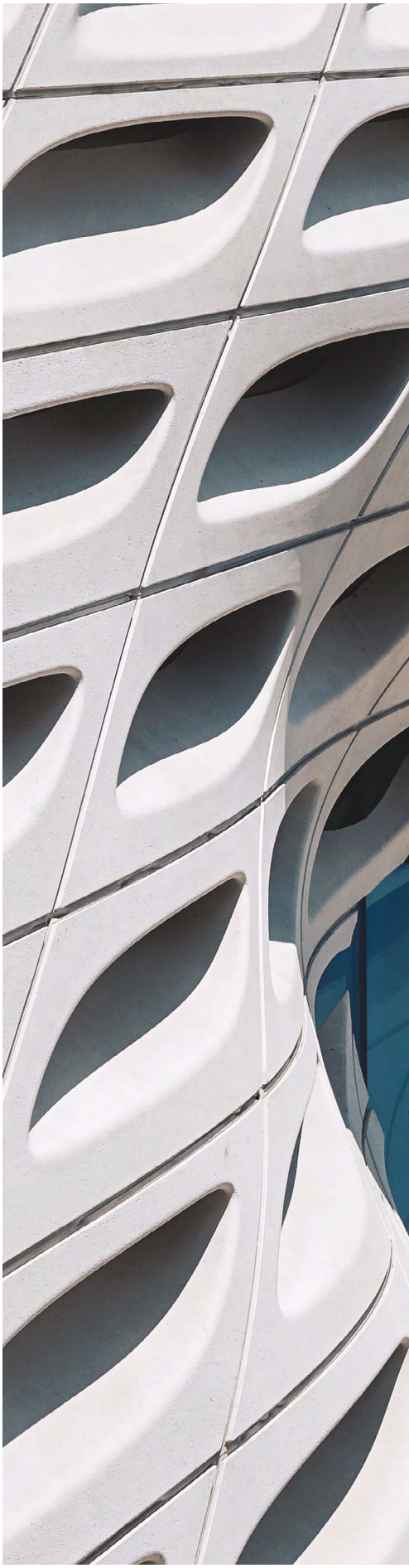
Global Insurance Updates:
Topical issues and news from the international insurance markets

DLA PIPER

Contents



Foreword

Welcome to our second edition of *Global Insurance Updates* on topical issues and news from the international insurance markets.

The second half of 2023 saw significant regulatory action and legislative proposals in a number of jurisdictions, affecting insurance companies across the globe.

We have included short updates on:

- Regulatory reform in Australia,
- Recent developments in case law in Colombia,
- New legislative proposals from New Zealand to Brazil, including Poland and Slovenia,
- The Energy Act in the UK,
- Cross-border insurance legislation in Croatia,
- Parametric insurance in Hong Kong, and
- The Nordic Marine Insurance Plan.

As the insurance sector around the world is facing new challenges in light of legislative changes and broader regulatory supervision, our international team of insurance sector specialists advises leading global insurance companies to help them navigate these challenges and develop tailored, strategic solutions.

Should you wish to explore any of these updates further, their authors will be happy to pick up the conversation with you. Of course, the countries in this publication are not exhaustive of DLA Piper's global insurance offering. If you are interested in any other jurisdictions on questions of insurance law or regulations, please do not hesitate to contact us.

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Significant Changes to Insurance Regulation Loom in New Zealand

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The Reserve Bank of New Zealand – Te Pūtea Matua (RBNZ) has released its final omnibus consultation paper (Omnibus Paper) on its review of the Insurance (Prudential Supervision) Act 2010 (IPSA). This update covers proposals that may be of interest to overseas or global insurers.

Scope and definitional issues

In the Omnibus Paper the RBNZ has proposed:

- To amend the definition of "carrying on insurance business in New Zealand" to remove the New Zealand policyholder requirement, so that all New Zealand-incorporated insurers will need to be licensed, even if they issue insurance only to offshore policyholders. The RBNZ's concern is reputational damage to the RBNZ and/or the New Zealand insurance market if an insurer holds itself out as a New Zealand incorporated insurer but is not licensed. This change will explicitly exclude overseas-incorporated captive insurers and overseas companies that act only as reinsurers in New Zealand.
- To amend IPSA so that the RBNZ can require licensing for a non-operating holding company, and therefore capture corporate insurance groups headquartered in New Zealand (whether operating only domestically or across borders).
- To remove the requirement for overseas reinsurers to hold a licence to do business with New Zealand policy holders.

"Overseas" insurers – branches and subsidiaries

The RBNZ is concerned about the complications and risks that can arise in cross-border businesses. It acknowledges that the New Zealand economy significantly benefits from the presence of overseas insurers but notes that complications and risks can arise in cross-border businesses. The Omnibus Paper discusses balancing the advantages of foreign presence with appropriate controls, including:

- Imposing dividend restrictions on the ability for the parent group to extract resources from the subsidiary to bolster the parent's capital position.
- Imposing a requirement for New Zealand branches to hold assets in New Zealand equivalent to the New Zealand solvency standard prudential capital requirement for their risk exposures, and life insurance branches to hold New Zealand statutory funds in New Zealand. In insolvency, these assets would then need to be applied to meet the New Zealand liabilities (with small branches being exempted, but still holding a *de minimis* amount).
- Imposing a due diligence duty for the chief executive officer of the New Zealand branch.
- Expanding the requirements on disclosing overseas policyholder preference (which currently only relates to home jurisdiction requirements to prefer home policyholders in insolvency) to cover any situation in which overseas policyholders may be given preference.

