International
Comparative
Legal Guides

Insurance & Reinsurance 2021

A practical cross-border insight into insurance and reinsurance law

10th Edition

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Ireland

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Central Bank of Ireland (the "**Central Bank**") is responsible for the authorisation of, and has primary responsibility for the prudential supervision and regulation of, insurance and reinsurance undertakings in Ireland. This role is achieved through monitoring and ongoing supervision of regulated firms and the issuing of standards, policies and guidance, with which (re) insurance undertakings are required to comply.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Undertakings wishing to set up a (re)insurance business in Ireland must obtain authorisation from the Central Bank.

The Central Bank has published both a checklist for completing and submitting applications for authorisation under the European Union (Insurance and Reinsurance) Regulations 2015 (the "**2015 Regulations**") (the "**Checklist**"), and a guidance paper to assist applicants. The application comprises the completed Checklist and a detailed business plan, together with supporting documents (the "**Business Plan**"), submitted after a preliminary meeting with the Central Bank.

The principal areas considered by the Central Bank in evaluating applications include:

- legal structure;
- ownership structure;
- overview of the group to which the applicant belongs (if relevant);
- scheme of operations;
- system of governance, including the fitness and probity of key personnel;
- risk management system;
- Own Risk and Solvency Assessment ("**ORSA**");
- financial information and projections;
- capital requirements and solvency projections; and
- consumer issues (such as the Minimum Competency Code and the Consumer Protection Code 2012 (the "**CPC**")).

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

- arrange a preliminary meeting with the Central Bank to outline the proposals, at which the Central Bank will provide feedback in relation to the proposal and identify any areas of concern that should be addressed before the application is submitted;
- prepare and submit the completed Checklist and Business Plan;
- dialogue with the Central Bank – the application process is an iterative one. During the review process, it will typically request additional information and documentation, and is likely to have comments on certain features of the proposal. The Central may seek additional meetings with the applicant as part of this process in order to discuss aspects of the proposal in further detail;
- the authorisation committee of the Central Bank considers the application;
- once the Central Bank is satisfied with the application, it will issue an "authorisation in principle" letter, which means that it is minded to grant its approval once certain conditions are satisfied; and
- once all conditions are satisfied, the Central Bank will issue the final authorisation and the (re)insurer can commence writing business in Ireland.

The Central Bank will issue a formal authorisation once it is satisfied that the capital requirements and any pre-licensing requirements have been met. The authorisation process can take between four to six months. The Central Bank does not currently charge a fee for assessing such applications.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

(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 regulator notifies the Central Bank. 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. Significantly, a Third-Country Branch that has been authorised by the Central Bank does not have the right to passport into other EU/EEA jurisdictions and, accordingly, is only permitted to write business in Ireland.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are some restrictions on insurers' freedom of contract in Ireland. These restrictions are largely for the protection of consumers. As Ireland is an EU Member State, Irish authorised insurers are subject to EU law and the Irish implementing legislation is the basis for many of these restrictions. Examples

include the Unfair Terms in Consumer Contracts Directive 1993/13/EC and the Distance Marketing of Financial Services Directive 2002/65/EC.

Insurers must also comply with the Central Bank's CPC and the Consumer Protection Act 2007 when dealing with consumers. The new Consumer Insurance Contracts Act 2019 (the "**2019 Act**"), which has been partially commenced, provides increased protection to consumers. Under the CPC and the 2019 Act, the term "consumer" is quite broadly defined, including individuals and small businesses with a turnover of less than EUR 3 million.

Insurance contracts, and the marketing and selling of insurance products to consumers, must also be compliant with the terms of the Sale of Goods and Supply of Services Act 1980.

1.5 Are companies permitted to indemnify directors and officers under local company law?

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

However, a company is not precluded from purchasing directors' and officers' ("**D&O**") insurance in relation to the negligence, breach of duty, default or breach of trust of a director. D&O policies generally cover damages awarded against the director, legal costs in relation to an action and in certain circumstances, the costs of the director in relation to any official investigation taken by the regulatory authorities in Ireland. However, D&O policies generally exclude cover for fraud and criminal fines imposed.

