Memorandum of understanding (commercial) Q&A: Ireland

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Ireland-specific information concerning the key legal and commercial issues when entering a memorandum of understanding in anticipation of a future commercial transaction.

This Q&A provides country-specific commentary on *Standard document, Memorandum of understanding (commercial): Cross-border*.

This Q&A forms part of *Cross-border commercial transactions*.

Memorandum of understanding

1. Are memoranda of understanding (MoUs) frequently put in place in your jurisdiction for a general commercial purpose?

MoUs are frequently entered into in Ireland in order to set out the principal terms and conditions on which the parties are willing to contract with each other. This is the case irrespective of where the parties to the MoU are incorporated. Common scenarios in which an MoU is entered into include:

- **Mergers and acquisitions.** The parties to a transaction will often enter into an MoU before any due diligence has been carried out on the target company or any negotiation of transactional documents has been conducted. The MoU will typically set out:
    - the terms of the transaction;
    - an exclusivity period for negotiations;
    - the form of transactional documents to be entered into (for example, a share purchase agreement or a business transfer agreement); and

    - any other terms to be incorporated into the transactional documents (for example, the number and class of shares to be purchased in a share purchase, and the governing law of the transactional documents).

- **Commercial property transactions.** Where a commercial property is for sale or for lease, the buyer and seller or lessor and lessee (as applicable) will often enter into an MoU setting out the principal terms on which they are willing to contract:
    - for a lease, the MoU will usually state the rent, duration of the lease and covenants and conditions for inclusion in the lease; and
    - for the sale of a property, the MoU will usually state the sale price, interest in the property to be transferred and any other terms relevant to the sale.

- **Financing arrangements.** Where a party will be receiving financing from a bank or other financial institution, the parties will often enter into an MoU that sets out the principal terms of the deal. The MoU will usually set out:
    - the purpose of the financing (for example, to facilitate the acquisition of a site for development);
    - the financing amount;
    - the security;
    - repayment amounts and frequency;
    - interest;
    - repayment period; and
    - financial covenants.

- **Pharmaceutical agreements**. Pharmaceutical companies often enter into an MoU with their counterpart before entering into, for example, a research and development agreement, contract manufacturing agreement, clinical supply agreement or commercial supply agreement. The terms included in an MoU will depend on the specific type of arrangement being entered into, but are likely to include:
    - ownership/licensing of intellectual property rights;
    - who will be responsible for obtaining marketing authorisations and regulatory compliance; and
    - financial payments and commitments.

There are various other terms used to describe an MoU. They can also be referred to as heads of terms, heads of agreement, letters of intent or term sheets.

2. Would there be a presumption that an MoU is not legally binding in your jurisdiction?

There is a general presumption that an MoU is **not** legally binding. However, whether in fact the terms of an MoU will be deemed legally binding or non-binding will depend on the individual document and the surrounding circumstances. For a term to be legally binding, the contract law formalities for agreeing a term must be satisfied (see *Question 3*).

To avoid any ambiguity, the parties to an MoU will typically state in the MoU which clauses they intend to be legally binding and which they do not. The clauses that tend to be stipulated as legally binding include confidentiality obligations and exclusive negotiation periods (if applicable).

The *Memorandum of understanding (commercial): Cross-border* is aligned with what would be found in an Irish law-governed MoU, as it identifies which paragraphs are intended to be legally binding and includes the statement:

> "This MoU is not exhaustive and is not intended to be legally binding between Party 1 and Party 2 except where specifically stated."

3. What are the formalities required for the formation of contracts in a commercial context in your jurisdiction?

For a valid contract to exist, five elements must be satisfied:

- **Capacity to enter into a contract.** A person must have a certain level of understanding and judgment to have capacity to enter into a contract. Categories that can give rise to lack of contractual capacity include persons suffering from mental incapacity, intoxicated persons (*McGonigle v Black (unreported), 14 November 1988, (HC)*), minors and prisoners.
- **An offer.** An offer is a clear and unambiguous statement of the terms on which the offeror is willing to contract, should the person or persons to whom the offer is addressed decide to accept.
- **Acceptance.** Acceptance of an offer must occur. Acceptance occurs when there is a final and unequivocal expression of agreement to the terms of the proposed offer by the acceptor. The general rule is that an acceptance is not valid unless made with the intention of accepting the offer (*Parkgrange v Shandon (unreported), 2 May 1991 (HC (Carroll J))*).
- **Consideration.** Consideration must pass for a contract to be enforceable. Consideration is an act or forbearance by one party, or the promise of it, as the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

- **Intention to create legal relations.** The parties must intend to create legal relations. Intention may be implied from the subject matter or it may be expressed by the parties (see *Rogers v Smith (unreported), 16 July 1970, (SC)*).

4. Would an obligation to negotiate in good faith be enforceable in your jurisdiction? (See *Standard document, Memorandum of understanding (commercial): Cross-border: paragraph 2.1*.)

