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Ireland: Law & Practice
Darren Maher, April McClements, Sharon Daly and Grainne Callanan
Matheson LLP

Ireland: Trends & Developments
Darren Maher and Karen Reynolds
Matheson LLP

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IRELAND

Law and Practice

Contributed by:
Darren Maher, April McClements, Sharon Daly and Grainne Callanan
Matheson LLP **see p.25**

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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.

Following the enactment of the Consumer Insurance Contracts Act 2019 (CICA), the Marine Insurance Act 1906 (MIA) only applies to non-consumer contracts. There are some forms of insurance that are compulsory under statute in Ireland – for example, third-party motor insurance and professional indemnity cover for certain professionals.

There is no Irish equivalent to the UK Insurance Act 2015. However, CICA was signed into law in 2019, reforming the area of consumer insurance law. It commenced in two stages (on 1 September 2020 and 1 September 2021), following industry pressure to allow sufficient time for the insurance industry to account for the far-reaching changes imposed. In the case of consumer insurance contracts, CICA has replaced the duty of utmost good faith and the consumer's duty of disclosure with a duty to provide responses to questions asked by the insurer honestly and with reasonable care.

Consumers

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. Consumer protection law, in particular, 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 (CBI)'s Consumer Protection Code 2012 (CPC), the Consumer Protection Act 2007 and Consumer Rights Act 2022 (CRA). Under the CPC, "consumer" is quite broadly defined and includes individuals and small businesses with a turnover of less than EUR3 million. The same definition is applied for the purposes of the CICA. "Consumer" under the CRA is defined as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession".

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 (as amended by the CRA).

2. Regulation of Insurance and Reinsurance

2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

Ireland has a strong and efficient risk-based prudential regulatory framework, focusing on the application of the proportionality principle.

The Central Bank of Ireland

The CBI 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 CBI 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 CBI also conducts regular themed inspections across the (re)insurance sector.

The CBI 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.

Risks and risk ratings

An administrative sanctions regime provides the CBI with a credible enforcement tool and acts as an effective deterrent against breaches of financial services law. The CBI'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 CBI 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 CPRA

The CBI'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 CBI assesses the effectiveness of these internal management frameworks through targeted CPRAs, which are in addition and supplementary to the CBI's PRISM and regular thematic inspections.

II Code and the 2015 Regulations

The Insurance Institute's Code of Ethics and Conduct (the "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. They also impose certain restrictions on shareholders of (re)insurance undertakings, as the CBI 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
- makes it possible to exercise a significant influence over the management of the undertaking.

The IDD

The European Union (Insurance Distribution) Regulations 2018 (IDR) transposed the Insurance Distribution Directive (EU) 2016/97 (IDD) into Irish law – thereby harmonising the distribution of insurance and reinsurance products within the EU – with the aim of facilitating market integration and enhancing consumer protection. The IDR were designed to:

- enhance consumer protection and ensure a level playing field across the sector by extending the scope of application to include all participants in the distribution of insurance products;
- identify and mitigate conflicts of interest, particularly in the area of remuneration; and
- introduce increased transparency and conduct of business requirements.

2.2 The Writing of Insurance and Reinsurance

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

2.3 The Taxation of Premium

Insurance undertakings and intermediaries authorised by the CBI or in another EU/EEA member state carrying on business in Ireland are required to comply with certain Irish general good requirements, such as the CPC. The CPC contains general and specific provisions concerning insurance, including requirements relating to premium handling and contact with consumers – for example, 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 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 (MCC).

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

- non-life insurance policies attract stamp duty of EUR1 per policy;
- non-life insurance policies 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% contribution to the Insurance Compensation Fund applies to premiums received in relation to non-life insurance policies;
- life assurance premiums attract a levy of 1% of gross premiums; and
- health insurance attracts levies that, depending on the cover, range from:
  - (a) EUR122 to EUR406 in respect of relevant contracts renewed or entered into on or after 1 April 2022 and on or before 31 March 2023; and
  - (b) EUR109 to EUR438 in respect of relevant contracts renewed or entered into on or after 1 April 2023.

3. Overseas Firms Doing Business in the Jurisdiction

3.1 Overseas-Based Insurers or Reinsurers

Licensing of (Re)insurance Companies

Undertakings wishing to carry on (re)insurance business in Ireland must obtain authorisation from the CBI or another EU regulator through the "single passport" regime. The CBI has published a checklist for completing and submitting applications for authorisation under the 2015 Regulations (the "Checklist"), along with a guidance paper to assist applicants. The applicationcomprises the completed Checklist and a detailed business plan plus supporting documents (the "Business Plan") that is submitted after a preliminary meeting with the CBI.

The principal areas considered by the CBI 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 (such as MCC and CPC).

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

- arrange a preliminary meeting with the CBI to outline the proposals, at which the CBI 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 CBI;
- the authorisation committee of the CBI considers the application;
- once the CBI 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 CBI will issue the final authorisation and the (re)insurer can commence writing business in Ireland.

The application process is an iterative one, involving contact and consultation with the CBI 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 CBI may seek additional meetings with the applicant as part of this process in order to discuss aspects of the proposal in further detail.

The CBI will issue a formal authorisation once it is satisfied that the capital requirements and any pre-licensing requirements have been met. Throughout this process there will be multiple meetings, and the CBI may request additional information. The process can take between four to six months. The CBI does not currently charge a fee for licence applications.

The Position of UK-Based Insurers Post 31 December 2020

The Brexit Deal agreed in December 2020 between the UK and the EU was largely silent on financial services. The effect of same is that, as

at the end of the transition period on 31 December 2020, the UK is now a third country and UK-authorised insurers can no longer rely on the EU passporting regime to access the Irish and wider EU market.

In anticipation of this happening, the Irish government introduced a Temporary Run-Off Regime (TRR) through Part 10 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (the "Brexit Omnibus 2020 Act"). This has become crucially important for those UK/Gibraltar (GI) insurers and insurance intermediaries with Irish customers, which decided against establishing an EU authorised entity to access Ireland post Brexit.

Part 10 of the Brexit Omnibus 2020 Act addresses the issue of insurance contract continuity and inserts additional provisions into the 2015 Regulations and the IDR, permitting a UK firm to administer its run-off business in Ireland for a period of 15 years from 31 December 2020 "in order to terminate its activity" in Ireland. Crucially, no new business is permitted but compliance with the general good requirements remains a requirement.

The Insurance (Miscellaneous Provisions) Act 2022 ("2022 Act") amends the 2015 Regulations to provide for technical changes in order to ensure that UK and Gibraltar-based insurance firms who provide reinsurance to Irish based insurers through the third country exemption (pursuant to Regulation 12 of the 2015 Regulations), along with firms in liquidation, can rely on the TRR to run-off their existing Irish insurance contracts.

