Country Comparative Legal Guides

Ireland: Insurance & Reinsurance

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This country-specific Q&A gives a pragmatic overview of the law and practice of insurance & reinsurance law in Ireland.

It addresses topics such as **contract regulation, licensing, penalties, policyholder protection, alternative dispute resolutio**n as well as personal insight and opinion as to the future of the insurance market over the next five years.

This Q&A is part of the global guide to Insurance & Reinsurance. For a full list of jurisdictional Insurance & Reinsurance Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/insurance-reinsurance

1. **How is the writing of insurance contracts regulated in the jurisdiction?**

The law in relation to insurance contracts in Ireland is primarily governed by common law principles, the origins of which can be found in case law. There is no statutory definition of a contract of insurance under Irish law, nor are there specific rules for the formation of an insurance contract beyond the general principles of contract law and the duty of utmost good faith. Irish legislation does not specify the essential legal elements of an insurance contract and the courts have considered it on a case-by-case basis.

The Central Bank of Ireland (the “Central Bank”) is responsible for the prudential regulation of insurance and reinsurance undertakings and intermediaries operating in Ireland. The European Communities (Insurance and Reinsurance) Regulations 2015 (the "2015 Regulations") transposed Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (“Solvency II”) into Irish law. The 2015 Regulations set out the regulatory framework within which insurance activity may be carried on by insurers and reinsurers in Ireland.

Generally speaking, the Central Bank has no involvement in supervising the writing of insurance contracts and insurers retain significant freedom of contract. However, the Central Bank may, from time-to-time, request that an insurer provides its general and special policy conditions, scales of premiums and other documents which the insurer uses in its dealing with policy holders. The Central Bank may request such information in respect of an insurance contract in order to verify its compliance with applicable requirements, namely the Unfair Terms in Consumer Contracts Directive, the Distance Marketing of Financial Services Directive, the Consumer Protection Code and the Consumer Protection Act 2007. The Sale of Goods and Supply of Services Act 1980 is also applicable to insurance contracts.

2. **Are types of insurers regulated differently (i.e. life companies, reinsurers)?**

Prior to the implementation of Solvency II through the 2015 Regulations, distinct regulations governed the activity of life insurance, non-life insurance and reinsurance in Ireland. The 2015 Regulations now provide a uniform regulatory framework for

each type of business and the Central Bank adopts a consistent approach in its supervision of these entities. However, given the difference in the nature of business carried on by each distinct insurer, the 2015 Regulations, together with the Insurance Acts 1909-2011, do make certain distinctions between the carrying on of non-life insurance, life insurance or reinsurance business.

3. Are insurance brokers and other types of market intermediary subject to regulation?

A person (or firm) cannot undertake, or claim to undertake, insurance mediation or reinsurance mediation unless they are registered with the Central Bank pursuant to the European Communities (Insurance Mediation) Regulations 2005 (the "2005 Regulations") or are passporting into Ireland on a freedom of establishment or freedom of services basis.

Insurance or reinsurance mediation means any activity involving proposing or undertaking preparatory work for entering into insurance contracts, or assisting in the administration and performance of insurance or reinsurance contracts that have been entered into.

On applying to the Central Bank to be registered as an insurance or reinsurance intermediary, the applicant must satisfy a number of criteria for authorisation, which 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.

The Central Bank maintains a register of authorised insurance and reinsurance intermediaries in Ireland and is responsible for supervising their compliance with regulatory requirements by way of advertising monitoring, themed inspections, general inspections and mystery shopping. Intermediaries are generally ranked as 'Low Impact' under the Central Bank's supervisory framework, the Probability Risk and Impact System ("PRISM"). Therefore, intermediaries are subject to a lower level of supervision than imposed by the Central Bank on insurers and reinsurers.

4. Is authorisation or a licence required and if so, how long does it take on average to obtain such permission?

Undertakings cannot carry on insurance or reinsurance business in Ireland without authorisation from the Central Bank or from another recognised EU regulator through the ‘single passport’ regime.

On applying for authorisation, an applicant will typically meet with Central Bank representatives on a number of occasions. In the first instance, the applicant will have a preliminary meeting with the Authorisations Team of the Central Bank. Thereafter, the application proceeds through the submission of a detailed business plan to the Central Bank. The Central Bank will take a number of months to review the application. During the review process it will typically request additional information and documentation and is likely to have comments on certain features of the application for authorisation. 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 Central Bank has a statutory six month time period within which to consider a fully completed application for authorisation as an insurance undertaking. Once an undertaking is authorised by the Central Bank it is licensed to carry on insurance or reinsurance activity across the EEA.

