

---

# THE INSURANCE AND REINSURANCE LAW REVIEW

---

THIRD EDITION

EDITOR  
PETER ROGAN

LAW BUSINESS RESEARCH

# THE INSURANCE AND REINSURANCE LAW REVIEW

---

The Insurance and Reinsurance Law Review  
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Insurance and Reinsurance Law Review - Edition 3  
(published in April 2015 – editor Peter Rogan).

For further information please email  
[Nick.Barette@lbresearch.com](mailto:Nick.Barette@lbresearch.com)

# THE INSURANCE AND REINSURANCE LAW REVIEW

---

Third Edition

Editor  
PETER ROGAN

LAW BUSINESS RESEARCH LTD

PUBLISHER  
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER  
Nick Barette

SENIOR ACCOUNT MANAGERS  
Katherine Jablonowska, Thomas Lee

ACCOUNT MANAGER  
Felicity Bown, Joel Woods

PUBLISHING COORDINATOR  
Lucy Brewer

MARKETING ASSISTANT  
Dominique Destrée

EDITORIAL COORDINATOR  
Shani Bans

HEAD OF PRODUCTION  
Adam Myers

PRODUCTION EDITOR  
Claire Ancell

SUBEDITOR  
Charlotte Stretch

MANAGING DIRECTOR  
Richard Davey

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2015 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of April 2015, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-909830-44-8

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND  
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND  
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

# ACKNOWLEDGEMENTS

---

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BIRD & BIRD ADVOKATPARTNERSELSKAB

BUN & ASSOCIATES

CHALFIN, GOLDBERG, VAINBOIM & FICHTNER  
ADVOGADOS ASSOCIADOS

CLAYTON UTZ

CLYDE & CO LLP

CONYERS DILL & PEARMAN LIMITED

CROWELL & MORING LLP

ELVINGER, HOSS & PRUSSEN

FENXUN PARTNERS

GBF ATTORNEYS-AT-LAW

GROSS ORAD SCHLIMOFF & CO

GÜN + PARTNERS

INCE & CO

JORQUIERA & ROZAS ABOGADOS

KIM & CHANG

LC RODRIGO ABOGADOS

LEE AND LI, ATTORNEYS-AT-LAW

MAPLES AND CALDER

NADER, HAYAUX & GOEBEL

NISHIMURA & ASAHI

ROSE-MARIE LUNDSTRÖM ADVOKAT AB

SEDGWICK LLP

STEPTOE & JOHNSON LLP

STIKEMAN ELLIOTT LLP

STUDIO LEGALE GIORGETTI

TULI & CO

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

WOLF THEISS RECHTSANWÄLTE GMBH & CO KG



# CONTENTS

---

<b>Editor's Preface</b>	.....vii
	<i>Peter Rogan</i>
<b>Chapter 1</b>	LATIN AMERICA OVERVIEW ..... 1
	<i>Duncan Strachan</i>
<b>Chapter 2</b>	AUSTRALIA ..... 9
	<i>David Gerber and Craig Hine</i>
<b>Chapter 3</b>	AUSTRIA..... 21
	<i>Ralph Hofmann-Credner</i>
<b>Chapter 4</b>	BELGIUM ..... 35
	<i>Philip Woolfson</i>
<b>Chapter 5</b>	BERMUDA..... 52
	<i>Christian Luthi and Michael Frith</i>
<b>Chapter 6</b>	BRAZIL..... 72
	<i>Ilan Goldberg, Priscila Mathias de Morais Fichtner and Pedro Bacellar</i>
<b>Chapter 7</b>	CAMBODIA..... 86
	<i>Antoine Fontaine</i>
<b>Chapter 8</b>	CANADA..... 101
	<i>Stuart S Carruthers, Peter J Cullen, Ellen M Snow and Matthew Angelus</i>
<b>Chapter 9</b>	CAYMAN ISLANDS ..... 115
	<i>Tim Frawley and John Dykstra</i>

<b>Chapter 10</b>	CHILE .....	127
	<i>Ricardo Rozas</i>	
<b>Chapter 11</b>	CHINA .....	139
	<i>Jianzhao Wang</i>	
<b>Chapter 12</b>	COLOMBIA .....	152
	<i>Neil Beresford and Raquel Rubio</i>	
<b>Chapter 13</b>	DENMARK .....	176
	<i>Philip Graff</i>	
<b>Chapter 14</b>	ENGLAND AND WALES .....	188
	<i>Simon Cooper and Mona Patel</i>	
<b>Chapter 15</b>	EUROPEAN UNION .....	207
	<i>Philip Woolfson and Daniella Terruso</i>	
<b>Chapter 16</b>	GERMANY .....	223
	<i>Markus Eichhorst</i>	
<b>Chapter 17</b>	GREECE .....	242
	<i>Dimitris Kapsis and Dimitris Giomelakis</i>	
<b>Chapter 18</b>	INDIA .....	253
	<i>Neeraj Tuli and Celia Jenkins</i>	
<b>Chapter 19</b>	ISRAEL .....	266
	<i>Harry Orad and Rena Egulsky</i>	
<b>Chapter 20</b>	ITALY .....	276
	<i>Alessandro P Giorgetti</i>	
<b>Chapter 21</b>	JAPAN .....	297
	<i>Shinichi Takahashi and Takahiro Sato</i>	

<b>Chapter 22</b>	KOREA.....	312
	<i>Jay Ahn, Jae Ho Baek, Joon Young Kim and Brandon Bae</i>	
<b>Chapter 23</b>	LUXEMBOURG .....	324
	<i>Michel Marques Pereira and André Hoffmann</i>	
<b>Chapter 24</b>	MEXICO .....	339
	<i>Yves Hayaux-du-Tilly</i>	
<b>Chapter 25</b>	PORTUGAL.....	353
	<i>Pedro Ferreira Malaquias and Helder Frias</i>	
<b>Chapter 26</b>	SPAIN .....	368
	<i>Jorge Angell</i>	
<b>Chapter 27</b>	SWEDEN .....	383
	<i>Rose-Marie Lundström</i>	
<b>Chapter 28</b>	SWITZERLAND.....	395
	<i>Lars Gerspacher and Roger Thalmann</i>	
<b>Chapter 29</b>	TAIWAN.....	409
	<i>C T Chang, Trisha Chang and Jessica Wang</i>	
<b>Chapter 30</b>	TURKEY.....	424
	<i>Pelin Baysal and Bensu Aydın</i>	
<b>Chapter 31</b>	UNITED STATES.....	437
	<i>Michael T Carolan, Paul W Kalish, William C O'Neill and Rachel P Raphael</i>	
<b>Appendix 1</b>	ABOUT THE AUTHORS .....	455
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS....	477

# EDITOR'S PREFACE

---

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant; it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with the emerging markets of Brazil, Russia, India and China developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Looking back on 2014, Aon Benfield's Annual Global Climate and Catastrophe Report (of 13 January 2015) reveals that 258 global natural disasters occurred worldwide. The two costliest insured loss events of 2014 were both as a result of severe thunderstorms, in the USA in May and Europe in June, although the September floods in northern India and Pakistan resulted in the largest economic loss of the year. The combined total insured loss for 2014 was US\$39 billion, 38 per cent below the 10-year average of US\$63 billion and the lowest annual insured loss total since 2009. However, we should not of course forget the cost in human terms: the deadliest event of 2014 was a stretch of flooding and landslides that killed an estimated 2,600 people in Afghanistan. Events such as these test not only insurers and reinsurers but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. I hope that you find this third edition of *The Insurance and Reinsurance Law Review* of use in seeking to understand them and I would like once again to thank all the contributors.

