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INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

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**PROJECTS**

**Does a Right to a  
Physical Hearing Exist  
in International  
Arbitration?**

**IRELAND**

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**a. Parties' Right to a Physical Hearing in the *Lex Arbitri***

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Irish Arbitration Act 2010 incorporates the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) into all arbitration proceedings seated in Ireland, with no distinction between international and domestic arbitration proceedings.

Article 24 of the Model Law, which deals with hearings and written proceedings, provides that failing the parties’ agreement to the contrary, the arbitral tribunal shall have discretion to determine whether an oral hearing shall take place or if the case will be decided solely on the basis of written submissions and documentary evidence.

Furthermore, Article 24 states that unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings if so requested by a party.

While specifying the arbitral tribunal’s discretion to hold oral hearings (absent a contrary agreement by the parties), Article 24 makes no specific reference to a right to a physical hearing. Therefore, there is no express right to a physical hearing in Irish arbitration proceedings.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction’s lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: Unlikely.

There has been no consideration to date by the Irish Courts regarding the holding of either a physical arbitral hearing or a remote-only hearing under the Arbitration Act 2010 and/or the Model Law. Equally, there has been no consideration of Article 20 of the

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Model Law, which provides that the parties are free to agree on the place of arbitration but that does not impose any requirement that the hearing must take place physically. In fact, Article 20 goes on to state that in the event the parties cannot agree on the place of arbitration, the arbitral tribunal shall determine the place of arbitration “having regard to the circumstances of the case”.

As noted above, Article 24 of the Model Law provides that subject to the parties’ contrary agreement, the arbitral tribunal enjoys the discretion to decide on how to conduct the proceedings, which includes whether to do so on the basis of documents and other materials only. Article 24 of the Model Law requires oral hearings to be conducted if requested by any party but there is no requirement, pursuant to statute or case law, that the participants be physically present together.

The Irish Courts have in general been very receptive to facilitating remote hearings in the litigation context, especially appellate courts which do not have the necessity for *viva voce* evidence. From a technical standpoint, the Irish Courts during the COVID-19 pandemic have equipped themselves with the necessary technology and are holding remote hearings on a regular basis. This move has been underpinned by the recent introduction of legislation, namely, the Civil and Criminal Law (Miscellaneous Provisions) Act 2020, which permits such hearings before any Irish Court and provides other measures to complement the virtual nature of court proceedings such as allowing for documents to be filed electronically.<sup>1</sup>

In parallel with the Courts’ openness to the use of remote hearings, many arbitration proceedings have also moved online based on the interpretation of Article 24 of the Model Law as permitting remote hearings where previously physical hearings were the default option.

### **b. Parties’ Right to a Physical Hearing in Litigation and its Potential Application to Arbitration**

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: No.

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<sup>1</sup> See decision of the High Court (O’Moore J.) in *Irish Bank Resolution Corporation v. Thomas Browne* [2021] IEHC 83, in which the Court exercised the power under section 11 of the 2020 Act to direct the holding of remote hearing, notwithstanding the objections of one of the parties. The Court held that it was satisfied that the holding of a remote hearing would not be contrary to the interests of justice or otherwise unfair to the party who had objected.

The Irish Court Rules do not explicitly make reference to physical hearings but rather “hearings” simpliciter.<sup>2</sup> The Irish Courts system allows for physical hearings but does not mandate them in all cases.<sup>3</sup> Litigation in Ireland provides parties with the right to be heard.<sup>4</sup> The default rule in evidential cases is that a physical hearing takes place to facilitate live evidence being exchanged.

The Irish Court Rules provide that some cases can be heard on affidavit meaning that the right to be heard is curtailed.<sup>5</sup> This only occurs in limited circumstances and even where it applies, if an issue arises on the basis of the evidence being given on affidavit, the Court Rules provide that a notice to cross-examine may be made to the Court which would mean the deponent of the affidavit may, if the Court accedes to the application having considered the relevance and/or import of the matter(s) on which a party seeks to cross-examine a deponent, have to give evidence in court (whether physical or remote) and be open to cross-examination.<sup>6</sup> There are no procedural rules, nor any pieces of primary or secondary legislation, under Irish law that would support the inference that there is a right to a physical hearing in arbitration proceedings.