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 by the Central Bank as compared with fully regulated reinsurers.

5. Are there restrictions over who owns or controls insurers (including restrictions on foreign ownership)?

The authorisation process requires the submission of details of all of the entity’s proposed shareholders to the Central Bank. However, there are no restrictions on the ownership or control of an insurance or reinsurance undertaking, other than the requirement that the proposed controller must be of good standing. The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 have introduced increased disclosure requirements in respect of

ownership of corporate entities. These regulations require entities to maintain a register of the beneficial owner (ie the natural person who ultimately owns or controls the share capital or the voting rights or has control by any other means of the undertaking) in order to ensure greater transparency of ownership.

Where there is a change in the ownership or control of a regulated entity, the 2015 Regulations require certain notifications to be made to the Central Bank. The acquisition or disposal of a 'qualifying holding', which is defined in the 2015 Regulations as a holding representing 10% or more of the capital or voting rights, or which makes it possible to exercise a significant influence over the management of the undertaking, triggers the requirement to notify the Central Bank. The Central Bank will assess any proposed acquisition by reference to the financial soundness and reputation of the proposed acquirer. In addition, the Central Bank will assess the suitability of all proposed directors and senior management in accordance with its Fitness and Probity regime to ensure the sound and prudent management of the undertaking.

6. Is it possible to insure risks without a licence or authorisation? (i.e. on a non-admitted basis)?

Prior to the introduction of Solvency II, insurance and reinsurance activity was regulated at an EU level by Directives 88/357/EEC, 90/619/EEC, 92/49/EEC and 92/96/EEC (together "Solvency I"). Under Solvency I it was possible for third-country reinsurers to write business in Ireland on a non-admitted basis subject to compliance with certain conditions. However, these provisions were not carried over into Solvency II. The market has viewed this as an oversight in the legislation and there has been on-going lobbying by the insurance industry to have the 2015 Regulations amended in order to permit third-country reinsurers to write business in Ireland on a non-admitted basis, as was originally provided for under the Solvency I regime.

7. What penalty is available for those who operate without appropriate permission?

An insurance or reinsurance undertaking, which operates in Ireland without the requisite authorisation from the Central Bank commits an offence under the 2015 Regulations. Where an offence is committed by an undertaking, and it can be proven

that the offence was committed with the consent or connivance, or was attributable in any way to the wilful neglect of a person in management of the undertaking, the Central Bank has the power prosecute the relevant person, as well as the undertaking. Therefore, a director, manager, secretary, other officer of the company or any person purporting to act in that capacity could be subject to prosecution from the Central Bank for the unauthorised operations of an insurance or reinsurance undertaking.

The penalties which can be imposed by the Central Bank will depend on the seriousness of the offence. If convicted of a summary offence (ie a more minor offence) the undertaking and / or relevant person is liable to a fine not exceeding €5,000 or to imprisonment of a term not exceeding 12 months, or to both. On conviction on indictment (ie a more serious offence, which operating without a licence most likely constitutes) the undertaking and / or relevant person is liable to a fine not exceeding €500,000 or to imprisonment for a term not exceeding 3 years, or to both.

If an undertaking continues to operate in Ireland without authorisation, the undertaking and / or relevant person will be guilty of an offence for each day on which the contravention continues and liable for a fine of €500 for each such offence.

8. How rigorous is the supervisory and enforcement environment?

Ireland has a well-established efficient prudential regulatory infrastructure that complies with best international standards. The Central Bank's prudential supervisory framework, PRISM, focuses on the most significant firms, the risks they pose and the level of damage they could cause to the financial system, the economy and consumers if they were to fail. Following the economic crash in Ireland, the Central Bank is intent on ensuring a rigorous and effective supervisory and enforcement framework is in place.

The Central Bank's supervisory role involves overseeing an undertaking's corporate governance, risk management and internal control systems. Insurance and reinsurance undertakings are required to submit annual and quarterly returns on solvency margins and technical reserves to the Central Bank for assessment. In addition, the Central Bank conducts regular themed inspections across the insurance and reinsurance industry.

The Central Bank's Administrative Sanctions Regime provides it with a credible tool of enforcement and acts as an effective deterrent against breaches of financial services law. The Central Bank has the power, where a breach is identified, to issue a supervisory warning, take supervisory action, agree a settlement, or refer the case to formal inquiry for determination and sanction.

9. How is the solvency of insurers (and reinsurers where relevant) supervised?

Insurers and reinsurers regulated by the Central Bank are required to meet the capital and solvency requirements set out under Pillar 1 of Solvency II, as transposed by the 2015 Regulations.