1.6 Are there any forms of compulsory insurance?

There are some forms of insurance that are compulsory under statute in Ireland, for example third-party motor insurance and certain types of aircraft and shipping insurance. Certain professional bodies also require their members to maintain professional indemnity insurance (e.g. solicitors, liquidators and (re) insurance intermediaries).

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The substantive law relating to insurance in Ireland is traditionally perceived as being more favourable to insurers.

However, the recently enacted 2019 Act has introduced significant changes to insurance law when an insurer is dealing with a consumer. The legislation is ultimately aimed at improving consumer protection, and it addresses some of the perceived imbalances between insurers and consumers in Irish insurance law. The following is a sample of some of those changes:

- The 2019 Act abolishes the concept of an "Insurable Interest" as a requirement for a customer to make a claim, except in the case of a contract of indemnity. Additionally, an insurer is not relieved of its liability under a contract simply because the name of the beneficiary is not specified in the policy document.
- The 2019 Act replaces warranties in consumer contracts with suspensive conditions. Basis of contract clauses, which effectively convert representations into warranties, are abolished.
- The 2019 Act has introduced a 14-working-day cooling-off period for consumers for all contracts.
- The principle of pre-contractual utmost good faith has been abolished for consumer contracts, and consumers are now only required to answer honestly and with reasonable care the specific questions posed to them by the insurer. Insurers may not ask general questions but specific questions in a durable medium, in plain and intelligible language.
- Where a contract is cancelled the consumer must be provided with reasons for the cancellation, and the insurer must repay the balance of any unexpired term of the contract.

2.2 Can a third party bring a direct action against an insurer?

At common law, a third party to an insurance contract has no general right to bring a direct action against an insurer. This is due to the operation of the principle of privity of contract, which provides that a person who is not a party to a contract may not enforce it.

Statute does, however, provide a number of limited exceptions to this rule in the context of third-party actions against insurers.

- Under section 62 of the Civil Liability Act 1961, where an insured with a liability insurance policy becomes bankrupt or dies (if an individual), is wound up (if a company) or is dissolved (if a partnership or other incorporated association), then monies payable to the insured under the policy are ring-fenced and will only be applicable to discharging all valid claims against the insured. The courts have expressed the view that section 62 creates a right of action in favour of an injured third party against the insurer. However, before any action can be taken against the insurer by the third party, liability must be established in the underlying claim against the insured, and quantum assessed.
- Sections 21 and 22 of the 2019 Act permit third parties to step into the shoes of an insured in the context of consumer contracts, such that the third party can make a claim under the insurance contract where the insured dies, cannot be found, is insolvent or for any other reason the court deems it just and equitable.
- A spouse or child who is beneficiary to a life assurance policy or endowment is entitled to enforce that policy in accordance with section 7 of the Married Women's Status Act 1957.
- Pursuant to section 76(1) of the Road Traffic Act 1961 (as amended), an injured third party can proceed directly against the insurer/indemnifier of the owner/driver of a motor car who is liable to the third party for injuries sustained as a result of a motor car accident.

A trust can be created under an insurance policy in favour of a third party, giving them the right as beneficiary to proceed directly against the insurer under the policy.

2.3 Can an insured bring a direct action against a reinsurer?

Under Irish law, an insured does not have a general right to bring a direct action against a reinsurer. The insured is not party to

the reinsurance agreement and is therefore restricted from bringing a direct action under the agreement, in accordance with the principle of privity of contract.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Prior to the introduction of the 2019 Act, parties to all insurance contracts were subject to a duty of utmost good faith, which imposed a duty on the insured to disclose all material facts before inception or renewal of an insurance policy. The remedy for breach of the duty of utmost good faith was avoidance of the policy.

