

# **Encyclopedia of International Commercial Litigation**

**General Editor**  
**The Hon. Sir Anthony Colman**



**INDONESIA**

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# Ireland

by

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# Ireland

## PART A—GENERAL SECTION

### (1) STRUCTURE OF THE COURTS

#### (a) The Court System

**A1.1** All commercial litigation of any substance is conducted before the High Court<sup>1</sup> in Dublin which has an unlimited monetary jurisdiction. It is the principal Court of First Instance and it will be the main focus of attention in this part. There is a right of appeal to the Court of Appeal and in certain circumstances Supreme Court.<sup>2</sup> Claims with a value of up to EUR 75,000 (EUR 60,000 for Personal Injury claims)<sup>3</sup> can be brought before the Circuit Court, which sits in most of the main towns in Ireland. Claims below EUR 15,000<sup>4</sup> can be brought in the District Court, which sits in towns and villages throughout the country.

**A1.2** The High Court consists of the President of the High Court and thirty-six ordinary judges. The President of the Circuit Court and the Chief Justice are, by virtue of their office, additional judges. Matters before the High Court are normally heard and determined by one judge without a jury (with the exception of defamation and civil assault claims) but the President of the High Court may decide that any cause or matter or any part thereof may be heard by three judges in what is known as a divisional court.

**A1.3** A specific Commercial List of the High Court was introduced in 2004. The Commercial List was developed to address the growing need for specialist judges and a case management regime to accommodate large-scale commercial litigation. Certain categories of litigation can be transferred to the Commercial List on the application of the parties and subject to the approval of the Judge in charge of the Commercial List (currently Mr Justice Brian McGovern). Commercial Court litigants need to be ready to meet the more exacting timetables and pleading requirements but the reward is that the dispute should be resolved far more quickly than elsewhere in the High Court.<sup>5</sup> The Commercial List Rules set out a series of categories of cases, defined as ‘Commercial Proceedings’, which are eligible to be transferred to the Commercial List.

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<sup>1</sup> The High Court is located at The Four Courts, Inns Quay, Dublin 7, to hear original actions. Personal and fatal Injury claims are held in Dublin and in other provincial locations at specified times throughout the year.

<sup>2</sup> See A.13 re Appeals.

<sup>3</sup> *The Courts and Civil Law (Miscellaneous Provisions) Act 2013 increased the previous limit of EUR 38,092.14 for all proceedings instituted after 3 Feb. 2014.*

<sup>4</sup> The Courts and Civil Law (Miscellaneous Provisions) Act 2013 increased the previous limit of EUR 6,348.69 for all proceedings instituted after 3 Feb. 2014.

<sup>5</sup> Whilst the Rules (Order 63A Rule 4) say that any party to the proceedings may apply to the Commercial Court for entry at any time prior to the close of pleadings or completion of affidavits, the reality is that applicants are required to move as early in the proceedings as possible. Delay is likely to be adversely regarded by the judge who has ultimate discretion in whether or not to admit a case for entry.

**A1.4** Commercial Proceedings include any claim or counterclaim (not being a claim or counterclaim for personal injuries) arising from or relating to the following:

- (1) a business document, business contract or business dispute;
- (2) a claim or counterclaim involving any question of construction arising in respect of a business document or business contract;
- (3) the purchase or sale of goods;
- (4) the import or export of goods;
- (5) the carriage of goods by land, sea, air or pipeline;
- (6) the exploitation of oil or gas reserves or any other natural resource;
- (7) insurance or re-insurance;
- (8) the provision of services (but this does not include medical, quasi-medical or dental services or any service provided under a contract of employment);
- (9) the operation of markets or exchanges in stocks, shares or other financial or investment instruments, or in commodities;
- (10) the construction of any vehicle, vessel or aircraft;
- (11) business agency;
- (12) all intellectual property disputes.

**A1.5** The value of the claim or counterclaim concerned in any of these categories<sup>6</sup> should not be less than EUR 1,000,000.00<sup>7</sup>. There is no automatic right of entry to the Commercial List which is entirely at the discretion of the Court which also has discretion to admit cases to the Commercial List which fall outside the specified categories. Proceedings under the Arbitration Act with a value in excess of EUR 1,000,000.00 and decisions amenable to judicial review may also be admitted to the Commercial List. Certain classes of action are specifically excluded from the Commercial List including employment, landlord and tenant and personal injuries actions.

**A1.6** Cases progress in the Commercial Court very quickly. Active case management enables quick resolutions and the judges are committed to progressing cases without delay. The average completion time currently stands at twenty-one weeks from the start to finish of a case.

**A1.7** The range of cases going through the Commercial Court further reflects the nature of commercial activity and disputes in the world economy generally – so property disputes, insolvencies, judgments for loan defaults and investment disputes have featured heavily in the past three years.

### **(b) The Competition List**

**A1.8** In competition law proceedings, a party can apply to transfer, or the Judge can assign, the proceedings to the Competition List. Any motions or other applications in competition proceedings are conducted in a swift and similar way to that of the Commercial List, as detailed herein.

**A1.9** The Judges in charge of the Competition List are committed to directing parties to participate in active case management and to progress the trial in an expeditious fashion. This aids the substantive legal issues and ultimately saves both time and costs for litigants.

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<sup>6</sup> With the exception of intellectual property claims or proceedings brought under the Cape Town Convention or the Aircraft Protocol or any regulations or procedures made thereunder.

<sup>7</sup> Although the court will permit consolidation of similar claims to meet the threshold.

**A1.10** Judges in the Competition List are formally designated due to their particular expertise in the area. In addition, the Judges may on the application of a party or of its own motion, appoint a skilled person to assist in understanding or clarifying a matter or evidence in order to expedite the trial. Expert witnesses may also be directed by the Judge to consult with each other for the purposes of reaching an agreement, identifying issues and jointly considering matters to be resolved before the Judge.

**A1.11** The State regulatory agency on competition, the Competition and Consumer Protection Commission<sup>8</sup> may make written or oral observations to the Court on points or issues of competition law either on their own application or at the request of the parties or the Judge, provided they are not party to the proceedings. The European Commission may make written observations to courts of the Member States on its own initiative and, with the permission of the court, it may also make oral observations. Parties may file an affidavit to the Court in reply to these observations.

**A1.12** Other lists within the High Court include:

- (1) The Non Jury List which deals with contract claims, professional negligence and debt collection matters.
- (2) The Chancery List which deals with company law matters, junctions, specific performance and recession.
- (3) The Judicial Review List which deals with challenges to decisions of Public bodies.
- (4) The Admiralty List which deals with maritime and shipping matters.

**A1.13** Appeals from the High Court are to the Court of Appeal (established on 28 October 2014) and in certain limited circumstances the Supreme Court. Prior to establishment of the Court of Appeal there was an approximate waiting time of four years for an appeal to be heard by the Supreme Court. Although the Court of Appeal is in early stages, the current waiting time for an appeal from the High Court to the Court of Appeal is approximately five months which is as a result of the active case management of appeals before the Court.<sup>9</sup>

## **(c) Limits on the Courts' Jurisdiction**

### **(i) Monetary Value of the Claim**

**A1.14** As stated above, the District Court has jurisdiction to deal with claims below EUR 15,000, the Circuit Court has jurisdiction of claims up to EUR 75,000 (EUR 60,000 Personal Injury Claims), and the High Court has no limit on its monetary jurisdiction. In relation to 'Commercial Proceedings' in the Commercial List the value of the claim or counterclaim concerned in any of these categories should not be less than EUR 1,000,000.00.

### **(ii) Issue-Related Limits**

**A1.15** No limits are placed on the High Court's jurisdiction. According to the Irish Constitution, it has full original jurisdiction over all claims. The Circuit Court and District

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<sup>8</sup> The Competition and Consumer Protection Commission was established on 31 Oct. 2014 and is an amalgamation of what was previously the Competition Authority and the National Consumer Agency.

<sup>9</sup> See A.13 re appeals.

Court's jurisdiction is prescriptive in that they are assigned, by statute, jurisdiction over a limited range of cases, which were traditionally small in value and importance. The Government has recently appointed specialist insolvency judges to the Circuit Court and has introduced a cheaper examinership (administration) process for smaller companies in the Circuit Court.

