ICLG

The International Comparative Legal Guide to:

Financial Services Disputes 2019

1st edition

A practical cross-border insight into financial services disputes work

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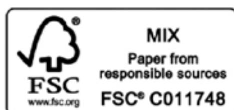

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Ireland

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1 Bringing a Claim – Initial Considerations

1.1 What are the most common causes of actions taken by or against financial institutions and service providers in your jurisdiction?

Causes of actions commonly taken by customers and other stakeholders against financial institutions include actions arising from alleged mis-selling of financial products, misstatement claims, claims for breach of fiduciary, contractual and other duties. Cases against financial services entities often involve allegations of misrepresentation, negligent misstatement, breach of contract and/or breach of a duty of care, fraud and deceit. Actions in tort and contract can be pursued concurrently. Certain statutory provisions impose civil liability for breaches, e.g., under the Companies Act 2014. This would include, for example, actions for loss or damage where, as a result of untrue statements or omissions of information in a prospectus, a person acquires securities in a publicly traded company, and actions for civil liability for breaches of market abuse legislation in connection with securities traded on the Main Securities Market, the Enterprise Securities Market and the Global Enterprise Market of Euronext Dublin (formerly the Irish Stock Exchange).

Actions arising from enforcement action by secured lenders/acquirers of Non-Performing Loans (NPLs) are quite common; for example, defensive/injunctive actions by borrowers. The recent decision of the Court of Appeal in *Tanager Designated Activity Company v Kane & Ors* [2018] IECA 352 was much anticipated in the Irish financial services market and has restored certainty as regards the enforceability of assigned security rights in loan portfolio sales.

The Central Bank of Ireland (CBI) is responsible for prudential and conduct of business supervision and regulation of financial services firms which provide financial services in Ireland. Pursuant to section 44 of the Central Bank (Supervision and Enforcement) Act 2013, any failure by a regulated financial service provider to comply with any obligation under financial services legislation is actionable by the customer who suffers loss or damage as a result of such failure.

1.2 What remedies are most likely to be awarded?

The main remedy awarded in claims against financial institutions is damages. Damages may come in the form of general damages, special damages, punitive or nominal damages. Irish courts tend to award compensatory and not punitive damages, meaning that the courts look to the damage done rather than punishing the offender and deterring others, although aggravated damages and exemplary/punitive damages are available. Other remedies depend on the nature of the claim; general common law and equitable remedies which are available include specific performance, declaratory relief, and injunctive relief. In appropriate circumstances, orders for rescission may be made.

1.3 Who has a right of action in financial services disputes? Does it make a difference if the customer is an individual or a commercial entity?

Any recipient of financial services, or any person who believes they have been impacted by the actions, omissions or statements of a financial services provider, whether an individual or a corporate, has the right to issue proceedings (see question 1.1 above in relation to the types of claims).

1.4 Is third-party funding available in financial services litigation (crowdfunding, maintenance, champerty, etc.)? Does litigation insurance operate in your jurisdiction and, if so, what are the implications for this?

Litigation is usually funded by the individual parties, but the unsuccessful party is typically ordered to pay the successful party's costs. Third Party Funding (TPF) is generally prohibited by the common law principles of maintenance and champerty (the Maintenance and Embracery (Ireland) Act 1634). In the case of *Persona Digital Telephony Limited & anor v The Minister for Public Enterprise Ireland & ors* [2017] IESC 27, the Supreme Court upheld the prohibition against litigation being funded by a person with no legitimate interest in the claim. In *SPV OSUS Limited v HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44 (SPV), the Supreme Court upheld the prohibition on litigation trafficking. A party with a legitimate interest in proceedings (a shareholder or creditor) does not come under this prohibition (*Moorview Development Limited & Ors v First Active Plc & ors* [2018] IESC 33).

Parties to litigation in Ireland may avail of after the event insurance policy (*Greenclean Waste Management Ltd v Leahy (No 2)* [2014] IEHC 314).

