Ireland

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MARKET TRENDS AND REGULATORY FRAMEWORK

1. What were the main trends in the insurance and reinsurance markets over the last 12 months?

Ireland has a thriving domestic and international insurance industry, which includes life, non-life, captive, reinsurance and intermediary activities. It is a leading jurisdiction for domiciling head office insurers targeting the EU/European Economic Area (EEA) markets. Since 2008, several overseas insurance and reinsurance groups have relocated to Ireland, including Beazley Group plc, XL Capital Limited, Willis Group Holdings Limited and Zurich. Others have restructured to underwrite their “Europe ex-UK” business from Ireland. These groups have been motivated by a number of reasons, including Ireland’s low corporation tax rate of 12.5% and well-established prudential regulation.

Insurers and reinsurers (where applicable) have spent the last 12 months taking steps to ensure compliance with the various codes of conduct and regimes recently introduced by the Central Bank of Ireland (Central Bank), including the Corporate Governance Code for Credit Institutions and Insurance Undertakings, the Fitness and Probity Regime, the Minimum Competency Code and the Consumer Protection Code. These are some of a number of measures introduced by the Central Bank in response to the recent financial crisis and in preparation for the implementation of Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II Framework Directive). In addition, many insurers and reinsurers have undergone corporate restructurings, with an increased number of cross-border mergers, schemes of arrangement and portfolio transfers.

The decision of the ECJ in the Test Achats case (C-236/09) has had a significant impact on the European insurance industry. The effect of the ruling is to prohibit the selling of private insurance products which differentiate by gender on price or benefits, where such provisions are in force on or before 21 December 2012. The ruling is binding on all EU member states.

2. What is the regulatory framework for insurance/reinsurance activities?

Regulatory framework

The Central Bank has responsibility for the authorisation and ongoing supervision of insurance and reinsurance undertakings and intermediaries. The Central Bank’s powers are set out in laws and regulations derived from EU directives and domestic legislation, including the:

- European Communities (Reinsurance) Regulations 2006 (Reinsurance Regulations).
- European Communities (Insurance Mediation) Regulations 2005 (Mediation Regulations).

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

Regulatory bodies

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

The Central Bank is responsible for assessing the fitness and probity of the proposed directors, management and significant shareholders of authorised firms and for the prudential assessment of any change in their control.

The Central Bank also has responsibility for consumer protection issues.

Also of importance is the Irish Insurance Industry Federation Code of Practice (IIF Code), a voluntary code of conduct adopted by members of the Insurance Industry Federation, a trade body representing insurance undertakings in Ireland. The IIF Code protects policyholders resident in Ireland and insured in their private capacity.
REGULATION OF INSURANCE AND REINSURANCE CONTRACTS

3. What is a contract of insurance for the purposes of the law and regulation? How does it differ from a contract of reinsurance?

Contract of insurance
There is no statutory definition of a contract of insurance under Irish law, nor are there specific rules for the formation of an insurance contract beyond the general principles of contract law and the duty of utmost good faith (see Question 20, Utmost good faith). Irish legislation does not specify the essential legal elements of an insurance contract and the courts have considered it on a case-by-case basis.

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

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

Contract of reinsurance
There is no legal difference under Irish law between an insurance contract and a reinsurance contract (see above, Contract of insurance).

4. Are all contracts of insurance/reinsurance regulated?

The Central Bank regulates the carrying on of insurance business in Ireland (and not contracts of insurance). The Central Bank regulates the classes of insurance business annexed to the Non-Life Insurance Framework Regulations and the Life Assurance Framework Regulations. There are two main categories:

- Life business. Broadly, this consists of:
  - life assurance;
  - pensions insurance;
  - permanent health insurance; and
  - pension fund management.

- Non-life business. This comprises the remainder, including:
  - property insurance;
  - accident and sickness insurance; and
  - travel and liability insurance.

Reinsurance business is not covered by these regulations but is covered by the Reinsurance Regulations.

CORPORATE STRUCTURE

5. What form of corporate organisation can insurers take?

Under the Life Assurance Framework Regulations, an insurance undertaking must be one of the following:

- An incorporated company limited by shares or by guarantee or an unlimited company.
- A society registered under the Industrial and Provident Societies Acts.

Under the Non-Life Insurance Framework Regulations, an insurance undertaking must be one of the following (as defined by the Companies Acts 1963 to 2009):

- A company limited by shares or by guarantee.
- An unlimited company.
- A European Company (SE).

REGULATION OF INSURERS AND REINSURERS

6. Are all insurers and reinsurers regulated? Are they all regulated in the same way?

Although insurance and reinsurance undertakings are governed by separate legislation, the Central Bank adopts a consistent approach to the regulation of insurance and reinsurance undertakings, particularly in relation to the authorisation, ongoing supervision and sanction procedures that it adopts.

