THE

INSURANCE AND
REINSURANCE
LAW REVIEW

Fourth Edition

Editor

PETER ROGAN

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EDITOR’S PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant; it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with the emerging markets of Brazil, Russia, India and China developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Looking back on the past year, market estimates suggest that the insured losses flowing from the explosion at the Port of Tianjin in China may well exceed US$3 billion. The losses will arise on a wide variety of policies ranging from cargo, property and ports and terminals insurance through to product liability and business interruption. Those policies will be subject to a range of governing laws. It is likely that there will be complex issues to consider in relation to each of these types of coverage, both at the direct insurance and reinsurance levels. The US winter storm of January 2016 is predicted to be a multi-billion dollar loss event. In the UK, December 2015 was the wettest on record. Denial of access to homes and businesses was significant, and the insurance market is braced for the ensuing losses.

Events such as these test not only insurers and reinsurers but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. I hope that you find this fourth edition of The Insurance and Reinsurance Law Review of use in seeking to understand them and I would like once again to thank all the contributors.

Peter Rogan
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London
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I INTRODUCTION

Ireland has a thriving domestic and international insurance industry, which includes life, non-life, captive, reinsurance and intermediary activities. It is a leading jurisdiction for domiciling head-office insurers targeting the EU and European Economic Area (EEA) markets. In recent years, several overseas insurance and reinsurance groups have relocated to Ireland, including Beazley Group plc, XL Group, Willis Group Holdings plc and Zurich. Others have restructured to underwrite their ‘Europe ex-UK’ business from Ireland. Such groups are attracted to Ireland for a number of reasons, including Ireland’s low corporation tax rate of 12.5 per cent and well-established prudential regulation.

II REGULATION

i The insurance regulator

The Central Bank of Ireland (Central Bank) has responsibility for the authorisation and ongoing supervision of insurance and reinsurance undertakings and intermediaries.

The Central Bank’s supervisory role involves overseeing an undertaking’s corporate governance, risk management and internal control systems. It requires that insurance and reinsurance undertakings submit annual and quarterly returns on solvency margins and technical reserves. In addition, the Central Bank conducts regular themed inspections across the insurance and reinsurance industries.

The Central Bank also issues guidance in relation to the authorisation and ongoing requirements applicable to firms. These include the Corporate Governance Code for Credit Institutions and Insurance Undertakings, the Minimum Competency Code 2011 and the Consumer Protection Code 2012.

1 Sharon Daly, Darren Maher and April McClements are partners at Matheson.
ii Requirements for authorisation

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.

As to the process applied by the Central Bank when reviewing a licence application, the applicant first has an initial meeting with the Central Bank, after which the applicant must submit a written application and any supporting materials.

Once the applicant has satisfied the minimum capital requirements and any pre-licensing requirements set out in the authorisation in principle, the Central Bank issues a formal authorisation.

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 as compared with fully regulated reinsurers.

The key ongoing requirements for insurance and reinsurance providers are to:

- maintain authorisation;
- maintain technical reserves and the requisite solvency margin;
- submit quarterly and annual returns to the Central Bank;
- comply with the Corporate Governance Code for credit institutions and insurers;
- comply with the general good requirements set down in the Consumer Protection Code where insuring Irish resident entities; and
- ensure that all directors, executives and staff comply with the fitness and probity regime.

iii Regulation of individuals employed by insurers

Irish insurance and reinsurance undertakings must ensure that individuals holding certain positions comply with the Central Bank's Fitness and Probity Regime. Forty-six senior positions are prescribed as Pre-Approval Controlled Functions (PCFs), including the positions of director, head of finance and head of compliance. The prior approval of the Central Bank of Ireland is required before an individual can be appointed to a PCF, to ensure that a person performing a PCF has a level of fitness and probity appropriate to the performance of that particular function. The individual must complete an online individual questionnaire that is endorsed by the proposing entity and then submitted electronically to the Central Bank for assessment.

iv The distribution of products

Insurance and reinsurance services and contracts can be marketed or sold in Ireland to any person by insurers and reinsurers holding the relevant authorisation. However, insurance undertakings must comply with the general good requirements that regulate the manner in which insurance undertakings may sell and market insurance products to consumers in Ireland, as set out under the:

- Central Bank's Consumer Protection Code;
- Consumer Protection Act 2007;
- Sale of Goods and Supply of Services Act 1980;
- European Communities (Unfair Terms in Consumer Contracts) Regulations 1995; and
- European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004.
v Taxation of premiums

Non-life insurance companies

Non-life insurance business carried on by a company in Ireland is subject to the standard 12.5 per cent corporation tax rate. Profits for tax purposes are generally recognised in accordance with the applicable accounting treatment. However, a number of special rules apply to certain aspects of insurance businesses, including:

a realisation of non-financial investment assets;
b treatment of equalisation or catastrophe reserves; and
c taxation of captive insurers is broadly the same as non-captives.

Life assurance companies

Taxation of life assurance companies varies depending on when their life assurance business was contracted:

a Old-basis business (business contracted before 1 January 2001) is taxed on investment return as apportioned between policyholders and shareholders. The policyholders’ share is taxed on an annual basis at a 20 per cent corporation tax rate and the shareholders’ share is taxed at the standard 12.5 per cent corporation tax rate.

b For new-basis business (business contracted on or after 1 January 2001), no annual tax is imposed on the policyholders’ fund. Income and gains within the fund are permitted to grow tax-free throughout the term of the policy. An exit tax applies to payments to certain Irish policyholders. Non-Irish policyholders are exempt, once they provide a declaration of non-Irish residency. The rate of exit tax applicable on payments to certain Irish policyholders is 25 per cent where the policyholder is a company and makes an election, and 41 per cent in other cases. The insurer’s own profits from new-basis business are subject to the standard 12.5 per cent corporation tax rate. Special rules apply to calculation of these profits.

Reinsurance companies

Reinsurance business is taxed in essentially the same way as non-life insurance. Corporate profits are generally taxed at the standard 12.5 per cent corporation tax rate. The old-basis or new-basis rules applicable to life assurance companies do not apply to reinsurance companies.

SPRVs, however, can be established on an effectively tax-neutral basis (if they qualify under Section 110 of the Taxes Consolidation Act 1997). While SPRVs are liable to a 25 per cent corporation tax rate, the tax is applied on the company’s net taxable profit, which can be maintained at a minimal level through specific tax-deductible expenditure.

vi Proposed changes to the regulatory system

EU Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) aims to create a fully harmonised regime for the prudential regulation of insurance and reinsurance business in Europe. Solvency II has now been transposed into Irish law by the European Union (Insurance and Reinsurance) Regulations 2015 (Irish Regulations), which took effect on 1 January 2016. Accordingly, the initiation of the Solvency II regime is the reform that dominates the Irish insurance industry at this time. The primary purpose of the new regime is to introduce a risk-based approach to the supervision of insurers and reinsurers, with its principal objective being the protection of policyholders. In
transposing Solvency II, the Irish Regulations establish new capital requirements, valuation techniques and governance and reporting standards. The Irish Regulations also provide the Central Bank of Ireland with increased supervisory responsibilities.

vii Capital requirements

Insurance undertakings regulated by the Central Bank are required to meet the capital and solvency requirements set out under Solvency II and the Irish Regulations.

Irish-authorised insurance undertakings are required to establish and maintain technical provisions in respect of all insurance and reinsurance obligations towards policyholders and beneficiaries of insurance or reinsurance contracts. The value of technical provisions must correspond to the current amount an undertaking would have to pay if it were to transfer its insurance and reinsurance obligations immediately to another insurance undertaking. The Irish Regulations set out detailed provisions for the calculation of technical provisions.²

In accordance with the Solvency II regime, Irish-authorised insurance undertakings are also required to establish and maintain a further solvency margin as a buffer, to ensure their assets are sufficient to cover their liabilities. The Solvency II capital requirements are calculated based on the specific risks borne by the relevant insurer and are prospective in nature (i.e., each insurer must make the relevant calculations at least once year to cover both existing business and the 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).

