



# ICLG

The International Comparative Legal Guide to:

## Insurance & Reinsurance 2014

**3rd Edition**

A practical cross-border insight into insurance and reinsurance law

Published by Global Legal Group, with contributions from:

AlixPartners

Anderson Mōri & Tomotsune

Attorneys at Law Borenus Ltd

Bedell Cristin

Blaney McMurtry LLP

Cabinet BOPS

Chalfin, Goldberg, Vainboim & Fichtner Advogados Associados

Clyde & Co LLP

Clyde & Co LLP and associate CIS Advocates

Creel, García-Cuéllar, Aiza y Enríquez, S.C.

DAC Beachcroft SLPU

DAC Beachcroft Colombia Abogados SAS

Debarliev, Dameski & Kelesoska Attorneys at Law

Erçin Bilgin Bektaşoğlu Law Firm

gbf Attorneys-at-law

JŠK, advokátní kancelář, s.r.o.

KALO & ASSOCIATES

Morton Fraser LLP

Oppenhoff & Partner Rechtsanwälte Steuerberater mbB

Osterling Abogados

Rose-Marie Lundström Advokat AB

Russell McVeagh

Sahurie & Asociados

Studio Legale Giorgetti

Tuli & Co

Wotton + Kearney

# GLG

Global Legal Group

## Contributing Editors

Jon Turnbull & Geraldine Quirk, Clyde & Co LLP

## Account Managers

Edmond Atta, Beth Bassett, Maksim Dolgusev, Dror Levy, Maria Lopez, Florjan Osmani, Oliver Smith, Rory Smith

## Sales Support Manager

Toni Wyatt

## Sub Editors

Nicholas Catlin  
Amy Hirst

## Editors

Beatriz Arroyo  
Gemma Bridge

## Senior Editor

Suzie Kidd

## Group Consulting Editor

Alan Falach

## Group Publisher

Richard Firth

## Published by

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

## GLG Cover Design

F&F Studio Design

## GLG Cover Image Source

iStockphoto

## Printed by

Ashford Colour Press Ltd  
February 2014

Copyright © 2014

Global Legal Group Ltd.

All rights reserved

No photocopying

ISBN 978-1-908070-88-3

ISSN 2048-6871

## Strategic Partners



## General Chapters:

1	<b>The Jackson Reforms in England and Wales and the Insurance Industry</b> – Jon Turnbull & Michelle Radom, Clyde & Co LLP	1
2	<b>An Economic Perspective on EU and UK Competition Policy in the Insurance Sector</b> – Mat Hughes & Pablo Florian, AlixPartners	6
3	<b>Data Risk, Privacy Breach and Insurance Coverage in Canada</b> – Lori D. Mountford & David R. Mackenzie, Blaney McMurtry LLP	12
4	<b>New Framework for Insurance and Surety in Mexico</b> – Leonel Perezniето del Prado, Creel, García-Cuéllar, Aiza y Enríquez, S.C.	20