However, there are some notable differences in how insurers and reinsurers are regulated, including:

- An insurance company, unlike a reinsurance company, cannot simultaneously be authorised to carry on both life and non-life reinsurance business (see Question 7).
- The Reinsurance Regulations permit the establishment of special purpose reinsurance vehicles (SPRVs), providing a quicker and simpler route to authorisation and reducing the extent of supervision by comparison with fully regulated reinsurers (see Question 9, Insurance/reinsurance providers).
Traditionally, the Central Bank’s “80/20 Rule” restricted Irish-authorised insurance companies from writing more than 20% (and subsequently 50%) gross written premiums relating to reinsurance. Reinsurance companies cannot generally underwrite direct business. However, the Central Bank has, in recent times and in certain circumstances, agreed to waive the 80/20 Rule in its entirety on application by a previously restricted Irish-authorised insurance company.

Insurers have significant technical reserve requirements where they reinsure more than 90% of their liabilities (see Question 8). Reinsurers are given much more discretion in the amount they may effectively retrocede, but must calculate both a gross and a net technical reserve and are subject to a more sophisticated set of rules in calculating their solvency margin.

7. Can insurers and reinsurers carry on non-insurance business? Are there any restrictions on their business activities?

Insurance undertakings are limited to activities for which they are specifically authorised, to the exclusion of all other business activity:

- Non-life insurance undertakings can only carry on the business of non-life insurance and operations directly arising from that business, to the exclusion of all other commercial business (Regulation 7(2), Non-Life Insurance Framework Regulations).

- Life assurance undertakings were traditionally limited to the business of life assurance and operations directly arising from that business, to the exclusion of all other commercial business (Regulation 7(2), Life Assurance Framework Regulations). However, under Regulation 4 of the European Communities (Life Assurance) Framework (Amendment) Regulations 2011, life insurance companies may also conduct non-life classes 1 (accident) and 2 (sickness) business where authorised to do so.

Reinsurance undertakings are also restricted from conducting all other commercial business, although the rule is less clear (section 6, Reinsurance Regulations, when read in the context of recital 14 of the preamble to Directive 2005/68/EC on reinsurance).

Irish-authorised insurance undertakings, except life assurance undertakings (see above):

- Cannot simultaneously carry on life and non-life business.
- Must establish separate undertakings and obtain separate authorisations for this.

However, reinsurers can underwrite life and non-life reinsurance if authorised as a composite reinsurer (Reinsurance Regulations).

8. Are there any statutory limits or other restrictions on, or requirements relating to, the transfer of risk by insurance or reinsurance companies?

The following restrictions apply:

- Where a general insurer cedes more than 90% of its gross written premium in any class of insurance business, it must maintain a technical reserve of the larger amount of 10% of gross premium income, or 10% of gross technical reserves relating to that business in that class, and hold assets representing that amount (sub-article (3), Non-Life Insurance Framework Regulations).

- Where a life insurer cedes more than 75% of its gross written premiums in any one of a specified range of contracts, the insurer must maintain a technical reserve equivalent to at least 25% of gross premiums or 25% of gross reserves in that class (whichever is the larger) (Article 12(5) and Annex VI, Life Assurance Framework 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. 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.

OPERATING RESTRICTIONS

Authorisation or licensing

9. Does the entity or person have to be authorised or licensed?

Insurance/reinsurance providers

Undertakings cannot carry on insurance or reinsurance business in Ireland without authorisation from the Central Bank or from another recognised EU regulator through the “single passport” regime.

The regulatory framework under which the Central Bank can authorise this activity is set out in:

- Articles 6 to 9 of the Non-Life Insurance Framework Regulations.
- Articles 6 to 9 of the Life Assurance Framework Regulations.
- Articles 7 to 13, and 30 to 34, of the Reinsurance Regulations.

The Central Bank has issued guidance on the procedures it applies when reviewing a licence application:

- The applicant has an initial meeting with the Central Bank.
- Following this meeting, the applicant must submit a written application and any supporting materials.
Once a complete application is received, the Central Bank must confirm receipt three working days before beginning its review.

The Central Bank will give its initial comments on the application (generally within 25 working days).

The Central Bank will issue further comments within ten days of the applicant’s response to the initial comments.

When the Central Bank completes its review of the application, it usually gives the applicant authorisation in principle before formal authorisation. Once the applicant has satisfied the minimum capital requirements and any pre-licensing requirements set out in the authorisation in principle, the Central Bank issues a formal authorisation.

A reinsurance provider can establish an SPRV, which provides a quicker and simpler route to authorisation and reduces the extent of supervision by comparison with fully regulated reinsurers. The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) previously stated in its guidance that if the undertaking clearly states at the authorisation process the aim and details of reusing the SPRV, then detailed follow-up discussions should not be necessary provided the same circumstances apply during reuse as at the initial authorisation. Where the proposed reuse was not planned and discussed with the Central Bank at initial authorisation or if authorisation was granted subject to a proviso that a potential reuse would have to be approved, the proposed reuse of the SPRV requires prior approval of the Central Bank.

Insurance/reinsurance intermediaries

A person cannot undertake or purport to undertake insurance or reinsurance mediation unless that person is a registered insurance or reinsurance intermediary or is exempt from registration (Mediation Regulations). Insurance/reinsurance mediation is defined as any activity involved in:

- Proposing or undertaking preparatory work for entering into insurance/reinsurance contracts.
- Assisting in the administration and performance of insurance/reinsurance contracts that have been entered into.