1.5 Are class action law suits available in your jurisdiction? If so, has this impacted financial services litigation? Has there been an increase in class action suits post the financial crisis?

Under Irish law, it is possible to bring representative actions which

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are currently the closest thing to class actions. Test cases or "pathfinder cases" also exist. The parties agree to be bound by the decision of the test case, which becomes the benchmark by which the remaining cases will be resolved.

Class actions will indirectly be facilitated in Ireland through the European Commission's "New Deal for Consumers" which was published by the European Commission in April 2018. If enacted, this would import an increased litigation risk for industry sectors subject to EU regulation, including in relation to financial services. Class party actions will only be available for individuals, and commercial entities (including law firms) will be excluded.

2 Before Commencing Proceedings

2.1 What are the main barriers to financial service litigation for customers? Are there exclusionary clauses or duty defining clauses in customer contracts which prevent customers from bringing a case?

The fact that neither TPF nor class actions are permissible, at present, under Irish law could be described as barriers to litigating against financial services entities. Irish courts recognise and enforce exclusion clauses; however, they are generally strictly interpreted, and may be impacted by applicable consumer protection legislation and regulation (for example, the CBI's Consumer Protection Code) and would not, generally, be perceived to be an obstacle to litigation.

The European Communities (Unfair Terms in Consumer Contracts) Regulations (Unfair Terms Regulation) (SI 27/1995), as amended (the Regulations), provide protection for consumers if an exclusion clause is present on a standardised form (see *McCaughey v IBRC Ltd & Anor* [2013] IESC 17, *AGM Londis plc v Gorman's Supermarket Ltd* [2014] IEHC 95 and *Start Mortgages Ltd v Hanley* [2016] IEHC 320).

2.2 Is there a time limit within which financial services disputes must be commenced? If so, is it different depending on whether proceedings are brought before a regulatory body or before the courts? Does the commencement of a regulatory process 'stop the clock'?

The majority of financial services disputes relate to matters of contract law or tort, where the limitation period is six years. The Financial Services and Pensions Ombudsman Act 2017 extended the time limit for bringing certain financial complaints relating to long-term financial services. The limitation period runs from the point in time where the customer was aware or ought reasonably to have become aware of the conduct giving rise to the complaint. The Ombudsman has discretion to extend the period further. In cases of fraud, the limitation period does not start to run until the claimant became aware of, or should have become aware of, the impugned conduct. Parties can enter into agreements to shorten, or pause, a limitation period. The commencement of proceedings "stops the clock".

For cases which do not come under the Financial Services and Pensions Ombudsman Act 2017, *Gallagher v ACC Bank* [2012] IESC 35 (Gallagher) and *Cantrell v AIB PLC & Ors* [2017] IEHC 254 (Cantrell) clarified that although the limitation period is calculated from when the loss occurred, the clock may not begin to run if there is only a mere possibility of loss. In Cantrell, the court further clarified that the clock will only begin to run in financial disputes when the loss has actually occurred – i.e. when the tort is complete.

Actions for insider trading, unlawful disclosure of inside information and market manipulation under the Companies Act 2014 are subject to a two-year limitation period.

2.3 Can parties in financial services litigation avail of litigation and/or legal advice privilege? Are investigations conducted by regulated bodies considered 'litigation' in the context of privilege?

Yes – litigation privilege protects from disclosure confidential communications between lawyer and client made for the dominant purpose of being used to prepare for existing or contemplated litigation. Litigation privilege may also extend to communications between a client and a third party, where the dominant purpose is to prepare for existing or contemplated litigation and is therefore considered to offer a greater level of protection. Litigation privilege rarely continues beyond the final judicial determination of the proceedings in which it was asserted (see *UCC v ESB* [2014] 2 IR 525).

Legal advice privilege can arise in circumstances where litigation is not in contemplation, and is similar to "attorney-client privilege" in the US. Legal advice privilege protects confidential communications between lawyer and client made for the dominant purpose of seeking or giving legal advice. Unlike litigation privilege, it does not protect communications between client/lawyer and third parties.

