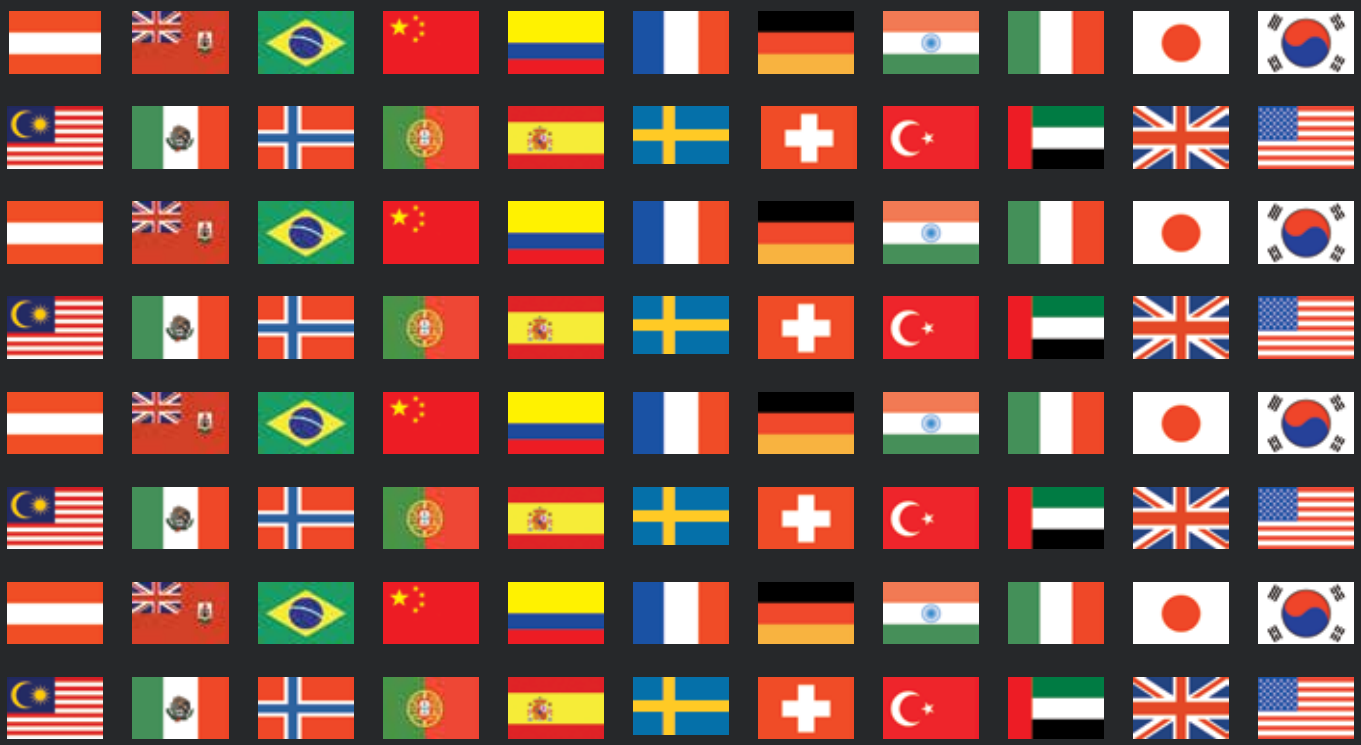
Insurance Litigation

Contributing editors
Mary Beth Forshaw and Elisa Alcabes



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GETTING THE DEAL THROUGH

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Insurance Litigation 2016

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Italy

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Preliminary and jurisdictional considerations in insurance litigation

1 In what fora are insurance disputes litigated?

As Italy is part of the EU, jurisdiction in matters relating to insurance is determined in accordance with the provisions of section 3 (articles 8–13) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. A particular situation arising from this Regulation is the concurrent jurisdiction of the state of residence of the victim of a motor accident. The EU Court of Justice, in judgment No. 6 dated 13 December 2007-C463, interpreting Regulation (EC) No. 44/2001, affirmed that the injured party may sue, with direct action, the foreign motor liability insurer before the judges of the states where he or she resides, provided that direct action is provided for by the national law (and in Italy it is) and that the insurer has a domicile within the territory of an EU member state.

Another frequent problem related to this Regulation was where to sue the producer of a defective product. In this respect, under the EU Court of Justice judgment No. 45 dated 16 January 2014 C45/13 with regard to the determination of the place of the damaging event in cases of liability for defective products, it shall be the place where the relevant defective product is fabricated. The Court pointed out that the proximity of the venue to the producer should be considered the most convenient for the possibility of collecting evidence to ascertain the alleged defect, and the best place for proper administration of justice.

