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Insurance & Reinsurance 2022

Ireland: Law & Practice and Trends & Developments
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IRELAND

Law and Practice

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CONTENTS

1. Basis of Insurance and Reinsurance Law p.3
1.1 Sources of Insurance and Reinsurance Law p.3

2. Regulation of Insurance and Reinsurance p.3
2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance p.3
2.2 The Writing of Insurance and Reinsurance p.5
2.3 The Taxation of Premium p.5

3. Overseas Firms Doing Business in the Jurisdiction p.5
3.1 Overseas-Based Insurers or Reinsurers p.5
3.2 Fronting p.8

4. Transaction Activity p.8
4.1 M&A Activities Relating to Insurance Companies p.8

5. Distribution p.8
5.1 Distribution of Insurance and Reinsurance Products p.8

6. Making an Insurance Contract p.10
6.1 Obligations of the Insured and Insurer p.10
6.2 Failure to Comply with Obligations of an Insurance Contract p.10
6.3 Intermediary Involvement in an Insurance Contract p.10
6.4 Legal Requirements and Distinguishing Features of an Insurance Contract p.11
6.5 Multiple Insured or Potential Beneficiaries p.11
6.6 Consumer Contracts or Reinsurance Contracts p.11

7. Alternative Risk Transfer (ART) p.11
7.1 ART Transactions p.11
7.2 Foreign ART Transactions p.11

8. Interpreting an Insurance Contract p.11
8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence p.11
8.2 Warranties p.12
8.3 Conditions Precedent p.12

9. Insurance Disputes p.13
9.1 Insurance Disputes over Coverage p.13
9.2 Insurance Disputes over Jurisdiction and Choice of Law p.13
9.3 Litigation Process p.13
9.4 The Enforcement of Judgments p.14
9.5 The Enforcement of Arbitration Clauses p.14
9.6 The Enforcement of Awards p.14
9.7 Alternative Dispute Resolution p.14
9.8 Penalties for Late Payment of Claims p.15
9.9 Insurers' Rights of Subrogation p.16

10. Insurtech p.16
10.1 Insurtech Developments p.16
10.2 Regulatory Response p.16

11. Emerging Risks and New Products p.17
11.1 Emerging Risks Affecting the Insurance Market p.17
11.2 New Products or Alternative Solutions p.18

12. Recent and Forthcoming Legal Developments p.19
12.1 Developments Impacting on Insurers or Insurance Products p.19

13. Other Developments in Insurance Law p.20
13.1 Additional Market Developments p.20

1. BASIS OF INSURANCE AND REINSURANCE LAW

1.1 Sources of Insurance and Reinsurance Law

Ireland has a common law legal system. The law in relation to insurance contracts is primarily governed by common law principles, the origins of which can be found in case law.

Following the enactment of the Consumer Insurance Contracts Act 2019 (CICA), the Marine Insurance Act 1906 (MIA) only applies to non-consumer contracts. There are some forms of insurance that are compulsory under statute in Ireland, for example third-party motor insurance and professional indemnity cover for certain professionals.

There is no Irish equivalent to the UK Insurance Act 2015. However, the 2019 Act, reforming the area of consumer insurance law, was signed into law in 2019 and commenced in two stages, on 1 September 2020 and 1 September 2021, following industry pressure to allow sufficient time for the insurance industry to account for the far-reaching changes imposed. The 2019 Act has, for consumer insurance contracts, replaced the duty of utmost good faith and the consumer's duty of disclosure with a duty to provide responses to questions asked by the insurer honestly and with reasonable care.

Consumers

There are some restrictions on insurers' freedom of contract, largely for the protection of consumers, as they are subject to the enactment of Irish legislation to comply with EU law. In particular, consumer protection law has undergone a number of changes as a result of the Unfair Terms in Consumer Contracts Directive 1993/13/EC and the Distance Marketing of Financial Services Directive 2002/65/EC.

When dealing with a "consumer", the insurer must also comply with the Central Bank of Ireland (CBI) Consumer Protection Code 2012 (CPC) and the Consumer Protection Act 2007. Under the CPC, "consumer" is quite broadly defined, including individuals and small businesses with a turnover of less than EUR3 million. The same definition is applied for the purposes of the CICA. Insurance contracts, and the marketing and selling of insurance products to consumers, must also be compliant with the terms of the Sale of Goods and Supply of Services Act 1980.

2. REGULATION OF INSURANCE AND REINSURANCE

2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

Ireland has a strong and efficient risk-based prudential regulatory framework, focusing on the application of the proportionality principle.

The CBI

The CBI has primary responsibility for the prudential supervision and regulation of insurance and reinsurance undertakings in Ireland. It carries out its role through monitoring and ongoing supervision and issues standards, policies and guidance, with which (re)insurance undertakings are required to comply.

The CBI oversees corporate governance functions, risk management and internal control systems of (re)insurance undertakings without placing burdensome administrative requirements on their operators. Such undertakings are required to submit annual and quarterly returns on solvency margins and technical reserves for supervisory purposes. The CBI also conducts

regular themed inspections across the (re)insurance sector.

The CBI operates a rigorous authorisation process and conducts fitness and probity assessments of individuals who are to hold certain designated management functions and positions within authorised firms. It also has responsibility for consumer protection issues.

Risks and risk ratings

An administrative sanctions regime provides it with a credible enforcement tool, and acts as an effective deterrent against breaches of financial services law. The CBI's supervisory framework, "Probability Risk and Impact SysteM" (PRISM), is a risk-based framework that categorises regulated firms by the potential impact of their failure on the economy and the consumer. Under PRISM (re)insurance undertakings are allocated a risk rating on a scale of high (including ultra-high), medium-high, medium-low or low. PRISM recognises that the CBI does not have infinite resources, and selectively deploys supervisors according to a firm's risk rating.

Although relatively few in number, high-impact firms are recognised as the most important for ensuring financial and economic stability and are therefore subject to a higher level of supervision.

The CPRA

The CBI's Consumer Protection Risk Assessment (CPRA) model aims to enhance the manner in which regulated entities manage "the risks they pose to consumers and ensure they have appropriate risk management frameworks to deliver for their customers". (Re)insurance companies are required to implement a consumer protection risk management framework that is tailored to the nature, scale and complexity of their business. The CBI assesses the effectiveness of these internal management frameworks through targeted CPRAs, which are in addition and supplementary to the CBI's PRISM and regular thematic inspections.

II Code and the 2015 Regulations

The Insurance Institute's Code of Ethics and Conduct ("II Code") is also relevant to the regulation of insurance and reinsurance undertakings. The II Code is a voluntary code of conduct aimed at protecting policyholders resident in Ireland. It has been adopted by members of Insurance Ireland, which is the representative body for (re) insurance undertakings in Ireland.

EU Directive 2009/138/EC ("Solvency II") introduced a common regulatory framework for EEA insurance and reinsurance undertakings and was transposed into Irish law by the European Union (Insurance and Reinsurance) Regulations 2015 (the "2015 Regulations"). The 2015 Regulations impose harmonised capital and solvency requirements, valuation techniques and governance and reporting standards, and also impose certain restrictions on shareholders of (re)insurance undertakings, as the CBI will not grant an authorisation to an undertaking if it isn't satisfied as to the suitability, fitness and probity of "qualifying" shareholders.

For the purposes of the 2015 Regulations, a qualifying shareholding means a direct or indirect holding in an undertaking that represents 10% or more of the capital or voting rights of the undertaking, or that makes it possible to exercise a significant influence over the management of the undertaking.

The IDD

The European Union (Insurance Distribution) Regulations 2018 (IDR) transposed the Insurance Distribution Directive 2016/97 (IDD) into Irish law, harmonising the distribution of insurance and reinsurance products within the EU, with the aim of facilitating market integration and enhancing consumer protection. The IDR aims

to enhance consumer protection and ensures a level playing field across the sector by extending the scope of application to include all participants in the distribution of insurance products, seeks to identify and mitigate conflicts of interest, particularly in the area of remuneration, and introduces increased transparency and conduct of business requirements.

2.2 The Writing of Insurance and Reinsurance

See **2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance**.

2.3 The Taxation of Premium

Insurance undertakings and intermediaries authorised by the CBI or in another EU/EEA member state carrying on business in Ireland are required to comply with certain Irish general good requirements, including the CPC. The CPC contains general and specific provisions relating to insurance, including requirements relating to premium handling and contact with consumers, including information that must be provided to consumers before entering into a contract for a product or service, records, errors, rebates and claims processing. Persons carrying out a "controlled function" on behalf of financial service providers are also expected to satisfy the minimum professional knowledge and competency requirements set out in the Minimum Competency Code and Regulations 2017 (MCC).