Communications with financial regulators do not generally attract the protection of litigation or legal advice privilege. There is, however, a clear line of authority which has evolved and supports the application of litigation privilege to documents generated for the purpose of engaging in regulatory investigations and inquiries (see: *Ahern v Mahon* [2008] 4 IR 704, in relation to privilege before a statutory investigation or inquiry, such as a tribunal; *Quinn & ors v Irish Bank Resolution Corporation Ltd & Anor* [2015] IEHC 315, in relation to litigation privilege over documents created for the dominant purpose of engaging with regulatory and investigative processes involving the financial regulator and the Office of Director of Corporate Enforcement; and *The Director of Corporate Enforcement v Leslie Buckley* [2018] IEHC 51, relating to the preparation of a response to the State corporate enforcer's investigation of a whistleblower complaint).

The Irish High Court in *UCC v ESB* (referred to above) has adopted a narrow interpretation of "client" for the purposes of legal privilege (similar to the Three Rivers No. 5 test in the UK). It remains to be seen if the commentary in *SFO v ENRC* [2018] EWCA Civ 2006, which suggests a willingness to depart from the restrictive interpretation (noting that English law appeared to be so out of sync with international common law on the point), will be persuasive here.

2.4 Are standard form master agreements used in your jurisdiction for financial institutions (for example, the ISDA Master Agreement)? How are they treated?

Many financial services providers utilise standard form contracts and generally applicable terms and conditions. See question 3.6 below in relation to protections for consumers in connection with standardised contracts and question 7.3 below in relation to a recent case where the surcharge interest provision in a lender's standard terms and conditions was held to constitute an unenforceable penalty clause.

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ISDA Master Agreements are used in Ireland mainly for cross-jurisdictional agreements. On 3 July 2018, ISDA released an Irish law ISDA Master Agreement (a French law version has also been published). The adoption of ISDA agreements, which are governed by the law of EU Member States other than the UK, is a welcome development given the anticipated departure of the UK from the EU.

2.5 Are there any non-contractual duties which are binding on financial services entities (for example, a particular fiduciary duty or a code of conduct)? Can they be contracted out of?

As mentioned, the CBI is the local regulator of financial services entities in Ireland. The CBI issues codes of conduct, which set out the CBI's policy and which supplement applicable financial services legislation. These statutory codes of conduct set out the minimum requirements which are binding on regulated financial services firms when providing financial services. Failure to comply can result in an investigation and the imposition of an administrative sanction by the Central Bank.

A bank owes a duty of confidentiality to its customers. The foundation of this duty is contractual in nature but increasingly the position taken in Irish courts is to analyse the duty against the backdrop of public policy. Fiduciary duties may be owed in the context of a bank and customer relationship. Recently, the Irish Court of Appeal affirmed that Irish contract law does not recognise any general principle of good faith and fair dealing in commercial contracts (*Flynn & Anor v Breccia & Anor* [2017] IECA 74).

3 Progressing the Case

3.1 Is there a specialist court or specialist judges for financial services litigation?

No. However, most cases are heard by the Commercial Court, a "fast track" division of the High Court which deals with commercial contracts and business disputes with a monetary value in excess of €1 million. Plans are in train to build on the success of the Commercial Court list with the introduction of a separate, specialist financial services court (together with other specialist courts including a specialist IP court).

3.2 Does the method of service of proceedings differ for financial service litigation?

In general, financial services litigation follows the same procedural rules as any other type of litigation. High Court proceedings are commenced by issuing and serving an originating summons. Service on an individual is to be done personally (where practicable). Service on a registered company is affected by leaving a summons at the registered office of the company or service by ordinary pre-paid post to the company's registered office and keeping the postal certificate.

3.3 Are there any specific pre-trial procedures that must be followed for financial services litigation in your jurisdiction? If so, what are they and what are the consequences of not abiding by them?

Pre-trial steps are the same in financial services litigation as they are in other litigation cases. However, there are specific pre-trial procedures for the Commercial Court which differ slightly.