## Country Question and Answer Chapters:

5	<b>Albania</b>	KALO & ASSOCIATES: Aigest Milo	24
6	<b>Australia</b>	Wotton + Kearney: David Kearney & Adam Chylek	28
7	<b>Brazil</b>	Chalfin, Goldberg, Vainboim & Fichtner Advogados Associados: Ilan Goldberg & Pedro Bacellar	35
8	<b>Canada</b>	Clyde & Co Canada LLP: Roderic McLauchlan & Nathalie David	42
9	<b>Chile</b>	Sahurie & Asociados: Emilio Sahurie & Julián Ortiz	48
10	<b>Colombia</b>	DAC Beachcroft Colombia Abogados SAS: Gabriela Monroy Torres & Camila de la Torre Blanche	53
11	<b>Czech Republic</b>	JŠK, advokátní kancelář, s.r.o.: Eva Nováková & František Čech	59
12	<b>England &amp; Wales</b>	Clyde & Co LLP: Jon Turnbull & Geraldine Quirk	65
13	<b>Finland</b>	Attorneys at Law Borenus Ltd: Ulla von Weissenberg	73
14	<b>France</b>	Cabinet BOPS: Pascal Ormen & Alexis Valençon	78
15	<b>Germany</b>	Oppenhoff & Partner Rechtsanwälte Steuerberater mbB: Dr. Peter Etbach, LL.M. & Christoph Appel	84
16	<b>Guernsey</b>	Bedell Cristin: Mark Helyar	90
17	<b>India</b>	Tuli & Co: Neeraj Tuli & Celia Jenkins	95
18	<b>Italy</b>	Studio Legale Giorgetti: Avv. Alessandro P. Giorgetti	101
19	<b>Japan</b>	Anderson Mōri & Tomotsune: Tomoki Debari & Tomoyuki Tanaka	107
20	<b>Kosovo</b>	KALO & ASSOCIATES: Atthe Dika & Vegim Kraja	112
21	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska Attorneys at Law: Elena Miceva & Dragan Dameski	117
22	<b>Mexico</b>	Creel, García-Cuéllar, Aiza y Enríquez, S.C.: Leonel Perezniето del Prado	123
23	<b>New Zealand</b>	Russell McVeagh: Sarah Armstrong & Caroline Laband	127
24	<b>Peru</b>	Osterling Abogados: Enrique Ferrando Gamarra & Marco Rivera Noya	133
25	<b>Russia</b>	Clyde & Co LLP and associate CIS Advocates: Máire Ní Aodha & Polina Kondratyuk	138
26	<b>Scotland</b>	Morton Fraser LLP: Jenny Dickson	143
27	<b>Spain</b>	DAC Beachcroft SLPU: Pablo Wesolowski & Paulino Fajardo	149
28	<b>Sweden</b>	Rose-Marie Lundström Advokat AB: Rose-Marie Lundström	155
29	<b>Switzerland</b>	gbf Attorneys-at-law: Lars Gerspacher & Dr. Laurent Chassot	160
30	<b>Turkey</b>	Erçin Bilgin Bektaşoğlu Law Firm: Dilek Bektaşoğlu-Sanlı & Pelin Erkut	166
31	<b>USA</b>	Clyde & Co US LLP: Stephen Kennedy & Eileen Sorabella	172

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

## Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# Italy



Studio Legale Giorgetti

Avv. Alessandro P. Giorgetti

## 1 Regulatory

### 1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Decree-Law No. 95 of 6 July 2012 dissolved the Italian Private Insurance Regulatory Authority (ISVAP) and replaced it with the Institute for the Supervision of Insurance (IVASS or *Istituto per la vigilanza sulle assicurazioni*); a newly formed department at the Bank of Italy. IVASS operates on the basis of organisational, financial and accounting autonomy from the Bank of Italy, as well as on the basis of transparency and cost-effectiveness, in order to ensure the stability and smooth operation of the insurance system and consumer protection. In this perspective IVASS took over all functions of the former body, ISVAP, including supervision of transparency and fairness in the activity of insurers, intermediaries and other insurance market participants. To the contrary, the register of insurance experts and the Italian Information Centre, providing information to parties entitled to compensation following a motor accident that has occurred in an EU Member State, have been transferred to an independent public authority: the Concessionaire for Public Insurance Services (CONSAP).

### 1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

According to Italian Law only public companies, cooperatives and mutual insurance companies or equivalent foreign companies can practice insurance and reinsurance and therefore apply to the IVASS for an authorisation to underwrite insurance and reinsurance in Italy. A notable exception are Lloyd's syndicates which were specially authorised by way of the Industry Ministry Decree 02.07.1986 because of their particular historical status.