Peter Rogan  
Ince & Co  
London  
April 2015

## Chapter 20

---

# ITALY

*Alessandro P Giorgetti*<sup>1</sup>

### I INTRODUCTION

Italy has the world's eighth-largest economy, made up of small and medium-sized companies producing high technology and quality products. This economy has suffered badly as a result of the international crisis of the past three years. According to the European Commission's winter forecast, published on 5 February 2015, all Member States are growing at a moderate speed in 2015 (1.7 per cent for the EU and 1.3 per cent for the euro area), with further acceleration predicted in 2016 (2.1 per cent and 1.9 per cent). Notwithstanding such a positive forecast, the first estimates released by the Italian National Statistical Institute<sup>2</sup> for the fourth quarter of 2014 stress a stay of the Italian GDP compared to the previous quarter (down by 0.3 per cent compared to the fourth quarter of 2013).

Despite this situation, according to the report 'Italian insurers resilient amid challenging operating conditions'<sup>3</sup> the profit and the adequacy of Italian insurers will be able to cope with the difficult domestic operating conditions.

In fact, in December 2014, new life business (personal lines) underwritten by Italian and EU insurers was up to 6.4 billion, an increase of 31.3 per cent compared to December 2013. Moreover, the results of a sample survey conducted by the Italian National Association of Insurance Companies (ANIA)<sup>4</sup> on motor insurances in

---

1 Alessandro P Giorgetti is the managing partner at Studio Legale Giorgetti.

2 The Italian National Statistical Institute's activities include the census of population, economic censuses and a number of social, economic and environmental surveys and analyses. It is an active member of the European Statistical System, coordinated by Eurostat.

3 Published on 2 February 2015 by Fitch Ratings,

4 ANIA was founded in 1944 and currently has a constituency of 173 enterprises, which represent approximately 90 per cent of the insurance market in terms of premiums.

December 2014 show that the average price of coverage before taxes declined by 6.3 per cent (from €463 to €434) between December 2013 and December 2014, with an average premium in 2014 (before taxes) of €411. This is a decline of 6 per cent compared to the 2013 average.

This situation shows that, despite the economic difficulties, Italy is still a fertile ground for insurance underwriters and provides interesting opportunities for prudent insurers and reinsurers.

## II REGULATION

### i The insurance regulator

Decree-Law No. 95 of 6 July 2012<sup>5</sup> dissolved the Italian Private Insurance Regulatory Authority (ISVAP) and replaced it with the Institute of Insurance Supervision (IVASS), now a department of the Bank of Italy.

On 1 January 2013, IVASS took over all functions previously carried out by ISVAP, including the supervision of intermediaries and the distribution of insurance products for better coordination between the control and regulation of the financial promoters. The register of insurance experts and the Italian Information Centre<sup>6</sup> have been taken away from the insurance regulator's competence and passed on to the Concessionaire for Public Insurance Services (CONSAP).<sup>7</sup>

In accordance with the law, the Bank of Italy's General Manager *pro tempore*, is also the President of IVASS.

Other governing organs of the new supervisory body are the Council and the integrated Directorate made up of directors of the Bank of Italy and IVASS advisers. The President promotes and coordinates the activities of the Council, which is responsible for the overall administration of the institute. The Directorate is competent to direct public body activities and adopt strategic decisions. IVASS should establish more focused supervisory controls upon life and non-life insurance companies to bring down insurance costs and, consequently, premiums.

5 Decree-Law No. 95 (the Spending Review Decree) has been subsequently amended and converted into Law No. 135 of 7 August 2012. The government, which originally also considered dissolving the Commission for the Supervision of Pension Funds (COVIP), the regulator for pension funds, at the very last minute introduced an amendment to the Spending Review Decree and chose to keep COVIP as its dissolution would not have reduced government expenditure.

6 The Centre is responsible for providing information to parties entitled to compensation following an accident that has occurred in an EU Member State (other than the country of residence) and was caused by circulation of motor vehicles registered and insured in one of the Member States of the European Economic Area. To obtain the necessary information for users, the Italian Information Centre – in accordance with ISVAP Regulation No. 3 of 26 May 2006 – utilises data collected in the insurance coverage database maintained by the Integrated Service for Control of Automobiles run by ANIA.

7 [www.consap.it](http://www.consap.it).

Having implemented a new regulation concerning its organisational structure, IVASS became quite active. In 2013, IVASS issued the very first set of rules for the management of insurance services offered online. These norms implemented the provisions introduced by Article 22, Paragraph 8, of Development Decree No. 179 of 18 October 2012. This regulation lays down rules and minimal requirements to promote more effective management of insurance e-commerce or services offered electronically through insurance portals or the website of insurance and reinsurance companies. The regulation became effective on 1 September 2013 and insurance and reinsurance companies had had 60 days from that date to comply with the new provisions.

Then, in October 2013 IVASS released Regulations No. 1 and 2 concerning, respectively, the imposition of administrative fines and the application of disciplinary sanctions in respect of insurance and reinsurance intermediaries and the rules of functioning for the Guarantee Committee supervising the sanction proceedings. The regulatory activity of IVASS continued on 2 November with Regulation No. 3, which introduced the obligation for intermediaries to adopt a certified electronic mail address to be communicated to the authority within three months after the entry into force of regulation, along with the invitation (thus a measure 'not legally binding') to use an advanced electronic signature in all contracts. Furthermore, this regulation introduced an obligation for the intermediaries to facilitate electronic payment, and specified that the intermediary should make the electronic documentation and information package available to customers who have chosen to receive them. In respect of the insurers, this regulation established the prohibition of requiring documentation that is already in possession, having been obtained on the conclusion of a previous contract. This ban does not apply if the documentation in question is no longer valid. IVASS's hectic activity in 2013 was concluded on 17 December 2013 by Regulation No. 4 of the Council regulation receivership of insurance companies.

In 2014, with Regulation No. 5 of 21 July, IVASS intervened to regulate the obligations of adequate due diligence and anti-money laundering registrations on the part of insurance companies and insurance intermediaries. Finally, on 2 December IVASS published Regulations No. 6 and 7, on occupational requirements of insurance and reinsurance intermediaries respectively, with the goal of promoting the insurance intermediaries' professional requirements, particularly keeping into account the increasing spread of insurance relations to be handled electronically and concerning its internal identification of the organisational units responsible for administrative proceedings.

Lack of space prevents us from further discussing all of the other important measures taken by IVASS, but in conclusion it is possible to say that the Supervisory Authority's first regulatory interventions are reshaping a market stuck in its old ways and unable to provide real growth opportunities for the insurance industry. The interventions are preserving the transparency and clarity of information and negotiating simplicity for the insured, at the same time securing effective sanctions in the case of insurance companies' non-compliance with the new market rules.

IVASS's address is 21 Via del Quirinale, Rome, and it seems that, despite its total integration into the Bank of Italy structure, it has maintained some sort of logistical and decision-making autonomy.

**ii Position of non-admitted insurers**

In Italy, only admitted insurers are entitled to provide insurance. More precisely, under the Italian legislation the admitted insurers should meet the existing requirements for authorisation and have the minimal share capital or guarantee fund, fully paid-up in cash.

**iii Requirements for authorisation**

In general, only public companies, cooperatives and mutual insurance companies or equivalent foreign companies can apply to IVASS for an authorisation. Lloyd's syndicates are the sole exception and they have been specially authorised because of their particular historical status and in accordance with the fundamental freedoms of the Treaty on the Functioning of the European Union.