For consumer contracts only, the 2019 Act (which is being commenced in two stages) introduces proportionate remedies for the breach of a new duty of disclosure which is confined to answering specific questions posed by the insurer honestly and with reasonable care. There is a presumption that where an insurer asks a specific question about a matter that it is material to the risk undertaken by the insurer or the calculation of the premium or both. The sections of the Act introducing the new duty of disclosure and proportionate remedies will be commenced on 1 September 2021.

From 1 September 2021 an insurer will only be permitted to avoid a policy where there has been a fraudulent misrepresentation. Proportionate remedies apply where there is a negligent misrepresentation and the remedy available to the insurer concerned must reflect what the insurer would have done if had been aware of all the facts. The insurer is only entitled to avoid the policy for a negligent misrepresentation where it would not have entered into the contract on any terms. Where it would have entered the contract on different terms, the contract is to be treated as if it had been entered on those terms and if the insurer would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on the claim. There is no remedy available to the insurer where the misrepresentation is innocent.

Section 8(6) of the 2019 Act requires an insurer to establish inducement to avail of the remedies under the act for a breach of the duty of disclosure.

The previous law and the duty of utmost good faith continues to apply in the case of non-consumer insurance contracts and avoidance of the policy is the only remedy available to the insurer where there is a material non-disclosure or misrepresentation, unless the contract provides otherwise; for example, if there is an innocent non-disclosure clause.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

As noted above, the 2019 Act, reforming the area of consumer insurance law, was signed into law in 2019 and is being commenced in two stages. Once fully commenced on 1 September 2021, the 2019 Act will replace the principle of utmost good faith and the duty of the consumer to provide full disclosure of all material facts before inception or renewal of an insurance policy with the duty of the consumer to provide responses honestly and with reasonable care to questions posed by the insurer.

The insurer will be required to ask specific questions on paper or on another durable medium, and shall not use general questions, and the consumer will not be under a duty to volunteer information over and above that required by the insurer's questions.

Parties to a non-consumer insurance contract remain subject to the duty of utmost good faith. The proposer or insured has a duty to disclose all material facts (a material fact is one which 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 and all material facts must be identified irrespective of whether the insurers has specifically asked about them.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling 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.

The 2019 Act 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 employment scenarios.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In Ireland, the monetary value of the claim determines the jurisdiction in which court proceedings are brought. The District Court deals with claims up to a monetary value of EUR 15,000. The Circuit Court deals with claims with a monetary value up to EUR 75,000 (EUR 60,000 for personal injury cases). The High Court hears claims in excess of this with an unlimited monetary jurisdiction.

Insurance disputes before Irish courts 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 EUR 1 million and the dispute is commercial in nature, either party may apply to have the dispute heard in the Commercial Court. Insurance and reinsurance proceedings where the value of the claim or counterclaim is not less than EUR 1 million are included within the meaning of commercial proceedings under the Superior Court Rules. There is no automatic right of entry to the Commercial Court; entry is at the discretion of the judge and can be refused if there has been any delay.

Decisions appealed from the High Court are dealt with by the Court of Appeal. However, where the Supreme Court believes that a case is of public importance, it may be appealed directly to the highest court in the state.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

In order to be admitted to the Commercial Court list, a payment of EUR 5,000 in stamp duty is required on the Notice of Motion seeking entry. Commencing proceedings in the District Court, Circuit Court or High Court requires the payment of nominal filing fees.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Proceedings in the Commercial Court are case-managed to ensure that proceedings are progressed at a much quicker pace.

Currently, the length of time from entry to the Commercial Court list to hearing tends to be between one week and six months, depending on the time required for the hearing. A strong emphasis is placed on alternative dispute resolution and the court can provide for a stay of proceedings for up to four weeks for the parties to consider mediation.

3.4 Have courts been able to operate remotely, where necessary, given COVID-19, and have there been any delays or other significant effects upon litigation as a result of COVID-19?