An insurance undertaking may calculate the SCR based on the formula set out in the Irish 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 ensuring 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 identify and inform the Central Bank immediately of any deteriorating financial conditions. As such, the SCR and MCR provide for clear channels by which the Central Bank can monitor the financial state of insurance undertakings. In the event of a breach of the capital requirements, the Central Bank will employ an escalating ladder of supervisory intervention, allowing for 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 the free disposal of the assets of the undertaking and ultimately withdraw its authorisation.

² Regulations 83–101, Irish Regulations.
III INSURANCE AND REINSURANCE LAW

i Sources of law

Statute
In general terms, insurers retain significant freedom of contract; however, this has been tempered in recent years by legislation enacted to comply with EU law in the area of consumer protection including the Unfair Terms in Consumer Contracts Directive and the Distance Marketing of Financial Services Directive.

In circumstances where the insured is a ‘consumer’, the insurer must also comply with the Consumer Protection Code and Consumer Protection Act 2007. The Sale of Goods and Supply of Services Act 1980 is also applicable to insurance contracts.

Save for the transposition of EU legislation, there have been very few substantive legislative amendments to the law in this area in recent years. The Marine Insurance Act 1906 remains the most recent codification of general principles of insurance law. The Law Reform Commission (LRC) has recommended reforms to consumer insurance law and published a draft bill in July 2015; however, there is currently no timeline for the implementation of the reforms recommended by the LRC.

Common law, if applicable
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.

ii Making the contract

Essential ingredients of an insurance contract
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 common law definition of an insurance contract is of persuasive authority in Ireland (Prudential Assurance v. Inland Revenue [1904] 2 KB 658). The leading Irish authority, International Commercial Bank plc v. Insurance Corporation of Ireland plc [1991] ILRM 726, in distinguishing an insurance contract from a guarantee, listed the main characteristics of an insurance contract as follows:

a generally the insured must have an insurable interest in the subject matter of the insurance policy;
b payment of a premium;
c the insurer undertakes to pay the insured party in the event of the happening of the insured risk;
d the risk must be clearly specified;
e the insurer will indemnify the insured against any actual loss (indemnification); and
f the principle of subrogation is applied, where appropriate. This is generally not appropriate in relation to life assurance or personal injury policies.

There is no legal difference under Irish law between an insurance contract and a reinsurance contract.
A typical insurance policy will comprise:

- a proposal form completed by the insured;
- policy terms and conditions drafted by the insurer; and
- supporting documentation provided to the insurer at the application stage by the insured.

The policy will typically contain express terms defining coverage, exclusions, excess, conditions or conditions precedent and warranties.

**Information provided to the insurer at placement**

The information provided to the insurer at placement depends on the risk and the requirements of the insurer in question; however, there has been a recent trend towards very short proposal forms that do not request detailed information about the risk. It is anticipated this may change in line with the changes in the UK driven by the new Insurance Act.

**Utmost good faith, disclosure and representations**

Parties to contracts of insurance are subject to the duty of utmost good faith. As a result, the insured or proposer has a duty prior to renewal or inception to disclose all material facts. The remedy for breach of the duty is avoidance.

A material fact is one that would influence the judgement of a prudent underwriter in deciding:

- whether to underwrite the contract; and if so
- the terms (such as the premium) on which it might do so.

The duty goes beyond a duty to answer questions on a proposal form correctly; however, the Irish courts have confirmed that the questions posed on the proposal form will inform the duty. There is no requirement to show inducement under Irish law.

Misrepresentation is closely related to non-disclosure and attracts the same remedy. To rely on misrepresentation, the insurer must establish that there has been a representation of fact made by the insured that is untrue. Misrepresentations can be fraudulent, reckless or innocent. The common law position is that a misrepresentation is fraudulent if made with knowledge of its falsity or without belief that it was true or with reckless disregard as to whether it was true or false.

In practice, many insurance policies contain ‘innocent non-disclosure’ clauses that prevent the insurer from avoiding the policy for an innocent non-disclosure or misrepresentation.