Major commercial litigation, however, remains largely confined to the High Court (particularly with the introduction of the Commercial List) and, on appeal, the Court of Appeal and in limited circumstances the Supreme Court.

## (2) JUDICIARY

### (a) Training and Background

**A2.1** Judges in Ireland are appointed by the government, with advice from the Judicial Appointments Board. The Judges are lawyers with extensive experience in practice. While areas of expertise prior to appointment would differ, many judges would have had extensive specialist commercial litigation experience prior to becoming a judge. Both solicitors and barristers are eligible for appointment.

## (3) THE LEGAL PROFESSION

### (a) Structure

**A3.1** Ireland's legal profession comprises solicitors and barristers. Firms of solicitors vary considerably in size, from one-man practices, to a comparatively small number of large full-service commercial law firms offering a wide range of specialist expertise on a par with those in any major city. The administrative body for solicitors in Ireland is the Law Society of Ireland<sup>10</sup> which exercises a supervisory, representative, regulatory, educational and disciplinary role. It exercises statutory functions under the Solicitors' Acts 1954–2008 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is governed by an elected Council, which is supported by a full-time executive led by the Director General.

**A3.2** Barristers are divided into Junior Counsel (BL) and Senior Counsel (SC, or Silks), and are all independent sole practitioners who have been called to the Irish Bar (the Bar). All barristers in practice in Ireland are members of the Law Library<sup>11</sup> which is located in the main Four Courts building in Dublin. The Bar Council is the administrative body which regulates the Bar. Barristers only act upon the instructions of a solicitor, foreign attorney (if providing advice), and a limited number of prescribed bodies (such as patent agents, insurance companies, etc). Barristers do not handle clients' funds or provide the normal administrative services which a client would expect from a firm of solicitors but rather specializes in providing an advisory and, or, advocacy service for which the barrister is briefed by a solicitor or other body.

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<sup>10</sup> See <[www.lawsociety.ie](http://www.lawsociety.ie)>, the official website of the Law Society of Ireland on which can be found a directory of all solicitor firms in Ireland. The Law Society is located at Blackhall Place, Dublin 7.

<sup>11</sup> See <[www.lawlibrary.ie](http://www.lawlibrary.ie)>, the official Bar Council website on which can be found a directory of barristers.

**A3.3** The Government has introduced a Legal Services Regulation Bill 2011 which is currently before the Irish Parliament. The key proposed reforms include:

- (1) The establishment of a Legal Services Regulatory Authority to undertake most of the regulatory activities at present conducted by The Law Society and the Bar Council.
- (2) The establishment of a Legal Practitioners Disciplinary Tribunal.
- (3) The establishment of a new Office of the Legal Costs Adjudicator.
- (4) The creation of new forms of legal partnerships, more direct professional access to barristers and Multidisciplinary Practices (MDPs).

The latter proposal has generated significant controversy and it remains to be seen whether the proposed legislation will be enacted in its current form.<sup>12</sup>

### **(b) Experience and Specialization**

**A3.4** The larger firms of solicitors in Dublin and elsewhere are able to conduct the full range of commercial litigation. Smaller firms also conduct commercial litigation. In most major commercial litigation in Ireland barristers are retained for advice, preparation of pleadings, and oral advocacy in court.

### **(c) Experience in Dealing with Overseas Clients, Evidence and Witnesses**

**A3.5** All of the larger and, indeed, some of the medium-sized Irish law firms have extensive ongoing contacts with foreign clients and law firms and would have involvement with obtaining evidence overseas for use in litigation in Ireland, or for assisting with regard to the Irish dimension of international litigation and the involvement of overseas lawyers, clients, evidence and witnesses presents no significant difficulty whatsoever.

### **(d) Charges**

**A3.6** Unless otherwise agreed in writing solicitors' fees are generally calculated by reference to the criteria set out in the Solicitors' Remuneration General Orders 1884–1886. These provide that solicitors' fees are calculated having regard to:

- (a) the complexity, importance, difficulty, rarity or urgency of the questions raised;
- (b) where money or property is involved, its amount or value;
- (c) the importance of the matter to the client;
- (d) the skill, labour and responsibility involved therein and any specialized knowledge given or applied on the part of the solicitor;
- (e) the number and importance of any documents perused;
- (f) the place where and the circumstances in which the business or any part thereof is, transacted; and
- (g) the time reasonably expended thereon.

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<sup>12</sup> Legal Services Regulation Bill 2011, Bill No. 58/2011, available at [www.oireachtas.ie/viewdoc.asp?DocID=19208](http://www.oireachtas.ie/viewdoc.asp?DocID=19208).



**A3.7** Section 68 of the Solicitors' (Amendment) Act 1994<sup>13</sup> provides that, on taking instructions to provide legal services or as soon as practicable thereafter, a solicitor should provide his or her client with written particulars of the actual charges or, where this is not possible or practicable, an estimate as near as may be of the charges or where that is not possible or practicable the basis on which the charges are being made. In contentious business, the solicitor must advise as to the circumstances in which the client may be liable to pay the costs of other parties and where the client's liability for costs may not be fully discharged by the amount of any of the costs recovered from the other parties. A fee structure which is based on a percentage of damages is unlawful although no win no fee arrangements are common in personal injuries actions. Most solicitors firms provide detailed itemized bills and fee notes on request. Barristers generally charge on the basis of brief fees for cases as a whole together with 'refreshers' for each additional day a case is at hearing, and additional fees to cover additional work such as attendance at consultations, settling pleadings, the provision of a written opinion and so on.

### (e) Fee-Review Procedure

**A3.8** Pursuant to section of the 68(8) Solicitors' (Amendment) Act 1994 where a solicitor has issued a bill of costs to a client in respect of the provision of legal services and the client disputes the amount the solicitor shall take all appropriate steps to resolve the matter by agreement with the client and inform the client of the client's right to require the solicitor to submit the bill of costs to a taxing master of the High Court for taxation on a solicitor and own client basis and of the client's right to make a complaint to the Law Society under section 9 of the Act that he has been issued with a bill of costs that he or she claims to be excessive.

**A3.9** The Law Society regulates and monitors the practice of solicitors in Ireland. Every solicitor must have a practising certificate and to obtain one the solicitor must provide evidence of professional indemnity insurance or exemption therefrom. A solicitor is required to carry run-off cover for two years from the date of cessation of practice. In addition to the Solicitors' Acts 1954–2008 and the Regulations made pursuant thereto, solicitors must also adhere to the rules of practice, principles and procedure in accordance with a code of ethics published by the Law Society entitled 'The Guide to Professional Conduct of Solicitors (2nd edition 2002)' and investigations are carried out by the Guidance and Ethics Committee of the Law Society.

## (4) JURISDICTION OF THE COURTS GENERALLY

**A4.1** If a foreign defendant is domiciled or registered in the European Union, or in a Lugano Convention Contracting State, or in Denmark (pursuant to the Brussels Convention) then the Irish Courts will exercise jurisdiction pursuant to those conventions or pursuant to the rules of Council Regulation (EC) No 1215/2012 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) known as Brussels 1 (Recast) which applies from 10 January 2015.<sup>14</sup> No permission is required from

<sup>13</sup> Statutes of the Irish Parliament (Oireachtas) can be viewed at <[www.irishstatutebook.ie](http://www.irishstatutebook.ie)>.

<sup>14</sup> *Prior to the coming into force of Regulation 1215/2012 Regulation 44/2001 on jurisdiction on the recognition and enforcement of judgments in civil and commercial matters applied.*

the Irish Courts to issue proceedings against such parties, and all that is required is an endorsement on the writ setting out the articles relied upon.