At the beginning of the COVID-19 restrictions in March 2020, there was an adjustment period for the Courts Service to enable proceedings to operate in line with government advice and regulations. In light of the restrictions, the courts had to adjust how hearings were proceeding. This meant reducing the numbers of people who could attend court in person and proceeding with hearings on a hybrid basis (where the hearing was partly physical and partly remote) or on a fully remote basis. Most court lists are now proceeding remotely (where possible). The Courts Service uses platforms such as Pexip and Video Conferencing to run hearings on a remote basis.

For longer trials and hearings that are proceeding on a hybrid or remote basis and involve witness evidence, parties to the proceedings now have the option of using platforms such as TrialView or Opus II. These platforms enable parties to make their submissions and witnesses to give their evidence remotely over live video. They also assist with document management and any documents opened to the court are shared on screen.

The High Court has the power to direct a fully remote hearing with witness evidence under section 11 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. This power was exercised for the first time on 8 February 2021, in the case of *Irish Bank Resolution Corporation Limited (In Special Liquidation) v Browne*, where the court directed that a fully remote hearing of the trial be conducted using the TrialView platform.

On 30 September 2020, the European Commission published the first EU-wide report on the rule of law, which aimed to assess key developments across the EU as well as the specific situation in each Member State. The chapter in relation to Ireland highlighted the steps that the Irish courts have taken to facilitate the administration of justice and noted that the number of virtual hearings had increased steadily since April 2020, with approximately 400 remote court sessions held in July 2020 alone. In addition, the Courts Service Strategic Plan 2021–2023 was published and laid before the Houses of the Oireachtas on 15 February 2021. The plan covers the first phase of a 10-year vision to transform the Courts Service, and aims to bring new digital technology and modern ways of working to the administration of justice, with one of the key goals being to adopt a *digital first* approach. The Courts Service hopes to develop an ICT and data strategy to define the application, infrastructure and data architecture to support a modern and digitally enabled Courts Service.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

(a) Parties to the action

A party to High Court proceedings can seek discovery of categories of documents relevant to the issues and necessary to dispose of the matter fairly. This can also be done to save costs. The court will consider whether such a request is proportionate and whether the documents can be obtained from a more readily available source.

(b) Non-parties to the action

A request for voluntary discovery of categories of documents must be made by a party first. If agreement on discovery is not reached, the party can then seek an order for discovery from the court.

Parties must disclose not only those documents which support their case, but all documents that fall within the categories of discovery. Any contents of the documents that are subject to privilege do not need to be disclosed.

An order for discovery against a non-party may be made by the High Court where it appears that the person is likely to have or has had documents which are relevant to the proceedings in its possession, custody or power.

The party seeking the non-party discovery must indemnify such person against the costs of the discovery. The court will also consider the possible prejudice or oppression a non-party might suffer in complying with the order for discovery.

Following delivery of the defendant's defence, parties usually seek voluntary discovery. In limited circumstances it is possible to obtain discovery by court order prior to the commencement of proceedings. Generally, such an order will only be made in cases where a clear proof of wrongdoing exists and where the information sought includes the names and identities of wrongdoers, as opposed to factual information concerning the commission of a wrong.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Legal professional privilege enables a party to protect itself from disclosure of certain communications between them and their solicitor. When legal privilege has been established, neither the client nor the solicitor can be compelled to disclose details of this communication for any reason.

(a) Documents relating to advice given by lawyers

Litigation privilege protects documents produced for the purpose of the litigation in question. Litigation privilege includes all communications between a solicitor and their client, a solicitor and their non-professional agent and a solicitor and a third party.

The communications over which privilege is claimed must be made for the dominant purpose of advancing the prosecution or defence of the case or the seeking or giving of legal advice in connection with it.

(b) Documents prepared in contemplation of litigation

Communications between a solicitor, acting in their professional capacity, and their client, are protected by legal advice privilege provided the communication is confidential and for the purpose of seeking or giving legal advice.

(c) Documents produced in the course of settlement negotiations/attempts

Documents relating to communications made without prejudice for the purposes of negotiating a settlement may be withheld and protected from disclosure or admissibility as evidence in court.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

A person can be subpoenaed by the courts to attend as a witness at the final hearing of an action. Failing to attend can amount to contempt of court.