A range of taxes, levies and duties are applied to insurance policies:

- non-life policies of insurance attract stamp duty of EUR1 per policy;
- non-life policies of insurance also attract a levy of 3% on the gross amount received by an insurer in respect of certain non-life insurance premiums – an additional 2% contribution to the Insurance Compensation Fund applies to premiums received in relation to non-life insurance policies;
- life assurance premiums attract a levy of 1% of gross premiums; and
- health insurance attracts levies ranging from EUR157 to EUR449, depending on the type of cover.

3. OVERSEAS FIRMS DOING BUSINESS IN THE JURISDICTION

3.1 Overseas-Based Insurers or Reinsurers

Licensing of (Re)insurance Companies

Undertakings wishing to carry on (re)insurance business in Ireland must obtain authorisation from the CBI or another EU regulator through the "single passport" regime. The CBI has published both a checklist for completing and submitting applications for authorisation under the 2015 Regulations (the "Checklist"), and a guidance paper to assist applicants. The application comprises the completed Checklist and a detailed business plan, together with supporting documents (the "Business Plan"), submitted after a preliminary meeting with the CBI.

The principal areas considered by the CBI in evaluating applications include:

- legal structure;
- ownership structure;
- overview of the group to which the applicant belongs (if relevant);
- scheme of operations;
- system of governance, including the fitness and probity of key personnel;
- risk management system;
- Own Risk and Solvency Assessment (ORSA);
- financial information and projections;
- capital requirements and solvency projections; and

- consumer issues (such as MCC and CPC).

A high-level overview of the application for authorisation process is as follows:

- arrange a preliminary meeting with the CBI to outline the proposals, at which the CBI will provide feedback in relation to the proposal and identify any areas of concern that should be addressed before the application is submitted;
- prepare and submit the completed Checklist and Business Plan;
- dialogue with the CBI. The application process is an iterative one, involving contact and consultation with the CBI after an application is formally submitted. During the review process, it will typically request additional information and documentation, and is likely to have comments on certain features of the proposal. The CBI may seek additional meetings with the applicant as part of this process in order to discuss aspects of the proposal in further detail;
- the authorisation committee of the CBI considers the application;
- once the CBI is satisfied with the application, it will issue an "authorisation in principle", which means that it is minded to grant its approval once certain conditions are satisfied; and
- once all conditions are satisfied, the CBI will issue the final authorisation and the (re)insurer can commence writing business in Ireland.

The CBI will issue a formal authorisation once it is satisfied that the capital requirements and any pre-licencing requirements have been met. Throughout this process there will be multiple meetings, and the CBI may request additional information. The process can take between four to six months. The CBI does not currently charge a fee for licence applications.

The Position of UK-Based Insurers Post 31 December 2020

The Brexit Deal struck at the final hour on 24 December 2020 between the UK and the EU was largely silent on financial services. The effect of same is that as at the end of the transition period on 31 December 2020, the UK is now a third country and UK authorised insurers can no longer rely on the EU passporting regime to access the Irish and wider EU market.

In anticipation of this happening, the Irish Government introduced, through Part 10 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (the "Brexit Omnibus 2020 Act"), a Temporary Run-Off Regime (the "TRR") which has become crucially important for those UK/Gibraltar (GI) insurers and insurance intermediaries with Irish customers, which decided against establishing an EU authorised entity to access Ireland post Brexit.

Part 10 of the Brexit Omnibus 2020 Act addresses the issue of insurance contract continuity and inserts additional provisions into the 2015 Regulations and the IDR, permitting a UK firm to administer its run-off business in Ireland for a period of 15 years from 31 December 2020 "in order to terminate its activity" in Ireland. Crucially, no new business will be permitted but compliance with the general good requirements will remain a requirement.

In order to avail of this regime, a UK firm would have needed to notify the CBI that the relevant regulation would apply to its business no later than three months from 31 December 2020. On 1 January 2021, the CBI released a webpage fully dedicated to the TRR in which it clarifies how the TRR will operate, provides answers to a number of questions which have arisen since the publication of the Brexit Omnibus 2020 Act

and outlines the steps that need to be taken by impacted firms.

The Insurance Bill proposes to amend the 2015 Regulations to address issues identified in respect of the operation of the TRR for UK and Gibraltar-based insurers in two circumstances. These amendments will provide for technical changes in order to ensure that UK and Gibraltar-based insurance firms who provide reinsurance to Irish based insurers, through the third country exemption pursuant to Regulation 12 of the 2015 Regulations, along with firms in liquidation, can rely on the TRR to run-off their existing Irish insurance contracts.

See below, "*Establishing a Third-country Insurance Branch in Ireland*".

Third-Country Reinsurers

Third-country reinsurers are excluded from the application of the 2015 Regulations where the following conditions are satisfied:

- the reinsurer has its head office in a third country;
- the reinsurer is lawfully carrying on reinsurance in that third country; and
- the reinsurer is carrying on reinsurance (but no other activity) in Ireland.

The effect of this exclusion is that a third-country reinsurer is not required to be authorised in accordance with the 2015 Regulations in order to carry on reinsurance business in Ireland.

Freedom of Establishment or Freedom of Services basis

(Re)insurance undertakings authorised in an EU/EEA member state may carry on business in Ireland on a freedom of establishment basis, through a local branch or operate in Ireland on a freedom of services basis, provided that their home state regulators notify the CBI. Passporting undertakings must comply with the Irish general good requirements.

Special Purpose Reinsurance Vehicle

A reinsurance provider can establish a special-purpose reinsurance vehicle, which provides a quicker and simpler route to authorisation and reduces the extent of supervision compared with fully regulated reinsurers.

Establishing a Third-Country Insurance Branch in Ireland

The 2015 Regulations facilitate a non-EEA insurer establishing a branch in Ireland (a "Third-Country Branch"), subject to the fulfilment of specific regulatory requirements. The 2015 Regulations impose standalone capital requirements on a Third-Country Branch and require the Third-Country Branch to hold assets in Ireland of at least 50% of the absolute floor prescribed in the 2015 Regulations in respect of the Minimum Capital Requirement (currently EUR3.7 million) and deposit 25% of that amount with the Irish High Court as security. The local substance requirements for a Third-Country Branch will depend on the nature, scale and complexity of its operations.

The CBI will expect an appropriate number of senior management in Ireland to demonstrate a sufficient level of local oversight and control; as a minimum, a branch manager and a branch management committee in Ireland, with day-to-day responsibility for corporate governance of the branch, will be required. To date, no Third-County Branches have been authorised in Ireland but the CBI guidelines and checklists for third-country insurers applying for branch authorisation have been effective since May 2018.

Significantly, a Third-Country Branch does not have the right to passport into other EU/EEA jurisdictions and, accordingly, is only permitted to write business in the jurisdiction in which

it is established. Therefore, a Third-Country Branch is not suitable for third-country insurers seeking to write business across the EU/EEA. Within the current context of Brexit, establishing a Third-Country Branch may not represent a comprehensive solution for UK insurers seeking to maintain access to the single market, and establishing an EEA-authorised subsidiary has been the preferred option.

3.2 Fronting

The CBI does not currently permit 100% reinsurance arrangements.

4. TRANSACTION ACTIVITY

4.1 M&A Activities Relating to Insurance Companies

The robust upturn in M&A activity experienced in the second half of 2020 continued throughout 2021. M&A with Irish involvement during 2021 totalled approximately USD90 billion during the first 9 months of 2021 – a fivefold increase in value from 2020. Irish outbound M&A activity amounted to approximately USD67.2 billion during the first nine months of 2021.

This strong level of transactional activity has been accompanied by resilient macroeconomic performance; the Irish economy is predicted by the European Commission to grow by some 14.6%, notwithstanding the continuing effects of the pandemic and related restrictions affecting certain sectors of the economy.

The outlook for M&A activity in 2022 remains optimistic as the global macroeconomic forecast remains positive. Increased private equity interest also continues to drive transaction levels in Ireland and this is expected to continue in 2022. Environmental, social and corporate governance (ESG) considerations are expected to become deal breakers in 2022 given the increased global regulatory focus and public awareness of this area.

