Insurance & Reinsurance 2019

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the twelfth edition of *Insurance & Reinsurance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Mexico and Sweden.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Torchiana, Mark F Rosenberg and Marion Leydier, of Sullivan & Cromwell LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Ireland

Sharon Daly, Darren Maher, April McClements and Gráinne Callanan

Matheson

REGULATION

Regulatory agencies

1 Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

Ireland has a well-established, efficient prudential regulatory infrastructure that complies with best international standards and focuses on risk-based regulation and the application of the proportionality principle.

The Central Bank of Ireland (the Central Bank) is responsible for the prudential supervision and regulation of insurance and reinsurance undertakings authorised in Ireland to ensure compliance with regulatory requirements. The Central Bank is a well-regarded regulatory authority and enjoys a reputation for being a robust yet business-friendly regulator. The European Union (Insurance and Reinsurance) Regulations 2015 (the 2015 Regulations), which transposed Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 (Solvency II) into Irish law, set out the regulatory framework within which insurance activity may be carried out by insurers and reinsurers in Ireland. The 2015 Regulations received minor amendments by way of the European Union (Insurance and Reinsurance) (Amendment) Regulations 2017 (the 2017 Regulations).

The Central Bank plays a pivotal role in the supervision and regulation of insurance and reinsurance undertakings in Ireland to ensure compliance with regulatory requirements without placing burdensome administrative requirements on insurance and reinsurance operators.

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

Formation and licensing

2 What are the requirements for formation and licensing of new insurance and reinsurance companies?

Formation of insurance and reinsurance companies

The incorporation procedure in Ireland is straightforward. A company wishing to apply for a licence to carry out insurance or reinsurance business in Ireland may adopt the form of a designated activity company (DAC), a public limited company, an unlimited company, a company limited by guarantee or a *Societas Europaea*.

The DAC is by far the most common form adopted by insurance and reinsurance companies in Ireland and is very similar to the traditional private company limited by shares that existed prior to the introduction of the Companies Act 2014. The DAC's constitution includes a memorandum and articles of association. The objects clause of the memorandum of association of a DAC sets out the activities that the insurance or reinsurance company has the corporate capacity to undertake.

Generally, a DAC may take up to five business days to be incorporated by making an application to the Irish Companies Registration Office.

Licensing of insurance and reinsurance companies

To establish an insurance or a reinsurance undertaking, an application is required to be made to the Central Bank pursuant to the 2015 Regulations.

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

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

- legal structure;
- ownership structure;
- overview of the group to which the applicant belongs (if relevant);
- scheme of operations;
- system of governance, including the fitness and probity of key personnel;
- risk management system;
- own risk and solvency assessment (ORSA);
- financial information and projections;
- capital requirements and solvency projections; and
- consumer issues (eg, minimum competency requirements and consumer protection code).

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

- arrange a preliminary meeting with the Central Bank to outline the proposal. At this meeting, the Central Bank will provide feedback in relation to the proposal and identify any areas of concern, which should be addressed before the application is submitted;
- prepare and submit the completed application for authorisation;
- dialogue with the Central Bank. The application process is an iterative one involving contact and consultation with the Central Bank after an application is formally submitted. During the review process, it will typically request additional information and documentation, and is likely to have comments on certain features of the proposal. The Central Bank may seek additional meetings with the applicant as part of this process to discuss aspects of the proposal in further detail;
- the authorisation committee of the Central Bank considers the application;
- once the Central Bank is satisfied with the application, it will issue an 'authorisation in principle', which means that the Central Bank 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 insurer or reinsurer can commence writing business in Ireland.

From submission of the formal application to the Central Bank to receipt of the final authorisation, it takes in the region of three to six months. The Central Bank does not currently charge a fee for licence applications.

Other licences, authorisations and qualifications

3 What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

As mentioned in question 2, insurance and reinsurance undertakings must obtain prior regulatory approval from the Central Bank to conduct insurance and reinsurance business in Ireland. The authorisation is granted to either a life or non-life insurance and reinsurance undertaking in respect of one or more specified classes of insurance, which relate to different types of risks.

No further authorisation is required to be granted by the Central Bank provided that the undertaking is operating within the scope of the licence granted and there are no material changes to the Business Plan submitted to the Central Bank.

Any insurance or reinsurance undertaking authorised to carry out its activities may establish branches in other EU member states or operate in these countries on a freedom of services basis, provided that the relevant notifications are made in accordance with the 2015 Regulations.

Officers and directors

4 What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

Part 3 of the Central Bank Reform Act 2010 (the 2010 Act) established a statutory system for the regulation by the Central Bank of persons performing controlled functions (CFs) or pre-approval controlled functions (PCFs) for regulated financial service providers.

A regulated financial service provider (including an insurance or a reinsurance undertaking) may not permit a person to perform certain prescribed roles unless the regulated financial service provider is satisfied, on reasonable grounds, that the person complies with the Central Bank's Minimum Competency Framework (as defined below) and the person has agreed to abide by the fitness and probity standards issued by the Central Bank. This requirement ensures that such senior personnel of regulated financial service providers are competent and capable, honest, ethical and of integrity, and also financially sound.

The Minimum Competency Framework means the Minimum Competency Code 2017 and the Central Bank (Supervision and Enforcement) Act 2013 (section 48(1) of the Minimum Competency Regulations 2017), which together replaced the existing Minimum Competency Code 2011 with effect from 3 January 2018. The Minimum Competency Framework is closely linked to the Central Bank's fitness and probity regime.

Officers, directors and persons who exercise senior management positions will generally constitute PCFs, and persons intending to occupy PCF roles must be pre-approved by the Central Bank in advance of a person being appointed to such roles under its fitness and probity regime.

There are 46 PCF roles prescribed by the 2010 Act, including the following:

- executive and non-executive directors;
- chief executive;
- head of underwriting;
- head of claims;
- head of actuarial function;
- head of investment;
- head of compliance;
- head of internal audit; and
- head of risk.

The requirements as to the key CFs are set out in the Central Bank's fitness and probity regime and the various guidelines and policy documents published by the Central Bank. In general, the person must be able to demonstrate that he or she has the following:

- professional or other qualifications and capability appropriate to the relevant function;
- obtained the competence and skills appropriate to the relevant function, whether through training or experience gained in an employment context; and
- shown the competence and proficiency to undertake the relevant function.

Specified individuals in such functions are also required to undertake a programme of continuing professional development.

More than one of the key functions can be combined and undertaken by one individual if the entity is satisfied that the nature, scale and complexity of the insurance or reinsurance undertaking allows it. The individual appointed to more than one PCF role must display the competency for each separate role and demonstrate that holding multiple roles will not give rise to conflicts of interest. The Central Bank must approve that person for each PCF role. As a general rule, persons carrying out internal audit functions must not assume responsibility for any other function.

