# Insurance & Reinsurance

*Contributing editors*
**William D Torchiana, Mark F Rosenberg and Marion Leydier**

2016

GETTING THE DEAL THROUGH

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*Contributing editors*

**William D Torchiana, Mark F Rosenberg and Marion Leydier**
**Sullivan & Cromwell LLP**

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Sullivan & Cromwell LLP

# Italy

**Alessandro P Giorgetti**
**Studio Legale Giorgetti**

## Regulation

### 1 Regulatory agencies

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

The Decree Law of 6 July 2012, No. 95, as amended and converted into Law No. 135 of 7 August 2012, dissolved the Italian Private Insurance Supervisory Agency (ISVAP) and replaced it with the Insurance Supervisory Agency (IVASS), a department of the Bank of Italy.

From 1 January 2013, IVASS took over all functions carried out by ISVAP, including the power of authorisation, direction, inspection, enforcement of precautionary measures and sanctions, as well as the adoption of any regulation necessary for the sound and prudent management of undertakings or for disclosure and fairness of behaviour by supervised entities, including the control of intermediaries, the financial promoters and agents listed in the Register of Insurance and Reinsurance Intermediaries (RUI). In contrast, the Register of Insurance and Reinsurance Loss Adjusters and the Italian Information Centre, 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 of the party) and caused by motor vehicles registered and insured in one of the states of the European Economic Area, have been taken away from the insurance regulator's competences and passed to the Public Insurance Services Agency.

The General Manager of the Bank of Italy is also the President of the new Italian supervisory agency, and he or she promotes and coordinates the activities of the Council, which is responsible for the overall administration of the agency.

Other governing organs of IVASS are the Council and the integrated directorate made up of some members of the board of directors of the Bank of Italy and the IVASS advisers. The directorate has competence in integrating and directing the public body activities and strategic decisions.

The new Italian regulator adopted an internal organisational regulation providing for a full integration into the Bank of Italy structure, although it does preserve some logistical autonomy.

Following its logistical and administrative reforms, the Italian regulator has been active in reshaping a rigid and overcrowded insurance market, enhancing the transparency and clarity of information but preserving the negotiating simplicity for insureds, and securing, at the same time, effective sanctions against insurance companies that are not compliant with the new market rules.

First, IVASS regulated the insurance services offered via the internet laying down rules setting out the minimum requirements any insurance or reinsurance company's website shall have in order to legitimately promote insurance business or services offered electronically through insurance portals. Then IVASS reformed the administrative fines and the application of disciplinary sanctions in respect of insurance and reinsurance intermediaries, and the norms ruling the operativity of the guarantee committee that shall oversee sanctions proceedings. Subsequently IVASS introduced an obligation for (re)insurers and intermediaries to adopt a certified e-mail address simplifying the formal communications and services of judiciary writs upon these subjects and shortly after IVASS dealt with the long-term property insurance reintroduced by the Law No. 99/2009. Due to a multitude of protests made by insureds complaining about companies' refusal to grant an early termination of multi-year insurance contracts, IVASS directed all insurance to 'specifically and with adequate graphic evidence' indicate in the insurance wording whether the insured benefited from a discount because of the long duration of the contract 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 the contract.

Subsequent IVASS interventions regarded the receivership of (re)insurance companies, the due diligence and anti-money laundering registrations on the part of (re)insurance companies and intermediaries. In addition, IVASS published Regulations Nos. 6 and 7 on the occupational requirements of insurance and reinsurance intermediaries, respectively, especially regarding the professional requirements that the intermediaries must possess. During the first quarter of the 2015, IVASS issued Regulation No. 8 concerning measures to simplify the contractual relations between insurers, intermediaries and customers enhancing the use of an advanced electronic signature in all contracts. Furthermore, this Regulation introduced an obligation for intermediaries to facilitate electronic payment and specifies the requirement for the intermediary to 'make available' to their customers an electronic documentation and information package if the client requires such in electronic format instead of a paper copy of the policy.

The Italian insurance regulator in the last twelve months has been particularly active regarding complaints handling. The first set of new rules amended ISVAP/IVASS Regulation No. 24 (dated 19 May 2008) and included a number of significant changes, particularly for insurers receiving more than 20 complaints per year, which shall now catalogue the complaints and report them to IVASS on a regular basis.

A more radical and important reform of the complaints handling took place with Regulation No. 46 of 3 May 2016 which, amending ISVAP Regulation No. 24, adjourned the procedure for the submission of complaints to IVASS and provided the complaints management guidelines for both insurance companies and intermediaries. According to the new regulation, the relevant insurance companies must handle complaints related to their insurance agents who shall be involved in the management of the complaints and must provide the insurance company with all necessary information.