**A4.2** If the foreign defendant is not from the countries covered by Regulation 1215/2012 or the Lugano Convention, permission will have to be obtained from the Court before the proceedings can be issued. In the High Court, this is governed by Order 11 of the Rules of the Superior Courts. If a claim falls within the following categories, then the Court will allow the proceedings to be issued:

- (a) the whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction; or
- (b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
- (c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
- (d) the action is for the administration of the personal estate of any deceased person, who, at the time of his death, was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Ireland; or
- (e) the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract:
  - made within the jurisdiction; or
  - made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or
  - by its terms or by implication to be governed by Irish Law, or is one brought in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction; or
- (f) the action is founded on a tort committed within the jurisdiction; or
- (g) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect, thereof; or
- (h) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction; or
- (i) the proceeding relates to an infant or person of unsound mind domiciled in, or a citizen of Ireland; or
- (j) the proceeding is an interpleader proceeding relating to property within the jurisdiction; or
- (k) the proceeding relates to an arbitration held or to be held within the jurisdiction; or
- (l) the proceeding relates to the enforcement of an award under Part III of the Arbitration Act, 1980 or of the pecuniary obligations imposed by an award under Part IV of the Arbitration Act, 1980; or

- (m) the proceeding is by a mortgagee or mortgagor in relation to a mortgage of personal property situate within the jurisdiction and seeks relief of the nature or kind following, that is to say sale, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee; but does not seek any personal judgment or order for payment of any moneys due under the mortgage; or
- (n) the proceeding is brought under the provisions relating to carriage by air of the Air Navigation and Transport Act, 1936; or
- (o) the proceeding relates to a ship registered or required to be registered under the Mercantile Marine Act, 1955, or any share or interest therein; or
- (p) the proceeding relates to the ownership of a trademark registered or sought to be registered in the Industrial and Commercial Property Registration Office; or
- (q) the proceeding is brought to enforce any foreign judgment or foreign arbitral award; or
- (r) relief is sought within the jurisdiction in connection with an international commercial arbitration (within the meaning of section 3(1) of the Arbitration (International Commercial) Act 1998), regardless of the place of arbitration.

**A4.3** The procedures involved in making a personal injury claim in Ireland differ from other types of litigation. It is not possible to issue proceedings for any case within its remit until you have received the authorization of the Injuries Board.<sup>15</sup> The Injuries Board is an online statutory body which provides independent assessment of personal injury compensation for victims of Workplace, Motor and Public Liability accidents. It applies to all personal injury cases other than medical negligence and actions under the European Convention on Human Rights. A claimant must submit an application for assessment to the Injuries Board. The following<sup>16</sup> must be submitted along with the form:

- (a) A medical report of the injuries from a doctor who has treated the claimant.
- (b) All correspondence between the respondent and the claimant.
- (c) Supporting documentation for damages claimed such as receipts or vouchers.
- (d) Any other documents the Injuries Board may consider relevant to the claim.

The claim is assigned to an Injuries Board assessor. The Injuries Board will send the respondent a letter and the respondent will have ninety days to decide to consent to an assessment of the claim by the Injuries Board.<sup>17</sup> The Injuries Board will assess damages on a 100% liability assumption. The Injuries Board's assessment of damages is intended to mirror that of the Courts but no legal costs are awarded. The theory is that the assessment of quantum should lead to the resolution of most cases where liability is not seriously in dispute.

**A4.4** Court proceedings in personal injury matters may then arise in one of the following ways:

- (a) Where the Injuries Board notifies the parties that they are unable to deal with the Case under section 17 of the Act. Section 17 sets out five circumstances in which the Injuries Board has a discretion not to arrange for the making of an

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<sup>15</sup> Section 12 of the Personal Injury Assessment Board Act 2003.

<sup>16</sup> Section 11 of the Personal Injury Assessment Board Act 2003.

<sup>17</sup> Section 13 of the Personal Injury Assessment Board Act 2003.

assessment, including cases involving a large amount of psychological damage (the nature and extent of which is difficult to assess), aggravated or exemplary damages are trespassed to the person, there is insufficient case law or because of the complexity of the issue.

- (b) Where a respondent has refused to consent to the Injuries Board making an assessment.
- (c) Either the claimant or the respondent has rejected an Injuries Board assessment. In each of these situations, the Injuries Board will issue an authorization to the claimant to institute proceedings in the Courts. The claimant may now issue legal proceedings in the form of a Personal Injuries Summons as claimant in the High, Circuit or District Court.

## **(5) GENERAL DESCRIPTION OF PROCEDURE OF A TYPICAL COMMERCIAL CLAIM**

### **(a) Pre-trial Definition of Issues**

**A5.1** There is no required pre-action protocol in Ireland (other than in personal injuries actions). However, a warning letter is generally sent prior to the issue of proceedings as a protective measure in relation to costs. The primary means of pre-trial definition of issues is by written pleadings. Proceedings are commenced in the High Court by issuing and serving a High Court Summons, most usually a plenary summons. Where an action is for the recovery of a liquidated sum, a summary summons is used. The principal pleadings in most High Court actions consist of the statement of claim and the defence and counterclaim in which the parties set out their respective cases. Other pleadings deal with contingencies such as third party proceedings and claims between defendants. The pleadings set out the facts on which each party relies but are not required to contain matters of evidence or law. Where a party has failed to give proper details of the nature of his or her claim or his or her defence, the other party can serve a notice for particulars and if necessary apply to the Court to compel the delivery of sufficient pleadings. There are other procedural devices available to ensure the pre-trial definition of issues including the service of interrogatories requiring the other party to answer specified questions (in writing and on oath), and the service of a notice to admit facts. Parties can also apply to strike out issues in whole or in part or for orders requiring the trial of a preliminary issue before the action as a whole proceeds. Pleadings can be amended after they have been served by leave of the Court.

The introduction of the Civil Liability and Courts Act 2004 has reformed certain aspects of the conduct of personal injury litigation. One of the principal reforms is the requirement of an affidavit swearing as to the truth of pleadings or particulars.<sup>18</sup> Furthermore the case must be pleaded in more detail than was previously required. The Court can dismiss actions where a plaintiff gives false or misleading information or swears an affidavit containing such material. A dishonest plaintiff will also run a greater risk of criminal prosecution and face a fine of up to EUR 100,000.00, and/or up to ten years imprisonment on conviction.<sup>19</sup>

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<sup>18</sup> Section 14 of the Civil Liability and Courts Act 2004.

<sup>19</sup> Section 29 of The Civil Liability and Courts Act 2004.

When an action is set down for trial in the High Court and it is assigned to a judge for hearing, the party who set the Case down for trial is required to lodge with the registrar to that judge on the trial date a certified copy of the Book of Pleadings.

**A5.2** Commercial proceedings can be entered in the Commercial List at any time prior to the close of pleadings, in the case of plenary proceedings or the completion of filing of affidavits, in the case of summary proceedings.<sup>20</sup> Application is made by way of notice of motion to the other parties to the proceedings. Entry of a case in the Commercial List is at the discretion of the Judge in charge of the Commercial List. If entered into the Commercial List, all further motions or applications for that Case will take place in that List.<sup>21</sup>

### **(b) Pre-trial Hearings**

**A5.3** Pre-trial hearings of substantive issues are not a normal part of the litigation procedure in Ireland but they can be conducted before major trials when the circumstance of a particular case requires it. For example, either party can apply to the Court for an order for the trial of a preliminary issue or indeed for directions and in the course of any such application for directions the Court can deal with any outstanding issues as regards pleadings, discovery or any other matters which need to be disposed of prior to the trial of the action. Such matters will be dealt with by a judge or, in the case of certain applications, the Master of the High Court, both of whom will be concerned to make orders designed to advance the interests of justice or save costs while advancing the matter to trial. Except in the Case of the trial of a preliminary issue, substantive factual issues will be resolved at trial. Procedural issues will be dealt with prior to trial on the basis of a written application (notice of motion) and affidavits from each interested party and on the basis of oral argument.

**A5.4** Special procedures apply to cases in the Commercial List and these procedures are designed to progress cases in a just and prompt manner and to reduce costs.<sup>22</sup> Once a case enters the Commercial List, it faces a rigorous pre-trial procedure to narrow the issues and get it to trial. If a case has been transferred into the Commercial List,<sup>23</sup> the Judge assigned to the Case will hold an Initial Directions Hearing which takes place when the Case is admitted to the Commercial List.<sup>24</sup> This hearing enables the Court to direct the mode of trial and also to fix the issues of law and fact. Application can be made at the Initial Directions Hearing to suspend the proceedings for a period of not more than twenty-eight days to explore all avenues open to the parties to settle the proceedings by recourse to mediation, conciliation or arbitration.<sup>25</sup>

**A5.5** In practice it is not likely that such an Order would be made at this early stage, but it is still possible. The more usual course is for the parties to be given short time periods for the delivery of points of claim and defence and requests for discovery. If the claim is complex, the more traditional Statement of Claim and Defence will be directed, but the parties must be careful only to plead matters they are in a position to substantiate. The

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<sup>20</sup> Rule 4(2) of Ord. 63A. Although the Court is likely to refuse entry to the Commercial List if there is an unreasonable delay in applying for entry.

