Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Insurance & Reinsurance

Ireland
Matheson

chambers.com

2019

Law and Practice

Contributed by Matheson

Contents

1. Basis of Insurance and Reinsurance Law p.4
- 1.1 Sources of Insurance and Reinsurance Law p.4

2. Regulation of Insurance and Reinsurance p.4
- 2.1 Regulatory Bodies and Legislative Guidance p.4
- 2.2 The Writing of Insurance and Reinsurance p.5
- 2.3 The Taxation of Premium p.5

3. Overseas Firms Doing Business in the Jurisidiction p.5
- 3.1 Overseas-Based Insurers or Reinsurers p.5
- 3.2 Fronting p.7

4. Transaction Activity p.7
- 4.1 M&A Activities Relating to Insurance Companies p.7

5. Distribution p.7
- 5.1 Distribution of Insurance and Reinsurance Products p.7

6. Making an Insurance Contract p.8
- 6.1 Intermediary Involvement p.8

7. Alternative Risk Transfer p.8
- 7.1 ART Transactions p.8

8. Interpreting an Insurance Contract p.9
- 8.1 Contractual Interpretation and Use of Extraneous Evidence p.9
- 8.2 Warranties p.9
- 8.3 Conditions Precedent p.9

9. Disputes p.9
- 9.1 Disputes Over Coverage p.9
- 9.2 Disputes Over Jurisdiction and Choice of Law p.10
- 9.3 Litigation Process p.10
- 9.4 The Enforcement of Judgments p.10
- 9.5 Alternative Dispute Resolution p.10
- 9.6 Penalties for Late Payment of Claims p.11

10. InsurTech p.11
- 10.1 InsurTech Developments p.11
- 10.2 Regulatory Response p.12

11. Emerging Risks and New Products p.12
- 11.1 Emerging Risks p.12
- 11.2 New Products or Alternative Solutions p.13

12. Recent and Forthcoming Legal Developments p.14
- 12.1 Developments Impacting on Insurers or Insurance Products p.14

13. Other Developments p.16
- 13.1 Additional Market Developments p.16

Matheson was established in 1825 in Dublin, Ireland and with offices in Cork, London, New York, Palo Alto and San Francisco, more than 700 people work across Matheson's six offices, including 96 partners and tax principals and over 470 legal and tax professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Our clients include over half of the world's 50 largest banks, 6 of the world's 10 largest asset managers, 7 of the top 10 global technology brands and we have advised the majority of the Fortune 100.

Our expertise is spread across more than 30 practice groups, including Finance and Capital Markets, Corporate, International Business, Mergers and Acquisitions, Technology and Innovation, Intellectual Property, Insolvency and Corporate Restructuring, EU and Competition, Asset Management and Investment Funds, Employment, Pensions and Benefits, Commercial Real Estate, Litigation and Dispute Resolution, Healthcare, Insurance, Tax, Private Client, Energy and Infrastructure, FinTech and Life Sciences. We work collaboratively across all areas, reinforcing a client first ethos among our people, and our broad and interconnected spread of industry and sectoral expertise allows us to provide the full range of legal advice and services to our clients.

Authors

Sharon Daly heads the Commercial litigation insurance team which is described by legal directories as "second to none", with Sharon being personally commended for her ability to respond creatively to complex issues. Sharon and her team have been involved in some of the most significant commercial litigation before the Irish courts in the last ten years, including defending a major financial institution in a multi-billion, multi-jurisdictional dispute arising from investment in Bernard L. Madoff's business. Sharon also acted for insurers in the largest property damage dispute to come before the Irish courts in relation to the liability of hydro-electrical dams and flood damage arising therefrom. Sharon and her team advise a wide range of clients on insurance issues including policy wordings, coverage, policy disputes, defence of large complex claims and subrogated recovery actions. As a member of Matheson's Brexit Advisory Group and a council member of the Dublin Chamber of Commerce, Sharon is working with Government and other key stakeholders to encourage UK-based multinationals to relocate to Dublin in order to facilitate the growth of Dublin as a leading global business centre, building on Brexit and beyond.

Darren Maher is a partner and head of financial institutions group at Matheson. He has advised a wide range of leading domestic and international financial institutions on all aspects of financial services law and regulation including establishment and authorisation, development and distribution of products, compliance, corporate governance and reorganisations including cross-border mergers, schemes of arrangement, portfolio transfers and mergers and acquisitions. Darren is a member of the firm's Brexit Advisory Group and is advising a significant number of the world's leading financial services firms on their plans to establish a regulated subsidiary in Ireland in order to maintain access to the EU single market following the United Kingdom's exit from the EU. Darren frequently publishes articles in financial services publications.

April McClements is a Partner in the insurance and dispute resolution team. April is a commercial litigator and specialises in insurance disputes. April advises insurance companies on policy-wording interpretation, complex coverage disputes (in particular relating to financial lines policies), D&O claims, professional indemnity claims, including any potential third-party liability, and subrogation claims. April manages a significant number of professional indemnity claims for professionals, including insurance brokers, architects and engineers, for a variety of insurers. April has been involved in obtaining High Court approval for various insurance portfolio transfers and/or schemes of arrangement arising from reorganisations and/or mergers and acquisitions involving life, non-life and captive insurers. April also works in the area of general commercial litigation with a particular focus on contractual disputes, most of which are litigated in the Commercial Court. She is also a strong advocate of ADR and has acted for clients in mediations and arbitration.

