ICLG

The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2016

9th Edition

A practical cross-border insight into litigation and dispute resolution work

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

Two general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting litigation and dispute resolution work.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 49 jurisdictions, with the USA being sub-divided into 11 separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Greg Lascelles of King & Wood Mallesons LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Ireland has a common law tradition; prior Irish written judgments have precedent effect, and judgments of courts in other common law jurisdictions are persuasive. Ireland has a written Constitution, amendable only by popular referendum, which is superior to all other law other than EU law in its proper sphere of operation. The High Court (and, on appeal, the Court of Appeal and Supreme Court) may declare invalid laws which infringe constitutional requirements, including personal rights. Primary legislation (Acts enacted by a bicameral legislature, the Oireachtas), EU law and secondary legislation (statutory instruments) are major sources of modern law.

Civil procedure is governed by rules adopted by committees comprising representatives of the judiciary, legal professions, State and court officers. The principal such rules are the *Rules of the Superior Courts* (covering the Supreme Court, Court of Appeal and High Court) ("**RSC**"), the *Circuit Court Rules* ("**CCR**") and the *District Court Rules* ("**DCR**"). Civil proceedings in Ireland are adversarial.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The High Court is the Irish court of unlimited original jurisdiction. It consists of a President, 37 ordinary judges and *ex officio* members.

The Court of Appeal is the intermediate appellate court. It consists of a President, nine ordinary judges and *ex officio* members. It sits as a court of three judges, though a single judge may deal with interlocutory applications and case management. In general, there is an unlimited right of appeal from the High Court to the Court of Appeal; the Court of Appeal also decides points of law by case stated from the Circuit Court.

The Supreme Court is the Irish court of final appeal. It consists of the Chief Justice, nine ordinary judges and *ex officio* members. The court generally sits as a court of three judges or of five/seven in specially significant matters. There is no general right of appeal to the Supreme Court; appeals are by leave of the Supreme Court only. A "tertiary appeal" from the Court of Appeal to the Supreme Court is possible where (i) the decision involves a matter of general public importance, or (ii) an appeal to the Supreme Court is necessary in the interests of justice. A "leapfrog appeal" from the High Court to the Supreme Court is possible where exceptional circumstances warrant a direct appeal including when the decision involves a matter of general public importance and/or in the interests of justice.

The Circuit and District Courts are courts of limited and local jurisdiction. Circuit Court judges sit permanently in major cities and other judges are assigned to circuits consisting of one or more counties, and sit principally in the main towns. The Circuit Court's jurisdiction limit is €75,000 in contract and tort and €60,000 in personal injuries claims. It has a significant jurisdiction in property disputes and limited jurisdiction to grant equitable relief. It has an important family law jurisdiction, jurisdiction in personal insolvency arrangements (excluding bankruptcy) and in examinership (corporate rescue) of smaller companies. It hears appeals from the District Court and from employment tribunals.

The District Court sits permanently in major cities, and periodically in many towns and villages. Its jurisdiction limit in contract and tort cases is €15,000. It has a minor jurisdiction in property disputes. It oversees an informal small claims procedure for consumer and small business claims of up to €2,000, and also operates the European Small Claims Procedure and debt enforcement by instalment order.

There are no specialist courts, though judges in many courts are assigned to cases in which they specialise.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe?

The main stages in proceedings likely to involve a trial on oral evidence are exchange of written pleadings; discovery (disclosure); preparation and occasionally exchange of evidence; and trial. Time limits for exchange of pleadings are fixed by rules of court (though the court may extend or abridge time) or fixed by order of court, having heard the parties, having regard to the nature of the case. Time limits for production of discovery are either agreed or fixed by the court. Reports of expert evidence must be exchanged in certain cases; occasionally the court directs exchange of summaries of the evidence to be given by witnesses of fact, particularly in complex commercial cases. Each pre-trial phase in a High Court action can be completed in two/three months but timings vary greatly depending on the nature and urgency of the case. The pre-trial stages are quicker in the lower courts and discovery is very rare in the District Court.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Irish courts generally enforce a valid exclusive jurisdiction clause where it is plainly the parties' contractual choice. Ireland is bound by Article 25 of Regulation (EU) No. 1215/2012 ("**Brussels I Recast**") on prorogation of jurisdiction and by the Hague Choice of Forum Convention, implemented by the Choice of Court (Hague Convention) Act 2015. While exclusive jurisdiction clauses are generally also enforced at common law, one would not be given effect if inconsistent with a mandatory law which conferred jurisdiction exclusively on another court (e.g. Article 24 of Brussels I Recast).

