Insurance & Reinsurance Law & Regulation

Jurisdictional comparisons **First edition 2014**

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THE EUROPEAN LAWYER REFERENCE

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Foreword

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Insurance is about the spreading of risk. Ever since Lombard merchants introduced marine insurance in 1200 or Icelandic farmers formed themselves into a mutual later that century, the risk of one has been spread across many.

Of course, sharing risk among people exposed to the same peril does not always work. Accumulation of risk in one geographic area or some other similarly exposed grouping simply magnifies the problem. It was for this reason that reinsurance was born in the fourteenth century in order to allow greater diversification of security and of risk. Risks crossed frontiers, often on a reciprocal basis. A calamity in one place was resolved from the purses and pockets of strangers from far away.

As much early insurance and reinsurance was based upon international trade, the growth of insurance and reinsurance has always been international and the geographic sharing of risk has allowed economies to flourish or, at least, has prevented them from an even earlier demise.

Insurance and reinsurance are not the sole preserves of capitalism. Socialist countries, for example, have used the world's reinsurance markets to protect their macroeconomic interests. Even North Korea used to reinsure itself around the world until sanctions denied it protection. Countries in the former Soviet bloc used reinsurance not merely to protect themselves, but as a way to earn "hard" currency. Often they did so only to find that claims had to be paid in hard currency as well.

The global economy is growing and is becoming ever more interconnected. With the growth in economies, the need for insurance grows as well. Whereas, in the early 1980s, the USA accounted for around 40 per cent of the world's insurance premiums, that figure has fallen to under 25 per cent today while, at the same time, US premiums themselves have continued to grow.

Insurers have also tended to become larger. As global enterprises have consolidated and grown, their need for ever larger insurers has increased. These larger insurers, in turn, need larger reinsurers to protect their capital.

New markets are developing around the world. As they do so, established insurers are often seeing their opportunities for growth there rather than in established and over-competitive locations.

As economies expand, insurance is required in new areas, both geographically and conceptually. New forms of risk are emerging and insurers are struggling to apply old forms of cover to them, often restricted in what they can do by regulatory regimes.

Insurance does not merely follow but can be used as a tool to assist development. Microinsurance schemes are being established, often in conjunction with microfinance, to help create a middle class and a sustainable economy in poorer countries, and to allow them to develop beyond subsistence. Takaful is being developed to give access to risk sharing to millions of devout Muslims, who make up a significant proportion of the world's population, often in areas undergoing some of the fastest economic growth, and who would otherwise have no recourse to cover.

The insurance and reinsurance industry, however much it may be growing, is still dwarfed by the capital markets. Following the global economic downturn and the combined effects of a number of natural disasters, a need emerged for non-correlated security to protect insurers. At the same time, capital, lacking opportunity elsewhere, was available. As economies have recovered, the capital has remained, and now it is clear that insurance-linked securities are not a temporary trend but a significant change in the way that insurers protect themselves and that capital markets interact with them.

As capital markets become familiar with and develop an appetite for risk transfer, the issue arises as to what extent they will still require the intervention of insurers or whether they might be better suited to providing new solutions to those requiring protection directly. The ability of capital markets to innovate within the confines of their regulatory framework could present the greatest challenge yet to insurers.

Regulators are bound by the limits of their jurisdiction. Those that they regulate and those they protect operate on a broader, often global, scale. Cooperation between regulators is required for fear of loopholes emerging between them which could be exploited by those without good faith.

The international nature of recent developments, adding to an already global industry, presents challenges not only to regulators, but also to legal systems. Principles of insurance law, developed from cases surrounding eighteenth- and nineteenth-century ocean voyages, where cargos were carried on sailing ships, are now being asked to respond to quasi-financial instruments protecting satellite launches.

Often the transaction will be reflected in a number of documents involving parties in a variety of jurisdictions and subject to different forms of regulation.

Existing laws and regulations are being tested. It is too early to say whether they will pass these tests, but all concerned must be aware of the issues that they face.

To aid this process, we have brought together leading insurance lawyers from around the world to ponder and opine upon some of the challenges the insurers and their lawyers and regulators will face in the coming years. The questions considered in this book will be asked for many years to come.

Ireland

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1. WHAT RISKS MUST BE INSURED?

1.1 What are the compulsory classes of insurance?

The following insurances are compulsory under Irish law:

- third party motor insurance: a minimum of third party liability insurance must be maintained on all motor vehicles in use in Ireland;
- solicitors professional indemnity insurance;
- professional indemnity insurance cover for insurance and reinsurance intermediaries;
- aircraft insurance: it is mandatory to hold insurance in order to operate as an air carrier transporting passengers, mail and/or cargo for remuneration and/or hire. Public liability insurance is not, however, compulsory for private aircraft;
- shipping insurance: insurance of passenger ships is compulsory. Ships which carry crude or fuel oil must have insurance against pollution damage which meets Irish government requirements; and
- pay-related social insurance (PRSI): most employers and employees over the age of 16 pay social insurance contributions into a national fund, which is used for the purpose of social insurance payments. However, this fund is managed by ministers of the Irish government and there is no scope for a private insurer to become involved in this process.

Certain professional bodies also require their members to maintain professional indemnity insurance as a condition of membership and, in this regard, such insurance may be said to be 'compulsory' for members. This is true of consulting engineers, accountants and auditors. Other professional bodies, while not requiring insurance as a prerequisite to membership, strongly recommend it, and, in the case of architects, real estate agents, bailiffs, pharmacists and medical practitioners, it is standard practice for members hold it.

In April 2014, the Irish government published a White Paper on Universal Health Insurance proposing the introduction of compulsory health insurance in Ireland by 2019.