New insurance and/or reinsurance companies wishing to do business in Italy shall seek and obtain the IVASS's authorisation order (if the undertaking has its head office in Italy) or by a formal acknowledgment of the certification issued by the competent authority of the state where the company has its registered office. The newly authorised insurance and/or reinsurance company can start operating only after IVASS's authorisation or the formal acknowledgment has been published in the Italian Official Journal.

To apply for authorisation the insurance and/or reinsurance company must submit to the IVASS a technical file containing:

- a) a certified copy of the memorandum and articles of incorporation listing the insurance/reinsurance classes of insurance the insurer will write with the caveat that, in Italy,

it is prohibited to set up a company having exclusive scope to write insurance business abroad. If within the declared classes of business the compulsory motor or vessel liability insurance is listed, then the insurer shall produce a side letter undertaking the obligation to become a member of the Italian Bureau (*Ufficio centrale italiano*) and of the Motor Guarantee Fund (*Fondo di garanzia per le vittime della strada*);

- b) evidence that the memorandum and articles of association have been deposited with the Registrar of Companies;
- c) a scheme of operations and a technical report drawn up pursuant to the IVASS's regulations, providing the names of the persons charged with administration, management and internal control and corporate governance as well as the names of the natural or legal persons who directly or indirectly have control of the capital or who qualify as holdings, with an indication of the share capital detained;
- d) proof that the company has a share capital or guarantee fund, fully paid up, sufficient to meet the business plan liabilities and evidence that the company has the mandatory minimum organisation fund in accordance to ISVAP Orders No. 97/1995 or 98/1995, or both, fully paid up; and
- e) for foreign companies, proof of the appointment of a general representative, who shall be domiciled in Italy for the appointment. Should a company be appointed, its registered office shall also be in Italy.

The application is refused if it is incomplete or when requests of further information or documents are not satisfied in a timely manner or when no proof is given that the share capital, the guarantee or the organisation funds are actually and immediately available to the applicant company. Furthermore, an authorisation or licence is denied when the persons charged with the administration, management and internal control functions do not meet the mandatory professional, good repute and independence requirements.

### 1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers based in an EU Member State can write business in Italy directly under the freedom of services principle, in accordance to EU legislation and national implementation rules. Foreign insurers which are not based or do not have a General Representative in an EU Member State are forbidden from underwriting risks directly on the basis of the freedom of services principle, but they can still underwrite reinsurance risks without limitation.

#### 1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Yes, in Italy freedom of contract is constrained by public order and legal rules.

First of all, the governing law for mass risk insurance contracts, shall be either the Italian law or, if the contract has international elements of contracts, one of the laws permitted by the Italian set of rules on conflict of laws.

In addition, insurance being regarded as a social contract, there are a number of mandatory laws governing the drafting and content of insurance contracts, the marketing and negotiations aimed at protecting the consumers and, in some cases, also the professional policy holder. Such mandatory rules are considered as part of the internal public order hence they are applicable regardless of the governing law of the contract, which may well not be Italian law.

Last, but not the least, the Private Insurance Code forbids some classes of insurance (e.g., insurance which have as their object the transfer of risk of payment of administrative penalties or criminal penalties and those concerning the price of ransom in the case of kidnapping, mutual companies set up with the scope of collecting contributions and then distributing the assets so accrued between the survivors at a due time, or the beneficiaries of the departed).

#### 1.5 Are companies permitted to indemnify directors and officers under local company law?

Article 12 of the Decree Law 07.09.2005 n. 209 prohibits insurance contracts from indemnifying directors and officers for administrative or criminal penalties due for a breach of law.

#### 1.6 Are there any forms of compulsory insurance?

Yes, a number of special laws impose compulsory insurance to be undertaken with either private insurance companies or public insurers.

A typical example of compulsory insurance placed with private insurers is the compulsory motor insurance for motor vehicles and boats which cannot be tacitly renewed and cannot be underwritten for a period longer than a year; any eventual policy provision in contrast are considered null and void.