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Legal fees between Irish lawyers and clients are principally a matter of contract. Fees are often calculated by reference to time spent, though account is also taken of the level of skill involved and other factors set out in legislation. Publicly funded legal aid is available in limited circumstances and is means-tested.

In Ireland, parties' costs may be awarded in litigation in the discretion of the Court, and costs orders generally "follow the event", i.e. the successful party is awarded costs against the loser, though in complex cases, costs may be apportioned according to the parties' relative success on individual issues. The costs usually awarded ('party and party costs') do not provide a full indemnity. Rarely, the court will award ('solicitor and client costs'), which are intended to indemnify against all reasonable costs. There is a fixed scale of recoverable costs in District Court civil proceedings. However, costs in the Circuit Court and superior courts depend on the individual case and the amount of costs, if not agreed, may be assessed by a specialist costs officer, though there are proposals in the *Legal Services Regulation Act 2015* to overhaul costs assessment arrangements.

Though there are no formal requirements for costs budgeting, Irish court rules increasingly require that proceedings be managed "in a manner which is just, expeditious and likely to minimise costs" so there is some judicial control over costs.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Irish law on non-party funding of litigation is very restrictive. Maintenance (funding of litigation by a non-party who does not have a genuine interest in the outcome) and champerty (funding litigation for a share of the proceeds) remain impermissible in Ireland, though these long-standing rules are currently subject to legal challenges. After The Event (ATE) Insurance is permissible.

There is no explicit Irish law provision on contingency fees, though Irish lawyers are expressly prohibited from charging fees by reference to a percentage of damages awarded. There is a long-established practice in Ireland of "no win no fee" arrangements, where the lawyer agrees to seek payment from the client only on a successful outcome.

Security for costs is at the court's discretion. Irish courts will first determine whether the defendant has a *prima facie* defence. If the claimant is a natural person or a corporation outside the ambit of the *Companies Act 2014*, the focus is on the claimant's residency, rather than means; if the claimant is resident outside of the EU/EEA, enforceability of a costs order against the claimant may be doubtful. However, if the claimant is a company governed by the *Companies Act 2014*, inability to meet a costs order is the determining factor.

If the defendant meets the criteria for security, he is *prima facie* entitled to security for costs unless the claimant shows special circumstances (*e.g.* prejudicial delay in seeking security; the fact that the defendant's wrong caused the inability to provide security, or the case being of public importance) justifying refusal. The existence of ATE insurance might be a sufficient answer to an application for security (*Greenclean Waste Management Limited v. Leahy* [2015] IECA 97).

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Assignment of a claim or cause of action is permissible in limited circumstances in Ireland, *e.g.* where the assignee has acquired the claimant's interest in property which is the subject matter of litigation (and the assignee has succeeded to a legitimate interest in the outcome of the litigation) and provided that formal requirements (Section 28(6), Supreme Court of Judicature (Ireland) Act 1877) are met, including that the assignment is absolute, in writing, and on notice to the defendant.

However, assignment of a bare cause of action in which the assignee has no valid connection with property underlying the claim is void in Ireland as champertous and contrary to public policy *SPV Osus Limited v. HSBC International Trust Services (Ireland) Limited & ors* [2015] IEHC 602.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Irish rules of court do not cover pre-action matters and no formal requirement arises before initiating proceedings. A letter of claim is usually sent before issuing proceedings, describing the circumstances giving rise to the claim and calling on the intended defendant to make proposals to compensate the claimant. Such a letter is required in personal injuries cases within two months from the date of the cause of action, or as soon as practicable thereafter (Section 8, *Civil Liability and Courts Act 2004*). Where two or more parties may be responsible for loss suffered, an "O'Byrne letter" is usually sent to each suspected wrongdoer, calling on him to admit full responsibility, failing which the letter would be used to resist an application for costs by a successful defendant.

