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Industry Chapter

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International Comparative Legal Guides

Ireland


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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Central Bank of Ireland (the "**Central Bank**") is responsible for the authorisation of and has primary responsibility for the prudential supervision and regulation of insurance and reinsurance undertakings in Ireland. This role is achieved through the monitoring and ongoing supervision of regulated firms and the issuing of standards, policies and guidance, with which (re)insurance undertakings are required to comply.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Undertakings wishing to set up a (re)insurance business in Ireland must obtain authorisation from the Central Bank.

The Central Bank has published both a checklist for completing and submitting applications for authorisation under the European Union (Insurance and Reinsurance) Regulations 2015 (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 Central Bank.

The principal areas considered by the Central Bank 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 (the "**ORSA**");
- financial information and projections for at least three to five years;
- capital requirements and solvency projections; and
- consumer issues (such as the Minimum Competency Code and the Consumer Protection Code 2012 (the "**CPC**")).

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

- arrange a preliminary meeting with the Central Bank to outline the proposals, at which the Central Bank 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 Central Bank – the application process is an iterative one. 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 Central Bank 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 Central Bank considers the application;
- once the Central Bank is satisfied with the application, it will issue an "authorisation in principle" letter, which means that it is minded to grant its approval once certain conditions are satisfied; and
- once all conditions are satisfied, the Central Bank will issue the final authorisation and the (re)insurer can commence writing business in Ireland.

The Central Bank will issue a formal authorisation once it is satisfied that the capital requirements and any pre-licensing requirements have been met. The authorisation process can take between four and six months. The Central Bank does not currently charge a fee for assessing such applications.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

(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 by operating in Ireland on a freedom of services basis, provided that their home state regulator notifies the Central Bank. 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. Significantly, a Third-Country Branch that has been authorised by the Central Bank does not have the right to passport into other EU/EEA jurisdictions and, accordingly, is only permitted to write business in Ireland.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are some restrictions on insurers' freedom of contract in Ireland. These restrictions are largely for the protection of consumers. As Ireland is an EU Member State, Irish authorised insurers are subject to EU law and the Irish implementing

legislation is the basis of many of these restrictions. Examples include the Unfair Terms in Consumer Contracts Directive 1993/13/EC and the Distance Marketing of Financial Services Directive 2002/65/EC.

Insurers must also comply with the Central Bank's CPC and the Consumer Protection Act 2007 when dealing with consumers. The Consumer Insurance Contracts Act 2019 (the "**2019 Act**") provides increased protection to consumers. Under the CPC and the 2019 Act, the term "consumer" is quite broadly defined, including individuals and small businesses with a turnover of less than EUR 3 million.

The Central Bank is currently undergoing a periodic review of the CPC and expects to publish an updated version in the first quarter of 2024. Throughout the CPC review process, several key themes have emerged: securing consumers' best interests (in terms of both the availability and choice of financial products, and ensuring that firms act in the best interests of consumers); innovation and disruption; digitalisation; unregulated activities; pricing; informing effectively; vulnerability; financial literacy; and climate matters. The revised CPC will provide additional protections for consumers, which will likely result in further restrictions on insurers' freedom of contract in Ireland.

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.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Irish legislation prohibits a company from including in its constitutional document and contracts any provision which indemnifies its directors and officers from liability to the company in respect of negligence, breach of duty, default or breach of trust. However, there is one exception to this: section 235 of the Companies Act 2014 allows companies to indemnify directors and officers for certain liabilities incurred while acting in their official capacities. Companies can cover costs related to defending civil or criminal proceedings arising from their conduct as directors and officers for the company.

Furthermore, companies are not precluded from purchasing directors' and officers' ("**D&O**") insurance in relation to the negligence, breach of duty, default or breach of trust of a director. D&O policies generally cover damages awarded against the director, legal costs in relation to an action and, in certain circumstances, the costs of the director in relation to any official investigation taken by the regulatory authorities in Ireland. However, D&O policies generally exclude cover for fraud and criminal fines that have been imposed.