Article 34.1 of the Irish Constitution states that “[j]ustice shall be administered in Courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public”.

In the wake of the impact of COVID-19, many Irish court proceedings have moved into virtual courtrooms, which can still be accessed by members of the public to ensure the constitutional right to hold hearings in public is respected. The Irish judiciary and Courts Service have made a number of changes to facilitate this way of working. For example, section 11 of the Civil and Criminal Law (Miscellaneous Provisions) Act 2020 provides that the Courts can direct, or the parties can apply for an order, that a hearing be conducted remotely.<sup>7</sup>

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<sup>2</sup> Order 1, Rule 2 of Rules of the Superior Courts (“RSC”) refers to: “An originating summons for the commencement of plenary proceedings with pleadings and to be heard on oral evidence”. The term “heard” (or “hearing”) is not further defined within the Rules.

<sup>3</sup> The RSC provides that in certain categories of proceedings, which are suitable for summary disposal and/or where there are unlikely to be serious disputes of fact, such as proceedings brought by way of summary summons, special summons, originating notice of motion or petition, evidence is generally adduced by means of affidavit. Even where procedure by way of plenary summons is adopted, evidence will be given by way of affidavit on interlocutory applications – as per Order 40, Rule 1 RSC.

<sup>4</sup> This flows from a Constitutional right under Article 40.4 that guarantees a right to liberty and freedom, except where otherwise provided in accordance with the law.

<sup>5</sup> See fn. 3 above.

<sup>6</sup> There is provision under the Court Rules for hearings to be conducted by affidavit evidence only, however either party may apply to cross-examine a deponent where what is stated on affidavit is disputed.

<sup>7</sup> See further fn. 1 above.

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4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

When compared with judicial proceedings, arbitration hearings can be relatively informal. Arbitrators are not bound by formal rules of procedure so long as the hearing is fairly conducted, due process is followed and the terms of any agreement between the parties are respected.<sup>8</sup> An arbitrator has broad discretion in conducting the hearing and determines how the rules governing the arbitration will be applied and that discretion has been confirmed by the Irish Courts.<sup>9</sup> To the extent that such a right does exist, it is limited by the comprehensive jurisprudence concerning the application of the Model Law which underlines the importance of arbitration proceedings being informal (in comparison to judicial proceedings) and the power of an arbitral tribunal to control its own procedures when holding an arbitration.

In terms of the practicalities of how arbitration proceedings are managed, video platforms are being used for hearing live testimony and cross-examination. Furthermore, arbitrations are routinely conducted where all pleadings, submissions and other documents are electronically shared with the relevant parties. This was already happening to some extent before the onset of the COVID-19 pandemic but has accelerated over the last number of months. Since the changes have been either requested or approved by the parties, there has been little evidence of complaints about the move to a virtual setting for arbitration proceedings.

### c. **Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

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<sup>8</sup> An arbitrator can determine the procedural rules for the arbitration if the parties have not already done so (Article 19 Arbitration Act 2010). See also *Dunnes Stores v. Holtglen Ltd.* [2012] IEHC 93.

<sup>9</sup> Under Article 19 of the Model Law, in the absence of an agreement by the parties regarding the procedure to be followed in conducting the arbitration proceedings, it is for the tribunal to conduct the arbitration in such manner as it considers appropriate and the arbitral tribunal is empowered to determine the admissibility, relevance and weight of any evidence. See *Narooma Ltd. v. Health Service Executive* [2020] IEHC 315.

