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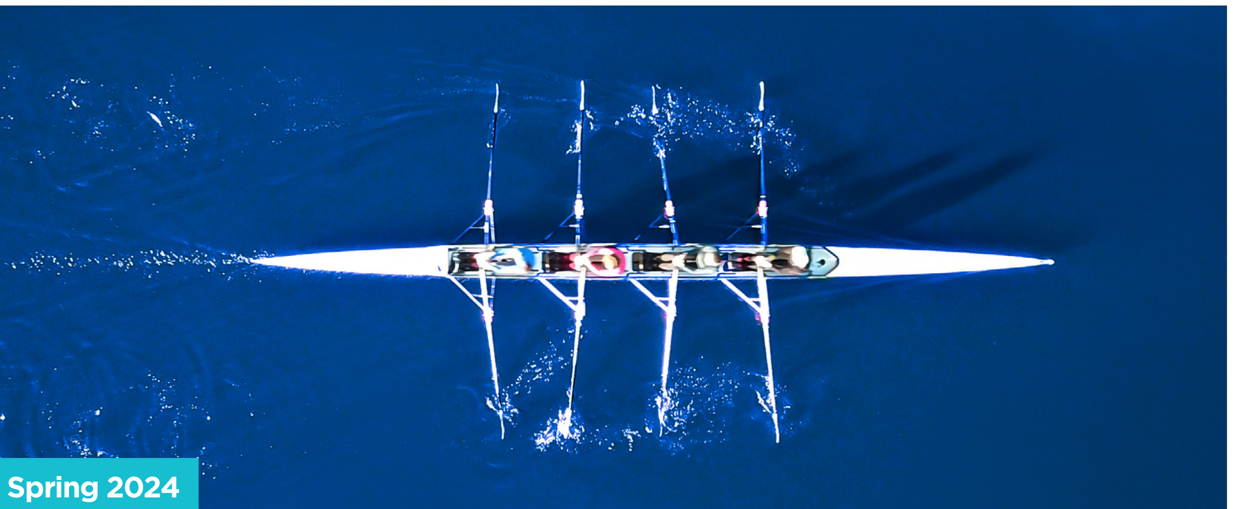

Spring 2024

GUIDELINES ON BROKER LIABILITY: A COMPARATIVE REVIEW

A recent English judgement provides the basis for a review of broker liability in different jurisdictions.

The High Court of England & Wales has recently handed down a judgment, *Infinity Reliance Limited v Heath Crawford Limited [2023] EWHC 3022 (Comm)* that summarises English case law on the duties of insurance brokers.

The facts

The judgment focuses on the duty of brokers to provide advice to their clients when obtaining an insurance policy. The case in question concerns a company that, during a previous insurance period, had purchased an all-risk insurance policy with loss of profit cover. The loss of profit cover had been taken out on a *declaration-linked basis* (cover of this kind allows premium adjustments at the end of each insurance period and is more suited to covering future profits which may be uncertain). The policyholder subsequently changed broker and insurance company and purchased an insurance policy under the traditional *insured sum* basis (where the insurer forecasts the profit for the indemnity period and sets the premium in advance, but the risk of underinsurance is greater). The change in coverwas down to the insured's CFO's decision to reject the declaration-linked system.

By the time the insurance contract was up for renewal, a different CFO was in place. However, the broker did not raise the issue of potentially changing back to a declaration-linked cover. The following year, when the business was already feeling the impact of Covid 19, the insured decided to reduce the insured sum which was calculated using a generic document sent to the insured by the broker on how to calculate the gross profit. This document was misleading and led to the insured purchasing insufficient cover.

After the loss, the underinsurance became apparent, and the insured company sued the broker for negligent advice.

The judgment of the High Court

According to English law, the broker must use "reasonable skill and care in obtaining insurance on the client's behalf". Therefore, a broker must gather sufficient information on the client's business and needs to enable it to make recommendations that will lead the client to make an informed and effective decision regarding coverage. In the judgment, the High Court summarises the most relevant case law that establishes the standards of care expected:

- Taking reasonable steps to understand the client's business and insurance needs.
- Making sure that the client understands the key terms of the cover offered.
- Explaining the advantages and disadvantages of each type of cover if the market offers different types of cover that may meet the client's needs.
- Taking reasonable steps to ensure the client understands the underwriting process and the information they must provide to insurers.