1. Basis of Insurance and Reinsurance Law

1.1 Sources of Insurance and Reinsurance Law

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

The Marine Insurance Act 1906 (the "Marine Insurance Act") remains the most recent codification of the general principles of insurance law applicable in Ireland. There are a number of forms of insurance that are compulsory under statute in Ireland, for example third party motor insurance and professional indemnity cover for certain professionals, such as lawyers and medical practitioners.

There is no Irish equivalent to the Insurance Act 2015, which was issued in the UK. However, the Consumer Insurance Contracts Bill 2017 (the "2017 Bill") has been proposed, which seeks to reform the area of consumer insurance law. There is currently, however, no clear timeline as to the implementation of the Bill.

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

When dealing with a "consumer," the insurer must also comply with the Central Bank of Ireland (the "Central Bank") Consumer Protection Code 2012 (CPC) and the Consumer Protection Act 2007. Under the CPC, "consumer" is quite broadly defined, including individuals and small businesses with a turnover of less than EUR3 million (provided that these persons are not a member of a group having a combined turnover greater than EUR3 million). Insurance contracts, and the marketing and selling of insurance products to consumers, must also be compliant with the terms of the Sale of Goods and Supply of Services Act 1980.

2. Regulation of Insurance and Reinsurance

2.1 Regulatory Bodies and Legislative Guidance

Ireland has a strong and efficient risk-based prudential regulatory framework, which is internationally respected and focuses on the application of the proportionality principle. The Central Bank has primary responsibility for the prudential supervision and regulation of insurance and reinsurance undertakings in Ireland. It carries out its role through monitoring and ongoing supervision and issues standards, policies and guidance, with which (re)insurance undertakings are required to comply.

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

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

The Central Bank's administrative sanctions regime provides it with a credible enforcement tool, and acts as an effective deterrent against breaches of financial services law.

The Central Bank's supervisory framework "Probability Risk and Impact SysteM" (PRISM) is a risk-based framework that categorises regulated firms by the potential impact of their failure on the economy and the consumer. Under PRISM (re)insurance undertakings are allocated a risk rating on a scale of high (including ultra-high), medium-high, medium-low or low. PRISM recognises that the Central Bank does not have infinite resources, and selectively deploys supervisors according to a firm's risk rating. Although relatively few in number, high-impact firms are recognised as the most important for ensuring financial and economic stability and are therefore subject to a higher level of supervision.

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

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

EU Directive 2009/138/EC ("Solvency II") introduced a common regulatory framework for EEA insurance and reinsurance undertakings and was transposed into Irish law by the European Union (Insurance and Reinsurance) Regulations 2015 (the "2015 Regulations"). The 2015 Regulations impose harmonised capital and solvency requirements, valuation techniques and governance and reporting standards on (re)insurance undertakings.

The 2015 Regulations also impose certain restrictions on shareholders of (re)insurance undertakings, as the Central Bank will not grant an authorisation to an undertaking if it isn't satisfied as to the suitability, fitness and probity of "qualifying" shareholders. For the purposes of the 2015 Regulations, a qualifying shareholding means a direct or indirect holding in an undertaking that represents 10% or more of the capital or voting rights of the undertaking, or that makes it possible to exercise a significant influence over the management of the undertaking.

The European Union (Insurance Distribution) Regulations 2018 (the "IDR") transposed the Insurance Distribution Directive 2016/97 ("IDD") into Irish law, with effect from 1 October 2018. The IDD is a minimum harmonising directive for the distribution of insurance and reinsurance products within the EU, with the aim of facilitating market integration and enhancing consumer protection. The IDR aims to enhance consumer protection and ensures a level playing field across the sector by extending the scope of application to include all participants in the distribution of insurance products. The IDR seeks to identify and mitigate conflicts of interest, particularly in the area of remuneration, and introduces increased transparency and conduct of business requirements.

2.2 The Writing of Insurance and Reinsurance

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

2.3 The Taxation of Premium

Insurance undertakings and intermediaries authorised by the Central Bank or authorised in another EU / EEA Member State carrying on business in Ireland on either a branch or freedom of services basis are required to comply with certain Irish general good requirements, including the CPC. The CPC contains general and specific provisions relating to insurance, including requirements relating to premium handling and contact with consumers – information that must be provided to consumers before entering into a contract for a product or service, records, errors, rebates and claims processing. Persons carrying out a "controlled function" on a professional basis on behalf of financial service providers are also expected to satisfy the minimum professional knowledge and competency requirements set out in the Minimum Competency Code and Regulations 2017 (the "MCC") when dealing with Irish consumers. A consumer includes natural and legal persons with an annual turnover of less than EUR3 million.

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

- Non-life policies of insurance attract stamp duty of EUR1 per policy;
- Non-life policies of insurance also attract a levy of 3% on the gross amount received by an insurer in respect of certain non-life insurance premiums. An additional 2% levy will be introduced in respect of motor insurance;
- Life assurance premiums attract a levy of 1% of premiums; and
- Health insurance attracts levies ranging from EUR95 to EUR350, depending on the type of cover.

3. Overseas Firms Doing Business in the Jurisidiction

3.1 Overseas-Based Insurers or Reinsurers

Overseas-based insurers and reinsurers licensing of (re) insurance companies

Undertakings wishing to carry on (re)insurance business in Ireland must obtain authorisation from the Central Bank or another EU regulator through the "single passport" regime.

The authorisation process involves an applicant making an application for authorisation to the Central Bank, pursuant to the 2015 Regulations. As part of this process, a preliminary meeting is held with the Central Bank and then an application is submitted, together with supporting documentation.

