

Insurance Litigation

Contributing editors

Mary Beth Forshaw and Elisa Alcabas



2018

GETTING THE
DEAL THROUGH 

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Mary Beth Forshaw and Elisa Alcabes
Simpson Thacher & Bartlett LLP

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This article was first published in March 2018

For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law
Business
Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2014
Fifth edition
ISBN 978-1-78915-033-9

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Austria	5	Korea	48
Philipp Strasser and Jan Philipp Meyer Vavrovsky Heine Marth Rechtsanwälte GmbH		Sung Keuk Cho and Dong-Hyun Kim Cho & Lee	
Bermuda	10	Malaysia	52
Peter Dunlop ASW Law Limited		Loo Peh Fern and Khoo Wen Shan Skrine	
Chile	13	Norway	56
Ricardo Rozas Jorquiera & Rozas Abogados (JJR)		Atle-Erling Lunder Arntzen de Besche Advokatfirma AS	
China	17	Sweden	59
Zhan Hao, Wang Xuelei and Wan Jia AnJie Law Firm		Johan Gregow Wistrand	
Colombia	22	Switzerland	63
Sergio Rojas DLA Piper Martínez Beltrán		Dieter Hofmann and Daniel Staffelbach Walder Wyss Ltd	
Germany	26	Turkey	66
Fabian Herdter and Christian Drave Wilhelm Rechtsanwälte		Pelin Baysal and Ilgaz Önder Gün + Partners	
India	31	United Arab Emirates	71
Neeraj Tuli and Rajat Taimni Tuli & Co		Sam Wakerley and John Barlow HFW	
Ireland	36	United Kingdom	75
Sharon Daly and April McClements Matheson		Hermes Marangos, Tom Rotherham and Lucy Alexander Signature Litigation LLP	
Italy	40	United States	80
Alessandro P Giorgetti Studio Legale Giorgetti		Mary Beth Forshaw and Elisa Alcabes Simpson Thacher & Bartlett LLP	
Japan	44		
Keitaro Oshimo Nagashima Ohno & Tsunematsu			

Preface

Insurance Litigation 2018

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Insurance Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mary Beth Forshaw and Elisa Alcabes of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
February 2018

Ireland

Sharon Daly and April McClements*

Matheson

Preliminary and jurisdictional considerations in insurance litigation

1 In what fora are insurance disputes litigated?

In Ireland, the jurisdiction in which court proceedings are brought depends on the monetary value of the claim. The District Court deals with claims up to a value of €15,000 and the Circuit Court up to a value of €75,000 (€60,000 for personal injury cases). Claims with a monetary value in excess of the Circuit Court jurisdiction are heard by the High Court, which has an unlimited monetary jurisdiction.

The High Court has a specialist court, the Commercial Court, which deals exclusively with commercial disputes. Proceedings are case-managed and tend to move at a much quicker pace than general High Court cases; time from entry into the list to full hearing varies between one week to four months depending on the time required for hearing. Entry to the list is at the discretion of the judge and may be refused if there has been any delay. Insurance and reinsurance disputes can be heard in the Commercial Court if the value of the claim or counterclaim exceeds €1 million and the court considers that the dispute is inherently commercial in nature.

The Commercial Court judges place a strong emphasis on mediation and the Commercial Court Rules provide for up to a four-week stay of proceedings to allow the parties to consider mediation.

Insurance disputes before the courts in Ireland are heard by a judge sitting alone and not a jury.

If an insurance contract contains an arbitration clause, the dispute must be referred to arbitration. However, there is an exception for consumers, who are not bound by an arbitration clause in an insurance policy if the claim is less than €5,000 and the relevant policy has not been individually negotiated.

The Financial Services Ombudsman (FSO) is a statutory officer who deals independently with unresolved complaints from consumers about their individual dealings with all financial service providers, including insurers. The FSO has broad powers and may direct insurers to: pay compensation up to a maximum of €250,000; change their practices in the future; and rectify the conduct complained of (for example, requiring the insurer to pay a disputed claim).

2 When do insurance-related causes of action accrue?

For actions in contract, the cause of action accrues on the date of the breach (and not when the damage is suffered). The general position under Irish law is that claims for breach of contract must be brought (by issue of proceedings) within six years of the date on which the cause of action accrued (section 11(1)(a), Statute of Limitations Act 1957).