A dedicated complaints management policy is available to insurance brokers, EU intermediaries, banks, financial intermediaries, Italian investment firms and Poste Italiane; they shall directly manage the complaints received and shall implement an internal structure in charge of complaints handling. The complaints handling or specific phases of the procedure can be outsourced and Regulation No. 46 lays down specific rules for the transparent and efficient handling of the complaints.

Complaints received in accordance with the terms and procedures applicable to Italian insurance companies and intermediaries must be dealt with and an answer must be sent to the complainant within 45 days. When the grievance is rejected, partially or in full, the response shall contain a clear description of the insurance or the intermediary's positions, in simple and plain language.

Complaints shall be recorded in a dedicated archive and all pre-contractual documentation shall include information on the complaints submission procedure with details of the insurance or the intermediary's internal structure in charge of handling the complaints.

## 2 Formation and licensing

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

According to Italian insurance law, 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 by way of the Industry Ministry Decree of 2 July 1986 because of their particular historical status and in accordance with the Treaty on the Functioning of the European Union (formerly the EC Treaty).

Insurance and reinsurance companies must be incorporated in Italy, in a member state of the European Union or elsewhere in the world. Different requirements and conditions apply for the formation and licensing of a company depending on where it is incorporated.

In Italy, it is forbidden to set up a company whose sole object is the exclusive pursuit of insurance business abroad.

## 3 Other licences, authorisations and qualifications

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

New insurance and reinsurance companies that want to undertake or start a new business in Italy can do so only once they have been authorised or licensed by IVASS through an order (if the undertaker has its head office within the territory of Italy) or by an acknowledgement of the formal communication made by the company, which has to be backed up by a confirmation of the supervisory authority of the state where the undertaker has its head office.

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

An insurance and reinsurance company that applies to IVASS for an authorisation shall submit a number of documents. The most important are as follows:

- a certified copy of the memorandum and articles of association, showing the insurance classes that the insurer will underwrite and if it also intends to offer reinsurance;
- 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;
- a scheme of operations and a technical report drawn up according to the IVASS regulations, including the names of the persons charged with administration, management and internal control and corporate governance functions, and the names of the natural or legal persons who directly or indirectly have controlling interests or qualifying holdings in the company with an indication of the amount of each holding;
- 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, Order No. 98/1995, or both, fully paid up in cash; and
- for foreign companies, proof of the appointment of a general representative, who must be domiciled for the appointment 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, the authorisation is usually not granted. 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. Equally, the authorisation or licence is denied if any persons charged with the administration, management and internal control functions do not meet the prescribed requirements, or if the scheme of operations does not satisfy the financial needs and the technical rules for the correct management of an insurance business.

A major role in the authorisation process is played by the laws, regulations and administrative provisions of any EU or non-EU 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 an 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 the six months elapse with no response received by the applicant company, then the authorisation shall be considered refused.

## 4 Officers and directors

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

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, thereby being able to ensure sound and prudent management. The sensitive question of the 'interlocking directorates' has been addressed and dealt with by article 36 of Decree-Law No. 201 of 6 December 2011, introducing a prohibition for an individual to be a member of two or more boards of insurance companies, financial institutions or banks if these are in competition among themselves.

## 5 Capital and surplus requirements

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

In Italy, an insurance company's minimum share capital or guarantee fund fully paid up in cash must not be less than:

- for companies intending to pursue life insurance: €5 million;
- 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;
- for companies intending to pursue life insurance, personal accident and sickness insurance simultaneously:
  - €5 million for life insurance; and
  - €2.5 million for the pursuit of personal accident and sickness insurance; and
- 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 the new ISVAP Regulation No. 36 dated 31 January 2011, which almost entirely repeats the provisions of the two previous regulations, is to improve policyholder protection and strengthen the measures for preventing insolvency.

The implementation date of EU Solvency II has been postponed several times in the past, until 27 May 2016 when the European Commission adopted a Regulation on the risk-free rate under the Solvency II Directive. This Regulation lays down guidelines for insurance companies to follow when calculating technical reserves and financial data with reference to dates from 31 March until 29 June 2016.

## 6 Reserves

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

Italian law provides for statutory and free reserves not corresponding to particular underwriting liabilities or to adjustments of asset items. At present, 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, which has effected a certain number of investigations and controls to guarantee the adequate reservation level of insurers and reinsurers subject to the controls.