5. DISTRIBUTION

5.1 Distribution of Insurance and Reinsurance Products

The European Union (Insurance Distribution) Regulations 2018 (IDR)

The distribution or sale of insurance products is governed by the IDR, which applies to persons engaged in insurance distribution business in the Irish market, such as agents, brokers and bancassurance operators. However, insurers can also distribute insurance products directly to customers.

Definition of insurance distribution

Under the IDR, insurance distribution is broadly defined as "any activity involved in advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media".

Certain activities are specifically excluded, including claim management on a professional basis, loss adjusting, expert claim appraisal and the mere provision of information if no additional steps are taken by the provider to assist in the conclusion of an insurance or reinsurance con-

tract. The IDR clarifies that "introducing" is not considered a regulated activity under Irish law.

Impact of the IDR

The IDR introduces enhanced information and conduct of business requirements for insurance distributors. "Ancillary insurance intermediaries" are exempt from the application of the 2018 Regulations where certain conditions are satisfied.

The IDR prescribes certain requirements in relation to product oversight and governance (the "POG Requirements"), intended to enhance consumer protection by ensuring that insurance products meet the needs of the target market and aim to mitigate the risk of mis-selling by insurance distributors. Insurance undertakings (and relevant intermediaries) are required to implement product oversight and governance procedures prior to distributing or marketing an insurance product to customers.

The IDR also states that distributors must have Product Distribution Arrangements (PDAs) in place containing appropriate procedures to obtain all appropriate information on the products they intend to offer to their customers from the manufacturer. The PDA should be a written document made available to their staff with the aim of preventing customer detriment, managing conflicts of interest and ensuring the objectives, interests and characteristics of customers are taken into account.

The Investment Intermediaries Act 1995

Previously, two pieces of legislation governed intermediaries operating in Ireland – the European Union (Insurance Mediation) Regulations 2005 (IMR) and the Investment Intermediaries Act 1995 (IIA). The IDR has brought much needed clarification in relation to the application of IIA to insurance intermediaries by revoking all references to insurance, and the IMR has been repealed in full.

Authorisation

(Re)insurance brokers/intermediaries must be authorised by the CBI in order to carry out (re) insurance distribution or advise consumers in relation to general insurance products, life assurance products, or health and medical insurance products, or to act as an insurance intermediary on behalf of an insurance company with which they have an agreement or carry out certain activities, such as loss assessing or assisting consumers in dealing with claims under insurance contracts.

(Re)insurance brokers/intermediaries are subject to ongoing CBI supervision of their compliance with the registration requirements, which includes completing an annual return and holding an adequate policy of professional indemnity insurance. The CBI maintains a register of authorised (re)insurance intermediaries in Ireland. (Re)insurance undertakings involved in the distribution of insurance products must also comply with the national general good provisions that regulate the manner in which such undertakings may sell and market insurance products to consumers in Ireland, as set out under:

- the CPC;
- the MCC;
- the Consumer Protection Act 2007;
- the Sale of Goods and Supply of Services Act 1980;
- the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995; and
- the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004.

The Position of UK-Based Insurance Intermediaries Post 31 December 2020

See **3.1 Overseas-Based Insurers or Reinsurers**.

6. MAKING AN INSURANCE CONTRACT

6.1 Obligations of the Insured and Insurer

Parties to a non-consumer insurance contract are subject to the duty of utmost good faith (Section 17, MIA). The proposer or insured has a duty to disclose all material facts (a material fact is one which would influence the judgment of a prudent underwriter in deciding whether to underwrite the contracts and if so, on what terms). The duty goes beyond answering questions on a proposal form correctly; every material representation made by the insured or proposer, or their agent, to the insurer must be true.

The 2019 Act replaces the duty of good faith for consumer insurance contracts and the MIA no longer applies to these contracts. Since 1 September 2021, the consumer proposer's duty is limited to a duty to provide responses to specific questions asked by the insurer honestly and with reasonable care.

The majority of provisions of the 2019 Act took effect from 1 September 2020, and the remaining sections, including Section 8 (duty of disclosure) and Section 9 (proportionate remedies), commenced on 1 September 2021.

6.2 Failure to Comply with Obligations of an Insurance Contract

Prior to the 2019 Act, the remedy for breach of the duty of utmost good faith was avoidance of the policy. The 2019 Act introduced new proportionate remedies (proportionate to the effects of the misrepresentation, depending on whether it was innocent, negligent or fraudulent) for a breach of the new duty of disclosure.

Section 8(6) requires an insurer to establish inducement to avail of the remedies under the act for a breach of the duty of disclosure.

6.3 Intermediary Involvement in an Insurance Contract

Typically, an insurance intermediary is deemed to be acting on behalf of the customer at all times during the negotiation of an insurance contract, except when collecting premiums on behalf of the insurer. However, certain intermediaries act for and on behalf of an insurer as a tied insurance intermediary.

Under the IDR, insurance distributors are required to act honestly, fairly and professionally in accordance with the best interest of their customers. This obligation applies irrespective of whether the intermediary is negotiating an insurance contract as an individual broker, or acting as a tied insurance intermediary of a particular insurer. The information and transparency requirements set out in the IDR require an intermediary to promptly disclose whether it is representing the customer or acting for and on behalf of the insurer, before the conclusion of a contract, and any remuneration received by an intermediary in relation to a contract must also be disclosed to the customer. Additional key ongoing requirements include:

- the good reputation of directors;
- the knowledge and ability of senior management and key personnel;
- the holding of minimum levels of professional indemnity insurance; and
- maintenance and operation of client premium accounts.

In November 2017, the CBI published a consultation paper on a series of proposed con-

sumer protection measures in relation to commission payments, "Intermediary Inducements – Enhanced Consumer Protection Measures" ("CP116"), following which the CBI made an Addendum to the CPC on 31 March 2020 introducing changes to commission payments, disclosure requirements and some consequential amendments arising from the IDR.

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

There are no specific rules for the formation of an insurance contract under Irish law, beyond the general principles of contract law, common law and the duty of good faith. There is no statutory definition of an insurance contract and the legislation does not specify its essential legal elements. The main characteristics of an insurance contract were set out in the leading Irish authority of International Commercial Bank plc v Insurance Corporation of Ireland and include:

- an insurable interest;
- payment of a premium;
- the insurer undertakes to pay the insured on the happening of an insured risk;
- the risk must be clearly specified;
- indemnification (the insurer will indemnify the insured against actual loss); and
- the principle of subrogation is applied where appropriate.

CICA defines a contract of insurance as "a contract of life insurance or non-life insurance made between an insurer and a consumer" and reforms the law relating to insurable interests.

6.5 Multiple Insured or Potential Beneficiaries

There is no information available.

6.6 Consumer Contracts or Reinsurance Contracts

Consumer contracts are now governed by CICA. The legal requirements of insurance and reinsurance are the same.

7. ALTERNATIVE RISK TRANSFER (ART)

7.1 ART Transactions

ART transactions are recognised as reinsurance transactions under the 2015 Regulations and are characterised by the CBI in a manner consistent with the Solvency II Regime.

There has been a slow-down in recent years in the number of ART deals in Ireland. The CBI has concerns relating to the viability of ART transactions and the potential risks for insurance carrier, in particular in relation to basis risks. Further, it is not clear if ART transactions entered into by life insurers comply with the requirements to be "fully-funded". Significant growth is not expected in the coming years.

7.2 Foreign ART Transactions

No information available.

8. INTERPRETING AN INSURANCE CONTRACT

8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

Insurance contracts are subject to the same general principles of interpretation as other contracts. The Supreme Court has confirmed in two judgments, Analog Devices v Zurich Insurance and ors and Emo Oil v Sun Alliance and London Insurance Company, that the principles of construction as set out by Lord Hoffman in ICS v West Bromwich Building Society should

be applied to the interpretation of insurance contracts.

The Irish courts consider the ascertainment of the meaning that the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract (sometimes referred to as the "matrix of fact"). However, a number of things are excluded from the admissible background, including previous negotiations of the parties and their declarations of subjective intent. The meaning of the document is not the same as the particular meaning of the words; it is what the parties using those words against the relevant background would reasonably have been understood to mean.

The courts apply the words' ordinary and natural meaning as it is assumed that people ordinarily do not make linguistic mistakes in formal documents. However, if it is clear from the "matrix of fact" and background that something has gone wrong with the language, judges can attribute to the parties the intention they clearly had.