The Central Bank requires that the number of financial directorships (ie, directorships of insurance undertakings and credit institutions) held by a director of a non-high-impact designated insurance undertaking will not exceed five (limited to three for high-impact designated firms) and this would include financial directorships of institutions authorised outside of Ireland. This restriction does not apply to other directorships held within the same group. If an individual holds more than five financial directorships, this creates a rebuttable presumption that the director has insufficient time available to fulfil his or her role and functions. Submissions can be made to the Central Bank in this regard for a derogation.

Capital and surplus requirements

5 What are the capital and surplus requirements for insurance and reinsurance companies?

Insurance and reinsurance companies regulated by the Central Bank are required to meet the capital and solvency requirements set out under Solvency II, the 2015 Regulations and the 2017 Regulations. Irish-authorised insurance and reinsurance undertakings are also required to establish and maintain a further solvency margin as a buffer to ensure their assets are sufficient to cover their liabilities. Solvency II capital requirements are calculated based on the specific risks borne by the relevant insurer and are prospective in nature (ie, each insurer must make the relevant calculations at least once a year to cover both existing business and the new business expected to be written over the following 12 months).

Solvency II imposes a solvency capital requirement (SCR) and a lower, minimum capital requirement (MCR). An insurance or a reinsurance undertaking may calculate the SCR based on the formula set out in the 2015 Regulations or by using its own internal model approved by the Central Bank. The SCR should amount to a high level of eligible own funds, thereby enabling the undertaking to withstand significant losses and ensuring a prudent level of protection for policyholders and beneficiaries. The MCR should be calculated in a clear and simple manner, corresponding to an amount of eligible, basic own funds, below which policyholders and beneficiaries would be exposed to an unacceptable level of risk if the undertaking were allowed to continue its operations.

An insurance or a reinsurance undertaking must have procedures in place to identify and inform the Central Bank immediately of any deteriorating financial conditions. As such, the SCR and MCR provide for clear channels by which the Central Bank can monitor the financial state of insurance and reinsurance undertakings. In the event of a breach of the capital requirements, the Central Bank will employ an escalating ladder of supervisory intervention, allowing for the implementation of a recovery plan by an insurance undertaking, as approved by the Central Bank. Where there is a breach of the SCR or MCR, compliance must be re-established within six months or three months respectively, otherwise the Central Bank may restrict the free disposal of the assets of the undertaking and ultimately withdraw its authorisation.

Reserves

6 | What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

Irish-authorised insurance and reinsurance undertakings are required to establish and maintain technical provisions in respect of all insurance and reinsurance obligations towards policyholders and beneficiaries of insurance or reinsurance contracts. The 2015 Regulations, Solvency II and the Commission Delegated Regulation (EU) 2015/35 (the Delegated Regulations) set out the requirements regarding the calculation of reserves to be maintained by insurance and reinsurance undertakings. The value of technical provisions is to be calculated as a combination of the best estimate and a risk margin.

Product regulation

7 | What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

The Consumer Protection Code 2012 (CPC) applies to all Irish-authorised insurers carrying on insurance business in Ireland with Irish consumers. Under the CPC, a 'consumer' means either:

- a person or group of persons, but not an incorporated body, with an annual turnover in excess of €3 million in the previous financial year (a group of persons includes partnerships and other unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate); or
- incorporated bodies having an annual turnover of €3 million or less in the previous financial year (provided that such body shall not be a member of a group of companies having a combined turnover greater than the said €3 million); and includes where appropriate, a potential consumer.

The CPC contains specific provisions relating to the sale of insurance products in Ireland. These include provisions relating to information and documentation required to be provided to consumers both pre- and post-sale relating to the relevant products.

An insurance undertaking must also comply with the other legislation that regulates the sale and marketing of certain products (including insurance products) to consumers (as defined above) in Ireland, including but not limited to the following:

- 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 (as amended).

The Central Bank does not require the submission of product documents by insurance undertakings operating in the Irish market.

Insurance undertakings that offer certain products are subject to additional regulation by other authorities. By way of example, health insurers operating in the Irish market are subject to prudential supervision by the Central Bank but are also required to be registered with the Health Insurance Authority, which also supervises health insurers, particularly with regard to the products offered to Irish customers.

Regulatory examinations

8 | What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

The Central Bank's supervisory role involves overseeing an insurance or a reinsurance undertaking's regulatory capital, corporate governance, risk management and internal control systems without placing burdensome administrative requirements on insurance and reinsurance operators.

The Central Bank introduced its Probability Risk and Impact System (PRISM) framework in late 2011, which is a systemic risk-based framework against which the Central Bank assesses supervisory requirements. All regulated firms are categorised as either high-impact (including ultra-high), medium–high impact, medium–low impact or low impact. The category assigned determines the level of supervision and the regulatory fees payable to the Central Bank, which are aligned with the entity's PRISM rating. The ratings are set according to the systemic risk posed by regulated entities, that is, entities that are categorised as being high-impact under PRISM are subject to a higher level of supervision by the Central Bank, as these firms are important for ensuring financial and economic stability. PRISM recognises that the Central Bank does not have infinite resources and selectively deploys supervisors according to a regulated firm's potential impact and probability for failure.

In addition, the Central Bank implements its supervisory function by requiring that insurance and reinsurance undertakings submit annual and quarterly returns on solvency margins and technical reserves. The qualitative reporting under the 2015 Regulations includes the Regular Supervisory Report (RSR), the Solvency and Financial Condition Report (SFCR), as well as the ORSA. The quantitative reporting includes the technical provisions, own funds and other data on the regulated entity. All quantitative reporting templates (QRTs), the ORSA and the RSR will be reported privately to the Central Bank. A limited number of QRTs and additional qualitative information are required to be made publicly available in the SFCR on an annual basis.

In addition to PRISM, the Central Bank's administrative sanctions procedure acts as an effective deterrent against breaches of financial services law, including the 2015 Regulations.

Investments

9 | What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

For regulatory capital purposes, insurance and reinsurance undertakings are required to invest assets in accordance with the prudent person principle. This principle sets out the requirements applying from 1 January 2016 to investments and the associated risk management of primary insurers and reinsurers subject to Solvency II.

Regulation 141 of the 2015 Regulations (or article 132 of Solvency II) and the Delegated Regulations include provisions on how insurance and reinsurance undertakings should invest their assets and cover extensively some of the main aspects of the prudent person principle, such as asset-liability management, investment in derivatives, liquidity risk management and concentration risk management. Guidelines on the prudent person principle form part of the European Insurance and Occupational Pensions Authority (EIOPA) Guidelines on System of Governance. In addition, a supervisory review process of this principle has been developed for the Central Bank supervisors.