4.4 Is evidence from witnesses allowed even if they are not present?

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

With a number of hearings proceeding remotely due to the current COVID-19 restrictions, witnesses are more frequently giving their oral evidence over live video as set at question 3.4 above.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Courts rarely appoint expert witnesses. Expert witnesses are generally retained by the parties to the litigation.

There are no general restrictions on calling expert witnesses.

Commercial Court rules require the parties to exchange expert reports in advance of a trial, and pre-trial directions will usually include directions in relation to expert reports. Such directions might include a pre-trial expert meeting in an effort to reduce the number of issues between the parties.

In insurance disputes, expert evidence in relation to the interpretation of the policy is generally not admissible as this is a matter to be determined by the court.

4.6 What sort of interim remedies are available from the courts?

The main form of interim relief available in this jurisdiction is by way of interim or interlocutory injunctions. Interim injunctions are granted *ex parte* (i.e. without notice to the other party) for a short period until the hearing for an interlocutory injunction (where the other party will be involved) can take place. The following test is generally applied by the court in considering an interlocutory injunction application:

1. whether there is a serious/fair issue to be tried;
2. whether damages would be an adequate remedy; and
3. whether the balance of convenience lies in granting or refusing an injunction.

An applicant for an injunction is required to provide an undertaking to cover any damages they may be liable for as a result of the injunction. The undertaking is given in the event that they are ultimately unsuccessful in the proceedings.

Generally, injunctions restrain or prohibit a person from doing something or require a person to do something.

Types of Injunctions

The following are types of injunctions that can be granted in this jurisdiction:

- *Quia Timet*: these are used to prevent an anticipated infringement of a legal right;
- *Mareva*: these are used to prevent the removal or disposal of assets;
- *Anton Piller* Orders: these allow for entry to the premises of a defendant for the inspection and removal of items of evidence; and
- *Ne Exeat Regno* Writ and *Bayer* Injunction: these can be sought where you are seeking to prevent a defendant from leaving the jurisdiction.

These particular types of orders are rarely granted because they can have an onerous impact on a person's rights. The court can, at its discretion, make an interim attachment order to preserve assets pending judgment. A party can bring an application for an order where they can establish that the defendant has assets within the jurisdiction and that there is a serious risk that those assets will be dissipated before the hearing of the action, with the intention of evading judgment. The plaintiff in such an application is responsible for any loss resulting from the freezing of the assets if the order was not obtained honestly.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

District Court decisions may be appealed to the Circuit Court and Circuit Court decisions (including appeals from the District Court) may be appealed to the High Court. In addition, either party to a set of proceedings may appeal directly to the High Court from the District Court on a point of law.

The Court of Appeal has appellate jurisdiction from a decision of the High Court (including the Commercial Court) in respect of matters of law and fact. However, decisions of the High Court on appeal from the Circuit Court cannot be appealed to the Court of Appeal.

It is generally not possible to adduce oral evidence (or new evidence) on appeal to the Court of Appeal. The hearing is generally based on the consideration of the transcripts of the evidence that was provided in the High Court together with the submissions of the parties. The Court of Appeal can be slow to overturn a finding of fact of the High Court, unless it is satisfied that the evidence that was acted on could not reasonably have been correct.

A case may be appealed from the Court of Appeal to the Supreme Court where it is in the interests of justice to do so or where the decision involves a matter of general public importance. As set out at question 3.2 above, in certain circumstances, a case may be appealed from the High Court directly to the Supreme Court. This is referred to as a leapfrog appeal.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Under Section 22(1) of the Courts Act, 1981, in proceedings where a court orders the payment of a sum of money (which includes damages), the court also has the discretion to order the payment of interest on the whole or any part of such damages in respect of a part or the entire period between the dates when the cause of action accrued and the date of judgment. This rate of interest is currently 2%. This is discretionary and will only be awarded in cases where the trial judge deems that it is appropriate to do so. Once judgment is awarded, Courts Act interest will apply to the monetary sum awarded.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Costs typically will follow the event, and the "loser pays"

principle will apply. However, where the litigation is "complex", case law from the Commercial Court suggests that an analysis should be carried out by the court and the court should consider whether the winning party has succeeded on all grounds, rather than simply awarding full costs to the winning side.