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 an 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 their home state regulators notify the CBI. Passporting undertakings must comply with the Irish general good requirements.

Special Purpose Reinsurance Vehicle

A reinsurance provider can establish a special-purpose reinsurance vehicle, which provides a quicker and simpler route to authorisation and reduces the extent of supervision 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 the fulfilment of specific regulatory requirements. The 2015 Regulations impose standalone capital require-

ments on a Third-Country Branch and require the Third-Country Branch to:

- hold assets in Ireland of 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 its operations.

The CBI will expect an appropriate number of senior management in Ireland to demonstrate a sufficient level of local oversight and control. As a minimum, a branch manager and a branch management committee in Ireland – with day-to-day responsibility for corporate governance of the branch – will be required. To date, no Third-County Branches have been authorised in Ireland but the CBI guidelines and checklists for third-country insurers applying for branch authorisation have been effective since May 2018.

Significantly, a Third-Country Branch does not have the right to passport into other EU/EEA jurisdictions 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; therefore, establishing an EEA-authorised subsidiary has been the preferred option.

3.2 Fronting

The CBI does not currently permit 100% reinsurance arrangements.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies

The robust M&A environment experienced in 2021 showed some signs of easing in the first half of 2022, with a total of 122 deals recorded (a drop of 14% since the first half of 2021), and the total deal value came to EUR6.4 billion (a decrease of 66% from the first half of 2021). Factors relating to this cooling market include the war in Ukraine, increased equity market volatility, and rising inflation – all of which contribute to uncertainty, lower valuations and increased costs of funding.

While there has been a cooling in the market compared to 2021, M&A has returned to pre-pandemic levels of activity – with the 2022 figures representing, in some measure, an increase from pre-pandemic activity levels. Certain sectors in Ireland continue to demonstrate marked resilience – in particular, sectors such as the insurance broking industry, where there has been a trend towards consolidation. Notably, financial services proved to be the most prevalent sector in the domestic context, accounting for approximately one third of total Irish M&A in the first half of 2022.

In terms of the outlook for 2023, a positive level of activity overall in the market is anticipated. Irish M&A is highly resilient and, although the market has showed a decline in 2022, the outlook for 2023 overall remains positive.

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

The European Union (Insurance Distribution) Regulations 2018 (IDR)

The distribution or sale of insurance products is governed by the IDR, which applies 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, 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, such as:

- 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 clarifies that "introducing" is not considered a regulated activity under Irish law.

Impact of the IDR

The IDR introduces enhanced information and conduct of business requirements for insurance distributors. "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"), which aim to:

- enhance consumer protection by ensuring that insurance products meet the needs of the target market; and
- mitigate the risk of mis-selling by insurance distributors.

Insurance undertakings (and relevant intermediaries) 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. The PDA should be a written document made 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 (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 CBI in order to carry out (re) insurance distribution or 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 activities, such as loss assessing or assisting consumers in dealing with claims under insurance contracts.

(Re)insurance brokers/intermediaries are subject to ongoing CBI supervision of their compliance with the registration requirements, which include completing an annual return and holding an adequate professional indemnity insurance policy. The CBI 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 Consumer Financial Services) Regulations 2004.

The Position of UK-Based Insurance Intermediaries Post 31 December 2020
See **3.1 Overseas-Based Insurers or Reinsurers**.

6. Making an Insurance Contract

6.1 Obligations of the Insured and Insurer

Parties to a non-consumer insurance contract are subject to the duty of utmost good faith (Section 17, MIA). The proposer or insured has a duty to disclose all material facts. A material fact is one that would influence the judgment of a prudent underwriter in deciding whether to underwrite the contracts and, if so, on what terms. The duty goes beyond answering questions on a proposal form correctly; every material representation made by the insured or proposer, or their agent, to the insurer must be true.

CICA replaces the duty of good faith for consumer insurance contracts and the MIA no longer applies to these contracts. Since 1 September 2021, the consumer proposer's duty is limited to a duty to provide responses to specific questions asked by the insurer honestly and with reasonable care.

The majority of provisions of CICA took effect from 1 September 2020. The remaining sections – save for section 18(4) – commenced on 1 Sep-

tember 2021, including Section 8 (duty of disclosure) and Section 9 (proportionate remedies).

6.2 Failure to Comply With Obligations of an Insurance Contract

Prior to CICA, the remedy for breach of the duty of utmost good faith was avoidance of the policy. CICA introduced new proportionate remedies (proportionate to the effects of the misrepresentation, depending on whether it was innocent, negligent or fraudulent) for a breach of the new duty of disclosure.

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

6.3 Intermediary Involvement in an Insurance Contract

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 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 promptly disclose whether it is representing the customer, or acting for and on behalf of the insurer, before the conclusion of a contract. Any remuneration received by an intermediary in relation to a contract must also be disclosed to the customer. Additional ongoing key requirements 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.

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

There are no specific rules for the formation of an insurance contract under Irish law, beyond the general principles of contract law, common law and the duty of good faith. There is no statutory definition of an insurance contract and the legislation does not specify its essential legal elements. The main characteristics of an insurance contract were set out in the leading Irish authority of International Commercial Bank plc v Insurance Corporation of Ireland and include the following:

- an insurable interest;
- payment of a premium;
- the insurer undertakes to pay the insured on the happening of an insured risk;
- the risk must be clearly specified;
- indemnification (the insurer will indemnify the insured against actual loss); and
- the principle of subrogation is applied where appropriate.

CICA defines an insurance contract as “a contract of life insurance or non-life insurance made between an insurer and a consumer” and reforms the law relating to insurable interests.

6.5 Multiple Insured or Potential Beneficiaries

There is no information available for this jurisdiction.

6.6 Consumer Contracts or Reinsurance Contracts

Consumer contracts are now governed by CICA. The legal requirements of insurance and reinsurance are the same.

7. Alternative Risk Transfer (ART)

7.1 ART Transactions

ART transactions are recognised as reinsurance transactions under the 2015 Regulations and are characterised by the CBI in a manner consistent with the Solvency II Regime.

There has been a slowdown in recent years in the number of ART deals in Ireland. The CBI has concerns relating to the viability of ART transactions and the potential risks for insurance carriers, particularly in relation to basis risks. Further, it is not clear if ART transactions entered into by life insurers comply with the requirements to be "fully funded". Significant growth is not expected in the coming years.

7.2 Foreign ART Transactions

There is no information available in this jurisdiction.

8. Interpreting an Insurance Contract

8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

Insurance contracts are subject to the same general principles of interpretation as other contracts. The Supreme Court has confirmed in two judgments (Analog Devices v Zurich Insurance 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.