There is no general principle of good faith and fair dealing implied into Irish contract law (*Flynn v Breccia [2017] IECA 74*). Consequently, a term that parties will act in good faith generally will not be implied into contracts. Justice Finlay Geoghegan in *Flynn v Breccia* accepted, however, that there are certain types of contracts in which a duty of good faith applies, such as partnership agreements or the principle of *uberrima fides* in insurance contracts.

As to whether an express obligation to negotiate in good faith is enforceable, the general understanding from case law is that generally it is not, due to lack of certainty as to its terms (*Triatic Ltd v Cork County Council [2006] IEHC 111*). The Irish High Court in *Esso Ireland Limited and Ireland ROC Limited v Nine One One Retail Limited* considered the enforceability of a clause to negotiate in good faith when attempting to negotiate a new contract on the expiry of the existing operating agreement (*[2013] IEHC*). Justice McGovern determined that the clause was insufficiently precise for the court to enforce it, and that the court could not impose its opinion of what the phrase "good faith" means in the context of commercial discussions where both parties were pursuing their own business interests.

5. What period would obligations of confidentiality typically endure under an MoU in your jurisdiction? (See *Standard document, Memorandum of understanding (commercial): Cross-border: paragraph 5.2*.)

The general position is that contractual confidentiality obligations are not subject to any maximum duration under Irish law, and so the parties are free to agree an appropriate duration. However, while confidentiality obligations can in principle last indefinitely, not all such clauses will be enforceable and their enforceability is fact-dependent.

In practice, parties will often seek to agree a specific period for confidentiality obligations to apply, which will typically range from between one year and ten years depending on the nature of the information to be protected. Confidentiality obligations will in any event cease to apply once the information enters into the public domain other than through the fault of the receiving party.

6. Are there any limitations on the use of non-solicitation restrictions in your jurisdiction? (See *Standard document, Memorandum of understanding (commercial): Cross-border: paragraph 6*.)

Non-solicitation clauses are considered to be a type of restrictive covenant under Irish law and the Irish courts interpret them narrowly.

The Irish courts take a less restrictive view of a covenant in a contract for the sale of a business than they will of a restraint in an employment contract (*Murtigroyd & Company Limited v Barry Purdy [2005] IEHC 159; Ryanair DAC v Bellew [2020] IEHC 907*).

The principles of the enforceability of restrictive covenants were set out in the case of *Murtigroyd & Co Limited v Barry Purdy*, in which it was stated that such covenants are on the face of it unenforceable unless they:

- Protect a legitimate business interest.
- Are no wider than is reasonably necessary for the protection of that interest.

(*[2005] 3 IR 12*.)

If a company seeks to rely on a restrictive covenant, it should seek to identify the legitimate interest to be protected (for example, customer connection or goodwill, trade secrets, or confidential or commercial information) and ensure that the covenant is drafted in such a way that it does not go further than necessary. *Standard Document, Memorandum of understanding (commercial): Cross-border: Clause 6.3* contains carve-out wording that is typically included to ensure that the covenant is not implicated where employees respond to a national advertising campaign in an unsolicited manner. However, in light of evolving recruitment practices, we would suggest that this provision be expanded to refer additionally to jobs advertised on a recruitment website/social media page or the company's own website.

Whether a non-solicitation clause is enforceable is fact-dependent. However, the Irish courts have previously considered the following factors as relevant:

- **Restraint period.** The period of restraint must be reasonable. What is considered reasonable will depend on the type of activity being restrained; for example:
    - the Irish High Court recently held in *Ryanair v Bellew* that a post-termination restriction of 12 months preventing a Chief Operating Officer (COO) from working for Ryanair's competitor EasyJet was justified due to the likely useful life of the confidential commercial information that would have come to the COO's knowledge (*[2019] IEHC 907*). However, it should be noted that restraint of trade clauses in excess of six months have previously been difficult to enforce in the Irish courts (see *Brightwater v Gemma Allen and Robert Walters Limited [2005] IEHC 155*); and
    - A non-solicitation/non-poaching of customers and employees clause with a 12-month post-termination restraint period is not unusual and in certain circumstances has been considered reasonable. In *Net Affinity Limited v Conaghan and Revmac Limited t/a Avivo*, the Irish High Court found that it was appropriate to grant an injunction against Avivo preventing them from soliciting, approaching or dealing with existing clients of the plaintiff for 12 months (*[2011] IEHC 160*).

- **Geographic area.** The Irish courts will look at the geographical scope of the clause and assess whether it is reasonable. If the restraint in the non-solicitation clause extends beyond the region where the business operates, it will often be deemed unreasonable. In *Net Affinity v Conaghan*, there was no geographical limit contained in the non-solicitation clause; this was considered by the Irish High Court as unreasonable, as it could have precluded the employee from taking up similar employment with a non-competitor in another country. In *Murtigroyd & Company Limited v Purdy*, the Irish High Court found that a restraint relating to the entirety of Ireland was reasonable, having regard to the way in which the business (patent attorneys) was operated in Ireland.
- **Actual contact.** In many cases, a non-solicitation clause will be deemed unreasonable if it extends to the solicitation of customers that the former employee had no material dealings with. In *Allied Irish Banks PLC & Others v Pat Diamond & Others*, the Irish High Court, at the interlocutory stage, found that it would be appropriate to make an order restraining the defendants from soliciting AIB IFS customers, but that the same order could not preclude the concluding of contracts with such clients where there was no solicitation (*[2011] IEHC 505*).
- **Business scope.** The scope of the clause should be limited to the area in which the business operates and competes.