On 6 June 2016 IVASS enacted Regulation No. 24 providing for investment limits and coverage of technical reserves. This new set of rules amends ISVAP Regulation No. 27 of 14 October 2008 in order to provide guidelines on how technical reserves of insurance and reinsurance companies should be invested and listed in a register to be kept by the companies. In this respect, insurance companies shall determine their investment policies by 30 September 2016 and shall fully comply with the new Regulation No. 24 provisions from 1 October 2016.

## 7 Product regulation

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

The proposing company attaches specimens of their wording to the business plan and technical operation scheme that have been drafted in accordance with the local laws. Unless there are clear and large-scale violations of the Italian public order, IVASS does not exercise any other form of supervision over the wording of insurance provisions.

On the contrary, IVASS, along with the Italian Competition Authority, will assess and potentially investigate whether two or more insurers for one or more class of business are creating cartels in breach of the freedom of competition and to the detriment of consumers. In these cases, 'supervision' of the insurance companies will turn into a full investigation with administrative sanctions and orders to do or not to do something.

For some other products such as pension funds and some life policies, the united index-linked products can be subject to the control of multiple agencies. This is typical with pension products, which are subject to the supervision and control not only of IVASS but also of the Supervisory Commission for Pension Funds (COVIP).

The COVIP was set up by Legislative Decree No. 124 of 21 April 1993, but actually started to operate with its current configuration, functions and scope after Legislative Decree No. 252 of 5 December 2005, in tandem with the introduction in Italy of social security. This act attributes some specific functions to the COVIP, such as:

- authorising and supervising pension funds;
- approval of their memorandum, articles of association and regulations for complementary or voluntary social security;
- supervising and inspecting the technical management, financial institution, assets and bookkeeping of the pension funds; and
- reviewing the adequacy of their organisational structure, including the duty to ensure respect for the principles of transparency in the relationships between the pension products, funds and clientele.

## 8 Regulatory examinations

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

According to article 39 of Decree Law No. 1 of 24 January 2012, as amended and updated on 19 April 2012, IVASS shall annually verify that all intermediaries, financial promoters and agents listed in the RUI are carrying proper errors and omissions insurance. Moreover, in accordance with the same law provision, IVASS can perform random examinations of the single intermediary, the financial promoter and the agent listed in the RUI to determine their fulfilment of the requirements of probity, independence and trustworthiness, their professional qualifications and their continuous professional education.

In respect of insurance companies subject to IVASS control, there is no compulsory periodic examination of insurance and reinsurance companies; however, IVASS tends to prudentially execute verifications, especially in respect of the technical reserves and with respect to the Solvency II requirements.

## 9 Investments

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

Technically, each insurer is free to determine the amount of investment, with the only limitation being in respect of the margin of solvency as dictated by article 44 of the Private Insurance Code. In reality, ISVAP intervened on a precautionary basis and issued Regulation No. 19 of 19 March 2008, which provides different standards for life and non-life insurance companies.

## 10 Change of control

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

All mergers that involve insurance companies operating in Italy are subject to IVASS's prior agreement, but if the merger could end up in a position of market dominance, the Italian Antitrust Authority may also have to give its preliminary authorisation of the operation.

The relevant arrangements and the new memorandum and articles of incorporation are subject to IVASS control.

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 agreement to the operation can only be given after the relevant home supervisory authority has expressed its positive opinion.

In the process of reviewing the merger's relevant arrangements, new memorandum and articles of incorporation, IVASS carries out a limited background investigation on the officers and directors of the acquirer or of the new company to ensure that they all respect the Civil Code provisions or meet the applicable legal requirements.

Moreover, following the enforcement of its Regulation No. 10 of 22 December 2015 concerning the processing of equity investments by or into (re)insurance companies, currently IVASS exercises supervisory powers upon the (re)insurance companies holding. In particular, IVASS can deny the permit or condition to certain circumstances the acquisition if the transaction appears to be contrary to the sound and prudent management of the Italian (re)insurance company or group, or derives a danger to the stability of the same or group.

Subject to prior authorisation are always: acquisition of control or even significant influence in any (re)insurance company or in a financial or credit institution with registered office in a non-EU country. On the contrary, acquisition of control or dominance in a (re)insurance company or in a financial or credit institution with a registered office in Italy must be pre-authorised only in specific circumstances clearly listed in regulation No. 10.

## 11 Financing of an acquisition

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

The sole 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.

## 12 Minority interest

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

No specific regulatory requirements and restrictions exist on investors acquiring a minority interest in an insurance or reinsurance company; they shall comply with the existing anti-money laundering legislation, and provide evidence of their probity and that they are not in breach of any antitrust legislation.