The Central Bank has established a process for dealing with applications for authorisation of (re)insurance undertakings. It has published both a checklist for completing and submitting applications for authorisation under the 2015 Regulations (the "Checklist"), and a guidance paper to assist applicants. The application comprises the completed Checklist and a detailed business plan, together with supporting documents (collectively, the "Business Plan").

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 ("ORSA");
- financial information and projections;

- capital requirements and solvency projections; and
- consumer Issues (eg MCC and 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, involving contact and consultation with the Central Bank after an application is formally submitted. During the review process, it will typically request additional information and documentation, and is likely to have comments on certain features of the proposal. The 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," 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-licencing requirements have been met. Throughout this process, the applicant will typically meet with Central Bank representatives on a number of occasions and the Central Bank may request additional information. From submission of the formal application to the Central Bank through to receipt of the final authorisation takes in the region of four to six months. The Central Bank does not currently charge a fee for licence applications.

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

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

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

Freedom of establishment or freedom of services basis

(Re)insurance undertakings authorised in one EU/EEA member state may carry on business in Ireland on a freedom of establishment basis, through a local branch or operate in Ireland on a freedom of services basis, provided that the relevant notifications are made by their home state regulators to the Central Bank. Passporting undertakings are required to comply with the Irish general good requirements, which include the CPC and MCC when dealing with Irish consumers.

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

Establishing a third-country insurance branch in Ireland
The 2015 Regulations facilitate a non-EEA insurer establishing a branch in Ireland (a "Third Country Branch"), subject to fulfilment of specific regulatory requirements. The 2015 Regulations impose standalone capital requirements on a third-country branch and require the third-country branch to hold assets in Ireland of an amount equal to at least 50% of the absolute floor prescribed in the 2015 Regulations in respect of the Minimum Capital Requirement (currently EUR3.7 million) and deposit 25% of that amount with the Irish High Court as security. The local substance requirements for a Third Country Branch will depend on the nature, scale and complexity of the operations of the branch in Ireland. The Central Bank will expect an appropriate number of senior management in Ireland to demonstrate a sufficient level of local oversight and control. As a minimum, the applicant will be required to appoint a branch manager and establish a branch management committee in Ireland, with day-to-day responsibility for corporate governance of the branch. However, it should be noted that to date no Third County Branches have been authorised in Ireland and the Central Bank only recently published guidelines and checklists for third country insurers applying for authorisation of a branch in Ireland.

Significantly, a Third Country Branch does not have the right to passport into other EU/EEA jurisdictions like an EEA subsidiary and, accordingly, is only permitted to write business in the jurisdiction in which it is established. Therefore, a Third Country Branch is not suitable for third country insurers seeking to write business across the EU/EEA. Within the current context of Brexit, establishing a Third Country Branch may not represent a comprehensive solution for UK insurers seeking to maintain access to the Single Market,

and establishing an EEA-authorised subsidiary has, therefore, been the preferred option for many clients.

3.2 Fronting

As a matter of policy, the Central Bank currently does not permit 100% reinsurance arrangements.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies

In 2018, there has been continued interest in the run-off insurance market, with many deals involving the transfer of closed books of business through a share/asset purchase agreement and subsequent court-authorised port folio transfer. It is anticipated that the interest in run-off will remain due to the presence of a number of aggregators in the Irish market.

Looking forward, in the context of insurance M&A, the dis ruptive impact of InsurTech may result in increased M&A activity as the market evolves and insurers are obliged to invest in resources that enhance scale, growth and efficiency. Many InsurTech start-ups are extremely valuable, and it is likely that there will be acquisitions in this subsector.

As the March 2019 deadline for the exit of the UK from the EU approaches, many financial services providers are in the process of establishing subsidiaries and third country branches in Ireland in order to maintain access to the Single Market and mitigate the potential loss of passporting rights post-Brexit. Authorisation-related activity since the Brexit vote has sharply increased. It is estimated that over 50 UK-based insurance undertakings and intermediaries have chosen to relocate to Ireland as a consequence of Brexit. Several overseas (re)insurance groups have also chosen Ireland as the headquarters for their European business, including Beazley Group, XL Capital, Willis Group Holdings and Zurich. Oth ers have restructured to underwrite their "Europe ex-UK" business from Ireland.

Overall outbound M&A activity in the first half of 2018 was slightly up on Q1 2017. While the volume of transactions was down to 41, the value of those transactions has increased hugely (from EUR717 million to EUR3.5 billion). Ireland also set a record for the value of inbound deals in the first half of 2018, with deals worth EUR70.6 billion targeting Irish firms recorded. However, much of this (EUR67.1 billion) related to a single pharmaceutical deal. This healthy level of activity has been accompanied by strong economic growth. The European Commission estimates that the Irish economy grew by 7.8% in 2017 and anticipates further growth of 5.6% in 2018 and 4% in 2019.

In 2019, it is expected that macroeconomic issues and geopolitical risks such as divisions within Europe, concerns regarding the ongoing trade dispute between the US and China, the prospect of a hard border between Ireland and the UK and the potential for a surge in worldwide energy prices, will impact Ireland's M&A landscape. The full impact of Brexit on M&A remains to be seen, given the ongoing uncertainty over the exit deal.

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

The European Union (Insurance Distribution) Regulations 2018

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

Definition of insurance distribution

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

Certain activities are specifically excluded from the IDR's application, including claim management on a professional basis, loss adjusting, expert claim appraisal and the mere provision of information if no additional steps are taken by the provider to assist in the conclusion of an insurance or reinsurance contract. The IDR therefore clarifies that "introducing" is not considered a regulated activity under Irish law.