Based on these standards, the judge found that the broker had been negligent in that he should not have assumed that nothing had changed just because it was a renewal. The broker ought to have taken reasonable steps to ensure that, following the change in financial management, the insured's knowledge and understanding of the product were adequate.

To learn more about this ruling and its impact on the English market in more detail, we suggest reading our post High Court provides a reminder of the key principles relevant to broker negligence claims.

Do these principles apply to other legal systems?

Spain

The current Law on Insurance Distribution) in Spain (*Real Decreto-Ley 3/2020*) and previous versions of the same legislation – in 1992 and 2006 – contain practically identical obligations for insurance brokers:

- Informing clients (potential insured) of the terms and conditions that would be convenient for them to subscribe.
- Offering the cover that, according to their professional criteria, best suits the needs of the policyholder.
- Ensuring that the policy meets the requirements for it to be effective.
- Assisting and advising the insured in the process of handling a claim under the policy.

It is therefore evident that the obligations set out in Spanish law and applied by the Spanish courts are very similar to the standards established by English law. Indeed, in 2011, the Provincial Court of Zaragoza (Court of Appeal) delivered a judgment on a case similar to the facts referred to in the English judgment.

A property owners' association had purchased a damage insurance policy through a broker covering water damage. After several years, the insurer included a clause in a particular annuity that excluded cover against water damage caused by plumbing that was not made of copper. When the loss occurred, and the plumbing proved not to have been made of copper, the insurer rejected the claim. The Court held that the broker's professional advice had been negligent as he did not inform the client that the insurer had included the restriction and ordered the broker to pay the cost of the repairs that would otherwise have been borne by the insurer. According to the judgment, the broker ought to have informed the insured of the restriction to coverage, which would have given the insured the possibility of renegotiating the coverage, looking for another insurer, or even accepting the restriction, but by making an informed decision on the matter (Court of Appeal of Zaragoza, Section 5, Judgment no. 95/2011).

As for the broker's obligations of advice and assistance at the time of the claim, the Provincial Court of Valencia has recently ruled on an insured's claim against its insurer and the broker for negligent management of a claim. The case involved a failure to notify the insured of the insurer's refusal to handle the legal defence under a civil liability insurance policy. As a result, the insured was unable to defend itself properly in the claim brought for damage to goods in transit. Given that the insurer had informed the broker that it would not defend the insured shortly after receiving notification of the claim, the Court considered that the broker had been negligent in the performance of its duties to assist with the handling of the claim as it had not duly informed the insured of the insurer's refusal in sufficient time to be able to respond to the lawsuit in good time (Court of Appeal of Valencia, Section 8, Judgment no. 197/2023).

Germany

Under current German Insurance Law insurance brokers must comply with similar obligations as under English Law.

In Germany insurance brokers are generally obliged to provide advice to their clients. According to the Federal Court of Justice (Bundesgerichtshof, "BGH") and the prevailing view in legal literature this even applies after the insurance contract is concluded (BGH, Judgement of 10 March 2016 – I ZR 147/14). In particular, the insurance broker should carry out regular checks and notify the client of any material developments. As mentioned at the end of this section, this obligation to provide ongoing advice can be excluded.

When providing advice, an insurance broker must base his recommendations on professional criteria and must make sure that the recommended insurance policy is suited to meet the needs of the client (Sec. 60 Insurance Contract Act (Versicherungsvertragsgesetz, "VVG").

Regarding the duties of advice, according to Sec. 61 and 62 VVG an insurance broker must:

- ask the client about his wishes and needs;
- advise the client (whereby the time and effort spent providing the advice must be in line with the premium to be paid by the policyholder, ie, the higher the premium the more comprehensive the advice);
- state reasons for each piece of advice given in respect of a particular insurance policy (arguably such reasons may include advantages as well disadvantages); and
- inform the client in a clear and comprehensible written form, which should ensure that the client understands the key terms of the cover offered.

Therefore, also under German Law an insurance broker should take the customer's wishes into due consideration in order to make recommendations that will lead the client to make an informed and effective decision.

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Further, according to the BGH "the obligations of the insurance broker are far-reaching". The BGH concretizes the obligations as follows: the insurance broker must (i) analyze the risk on his own initiative, (ii) inspect the object or matter that is supposed to be covered by the insurance policy in question (in the case that was decided by the BGH, an insured property) and (iii) constantly inform the policyholder as his client immediately and without being asked about the important interim and final results of his efforts to find a suitable policy (BGH, Judgement of 10 March 2016 – I ZR 147/14).