## 13 Foreign ownership

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

There are no restrictions regarding investments in or the acquisition of an insurance or reinsurance company, subject to the fact that the funding of the operation does not breach any anti-money laundering provision or public policy.

## 14 Group supervision and capital requirements

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

IVASS has supervisory power over foreign companies controlled or participated in by companies or holdings and subject to their direct control. Furthermore, IVASS has a residual controlling power over Italian companies that are part of a foreign conglomerate that is subject to an EU regulatory body.

In this scheme, the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company are subject to the normal company law provisions dictated by the Civil Code as integrated in Legislative Decree No. 58 of 24 February 1998 and the implementing regulations issued by the National Commission for Enterprises and the Stock Exchange (Consob, which was established under Law No. 216 of 7 June 1974 and which is an independent administrative authority with legal personality and full autonomy. Consob's activity is directed at investor protection, efficiency, transparency in financial conglomerates and the development of the Italian securities market) on intermediaries, markets and issuers.

Following Regulation No. 10 of 22 December 2015 concerning the processing of equity investments by and within (re)insurance companies and the Legislative Decree 12 May 2015, No. 74 implementing the Directive 2009/138/EC on the taking-up and pursuit of insurance and reinsurance business, IVASS controls that the single company as well as the group to which the former belongs are operating in accordance with the European Insurance and Occupational Pensions Authority (EIOPA) guidelines on the solvency capital requirements and in respect of Solvency II financial requirements. For such purposes, IVASS pursues the health and prudent management of (re)insurance companies, together with Consob, each to the extent of its respective scope of authority, transparency and fairness towards customers.

## 15 Reinsurance agreements

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

At present, the regulatory requirements with respect to agreements for reinsurance ceded and assumed by insurance and reinsurance companies domiciled in Italy are found in EU Directive 2005/68/EC of 16 November 2005 on reinsurance, which modified EU Directives 73/239/EEC and 92/49/EEC as well as 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 aims to implement 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 in particular for:

- 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);
- the procedures for authorising such activities; and
- licensing for companies that have a registered office in Italy and authorisation to conduct reinsurance activities and to carry on such activities in other EU member states under the applicable regulations on freedom of establishment and freedom to provide services.

This regulation has been obligatory for all reinsurers operating in Italian territory since 1 September 2010.

## 16 Ceded reinsurance and retention of risk

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

There are no requirements and restrictions governing the amount of ceded reinsurance; this depends on the reinsured company's capacity, its margin of solvency and other contingent business decisions.

Typically, Italian fronting companies retain at least a minimum percentage of risk between 1 and 5 per cent of the overall risk, but it is not uncommon to have policies reinsured 100 per cent.

## 17 Collateral

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

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. However, collateral might become necessary with a retrocessionaire (reinsurer of a reinsurer) 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 carried on the reinsured company's statutory financial statement.

## 18 Credit for reinsurance

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

Regulatory requirements for cedents to obtain credit for reinsurance on their financial statements has been given by IVASS on the basis of the EIOPA guidelines on the system of prospective evaluation of risks for the Solvency II test (ORSA).

According to these directions, Italian companies shall determine a variation of the solvency margin in light of risks ceded, and they could get facilitations on their financial statements, depending on how they have structured their reinsurance programmes and the rating of their reinsurers, which will 'lighten' the companies' counts for the definition of the solvency margin.

Of particular interest in this respect is the IVASS letter dated 24 March 2015 to the market. In this communication IVASS drew the attention of Italian insurance companies to the EU Delegated Regulation 2015/35 of 10 October 2014, supplementing Directive 2009/38/EC implementing the provisions of Solvency II, which, since 1 January 2016, have direct application at the national level.

## 19 Insolvent and financially troubled companies

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

Chapter IV (articles 245 to 265) of the Private Insurance Code provides for the administrative compulsory winding-up of insolvent or financially troubled insurance and reinsurance companies.

## 20 Claim priority in insolvency

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

There is no priority for claims in an insolvency proceeding against an insurance or reinsurance company, and the claimants participate in the company bankruptcy on an equal footing. The sole exception to this rule is contained in article 1930 of the Civil Code, according to which, in the case of insolvency of the reinsured, the reinsurer shall pay the full indemnity but net of the due premiums and pre-deductions of other receivables.

## 21 Intermediaries

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

The RUI was set up by the Private Insurance Code, implementing Directive 2002/92/EC on Insurance Mediation, and is governed by ISVAP Regulation No. 5 of 16 October 2006. According to such regulations for the protection of consumers, any insurance and reinsurance intermediation activity has been reserved solely to the persons listed in the RUI.