Neither legislation nor the EIOPA guidance provides a definition of the concept of a 'prudent person'. In general, the prudent person principle compels an undertaking to show that their investment strategy matches the interests of policyholders. With respect to the whole portfolio of assets, undertakings shall only invest in assets and instruments whose risks the undertaking concerned can properly identify, measure, monitor, manage, control and report, and appropriately take into account in the assessment of its overall solvency needs.

It further provides that all assets, in particular covering the MCR and SCR, shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole. In addition, the localisation of those assets shall be such as to ensure their availability. Assets held to cover the technical provisions shall also be invested in a manner appropriate to the nature and duration of the insurance liabilities. Those assets shall be invested in the best interest of all policyholders and beneficiaries, taking into account any disclosed policy objective.

The 2015 Regulations require insurance and reinsurance undertakings to hold eligible own funds equal to the SCR to cover unexpected losses arising both from their underwriting business and the assets in which they invest, and the investment strategy of insurance and reinsurance undertakings is to be determined on a risk-based calculation of the insurer's SCR.

Change of control

10 What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers, directors and controlling persons of the acquirer subject to background investigations?

In accordance with the 2015 Regulations, a proposed acquirer shall not, directly or indirectly, acquire or dispose of a qualifying holding in an insurance or a reinsurance undertaking without having previously notified the Central Bank in writing of the intended size of the qualifying holding.

A 'qualifying holding' means either a direct or indirect holding in an insurance or a reinsurance undertaking that represents 10 per cent or more of the capital of, or the voting rights in, the undertaking, or that makes it possible to exercise a significant influence over the management of the undertaking.

The notification is typically made by the parties jointly completing an acquiring transaction notification form (the Notification Form) and submitting it to the Central Bank. Detailed information in respect of each of the notifying parties must be included in the Notification Form, particularly in respect of the target entity and the proposed acquirer or disposer. To avoid undue delays in the notification and assessment process, and to reduce the risk of submitting incomplete notifications, the proposed acquirer is expected to engage in pre-notification contact and discussions with the Central Bank.

Notification and assessment process

Following submission of the Notification Form to the Central Bank, it will acknowledge its receipt within two working days and will carry out its assessment of the proposed transaction within 60 working days of this acknowledgement. It will also confirm the date on which the assessment period of the proposed transaction will end. During the assessment period, but no later than the 50th working day of that period, the Central Bank may request further information or clarification necessary to complete its assessment of the proposed transaction. If such a request is made by the Central Bank, the 60-day assessment period is taken to be interrupted for the shorter of: (i) the period between the date of the request and the date of the receipt of a response from the proposed acquirer; or (ii) 20 working days. In certain circumstances, the Central Bank may extend the interruption period to 30 working days. The Central Bank is entitled to make further requests for information. Such further requests will not, however, interrupt the assessment period. Nonetheless, if any additional requested information is not provided on a timely basis, the application may be rejected on the ground of incomplete information. In this event, an applicant would, if so minded, need to recommence the application process.

In carrying out its assessment of the proposed transaction, the Central Bank may consult with other supervisory authorities in the European Economic Area (EEA) member states of the notifying parties where relevant.

If the Central Bank does not give written notice within the assessment period that it opposes the proposed transaction, it is deemed to be approved. It is open to the Central Bank, however, to impose a condition or a requirement, or both, in relation to the proposed transaction. The Central Bank may also fix a maximum period within which the proposed transaction must be completed. In rare circumstances where the Central Bank opposes the proposed transaction, it must inform the proposed acquirer or disposer of this in writing within two working days, but in any case, before the end of the assessment period, and provide reasons for the opposition. The Central Bank's opposition to the proposed transaction is only permitted where there are reasonable grounds for doing so, or where incomplete information is provided in the Notification Form or in a response to a request for further information. Any decision by the Central Bank to oppose the proposed transaction can be appealed to the Irish Financial Services Appeals Tribunal.

In general, the proposed individuals who will direct the business of the target entity as a result of the proposed transaction must be of good standing and the Central Bank will assess the suitability of all persons proposed to be appointed to a PCF, who must comply with its fitness and probity regime. The approval process requires the submission of an individual questionnaire to the Central Bank for each proposed individual.

In addition, any person seeking to acquire or dispose of a shareholding or other interest that would either give them a qualifying level of control in an insurance or a reinsurance undertaking or increase that person's control above certain levels must first obtain the approval of the Central Bank.

As part of its assessment, the Central Bank will appraise the suitability of the proposed acquirer and the financial soundness of the proposed transaction against certain criteria, including but not limited to the following:

- the reputation of the proposed acquirer or disposer;
- the reputation and experience of the individuals who will direct the business of the target entity as a result of the proposed transaction;
- the financial soundness of the proposed acquirer or disposer, particularly in relation to the type of business carried out by the target entity; and
- whether the target entity will be able to comply and continue to comply with the prudential requirements of existing legislation.

Financing of an acquisition

11 | What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

There are no specific requirements or restrictions under Irish law regarding financing the acquisition of an insurance or a reinsurance company.

However, a Notification Form must be submitted to the Central Bank prior to the proposed acquisition of a qualifying holding in an insurance or a reinsurance company. The Notification Form requests details of the proposed acquisition and the proposed acquirer, the rationale for the proposed acquisition and details regarding the impact of the proposed acquisition on the target entity. In this regard, it is necessary to provide a detailed business plan for the target entity, setting out the proposed direction of the business, including financial projections over three years, and demonstrate that the proposed acquirer has sufficient resources to effectively support the target entity within the requirements of the supervisory regime, together with full details on the cost of the proposed acquisition and confirmation as to how the acquisition will be financed.

Minority interest

12 | What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

Where the proposed acquisition represents voting rights or share ownership of less than 10 per cent (ie, not a qualifying holding), there are no specific restrictions on investors acquiring a minority interest. However, where the interest is 10 per cent or greater (ie, a qualifying holding), the regime described in question 10 will apply.

As noted in question 10, the Central Bank must be also notified of any increase in a holding above 10 per cent in insurance and reinsurance undertakings, which would result in the size of the holding reaching or exceeding yardsticks of 20, 33 or 50 per cent.

Foreign ownership

13 | What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

There are no specific regulatory requirements or restrictions in Irish law governing the investment of foreign citizens, companies or governments in insurance and reinsurance undertakings. However, a Notification Form must be submitted to the Central Bank prior to the proposed acquisition of a qualifying holding in an insurance or a reinsurance company (see question 10).

Group supervision and capital requirements

14 | What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company? What holding company or group capital requirements exist in addition to individual legal entity capital requirements for insurers and reinsurers?