Impact of the IDR

Amongst other things, the IDR introduces enhanced information and conduct of business requirements for insurance distributors. Any person carrying on the activity of insurance distribution is required to comply with the requirements of the 2018 Regulations. However, "ancillary insurance intermediaries" are exempt from the application of the 2018 Regulations where certain conditions are satisfied.

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

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

The Investment Intermediaries Act 1995

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

Authorisation

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

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

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

6. Making an Insurance Contract

6.1 Intermediary Involvement

Typically an insurance intermediary is deemed to be acting on behalf of the customer at all times during the negotiation of an insurance contract, except when collecting premiums from a customer on behalf of the insurer. However, certain intermediaries act for and on behalf of an insurer as a tied insurance intermediary. Under the IDR, insurance distributors are required to act honestly, fairly and professionally in accordance with the best interest of their customers. This obligation applies irrespective of whether the intermediary is negotiating an insurance contract as an individual broker, or acting as a tied insurance intermediary of a particular insurer. The information and transparency requirements set out in the IDR require an intermediary to disclose whether it is representing the customer or acting for and on behalf of the insurer in good time before the conclusion of a contract. In addition, any remuneration received by an intermediary in relation to a contract must also be disclosed to the customer. Additional key ongoing requirements for insurance intermediaries 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.

7. Alternative Risk Transfer

7.1 ART Transactions

ART transactions are recognised as reinsurance transactions under the 2015 Regulations and are characterised by the Central Bank in a manner consistent with the Solvency II Regime. There has been a slow-down in recent years in the number of ART deals in Ireland. It appears the Central Bank has concerns relating to the viability of ART transactions and the potential risks for insurance carriers entering into these transactions, in particular in relation to basis risks. It is also not clear if ART transactions entered into by life insurers comply with the requirements to be "fully-funded." Significant growth in this area in Ireland is not expected in the coming years.

8. Interpreting an Insurance Contract

8.1 Contractual Interpretation and Use of Extraneous Evidence

General rules of interpretation that apply to normal contracts apply to contracts of insurance. The principles of construction as set out by Lord Hoffman in ICS v West Bromwich Building Society (1998) 1 W.L.R. 896 in the UK have been confirmed as applying to the interpretation of insurance contracts by the Irish Supreme Court in two judgments, Analog Devices v Zurich Insurance and ors (2005) 1 I.R. 274 and Emo Oil v Sun Alliance and London Insurance Company (unreported) (2009) IESC 2 with the court in Analog Devices referring to these principles of interpretation as "the modern principles of insurance."

The Irish courts consider the ascertainment of the meaning that the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract. This is sometimes referred to as the "matrix of fact." This includes anything that would have affected the way in which the language of the document would have been understood by a reasonable man or woman. However, a number of things are excluded from the admissible background, including the previous negotiations of the parties and their declarations of subjective intent. The meaning of the document is not the same as the particular meaning of the words; it is what the parties using those words against the relevant background would reasonably have been understood to mean. The courts apply the words' ordinary and natural meaning as it is assumed that people ordinarily do not make linguistic mistakes in formal documents. However, if it is clear from the "matrix of fact" and background that something has gone wrong with the language, judges can attribute to the parties the intention they clearly had.

The court will take an objective approach in determining what would have been the intention of reasonable persons in the position of the parties. Where a contractual term is ambiguous, the contra proferentem rule will apply and the interpretation less favourable to the drafter is adopted. The rule also applies to consumer contracts, and so the interpretation most favourable to the consumer will prevail. The Irish courts have not yet followed recent decisions in England that have arguably limited the application of the contra proferentem rule.

8.2 Warranties

There is no specific form of wording required to create a warranty. The word "warranty" is not required but may be considered as evidence of the intention to create a warranty. Further, a warranty may be express or implied, as set out in Section 33 of the Marine Insurance Act 1906. A warranty is treated differently to a contractual term in that it must be exactly complied with, whether it is material to the risk or not, and the insurer is discharged from liability from the date of breach of the warranty, but without any prejudice to any liability incurred before that date.

The Irish courts construe warranties strictly as breach entitles the insurer to repudiate liability even if the breach is not material to the loss. Due to the strict effect of breach, warranties are considered to be draconian. The LRC has recommended that warranties in consumer insurance contracts should be abolished and replaced with suspensive conditions, which is proposed in the Consumer Insurance Contracts Bill 2017.

8.3 Conditions Precedent

Certain terms of an insurance policy will be identified as "conditions" to that policy. The effect of a breach of a condition depends on whether the condition is a condition precedent to liability. Conditions precedent to liability relate to matters arising after a loss has occurred, most commonly in relation to notification. The Irish courts will generally not construe an insurance condition as a condition precedent unless it is expressed as a condition precedent, or the policy contains a general condition precedent provision. Breach of a condition precedent means that the insured cannot pursue their claim for indemnity, and the insurer does not have to demonstrate that it has suffered any prejudice.

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

9. Disputes

9.1 Disputes Over Coverage

An insurance contract will typically contain a dispute resolution clause, which requires the insured to raise the dispute with the insurer in the first instance. In the case of a consumer contract, there may be a clause requiring the dispute to be referred to the Financial Services Ombudsman. An insurance contract may contain an arbitration clause, or may stipulate another form of alternative dispute resolution (ADR), such as mediation. An exception applies to consumers where the claim is less than EUR5,000 and the relevant policy has not been individually negotiated, in which case the consumer is not bound by the arbitration clause.