Most personal injuries claims must be begun by an application for assessment to the Injuries Board (a statutory claims assessment body established by the *Personal Injuries Assessment Board Act 2003*); court proceedings in respect of a "relevant claim" are barred unless or until the Injuries Board issues an authorisation to issue proceedings (*e.g.* if the respondent refuses to allow an assessment, or the claimant refuses to accept the amount assessed).

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The most generally applicable limitation periods are fixed by the *Statutes of Limitation 1957 and 1991*, the *Civil Liability Act 1961*

and *Civil Liability and Courts Act 2004*. The major limitation periods are six years for contract and tort generally; two years for person injury claims (though time may not run against a person under a legal disability *e.g.* a child) and one year, or a longer period allowed by the court not exceeding two years, in defamation claims.

In general, time runs from when the cause of action accrues; however, in personal injury cases, the period commences when the claimant knew or ought to have known of the cause of action (Section 3, *Statute of Limitations (Amendment) Act 1991*). Similar discoverability considerations apply in respect of property damage cases within the (narrower) scope of the *Liability for Defective Products Act 1991*, which gives effect to the EC Product Liability Directive.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings in the High Court are usually commenced by a summons (plenary, summary, personal injuries or special), in the Circuit Court by a civil bill (O. 5, r. 1, CCR) and in the District Court by a claim notice (O. 40, r. 4(1), DCR). The originating document is filed in court and issued for service on the defendant.

Personal service of the originating document is normally required on natural persons in High Court actions (O. 9, r. 2, RSC), but where this proves difficult, the Court may permit service by alternative means ("substituted service"), usually by post. In the lower courts, natural persons may be served by registered post (O. 11, r.5, CCR; O. 41, r. 2(1), DCR). Service on a company is by post or delivery to the company's registered office (Section 51(1)(a), *Companies Act 2014*). Documents served by post are deemed served on the date when the document would be delivered in ordinary course of post (O. 41, r. 16, DCR).

Service in another EU Member State of civil or commercial proceedings in which an Irish court has jurisdiction under Brussels I Recast does not require prior permission from an Irish court. Service may be effected through a County Registrar (officer of the Circuit Court) in accordance with the EU Service Regulation (Regulation 1393/2007) or otherwise as permitted by local rules in the place of service.

Service of Irish proceedings in a state outside the EU requires prior permission of the Irish court (O. 11, r. 1, RSC; O. 13, r. 1, CCR; O. 41A, r. 2(1), DCR) and must be grounded on a particular connection with Ireland. Service is either through the Master of the High Court in accordance with the Hague Service Convention 1965 or as directed by the court when giving permission.

Where foreign proceedings are issued in another EU Member State they may be served in Ireland in accordance with Regulation 1393/2007; where foreign proceedings are issued in a non-EU Member State they may be served in Ireland in accordance with the Hague Service Convention 1965. Where the issuing state recognises service in accordance with local law in the destination state as sufficient (*e.g.* for service of English proceedings in Ireland), they are commonly served directly by an Irish lawyer as agent for the claimant in the foreign proceedings.

A defendant intending to answer Irish proceedings must enter a written appearance (acknowledgment of service).

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Injunctions are available as a pre-action interim remedy in the High Court and in some cases in the Circuit Court. An injunction application is made either *ex parte* (without notice to the opposing party) or *inter partes* by notice of motion grounded on an affidavit. An *ex parte* injunction is of short duration and will be returned to an *inter partes* hearing. An *inter partes* injunction can last until the trial, but can be varied or set aside. The party seeking the injunction must give an undertaking (enforceable promise) to pay any damages suffered by reason of the injunction if that party loses the substantive action. The criteria for a pre-trial injunction are that there is a serious issue to be tried, damages would not be an adequate remedy and the balance of convenience favours the granting of an injunction (*Campus Oil v. Minister for Industry and Energy (No.2)* [1983] IR 82). *Norwich Pharmacal* orders (for pre-action disclosure) and *Anton Piller* orders *(Jobling-Purser v. Jackman* [1999] IEHC 243) (pre-action searches) are also available in Ireland in exceptional cases.