When Italy is the member state with jurisdiction over a dispute pursuant to Council Regulation (EC) No. 44/2001 of 22 December 2000, the competent Italian court to hear the dispute will be determined by the Code of Civil Procedure.

2 When do insurance-related causes of action accrue?

The cause of action accrues when the insured event materialises, and this can substantially differ depending on whether property or casualty insurance is involved.

In property insurance the cause of action, or right to indemnity, is fully accrued when the insured event occurs and produces damage to the insured property. It is from that initial moment that the statute of limitations will start to run.

In liability insurance the cause of action, or right to guarantee, is fully accrued when the insured, for the first time, has been formally held responsible by the damaged third party by way of a registered letter or by the service of a writ of summons in court or the service of any other pleading initiating litigation. It is from that initial moment that the statute of limitations will start to run.

3 What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

There are two main preliminary procedural and strategic considerations to be carefully considered when an insurance litigation becomes a reality: is there any concurrent jurisdiction that might have competence to hear the case and that might give a significant advantage under the procedural or substantial point of view?; and is the case suitable for a declaratory relief action, or it is better to adopt a passive attitude and wait to be sued?

4 What remedies or damages may apply?

When insurance disputes are litigated, the parties can chose to act on contract or on tort.

If the action is for the maintenance of a contract, the remedy is to have the insurance or reinsurance declared operative, and therefore the insurer or reinsurer is obliged to pay the due indemnity or provide the guarantee within the policy limits, eventually with legal interest from the date on which the litigation was launched or from the date established by the insurance contract.

If the action is for breach of contract, the remedy is to have all foreseeable damages awarded that could be caused by the breach. Typically this includes a sum equitably determined by the court that in general reflects the due indemnity or the denied guarantee plus monetary devaluation to compensate the loss of power of acquisition, a sanction for frivolous litigation and interest. Unless a specific interest rate has been contractually agreed within the insurance policy, the legal rate shall apply. The legal interest rate was set by a Department of Justice Decree, and the rate for 2014 was as low as 0.5 per cent per annum.

In November 2014 article 17, paragraph 1 of Law No. 162/2014 changed the old system by way of modifying article 1284 of the Civil Code so that the interest legal rate shall be determined in accordance with paragraph 2, article 5 of Legislative Decree 9 October 2002 No. 231, which implemented EU Directive No. 2000/35/EC in Italy. Thus, for 2015 and the early months of 2016, the annual rate should be 8.05 per cent. For the remaining months of 2016, the level will vary in accordance with variations in the European Central Bank's rate.

Whenever the case involves a criminal act (ie, an attempted or successful fraud or similar situation) the insurer may act on tort and claim compensation for all the costs incurred, from the administrative costs to open and run the case, compensation for the financial prejudice due to the creation of the claim and cost reserves, to restitution of any money paid to the insured plus the monetary devaluation to compensate the loss of power of acquisition and interest.

5 Under what circumstances can extracontractual or punitive damages be awarded?

In Italy, following the leading precedent, decision No. 1183 of 19 January 2007 of the Court of Cassation, punitive damages are considered alien to the Italian legal system, and therefore contrary to internal public policy. A subsequent Court of Cassation decision No. 1781 of 8 February 2012 confirmed in full this precedent.

As consequence , currently it is not permissible to insure against punitive or exemplary damages in Italy, even if it is possible to do so for punitive damages legitimately awarded in other jurisdictions.

Interpretation of insurance contracts

6 What rules govern interpretation of insurance policies?

Under Italian law insurance is a 'typified contract', and hence thoroughly regulated by the Civil Code. Articles 1360 to 1371 of the Civil Code dictate subsidiary hermeneutic rules for the interpretation of all contracts, including insurance contracts.

For insurance contracts, article 1888 of the Civil Code provides that while an insurance contract can be orally stipulated, the proof of its existence and of its terms and conditions shall be in writing. This provision, along with a clear and properly drafted wording, prevents a number of disputes

on the object, scope and extension of the contract. Notwithstanding this, there are some cases where the policies are badly drafted or the risk transferred particularly complicated, with the consequence that the policy wording needs clarification.

7 When is an insurance policy provision ambiguous and how are such ambiguities resolved?

Should a problem of interpretation arise, the contract shall be interpreted using the general interpretation rules provided by the Civil Code, which mainly relate to the will of the parties and good faith.

Furthermore, depending on whether the insurance wording was thoroughly negotiated between the parties or was a prepared and pre-printed form, some mandatory rules provide significant differences in the interpretation and enforcement of contracts.