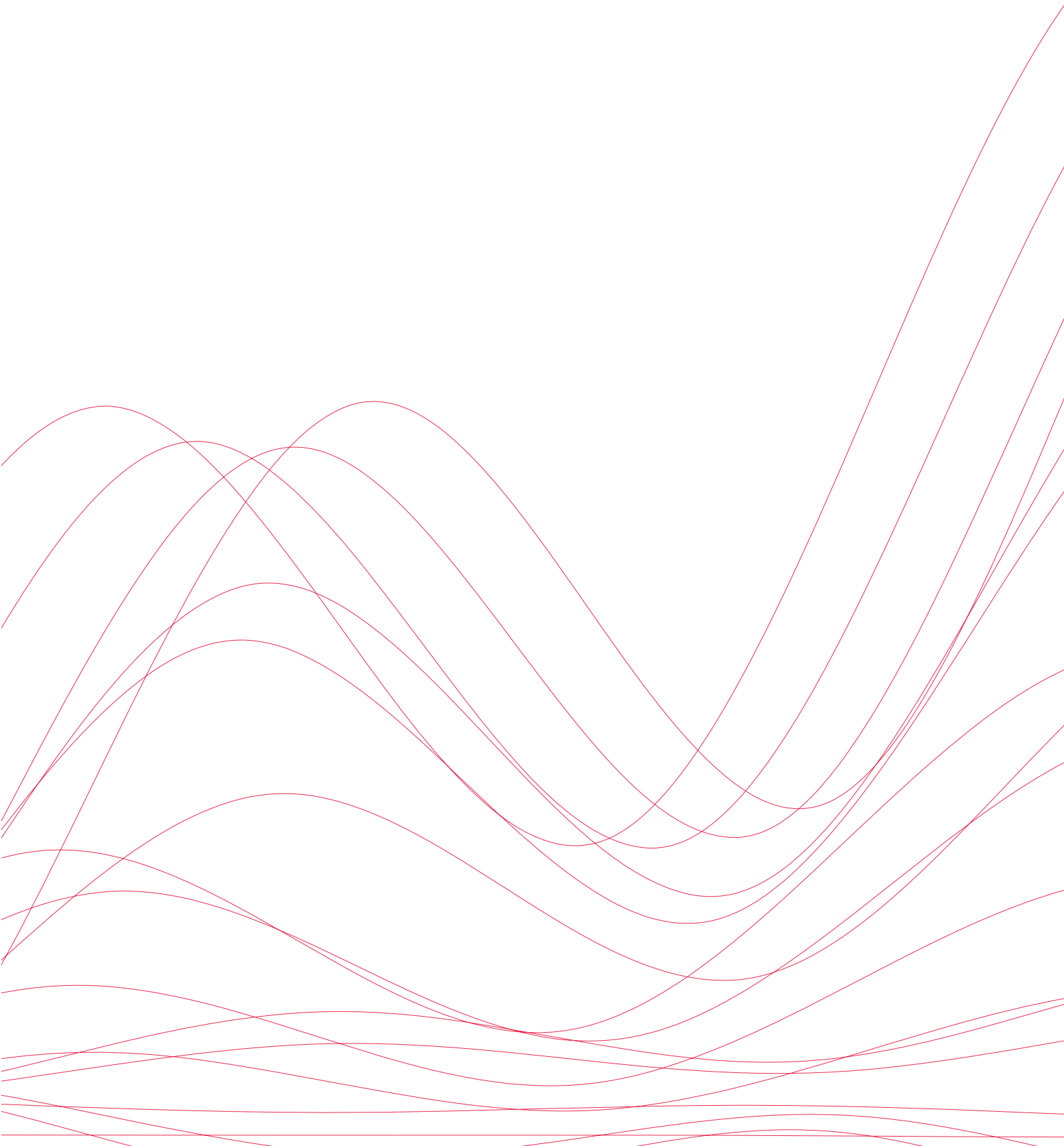
The RBNZ also acknowledged that the risks presented by local branches of overseas insurers increase with the size of the branch and appeared to be open to tailoring approaches relative to branch size.

Governance risk management and relevant officers

The RBNZ is also concerned about governance and risk management of an insurance company, and oversight and accountability for relevant officers in that company. It is considering several changes to bolster their guidance supervision, including:

- Moving from non-binding guidance to rule setting through standards. These would be consulted on in more detail, but the proposed high-level topics are:
  - corporate governance;
  - risk management;
  - internal capital adequacy assessment process/own risk and solvency assessment;
  - outsourcing policy; and
  - connected/related party exposures.
- Narrowing the scope of exemptions for overseas insurers exempt from certain governance and risk management standards due to home supervision. The RBNZ is considering imposing rules on New Zealand subsidiaries in the appropriate context.
- Introducing a new director duty for directors of a New Zealand incorporated licensed insurer, which, as mentioned above, will also be imposed on the chief executive officer of an overseas insurer, to exercise due diligence to ensure that the insurer complies with its prudential obligations under IPSA and regulation, standards, licence conditions and directions.

If you would like more information on how the Omnibus Paper may affect you, or would like support in making a submission on the changes proposed in the Omnibus Paper, please contact the authors. Our team in New Zealand advises insurance companies on any kind of corporate, regulatory or disputes-related issues.



Unfair Contract Terms Reforms – Implications for Insurance Contracts in Australia

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On 9 November 2023, amendments to the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) regarding unfair contract terms came into effect in Australia. The amendments include the broadening and expansion of the contracting parties that the unfair contract terms (UCT) regime applies to, together with introducing new penalties for breaches of the regime.

The amendments form part of the ongoing wave of regulatory reform in Australia's financial services sector since the Hayne Royal Commission, particularly in relation to financial product design and governance which has been a key focus area for the Australian Securities and Investments Commission (ASIC).

This article provides a brief snapshot of the amendments to the ASIC Act and their implications for insurance contracts.

Unfair contract terms reforms – insurance contracts

The ASIC Act is the relevant legislation for unfair contract terms (UCT) in insurance contracts. Insurance contracts first became subject to the UCT regime in April 2021.

By way of summary, the recent changes have introduced the following amendments:

- creation of new prohibitions for UCTs in the ASIC Act;
- a broadened definition of "small business";
- clarification on matters relevant to determining whether a contract is a "standard form contract"; and
- providing courts more flexible remedies once a term of a contract is declared unfair.