The Central Bank maintains a register of authorised insurance and reinsurance intermediaries in Ireland. All applications for registration as an insurance intermediary and/or reinsurance intermediary must be submitted to the Central Bank, together with supporting documentation. The applicant must satisfy a number of criteria, some of the most significant are:

- The good reputation of directors.
- The knowledge and ability of senior management and key personnel.
- The holding of minimum levels of professional indemnity insurance.
- Maintenance and operation of client premium accounts.

Other providers of insurance/reinsurance-related activities

There are no other authorisation requirements for providers of insurance/reinsurance-related activities.

10. What are the main exemptions or exclusions from authorisation or licensing?

Insurance/reinsurance providers

The following exemptions from authorisation exist:

- Insurance undertakings whose head office is situated outside the EU can, subject to certain conditions, carry on certain classes of non-life business through services into Ireland (Regulation 6(4), Non-Life Insurance Framework Regulations). The relevant classes include specified classes of marine, aviation and goods in transit insurance.

- Exempt undertakings can carry on reinsurance business in Ireland without full authorisation or authorisation as an SPRV (Regulation 5, Reinsurance Regulations). An exempt undertaking in this context means:
  - an insurance undertaking to which Directive 73/239/EEC relating to the taking-up and pursuit of the business of direct insurance other than life assurance applies or a body referred to in Article 2 or 3 of that Directive;
  - a life assurance undertaking to which Directive 2002/83/EC applies or a body referred to in Article 3 of that Directive;
  - a reinsurance undertaking or special purpose vehicle established in a third country which has no place of business in Ireland and which is not required to be authorised under the corresponding law of another EU member state;
  - a branch in Ireland, under regulation 4(6) of the European Communities (Reinsurance) Regulations 2006, if a reinsurance undertaking whose head office is established in a third country maintains a branch in the state.

Insurance/reinsurance intermediaries

There is a limited exemption from authorisation for mediation services relating to insurance that are complementary to either (Regulation 6, Mediation Regulations):

- A contract for the supply of goods covering the risk of breakdown, loss of or damage to those goods.
- A contract for the provision of travel covering damage to or loss of baggage and other risks linked to the travel. This applies even if the insurance also covers life assurance or liability risks, provided that they are ancillary to the main cover for the risks linked to the travel.

In both cases, a number of conditions must be met, including that the:

- Annual premium payable under the policy must not exceed EUR500 (as at 14 March 2013, US$1 was about EUR0.8);
- Term of the cover, including renewals, does not exceed five years.
Restrictions on ownership or control

11. Are there any restrictions on the ownership or control of insurance-related entities?

There are no restrictions on the ownership or control of insurance or reinsurance companies or intermediaries, other than that the proposed controller must be of good standing. The Central Bank assesses the suitability of all persons proposed to be appointed to pre-approval controlled functions who are required to comply with the new Fitness and Probity Regime as issued by the Central Bank under legislative provisions (Fitness and Probity Regime). The approval process requires the submission of an individual questionnaire to the Central Bank for each proposed individual. There are no specific requirements concerning age or nationality.

See also Question 12.

12. Must owners or controllers be approved by or notified to the relevant authorities before taking, increasing or reducing their control or ownership of the entity?

Insurance/reinsurance providers

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 reinsurance undertaking or increase that person’s control above certain levels must first obtain the approval of the Central Bank. The relevant levels are 10%, 20%, 33% or 50% control of the votes exercisable by shareholders at a general meeting.

On receiving a completed application for approval, the Central Bank must acknowledge receipt and begin a prudential assessment of the proposed transaction. This must generally be completed within 60 working days after the acknowledgement is issued but the Central Bank can extend that period to request additional information, such as confirmation of references. Without pre-authorisation, the transaction is not legally valid in Ireland.

When assessing an application for initial authorisation, the Central Bank will also assess the ownership structure of the relevant entity. The applicant must provide details of each direct and indirect shareholder with a holding or interest of 10% or more in the applicant. For captive insurance and reinsurance undertakings, the relevant holding or interest is 5% or more.

Insurance/reinsurance intermediaries

The Central Bank does not assess the ownership structure or require prior notification of acquisition transactions concerning insurance or reinsurance intermediaries.

Ongoing requirements for the authorised or licensed entity

13. What are the key ongoing requirements with which the authorised or licensed entity must comply?

Insurance/reinsurance providers

The key ongoing requirements that an authorised or licensed entity must comply with are contained in the:

- Life Assurance Framework Regulations.
- Non-Life Insurance Framework Regulations.
- Reinsurance Regulations.
- Codes of conduct, such as the revised Consumer Protection Code 2012, the Corporate Governance Code for Credit Institutions and Insurance Undertakings (see Question 21), the Fitness and Probity Regime and the Minimum Competency Code as issued by the Central Bank under legislative provisions.