As set out in the above answers, there is no right to a physical arbitration hearing in Ireland. As a result, the parties could by their own volition agree to a remote hearing and frequently do, especially in the current climate where remote and hybrid arbitrations are popular due to the worldwide travel restrictions and decrease in the movement of people. This also resonates with the general principle of party autonomy in arbitration (under international frameworks such as the Model Law) which allow for much of the procedural details of proceedings to be agreed between the parties. The ability to waive certain rights, which may be problematic in the context of Irish litigation, is much more compatible with arbitration which facilitates such an approach where there is consent and agreement among the parties.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: Unlikely, and such a decision could potentially lead to the award being set aside.

Article 24 of the Model Law is clear that, subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. In circumstances where Article 24 is subject to the agreement of the parties, any decision of an arbitrator to hold a remote hearing despite the parties' agreement to the contrary, is at risk of resulting in the subsequent award being set aside.

From a contractual standpoint, the jurisprudence confirms that the terms of the parties' arbitration agreement are paramount and will be enforced accordingly.<sup>10</sup> In those circumstances, the terms of the agreement are crucial and if the parties have opted for a physical hearing, either expressly or by reference to recognised arbitration rules, it is unlikely that an arbitrator could permissibly proceed in breach of that agreement by holding a remote hearing.

In terms of legal consequences, the Model Law makes limited provision for challenging arbitral awards. Article 34(2)(a)(iv) states that an arbitral award may be set aside where the arbitral procedure was not in accordance with the agreement of the parties. There is no Irish case law directly on the point of whether the conduct of an arbitrator who designates a remote hearing absent the agreement of the parties is sufficiently egregious to warrant a Court setting aside the resulting arbitral award. It is likely that the Court would also examine whether the remote hearing infringed the parties' rights to fair proceedings but, in general, procedural inefficiencies tend not to

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<sup>10</sup> See *Bowen Construction Ltd. ((in Receivership)) v. Kelly's of Fantane (Concrete) Ltd. ((in Receivership))* [2019] IEHC 861.

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render the entire arbitration process impeachable.<sup>11</sup> However, there could certainly be an argument that a prejudice arose from the failure to abide by the parties' wishes regarding the hearing of the matter and therefore there could be scope to invalidate the arbitral award.

### d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Most likely.

Typically, Irish Courts do not tend to set aside arbitrations awards or refuse enforcement of an award if the impugned conduct was not raised as an objection during the arbitral process.<sup>12</sup> So, if a party did not object to a perceived breach in respect of a remote hearing at the relevant time and instead participated in the remote hearing process, it would most likely prevent any successful challenge to an award at a later stage.

The grounds to set aside an arbitral award are limited and are generally narrowly construed.<sup>13</sup> While the Model Law does not specifically address the issue, the Irish Courts would be unlikely to give much weight to arguments which were not opened to the arbitrator to rule upon during the proceedings. A party can still list it as a ground of challenge but the failure to object at the time is likely to be an important factor in the Court's decision on whether to set aside the award on that ground.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

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<sup>11</sup> In *Delargy v. Hickey* [2015] IEHC 436 Gilligan J, stated that the purpose of the procedural fairness guarantees in Article 34 and elsewhere in the Model Law, in the Court's view, is to protect a party from egregious and injudicious conduct by a tribunal.

<sup>12</sup> See *Delargy v. Hickey* and another [2015] IEHC 436.

<sup>13</sup> See *Deluxe Art & Theme Ltd v. Sheffs Ltd.* [2014] IEHC 695.

As mentioned above, under Irish law, there is no right to a physical arbitration hearing.

The Model Law makes limited provision for challenging arbitral awards. Article 34(2)(a)(iv) states that an arbitral award may be set aside where the arbitral procedure was not in accordance with the agreement of the parties. Any violation in terms of procedure would have to involve an element of prejudice to result in the substantive proceedings being overturned.<sup>14</sup>

Article 34(2)(b)(ii) states that an award which is in conflict with the public policy of the State may be set aside. This general catch-all provision can be used to invalidate arbitral awards but only in circumstances where there is a clear violation of the State's most basic notions of morality and justice.<sup>15</sup> It is rarely successfully invoked and it is unlikely that the breach in respect of the lack of a physical hearing would be interpreted as a material violation of the public policy principle.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: It depends.