NEW PROHIBITIONS AND PENALTIES

Section 12BF of the ASIC Act has been amended to introduce the following new prohibitions:

- prohibition on entering into a standard form contract containing an unfair term; and
- prohibition on applying or relying on an unfair contract term.

This means that breaches of the above prohibitions will constitute the contravention of a civil penalty provision with the result that there are now financial penalties for non-compliance (previously, if a contract term was found to be unfair, it would be declared void but there were no financial penalties).

EXPANDED "SMALL BUSINESS" DEFINITION

Under the previous laws, the UCT regime applied if one party to the insurance contract was a business that employs fewer than 20 persons. The change to the definition means that a small business contract is where one party to the contract:

- is a business that employs fewer than 100 persons; or
- has a turnover for the last income year of less than USD10 million.

This amended definition will significantly expand the reach of the UCT regime to a broader number of policyholders.

Additionally, the upfront price payable threshold for determining whether an insurance contract is a "small business" contract has been increased to USD5 million.

CLARIFICATION ON "STANDARD FORM CONTRACT" DEFINITION

Whilst many insurance contracts already fell within the definition of a "standard form contract," the amendments now clarify that a contract may still be a "standard form contract" even where a party has been given the opportunity to negotiate minor changes to the contract.

FLEXIBLE REMEDIES

The amendments also give courts more powers to determine a remedy once a term of a contract is declared unfair.

Whilst the court will still retain the power to declare the term void, the changes also give the court powers to make orders:

- to prevent or reduce loss caused by the unfair term itself or any similar terms in any existing contracts; and
- to prevent a similar term being included in any future standard contracts to which the respondent is a party.

IMPLICATIONS FOR THE INSURANCE SECTOR

ASIC has been increasingly active in pursuing enforcement activity related to unfair contract terms in insurance contracts. ASIC has explicitly stated that it will be reviewing terms in home insurance contracts relating to maintenance and "wear and tear" for potential unfairness. We expect this activity to continue in 2024.

In light of ASIC's declared focus on this issue, UCT compliance will need to be a priority for insurers to ensure that they meet their obligations in relation to the amendments and avoid the risk of financial penalties and other consequences.

Overview of Parametric Insurance in Hong Kong

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With the increasingly severe and unpredictable weather events in 2023, such as the typhoon 10 and the "one-in-500-years" black rainstorm in Hong Kong, these extreme climate events render past climate records inadequate for reference and have created a huge challenge for conventional insurance as it traditionally uses historical data for risk pricing and modelling. As noted from an interview with Victor Kuk, Head of Property & Casualty Reinsurance SID at Swiss Re, due to rapid economic development, urbanization and expanding populations, over 30% of the global natural catastrophe events in 2022 occurred in Asia.[1] And a recent study conducted by Swiss Re[2] reveals that 76% of the natural catastrophe exposures are in fact unprotected by insurance and reinsurance. This has demonstrated the demand and great opportunity for insurance products such as parametric insurance to bridge the increasing gap, stemming from natural disasters, between economic losses and insured losses.

In the APAC region, Hong Kong has been relatively flexible and open to the concept of parametric insurance. While there is no specific legislation governing parametric insurance in Hong Kong, parametric insurance contracts are generally recognized as valid insurance contracts, and they can be reinsured

[1] Asia faces mounting nat cat losses and resilience challenges: Swiss Re's Victor Kuk, Reinsurance News, 27 October 2023, full article could be assessed here.

[2] Nat cat protection gap widens to USD368 billion. Cat/resilience bonds needed: Swiss Re, Artemis, 21 June 2023, full article could be assessed here.

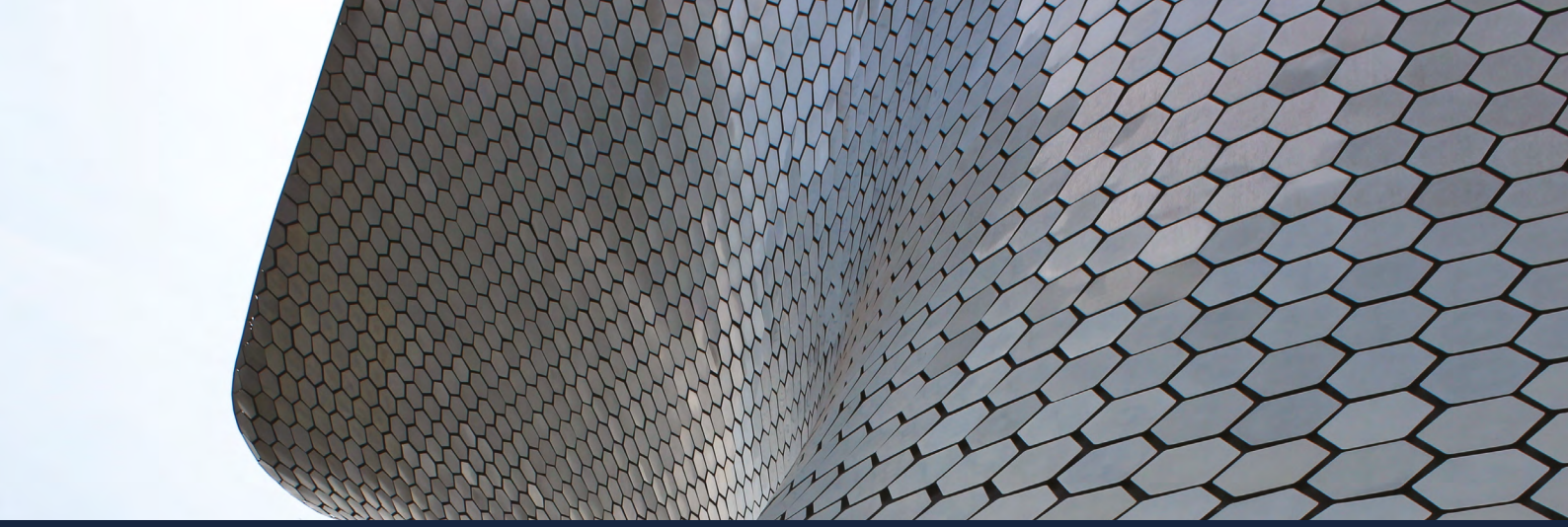
on the same basis as traditional reinsurance contracts. While parametric insurance would not directly replace traditional insurance policies, it complements traditional insurance policies and can bridge the protection gap and cover risks that have traditionally been uninsurable or difficult to insure. Compared to traditional insurance, parametric insurance is more transparent and could offer a faster payment process and reduce costs as the payout to the policyholders is agreed in advance, based on pre-determined payout formulas.