3.4 Are there any alternative dispute resolution (ADR) regulations that apply to financial services disputes in your jurisdiction? Are ADR clauses typically included in financial services contracts, and is ADR commonly used to resolve financial services disputes in your jurisdiction?

The Mediation Act 2017 requires litigants to confirm to the courts that they have considered mediation. The solicitors on record must evidence this by completing a statutory declaration in advance of the commencement of proceedings. If an agreement contains an ADR clause, any court proceedings instigated can be stayed by an application from the other side, for the case to be referred to arbitration. A compliant made by a consumer to the Financial Services and Pensions Ombudsman (the FSPO) must have initially been attempted to be resolved between the consumer and the financial institution using the financial institution's complaints resolution system.

3.5 How are claims for negligent misstatement/mis-selling dealt with in your jurisdiction?

Mis-selling of financial products claims can be dealt with by way of litigation or can be the subject of complaints to the FSPO and/or the CBI. In Ireland, the issue of mis-sold payment protection insurance was addressed by way of a redress and compensation scheme under the Central Bank Act 1942 (as amended). In order to prove negligent misstatement, a claimant is required to show the existence of a special relationship between the claimant and the financial services firm such that the firm owed a duty of care to the claimant, that the firm misstated something on which the claimant relied and, as a result of such reliance, caused loss or detriment and that the firm should reasonably have foreseen that the claimant would rely on its (mis)statement. For negligent misrepresentation claims to succeed, the claimant must establish that the financial services firm made a representation to the claimant on foot of which the claimant was induced into entering into an agreement, that the financial services firm lacked the requisite level of due care in making the representation, and the claimant's loss was caused by the incorrect representation provided. The Irish High Court noted in *Walsh v Jones Lang LaSalle Ltd* [2017] IEHC 38 that a disclaimer could limit liability for a negligent misstatement. However, Mr. Justice O'Donnell did state that a disclaimer of this nature would only be upheld if it was clear that the reader should take all responsibility to ensure the information in the prospectus was accurate.

Civil liability for untrue statements or omissions in prospectuses is addressed under section 1349 of the Companies Act 2014 and criminal liability is addressed under section 1357 of the Companies Act 2014. Under section 1349 of the Companies Act 2014, there is a statutory compensatory regime for customers who have acquired securities on the faith of a prospectus that contains an untrue statement or an omission of information required by EU prospectus law to be contained in the prospectus.

3.6 How have unfair terms in contracts been interpreted in your jurisdiction? Are there any causes of action or defences available specifically to consumers? How broad is the definition of a 'consumer' in your jurisdiction?

The Regulations provide statutory protections against the use of unfair contractual terms in consumer contracts (particularly where there are standard form contracts). The Irish courts more and more frequently

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consider the application of the Regulations of their own volition. The EU Unfair Commercial Practices Directive (Directive 2005/28/EC of 11 May 2005) was implemented in Ireland pursuant to the Consumer Protection Act 2007. This legislation provides protection against unfair, aggressive or misleading business-to-consumer commercial practices. The Competition and Consumer Protection Commission and the CBI are empowered to enforce the legislation.

The High Court in *KBC Bank Ireland Plc v Osborne* [2015] IEHC 795 (relating to commercial loan facilities where the borrower had confirmed by way of executing a facility letter that he was not borrowing as a consumer) held that a person other than a natural person cannot be a consumer. In *AIB v Higgins* [2010] IEHC 219, the High Court found that a person can have more than one business trade or profession and that the same person can be regarded as a consumer for certain transactions and as an economic operator in relation to others.

3.7 How is data protection/freedom of information dealt with in financial services litigation? Can a financial services customer access their personal data? How is commercially sensitive or confidential information dealt with in the context of discovery or disclosure?