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 (sometimes referred to as the "matrix of fact"). However, a number of things are excluded from the admissible background, including previous negotiations and 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 understood them to mean.

The courts apply the words' ordinary and natural meaning because 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 takes an objective approach to determine the intention of reasonable persons in the position of the parties. Where a contractual term is genuinely ambiguous, the contra proferentem rule will apply and the interpretation less favourable to the drafter is adopted. The rule also applies to consumer contracts.

8.2 Warranties

In non-consumer contracts, no specific wording is 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 (Section 33 of the MIA).

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. 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 a breach entitles the insurer to repudiate liability even if the breach is not material to the loss. CICA replaces warranties in consumer contracts with suspensive conditions and abolishes basis of contract clauses.

8.3 Conditions Precedent

The effect of a breach of a condition depends on whether the condition is a condition precedent to liability. Condition precedents 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 an insurer can repudiate liability for the claim without any requirement to demonstrate prejudice. There is no requirement for a link between the breach and the damage.

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

In consumer contracts, condition precedents could now be considered "continuing restrictive conditions" following commencement of CICA.

9. Insurance Disputes

9.1 Insurance Disputes Over Coverage

Insurance contracts typically contain a dispute resolution clause. An insurance contract may contain an arbitration clause or may stipulate another form of ADR, such as mediation. In the case of a consumer contract, a consumer may make a complaint to the Financial Services and Pensions Ombudsman (FSPO).

9.2 Insurance Disputes Over Jurisdiction and Choice of Law

Choice of forum, venue and applicable law clauses in (re)insurance contracts are generally recognised and enforced. Where an insured is domiciled in an EU member state, regard should be had to the following regulations that may limit 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 commenced after 10 January 2015;
- Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I Regulation);
- Lugano Convention (L339, 21 December 2007) on jurisdiction and the recognition and

enforcement of judgments in civil and commercial matters; and
- the Hague Choice of Court Agreements Convention 2005.

9.3 Litigation Process

In Ireland, 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 as it has an unlimited monetary jurisdiction. Insurance disputes before the courts in Ireland are heard by a single judge with no jury.

The Commercial Court is a specialist division of the High Court and it deals 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, which is at the discretion of the judge and can be refused if there has been any delay.

Commercial Court proceedings progress at a much quicker pace. Generally, the time from entry into the Commercial Court to the allocation of a trial date ranges from a matter of weeks to four to six months, depending on complexity and the number of parties.

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 (factual or expert) oral evidence of a witness, a witness statement or expert report must be filed – unless a judge orders otherwise.

Costs

Costs typically will follow the event, whereby the loser pays. However, where the litigation is "complex", the Commercial Court will often carry out an analysis of whether the winning party has succeeded on all grounds.

Limitation

The general position under Irish law (the Statute of Limitations Act 1957) is that claims for breach of contract must be brought within six years of the date of breach.

Where a complaint is made to the FSPO, there is an extended limitation period applicable to complaints relating to "long-term financial services" (products or services where the maturity or term extends beyond five years and one month, or life assurance policies not subject to annual renewal) – otherwise a six-year rule applies.

9.4 The Enforcement of Judgments

In the case of non-EU, non-Lugano Convention and non-Hague Convention judgments, an originating High Court summons is required to recognise and enforce a foreign judgment and the High Court must grant leave to issue and serve the proceedings. In order to succeed, such foreign judgment must be for a definite sum, 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 are contrary to Irish law or the principles of natural justice.

9.5 The Enforcement of Arbitration Clauses

See **9.7 Alternative Dispute Resolution**.

9.6 The Enforcement of Awards

See **9.7 Alternative Dispute Resolution.**

9.7 Alternative Dispute Resolution

Insurance disputes may also be dealt with by ADR. 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, 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") incorporates 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 valid arbitration agreements, the courts are obliged to stay proceedings.

Although there are additional costs incurred for an arbitration, there is the benefit of confidentiality.

Ireland is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), 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, albeit on very limited grounds. The party seeking to have the arbitral award set aside must prove 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 the arbitral proceedings or was otherwise unable to present their case;
- the award deals with a dispute not falling within the ambit of the arbitration agreement;
- the arbitral tribunal was not properly constituted; or
- the award is in conflict with the public policy of the state.

The recent High Court decision in Charwin Limited t/a Charlie's Bar v Zavarovalnica Sava Insurance Company D.D. [2021] IEHC 489 made it clear that the bar is high when seeking to resist a referral to arbitration on grounds of public policy.

Mediation

The Mediation Act 2017 (the "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 Mediation Act makes provision for any court to adjourn legal proceedings in order to allow the parties to engage in mediation. The court can make such an order on its own initiative or on the application of either party to the proceedings. There may be cost implications where either party fails to engage in ADR following such a direction from the court.

The Financial Services and Pensions Ombudsman

The FSPO is the amalgamation of the Financial Services Ombudsman and the Pensions Ombudsman, pursuant to the FSPO 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.

9.8 Penalties for Late Payment of Claims

There is no cause of action in damages for the late payment of claims in Ireland. However, under Section 26 of CICA, where an insurer is in breach of any of the duties under the act, the court has a discretion to order that a sum payable in a claim under a contract of insurance shall be increased in proportion to the breach involved.

9.9 Insurers' Rights of Subrogation

Insurers have subrogation rights at common law and subrogation provisions in insurance policies are common. Generally, an indemnity must have been provided before the insurer is entitled to subrogate. CICA has introduced certain restrictions on subrogation rights in the context of family and personal relationships (where the consumer has consented to the use of their vehicle) and in employment scenarios.

10. Insurtech

10.1 Insurtech Developments

Irish government bodies, such as Enterprise Ireland and the Industrial Development Authority Ireland (IDA), work in tandem to attract and support foreign direct investment in Ireland and have been promoting Ireland as a destination for companies in the insurtech industry.

In July 2021, 12 stakeholders in the Irish insurance sector joined together to create InsTech.ie in order to promote the country as an EU hub for insurtech. In April 2021, a study commissioned by InsTech.ie and conducted by Deloitte, entitled *Driving Insurtech Growth in Ireland*, was published. The study found that Ireland is well placed to develop an insurtech ecosystem and this should be explored further. It also noted that Ireland is "one of the most developed insurance markets" in Europe and is "well positioned to take advantage of the innovation and technological enhancements being developed within the sector as part of the growth of global insurtech".

One of the most significant Irish insurtech firms is Blink, which was founded in 2016 to build data-driven travel disruption insurance solutions. On the back of this success, the firm launched Blink Parametric in 2020, offering a full suite of parametric insurance solutions. Blink has made it onto The InsurTech100 in 2019, 2020 and 2022.