1.6 Are there any forms of compulsory insurance?

There are some forms of insurance that are compulsory under statute in Ireland, such as third-party motor insurance and certain types of aircraft and shipping insurance. Certain professional bodies also require their members to maintain professional indemnity insurance (e.g., solicitors, liquidators and (re)insurance intermediaries).

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In Ireland, the substantive law relating to insurance is traditionally perceived as being more favourable to insurers.

However, the 2019 Act introduced significant changes to insurance law when an insurer is dealing with a consumer. The legislation is ultimately aimed at improving consumer protection, and it addresses some of the perceived imbalances between insurers and consumers in Irish insurance law. The following is a sample of some of those changes:

- The 2019 Act abolished the concept of an "Insurable Interest" as a requirement for a customer to make a claim, except in the case of a contract of indemnity. Additionally, an insurer is not relieved of its liability under a contract simply because the name of the beneficiary is not specified in the policy document.
- The 2019 Act replaced warranties in consumer contracts with suspensive conditions. Basis-of-contract clauses, which effectively convert representations into warranties, have been abolished.
- The 2019 Act introduced a 14-working-day cooling-off period for consumers for all contracts.
- The principle of pre-contractual utmost good faith has been abolished for consumer contracts, and consumers are now only required to answer honestly and with reasonable care with respect to the specific questions posed to them by insurers. Insurers may not ask general questions but specific questions in a durable medium, in plain and intelligible language.
- Where a contract is cancelled the consumer must be provided with reasons for the cancellation, and the insurer must repay the balance of any unexpired term of the contract.

2.2 Can a third party bring a direct action against an insurer?

Under common law, a third party to an insurance contract has no general right to bring a direct action against an insurer. This is due to the operation of the principle of privity of contract, which provides that a person who is not a party to a contract may not enforce it.

Statute does, however, provide a number of limited exceptions to this rule in the context of third-party actions against insurers.

- Under section 62 of the Civil Liability Act 1961, where an insured with a liability insurance policy becomes bankrupt or dies (if an individual), is wound up (if a company) or is dissolved (if a partnership or other incorporated association), then monies payable to the insured under the policy are ring-fenced and will only be applicable to discharging all valid claims against the insured. The courts have expressed the view that section 62 creates a right of action in favour of an injured third party against the insurer. However, before any action can be taken against the insurer by the third party, liability must be established in the underlying claim against the insured, and quantum assessed.
- Sections 21 and 22 of the 2019 Act permit third parties to step into the shoes of an insured in the context of consumer contracts, such that the third party can make a claim under the insurance contract where the insured dies, cannot be found, is insolvent or for any other reason the court deems it just and equitable.
- A spouse or child who is beneficiary to a life assurance policy or endowment is entitled to enforce that policy in accordance with section 7 of the Married Women's Status Act 1957.
- Pursuant to section 76(1) of the Road Traffic Act 1961 (as amended), an injured third party can proceed directly against the insurer/indemnifier of the owner/driver of a motor car who is liable to the third party for injuries sustained as a result of a motor car accident.

A trust can be created under an insurance policy in favour of a third party, giving them the right as beneficiary to proceed directly against the insurer under the policy.

2.3 Can an insured bring a direct action against a reinsurer?

Under Irish law, an insured does not have a general right to bring a direct action against a reinsurer. The insured is not party to the reinsurance agreement and is therefore restricted from bringing a direct action under the agreement, in accordance with the principle of privity of contract.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Prior to the introduction of the 2019 Act, parties to all insurance contracts were subject to a duty of utmost good faith, which imposed a duty on the insured to disclose all material facts before inception or renewal of an insurance policy. The remedy for breach of the duty of utmost good faith was avoidance of the policy.

For consumer contracts only, the 2019 Act introduced proportionate remedies for the breach of a new duty of disclosure, which is confined to answering specific questions posed by the insurer honestly and with reasonable care. There is a presumption that where an insurer asks a specific question about a matter, it is material to the risk undertaken by the insurer or the calculation of the premium, or both.