The parameters, specific triggers and payout of the parametric solution could also be tailored to the insured's needs and provide coverage for assets that could not be insured traditionally. For example, a business might be concerned about potential business interruption caused by future typhoons affecting their transmission and distribution (T&D) systems. As such, we have seen that Marsh designed a customized parametric typhoon insurance policy, where claim payouts are determined by the typhoon's sustained wind speed in the indemnification zone.

One notable adoption of parametric insurance in Hong Kong is the first-ever typhoon warning insurance solution Insur8 developed and launched by Swiss Re Corporate Solutions. The solution will indemnify and pay out policyholders automatically in case of any loss of earnings and additional operating costs caused by a typhoon warning signal number 8 or above issued by the Hong Kong observatory. The form of coverage could potentially include any loss of earnings from customers not being able to reach the store or premises of the business, reimbursement costs from the cancellation or postponement of an event, and loss of revenue from reduced productivity, etc.

With the increasing frequency and severity of extreme weather events in Hong Kong and in the wider Greater Bay Area region, we anticipate that the trend towards parametric insurance will undoubtedly continue to grow in the APAC region.

If you would like any advice on parametric insurance solutions in Hong Kong, please contact the authors.



Legislative Changes in Poland in the Insurance Sector

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The end of 2022 and all of 2023 were full of legislative changes in Poland. Below we provide an overview of the changes that will have the greatest impact on the activities of insurers operating in the Polish market.

Recommendation on Bancassurance, issued by KNF (Polish Financial Supervisory Authority) of 26 June 2023

The aim of the Recommendations is to improve the standards of bancassurance business and to set the conditions for stable market development. A key element is to ensure that customers receive good value for the insurance products offered through bancassurance. The Recommendations aim to regulate relations in this market, especially in the context of protecting consumers and the conduct of bancassurance activities by banks. It concerns the bank's management and supervisory board, the bank's risk hedging, the role of the bank, the accounting policy, customer relations, the internal control system for bancassurance, and compliance.

KNF's Recommendations of 15 September 2023 for insurance companies on assessing the suitability of life insurance with an investment element

These Recommendations will replace the Recommendations for Insurance Undertakings on Product Adequacy Testing of 22 March 2016, and explain and clarify the changed legal environment for insurance product adequacy testing.

The Recommendations are intended to strengthen the protection of the customer's interests, and they constitute an important step towards ensuring higher quality and transparency of the process of life insurance distribution with an investment element.

Act of 16 August 2023 amending certain acts in connection with ensuring the development of the financial market and the protection of investors in that market

This Act aims to improve the functioning of financial market institutions, in particular with regard to eliminating barriers to accessing the financial market, improving supervision, protecting customers, protecting minority shareholders in public companies and increasing digitisation in the implementation of supervisory duties by the Office of the Financial Supervision Commission.

The Act amends 41 laws, for example:

- It provides life insurance insureds with an insurance capital fund, with protection comparable to that provided to participants in open-ended investment funds with respect to the investment activities carried out by these funds.
- It regulates the obligations of insurance companies and the Insurance Guarantee Fund (responsible for payment of compensations to injured parties in traffic accidents and collisions caused by uninsured motor vehicle owners and uninsured farmers) in the event of the guaranteed sum being exhausted, and issues relating to membership in the Insurance Guarantee Fund of foreign insurance companies.
- It introduces regulations regarding the IT database maintained by the Insurance Guarantee Fund.

Amendments to the Commercial Companies Code

The amendment to the Commercial Companies Code, which entered into force on 13 October 2022, extended the powers of corporate bodies. The amendment has created new rules governing the liability of members of the governing bodies of a company that is part of a group of companies. The amendment has had an impact on the design of various indemnity insurance products, in particular, insurance for the company and members of its bodies, in particular directors and officers (D&O) insurance.

Criminal Code

On 1 October 2023, a major revision of the Criminal Code came into force, creating new types of offences. The most important one, from an insurer's point of view, is that the driver of a car without valid third-party liability insurance who fails to pay compensation to the victim may be imprisoned for up to five years. If the damage is repaired by the Insurance Guarantee Fund instead of the offender, the offender can expect to receive a recourse claim from the Fund, ie a demand for reimbursement of the repair costs plus interest.

In summary, the legal changes aim to broaden the protection of insureds, and the transparency of insurance products; insurers will have to adapt to the changes and amend their distribution strategy accordingly. The changes will also have an impact on D&O insurance products offered on the Polish market.

If you would like to learn more about any of these issues or have any insurance-related questions in Poland, please do not hesitate to contact the authors.

Insights into Proposed Amends to a New Legislative Insurance Law Framework in Slovenia

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In the Slovenian legal system, insurance contracts are regulated under the Slovenian Code of Obligations (*Obligacijski zakonik*; OZ), while insurance activities, in general, are governed by the Slovenian Insurance Act (*Zakon o zavarovalništvu*). In addition to these two acts, insurance activities are also subject to several special regulations that transpose European insurance contract law into the Slovenian legal order. Consequently, the regulation of insurance contracts is not only outdated but also fragmented, which leads to increased legal uncertainty. A lively debate has evolved in the Slovenian legal community and several proposals have been made to address this uncertainty.