New insurance and reinsurance companies that wish to undertake or start a new business in Italy can do so only after being authorised or licensed by IVASS through an order (if the undertaking has its head office in Italy) or by an acknowledgement of the formal communication made by the company accompanied with confirmation of the supervisory authority of the state where the company has its registered office.

The order or the acknowledgement of the formal communication must be published in the Italian Official Journal and the newly authorised or licensed insurance company may start underwriting insurance or reinsurance only after such publication.

An insurance company that applies for authorisation must submit a number of documents to IVASS. The most important are:

- a* a certified copy of the memorandum and articles of association showing the insurance classes that the insurer will underwrite and stating whether it also intends to offer reinsurance. In Italy it is forbidden to set up a company whose sole object is the exclusive pursuit of insurance business abroad;
- b* evidence that the memorandum and articles of association have been deposited with the Registrar of Companies and that the incorporation has taken place in accordance with the Civil Code provisions or the applicable local laws;
- c* a scheme of operations and a technical report drawn up pursuant to the ISVAP regulations, including the names of the persons charged with administration, management and internal control and corporate governance functions as well as the names of the natural or legal persons who directly or indirectly have controlling interests or qualifying holdings in the company with indication of the amount of each holding;
- d* proof that the company has a share capital or guarantee fund, fully paid-up in cash, sufficient to meet the liabilities of the intended business plan and proof that the company possesses the minimum organisation fund required by ISVAP Order No. 97/1995 or 98/1995, or both, fully paid-up in cash; and
- e* for foreign companies, proof of the appointment of a general representative, who must be domiciled at the address of the branch. If a company is appointed as general representative then the registered office must be within the territory of Italy.



If the application is incomplete or IVASS's requests for further information are not met, authorisation is usually denied. It is also refused if no proof is given that the share capital or guarantee fund has been fully paid up or that the organisation fund is actually and immediately available to the company.<sup>8</sup>

Equally, the authorisation or licence is denied if any of persons charged with the administration, management and internal control functions do not meet the prescribed requirements<sup>9</sup> or if the scheme of operations does not satisfy the financial needs and the technical rules for the correct management of an insurance business.<sup>10</sup>

A major role in the authorisation process is played by the laws, regulations and administrative provisions of any state to which the company or one or more of its shareholders is subject, and any difficulties in meeting such requirements may delay the application or even entail a final refusal.

An IVASS order refusing the authorisation is notified to the company by means of a registered letter with advice of receipt within six months from the date of the complete application with all documents required by law or with the additional documents and information requested by the authority. If six months elapse with no response received by the applicant company, then the authorisation shall be considered refused.

#### **iv Other notable regulated aspects of the industry**

In Italy, in accordance with the Private Insurance Code, an insurance company's minimum share capital or guarantee fund, fully paid-up in cash, must be not less than:

- a* for companies intending to pursue life assurance: €5 million;
- b* for companies intending to pursue non-life insurance:
  - €5 million for insurance classes 10, 11, 12, 13, 14 and 15;
  - €2.5 million for insurance classes 1, 2, 3, 4, 5, 6, 7, 8, 16 and 18; and
  - €1.5 million for insurance classes 9 and 17;

---

8 The implementation date of the EU Solvency II Directive has been delayed, pushing its introduction back probably to 2015, or even beyond, and, at the same time, there has been some expectation that Tier I capital would be set at 50 per cent of the solvency capital requirement, making it easier and less onerous for insurers to comply with the Directive.

9 The directors, officers, statutory auditors and general directors must all meet the prescribed requirements of probity, independence and trustworthiness according to the relevant Civil Code provisions, Article 4 of Ministerial Decree No. 186/1997 and Ministerial Decree No. 162/2000, to ensure sound and prudent management of the insurance or reinsurance company. Article 36 of Decree-Law No. 201 of 6 December 2011 addressed the issue of 'interlocking directorates', introducing the prohibition for an individual to be member of two or more boards of insurance companies, financial institutions or banks.

10 Italian law provides for statutory and free reserves not corresponding to particular underwriting liabilities or to adjustments of asset items. Currently the reserves are considered and regulated by the Private Insurance Code. Foreign insurance companies operating in Italy under the freedom of establishment system shall comply with the provisions on technical reserves that apply to companies with a registered office in Italy. The adequacy level of the reserves is a source of major concern for the Italian regulator.

- c* for companies intending to pursue life assurance, personal accident and sickness insurance simultaneously:
  - €5 million for life assurance; and
  - €2.5 million for the pursuit of personal accident and sickness insurance; and
- d* for cooperative companies the minimum share capital is reduced to half the listed amounts.

EU Directives 2002/12/EC and 2002/13/EC on solvency margin requirements for life and non-life insurance undertakings were implemented in Italy in 2003; ISVAP Regulations Nos. 2322/2004 and 2415/2006 were subsequently issued on the same subject for domestic insurers and branch offices of non-EU insurers. The aim of these Regulations is to improve policyholder protection and strengthen the measures for preventing insolvency.

Mergers and transfers of insurance portfolios that involve insurance companies operating in Italy are subject to IVASS's prior agreement, but if the merger may result in the company having a position of market dominance, the Italian Antitrust Authority might also have to give its preliminary authorisation. The sole financial requirement is that the incorporating company or the new company resulting from the merger has the necessary solvency margin, taking into account the merger and the consolidated liabilities.

In case of a merger, the entire operation, the relevant arrangements, and the new memorandum and articles of incorporation must be presented to and reviewed by the insurance regulator, which can make observations to ensure conformity with the law and to guarantee the insured.

There are no restrictions regarding investments in or the acquisition of an insurance or reinsurance company, provided that the funding of the operation does not breach any anti-money laundering provision or Italian public policy. In the event of a merger resulting in the setting up of a new company with its head office in Italy, the new company must be authorised before it can legitimately underwrite insurance, whereas if one of the parties in the merger has its head office in another EU Member State, IVASS's agreement to the operation can only be given after the relevant home supervisory authority has approved the merger.

While reviewing the merger, and the new memorandum and articles of incorporation, IVASS performs a limited background investigation of the officers and directors of the acquirer or of the new company to ensure that they all respect the Civil Code provisions and meet the applicable legal requirements.

Should an insurance or reinsurance company enter into serious financial difficulties, Articles 245 to 265 of the Private Insurance Code provide for the administrative compulsory winding up of insolvent or financially troubled insurance and reinsurance companies.

With respect to reinsurance companies domiciled in Italy, the current regulatory requirements with respect to reinsurance ceded shall be found in EU Directive 2005/68/EC of 16 November 2005 on reinsurance, which amended EU Directives 73/239/EEC and 92/49/EEC and Directives 98/78/EC and 2002/83/EC, although the relevant provision at law has not yet been formally enforced in Italy.

On 10 March 2010, ISVAP published Regulation No. 33 on reinsurance, which implemented the provisions of the Insurance Code as modified by the adoption of the EU Reinsurance Directive (2005/68/EC). The regulatory framework is complex, with its 143 articles detailing and providing for:

- a* the exclusive conduct of reinsurance activities by companies with a registered office in Italy or Italian branches of companies with registered offices abroad (or both);
- b* the procedures for authorising such activities; and
- c* companies that have a registered office in Italy and authorisation exclusively to conduct reinsurance activities to carry on such activities in other EU Member States under the applicable regulations on freedom of establishment and freedom to provide services.