Article 34(2) of the Model Law provides the limited grounds upon which a party can attempt to set aside an award:

“An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
  - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not

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<sup>14</sup> See *O’Cathain v. O’Cathain* [2012] IEHC 223.

<sup>15</sup> In *Broström Tankers A.B. v. Factorias Vulcano S.A.* [2004] 2 I.R. 191, available at <<https://www.bailii.org/ie/cases/IEHC/2004/198.html>> (last accessed 30 April 2021), Kelly J. considered the concept of public policy under the Arbitration Act 1980 which was in similar terms to the Model Law stating: “The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of a narrow scope. It extends only to a breach of the most basic notions of morality and justice”.

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- so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the award is in conflict with the public policy of this State”.

Only in circumstances where the breach in arbitral procedure was so egregious that, under Article 34(2)(a)(iv), it invalidated the entire process, would setting aside an award be considered. The strong likelihood is that the failure to hold a physical hearing would not constitute a breach under Article 34(2)(a)(iv) unless it was conducted in such a manner that it impacted on the fundamental fairness of the entirety of the arbitration proceedings.

Irish Courts have consistently supported an arbitrator’s ability to manage his or her own procedural issues meaning only procedural irregularities that impact on the fundamental fairness of the proceedings will meet the threshold set out under the Model Law.<sup>16</sup> So, unless the arbitrator’s decision to hold a remote hearing meets this high threshold, it is unlikely to be set aside. In the context of COVID-19, in which many hearings need to be remote, there would most likely be a difficulty in convincing a Court to set aside the proceedings on the basis only that no physical hearing had been held.

### e. Recognition/Enforcement

*10. Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Unlikely.

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<sup>16</sup> In *Ryan & Anor v. Kevin O’Leary (Clonmel) Ltd. & Anor* [2018] IEHC 660, the High Court refused to set aside an arbitral award. It held that the jurisdiction to set aside an award under Article 34 is “very limited and it is a jurisdiction which the court should only exercise sparingly”. See also *Hoban v. Coughlan and another* [2017] IEHC 301, *Delargy v. Hickey* [2015] IEHC 436 and *O’Cathain v. O’Cathain* [2012] IEHC 223.

If the right to a physical hearing was found to exist under the Model Law<sup>17</sup> in the particular circumstances of a case, it is still highly questionable whether a breach of that right would impact on the enforcement of any arbitral award under the New York Convention. The New York Convention provides the grounds on which a Court may choose not to recognise or enforce an award, including for a violation of a party's right to equal treatment or its right to be heard, both of which are contained in Article V(1)(b) and are incorporated, through adoption of the Model Law, in the Irish Arbitration Act.<sup>18</sup> The clear preference of the Irish Courts is to respect and enforce arbitral awards, in general, and cases where an award is not enforced are rare. The Courts tend to follow the international practice of construing the terms of the New York Convention narrowly and in a manner that facilitates that arbitral awards will be enforced in cross-border disputes with a high degree of certainty.

Ireland has not seen any decisions where the imposition of a remote hearing (instead of a physical hearing) in and of itself was found to amount to a violation of these rights. Irish Courts tend to set high thresholds for the requirements under Article V of the Convention. Set against the backdrop of the Irish common law system, Irish Courts would be likely to enforce, except where there was clear evidence that a party was not given an adequate opportunity to present its evidence and arguments (this could arise in a remote or a physical hearing).

Similar considerations apply in terms of irregularity in the procedure and with respect to a violation of public policy (Article V(1)(d) and V(2)(b) of the New York Convention, which are both incorporated, through the Model Law, in the Irish Arbitration Act).<sup>19</sup>

For public policy considerations, the defences provided under the New York Convention are also narrowly construed. Irish Courts follow the international practice of denying enforcement only where there is a clear violation of the State's most basic notions of morality and justice. Decisions by members of the Irish judiciary refusing enforcement on this basis are rare and only invoked where there are substantial matters of public policy<sup>20</sup> at issue. Procedural matters such as the format of the evidential hearing or whether or not the arbitrator had authority to order a remote hearing would be unlikely to result in a finding that the arbitral award should be set aside on public policy grounds.