Where a complaint is made to the FSO, the FSO does not currently have jurisdiction to investigate complaints where the conduct complained of occurred more than six years before the complaint is made. However, the Financial Services and Pensions Ombudsman Act 2017 came into effect on 1 January 2018 and amends this limitation period for complaints in respect of 'long-term financial services', namely products or services where the maturity or term extends beyond six years and is not subject to annual renewal. The limitation period for such products is six years from the date of the act or conduct giving rise to the complaint or three years from the earlier of the date on which the consumer became aware of the said act or conduct or ought to have become aware. Significantly, the amendment has retrospective effect.

The FSO now also has the power to extend the time periods where there are reasonable grounds to do so.

3 What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

The strategic considerations will vary depending on the nature of the dispute, the parties involved and their relationship.

Where an insurer seeks to decline cover of a claim or avoid a policy, the declinature or avoidance letter will be a key proof in any subsequent litigation and should therefore be drafted carefully. Timing is also critical. An insurer should not use the same lawyers to provide coverage advice and to defend the claim under a reservation of rights.

Prior to commencing any proceedings, the contractual documentation should be reviewed, and in particular jurisdiction and choice of law clauses, to identify the appropriate jurisdiction and forum for the dispute. If the contract contains an arbitration clause, the dispute must be referred to arbitration. The contract may also stipulate an alternative form of dispute resolution such as mediation.

In general, consideration should also be given at the outset to the availability of evidence and witnesses.

It is usual practice in Ireland for a pre-action letter to be sent prior to proceedings being issued.

It should also be noted that the Mediation Act 2017 came into effect on 1 January 2018 and requires solicitors to advise their clients of the merits of mediation as an alternative dispute resolution mechanism to issuing court proceedings in advance of issuing court proceedings. In addition, in order to issue proceedings, the Act requires the solicitor to swear a statutory declaration confirming that such advice has been provided and this declaration must be filed with the originating document in the relevant court office.

4 What remedies or damages may apply?

The remedies available to an insurer depend on the breach.

In case of a breach of the duty of utmost good faith, the remedy is to declare the contract void. Under the Marine Insurance Act 1906, this remedy is available for non-disclosure (section 18) or material misrepresentation (section 20) by the insured. However, avoidance is generally considered to be a draconian remedy and the Irish courts have traditionally been reluctant to uphold avoidance with the result that insurers can be left without an effective remedy. An insurer is not entitled to decline cover of the claim in lieu of avoidance, unless the relevant policy contains an innocent non-disclosure clause to this effect.

The Irish courts are willing to uphold policy avoidance for material non-disclosure where the proposal form is clear and unambiguous and the proposer's duty to disclose is not qualified by reference to answering the questions in the proposal form to the best of the proposer's knowledge.

The remedy for breach of warranty (including basis of contract clauses) is repudiation; however, warranties are construed very strictly.

Breach of a condition precedent to cover entitles insurers to decline cover of a claim without a requirement to demonstrate prejudice, whereas breach of a condition which is not stated to be a condition precedent to cover entitles the insurer only to damages.

Normally, damages are an adequate remedy for breach of an insurance policy. However, if damages are deemed neither adequate nor

appropriate, the law of equity may intervene and the court may grant the remedy of specific performance.

Unless the contract provides otherwise, the general actions for breach of contract are available to the insured. Accordingly an insured would have an action for damages arising from the failure of the insurer to pay a valid claim.

The Consumer Insurance Contracts Bill 2017 was published on 20 January 2017 and was referred to the Select Committee on 9 February 2017. There is no clear timeline for its implementation. It is largely based on recommendations made by the Law Reform Commission in its report on Consumer Insurance Contracts in 2015 and largely mirrors the provisions of the draft bill proposed in this report. The bill applies to consumer insurance contracts only (although the definition of consumer is broad).

The bill provides for the following:

- the duty of the pre-contractual duty of good faith is abolished;
- avoidance of an insurance policy will no longer be the main remedy. In cases of non-disclosure and misrepresentation, the principal remedy will be damages in proportion to the failure by the insured (however, avoidance is retained for fraudulent breaches on public policy grounds);
- warranties (including basis of contract clauses) are abolished and replaced with suspensive conditions; and
- a consumer will be entitled to seek damages where an insurer unreasonably withholds, or unreasonably delays in making a payment for a valid claim.

5 Under what circumstances can extracontractual or punitive damages be awarded?

The Irish courts occasionally award punitive or exemplary damages on public policy grounds. The Irish Supreme Court has recently confirmed that exemplary damages can be awarded where the damage caused was deliberate and malicious, and calculated to unlawfully cause harm or gain an advantage. The award of damages must be proportionate to the injuries suffered and the wrong done.