In Italy only licensed or accredited reinsurers can provide reinsurance. Therefore, there is no need for collateral to allow a deduction from the liabilities stated on the reinsured company's statutory financial statement. All the same, collateral might become necessary with a retrocessionaire of the reinsurer that is neither licensed nor accredited. In this case the retrocessionaire must provide some form of collateral to allow a deduction from the liabilities stated on the Italian reinsured company's statutory financial statement.

#### **v The distribution of products**

The distribution of insurance products in Italy is usually done through intermediaries, but in rare and limited cases insurance can be acquired directly from the insurer at the registered office agency.

During the distribution a number of rules, to protect consumers and unsophisticated customers, must be respected. In particular Article 182 of the Insurance Code obliges IVASS to ensure compliance with the principles of clarity, recognition, transparency and fairness of advertising and information on the conformity of the insurance contract with the advertising and in the pre-contract negotiations (with the information notice) and the execution of the insurance contract (policy conditions).<sup>11</sup>

In this respect the former Italian regulator issued ISVAP Regulation No. 35 of 26 May 2010, providing specifically for the level of information to be provided

---

11 ISVAP, just before its dissolution, issued a number of regulations to protect the consumer, and in particular it is worth mentioning the following.

- a* ISVAP Regulation No. 40 of 3 May 2012 on mortgages, which defines the minimum requirements for life insurance contracts related to a mortgage or consumer credit as per Article 28, Paragraph 1 of Decree-Law No. 1 of 24 January 2012 (the Deregulation Decree), amended by Law No. 27 of 24 March 2012.
- b* Regulation No. 41 of 15 May 2012, implementing provisions for the organisation and creation of procedures and internal controls aimed at preventing the use of insurance companies and insurance intermediaries for the purpose of money laundering and financing of terrorism, in accordance with Article 7, Paragraph 2 of Legislative Decree No. 231 of 21 November 2007.

to the prospective insured and information notices to facilitate the understanding of the products and their comparability.

For some life products such as pension funds and some life policies, the index-linked products are subject to the supervision and control not only of IVASS but also of COVIP.

#### **vi Intermediaries**

Among the principal duties of the Italian regulator is the supervision of insurance intermediaries, which to operate legitimately must be listed on the Sole Register of Insurance and Reinsurance Intermediaries (RUI).

The RUI was set up by the Private Insurance Code, implementing Directive 2002/92/EC on insurance mediation, and is mainly governed by ISVAP Regulation No. 5 of 16 October 2006. According to the regulations, any insurance and reinsurance intermediation activity is reserved solely to persons who have passed the ISVAP/IVASS national exam and consequently have been listed on the RUI.

Based on the Private Insurance Code, the RUI is divided into five sections as follows, and no intermediary may be recorded in more than one section:

- a* section A for insurance agents;
- b* section B for brokers;
- c* section C for direct canvassers of insurance undertakings;
- d* section D for banks, financial intermediaries as per Article 107 of the Consolidated Banking Law, stockbroking houses and the Italian Post Office's banking division (Bancoposta); and
- e* section E for the collaborators of the intermediaries registered under sections A, B and D conducting business outside the premises of such intermediaries.

ISVAP attached to the RUI a list of intermediaries having their residence or head office in EU Member States. This special section contains information on natural persons and companies, licensed as insurance and reinsurance intermediaries in other EU or EEA Member States, who have also been authorised by the regulator to pursue insurance mediation in Italy based on the freedom of establishment or freedom of services.

#### **vii Compulsory insurance**

Currently a number of special laws impose compulsory insurance to be undertaken with private insurance companies.<sup>12</sup>

At other times, the private insured must instead take out an insurance contract with a public insurer such as, for example, the National Institute for the Insurance of

---

12 Motor insurance was introduced in Italy with Law No. 990 of 29 April 1969 in OJ 3.1.1970 No. 2. It has subsequently been modified and the most recent amendment was introduced by Decree-Law No. 179 of 18 October 2012, which provided that compulsory motor insurance contract for motor vehicles and boats cannot be tacitly renewed and cannot be underwritten for a period longer than a year; any eventual policy clauses in contrast with this provision are deemed to be null and void.

Accidents at Work (INAIL),<sup>13</sup> or take out a mutual insurance contract with a private insurer through a public contracting entity.<sup>14</sup>

Finally an obligation to take out an insurance contract can be found in some National Collective Contracts of Work (CCNL) stipulated between the trade unions, representing the employees, and the Industrial Association, representing all their members who will adopt the negotiated CCNL for the specific industry.<sup>15</sup>

The most recent legislation that introduced compulsory insurance is Decree-Law No. 138 of 13 August 2011, converted into Law No. 148 of 14 September 2011. This provision provided for all professionals to take out a professional indemnity insurance contract by 13 August 2012.

Presidential Decree No. 137 of 7 August 2012 reformed the professional bodies' implementation of the principles laid down in Article 3, Paragraph 5 of Decree-Law No. 138 of 2011. Article 5 of this Decree-Law provides that: 'the insurance obligation [...] becomes effective 12 months after the coming into force of this Decree'.<sup>16</sup> Therefore, the deadline for all professionals (accountants, architects, engineers, notaries public, etc.) – with the exception of physicians and lawyers – to take out a professional indemnity insurance contract was 15 August 2013.

For physicians the duty to undertake an E&O insurance will become effective on the 15 August 2014 whereas for the lawyers there is not yet a final term as everything is connected to the decree that the Department of Justice shall issue regarding a reform of the legal profession.

---

13 Domestic accidents compulsory insurance was introduced in Italy with Law No. 493 of 3 December 1999, which imposes from 31 January 2013 the obligation to take out a contract of compulsory insurance with INAIL for persons between 18 and 65 years who work full-time in the family house. The policy costs around €1 per month.

14 Typical examples of this are:

*a* the Law on Hunting No. 157 of 11 February 1992, according to which hunters must obtain insurance coverage for: (1) civil liability arising from the use of firearms for hunting, with a €1 billion limit per claim, with a sub-limit of €750 million per injured person and €250 million for damage to animals and things; or (2) for personal accidents related to hunting, with a limit of at least €100 million for death or permanent disability, and such insurance is provided through the National Federation of the Hunters; or

*b* the obligation to pay a small premium to the Italian Gas Committee for the policy it annually draws up against the risks arising from the use or abuse of the gas distributed via networks or pipelines by the different national public utilities companies regardless of whether they are publicly or privately owned.

15 For example, the national collective labour agreement for managers and executives, according to Article 18(7)(a), (b) and (c), obliges the enterprises party to such collective contract to take out, for the benefit of their employees, executive insurance against professional and extra-professional accidents.

16 See the Decree in Official Journal of the Italian Republic No. 189 of 14 August 2012.

**viii Taxation**

The taxation of premiums and life policy revenues in Italy is a complex matter that cannot be discussed in detail in this chapter. In brief, premiums are not subject to value added tax but to an insurance tax that varies for each class of insurance in accordance with the fixed percentage set forth by Law No. 1216 of 29 October 1961.<sup>17</sup>

Similarly to any capital gain, financial yields resulting from life insurance contracts and capitalisation are subject to the substitutive tax provided for in Article 26 ter of Decree No. 600 of 29 September 1973. The tax currently due is up to 20 per cent of the capital gain, but reduced to 12.5 per cent for the portion of income that relates to the period between the date of subscription or purchase and 31 December 2011.