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<sup>17</sup> Section 6 of the Arbitration Act 2010 formally adopted the Model Law into Irish law.

<sup>18</sup> Section 6 of the Arbitration Act 2010 formally adopted the Model Law into Irish law.

<sup>19</sup> Section 6 of the Arbitration Act 2010 formally adopted the Model Law into Irish law.

<sup>20</sup> In *Broström Tankers A.B v. Factorias Vulcano S.A.* [2004] IEHC 198 the Irish High Court emphasised that the public policy ground would be interpreted narrowly as a broad interpretation would defeat the purpose of the New York Convention. While no Irish caselaw gives explicit examples of a substantial matter of public policy, the English case of *Westacre Investments v. Jugoimport-SDPR Holding Co. Ltd.* [1998] 2 Lloyd's Rep 111 states: "It was difficult to see why acts outside the field of universally condemned activities (such as terrorism, drug trafficking, prostitution, paedophilia), or anything short of corruption or fraud in international commerce, should invite the attention of English public policy where the contracts are not performed within the jurisdiction of the English courts".

**f. COVID-Specific Initiatives**

- 11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: Yes.

Around mid-March 2020 in response to COVID-19, the Irish Court Services announced that the Irish Courts would only sit for limited urgent matters.<sup>21</sup> At the beginning of April 2020, the Irish Courts began piloting remote hearings, building on already established technology within the courts system, such as the use of video links in criminal and bail proceedings, assisted by the prison service and the Irish police.

The Courts Service provided guidelines to practitioners for conducting remote hearings, including advice on preparing and connecting to the remote hearing, technical requirement (Pexip VMR) and general tips for improving a video conferencing experience.<sup>22</sup> The Courts rapidly adapted to the situation and held a number of successful remote hearings. So, for the first time ever in 2020, the Irish Courts held hearings with all parties participating remotely.

The Courts Service has commenced holding physical, remote and hybrid hearings, on the basis of what is most appropriate for the particular proceedings.

The Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 recognises and provides on a statutory footing, some of the innovations undertaken by the judiciary and Courts Service, such as, facilitating remote judicial hearings and providing for electronic issuing and filing of court documents. Essentially the 2020 Act has introduced much needed reforms that are required to ensure the Irish judicial system continues to evolve to reflect technological, societal, and economic developments and requirements.

Section 11 of the 2020 Act allows the Chief Justice and Presidents of the various Irish Courts to direct that certain categories of types of proceedings may be heard remotely. Parties may apply to the Courts to have their proceedings heard remotely and the Courts may use their discretion to decide whether a remote hearing would be fair to all parties or in the interest of justice.

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<sup>21</sup> See Courts Service, “Statements in respect the arrangement of Courts” (13 March 2020) at <<https://www.courts.ie/news/statements-respect-arrangement-courts-%E2%80%9313th-march-2020>> (last accessed 30 April 2021).

<sup>22</sup> See Law Society of Ireland, “Remote Hearings Update” (17 April 2020) at <<https://www.lawsociety.ie/Solicitors/Practising/covid-19-support/courts-and-justice-agency-updates/remote-hearings-update/#.YHhkzOi2k2w>> (last accessed 30 April 2021).

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Section 20 of the 2020 Act also provides for recognition in changes brought to court practice in filing documents, allowing electronic filing of documents, the delivery of judgments electronically and similar reforms. Where a document is lodged with the court electronically, this version will be treated as the original.

While Court Rules need to be implemented to give effect to some of the changes introduced by the 2020 Act, the above initiatives and the Act itself have brought about significant progress in improving the accessibility of the Irish Courts and have effectively addressed problems presented by the COVID-19 pandemic.