Exemplary damages are insurable in Ireland. The Law Reform Commission considered this issue in a report published in 2000 ('Aggravated, exemplary and restitutionary damages') and considered that public policy considerations in favour of prohibiting insurance for exemplary damages were not sufficiently strong to necessitate legislation in this area. It is therefore a matter for individual insurance companies whether they choose to expressly exclude exemplary damages from cover.

Interpretation of insurance contracts

6 What rules govern interpretation of insurance policies?

Insurance contracts are subject to the same general principles of interpretation as other contracts. The Irish 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 Hoffmann in *ICS v West Bromwich Building Society* should be applied to the interpretation of insurance contracts.

In summary, interpretation is 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. The background or 'matrix of fact' should have been reasonably available to the parties and includes anything that would have affected the way in which the language of the document would have been understood by a reasonable person. The previous negotiations of the parties and their declarations of subjective intent are excluded from the admissible background. The meaning that a document (or any other utterance) would convey to a reasonable person is not the same thing as the meaning of its words. The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would, nevertheless, conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention that they plainly could not have had.

The court will apply an objective approach to determine what would have been the intention of reasonable persons in the position of the parties.

Where a contractual term is ambiguous, the interpretation less favourable to the drafter is adopted using the contra proferentem rule (see question 7).

In circumstances where the policyholder is a consumer, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 and the Consumer Protection Code 2012 will apply to the contract.

7 When is an insurance policy provision ambiguous and how are such ambiguities resolved?

An insurance policy wording is ambiguous if a provision can have more than one meaning or if the policy is silent in relation to a particular situation. In addition to the rules set out in question 6, the contra proferentem rule will be applied where there is ambiguity. This rule provides that, if a term is ambiguous, it is interpreted against the person who drafted it. This is usually the insurer and thus the ambiguity is interpreted in favour of the insured. However, if drafted by the broker, the ambiguous term would be interpreted against the insured.

Notice to insurance companies

8 What are the mechanics of providing notice?

Notice requirements vary from policy to policy. The policy wording will typically confirm to whom a claim should be notified and the manner in which the notification should be made. Typically, notice must be given in writing within a specified time period after the policyholder becomes aware of a claim or a circumstance likely to lead to a claim.

9 What are a policyholder's notice obligations for a claims-made policy?

Claims-made policies generally require claims to be notified during the policy period and as soon as reasonably practicable or within a specified time limit. Claims-made policies may also require or permit circumstances that may give rise to a claim to be notified to insurers. The policy may contain a discovery period that allows claims to be notified within a specified period following the expiry of the policy period.

Where the notice requirements are stated to be a condition precedent to cover, the insurer is entitled to decline cover for a breach without any requirement to establish it has suffered prejudice as a result of the breach. In the absence of a condition precedent to liability, the only remedy available to insurers for breach of a notice condition is damages.

10 When is notice untimely?

See question 9. If an insurer wants to ensure compliance with a notification requirement, it must make timely notification a condition precedent. Where the notification is of a circumstance and not a claim, the courts have interpreted the knowledge of the policyholder on a subjective rather than objective basis.

11 What are the consequences of late notice?

The consequences of late notice will often be specified in the policy.

Where the notice requirements are stated to be a condition precedent to cover, the insurer is entitled to decline cover for a breach without any requirement to establish it has suffered prejudice as a result of the breach. In the absence of a condition precedent to liability, the only remedy available to insurers for breach of a notice condition is damages.

In practice, the Irish courts are reluctant to permit insurers to decline claims for technical breaches of notice conditions, particularly where there has been a failure to notify a circumstance. While the test to be applied is objective, the court will consider whether the insured had actual knowledge of the particular circumstance that it is alleged should have been notified to insurers. The knowledge of the insured is subjective.

Insurer's duty to defend

12 What is the scope of an insurer's duty to defend?

This is a matter of contract and Irish law does not impose a duty to defend on the insurer. The policy may impose such a duty or may

Update and trends

Developments related to third party funding

In May 2017, the Irish Supreme Court confirmed in its decision in *Persona Digital Telephony Ltd & Another v Minister for Public Enterprise* that third-party funding of litigation is unlawful, and indicated that any changes to the law in this regard in Ireland would be a matter for the legislature, not the courts. However, the Irish High Court has previously made clear that after-the-event insurance is valid; therefore, post-*Persona Digital*, ATE insurance is the only valid third-party funding in this jurisdiction.

European Commission investigation into the motor insurance industry

European and local competition regulators commenced an investigation into whether there are concerted practices between insurers and brokers in the commercial motor insurance industry in Ireland in 2017. There is a similar investigation in the UK in relation to the aviation sector.

