DLA PIPER

APRIL 2014

INSURANCE AND REINSURANCE NEWSLETTER

ITALY

1. IVASS (ITALIAN INSURANCE SUPERVISORY AUTHORITY) – NEW REGULATIONS ON COMPLAINTS MANAGEMENT

On 1 April 2014, the draft measure containing amendments to ISVAP (former Italian Insurance Supervisory Authority) regulation no. 24 dated 19 May 2008 on complaints handling was published on the IVASS website.

The accompanying report to the draft measure explains that the new provisions contained therein are necessary following the approval by **EIOPA** of its ***Guidelines on Complaints Handling by Insurance Undertakings***.

Based upon those guidelines, national supervisory authorities are required to ensure compliance by insurance undertakings with seven principles, namely:

i. definition of a complaints management policy;

ii. institution of a complaints management function;

iii. appropriate registration of complaints received;

iv. reporting to the supervisory authority;

v. analysis of data on complaints, with a view to identifying and solving recurring or systemic problems;

vi. adequate information to consumers (for example, by publishing in brochures or on websites the description of the complaints-handling process) and individual complainants (for example, by offering them the possibility of contacting alternative dispute resolution organisations or the supervisory authority, in addition to the courts, where the complaint is rejected);

vii. definition of an adequate procedure to ensure that responses to complaints are provided in accordance with criteria of validity of the information gathered, that it is communicated in plain language and in compliance with the set time limits, and that a thorough explanation of the insurance intermediary's position is provided.

The main changes introduced by the draft measure in question are as follows:

– the definition of "complaint" has been altered in order to clarify that simple requests for information or requests for contract implementation or damage compensation do not constitute complaints;

– **the scope of application of the Regulation has been extended to EU insurance undertakings operating in Italy on a permanent basis and by way of freedom to provide services;**

– the following further obligations have been introduced:

(i) the definition of the **complaints handling policy** – to be regularly reviewed by the administrative body – based upon the fair treatment of policyholders, beneficiaries and injured parties;

(ii) the adoption of **procedures that allow for the identification of business products and processes most affected by complaints** as well as identification of the causes at the root of those complaints, also with a view to checking that they do not impact upon other business products or processes;

(iii) the adoption of the necessary **corrective actions** in the case of criticalities;

– the periodic report on complaints handling prepared by Internal Auditing – to be submitted to the administrative body of the company and to be sent periodically to IVASS – must contain an analysis of the issues that have given rise to complaints and the proposal of corrective actions;

– the language used by undertakings in communications with the complainant must be plain and easily understandable. Where the complaint is not accepted or is only partially accepted, the undertaking must provide a thorough explanation of its position, providing information in relation to the possibility of contacting IVASS or alternative dispute resolution systems, as well as the judicial authority.

Any observations, comments and proposals may be sent to IVASS by 30 April 2014

2. IVASS – NON-LIFE INSURANCE – SIMPLIFICATION OF PROCEDURES AND REQUIREMENTS

On 18 March 2014, the draft regulation concerning the definition of measures to simplify the procedures and requirements in contractual relationships between insurance undertakings, intermediaries and customers was published on the IVASS website.

The draft measure implements Article 22, Paragraph 15*bis*, of Italian Decree Law 18 October 2012, no. 179 laying down *"Further urgent measures for the growth of the Country*" converted, with amendments, into Law no. 221 of 17 December 2012.

That rule provides that, for the non-life insurance sector alone, IVASS deals with defining the measures aimed at **reducing paperwork requirements in contractual relationships between insurance undertakings, intermediaries and customers**, also favouring the use of digital tools, certified e-mail, digital signature and electronic and online payments.

The provisions contained in the draft measure are intended to amend Regulations no. 5 (in relation to insurance intermediation); no. 34 (in relation to distance sales of insurance products) and no. 35 (in relation to reporting obligations).