In all group undertakings, the risk management, internal control systems and reporting procedures must be implemented consistently. These group internal control mechanisms must include, at minimum, adequate mechanisms to identify and measure all material risks incurred, to appropriately relate eligible own funds to risks, and sound reporting and accounting procedures to monitor and manage the intra-group transactions and risk concentration. These procedures must be satisfactory to the Central Bank.

As provided for in the 2015 Regulations, participating insurance and reinsurance undertakings and the relevant insurance holding company or mixed financial holding company should undertake the ORSA that is required as part of an insurance or a reinsurance undertakings risk management system. The calculation of solvency at group level can be conducted using either the accounting consolidation-based method or the deduction and aggregation method. Holding companies are not subject to any specific additional capital requirements under Irish legislation. However, they must comply with the processes and procedures prescribed under the 2015 Regulations for insurance and reinsurance companies in relation to their capital requirements.

The group supervisor will usually be the supervisory body in the EEA member state where the group has its headquarters. Where the Central Bank is the group supervisor, it will review the systems and reporting procedures, and review the ORSA conducted at group level to supervisory review. Further, the Central Bank may permit the participating insurance or reinsurance undertaking, insurance holding company or mixed financial holding company to undertake any assessment required in relation to risk and solvency at a group level, at the same time enabling the group to produce a single document covering all relevant assessments.

However, where EU insurers and reinsurers are part of a wider group with a parent insurer or reinsurer, or holding company that is headquartered outside of the EEA, supervision may apply in one of two ways:

- by supervising the EU insurers and reinsurers in the group, taking account of whether the worldwide group complies with Solvency II standards; or
- by supervising an EU subgroup only.

Reinsurance agreements

15 | What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

The Central Bank has issued guidelines on reinsurance cover for primary insurers and the security of their reinsurers (the Guidelines). The Guidelines provide that every insurer should have a reinsurance strategy, approved by the company's board of directors, that is compliant with all legal and regulatory requirements, is appropriate to the company's overall risk profile and sets a limit on the net risk to be retained. This reinsurance strategy should be part of the company's overall underwriting strategy and be reviewed annually, or where a change in the company's circumstances or status dictates a review. The reinsurance strategy should identify the procedures for the following:

- the reinsurance to be purchased;
- how reinsurers will be selected, including how to assess the security;
- what collateral, if any, is required at any given time; and
- how the reinsurance programme will be monitored (ie, the reporting and internal control systems).

The Guidelines also provide that Irish-authorised cedents must ensure that reinsurance agreements entered into include the following mandatory terms:

- an insolvency clause requiring the reinsurer to perform its contractual obligations without reduction if the ceding insurer becomes insolvent;
- a provision stating that the reinsurance agreement constitutes the entire contract between the parties;

- a provision requiring reinsurance recoveries to be paid to a cedent without delay and in a manner consistent with the orderly payment of claims by the ceding insurer; and
- a provision providing for reports, at least quarterly, regarding premiums paid and incurred losses.

Ceded reinsurance and retention of risk

16 | What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

The Central Bank requires insurance companies to hold at least 10 per cent of their own risk; 100 per cent reinsurance is not typically permitted in Ireland.

Collateral

17 | What are the collateral requirements for reinsurers in a reinsurance transaction?

There are no specific collateral requirements for reinsurers in a reinsurance transaction under Irish law. However, the Guidelines (see question 15) provide that an insurer's reinsurance strategy should include an evaluation of the reinsurer's security and collateral. Moreover, the precise nature of the collateral is an issue for the parties to the contract to agree.

The 2015 Regulations do not permit the Central Bank to impose, on reinsurers from other member states or an 'equivalent jurisdiction', collateral requirements that require the pledging of assets to cover unearned premiums and outstanding claims provisions.

Credit for reinsurance

18 | What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?

Under the 2015 Regulations, a life or a non-life insurance undertaking can take credit in respect of a contract of reinsurance against its technical reserve requirements only to the amount that can reasonably be expected to be recovered under the contract of reinsurance. In addition, the Delegated Regulations set out specific rules in relation to collateral arrangements. No account is taken of any debts arising out of reinsurance operations that are owed by intermediaries if these debts have been outstanding for longer than three months.

Insolvent and financially troubled companies

19 | What laws govern insolvent or financially troubled insurance and reinsurance companies?

Generally

Section 2(1) of the Insurance (No. 2) Act 1983 enables the Central Bank to petition the court to appoint an administrator over an insurance undertaking, in circumstances where an insurer has failed to maintain its regulatory solvency margin or cannot meet claims. The administrator will assume management of the company to attempt to place the insurer on a sound commercial and financial footing. The petitioning of the court to have an administrator appointed to an insurance undertaking is not available as a remedy for individual creditors, but is available to the Central Bank notwithstanding the availability to the Central Bank of another remedy or cause of action. The following procedures are available under Irish company law for insolvent or financially troubled insurance and reinsurance companies.

Liquidation

Under section 569 of the Companies Act 2014, a creditor or the company can petition the court for a winding-up order and the appointment of a liquidator. In the case of an insolvent company, the most common grounds on which a petitioner relies when petitioning to have an insolvent company wound up are as follows:

- the company is unable to pay its debts; and
- it is just and equitable to have the company wound up.

Part 18 of the 2015 Regulations governs the reorganisation and winding-up of insurance undertakings, and Chapter 3 of Part 18 sets out the procedures for the commencement of the winding-up proceedings, the treatment of insurance claims, the right to lodge claims and the withdrawal of authorisation.

Receivership

Receivership is not, strictly speaking, an insolvency process but facilitates the enforcement of security. A receiver may be appointed by the court or on the basis of a contractual right contained in a charge (a form of security over assets). A receiver's function is to realise the charged assets and to repay the secured debt.

Examinership

Examinership is a legal mechanism to rescue an ailing but potentially viable company (or a part of its undertaking) by giving the company 'breathing space' from its creditors. While a company is in examinership, it is afforded the following protections (which can last for up to 100 days):

- the company cannot be wound up;
- a receiver cannot be appointed;
- creditors cannot enforce their claims; and
- proceedings cannot be issued or continued against the company except with the leave of the court.

Scheme of arrangement

A scheme of arrangement (schemes that attempt to find a compromise between a company and its creditors, and avoid the need for liquidation) is governed by section 450 of the Companies Act 2014 and can be used to rescue companies in financial difficulty. The scheme must have been approved by meetings of creditors or members who have convened the meeting.

Claim priority in insolvency

20 | What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?