In 2021 and 2022, Companjon – an innovative insurtech start-up headquartered in Dublin, Ireland – was named in the InsurTech100. Companjon is Europe's leading specialist in unique add-on insurance that is 100% digital. Companjon has been recognised by Forbes as "a tech-driven disruptor that is changing the way people think about insurance".

10.2 Regulatory Response

In Ireland, the CBI is responsive to the challenges posed by the regulatory treatment of financial innovations. It is a robust regulator, and 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. The CBI 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.

The CBI has taken a range of measures in relation to fintech, including:

- establishing an Innovation Hub in 2018 for engagement with fintech companies;
- creating an Innovation Steering Group and a fintech network within the CBI; and
- engaging with the European Supervisory Authorities (ESAs) and the Single Supervisory Mechanism on the EC's FinTech Action Plan.

11. Emerging Risks and New Products

11.1 Emerging Risks Affecting the Insurance Market

"Emerging risks" refer to new and evolving risks that are difficult for insurers to assess and typically carry with them a high degree of uncertainty with regard to their impact, probability, and amount of losses expected. The CBI expects Irish insurance undertakings to give appropriate consideration to assessing emerging risks (particularly in relation to climate change) and adopt a longer-term perspective than typical business planning and strategy-setting processes. The CBI expects to see evidence of robust analysis and challenge and timely and effective action in relation to emerging risks.

Cyber-risk and longevity risk appear to be the most formidable emerging risks in Ireland. The Governor of the CBI stated in August 2022, on the publication of a consultation paper on proposed Guidance for (Re)insurance Undertakings on Climate Change Risk (CP151), that "climate change is no longer an emerging risk". However, this risk will still be addressed for now as the pronouncement is only recent.

In the last quarter of 2020, the CBI issued a Climate Change and Emerging Risk Survey ("CBI Survey") to better understand Irish insurance undertakings' exposure to and management of emerging risks. On 1 May 2021, the CBI published its feedback and key observations to the industry. Overall, the CBI Survey found that emerging risks were well integrated in the majority of firms' risk management processes and that there was a good level of awareness of climate risk among firms.

Additionally, the exposure level of Irish firms to "affirmative" cyber underwriting risk appears to be limited. While good practices were noted, the CBI outlined a number of recommendations and noted its intention to increase its supervisory focus in these areas in the future. The CBI noted: "Certain good practices are already being embedded in insurance firms in relation to climate risk. However, there is work to do in terms of establishing plans and strategies. Firms can expect that the CBI will become increasingly active and intrusive in its approach to the supervision of climate change-related risks going forward."

Cyber-risk

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

Cyber-risk was ranked by national supervisors as the second-biggest risk for the insurance sector and the sixth for the pensions sector in the European Insurance and Occupational Pensions Authority (EIOPA) Autumn 2019 Qualitative Survey.

The CBI published cross-industry guidance in respect of IT and cybersecurity risks in 2016, which highlighted a variety of emerging threats. This guidance notes that the risks associated with IT and cybersecurity are a key concern for the CBI. The guidance was published at a time when there was little formal supervisory guidance on this topic. However, in October 2020, EIOPA published its Guidelines on ICT Security and Governance. The CBI has confirmed that these guidelines supersede the CBI's 2016 guidance but do not contradict anything in that guidance.

In December 2021, the CBI published its final cross-industry guidance on Operational Resilience, in order to assist financial firms to prepare for, respond to, recover and learn from an operational disruption that affects the delivery of critical or important business services. Anticipating the adoption of the Digital Operational Resilience Act (DORA) at EU level, the CBI noted – in its feedback statement to the consultation paper on the draft guidelines – that the Operational Resilience Guidelines were compatible with and complementary to DORA and that it had determined there were no contradictions between the two.

DORA puts in place a comprehensive framework on digital operational resilience for EU financial firms, including insurance and reinsurance undertakings, intermediaries and ancillary intermediaries, as well as critical third parties that provide ICT-related services to these firms. DORA will come into force on 16 January 2023 and will apply 24 months from the date of its entry into force.

The CBI also has a dedicated IT risk inspection team, operational since April 2015.

As noted earlier, the CBI Survey found that Irish firms' overall level of exposure to "affirmative" cyber underwriting risk appears to be limited – with just 32 of the surveyed firms offering some type of affirmative cybercover.

Longevity Risk

Longevity risk is the potential risk of an individual living longer than expected. The financial implications of exponentially increasing lifespans are colossal. If the average life expectancy were to increase by three years, the cost of supporting the aging population would increase by 50%. As the mortality risk continues to decrease, it is clear that understanding the associated risk is of crucial importance to insurers. The IMF has even highlighted the grave implications 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, certain companies have created insurance subsidiaries to run their pensions schemes, who then reinsure its longevity 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 govern-

ments, as insurers and reinsurers alone may be constrained by capital.

Climate Risk

The CBI's proposed Guidance for (Re)insurance Undertakings on Climate Change Risk aims to clarify the CBI's expectations on how (re)insurers address climate change risks in their business and to assist them in developing their governance and risk management frameworks to do this. The final guidance will apply to authorised insurers and (re)insurers, including captive (re) insurers and third-country branches.

In November 2021, the CBI published a Dear CEO letter setting out its supervisory expectations in relation to climate and other ESG issues. The CBI's expectations, which are based upon international practice and informed by regulatory development at EU level, are not binding on firms.

The CBI has also established a Climate Risk and Sustainable Finance Forum, which brings together stakeholders to share knowledge and understanding of the implications of climate change for the Irish financial system.

11.2 New Products or Alternative Solutions

Warranty and Indemnity Insurance

Warranty and indemnity insurance is being used more frequently in commercial transactions, as are other bespoke transactional products such as litigation buyout policies.

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 within five years. It is expected to be a growth area in Ireland in the future.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

Health Insurance (Amendment) Act 2022

On 24 November 2022, the Health Insurance (Amendment) Act 2022 (the "Health Insurance Act") was published. The Health Insurance Act provides the legislative basis for the rates of risk equalisation credits and stamp duty levies to apply in the private health insurance market in 2023. The Health Insurance Act was signed into law by the President of Ireland on 21 December 2022.

Consumer Insurance Contracts Act 2019

In addition to the changes highlighted earlier in relation to the duty of disclosure, remedies and warranties, other reforms were introduced by CICA, including the following:

- requirements in relation to the provision of information to the consumer by the insurer after the contract has been concluded;
- duties on both the consumer and insurer on renewal (Section 12);
- post-contractual duties of the consumer and insurer (Section 15);
- policy exclusions must be provided to a consumer in writing prior to the commencement of an insurance contract (Section 15(6));
- new obligations in relation to claims handling and duties are imposed on both the consumer and insurer (Section 16);
- provisions in relation to third-party rights and confirmation that a third party may claim

directly against an insurer in certain limited circumstances (Section 21);
- provisions regarding the distribution of funds following a subrogated recovery (Section 24); and
- where a consumer is in breach of a duty under the Act, a court has a discretion to order that a claim be reduced in proportion to the breach – and, similarly, where an insurer is in breach, the court may order that the sum payable be increased in proportion to the breach (Section 26(a)).