The key obligations include:

- Notifying the Central Bank before entering into any material transaction with a related company or companies. This applies to insurance companies only.
- Establishing and maintaining an adequate solvency margin and guarantee fund.
- When providing an insurance quote to a consumer, informing the consumer of the:
  - amount of the quotation;
  - length of time for which the quotation will be valid; and
  - full legal name of the relevant underwriter.
- Operating separate client premium accounts for life and non-life business.
- Demonstrating a minimum level of professionalism and expertise.
- Submitting annual and quarterly returns and an annual statement of compliance with the Corporate Governance Code for Credit Institutions and Insurance Undertakings to the Central Bank.

Insurance/reinsurance intermediaries

Insurance intermediaries and reinsurance intermediaries must comply with the:

- Mediation Regulations.
- Various codes of conduct, such as the revised Consumer Protection Code various requirements of the Fitness and Probity Regime and the Minimum Competency Code.
Key ongoing requirements include:
- Maintaining and operating designated client premium accounts.
- Holding appropriate professional indemnity insurance cover.
- Senior staff being able to manage the business and to carry on activities on the intermediary’s behalf.

Penalties for non-compliance with legal and regulatory requirements

14. What are the possible consequences of an entity failing to comply with applicable legal and regulatory requirements? What recourse do policyholders have if they have done business with a non-approved entity?

Insurance/reinsurance providers
The Central Bank has the power under the Central Bank Act 1942 (the 1942 Act) to impose sanctions for prescribed contraventions with legal and regulatory requirements.

Part IIIC of the 1942 Act sets out the various consequences of breach, providing a common form of administrative sanctions procedure. This procedure is only applied to regulated entities such as insurers and reinsurers, and those concerned with their management.

Where the Central Bank suspects that a prescribed contravention has been committed, it will conduct a preliminary examination. If, subsequently, the Central Bank has reasonable grounds to suspect that a contravention has occurred, it can set up an inquiry to determine the facts and an appropriate sanction.

The Central Bank can enter into a binding settlement agreement with an insurance or reinsurance undertaking at any stage up to the conclusion of an inquiry. The recent settlement agreements entered into by the Central Bank with Quinn Insurance and the Combined Insurance Company of Europe highlight that significant fines will be imposed on undertakings for serious and persistent breaches of regulatory requirements.

It is possible to appeal any decisions made under the procedure to the Irish Financial Services Appeals Tribunal and the Irish courts.

Insurance/reinsurance intermediaries
The Central Bank can apply the administrative sanctions procedure to insurance and reinsurance intermediaries (see above, Insurance/reinsurance providers). The Central Bank can also cancel the registration of an insurance or reinsurance intermediary as a disciplinary measure (Regulation 11, Mediation Regulations).

Non-approved entities
Non-approved entities can be reported to the Central Bank, which has investigative and enforcement powers. However, the policyholder’s only recourse is likely to be to the courts through an action for damages.

A policyholder can only make a complaint to the Financial Services Ombudsman (FSO) in relation to regulated financial services providers (see Question 33, FSO).

Restrictions on persons to whom services can be marketed or sold

15. Are there any restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold?

Insurance and reinsurance services and contracts can be marketed or sold in Ireland to any person. However, insurance undertakings must comply with the general good requirements, which regulate the manner in which insurance undertakings may sell and market insurance products to consumers in Ireland, including under the:
- European Communities (Distance Marketing of Consumer Financial Services) Regulations, 2004 (as amended).

In addition, the provisions of the revised Consumer Protection Code apply to insurance undertakings. The revised Code introduces additional protections for vulnerable consumers.

REINSURANCE MONITORING AND DISCLOSURE REQUIREMENTS

16. To what extent can/must a reinsurance company monitor the claims, settlements and underwriting of the cedant company?

There is no express obligation on a reinsurance company to monitor the claims, settlements or underwriting of a cedant company. However, a prudent reinsurance undertaking will seek to include certain disclosures and notification requirements relating to the claims, settlements and underwriting of the cedant in the contract of reinsurance.

17. What disclosure/notification obligations does the cedant company have to the reinsurance company?

The Central Bank has issued a set of guidelines on reinsurance cover for primary insurers and the security of their reinsurers (see Question 19). This includes a requirement that the reinsurance contract include an obligation for the insurer to provide reports, at least quarterly, regarding premiums paid and losses incurred. In addition, disclosure must be made of certain matters under the principle of utmost good faith (see Question 20, Utmost good faith).
**INSURANCE AND REINSURANCE POLICIES**

**Content requirements and commonly found clauses**

18. What are the main general form and content requirements for insurance policies? What are the most commonly found clauses?

**Form and content requirements**

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

**Commonly found clauses**

A typical insurance policy will consist of:

- A proposal form completed by the insured.
- Policy terms and conditions drafted by the insurer.
- Supporting documentation provided to the insurer at the application stage by the insured.

The policy would include express terms defining:

- Coverage: the extent of the insurer's potential liability to the insured.
- Exclusions: matters expressly excluded from cover.
- Excess: the initial amount of any loss that the insured must bear themselves.
- Conditions precedent to the insurer’s liability for a loss, such as notice provisions.
- Warranties: statements by the insured of fact or continuing intention in relation to the risk underwritten, such as a warranty that certain precautions will be taken in respect of particular activities. If a warranty is breached the insurer has no further liability under the policy from the date of breach.