1.2 Who must they be insured with?

With the exception of PRSI, any appropriately authorised non-life insurer, whether a locally admitted insurer or a foreign insurer, may insure the forms of compulsory insurance mentioned above. Compulsory forms of insurance may be insured by either locally admitted insurers or branches of foreign insurers (as defined at sections 1.2.1 and 1.2.2 below), provided that their authorisations cover the relevant class of non-life insurance.

1.2.1 Locally admitted insurers

In this chapter, the term 'locally admitted insurer' is used to describe:

- an insurance undertaking with its head office in Ireland and which is authorised by the Central Bank of Ireland (the regulatory authority responsible for the authorisation and supervision of insurance undertakings in Ireland; the CBI) to carry on the business of either life or non-life insurance; or
- an insurance undertaking with its head office in another member state of the European Economic Area (EEA) which is authorised by the insurance supervisory authority in that other member state to carry on the business of either life or non-life insurance and which is permitted to carry on insurance business in Ireland on a cross-border basis under the EEA passport regime for life and non-life insurance undertakings with their head offices in an EEA member state.

1.2.2 Foreign insurers

In this chapter, the term 'foreign insurer' is used to describe an insurance undertaking with its head office outside the EEA. It can only carry on insurance business in Ireland if it establishes a branch in Ireland which becomes authorised and regulated by the CBI.

2. WHO CAN INSURE NON-COMPULSORY CLASSES OF RISK?

2.1 Locally admitted insurers

Similar to compulsory insurance, non-compulsory forms of insurance may be insured by locally admitted insurers provided that they are authorised by the CBI or their home member state insurance supervisor, as applicable, to write the relevant classes of life insurance or non-life insurance.

2.2 Foreign insurers

Non-compulsory forms of insurance may be insured through Irish branches of foreign insurers provided they are authorised by the CBI to write the relevant classes of life-insurance or non-life insurance.

2.3 Excess and surplus lines markets

There is no separate excess and surplus lines market in Ireland.

3. WHICH REINSURERS CAN BE USED?

3.1 Must they be locally admitted?

Reinsurers authorised in any EEA member state have full access to the Irish market under Directive 2005/68/EC (the Reinsurance Directive).

Reinsurers authorised outside the EEA can benefit from an exemption under the European Communities (Reinsurance) Regulations 2006 (the Reinsurance Regulations), which implement the Reinsurance Directive, allowing access to the Irish market. This exemption arises where those reinsurers do not have a place of business in Ireland and are not required to be authorised in any other EEA member state under the laws implementing the Reinsurance Directive in that state. This exemption is used to allow a significant level of (usually intra-group) reinsurance cessions from Irish insurers to group companies in the US and Bermuda.

There is potential for some tension between the exemption provided for in the Reinsurance Regulations and Article 49 of the Reinsurance Directive. Article 49 prohibits EEA member states from applying provisions to third country reinsurers that result in more favourable treatment for those third country reinsurers. This Article 49 prohibition will be carried over into the Solvency II Directive (2009/138/EC) (Solvency II).

Solvency II (Article 172) provides that reinsurance placed with reinsurers in countries with regulatory regimes equivalent to Solvency II will be treated in the same way as reinsurance placed with reinsurers authorised in an EEA member state. As Solvency II evolves, it may be that reinsurers authorised in countries with regulatory regimes that are not equivalent to Solvency II would be regarded as receiving more favourable treatment (particularly if their capital and regulatory burden is lower). Therefore, in future, reinsurance placed with reinsurers authorised in non-equivalent countries may not be acceptable.

3.2 If not, are security requirements imposed?

Under the Reinsurance Directive, EEA member states (including Ireland) are not entitled to impose collateral requirements on reinsurance placed with reinsurers authorised in an EEA member state. There is no such prohibition in respect of reinsurers authorised outside the EEA.

Separately, the Irish regulations implementing the EU insurance directives provide that an Irish authorised insurer will only be allowed credit for reinsurance cessions against its reserves where such reinsurance arrangements are acceptable to the CBI. The CBI has produced guidance for insurers in relation to reinsurance of their risks. In this guidance, it identifies a number of factors to be taken into account by an insurer in choosing its reinsurers. These factors provide a guide to the approach that the CBI would take to assess whether reinsurance is acceptable.

In certain cases it could be argued that the provision in relation to credit is at odds with the Reinsurance Directive. For example, if the CBI were to require that collateral be posted in order for an insurer to get credit for reinsurance from an EEA authorised reinsurer, this would be at variance with the prohibition upon imposing collateral requirements in respect of a reinsurer. However, even if the power to refuse credit is incompatible with the Reinsurance Directive, the CBI has other powers to intervene if it is concerned about the financial position of the insurer. It is likely that those powers could be used if the CBI is concerned that reinsurance recoveries may not be paid (irrespective of whether the reinsurer is authorised in an EEA member state or not).

4. THE TAXATION OF INSURANCE

4.1 What taxes are levied on insurance premium?

Non-life insurance

There are two charges to stamp duty levied on non-life insurance policies – one in respect of premiums paid, known as insurance premium tax (IPT), and one on the policy itself ('normal' stamp duty).

IPT

An IPT charge of 3 per cent of the premiums received by an insurer is imposed on certain non-life insurance policies.

Stamp duty

A fixed stamp duty charge of EUR 1 is applied on the issuance of each non-life policy of insurance where:

- the risk to which the policy relates is situated in Ireland (eg where the policyholder is an individual and his habitual residence in Ireland); and
- if there is only one premium in any 12 month period payable and it is at least EUR 20, or if there is more than one premium payable in that period and the total amount payable is at least EUR 20.