The changes introduced by the 2022 Act were effective from 8 July 2022; however, section 18(4) of CICA now stands reworded pursuant to Section 9 of the 2022 Act and is yet to be commenced.

COVID-19

The response to the COVID-19 pandemic, in line with many countries worldwide, involved public health measures to reduce the spread of the virus and therefore the closure of non-essential businesses and subsequent loss of income for many households and businesses.

The CBI's focus throughout the crisis was to ensure "the financial system operate[s] in the best interests of consumers and the wider economy". To that end, the CBI – aligned with other supervisory authorities in Europe – issued a number of communications and statements to the financial services sector on its response to the crisis and its expectations of firms in their response to the crisis.

Business Interruption

There have been a number of test cases in relation to COVID-19 Business Interruption cover litigated before the Irish courts under the COVID-19 and Business Interruption Insurance Supervisory Framework. To date, there have been judgments in five test cases – all of which proceeded on a modular basis, with liability being considered in the first module. In four of the judgments, liability was determined in favour of the insurer; however, in one liability was determined in favour of policyholders, with the court going on to consider quantum issues in subsequent modules. The judgments reinforce that whether a policy responds to losses of this type will depend on the specific wording of the policy.

Insurance (Miscellaneous Provisions) Act 2022

The 2022 Act came into effect in November 2022 and addresses several insurance-related issues, including:

- a new requirement for the CBI to submit a report to the Minister for Finance setting out the steps (if any) it has taken to regulate the practice of price walking;
- a new requirement under CICA to disclose to consumers any deductions of public moneys from insurance claims settlement amounts; and
- amendments to CICA in order to address issues that arose following the initial enactment of this legislation, most notably Section 16(10) and the insertion of Section 16A.

The amendment to CICA Section 16(10) clarifies the scope of disclosure requirements.

The new Section 16A provides for an obligation to disclose information. Where such information is contained within a report that was prepared with a view to maintaining or defending civil proceedings – and which (i) was obtained for the purposes of assessing the validity of the claim, or (ii) contains information that either supports or prejudices the claim – the report must be dis-

closed to the other side no later than 60 days following receipt of the report by the insurer or consumer. This duty to disclose extends to draft reports.

Section 16A specifically states that, despite the fact that such a report is prepared for the purposes of civil proceedings, a claim of litigation privilege may not be maintained over it. However, Section 16A also notes that the concept of legal advice privilege is maintained and provides that the duty of mutual disclosure of reports does not apply to reports prepared by a lawyer, in addition to any communication between a lawyer and "another person".

As noted earlier, the 2022 Act also amends the 2015 Regulations in order to address issues identified in respect of the operation of the TRR for UK and Gibraltar-based insurers.

Personal Injuries Resolution Board Act 2022

The Personal Injuries Resolution Board Act 2022 facilitates an increase in the number of personal injury claims that may be resolved through the Personal Injuries Assessment Board (now called the Personal Injuries Resolution Board, or PIRB).

The Act extends the functions of the PIRB and offers mediation as a means of resolving a claim. The Act also provides that the PIRB will:

- retain claims of a wholly psychological nature;
- have additional time to assess claims; and
- take measures to reduce fraud.

Personal Injury Guidelines

The Personal Injury Guidelines were published in March 2021 by the Judicial Council to achieve a greater consistency in awards for personal injuries. The PIRB and the courts are required to consider the guidelines when making an assessment for damages, which are generally lower as a result of the guidelines.

Consumer Rights Act 2022

The CRA significantly reforms consumer protection law in Ireland. The majority of the reforms are necessitated by the transposition of various EU initiatives, including the "Omnibus Directive", the Digital Content Directive, and the Sale of Goods Directive.

The CRA also overhauls the current Irish regulatory framework by repealing and providing amendments to several existing pieces of Irish legislation, collating all existing provisions together in a single enactment.

The CRA commenced on 29 November 2022, with all sections other than section 161 commencing from 29 November 2022.

13. Other Developments in Insurance Law

13.1 Additional Market Developments

Heightened Regulatory Scrutiny

Use of service companies in the insurance sector

On 31 January 2022, the CBI published its final Guidance on the Use of Service Companies for Staffing Purposes in the Insurance Sector. The guidance sets out the CBI's expectations for (re) insurance entities that choose to enter arrangements with separate legal entities for the provision of extensive staffing or hybrid arrangements (which involve a combination of the provision of staff and other outsourced activities). The CBI expects firms to align relevant staffing arrangements with the expectations set out in the guidance by 31 January 2023.

Differential pricing

On 15 March 2022, the CBI published the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Insurance Requirements) Regulations 2022 following its consultation paper on recommendations on the Review of Differential Pricing in the Private Car and Home Insurance Markets (published in July 2021). From 1 July 2022, the regulations will:

- ban the practice of "price walking";
- require insurers to review their pricing policies and processes annually; and
- require insurers to provide policyholders with additional information in advance of the automatic renewal of their insurance policy.

Review of the CPC

On 3 October 2022, the CBI launched its review of the CPC. The review is three-phased and will be conducted between October 2022 and sometime in 2024. Phase 1 is a discussion paper on the review. The feedback received from same will inform Phase 2, which is a formal public consultation on the CBI's proposed updates and improvements to the CPC, along with the necessary draft regulations. In Phase 3 of the review, the CBI will publish the updated CPC and supporting regulations, along with a feedback statement clarifying the CBI's approach to the updated CPC.

CBI Dear CEO Letter on protecting consumers in a changing economic landscape

On 17 November 2022, the CBI wrote to all regulated firms to reaffirm its expectations regarding how they treat consumers in the context of the current economic environment. The Dear CEO Letter details the specific actions, as set out in the Consumer Protection Outlook Report published in March 2022, which firms are required to address in order to manage potential risks arising from this changing landscape for consumers, as well as identifying a number of areas for particular attention.

Individual accountability

The Central Bank (Individual Accountability Framework) Bill 2022 (the "IAF Bill") was published on 28 July 2022. The IAF Bill aims to support the advancement of an improved culture in the Irish financial system through greater accountability in the regulated sector by introducing an Individual Accountability Framework (IAF).

The four key pillars of the IAF are:

- conduct standards that set out the behaviour the CBI expects of firms and the individuals working within them;
- a Senior Executive Accountability Regime (akin to the Senior Managers Regime in the UK), which places obligations on certain firms and senior individuals to set out where responsibility and decision-making lies for their business in order to ensure clearer accountability;
- enhancements to the current Fitness and Probity Regime; and
- a unified enforcement process, which would enable the CBI to pursue individuals directly for their own misconduct rather than having to link the misconduct to their participation in a regulatory breach by their firm.