Under regulation 277(1) of the 2015 Regulations, insurance claims shall, with respect to assets representing the technical provisions of an insurance undertaking, take absolute precedence over any other claims on the insurance undertaking, including claims accorded preference under section 621 of the Companies Act 2014. However, where a life insurance undertaking is authorised to write non-life insurance for accident or sickness, the insurance claims in relation to the life business of the undertaking shall, with respect to the assets representing the life technical provisions of the undertaking, take absolute precedence over any claims in relation to the non-life insurance business of the undertaking. Furthermore, insurance claims in relation to the insurance business of the undertaking falling within the categories of accident or sickness shall, with respect to the assets representing the non-life technical provisions of the undertaking, take absolute precedence over any claims in relation to the life business of the undertaking.

Despite this, however, expenses arising out of winding-up proceedings shall take precedence over insurance claims to the extent that the assets of the undertaking, other than the assets representing the technical provisions, are insufficient to meet such expenses; and, in a situation where a life insurance undertaking writes non-life insurance for accident or sickness, such expenses shall be divided proportionally between the assets representing life and non-life technical provisions.

The priority of claims against the remaining funds in an insurance or a reinsurance company that has entered into insolvency proceedings is the same as against any company (section 621 of the Companies Act 2014). Claims will be paid out in order of priority to secured creditors, preferential creditors and unsecured creditors.

Intermediaries

21 What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

The activity of insurance distribution is regulated by the European Union (Insurance Distribution) Regulations 2018 (the IDD Regulations), which transposed Directive (EU) 2016/97 on insurance distribution (the IDD) into Irish law. The IDD is a recast of the Insurance Mediation Directive (Directive 2002/92/EC) (the IMD), which was transposed into Irish law by the European Communities (Insurance Mediation) Regulations. The IDD, like its predecessor, is a 'minimum harmonising' directive. It creates a minimum legislative framework for the distribution of insurance and reinsurance products within the European Union and aims to facilitate market integration and enhance consumer protection. The IDD introduces general consumer protection principles for all insurance distributors to act honestly, fairly and professionally, and in accordance with the best interests of the customer.

Section 57 of the IDD Regulations provides that a person cannot purport to undertake insurance or reinsurance distribution unless they have registered with the Central Bank as an insurance or a reinsurance intermediary, or are exempt from such registration. This now includes ancillary intermediaries, unless the relevant ancillary intermediary falls outside the scope of the IDD Regulations. In addition to authorising insurance companies to carry out the business of insurance, the Central Bank also maintains a register of authorised insurance and reinsurance intermediaries in Ireland.

The IDD Regulations define 'insurance distribution' broadly as:

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

Activities specifically excluded from the definition include an activity that involves: the provision of information on an incidental basis in conjunction with some other professional activity, so long as the purpose of the activity is not to assist a person to enter into or perform an insurance contract and additional steps are not taken by the provider to assist in concluding or performing an insurance contract; the management of claims of an insurance undertaking on a professional basis; or loss adjusting or expert appraisal of claims for reinsurance undertakings.

In Ireland, the IDD Regulations capture most activities that insurance agents engage in other than limited back office claims management. Therefore, it is the generally accepted understanding that insurance undertakings that engage solely in the administration of insurance claims, without assisting the insured with regard to claims, are not governed by the IDD Regulations.

Prior to the implementation of the IDD Regulations, intermediaries were subject to the Investment Intermediaries Act 1995 (IIA), which was extended to insurance intermediaries in 2000. On implementation of the IMD Regulations, the IIA was not disapplied. As a result, both the IMD Regulations and the IIA continued to apply to intermediaries (although, as a practical matter, the Central Bank operated on the basis that the IMD Regulations applied only with regard to insurance intermediaries that are solely engaged in the business of insurance mediation). The term 'insurance policies' has now been removed from the definition of 'investment instruments' within section 2 of the IAA by the IDD Regulations. As a result, the Central Bank recommends that, if an insurance intermediary holds its IIA registration solely for the purpose of providing insurance policies, in addition to its IDD Regulations registration, it should voluntarily revoke its IIA registration.

In fulfilling its statutory role, the Central Bank operates a robust authorisation process that requires applicants to demonstrate compliance with the authorisation standards set out in the legislation described above.

Before the Central Bank will authorise an insurance or reinsurance intermediary and enter it into the register, the applicant must satisfy the Central Bank that:

- the directors satisfy the Minimum Competency Framework as published by the Central Bank;
- the undertaking holds certain minimum levels of professional indemnity insurance;
- senior management and key personnel possess the requisite knowledge and ability; and
- the undertaking will implement internal procedures for the proper operation and maintenance of client premium accounts.

INSURANCE CLAIMS AND COVERAGE

Third-party actions

22 Can a third party bring a direct action against an insurer for coverage?

A contract is not generally enforceable in favour of or against a person who is not a party to the contract under Irish law because of the common law doctrine of privity of contract. There is no Irish legislation providing for the rights of third parties, as there is no equivalent to the UK Contracts (Rights of Third Parties) Act 1999.

Section 76(1) of the Road Traffic Act 1961 (Section 76(1)) and section 62 of the Civil Liability Act 1961 (the Civil Liability Act) provide limited exceptions to this rule. For example, a claimant in a road traffic accident is entitled to claim against the insurance company of the owner or driver of the other vehicle involved in the accident. The decision in *Bin Sun v Jason Price and John Price* [2018] IEHC 201, in April 2018, which concerned Section 76(1), provided useful guidance on the circumstances where a party, such as an insurer, can be joined as a co-defendant against the wishes of the plaintiff, including that the interests of justice are served by adding the insurer and that the court's interests would be served in seeing the litigation being properly conducted, and in such a way that is just and fair and in the interests of the insurer. In circumstances where an insured under a liability insurance policy becomes bankrupt or dies (individual), is wound up (company) or dissolved (partnership or other incorporated association), a third party may have a direct action against the insurer under section 62 of the Civil Liability Act.

The scope and operation of section 62 of the Civil Liability Act is quite limited following clarification by the High Court in recent years. Irish courts have confirmed that liability in the underlying claim against the insured must be established before the insurer can be joined to proceedings or sued. Courts will recognise a valid repudiation by an insurer; a claimant cannot remedy a breach by an insured of the insurance policy (*McCarron v Modern Timber Homes Limited (in liquidation)* [2013] 1IR 169*, Shaun McColgan, Daniel McColgan v Quinn Insurance Limited* (unreported) High Court [3 December 2012] and *Yun Bing Hu v Duleek Formwork Limited (in liquidation*) *and Aviva Direct Ireland Limited* [2013] IEHC 50).

In certain circumstances, a beneficiary of a trust can directly enforce the rights of the trust against an insurer. However, the burden of proving that the trust exists rests on the beneficiary, and the beneficiary must also be able to show that he or she is entitled to the benefit of the particular insurance policy by proving 'more than a reasonable expectation' that he or she is to benefit (*In re Irish Board Mills Ltd (in Receivership*) [1980] ILRM 216).