A policy of insurance for these purposes *'includes every writing whereby any contract of insurance is made or agreed to be made or is evidenced'*. The Irish Revenue Commissioners takes the position that each individual policy (which would include written evidence of entitlement to cover under, for example, a master policy) is subject to the EUR 1 charge.

Health insurance levies

Irish law provides for a stamp duty levy on health insurance contracts. The levy is payable in respect of all policyholders irrespective of age and is intended to finance the age-related tax credits paid primarily to insurers of elderly policyholders.

For new contracts entered into and contracts renewed after 30 March 2013, the levy is set at EUR 290 in respect of an adult with non-advanced cover, EUR 350 in respect of an adult with advanced cover (broadly where the contract provides health insurance cover for private hospital accommodation), EUR 100 for a child (under 18 years of age) with non-advanced cover and EUR 120 in respect of a child with advanced cover.

Additional levies

A 2 per cent contribution to the Irish Insurance Compensation Fund, which is calculated based on gross premiums paid to the insurer in respect of policies issued in respect of risks located in Ireland, is collected by the Revenue Commissioners in conjunction with the 3 per cent IPT.

Life insurance

IPT is payable by life insurers at the rate of 1 per cent in respect of premiums on life policies, where the risk to which the policy relates is located in, or is deemed to be located in, Ireland. The risk will be deemed to be located in

Ireland if the policyholder has his or her habitual residence in Ireland or, in respect of a policyholder who is a person other than an individual, if the policyholder's head office or branch to which the policy relates is situated in Ireland.

4.2 What exceptions are there?

IPT only arises where the risk to which the policy of non-life insurance or policy of life insurance relates is located in Ireland. As such, IPT will not apply where, for example, the policyholder has his or her habitual residence outside Ireland or where the policyholder is a legal person other than an individual and where its head office or branch to which the policy relates is located outside Ireland.

Furthermore, IPT does not apply to premiums received by an insurer on certain non-life policies. These include voluntary health insurance, marine, aviation and transit insurance, export credit insurance and certain dental insurance contracts.

5. INSURANCE, REINSURANCE AND CAPITAL MARKETS

5.1 How is finite reinsurance treated?

5.1.1 What constitutes risk transfer?

An Irish reinsurer must confine its activities to reinsurance and related activities. The first question, therefore, is whether finite reinsurance is a permitted activity for reinsurers authorised in Ireland.

Finite reinsurance is recognised by the CBI. The CBI has produced a set of requirements (Finite Requirements) that apply to reinsurers authorised in Ireland that carry on finite reinsurance. The Finite Requirements are designed to ensure that reinsurers and/or their cedents, as appropriate, make certain additional disclosures (including mandatory clauses to be included in the reinsurance contract), maintain certain internal controls and maintain an enhanced minimum solvency margin in respect of certain types of finite reinsurance.

Finite reinsurance is defined as reinsurance that involves substantial, but limited, risk transfer. 'Substantial' is not defined. However, the CBI has issued a similar set of requirements (Financial Requirements) in relation to another category of reinsurance, known as financial reinsurance. This is reinsurance where there is insufficient underwriting or timing risk to constitute finite reinsurance or where there is no underwriting or timing risk but there is a financial risk transfer. While there is no definition of 'financial risk' in the Financial Requirements, those requirements suggest that very limited risk transfer will constitute financial reinsurance. For example, transfer of lapse risk appears to be sufficient. It is reasonable to conclude that recognition of finite and financial reinsurance by the CBI through the Finite Requirements and Financial Requirements means that finite and financial reinsurance are permitted activities for Irish-authorised reinsurers.

The second question is the extent of any credit given to an insurer against its regulatory capital for finite or financial reinsurance. The extent of this relief will depend on the extent of the risk actually transferred. In practice, this is a matter for agreement with the CBI.

5.2 Derivatives, ILWs and wagering agreements

5.2.1 What constitutes insurable interest?

General

Irish insurance law can impact in two principal ways on derivatives and industry loss warranties (ILWs). First, if performing a party's obligations under a contract constitutes carrying on insurance business, that party must be authorised as an insurer. Secondly, the extent of the other party's right to recover (or, in some cases, the validity of the contract) will depend on whether that party has an insurable interest in the subject matter of the contract. The subject matter of the contract is the thing that is insured, such as property, a liability or a life. Other rules of Irish insurance law may also impact. For example, unless excluded in the contract concerned, the parties will be subject to duties of utmost good faith. For the recipient of protection, this could mean that failure to disclose a material fact will allow the protection provider to refuse to pay.

Carrying on insurance business

Irish law does not set out a specific definition of carrying on insurance business. However, related definitions suggest that insurance business is the business of covering risks falling under the categories of activity identified as insurance in the Irish regulations implementing the EU insurance directives. These categories are wide ranging and cover traditional insurance business, such as life, accident, health, property damage, motor, storm, liability, credit, guarantee and miscellaneous financial loss. They also cover certain activities (such as managing group pension funds or capital redemption) that are not exclusively regarded as insurance but are categorised as insurance business when carried on by an authorised insurer. They further include investment business linked to life. Insurance in categories such as property damage, credit and miscellaneous financial loss cover similar risks to risks frequently covered by derivative and ILW instruments.

In addition to a requirement for authorisation, if a person issues insurance cover, as opposed to some other form of protection, this can have a number of significant implications under Irish law. These include a duty of disclosure, known as the duty of utmost good faith, and a requirement for an insurable interest in the subject matter of the contract in order to recover under the contract. The duty of utmost good faith is addressed in section 5.4 below. Insurable interest is addressed directly below.