The Italian State Agency, with Ministerial Circular No. 41/2012, clarified that, according to Article 83 of Decree No. 68 of 29 March 2012, financial yields resulting from life insurance contracts and capitalisation of foreign insurance policies are also subject to the substitutive tax provided for in Article 26 ter of Presidential Decree No. 600 of 29 September 1973, even if paid by foreign insurers to persons residing in Italy.

**ix Regulation of individuals employed by insurers**

In Italy, all employees are subject to a collective contract negotiated at national level between the most representative trade unions and the national association of the employers (in the case of the insurance market, the ANIA). The national collective contract can then be integrated using a specific collective contract negotiated between the local trade unions and the representative of a specific insurance company or group of insurance agents.

The national collective contract for insurance employees, in force since 1 January 2010, expired at the end of June 2013 and the two parties have not yet reached an agreement on the new contract terms and conditions. In the meantime, the old contract's effects are prorogued and still binds the two parties.

To the contrary, the national collective labour contract for the employees of insurance agencies was recently concluded, on 8 July 2014 for the agents of the Generali/Ina Group and on 20 November 2014 for insurance agents in free management.<sup>18</sup>

Furthermore, the national collective labour contract is integrated into all applicable labour laws. Of particular importance are legislative Decree No. 626/1994 dealing with the safety and health of workers at work, the very recent Jobs Act,<sup>19</sup> and the two delegated implementing Decrees approved by the Italian Parliament on 20 February 2015

---

17 Percentages can vary enormously from a minimum of 0.05 per cent for insurance stipulated on ships registered in Italy up to a maximum of 21.25 per cent for any insurance other than fire, theft, liability, machinery breakdown, personal accident, cargo and marine insurance (i.e., credit or bond insurance is subject to this rate).

18 CCNL per i dipendenti delle agenzie di assicurazione in gestione libera (20 November 2014).

19 Legislative Decree No. 34 of 20 March 2014, converted, with amendments, into Law No. 78 of 16 May 2014, 'Urgent measures to promote employment and to raise the simplification of formalities for enterprises'.

(respectively, redundancies and contracts and social safety nets). The Jobs Act and the two Decrees will officially be in force from 1 March.

### III INSURANCE AND REINSURANCE LAW

#### i Sources of law

In Italy the source of insurance and reinsurance law is statutory. Case law precedents are not binding and the very same issue could receive different treatment from one court to the next.

The principal written statutes to be considered are:

- a* the Private Insurance Code;<sup>20</sup>
- b* the Civil Code;<sup>21</sup>
- c* the special legislation dealing with compulsory insurance;<sup>22</sup> and
- d* regulations issued until 21 December 2012 by ISVAP and from that date onward by IVASS.

#### ii Making the contract

The rules providing for the insurance contract and its drafting are all contained in the Civil Code.

The contract is not concluded until the two parties agree on the extension of the risk and on the premium to be paid for the shifting of the risk from the insured onto the insurer.

The conclusion of the contract is a complex succession of events where the prospective insured will propose a risk, usually by completing a proposal form prepared by the insurer, who will evaluate the risk and quote the premium. In completing the proposal the prospective insured must answer truthfully and completely to avoid being sanctioned for wilful non-disclosure according to Article 1892 of the Civil Code or negligent non-disclosure according to Article 1893 of the Civil Code.<sup>23</sup> Case law indicates that all information that is requested by the insurer in the proposal form must be deemed

---

20 Legislative Decree No. 209 of 7 September 2005, as amended by Legislative Decree No. 130 of 30 July 2012.

21 Royal Decree No. 262 of 16 March 1942 in the Official Journal No. 79 of 4 April 1942.

22 See, *inter alia*, the Motor Insurance Act No. 990 of 29 April 1969 or the Law on Hunting No. 157 of 11 February 1992.

23 In case of wilful non-disclosure, which can also be committed by omitting to state or represent, according to Article 1892 of the Civil Code, is sanctioned with the loss of the right to recover any indemnity under the policy whereas in the case of negligent non-disclosure according to Article 1893 of the Civil Code the right to recover is reduced in proportion to the premium that would have been charged if the true situation had been known and the premium that was actually charged. See Cass. Civil No. 3165 of 4 March 2006; Cass. Civil No. 7245 of 29 March 2006; Cass. Civil No. 16769 of 21 July 2006; and Cass. Civil No. 5849 of 13 March 2007.

essential and a non-disclosure or false statement in response to a query automatically qualifies the misrepresentation as wilful.<sup>24</sup>

When the risk is of an industrial or technical nature a survey is sometimes undertaken. This provides better understanding of the risk but might pose substantial problems should the insured have made a misrepresentation. In fact the case law indicates that any onsite visit and survey might override the false or omitted declarations in the proposal form as the insurer or its agent, the surveyor, should have checked and realised the differences between the proposed risk and the real risk.

Finally, it is important to mention the IVASS Circular Letter to the Market of 5 November 2013, concerning the long-term property insurance reintroduced by Law No. 99/2009. In this respect IVASS, as a result of numerous protests received by insurers complaining about companies' refusal to grant them an early termination of insurance contracts of multi-annual duration, invited all insurance companies, by 31 December 2013, to 'specifically and with adequate graphic evidence,' indicate in the policy whether the insured benefited from a discount because of its long duration and the fact that, due to the discount applied, the policyholder cannot exercise the right of early withdrawal from the contract for the first five years of contract.

### iii Interpreting the contract

While the insurance contract may be concluded orally, according to Article 1888 of the Civil Code there must be written proof of its existence.

Usually this prevents potential controversies on the object of the insurance or the scope and extension of the contract and clearly excludes from the insurance any contractual terms that are not expressly incorporated into the policy wording. Notwithstanding this there are some cases where the policies are badly drafted and the wording can pose problems. Should a problem of interpretation arise the contract shall be interpreted using the general interpretation rules that are provided in the Civil Code for all contracts,<sup>25</sup> which mainly relate to the will of the parties and good faith.

Furthermore, depending on whether the insurance contract has been prepared by the insurer as *pro forma* contracts or if the policy wording has been duly and totally negotiated between the parties there will be some substantial differences in the interpretation and enforcement of the contract.

In the first case, whenever the insurer prepares policy wordings or forms designed to uniformly regulate a number of contractual relationships principally with non-professionals, the basic rule is to interpret *contra proferentem* (i.e., the wording shall be interpreted against the party who prepared the policy wording). Furthermore, any added clause or cancellation that modifies the original policy text shall prevail in accordance with Article 1342 of the Civil Code.

In addition, there are terms that are considered legal, but onerous for the party against which these are drafted. Such clauses are not binding on a party who has not

24 See Cass. Civil No. 3165 of 4 March 2003; Cass. Civil No. 4862 of 12 May 1999; and Cass. Civil No. 10086 of 12 October 1998.

25 See Articles 1362 to 1371 of the Civil Code.



accepted it and signed twice in accordance with Article 1341 of the Civil Code. This is usually to regulate the contractual terms stipulating a specific and particularly short period to comply with the contract provision, or that modify the court jurisdiction as per the general rules of law or create foreclosure terms. Notwithstanding a listing of clauses, this procedure also has to be followed in cases where the insurance has been underwritten on claims-made basis, because although this is a legitimate contract it deviates from the loss-occurrence basis chosen by the Italian legislature as the typical way in which insurance shall operate.<sup>26</sup>

Under Italian law there are no warranties but conditions precedent or essential conditions. These must be marked and appropriately addressed in the policy so that the insured's attention is directed to the condition.