<sup>21</sup> Paragraph 9 of Courts Service Practice Direction HC31 in relation to The High Court Commercial List.

<sup>22</sup> Rules 5 and 14(7) of Order 63A.

<sup>23</sup> The transfer of proceedings to the High Court Commercial List, and the conduct of proceedings once transferred to the Commercial List, are regulated by Ord. 63A of the Rules of the Superior Courts which were brought into effect by Statutory Instrument No. 2 of 2004.

<sup>24</sup> Rule 4(5) of Ord. 63A.

<sup>25</sup> Rule 6(1) (xiii) of Ord. 63A.

parties will be asked to draw up a list of the facts and issues in the case. The Court then focuses on this list throughout the pre-trial case management with a view to narrowing the issues which will require to be heard *viva voce* at trial.

**A5.6** On every Friday during the Court's term, there is a call-over before the Judge in charge of the Commercial List of the Cases listed for trial during the following week, the purpose for this call-over is to ensure that all pre-trial directions given by the Court have been complied with in full. The form of pleadings in the Commercial List is required to be much more precise than one would see in the High Court and will need to be such as to clearly identify the Case being made and the defence being relied on. Both parties will be required to identify, very early on, all of the agreed facts, and all of the matters relevant to the resolution of a dispute that are not agreed. A date for the next directions hearing is always given, together with a list of matters to be attended to before the next date. In the event that a party fails to comply with the directions, they could face severe criticism and possibly an Order against them in respect of costs.

**A5.7** A Case Management Conference may be required due to the complexity of the case, number of issues/parties, volume of evidence in the Case or for any other special reason.<sup>26</sup> The purpose of this conference is to ensure the proceedings are prepared for trial in a just and expeditious manner and likely to minimize costs by ensuring that the issues as to fact and law are clearly defined; all pleadings, affidavits and statement of issues and notices and replies are served or delivered; all interlocutory applications which the parties intend to make are made; any directions of the Judge have been complied with. If the Court directs or the parties request case management the plaintiff should lodge a case booklet with the Registrar in advance of proceedings. If case management is not taking place each party can make an application for Pre-trial conference.

**A5.8** While the rules provide that a Pre-trial Conference is mandatory in all Commercial list cases, this does not tend to happen in practice.<sup>27</sup> Where there is a Pre-trial Conference a Pre-trial Questionnaire should be completed by the parties which addresses various issues such as whether direct evidence will be given on sworn witness statements, whether video evidence is required and the number of witnesses which need to be cross-examined, etc.

**A5.9** In respect of both the Initial Directions Hearing, together with any Case Management Conferences and the Pre-trial Conference, it is an explicit requirement of the Commercial List Rules that solicitors who are attending such meetings are sufficiently familiar with the Case and have authority to deal with any issues that arise at those meetings. The legal representatives are expected to give the Commercial List priority over all other work.

**A5.10** Parties are not obliged to engage in conciliation or mediation of disputes but where such Alternative Dispute Resolution (ADR) mechanisms are not explored there may be implications in terms of costs for the parties involved. However, no decisions, akin to those in England imposing adverse costs orders on a party refusing mediation, have yet been rendered by the Irish Courts. Even if the parties decide not to pursue ADR, it is still open to the Court to refer the parties to a variety of ADR mechanisms. Usually once the pleadings have been exchanged, although, as stated above, it can be at any time after the Case is admitted to the Commercial List, the parties can apply to suspend the proceedings in order to explore all avenues open to them to settle the proceedings, by recourse to mediation.

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<sup>26</sup> Rule 6(1) (xiii) of Ord. 63A.

<sup>27</sup> Rule 16 of Ord. 63A.

### (c) Pre-trial Discovery/Depositions

**A5.11** Pre-trial discovery in Ireland is limited to documentary discovery. There is no procedure for oral discovery or depositions. In exceptional cases such depositions may be ordered (e.g., where the witness is overseas, or an invalid or likely to die before the trial). Proceedings must be in being, and not just contemplated, for such a procedure to be available. Videotaping a witness in advance of proceedings being issued in the hope that such testimony will be admitted in evidence will not work.

**A5.12** Documentary discovery in the High Court is limited to specified categories of relevant and necessary documents and usually takes place after pleadings have closed. Order 31 of the Rules of the Supreme Courts governs the procedure. Each party requests voluntary discovery from the other. The party seeking such discovery must show the discovery is relevant and necessary for the proceedings or for saving costs. Legally privileged documents are not disclosed to the other side, although they are listed in the affidavit of discovery. Discovery may be prepared using Technology Assistance Review where appropriate.<sup>28</sup>

The discovered documents are then made available to the other party. Failure to make proper discovery can result in a claim being dismissed or a defence struck out or the Parties could suffer costs sanctions.

Exchange of witness statements prior to trial arise in High Court personal injury actions where:

- (a) each party must exchange a list of witnesses it, intends to call; and
- (b) each party must exchange the evidence of the experts on whom it intends to rely.  
(See A.5.13 below)

In Commercial List cases the rules provide that the parties exchange witness statements from witnesses both as to fact and expert witnesses prior to trial<sup>29</sup> These statements should contain the essential elements of the evidence that will be given to the Court and shall be signed and dated by the witness or expert as the case may be (see A5.21 below).

### (d) Other Pre-trial Exchange of Evidence

**A5.13** The exchange of expert evidence prior to trial is required in personal injury actions. The rules refer to any report or statement from accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists, scientists or any other expert whatsoever intended to be called to give evidence in relation to any issue in an action and containing the substance of the evidence to be adduced and shall also include maps, drawings, photographs or any like matter referred to in any such report. The rules require the plaintiff to furnish the other parties with all reports from expert witnesses intended to be called within one month of the service of the notice of trial or within such further time as may be permitted by the parties as may be agreed by the parties or permitted by the Court. Within seven days thereafter the other parties must reciprocate and within seven days of the receipt of the schedule of the Defendants or other parties the parties shall exchange copies of the reports listed and the relevant schedules.

<sup>28</sup> *The High Court in IBRC v. Quinn & Ors [2015] IEHC 175 held that technology assisted review complied with the Irish discovery rules and approved its use in a case involving a significant volume of documents.*

<sup>29</sup> *Order 63A Rule 22.*

As set out in paragraph A5.21 below witness statements from experts are exchanged in Commercial List cases prior to trial. Such statements should set out the essential elements of the evidence to be given and shall be signed and dated by the expert.

### **(e) Pre-trial Investigatory Procedures**

**A5.14** The Court may appoint its own experts in personal injury cases and require the parties to attend a mediation conference.

The Court also has jurisdiction to order the detention, preservation or inspection of any property or thing and may authorize entry into land or buildings or the taking of samples or experiment for the purposes of obtaining full information or evidence. The Court may also suggest mediation or other ADR processes (other than arbitration) and require discovery in advance of mediation per S.I. No. 502/2010 implementing Order 56A of the Rules of the Superior Courts.<sup>30</sup>

### **(f) Fixing of Trial Dates**

**A5.15** Once the Pre-trial steps have been completed, such as pleadings and discovery, it is usual that each side then sends to Senior Counsel a full brief for him or her to advise on the proofs which will be required for the trial. This advice on proofs is sent by Senior Counsel to the instructing solicitor in order that the evidence can be assembled for the trial. Once the steps set out in the advice on proofs are completed, the Senior Counsel will issue a certificate of readiness. This certificate and a notice of trial are then lodged with the High Court Office and served on the other side. These documents place the Case in the Court list for hearing. Four times a year (at the end of each law term)<sup>31</sup> lists to fix dates are held by the High Court in which the parties can seek trial dates for the following law term.

**A5.16** The parties cannot be guaranteed that the Case will be heard on the date assigned by the Court. The number of cases coming before the High Court inevitably leads to situations where cases spill over from previous days, and judges are simply unavailable. If that happens, the Case is adjourned to the next list to fix dates in order that a new date can be assigned to it. This means that significant delays can occur, and parties should be prepared for that possibility.