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

9.2 Disputes Over Jurisdiction and Choice of Law

Where an insurance or reinsurance contract contains choice of forum, venue and applicable law clauses, these are generally recognised and enforced. However, in the case of an insured that is domiciled in an EU Member State, regard should be had to the following European regulations that may limit the application of these provisions:

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

9.3 Litigation Process

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

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

Proceedings in the Commercial Court are case managed, which aims to ensure that proceedings are progressed at a much quicker pace. Generally the length of time from entry to the Commercial Court list to hearing tends to be between one week and six months, depending on the time required for the hearing. A strong emphasis is placed on alternative dispute resolution and the court can provide for a stay of proceedings for up to four weeks to allow the parties to consider mediation.

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

Evidence

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

Costs

Costs typically will follow the event, whereby the loser pays. 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 cCourt should consider whether the winning party has succeeded on all grounds, rather than simply awarding full costs to the winning side.

9.4 The Enforcement of Judgments

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

9.5 Alternative Dispute Resolution

Insurance disputes may also be dealt with by way of ADR and it is common for insurance contracts to contain a clause requiring the dispute to be dealt with by ADR. In Ireland the most common forms of ADR are mediation and arbitration.

Arbitration

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

The Arbitration Act 2010 (the "2010 Act") repealed all previous arbitration legislation in Ireland and incorporated the UNCITRAL Model Law on International Commercial Arbitration. Under the 2010 Act, the decision of an arbitrator is binding on the parties and there is no means of appeal. Where parties have entered into a valid arbitration agreement the courts are obliged to stay proceedings.

Interim measures of protection and assistance in the taking of evidence may be granted by the High Court; however the arbitral tribunal may also grant most interim measures. Jurisdiction of the dispute is 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.

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

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

- A party to the arbitration agreement was under some incapacity or the agreement itself was invalid;
- The party making the application was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his or her 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.

Mediation

The Mediation Act 2017 ("Mediation Act") came into force on 1 January 2018. Under the Mediation Act, solicitors in Ireland must advise their clients of the merits of mediation as an ADR mechanism before proceedings are issued. The solicitor must swear a statutory declaration confirming that they have advised their clients on the benefits of mediation, which is filed with the originating document.

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

The Financial Services and Pensions Ombudsman

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

9.6 Penalties for Late Payment of Claims

There is no cause of action in damages for the late payment of claims in Ireland.

10. InsurTech

10.1 InsurTech Developments

Government bodies such as Enterprise Ireland (EI) and the Industrial Development Authority Ireland (IDA), which work in tandem to attract and support foreign direct investment in Ireland, have recently been promoting Ireland as an excellent destination for companies in the InsurTech industry, as there are many advantages to locating here. Ireland is the world's second largest exporter of software, and 105,000 educated, skilled and multilingual employees work in the technology sector. Over 212,000 members of the Irish workforce work in digitally-intensive sectors.

Eleven of the top 15 global insurers are located in Ireland. The Irish Government invests EUR700 million annually in research and development in strategic areas such as software, data analytics, machine learning and cyber security.

InsurTech offers those operating within Ireland's domestic and international insurance industry the possibility to take advantage of new and emerging opportunities. Historically, it has received markedly less attention and investment in comparison to Fintech; for example, in 2015 InsurTech received EUR2.6 billion in investment compared to some EUR20 billion for Fintech. Despite this, InsurTech provides insurers the opportunity to innovate and grow by providing increasingly sophisticated methods to engage and serve customers in a unique and distinctive fashion. There were 66 InsurTech investment deals reordered in the first quarter of 2018, seven of which were valued at over EUR30 million. It is notable that the average value of deals has increased, showing that investors are becoming more inclined to invest in more established companies targeting aggressive expansion.

The EI and IDA are calling for InsurTech start-ups to receive funding as part of the government's financial strategy, the IFS2020. This strategy seeks to accelerate the growth of high potential companies with a focus in areas of InsurTech such as blockchain, the internet of things (IoT) and data analysis. At present, there are approximately 120 indigenous Fintech companies in Ireland, and many insurers such as AXA and Allianz have entered into industry carrier-start-up partnerships. These start-ups leverage technologies in a manner that delivers personalised and unique policies tailored to the consumer. Artificial intelligence, IoT and analytics are the three chief InsurTech areas driving the disruption, with the number of deals pertaining to this trio of technologies tripling between 2012 and 2016. Collectively they accounted for nearly 56% of all 2016 InsurTech deals. These technologies have the potential to compress the insurance value chain

or better equip insurers, reinsurers and brokers by more efficiently identifying and quantifying risk through the use of increasing sophisticated data models.

With the large number of diverse domestic and global InsurTech companies (it is estimated that there may be 1,500 InsurTech companies worldwide), insurers are quickly beginning to understand that InsurTech technology is compatible with industry processes and can complement their books of business. Innovative IoT technology and the proliferation of smart devices have allowed insurers to delineate risk more accurately by relying on new real-time sources of information.

The growing presence of InsurTech in the insurance industry looks set to continue, with global InsurTech investment in the first six months of 2018 amounting to over 85% of 2017's total funding. The European Insurance and Occupational Pensions Authority has organised a series of InsurTech roundtable talks, which further highlights the importance and emphasis being placed on InsurTech. Domestically, the future of InsurTech looks bright as Insurance Ireland, the organisation representing 95% of Ireland's domestic market, is currently liaising with Massachusetts Institute of Technology to examine innovative new approaches to blockchain technology as well as forming part of the IDA Blockchain Expert Group.