In addition, there are some areas where compulsory financial guaranty can be given by way of an insurance contract (e.g., tour operators) or where specific activities (e.g., engineers designing or testing public works or hunters) can be performed or carried out only by the person holding an insurance meeting the minimum law requirements.

At other times, compulsory insurance has to be stipulated with a public insurer such as, for example, the National Institute for the Insurance of Accidents at Work (*INAIL* for its Italian acronym), or a mutual insurance contract taken out with a private insurer through a public contracting entity. This is the case of the Italian Gas Committee (*Comitato Italiano Gas*) who collects the users' small premiums for the the insurance against the risks arising from the use or abuse of the gas distributed via networks or pipelines by public utilities companies.

Finally, an obligation to take out insurance can be found in the National Collective Contracts of Work (*CCNL* for its Italian acronym) concluded between trade unions and the Industrial Association for some specific industries.

## 2 (Re)insurance Claims

### 2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Italian law is rather protective towards the insured, on the basic consideration that he/she is the weaker negotiating party and the court's case law fully mirrors such a legislative approach. As a matter of fact, in addition to standard consumers' protection rules, there are a number of specific mandatory law rules providing for the content of some clauses and how these should be presented and drafted; contract clauses conflicting with such provision might be attacked in a court of justice and almost invariably declared null and void and substituted by the relevant law provision.

### 2.2 Can a third party bring a direct action against an insurer?

No. The third party has no privity to the insurance contract; thus third parties have no right of action.

Only exceptionally and in very limited cases, when the policyholder or the insured entity remains inactive with the actual danger of having the right to indemnity time-barred, a third party (potentially a creditor of the insured) can subrogate itself – according to article 2900 of the Civil Code – into the policyholder or insured rights and claim the insurance coverage, but still on the latter's behalf.

Further exceptions to this general rule are the special provisions of Law of No. 990/69 on "Compulsory Motor Accident Insurance" where the third injured party has a direct action against the insurer of the liable driver or against his own insurer according to the direct indemnification procedure as set forth in article 145, 2nd paragraph of the Private Insurance Code.

### 2.3 Can an insured bring a direct action against a reinsurer?

In Italy, no policyholder or non-signatory to a reinsurance agreement has any privity to the reinsurance contract, hence he/she has no consequential right of action. The sole rare exception would be a policy incorporating a "cut-through" clause providing a limited direct action against the reinsurer/s for the case in which the Ceding Insurer should have become insolvent.

### 2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The conclusion of an insurance contract is often preceded by the completion of a proposal form prepared by the insurer. The prospective insured shall answer truthfully and completely to avoid being sanctioned with the total loss of the right to the indemnity for wilful non-disclosure according to article 1892 of the Civil Code or with the partial loss of the right to the indemnity for negligent non-disclosure according to article 1993 of the Civil Code.

A court's case law retained that all information requested by the insurer into the proposal form must be deemed as essential and a non-disclosure or a false statement in response to a query therein contained qualifies the misrepresentation as wilful with the total loss of the indemnity; on the other hand, circumstances not mentioned in the questionnaire prepared by the insurer would *prima facie* be considered as non-material.

## 2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Misrepresentation and non-disclosure are relevant if material to the insurer's consent to write the risk; so in principle, the insured has the duty to inform the insurer of all material information concerning the proposed risk. In case of misrepresentation or non-disclosure it is the insurer's onus to prove that the information was material and it was withheld or misrepresented wilfully or with gross negligence with the scope of getting the insurer consent to write the risk at the obtained economical terms and contractual conditions.

## 2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Upon payment of the indemnity the insurer is subrogated by operativity of the Law (article 1916 c.c.) into all rights of the insured against any third liable parties, up to the indemnity paid, plus the adjustment costs.

To prevent the third party or the insured to prejudice of the insurer's right to the recovery, the insurer must put the third party on notice of the occurred subrogation so that the latter shall be obliged toward the new creditor.