Where an insurance policy is subject to the 2019 Act, an insurer will only be permitted to avoid a policy where there has been a fraudulent misrepresentation. Proportionate remedies apply where there is a negligent misrepresentation and the remedy available to the insurer concerned must reflect what the insurer would have done if it had been aware of all the facts. The insurer is only entitled to avoid the policy for a negligent misrepresentation where it would not have entered into the contract on any terms. Where it would have entered the contract on different terms, the contract is to be treated as if it had been entered on those terms; if the insurer would have charged a higher premium, the insurer may proportionately reduce the amount to be paid on the claim. There is no remedy available to the insurer where the misrepresentation is innocent.

Section 8(6) of the 2019 Act requires an insurer to establish inducement to avail of the remedies under the act for a breach of the duty of disclosure.

The previous law and the duty of utmost good faith continues to apply in the case of non-consumer insurance contracts, and avoidance of the policy is the only remedy available to the insurer where there is a material non-disclosure or misrepresentation, unless the contract provides otherwise; for example, if there is an innocent non-disclosure clause.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

As noted above, the 2019 Act has reformed the area of consumer insurance law. The principle of utmost good faith and the duty of the consumer to provide full disclosure of all material facts before inception or renewal of an insurance policy has been replaced under the 2019 Act with the duty of the consumer to provide responses honestly and with reasonable care to questions posed by the insurer.

The insurer is required to ask specific questions on paper or on another durable medium, and shall not use general questions, and the consumer is not under a duty to volunteer information over and above that required by the insurer's questions.

Parties to a non-consumer insurance contract remain subject to the duty of utmost good faith. 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, and all material facts must be identified irrespective of whether the insurer has specifically asked about them.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Insurers have subrogation rights under 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 2019 Act 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.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

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 EUR 15,000. The Circuit Court deals with claims with a monetary value up to EUR 75,000 (EUR 60,000 for personal injury cases). The High Court hears claims in excess of this with an unlimited monetary jurisdiction.

Insurance disputes before Irish courts are heard by a single judge with no jury.

The Commercial Court is a specialist division of the High Court and deals exclusively with commercial disputes. Where the monetary value of a claim or counterclaim exceeds EUR 1 million and the dispute is commercial in nature, either party may apply to have the dispute heard in the Commercial Court. Insurance and reinsurance proceedings where the value of the claim or counterclaim is not less than EUR 1 million are included within the meaning of commercial proceedings under the Superior Court Rules. 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.

Decisions appealed from the High Court are dealt with by the Court of Appeal. However, where the Supreme Court believes that a case is of public importance, it may be appealed directly to the highest court in the state.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

In order to be admitted to the Commercial Court list, a payment of EUR 5,000 in stamp duty is required on the Notice of Motion seeking entry. Commencing proceedings in the District Court, Circuit Court or High Court requires the payment of nominal filing fees.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Proceedings in the Commercial Court are case-managed to ensure that proceedings are progressed at a much quicker pace. Currently, the length of time from entry to the Commercial Court list to hearing tends to be between two weeks and six months, depending on the time required for the hearing. The average life cycle of a commercial case from the issuing of proceedings to disposal in 2022 was 665 days. A strong emphasis is placed on alternative dispute resolution and the court can provide for a stay of proceedings for up to four weeks for the parties to consider mediation.

3.4 Does COVID-19 have, or continue to have, a significant effect on the operation of the courts, or litigation in general?

Following the pandemic, the Irish court service faced challenges such as capacity issues, backlogs and delays. However, notable adaptations have been made to ensure the continuity of legal processes.

Amid the pandemic, the court service embraced remote hearings using video conferencing technologies. This approach, aimed at minimising in-person gatherings, has been instrumental in continuing court proceedings. Notably, the High Court's authority to direct fully remote hearings under the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 was exercised for the first time in February 2021.

To address longer trials and hearings involving witness evidence, the court service introduced hybrid proceedings. This model allows parties to make submissions and witnesses to provide evidence remotely through live video. Electronic platforms not only facilitate the process but also assist in document management, enhancing the flexibility and efficiency of legal proceedings.