**A5.17** In Commercial Court cases at the Pre-trial Conference each party must complete a Pre-trial questionnaire. This helps the Judge to establish the length of the trial and make arrangements for the trial. It contains a checklist of actions requiring completion at the Pre-trial stage and arrangements for trial. Also before the trial a Trial Booklet and Case summary should be prepared by the plaintiff/party prosecuting the proceedings. The Case summary should include an agreed outline of the Case and sequence of relevant events not in dispute; a list of those issues which are not in dispute; a list of the persons principally involved in the matters or events the subject of the proceedings and; where appropriate, a glossary of technical terms which are likely to be used in the course of the trial. If the Judge is satisfied that the Case is ready to precede to trial he or she will fix a hearing date. The Judge can also request parties to consult and agree documents for trial.

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<sup>30</sup> The Government has committed to introducing a Mediation Bill in 2015 to provide mediation as an alternative to litigation.

<sup>31</sup> The legal calendar in Ireland follows a pattern of four terms, Michaelmas (the first Monday in October to 21 December), Hilary (early January to the Friday before Palm Sunday), Easter (the second Monday after Easter Sunday to Whitsun), and Trinity (shortly after Whitsun to 31 July).



## (g) Trial Procedures

### (i) Conduct of Trial

**A5.18** Generally trials are conducted on the basis of oral testimony with witnesses being called to give evidence and subsequently being cross-examined by the other parties. Certain types of proceedings, such as judicial review proceedings, are generally dealt with on the basis of affidavit evidence without oral testimony.

### (ii) Recording of Evidence

**A5.19** It is open to the parties to obtain the transcripts of evidence of the proceedings. The cost of such transcripts are borne by the parties but may be recoverable as part of the costs of the proceedings. For most Commercial Court cases a stenographer is needed. Parties generally agree to share the costs of the stenographer equally.

### (iii) In What Form (Written or Oral) the Court Receives Evidence

**A5.20** The primary form in which evidence is received at trial is through oral testimony. However, Pre-trial applications are generally dealt with on the basis of affidavit evidence as are certain types of proceedings.<sup>32</sup> Cross-examination of witnesses is permitted. Facts may also be proved by way of other procedures provided under the Rules including delivery of a notice to admit facts, and the service of interrogatories; statements of factual witnesses are not exchanged in advance, however, in High Court personal injury action copies of experts' reports and lists of factual witnesses are exchanged.

In the Commercial List facilities are available for the taking of live evidence by video link. The Court is also designed to be paper free and facilities for pleadings and documents to be used in electronic format have also been installed.

**A5.21** Witness statements are exchanged prior to trial in Commercial List cases. The Rules provide that a Plaintiff, not less than one month before the trial date, and the Defendant, not later than seven days prior to the trial date, must serve on the parties to the proceedings written, signed and dated statements setting out the essential elements of their evidence. These witness statements are to be completed by both witnesses as to fact and expert witnesses. The Court can direct that such a statement be treated as the witness's evidence-in-chief on being verified on oath.<sup>33</sup>

**A5.22** Not every case which falls within the ambit of the definition of 'Commercial Proceedings' is suitable for trial in this manner. Because of the speed of the process, very significant costs are incurred very quickly as the deadlines set at the various directions hearings are very short and thus require a high time commitment for all the lawyers involved. However in cases where in the past, parties would have considered seeking interlocutory relief, it is now possible to avoid the costs of taking interlocutory proceedings as parties can move towards a full trial in a very short period of time. On the other hand, if a case requires very detailed investigation and assimilation of documentation, it may not be in the best interest of the parties to follow this fast track approach initially, but rather the traditional High Court list would be more appropriate until such time as the parties are

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<sup>32</sup> As previously indicated proceedings for the recovery of a liquidated sum and practical review proceedings are generally dealt with on affidavit evidence.

<sup>33</sup> Rule 22(1) of Ord. 63A.

prepared. That said, a case of this nature would clearly benefit from careful case management which avoids the parties incurring unnecessary costs in preparation of non-core issues that a party may have pleaded.

#### **(iv) In What Form the Court Receives Expert Evidence**

**A5.23** The Court will usually receive expert evidence in the form of written reports together with oral testimony from the expert witness concerned who will also be subject to cross-examination from the opposing party.

**A5.24** In the Commercial List the Court may direct consultations between expert witnesses to:

- (a) identify the issues in respect of which they intend to give evidence;
- (b) where possible, reach agreement on the evidence they intend to give in respect of those issues; and
- (c) consider any matter which the Judge may direct them to consider,

and the Court may require that they record in a memorandum to be jointly submitted to the Court and delivered to the parties, particulars of the outcome of their consultations.<sup>34</sup>

#### **(v) How Legal Submissions Are Made at the Trial**

**A5.25** Legal submissions can be made at the trial both orally and in writing. The Courts require that, if complex legal issues are raised in the Case, written arguments should be lodged by the parties in advance of the hearing. In the Commercial List, the Court of Appeal and the Supreme Court, written submissions are lodged as a matter of course.

#### **(vi) How Damages Are Assessed**

**A5.26** Damages are generally assessed by the Judge at the trial; however, the Courts will in appropriate cases separate the trial of liability and quantum. There is a rarely used provision under the Rules of the Court for the High Court judge to refer a matter to the Master of the High Court to enable the damages to be assessed by the Master.

#### **(vii) What Happens if the Case Lasts Longer than the Estimated Trial Time Reserved by the Court?**

**A5.27** If the Case lasts longer than originally estimated it may be heard to completion or adjourned depending upon the circumstances. The High Court (and most particularly the Commercial List) is becoming insistent on the estimated duration of cases being adhered to.

#### **(h) Availability of Judgments**

**A5.28** Judgments can be delivered orally following the conclusion of the Case but, in major or complex proceedings, judgments would generally be reserved and delivered in writing and would set out the findings of the facts on relevant issues and include full details of the legal reasoning.

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<sup>34</sup> Rule 6(1) (ix) of Ord. 63A.

## **(6) RECEPTION OF EVIDENCE AT THE TRIAL**

### **(a) From Overseas Witnesses**

**A6.1** The general principle is that witnesses attend the trial and give evidence in person in open court. In appropriate cases the Court can provide for alternative modes of testimony including the giving of evidence on affidavit or by way of response to interrogatories or by giving evidence to a commissioner or examiner. The Court will not authorize the evidence of a witness to be given by affidavit where the other party has a bona fide desire for the particular witness to be produced for cross-examination. However, the testimony can be obtained by means of evidence on commission in such circumstances. Frequently overseas witnesses will travel to Ireland for the purposes of the trial of major litigation in which they are involved. If it is not possible for the witness to be present at the trial, the other parties might agree to the provision of the particular testimony by affidavit. Failing such agreement, it might be necessary to secure the evidence on commission. If overseas witnesses were unwilling to co-operate it would not be possible to compel them to do so by way of *subpoena*, but an application could be made for letters rogatory to be issued by the Irish Court to the Courts for the appropriate jurisdiction to seek their assistance in compelling the attendance of an individual to give testimony. Alternatively, if the witness is located in a European Union State then the procedure under Council Regulation 1206/2001 is available. Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the Courts of the Member States in the taking of evidence in civil or commercial matters allows the taking of evidence from one Member State to another without recourse to consular and diplomatic channels.

### **(b) From Expert Witnesses**

**A6.2** Reports by expert witnesses must be exchanged prior to trial in High Court personal injury actions, and can be exchanged between the parties in other litigation. Expert witnesses would normally furnish a formal report but would also give oral evidence and would be subject to cross-examination. The Commercial List, as noted above, has developed specific procedures for the reception of evidence from experts.

### **(c) Evidence of Foreign Law**

**A6.3** Evidence of foreign law would be obtained by means of a report by an appropriately qualified lawyer in the jurisdiction concerned. In some cases the parties will agree that such evidence will be given in a written report or by affidavit avoiding the necessity for such foreign lawyers to travel to Ireland for the hearing. In default of such agreement, or alternative orders, the normal rules would apply and the foreign lawyers would be required to attend the trial in Ireland, giving evidence and being subjected to cross-examination. As with other common law jurisdictions, foreign law is considered to be an issue of fact, and must therefore be proved in the same manner as other facts involved in the Case. Usually, if foreign law is an issue in the Case, the normal practice is that each side pleads the foreign law, either in the statement of claim or defence, or in submissions specifically for that task.