## 3 Litigation - Overview

### 3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The parties are free to choose the jurisdiction there including an arbitration clause to derogate the ordinary court jurisdiction, unless such a clause would be in conflict with the law. An example of the parties' freedom limitation is *vis-à-vis* the choice of the international jurisdiction which, with reference to insurance, shall be made in accordance with Articles 8 to 13 of EU Regulation No. 44/2001.

Within the Italian Republic, the territorial and value jurisdictions are determined in accordance to the general provisions of the Civil Procedure Code. Currently, first instance cases the value of which does not exceed €5,000 (or in cases of motor accidents a value not exceeding €20,000) can be brought only in front of the Judge of Peace (*Giudice di Pace*) whereas all other cases are brought in front of the competent territorial tribunal (*Tribunale*). In Italy there are no jury trials.

### 3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

Usually the first instance in a tribunal last from two to three years; half of this time in front of a Judge of Peace.

The appeal equally lasts between two to three years; whereas cases heard at the Supreme Court of Cassation can be decided between 18 and 20 months from the date in which the case was recorded with the court clerk.

## 4 Litigation - Procedure

### 4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action and (b) non-parties to the action?

In general the burden of proof in a court of justice rests with claimant, and the defendant shall substantiate his or her case only if the claim has been proved. The claimant is free to decide what documents he/she wants to produce and what he does not want to disclose. For this reason Italian tribunals do not, in general, have the power to order disclosure/discovery or inspection of documents with the limited exception that, on *ex-parte* specific application, it might be possible to get an order for the disclosure of a specific document. The Courts have a wide discretion in deciding if the requested order is necessary and if the piece of evidence cannot be offered by the applicant in other ways. The court can also, *ex officio*, order Public Authorities or Public Offices to release certified copies of documents or information that the court considers essential for the decision of the case; such power is very rarely exercised.

Because insurance contracts have to be proved in writing, usually the insured shall produce the policy or any other pertinent documents to demonstrate the insurance contract existed, that the premium had been paid and that the insured event occurred.

### 4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

The Common Law discovery is unknown in Italy; therefore the party can legitimately withhold disclosure of advices or documents. Furthermore correspondence between the client and the lawyer is covered by professional privilege. Any draft or documents produced in the course of settlement negotiations are also covered by privilege. Any *ex-parte* application to have a court order for the disclosure of such documents would almost certainly be dismissed.

### 4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Under Italian Civil Procedure the witnesses' exam is done within the trial and their exam is run by the judge. Upon an *ex-parte subpoena* the court can order the witnesses to give evidence and they can fine the reticent witness if he/she does not speak the truth. Civil judges can charge the witnesses of the crime of false statement and in this case the civil case is suspended and the court file is passed to the Office of the Public Prosecutor for the proper criminal investigations. The underlying civil proceeding will start again only when the criminal case has been decided by a definitive and unappealable judgment.

### 4.4 Is evidence from witnesses allowed even if they are not present?

Yes. Only recently the legislator introduced into the Civil Procedure the written statement according to which the witness can give testimony in writing and send the statement to the court clerk. This possibility is not really favoured by the judges who like to examine directly the witnesses.

#### 4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

In Italy, expert witnesses are not known: a witness can testify only on facts and cannot render opinions, views or judgments. The technical issues are dealt with and decided by way of an expertise (*Consulenza Tecnica d'Ufficio*). The judge will decide if an independent expertise is necessary; so a specific hearing is fixed to swear the court expert and to instruct him about the scope and object of the expertise. One expert is appointed by the court and one expert by each of the parties. The court-appointed expert will draft a written report to which the parties' experts can contribute by way of producing memos, information and commenting or criticising the document. Should one or both parties be in disagreement with the court-appointed expert, the latter may be called to orally answer to the party's questions at court or can be instructed to draft a supplement to his/her report. This further technical document closes the expertise phase.