7. Would it be standard practice to include a provision like *Standard document, Memorandum of understanding (commercial): Cross-border: paragraph 6.4* (providing an express remedy for breach a non-solicitation restriction) in your jurisdiction? What other remedies might be available to a party in the event of a breach? Would *paragraph 6.4* potentially prevent recovery?

While it is not standard in Irish law-governed MoUs to include an express monetary remedy similar to *Standard Document, Memorandum of understanding (commercial): Cross-border: Clause 6.4* for a breach of a non-solicitation restriction, such a clause would not be completely unheard of.

There is the risk that *clause 6.4* could be construed to be a penalty clause under Irish law (and therefore void), unless the sum payable for breaching *clause 6.2* represents a genuine pre-estimate of the loss that the non-breaching party would incur in the circumstances. If *clause 6.4* was found to be void, the Irish courts might look to sever this clause from the remainder of the contract, to preserve the other rights and remedies.

As regards other remedies open to the non-breaching party, the following remedies may be of use:

- **Injunction.** Injunctive relief may be sought to stop the breach of a restrictive covenant (or to stop a further breach or anticipated breach). Injunctive relief has been granted by the Irish courts to introduce measures designed to redress an improper head start in competition obtained by unlawful activity (*Allied Irish Banks v Diamond [2012] 3 IR 549*).
- **Damages.** A damages claim could be made. While there has not been much debate on how to quantify damages for the breach of a restraint of trade clause, the plaintiff purchaser was awarded damages in *Lennon v Doran* after the defendant vendor breached a non-compete clause (*(20 February 2001), HC*).

- **Declaratory order.** A party might also seek a declaratory order that a non-solicitation clause is binding and enforceable.

8. Are there any limitations on the use of exclusivity or lock-out provisions in your jurisdiction? (See *Standard document, Memorandum of understanding (commercial): Cross-border: paragraph 7*.)

Exclusivity and lock-out provisions are commonly used in Ireland to give potential buyers of a company, for example, some protection and comfort by preventing the seller from signing an agreement with a third party for a period of time referred to as the "exclusivity period", during which the potential buyer will conduct due diligence and negotiations on the target company.

An agreement not to negotiate with a third party for a limited period is enforceable, provided it is for a fixed period and is supported by consideration under Irish law (see *Walford v Miles [1992] 1 All ER 453; Triatic Limited v Cork County Council [2006] IEHC 111*).

However, Irish common law does not recognise an obligation for the parties to the lock-out agreement to negotiate in good faith (see *Question 4*). And, in relation to an agreement to negotiate, in *Triatic*, Justice Laffoy found "persuasive" the dicta of Lord Ackner in *Walford v Miles* to the effect that an agreement to negotiate for an unspecified period, and which contained no provision for the defendant to determine the negotiations, was not enforceable, primarily on grounds of lack of certainty.

Standard Document, Memorandum of understanding (commercial): Cross-border: Clause 7 is generally reflective of the exclusivity and lock-out provisions commonly found in Irish law-governed documents.

9. Would it be standard practice to include an indemnity to cover breach of exclusivity like *Standard document, Memorandum of understanding (commercial): Cross-border: paragraph 7.7* in an MoU in your jurisdiction?

It would not be standard in Ireland for an MoU to include such an indemnity for breach of exclusivity provisions. However, some parties to an MoU might seek to include one with a view to strengthening their position in the event of a breach of the exclusivity provisions (bearing in mind that indemnities can make recovery easier and quicker than the alternative of bringing an action for damages).

10. Does the law of your jurisdiction dictate which governing law and jurisdiction will apply to an MoU? (See *Standard document, Memorandum of understanding (commercial): Cross-border: paragraphs 11* and *12*.)

The parties are free to agree and stipulate which law governs the MoU and the appropriate jurisdiction for dealing with disputes in connection with it.

EU law (as set out in particular in the Rome I Regulation (*593/2008*) and the Recast Brussels Regulation (*1215/2012*)) respects the governing law and jurisdiction stipulated in an agreement (subject to certain exceptions, which are unlikely to be relevant to an MoU).

11. Are there any clauses in *Standard document, Memorandum of understanding (commercial): Cross-border* that would be ineffective or not standard practice in your jurisdiction?

See *Question 7* for our comments in relation to *Standard document, Memorandum of understanding (commercial): Cross-border: Clause 6*.

12. Are there any other clauses that it would be usual to see in an MoU and/or that are standard practice in your jurisdiction?

No, however, as a matter of convenience, a counterparts clause may be included in some circumstances, to clarify that separate copies of the agreement may be executed by different parties and each copy will be considered to be an original.

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