## **(7) EXTENT TO WHICH THE COURTS HAVE REGARD TO THE PREVIOUS DECISIONS**

**A7.1** Ireland is a common law jurisdiction and the Courts are bound by previous decisions of superior courts on the same legal issues. Courts will not be bound by previous decisions of other courts of equal or inferior jurisdictions but may regard them as persuasive. The Irish courts will often be referred to decisions of the Courts of England and Wales, but only regard them as persuasive. Decisions of common law jurisdictions further afield, such as New Zealand, Australia, Canada, and (infrequently) the United States, are cited before the Courts. Decisions of the European Court of Justice are also binding on the Irish courts.

## **(8) CONSERVATORY JURISDICTION GENERALLY**

**A8.1** A plaintiff can seek orders freezing the defendant's assets<sup>35</sup> pending completion of the trial providing various criteria can be met including the provision of an undertaking as to damages by the plaintiff (which applies if it subsequently transpires that the freezing order should not have been granted), there must also be an arguable case to be tried for the plaintiff, and the balance of convenience must favour the granting of such an order. In addition, the Courts will generally only make such an order where there is evidence of an intention on the part of a defendant to dissipate assets to defeat the plaintiff's claim pending trial. This is a high burden for a plaintiff. This has been described as a subjective test, and is in contrast to the objective test which obtains in England and Wales. If a party requires such an order, it must be in possession of credible, sustainable and detailed evidence of the defendant's 'nefarious' intention.

**A8.2** Such orders can require the defendant and third parties to preserve assets pending trial. Other orders can be granted at the Court's discretion pending trial generally to preserve the status quo and will largely depend on the balance of convenience and an undertaking as to costs from the plaintiff, and whether damages would be an adequate remedy at trial.

## **(9) AVAILABILITY OF JUDGMENTS FOR INTEREST ON DEBTS OR DAMAGES**

**A9.1** The Irish courts can award interest on debts or damages and this interest can be awarded in accordance with the provisions of the contractual arrangements between the particular parties or pursuant to prescribed statutory rates which apply in default of any such contractual arrangements.

## **(10) AVAILABILITY OF ORDERS FOR COSTS**

**A10.1** The Court has a discretion as to the award of costs but generally, the unsuccessful party is ordered to meet the costs of the other parties. The amount actually paid in

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<sup>35</sup> See the chapter on Ireland in *Attachment of Assets* (Lawrence W. Newman ed., Juris, New York) (looseleaf) (2015).

accordance with such an order can be assessed by a court official in default of agreement between the parties. Generally the amount recovered is about 65% of the actual costs incurred by the successful party. In certain circumstances a plaintiff can be required to give security on account of costs prior to commencement of proceedings and such an application for security for costs is likely where the plaintiff is either an individual who is not an Irish or EU citizen or resident or where the plaintiff is a limited company and there is reason to believe it will be unable to pay the costs of the defendant if the defence is successful in the proceedings. Security for costs will not be awarded even in those circumstances unless there is no arguable defence to the claim and there are no special circumstances why security should not be awarded.

**A10.2** In the Commercial List the costs of the initial directions hearing shall, unless the Judge orders otherwise, be deemed to be costs in the cause. The Judge of the Commercial List may prescribe requirements as to the form and content of bills of costs to be prepared in respect of proceedings entered in the Commercial List. Otherwise bills of cost are to be prepared in the manner prescribed by Order 99 Rule 29. When a judge is deciding on an interlocutory application, he or she shall make an award of costs unless it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. If the Judge is of the opinion at the Case management conference that a pleading contains unnecessary matter or unnecessarily long he or she can award costs incurred by one party in having to deal with the unnecessary matter against the offending party.

## **(11) ENFORCEMENT OF DOMESTIC JUDGMENTS AND ORDERS**

**A11.1** A variety of tools are available for the enforcement of domestic judgments and orders and enforcement rarely poses a significant obstacle once the final judgment has been obtained providing the defendant has sufficient assets against which to have recourse. A judgment for the recovery of any property other than land or money may be enforced by an order for the delivery or attachment of the property or for its sequestration. An order for the recovery or delivery of the possession of land may be enforced by an order accordingly. A judgment requiring any person to do any act other than the payment of money or to abstain from doing anything may be enforced by order of attachment or committal. In respect of judgments for the payment of money, orders can be sought by the seizure or attachment of assets or – in very limited circumstances and where the debtor has the means to discharge any debt refuses to do so – for his or her committal to prison. The rules also provide for the attachment of debts or the appointment of receiver or for charging orders in respect of stocks and shares.

## **(12) GERMANE JURISDICTIONS**

**A12.1** Ireland's procedures would traditionally have been similar to those of other common law jurisdictions such as England, New Zealand, Hong Kong, Singapore and Australia but there has been a degree of divergence over recent years, and, although similarities remain in many areas, in other respects the different jurisdictions have developed different procedural requirements, for example as to case management, discovery, exchange of evidence, and style of pleadings.

## (13) APPEAL

**A13.1** Appeals from the Circuit Court are heard in the High Court. The notice of appeal must be served within ten days of the date on which the judgment or order appealed from was pronounced in open court. Although the Court has a jurisdiction to extend this period, this discretion is rarely exercised. If, on the hearing of an appeal, a party desires to submit fresh evidence it is required to lodge an affidavit setting out the nature of the evidence and reason it was not submitted in the Circuit Court. However, the Court has in any event jurisdiction to admit fresh evidence.

**A13.2** Appeals from the High Court are dealt with by the Court of Appeal or in limited circumstances the Supreme Court.

There are two types of civil appeals to the Court of Appeal:

- (1) Expedited Appeal.
- (2) Ordinary Appeal.

Expedited appeals arise in specified cases including interlocutory, summary and insolvency matters.

The time limits for expedited appeals are quite short. In an expedited appeal the appellant shall lodge a Notice of Expedited Appeal within ten days from the date of the perfection of the Order. The Respondent then has seven days to lodge and serve the Respondent's Notice.

Ordinary Appeals are appeals which are not expedited appeals. In an ordinary appeal the Notice of Appeal shall be lodged within twenty-eight days of the date of perfection of the order being appealed from and the Respondent's twenty-one days to lodge and serve the Respondent's notice.

Leave must be obtained to appeal to the Supreme Court and an application for leave to appeal must be brought within twenty-eight days of perfection of the order being appealed from.

The Court of Appeal has jurisdiction to hear appeals in all civil proceedings from the High Court. Exceptions are those cases in which the Supreme Court has permitted an appeal directly to it (a 'Leap Frog' appeal). This is where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it and it involves a matter of general public interest and/or it is in the interests of justice that the Supreme Court hear the appeal.

The decision of the Court of Appeal is final unless the Supreme Court permits an appeal which it can do where it is satisfied that the decision involves a matter of general public importance or it is in the interests of justice that there be an appeal to the Supreme Court.

All appeals to the Court of Appeal and the Supreme Court are by way of re-hearing, and the appellant may appeal from the whole or part of any judgment or order. The Court of Appeal and Supreme Court have discretionary power to receive further evidence on questions of fact by oral examination or by affidavit before an examiner or commissioner. Upon any appeal from a final judgment, such further evidence shall be admitted on special grounds only and requires leave of the Appeal Court. The Appeal Court has power to make any such further order as the case may require. The Appeal Court can also order that the Judgment or Order be set aside and a new trial be ordered.

**A13.3** Findings of fact made by the trial Judge in the High Court will, as a matter of Irish law, be almost impossible to overturn in the Court of Appeal or Supreme Court.

## (14) TIME LIMITATION

**A14.1** The general limitation period in contract and tort is six years from the date upon which the cause of action arises. The statutory limitation period for all personal injury cases is two years<sup>36</sup> from the date: (a) on which the cause of action accrued; or (b) of knowledge of the injury, whichever is the lesser. Another significant effect of the 2004 Act relates to the letter of claim. A claimant in a personal injuries action must now issue a notice providing details of the accident to the respondent within two months of the date of the cause of action or as soon as practicable thereafter.<sup>37</sup> Failure to do so entitles the Courts to draw 'adverse inferences' and may affect decisions as to costs.