Despite the lifting of pandemic restrictions, these adaptations persist, signifying a lasting shift in the court service's approach.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

(a) Parties to the action

A party to High Court proceedings can seek discovery of categories of documents relevant to the issues and necessary to dispose of the matter fairly. This can also be done to save costs. The Court will consider whether such a request is proportionate and whether the documents can be obtained from a more readily available source.

(b) Non-parties to the action

A request for voluntary discovery of categories of documents must be made by a party first. If agreement on discovery is not reached, the party can then seek an order for discovery from the court.

Parties must disclose not only those documents which support their case, but all documents that fall within the categories of discovery. Any contents of the documents that are subject to privilege do not need to be disclosed.

An order for discovery against a non-party may be made by the High Court where it appears that the person is likely to have or has had documents which are relevant to the proceedings in its possession, custody or power.

The party seeking the non-party discovery must indemnify such person against the costs of the discovery. The court will also consider the possible prejudice or oppression that a non-party might suffer in complying with the order for discovery.

Following delivery of the defendant's defence, parties usually seek voluntary discovery. In limited circumstances, it is possible to obtain discovery by court order prior to the commencement of proceedings. Generally, such an order will only be made in cases where clear proof of wrongdoing exists and where the information sought includes the names and identities of wrongdoers, as opposed to factual information concerning the commission of a wrongful act.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Legal professional privilege enables a party to protect itself from disclosure of certain communications between them and their solicitor. When legal privilege has been established, neither the client nor the solicitor can be compelled to disclose details of this communication for any reason.

(a) Documents relating to advice given by lawyers

Communications between a solicitor, acting in his/her professional capacity, and his/her client, are protected by legal advice privilege, provided the communication is confidential and for the purpose of seeking or giving legal advice.

(b) Documents prepared in contemplation of litigation

Litigation privilege protects documents produced for the purpose of the litigation in question. Litigation privilege includes all communications between a solicitor and his/her client, a solicitor and his/her non-professional agent and a solicitor and a third party.

The communications over which privilege is claimed must be made for the dominant purpose of advancing the prosecution or defence of the case or seeking or giving of legal advice in connection with that case.

Under Section 8 of the Insurance (Miscellaneous Provisions) Act 2022, if an insurer becomes aware of information (including non-factual information) that would either support or prejudice the validity of an insurance claim made by a consumer, then the insurer must disclose this to the consumer. This duty to disclose overrides litigation privilege but does not override advice privilege.

(c) Documents produced in the course of settlement negotiations/attempts

Documents relating to communications made without prejudice for the purpose of negotiating a settlement may be withheld and protected from disclosure or admissibility as evidence in court.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

A person can be subpoenaed by the courts to attend as a witness at the final hearing of an action. Failing to attend can amount to contempt of court.

4.4 Is evidence from witnesses allowed even if they are not present?

Evidence is to be given orally, except in the most limited of 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 the judge orders otherwise.

There is a possibility of evidence being given remotely, as set out at question 3.4 above.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Courts rarely appoint expert witnesses. Expert witnesses are generally retained by the parties to the litigation. There are no general restrictions on calling expert witnesses; however, experts must be relevant and necessary (or costs may be awarded against the party producing the expert) and must only give evidence in relation to matters within their expertise – not legal matters. In insurance disputes, expert evidence in relation to the interpretation of the policy is generally not admissible, as this is a matter to be determined by the court.

Commercial Court rules require the parties to exchange expert reports in advance of a trial, and pre-trial directions will usually include directions in relation to expert reports. Such directions might include a pre-trial expert meeting in an effort to reduce the number of issues between the parties.

4.6 What sort of interim remedies are available from the courts?

The main form of interim relief available in this jurisdiction is by way of interim or interlocutory injunctions. Interim injunctions are granted *ex parte* (i.e., without notice to the other party) for a short period until the hearing for an interlocutory injunction (where the other party will be involved) can take place. The following test is generally applied by the court in considering an interlocutory injunction application:

1. whether there is a serious/fair issue to be tried;
2. whether damages would be an adequate remedy; and
3. whether the balance of convenience lies in granting or refusing an injunction.