The insurance contract regime in the Slovenian OZ is largely copied from the Yugoslav Code of Obligations, which means that it is over 40 years old. Since then, circumstances have changed significantly – insurance as an economic activity has expanded, the diversity of risks has increased, and there is a growing variety of new insurance products on the market. Given that the insurance industry is a major economic activity, and the insurance contract is the cornerstone of contractual insurance law, we can anticipate changes to the Slovenian regulation of the insurance contract in the future.

Some of the most critical and most heavily discussed topics in current proposals for a new regime are:

Pre-contractual duties and obligations

There is a dire need for more detailed regulation of the policyholder's duty to disclose all circumstances relevant for the assessment of the insured risk, the insurer's obligation to inform the policyholder about the characteristics of the insurance, and to advise of any discrepancy between the insurance offered and the policyholder's requirements, so as to enable the policyholder to make an informed choice as to the insurance product that best aligns with its requirements.

Classification of insurance into indemnity insurance and insurance of fixed sums

The current regime classifies insurance into property and personal insurance. However, under the proposed regime, insurance would be categorized as either 'indemnity insurance' or 'insurance of fixed sums', following the model of the Principles of European Insurance Contract Law.[1] In the case of indemnity insurance, the insurance sum is assessed based on the indemnity principle as compensation for the loss suffered. For insurance of a fixed sum, where the amount of the loss cannot be quantified, the insurance sum will be predetermined in the insurance contract. Insurance of a fixed sum would only be allowed in case of accident, health, life, marriage, birth, or other personal insurance. This conceptual change would further align Slovenian insurance regulation with international market standards.

Liability insurance

In a liability insurance contract, the insurer undertakes to compensate the injured party directly for damages caused by the insured. The current regulation of liability insurance under the OZ is deficient and rudimental, as it contains only two short articles. In particular, the concepts of (i) the insured event and (ii) direct claims of the injured party require more precise definitions. Presently, the OZ does not provide any details on these topics. It is currently proposed to change the concept of direct claims of the injured party, according to which the primary beneficiary of the liability insurance contract would be the insured, as in the case of other property insurance, rather than the injured party, who is not a party to the insurance contract. The injured party would only be a secondary beneficiary if the law specifically recognises this position.

Bonus and malus system (comparable to the no-claims bonus system in common law jurisdictions)

After entering into an insurance contract, the insured is more likely to omit certain precautions due to the availability of insurance. With the bonus and malus system, insurers encourage the insured to behave in a careful and responsible manner. Currently, the issue of bonuses being considered when switching insurers is not regulated, and since insured individuals frequently switch insurers, the proposed reform requires the insurer to consider the insured person's past claims record with other insurers.

Claims exceeding of the sum insured

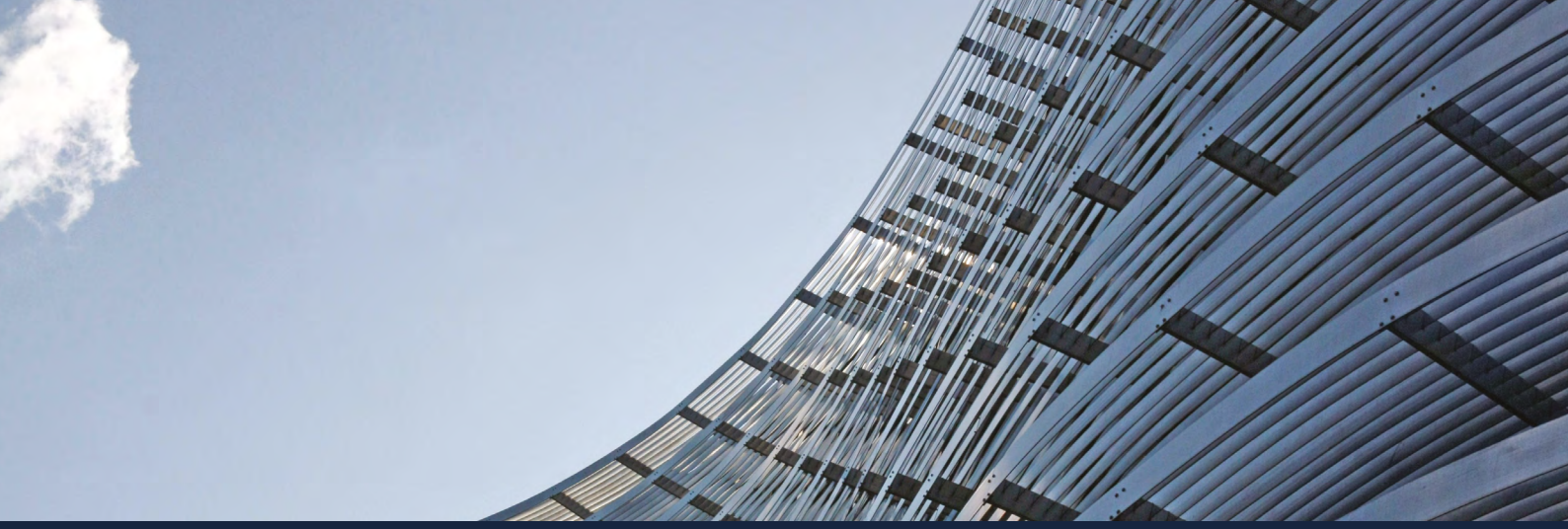
An insurance company's liability is typically limited, and in cases where a single insured event causes aggregate damage to different victims, the losses can often exceed the sum insured. The current regime does not address this situation. The proposed regime would ensure that all victims are treated fairly by proportionally reducing the pay-out to each victim.

Group insurance

Since contracts for group insurance are already widespread in other European countries and are not yet regulated by the Slovenian OZ, the proposed regulation includes a chapter on group insurance.

With these proposed reforms of insurance law, Slovenia will become a more attractive jurisdiction for insurers to underwrite risks in this region. If you have any questions on the above, please do not hesitate to contact the authors.

[1] Principles of European Insurance Law at page 14



Cross-Border Insurance Legislation in Croatia

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This article provides an overview of Croatia's legal framework focusing particularly on the insurance sector, and highlights how the framework facilitates cross-border insurance services for EU/EEA states.