The LRC has recommended that for consumer insurance contracts, the duty of disclosure should be replaced with a duty to answer specific questions carefully and honestly. The questions posed by the insurer should identify the material risk and the relevant information actually to be relied upon by the insurer. The LRC has also recommended that avoidance should no longer be the main remedy and that in cases of innocent or negligent non-disclosure and misrepresentation, the principal remedy should be to adjust the payment of the claim taking account of the carelessness of the insured and whether the breach in question affected the risk. The LRC has recommended that avoidance should be retained for fraudulent breaches on public policy grounds.
Recording the contract

Insurance contracts are generally required to be evidenced by a written policy. There are various legislative provisions that impose mandatory requirements concerning the form and content of insurance contracts, some of which are derived from EU law. The LRC has recommended that the essential requirements concerning the form of consumer insurance contracts should be consolidated in a single general legislative framework.

iii Interpreting the contract

General rules of interpretation

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

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

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

Where a contractual term is ambiguous the interpretation less favourable to the drafter is adopted using the contra proferentem rule.

Incorporation of terms

There are generally no mandatory provisions in insurance policies that are implied by Irish law or regulation, although there are certain:

- implied restrictions contained in motor insurance policies;
- mandatory provisions concerning professional indemnity insurance for solicitors and insurance intermediaries;
- provisions in the Criminal Justice (Drug Trafficking) Act 1996 concerning minimum disclosure requirements; and
- professions whose professional bodies set professional indemnity insurance requirements. For example, practising solicitors and members of the Institute of
Chartered Accountants in Ireland are required to have a minimum level of professional indemnity cover. The Royal Institute of the Architects in Ireland also requires its members to have adequate and appropriate professional indemnity cover.

The all important element in the declaration usually contained in a proposal form is the phrase that makes the declaration the ‘basis of the contract’. In making the proposal the basis of the contract the proposer warrants the truth of his or her statements and, in the event of a breach of the warranty, the insurer can repudiate liability under the policy without reference to issues of materiality. However, basis of the contract clauses are considered to be very draconian by the Irish courts and there is a judicial reluctance to enforce such clauses. The LRC has recommended the abolition of basis of the contract clauses in consumer insurance policies.

**Types of terms in insurance contracts**

Insurers in the Irish insurance market usually have standard policy conditions for each product. These have developed over time and are influenced by standard industry norms and decisions handed down by Irish courts in cases involving contractual clauses. In addition, most Irish insurers and reinsurers underwriting international business are familiar with London market terms (International Underwriting Association and Lloyd's Market Association)

A policy will typically include express terms defining:

- coverage: the extent of the insurer’s potential liability to the insured;
- exclusions: matters expressly excluded from cover;
- excess: the initial amount of any loss that the insured must bear themselves;
- conditions precedent to the insurer’s liability for a loss, such as notice provisions; and
- warranties: statements by the insured of fact or continuing intention in relation to the risk underwritten, such as a warranty that certain precautions will be taken in respect of particular activities.

Warranties are construed very strictly by the Irish courts in circumstances where the breach discharges the insurer from liability from the date of breach (irrespective of whether the breach is material to the loss) and they are thus considered to be draconian. The LRC has recommended that warranties should be abolished in consumer insurance contracts and replaced with suspensive conditions.

Almost all insurance policies list terms of the contract as ‘conditions’. The effect of a breach of condition in an insurance policy depends on whether that condition is a condition precedent to liability. Breach of a condition precedent entitles the insurer to decline cover for a claim in the event of a breach without the necessity to demonstrate that the insurer has suffered any prejudice. The remedy for breach of a bare condition is in damages. The Irish courts will 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.

‘Follow the fortunes’ and ‘follow the settlements’ clauses are common in Irish law reinsurance agreements.

**Intermediaries and the role of the broker**

**Conduct rules**

A person cannot undertake or purport to undertake insurance or reinsurance mediation unless that person is a registered insurance or reinsurance intermediary under the Investment
Intermediaries Act 1995 or the European Communities (Insurance Mediation) Regulations 2005 or, has passported into Ireland on a freedom of establishment or freedom of services basis. Insurance or reinsurance mediation is defined as any activity involved in:

a proposing or undertaking preparatory work for entering into insurance or reinsurance contracts; or

b assisting in the administration and performance of insurance or reinsurance contracts that have been entered into.