To comply with the enhanced regulatory reporting requirements in respect of solvency introduced by the Solvency II regime, Irish authorised insurers and reinsurers are required to submit the following information to the Central Bank:

- a solvency and financial condition report;
- detailed annual and quarterly reports supplementing information contained in the solvency and financial condition report;
- a regular supervisory report, at least every three years, containing specific information regarding the business and performance of the insurer, its system of governance, risk profile, capital management and information relating to its valuation of assets, technical provisions and other liabilities for solvency purposes;
- an annual own-risk and solvency assessment supervisory report, setting out the results of the own risk and solvency assessment performed by the life insurer; and
- other reports required by the Central Bank.

In supervising the solvency of an undertaking, the Central Bank may also require an insurer to provide it with a certificate of the value of the assets representing the technical provisions on the closing date on which the accounts and balance sheets of the insurer were provided to the Central Bank.

10. What are the minimum capital requirements?

The Solvency II capital requirements prescribed in the 2015 Regulations are calculated based on the specific risks borne by the relevant insurer and are prospective in nature. In calculating its solvency and capital requirements insurers are required to include both existing business and any new business expected to be written over the following 12 months. Solvency II imposes a solvency capital requirement ("SCR") and a lower, minimum capital requirement ("MCR") on insurance undertakings.

An insurance undertaking may calculate the SCR based on the formula set out in the 2015 Regulations or by using its own internal model approved by the Central Bank. The SCR should amount to a high level of eligible own funds, thereby enabling the undertaking to withstand significant losses and ensure a prudent level of protection for policyholders and beneficiaries. The MCR should be calculated in a clear and simple manner, corresponding to an amount of eligible basic own funds, below which policyholders and beneficiaries would be exposed to an unacceptable level of risk if the undertaking were allowed to continue its operations.

An insurance undertaking must have procedures in place to immediately identify and inform the Central Bank of any deterioration in its financial condition. As such, the reporting requirements in respect of SCR and MCR provide for clear channels by which the Central Bank can monitor the financial state of an insurance undertaking. In the event of a breach of capital requirements, the Central Bank will employ an escalating level of supervisory intervention, beginning with the implementation of a recovery plan by an insurance undertaking, as approved by the Central Bank. Where there is a breach of the SCR or MCR, compliance must be re-established within six months or three months respectively, otherwise the Central Bank may restrict

11. Is there a policyholder protection scheme?

The Insurance Compensation Fund (the "Fund") provides compensation to eligible policyholders of an Irish-authorised non-life insurer or an EU-authorised non-life insurer, which carries on business in Ireland, and which has gone into liquidation or administration. Non-life insurance companies writing business in Ireland are required to contribute 2% of gross written premium in respect of Irish situate risk to the Fund. The Central Bank is responsible for assessing the financial position of the

Fund and determining the appropriate contribution to be paid.

The approval of the High Court of Ireland is required for a payment to be made out of the Fund. Where an insurer is in administration, at least 70% of its entire business in the preceding 3 years must relate to Irish situate risk in order to gain access to the Fund. Payments out of the Fund are capped at 65% of the sum due to the policyholder or €825,000 whichever is the less. Health, dental and life policies are excluded from the scope of the Fund.

12. How are groups supervised, if at all?

Where an Irish-authorised insurer or reinsurer is a member of a wider insurance group, the group is subject to group supervision in accordance with the Solvency II regime. The provisions relating to group supervision are quite complex, as supervision is required of the group's solvency, governance and reporting obligations. The level of group supervision by the Central Bank will depend on the location of the ultimate insurance parent and the Solvency II regime permits the application of a tailored-approach by the local regulator in respect of group supervision.

Where a group is made up of several EEA insurers, one EEA regulator will act as the group supervisor, while the local regulators are responsible for supervision of the individual entity operating in their respective jurisdiction.

Where the ultimate insurance parent is located outside the EEA, the Central Bank is required to ensure appropriate supervision of the worldwide group. This may be done by extending the solvency capital requirements imposed on EEA insurers and reinsurers to non-EEA entities. Alternatively, it is open to the Central Bank to adopt "other methods" which ensure appropriate group supervision. Where a third-country has been recognised as having an equivalent prudential supervisory regime to that imposed under Solvency II, the Central Bank may rely on the supervision of the worldwide group by the relevant third-country regulator.