They are applied to insurance contracts for the cover of **risks located in the Italian territory**, except where that positioning of the contract occurs by way of distance communication techniques (in that case, the provisions contained in ISVAP Regulation no. 34 of 2010 shall apply).

It is worth noting (amongst the other provisions) the provisions noted below:

– Article 7, concerning the **methods for acquiring from the policyholder consent to use e-mail** for sending documentation;

– Article 13, which requires that form no. **7B**, containing general information on the intermediary, on situations of potential conflict of interest and on the means of protection of the policyholder, **must be provided to the customer only once**, irrespective of the number of contracts entered into by the latter and subject to no changes having been made to the data contained therein.

– Article 15, which introduces the "**summary sheet**" outline. This is a new document aimed at providing to the policyholder immediately useable information on the characteristics, warranties and costs of the contract. The new outline is added to the content of the information booklet.

3. "BIOLOGICAL" DAMAGE TABLES APPROVED BY THE COURT OF ROME FOR THE YEAR 2014

The "biological" damage tables for the year 2014 have been approved by the Court of Rome. The process for updating the standards required for the payment of compensation to accident victims has recently concluded. The update is made on the basis of the ISTAT (Italian Statistical Institute) increase for the year 2013 applied to the values of the year 2013. It is applied to all compensation for which Law 57/2001 or Articles 138 and 139 of the Private Insurance Code do not explicitly apply and in the other cases provided by law (Article 3, Paragraph 3, of the Balduzzi Decree – Decree Law 158/12, converted by Law 189/12).

4. *CLAIM MADE* POLICIES – RETROACTIVITY PERIOD

By ruling no. 3622 filed on 17 February, the Court of Cassation dealt with the specific issue of the validity of *claim made* policies where – as in the majority of cases – they also provide cover for claims made against the insured during the policy period but relating to wrongful actions committed before the effective date of that policy (**retroactivity period**).

According to the Court of Cassation "*…the claim made clause involves the possible time lag between the performance of the insurer (obligation to provide compensation in relation to the risk of occurrence of certain events) and the counter-performance of the insured (payment of the premium), in the sense that the insured's conduct prior to the date of concluding the contract may be covered by the insurance, where the compensation claim for damage is made for the first time after that date, as in the case in question; vice versa, the insured's conduct during the full force and validity of the policy may not be covered by the warranty, where the compensation claim for damages is brought after termination of the effects of the contract …*".

The Court of Appeal deemed ineffective the clause in question based upon the deemed absence of risk (which is an essential requirement of the insurance contract).

However, according to the Court of Cassation, the Court of Appeal erred in deeming the risk to be non-existent. Indeed, in the case of the policy in question **the risk consists of the possibility that the insured has made wrongful actions in the past "*albeit not yet being aware of its unlawfulness or likelihood to cause damage*** *...and the motivation of the Court of Appeal is therefore to be deemed incongruous, where it felt it had to exclude the existence of the risk with reference to events that had already occurred.* ***The risk does not concern past conduct in its material nature, but the awareness by the insured of their wrongful actions and their likelihood to cause damage to third parties.*** *Secondly, it is not said that any wrongful actions induces the injured party to bring a claim for compensation for damages. Secondly, contracts containing the claim made clause usually limit the retroactive period to no more than two or three years prior to the signature of the policy, as well as to cases in which the insured is not aware of the previous offence, the related harmful effects and the intention of the injured party to bring action for compensation, keeping in place, in the absence thereof, the possibility of charging against the insured liability and the effects of inaccurate or reticent declarations, in accordance with Articles 1892 and 1893 of the Italian Civil Code (see, precisely with reference to a claim made clause, Civil Cassation, Section 3, 22 March 2013 no. 7273)….*".

5. FOR OICRS, THE RESTYLING IS NOW LAW

The new regulation of GEFIAs (Alternative Investment Fund Managers) has been enacted following publication in the Official Gazette of the Italian Republic dated 25 March 2014 of Italian Legislative Decree no. 44/2014.