Following the Defamation Act 2009 the limitation period for defamation claims is one year from the date of publication of the defamatory material.

In land recovery claims the limitation period is twelve years from the accrual of the right of action.

In Maritime and Airline cases the limitation period is two years from the date of accrual of the cause of action.

In judicial review disputes the claim must be brought promptly and in any event within three months of the date of the cause of action (the period can be extended by the Court with good reason).

**A14.2** The Law Reform Commission has recommend a uniform, basic, limitation period for 'common law actions' (contract, negligence, nuisance and breach of duty) of two years, to run from the date of knowledge of the claimant, that is, the date that the claimant knew or ought to have known of the cause of action. 'Knowledge' includes both actual and constructive knowledge. The Commission has also recommended the introduction of a long-stop limitation period of fifteen years to run from the date of the act or omission giving rise to the cause of action. The proposed reforms have not been implemented to date.

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<sup>36</sup> Section 7 of the Civil Liability and Courts Act 2004.

<sup>37</sup> Section 8 of the Civil Liability and Courts Act 2004.

## **PART B—PARTICULAR CLAIMS**

### **(1) CLAIMS FOR BREACH OF CONTRACT FOR SALE OF GOODS**

#### **(a) Appropriate Court for Claim and Method of Initiation of Claim**

**B1.1** There are no special provisions as to the choice of court for a sale of goods claim and the amounts in section A1 would be equally applicable here. If the sale of goods claim is for more than EUR 1,000,000.00 in value, it would be eligible to be transferred to the Commercial List. The normal mode of initiating proceedings in the High Court is by way of plenary summons, but alternative modes of commencement are available in certain circumstances. In particular, where a plaintiff only seeks to recover a debt or liquidated demand in certain circumstances, or a landlord seeks to recover possession of land, or a plaintiff initially seeks to have an account taken, it may proceed by way of summary summons. A summary summons will proceed on affidavit evidence only, and oral testimony will not be allowed. A defendant faced with such a summons will have to depose to any defence it may have, and, unless that is sufficient, summary judgment will be entered against it by the Master of the High Court. If a credible defence is set out on affidavit by the defendant, the matter will then proceed by way of plenary proceedings with discovery and oral testimony.

#### **(b) Claims by and against More than One Party**

**B1.2** There is no class action procedure in Ireland although the Courts will allow a representative action i.e. where numerous persons have the same interest in a cause or matter one or more persons may sue on behalf of all authorized persons. The proposed Plaintiff must be authorized to sue on behalf of the other persons and the decision of the Court will bind every interested party. In reality, in class action type cases, each Plaintiff tends to issue separate proceedings. Claims may be issued against more than one defendant, and the defendant can seek leave to issue third party proceedings against a party not previously joined to the proceedings.

#### **(c) Method of Pre-trial Definition of Issues**

**B1.3** In most cases a plenary hearing is required to dispose of cases. The pre-trial definition of issues is on the basis of the exchange of pleadings as set out of section A5 (a) above. If a defendant seeks to rely on a right of counterclaim he or she is required to state the ground of counterclaim in his or her defence (subject to a right to subsequently amend the defence and counterclaim with leave of the Court). If the Court considers, on the application of any party, that the counterclaim should not be dealt with as a counterclaim but rather as an independent action it can order accordingly.



### **(d) Pre-trial Conservatory Remedies**

**B1.4** The Court can make orders for the examination of a party as to its assets or for the freezing of a defendant's assets but a freezing order will only be made if a number of conditions are satisfied, including a demonstration of evidence of the 'nefarious' intention or an intention to dissipate its assets prior to trial, in order to defeat the plaintiff's claim. Applications for such remedies are on the basis of notice of motion supported by affidavits and are generally on notice to the other parties but applications *ex parte* are permitted if the delay caused by proceeding by motion on notice would or might entail irreparable or serious mischief.

**B1.5** The Court can make other conservatory orders pending trial, such as 'an order' for the preservation of property.

### **(e) Pre-trial Hearings**

**B1.6** The plaintiff can apply for summary judgment if it can show that the defendant has no arguable defence to the proceedings. This procedure is only available in certain types of cases, and, in particular, is most often used in claims for liquidated debts, or mortgage suits. Any such application will also be commenced by notice of motion and dealt with on affidavit. If there is a bona fide defence the matter will proceed to trial in the normal way. Other Pre-trial hearings include the trial of a preliminary issue (such as, for example, limitation questions, or to compel a party to give better particulars of its claim or counterclaim or defence, or to give further discovery of documents, or to give security for costs or for various other reliefs provided for under the Rules). Once again, such hearings are dealt with on the basis of affidavit evidence and oral legal argument, and the Court can make orders either giving judgment for either party or requiring either party to take particular steps in the proceedings. In the event of the breach of any such order the other party can apply for the dismissal of that party's claim or defence, for an order for committal or sequestration of the defaulting party's assets.

### **(f) Pre-trial Discovery/Depositions**

**B1.7** Pre-trial discovery is generally limited to the discovery of documents which are relevant and necessary for the proceedings (as outlined in A.5), and oral discovery/depositions are unusual although they can be ordered if a witness is sick or likely to die before trial or is overseas. Witness statements and experts' reports will not be required to be exchanged prior to trial (other than as outlined in A.5 above in relation to the Commercial List). The Court can, and frequently does, require the exchange of legal submissions in advance of the trial.

### **(g) Other Pre-trial Procedures**

**B1.8** The position as to exchange of experts' reports, witness statements and legal submissions is set out in section A (5) (c), (d) and (g).

### **(h) Pre-trial Investigatory Procedures**

**B1.9** It would be unusual for there to be Pre-trial investigatory procedures by the Court or court experts but either party could seek an order for the examination or testing of goods.

### (i) Trial Dates

**B1.10** This has been covered by section A5 (f).

### (j) Preparation of Evidence: How Long the Evidence of Typical Witnesses for that Type of Claim is Brought before the Court, Signed Statements, Sworn Evidence, Oral Evidence. Special Treatment of Expert Evidence; Evidence of Foreign Law, Proof of Documents and Assessments of Damage

**B1.11** Where matters are dealt with on an application for summary judgment, they can be disposed on the basis of affidavit evidence. In most actions, however, they proceed to plenary hearing, the evidence of witnesses is given orally on oath and also to witnesses who are likely to be cross-examined by the other party. Experts' reports are not automatically exchanged prior to trial, written reports from experts are usually furnished to the Court in addition to oral testimony from the expert who is also likely to be cross-examined. By agreement between the parties evidence of foreign law can be dealt with by the provision of a report or an affidavit from a suitably qualified foreign lawyer. In the absence of such agreement the foreign lawyers will be required to attend and give evidence on oath as to the foreign law in question.

**B1.12** Documents are often admitted by consent, but in the absence of such consent they do require formal proof before they can be admitted into evidence. A useful device is the notice to admit documents which requires the other side to either admit a particular document or suffer the costs of the proof of such document.

**B1.13** Damages are generally assessed by the High Court, but can also be referred to the Master of the High Court, though that is a rare occurrence.

### (k) Conduct of Trial

**B1.14** Counsel for the plaintiff opens the trial by summarizing the Case, reading the pleadings, setting out the nature and extent of the evidence to be given, and noting any particular issues of law which will be raised. Once the opening has been completed, the witnesses for the plaintiff are called one by one to give their evidence on oath in open court. Each witness gives his or her evidence-in-chief upon questions from the plaintiff's counsel. After evidence-in-chief, counsel for the defendant then has the opportunity of cross-examining the witness. Once the plaintiff has completed its evidence, the defendant will present its case in the same manner.

**B1.15** On completion of the evidence, it is usual that argument will be engaged in on the legal issues raised by the Case. In most cases, judgment will be reserved by the Court to be delivered at a later date. As to how long the Court will take to deliver its judgment, there are no definite rules, and it depends entirely on the timetable of the Judge in question. As already noted, the judgment will be reasoned, and award interest if appropriate on the judgment amount. As regards costs, this will be argued in open court after delivery of the judgment and it is usual that costs will follow the event. However, the Court can take into account the entire conduct of the parties, and, as has happened in certain cases, will not

award the entire costs to the winning party if the Court is of the view that the Case was unduly drawn out by that party.