13. **Do senior managers have to meet fit and proper requirements and/or be approved?**

The Central Bank the power to designate certain positions within a regulated firm as being Pre-approval Controlled Functions ("PCFs"). The approval of the Central Bank

must be sought prior to appointing a person to act as a PCF. In summary, a PCF is a function through which a person may exercise a significant influence on the conduct of a regulated financial service provider's affairs. Therefore, as part of the Central Bank's Fitness and Probity regime, all proposed directors and senior management will have to apply to the Central Bank for prior approval.

In order to comply with the Central Bank's Fitness and Probity standards a person is required

- competent and capable;
- honest, ethical and act with integrity; and
- financially sound.

For the purposes of considering whether or not to approve a person to carry on a PCF, the Central Bank has a broad range of powers and in particular may request that the person or an individual on behalf of the undertaking provide certain specified information to it. The person may also be required to attend before a specified officer or employee of the Central Bank for an interview. This is to ensure that the undertaking has the necessary people, skills, processes and structures to successfully manage its insurance or reinsurance business. This includes, in particular, close scrutiny of the undertaking's management structures, board and senior management appointments, key committees and key statutory roles.

14. Are there restrictions on outsourcing parts of the business?

The 2015 Regulations permit an insurance company to be outsourced to a third party, provided that appropriate oversight and control is retained by the insurance company over the relevant function. An insurance undertaking is required to notify the Central Bank before outsourcing any critical and important function or activity and is also required to inform the Central Bank of any subsequent material developments with respect to any such function or activity. Critical or important functions are defined by EIOPA as those that are 'essential to the operation of the undertaking as it would be unable to deliver its services to policyholders without the function or activity'.

The 2015 Regulations permit an insurance company to outsource any activity to a third party, provided that appropriate oversight and control is retained by the insurance company over the relevant activity. Where the outsourced activity

constitutes a critical and important function of an insurance undertaking, the Central Bank must be notified before outsourcing the activity. Critical or important functions are defined by EIOPA as those that are 'essential to the operation of the undertaking as it would be unable to deliver its services to policyholders without the function or activity'. An undertaking is also required to inform the Central Bank of any subsequent material developments with respect to any such outsourced function or activity.

Insurance undertakings are required to have written outsourcing policies in place which clearly define the duties and responsibilities of both parties. In addition, an outsourcing agreement must ensure effective access for the insurer, its external auditor and the Central Bank to all information on the outsourced functions and activities and provide permission to conduct on-site inspections. Any outsourcing must not:

- materially impair the undertaking's system of governance;
- cause an undue increase in operational risk;
- impair the supervisory monitoring of compliance with obligations; or
- undermine the continuous and satisfactory service to policyholders.

While an insurer can outsource freely to an entity located in another EU / EEA Member State, the Central Bank has been reluctant in the past to authorise an undertaking which plans to outsource a large proportion of its activities to a third country.

15. How are sales of insurance supervised or controlled?

Insurance undertakings are required to comply with the general good requirements, which regulate the manner in which insurance undertakings may sell and market insurance products to consumers in Ireland. These general good requirements for the sale of insurance are set out in the:

(a) Central Bank's Consumer Protection Code;
(b) Consumer Protection Act 2007;
(c) Sale of Goods and Supply of Services Act 1980;
(d) European Communities (Unfair Terms in Consumer Contracts) Regulations 1995; and

(e) European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004.

Where these requirements are not complied with, entities and their management should expect vigorous investigation and enforcement action by the Central Bank.

16. Are consumer policies subject to restrictions? If so, briefly describe the range of protections offered to consumer policyholders.

Consumer policies are not subject to any particular restrictions by the Central Bank. However, there are a broad range of protections afforded to consumers of financial products under the Consumer Protection Code (the “CPC”). The CPC applies to financial services providers regulated either by the Central Bank or by a regulator in another EU or EEA Member State, when providing services to consumers in Ireland on a freedom of establishment or freedom of services basis.

Under the CPC, regulated entities are required to act honestly, fairly, and in the best interests of the consumer and the integrity of the market. Firms are obliged to obtain certain information from a consumer prior to providing a product or service, in order to assess the suitability of a product for the individual consumer. This includes information on the consumer’s needs and objectives, personal circumstances, financial situation and where relevant attitude to risk. The CPC also sets out the obligations on financial service firms when dealing with consumers in respect of advertising, contacting consumers, claims processing, handling of errors and complaints, maintaining records and providing information on products. In addition, regulated entities are required to disclose certain information to consumers in respect of conflicts of interest and any remuneration arrangements in place.

Consumer policies are strongly protected under the CPC and regulated entities may be subject to administrative sanctions by the Central Bank for any failure to comply with its provisions.

Are the courts adept at handling complex commercial claims?

17.

