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Italy

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Regulation

1 Regulatory agencies

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

Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo (ISVAP), the Italian supervisory agency for private insurance, was set up by Law No. 576 of 12 August 1982.

The agency consists of the president and director general, the vice-director general and the board of directors, made up of seven members including the chairman, who manage and lead 11 divisions, subdivided into 17 sections and nine units.

ISVAP's supervisory functions are exerted over the insurance sector by means of the powers of authorisation, direction, inspection, enforcement of precautionary measures and sanctions, as well as through the adoption of any regulation necessary for the sound and prudent management of undertakings or for disclosure and fairness of behaviour by supervised entities.

Off-site supervision is exercised by two supervisory divisions that have their work organised by insurance groups. On site supervision is carried out by one single division that is responsible for all inspections.

Many supervisory instructions, regulations and provisions issued by ISVAP in the past have now been unified into Legislative Decree No. 209 of 7 September 2005 (the Private Insurance Code), which entered into force on 1 January 2006.

ISVAP is also the supervisory body for the brokers and the loss adjusters, for which professional bodies the agency keeps the Register of Insurance and Reinsurance Intermediaries (RUI) and the Register of Motor Accident Loss Adjusters (RUP) containing the data of the persons licensed to professionally assess and estimate material damage resulting from the use, theft and fire of motor vehicles and craft.

2 Formation and licensing

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

According to Italian insurance law, only *società per azioni* (public companies), *società cooperative* (cooperatives) and *società di mutua assicurazione* (mutual insurance companies) or equivalent foreign companies can apply to ISVAP for an authorisation.

Lloyd's syndicates are the sole exception and they have been specially authorised because of their particular historical status and in accordance with the Treaty on the Functioning of the European Union (formerly the EC Treaty).

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

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

3 Other licences, authorisations and qualifications

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

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

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

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

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

If the application is incomplete or ISVAP requests for further information are not met, the authorisation is usually not granted. It is also refused if no proof is given that the share capital or guarantee fund has been fully paid up or that the organisation fund is actually and immediately available to the company. Equally, the authorisation or licence is denied if any of persons charged with the administration, management and internal control functions do not meet the prescribed requirements or if the scheme of operations does not satisfy the financial needs and the technical rules for the correct management of an insurance business.

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

An ISVAP order refusing the authorisation is notified to the company by means of a registered letter with advice of receipt within 6 months from the date of the complete application with all documents required by law or with the additional documents and information requested by the authority. If six months elapse with no response received by the applicant company, then the authorisation shall be considered refused.

4 Officers and directors

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

The directors, officers, statutory auditors and general directors must all meet the prescribed requirements of probity, independence and trustworthiness according to the relevant civil code provisions, article 4 of Ministerial Decree No. 186/1997 and Ministerial Decree No. 162/2000, thereby being able to ensure sound and prudent management.

5 Capital and surplus requirement

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

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

- for companies intending to pursue life assurance: €5 million;
- for companies intending to pursue non-life insurance:
 - €5 million for insurance classes 10, 11, 12, 13, 14 and 15;
 - €2.5 million for insurance classes 1, 2, 3, 4, 5, 6, 7, 8, 16 and 18;
 - €1.5 million for the insurance classes 9 and 17;
- for companies intending to pursue life assurance, personal accident and sickness insurance simultaneously:
 - €5 million for life assurance; and
 - €2.5 million for the pursuit of personal accident and sickness insurance; and
- for cooperative companies the minimum share capital is reduced to half the listed amounts.

EU Directives 2002/12/EC and 2002/13/EC on solvency margin requirements for life and non-life insurance undertakings were implemented in Italy in 2003; ISVAP Regulation Nos. 2322/2004 and 2415/2006 were subsequently issued on the same subject for domestic insurers and branch offices of non-EU insurers.

The aim of the new regulation, which almost entirely repeats the provisions of the two previous regulations, is to improve policyholder protection and strengthen the measures for preventing insolvency.

The implementation date of EU Solvency II has been delayed until 31 December 2012 and, at the same time, there has been some expectation that tier 1 capital would be set at 50 per cent of the solvency capital requirement, making it easier and less onerous for the insurers to comply with the captioned directive.