19. Is facultative or treaty reinsurance more common? What are the most commonly found clauses in reinsurance policies?

**Faculative/treaty reinsurance**

Treaty reinsurance is generally more common than facultative reinsurance in the Irish market, but whether treaty or facultative reinsurance would be used depends on what the parties are trying to achieve.

**Commonly found clauses**

The Central Bank has issued a set of guidelines on reinsurance cover for primary insurers and the security of their reinsurers. These guidelines provide that Irish-authorised cedants must ensure their reinsurance cover includes the following 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 cedant without delay and in a manner consistent with the orderly payment of claims by the ceding insurer.
- A provision providing for reports, at least quarterly, regarding premiums and paid and incurred losses (see Question 17).

The reinsurance contract will sometimes include security and collateral clauses for the benefit of the ceding insurer. Often the reinsurer grants security in circumstances where the cedent would not otherwise be satisfied with the reinsurer's credit rating, or to allow a greater amount of business to be ceded to the reinsurer. The most sought-after collateral by cedants is a stand-by letter of credit arranged by the reinsurer with a recognised bank. However, in the current market letters of credit are seen as expensive and parties now seek to create alternative collateral and security structures by withholding premium or placing funds in trust.

Follow the fortunes and follow the settlements clauses are common in Irish law reinsurance agreements. Contract disputes are usually subject to arbitration (see Question 34).

**Implied terms**

20. Are there any terms that are implied by law or regulation (even if not included in the insurance or reinsurance contract)?

**Mandatory provisions**

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

- Implied restrictions contained in motor insurance policies.
- Mandatory provisions concerning solicitors’ professional indemnity insurance.
- Provisions in the Criminal Justice (Drug Trafficking) Act 1996 concerning minimum disclosure requirements.

**Utmost good faith**

Parties to contracts of insurance are subject to the duty of utmost good faith: both parties have an overriding duty to disclose all material facts to the other before the contract is made. This goes beyond the usual common law rules on misrepresentation, as the duty of utmost good faith imposes a positive obligation on the parties to make disclosure. It is possible to breach the duty by omission or silence in relation to a material fact.

The remedy for breach of the duty is to declare the contract void. In practice, therefore, the duty owed by the insured to the insurer (or the cedant to the reinsurer) is the most significant.

A material fact is one which would influence the judgment of a prudent underwriter in deciding:

- Whether to underwrite the contract.
- The terms (such as the premium) on which it might do so.
If a breach of utmost good faith is alleged, the insurer must show (on the balance of probabilities) that the breach influenced it to make the contract on the particular terms.

Customer protections

21. How do customer protections in the general law affect insurance contracts? What customer protections are generally included in insurance policies to supplement this?

The inclusion of customer protections affects the format and content of insurance contracts and the manner in which insurance policies are marketed and sold to consumers. Customer protections included in insurance policies are derived from the following:

- The Sale of Goods and Supply of Services Act 1980. This provides a framework in Ireland for the protection of consumers of goods and services. It:
  - prohibits the provision of false or misleading information to consumers;
  - requires the supplier of a service to have the necessary skill to provide the service and exercise due care and diligence in carrying out the service.

- The European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. This governs the relationship between a non-business consumer and an insurer where the terms of the contract have not been individually negotiated. Written terms must be set out in plain, intelligible language and terms that are considered to be unfair are not binding on the consumer. A term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.

  These implied terms can be excluded or varied if:
  - it is both fair and reasonable to do so; and
  - the exclusion or variation has been specifically brought to the consumer’s attention.

- Consumer Protection Act 2007. This prohibits trading practices that are unfair, misleading or aggressive and are likely to impair the average consumer’s choice. It is an offence to provide false or misleading descriptions of goods or services. The Act specifically states that in respect of a consumer’s claim on an insurance policy the:
  - consumer must not be required to produce documents that are irrelevant to the claim;
  - insurance undertaking must not persistently fail to respond to the consumer’s correspondence on a matter, to dissipate the consumer from exercising contractual rights in respect of a claim.

- Consumer Protection Code. Areas of relevance to insurance include:
  - chapter 3, which deals with premium handling and contact with consumers;
  - chapter 4, which specifies the information that must be provided to consumers before entering into a contract for a product or service; and

  chapter 7, which deals with rebates and claims processing and includes the requirement for an insurance intermediary assisting a consumer in making a claim, to transmit the documentation to the relevant regulated entity within one business day.

Standard policies or terms

22. What are the main standard policies or terms produced by trade associations or relevant authorities?

Regulations adopted under the Solicitors Acts 1954 to 2011 contain minimum terms and conditions for professional indemnity insurance for solicitors and lawyers registered in Ireland.
Third party insurance claims

24. What are the circumstances in which third parties can claim under an insurance policy?

Under Irish law, in accordance with the common law doctrine of privity of contract, a contract cannot generally be enforceable in favour of or against a person who is not a party to the contract. There is no Irish equivalent of the UK Contracts (Rights of Third Parties) Act 1999.

There are however certain exceptions under section 76(1) of the Road Traffic Act 1961 and section 62 of the Civil Liability Act 1961. For example, a claimant in a road traffic accident can claim against the insurance company of the owner or user of the vehicle involved in the accident. Where an insured under a policy of liability insurance 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.