The Decree introduces into the Consolidated Finance Law the new statutory/regulatory provisions in relation to alternative collective investment undertakings and the coordinating tax rules.

One of the most important innovations is represented by the SICAFs (collective investment companies with fixed capital) defined as OICRs in the form of *società per azioni* (joint stock companies) with fixed capital, with registered headquarters and general management in Italy, having as their exclusive objective the collective investment of funds raised by way of the offer of own shares and other financial instruments.

By virtue of the new provisions, some entities currently positioned among the corporate bodies of common law may be attracted as SICAFs in the regulation of OICRs, with consequent application of the tax rules provided for SICAFs by Italian Legislative Decree no. 84/1992.

6. FOR INSOLVENCY IN INSURANCE COMPANIES, THE VIEW OF BANKRUPTCY EXPERTS IS NO LONGER SUFFICIENT

In order to assess whether or not an insurance company is in a state of insolvency, the yardstick to be used is not the same as for any other enterprise.

The fact that an insurance undertaking, owing to the inadequacy of its provisioned reserves, is forced to pay compensation using liquidity originating from the premiums collected (which should be used to cover risks not yet matured) may well constitute – regardless of whether such conduct qualifies as seriously irregular in terms of management – a clear indicator of its incapacity to fulfil properly, or by normal means, its obligations.

This is the view of the Court of Cassation (Civil Section I dated 27 January 2014 no. 1645) which dismissed the appeal aimed at rejecting the claim for declaration of insolvency, denouncing the breach and misapplication of Articles 5 and 202 of the Bankruptcy Law as well as the special regulations in relation to insurance, as the lower Court had based its ruling upon purely accounting details

(solvency margin, guarantee fund, technical reserves) and on the capital deficit only resulting from the financial statements without considering the substantial goodwill realisable, in theory, by way of the sale of the customer portfolio, or the real estate capital gains.

7. CASES IN WHICH A FOREIGN COUNTRY IS A PARTY: YES, BUT NOT EVERYWHERE

Since 22 February last, disputes in which a company based abroad is a party, even if it has a branch within the Italian territory, and which are, *ratione materiae*, under the jurisdiction of the specialist sections in relation to companies (Art. 3 of Italian Legislative Decree dated 27 June 2003 no. 168) may only be brought before the specialist sections constituted at the following judicial departments: Bari, Cagliari, Catania, Genoa, Milan, Naples, Rome, Turin, Venice, Trento and Bolzano.

This is due to: (i) the entry into force of Art. 10, Paragraph 1, Letter "b" of Italian Decree Law "Destination Italy" (no. 145/2013, converted into Law no. 9/2014), which amended Italian Legislative Decree no. 168/2003, instituting the specialist sections in relation to industrial and intellectual property and (ii) Italian Decree Law 24/1/2012 no. 1 on the specialist sections in relation to companies.

The criteria of jurisdiction set out above are applied where the company based abroad is the claimant or defendant. It is more difficult to understand if the action in warranty or the voluntary intervention of the foreign company causes a shift in jurisdiction.

KEY CONTACTS

Francesco Cerasi
Partner – Rome
T +39 06 688801
francesco.cerasi@dlapiper.com

Bruno Giuffrè
Partner – Milan
T +39 02 806181
bruno.giuffre@dlapiper.com

David Marino
Partner – Milan
T +39 02 806181
david.marino@dlapiper.com

OTHER CONTACTS

Mauro Carretta
Senior Associate – Milan
mauro.carretta@dlapiper.com

Marco Dimola
Senior Associate – Milan
marco.dimola@dlapiper.com

Sara Sparagna
Associate – Rome
sara.sparagna@dlapiper.com

Karin Tayel
Associate – Milan
karin.tayel@dlapiper.com

If you would like further information, please e-mail daniela.marinaro@dlapiper.com.

@DLA_Piper_Italy

www.dlapiper.com