6 Reserves

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

Italian law provides for statutory and free reserves not corresponding to particular underwriting liabilities or to adjustments of asset items. Currently the reserves are considered and regulated by the Private Insurance Code.

Foreign insurance companies operating in Italy under the freedom of establishment system shall comply with the provisions on technical reserves that apply to companies with a registered office in Italy.

7 Product regulation

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

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

On the contrary, the agency will control and eventually investigate if two or more insurers for one or more class of business are creating cartels in breach of freedom of competition and prejudicial against consumers. In these cases, supervision of the insurance companies will turn into a full investigation with administrative sanctions and orders to do or not to do something about the situation.

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

The COVIP was set up by Legislative Decree No. 124 of 21 April 1993 but actually started to operate with its current configuration, functions and scope after Legislative Decree No. 252 of 5 December 2005 in tandem with the introduction in Italy of social security. This act attributes to the COVIP some specific functions such as authorising and supervising pension funds, approval of their memorandum, articles of association and regulations for complementary or voluntary social security, supervising and inspecting the technical management, financial institution, assets and bookkeeping of the pension funds and reviewing the adequacy of their organisational order, including the duty to ensure respect for the principles of transparency in the relationships between the pension products, funds and clientele.

8 Change of control

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

All mergers that involve insurance companies operating in Italy are subject to ISVAP prior agreement, but if the merger ends up in a position of market dominance, the Italian Antitrust Authority might also have to give their preliminary authorisation to the operation.

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

In the event of a merger resulting in the setting up of a new company with its head office in Italy, the new company must be authorised before it can legitimately underwrite insurance, whereas if one of the parties in the merger has its head office in another EU member state, ISVAP agreement to the operation can only be given after the relevant home supervisory authority has expressed its positive opinion.

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

9 Financing of an acquisition

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

The sole requirement is that the incorporating company or the new company resulting from the merger has the necessary solvency margin, taking into account the merger and the consolidated liabilities.

10 Foreign investment

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

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

11 Reinsurance agreements

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

Currently, the regulatory requirements with respect to agreements for reinsurance ceded and assumed by insurance and reinsurance companies domiciled in Italy are found in EU Directive 2005/68/EC of 16 November 2005 on reinsurance that modified EU Directives 73/239/EEC and 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, although the relevant provision at law has not yet been formally enforced in Italy.

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

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

This regulation is obligatory for all reinsurers operating within the Italian territory since 1 September 2010.

12 Ceded reinsurance and retention of risk

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

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

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

13 Collateral

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

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

14 Insolvent and financially troubled companies

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

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

15 Intermediaries

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

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

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

- section A for the insurance agents;
- section B for brokers;
- section C for direct canvassers of insurance undertakings;
- section D for banks, financial intermediaries as per article 107 of the Consolidated Banking Law, stockbroking houses and *Poste Italiane – Divisione servizi di bancoposta*; and
- section E for the collaborators of the intermediaries registered under sections A, B and D conducting business outside the premises of such intermediaries.

Recently ISVAP has also attached to the RUI a list of intermediaries having their residence or head office in EU States. It contains information on natural persons and companies duly licensed as insurance and reinsurance intermediaries in other EU or EEA states who have also been licensed to pursue insurance mediation upon the Italian Republic either on freedom of establishment or freedom of services.

Insurance claims and coverage**16 Third-party actions**

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

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

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

A further exception to the aforementioned rule are the special provisions of Law of No. 990/69 on compulsory motor accident insurance or of article 149 of the Private Insurance Code (see Constitutional Court judgment No. 180/2009).

17 Late notice of claim

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

Article 1913 of the Civil Code provides that, unless the insured entity has already had notice of the loss occurrence, notice must be given within three days from the loss event.

A lack of notice or late notice does not permit the insurer to deny liability unless prejudice has been suffered and in this case the denial shall be proportional to reflect the prejudice suffered.

18 Wrongful denial of claim

Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

No specific sanction is provided for wrongful denial of a claim, but because litigation usually follows, the court might then be entitled to award not only the judiciary interests from the date of the judgment but also from the date in which the indemnity was due to the date of the judgment or to the date of final settlement; also the interest provided for by Legislative Decree No. 231 of 9 October 2002 that currently stands at the European Central Bank annual interest rate plus 7 per cent.