Yes. In Ireland, the jurisdiction in which court proceedings are brought depends on

the monetary value of the claim. Claims with a monetary value in excess of €75,000 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 1 week to 4 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 €1,000,000; 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.

18. Is alternative dispute resolution well established in the jurisdiction?

Yes.

Mediation
Mediation is the most common form of ADR for insurance disputes in Ireland. The courts cannot compel the parties to mediate disputes; however, in the High Court and Circuit Court, a judge may adjourn legal proceedings on application by either party to the action, or of its own initiative, to allow the parties to engage in an ADR process. When the parties decide to use the ADR process, the rules provide that the courts may extend the time for compliance with any provision of the rules. A party failing to mediate following a direction of the court can be penalised as to costs.

Arbitration
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.

Since 8 June 2010 the Arbitration Act 2010 (2010 Act) has applied the United Nations Commission on International Trade Law (UNCITRAL) Model Law to all Irish arbitrations. The 2010 Act brought increased finality to the arbitral process by reducing the scope for court intervention or oversight and providing a more limited basis for appealing awards and decisions than was previously available.

The High Court has powers for granting interim measures of protection and assistance in the taking of evidence, although most interim measures may now also be granted by the arbitral tribunal under the 2010 Act. Once an arbitrator is appointed and the parties agree to refer their dispute for the arbitrator's decision, then the jurisdiction for the dispute effectively passes from the court to the arbitrator.

A contract that does not contain a written arbitration agreement is not arbitrable and is specifically excluded from the application of the 2010 Act. The arbitration agreement must be in writing whether by way of a clause in the substantive contract or by way of separate agreement. While Section 2(2) of the 2010 Act stipulates that such clauses should be in writing, this provision has been given a broad interpretation to include an agreement concluded orally or by conduct as long as its content has been recorded in writing.

Article 34 of the 2010 Act deals with applications to the court for setting aside an award. The grounds on which a court can set aside an award are extremely limited and correspond with those contained in Article V of the New York Convention, which requires the party making the application to furnish proof that:

(a) a party to the arbitration agreement was under some incapacity or the agreement itself was invalid;

(b) the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;

(c) the award deals with a dispute not falling within the ambit of the arbitration agreement;

(d) the arbitral tribunal was not properly constituted; or

(e) The award is in conflict with the public policy of the state.

19. What are the primary challenges to new market entrants?

The Central Bank requires the substance and “heart and mind” of an Irish-authorised insurance undertaking to be maintained in Ireland in order to ensure compliance with all applicable legal and regulatory requirements. As such, the primary challenge facing insurers and reinsurers seeking to establish in Ireland is demonstrating real substance. In considering an application for authorisation, the Central Bank will need to be satisfied that the key personnel responsible for the strategic decision making of the undertaking will be located in Ireland. There are no guidelines in terms of the specific numbers required by the Central Bank, as this will generally depend on the nature, scale and complexity of the business.

20. To what extent is the market being challenged by digital innovation?

In many ways, digital innovation has yet to come to the fore in the insurance market. However, the challenges created by such innovation are increasingly relevant. The growing sophistication of digital technology gives rise to cyber-security threats and risk of data breaches. The nature of the insurance market itself is also being challenged by digital innovation. We are seeing an increasing trend towards risk prevention rather than insuring against risk. Advanced technology has created safer cars and smarter devices which can prevent household damage, thereby mitigating risk and reducing premiums. Insurers will have to adapt to the technological needs of the market or risk being left behind.

In order to rise to the challenges created by digital innovation, insurers must seek to create innovative products, which protect against data loss or cyber damage. In addition, the introduction of automation into the workplace will change the nature of many roles in the insurance industry and the market will have to adapt by reducing administrative and operational support, in favour of skilled resources such as analytics and software development.

21. Over the next five years what type of business do you see taking a market lead?

The market for cyber insurance is growing and is seen as one of the biggest growth areas in the insurance industry globally. According to industry data, the global cyber market was estimated to be worth around $2.4bn in premiums in 2014. Fitch believes cyber insurance premiums could increase to $20bn by 2020.

Cyber insurance is still a relatively new product on the Irish market however it has become more popular in recent times and a number of insurers are now offering new cyber products in Ireland as a result. It is expected that cyber will be a growth area in Ireland in the coming years.

In our view, the market leaders over the next five years will be those insurance companies that branch away from the traditional insurance business model towards a more technology-friendly operating model. In today's digital economy, consumers want instant access to relevant and simplified information and this extends to complex insurance products. Embracing the benefits that technological advances can offer to the design and distribution of innovative insurance products will enable progressive companies to meet the needs and expectations of consumers in a more effective and efficient manner.