The broker's duties are, however, limited to the specific insurance concern of his customer, ie the risk and insured object in question. Unless otherwise agreed, the insurance broker is not required to conduct a comprehensive review of the customer's existing insurance coverage (OLG Hamm, Judgement of 21 May 2015 – 18 U 132/14).

Similar to the principles set out in the judgment of the High Court, a German insurance broker is obliged to provide ongoing and constant support to the client and must, in particular, check immediately and without being asked whether the existing policy still meets the customer's needs and advise on any changes to the insured risk (BGH, Judgement of 10 March 2016 – I ZR 147/14).

There is an important exception though: German Courts have ruled that an insurance broker is not subject to the aforementioned obligation to provide ongoing advice if he explicitly informs the client about this fact (BGH, Judgement of 28 June 2018 – I ZR 77/17).

France

Insurance brokers' duties under French law are similar to their duties under English law as described above.

Deriving from the 2018 transposition into French law of EU Directive 2016/97 of 20 January 2016 on Insurance Distribution (recast), those duties are also unsurprisingly similar to the duties established by Spanish and German law.

In a nutshell, under French law, insurance brokers must:

a) at all times act honestly, fairly and professionally in accordance with the best interests of the policyholders; any information provided, or communication made by brokers to their clients and prospects must be clear, accurate and not misleading (Article L. 521-1 of the French Insurance Code);

b) prior to the clients' conclusion of any insurance contract:

- provide clients/prospects with certain information including *inter alia* the way they are remunerated and whether they work with insurance companies on an exclusivity basis (Article L. 521-2 of the French Insurance Code);
- based on information obtained from clients/prospects, provide them with a written document setting out the clients/prospects' intentions and needs regarding the contemplated insurance product (Article L. 521-4 of the French Insurance Code). This requires that the brokers ask clients/ prospects for their intentions and needs prior to proposing any insurance products;
- provide clients/prospects with objective information on the proposed insurance products in a comprehensible, accurate and non-misleading form to enable clients/prospects to make an informed decision, taking into account the complexity of the proposed products (Article L. 521-4 of the French Insurance Code);
- recommend to their clients/prospects an insurance product consistent with their intentions and needs and explain the reasons for choosing the proposed product (Article L. 521-4 of the French Insurance Code);

c) once the client has taken out an insurance policy distributed by the broker: assist the client in (i) handling, and adapting as needed, the insurance policy, and (ii) handling indemnification claims when they arise.

Importantly, the duties described in b) above – and perhaps also the duty of assistance described in c), though this point is debated – do not apply when the contracts distributed by the brokers are reinsurance products and large risks insurance products, with large risks being defined in Article L. 111-6 of the French Insurance Code as risks relating to (i) rail, air, sea, lake and river vehicles, (ii) transported goods, (iii) professional credit and collateral transactions, (iv) marine renewable energy installations, and (v) only when the policyholder's business exceeds certain thresholds in terms of revenues and number of employees: fire and natural elements, property damage, general civil liability, miscellaneous pecuniary losses, motorised land vehicles and liability deriving therefrom.

South Africa

Duties of insurance brokers under South African law are largely similar to the United Kingdom, Spain, Germany and France. The law imposes a legislative and common law duty on brokers to act in a specified way.

The Financial Advisory and Intermediary Services Act ("**FAIS Act**") requires insurance brokers to be licensed as a financial services provider and such insurance broker must abide by the duties imposed by the FAIS Act and its accompanying General Code of Conduct ("**GCC**").

The GCC requires insurance brokers to render financial services honestly, fairly, with due skill, care and diligence and in the interests of clients and the integrity of the financial services industry at all times. Some duties imposed by the GCC require insurance brokers to:

- provide a reasonable and appropriate explanation of the nature and material terms of the policy to their client.
- provide the client with concise details of any special terms or conditions, exclusions of liability, restrictions or circumstances in which benefits will not be provided.
- fully inform a client that all material facts must be accurately and properly disclosed and of the possible consequences of the misrepresentation or non- disclosure of a material fact or the inclusion of incorrect information.

Under the common law, a contract of brokerage requires the broker to properly advise his client as to the suitability of the product recommended by the broker. In advising his client, a broker must exercise the degree of care and skill which is ordinarily exercised by reasonably competent members of the profession who have the same rank specialisation. This same standard is required for any other duty the broker may have to perform towards his client.