19 Defence of claim

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

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

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

20 Indemnity policies

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

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

21 Incontestability period

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

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

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

22 Punitive damages

Are punitive damages insurable?

The Supreme Court of Cassation in its leading precedent No. 1183 on 19 January 2007, declared punitive damages alien to the Italian system and therefore contrary to internal public order.

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

23 Excess insurer obligations

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

In Italy, usually the excess insurer includes a 'drop-down clause' providing for this specific case. It is notable that should this provision

not be included, the primary limits will become assimilated to a deductible and the excess insurer obligation will guarantee only the proportion of the claim exceeding the primary layer limit.

24 Claim priority

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

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

In the first case the guarantee will indemnify the oldest claim first and so on to the most recent until the policy limit is exhausted.

Whenever there is a plurality of claimants, all of them concur in proportion to their claims to the policy indemnity, which is divided in proportion to the respective claims.

25 Allocation of payment

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

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

Reinsurance**26 Reinsurance disputes**

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

In Italy it was traditional to resolve the eventual disputes arising from reinsurance agreement interpretation, execution or breach by negotiations; this traditional approach has been abandoned in the past five years as arbitrations and litigation in court are becoming more and more frequent.

27 Common dispute issues

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

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

28 Arbitration awards

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

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

29 Power of arbitrators

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

Because arbitration is a private form of justice, arbitrators do not have any powers over non-parties to the arbitration agreement.

Update and trends

On the regulatory side, ISVAP has been active and on 16 February 2011 published a draft of Regulation 42/2011 to implement article 7 of the Anti-Money Laundering Decree No. 231/2007 indicating procedures and internal controls to prevent insurers and intermediaries from being exploited by money laundering and terrorist financing. The regulation is consistent with ISVAP Regulation 20/2008 currently providing for internal controls, risk management, compliance and outsourcing. The proposed regulation will apply to:

- Italian insurance and reinsurance companies;
- branches of foreign insurance and reinsurance companies authorised to underwrite life insurance in Italy pursuant to article 2(1) of the Insurance Code (Legislative Decree 209/2005);
- insurance intermediaries (agents and brokers) broking life insurance under sections 109(2) (a) and (b) of the Insurance Code (Legislative Decree 209/2005); and
- insurance intermediaries under section 116(2) of the Insurance Code (Legislative Decree 209/2005) (namely, EU insurance and reinsurance agents and brokers), with respect to activities carried out within the Italian territory.

The draft publication of 31 March 2011 called for public observations. Currently ISVAP is preparing the final version of the regulation that is expected to be passed before the end of the year.

Regulations 38 and 39

On 3 and 9 June 2011 the ISVAP approved regulations 38 and 39, the former providing for the establishment and management of segregated assets and internal funds for undertakings carrying out life insurance business and the latter setting forth remuneration policies for insurance companies following the international guidelines on remuneration policies, contained in the European Commission Recommendations 2009/384/EC and 2009/385/EC of 30 April 2009.

Based on the principle of home country control, the regulations will apply only to insurance companies with registered offices in Italy and to branch offices operating in Italian territory but based abroad.

Mediation

Another hot topic for the insurance market is the introduction in Italy of mediation. In March 2010 the government approved the Legislative Decree No. 28/2010 to implement the EU Mediation Directive 2008/52/EC. The new act introduced a compulsory mediation stage to resolve civil and commercial disputes including insurance, banking

or other financial contracts.

For the purpose of the disputes expressly listed in article 5 of the Legislative Decree No. 28/2010, mediation became a precondition for litigating in court and, as a result, the judge shall not consider and decide a case unless the parties have previously unsuccessfully mediated. In all the other civil and commercial disputes it will remain an ADR accessible on voluntary basis.

To be enforced, the new act needed a logistic and administrative structure non-existent until the Ministry of Justice, by way of the Ministerial Decree No. 180/2010, provided the criteria and terms for creating, licensing and registering the mediation chambers and for the mediator's admission to such bodies.

This lack of coordination delayed the coming into force of the mediation until 21 March 2011 for the best part of the disputes expressly listed in article 5 of the Legislative Decree No. 28/2010 and further delayed to 20 March 2012 the coming into force of the mediation for disputes concerning property rights between neighbours and controversies consequent to motor vehicle and boating accidents.