Under the law of trust a beneficiary can, in certain circumstances, directly enforce the rights of the trust against an insurer. The beneficiary has the burden of proving that a trust exists. The beneficiary must also be able to demonstrate that he is entitled to the benefit of the policy by proving “more than a reasonable expectation” that he is to benefit (Re Irish Board Mills Ltd (in Receivership) [1980] ILRM 216).

Time limits

25. Is there a time limit outside of which the insured/reinsured is barred from making a claim?

Actions founded in contract cannot be brought after six years have expired from the date on which the cause of action accrued (section 11(1)(a), Statute of Limitations Act 1957).

Enforcement

26. Can the original policyholder or other third party enforce the reinsurance contract against a reinsurer?

As a result of the doctrine of privity, a primary policyholder cannot make a direct claim against a reinsurer because the primary policyholder is not a party to the reinsurance contract, only to the policy of insurance that is subsequently reinsured (see Question 24).

The general view is that “cut-through” clauses (under which the reinsurer agrees to pay the claim to the original policyholder if the reinsured becomes insolvent) are not effective under Irish law because of the doctrine of privity and under insolvency law.

In circumstances where an insolvent Irish non-life insurer is unable to meet policyholder liabilities, the liquidator can obtain funds from the Insurance Compensation Fund (Fund) to meet those liabilities. The Insurance Act 1964, as amended, established the Fund, which is funded by grants and advances made by the Central Bank and contributions by non-life insurers. The recently enacted Insurance (Amendment) Act 2011 amends the Insurance Act 1964 by introducing a levy of up to 2% on all non-life insurance policies that relate to risks located in the State, in order to contribute to the current shortfall in the Fund.

Remedies

27. What remedies are available for breach of an insurance policy?

The remedy depends on the breach. Breach of a condition precedent to cover, entitles insurers to decline cover of a claim, whereas breach of a condition which is not stated to be a condition precedent to cover, entitles the insurer only to damages.

Unless the contract provides otherwise, the general actions for breach of contract are available to the insured. Accordingly an insured would have an action for damages arising from the failure of the insurer to pay a valid claim. The Irish courts occasionally award punitive, or exemplary, damages on public policy grounds (see Question 28).

Normally damages are an adequate remedy for breach of an insurance policy. However, if damages are deemed neither adequate nor appropriate, the law of equity may intervene and the court may grant the remedy of specific performance.

In case of a breach of the duty of utmost good faith, the remedy is to declare the contract void (see Question 20, Utmost good faith).

In the case of non-disclosure of a material fact the remedy of avoidance of the policy is available.

Punitive damage claims

28. Are punitive damages insurable? Can punitive damages be reinsured if they are covered by an underlying policy?

The Irish courts occasionally award punitive or exemplary damages on public policy grounds. The Irish Supreme Court has recently 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 damages are insurable in Ireland and can be reinsured if they are covered by an underlying policy. The Law Reform Commission considered this issue in a report published in 2000 (Aggravated, Exemplary and Restitutionary Damages) and considered that public policy considerations in favour of prohibiting insurance for exemplary damages were not sufficiently strong to necessitate legislation in this area. It is therefore a matter for individual insurance companies whether they choose to expressly exclude exemplary damages from cover.
**INSOLVENCY OF INSURANCE AND REINSURANCE PROVIDERS**

29. What is the regulatory framework for dealing with distressed or insolvent insurance or reinsurance companies, or other persons or entities providing insurance or reinsurance related services? What regulatory and/or other protections exist for policyholders if the insurance company is insolvent?

**Administration**
The Central Bank can request the court to impose administration under section 2(1) of the Insurance (No.2) Act 1983 when an insurer has failed to maintain its regulatory solvency margin or cannot meet claims. The Administrator will assume management of a company to attempt to place the insurer on a sound commercial and financial footing. Administration is not available as a remedy for individual creditors, but is available to the Central Bank even if another remedy or cause of action is available.

**Liquidation**
A creditor, or the company itself, can petition the court for a winding-up order and the appointment of a liquidator. In the case of an insolvent company the usual grounds the petitioner relies on are that:

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

The European Communities (Reorganisation and Winding-Up of Insurance Undertakings) Regulations 2003 apply to give preference to policyholders when an insurer is wound up. The regulations do not apply in the winding-up of reinsurance undertakings.

**Receivership**
Receivership is not strictly speaking an insolvency process but the enforcement of security. A receiver may be appointed by the court or on the basis of a statutory power, usually on the occurrence of a trigger event 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 by giving the company “breathing space” from its creditors. It is analogous to Chapter 11 bankruptcy in the US and administration in the UK. While a company is in examinership (which can last for a period of up to 100 days):

- The company cannot be wound up.
- A receiver cannot be appointed.
- Creditors cannot enforce their claims.
- Proceedings cannot be issued or continued against the company except with the leave of the court.

**Schemes of arrangement**
The court can sanction schemes of arrangement (that is, schemes which attempt to find a compromise between a company and its creditors and avoid the need for liquidation) (section 201, Companies Act 1963). The scheme must have been approved by meetings of creditors and/or members which have been convened at the direction of the court on the application of the company or any member or creditor.