The IAF Bill is expected to be enacted in early 2023. Once enacted, the CBI will publish the relevant draft regulations and supporting guidance, along with a consultation paper. These are expected to be implemented in 2023.

Consultation paper on Guidance for (Re) insurance Undertakings on Climate Change Risk

On 3rd August 2022, the CBI published CP151. The proposed guidance aims to clarify the CBI's expectations regarding how (re)insurers address climate change risks in their business and to assist them in developing their governance and risk management frameworks in order to do this. The consultation closed for feedback on 26 October 2022 and the authors await the publication of the final guidelines.

Consultation paper on Guidance for (Re) Insurance Undertakings on Intragroup Transactions and Exposures

On 4 July 2022, the CBI published a consultation paper on Guidance for (Re)Insurance Undertakings on Intragroup Transactions and Exposures. The CBI is proposing to introduce guidance for (re)insurance undertakings on intragroup transactions and exposures, with the aim of being more transparent about its expectations. The consultation paper closed for feedback until 23 September 2022 and the authors await the publication of the final guidelines.

CBI amendments to the list of PCFs

On 5 April 2022, the CBI published the Central Bank Reform Act 2010 (Sections 20 And 22) (Amendment) Regulations 2022 making a number of changes to the list of pre-approval controlled function (PCF) roles.

Public consultation on the development of a national resolution framework for (re)insurers

On 1 September 2021, the Department of Finance – in collaboration with the CBI – launched a public consultation on the development and scope of a possible domestic resolution framework for insurers.

On 16 May 2022, the Department of Finance published the feedback statement from the public consultation. It was noted that, since the consultation was launched, the EC has published a legislative proposal for a new insurance recovery and resolution directive (IRRD) and that this proposal is, in many ways, aligned with Ireland's proposed potential domestic framework. Therefore, the Department of Finance and CBI will instead input into the IRRD as a means to progress a resolution framework for insurers and will not proceed with a domestic framework.

Insolvency Regime for Insurers

Parallel to the progression of the IRRD, the Department of Finance and the CBI noted they will continue to review the existing corporate insolvency regime for (re)insurers. They will also seek to examine and remedy weaknesses in the current corporate insolvency regime as it applies to insurers, including considering any required legislative amendments.

CBI's cross-industry guidance on operational resilience

On 1 December 2021, the CBI published its final Cross-Industry Guidance on Operational Resilience, which communicates to firms how to prepare for, respond to, recover and learn from an operational disruption that affects the delivery of critical or important business services. Firms should be able to demonstrate that they have applied the guidelines within an appropriate timeframe at the latest within two years of its being issued.

Matheson LLP was established in 1825 in Dublin and has offices in Cork, London, New York, Palo Alto and San Francisco. The firm employs more than 800 people across its six offices, including 120 partners and tax principals, and more 540 legal, tax and digital services professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. The firm counts more than half of the world's top 50 banks, seven of the world's ten largest asset managers and nine of the top ten most innovative companies in the world among its clients, and has advised the majority of Fortune 100 companies. The team's expertise is spread across more than 30 practice groups, including finance and capital markets, insolvency and corporate restructuring, asset management and investment funds, commercial real estate, litigation and dispute resolution, insurance and tax.

Authors

Darren Maher is a partner and head of the 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 such as cross-border mergers, schemes of arrangement, portfolio transfers and M&A. Darren is a member of the firm's Brexit advisory group and has advised a 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. Darren frequently publishes articles in financial services publications.

April McClements is a partner in the insurance and dispute resolution team at Matheson. She is a commercial litigator and specialises in insurance disputes. April advises on the full spectrum of insurance disputes, including complex coverage disputes (in particular, those relating to financial lines policies), policy-wording interpretation, D&O claims, and professional indemnity claims (eg, potential third-party liability, cyber and emerging risks and subrogation claims). April manages large-scale complex commercial disputes such as high-profile Commercial Court litigation and arbitrations. In addition, she manages the professional indemnity claims of clients – ranging from insurance brokers to architects and engineers – for a variety of insurers.

Sharon Daly is a partner in the insurance and dispute resolution team at Matheson and leads the firm's London office. She is a commercial litigator who specialises in insurance disputes and has been involved in some of the most significant commercial litigation before the Irish courts in the past ten years, including defending a major financial institution in a multibillion, multi-jurisdictional dispute arising from investment in Bernard L Madoff's business. Sharon advises a wide range of clients on insurance issues such as policy wordings, coverage, policy disputes, defence of large complex claims and subrogated recovery actions.

Grainne Callanan is a partner in the financial institutions group at Matheson and leads the firm's Cork office, where she specialises in corporate and regulatory insurance. She has advised a wide range of leading domestic and international financial institutions on all aspects of financial services law and regulation, including authorisation and establishment, corporate governance and reorganisations, combined cross-border M&A, compliance and regulatory matters. Grainne is the co-chair of the International Bar Association's organising committee for its 2020 Insurance Conference. She regularly lectures for the Law Society of Ireland and the Insurance Institute of Ireland.

Matheson LLP

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

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Trends and Developments

Contributed by:
Darren Maher and Karen Reynolds
Matheson LLP **see p.33**

The Introduction of an Individual Accountability Framework in Ireland

The international trend towards regulating individual accountability and consumer-centric cultures in financial services has also been taken into consideration in Ireland for many years now. This article charts Ireland's journey in this area from 2017 right through to the present day, in addition to setting out the key requirements of the new proposed framework and the timeline for implementation.

Central Bank of Ireland's report on "Behaviour and Culture of the Irish Retail Banks"

Following the completion of the Central Bank of Ireland (CBI)'s Tracker Mortgage Examination, the CBI published a report on the behaviour and culture of the Irish retail banks (the "Report") in response to a mandate by the Minister for Finance and Public Expenditure and Reform in 2017. In the Report, the CBI set out a proposal for the introduction of an Individual Accountability Framework (IAF) based on the details of the findings of its review. This proposal it stated should "apply more widely than to retail banks alone".

The proposal was based on the following four main pillars.

- Conduct standards – these set out the behaviour that the CBI expects of all Regulated Financial Service Providers (RFSPs) and the individuals working within them.
- Senior Executive Accountability Regime (SEAR) – this places obligations on certain firms and senior individuals to set out where responsibility and decision-making lies for their business in order to ensure clearer accountability. The CBI proposed that, in the first instance, the SEAR would apply to credit institutions, insurance undertakings and certain investment firms.
- Enhancements to the current fitness and probity (F&P) regime – these measures will increase the focus on the responsibility of RFSPs by requiring them to assess individuals proactively in controlled functions on an ongoing basis.
- A unified enforcement process – this would enable the CBI to pursue individuals directly for their own misconduct rather than having to link the misconduct to their participation in a regulatory breach by their RFSP.