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

- section A for insurance agents;
- section B for brokers;
- section C for direct canvassers of insurance undertakings;

- section D for banks, financial intermediaries as per article 107 of the Consolidated Banking Law, stockbroking houses and the banking division of the Italian Post Office; and
- section E for collaborators with the intermediaries registered under sections A, B and D conducting business outside the premises of such intermediaries.

Recently, just before its dissolution, ISVAP sent the RUI a list of intermediaries having their residence or head office in EU states. This special section contains information on natural persons and companies duly licensed as insurance and reinsurance intermediaries in other EU or EEA states who have also been licensed to pursue insurance mediation in Italy either on freedom of establishment or freedom of services.

Article 182 of the Insurance Code assigns to IVASS the duty to ensure that insurance intermediaries comply with the principles of clarity, recognition, transparency and fairness of advertising and information on the conformity of the insurance contract in advertising and in the pre-contract negotiations (informative note) and in the execution of the insurance contract (policy conditions). In this respect, the former Italian regulator issued Regulation No. 35 of 26 May 2010 providing specifically for the level of information to be provided to the prospective insured, and produced a simplified, standardised information note in order to facilitate an understanding of the products on offer and their comparability.

## Insurance claims and coverage

### 22 Third-party actions

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

No third party has any privity to the insurance contract in cases of liability insurance; thus, third parties have no right of action.

Only in exceptional and very limited cases, when the policyholder or insured entity remains inactive with the risk of having the right to indemnity time-barred, may a third party subrogate itself, according to article 2900 of the Civil Code, into the policyholder or insured rights and claim the insurance coverage.

Further exceptions to the mentioned rule are the special provisions of Law No. 990/69 on Compulsory Motor Accident Insurance and of article 149 of the Private Insurance Code (see Constitutional Court judgment No. 180/2009).

### 23 Late notice of claim

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

Article 1913 of the Civil Code provides that notice must be given within three days of the loss or within three days from the day on which the insured entity received notice of the loss.

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 so as to reflect the prejudice suffered. The onus of proving the prejudice rests with the insurer.

### 24 Wrongful denial of claim

**Is an insurer subject to extracontractual exposure for wrongful denial of a claim?**

No specific sanction is provided for wrongful denial of a claim, but because litigation usually follows, the court might then be entitled to award not only the judiciary interests from the date of the judgment, but from the date in which the indemnity was due to the date of the judgment or to the date of final settlement. In some cases of property insurance, the courts considered it legitimate to award the interests provided for by Legislative Decree No. 231 of 9 October 2002, which, at present, stands at the European Central Bank annual interest rate plus 8 per cent (since 1 January 2014 the interest rate has been 8.25 per cent).

### 25 Defence of claim

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

Article 1917 of the Civil Code on liability insurance contracts provides that a claim made by a third party by way of registered letter or service of a writ of summons that is notified to the liability insurer triggers the latter's duty to defend the claim.

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 degree. The duty to defend also triggers a sub-limit for defence costs, equal at least 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.

### 26 Indemnity policies

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

For all non-liability insurance, the insured event or the loss occurrence triggers the insurer's payment obligations if the insured knew of the event or occurrence, or the insured should have known of the event or occurrence.

### 27 Incontestability period

**Is there an incontestability period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?**

No; an insured entity can always deny liability on misrepresentation in the application or proposal form if it has discovered the non-disclosure after the occurrence of loss.

On the contrary, if the insurer discovers the misrepresentation before any loss occurs, then it has three months to rescind the contract; if the contract is not challenged in time for a declaration of nullity, then any insurer has no right based upon the misrepresentation or non-disclosure in the application or proposal form.

### 28 Punitive damages

**Are punitive damages insurable?**

The Supreme Court of Cassation, in its leading precedent No. 1183 of 19 January 2007 – recently restated in judgment No. 1781 of 8 February 2012 – declared punitive damages alien to the Italian system and therefore contrary to public policy.

Therefore, no insurance can insure punitive or exemplary damages awarded in Italy; however, it is possible to insure in Italy against punitive damages awarded legitimately in other jurisdictions.

### 29 Excess insurer obligations

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

In Italy, the excess insurer usually includes a 'drop-down clause' providing for this specific case. It is notable that, should this provision not be included, the primary limits will be assimilated into an excess and the excess insurer obligation will guarantee only the proportion of the claim exceeding the primary layer limit.