3.3 What are the main elements of the claimant's pleadings?

All pleadings must set out in summary form the material facts on which the party pleading relies, but need not identify the evidence by which they are to be proved; conventionally, they also particularise special damages claimed and the particular orders or reliefs sought (*Jobling-Purser v. Jackman* [1999] IEHC 243).

The statement of claim is the claimant's principal pleading in most High Court actions and is served with or following the summons. In the lower courts, the statement of claim is included within the originating document. Further particulars of the statement of claim may be requested or ordered by the court.

In personal injuries actions, there are special rules regarding the information included in the statement of claim.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended. Once a pleading has been served on the other party, amendment may require the permission of the court. Permission will be granted if the amendments are necessary for the purpose of determining the real questions in controversy between the parties (O. 28 r. 1, RSC; O. 65, r. 1, CCR; O. 45E, r. 1, DCR). Leave to amend will not be granted where doing so would prejudice the other party (Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Round Hall, 20120); Dowling, *Civil Procedure in the Circuit Court* (Round Hall, 2008) (*e.g.* by allowing introduction of a new claim that is time-barred).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

The main elements of a written defence involve identifying which allegations are admitted, and which denied, and any special defence

to the claim (*e.g.* time-bar, contributory negligence, etc.). Where an allegation is denied, the claimant is put on proof.

A defence of set-off and/or a counterclaim, if brought, are included in the defence (O. 21, RSC; O. 15, r. 7, CCR). A counterclaim is required to be distinguished by heading or otherwise from remainder of the defence (O. 21, r. 10, RSC).

4.2 What is the time limit within which the statement of defence has to be served?

In the High Court, a defence must be delivered within 28 days of delivery of the statement of claim (O. 21, r. 1, RSC; O. 42, r. 1, DCR). In the Circuit Court, a defence must be delivered within 10 days of entry of an appearance (O. 15, r. 4, CCR). In the District Court, 28 days is allowed. The court may extend this period.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes, a defendant may use a third party procedure to pass on liability to a third party; where he claims that he is entitled to contribution or indemnity; or relief or a remedy concerning the original subject matter of the proceedings from the third party; or any question with the third party relating to the subject matter is the same as the issues arising between the claimant and defendant (O. 15, r. 4, CCR).

Defendants may also claim contribution or indemnity among themselves.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not appear, the claimant may enter judgment in default without a hearing and may execute where the claim is for a liquidated or specific amount (or may apply for a hearing to assess damages).

Where the defendant fails to deliver a defence within the required time, the claimant will usually apply to court (on notice to the defendant) for judgment in default. Where the defendant appears on this application, the court will often extend time to deliver a defence. Where a default judgment is given, the claimant may execute if judgment is for a specified amount or seek a hearing to assess damages (O. 27, RSC; O. 26 and 27, CCR; O. 47 and 47A, DCR).

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can dispute the court's jurisdiction. A defendant doing so should enter a conditional or qualified appearance (O. 12, r. 26, RSC) and thereafter apply to the court to set aside service of the Irish proceedings. Taking a step in Irish proceedings (*e.g.* seeking particulars or delivering a defence) may be regarded as submitting to jurisdiction (*Minister for Agriculture, Food and Forestry v. Alte Leipziger* [2001] 2 IR 82). Where a defendant files an unqualified appearance, he will usually be taken as submitting to the Irish court's jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Additional parties can be joined to ongoing proceedings as co-claimants or co-defendants, or as third parties.

Generally, a co-claimant can be joined where the co-claimant is alleged to have a right to relief against the defendant in respect of or from the same transaction(s), whether jointly, severally, or in the alternative. Similarly, co-defendants against whom a right to the relief claimed in the proceedings is alleged to exist, whether jointly, severally, or in the alternative, may be joined. Neither every co-claimant nor every co-defendant needs to be interested in every relief claimed.

The court has broad powers (O. 15, RSC) to deal with applications to join a party, and will usually do so where that party's involvement is necessary to enable the court effectually and completely adjudicate on all questions in the case; it may refuse to join an additional party where doing so would delay the trial.