30. Can excess insurance policies “drop down” to provide coverage if the primary insurer goes into insolvency?

Excess insurance is not usually triggered until the primary layer cover has been exhausted. Whether excess coverage can, or is required to, “drop down” in circumstances where the primary layer insurer is insolvent will depend on the policy wording. There are no reported decisions of the Irish courts on the interpretation of excess policy wordings. An Irish court would not be expected to order a drop down, absent express wording in the policy.

31. Is a right to set-off mutual debts and credits recognised in an insolvency proceeding involving an insurer or reinsurer?

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

**TAXATION OF INSURANCE AND REINSURANCE PROVIDERS**

32. What is the tax treatment for insurers, reinsurers, and other persons or entities providing insurance and reinsurance-related services?

**Non-life insurance companies**
Non-life insurance business carried on by a company in Ireland is subject to the standard 12.5% corporation tax rate. However, a number of special rules apply to aspects of insurance businesses, including:

- Treatment of investment income.
- Realisation of investments.
- Funded basis of accounting to defer recognition of profit.
- Treatment of technical reserves.
- Treatment of Irish branches of non-resident companies.
- Taxation of captive insurers is broadly the same as non-captives.
Life assurance companies
Taxation of life assurance companies varies depending on when their life assurance business was contracted:

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

- New-basis business (business contracted on or after 1 January 2001). No annual tax is imposed on the policyholders’ fund. Income and gains within the fund are permitted to grow tax-free throughout the term of the policy. An exit tax (currently 36%) applies to payments to certain Irish policyholders. Non-Irish policyholders are exempt, once they provide a declaration of non-Irish residency. The insurer’s own profits from new-basis business are subject to the standard 12.5% corporation tax rate. Special rules apply to calculation of these profits.

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

SPRVs, however, can be established on an effectively tax neutral basis (if they qualify under section 110 of the Taxes Consolidation Act 1997) (see Question 9, Insurance/reinsurance providers). While SPRVs are liable to a 25% corporation tax rate, the tax is applied on the company’s net taxable profit, which can be maintained at a minimal level through specific tax deductible expenditure.

INSURANCE AND REINSURANCE DISPUTE RESOLUTION

33. Are there special procedures or venues for dealing with insurance or reinsurance complaints or disputes?

Commercial Court
Insurance and reinsurance disputes can be heard in the Commercial Court if:

- The value of the claim or counterclaim exceeds EUR1 million.
- The Court considers that the dispute is inherently commercial in nature.

The Commercial Court is a branch of the High Court and deals exclusively with commercial disputes. Proceedings are case-managed and tend to move at a much quicker pace than general High Court cases, on average taking a period of 22 weeks from entry in the list to conclusion. Entry to the list is at the discretion of the judge and may be refused if there has been any delay.

The Commercial Court judges place a strong emphasis on mediation and the Commercial Court Rules provide for up to a four-week stay of proceedings to allow the parties to consider mediation.

Arbitration
If a contract contains an arbitration clause, the dispute must be referred to arbitration. However, there is an exception for consumers, who are not bound by an arbitration clause if the claim is less than EUR5,000 and the relevant agreement has not been individually negotiated.

The 2010 Act brought increased finality to the arbitral process by reducing the scope for court intervention or oversight and providing a more limited basis for appealing awards and decisions than was previously available.

Financial Services Ombudsman (FSO)
The FSO is a statutory officer who deals independently with unresolved complaints from consumers about their individual dealings with all financial service providers, including insurers. The FSO has broad powers and may direct insurers to:
- Pay compensation up to a maximum of EUR250,000.
- Change its practices in the future.
- Rectify the conduct complained of (for example, requiring the insurer to pay a disputed claim).

34. Are arbitration clauses in insurance and reinsurance agreements enforceable?

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

35. Are choice of forum, venue and applicable law clauses in an insurance or reinsurance contract recognised and enforced?

Choice of forum, venue and applicable law clauses in an insurance or reinsurance contract are generally recognised and enforced. However, where the insured is domiciled in an EU member state, the following may limit the application of these provisions in insurance contracts:
- Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I Regulation).

Jurisdiction clauses/choice of court clauses
Generally, an insured who is domiciled in an EU member state can only be sued in the courts of that member state (Brussels I Regulation). Agreements extending the right of insurers to sue the insured elsewhere are only valid if the agreement:
- Is entered into after the dispute has arisen.
- Is concluded with a policyholder who is not domiciled in a member state (except if the insurance is compulsory or relates to immovable property in a member state).
- Relates to certain risks to ships, aircraft or goods in transit.
- Relates to a large commercial risk (which broadly includes commercial risks or property risks where the insured is a substantial commercial entity and satisfies specified tests).
- Where both the insurer and the insured are domiciled or habitually resident in the same member state at the time the contract is concluded.