In the case of a negotiated contract, this is constructed in accordance with good faith and the parties' original intentions, including parties' actions before and after the interpretation became an issue, and any added clause or cancellation that modifies the original policy text shall prevail. Conditions precedent or essential conditions must be properly addressed in the policy so that the insured's attention is directed to the conditions so that no misunderstanding or misinterpretation can arise from them.

To the contrary, whenever the insurance contract is in a pre-printed form designed to uniformly regulate a number of contractual relationships principally with consumers or involving mass risks, the basic rule is to interpret the contract against the party who drafted the policy wording.

Notice to insurance companies

8 What are the mechanics of providing notice?

Once an insured event has taken place the insured, unless the insurer or reinsurer has already had notice of the loss, in accordance with article 1913 of the Civil Code, within three days from the day on which he or she became aware of the loss occurrence, shall inform the insurer or reinsurer of such event.

Notice of claim is given by any means of communication, but in general a receipt of the given notice is required should an issue arise about the timing of the notice to the insurance company.

9 What are a policyholder's notice obligations for a claims-made policy?

Except where the insurance contract does not provide differently, a policyholder's notice obligations for a claims-made policy are the same as any other insured: within three days from the day on which he or she became aware of the loss event – or ought to be aware of the loss event – the insured shall inform the insurer or reinsurer of such event or occurrence. The only difference in the case of a claims-made policy is that the duty arises not from the day on which the insured completed the relevant action or omission, but from the day on which the policyholder received the first communication from the damaged third party holding him or her responsible for the damage caused.

10 When is notice untimely?

A notice is untimely either when it is given beyond the three days provided by article 1913 of the Civil Code, or beyond the longer terms agreed by the parties and listed in the policy.

11 What are the consequences of late notice?

Should the insured fail to give notice within three days of the loss event or should totally omit to give notice to the insurance or reinsurance company, this does not authorise the reinsurer or insurer to deny liability unless prejudice has been suffered, and in this case the indemnity can only be proportionally reduced to reflect such prejudice.

Insurer's duty to defend

12 What is the scope of an insurer's duty to defend?

According to article 1917, the insurer has a duty to defend until the automatic sub-limit for defence costs, equal to at least one-quarter of the policy limit, is exhausted or until the insured has negotiated a settlement with the injured party that was not finalised due to the fact that the policyholder withheld his or her consent to the settlement.

Should the sub-limit for defence costs be exhausted while the case is still ongoing, the insurer will be obliged to defend and bear the relative costs until the end of that phase of the proceeding.

Finally, it is important to note that if the judgment or arbitration award should exceed the policy limit, the defence costs shall be apportioned between the policyholder and the insurer in accordance with their respective interests in the award.

13 What are the consequences of an insurer's failure to defend?

There are a number of consequences if an insurer fails to defend. The first and most immediate would be to be joined by the policyholder to every litigation the damaged third party brings against the insured. The second is that the insurer or reinsurer will have to bear all litigation costs, including its own insured's ones. The third and last consequence is that the policyholder could claim breach of contract against the insurer or reinsurer and seek special damages according to article 96 of the Civil Procedure Code for abusive or frivolous litigation.

Standard commercial general liability policies

14 What constitutes bodily injury under a standard CGL policy?

Bodily injury is any negative modification of the physical or psychological situation of a human being. The concept of injury is strictly connected to the alteration of the person's health with reference to his or her original state (ie, the passage from health to illness, or the aggravation of a pre-existing disability or pathological condition).

15 What constitutes property damage under a standard CGL policy?

Property damages are any material harm suffered by an object owned by the insured upon the occurrence of certain events covered by the insurance.

Property damage can be divided into direct property damage and consequential property damage. Direct damage is any harm caused by the insured event by way of an immediate physical contact with the insured's object. Consequential property damage is that not immediately and materially connected with the event, but linked to it only as an indirect consequence; this second category of property damage is insured only if expressly named in the policy wording as covered damage.

16 What constitutes an occurrence under a standard CGL policy?

The term 'occurrence' in CGL contracts could indicate both the fact that a third party alleges damages as consequence of a specified action or omission of the policyholder holding him or her liable for damages and claiming full compensation; or the specified action or omission from which the claimed damages stem.

17 How is the number of covered occurrences determined?

Policies usually determine each loss event as an occurrence, unless the policy wording incorporates a 'claims series clause' according to which several adverse events attributable to a single cause are jointly considered as just one occurrence. This is common especially in product liability insurance, where a single common defect can determine a series of separate third-party claims that are all considered one occurrence backdated to the first loss occurrence and applying to all that year of coverage despite the fact that some of them may have occurred in the following years of coverage.

18 What event or events trigger insurance coverage?

Each loss event is an occurrence triggering insurance coverage unless a 'claim series clause' is incorporated into the insurance contract, and in this case only the very first loss event triggers the insurance coverage.