The Consumer Insurance Contracts Bill 2017 was referred to the Select Committee on Finance, Public Expenditure and Reform, and the Taoiseach in February 2017. It is at the third stage in the Dáil (the lower house of Parliament); however, there is currently no clear timeline for its implementation. The Bill was published following a report by the Law Reform Commission in 2015 that recommended reforms to consumer insurance law. Sections 18(1) and 18(2) of the Bill provide that where a policy provides insurance against a liability that may be incurred to a third party, and where the person has died, cannot be found or is insolvent, or where for any other reason it appears to a court to be just and equitable to so, the third party should benefit from the rights of the insured person under that contract of insurance and should be entitled to enforce those rights directly against the insurer, notwithstanding anything to the contrary in any enactment or rule of law, including the doctrine of privity of contract.

Section 18(4) of the Bill provides that third parties should be entitled to issue proceedings directly against an insurer before the establishment of liability of the particular insured person, but that the liability of the insured must be established throughout the course of those proceedings before the rights of the third party can be enforced.

Late notice of claim

23 | Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

Generally, any consequences of late notice will be set out in the insurance policy.

In circumstances where late notice requirements are a condition precedent to liability, an insurer is entitled to deny coverage for a breach without having to demonstrate that it has suffered loss or prejudice as a result of that breach. Absent such a condition precedent, damages are the only remedy available to insurers for late notice of a claim by an insured.

Courts are reluctant to allow insurers to deny coverage for technical breaches of notice conditions, particularly for mere failure to notify a circumstance. Though an objective test is applied, in practice, the court will consider whether an insured had actual knowledge of the particular circumstance that it is alleged should have been notified to insurers. The knowledge of the insured in that respect is subjective.

Wrongful denial of claim

24 | Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

An insurer is not subject to extra-contractual exposure in the event of wrongful denial of a claim. However, the insured may have a remedy in damages for breach of contract.

Defence of claim

25 | What triggers a liability insurer's duty to defend a claim?

Irish law does not impose a duty to defend on the insurer, this is a matter of contract. The policy may impose this duty or may simply provide that the insurer has a right to associate in the defence of the claim. If an insurer takes on the defence of the claim, it must defend the claim subject to the contract of insurance.

Indemnity policies

26 | For indemnity policies, what triggers the insurer's payment obligations?

The insured's right to an indemnity is dependent on:

- the occurrence of an event that has rendered the insured liable to a third party;
- the event and the consequent liability being within the scope of the cover provided by the policy; and
- it being established that the liability has caused loss to the insured.

Subject to the express provisions of the policy, the insurer's payment obligation is triggered when the insured's liability to a third party has been determined by agreement, award or court judgment (and not when the incident or occurrence giving rise to the liability takes place).

Incontestability

27 | Is there a period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

There is no general incontestability period beyond which a life insurer cannot contest coverage based on misrepresentation in the application for coverage.

Punitive damages

28 | Are punitive damages insurable?

Courts occasionally award punitive or exemplary damages on public policy grounds. The Irish Supreme Court has confirmed that exemplary damages can be awarded where the damage caused was deliberate and malicious, and calculated to unlawfully cause harm or gain an advantage. The award of damages must be proportionate to the injuries suffered and the wrong done.

Exemplary or punitive damages are insurable. The Law Reform Commission considered this issue in a report published in 2000 entitled 'Aggravated, Exemplary and Restitutionary Damages'. In this report, the Law Reform Commission stated that public policy considerations in favour of prohibiting insurance for exemplary damages were not strong enough to require legislation in this area. However, such damages are likely to be excluded from cover in circumstances where they are awarded to remedy an intentional act.

Excess insurer obligations

29 | What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

Excess insurance is not usually triggered until primary limits have been exhausted. Whether excess coverage is required to 'drop down' in circumstances where the primary insurer is insolvent will ultimately depend on the wording of the policy. As yet, there are no reported decisions of Irish courts on the interpretation of excess policy wording.

However, a court would not be expected to order a drop down in the absence of an express provision in the policy.

Self-insurance default

30 | What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

Subject to policy terms and conditions, where an insured is insolvent and unable to pay a self-insured retention or a deductible, there is no obligation on the insurer to pay the retention or deductible. However, the insurer will generally be obliged to pay the claim net of the retention or deductible unless payment of the retention or deductible is expressed to be a condition precedent to cover in the policy.

As noted in question 22, a third party may have a direct action against the insurer under section 62 of the Civil Liability Act, in circumstances where an insured under a liability insurance policy becomes insolvent. However, in *Hu v Duleek Formwork Ltd (in liquidation) and Aviva Direct Ireland Ltd* [2013] IEHC 50, High Court, 5 February 2013, the payment by the insured of an excess was a condition precedent to the policy and had not been paid. The court held that the third party was not entitled to remedy the breach by discharging the excess.

Claim priority

31 | What is the order of priority for payment when there are multiple claims under the same policy?

Subject to the terms and conditions of the policy, where there are multiple claims under one policy, claims are usually paid in chronological order once they have been fully proved.

Allocation of payment

32 | How are payments allocated among multiple policies triggered by the same claim?

In circumstances where more than one policy responds to the same loss, it is necessary to consider how the various responsive policies interact and which policy responds first.

There is a distinction between double insurance and instances where there are layered policies to provide for different levels of cover. In circumstances where there are layered policies, the excess policy is not triggered until the primary policy has been exhausted. In instances of double insurance (ie, where two or more policies cover the same risk on behalf of the same insured), the principle of contribution applies.

Section 80(1) of the Marine Insurance Act 1906 provides that, in cases of double insurance, each insurer is bound to contribute rateably to the loss in proportion to the amount for which the insurer is liable under contract. In this respect, it is also necessary to consider whether a policy contains rateable contribution clauses, non-contribution clauses or an excess clause.

Disgorgement or restitution

33 | Are disgorgement or restitution claims insurable losses?

Disgorgement is not a concept of Irish law, but appears to encompass the concept of unjust enrichment. The doctrine of restitution also encompasses the concept of unjust enrichment, and is an equitable remedy recognised in Irish law. Restitutionary damages are recognised as a remedy for breach of contract; however, to date there have been very few awards of restitutionary damages by courts and they have not considered whether such damages are insurable. In circumstances where punitive or exemplary damages are insurable under Irish law, it would appear that restitutionary damages are insurable, although they are likely to be excluded from cover in circumstances where they are awarded to remedy an intentional act.

Definition of occurrence

34 | How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

There are no reported Irish decisions on the interpretation of aggregation clauses in insurance contracts. There are a number of UK decisions that may be considered by courts to be persuasive in the absence of an Irish authority. However, the courts' analysis is fact specific and each case depends on the particular wording of the relevant clause, therefore the judgments are of limited value.