The court takes an objective approach to determine the intention of reasonable persons in the position of the parties. Where a contractual term is genuinely ambiguous, the contra proferentem rule will apply and the interpretation less favourable to the drafter is adopted. The rule also applies to consumer contracts. The Irish courts have not yet considered recent decisions in England that have arguably limited the application of the contra proferentem rule.

8.2 Warranties

In non-consumer contracts, no specific wording is required to create a warranty. The word "warranty" is not required but may be considered as evidence of the intention to create a warranty. Further, a warranty may be express or implied (Section 33 of the MIA).

A warranty is treated differently to a contractual term in that it must be exactly complied with, whether it is material to the risk or not, and the insurer is discharged from liability from the date of breach of the warranty, but without any prejudice to any liability incurred before that date.

The Irish courts construe warranties strictly as a breach entitles the insurer to repudiate liability even if the breach is not material to the loss. The CICA replaces warranties in consumer contracts with suspensive conditions and abolishes basis of contract clauses.

8.3 Conditions Precedent

The effect of a breach of a condition depends on whether the condition is a condition precedent to liability. Conditions precedent to liability relate to matters arising after a loss has occurred, most commonly in relation to notification. The Irish courts will generally not construe an insurance condition as a condition precedent unless it is expressed as a condition precedent, or the policy contains a general condition precedent provision. Breach of a condition precedent means that an insurer can repudiate liability for the claim without any requirement to demonstrate prejudice. There is no requirement for a link between the breach and the damage.

The consequences for breach of a bare condition are in damages.

In consumer contracts, conditions precedent could now be considered "continuing restrictive conditions" following commencement of the CICA.

9. INSURANCE DISPUTES

9.1 Insurance Disputes over Coverage

Insurance contracts typically contain a dispute resolution clause, which requires the insured to raise the dispute with the insurer in the first instance. An insurance contract may contain an arbitration clause, or may stipulate another form of alternative dispute resolution (ADR), such as mediation. In the case of a consumer contract, a consumer may make a complaint to the Financial Services & Pensions Ombudsman (FSPO).

"Follow the fortunes" and "follow the settlements" clauses are common in Irish law reinsurance agreements. "Follow the fortunes" is a burden-shifting clause that provides a reinsurer is bound by the reinsured's good-faith decisions regarding payment of settled claims and prevents the parties litigating the matter twice. "Follow the settlement" clauses usually appear in ceding insurance company contracts to deal with the allocation of a settlement to its reinsurers.

9.2 Insurance Disputes over Jurisdiction and Choice of Law

Choice of forum, venue and applicable law clauses in (re)insurance contracts are generally recognised and enforced. Where an insured is domiciled in an EU member state, regard should be had to the following regulations that may limit these provisions:

- Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation);
- Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation), which replaces the Brussels I Regulation in respect of proceedings and judgments in proceedings commenced after 10 January 2015;
- Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I Regulation);
- Lugano Convention (L339, 21/12/2007) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and
- the Hague Choice of Court Agreements Convention 2005.

9.3 Litigation Process

In Ireland, the monetary value of the claim determines the jurisdiction in which court proceedings are brought. The District Court deals with claims up to a monetary value of EUR15,000, the Circuit Court deals with claims with a monetary value up to EUR75,000 (EUR60,000 for personal injury cases) and the High Court hears claims in excess of this with an unlimited monetary jurisdiction. Insurance disputes before the courts in Ireland are heard by a single judge with no jury.

The Commercial Court is a specialist division of the High Court dealing exclusively with commercial disputes. Where the monetary value of a claim or counterclaim exceeds EUR1 million and the dispute is commercial in nature, either party may apply to have the dispute heard in the Commercial Court. There is no automatic right of entry to the Commercial Court; entry is at the discretion of the judge and can be refused if there has been any delay.

Proceedings in the Commercial Court progress at a much quicker pace. The time from entry of a case into the Commercial Court to the allocation of a date for trial in the majority of cases ranges from a matter of weeks to a four to six months, depending on the number of parties and general complexity of the case. This is achieved by the use of directions for the exchange of pleadings and the rigorous application of short deadlines.

A strong emphasis is placed on ADR and the court can provide for a stay of proceedings for up to four weeks to allow the parties to mediate.

Appeals from the High Court are dealt with by the Court of Appeal, except when the Supreme Court believes a case is of such public importance that it should go directly to the highest court in the State.

Evidence

Evidence is to be given orally, except in the most limited circumstances. Where a party intends to rely upon the oral evidence of a witness, factual or expert, a witness statement or expert report must be filed, unless a judge orders otherwise.

Costs

Costs typically will follow the event, whereby the loser pays. However, where the litigation is "complex", the Commercial Court will often carry out an analysis on whether the winning party has succeeded on all grounds, rather than simply awarding full costs to the winning side.

Limitation

The general position under Irish law (the Statute of Limitations Act 1957) is that claims for breach of contract must be brought within six years of the date of breach.

Where a complaint is made to the FSPO, there is an extended limitation period applicable to complaints relating to "long term financial services" (products or services where the maturity or term extends beyond five years and one month, or life assurance policies not subject to annual renewal), otherwise a six year rule applies.

9.4 The Enforcement of Judgments

In the case of non-EU, non-Lugano Convention and non-Hague Convention judgments, an originating High Court summons is required to recognise and enforce a foreign judgment and the High Court must grant leave to issue and serve the proceedings. In order to succeed, such foreign judgment must be for a definite sum, be final and conclusive, and a court of competent jurisdiction must have handed down the judgment. The High Court may refuse to recognise and enforce a judgment on a number of grounds including fraud, lack of jurisdiction, that it is contrary to Irish law or the principles of natural justice.

9.5 The Enforcement of Arbitration Clauses

See **9.7 Alternative Dispute Resolution**.

9.6 The Enforcement of Awards

See **9.7 Alternative Dispute Resolution**.

9.7 Alternative Dispute Resolution

Insurance disputes may also be dealt with by ADR and ADR clauses are common. The most common forms of ADR are mediation and arbitration.

Arbitration

Where an insurance contract contains an arbitration clause, a dispute must be referred for arbitration. However, consumers are not bound by an arbitration clause where the claim is less than EUR5,000 and the relevant policy has not been individually negotiated.

The Arbitration Act 2010 (the "2010 Act") incorporates the UNCITRAL Model Law on International Commercial Arbitration. Under the 2010 Act, the decision of an arbitrator is binding on the parties and there is no means of appeal. Where parties have entered into valid arbitration agreements, the courts are obliged to stay proceedings.

Interim measures of protection and assistance in the taking of evidence may be granted by the High Court; however, the arbitral tribunal may

also grant most interim measures. Jurisdiction of the dispute is passed from the court to the arbitrator once an arbitrator is appointed and the parties agree to refer their dispute for the arbitrator's decision. Although there are additional costs incurred for an arbitration, there is the benefit of confidentiality.

Ireland is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, allowing Irish arbitral awards to be enforced in any of the 157 countries party to the Convention.

The courts can set aside an arbitral award under Article 34 of the 2010 Act, but only on very limited grounds. The party seeking to have the arbitral award set aside must furnish proof of the following:

- a party to the arbitration agreement was under some incapacity or the agreement itself was invalid;
- the party making the application was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present their case;
- the award deals with a dispute not falling within the ambit of the arbitration agreement;
- the arbitral tribunal was not properly constituted; or
- the award is in conflict with the public policy of the state.

In the recent High Court decision in Charwin Limited t/a Charlie's Bar v Zavarovalnica Sava Insurance Company D.D. [2021] IEHC 489, the Irish High Court, for the first time, provided a detailed analysis of the impact of public policy considerations on the arbitrability of a dispute. The court found the public policy considerations put forward by the Plaintiff were not sufficiently fundamental and far reaching to render the arbitration clause in the policy null and void.

It is clear from the decision that the bar is high when seeking to resist a referral to arbitration on grounds of public policy. In reaching this decision, the court referred to the importance of the public policy objective advanced by the Oireachtas in enacting the 2010 Act and in adopting the Model Law, ie, the promotion of arbitration as a consensual means of resolving disputes and encouraging party autonomy.

Mediation

The Mediation Act 2017 ("Mediation Act") came into force on 1 January 2018. Under the Mediation Act, solicitors in Ireland must advise their clients of the merits of mediation as an ADR mechanism before proceedings are issued.

The Mediation Act makes provision for any court to adjourn legal proceedings to allow the parties to engage in mediation. The court can make such order on its own initiative or on the application of either party to the proceedings. There may be costs implications where either party fails to engage in ADR following such a direction from the court.