The Legislative Decree No. 28/2010, integrated by the Ministerial Decree No. 180/2010, outlines a mediation procedure which can last four months at the maximum and, according to which, much is left to the parties' goodwill and to the mediators' capacities.

This situation causes many problems and uncertainties for the insurers and reinsurers, as shown by the serious doubts if controversies based on reinsurance and retrocession contract should be compulsorily mediated or not. Another example of the problems posed by the lack of provisions clearly setting the procedure is the site of the mediation which might be hundreds of kilometres from the tribunal competent for the eventual court case.

On 25 May 2011 the Ministry of Justice published the first statistics for the period 21 March – 31 April 2011 and for the scope of this publication these were the relevant data: out of 5,070 requests of mediation presented in the considered period, 406 were based on insurance of which 11 were positively settled, 94 unsuccessfully terminated and 301 still pending. The data also shows that 65 per cent of the controversies mediated were between €1 and €25,000, whereas the remaining 35 per cent were above €25,001 or of undetermined value.

These first and incomplete data are not very encouraging but the legislation is in its infancy and a better assessment of its efficacy in resolving civil and commercial disputes will be possible next year when a comparison over a 12-month period will be possible.

It should be noted that they have the power, granted to them by article 816ter of the Civil Procedure Code, to lodge a request with the chairman of the competent court to obtain a subpoena to oblige reluctant witnesses to appear in front of the arbitrators and give evidence.

30 Appeal of arbitration awards

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

Yes, the losing party can appeal a negative arbitration award according to articles 828 and 829 of the Civil Procedure Code. The appeal is divided into two phases; the first, seeking to vacate the arbitration award, is necessary. The second phase, on the merit of the controversy, is merely eventual and it takes place only if the arbitration award has been voided.

Judicial confirmation of the arbitration award is necessary only if the arbitration was informal – in fact, the award in this case has an efficacy equivalent to a contract and the party that does not comply with the arbitration award can be sued for breach of contract and damages. However, no judicial confirmation of the arbitration award is necessary if the arbitration was formal; according to article 824bis of the Civil Procedure Code, the award has the same efficacy as a court judgment.

Reinsurance principles and practices

31 Obligation to follow cedent

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

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

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

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

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

32 Good faith

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

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

33 Facultative reinsurance and treaty reinsurance

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

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

From the regulatory perspective, the reinsurance companies undertaking facultative and treaty reinsurance are subject to title VI of the Private Insurance Code and the 18 November 2009 ISVAP regulation on reinsurance that for the first time expressly addressed and also ruled for finite reinsurance.

34 Third-party action

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

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

35 Insolvent insurer

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

A reinsurer has no duty to pay a policyholder's claim directly unless this is expressly requested by the liquidator or the trustee of the insolvent company or a so called 'cut-through' clause exists in the reinsurance agreement. Under Italian law the contractual obligation arising from a reinsurance remains between the reinsurer and the cedent company, even if the latter becomes insolvent and subject to the compulsory winding-up procedure. Usually it is the special liquidator or the trustee in bankruptcy who will enforce the right under the reinsurance or retrocession contract, but in this case it is customary to undertake a total commutation between the cedent and the reinsurer/retrocessionaire.

36 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer?

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

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

In facultative reinsurance, information depends on whether there is either a claim control clause or a cooperation clause or not, and the duty to notify and provide information or data depends on the clause extension.

Clearly delaying relevant information might impact upon the right to recover under the reinsurance agreement.

37 Allocation of underlying claim payments or settlements

In the case of multi-year occurrences, such as pollution, how are underlying claim payments or settlements allocated among policy years covered by multiple reinsurance agreements?

Whenever a risk of multi-year occurrences or claims in series exists, the reinsurance contract usually contains a clause according to which all subsequent events are considered as having occurred on the same day as the first loss occurrence.

If the reinsurance does not contain a clause to this extent, each loss will be imputed to the competent year of coverage.

38 Review

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

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

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39 Reimbursing of commutation payments

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

Commutations are freely determined and therefore the liabilities related to these are voluntary obligations that fall outside the scope of reinsurance. Thus, the obligation of a reinsurer to reimburse a

cedent for commutation payments is limited to the reinsurer's willingness to support the cedent and that there are no strict obligations in law.

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

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