In setting the terms of an insurance contract the parties, according to Article 1322 of the Civil Code, are free to negotiate the content of the insurance provided that a risk does exist and that the terms do not breach internal public policy,<sup>27</sup> or have an illicit scope.<sup>28</sup>

Usually there are general conditions providing for all contracts falling in a specific class of business (i.e., professional indemnity), particular conditions for a specific group of insured (i.e., the engineer's professional indemnity), and special conditions that should provide only for that particular contract and are quite often condensed in a summary at the beginning of the policy document.

#### **iv Claims**

When an insured-against event occurs the insured shall notify the loss to all insurers and start a salvage to minimise the extent of the loss.

Article 1913 of the Civil Code provides that, unless the insured entity has already had notice of the occurrence of the loss, notice must be given within three days from the loss event. A lack of notice or late notice does not permit the insurer to deny liability unless prejudice has been suffered and in this case the denial shall be proportional to reflect the prejudice suffered.

For all non-liability insurance, the insured event or the loss occurrence triggers the insurer's indemnity obligations if the insured knew of the event or occurrence or the insured should have known of the event or occurrence. Should the insured not make a timely notification or not enforce its right to the indemnity within two years from the loss event, any right under the policy will be covered by the statute of limitation.

---

26 Cass. Civil No. 5264 of 23 December 2005, according to which claims-made clauses are deemed to be unfair contract terms. Therefore, they are valid only if they are specifically accepted in writing (double signature) pursuant to Articles 1341 and 1342 Civil Code.

27 In the past the nullity of the kidnap and ransom insurance was grounded on the ISVAP Regulation No. 246 of 22 May 1995 on the grounds that this type of insurance was inviting the criminals in kidnapping insured persons with the aim of obtaining the indemnity payment. Today the prohibition is provided by Article 12 of the Private Insurance Code.

28 It is forbidden to insure any crime. For example, a clause insuring a cargo of drugs against the peril of fire or against the loss following a police seizure would be null.

A slightly different approach is adopted by Article 1917 of the Civil Code on liability insurance contracts underwritten on a claim-made basis, where the element triggering the insurance guarantee is a third party claim against the insured made by way of registered letter or service of a writ of summons.

Once notified of such claim the liability insurer can decide to defend the third-party claim on behalf of the insured. The duty remains until the liability insurer has exhausted the policy limits, in which case the liability insurer shall be obliged to defend until the end of the proceeding. The duty to defend also triggers a sub-limit for defence costs, equal to one-quarter of the policy limit. If the judgment or arbitration award exceeds the policy limit, the defence costs are apportioned between the insurer and the insured according to their respective interests.

Usually third parties are not privy to the insurance contract and have no right to make a claim and enforce it in a court of justice. In exceptional and very limited cases, when the policyholder or insured entity remains inactive where there is a risk that the right to indemnity will be time-barred, a third party may through subrogation<sup>29</sup> assume the rights of the insured and claim the insurance coverage. According to Italian law not even the policyholder can act unless expressly delegated to do so in the policy, or by a proxy of the insured.

Further exceptions to the aforementioned rule are found in the special provisions of Law No. 990/69 on compulsory motor accident insurance and Article 149 of the Private Insurance Code (see Constitutional Court judgment No. 180/2009).

No specific sanction is provided for wrongful denial of a claim, but because litigation usually follows, the court might award interests for late payment (provided for by Legislative Decree No. 231 of 9 October 2002) either from the date in which the indemnity was due to the date of final settlement or (in accordance with newly modified Article 1284 of the Civil Code)<sup>30</sup> from the date of the lawsuit service to the date of final settlement.<sup>31</sup>

Quite often in Italian policy wording there is a provision for the loss adjustment of the claim whereby the parties or their experts should negotiate the amount of the loss and the level of the indemnity. More often than not these clauses not only focus on the pure quantification of the loss but also authorise the experts to resolve any controversy about the warranties or the increment of the risk or even to determine if a misrepresentation of the risk took place. Whenever this occurs the case law indicates that the loss adjustment process turned into a real arbitration<sup>32</sup> with all the connected problems of challenging and voiding the outcome of the ‘informal arbitration award’.

---

29 In accordance with the provisions of Article 2900 of the Civil Code.

30 See Article 17, Paragraph 1 of Law No. 162, dated 2 November 2014.

31 While the legal interest rate currently stands at 0.5 per cent, the interest for late payment provided for by Legislative Decree No. 231 of 9 October 2002 currently stands at the European Central Bank annual interest rate plus 7 per cent.

32 Among others, see Cass. Civil No. 1081 of 18 January 2011.

## **IV DISPUTE RESOLUTION**

### **i Jurisdiction, choice of law and arbitration clauses**

The parties are free to choose the jurisdiction and the applicable substantive law, and to include an arbitration clause to derogate the ordinary court jurisdiction, unless the clause would be in conflict with the law.

An example according to which the freedom of the parties is limited is in the choice of the international jurisdiction, which in relation to the insurance shall be made in accordance with the Articles 8 to 13 of the EU Regulation No. 44/2001, or the territorial jurisdiction within the Italian Republic when the insured is a consumer.<sup>33</sup>

### **ii Litigation**

Litigation proceedings include first instance trial, an appeal and possibly a final appeal to the Court of Cassation for procedural faults or errors in application of the law into the second instance judgment.

In accordance with Article 2697 Civil Code the burden of proof rests with the party seeking to enforce the right in court and the defendant must prove his or her case only after the claimant has fully proved the claim.

The insured or claimant must prove the insured event occurred, the premium had been paid and the insurance contract existed; whereas the loss occurrence can be proved by witnesses or other means, the insurance and the premium payment shall be proved in writing.<sup>34</sup>

Legislative Decree No. 28 of 4 March 2010,<sup>35</sup> implementing EU Directive No. 52 of 2008, imposed mediation for civil and commercial controversies. The Italian Constitutional Court declared such Decree unconstitutional for its abuse of power,<sup>36</sup> therefore the government issued Decree-Law No. 69 on 21 June 2013 (converted into Law No. 98 on 9 August 2013), which restored the mediation process as a condition of admissibility but limited it to any proceedings in the areas listed in Article 5, Paragraph 1 of legislative Decree No. 28/2010. Among the different conflictual issues listed are:

---

33 In this sense the Cass. Civil No. 9922 of 26 April 2010 affirmed that Article 1469 bis, third paragraph, No. 19 of the Civil Code is procedural in nature and applies in cases started after it entered into force, even if relating to disputes arising from contracts stipulated before and affirmed that the rule, in disputes between a consumer and a professional, establishes the exclusive jurisdiction of the courts of the place where the consumer has his or her residence or elected domicile.

34 According to Article 1888 of the Civil Code, the insurance contract must be proven in writing, whereas Article 2721 of the Civil Code excludes the admissibility of testimonial proof of contracts when their value exceeds the sum of €2.58. However, the judge may allow the testimony beyond the limit above, taking into account the quality of the parties, the nature of the contract and any other relevant circumstance.

35 See Official Journal of the Italian Republic No. 53 of 5 March 2010.

36 Constitutional Court judgment No. 272/2012 in Official Journal of the Italian Republic of 12 December 2012.

- a* insurance contracts;
- b* medical malpractice;
- c* directors and officers' liabilities; and
- d* banking and financial contracts.

The proper service of the writ of summons imposes a term of 90 days between the date of service and the first hearing. If the defendant wishes to join a third party or to counterclaim it must make an application 20 days before the scheduled hearing otherwise the defendant will lose such an opportunity and may only oppose and resist the claim when appearing at the first hearing, which is either scheduled on the writ of summons or postponed *ex officio* by the court to meet the court calendar.