### 30 Self-insurance default

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

When the insured has a self-insured retention or deductible and is insolvent and unable to pay it, the insurer's obligation is to indemnify the loss in accordance with the policy terms and conditions for the amount in excess of the self-insured retention or deductible, unless a drop-down clause providing for this specific case has been expressly negotiated.

### 31 Claim priority

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

The existence of multiple claims under the same policy can have different effects depending on whether the claimant is the same person or there is a more than one claimant.

In the first case, the guarantee will indemnify the oldest claim first, up to the most recent claim, until the policy limit is exhausted.

Whenever there is more than one claimant, all of them are covered by the indemnity policy, which is divided in proportion to the level of each respective claim.

### 32 Allocation of payment

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

In a situation technically defined as indirect co-insurance, each and every insurer will concur on the indemnity in proportion of its policy limit (that is, its share of interest in the risk). In this situation there is no joint and several liability; therefore, the insured should recover the respective indemnity from each of the insurers, but it might also be able to get all the indemnity from one insurer who then will have the right of recourse against the other insurers for their quota shares. If one of the insurers should become insolvent, its quota share shall be divided among all the remaining insurers in proportion to their policy limits.

### 33 Disgorgement or restitution

**Are disgorgement or restitution claims insurable losses?**

Disgorgement or restitution claims are unknown in Italy and, because more often than not such claims are the consequence of a wrongful or wilful conduct, they would be excluded in accordance to article 1901 of the Italian Civil Code, which excludes insurance operativity for any loss or damage caused wilfully by the insured.

### 34 Definition of occurrence

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

A single event resulting in multiple injuries or claims constitutes a plurality of occurrences under an insurance policy, unless the insurance contains a 'claim series clause'. Such clause is usually contained in a product liability insurance policy, and is a provision that takes all product losses related to a given product and contractually classifies them as a single loss.

### 35 Rescission based on misstatements

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

Wilful or gross negligent misrepresentation of a risk can ground the unilateral rescission of the insurance contract in accordance with article 1892 of the Italian Civil Code; the same law provision indicates that wilful or grossly negligent misstatements can ground the claim dismissal if the loss took place before the misstatement is communicated to the insurer and the latter had the opportunity to decide to attack the contract as null and void.

## Reinsurance disputes and arbitration

### 36 Reinsurance disputes

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

In Italy, it was traditional to resolve eventual disputes arising from reinsurance agreement interpretation, execution or breach by negotiation or with the services of a mediator. However, this traditional approach has been abandoned in recent years as arbitration, and especially litigation in court, are occurring more and more frequently.

### 37 Common dispute issues

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

The most commonly disputed issues are the execution of the reinsurance agreement and the method of calculating damages. Good faith issues in 'follow the fortune' contracts as well as misrepresentation of the reinsurance risk have been litigated recently along with statute of limitation and scope of the reinsurance contract disputes.

### 38 Arbitration awards

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

Yes. According to article 823 No. 5 of the Civil Procedure Code, the reason for the decision, even if summarily exposed, is a necessary element of the arbitration award, the omission of which renders the award voidable.

### 39 Power of arbitrators

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

Because arbitration is a private form of justice, arbitrators do not have any powers over non-parties to the arbitration agreement. It should be noted that they have the power, granted to them by article 816-ter of the Civil Procedure Code, to lodge a request with the chair of the competent court to obtain a subpoena to oblige reluctant witnesses to appear in front of the arbitrators and render evidence.

### 40 Appeal of arbitration awards

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

Yes, the losing party can appeal a negative arbitration award according to articles 828 and 829 of the Civil Procedure Code. The appeal is divided into two phases; the first, seeking to vacate the arbitration award, is necessary. The second, on the merit of the controversy, is not, and it takes place only if the arbitration award has been voided.

Judicial confirmation of the arbitration award is necessary only if the arbitration was informal; in fact, the award in this case has an efficacy equivalent to a contract, and the party that does not comply with the arbitration award can be sued for breach of contract and damages.

However, no judicial confirmation of the arbitration award is necessary if the arbitration was formal; according to article 824-bis of the Civil Procedure Code, the award has the same efficacy as a court judgment.

## Reinsurance principles and practices

### 41 Obligation to follow cedent

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

Under general provisions at law, a reinsurer's obligations are determined by the scope and extension of the reinsurance agreement. Therefore, in the absence of an express contractual provision to that effect, a reinsurer has no obligation to follow its cedent's underwriting fortunes and claims payments or settlements.

In practice this is not the case, and it is customary for a reinsurer to follow its cedent's underwriting fortunes despite an express contractual provision to that effect in the reinsurance agreement.