Insurable interest

Distinction between life and non-life insurance

The requirement for a policyholder to have an insurable interest in the subject matter of a non-life insurance contract is imposed only by common law in Ireland. In the eighteenth century, Ireland was a separate jurisdiction within the UK. Elsewhere in the UK, the Life Assurance Act 1774 imposed a requirement that the policyholder have an insurable interest in the subject matter of both life and non-life insurance contracts. It also provided that, in the absence of such an interest, a policy is void. This Act was applied to Ireland by the Life Assurance Act 1866. However, under that Act, the requirement for an insurable interest was confined to life insurance contracts. Therefore, non-life insurance contracts are not void under Irish law, notwithstanding the absence of an insurable interest. Instead, the common law position applies so that the insurer is only obliged to make a payment to the extent of any insurable interest that does exist.

Definition

There is no established definition of insurable interest in Irish law. However, a good working definition is an interest in the subject matter of the contract which is such that, if the insured event occurs, the insured will incur a loss or diminution of a right recognised by law or will incur a legal liability. The need for the right to be recognised by law is important. A hope or expectation of receiving a benefit, as opposed to a legal right to receive that benefit, is not sufficient to create an insurable interest.

Life insurance – categories of insurable interest evolved from case law

In the absence of a statutory definition, certain categories of insurable interest have evolved from case law. Interestingly, there is still debate as to the exact nature and extent of insurable interest (see, for example, the discussion in chapter 2 of the Irish Law Reform Commission Consultation Paper LRC CP65 – 2011 published in December 2011). However, certain categories can be identified:

First, a person has an unlimited insurable interest in his or her own life. However, there is no automatic insurable interest in other family relationships. For example, a parent does not have an automatic insurable interest in a child. Therefore, to insure the life of a child, some other insurable interest is required.

Secondly, an interest can arise out of a potential financial loss, recognised by law, that was existing at the time the insurance was taken out. Therefore, for example, if a person is a creditor of another, that person would be entitled to insure the life of the debtor to the extent of the debt. Equally, an employer can insure the life of a key employee.

Thirdly, an insurable interest can be created by statute. For example, section 11 of the Married Women's Status Act 1882 allows a person to insure the life of his or her spouse. Another example (since repealed) arose under section 36 of the Assurance Companies Act 1909, which created a limited insurable interest for the funeral expense of close relatives of the policyholder.

Finally, decisions of the higher courts of the UK are persuasive (but not binding) precedent in Ireland. Some commentators have suggested that the English Courts have recognised a further category of insurable interest in the case of *Feasey v Sun Life Assurance of Canada* [2003] 2 All E.R. (Comm) 587. This decision has not been considered by an Irish Court. The decision recognises that certain pecuniary interests are sufficient to create an insurable interest. In that case, the insurer was a protection and indemnity club. It covered its members against liability for death or injury of people engaged on the members' vessels or oil rigs. Rather than reinsuring this liability, the insurer purchased a personal accident and illness policy that paid a fixed sum to the insurer on injury or illness of any of those people. The English Court of Appeal held that this policy covered the insurer against losses that it would suffer as an insurer of its members. Therefore, it did have an insurable interest in the lives of people engaged on the members' vessels and oil rigs.

Rather than a separate category of insurable interest, it may be more appropriate to regard this case as a development of the existing category of insurable interest applying where a person will incur a financial loss, recognised by law, on the happening of an event.

Application of requirement

The provisions in relation to insurable interest, whether at common law or under legislation, only apply to insurance contracts. Therefore, if a contract is not an insurance contract, no insurable interest is required to ensure the validity of that contract or the right of a party to recover under it. Similarly, although the conduct of insurance business in Ireland requires authorisation, either from the CBI or from an equivalent authority in another member state of the EEA, issuing contracts that do not constitute insurance does not attract this authorisation requirement. Note, however, that providing these contracts may require authorisation under other legislation, such as the Irish regulations implementing the EU Markets in Financial Instruments Directive (MiFID).

Distinction between insurance and other contracts

In distinguishing between insurance business and businesses such as provision of derivatives and ILWs, the test applied, in practice, is based on an opinion given in 1997 to the International Swaps and Derivatives Association in the UK by a Queen's Counsel, Robert Potts (the Potts Opinion). As a result of that opinion, the view commonly taken is that, where the provider of a derivative or ILW must pay irrespective of whether the recipient can incur a loss, the contract should not be characterised as one of insurance. Therefore, a contract is not regarded as insurance where, for example, a person holds reference assets and purchases a derivative contract that will pay on the happening of an event impairing the value of those assets, irrespective of whether the person will still have an interest in the assets. This test is applied even if the person continues to hold the assets and suffers loss. The key distinguishing factor is that the contract will pay irrespective of loss.

For ILWs, payment is typically based on the total loss to an industry from an event. For example, an agreement may provide that payment will be made to a person purchasing the ILW if losses to the industry from the event concerned exceed a particular threshold. While, in some cases, ILWs are written as reinsurance contracts (and require loss), typically there is no requirement that the purchaser incur a loss in order to recover under an ILW contract.

The analysis in the Potts Opinion has never been tested in an Irish court. Therefore, it remains to be seen precisely where the courts will draw a line between insurance, derivative and ILW contracts. However, if the Potts Opinion is followed, neither derivatives nor ILWs of the type described above would be insurance contracts.