In the first hearing the judge checks that all the necessary parties are present. Following this, the court may issue default orders against parties who failed to attend and if a duly summoned party to proceedings fails to attend, the court might consider some of the factual allegations and the documents produced as uncontested and ground his or her decision on such evidence. After that the discovery phase opens and the parties will have:

- a* 30 days from the date of the hearing to amend the defences;
- b* 30 days to present any further evidence that might be necessary to support the case – again, please note that in Italy discovery is limited to what the parties consider relevant and the documents affecting the case usually are not produced in court; and
- c* 20 days to rebut, object to and oppose the opponent's discovery.

The dates of all hearings are set *ex officio* by the judge depending on his or her workload.

When all the defences are lodged in court, these are discussed by the judge who will determine which evidence is relevant for the case, hence admissible, in the same court order the judge will decide if independent expertise is necessary. If so, the judge will fix a specific date to swear in the court expert and to give instructions about the scope and object of the expert testimony. One independent expert is appointed by the court and one by each of the parties, the court-appointed expert will lodge a written report to which the parties have a right of reply. Should one or both parties disagree with the court-appointed expert the latter might be called the hearing to answer questions or to draft a supplement of report; this further report usually closes the discovery phase.

Depending on the number of witnesses and questions, the evidentiary proceedings will be divided into one or more hearings scheduled generally every quarter. Once the evidentiary phase is over the case enters into the decision phase with a hearing where the court receives the parties' arguments. From that date two terms start to run: the first of 60 days to lodge the last written defence and the second of a further 20 days to rebut the final defences of the opponents.

Exceptionally, at the end of the discovery the court might elect to follow a fast-track proceeding pursuant to Article 281 *quinquies et sexies* of the Civil Procedure Code. In such a proceeding, 10 days before the hearing for arguments the parties shall lodge a short brief to the court and at the hearing after having given the arguments, the judge will listen to their oral pleadings and issue a decision, the reasoning for which will be explained in writing at the time of the publication of the judgment.

In general it is impossible to anticipate the time a court requires to make its decision; usually the decision process takes from three to 14 months and much will depend on the complexity of the arguments raised by the parties and the court's workload. Typically the entire litigation lasts from two to three years in first instance, and a little less at first appeal and before the Court of Cassation.<sup>37</sup>

In Italian litigation, costs follow the event, therefore the losing party shall bear on top of its own costs the successful party's costs and court costs including the cost of expertise, the court duties and the register tax on the judgment.<sup>38</sup> This is the general rule but the courts have the opportunity to expressly apportion the litigation costs between the two parties, and in insurance contract litigation the most common reason to derogate the rule is that the policy wording was unclear and the insured had good grounds to believe that he or she had a viable and legitimate claim.

The Supreme Court of Cassation, in its leading precedent No. 1183 of 19 January 2007, declared that punitive damages were alien to the Italian legal system and therefore contrary to internal public policy. Therefore, it is not permissible to insure against punitive or exemplary damages in Italy, even if it is possible to do so legitimately for punitive damages awarded in other jurisdictions.

For the very same reasons no punitive or exemplary damages can be awarded against an insurer who challenged in court a claim made under one or more of its policies.

A recent piece of legislation<sup>39</sup> impacting onto the Italian litigation environment, and the fact that since 1 January 2015 a series of tasks previously carried out on paper and in person must now be done electronically and remotely<sup>40</sup> should, in the short period, speed up the civil proceedings and reduce Italian Court backlogs.

In fact, with the Electronic Civil Process, lawyers throughout the Peninsula can:

- a* consult case court files online;
- b* receive telematics communications from judicial offices and can serve defences and judgements directly upon other lawyers;
- c* execute electronic payment of unified court duties; and
- d* file defences, writs and pleadings along with the supportive documents packed into a specific 'electronic envelope' which is automatically electronically controlled and recorded by the national software system.

---

37 Usually an appeal lasts two years and the Court of Cassation proceeding between one year and 18 months.

38 The register tax is a proportional tax, usually 3 per cent of the court award; in case of rejection of the claim usually a fixed fee is charged.

39 Decree Law No. 132/2014, as converted into Law No.162/2014, provides rules to speed up the proceeding granting the possibility of moving away from the usual and general burdensome rite to pass to a faster, albeit summary, rite of cognition (new Article 183-bis civil procedure code), and it introduced measures for the efficiency and simplification of the executive process along with a reduction of the judges, magistrates and public prosecutors vacations.

40 The Electronic Civil Process.

Despite a number of courts experiencing technical problems and interpreting the new rules differently, the technical instrument should guarantee a faster proceeding with less administrative personnel, reducing the overall time between the service of the summons and the issuing of the judgement. The results of the reforms undertaken in past years are becoming evident:

- a* between December 2010 and December 2014 pending backlog of civil cases were reduced by 14.9 per cent;
- b* the length of proceedings in cases in which mediation led to agreement is approximately 70 days, as opposed to 1,132 days for ordinary procedures in court; and
- c* starting from July 2014, injunction proceedings take six days instead of the previous 30, thanks to the introduction of new online procedures.

### iii Arbitration

In Italy there are two forms of arbitration: formal arbitration where the award has the nature of a court judgment and informal arbitration whose award has the nature of a contract and therefore can be only challenged for error, illegality, fraud, duress or excess of power in making the award.

The differences in the procedural and evidentiary requirements between the two formats are substantial: whereas the formal arbitration procedure is regulated by the Civil Procedure Code<sup>41</sup> and the decision is rendered in accordance with the strict rule of the law, informal arbitration is not regulated and the parties can decide their own rules in the arbitration clause.

In the Italian policy wordings it is somewhat rare to encounter clauses providing for formal arbitration for a number of reasons, including the risk of lack of independence of one or more of the arbitrators and the costs of such procedures. Formal arbitration can, however, guarantee a first-instance decision in a relatively short time (between six months and a year in the vast majority of the cases) against the lengthy proceedings in a court of law (between two and 10 years).

Informal arbitrations are, however, quite common in property and business-interruption insurance. There too the costs of the procedure are usually high and reflect the work done in the loss-adjustment process.

### iv Alternative dispute resolution

Alternative dispute resolution clauses, apart from the contractual expertise clauses are totally unknown in insurance contracts.

In a contractual expertise clause the parties provide to refer to one or more third parties, chosen for their particular technical competence, the task of formulating a technical appreciation, evaluation or economic appraisal. It follows that, if the parties have referred to the experts the determination of a value of the relevant things<sup>42</sup> or of

---

41 See Civil Procedure Code Title VIII: On Arbitration (Articles 806–840).

42 A contractual expertise clause is typically included in fire or theft insurance policies to determine the insured item(s) lost due a fire or a theft.

the extent of the damage suffered<sup>43</sup> or the indemnification,<sup>44</sup> the adjustment they make shall determine the value, not in the abstract, but with reference to the specific loss event.

The expert opinion can be attacked and challenged only through the typical actions for annulment, actions for breach of contracts, or both.

#### **v Mediation and mandatory assisted negotiation**

Article 5 of Legislative Decree No. 2 of 4 March 2010 created a list of disputes subject to compulsory mediation. Among other controversies, the law mentioned disputes relating to insurance contracts and to compensation for damage caused by the circulation of vehicles, by medical malpractice and by liability of the directors and officers. If the case was litigated without prior recourse to mediation the judge had to suspend the litigation and grant the parties a term of six months to mediate.