The duties distilled from the common law and legislation require the insurance broker to:

- act in good faith.
- evaluate the insurance needs of his client and then either recommend or take out appropriate insurance cover.
- advise the client to disclose material information.
- advise the client on the suitability of the product recommended by him.
- take reasonable steps to elicit and convey material information both from and to the insured.
- if the client obtains cover, advise the client promptly on the terms of the cover and any restrictive terms and conditions.

Importantly a broker's duty is only discharged when he has done everything reasonably necessary to draw the attention of the insured to obligations imposed by the policy.

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Preparing for a rainy day: Mandatory insurance coverage against climate damage in Italy

Italy's new Budget Law 2024 (see Law No. 213 of 30 December 2023, the "Law") introduced mandatory climate damage insurance policies for registered companies headquartered in Italy and companies with registered offices abroad with a permanent establishment in Italy.

Background: Climate risk and insurance in Italy

This new government measure is the result of a protracted and heated debate on the allocation of risk to damage caused by natural disasters between the private and public sectors. Furthermore, those risks been exacerbated as a result of the increased impact of global climate change, the particular exposure of Italian territory to natural disasters and the low degree of insurance coverage against damage in the Italian system, all of which ultimately creates a significant gap between damage suffered and damage insured.

That gap is even greater in the case of private homes. Even though more than 80% of private homes are in a position of medium to high risk, only 5% of private homes are insured against climate damage. As for the business sector, the level of insured coverage is directly proportional to the number of employees in a company: from 5% in the case of micro-companies (<10 employees) to 78% in the case of large companies (>250 employees).

According to Legambiente's Climate City Observatory, there has been a 135% increase in extreme climate events between 2022 and 2023. Italy's central location and environmental features make it particularly vulnerable to natural disasters. However, historically the country has low levels of insurance coverage against climate damage, much like some Eastern European countries.

The new regulations

By 31 December 2024, every company subject to the obligation to register with the Italian Register of Companies that either has its headquarters or a permanent establishment in Italy is required to purchase insurance to cover against damage to real property, in particular land, buildings, plants, machinery and equipment, directly caused by natural disasters and catastrophic events, including earthquakes, floods, landslides, floods and overflows, without there being a need for the event in question to be declared a state of emergency.

From the text of the provision, it is possible to define the scope of the obligation; (i) it only relates to companies (ie, business premises, thus excluding private homes); (ii) it does not extend to agricultural companies (which are not subject to the registration requirement); (iii) does not include damage caused by windstorms (even though the latter was included by the EIOPA in the list of climate-related risks); and (iv) only covers real property and industrial fixtures, (excluding so-called current assets, such as stocks and the like).

A two-way obligation is established: while companies must purchase insurance, in turn, insurance companies must offer appropriate policies. For the same reason, the Law also provides two sets of sanctions in the event of non-compliance. On the one hand, if companies fail to fulfil their obligation, this will be considered as a negative factor when applying for grants, subsidies, or in the case of economic benefits, particularly those provided in response to extreme adverse weather events. On the other hand, as insurance companies have an obligation to issue insurance policies, either by bearing the entire risk directly, via co-insurance, or as a part of a consortium of several companies, any failure to do so will lead to administrative pecuniary penalties ranging from €100,000 to €500,000.

As is common in Italy, the Law only sets out the main provisions and obligations, leaving the specific measures to the Minister of Economy and Finance and the Minister of Business and Made in Italy. The new Budget Law only provides a maximum percentage of deductible that a policyholder can bear, which cannot exceed 15% of the damage suffered by the company.

As for the measures to implement the Law, the Ministers will have to (promptly) issue the proper decrees to define the essential elements, particularly the criteria to both identify the climate events eligible for compensation and to set the insurance premium and its adjustment.

Conclusion

From a voluntary insurance market (where the policyholder had discretion as to whether to engage insurance cover) and following the advice of the European Union, Italy has now adopted a compulsory insurance market structure (where the policyholder is legally obliged to take out insurance).

Only a few weeks have passed since the approval of the new Italian Budget Law and it will be interesting to see how it will be implemented, the limitations and safeguards that will be provided, and how, in the broader picture, this new mandatory requirement will affect the market and the investment in climate change prevention and mitigation.