As noted above at question 4.3, third parties can be added by a defendant in certain circumstances (O. 16, r. 1(1), RSC; O. 42A, DCR).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two (or more) sets of proceedings may be consolidated where a right to relief arises out of the same transaction and where, if the actions were brought separately, common questions of law and fact would arise (O. 15, r. 1, RSC; O. 9, CCR; O. 43, r. 35, DCR. See also Delany and McGrath, *Civil Proceedings in the Superior Courts* (3rd ed., Round Hall, 2012), 326).

5.3 Do you have split trials/bifurcation of proceedings?

Where it appears to a court that several causes of action cannot conveniently be tried together, it may order separate trials or make such orders as are necessary or expedient for the separate hearing of the proceedings (O. 18, r. 1, RSC; O. 9, CCR). Complex cases involving multiple issues are sometimes split into modular trials in the commercial division of the High Court (known as the "Commercial Court"), though splitting liability and quantum is rare.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Case allocation occurs administratively at each jurisdictional level. Pre-trial applications and trials in the High Court are allocated to specialist lists managed by judges depending on the subject matter and relief sought, although admission to the Commercial Court is

by prior application only. Long pre-trial applications (taking more than half a day's hearing) and trials are usually allocated to panel judges by the judge managing the list, though trial dates may be allocated by a registrar. Parties in complex or lengthy cases may seek specially-fixed trial dates. Case allocation is more informal at lower court level, though cases of a similar nature are conventionally scheduled together in blocks.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Irish courts have explicit and inherent case management powers. Most court rules require cases to be managed "in a manner which is just, expeditious and likely to minimise costs", and case management hearings invariably occur in the Commercial Court. Interim orders of a case management nature may include orders that formal pleadings be replaced with statements of issues of law and/or fact; that pleadings be replaced by trial on affidavit evidence; fixing issues of fact and/or law to be determined; exchange between parties of papers aimed at clarifying or defining the issues; requiring the filing of lists of documents, generally or with respect to specific issues; directing expert witnesses to consult for the purposes of identifying and where possible agreeing issues and considering specific matters directed by the Judge; adjourning to facilitate mediation, conciliation or arbitration; requiring information in respect of the proceedings, including witness lists, particulars of any technical or scientific matter at issue, time estimates for trial preparation and for trial.

The costs of case management are usually treated as costs in the cause (*i.e.* costs that will be awarded to the successful party (Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Round Hall, 2012), para. 23-47)).

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Where a party disobeys an order concerning pleading, discovery, *etc*., it may be penalised by bearing the costs of an application to make it comply, or at an extreme, have its claim or defence struck out.

The High Court and Circuit Court have broad powers in civil contempt, which may be used where a party disobeys an order. Civil contempt is aimed at compelling a party to comply with an order of the court and a civil contempt order may also have a punitive element (*Irish Bank Resolution Corporation Ltd v. Quinn Investments Sweden AB*. [2012] IESC 51). A natural person guilty of civil contempt can be committed to prison until the contempt is purged (O. 42, r. 7, RSC; O. 37, r. 5, CCR); a body corporate in contempt may be liable to sequestration.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, in what circumstances?

Irish courts have power to strike out all or part of a case. This power may be exercised on an application by a party or of the court's own motion. It may be exercised where it appears from the pleadings that there is no reasonable cause of action or defence, or the action or defence is frivolous or vexatious, bound to fail, and/or an abuse of process (O. 19, r. 28, RSC; Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Round Hall, 2012), 583–595). Additionally, a court may strike out proceedings where the claimant delays unreasonably in prosecuting it (O. 122, r. 11, RSC).

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Irish civil courts can enter summary judgment. Summary judgment may be sought where the claimant can show his/her entitlement to relief and that there is no defence to the action (O. 37, r. 1, RSC). In practice, summary judgment is only available in claims for liquidated damages (usually debt claims). Summary judgment may also be entered by default where a defendant fails to enter an appearance within the required time (O. 13, r. 2, RSC; O. 33 r. 5, CCR).