Wagering agreements

Wagering agreements are void under the Irish Gaming and Lotteries Acts. Under legislation establishing an Irish futures and options exchange, the Gaming and Lotteries Acts were disapplied *'for the avoidance of doubt'* to futures and options contracts traded on any financial futures or options exchange in Ireland. This leaves open the question of whether the Gaming and Lotteries Acts invalidate other derivative contracts. However, the inclusion of the words 'for the avoidance of doubt' in the futures and options legislation suggests that this is not necessarily the case. The view taken is that a contract in respect of subject matter in which a party has an interest is not a wager. Therefore, an insurance contract would not be a wager. Similar logic would apply where a person obtains protection under a derivative or ILW contract where, in fact, that person has an interest in the subject matter of the contract, irrespective of whether a continuing interest is necessary in order to recover under the contract.

5.3 Sidecars and CAT bonds

5.3.1 To what extent are these governed by the law relating to insurance contracts?

Sidecars and CAT bonds generally involve a mixture of insurance and capital market products. Typically, an insurer will pass insurance risks to the capital markets either directly, through the issue of bonds, or indirectly, via a reinsurance vehicle. Where risk is passed indirectly, the reinsurance vehicle provides reinsurance to the insurer and the reinsurance vehicle issues bonds. In each case, the performance of these bonds will depend on the fortunes of the risks transferred, with the occurrence of an insured event impacting on the return to investors. These bonds would typically be tranched, with higher risk, higher yielding bonds taking the first loss. Depending on the extent of the loss, lower risk, lower yield bonds may still receive a return notwithstanding occurrence of the insured event.

Only the insurance and reinsurance elements of these arrangements are subject to insurance laws. There is a lack of case law on the capital markets elements of these arrangements. However, the generally accepted view is that purchasing a bond of this nature is not the conduct of insurance business unless the risk assumed under the bond is so directly related to the underlying risk as to amount to assuming that risk.

Another structure for passing risk to the capital markets is through transformer vehicles. Typically, in these cases, risk is assumed as reinsurance and hedged through capital market products such as derivatives. There is nothing in Irish law to prevent an insurer from hedging risks through the purchase of instruments such as derivatives. However, the credit given for these instruments against the regulatory capital to be held by the insurer is very limited. Therefore, it is not financially efficient for an Irish authorised insurer or reinsurer to use these instruments to hedge insurance or reinsurance risks.

The status of transformer vehicles has not been considered by the Irish courts. However, Irish law does provide for establishment of special purpose reinsurance vehicles (SPRVs) to facilitate passing risk to capital markets. These vehicles must be fully funded. They require authorisation, but are exempt from most of the requirements applying to authorised reinsurers. As a result, there is no need to hold regulatory capital. In principle, therefore, an SPRV could hedge risk by purchasing a derivative instrument in a capital efficient way. However, there is considerable doubt as to whether the requirement to be fully funded would be met through purchase of a derivative instrument. This would mean that an SPRV is not an efficient transformer vehicle. Also, if providing protection to an SPRV under the derivative instrument were a regulated activity in Ireland (eg under MiFID), that instrument could only be provided by a person holding the appropriate authorisation.

The status of the capital markets hedging instruments would be determined in the same way as derivatives discussed above.

5.4 Other ILS and ART products

While, again, there is a lack of case law on other ILS and ART products, fundamental questions are: (i) whether the product concerned is insurance, in substance; and (ii) whether the provider of the product is conducting insurance business. If the product is insurance, then insurance law will apply to the contractual arrangements. If the purchaser is conducting insurance business, then it will require authorisation to do so.

This is a significant issue. If the product is insurance, then, under the rules governing insurable interest, the provider will not be obliged to pay more than the amount that represents the insured's interest in the subject matter of the contract. In the case of a risk related to life, the contract may be void in the absence of an insurable interest. Other rules of insurance law, including, for example, the implied duty of utmost good faith, would also apply except to the extent that these can be, and are, excluded by contract. The requirement for utmost good faith is particularly significant for the recipient of protection. Failure to reveal information that would have influenced the provider as to whether to provide the product or the price at which it would have been provided could invalidate a claim for payment.

6. COMMISSIONS

6.1 What commissions and brokerages are permissible? What disclosure of commissions is required?

In contrast to the position in the UK, Irish law does not impose any restrictions on the ability of an insurer to pay an insurance intermediary a commission. However, there are disclosure obligations in respect of such payments, and particularly so for life insurance commissions. These obligations are contained in two separate pieces of legislation/regulation and apply to insurers and intermediaries dealing with Irish consumers.

Life insurers and intermediaries are subject to disclosure requirements under both the Life Assurance (Provision of Information) Regulations 2001 (the Disclosure Regulations) and the Consumer Protection Code 2012 (CPC). For non-life insurers and intermediaries, only the provisions of the CPC apply.

The Disclosure Regulations

The Disclosure Regulations place obligations on life insurers and intermediaries to provide information to a consumer prior to signing a proposal or an application form for a policy of life insurance. That information includes an illustrative table of intermediary remuneration which breaks down, per year of the policy, the premium payable and the projected total intermediary/sales remuneration payable. Any arrangement between an insurer and an intermediary (other than a tied insurance intermediary) whereby remuneration may be provided by the insurer which is contingent on the intermediary placing a minimum level of business with the insurer, must also be disclosed in a statement following the illustrative table.

The Disclosure Regulations were adopted specifically in response to incidents of ‘churning’ (ie persuading policyholders to surrender an existing policy and take out a substitute policy, for the purposes of generating additional fees or commission, or otherwise than in the best interests of the policyholder).

The CPC

The CPC provides that, where remuneration is to be received by an intermediary from an insurer on an ongoing basis in respect of a product or service, the intermediary must disclose to the consumer (on a durable medium), prior to the provision of that product or service, the nature of the service to be provided to the consumer in respect of this remuneration.