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Difficult times for life insurance run-Off in the EU? What the failed deal between Viridium and Zurich in Germany means for the market

On 30 January 2024, German run-off specialist Viridium and Zurich Germany announced in separate press releases that the planned takeover of 720,000 German life insurance policies from Zurich by Viridium had been cancelled. These policies are "traditional" life insurance policies backed by guarantees which are "in run-off", meaning that this type of policy is longer sold by Zurich Germany. With a portfolio value of approx. EUR 20 billion this would have been the biggest life insurance run-off transaction in the German market.

There is little official information, but it seems that German regulator BaFin has signalled to Viridium that they would not approve the transaction due to Viridium's current ownership structure. Viridium is at 70% owned by London-based private equity firm Cinven. Cinven was also the owner of the Italian life insurer Eurovita which collapsed in 2023 following significant policyholder redemptions. The Italian regulator IVASS had requested Cinven to provide EUR 400 million of additional capital to Eurovita which Cinven had initially refused. Cinven finally provided EUR 100 million, but Eurovita had to be dissolved and its policy portfolio distributed among the five biggest Italian life insurers.

In Germany, the transfer of run-off policies like those in the Viridium Zurich deal can be carried out in two different ways: either by directly transferring the policies and related assets (so-called "portfolio transfer", which is an asset deal from a corporate law perspective) or by selling the shares in the company holding the policies and related assets (by way of a share deal from a corporate law perspective). For both options, the German regulator BaFin needs to be involved. For a portfolio transfer (asset deal), BaFin's approval is required to transfer the policies to the acquiring run-off provider (section 13 of the German Insurance Supervisory Act (VAG)). This approval replaces the individual consent of the policyholders which would in practice be very difficult or even impossible to obtain. In a share deal, BaFin needs to be notified by acquirer prior to the transaction and can object to the transaction within a certain time frame if it considers that the acquirer is not sufficiently reliable, experienced, or financially solid (sections 17,18 VAG).

Interestingly, the Viridium Zurich deal included both options since Zurich Germany had first spun off the policies and related assets into a newly founded company, Zurich Life Legacy, by way of a portfolio transfer (asset deal). In a second step, Zurich Germany intended to transfer the shares in Zurich Life Legacy to Viridium by way of a share deal. BaFin had approved the portfolio transfer to Zurich Life Legacy in the first step. This shows that BaFin was not generally opposed to Zurich Germany transferring the policies to a third party. However, the chosen acquirer Viridium (which had been selected by Zurich Germany in an auction process involving several run-off specialists) failed to pass BaFin's scrutiny in the ownership control procedure.

By the letter of the law, BaFin should have formally objected to the acquisition of ownership in Zurich Life Legacy by Viridium (in line with section 18 VAG). However, BaFin has chosen to take a more subtle approach by informing Viridium that BaFin would object to the transaction should Viridium continue with the ownership control procedure. In doing so, BaFin saved itself from having to write a reasoned formal decision able to withstand scrutiny in court. BaFin has also saved Viridium from receiving a formal objection. However, due to the ripple the sudden end of the deal has caused in the insurance market, this may not make a big difference for Viridium.

BaFin's position reflects the increasing scrutiny applied by regulators to private equity-backed run-off providers, evidenced eg, by EIOPA's Supervisory Statement on the Supervision of Run-Off Undertakings published on 7 April 2022 (2022 Supervisory Statement) and a recent Global Financial Stability Note published by the International Monetary Fund on Private Equity and Life Insurers in December 2023 (2023 IMF Note).

In its 2022 Supervisory Statement, EIOPA describes the main elements that differentiate private equity run-off investors from other players in the market and the concerns which these may cause:

- Private equity investors usually have a shorter investment horizon (typically 10 to 15 years) than more traditional shareholders which may prompt them to pull capital out of the insurer.
- Private equity investors tend to increase shareholder returns by making changes to the insurer's operations in relation to the (i) asset allocation to increase investment returns; (ii) operations to reduce the cost base; (iii) methodology and/or assumptions for the valuation of technical provisions to reduce the amount of provisions required; and (iv) methodology and underlying assumptions for the calculation of capital requirements to reduce such capital requirements. All of these approaches may, if not performed properly, lead to additional operational challenges, risks and negative impacts for policyholders.
- Private equity investors often use complex group structures supervised in different countries by different regulators. This makes it difficult for individual regulators to assess the impact of ownership shifts and changes in the outsourcing environment.