The reinsurer has the right to avoid its obligations under a follow the fortunes clause in very limited cases, notably:

- when the indemnified or settled claim falls outside the scope and limits of the underlying insurance policy;
- when the cedent company did not oppose legitimate and valid defences to the insured, wilfully assuming liability for a claim that was excluded by the underlying policy; and
- in the event of breach of the claim control clause, or in very limited cases of breaching the claim control or cooperation clause.

### 42 Good faith

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

A duty of utmost good faith is implied in reinsurance agreements as in insurance agreements, and it is stricter than the one provided for contracts

**Update and trends**

In 2016, the profitability of Italian non-life insurers should remain stable and continue the positive underwriting performance in non-motor lines characterised by a firmer rates increase. Motor rates will continue to be soft but should still positively offset the higher claim costs, also maintaining this line of insurance on the profitable side.

In contrast, for the past twelve months (and the trend should continue throughout 2016) the Italian life insurance market suffered a contraction with the sales of unit-linked products falling slowly, but steadily, reflecting the volatility of the equity markets and their underperformance.

Italian insurers are expected to perform well and easily meet Solvency II financial requirements. Nonetheless, the negative trend on life insurance and Italian insurers' high exposure to government bonds could affect their credit profiles and change the overall situation. In fact, the unit-linked business generates lower capital exposure to adverse movements in interest rates, equity and credit markets and the Italian insurers might face the risk of being called to some substantial increase in capital to meet the required standards, should the European regulators remove the zero risk weighting for sovereign debt under Solvency II's standard formula.

In June 2015, following the EU Court of Justice decision of 23 April 2015, according to which clauses limiting insurance coverage for payments of mortgage or loan instalments in the event of a borrower's total incapacity fall within the scope of the Unfair Consumer Contract Terms Directive (93/13/EEC), IVASS and Bank of Italy addressed a joint letter to the insurance market identifying critical issues and inviting insurers and brokers to make changes as to how the policy was stipulated, and asking for new clauses in payment protection policies. Therefore, during the year 2016, insurers shall:

- for new contracts adopt questionnaires requiring the proposer to provide a full account of his or her health situation and to list any previous illness. In respect to policies already stipulated and for which a dispute arose in respect of an alleged insured non-disclosure, IVASS and the Bank of Italy recommend insurers to favour the payment of insurance indemnities;
- on the basis of the information provided, verify satisfaction of the conditions of insurability and the suitability of the product to the client's needs;
- revise general terms and conditions, removing clauses that involve reduction of cover, such as an insurance period inconsistent with the term of the loan or the number of payments that should be secured;
- adopt solutions involving a full refund of the premiums and expenses paid if the policies have been purchased by persons that do not meet the subjective requirements for cover, or the policy insurance period was inconsistent with the term of the loan, or the number of payments and the insured is not prepared to pay a higher premium;
- refund the portion of the premium paid but not enjoyed in the event of early repayment of the loan with which the policy is paired, specifying the criteria and methods of calculating this portion in the conditions of the policy;
- eliminate any excessive or unjustified cost; and
- create an internal control structure to supervise the distribution network as well as the brokers' compliance with the instructions provided to them and the marketing of products in respect of the insurer-specific portfolio.

Another recent and extremely important development in respect of insurance law is the binding precedent No. 9140/2016 rendered by the Court of Cassation, Joint Civil Divisions on 6 May 2016. The judgment addressed and resolved the controversial issue of whether claims-made clauses are unfair or not. The solution reached by the Supreme Court is that claims-made insurance policies are fair, and not excessively onerous, therefore valid and enforceable, as they do not limit the insurer's liability, but rather they define the scope of the insurance.

The decision is extremely detailed, but it still leaves some uncertainty where the court noted that such clauses: 'under certain conditions, however, may be held null and void in the absence of interests worthy of protection or in the case of consumers, because it determines a significant imbalance in the rights and obligations under the contract.' In respect of this argument, insurers might question what would be 'interests worthy of protection' or what to do in case of claims-made insurance policies stipulated with consumers. The Supreme Court does not offer any answer to such legitimate queries but a possibility could be to continue to include and list the claims-made clauses among the 'onerous' clauses expressly double approved according to article 1341 of the Italian Civil Code.

in general. In particular, non-disclosure during the negotiation phase has substantial consequences for the validity of the insurance and reinsurance, and the duty of utmost good faith continues to have effect during the execution of the contract, requiring the parties to meet timely terms and comply with warranties and conditions.

### 43 Facultative reinsurance and treaty reinsurance

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

No, both are subject to the same set of laws, namely, the Civil Code and the Private Insurance Code.