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Irish courts may order that an action, or part of an action, be discontinued at any stage on the application of the claimant or defendant (O. 26, r. 1, RSC; O. 21 r. 1, CCR; O. 47B, DCR). While the court may refuse leave to discontinue, it will generally grant it provided that it will not cause injustice to the defendant (*Covell Matthews v. French Wools Ltd* [1977] 1 WLR 876, see Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Round Hall, 2012), 601, para. 17–13).

Proceedings can be stayed indefinitely or for a defined period for several reasons; for example, where there is an enforceable arbitration clause; to allow performance of a settlement (with the proceedings to continue if the settlement terms are not implemented (Delany and McGrath at p. 631, para. 19-21)); or to facilitate ADR. The High Court may order a stay as interim relief where judicial review is sought of an order or decision (O. 84, r. 20(8)(a), RSC). Personal injuries proceedings may be stayed where a claimant has not complied with requirements for a personal injuries summons (O. 1A r. 11, RSC).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents?

Broadly, parties are entitled to disclosure of relevant documents within the possession, power or procurement of the other side. Relevance is determined according to the *Peruvian Guano* test, but it has been impacted by S.I. 233/99 which provides that parties must stipulate specific *categories* of documents they will require and why they are relevant.

Parties are required to try to agree terms for voluntary discovery through correspondence. If no agreement can be reached, the parties can seek an order of discovery from the court.

There is no provision in the rules for discovery pre-action. Letters seeking voluntary discovery do not normally issue until close of pleadings. However, *Norwich Pharmacal* relief is available in appropriate cases, and this relief is often sought pre-action, to identify a defendant or formulate particulars.

Documents that do not fall within one of the categories, or fall within the categories but outside the *Peruvian Guano* test, do not have to be disclosed.

There are special rules for the discovery of electronically stored information ("**ESI**"). The rules require the requesting party to specify whether it seeks production of the ESI in a searchable form, and if it seeks the provision of inspection and search facilities.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The main categories of privilege are legal advice privilege, litigation privilege, "without prejudice" privilege, public interest privilege and privilege against self-incrimination.

Where privilege is asserted, the existence (and possibly brief details) of the document must be disclosed but the document itself need not be made available for inspection.

Privilege belongs to the client and can only be waived with the client's consent.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The rules provide that an application can be made to court for a discovery order against a third party. The court can grant such an order if satisfied that the third party has relevant documents or information and there is no reasonably available alternative source. The costs of the discovery are borne by the party seeking the order.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The main role of the court is to support the discovery process by making discovery orders. Where the parties agree to voluntarily discover, this agreement equates to a court order without the need to go to court.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Where documents are disclosed, there is an implied undertaking that they will not be used for any collateral or ulterior purpose without the leave of the court or consent of the disclosing party. Failure to comply with this undertaking amounts to contempt of court. Courts have jurisdiction to release a party from the implied undertaking in cases where justice demands it.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The fundamental rule of evidence is relevance. Admissibility of relevant evidence is limited by various exclusionary rules, including the rule against hearsay and the rule against opinion evidence.

The primary form of evidence is oral testimony of witnesses given in open court, which gives the court the opportunity to observe the demeanour of the witness first hand. Pre-trial applications and certain trials (where factual disputes are unlikely) are on affidavit evidence.

The standard of proof required in civil proceedings is the balance of probability, and the onus of proof is borne by the person asserting a fact.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The main type of evidence in civil proceedings is oral witness testimony concerning disputed facts. Oral evidence is subject to cross-examination. Exceptionally, affidavit evidence may be admitted, although never if the opposing party satisfies the court that it genuinely requires cross-examination and the witness can be produced. Evidence may be taken by commission (other than at trial, by transcript or recording of a deposition), especially where the witness is outside Ireland (using the procedure in Council Regulation (EC) 1206/2001 or letters rogatory).

Expert evidence is admissible on matters within the witness's expertise (usually based on a disclosed written report); opinion evidence is not permitted from factual witnesses.

Documentary evidence is admissible if the adducing party can prove the contents and that the document was properly executed. Compliance with these formal requirements is dispensed with in most cases, by service of interrogatories, by notice to admit or by agreement. Real evidence is also admissible.