The data protection landscape in Ireland was previously made up of the Data Protection Act 1988 and the Data Protection Act 2003 (which transposed the European Directive 95/46/EC on data protection into Irish law) (together, the Pre-GDPR Regime). The General Data Protection Regulations (the GDPR) came into force in May 2018 along with the Data Protection Act 2018 to give further effect to the GDPR and repeal certain parts of the Pre-GDPR Regime. Under Article 15 of the GDPR, any individual has a right to obtain a copy of any information relating to them which is kept in a structured manual filing system. There are certain exceptions to this right; for example, information which relates to judicial proceedings, an active criminal investigation, the administration of tax or in contemplation or in preparation of a legal defence.

There are no specific disclosure or discovery requirements which apply solely to financial services litigation. Order 31 of the Rules of the Superior Courts of Ireland governs the main disclosure requirements which apply in any litigation. Recent court decisions have emphasised that orders for extensive discovery should only be made when all other avenues have been exhausted (see *Tobin v The Minister for Defence & Ors*, which is subject to an appeal to the Supreme Court on the basis that the discovery point is one of public importance). Cross-border discovery requests are possible through EU Regulation (EC) No. 1206/2001.

The Data Protection Act 2018 has introduced new court rules on media access to and reporting of court cases commenced on or after 1 August 2018.

In Ireland, almost all cases are heard in public. This means that commercially sensitive information which has been included in discovery may be publicised. Parties may apply to the court for an order to maintain confidentiality and, if successful, those documents may be redacted to block disclosure of sensitive information.

4 Post Trial

4.1 Is there a right of appeal in financial services disputes?

Generally, financial services disputes are litigated in the High Court (and the Commercial Court) from which an appeal lies to the Court of Appeal. The Court of Appeal does not hear oral evidence and considers findings of fact arrived at by the High Court. In limited circumstances, it is possible to bring a further appeal from the Court of Appeal to the Supreme Court. Leave of the Supreme Court must be obtained in advance. The Supreme Court may hear an appeal on a decision from the Court of Appeal if it is satisfied that the decision involves a matter of general public importance, or the interests of justice require it. A "leapfrog appeal" from the High Court directly to the Supreme Court is possible where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal. Any finding by the Supreme Court cannot be appealed, unless the case involves an issue of interpretation of EU law in which case it may be referred to the European Court of Justice.

4.2 How does the court deal with costs in financial services disputes?

In Ireland, costs generally "*follow the event*" and are usually awarded on a party-party basis. Costs are ultimately awarded at the discretion of the court. There is a growing trend to make issues-based costs awards. It is also common for costs sanctions to be imposed where the court is dissatisfied with certain aspects of the conduct of the proceedings, or for not availing of mediation or conciliation, unless there is a good reason for the refusal. The court will also take into account any lodgements or tenders made. In *Thema International Plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357, the High Court affirmed the court's jurisdiction to impose liability for costs on a third-party funder who had a legitimate interest in the proceedings, though not a party to the litigation, in light of his role in driving the action.

5 Cross-Border Issues

5.1 What issues typically arise in cross-border disputes or investigations involving financial institutions and how are they catered for in your jurisdiction?

The issue of jurisdiction is typically the biggest concern in cross-border disputes and is generally resolved by reference to common law principles for disputes involving non-EU Member States or by reference to EU regulations for disputes involving EU Member States.

Clauses of express jurisdiction in civil and commercial contracts between parties in different EU Member States are recognised pursuant to Regulation (EC) 593/2008 on the law of contractual obligations. In addition, the Irish courts respect a choice of jurisdiction in a commercial contract in accordance with the Recast Brussels Regulation (Regulation EU No. 2015/2012). The Recast Brussels Regulation provides priority to a court nominated in an exclusive jurisdiction clause. Failing a jurisdiction clause, the appropriate jurisdiction will be determined by the nature of the dispute.

Otherwise, and for all non-EU Member States, the common law rules apply and jurisdiction can be determined in the Irish courts' favour by mandatory provisions of Irish law or if the application of foreign legal provisions to the dispute would be manifestly incompatible with Irish public policy.

5.2 What is the general approach of the courts in your jurisdiction to co-operating with foreign courts or regulatory bodies or officials in financial services disputes (including investigations)?