EIOPA recommends to regulators to closely monitor and assess each of these elements. Particular attention should be paid to the track record of the private equity investor and the consequences of an early withdrawal from the investment – which is exactly what BaFin seems to have done with regard to the Viridium Zurich deal in light of the Eurovita collapse.

The growing role of private equity investors in life insurance is not a purely European phenomenon, as evidenced by the 2023 IMF Note which describes similar concerns and challenges with a specific focus on the US insurance market. The IMF experts outline the various forms of private equity involvement in life insurance which can range from investment to strategic alliances in asset management and reinsurance solutions. In contrast, EIOPA only focuses on investment in its 2022 Supervisory Statement. The 2023 IMF Note recognizes that private equity investors often use the insurers' asset base to manage and derive fee income, with a focus on the illiquid asset classes in which private equity investors have strong experience (private credit, structured credit, real estate, private equity). This leads to private equity-backed life insurers having fewer liquid investments and being more exposed to risks resulting from interest rate increases and the associated corporate defaults and credit downgrades. The 2023 IMF Note also points out that private equity investors may use regulatory arbitrage to achieve the most favourable regulatory conditions for the supervision of their insurance groups and their reinsurance business.

While European regulators have been eyeing the increasing stake of private equity firms in the run-off market critically, the Viridium Zurich deal is the first deal which has failed to pass the regulator at such a late stage. However, regulators continue to emphasize the benefits of properly and fairly managed run-off transactions for the transferring life insurer, such as capital allocation to more profitable business, reduction of costs and business complexity and mitigation of risks for new policyholders. The sale of run-off portfolios to specialist providers will therefore remain a viable business alternative. Insurers should however be aware that private equity-backed run-off providers will be subject to additional scrutiny and that incidents like the Eurovita collapse will be noticed and assessed by all European regulators. At the same time, it may be difficult to avoid private equity-backed run-off providers altogether since many of Viridium's competitors on the European life insurance market have some private equity involvement.

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Legal news & case law

Spain

New authority for the protection of financial customers

The Spanish Council of Ministers has agreed to process an urgent Draft Bill to establish an Independent Administrative Authority to Protect Financial Customers. The draft law aims to establish a single authority to handle complaints filed by financial services customers, including policyholders, insured parties and beneficiaries. Currently, these complaints are processed separately by the authority that supervises their respective markets (Banking, Securities, and Insurance).

The purpose of the new Authority is to promote out-of-court dispute resolution. An important new feature is that the Authority's decisions on breaches of rules of transparency and protection of customers and unfair terms will be binding where the amount of the complaint is less than €20,000. If the decision is favourable to the customer, the financial entity must comply within 30 days. Non-compliance will result in an administrative sanction. The decision of the Authority can be appealed against before the civil courts if the customer or the financial entity involved in the conflict disagree with its content.

If a non-binding decision is delivered that is favourable to the customer, the financial entity must within 30 days notify whether it accepts the decision. If they refuse to accept the decision, they must provide with the reasons why. The decision in these cases is final and not subject to appeal. However, such a decision will be considered as an expert report in any subsequent litigation on the dispute.

The following insurance issues fall outside the jurisdiction of the Authority: (i) claims related to insurance contracts covering large risk, except for marine, lake and river vehicle insurance when the policyholder or the insured is a consumer; and (ii) disputes the resolution of which necessarily requires the assessment of experts with specialised knowledge in a field other than transparency and customer protection regulations or good financial practices and customs. Therefore, any complaint where an adjuster opinion is necessary will fall outside the Authority's scope.

The new Authority will be funded partly from fees charged to financial entities for managing complaints. Those fees will be determined based on two factors: the first is the number of complaints lodged against each entity, which will make up 40% of the fee; and the remaining 60% will be based on the percentage of complaints resolved in favour of the customer.

Dubai

New insurance law comes into force

On 30 November 2023, Federal Decree-Law No. 48/2023 on the Regulation of Insurance Activities (the "UAE Insurance Law") came into force. The UAE Insurance Law applies to companies and insurance related professions, as well as holding companies that control or acquire 15% of the volume of insurance activity in the UAE or whose insurance activity and related services account for more than 50% of their revenues.