Irish law does not permit proof of a fact by hearsay. However, this rule is often overcome by the application of one of the established exceptions to the hearsay rule, by notice to admit facts and by judicial indulgence in particular cases.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

There are no special rules requiring particular witnesses of fact to be called; what is key is the relevance of the evidence they can give, though the court may be invited to draw inferences if a witness available to a party who appears to have relevant evidence is not called.

Where it is anticipated that a witness will not appear voluntarily, a *subpoena* is served to compel attendance. A court may allow a witness to give evidence, whether from within or outside Ireland, by videolink or similar means.

Written witness statements do not normally feature in Irish civil litigation, though they may be directed, especially in the Commercial Court (with the statement standing as the evidence in chief, and the witness open to cross-examination in court).

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

While experts are generally retained by parties in Ireland, the overriding duty of an expert is to give objective and unbiased evidence to the court and this supersedes any duty to the commissioning party. The court may appoint an expert, and in certain cases, may sit with a specialist assessor, though it rarely does so. Instructions to experts should be neutral, as they may be cross-examined about their instructions.

There are special rules in personal injuries actions that require exchange of expert reports.

Experts should not purport to give evidence on matters outside their expertise. They should also not give evidence on matters within the knowledge of the court nor express opinion on legal matters or their overall impression of the case.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The High Court (and within its jurisdictional limits, the Circuit Court) can award all common law and equitable remedies, including damages, permanent prohibitory or mandatory injunctions and declarations, and various remedies under statute. Damages and remedies under statute are the principal remedies in the District Court. An Irish court can give summary and default judgments as well as final judgments, and may give judgment or make an order by consent.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Irish law does not yet provide for interim damages before trial, for provisional damages or for structured settlements. Damages are calculated as a single assessment of all past and future losses comprised in the claim.

As to costs, see question 1.5 above.

Aside from any contractual right to interest a claimant has, pre-judgment interest on a damages award may be granted at the court's discretion at a statutory rate (currently 8%). Interest at the same rate is due as of right on any money judgment from the date of judgment.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced through:

- orders of *fieri facias* (a writ of execution levied on the goods of the defendant) and possession orders (an order to put the defendant in possession of goods);
- attachment of debts (garnishee);
- charging orders over land (judgment mortgages) or over stocks and shares;
- appointment of receivers by way of equitable execution;
- examination of the defendant in court as to means;
- instalment orders; or
- attachment and committal for contempt.

Under Article 39 of Brussels I Recast, judgments in civil and commercial matters given in other EU Member States are enforceable in Ireland without requiring a declaration of enforceability (*exequatur*), and the same enforcement methods are available.

Apart from Brussels I Recast, Ireland is not a party to any convention or instrument for the recognition and enforcement of foreign judgments. However, Irish courts will recognise and enforce foreign judgments where they accord with common law conflicts-of-laws principles (in broad terms, a foreign judgment will be enforced in Ireland without reopening the merits) in certain circumstances.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

See above at question 1.2.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Payments into court (lodgements), are provided for and put a claimant at risk as to costs if the award is less than an unaccepted lodgement. There are timing restrictions on the use of this procedure, though late lodgement, or an increase in lodgement is allowed in limited circumstances (*e.g.* where the claimant serves additional particulars of loss).

Courts must have regard to *Calderbank* offers (*i.e.* offers made "without prejudice save as to costs" where making a lodgement is not technically appropriate) in determining costs.

Each party to a personal injuries action is required at a specified pre-trial time to serve a formal notice of settlement offer (or in the case of defendant, to serve formal notice that it will make no offer).

The Courts may also adjourn proceedings to allow the parties to consider availing of ADR.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration involves the parties to a dispute going to an independent adjudicator to resolve their issues. The mechanism for appointing an arbitrator is usually set out in the contract. The decision of an arbitrator is final and binding. It is increasingly being used for commercial contract disputes, particularly construction, insurance and holiday contracts.

Mediation involves the parties to a dispute agreeing to use an independent third party to help resolve their issues. A term in a contract may set out that the parties will refer any dispute in the first instance to mediation, or alternatively, the parties can agree to submit to mediation when a dispute arises.