UK Insurance Act 2015

Following implementation of the Insurance Act 2015 in the UK in August 2016, insurance law in Ireland is now significantly different from the UK law for the first time since 1906. We anticipate that the implementation of the Act will have an impact on the Irish insurance industry as the Irish market is closely connected to the UK (in particular the London market) and many Irish risks are written subject to English law. However the significance of this impact remains to be seen.

Brexit

In the aftermath of the decision of the United Kingdom to leave the European Union (Brexit), many financial services companies are now looking to establish a subsidiary in a country with access to the Single Market in order to mitigate the potential loss of passporting rights post-Brexit. Ireland's well-established prudential regulation, common law jurisdiction, well-educated English speaking and flexible workforce

together with its close proximity to the UK has cemented its status as a thriving hub for the insurance industry. Authorisation-related activity since the Brexit vote has continued to increase including queries regarding insurance authorisations. It is anticipated that the increase in authorisation-related activity will continue and the Central Bank of Ireland has increased its workforce by a quarter in response.

Payment protection insurance (PPI)

Following the UK Supreme Court decision in *Plevin*, a further redress scheme in respect of PPI is under way in the UK. It is possible, particularly in light of the changes to the limitation period for claims to the Financial Services Ombudsman in relation to long-term financial products, that there could be further litigation in relation to the sale of PPI in Ireland.

Emerging technologies and risks

Drones are an emerging and rapidly developing technology, and new legislation is proposed in Ireland to increase existing drone regulation and impose criminal liability for certain drone offences. The draft bill (the Small Unmanned Aircraft (Drones) Bill 2017) imposes an obligation on commercial drone operators to have insurance for any liability arising from drone operation, including potential collision with persons or property, and it will be a criminal offence to operate a drone for commercial use without insurance. As this market continues to grow, it seems inevitable that drone insurance will be a growth area.

Driverless cars or autonomous vehicles present particular challenges for the motor insurance industry. The existing driver-centred Irish legislative framework will need to be updated to facilitate driverless cars on Irish roads. The UK has proposed a single insurer model for driverless cars, where both the driver and the driverless technology are insured under one policy. While this has not yet been considered by the Irish legislature in any meaningful way, it can be anticipated that the Irish legislature is likely to follow the UK approach, given similarities between the existing road traffic frameworks in both countries.

simply provide that the insurer has a right to associate in the defence of the claim.

13 What are the consequences of an insurer's failure to defend?

This will depend on the extent to which the contract imposes such a duty on the insurer. The insured may have a remedy for damages for breach of contract in the event that the insurer breaches a contractual duty to defend. In the event that an insurer takes on the defence of the claim, it must defend the claim subject to the contract of insurance. The interests of the policyholder and the insurer are not always aligned and this can lead to negotiations between them on how to settle or defend the claim.

Standard commercial general liability policies

14 What constitutes bodily injury under a standard CGL policy?

Commercial general liability is not a standard type of cover available in Ireland. Bodily injury is, however, a term that is used in liability policies. The definition used varies from policy to policy but typically refers to physical injury including illness and death.

15 What constitutes property damage under a standard CGL policy?

See question 14. In public liability policies, property damage is typically defined as loss or destruction of or damage to material property.

16 What constitutes an occurrence under a standard CGL policy?

See question 14. Liability policies are 'occurrence' based. Occurrence will be defined in the policy but usually the relevant occurrence is the event that triggers the bodily injury or property damage suffered by the third party.

Product liability policies can be 'occurrence' or 'claims-made' policies.

17 How is the number of covered occurrences determined?

It is very common for both claims-made and losses-occurring policies to contain aggregation wording that provides that claims or occurrences

arising out of a single event or source or cause will be treated as a single claim or occurrence for the purposes of the limit of indemnity and excess. Whether the aggregation clause favours the insurer or insured is highly dependent upon the facts and the specific wording of the aggregation clause.

18 What event or events trigger insurance coverage?

If the insured suffers loss or damage that is an insured risk under the policy and the claim is made in compliance with policy terms and conditions, a claim will be triggered.

In the case of insurance policies covering the risk of damage to the insured's property, this is typically when damage to the property occurs. The trigger is set out in the policy wording in the case of property policies. In the case of a policy that covers the risk of liability to third parties, a claim will be triggered when the third party seeks to be compensated by the insured or the insurer suffers loss as defined in the policy.

19 How is insurance coverage allocated across multiple insurance policies?

It is often the case that more than one policy responds to the same loss. In such circumstances the parties will need to understand how the responsive policies interact and which policy responds first.