The Central Bank maintains a register of authorised insurance and reinsurance intermediaries in Ireland. The applicant must satisfy a number of criteria for authorisation, some of the most significant of which are:

a the good reputation of directors;

b the knowledge and ability of senior management and key personnel;

c the holding of minimum levels of professional indemnity insurance; and

d maintenance and operation of client premium accounts.

Agency and contracting

Although the outsourcing of activities is permitted, Solvency II, together with the Irish Regulations, ensures that insurance undertakings, when delegating business activities to external agents, retain responsibility for all core business functions. Accordingly, 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 the European Insurance and Occupational Pensions Authority (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’. Insurance undertakings are also required to have written outsourcing policies in place, where relevant.

How brokers operate in practice

Brokers act as agents on behalf of insurance undertakings and are typically appointed by an insurance undertaking under the terms of a distribution agreement or claims administration agreement. A broker must be registered with the Central Bank as an authorised intermediary (in accordance with the legislative provisions referenced above) before being permitted to advise consumers on insurance products and carry out other specified activities on behalf of insurance companies (e.g., loss-assessing and claims administration). Key ongoing requirements for registered brokers include:

a maintaining and operating designated client premium accounts;

b holding appropriate professional indemnity insurance cover; and

c senior staff being able to manage the business and to carry on activities on the intermediary’s behalf.

---

3 Regulation 51(3), Irish Regulations.


5 Regulation 44(5), Irish Regulations.
Claims

Notification
Notice requirements vary from policy to policy depending on whether the policy in question is claims-made or losses-occurring. Claims-made policies generally require circumstances that may give rise to a claim to be notified to insurers within a short period of the insured becoming aware of the circumstances. It is usual for policies to require notice of circumstances and claims as soon as reasonably practicable. Some may set specific time limits.

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

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

Good faith and claims
While much of the case law regarding the duty of good faith is focused on the pre-contractual duty, the duty continues post contract and is a mutual duty. There is, however, no common law duty on the insured to disclose changes in the risk insured during the policy period (although the contract may contain a requirement to this effect).

Once a contract of insurance has been concluded, the relationship between insurer and insured is predominantly governed by the terms of the policy and typically the policy will impose obligations on the insured in relation to matters such as payment of premium, notification of claims and claims cooperation.

The consequence of making a fraudulent claim is avoidance and the policyholder also forfeits the premium paid under the insurance contract.

As noted above, the duty of good faith is mutual in nature; however, in practice breach of the duty by the insurer is rarely ever pursued because the only remedy for breach of the duty of good faith is avoidance of the contract. There are no statutory rules in Ireland that relate to the time in which a claim should be settled by an insurer, although provisions on claims settlement are included in the Central Bank's Consumer Protection Code 2012. The LRC has recommended that in the case of consumer insurance contracts, the insurer should be under a duty to handle claims promptly and fairly and that the insured should be entitled to damages where an insurer reasonably withholds or delays payment of a valid claim.

Set-off and funding
Regulation 20 of the Insurance Reorganisation Regulations provides that winding-up proceedings will not affect the right of creditors to demand set-off of their claims against the claims of the insurance undertaking where set-off is permitted by the law applicable to the insurance undertaking’s claim. A creditor must show mutuality of claims between the parties to rely on statutory set-off. Therefore, for example, where the reinsurer can prove mutual debits and credits in respect of the ceding company, set-off should be available to the reinsurer.
**Reinstatement**

The principle of indemnity has, to an extent, been eroded in recent years by insurers offering policies on a 'new for old' or 'reinstatement as new' basis, without any deduction for betterment or wear and tear, particularly in the areas of property damage and motor insurance.

A policy written on a 'reinstatement as new' basis is subject to the principle of indemnity in that the insured cannot recover more than his or her loss. The sum insured in the policy is the maximum sum payable by insurers, but not necessarily the amount paid. If the work of reinstatement is not carried out, or is not carried out as quickly as is reasonably practicable, the insurer is only liable to pay the value of the property at the time of the loss.