Courts distinguish between 'any one event' clauses and 'one source or original cause' clauses. In essence, 'event', 'occurrence' or 'claim' describe what has happened, whereas 'cause' describes why something has happened.

The UK cases demonstrate that the courts will carefully examine the aggregation clause and will not hesitate to draw sharp distinctions between clauses that appear similar at first glance.

Rescission based on misstatements

35 | Under what circumstances can misstatements in the application be the basis for rescission?

A 'basis of contract' clause is a declaration by the prospective insured warranting that all statements made in the proposal form are true and accurate, and form the basis of the contract. The effect of such clause is to elevate those statements to the status of contractual warranties. As a result, misstatements in the proposal form may entitle the insurer to repudiate the contract without any reference to materiality. However, basis of the contract clauses are considered to be very draconian by Irish courts and there is a judicial reluctance to enforce them. The Consumer Insurance Contracts Bill 2017 proposes to abolish basis of the contract clauses in consumer insurance policies.

Parties to contracts of insurance are subject to the duty of utmost good faith. As a result, the insured has a duty to disclose all material facts in the proposal form. The remedy for breach of the duty is avoidance.

A material fact is one that would influence the judgement of a prudent underwriter in deciding whether to underwrite the contract; and, if so, the terms (such as the premium) on which it might do so.

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

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

The Consumer Insurance Contracts Bill 2017, if and when enacted (there is no clear timeline for its implementation), will introduce proportionate remedies for misrepresentation but retain the remedy of avoidance for fraudulent misrepresentation. Section 16 of the Bill replaces warranties with suspensive conditions and abolishes basis of contract clauses. The effect of the suspensive condition is that the insurer's liability is suspended for the duration of the breach, but if the breach has been remedied by the time a loss has occurred, the insurer shall (in the absence of any other defence) be obliged to pay the claim.

This provision applies to any term however described that has the effect of reducing the risk underwritten by the insurer related to particular type of loss, loss at a particular time or loss in a particular location.

REINSURANCE DISPUTES AND ARBITRATION

Reinsurance disputes

36 Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

The vast majority of reinsurance agreements in Ireland include an arbitration condition, requiring all disputes under the agreement to be referred to arbitration in the first instance. As such, there are very few judicial decisions on reinsurance law in this jurisdiction.

Common dispute issues

37 What are the most common issues that arise in reinsurance disputes?

See question 36.

Arbitration awards

38 Do reinsurance arbitration awards typically include the reasoning for the decision?

Since 8 June 2010, the Arbitration Act 2010 (the Arbitration Act) has applied the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the Model Law) to all Irish arbitrations. The Arbitration Act provides that an award made by an arbitrator must be in writing and shall state the reasons on which it is based, unless the parties agree otherwise.

Power of arbitrators

39 What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

A third party cannot be joined to arbitral proceedings without its consent and, therefore, absent the agreement of the third party, an arbitrator does not have the power to join a third party to an arbitration. Section 16 of the Arbitration Act allows an arbitrator to consolidate multiple arbitral proceedings, including where these proceedings involve a different party or parties, in circumstances where all parties are in agreement with consolidation.

Appeal of arbitration awards

40 Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

Under section 23(1) of the Arbitration Act, an award made by an arbitral tribunal under an arbitration agreement is enforceable by action or by leave of the High Court, in the same manner as a judgment or order of that court and with the same effect.

The Arbitration Act incorporates the Model Law, aligning Irish law with international standards. Under the Model Law, an award made by an arbitrator can be challenged; however, the grounds that allow for such a challenge are very limited. Article 34 of the Model Law requires that the party making an application to challenge a decision of an arbitrator furnishes proof that:

- a party to the arbitration was under an incapacity or that the agreement is invalid under the law that governs it;
- the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his or her case;
- the award deals with matters outside the terms or beyond the scope of the submission to arbitration, provided that, in circumstances where matters submitted to arbitration can be distinguished from those not submitted, only the part of the award relating to matter not submitted may be set aside; or
- the composition of the arbitral tribunal was not in accordance with the agreement of the parties, unless such agreement was not in accordance with the law.

It is also open to parties to challenge an award where the court finds that the subject matter of the dispute is not capable of settlement by arbitration or that the award is in conflict with the public policy of the state. As such, following the enactment of the Arbitration Act and the application of the Model Law, Irish courts afford substantial deference to arbitral awards.

REINSURANCE PRINCIPLES AND PRACTICES

Obligation to follow cedent

41 Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

The onus to establish that the loss was covered and that there is actual liability for the reinsurer to pay is on the reinsured unless the contract proves otherwise.

The scope of the obligations and defences available to the reinsured are generally provided for within the contract itself; this is normally prescribed to be either a 'follow-the-settlements clause' or 'follow-the-fortunes clause'.

Good faith

42 Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

Parties subject to contracts of reinsurance are subject to the duty of utmost good faith. It is significantly different to other commercial agreements as it imposes a positive obligation on the insured to make a disclosure. Both parties have an overriding obligation to disclose all material facts and it is possible to breach the duty by omission or silence.

Facultative reinsurance and treaty reinsurance

43 Is there a different set of laws for facultative reinsurance and treaty reinsurance?

Under Irish law, both facultative reinsurance and treaty reinsurance are treated the same. Treaty reinsurance is generally more common than facultative reinsurance in the Irish market, although this depends on what the parties are trying to achieve. Reinsurance contracts are discussed generally in question 15.

Third-party action

44 | Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

In accordance with the common law doctrine of privity of contract, a contract cannot be enforceable in favour of or against a person who is not party to the contract.

Insolvent insurer

45 | What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

The Guidelines (see question 15) provide that Irish authorised cedents must ensure that reinsurance agreements entered into include a mandatory insolvency clause requiring the reinsurer to perform its contractual obligations without reduction if the ceding insurer becomes insolvent.

However, the reinsurer, for reasons of privity (see question 44) is not required to settle policyholder claims.

Notice and information

46 | What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

There are no prescribed provisions under Irish law that specifically govern notice and information between insurer and reinsurer. Usually these issues are dealt with in the reinsurance agreement together with the remedies for failure to comply.

Allocation of underlying claim payments or settlements

47 | Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

As there is no statutory law that regulates the allocation of underlying claims, the allocation of such claim payments or settlements depends on the respective reinsurance agreements. The reinsurance agreements may provide that the allocation of claims must occur in proportion to the reinsured amounts or, alternatively, it may establish a ranking between the respective reinsurance policies where the reinsured must exhaust the first-ranked policy before turning to subsequent reinsurance policies.