Choice of law clauses
Choice of law provisions in reinsurance contracts are generally enforced. However, different rules apply to choice of law provisions in insurance contracts depending on whether the risk in question is classified as a “large risk” (Rome I Regulation). Where a large risk is concerned the parties can choose the governing law, subject to certain caveats. However, in the case of an insurance contract covering other risks, the parties can only choose:
- The law of any member state where the risk is situated at the time of the conclusion of the contract.
- The law of the country where the policyholder has his habitual residence (a company has its habitual residence at its place of central administration at the time the contract is concluded).
- In the case of life assurance, the law of the member state of which the policyholder is a national.
- For insurance contracts covering risks limited to events occurring in one member state other than the member state where the risk is situated, the law of that member state.
- Where the policyholder pursues a commercial or industrial activity or liberal profession and the insurance contract covers two or more risks which relate to those activities situated in different member states, either:
  - the law of any of the member states concerned; or
  - the law of the country of habitual residence of the policyholder.

REFORM

36. What proposals are there for reform of the law, regulation or rules relating to the provision of insurance or reinsurance services?

The continued evolution of the Solvency II Framework Directive remains the most talked about reform likely to affect Irish insurance undertakings. The slow development of any detailed legal rules in the Lamfalussy process (a four-level structure often used for European legislation in the financial services sector) is being blamed in some quarters for “paralysis by analysis” in insurance sector investment. The original proposed implementation date for Solvency II of 1 January 2014 will not now be met. At the time of writing, a revised implementation timetable has not yet been formalised but it has been reported that this is likely to be 1 January 2016 at the earliest. The insurance industry is encouraged to maintain its focus on the implementation of Solvency II.

The last two years has seen the introduction by the Central Bank of the Corporate Governance Code for Credit Institutions and Insurance Undertakings 2011, the revised Consumer Protection
Code 2012 (see Question 21), the Corporate Governance Code for Captive Insurance and Captive Reinsurance Undertakings, the Minimum Competency Code and the implementation of the Fitness and Probity Regime. During 2013, the Central Bank is expected to closely supervise compliance with the rules and requirements introduced by the various codes of conduct and guidance through a number of themed reviews and inspections in the insurance and reinsurance industry.

In 2012, the Law Reform Commission (LRC) published a Consultation Paper on Insurance Contracts. The paper examined the current system of law on insurance contracts in Ireland and contained a number of detailed recommendations of the LRC in areas including the rights of third parties, the concept of insurable interest and the duty of disclosure placed on the insured. The LRC intends to publish a report in this area in 2013.

At a European level, the EU Commission is undertaking a review of Directive 2002/92/EC on insurance mediation (Insurance Mediation Directive), which is likely to have a considerable effect on the regulation of brokers and intermediaries. During 2012, the Commission published a proposed amending directive to replace the current Insurance Mediation Directive and indicated that this is likely to be adopted by the European Parliament and the Council of the European Union in 2013, to take effect in 2015.

*With thanks to our colleagues, Gráinne Webb, April Gilroy, Aoife McCluskey and Gerry Thornton.*
Quality. Ireland, 1992
Areas of practice. Commercial litigation and dispute resolution.
Recent transactions
- Acting for HSBC Bank in the defence of 63 cases brought by investment funds and shareholders in the funds arising out of losses suffered in the Madoff Ponzi Scheme.
- Acting for Aviva in a significant subrogation action in respect of flood damage in Cork City.
- Defending an insurance broker in professional negligence proceedings arising from an allegation that Bloxham Stockbrokers are under insured for substantial claims.
- Acting for Kenmare Resources in the Supreme Court appeal of a EUR10 million libel award.
- Successfully defended UPC in proceedings brought by the Irish record industry alleging the ISP was responsible for peer to peer file sharing.
- Successfully represented Chubb and WR Berkley in coverage proceedings arising from Chubb's declination of Michael Lynn Solicitor's practice due to non-disclosure of material fact.

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Recent transactions
- Advised the Aviva Group on the transfer of the non-life insurance business of Aviva Insurance Europe SE to Aviva Insurance Ireland by a High Court approved portfolio transfer and on the establishment of an Irish branch of Aviva Insurance Limited.
- Advising the Department of Health on legal matters relevant to the restructuring of the Irish health insurance market.
- Advised AIB Bank on the entry into a life insurance distribution agreement with Irish Life Assurance.
- Advised Handelsbanken Life & Pensions (an Irish authorised life insurer in the Handelsbanken Group) on its establishment in Ireland and on the subsequent transfer of its life insurance business to Handelsbanken Liv (a Swedish authorised insurer in the Handelsbanken Group).
- Advised Centrica Risk Limited (an Irish authorised captive insurer in the Centrica Group) on the transfer of its non-life insurance business to Zurich plc.
- Advised the QBE Group on the restructuring of its European insurance operations.
- Advising various life insurers carrying on business in Ireland on new life insurance products including Standard Life and Generali PanEurope.
- Advised the Michelin Group on the merger of its Irish authorised captive insurer and captive reinsurer through a High Court approved scheme of arrangement under the Irish Companies Acts.
- Advised the Beazley Group on its redomiciliation to Ireland and the establishment of it authorised subsidiary, Beazley Re Limited.
- Advised the Aviva Group on the acquisition of 70% shareholding in Vivas Health (now Aviva Health) and on its entry into a shareholders agreement with AIB.