of foreign arbitral awards can not be imposed than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV provides that the party applying for recognition and enforcement must at the time of the application, supply: the duly authenticated original award or a duly certified copy, or the original agreement to enforce if applicable or a duly certified copy. If the award or agreement is not made in an official language of the enforcing country, the requesting party must produce a translation of these documents certified by an official or sworn translator or by a diplomatic or consular agent. Article 35 the UNCITRAL Model Law is also applicable and contains nearly identical requirements.

The grounds for refusing recognition of enforcement set out in Article V of the New York Convention and Article 36 of the UNCITRAL Model Law, adopted by the Act, are virtually identical and provide as follows:

> At the request of the party against whom it is invoked, the following grounds are available:
>
> > ‘(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the governing law; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute outside the terms or contemplation of the submission to arbitration, or it contains decisions on matters beyond the scope of the arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

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

Enforcement or recognition can also be refused if the High Court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Irish law or if the recognition or enforcement of the award would be contrary to the public policy of Ireland. If an application for setting aside or suspension of an award has been made to the High Court, if it considers it proper, the High Court may adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Not applicable. See XIII.i.

(iii) Are conservatory measures available pending enforcement of the award?

Yes.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There is a strong pro-enforcement approach by the Irish courts. The issue of enforcing awards set aside at the place of arbitration has not received judicial attention.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

As with all applications to the High Court under the Act, enforcement proceedings are dealt with in a matter of weeks rather than months. The limitation period for the enforcement of an award is six years.

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

Ireland is not a signatory to the European Convention on State Immunity. The doctrine of foreign state or sovereign immunity is however a generally recognised principle of international law within the meaning of the Irish Constitution since 1937. Article 29.3 of the Constitution of Ireland provides:

> 'Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.'

Immunity is not absolute. Acts of a foreign state entity within a commercial sphere with elements of a private law character will usually be actionable against a foreign state, while acts in the nature of traditional public functions are not actionable against a foreign state.

In the case of the *Government of Canada .v. Employment Appeals Tribunal* [1992] IR 484, the Supreme Court held that sovereign immunity applies to proceedings before an administrative tribunal, at least where the tribunal's powers are akin to those of the Employment Appeals Tribunal. However, it is not clear that an arbitration tribunal would have the equivalent powers and status of the Employment Appeals Tribunal and would therefore succumb to the same level of sovereign immunity.

The concept of sovereign immunity has been restricted to exclude protection for the state or an agent of the state involved in commercial or trading transactions. It is also generally accepted that sovereign immunity cannot be claimed or granted in actions with respect to real property or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

See XIV.i above.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Yes. No other treaty in relation the protection of investments is in place. Ireland is a signatory to the Energy Charter Treaty

(ii) Has your country entered into bilateral investment treaties with other countries?

Yes; one with the Czech Republic but its future is in doubt given the ongoing work of the European Commission in relation to intra-EU BITs.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

As Ireland is a UNICTRAL Model Law jurisdiction, the main international titles are the principal source for practitioners. Those most often referred to are:

- International Commercial Arbitration, Born (2009, Kluwer);
- Redfern and Hunter on International Arbitration, Redfern, Hunter, Blackaby & Partasides (2009, OUP);
- A guide to the UNCITRAL Model Law on International Commercial Arbitration: legislative history and commentary, Holzmann & Neuhaus (1989, Kluwer) is a key publication given that the High Court is required, pursuant to Section 8 of the Act, to take judicial notice of the UNCITRAL *travaux préparatoires* and its working group relating to the preparation of the UNCITAL Model Law.
- Fouchard, Gaillard & Goldman on International Commercial Arbitration (1999, Kluwer).

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

Arbitration Ireland (the Irish Arbitration Association) is the principal umbrella body for arbitration in Ireland and organizes events and road-shows on a regular basis. Its website is **www.arbitrationireland.com.**

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes. With the passage into law of the Act on 8 June 2010 arbitration has significantly advanced into all sectors of commercial dispute resolution well beyond the areas already routinely addressed by the process. A further indicator of support is Section 32 of the Act which provides that without prejudice to any provision of any other enactment or rule of law, the High Court or the Circuit Court may, if appropriate and the parties consent, adjourn the proceedings to enable the parties to consider arbitration.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Mediation is of increasing importance due to significant support from the judge in charge of the Commercial List of the High Court (Mr Justice Kelly). The civil procedure rules governing the Commercial List empower the judge to adjourn litigation to enable the parties to consider mediation as a means for the resolution of their dispute. Mr Justice Kelly has been at the forefront of promotion of the use, to great effect, of mediation in the commercial disputes sector.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

The Act is still in its early stages but it is the single most important event in Irish arbitration law since 1954 when the original domestic Irish act was passed.