**Dispute resolution clauses**

Insurance policies in Ireland often contain a dispute resolution clause enabling either party to refer a contractual dispute to a particular dispute resolution forum before proceeding to litigation. Arbitration clauses are the most common in this regard; however, mediation has developed into a common form of dispute resolution in Ireland.

**IV DISPUTE RESOLUTION**

i **Jurisdiction, choice of law and arbitration clauses**

If an insurance or reinsurance contract contains an arbitration clause, the dispute under the policy must be referred to arbitration. Court proceedings brought where there is an arbitration agreement can be stayed in favour of arbitration. In the absence of an arbitration clause, the parties would have recourse to the Irish courts, including the Commercial Court. Mediation is also a commonly used method of dispute resolution in Ireland.

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

a Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation);

b 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; and

c Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I Regulation).

ii **Litigation**

**Litigation stages, including appeals**

In Ireland, the jurisdiction in which proceedings are brought depends on the monetary value of the claim: the district court deals with claims up to a value of €15,000 and the circuit court with claims up to a value of €75,000 (€60,000 for personal injuries cases).

Claims with a value in excess of the circuit court jurisdiction are heard by the High Court, which has an unlimited monetary jurisdiction.

The Commercial Court is a branch of the High Court and deals exclusively with commercial disputes. Proceedings are case managed and tend to move at a much quicker pace.
than general High Court cases. 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:

\( a \) the value of the claim or counterclaim exceeds €1,000,000; and
\( b \) the Court considers that the dispute is inherently commercial in nature.

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

A new Court of Appeal was established in 2014 to deal with appeals from the High Court. The Court of Appeal hears appeals from the High Court 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
Except in the most limited circumstances evidence is to be given orally. Where the attendance of a witness is required at the trial of an action, the lawyer for either party can issue a witness summons on an individual resident in Ireland. If the person required to give evidence is out of the jurisdiction, it is not possible to require attendance through service of a summons. In such circumstances, it is possible to apply to take evidence on commission, or use letters rogatory, or in some cases, where the witness is in the United States, rely on a procedure under Title 28 of the United States Code 1782 to compel a witness in the United States to give evidence or produce documents in proceedings before the Irish courts.

With the exception of the Commercial Court, where it is a requirement in contractual disputes, there is no provision for the exchange of witness statements or expert reports in proceedings before the Irish courts.

Costs
The general rule is that costs follow the event (i.e., the loser pays). However, there is a growing body of case law, mainly emanating from the Commercial Court, that suggests that if the litigation is ‘complex’, the court should engage in a more detailed analysis and should not just award full costs to the winning side if the plaintiff has not succeeded in all claims.

Where the parties cannot agree on the costs incurred during the proceedings, the matter will be referred to taxation, where the taxing master will review the bill of costs and decide on the appropriate figure to be awarded to a party for its costs. The successful party will normally recover approximately 60 per cent of its recoverable costs known as ‘party and party’ costs. These will usually be approximately 50 to 75 per cent of the total costs incurred by the party in the litigation.

There are a number of tools that a defendant can use to put the plaintiff ‘on risk for costs’ including lodgements, tenders and calderbank offers. In essence, all of these involve the plaintiff offering a figure to settle the matter; if the defendant rejects the offer and is then awarded a lower amount at the hearing of the action, the plaintiff is penalised for costs.

iii Arbitration
If a 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 if the claim is less than €5,000 and the relevant agreement 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 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 of 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.

Arbitration can be a more expensive option than litigation in circumstances where the arbitrator and the venue must be paid for while access to the courts is subject only to the payment of stamp duty, which is relatively modest in comparison with the costs in arbitration. Arbitration may be a favourable option, particularly for insurers, however, as the courts are traditionally seen as pro-insured in insurance disputes, given the draconian provisions in insurance contracts.

iv Alternative dispute resolution

Mediation is the most common form of ADR for insurance disputes.

v Mediation

The role of the courts

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.
V YEAR IN REVIEW

Insurers and reinsurers (where applicable) have spent the past 12 months preparing for the implementation of Solvency II. Some insurance and reinsurance groups have undertaken corporate restructurings, with an increased number of cross-border mergers, schemes of arrangement and portfolio transfers in preparation for the coming into force of Solvency II to ensure a more efficient use of capital.