### **(1) Appeals Procedure and Conduct of Appeals: Whether Fresh Evidence is Admissible; Costs of Appeal**

**B1.16** The position in relation to appeals is dealt with at section A13. Again, costs are at the discretion of the Court but the general rule is that costs follow the event.

### **(m) Enforcement of the Judgment Against Defendant within the Jurisdiction**

**B1.17** This is dealt with at section B11.

## **(2) CLAIMS FOR RIGHTS IN MINERAL CONCESSION IN THE JURISDICTION**

**B2.1** There are no special rules of court for dealing with such claims. These would be addressed in the same manner as normal commercial litigation.

## **(3) CLAIMS FOR TITLE TO OR DAMAGE TO GOODS IN THE JURISDICTION IN QUESTION**

**B3.1** In most cases there are no special requirements in respect of claims for title or damage to goods in the jurisdiction and the requirements stipulated in section A and in section B1 would also apply to such claims.

## **(4) CLAIMS FOR MONIES DUE UNDER INSURANCE/REINSURANCE CONTRACTS**

**B4.1** In most cases there are no special requirements in respect of claims for monies due under insurance/reinsurance contracts in the jurisdiction and the requirements stipulated in section A and in section B1 would also apply to such claims.

## **(5) CLAIMS TO ENFORCE CORPORATE SHARE-SALE TRANSACTIONS**

**B5.1** There is no special court for claims to enforce neither a share-sale transaction nor special procedures which apply to such claims. The appropriate court will depend on the

value of the claim, and may include an application to the Court for an order for specific performance of the transaction. In other respects the procedures do not differ from those set out in sections A and B1 above.

## **(6) CLAIMS TO ENFORCE COPYRIGHT/ TRADEMARK**

**B6.1** There is no special court for claims to enforce copyright/trademark. The appropriate court will depend on the value of the claim. However, certain applications can be made to specific courts. For example, the District Court can order the seizure by local police of goods, material, articles or devices that infringe trademark/copyright. Other rights available to right holders include seeing an order for delivery up of the infringing of goods, articles or devices. In other respects, the principles set out at sections A and B1 applies.

## **(7) CLAIMS TO AN INTEREST IN A BANK DEPOSIT**

**B7.1** The same principles set out at sections A and B1 would apply to a claim to interest in a bank deposit. In such proceedings it would be probable that the plaintiff would proceed by way of summary summons and make an application for summary judgment unless it was clear that the defendant would be in a position to show an arguable defence.

## **(8) CLAIMS FOR RECOVERY OF CHARTER HIRE/ DAMAGES UNDER A CHARTER PARTY**

**B8.1** Such claims fall within the Admiralty rules of the Rules of the Superior Courts.<sup>38</sup> However, the principles are virtually identical in dealing with such cases as would be the Case in other commercial litigation. There are certain small differences in the types of court forms used, but a party to such litigation should expect to conduct the Case in the usual manner.

## **(9) CLAIMS FOR AMOUNTS DUE UNDER A JOINT VENTURE TRADING AGREEMENT**

**B9.1** In most cases there are no special requirements in respect of claims for title or damage to goods in the jurisdiction and the requirements stipulated in section A and in section B1 would also apply to such claims.

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<sup>38</sup> Order 64 of the Rules of the Superior Courts.

## (10) ARREST OF SHIPS

**B10.1** As with B8, such claims fall within the ambit of Order 64 of the Rules of the Superior Courts, and are heard by the Judge assigned to Admiralty in the High Court. The principles for such litigation are virtually identical to other commercial litigation, with certain formal differences, though none that should trouble the practitioner.

## (11) ENFORCEMENT OF FOREIGN JUDGMENTS

**B11.1** If a foreign judgment comes within Council Regulation 1215/2012, (Brussels I Recast) enforcement is obtained by serving the Certificate of enforceability from the foreign Court on the debtor. The judgment, Certificate and Affidavit of Service are then provided to the competent enforcement authority (the Sheriff or Court as appropriate) who enforce the foreign judgment as they would an Irish judgment. If a foreign judgment comes within the Lugano Convention, then it will be enforced by means of an ex parte application to the Master of the High Court. As is usual in the case of such judgments, the Irish courts cannot, and will not review the foreign judgment as to its substance. Once the Master of the High Court has issued the enforcement order, it is served on the defendant, who then has a short opportunity to apply to have recognition and enforcement refused. As with other jurisdictions, issues of service are the ones which usually occupy such cases.

**B11.2** If a foreign judgment comes from a non-EU, non-Brussels Convention, non-Lugano Convention Contracting State, then it is enforced in Ireland by the commencement of simple debt proceedings. A summary summons would have to be issued and served on the judgment debtor. Thereafter, the plaintiff would issue an application for summary judgment based on affidavit evidence. The affidavit would have to show that the foreign court had jurisdiction over the dispute, the defendant was properly served who then had an opportunity to make its case, and also (very importantly) the foreign court's exercise of jurisdiction over the defendant was pursuant to rules also found in Irish conflicts of law rules. Unless the defendant can respond to the affidavit (by its own affidavit), summary judgment will be entered by the Master of the High Court.

**B11.3** Foreign judgments which contain a punitive element, such as treble damages, will not, as a matter of public policy, be enforced. This is in line with long-standing common law principles.

**B11.4** Practitioners should also carefully note that EC Directive 2010/24/EU provides for enforcement of revenue assessments and judgments throughout the EU, and has been implemented into Irish law by S.I. No. 643/2011 – European Union (Mutual Assistance For The Recovery of Claims Relating To Taxes, Duties and Other Measures) Regulations 2011.

## (12) ENFORCEMENT OF FOREIGN/DOMESTIC ARBITRATION AWARDS

**B12.1** The Arbitration Act 2010 makes the internationally recognized United Nations Convention on International Trade Law Model Law on International Commercial Arbitration (the Model Law), produced by the UN Convention on International Trade

Law (UNCITRAL), a part of Irish law for all arbitrations, domestic or foreign. This creates a much easier enforcement of arbitration awards in any of the 148 countries currently signed up to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (especially countries outside the EU) than the enforcement of an Irish court judgment or indeed the judgment of any court where the Courts will immediately move to recognize and enforce an arbitration award. It repeals and replaces earlier Irish legislation, sweeping away historic distinctions between domestic and international commercial arbitrations. The legislation applies the Model Law to all arbitrations in Ireland, both to all arbitrations commenced in Ireland after 8 June 2010, and it retrospectively applies to all arbitration agreements already in existence.

**B12.2** The ‘case stated’ procedure has been abolished. Arbitrators cannot refer questions of law to the Courts. It remains open under Article 26 to an arbitrator to seek independent advice or expert assistance if necessary in relation to a complex issue or a point of law arising in the arbitration and it confers a right on the parties to require that the expert participate in a hearing whereby the parties have the opportunity to put questions and present their own experts on the points at issue.

**B12.3** The removal of the case stated procedure and significant reduction of the scope for judicial intervention is likely to lead to an increased focus on the choice of arbitrators and appointment mechanisms and requirements. The Model Law also confers increased procedural powers on arbitrators including the power to terminate proceedings for want of prosecution, the power to review challenges to their appointment and to determine their own jurisdiction.

**B12.4** The arbitrator will be required to give reasons for the award unless the parties have agreed otherwise (Article 31(2) of the Model Law). The requirement for a reasoned award imposes an additional rigour on the arbitrator. The only method of challenging an arbitral award will be under Article 34 of the Model Law. The grounds are extremely limited and the legislation will make it far more difficult to challenge an arbitral award. The Model Law grounds of challenge have been interpreted narrowly in other jurisdictions, and the Irish Courts are likely to adopt a similar approach, in keeping with their approach to arbitration generally.

**B12.5** The legislation allows the parties to agree on the allocation of costs either before or after the dispute has arisen (section 21). The previous legislation provided that any such agreement on costs was only binding if it was reached after the dispute had arisen.

**B12.6** The legislation introduces the concept of a single arbitration judge (section 9) to deal with any applications. One judge will develop expertise in arbitration issues. This should ensure a consistent judicial approach, and reduce the risk that parties might inappropriately seek judicial intervention. Furthermore, and exceptionally, there is no right of appeal from the High Court in respect of applications under the new legislation – the High Court is the Court of final jurisdiction in that regard (as well as the Court of First Instance).