There is a distinction between double insurance and where there are layered policies to cover different levels of cover. Where there are different policy layers, the excess policy is not triggered until the primary policy has been exhausted. Where there is double insurance (ie, two or more policies covering the same risk on behalf of the same insured), the principle of contribution applies.

Section 80(1) of the Marine Insurance Act 1906 provides that each insurer shall contribute rateably to the loss in proportion to the amount for which the insurer is liable under contract.

It is also necessary to consider whether its policies contain rateable contribution clauses, non-contribution clauses or excess clauses.

First-party property insurance

20 What is the general scope of first-party property coverage?

First-party property coverage is essentially property insurance for loss or damage to an insured's goods or buildings, or both, following the occurrence of an insured event. The policy can either specify the insured event (earthquake, fire, flood) or be an 'all risks' policy. 'All risks' material damage property policies are common in Ireland. There is no standard wording. It is accepted that there is a limit on the range of risks covered and that the policy may expressly exclude or include particular risks.

21 How is property valued under first-party insurance policies?

The insured cannot recover more than his or her actual loss on the basis of the principle of indemnity (unless the policy provides otherwise).

In the absence of 'reinstatement as new conditions', insurers are liable for the value of the property at the time of the loss, destruction or damage. Insurers will generally seek to agree the value based on reinstatement costs less a deduction for betterment, the cost of an equivalent modern replacement, or market value.

22 Is insurance available in your jurisdiction for natural disasters and, if so, how does it generally operate?

We are not aware of any insurance products in Ireland that are aimed solely at providing cover for loss caused by natural disaster. However, there are insurance products available in Ireland that typically cover damage to property as a result of natural disasters (such as hurricanes, floods, wildfires and earthquakes). For example, home insurance policies in Ireland typically provide cover for damage to buildings and contents caused by fire, explosion, lightning, earthquake, storm or floods.

Directors' and officers' insurance

23 What is the scope of D&O coverage?

Legislation in Ireland prohibits a company from including in its constitutional documents and contracts any provision that indemnifies its directors and officers from liability to the company in respect of negligence, breach of duty, default or breach of trust. There is one exception to this, which provides that a company may indemnify a director or officer from any liability incurred by that director or officer in successfully defending civil or criminal proceedings taken against him or her.

A company is, however, permitted to purchase 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 imposed.

D&O cover is available in Ireland for side A (loss suffered by director or officer as a result of a claim that has not been indemnified by the company), side B (indemnifications by the company to the director or

officer) and side C (actions brought against the company). Side A cover is the most common form. On side A the director is the insured person, whereas for both side B and C the insured person is the company.

24 What issues are commonly litigated in the context of D&O policies?

In Ireland, D&O policies commonly respond to restriction and disqualification applications made in the context of insolvency.

From a coverage perspective, insured versus insured claims may be covered depending on the policy wording. There has been an increase in insured versus insured claims in recent years, in particular where, for example, a liquidator has been appointed to the company.

Issues of non-disclosure and late notification can arise in the context of D&O policies.

Cyber insurance

25 What type of risks may be covered in cyber insurance policies?

Cyber policies frequently cover the cost of responding to a breach as well as providing first-party and third-party cover.

Breach response coverage may include the cost of IT forensic experts to investigate how the breach occurred, whether it is ongoing and to identify system weaknesses, PR to manage the fallout publicly and to prevent or minimise brand damage, as well as legal experts and other costs associated with the notification process.

First-party cover relates to the insured's loss and covers business interruption costs due to the breach.

Third-party coverage includes defence costs and damages arising from third-party claims against an insured where, for example, the insured's negligence enabled the data breach to occur.

26 What cyber insurance issues have been litigated?

Cyber insurance is still a relatively new product on the Irish market; however, it has become more popular in recent times. We are not aware that any cyber insurance coverage issues have been litigated before the Irish courts as of yet. There have been data breaches and it is highly likely that the cyber policies have responded in these cases.

Terrorism insurance

27 Is insurance available in your jurisdiction for injury or damage caused by acts of terrorism and, if so, how does it generally operate?

There are insurance products available in Ireland that cover damage to property and loss of income as a result of terrorism. Cover extends to physical damage to commercial buildings and their contents resulting from terrorism and associated business interruption expenses, including profit loss and increased operational costs.

* *The authors would like to thank Mark Dunne for his contribution to this chapter.*

Matheson

Sharon Daly
April McClements

sharon.daly@matheson.com
april.mcclements@matheson.com

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
www.matheson.com

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