General Scheme of the Central Bank of Ireland (Individual Accountability Framework) Bill

On 27 July 2021, the Department of Finance published the General Scheme of the Central Bank of Ireland (Individual Accountability Framework) Bill (the "IAF Bill"). The purpose of the IAF Bill was to put the CBI's IAF proposal on a legislative footing. The four key components of the General Scheme broadly reflected the recommendations of the Report.

Central Bank (Individual Accountability Framework) Bill 2022

On 28 July 2022, a full year after the publication of the General Scheme and some four months after the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach's

report on its pre-legislative scrutiny of the General Scheme of the IAF Bill was published, the Department of Finance published the text of the IAF Bill. According to the Explanatory Memorandum to the IAF Bill, its primary purpose is to confer powers on the CBI to strengthen and enhance individual accountability in the financial services industry.

The overall structure proposed in the Report was retained – albeit with some amendments to the details of each pillar, which are examined more closely here.

Enforceable conduct standards

All RFSPs must comply with the conduct standards. The conduct standards set out the CBI's expectations for behaviour of RFSPs and their employees. These include obligations on firms and individuals alike to conduct themselves with honesty and integrity and to act with due skill, care and diligence in the best interest of consumers. The conduct standards comprise:

- common conduct standards that apply to all persons in controlled function roles;
- additional conduct standards that pertain to those holding senior positions (ie, those appointed to pre-approval controlled functions (PCF) roles) and others with significant influence; and
- business conduct standards for RFSPs.

RFSPs are required to notify affected persons of their obligations in relation to the conduct standards that apply to them, as well as to provide necessary training on such standards.

This pillar also imposes a duty on relevant individuals to take reasonable steps in order to meet both the common and additional conduct standards.

Senior Executive Accountability Regime

The aim of the SEAR is to overcome the difficulties the CBI has noted it often encounters when identifying precisely who is in charge of which decisions at RFSPs.

Impacted RSFPs must identify inherent responsibilities pertaining to the PCF role and allocate them to each PCF in the first instance before allocating responsibilities pertaining to the business of the RFSP. Following this, RFSPs must map out the roles, responsibilities and decision-making powers of these individuals. Impacted RFSPs will also have to create statements of responsibilities and responsibility maps pertaining to the RFSP, which describe their governance arrangements and demonstrate clearly that there are no gaps.

In addition to detailing the above-mentioned responsibilities, the IAF Bill states that "a person who has inherent or allocated responsibility for an aspect of the affairs of an RFSP shall take any steps that it is reasonable in the circumstances for the person to take". This has become known as the duty of responsibility. The question that arises concerns the standard that applies to this duty.

The authors believe that the crux of the matter lies in the wording (ie, "shall take any steps that it is reasonable in the circumstances for the person to take…"). This appears to be a subjective test, rather than a more objective requirement to take all reasonable steps as defined by the CBI or another organisation.

There is also a possibility that the term "reasonable in the circumstances" poses a risk of hindsight bias. A certain level of guidance from the CBI on these points is expected; however,

an overly prescriptive approach would not be useful.

As per the Report, the SEAR will initially apply to credit institutions, insurance undertakings and certain investment firms.

Enhancements to the CBI's F&P regime

Firms will have to do more to ensure and proactively certify that the individuals who are responsible for carrying out controlled functions have the requisite competencies and integrity to fulfil those roles.

Holding companies are now brought within the scope of the IAF Bill.

A CBI investigation of a person's F&P can look back as far as six years. Where a person is suspended from performing a controlled function, the maximum period of the suspension is extended to six months; however, the High Court can extend this to 24 months.

Proposed changes to the CBI's administrative sanctions procedure

I. Removal of the "participation link" in the administrative sanctions procedure

Under the current administrative sanctions procedure, the CBI must prove the breaches against the RFSP before it can sanction an accountable individual (otherwise known as the "participation link"). Under the IAF Bill, however, the CBI will be able to sanction an individual directly for breach of applicable conduct standards. This will essentially create an additional avenue of exposure for individuals who perform controlled functions, given that the CBI will also retain the ability to pursue individuals who perform controlled functions in a firm that has been found to have committed a prescribed contravention.

A person's ability to defend an enforcement action will depend on the their ability to demonstrate that they took such reasonable steps in the circumstances to, for example, comply with applicable conduct standards or prevent the prescribed contravention from occurring.

II. Changes following Zalewski v Adjudication Officer and Others

Additional changes were proposed in light of the Supreme Court of Ireland's decision in Zalewski v Adjudication Officer and Others. In this decision, the Supreme Court held that elements of the operations of the Workplace Relations Commission were unconstitutional.

As a result of the judgment and the Attorney General's Office's subsequent examination of the powers of "administrative bodies" with adjudicatory powers, the IAF Bill proposes to introduce a number of notable reforms to the CBI's investigative powers under the F&P regime and under the administrative sanctions procedure. Some of these changes include the following.

- New formalities relating to the commencement and conduct of an enforcement action, including the provision of relevant evidence with a notice of commencement of investigation and the duty to keep the person under investigation informed of progress.
- Separating the investigative and decision-making functions of the Enforcement Division. An authorised officer will be responsible for conducting the investigation and preparing a draft investigation report, which will be provided to the RFSP or individual under investigation. The person will have an opportunity to make submissions on the draft report. The authorised officer conducting the investigation will be prohibited from making any rec-

ommendation or expressing any opinion on a draft or final investigation report.
- If the CBI determines it appropriate to do so, a person will be able to reach a negotiated settlement of an enforcement action without making any acknowledgement (admission) of a breach. The CBI guidelines currently require a person to admit breaches in order to settle an enforcement action, so this will be a novel approach under the new regime.
- The most radical of the proposed changes, however, is that the High Court will be given the power to prevent a sanction from coming into effect if the High Court considers that an error of law has occurred or that the proposed sanction is manifestly disproportionate. This power will be reserved for scenarios in which the person under investigation has made admissions of breaches. The court will not have a confirmatory role where a settlement is reached without any acknowledgement of breaches. Where the High Court has a role, the sanction will not come into effect until the CBI confirms it.
- The IAF Bill makes provisions for the codification of the CBI's sanctioning guidelines – ie, the factors that the CBI will take into account when making a decision to impose a sanction.

Structure of the IAF Bill

As anticipated, the IAF Bill is presented as a series of amendments to the following three pieces of CBI legislation:

- the Central Bank of Ireland Act 1942;
- the Central Bank of Ireland Reform Act 2010; and
- the Central Bank of Ireland (Supervision and Enforcement) Act 2013.