International co-operation between Ireland and other countries is

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primarily governed by the Criminal Justice (Mutual Assistance) Act 2008 and the Criminal Justice (Mutual Assistance) (Amendment) Act 2015 (together, the Mutual Assistance Acts). Co-operation with foreign courts or regulatory bodies generally is dependent on the identity of the corresponding State and their ratification of relevant international agreements or existence of a mutual assistance treaty.

Co-operation is most evident between Ireland and other EU Member States. In addition to the Mutual Assistance Acts, there are numerous frameworks in place which enhance Ireland's co-operation with other EU Member States; for example, the Council Framework Decision on the European Evidence Warrant (2008/978/JHA) and the Council Framework Decision on Freezing Orders (2003/577/JHA). A court in any EU Member State (with the exception of Denmark) can also take evidence from a witness in Irish court proceedings, as provided for in the Evidence Regulation (Council Regulation 1206/2001) and the Rules of the Superior Courts of Ireland.

The applicable law of enforcement of foreign judgments depends primarily on the jurisdiction that has issued the foreign judgment. For judgments emanating from an EU Member State, the Brussels I Regulation (EC 44/2001) and the Brussels I Recast Regulation (EC 1215/2012) provide for the recognition and enforcement of judgments in civil and commercial matters. For all non-EU Member States, common law rules apply and the court will consider whether the judgment is for a definite sum, if it is final and conclusive, and the competency of the jurisdiction which issued the judgment amongst other factors.

Irish courts will not enforce non-EU Member State judgments in Ireland unless an applicant can show some legitimate benefit that will ensue from an order recognising the non-EU judgment in Ireland (see *Albaniabeg Ambient Shpk v Enel SpA and Enelpower SpA* [2018] IECA 46).

5.3 Is extra-territorial jurisdiction typically asserted in your jurisdiction and, if so, in what circumstances?

In general, Ireland does not exert extra-territorial jurisdiction. Extra-territorial jurisdiction is conferred in Ireland by way of statute and a consideration of the relevant offence must be made before it can be determined if Ireland can exercise extra-territorial jurisdiction.

5.4 Are unilateral jurisdiction clauses valid and enforceable in your jurisdiction?

Unilateral jurisdiction clauses are valid and enforceable in Ireland. The Recast Brussels Regulation addressed the issue of "torpedo actions" with respect to an exclusive jurisdiction clause. This matter has not been clarified with respect to unilateral jurisdiction clauses. Disputes arising under contracts containing such a clause could potentially fall victim to a "torpedo action".

6 Regulated Bodies

6.1 What bodies, apart from the courts, regulate financial services disputes in your jurisdiction?

The CBI is the main regulator dealing with financial services disputes in Ireland. The CBI can impose significant monetary penalties on regulated entities, up to a maximum of the greater of €10 million or 10% of turnover of the regulated entity. The CBI can also impose financial penalties on those involved in the management of regulated entities up to a maximum of €1 million. The FSPO deals with disputes with financial services providers.

6.2 What powers (investigative/inquisitorial/enforcement/sanctions) do these regulatory bodies have?

The CBI may commence an investigation into conduct of a regulated financial services provider where it has reason to believe that a contravention of applicable law or regulation has occurred. The CBI may conduct on-site inspections, interview individuals, compel the production of documents, carry out dawn raids and summon witnesses. There are a number of potential outcomes from the ASP which include a criminal prosecution, a supervisory warning, an inquiry, a settlement or no further action. The CBI may hold an inquiry to determine if a prescribed contravention has occurred and, if so, the appropriate sanction which could include caution or reprimand, monetary penalties as described in question 6.1 above, suspension or revocation of authorisation (or submission of proposal to suspend or revoke authorisation if the entity is authorised by the European Central Bank), disqualification of a person, a direction to cease a contravention and a direction to pay the CBI all or part of its costs. Under the Central Bank (Supervision and Enforcement) Act 2013, the CBI has power to make directions as to the regulated entity's business and order redress for customers.