An applicant for an injunction is required to provide an undertaking to cover any damages for which he/she may be liable as a result of the injunction. The undertaking is given in the event that the applicant is ultimately unsuccessful in the proceedings.

Generally, injunctions restrain or prohibit a person from doing something or require a person to do something.

Types of injunctions

The following are types of injunctions that can be granted in this jurisdiction:

- *Quia Timet*: these are used to prevent an anticipated infringement of a legal right.
- *Mareva*: these are used to prevent the removal or disposal of assets.
- *Anton Piller* orders: these allow for entry to the premises of a defendant for the inspection and removal of items of evidence.
- *Ne Exeat Regno writ* and *Bayer* injunction: these can be sought in order to prevent a defendant from leaving the jurisdiction.

These particular types of orders are rarely granted because they can have an onerous impact on a person's rights. The court can, at its discretion, make an interim attachment order to preserve assets pending judgment. A party can bring an application for an order where the party can establish that the defendant has assets within the jurisdiction and that there is a serious risk that those assets will be dissipated before the hearing of the action, with the intention of evading judgment. The plaintiff in such an application is responsible for any loss resulting from the freezing of the assets if the order was not obtained honestly.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

District Court decisions may be appealed to the Circuit Court and Circuit Court decisions (including appeals from the District Court) may be appealed to the High Court. In addition, either party to a set of proceedings may appeal directly to the High Court from the District Court on a point of law.

The Court of Appeal has appellate jurisdiction from a decision of the High Court (including the Commercial Court) in respect of matters of law and fact. However, decisions of the High Court on appeal from the Circuit Court cannot be appealed to the Court of Appeal.

It is generally not possible to adduce oral evidence (or new evidence) on appeal to the Court of Appeal. The hearing is generally based on the consideration of the transcripts of the evidence that was provided in the High Court together with the submissions of the parties. The Court of Appeal can be slow to overturn a finding of fact of the High Court, unless it is satisfied that the evidence that was acted on could not reasonably have been correct.

A case may be appealed from the Court of Appeal to the Supreme Court where it is in the interests of justice to do so or where the decision involves a matter of general public importance. As set out at question 3.2 above, in certain circumstances, a case may be appealed from the High Court directly to the Supreme Court. This is referred to as a "leapfrog appeal".

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Under section 22(1) of the Courts Act 1981, in proceedings where a court orders the payment of a sum of money (which includes damages), the court also has the discretion to order the payment of interest on the whole or any part of such damages in respect of a part or the entire period between the dates when the cause of action accrued and the date of judgment. This rate of interest is currently 2%. This is discretionary and will only be awarded in cases where the trial judge deems that it is appropriate to do so. Once judgment is awarded, Courts Act interest will apply to the monetary sum awarded.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Costs will typically follow the event and the "loser pays" principle will apply. However, where the litigation is "complex", case law from the Commercial Court suggests that an analysis should be carried out by the court, and the court should consider whether the winning party has succeeded on all grounds, rather than simply awarding full costs to the winning side.

An offer to settle proceedings, known as a Calderbank offer, can be made "without prejudice save as to costs". It has a statutory basis pursuant to Order 99 of the Rules of the Superior Courts. Where the settlement offer is declined, and the plaintiff does not subsequently "beat" the Calderbank offer, this can severely reduce any award for court costs to which they might otherwise have been legally entitled. It may result in the winning party being made to pay the losing party's legal costs in some cases. The courts have recognised the desirability of imposing financial consequences on a plaintiff who refuses what ultimately proves to have been a reasonable offer, notwithstanding that the same was made on a without prejudice basis. The Rules of the Superior Courts also provide for lodgements and tenders (where particular types of parties, including insurers, are permitted to tender an amount rather than pay the sum into court) to be made in proceedings. A Calderbank offer will not be effective where a lodgement or tender could have been made instead.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Mediation

The Mediation Act 2017 (the "**Mediation Act**") came into force on 1 January 2018. Under the Mediation Act, solicitors in this jurisdiction must advise their clients of the merits of mediation as an alternative dispute resolution 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 cost implications insofar as either party fails to engage in alternative dispute resolution following a court direction.