Primarily, the Croatian insurance market operates under the Croatian Insurance Act (*Zakon o osiguranju*) and the Croatian Act on Compulsory Insurance within the Transport Sector (*Zakon o obveznim osiguranjima u prometu*), along with various supplementary regulations. Additionally, the Croatian Civil Obligations Act (*Zakon o obveznim odnosima*) governs the principles of insurance contracts, including both contractual and non-contractual obligations.

Oversight of the insurance market is the responsibility of the Croatian Financial Services Agency (HANFA). HANFA's role is crucial in supervising market compliance with legal standards, aiming to ensure an efficient, equitable, and stable market environment. This supervision is vital for protecting the interests of insured individuals and beneficiaries, as well as for bolstering the financial system's overall stability.

With Croatia's accession to the EU in July 2013, the integration of EU law into its national legislation began, granting Croatia equal standing within the EU economic zone and the benefits of EU membership. This integration has enabled Croatian insurance firms to compete in the EU's internal market on equal footing with their EU counterparts.

Furthermore, it also simplified the process for EU-based companies to operate in the Croatian insurance market.

EU Insurance Regulation and freedom to provide insurance services

In light of the implementation of EU regulation, such as Solvency II and the Insurance Distribution Directive, there are currently a total of 537 non-Croatian EU insurance companies and branch offices of EU insurance companies that have notified the supervisory authority about their intention of directly offering insurance services in Croatia, leveraging the EU freedom to provide services within the EU. Although the exact number of these companies actively providing services in Croatia remains uncertain, it is evident that their presence substantially exceeds the number of domestic insurance companies (as of November 2023, only 14), which are currently operating in Croatia.

Croatian procedure for providing cross-border insurance services

The primary regulatory framework for cross-border provision of insurance activities as provided under Solvency II and the Insurance Distribution Directive has been transposed into Croatian law by the Croatian Insurance Act. The procedure for EU insurance companies to provide their services in Croatia on a cross-border basis is regulated under chapter II of the Croatian Insurance Act.

According to these rules, any permanent presence of an insurance company in Croatia, whether in the form of a branch or merely an office managed by the company's own staff, or an independent authorized representative, is recognized and treated the same as insurance companies with permanent presence.

Insurance companies headquartered in another EU Member State must notify the relevant home supervisory body before commencing operations in Croatia. This notification must include various details such as the nature of risks or obligations they intend to cover, their business plan, details of the authorized representative, and their Croatian address for correspondence. Additionally, these companies must confirm their compliance with the necessary solvency and minimum capital requirements as per Croatian law.

The competent supervisory authority of the insurance company from the other EU Member State is responsible for forwarding this information to HANFA. This is typically done within three months of receipt of the notification, provided there are no concerns regarding the company's management systems, financial position, or the credibility and experience of the authorized representative (also called *passporting*).

Furthermore, HANFA systematically informs the supervisory bodies of other EU Member States about the Croatian regulations that must be adhered to by insurance companies based in those states but operating in Croatia. These companies, especially those providing services under the Croatian Act on Compulsory Insurance within the Transport Sector, are required to submit a statement to HANFA confirming their membership in the national insurance office and national guarantee fund of Croatia before they can start offering their services.

Lastly, for insurance companies from other EU Member States covering risks under specific types of insurance, such as health insurance, in Croatia, they must submit their insurance terms to HANFA before starting health insurance operations.

If you are interested in engaging in insurance business in Croatia and would like further insight into the Croatian insurance legislation and regulation, please contact the author.

Update on the Nordic Marine Insurance Plan

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The new and updated version of the Nordic Marine Insurance Plan (the Nordic Plan) entered into force 1 January 2023. The Nordic Plan is subject to regular review by the Standing Revision Committee, normally every three years and the Nordic Plan 2023 revises and replaces the 2019 version. The below is a quick overview of some of the more material changes.

For a full overview of all changes please see: (Foford (cefor.no).

Sanctions

Following Russia's invasion of Ukraine and other notable trends and tensions in global geopolitics, the Standing Committee has revised clause 2-17 regarding sanction limitation and exclusion. The purpose of the clause is to protect the insurer by making sure the insurer is not contractually obligated to perform activities that will be contrary to applicable sanctions law, for instance making payments to a listed person or entity subject to financial sanctions. The 2019 version of the clause contained a reference to sanctions laws or regulations of the Russian

Federation. Considering the outbreak of war between Russia and Ukraine, this reference has been deleted. The main reason given in the commentary being the risk of countersanctions from Russia creating uncertainty for the parties. The reference to the People's Republic of China has also been removed to align the clause with the clauses in use in the English market.

Clarifications on the role and authority of the claim's leader

Where there are several insurers, a claim's leader may be appointed to act on behalf of the co-insurers in certain matters. The clauses regulating the claim's leader's authority and obligations are found in chapter 7 (in relation to mortgagees) and chapter 9 (in relation to co-insurers). The 2023 changes are meant to clarify the claim's leaders' authority, increasing the administrative benefits of co-insurers being represented by a claim's leader. In relation to mortgagees, whose interests are automatically covered by the insurance, the 2023 changes mean the mortgagee can deal with the claim's leader alone, for instance in notifying the mortgage under clause 7-1 sub-clause 2 and agreements on special requirements in the insurance contract within customary market practice under cause 7-1 sub-clause 4.

Changes in loss of hire conditions

Loss of hire conditions regulate the situation when the assured suffers a loss of income because a vessel is inactive due to damage or a similar situation. Changes to chapter 16 on loss of hire conditions have mainly been made to improve structure and consistency of terminology, but there are also some material changes: most notably the 2023 changes emphasize that the loss of hire insurance covers the *assured's loss of income* that is caused by damage to the vessel. Therefore, loss attributed to the vessel, where the assured does not suffer a loss of income, is not covered. This is contrary to the judgement LA-2018-35513 Hamburg Cruise where the appeal court ruled that the assured was entitled to compensation for loss of income even though the assured had employed a substitute vessel.