Where an intermediary allows the consumer the option to pay for its services by means of a fee, the CPC requires that the fee and the amount of the fee must be explained in advance to the consumer. Where the intermediary charges a fee and also receives commission, it must explain to the consumer whether or not the commission will be offset against the fee, either in part or in full.

These requirements apply in respect of both life and non-life insurance business.

The CPC also contains disclosure requirements for intermediaries specific to the sale of non-life insurance products. The intermediary must disclose, prior to the sale:

- that it is paid for the service provided to the consumer by the insurer;
- the amount paid, or that details of the amount paid are available on request; and
- any remuneration arrangements that are based on levels of business introduced by the intermediary to the insurer or that may have the potential to create a conflict of interest.

The practice of churning is also addressed by the General Principles of the CPC, which include a number of standards to be complied with by life and non-life insurers in their dealings with customers. These include a requirement to act *'honestly, fairly and professionally in the best interests of customers'* and not to *'exert undue pressure or undue influence on a customer'*.

IMD2

IMD2 (the proposed revised Insurance Mediation Directive, expected to be in force from 2015), has addressed disclosure requirements in respect of intermediary remuneration in different ways, throughout various drafts. It remains to be seen what additional disclosure requirements (if any) will be imposed when IMD2 is enacted.

7. HOW ARE AGENTS (BROKERS AND UNDERWRITING AGENTS AND THIRD PARTY CLAIMS ADMINISTRATORS) REGULATED?

The European Communities (Insurance Mediation) Regulations 2005 (the IMD Regulations) implement Directive 2002/92/EC on insurance mediation in Ireland.

The IMD Regulations provide that a person shall not, in Ireland or in any other EEA member state, undertake or purport to undertake insurance mediation or reinsurance mediation, unless the person:

- is registered as an insurance intermediary or reinsurance intermediary; or
- is exempt from registration under the IMD Regulations.

The IMD Regulations provide that contravention of these provisions is an offence.

An 'insurance intermediary' is a person who, for remuneration, undertakes or purports to undertake insurance mediation. *'Insurance mediation'* is very widely defined as *'any activity involved in proposing or undertaking preparatory work for entering into insurance contracts, or of assisting in the administration and performance of insurance contracts that have been entered into (including dealing with claims under insurance contracts), but does not include such an activity that:*

- *is undertaken by an insurer or an employee of such an undertaking in the employee's capacity as such, or*

- *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, or*
- *involves the management of claims of an insurance undertaking on a professional basis, or*
- *involves loss adjusting or expert appraisal of claims for reinsurance undertakings.'*

The IMD Regulations, therefore, are very broad, and capture most of the activities of insurance agents, other than some very limited back office claims management functions. As described above, the IMD Regulations provide for very limited exemptions from the requirement to register. One such exemption applies to *'the management of claims of an insurance undertaking on a professional basis'*. As there is a reference to *'dealing with claims'* (being within the scope of insurance mediation) and *'management of claims'* (which is not), the commonly held view in Ireland is that the intention is for the carve-out to apply to entities whose sole activity in the context of insurance policies is claims management (without any assistance to the claimant with respect to the claim, eg assisting with the notification of a claim or in negotiating settlement, taking the customer through the claims process or liaising directly with a customer). There are also exceptions for loss adjusting and expert appraisal of claims.

As currently drafted, IMD2 maintains the distinction between *'dealing with claims'* and *'claims management/administration'*. However, the position on this has changed a number of times and it remains to be seen whether the current exemptions will be retained in the final directive, once published.

Irish legislation dealing with the regulation of intermediaries existed prior to the implementation of the IMD Regulations. This legislation was the Investment Intermediaries Act 1995 (the IIA), which was extended in 2000 to apply to insurance intermediaries. Despite an intention to disapply the existing intermediary legislation, the IIA was not disapplied or even purported to be disapplied, either by the IMD Regulations or by any other statute. Therefore, technically, there are two pieces of legislation in Ireland applying to insurance intermediaries.

At a practical level, the CBI has operated for the last number of years as if the IIA has been formally disapplied. No new insurance intermediary registrations/authorisations under the IIA have therefore been granted since the IMD Regulations came into force (in early 2005). However, from a strict legal perspective, given that the IIA is still in force, it would be prudent for all insurance intermediaries operating in Ireland to continue to comply with the applicable requirements of the IIA in addition to those set out in the IMD Regulations.

8. IS TAKAFUL POSSIBLE?

The principles underlying takaful are similar, in a number of respects, to the principles underlying mutual insurance. Mutual insurance is a system of insurance under which capital is provided by policyholders who are both entitled to the profits of the insurer and responsible for any deficit in its funds.

Key requirements of takaful include the need to avoid interest, gambling and, with certain limitations, uncertainty. Within these confines, the concept of creating a pool of funds to support those in need is broadly acceptable under Sharia law.

Irish law is capable of accommodating a broad range of mutual insurance models. As a result, it would be possible to establish a takaful operation under Irish law. However, takaful presents some challenges in the modern regulatory environment. For example, a common low-risk investment for insurers would be corporate or government bonds. However, the element of receiving interest on the lending inherent in investing in a corporate bond is likely to make these investments undesirable for a takaful operation. Also, the need to ensure future sources of capital cannot be met by certain conventional sources in a takaful operation. For example, raising money through issuing interest-bearing bonds to the capital markets may create difficulties. However, structures such as a partnership between a well-capitalised operation capable of making interest-free loans to the takaful operation (on the understanding that these loans will be repaid out of future profits) provide alternatives.

To date, no takaful operation has been established in Ireland. However, both Irish law and the Irish regulatory regime are capable of accommodating such operations, notwithstanding the challenges, some of which are outlined above.