The Financial Services and Pensions Ombudsman

The FSPO is the amalgamation of the Financial Services Ombudsman and the Pensions Ombudsman, pursuant to the FSPO Act 2017. The FSPO is an independent body, established to resolve disputes between consumers and insurance providers either through informal means, such as mediation, or by way of formal investigation. The FSPO's decision is legally binding, with a right of appeal to the High Court.

9.8 Penalties for Late Payment of Claims

There is no cause of action in damages for the late payment of claims in Ireland. However, under Section 26 of the CICA, where an insurer is in breach of any of the duties under the act,

the court has a discretion to order that a sum payable in a claim under a contract of insurance shall be increased in proportion to the breach involved.

9.9 Insurers' Rights of Subrogation

Insurers have subrogation rights at common law and subrogation provisions in insurance policies are common. Generally, an indemnity must have been provided before the insurer is entitled to subrogate. The CICA has introduced certain restrictions on subrogation rights in the context of family and personal relationships, where the consumer has consented to the use of their vehicle, and employment scenarios.

10. INSURTECH

10.1 Insurtech Developments

Irish Government bodies, such as Enterprise Ireland (EI) and the Industrial Development Authority Ireland (IDA), work in tandem to attract and support foreign direct investment in Ireland and have been promoting Ireland as a destination for companies in the insurtech industry.

In July 2021, 12 stakeholders in the Irish insurance sector joined together to create Instech.ie to promote the country as an EU hub for the insurtech industry. In April 2021, a study, commissioned by InsTech.ie to advise the group on international best practice, conducted by Deloitte, on "Driving insurtech Growth in Ireland" was published. The study found that Ireland is well placed to develop an insurtech ecosystem and this should be explored further. The study noted that Ireland is "one of the most developed insurance markets" in Europe and is "well positioned to take advantage of the innovation and technological enhancements being developed within the sector as part of the growth of global insurtech". It further found the Irish insurance market is a "mature market with a need for regeneration" with many insurers feeling "increased pressure on legacy infrastructure and the ever-increasing need to accelerate the shift to cloud-based, modern architectures". Despite this pressure the study noted that Irish insurers are relatively well prepared to embrace this risk and are "actively embracing emerging technologies, maintaining international competitiveness and securing investment from overseas".

Carlow IT has a dedicated insurtech hub which is gaining momentum., One of the most significant Irish insurtech firms is Blink which was founded in 2016 to build data-driven travel disruption insurance solutions. On the back of this success, it launched Blink Parametric in 2020, offering a full suite of parametric insurance solutions. which in in 2019 and 2020, Blink made it onto The InsurTech100.

A new entrant to the InsurTech100 for 2021 is Companjon, a new innovative insurtech start-up which has chosen Dublin, Ireland as its headquarters. Companjon is Europe's leading specialist in unique add-on insurance that is 100% digital. Its business model allows companies to partner with leading industry providers and digital businesses to bring fast, flexible, and fully automated insurance add-ons to their customers' online bookings and purchases. Companjon has been recognised by Forbes, as "a tech-driven disruptor that is changing the way people think about insurance."

10.2 Regulatory Response

In Ireland, the CBI is responsive to the challenges posed by the regulatory treatment of financial innovations. It is a robust regulator, and acknowledges the need to strike the appropriate balance between encouraging innovation-related entry to the market and ensuring that new entrants are sufficiently ready to fulfil all their regulatory obligations in relation to financial stability and consumer protection. It is cognisant of

the requirement to keep abreast of the changing technological environment and has committed significant resources to improving its data architectures and establishing quantitative analytical teams in its banking, insurance and markets directorates.

The CBI has taken a range of measures in relation to FinTech including establishing an Innovation Hub in 2018 for engagement with fintech companies, creating an Innovation Steering Group and a fintech network within the CBI and engaging with the European Supervisory Authorities (ESAs) and the SSM on European Commission's FinTech Action Plan.

11. EMERGING RISKS AND NEW PRODUCTS

11.1 Emerging Risks Affecting the Insurance Market

"Emerging risks" refers to new and evolving risks that are difficult for insurers to assess and typically carry with them a high degree of uncertainty in regards to their impact, probability and amount of losses expected. The CBI expects Irish insurance undertakings to give appropriate consideration to assessment of emerging risk (particularly in relation to climate change) and adopt a longer term perspective than typical business planning and strategy setting processes. The CBI expects to see evidence of robust analysis and challenge and timely and effective action in relation to emerging risks.

Cyber-risk, longevity risk and climate risk appear to be the most formidable emerging risks in Ireland.

In Q4 of 2020, the CBI issued a Climate Change and Emerging Risk Survey (the "CBI Survey") to better understand Irish insurance undertakings' exposure to, and management of emerging risks. The survey focused particularly on climate risk and cyber-underwriting risks. The aim of this exercise was to highlight areas of potential vulnerability on which to frame future arrangements with the insurance sector and provide relevant guidance. On 1 May 2021 the CBI published its feedback and key observations to the industry.

Overall the CBI Survey found that emerging risks were well integrated in the majority of firms' risk management processes and that there was a good level of awareness of climate risk among firms. Additionally, the exposure level of Irish firms to "affirmative" cyber underwriting risk appears to be limited. While good practices were noted, the CBI outlined a number of recommendations and noted its intention to increase its supervisory focus in these areas in the future. The CBI noted that "certain good practices are already being embedded in insurance firms in relation to climate risk. However, there is work to do in terms of establishing plans and strategies. Firms can expect that the CBI will become increasingly active and intrusive in its approach to the supervision of climate-change related risks going forward."

Cyber-risk

Digital innovation and the growing sophistication of digital technology have led to increased cybersecurity threats and risk of data breaches. The market for cyber-insurance is seen as one of the biggest growth areas in the insurance industry, globally.

Cyber-risk was ranked by national supervisors as the second biggest risk for the insurance sector and the sixth for the pensions sector in the EIOPA Autumn 2019 Qualitative Survey.

The CBI published cross-industry guidance in respect of IT and cybersecurity risks in 2016, which highlighted a variety of emerging threats, focusing on four areas: governance, risk man-

agement, cybersecurity and outsourcing. The guidance focuses on the areas that the CBI deems most pertinent. This guidance notes that the risks associated with IT and cybersecurity are a key concern for the CBI, given their potential to have serious implications for prudential soundness, consumer protection, the reputation of the Irish financial system and financial soundness.

The CBI also has a dedicated IT risk inspection team, operational since April 2015. In addition to the recent prolific hackings and ransomware attacks, the CBI also drew attention to the deficiencies regarding IT outsourcing and IT governance. The CBI is of the opinion that cybersecurity risks are exacerbated by boards not monitoring service levels or performance of service providers, as well as inadequate due diligence being carried out to ensure robust agreements.

As noted above, the CBI Survey found that Irish firms' overall level of exposure to "affirmative" cyber underwriting risk appears to be limited with just 32 of the surveyed firms offering some type of affirmative cybercover.

Longevity Risk

Longevity risk is the potential risk of an individual living longer than expected. The financial implications of exponentially increasing lifespans are colossal. If the average life expectancy were to increase by three years, the cost of supporting the aging population would increase by 50%. As the mortality risk continues to decrease, it is clear that understanding the associated risk is of crucial importance to insurers. The IMF has even highlighted the grave implications for global fiscal stability in its Global Financial Stability Report.

Considering how quickly life expectancy is increasing, projecting future liabilities based solely on data extrapolated from the past is imprecise at best. To address this, certain companies have created insurance subsidiaries to run their pensions schemes who then reinsure its longevity risk with a reinsurer; this is expected to be a common trend in the future. From a reinsurance perspective, buying this longevity risk may be an attractive financial transaction as it lowers mortality risk and thereby helps balance life insurance risks. However, the IMF has stated that the longevity risk should be appropriately shared between insurers and governments, as insurers and reinsurers alone may be constrained by capital.

Climate Risk

On 3 November 2021, the CBI published a Dear CEO Letter setting out its expectations for firms in relation to climate and ESG issues. The CBI's expectations, which are based upon international practice and informed by regulatory development at EU level, are not binding on firms.

The Letter also explained that to facilitate meaningful engagement, the CBI will establish a Climate Risk and Sustainable Finance Forum which will bring together stakeholders to share knowledge and understanding of the implications of climate change for the Irish financial system. It is anticipated that the Climate Forum's first meeting will take place in the first half of 2022.