Conciliation is similar to mediation but rather than simply facilitate agreement, the conciliator will generally make recommendations which will become binding if not rejected within a given time period. Conciliation is often used in Irish domestic construction disputes.

Expert determination is similar to arbitration, in that it involves an independent third party who issues a binding determination. However, it differs as the adjudicator will be an expert in a particular technical field and there are less procedural rules. It is common in the context of share valuation or rent review disputes.

A number of specialist tribunals have been established in Ireland to deal with certain types of dispute in a faster and less expensive manner and to alleviate the pressure that would otherwise be placed on the courts. Examples include the Labour Court, Workplace Relations Commission and Residential Tenancies Board. Similarly, ombudsman facilities have been established to regulate complaints in certain sectors. Examples include Financial Services Ombudsman, Garda Ombudsman and Pensions Ombudsman.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Arbitration Act 2010 applies the UNCITRAL Model Law on arbitration to all arbitration in Ireland. In the event of conflict, the 2010 Act prevails.

Certain aspects of mediation are governed by the European Communities (Mediation) Regulations, which transposed Directive 2008/52/EC into Irish law.

Beyond this, ADR is governed by contractual terms and court rules.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Generally, any dispute can be dealt with by ADR, except where the claimant is a child, or where public policy dictates that some matters must be dealt with by the courts.

Under the 2010 Act, arbitration clauses in consumer contracts, where the clauses were not individually negotiated and are worth less than €5,000, are only enforceable at the election of the consumer.

The Act does not apply to disputes relating to the terms and conditions of employment contracts, or the remuneration of employees.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Where parties have entered into a valid arbitration agreement that is capable of being performed and where a dispute within the terms of the arbitration agreement has occurred, the courts are obliged to stay court proceedings between those parties under Article 8(1) of the Model Law, though courts can give interim relief available under the Model Law in aid of proceedings to be determined by arbitration.

The court rules also provide that the court may, on the application of any of the parties to a dispute or of its own motion, adjourn proceedings in order to allow the parties to engage in mediation or conciliation or other approved ADR. If a party to a dispute refuses without good reason, the court may, where it considers it just, have regard to the refusal in awarding costs against the party.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Awards of an arbitrator are legally binding. Parties can seek to set aside an award to which the 2010 Act applies on a number of the grounds set out in Article 34 of the Model Law. The Irish courts have shown in practice an increasing reluctance to intervene in arbitrations.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

There is no statutory institution offering ADR services in Ireland. However, a number of commercial bodies and lawyers offer ADR services.

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Seán trained with McCann FitzGerald and on qualifying, spent two years in our Brussels office, advising on EU developments and representing clients' interests before EU institutions.

In 1995 he rejoined the firm's Dispute Resolution & Litigation Group in Dublin, becoming a partner in 2001 and group head in 2015.

Seán specialises in administrative and public law. He advises many Irish Government agencies and public bodies on statutory powers, compliance and legal risk issues and on the conduct of internal reviews and investigations. He frequently acts in judicial review proceedings and statutory appeals.

Seán also has over 20 years' experience in the conduct of complex and large-scale commercial trials before the Irish courts, in domestic and international arbitrations and other fora, in areas including financial services disputes, corporate and business disputes, fraud and regulatory disputes.

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Megan is an experienced litigator who became a partner in the practice in 2014. Megan advises companies and financial institutions on corporate disputes, regulatory investigations and inquiries and dispute resolution through Commercial Court litigation and mediation. She also has experience advising in the health sector, in medical negligence and professional indemnity matters.

She has been the lead advisor to Irish Bank Resolution Corporation Limited in respect of regulatory and criminal investigations arising from legacy issues and related commercial court litigation. She has an excellent working knowledge of the financial services industry and internal banking practices and procedures.

Megan has extensive experience of electronic discovery in commercial litigation and regulatory investigations, electronic document management systems and privilege, having lectured extensively in each of these areas.

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The firm is consistently recognised as being the market leader in many practice areas and its pre-eminence is endorsed by clients and market commentators alike. Our principal office is located in Dublin and we have overseas offices in London and Brussels.

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