9. WHAT SCOPE IS THERE FOR MICROINSURANCE?

There is limited scope in the Irish market for microinsurance. In the past, microinsurances, such as industrial assurance, were popular. Industrial assurance is life assurance cover for relatively small amounts, with premiums normally being paid in small instalments, often weekly, to collectors who would call to policyholders' homes. Vestiges of microinsurance remain in areas such as accident & health insurance and funeral insurance. However, with increasing compliance obligations and restrictions on agents' activities under consumer protection laws, the economics of microinsurance are more challenging than in the past.

10. EXIT SOLUTIONS – WHAT SOLUTIONS ARE AVAILABLE AND HOW DO THEY OPERATE? HOW ARE FOREIGN SOLUTIONS RECOGNISED?

10.1 Portfolio transfer

Is it available?

Yes. A specific portfolio transfer process is prescribed under Irish law for life and non-life insurers. No such process is prescribed for reinsurers. However, there are a number of means through which a transfer of a portfolio of reinsurance policies under the Reinsurance Directive may be achieved, and certain requirements must be met in connection with the transfer of a reinsurance portfolio.

How does it operate?

Life and non-life insurers

An Irish insurer may transfer a portfolio of policies to another Irish or EEA authorised insurer.

The process requires the sanction of the Irish High Court (the Court). The Court process typically consists of two Court hearings:

- a hearing for directions, at which the Court is asked to approve proposals regarding preliminary matters such as advertising and informing policyholders of the proposal to transfer; and
- a substantive hearing, at which the Court is asked to sanction the proposed transfer.

In conjunction with the Court process, the CBI consults with the insurance supervisors in the other EEA member states where risks are situated. The Supervisory Authorities have a period of three months within which they may issue a response indicating agreement or otherwise. If no response is issued by a Supervisory Authority during that period, its consent is deemed to have been given.

The process also requires that the transfer may only proceed if the transferee's Supervisory Authority provides a certificate confirming that, following the transfer, the transferee will hold the necessary solvency margin under the EU insurance directives having taken the proposed transfer into account.

There is no specific portfolio transfer mechanism to transfer portfolios of insurance policies to insurers established outside of the EEA. However, recently, the Court has sanctioned (under a different process under the Irish Companies Acts, which also requires sanction of the Court and the approval of a special majority of creditors, including policyholders, voting at a meeting) a scheme of arrangement to transfer business from an Irish insurer to a non-EEA insurer. No such policyholder approval is required for a portfolio transfer. The scheme of arrangement process is described further in connection with solvent schemes in section 10.6 below.

Reinsurers

Although Ireland was obliged (under the Reinsurance Directive) to permit portfolio transfers within the EEA, it did not extend the existing insurance portfolio transfer process to reinsurers. Instead, Irish law provides that reinsurance portfolios are transferrable without restriction. While Irish law does not restrict transfers of portfolios of reinsurance contracts, it does not provide a specific mechanism to effect such transfers. Any of the following mechanisms can be used to do this:

- a novation;
- a scheme of arrangement; or
- a merger.

A merger may be between two Irish companies, or between an Irish company and a body corporate in another EEA member state. Approval of the Court is required for a merger.

How are foreign solutions recognised?

Life and non-life insurance

Transfers validly carried out under other EEA member states' laws are recognised in Ireland. This position is based on the EU insurance directives, which provide that:

- each member state shall authorise insurers with head offices in its territory to transfer all or part of their portfolios of contracts and shall set the conditions for same; and
- transfers so authorised shall be automatically valid against policyholders or any other person having rights or obligations arising out of the contracts transferred.

For transfers carried out outside the EEA, Irish law will generally recognise a transfer which is valid and binding under the law governing the relevant insurance policy. Exceptions might include, for example, orders made that contravene Irish public policy.

Court Orders in jurisdictions subject to Council Regulation (EC) No. 44/2001 (Brussels I) and the convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 (Lugano) would also be recognised in Ireland.

Reinsurance

Transfers validly carried out under other EEA member states' laws are recognised in Ireland, on the basis that the Reinsurance Directive contains similar provisions in respect of reinsurers as those described above for life and non-life insurers.

For transfers carried out outside the EEA, the position is as described above.

Court Orders in jurisdictions subject to Brussels I and Lugano would also be recognised in Ireland.

10.2 Statutory portfolio transfer

Section 10.1 above describes the position in Ireland relevant to portfolio transfers.

10.3 Novation

Is it available?

Novation is available under Irish law.

How does it operate?

Novation is achieved by the parties to the original agreement entering into a new agreement with one or more new party(ies). Under this new contract, an existing party(ies) is/are released from obligations under the original contract in return for the new party(ies) assuming those obligations. All parties must consent to the novation (but see below regarding novation by conduct). Novation places the new party(ies) in the shoes of the party(ies) released, extinguishing the existing contract and replacing it with a new one.

Novation is normally effected in writing. In principle, a novation does not need to be in writing. Where consent to the novation is inferred from the parties' behaviour (usually by a court), this is known as 'novation by conduct'.

How are foreign solutions recognised?
For contractual novations, Irish law will generally recognise a novation which is valid and effective under the law governing the novation.

If novation is declared/ordered by a court in another jurisdiction subject to Brussels I, eg as a novation by conduct or a ruling on the validity of a deed of novation, that court order will be recognised in Ireland in accordance with Brussels I. This means that a judgment given by an EU court will be recognised in Ireland *'without any special procedure being required'*, and may not be reviewed as to its substance. In Ireland, in order to enforce a judgment under Brussels I, a short form procedure is currently followed whereby a copy of the judgment is produced to the Master of the High Court, who issues an order for enforcement. From 10 January 2015, as a result of the recast Brussels I published in December 2012 (Council Regulation (EC) No. 1215/2012), no such enforcement procedure will be required. If novation is declared/ordered by a court in a non-EU jurisdiction which is subject to Lugano, that court order would be recognised in Ireland. The Irish process for recognition under Lugano is materially the same as is currently the case under Brussels I.