11.2 New Products or Alternative Solutions

Warranty and Indemnity Insurance

Warranty and indemnity insurance is being used more frequently in commercial transactions, as are other bespoke transactional products such as litigation buy-out policies.

Addressing the Emerging Risks

Cyber-insurance is still a relatively new product on the Irish market, but it has become more popular in recent times and a number of insurers are now offering new cyber products in Ireland.

PwC reported that 71% of Irish insurance CEOs believe that the majority of businesses will have cyber-insurance in five years. It is expected to be a growth area in Ireland in the coming years.

12. RECENT AND FORTHCOMING LEGAL DEVELOPMENTS

12.1 Developments Impacting on Insurers or Insurance Products

Consumer Insurance Contracts Act 2019

In addition to the changes highlighted above in relation to the duty of disclosure, remedies and warranties, other reforms were introduced by this act, including:

- requirements in relation to the provision of information to the consumer by the insurer after the contract has been concluded;
- duties on both the consumer and insurer on renewal (Section 12);
- post contractual duties of the consumer and insurer (Section 15);
- policy exclusions must be provided to a consumer in writing prior to the commencement of an insurance contract (Section 15(6));
- new obligations in relation to claims handling and duties are imposed on both the consumer and insurer (Section 16);
- provisions in relation to third party rights and confirms that a third party may claim directly against an insurer in certain limited circumstances (Section 21);
- provisions regarding the distribution of funds following a subrogated recovery (Section 24); and
- where a consumer is in breach of a duty under the act, a court has a discretion to order that a claim be reduced in proportion to the breach and, similarly, where an insurer is in breach, the court may order that the sum payable be increased in proportion to the breach (Section 26(a)).

COVID-19

The response to the COVID-19 pandemic, in line with many countries worldwide, involved public health measures to reduce the spread of the virus and the closure of non-essential businesses and the loss of income for many households and businesses.

The CBI's focus throughout the crisis was to ensure "the financial system operate[s] in the best interests of consumers and the wider economy". To that end, the CBI, aligned with other supervisory authorities in Europe, issued a number of communications and statements to the financial services sector on its response to the crisis and its expectations of firms in their response to the crisis.

Business Interruption

On 5 August 2020, the CBI published the COVID-19 and Business Interruption Insurance Supervisory Framework (the "BI Framework") with the aim of facilitating early identification and resolution of issues relating to Business Interruption (BI) Insurance. The BI Framework communication outlines the four moduled approach the CBI is taking to its analysis, details its expectations of insurers in addressing issues relating to BI claims and the escalation process (where necessary). The BI Framework also states that where cover and related issues are disputed, the CBI expects firms to pay the reasonable costs of customer plaintiffs in agreed test case litigation.

On 5 November 2020 the CBI advised that it considered that firms should have, by this time, adapted to the operating environment, and noted its expectation that firms meet specific risk mitigation programme submission dates going forward.

There have been a number of test cases litigated before the Irish courts under the BI Framework. To date there have been findings by the High Court in test cases involving FBD, AXA and Zurich, with findings in favour of both the insured and insurer, reinforcing that whether a policy responds to losses of this type will be looked at carefully on a case-by-case basis and will very much depend on the specific wording of the policy.

Complaints by consumer policyholders are also being dealt with by the FSPO. Where a complaint involves a policy wording that has already been considered by the Irish courts, the FSPO follows this. However, in a number of complaints the FSPO will also consider CPC breaches and conduct issues and compensation is regularly awarded on those grounds regardless of the position in relation to cover.

Insurance (Miscellaneous Provisions) Bill

On October 20 2021, the General Scheme of the Insurance Bill was published. The Insurance Bill seeks to address several insurance-related issues that have come to light since the Action Plan for Insurance Reform was published in December 2020 including:

- a new requirement under CICA, to disclose to consumers any deductions of public moneys from insurance claims settlement amounts;
- a new requirement for the CBI to submit a report to the Minister for Finance setting out the steps (if any) it has taken to regulate the practice of price walking; and
- amendments to CICA in order to address technical and legal issues that arose following the initial enactment of this legislation.

As noted above, the Bill also seeks to introduce amendments to the 2015 Regulations to address issues identified in respect of the operation of the TRR for UK and Gibraltar-based insurers.

Road Traffic and Roads Bill 2021

In October 2021, the Road Traffic and Roads Bill 2021 was published which will introduce the statutory basis for a shared database of insured drivers (the "MTPL database") to combat uninsured driving.

The MTPL Database is a centralised database developed by Insurance Ireland following recommendations by the Irish Government's Cost of Insurance Working Group which contains details on all motor insurance policies, including details of vehicles, policy holders and named drivers, operating in the State. This database will be owned and operated, on behalf of the insurance industry, by the Motor Insurers' Bureau of Ireland (MIBI). The Bill will put the MTPL database on legislative footing and introduce requirements for insurers to contribute policy information to the MTPL database.

13. OTHER DEVELOPMENTS IN INSURANCE LAW

13.1 Additional Market Developments

Heightened Regulatory Scrutiny

The Use of Service Companies in the Insurance Sector

In August 2021, the CBI published a follow-up consultation paper - Guidance on the Use of Service Companies for Staffing Purposes in the Insurance Sector (CP144) seeking views on proposed Guidance on the Use of Service Companies for Staffing Purposes in the Insurance Sector. The consultation closed in November 2021 with final guidance expected to be published in 2022.

Differential pricing proposals

On 21 November 2019, the CBI wrote to the insurance sector outlining the potential risk to consumers arising from the practice of differ-

ential pricing and informing firms of its intention to conduct a review of differential pricing in the private car and home insurance markets (the "Differential Pricing Review").

In July 2021 the CBI issued its final report and made the following proposals for implementation within the sector:

- ban the practice of price walking in private car and home insurance;
- require where new customers are offered a lower price to attract their business, it should be clearly disclosed to them that this includes a new business discount;
- require private motor and home insurance providers to review their pricing policies every year to ensure they maintain focus on their pricing practices and the impact of such practices on their customers, while also ensuring adherence to new pricing provisions and the fair treatment of consumers; and
- introduce new requirements in relation to automatic renewals, which will include consumer consent for the automatic renewal of insurance contracts, to allow personal customers to make more informed decisions.

On the same date, the CBI launched a consultation on the proposals set out in the final report. The consultation closed in October 2021. The CBI has noted its intention to finalise the proposed measures in early 2022 with the measures applying to insurance providers from 1 July 2022.

Individual accountability

The Central Bank (Individual Accountability Framework) Bill aims to support the advancement of an improved culture in the Irish financial system through greater accountability in the regulated sector by introducing an Individual Accountability Framework and, in particular, the Senior Executive Accountability Regime (akin to the Senior Managers Regime in the UK) which aims to increase accountability amongst senior executives through common and enforceable conduct standards and an enhanced enforcement process for individuals.

The text of this bill is expected to be published in early 2022 and the proposed measures likely to apply in 2023.

Consultation Paper 131 – regulations for pre-emptive recovery planning for (re)insurers

On 25 June 2020, the CBI published consultation paper CP131 to consult on proposals to introduce formal recovery planning requirements for (re)insurers under section 48[1] of the CBI (Supervision and Enforcement) Act 2013.

Following consultation, in April 2021, the CBI published its feedback statement and the responses received to CP131. In tandem with the release of the feedback statement, the (Supervision and Enforcement) Act 2013 (Section 48(1)) (Recovery Plan Requirements for Insurers) Regulations 2021 (S.I. Number 184 of 2021) were commenced. These regulations require insurers to establish and maintain pre-emptive recovery plans.

The deadline for preparation of a recovery plan under the regulations is 31 March 2022 (or within 12 months of authorisation where the (re)insurer is newly authorised on or after 19 April 2021, the date on which the regulations came into operation).

CBI Notice of Intention – Amendments to the list of PCFs

On 23 September 2021, the CBI published a Notice of Intention to amend the list of PCFs by expanding PCF-16 to include branch managers in non-EEA countries, introducing new standalone PCF roles for Independent Non-

Executive Directors and the Head of Anti-Money Laundering and Counter-Terrorist Financing.

The proposed amendments to the PCF list will be applicable to all Irish Regulated firms other than credit unions. The proposal closed for feedback on 20 October 2021.

Public consultation on the development of a national resolution framework for (re)insurers

On 1 September 2021, the Department of Finance in collaboration with the CBI launched a public consultation on the development and scope of a possible domestic resolution framework for insurers.