An offer to settle proceedings, known as a Calderbank offer, can be made "without prejudice save as to costs". It has a statutory basis pursuant to Order 99 of the Rules of the Superior Courts. Where the settlement offer is declined, and the plaintiff does not subsequently "beat" the Calderbank offer, this can severely reduce any award for court costs that they might otherwise have been legally entitled to. It may result in the winning party being made to pay the losing party's legal costs in some cases. The courts have recognised the desirability of imposing financial consequences on a plaintiff who refuses what ultimately proves to have been a reasonable offer notwithstanding that the same was made on a without prejudice basis. The Rules of the Superior Courts also provide for lodgments and tenders (where particular types of parties, including insurers, are permitted to tender an amount rather than pay the sum into court) to be made in proceedings. A Calderbank offer will not be effective where a lodgment or tender could have been made instead.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Mediation

The Mediation Act 2017 ("**Mediation Act**") came into force on 1 January 2018. Under the Mediation Act, solicitors in this jurisdiction must advise their clients of the merits of mediation as an alternative dispute resolution mechanism before proceedings are issued.

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

The Rules of the Superior Courts also expressly provide that the court may, on application of either of the parties or of its own motion, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the court considers just and convenient and invite the parties to use another alternative dispute resolution process to settle or determine the proceedings or issue.

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 EUR 5,000 and the relevant policy has not been individually negotiated.

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

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Under Section 21 of the Mediation Act, where a party refuses a request to mediate (or to engage with other forms of alternative dispute resolution), the refusal can be factored into account by the court in awarding costs.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Arbitration Act 2010 (the "**2010 Act**") incorporates the UNCITRAL Model Law on International Commercial Arbitration. The 2010 Act applies to all arbitration agreements entered into after that date.

Under Article 5 of the Model Law, no court shall intervene in an arbitration except where provided by the Model Law. The High Court has a limited supervisory role under the 2010 Act and the Model Law. However, parties can refer matters such as the appointment of an arbitrator (in default of agreement) or the removal of an arbitrator for failure to carry out its function to the High Court.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

It is an essential prerequisite that for arbitration and any subsequent award to be binding, there must be an agreement to arbitrate between the parties. The 2010 Act does not prescribe the content of an arbitration agreement or set out the form of words to be used but it should reflect the agreement between the parties where disputes or differences which may arise will be referred to arbitration. Under the 2010 Act, an agreement to arbitrate must be made in writing.

Arbitration clauses are a common feature in insurance policies and reinsurance contracts. A particular feature of the 2010 Act is that it gives the parties autonomy over a range of issues including the powers to be given to the arbitral tribunal and to the court.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As set out at question 5.1, the courts' powers to intervene with an arbitration are limited under Article 5 of the Model Law.

The 2010 Act provides that a decision by an arbitral tribunal that a contract (which includes an arbitration clause) is null and void shall not affect the validity of an arbitration clause. As mentioned at question, 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 EUR 5,000 and the relevant policy has not been individually negotiated.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

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

of the dispute is effectively passed from the court to the arbitrator once an arbitrator is appointed and the parties agree to refer their dispute for the arbitrator's decision. Although there are additional costs incurred for an arbitration, there is the benefit of confidentiality of the dispute.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Under the 2010 Act and the Model Law, an arbitrator must provide his/her award in writing. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 (Settlement).

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Under the 2010 Act, the decision of an arbitrator is binding on the parties and there is no means of appeal. Where parties have entered into a valid arbitration agreement, the courts are obliged to stay proceedings.

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

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

An application to set aside an arbitral award under Article 34 must be made within three months from the date on which the party making the application has received the award.

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 re-organisations including cross-border mergers, schemes of arrangement, portfolio transfers and mergers and acquisitions.
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