In any proceedings taken in Ireland for the enforcement of a foreign judgment which is not subject to Brussels I or Lugano, the foreign judgment may be recognised and enforced by the Irish courts. However, it may be necessary to obtain an order of the Irish courts on a case-by-case basis.

10.4 Commutation

Is it available?
Commutation is available under Irish law.

How does it operate?
Commutation occurs when an insured or reinsured agrees to release the insurer's/reinsurer's liabilities and obligations under an insurance contract. This is usually done in return for a payment by the insurer/reinsurer. The insurer's/reinsurer's obligations for future payments are terminated, as is the insurance/reinsurance contract.

How are foreign solutions recognised?
The position relating to recognition of commutations is as described in section 10.1 above regarding portfolio transfers conducted outside the EEA.

Court orders in jurisdictions subject to Brussels I and Lugano would also be recognised in Ireland.

10.5 Policy buy-back

Is it available?

While it is possible for policy buy-back to occur under Irish law, this is not common practice in the Irish market.

How does it operate?

While policy buy-back achieves a similar practical effect as commutation, it is a distinct concept.

In jurisdictions where the facility is commonly used, it is normally used where a potentially non-covered loss has taken place. A settlement of the coverage dispute is negotiated whereby the insurance company offers the insured a payment in exchange for an agreement to annul the policy/cover concerned. In principle, buy-back can be total (ie relating to all coverage under the policy) or partial (ie in respect of certain aspect(s) of the cover provided under the policy).

How are foreign solutions recognised?

The position relating to recognition of policy buy-backs would be as described in section 10.1 above regarding portfolio transfers conducted outside the EEA.

10.6 Solvent scheme

Is it available?

Solvent schemes of arrangement are available under Irish law. To date, the Court has sanctioned only a very few such schemes.

How does it operate?

Under Irish company law, a company may achieve a compromise with its members/creditors (or any class thereof). To achieve this, the company needs a majority in number, also representing 75 per cent in value, of the creditors/members (or class thereof) present and voting at a meeting convened for that purpose, to vote in favour of the compromise. In the case of an insurer/reinsurer, policyholders/cedents are creditors (albeit the extent of indebtedness to those creditors, if any, may not be known at the time of the scheme). In Ireland, the scheme or arrangement process is available to both solvent and insolvent companies.

A scheme of this nature must be sanctioned by the Court. If so sanctioned, it is binding on all creditors (including policyholders). The Court application may be made by the company, or any creditor/member/ liquidator of the company. The Court process typically involves three Court hearings, as follows:

(i) a hearing for directions to cater for certain preliminary matters (eg summoning meeting(s) of creditors/members and advertising);
(ii) following the creditor/member meeting(s), an additional hearing to fix a date for a final hearing; and

(iii) a final hearing at which all creditors/members may attend and make representations, and at which the Court will either approve or reject the scheme.

How are foreign solutions recognised?

Court-approved schemes of this nature in jurisdictions subject to Brussels I and Lugano would also be recognised in Ireland.

It is doubtful as to whether foreign schemes of this nature that cannot benefit from the Brussels I, Lugano or similar recognition regimes and that do not have their basis in European law (as portfolio transfers do) would be automatically recognised by Irish courts.

10.7 Assignment

Is it available?

Assignment is available in Ireland if not prohibited by the contract concerned.

How does it operate?

The benefit of a contract in general is freely assignable unless this is prohibited by the terms of the contract. However, as a general rule, the burden (obligations) of a contract cannot be passed by way of assignment without the consent of the person to whom the obligations are owed. This consent may be given in the contract itself. There is a limited exception to the general principle that a burden cannot be assigned. This is known as the conditional benefit principle. It can occur when a right assigned is conditional or qualified to the extent that the burden is considered to be an intrinsic part of the right assigned.

In the absence of consent to assignment of the burden of a contract or application of the conditional benefit principle, assignment will only result in transfer of the benefit of a contract. The assignee becomes entitled to the benefit of the contract and can enforce its rights against the other party to the original contract, whilst the assignor remains liable for the burden. Where the contract also prohibits assignment of the benefit, a purported assignment will be ineffective.

An assignment need not be in writing. If it is not, it may constitute an equitable assignment. An equitable assignment is one which does not meet the Irish law requirements for legal assignment (such as the need for it to be absolute, in writing and on notice to the original counterparty). Assignment can also occur by operation of law, eg upon death or bankruptcy.

Assignment in an insurance context usually takes place where the insured assigns its rights to the proceeds of an insurance policy. In order to constitute a valid assignment in such cases, when so stated in a contract of insurance, the consent of the insurer must be obtained. An insured must have an insurable interest in the subject matter of the insurance. Therefore, assignment of the subject matter should occur contemporaneously with the assignment of the insurance contract.

In the absence of policyholder consent to assignment of the burden of insurance contracts, assignment is not an effective exit solution for insurers. In these circumstances, 'assignment' of an insurer's book of insurance policies may only take place using the portfolio transfer process described in section 10.1 above.

How are foreign solutions recognised?

The position relating to recognition of assignments would be as described in section 10.1 above regarding portfolio transfers conducted outside the EEA.

Court Orders in jurisdictions subject to Brussels I and Lugano would also be recognised in Ireland.