10.2 Regulatory Response

At a European level, EIOPA has developed an InsurTech Task Force (ITF) with responsibility for the implementation of EIOPA's core digitalisation activities, in order to establish efficient and effective supervisory practices. The ITF will play a part in the convergence on supervision of algorithms and will also explore the benefits and risks that arise from the use of blockchain and smart contracts for (re)insurance and consumers.

In Ireland, the Central Bank is responsive to the challenges posed by the regulatory treatment of financial innovations, and enjoys a reputation as a robust yet business-friendly regulator. The Central Bank acknowledges the need to strike the appropriate balance between encouraging innovation-related entry to the market and ensuring that new entrants are sufficiently ready to fulfil all their regulatory obligations in relation to financial stability and consumer protection. It is cognisant of the requirement to keep abreast of the changing technological environment and has committed significant resources to improving its data architectures and establishing quantitative analytical teams in its banking, insurance and markets directorates.

In addition to these favourable domestic conditions, InsurTech collaborations and start-ups have an opportunity to flourish in Ireland as it is unlikely they will be hindered by excessive regulation. Philip Lane, the Governor of the Central Bank, has acknowledged that InsurTech is transforming into a significant part of the financial system, and is "open-minded" about extending regulations to it. This openness and willingness to engage with fintech and InsurTech start-ups is not unique to the Governor of the Central Bank, with past Director of Enforcement, Peter Oakes, founding Fintech Ireland to promote Ireland as a hub for fintech companies.

The Central Bank issued guidance relating to IT and cyber-security risks in 2016, which highlighted a variety of emerging threats. In addition to the recent prolific hackings and ransomware attacks, the Central Bank also drew attention to deficiencies regarding IT outsourcing and IT governance.

11. Emerging Risks and New Products

11.1 Emerging Risks

"Emerging risks" is the name given to new and evolving risks that are difficult for insurers to assess and typically carry with them a high degree of uncertainty in regards to their impact, probability and amount of losses expected. Cyber risk and longevity risk appear to be the most formidable emerging risks in Ireland.

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

Globally, there is an increasing trend towards risk prevention rather than insuring against risk. Advanced technology has created safer cars, drones, driverless cars and smarter devices that can prevent household damage, thereby mitigating risk and reducing premiums. Insurers are aware that they need to adapt to the technological needs of the market or risk being left behind.

Longevity risk, on the other hand, is the potential risk of an individual living longer than expected. The financial implications of exponentially increasing lifespans are colossal. If the average lifespan were to increase three years more than expected, the cost of supporting such a vast aging population would increase by 50%. As the mortality risk looks set to continue to decrease, thanks to improving medical advances, it is clear that understanding the risk associated with longevity is of crucial importance to insurers. The IMF has even highlighted the grave implications of longevity risk for global fiscal stability in its Global Financial Stability Report.

Considering how quickly life expectancy is increasing, projecting future liabilities based solely on data extrapolated from the past is imprecise at best. To address this problem, certain companies have created insurance subsidiaries to run their pensions schemes who would then reinsure its longev-

ity risk with a reinsurer; this is expected to be a common trend in the future. From a reinsurance perspective, buying this longevity risk may be an attractive financial transaction as it lowers mortality risk and thereby helps balance life insurance risks. However, the IMF has stated that the longevity risk should be appropriately shared between insurers and governments, as insurers and reinsurers alone may be constrained by capital. The 2012 IMF report urged governments to enhance regulation and provide more accurate data in order to facilitate the development of a more efficient market for longevity risk transfer.

Increasing innovation in the insurance sector presents a challenge to the regulator, as the emergence of new technologies presents both benefits and risks to the consumer.

The Central Bank is cognisant of its need to understand the digitalisation of financial services and the new and innovative products and services that have been offered or are in development by regulated firms in the Irish market, and the impact of these products/services on consumers in terms of risk.

The Central Bank published cross-industry guidance in respect of IT and cybersecurity risks in 2016, which highlighted a variety of emerging threats, focusing on four areas – Governance, Risk management, Cyber security and Outsourcing. The guidance focuses on the areas that the Central Bank deems most pertinent. This guidance notes that the risks associated with IT and cybersecurity are a key concern for the Central Bank, given their potential to have serious implications for prudential soundness, consumer protection, the reputation of the Irish financial system and financial soundness. The Central Bank also has a dedicated IT risk inspection team, which has been operational since April 2015. In addition to the recent prolific hackings and ransomware attacks, the Central Bank also drew attention to the deficiencies regarding IT outsourcing and IT governance. It is of the opinion that cybersecurity risks are exacerbated by boards not monitoring service levels or performance of service providers, as well as inadequate due diligence being carried out to ensure robust agreements. The Central Bank has stated that these inadequate polices must be addressed, and that work is required to improve cyber resilience. The difficulty in mitigating and insuring cybersecurity risk lies in the fact that it is a new and emerging catastrophe risk, meaning that insurers are struggling to understand the total economic scope of such a cyber-attack. Furthermore, as a result of the non-tangible nature of these attacks, it is often difficult to quantify and collect complete data, which in turn makes it harder to aggregate information, delineate risk and identify trends. However, the Central Bank's issued guidance outlines the steps that can be taken to protect against this risk and these steps will form the basis for its future supervisory work. The steps are broadly concentrated around risk and governance, IT strategy and management, as well as service delivery.

11.2 New Products or Alternative Solutions Addressing the Emerging Risks

Cyber insurance is still a relatively new product on the Irish market, but it has become more popular in recent times and a number of insurers are now offering new cyber products in Ireland. PwC reported that 71% of Irish insurance CEOs believe that the majority of businesses will have cyber-insurance in five years. It is expected that cyber will be a growth area in Ireland in the coming years.