The Constitutional Court, with ruling No. 272 of 6 December 2012,<sup>45</sup> declared Legislative Decree No. 2 of 4 March 2010 unconstitutional for excess of legislative delegation, insofar as it provided for the compulsory nature of mediation. Following this binding precedent, mediation remained available to resolve insurance disputes, but because it was no longer compulsory it was little used and the rate of successfully mediated disputes, which was already low when the procedure was compulsory, dropped even further after the Constitutional Court judgment.

This situation was reversed by the Decree Law No. 69/2013, which reintroduced compulsory mediation for a number of types of controversies, including claims for medical malpractice, professional E&O, damages for libel and slanders, insurance, banking and financial contracts. Two novelties have been introduced by the new legislation: (1) only mediation entities or bodies present within the territory of the judge competent to hear the eventual subsequent litigation can legitimately run a mediation; and (2) the parties shall be assisted by a lawyer during the compulsory mediation sessions.

Decree Law No.132/2014, as converted into Law No. 162/2014, introduced a brand new form of alternative dispute resolution as a condition of admissibility of any lawsuit, including payment of debts up to €50,000, but limited to any proceedings which are not listed in Article 5, Paragraph 1 of legislative Decree No. 28/2010: the mandatory assisted negotiation. With this brand new alternative dispute resolution the parties, with the assistance of one or more lawyer acting as facilitator, should try to negotiate a solution to their existing controversy within a period of three months. Should the assisted negotiation fail, then the parties can legitimately act in court to have the judge resolve the dispute.

---

43 The contractual expertise clause is typically included in personal accident or medical costs insurance to determine the accident, the disability sustained and the costs of medical care.

44 The contractual expertise clause is typically included in business interruption clauses to evaluate the indemnity consequent to the loss of earnings net of the deductible period.

45 See the judgment in Official Journal of the Italian Republic of 12 December 2012.

## V OUTLOOK AND CONCLUSIONS

In 2015, the Italian economy should benefit from the improvement of the general economic climate, led globally by the low oil prices and, from the European context, by the launch of the Quantitative Easing Programme. This would mean the end, in 2014, of the longest recessive episode of the Italian Republican history (14 consecutive quarters). On 13 February 2015, general and individual sector trends reflected such economical bettering: the insurance index increased by 11.4 per cent compared to 60 days before (7.6 per cent from the beginning of 2014), banking by 17.2 per cent (22.6 per cent from the beginning of 2014) and manufacturing by 15.5 per cent (18.1 per cent from the beginning of 2014).

Along with the improving economic situation, the Italian government enacted measures to promote the reform of the justice system, considered crucial to close the efficiency gap that adversely impacts not only on the public at large but also and more importantly on business activities, especially the insurance market. Important steps have been taken to improve efficiency in the judicial system, through the amalgamation of small courts, the introduction of the Electronic Civil Process and encouraging alternative dispute resolution. The next steps will focus on the final approval of pending legislation concerning, among the most important, the statute of limitation and judges' liability.

These reforms are reflected into the February 2015 Fitch Ratings report which, with reference to the non-life insurance, offer a positive analysis for 2015, despite the softening of premiums in the motor sector and fierce competition in the commercial lines.

As for the life sector, the Agency expects for this year a regular flow of premiums and a reduced risk on interest rates. The reduction of guaranteed minimum rates to levels close to zero should reduce the sensitivity to changes in interest rates on profits and capital. These positive factors continue to be offset by higher risk inherent to the investment portfolios of the life insurance companies, given the significant concentration of government bonds and corporate debt, a reflection of the strong relationship between the rating of the insurance sector and the sovereign one. In fact, any change to Italy's credit rating could generate a change to the rating of the Italian insurance industry.

Along with the systemic actions, the Italian government made a number of amendments to the compulsory motor insurance<sup>46</sup> according to which the insurers:

- a* shall grant a minimum 7 per cent premium discount if a black box is installed in the vehicle. In the event of an accident, data collected from the black box will provide non-rebuttable and conclusive evidence in court. The offer of a policy connected with a black box is not mandatory for customers;
- b* shall grant a minimum 7 per cent premium discount if the insured undertakes the obligation to receive medical and rehabilitative treatments chosen and paid for directly by the insurer;

---

46 Law Decree 'Destinazione Italia' on 23 December 2013, No. 145 in Official Journal of the Italian Republic of 23 December 2013 – Ordinary Series No. 300 converted with amendments by Law No. 9 on 21 February 2014 (Official Journal of the Italian Republic, 21 February 2014, No. 43).



- c* shall grant a minimum 5 per cent premium discount if the insured undertakes the obligation to repair damage through a trusted repairers directly paid by the insurer;
- d* can now include a clause in the policy preventing the transfer of the right to claim damages to the repairer, in return for a 4 per cent discount in premium. This provision should prevent fraudulent agreements between parties which can artificially increase repair process costs; and
- e* shall grant an undetermined discount if the insured does consent to let the insurer have a survey upon the vehicle prior to the issuing of the insurance certificate.

In an attempt to further limit judicial frauds, Law No. 09/2014 imposed strict rules on the admissibility of witnesses in court for cases of motor accidents with property damages only. To be called as such, a witness shall have to be identified in the accident declaration, the claim form or in a public authority report; no witness subsequently identified shall be admitted to give testimony. The same Law states that a judge presiding over any court proceedings shall inform the Public Prosecutor's Office if an individual has been a witness in three different motor liability cases within a period of three years to investigate the respectability of the witness.

In connection with these new law provisions, which became effective on 21 February 2014, specific disclosure obligations have been introduced in an effort to improve transparency, such as the inclusion of disclaimers on insurers' websites, communications to IVASS and the Ministry of Economics and policyholder's documents or information not timely or exhaustively executed shall be sanctioned with fines between €1,000 to €10,000 for each breach.

The insurance market and, as a consequence, the reinsurance market are expected to benefit from all these changes throughout 2015.

## Appendix 1

---

# ABOUT THE AUTHORS

### ALESSANDRO P GIORGETTI

*Studio Legale Giorgetti*

Alessandro P Giorgetti is a graduate of Milan State University where he studied private international law. He both graduated and was admitted to the Milan Bar in 1983. He subsequently studied commercial law at Robinson College, Cambridge University.

He is member of the special Bar for the High Courts in Italy.

Mr Giorgetti practises insurance and reinsurance law and has acted as principal consultant or litigator in some of the major Italian cases.

He works in English, French and Italian. He is an active member of the International Association of Defense Counsel, of which he has been a past international vice president; the Defence Research Institute (DRI) of which he chairs the Italian chapter; and the International Bar Association. Mr Giorgetti also belongs to the Association of Fellows and Legal Scholars of the Center for International Legal Studies in Salzburg and he has been listed since 2007 in *Who's Who Legal: Product Liability* and since 2008 in *Who's Who Legal: Insurance & Reinsurance*.

He has authored several articles and the book *Il contenzioso di massa in Italia, in Europa e nel Mondo – Profili di comparazione in tema di Class Action ed Azioni di Gruppo*, Ed. Giuffé (2008), comparing mass litigation and collective redress procedures around the world.

He is a regular lecturer in Italy and abroad on insurance, professional liability and personal injury law.

**STUDIO LEGALE GIORGETTI**

Via Fontana 28

20122 Milan

Italy

Tel: +39 02 5457 734 / +39 02 5457 923

Fax: +39 02 5518 0282

[giorgetti@giorgettilex.com](mailto:giorgetti@giorgettilex.com)

[www.giorgettilex.com](http://www.giorgettilex.com)