In accordance with the IAF Bill and the Explanatory Memorandum to the IAF Bill, the key amends to these pieces of legislation can be summarised as follows:

- the Central Bank of Ireland Act 1942 now:
  (a) extends the application of the administrative sanctions procedure to persons performing controlled functions and to certain holding companies;
  (b) provides for the appointment of a panel from which appointments may be made for the purposes of certain decisions;
  (c) provides for the admissibility of business records at an inquiry;
  (d) provides for disclosure agreements; and
  (e) provides for an application for confirmation by the High Court of a decision of an inquiry under Part IIIC and a decision of the Irish Financial Services Appeals Tribunal under Part VIIA of the Act;
- the Central Bank of Ireland Reform Act 2010 now:
  (a) extends the regulation and supervision of financial service providers and persons performing controlled functions and pre-approval controlled functions through the introduction of business standards, conduct standards and the duty of responsibility;
  (b) provides for the independence of persons carrying out an investigation in the performance of their functions;
  (c) provides for the independence of persons to whom a function of the Head of Financial Regulation, the CBI or the Governor is delegated in the performance of their functions;
  (d) provides for a right of appeal to the Irish Financial Services Appeals Tribunal against a decision by the Head of Financial Regulation to confirm a suspension

notice;
  (e) increases the period for which the High Court may extend the duration of a suspension notice; and
  (f) provides for an application for confirmation by the High Court of a decision of the CBI or the Governor to issue a prohibition notice;
- the Central Bank of Ireland (Supervision and Enforcement) Act 2013 now:
  (a) extends the regulation-making power of the CBI; and
  (b) provides for arrangements that financial service providers shall adopt in relation to the allocation of responsibilities and compliance with obligations under financial services legislation.

Implementation timeline

In October 2022, the IAF Bill commenced its journey through the legislative process. At the time of writing (January 2023), the IAF Bill had completed the Dáil Committee Stage and was moving to Report Stage in the Dáil, which is likely to take place this month when the Dáil reconvenes.

Report Stage and the fifth and final stage in the Dáil are expected to be taken consecutively on the same day, after which the IAF Bill will then be considered by the Seanad. Ultimately, it could be early February 2023 before the IAF Bill is passed by both Houses of the Oireachtas. Enactment will follow thereafter but the details of commencement are not yet known.

As regards the CBI's consultation process, the authors anticipate that this will swiftly follow enactment. The Minister for Finance, when speaking during the Committee Stage consideration of the IAF Bill, said that the CBI would issue its guidance six months after the consultation. All along, the CBI has indicated in multiple speeches that there would be little or no lead-in time for implementation of the guidance, given that impacted RFSPs have had plenty of time to prepare. There is currently no suggestion that this will change. As a result, RFSPs will need to be in a position to demonstrate compliance with the IAF in early course once the final guidance is issued by the CBI.

What should RFSPs do now?

RFSPs should not underestimate the scale of what needs to be done in order to achieve compliance with the requirements of the IAF Bill. In addition, given the details set out earlier regarding implementation, RFSPs would be well advised to initiate their projects without delay. The following are among some of the factors RFSPs should consider as they embark on this work.

Tone from the Top

Driving the desired cultural outcomes is a priority of the CBI and driving the right "Tone from the Top" is crucial. As such, RFSPs should begin by identifying a senior-level sponsor – ideally CEO or Chief Operating Officer.

Implementation team

RFSPs should then move to create an implementation team of internal experts and external advisers. In terms of composition, the team needs senior-level representatives from HR, the compliance department, the risk department and across the business.

Documentation and processes

A gap analysis should be undertaken on current relevant documentation and processes, as this will help to recognise RFSPs' key pain points while also identifying their quick wins and target areas that will require a more focused effort.

RFSPs should leverage what they can in terms of existing infrastructures and documentation but begin making changes to documents and processes based on the gaps identified.

One area that comes to mind with regard to leveraging existing documents and processes is F&P. RFSPs should ensure that their pre-existing processes and procedures in respect of the F&P regime are fit for purpose and take into account the requirements of the CBI's "Dear CEO" letters on F&P issued in April 2019 and November 2020.

In addition, any results of internal audit and or compliance reviews that have identified deficiencies within the pre-existing control framework should be examined and outstanding actions closed where possible. These steps will provide a good "baseline" from which the IAF can then be implemented.

Training

Training will be key when it comes to the conduct standards. Training needs to address:

- individuals subject to the conduct standards;
- individuals subject to additional conduct standards; and
- all staff on the firm's conduct standards to socialise the CBI's expectations.

Firms need to explicitly advise individuals as to:

- what is expected of them;
- how to act when issues arise; and
- the implications for employees if behaviours or conduct fall short of what is required.

It is worth noting the discussion that took place during the Committee Stage consideration of the IAF Bill on the importance of training. The Minister for Finance said that a lot of focus must be placed on making sure there is sufficient awareness among staff regarding their heightened and legal responsibilities. He went on to say that those employers responsible for overseeing this legislation within their companies "have a solemn duty to make sure that those who are working for them have access across next year to training that will be needed to make sure this legislation is implemented".

Matheson LLP was established in 1825 in Dublin and has offices in Cork, London, New York, Palo Alto and San Francisco. The firm employs more than 800 people across its six offices, including 120 partners and tax principals, and more 540 legal, tax and digital services professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. The firm counts more than half of the world's top 50 banks, seven of the world's ten largest asset managers and nine of the top ten most innovative companies in the world among its clients, and has advised the majority of Fortune 100 companies. The team's expertise is spread across more than 30 practice groups, including finance and capital markets, insolvency and corporate restructuring, asset management and investment funds, commercial real estate, litigation and dispute resolution, insurance and tax.

Authors

Darren Maher is a partner and head of the 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 such as cross-border mergers, schemes of arrangement, portfolio transfers and M&A. Darren is a member of the firm's Brexit advisory group and has advised a 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. Darren frequently publishes articles in financial services publications.

Karen Reynolds is a partner in the commercial litigation and dispute resolution department at Matheson, and head of the firm's regulatory investigations team. Karen advises international and domestic clients – including financial institutions, fintechs, banks, service providers, investment managers, private equity firms and credit firms – on their interactions with regulators, from supervisory engagement to regulatory investigations and enforcement actions. She guides clients expertly through all manner of commercial and financial services disputes, including in the Commercial Court, Court of Appeal and Supreme Court. Karen has substantial experience in corporate restructuring and insolvency law matters, having taken a lead role in some of the most high-profile corporate rescue transactions of the past ten years.

Matheson

70 Sir John Rogersonn's Quay
Dublin 2
Ireland

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

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