Driverless Cars/Autonomous vehicles

Driverless cars/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 published the draft Vehicle Technology Aviation Bill in February 2017 which did not make it through Parliament, but its provisions will be brought forward in the Automated and Electric Vehicles Act 2018, which received Royal Assent on 19 July 2018. The Act extends compulsory motor insurance to cover automated vehicles. While this has not yet been considered by the Irish legislature in any meaningful way, it can be anticipated that it is likely to follow the UK approach, given similarities between the existing road traffic frameworks in both countries.

Drones

Drones are another 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) 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 collisions with persons or property, and it will be a criminal offence to operate a drone for commercial use without insurance. There is currently no clear timeline as to the implementation of the Bill. As this market continues to grow, it seems inevitable that drone insurance will be a growth area.

Blockchain

One example of innovative IT causing disruption in the insurance industry is the use of blockchain. These blockchains form part of a digitalised ledger, which is cryptographically secure and acts as a transparent and incorruptible source of data that can be shared amongst insurers. This may aid fraud detection and risk prevention as it provides a complete historical record to eliminate errors and allow the verification of both customers and policies. Essentially, the use of blockchains will improve efficiency and enhance customer experience by providing superior data quality and security. Recognising the value in this innovative form of IT, a number of insurers have launched the Blockchain Insur-

ance Industry Initiative B3i, which seeks to use blockchain technology to improve industry processes. These insurers – including Allianz, Munich Re, Swiss Re and Zurich – are collaborating to improve the impact blockchain may have across the insurance landscape. Another consortium of nine major European banks has established a blockchain initiative based in Dublin. The We.trade group includes Deutsche Bank, HSBC and Santander, and has recently completed a number of cross-border financial trades using its blockchain platform. It is envisioned that the insurance industry will follow.

Further blockchain development will lead to a marked increase in the development of the IoT, which allows for devices to be connected to a variety of products to collect data to inform usage-based insurance or provide more accurate models. Previously, large data centres were required to store, process and collect the data extracted from this network of devices. However, blockchain allows the devices to communicate securely on a peer-to-peer network in an inexpensive and efficient manner. This data is hugely valuable to insurers, and IoT devices are currently being employed by motor insurers such as Progressive Snapshot, who use the devices to gather data regarding driving times, distances and speed to more accurately update their usage-based insurance policies.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

Litigation funding

The Irish Supreme Court has called on the government in the cases of both Persona Digital Telephony Ltd v Minister for Public Enterprise, Ireland (2017) IESC 27 and SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd (2017) 7 JIC 2507 to legislate for litigation funding. In 2013 the European Commission published recommendations that collective redress schemes be adopted by all Member States, which would allow for certain types of litigation funding. However, there is no discussion at this time of Irish legislation in this area. It is anticipated that once such legislation is implemented, this will result in a rise in litigation.

Brexit

The UK government confirmed that the UK will leave the European Union in March 2019 by the triggering of Article 50. Many financial services companies are establishing subsidiaries or headquarters in Ireland and other EU Member States in order to avoid loss of access to the Single Market or EU passporting rights. Ireland is a desirable location for the insurance industry, due to its highly educated English-speaking workforce, its well-known prudential regulation, common law jurisdiction and fast-track Commercial Court, as well as its proximity to the UK.

Insurance Distribution Directive

As set out above, the aim of the IDD is the facilitation of market integration and enhancement of consumer protection. The IDD regulates the distribution of (re)insurance products within the EU and strengthens protection for consumers by ensuring that insurance distributors act honestly, fairly and professionally and in accordance with the best interests of the customer. The IDD was transposed into Irish law by the European Union (Insurance Distribution) Regulations 2018, with effect from 1 October 2018 as already discussed.

Insurance (Amendment) Act 2018

The Insurance (Amendment) Act 2018 was signed on 24 July 2018. It amends and extends the law in Ireland relating to insolvent insurers. The Act clarifies the role of the Insurance Compensation Fund and establishes the Motor Insurers Insolvency Compensation Fund, also prescribing a rate of contribution towards that fund by insurers, currently set at 2% of gross written motor premiums.

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 (the "ML/TF Act") transposed the majority of the Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849) ("4AMLD") into Irish law on 14 November 2018. The ML/TF Act introduces a number of new legislative obligations for financial institutions and other designated persons, which will need to ensure their existing anti-money laundering and counter-terrorist financing policies and procedures are reviewed and updated to comply with the prescriptive requirements of the ML/TF Act. The ML/TF Act also sets out detailed requirements relating to business risk assessments to be conducted by designated persons and places the onus on financial institutions to assess the required level of client due diligence to be applied using a risk-based approach.

Consumer Insurance Contracts Bill 2017

As set out above, the 2017 Bill seeks to make a number of reforms to the area of consumer insurance law. The 2017 Bill is based on recommendations contained in a report by the Law Reform Commission in its report of Consumer Insurance Contracts 2015.

The Bill will apply to consumer insurance contracts only. One of the most significant reforms contained in the Bill is the recommendation that the existing pre-contractual duty of good faith be abolished and replaced with a statutory duty to answer carefully and honestly specific questions posed by an insurer that identify the material risks and relevant information actually relied on by the insurer.

The Bill also introduces the abolition of the concept of warranties in insurance contracts and their replacement with suspensive conditions; that is, on breach of the condition, the insurer's liability is suspended for the duration of the breach, but if the breach has been remedied by the time that a loss has occurred, the insurer must (in the absence of any other disclosure) pay any claim made.