The FSPO has the power to obtain information and make such inquiries. The FSPO can award compensation of up to €500,000 and it can also direct a regulated provider to rectify the conduct that is the subject of a complaint. There is no limit on the value of the rectification that can be directed.

6.3 Are the decisions of regulatory bodies binding on the parties to a financial services dispute?

Decisions of the CBI are binding on the regulated entity or person. Failure to comply with any decisions of the CBI under the administrative sanctions procedure could result in the revocation of a regulated entity's authorisation (or a submission of a proposal to suspend or revoke authorisation if the entity is authorised by the European Central Bank). Under the CBI's Fitness and Probity regime, individuals who carry out a "controlled function" can be suspended pending a Fitness and Probity investigation and, if found not to be of appropriate fitness and probity, they can be prohibited from carrying out a controlled function for a specified period or indefinitely. Fines may be imposed by the CBI of up to €10 million for firms and up to €1 million for individuals.

The decisions of the FSPO are binding.

6.4 What rights of appeal from regulatory decisions exist?

There is a right of appeal for regulated entities to the Irish Financial Services Appeals Tribunal (IFSAT) in respect of certain CBI decisions. With respect to administrative decisions which are appealed, IFSAT can uphold, vary, substitute, set aside or refer the decision back to the regulator. For a supervisory decision, IFSAT can affirm or refer the decision back to the regulator.

The decision of IFSAT can be appealed to the High Court. The appeal does not affect the operation of the IFSAT decision. Rights of quasi-appeal of a regulated body with respect to a decision of a

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regulator include constitutional challenge and judicial review. These actions are taken in the High Court.

Decisions of the FSPO may be appealed to the High Court.

6.5 Are decisions of regulatory bodies publicly accessible?

Details of decisions of the CBI following an inquiry or a settlement following an investigation under the ASP are published and will include the name of the regulated entity, details of the contraventions and details of any sanction imposed, including monetary penalties.

7 Updates – Cases and Trends

7.1 Summarise any legislative developments in this area expected in the coming year. Describe any practical trends in your jurisdiction (e.g., has the financial crisis impacted legislation? Has there been an increase in the powers of regulatory bodies as a reaction to the crisis? Has there been a change in the amount and type of cases being brought by and against financial service providers?).

The focus on regulation and enforcement has intensified since the financial crisis. This has led to an increase in legislation in this area at both national and European level to enhance the powers of regulatory bodies, to facilitate information sharing between relevant authorities and to increase transparency to ensure effective regulation of transactions.

The Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018 was enacted in November 2018 and transposes the Fourth Anti-Money Laundering Directive (4AMLD) into Irish law.

The Markets in Financial Instruments Act 2018 makes provision for indictable offences for contraventions under the MiFID II Regulations. The sanctions for these contraventions represent a significant increase on those provided for under the European Communities Act 1972. Under the 2018 Act, the sanction for a person found to be guilty of a relevant offence on indictment is a fine not exceeding €10 million and/or a prison term not exceeding 10 years.

As part of its recommendations to the Law Reform Commission and the July 2018 publication by the CBI of a report on the Behaviour and Culture of the Irish Retail Banks (the Report), the CBI has proposed the introduction of an Individual Accountability Framework. The proposals include the introduction of enforceable Conduct Standards which would set out the behaviour that the CBI expects of regulated firms and the individuals working within them as well as a Senior Executive Accountability Regime.

Investigations by the CBI and the FSPO have shone a light on regulatory failings by financial institutions, which in turn has led to an escalation in the number of private party actions brought against such institutions. One significant example of this is in relation to tracker mortgages.

7.2 On an international level, would your jurisdiction be considered to be more financial institution- or customer-friendly?

Ireland has a proven track record in its commitment to understanding and facilitating the evolving needs of international business, and, in particular, those of the financial services industry which has been central to the country's economic growth. This commitment is recognised at an international level. Beginning with the establishment of the International Financial Services Centre in 1987, business-friendly policies have been adopted over the years by successive Governments to foster a supportive and stable legal, tax and regulatory environment, which combined with access to the European market and a skilled workforce make Ireland an attractive location for financial institutions.