The consultation closed 30 November 2021. It is envisaged that any national resolution framework in Ireland would align with the core principles of resolution being discussed at EU level as part of the Solvency II Review.

CBI Cross-Industry Guidance on Outsourcing

On 25 February 2021, the CBI published a Consultation Paper on its proposed Cross-Industry Guidance on Outsourcing (CP138). This consultation followed on from the publication of Discussion Paper 9 "Outsourcing – Findings and Issues for Discussion" in November 2018.

On 17 December 2021, the CBI published its final cross industry guidance on Outsourcing, together with the feedback statement to CP138 setting out the CBI's views on the responses received following its engagement with regulated firms, industry representative bodies, associations and outsource service providers (OSPs).

The Guidance sets out the CBI's expectations regarding the management of outsourcing risk with a view to promoting higher standards of operational resilience in firms.

CBI's Cross Industry Guidance on Operational Resilience

On 9 April 2021 the CBI published a consultation paper CP140 on proposed Cross Industry Guidance on Operational Resilience with the aim of enhancing enhance operational resilience and recognising "the interconnections and interdependencies, within the financial system, that result from the complex and dynamic environment in which firms operate".

On 1 December 2021, the CBI published its final cross industry guidance on Operational Resilience, together with a feedback statement setting out the CBI's views on the responses received following its engagement with industry bodies and regulated entities, on CP140.

The CBI's Cross Industry Guidance on Operational Resilience communicates to firms how to prepare for, respond to, recover and learn from an operational disruption that affects the delivery of critical or important business services.

Matheson was established in 1825 in Dublin and has offices in Cork, London, New York, Palo Alto and San Francisco. More than 700 people work across Matheson's six offices, including 96 partners and tax principals and over 470 legal and tax professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Clients include over half of the world's 50 largest banks, six of the world's ten largest asset managers and seven of the top ten global technology brands. The firm's expertise is spread across more than 30 practice groups, including finance and capital markets, insolvency and corporate restructuring, asset management and investment funds, commercial real estate, litigation and dispute resolution, insurance and tax.

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Trends and Developments

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Introduction

The Consumer Insurance Contracts Act 2019 (the "Act") represents the most significant reform of Irish consumer insurance law in the past hundred years. The Act impacts all aspects of the life cycle of an insurance contract from the pre-contract stage, to inception and administration of the contract, and to renewals and claims. The Act applies the legislative reform recommendations of the Law Reform Commission to modernise consumer insurance law in Ireland, enacting largely pro-consumer measures, including the abolition of the duty of good faith, and providing proportionate remedies for misrepresentation and non-disclosure.

The majority of the Act commenced on 1 September 2020 and the remaining and most onerous provisions commenced on 1 September 2021 (except for Section 18(4), which will be amended by the Insurance (Miscellaneous Provisions) Bill 2021, as discussed later). The deferred implementation of these sections enabled the insurance industry to implement the changes necessary to give effect to those provisions and to avoid any unintended consequences for the consumer which might have arisen without such lead time.

As is often the case with major legal reforms, there are some uncertainties regarding implementation of aspects of the Act. On 20 October 2021, the government published the General Scheme of the Insurance (Miscellaneous Provisions) Bill, which (among other things) seeks to address some of the difficulties that have arisen regarding the application of the Act.

The application of some provisions of the Act might give rise to disputes in the future and further clarification might come through interpretation by the courts. The insurance industry is therefore closely monitoring developments in relation to the Act, including the compliance approaches taken by their competitors, to identify practical issues arising.

The Act required insurers to update their systems and processes as well as their key documentation, including policy terms and conditions, proposal forms and renewal notices. However, the Act also brings some benefits for insurers. In particular, the Act sets out more flexible remedies for misrepresentation and non-disclosure.

Scope of the Act

Each provision of the Act applies to life and general insurance contracts entered into after the provision is commenced. The provisions also apply to any variations to such insurance contracts from the commencement date. The Act excludes reinsurance contracts, contracts of insurance involving SPVs, and certain classes of general insurance.

Importantly, the Act does not apply to non-consumers. The Act only applies to insurance contracts agreed with "consumers", as defined in the Act, which includes individuals and small businesses with a turnover of less than EUR3 million (provided that these persons are not a member of a group having a combined turnover greater than EUR3 million).

The Act imposes obligations on consumers and insurers, but not on insurance brokers. Any act or omission by an agent (including insurance

intermediaries) on behalf of an insurer is regarded as an act or omission by the insurer. For this reason, insurers are closely monitoring brokers' compliance with the Act.

There have been questions regarding the territorial scope of the Act. The UK's Insurance Act 2015, which represented a major reform of UK insurance law and a significant divergence from Irish insurance law, specifies that it applies to insurance contracts governed by the law of England and Wales, Scotland and Northern Ireland wherever they are underwritten. By comparison, the Act is silent regarding territorial scope. However, a general consensus is emerging that it is considered the Act applies only where insurers are selling policies to Irish-resident consumers.

Key Changes Introduced in 2020 and Related Developments

Provision of information to consumers

Insurers are now required to provide the completed application or proposal form to the consumer within a reasonable time after concluding an insurance contract. Insurers are continuing to review their processes to ensure compliance with this requirement, including in the case of variations of contracts pre-dating the Act and in circumstances where the contract is concluded through brokers or online portals.

Cooling-off period

A 14 working day cooling-off period was introduced to cover contracts not covered by existing cooling-off periods, such as face-to-face sales of non-life insurance. When a consumer cancels within the cooling-off period, the only financial cost that can be imposed on the consumer is the cost of the premium for the period of cover. Cooling-off periods provided for in other legislation differ regarding the requirement to refund so insurers are closely examining how refunds should be approached when the cooling-off period in the Act applies (for example, what happens following cancellation after a claim is made during the cooling-off period).

Cancellation by insurer

If the insurer cancels an insurance contract at any time, the only financial cost that can be imposed on the consumer is the cost of the premium for the period of cover.

Insurable interest

The requirement for insurable interest was largely abolished for consumer contracts. However, contracts of indemnity can require consumers to have a factual expectation of benefit from the preservation of the insured subject matter, or of an economic loss on its destruction.

Notification of alterations at renewal

Within a reasonable time before renewal (and no later than 20 working days before renewal), insurers must notify the consumer in plain language of any alteration to the terms and conditions of the policy.

Post-contractual duties and "alteration of risk" clauses

The post-contractual duty of good faith for both consumers and insurers has been abolished. However, "alteration of risk" clauses are permitted, but will only be valid if they apply to alteration of the subject matter of the insurance. "Alteration of risk" clauses will be void if they apply to modifications of the insured risk. In practice, it is sometimes difficult to distinguish between alteration of the subject matter and modifications of the insured risk, which has been an area of focus for insurers seeking to bring their policy wordings in line with the Act.

Claims handling

Consumers are required to notify insurers of an insured event within a reasonable time or in accordance with the contract. However, where a breach of this duty does not prejudice the insur-

er, the insurer is not entitled to refuse liability for late notification alone. This means that an insurer is not entitled to rely on an existing condition precedent in relation to notification to decline cover without establishing prejudice.

In relation to claims co-operation, the consumer must co-operate with insurers in the investigation of insured events, including by responding to reasonable requests for information in an honest and reasonably careful manner. Unlike with the notification provision, this section does not say that an insurer cannot rely on a condition precedent where there is no prejudice. The insurer's remedy for breach of this obligation by a consumer would likely be an adjustment of the consumer's claim, at the discretion of the court or Financial Services and Pensions Ombudsman.

Significantly, the Act provides that if a consumer or insurer becomes aware of information after the claim is made (including information that would otherwise be subject to privilege) that would either support or prejudice the claim, there is a duty to disclose such information to the other party. The rationale behind this was that mutual disclosure could make an important contribution to claims settlements within a reasonable period because the settlements would be based on all the information that is available to both parties. However, due to concerns regarding the impact on legal professional privilege, it has been proposed that this requirement will be amended by the Insurance (Miscellaneous Provisions) Bill 2021, as discussed further below.

Deferring payment of claims in property contracts

The Act voids any term that provides that an insurer is not obliged to pay a full claim settlement amount until repair, replacement or reinstatement work has completed and specified documentation (such as receipts) has been provided, unless that term has been brought to the consumer's notice in clear and unambiguous terms before entering into the contract. In addition, the deferred payment is capped at:

- 5% of the claim settlement amount, where the claim settlement amount is less than EUR40,000; or
- 10% of the claim settlement amount, where the claim settlement amount is EUR40,000 or more.