Finally, the 2017 Bill introduces proportionate remedies where a consumer's non-disclosure, misrepresentation or other breach of contract is innocent or due to negligence and will allow the insured to claim damages for late payment of claims by insurers.

As mentioned above, there is currently no clear timeline for implementation of the 2017 Bill.

Financial Services and Pensions Ombudsman Act 2017

The Financial Services and Pensions Ombudsman Act 2017 ("FSPO Act") extends the limitation period for customers to bring a complaint against financial services providers including insurers, regarding long-term financial services. The limitation periods for bringing complaints is now either (i) six years from the date of the conduct giving rise to the complaint, (ii) three years from the date on which the person making the complaint first became or ought to have become aware of that act or conduct, or (iii) such longer period as may be permitted by the FSPO. A long-term financial service means (a) a financial service with a fixed term of five years and one month or more, or (b) life assurance.

The FSPO Act caps damages at EUR26,000 per annum where the subject of the complaint is an annuity, and EUR250,000 in respect of all other complaints.

Civil Liability Amendment Act 2017

Parts 1, 2 and 3 of the Civil Liability Amendment Act 2017 came into effect on 1 October 2018. Part 4 came into effect on 22 September 2018. At present, damages are awarded as a lump sum at the conclusion of an action; however, under the Act, the courts may make orders for periodic payment in catastrophic injury cases, and is of importance where insurers, or their insured, are meeting awards of damages. This allows a plaintiff to have their compensation paid over the course of their life, which limits the risk of them being undercompensated.

Mediation Act 2017

Under the Mediation Act 2017, legal practitioners are obliged to advise their clients to consider mediation before issuing court proceedings. The courts have the power to suspend proceedings to facilitate mediation on application of either party or on the court's own initiative.

GDPR

On 25 May 2018, the General Data Protection Regulation (EU) 2016/679 (the "GDPR") came into force with the effect of reforming EU data protection law. Prior to the introduction of the GDPR, EU law on data protection was regulated by the EU Data Protection Directive 95/46/EU (the "Directive"), which required national implementing legislation in the Member States and led to perceived fragmentation of EU data protection laws. The GDPR aims to change this by applying uniform principles to the processing of personal data across the EU. Many of the principles relating to the processing of personal data under the GDPR are broadly the same as those set out under the Directive. However, the GDPR enhances the data protection framework in a number of ways, including enhancing data subject rights, transparency, accountability and security requirements, greater penalties for breach, and extraterritorial effect in certain circumstances.

The Data Protection Act 2018 (the "DPA 2018") gives further effect to the GDPR and implements derogations permitted under the GDPR into Irish law, along with enhanced powers for the Data Protection Commission. The Data Protection Acts 1988-2003, which implemented the Directive into Irish law, are not repealed under the DPA 2018 in their entirety; however, their application is limited to the processing of data for purposes of national security, defence and the international relations of the state and processing under certain specified legislation, which fall outside the remit of the GDPR.

Litigation relating to the implementation and interpretation of the GDPR will likely arise. Notably also, the GDPR and the DPA 2018 permit individuals who consider that their rights under the GDPR have been infringed, to mandate certain not-for-profit organisations to bring a data protection action before the Irish courts on their behalf. Prior to this there was no provision under Irish practice and procedure for representative class actions.

Increase in regulatory litigation and previously statute barred claims

A further redress scheme for payment protection insurance (PPI) is underway in the UK following the Supreme Court decision of Plevin v Paragon Personal Finance Ltd (2013) EWCA Civ 1658. It is anticipated that there could be further Irish litigation surrounding the sale of PPI, particularly as the FSPO has extended the limitation period for FSPO claims for long-term financial products.

13. Other Developments

13.1 Additional Market Developments

Heightened regulatory scrutiny

The Central Bank is the first European regulator to take enforcement action against an insurer under Solvency II. The breaches in question related to solvency capital requirement calculations and filing incorrect solvency information with the Central Bank. This enforcement action and the absence of any grace period to comply with Solvency II sends a clear message to the industry that the Central Bank is an assertive and robust regulator, with a zero-tolerance approach to delivering on its mandate of protecting consumers and safeguarding financial stability.

Individual accountability

There is an increasing trend of proposed candidates being withdrawn from the PCF application process by their employer without achieving Central Bank approval. Since 2011, 58 applications for senior positions have been quietly withdrawn where the prospect of Central Bank refusal was raised. This year alone, 14 applications were withdrawn. This clearly indicates that persons previously employed in senior management of an insurer, which entered into regulatory or financial difficulties, will struggle to obtain Central Bank approval to act in another senior role in the industry going forward. This can have devastating consequences for an individual. The proposed introduction of an Individual Accountability Framework will bring clarity to the expected standards, regulatory responsibilities and accountability of senior management. The Central Bank has indicated that the public consultation period in respect of the proposal is not likely to be initiated until late 2019.

Increased use of technology

New challenges and opportunities are presented for insurers and professionals from the use of emerging technologies. Automation is on the rise in the insurance industry, which is likely to lead to litigation challenging the claims decisions made by automated claims processing systems and in relation to the interpretation of the specific GDPR Articles that confer rights on individuals in relation to automated decision-making.

There has been an increase in cyber-attacks in Ireland. This has resulted in an increase in Irish companies increasing the limits of their existing cover or taking out cyber cover, which is still a new product in the Irish market.

Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
Email: dublin@matheson.com
Web: www.matheson.com