#### 4.6 What sort of interim remedies are available from the courts?

The court can order any interim suitable relief in cases of urgency when the applicant proves the risk of suffering a major and irreparable harm; such innominate urgent measures can be awarded also on an *ex-parte* basis.

Besides these urgent measures, both before or during the proceedings, courts can grant order:

- (i) seizing real estate or goods when their ownership is disputed;
- (ii) seizing documents or examination of witness in view of preserving them for the subsequent discovery;
- (iii) the judiciary custody of properties, money or credits in cases when the claim is *prima facie* grounded and the defendant might no longer be able to meet the court award at the end of the case; and
- (iv) the appointment of a court expert to investigate and collect evidence or with the scope of attempting a conciliation between the parties.

#### 4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

In Italy, as a general rule, judgments can be appealed both for breach of procedural and/or substantial rules. The only exception to that are the Judge of Peace's decisions sundered on equitable basis in very low value cases which are immediately definitive.

The appeal is not subject to any prior authorisation and it is made at the territorially competent tribunal or Court of Appeal.

The appeal procedure strongly limits the opportunity of introducing new evidence, even if some limited exceptions exist. The courts cannot fully review the first instance decision on appeal but are constrained by the arguments and criticisms made in the writ of appeal; so any part of the judgment which is not actually targeted by an appeal argument became definitive.

The appeal does not suspend the enforceability of the first instance decision but, in limited cases of significant and irrecoverable harm, an application can be made and the appeal judge, following a special hearing in the Chambers, has the power to suspend first instance enforceability until the appeal judgment is rendered.

Appeal decisions can be further appealed to the Court of Cassation (*Corte di Cassazione*) but only on limited grounds concerning the

wrong use or interpretation of substantial or procedural rules; no evidence or factual review is permitted in this instance.

#### 4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interests can be recovered but the petitioner must specifically claim for the head of damage.

Unless a specific interest rate was contractually pre-agreed, the legal rate shall apply. The legal interest rate is set by a Department of Justice Decree and the current rate is 2.5 per cent *per annum*.

In cases of late or non-performance of contractual pecuniary obligations, interest for late payment shall be calculated pursuant to art. 5, paragraph 2 of Legislative Decree No. 231/2002. For the period 1 July-31 December 2013 the annual rate is 8.5 per cent. In some cases, this type of interest has been applied to breaches of the insurer's duty to provide timely indemnification in property insurances.

Whereas these types of interests are not applicable in cases of casualty insurance, in case of a claim in tort, the assessment of the damages can include, on top of the interests, an award to indemnify the money devaluation from the day of the loss occurrence to the payment date.

#### 4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The basic rule is that costs follow the events, so the winning party can expect to receive an award towards defence costs, but the courts have a wide discretion in deciding if, and how much, legal costs are recoverable. In insurance litigation it was customary for a successful defendant insurer to see the costs made even with the losing claimant on the basis that the policy interpretation was difficult and it was equitable to have each party bearing its own costs. This has recently changed and the courts have a duty to award the costs, or at least a minimal part of them, to the successful insurer.

If the case is only upon the different amount due, the debtor can make a formal or informal offer to the creditor before a litigation is started putting the latter on notice. Should the creditor accept the offer, then no litigation ensues; but should the case end in a court of justice the judge will, in the final award, determine if the offer was (i) timely, (ii) economically adequate, and (iii) complete, having taken into consideration all heads of damages. Should the judgment find that the offer made was proper, then all litigation costs and a fine will be put on the claimant who refused the offer; to the contrary if the offer was untimely, inadequate or incomplete then the litigation costs might be reduced at the court's discretion.

Payment into courts are rare and are treated in the same way as the offers made prior to the litigation has begun.

#### 4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

For certain type of claims (e.g., med mal, D&O, professional error or omissions, motor accident, insurance claims and the like) having attempted to mediate is a precondition to having a right to act in a court of justice. If the parties cannot prove to have attended to the mediation and they do not have a negative report of an authorised mediation body, they cannot serve the summon and particular of claim/s.