The Rules of the Superior Courts also expressly provide that the court may, on application of either of the parties or of its own motion, when it considers it appropriate and having regard to all circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the court considers just and convenient, and invite the parties to use another alternative dispute resolution process to settle or determine the proceedings or issue.

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 EUR 5,000 and the relevant policy has not been individually negotiated.

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.

4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Under section 21 of the Mediation Act, where a party refuses a request to mediate (or to engage with other forms of alternative dispute resolution), the refusal can be factored into account by the court in awarding costs.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Arbitration Act 2010 (the "**2010 Act**") incorporates the UNCITRAL Model Law on International Commercial Arbitration. The 2010 Act applies to all arbitration agreements entered into after that date.

Under Article 5 of the Model Law, no court shall intervene in an arbitration except where provided by the Model Law. The High Court has a limited supervisory role under the 2010 Act and the Model Law. However, parties can refer matters such as the appointment of an arbitrator (in default of agreement) or the removal of an arbitrator for failure to carry out its function to the High Court.

In the decision of Mr Justice Barniville in *Charwin Limited t/a Charlie's Bar v. Zavarovalnica Sava Insurance Company D.D. [2021] IEHC 489*, the courts in this jurisdiction – for the first time – gave detailed consideration to public policy considerations and their impact on the arbitrability of a dispute. The court considered what public policy considerations might be sufficient in order that a dispute could be non-arbitrable. It is clear from the findings of the court that the bar is high when seeking to resist a reference to arbitration on grounds of public policy. The type of public policy considerations required that might lead a court to conclude that a particular dispute is capable of being determined by arbitration would need to be fundamental and far reaching before a court could make such a finding. The court stressed the importance of the public policy objective intended to be advanced by the Oireachtas in enacting the 2010 Act and in adopting the Model Law to promote arbitration as a consensual means of resolving disputes and encouraging party autonomy.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

It is an essential prerequisite that for arbitration and any subsequent award to be binding, there must be an agreement to arbitrate between the parties. The 2010 Act does not prescribe the content of an arbitration agreement or set out the form of words to be used, but it should reflect the agreement between the parties where disputes or differences which may arise will be referred to arbitration. Under the 2010 Act, an agreement to arbitrate must be made in writing.

Arbitration clauses are a common feature in insurance policies and reinsurance contracts. A particular feature of the 2010 Act is that it gives the parties autonomy over a range of issues, including the powers to be given to the arbitral tribunal and the court.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As set out at question 5.1 above, the courts' powers to intervene with an arbitration are limited under Article 5 of the Model Law. In the *Charwin* decision, also referred to at question 5.1 above, the court noted that it will look at the particular arbitration clause in a dispute to ensure that the dispute between parties falls within its ambit.

The 2010 Act provides that an arbitral tribunal's decision that a contract (which includes an arbitration clause) is null and void shall not affect the validity of an arbitration clause. As mentioned at question 4.10 above, where an insurance contract contains an arbitration clause, a dispute must be referred for arbitration. However, consumers are not bound by an arbitration clause if the claim is less than EUR 5,000 and the relevant policy has not been individually negotiated.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

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 effectively 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 of the dispute.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Under the 2010 Act and the Model Law, an arbitrator must provide his/her award in writing. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 (Settlement).

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

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 a valid arbitration agreement, the courts are obliged to stay proceedings.

However, 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.

An application to set aside an arbitral award under Article 34 must be made within three months from the date on which the party making the application received the award.

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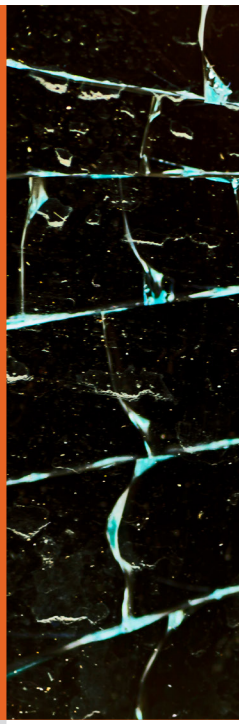

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