The implementation of the Insurance Act 2015 in the United Kingdom is expected to have an impact on the Irish insurance industry as the Irish market is closely connected to the United Kingdom (in particular the London market) and many Irish risks are written subject to UK law. Following implementation of the Act in August 2016, insurance law in Ireland will for the first time since 1906 be significantly different from UK law for the first time.

The LRC published its Report on Consumer Insurance Contracts in July 2015, together with a draft Consumer Insurance Contracts Bill 2015. The report contains 105 recommendations, many of which are similar to those proposed by the UK Insurance Act. In particular the LRC has recommended reform of the duty of disclosure, the introduction of proportionate remedies, the abolition of warranties, third-party rights, and damages for late payment of claims. The reforms recommended by the LRC are to be welcomed as they seek to improve the level of certainty in insurance contract law for both insurers and the insured; however, the LRC reforms are limited in scope to consumer contracts and there is currently no timeline for implementation.

Finally, after-the-event (ATE) insurance has been the focus of some attention over the past number of months. The rules on maintenance and champerty remain in force in Ireland; however, the High Court has confirmed that ATE insurance is valid and does not fall foul of the rules on maintenance and champerty. Following the 2015 decision of the Court of Appeal in *Greenclean Waste Management Ltd v. Leahy*, the way is clear for ATE insurance to be used as a legitimate form of third-party funding in this jurisdiction provided the policy in question is sufficiently certain.

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6 See Section II.vi, supra, on proposed changes to the regulatory system.
Appendix 1

ABOUT THE AUTHORS

SHARON DALY
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Sharon Daly is a partner in the commercial litigation and dispute resolution department at Matheson. Sharon is head of the firm’s insurance litigation group, which is focused on large complex disputes, many of which are on financial lines policies. Sharon also leads on a wide variety of complex commercial disputes for financial institutions and corporate clients.

Sharon provides advice on policy wordings and coverage of claims, and has litigated and mediated some of the most significant insurance law disputes and subrogated claims by insurers in Ireland. Sharon’s practice by its nature involves large-scale disputes for companies including insurance companies, many of whom are large financial institutions. These disputes are litigated in the Commercial Court and many are being resolved through mediation. Sharon is a strong advocate of alternative dispute resolution, which provides the means to resolve disputes in a cost-effective, time-efficient, confidential and creative manner.

Given the regulated nature of insurance, Sharon and her group provide crisis-management advice for clients dealing with investigations and enquiries from the Central Bank of Ireland, the Office of the Director of Corporate Enforcement (ODCE) and the Gardaí. Sharon has handled numerous administrative sanctions cases for financial institutions.

Sharon is a member of the Law Society of Ireland, the International Bar Association, the Copyright Association of Ireland the International Association for the Protection of Intellectual Property, and an elected council member of the Dublin Chamber of Commerce. Sharon lectures in the Law Society on the Commercial Court and mediation and is a frequent speaker at industry conferences.

DARREN MAHER
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Darren Maher is a partner in the financial institutions group at Matheson. He has advised a wide range of leading domestic and international insurance and reinsurance companies on all aspects of insurance law and regulation, including establishment and authorisation,
development and distribution of products, compliance, corporate governance and re-organisations including cross-border mergers, schemes of arrangement, portfolio transfers and mergers and acquisitions.

Darren has published articles in insurance and reinsurance publications and is co-author of the Irish chapter of PLC’s *Cross-border Insurance and Reinsurance Handbook*.

Darren lectures at the Law Society of Ireland and the Insurance Institute of Ireland.

**APRIL MCCLEMENTS**  
*Matheson*

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 or schemes of arrangement arising from reorganisations 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 mediation and arbitration.

April is a member of the Law Society of Ireland, the Insurance Institute of Ireland and the British Insurance Law Association. She has contributed to various industry publications and has participated in seminars as a speaker on insurance issues.

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