In all cases where the mediation is not compulsory, the court still has the option to order a mediation even during the proceedings when having evaluated the dispute, the discovery and the parties' behaviour, considers that an out of court conciliation would be preferable to a judgment.

#### 4.11 If a party refuses to a request to mediate, what consequences may follow?

If one of the parties does not mediate in an action where mediation is a pre-condition of the right to sue, the court orders the party to mediate and with the same order puts on hold the proceeding until the three-months mediation period is over.

If the refusal to mediate or the refusal to conciliate after the mediator has made a formal proposal are ill-founded or grounded on unreasonable basis, the court can impose a penalty and use the party refusal as an equitable concurring argument to award or to make even the litigation cost between the parties.

## 5 Arbitration

### 5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

In Italy there are two methods of arbitration.

The first method is the formal arbitration and the award has a nature of a court judgment and is subject to appeal at the competent territorial Court of Appeal. This arbitration procedure is regulated by the Civil Procedure Code and the decision is rendered in accordance with the strict rule of law.

The second procedure is the informal arbitration; such an award has the nature of a contract and therefore can only be challenged for error, illegality, fraud or excess of power of the arbiter/s in making the award.

The differences in the procedural and evidentiary requirements with the formal arbitration are substantial as the informal arbitration is not regulated and the parties can decide their own rules in the arbitration clause.

In Italian policy wording, it is somewhat rare to encounter clauses providing for formal arbitration even if this procedure can guarantee a first instance decision in a relatively short time (between six months and a year in the vast majority of the cases) against the lengthy proceedings in a court of justice (between two and 10 years).

Informal arbitrations are, however, quite common in property and/or business interruption insurance. There, the costs of the procedure are usually high and reflect the work done in the loss-adjustment process which usually is concluded in few months.

### 5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

There is no special wording to be put into contract, as the compromise in arbiter can be even contained into a side letter and can be agreed before, or after, a dispute has arisen. What is relevant is that the language used clearly shows the intention to arbitrate and the agreement must be in writing and signed by the interested parties.

If the arbitration agreement is incorporated into an insurance policy, because it is a derogation to the ordinary jurisdiction of the courts of justice, the clause shall have to be expressly approved and signed twice in accordance to the provisions of article 1341 of the Italian Civil Code.

### 5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Courts might refuse to enforce an arbitration clause for a number of reasons:

- (i) the arbitration is agreed on a matter which cannot be arbitrated or it is in a domain regulated by norms of internal public order;
- (ii) the arbitration is not properly worded or agreed in writing, or whoever signed it did not have the power to compromise the dispute in arbitration or the clause has not been expressly approved and signed twice in accordance to article 1341 of the Italian Civil Code provisions; and
- (iii) the arbitration clause is included into a printed standard mass contract or into a document non-negotiable by the consumer.

In all these cases, and few less frequent others, the court would consider vexatious the arbitration clause (and therefore null and void) in accordance to the general consumer protection rules.

### 5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The party to an arbitration can always make an *ex-parte* application to the court to get a seizure or arrest order or any other interim conservative measures, as the arbiters have no power to legitimately issue such interim forms of relief. To the contrary, arbitrators have the necessary authority to deal with all procedural and/or discovery issues which can be resolved by the arbitration proceeding.

### 5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The obligation for the arbitration panel to give reasons for the award exist for both the formal and informal forms of arbitration, the difference is the extent and rigidity of this duty.

In formal arbitrations the award shall always contain the reasons grounding the decision; should the arbiter/s omit to issue the opinion, the award can be attacked in court and be annulled.

In informal arbitrations the parties can agree that the reasons for the award can be succinct or argued by general reference to other documents and in this case what would be the minimum opinion to ground a legitimate award can easily become an issue for a court to decide upon.

### 5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Here, again, the difference between formal and informal forms of arbitration is important.