This section of the Act is applicable to any policy which provides insurance in respect of damage to property (in addition to other covers or not).

Fraudulent claims

An insurer is entitled to refuse to pay a fraudulent claim and terminate the contract without returning the premium. A fraudulent claim is a claim which contains information that is false or misleading in any material respect and which the consumer knows is false and misleading or consciously disregards whether it is false and misleading. A pre-existing valid claim is not affected. The insurer must notify the consumer of termination and such termination is from the date of the submission of the fraudulent claim. The insurer cannot claim the cost of investigating a fraudulent claim from the insured.

Warranties and basis of contract clauses

The Act abolishes basis of contract clauses. With regard to other warranties, any statement made by or attributable to a consumer with respect to the existence of a state of affairs or a statement of opinion shall have effect solely as a representation prior to entering into the contract.

Any term purporting to convert a statement into a warranty is invalid. Any contract term (howsoever described) that imposes a continuing restrictive condition on the consumer shall be treated as a suspensive condition. Where there

is a breach of a suspensive condition, the insurer's liability is suspended for the duration of the breach but if the breach has been remedied by the time a loss has occurred, the insurer shall (in the absence of any other defence) be obliged to pay any claim. Not all breaches will be capable of being remedied. In practice, a number of insurers have dealt with matters that would have been covered by warranties prior to the Act as suspensive conditions.

Liability is not suspended if the breach does not increase the risk of a loss that has occurred. Where a term has the effect of reducing the risk related to a particular type of loss, loss at a particular time or loss in a particular location, liability will only be suspended in respect of that particular type of loss, loss at a particular time or in a particular location.

Third-party rights

The Act sets out the right of a consumer third party with a claim against an insolvent insured to bring a direct claim against the insured's liability insurer. The Act goes further than the common law in a number of ways, including by actually transferring the rights of the insured to the third party, and vesting them in the third-party consumer. There are three main changes of note. Firstly, consumer third parties can issue proceedings directly against the insurer to enforce the terms of the insurance contract without first having established the liability of the insured, but liability will have to be established before the policy can be enforced against the insurer, by award, arbitration or agreement. Secondly, third parties will also be able to fulfil conditions of the policy itself, such as payment of an excess.

The third change, which is quite significant, is that the third party has a right to obtain information regarding the insurance position. Where a third party "reasonably believes" that the person has incurred a liability to which the section applies, that third party can seek and obtain information from the insurer or "from any other person who is able to provide it", neither of whom can unreasonably refuse such information, concerning:

- the existence of the contract of insurance;
- who the insurer is;
- the terms of the contract; and
- whether the insurer has informed the person that the insurer intends to refuse liability under the contract.

This could result in an increase in information requests to insurers, and may raise data protection issues.

Subrogation

An insurer's subrogation rights are restricted against a family member or cohabitant, or where the consumer consented to the use by the person of the car insured by the policy. The insurer does not have the right to subrogate if that other person is uninsured. If that other person is insured, the recovery is limited to the indemnity available under the person's policy. The restriction on subrogation does not apply where the conduct of the other person giving rise to loss was serious or wilful misconduct (for example, in the case of arson).

A policy condition requiring a consumer to assign the subrogation rights described above to the insurer in order to obtain payment is void. An insurer also has no right of subrogation against an employee of an insured employer except where it is proved that the loss was caused intentionally or recklessly and with knowledge that the loss would probably result. The Act puts the "recover down" common law principle for the distribution of recovered funds on a statutory footing.

Before the contract is entered into, the insurer must bring the consumer's attention to any provision which excludes or limits cover because a consumer has entered into a contract with a limitation on liability preventing the consumer from recovering damages from another person.

Key Changes Introduced in 2021 and Related Developments

Utmost good faith and duty of disclosure

The Act abolished the principle of utmost good faith and replaced the duty of disclosure by a consumer. This is arguably the most significant change to be introduced by the Act. The new consumer duty is limited to answering the insurer's specific questions honestly and with reasonable care.

Insurers may not use general questions and shall be deemed to have waived any further duty of disclosure where they fail to investigate an absent or obviously incomplete answer (unless there is fraudulent, intentional or reckless concealment). In addition, an insurer can only rely on a breach of a consumer's duty of disclosure where non-disclosure of material information induced the insurer to enter into the contract.

Consumer and insurer duties at renewal

Consumers are no longer required to provide additional information to the insurer at renewal unless requested to do so. In order to request further information the insurer can either:

- ask specific questions; or
- request that the consumer update specific information previously provided.

As is the case at inception of the contract, the consumer's duty is limited to answering the insurer's specific questions honestly and with reasonable care.

Proportionate remedies

The previous law provided that the only remedy for a non-disclosure or misrepresentation was avoidance ab initio. This was considered to be a draconian remedy, and one which insurers were at times reluctant to rely on. The Act provides insurers with alternative remedies to avoidance in the event of a misrepresentation, proportionate to the effects of the misrepresentation. The remedies available vary depending on whether the misrepresentation was innocent, negligent or fraudulent.

Renewal notices

Renewal notices will now need to include a schedule outlining premiums paid and claims made over the previous five years. These requirements replace similar obligations that applied only in the context of private motor insurance renewals, which were introduced by the Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) (Amendment) Regulations 2018 (which have since been deleted).

Insurance (Miscellaneous Provisions) Bill

The Insurance (Miscellaneous Provisions) Bill seeks to address a number of insurance law issues in line with the Government's promises regarding insurance reform. These include issues which have arisen regarding the application of certain provisions of the Act.

As mentioned above, the Act provides that if a consumer or insurer becomes aware of information after the claim is made (including information that would otherwise be subject to privilege) that would either support or prejudice the claim, there is a duty to disclose such information to the other party. It is intended that this obligation will be replaced as it "may have the unintended consequence of encroaching too far on legal professional privilege". The draft new provision removes the requirement to provide "information that would otherwise be subject to privilege".

However, the new provision still requires the consumer or insurer to disclose any report prepared by a third-party expert for the purposes of pending or contemplated litigation within 60 days of receiving that report.

The Insurance (Miscellaneous Provisions) Bill also proposes the insertion of a new Section 16B which will require insurers to notify a claimant of:

- any deductions made to a final claim settlement amount (subject to certain exclusions);
- the reasons for the deduction, including naming any State support relevant to such deductions; and
- the final amount to be deducted from the settlement.

It is intended that the scope of this provision will apply to individual consumers and smaller businesses, in line with the rest of the Act; however, it will apply only to non-life insurance contracts.

The effect of this new section will be that insurers must be fully transparent with consumers regarding deductions that are made in relation to a settlement of a claim, in particular regarding any State supports that the consumer may have received. This section has been proposed in response to the practice of insurers deducting or seeking to deduct the value of COVID-19 State supports from business interruption insurance claims settlements.

An amendment is also proposed in relation to Section 18(4), which is the only provision of the Act that has not yet been commenced. The original Section 18(4) gave effect to a recommendation made by the Law Reform Commission to ensure that "where a policy of insurance is held in the name of more than one consumer, and the insured property is damaged by the criminal or intentional act of one of those co-insured consumers, the fraud perpetrated by one co-insured will not exclude a claim made by an innocent co-insured." The Explanatory Memorandum to the Insurance (Miscellaneous Provisions) Bill explains that concerns emerged after enactment that the current wording of Section 18(4) could have the unintended consequence of precluding any contractual exclusion contained in a policy of insurance relating to criminal damage that was not caused by the insured or co-insured, such as risks relating to cybercrime and terrorism which are routinely excluded from the cover provided in policies of insurance. These concerns are addressed by the proposed amendment.

Conclusion

As is clear from the above, the Act is a major reform affecting all aspects of consumer insurance business. Insurers that write consumer insurance business in Ireland are continuing to monitor their compliance with the provisions implemented in 2020 and 2021. As the previous regime continues to apply to non-consumer contracts, this has created a divergence and may require a different approach for different categories of customer.

Matheson was established in 1825 in Dublin and has offices in Cork, London, New York, Palo Alto and San Francisco. More than 700 people work across Matheson's six offices, including 96 partners and tax principals and over 470 legal and tax professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Clients include over half of the world's 50 largest banks, six of the world's ten largest asset managers and seven of the top ten global technology brands. The firm's expertise is spread across more than 30 practice groups, including finance and capital markets, insolvency and corporate restructuring, asset management and investment funds, commercial real estate, litigation and dispute resolution, insurance and tax.

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