Under Article 101 of the UAE Insurance Law, insurance companies and re-insurance companies are obliged to issue a decision on any insurance claims, in accordance with the Rulebook of Professional conduct and Ethics and must provide written reasons if an insurance claim is rejected in whole or in part. Should an insured dispute the conclusion of the insurance/re-insurance company, it may submit a complaint to a committee of the Banking and Insurance Disputes Resolution Unit (the "BIDRU"), which is tasked with settling disputes arising from insurance contracts, business, and services. The insurance/re-insurance company may not appeal a decision of the BIDRU committee where the value in dispute does not exceed AED 50,000. Where the value exceeds AED 50,000, the decision may be appealed within 30 days to the Court of Appeal.

Pursuant to Article 104 of the UAE Insurance Law, the Central Bank may intervene in any lawsuit filed with the judicial authorities in which an insurance/re-insurance company or an insurance-related profession is a party. There is also an obligation on the entities falling within the scope of the UAE Insurance Law to notify the Central Bank of any investigations or proceedings initiated against any insurance/re-insurance company or insurance-related profession.

The UAE Insurance Law is a welcome development in the UAE, enhancing the regulatory framework for insurance related matters and providing additional transparency, protection, and support to insureds.

Italy

Expansion of the meaning of "due diligence" for policyholders?

An Italian Court of First Instance has found that parking a vehicle close to waste containers in summer does not comply with the ordinary concept of due diligence, rather, doing so constitutes gross negligence pursuant to Article 1900 of the Italian Civil Code, provided that the parker is already aware that the waste containers in question have been the subject of provoked fires in the past. The Court found that the vehicle, had it been parked elsewhere, would not have been involved in the fire and therefore declined the indemnity request filed by the fire policyholder (Court of Termini Imerese, decision dated 28 April 2023, n. 528).

In particular, the policyholder brought litigation against its insurer seeking indemnification pursuant to the "fire – special events" policy, with reference to a fire that destroyed his five go-karts and other goods. The insurer rejected the applicability of the policy claiming that the policyholder acted with gross negligence considered that the vehicles were parked close to waste containers that were full of garbage that posed a fire risk. The Court accepted the insurer's arguments, acknowledging the exclusion of damage due to the policyholder's gross negligence on the basis that the vehicles were parked close to waste containers that had in the past been the subject of intentional fires. The decision was based on Article 1900 of the Italian Civil Code, pursuant to which "the insurer is not liable for damages caused by wilful misconduct or gross negligence of the policyholder".

This decision is interesting as it expands a policyholder's "due diligence" obligation to the assessment of potential adverse effects resulting from previous known events concerning specific subjects or places (eg intentional fires in waste containers). As Italian law establishes that gross negligence can be found only when there is a failure to observe "the ordinary care and due diligence that a prudent man would exercise", the decision of the Court of Termini Imerese appears to put a greater burden on policyholders as they cannot merely rely on general experience and common sense; rather, they should also conduct research into and assessments of previous known events that, under normal conditions, would not have an impact on ordinary care.

Spain

When is a product manufactured and distributed by companies in the same group considered to have been put into circulation?

The case concerns a plaintiff who filed a lawsuit against the distributor of a faulty hip prosthesis. The distributor argued that it was not the manufacturer, and, in any event, the product had been in circulation for 10 years. During the out-of-court complaint phase, the distributor had not informed the plaintiff that it was not the manufacturer and only identified the latter after the lawsuit had been filed. Therefore, The Court of Appeal accepted the claim against the distributor but dismissed the case due to the expiration of the ten- years statute of limitation since the product had first gone to market.

An appeal was lodged with the Spanish Supreme Court and raises the question of how to calculate the period in question. The Supreme Court notes that Spanish legislation has not defined the term "putting into circulation," but the CJEU has done so. The concept must be interpreted strictly and connected to the fact that the product has left the manufacturer's control. In cases such as this, where the manufacturer and the distributor are part of the same group, the CJEU has established that the national court may determine the extent of the links between producer and distributor to decide on the case.

The Supreme Court held the distributor liable for not having identified the actual manufacturer before the start of judicial proceedings. And it believes that, in that circumstance, the period should be calculated from when the product left the distributor's 'sphere of control by handing it over to another distributor or directly to the consumer. Hence, the Supreme Court found that the action had not been time-barred.

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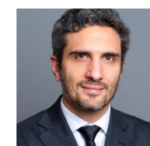

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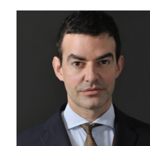

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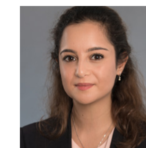

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