From the regulatory perspective, the reinsurance companies undertaking facultative and treaty reinsurance are subject to title VI (articles 62 to 67) of the Private Insurance Code and ISVAP Regulation No. 33 of 10 March 2010, which integrated the provisions of the Private Insurance Code as modified by the adoption of the EU Reinsurance Directive (2005/68/EC).

The framework set forth in article 143 of Regulation No. 33 details and provides for all aspects of the reinsurance practice, from the conduct of reinsurance activities by companies with a registered office in Italy or abroad, to the procedures for authorising such activities and the financial securities that have to be demonstrated and maintained during the conduct of reinsurance activities in Italy or other EU member states, under both the freedom of establishment or the freedom to provide services.

### 44 Third-party action

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

No policyholder or non-signatory to a reinsurance agreement has any privity to the reinsurance contract, and hence has no consequential right of action.

The sole exception to this general rule at law is the existence of a 'cut-through clause' in the reinsurance agreement providing a party not in privity with the reinsurer to have rights against the reinsurer under the reinsurance agreement.

### 45 Insolvent insurer

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

A reinsurer has no duty to pay a policyholder's claim directly unless this is expressly requested by the liquidator or the trustee of the insolvent company, or a 'cut-through' or 'pass-through' clause exists in the reinsurance agreement. Under Italian law, the contractual obligation arising from reinsurance remains between the reinsurer and the cedent company, even if the latter becomes insolvent and subject to a compulsory winding-up procedure.

### 46 Notice and information

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

The type of notice and information a cedent has to provide with respect to an underlying claim depends on whether the reinsurance is a treaty or a facultative reinsurance.

In treaty reinsurance, information is typically limited to the date of loss and the consequent liabilities and attached administrative and adjustment costs all summarised in the bordereaux.

In facultative reinsurance, information depends on whether there is either a claim control clause or a cooperation clause, or neither, and the duty to notify and provide information or data depends on the clause extension.

Within this perspective, the language of a reinsurance contract not only determines the extent of the cedent's obligations but also affects the availability of remedies to the reinsurer.

In general, delaying relevant information might affect the right to recover under the reinsurance agreement, but the delay should constitute a relevant breach of the contract.

### 47 Allocation of underlying claim payments or settlements

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

According to article 1910 of the Civil Code, where there is an underlying loss or claim that triggers multiple policies, with the sole condition that each of the triggered policies is insuring the very same interest, each insurance contributes to the indemnification in proportion to the respective policy limit. In this case, the cedent company cannot allocate the claim or the majority of the loss to just one policy, sparing all the others; all triggered insurances have to contribute in proportion. In this situation, each triggered policy will then activate the facultative applicable reinsurance.

In contrast, in treaty reinsurance it is common to have a 'batch clause' providing that only one excess (or retention) and only one limit applies per loss event, regardless of the number of claims resulting from that underlying loss or claim.

### 48 Review

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

Italian law does not provide for a general right of review with respect to a cedent's claims handling and settlement and allocation decisions; this is why, more often than not, Italian reinsurance agreements have an express contractual provision providing for a right of review and audit.

### 49 Reimbursement of commutation payments

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

Commutations are freely determined; therefore, the liabilities related to these are voluntary obligations that fall outside the scope of reinsurance. Thus, the obligation of a reinsurer to reimburse a cedent for commutation payments is limited to the reinsurer's willingness to support the cedent, and there are no strict obligations by law.

However, when the commutation is made between the reinsurer and the cedent, often as a negotiated way to prevent a dispute, the commutation's terms and conditions are obligatory for the reinsurer and their breaches are a source of damages.

### 50 Extracontractual obligations (ECOs)

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

In Italy, ECOs in general refer to damages awarded by a court against an insurer or reinsurer that are outside the provisions of the insurance policy and that are due to the insurer's bad faith, fraud or gross negligence in the handling of a claim. Typical examples of ECOs are punitive damages and losses in excess of policy limits, which are considered against public policy by the Italian courts. In reality, the courts very recently started to award such damages for frivolous litigation or resistance to legitimate claims in accordance with article 96 of the Civil Procedure Code. In these cases, the reinsurer has a full obligation of indemnifying the cedent for such ECOs.


# Studio Legale Giorgetti

**Alessandro P Giorgetti** **giorgetti@giorgettilex.com**

Via Fontana 28
20122 Milan
Italy

Tel: +39 02 545 7734/+39 02 545 7923
Fax: +39 02 551 8028 2
info@giorgettilex.com
www.giorgettilex.com

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