Further, the 2023 changes clarify coverage in cases of total loss pursuant to clause 16-2. The clause now states that the assured is not entitled to loss of hire coverage when the damage is covered by another hull insurance *in effect.* The aim of the change is for coverage to be more reasonable and avoid instances where the assured is denied coverage under the loss of hire based on a hypothetical assessment of the Plan chapter 11, when the damage is not covered by total loss provisions in the hull insurance in effect.

Other material changes to chapter 16 have also been made such as clause 16-11 being extended to cover all measures to avert or minimize loss, and not only costs to save time.

Sustainability

An overarching aim of the 2023 amendments have been for the parties to strive to find more environmentally and socially responsible ways to operate and adjust claims under the Nordic Plan. Effects of these considerations can be found in clauses regarding choice of repair yard, cf. clause 12-12 (hull insurance) and clause 18-29 (hull insurance for MOUs) where the assured may increase maximum contribution from hull insurers by up to USD40 per ton CO^2 emissions saved on fuel consumption for recovery by choosing a yard other than the cheapest. Clause 12-12 sub-clause 3 also contains the right for the assured to demand that tenders form certain repair yards be disregarded in case of "special circumstances." The commentary explains that grounds for objecting to a certain yard may be that the yard does not comply with relevant ESG standards.

Please do not hesitate to reach out to any of our shipping and marine insurance contacts should you have any questions about the Nordic Plan or the latest changes made.

Offshore Wind in the UK: Opportunities and Challenges for Insurers

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The insurance market is well-placed to support the UK's ambitious plans for the development of offshore wind and there continues to be strong appetite to invest in this class of business. However, there will be challenges for the insurance industry to overcome to maintain its crucial role in helping the UK achieve its demanding targets.

Current state of play

Offshore wind is one of the UK's biggest assets in the renewables industry and plays a central role in its transition away from fossil fuels. The UK is a global leader in offshore wind, in part due to the natural resources of shallow seabeds and high winds around the UK's shores, and this includes floating wind – with the world's first floating wind farm off the coast of Aberdeenshire.

The recent introduction of the Energy Act 2023[1] is a significant step in the UK government's plans for offshore wind development. This landmark piece of legislation received Royal Assent on 26 October 2023. The scope of the Energy Act and the policy areas it covers are wide-ranging.[2] According to a press release issued by the Department for Energy Security and Net Zero, the Energy Act is designed to strengthen energy security, make UK energy more affordable and independent, and help deliver on net zero

[1] Energy Act 2023 (legislation.gov.uk)

[2] See for further information: The Energy Act 2023 is here | DLA Piper

commitments.[1] The Energy Act and the policy papers leading up to it[2] make clear the significance of offshore wind in delivering on these net zero commitments.

Future targets

The UK's ambition is to rapidly develop offshore wind to deliver up to 50GW by 2030, including up to 5GW from floating wind, which would amount to half of all renewable energy generation. For perspective, the UK currently has approximately 14GW of offshore wind fully commissioned, so this would mean generating over 3.5 times the current capacity in 7 years.

A key requirement in achieving this target will be reducing the process time of development and deployment. This means reducing the consent times for new projects from up to four years to one year, and taking environmental considerations at a strategic level to reduce delays to projects. The acceleration of development will need to be balanced with protecting the marine environment. This is addressed by four measures in the Energy Act relating to environmental compensation and the establishment of a marine recovery fund.[3]

Growth opportunities and challenges

The Government targets will require a rapid increase in the number and size of wind farm projects, which in turn will require sufficient capacity in the insurance market. This development presents exciting growth opportunities for insurers backing this form of energy transition.

However, whilst the long-term growth opportunities are attractive, there has been an increase in the frequency and severity of offshore wind claims over the last ten years, with an average claim increasing from GBP1 million to GBP7 million in that time.[4]

There are a number of reasons for this significant increase. Technological developments and commercial drivers pushing for greater generation capacity mean ever-increasing turbine sizes, with heights currently reaching 260m in total, and blades of 107m in length. Among other issues, this can lead to more claims during construction due to the difficulties of transporting, harbouring and lifting larger components. New, unproven technology can also result in more defects. In addition, cables are becoming longer and more complex, leading to more costly cable malfunctions, including serial defects.

The costs of repairs and reinstatement are also increasing. This is in part due to significant rises in commodity prices and inflation, coupled with supply chain capacity and disruption issues. These challenging economics have affected market players, with the share prices of leading wind power suppliers dropping, and the latest round in the UK Contracts for Difference auction receiving no bids for offshore wind.[5] Rising energy prices have also led to increased business interruption claims, as have supply chain bottlenecks leading to delays in projects returning to operation after a loss. The shortage of appropriate vessels can also mean increased delays.

The way forward

Against this backdrop of increasing losses, the fact that offshore wind remains a growth opportunity means there is incoming underwriting capacity, which can lead to additional competition on premium rates and underwriters agreeing to increasingly broader policy terms.

Underwriters will need to manage the risks associated with prototypical technology, greater supply chain risk and larger and more complex exposures generally in the short to medium term, to reap the benefits of a sector which has projected long-term growth, fulfilling a crucial role in supporting the UK's energy transition through offshore wind.

[3] New laws passed to bolster energy security and deliver net zero - GOV.UK (www.gov.uk)

[4] See: British Energy Security Strategy (April 2022), Net Zero Strategy: Build Back Greener (October 2021) and Ten Point Plan for a Green Industrial Revolution (November 2020)

[5] See Sections 290 to 295

[6] Average offshore wind loss increased sevenfold 2012-2021: GCube (insuranceinsider.com)

[7] See all successful bids here: Contracts for Difference Allocation Round 5 results (publishing.service.gov.uk). The government has since announced an increase in the administrative strike prices for fixed bottom offshore wind projects. See: Boost for offshore wind as government raises maximum prices in renewable energy auction – GOV.UK (www.gov.uk)

Notes on the Brazilian Insurance Law Bill

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New Insurance Law Bill

Since 2004, a proposed new Insurance Law (the Legislative Bill No. 29/2017) has been under discussion and consideration by the Brazilian Congress. It was approved by the Chamber of Deputies and Senate, and is now at the final stages of approval. This Bill aims at providing a legal framework for insurance and reinsurance in Brazil, revoking the insurance provisions currently set out in the Brazilian Civil Code and further regulations enacted by the National Council of Private Insurance (*Conselho Nacional de Seguros Privados,* CNSP), and by the Brazilian Superintendence of Private Insurance (*Superintendência de Seguros Privados,* SUSEP), the authorities supervising the reinsurance and insurance sector in Brazil.