Review

48 | What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

Irish law does not provide any specific types of review rights in favour of the reinsurer. In practice, such a right of the reinsurer will be dealt with by the terms of the reinsurance agreement, and will most commonly include the submission of information or documents proving the occurrence of the loss or the fact that allocation was made in accordance with the reinsurance contract.

Reimbursement of commutation payments

49 | What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

Irish law is silent as to whether a reinsurer is obliged to follow the cedent's settlement of reinsurance claims by way of commutation. In practice, the obligation of the reinsurer to reimburse the cedent for its commutations with the underlying insured will depend on the terms of the reinsurance contract, particularly with reference to the provisions as to follow-the-settlements and as to the claims settlement authority vested in the cedent.

Extra-contractual obligations (ECOs)

50 | What is the obligation of a reinsurer to reimburse a cedent for ECOs?

Irish law does not provide any specific rule regarding ECOs. Instead, the reinsurer's liability towards the cedent is determined by the reinsurance agreement usually within loss settlements reinsurance clauses.

UPDATE AND TRENDS

Emerging trends

51 | Are there any emerging trends or hot topics in insurance and reinsurance regulation in your jurisdiction?

The Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019

The Irish government has made it a priority to minimise the impact of a no-deal Brexit on north–south cooperation and the all-island economy.

The Brexit Omnibus Bill was signed by the President of Ireland on 17 March 2019 and this emergency legislation is now known as the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 (the 2019 Act).

The 2019 Act addresses sectors where major challenges associated with a no-deal Brexit have been identified. Part 8 deals with the continuity for financial services in certain circumstances by introducing measures for a temporary run-off regime for UK and Gibraltar insurers and intermediaries to protect Irish policyholders from continuity issues with their insurance contracts in the event of a no-deal Brexit.

As regards commencement, Part 8 shall come into operation on such day or days as the Minister for Finance may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or different provisions.

Brexit

The United Kingdom's decision to leave the European Union has resulted in a number of financial services firms relocating in advance of Brexit to a country with guaranteed access to the EU single market.

The moves come in the face of the possibility of a no-deal Brexit on 31 October 2019, subject to a further extension of the Article 50 negotiatory period, despite a 'standstill' transition agreement being struck between the European Union and the UK government in March last year, which was arguably designed to avoid any such relocations. If a deal is agreed prior to 31 October, the transition period will kick in until 31 December 2020, at which time the United Kingdom will leave the European Union.

Though Brexit will clearly have a negative impact on the Irish economy, it does present many opportunities at least for the Irish financial services sector.

Developments in mergers and acquisitions

Although the lack of clarity about specific proposals under Brexit and the proposed changes to US financial services industry regulations and the tax code may be a short-term inhibitor of insurance mergers and acquisitions in the first half of 2018, once clear, some of the changes may drive increased deal-making as the year progresses.

The GDPR

The General Data Protection Regulation (EU) 2016/679 (GDPR) came into force in May 2018, with the effect of reforming EU data protection law.

Prior to the GDPR, data protection in Ireland was governed by the Data Protection Acts 1988 and 2003 (the DPA), which transposed the EU Directive 95/46/EU into Irish law (the Data Protection Directive). The aim of the GDPR was to apply uniform principles of data processing across the European Union. There was a perception that the data processing laws across the European Union had been fragmented as a result of the differences in the national implementing legislation of the Data Protection Directive. However, the GDPR maintained many of the principles under the Data Protection Directive in relation to data processing, while enhancing the existing framework.

Under the GDPR, data subject rights have been enhanced, there is an increased level of transparency, accountability and security requirements, with breaches carrying greater penalties, and in certain circumstances extraterritorial effect.

In Ireland, the Data Protection Act 2018 (the DPA 2018) gives further effect to the GDPR and implements into Irish law the derogations permitted under the GDPR. The powers of the Data Protection Commission have been greatly increased. The DPA have not been repealed in their entirety, but their application is limited to areas falling outside the scope of the GDPR, including the processing of data for the purposes of national security, defence and public security, for the prevention or prosecution of criminal offences and other areas related to law enforcement and security.

It is likely there will be litigation in relation to the implementation and interpretation of the GDPR. Individuals who consider that their rights under GDPR have been infringed can, under the GDPR and the DPA 2018, nominate certain not-for-profit organisations to seek a judicial remedy on their behalf. There had previously been no provision for representative actions under Irish practice and procedure.

The IDD

As noted at question 21, the IDD was transposed into Irish law by the European Union (Insurance Distribution) Regulations 2018, with effect from 1 October 2018.

Cyber-insurance

There was an increase in cybersecurity threats and data breaches in 2018. It is therefore becoming more important to have a regulated online sphere, in the context of data privacy and cybersecurity. An important consideration going forward will be the flow of data between states and the control that governments should exercise over this data. Another important issue in this area will be the enforcement of the GDPR.

An increase is expected in 2019 in Irish companies taking up cyber-insurance and potentially related coverage disputes. 'Silent cyber' is also becoming a key focus.

Developments related to litigation funding

In Ireland, third-party professional litigation funding is not generally permitted. The Irish Supreme Court in the case of *SPV OSUS Ltd v HSBC Institutional Trust Services (Ireland) Ltd*, in July 2018, called on the legislature to take action in reforming this area of law, failing which the Supreme Court may be forced to step in.

The High Court has previously confirmed that after-the-event insurance is valid and consequently the only valid form of third-party funding.

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The Civil Liability Amendment Act 2017

The Civil Liability Amendment Act came into effect in late 2018, under which courts in catastrophic injury cases are empowered to make awards by way of periodic payments, rather than as a lump sum. The aim of the legislation is for the plaintiff to have continuity of payment throughout his or her life. The first periodic payment order was made in February 2019.

PPI

Following the UK Supreme Court decision in *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61, a further redress scheme in respect of payment protection insurance (PPI) is underway in the United Kingdom. A judgment of the Manchester County Court was handed down in June 2018 in the case of *Doran v Paragon Personal Finance (unreported)*, where the amount that was awarded was higher than the amount that would have been awarded by the financial ombudsman and that would have been awarded under the Financial Conduct Authority guidelines for a case similar to *Plevin*. In light of the changes to the limitation period for claims to the Financial Services and Pensions Ombudsman in relation to long-term financial products, it is possible that there could be further litigation in relation to the sale of PPI in Ireland.

Representative actions in consumer litigation

A draft directive has been published by the European Commission proposing a new type of EU-wide collective redress mechanism for consumers. Under the directive, 'qualified entities' can seek redress before a member state court on behalf of a group of consumers who have been affected by a breach of consumer protection laws. For industry sectors that are subject to EU regulation, including insurers, this would increase the litigation risk. Further consultation will be required on the draft directive, and it is likely to be amended prior to publication in the Official Journal. It is expected that the draft directive will be adopted by the Commission during 2019.

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