19 How is insurance coverage allocated across multiple insurance policies?

Whenever multiple insurance policies are insuring the same risk there is a situation of indirect co-insurance where each and every insurer will concur to the indemnity in proportion to its policy limit without joint and several liability. The insured shall claim from each of the insurers their respective due indemnity.

In cases where concurrent tortfeasors are insured with different liability insurance companies, claimants can claim the full 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

Update and trends

On 19 November 2015, the Parliament's Social Affairs Committee approved a bill on medical professional liability, and it is almost certain that it will be licensed during 2016.

The bill introduces the compulsory management of health risks, providing that all medical structures shall activate adequate monitoring, prevention and risk management functions. Such activity shall be coordinated, and structures will work with centres for clinical risk management and patient safety, which will be set up in each region. These centres will be in charge of collecting regional data on litigation and medical malpractice, and will transmit them to the national body of reference at the Ministry of Health.

Following the path opened up by leading judgment 17/07/2014 of the first section of the Milan Tribunal, the bill moreover confirms that medical malpractice involves an inversion of the burden of proof borne by the patient, who shall prove the medical error, and reduces the statute of limitations from 10 to five years for actions brought against doctors, leaving untouched the 10-year statute provided for actions on contracts against hospitals.

Two major innovations are the enlarging of the scope of the contractual liability of structures for medical malpractice acts committed by self-employed doctors within any public or private health facilities, as well as by way of telemedicine; and the exclusion of self-employed doctors from tort liability.

If the legislation should be approved as it stands, it will provide some peace of mind to physicians and their insurers, as it should have a positive impact upon the number of cases being brought against them as well as sensibly reducing the level of medical malpractice awards made to patients.

quota share shall be divided among all the remaining insurers in proportion to their policy limits.

First-party property insurance

20 What is the general scope of first-party property coverage?

The scope is to indemnify any loss, covered under the terms of the insurance policy, that the policyholder caused to his or her own property. Article 1900 of the Civil Code excludes from the scope of any property insurance damage caused by gross negligence, or by the wilful acts of the contracting party, the insured or the beneficiary. Notwithstanding this provision, gross negligence can be covered by way of specific contractual provision and against a corresponding remuneration that increases the policy premium.

21 How is property valued under first-party insurance policies?

In a first-party property damage claim, the assessment of the damaged or lost property is determined by its condition and by the market price at the time of the loss occurrence, unless other criteria have been negotiated by the parties and contractualised in the insurance policy wording.

To determine the damaged property's economic value, the following factors are usually are taken into account: the age of the property, date of purchase, purchase price, its rarity on the market and any other facts pertinent to a correct appraisal.

Directors' and officers' insurance

22 What is the scope of D&O coverage?

D&O policies are designed to cover the risk of the individual liability of a director or officer from lawsuits as well as some regulatory actions undertaken by stakeholders or shareholders, regulators, state investigators or others alleging wrongdoing on the part of the board of directors, the officers and – in Italy – also the members of the internal auditing board. Some policies also provide cover for the indemnities the corporation is obliged to grant to their directors and officers for the same individual liability arising from the same lawsuits or regulatory actions based on alleged wrongdoing on the part of the board of officers.

23 What issues are commonly litigated in the context of D&O policies?

The bankruptcy context is probably the source of the largest and most commonly litigated issues in the context of D&O policies. The following controversial issues are often the source of such litigation: the misrepresentation of the D&O risk at the time of the insurance negotiation; the existence of the liability due to errors and omissions of the directors and officers; and the assessment of the economic prejudice that the alleged errors or omissions may have caused.

Other typically thorny issues litigated in the context of D&O policies are bankruptcy claims, defamation, mobbing and harassment.

Among financial risks, 'derivative representation' and creative financing through junk bonds are still commonly litigated issues in connection with D&O insurance, whereas among the industrial operative risks, air and water pollution are among the most frequent causes of litigation.

Cyber insurance

24 What type of risks may be covered in cyber insurance policies?

Cyber risks should be expressly insured with an ad hoc special coverage, but they can fall under a number of other insurances whenever such risk is not expressly excluded. A cyber risk could be a source of claim not only under electronic insurance policies and related extended warranties, but also under the following types of policies:

- product liability and recall insurance;
- some specific professional indemnity insurance;
- D&O liability insurance;
- business interruption insurance; and
- in financial lines, under bankers blanket bond or payment protection insurance.

25 What cyber insurance issues have been litigated?

Recently, a few high-profile data breaches have caused the party who suffered the breach to litigate with his or her insurer for remedial costs such as consumer notifications, customer support and costs of providing credit-monitoring services to affected consumers; and for business interruption and extra expenses related to the improvement of the party's security measures.

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