The discussions regarding the Bill are taking place 20 years after it was first proposed and after major changes in the Brazilian insurance sector have already taken place within the current regulatory framework. Previous changes, which are currently in force in Brazil, include the opening of the reinsurance market, less regulation where possible and alignment with international market practices such as the operation of supervised entities, the process of commercialization of insurance products for large insureds, liability on the transfer of portfolios, amongst many others.

These earlier changes ensured that the Brazilian insurance sector fostered innovation, catered for the needs of those individual insureds, had flexibility and was less bureaucratic.

Changes brought by the new Bill

With the change of current provisions, the Bill would bring (again):

- The requirement of prior approval for the offering of insurance products,
- Impose new liabilities to the transferor of a portfolio,
- Impose changes to arbitration provisions of (re)insurance matters,
- Impose conditions to reinsurance agreements, amongst other changes.

In many ways, the Bill does not reflect those significant improvements brought by the current insurance and re-insurance regulatory framework and represents a setback to the insurance sector in the country, as it undoes some positive developments in Brazilian insurance law over the last 20 years.

The Senate has recently received some amendments to the original wording of the Bill and expects to approve this new Bill in early 2024.

Our Insurance team in Brazil are monitoring the next steps of the approval. Please feel free to contact us if you have any questions on how this new Bill could impact your business or operation in the country.

Trending Topics in Colombian Insurance Law

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The legal landscape of the Colombian insurance sector has undergone significant advancements in recent years, with courts and legislative bodies addressing emerging challenges and gaps in insurance law. This article provides an overview of three trending topics in insurance law in Colombia.

Fair presentation of the risk by the policyholder's representatives

On 16 December 2022[1], the Supreme Court of Justice held that the declaration by the legal representative of the policyholder regarding the state of risk is binding on the policyholder company.

The legal representative of the policyholder confirmed to its insurers that they were not aware of any circumstance that could give rise to a claim. However, after numerous investigations, it was later found that the policyholder improperly used client resources, failed to fulfil its obligations to its clients and violated various securities market rules.

[1] Judgment SC3952-2022. https://cortesuprema.gov.co/corte/wp-content/uploads/2023/01/SC3952-2022-2015-00397-01.pdf

The court considered whether anomalous acts of employees are not deemed to be carried out by the company they represent and concluded that such an argument would not be reconcilable with the role of agents, and lead to the absurd conclusion that the insurance policy in question was not acquired by the defendant policyholder, but rather in the name of the person (as individual) who acted as its legal representative. Therefore, any declaration of the state of risk made by a company through its legal representative, administrator, manager, etc., at the time of obtaining an insurance policy, is binding on the policyholder.

All-risk insurance in construction, aggravation of risk and breach of warranties

On 22 November 2022, the Supreme Court of Justice of Colombia[2] analyzed an all-risk construction insurance contract that provided protection to a builder, contractor, and subcontractor which provided insurance cover from the commencement of their works to the end of the project. The policy provided cover for material damages and tort liability risks. Following a notification of a loss, the insurer did not respond to the notification and eventually objected to indemnifying the policyholders. As a consequence, the policyholders initiated legal proceedings against the insurer, who in its defence argued that there was an aggravation of the risk and a serious breach of warranty clauses.

The court stated that it was pertinent to differentiate between the concepts of aggravation or increase of risk (ie failure to disclose an increase of risk) and breach of warranties. The court observed that the policyholders had granted warranties regarding compliance with designs and constant monitoring of the construction, but the construction and excavation procedure did not follow the recommended sequence, constituting a breach of warranties rather than an aggravation of the risk. In conclusion, the court noted that the situation constituted a typical breach of the warranties granted by the policyholders and did not qualify as aggravation of the risk.

Directors and Officers Liability Insurance – Insured v Insured

The role of arbitration tribunals in resolving claims related to Directors and Officers (D&O) liability insurance is becoming more prominent in Colombia. On 30 March 2023,[3] an arbitration tribunal of the Chamber of Commerce of Bogotá handed down its award in respect of a claim brought by the policyholder of a D&O insurance policy against its former executive and its insurers. The claim was brought by the policyholder on the grounds that the executive allegedly caused economic harm to the company, as a result of a series of decisions made in the course of their duties.

The tribunal dismissed the claim and released the insurance companies from the payment of compensation on the grounds that it was demonstrated that: (i) the conduct of the executive was not the efficient cause of the additional financial cost suffered by the company; (ii) the corporate bodies of the company expressed no disagreement regarding the executive's management, and; (iii) there was no evidence that the executive had exceeded his duties.

In its decision, the tribunal clarified that D&O insurance is a professional liability insurance that provides compensation to the beneficiary arising from "pure economic harm" and does not cover losses or damages to property, physical injuries, or death. Furthermore, the tribunal established that, for insurances of this nature, typically, the managed company will be the policyholder and will transfer to the insurer the risks inherent in the management activity performed by its management organs.

If you have any questions on any of the above discussed decisions, or other insurance law queries in Colombia, please do not hesitate to contact the authors.

[2] Judgment SC3663-2022. https://cortesuprema.gov.co/corte/wp-content/uploads/2022/11/SC3663-2022-2012-00193-01.pdf

[3] Award Vehículos de la Costa S.A.S v. Chubb Seguros Colombia S.A., SBS Seguros Colombia S.A., and Luis Jesús Anaya Abello

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