7.3 Please identify any significant cases regarding financial services disputes during the past 12 months. Please highlight the significance of the case(s), any new or novel issues raised and what lessons can be drawn from them.

From a regulatory perspective, the decision of the Court of Appeal in *Fingleton v The Central Bank of Ireland* [2018] IECA 105 in April 2018 clarified that a settlement by a financial institution with the CBI will not, in and of itself, act as a bar to its pursuit of individuals within that institution by way of inquiry on grounds of bias.

In relation to costs, in *Moorview Development Limited & Ors v First Active Plc & ors* [2018] IESC 33, the Supreme Court confirmed that a costs order can be made against a person who funds litigation even if that person is not a party to the proceedings. In *Defender Limited v HSBC Institutional Trust Services (Ireland) DAC & ors* [2018] IEHC 322, the High Court gave judgment on a preliminary issue in favour of the defendant, HSBC Institutional Trust Services DAC, in a claim for $141 million taken against it by Defender.

In SPV, the Supreme Court reaffirmed the prohibition on unconnected third parties profiting in litigation. While upholding the prohibition, Chief Justice Frank Clarke and McKechnie J. urged legislators to reconsider the absolute ban on TPF.

In the linked cases of *Flynn & Benray Limited v Breccia* [2018] IECA 273 and *Sheehan v Breccia & Ors* [2018] IECA 286, the Court of Appeal upheld the High Court's decision that a 4% surcharge interest provision in a loan agreement constituted an unenforceable penalty clause. In particular, the court was influenced by the fact that the impugned provision was located in the lender's standard terms and conditions and, therefore, was not specifically negotiated. This decision demonstrates that the Irish courts will not deviate from the traditional penalty clause test of whether the clause is a genuine pre-estimate of the loss which would occur on default (and therefore is in contrast to the position in the UK under *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67).

The Regulations were an area of focus in 2018. The Regulations are increasingly relied on by borrowers in defending enforcement proceedings. In the recent judgment of Binchy J. in *The Governor and Company of the Bank of Ireland v McMahon & anor* [2018] IEHC 455, Binchy J. held that the Regulations, which place obligations for contracts to be drafted in "plain, intelligible language" do not apply to mortgages. This is a departure from other recent cases including *Ulster Bank Ireland Limited v Costelloe & anor* [2018] IEHC 289 and *Permanent TSB Plc formerly Irish Life & Permanent Plc v Fox* [2018] IEHC 292. Whilst these cases demonstrate differing approaches, a common theme is that where borrowers have entered into an agreement following receipt of independent legal advice, the court is more likely to determine that the agreed terms are not unfair.

7.4 Have global economic changes caused any changes to financial services litigation/regulation in your jurisdiction?

In Ireland, since the 2008 global financial crisis, there has been an increased emphasis on regulatory action, increased oversight,

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investigations and enforcement. The CBI has developed a more intrusive risk-based framework for supervision and its enforcement and redress powers have been enhanced significantly by legislation. Significantly, the Central Bank Reform Act 2010 strengthened the CBI's powers under the Fitness and Probity Regime and enabled it to remove individuals performing controlled functions and pre-approval controlled functions from industry, or to prevent individuals who do not meet the Fitness and Probity Standards issued by the CBI from performing pre-approval controlled functions. In addition, the Central Bank (Supervision and Enforcement) Act 2013 increased the CBI's powers to administer sanctions in response to regulatory breaches by regulated financial service providers and the level of fines that it could levy under its Administrative Sanctions Procedure. In 2017, the CBI restructured its financial regulation function into two distinct pillars: one dedicated to the regulation of financial conduct; and the other to prudential regulation. The CBI is also increasing its focus on personal responsibility and has expressed the view that "*individual accountability is integral to the regulation of firms*". In its recent Report on Behaviour and Culture of the Irish Retail Banks, it has called for additional legislative reforms to facilitate the introduction of an Individual Accountability Framework, a key component of which will be a Senior Executive Accountability Regime (as outlined at question 7.1 above).

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