In formal arbitrations, the award is always appealable in accordance to art. 829 of the Italian Civil Procedure Code, so that the losing party can enter an appeal before the competent territorial Court of Appeal within 90 days from the date in which the service of the

award took place. The appeal has two volleys, the first one is deemed to have the award set aside as null and void and the second volley is deemed to have the case retried on the merits even if on the basis of the very same facts and discovery examined by the arbitration tribunal. There are rather limited grounds to attack the award for nullity, the most important are:

- (i) the invalidity of the arbitration clause;
- (ii) if the arbitrators were appointed in breach of the applicable procedure, provided that the issue was timely raised in the arbitration;
- (iii) if the arbiter decided on matters which were outside the scope of the arbitration clause or did not decide on an issue/s on which a decision was required;
- (iv) if the award was missing the opinion or the reasons given were contradictory or the arbiter/s signature/s at the bottom of the award is/are missing;
- (v) if the award was issued after the time granted by the parties or by the law to complete the proceeding and make the award;
- (vi) if the award is contrary to a previous definitive decision of a court of justice, which was brought to the arbiter's/arbiters' attention during the proceedings; and
- (vii) if the arbiter/s did not respect the procedural rules, the due process and/or the right of defence during the proceedings.

In informal arbitrations the award is always appealable, unless the party in the arbitration clause declared it non-appealable.

The reasons to challenge the informal arbitrations in court for nullity are material or calculation errors, illegality, fraud or excess of power of the arbiter/s in making the award.



### Avv. Alessandro P. Giorgetti

Studio Legale Giorgetti  
Via Fontana n.28  
20122 Milan MI  
Italy

Tel: +39 02 545 7734 / +39 02 545 7923

Fax: +39 02 5518 0282

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

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

Alessandro P. Giorgetti graduated from Milan State University in 1983 with a degree in private international law and was admitted to the Milan Bar the same year. Six years later he studied commercial law at Robinson College, Cambridge University. Currently he is member of the special Bar for the High Courts and a chartered arbitrator and mediator at the Chamber of Arbitration and Mediation at the CONSOB, the Italian controlling body for the financial markets.

Mr. Giorgetti is an expert in Italian product liability litigation abroad, especially for medical devices and mechanical machinery. Notwithstanding this specialisation, he is also active in financial institutions litigation, D&O and professional liabilities, with a special emphasis on medical malpractice. He also practices in the field of reinsurance litigation, acting as principal consultant or litigator in cases involving Italian cedants.

He is an active member of the Defence Research Institute, of the IADC, IBA and the Association of Fellows and Legal Scholars of the Center for International Legal Studies in Salzburg, Austria.

Mr. Giorgetti has authored several articles in legal journals, as well as book chapters on Italian law and in 2008 he published the book *Il contenzioso di massa in Italia, Europa e nel Mondo* (Mass Litigation in Italy, Europe and Around the World), with a focus on class actions and collective redress.

He works in English and French and is a regular lecturer in Italy and abroad on insurance, product liability and personal injury law.

## STUDIO LEGALE GIORGETTI

Studio Legale Giorgetti was founded by Avvocato Luigi Giorgetti in 1922 when the firm became involved in insurance law, in which it is now specialised.

The firm is based in Milan, Italy's centre of financial and international legal work.

Studio Legale Giorgetti is retained by nearly all British loss adjusting firms in Italy; other clients include Lloyd's syndicates, major Italian and foreign insurance and reinsurance companies as well as insurance intermediaries but the firm also boasts clients in the banking, industrial, commercial and sporting spheres.

The firm offers a wide range of legal services from court litigation and arbitration to straight-forward negotiations and ADR. In fact, despite the specialisation in litigation - including forum shopping and choices of law issues - Studio Legale Giorgetti recognises that when settlement presents measurable economic and practical advantages over trial, it must be pursued with the same dedication and aggressivity as a court litigation.

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

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