THE INSURANCE DISPUTES LAW REVIEW

Fourth Edition

Editors
Joanna Page and Russell Butland

THE LAWREVIEWS

THE INSURANCE DISPUTES LAW REVIEW

FOURTH EDITION

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This article was first published in October 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-788-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AIYON ABOGADOS SLP

ALLEN & OVERY LLP

DURUKAN LAW FIRM

HOFMANN-CREDNER RECHTSANWALTS GMBH

HOGAN LOVELLS STUDIO LEGALE

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PREFACE

We are delighted that this is now the fourth edition of *The Insurance Disputes Law Review*. It is a privilege to be the editors of this excellent and succinct overview of recent developments in insurance disputes across 15 important insurance jurisdictions. We are particularly pleased that in this edition we are welcoming chapters from Greece, Brazil and Turkey.

The first three editions were very well received. They demonstrated both the need for and the very active interest in the legal frameworks for insurance and, in particular, in the insight that the developing disputes arena provides into this fascinating area. This interest has been clearly evident across the globe.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private spheres. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured, and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (concepts almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As editors, we have been impressed by the erudition of each author and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction. An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and therefore had to rely on the duties of disclosure of the policyholder). With the increasing use of artificial intelligence to assess data and more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example in relation to healthcare insurance,

policyholders are not denied insurance for historical matters. In light of the ongoing scourge of covid-19, and the complexity of its effects across the world's economies, this issue continues to be at the forefront of debate.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The effect of covid-19 on economies, and particularly on business interruption insurance, has been a significant theme in the past year. The consequences for credit insurance will no doubt follow through as well. In our home jurisdiction, the courts have faced this challenge by facilitating an important test case, utilising new procedural rules for the first time and reaching the highest UK court, our Supreme Court, in only seven months so as to provide urgent guidance on some key issues. The courts in many other jurisdictions have also sought to provide swift and practical guidance.

It is also fascinating to see how global concerns around climate change and cyber risk are working their way through the legal systems, with jurisdictions, particularly the United States, leading the way in assessing how existing insurance products might respond to these risks.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany) is likely to be an important factor.

We would like to express our gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. On a personal note, we must also thank Abigail Witts at our firm, who has done much of the hard work in this edition.

Finally, we would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in adding a professional look and more coherent finish to the contributions.

Joanna Page and Russell Butland
Allen & Overy LLP
London
October 2021

Chapter 7

GREECE

Antonios D Tsavdaridis and Kosmas N Karanikolas[1]

I OVERVIEW

The Greek Insurance Contract Act (ICA),[2] despite its very succinct nature, is regarded as a pioneering law in Europe. Occupying a position in the legislative vanguard in its field, its provisions resemble those of other contemporary European insurance contract laws. Rules applicable to insurance contracts are also found in the legislation on insurance supervision and distribution of insurance products, and in special laws regulating other, individual issues. Rules on general contract law apply supplementarily.

Premium income in Greece remains poor in relation to the country's income per capita,[3] contributing to the widespread use of international insurance terms and clauses, which are governed by Greek law as foreign laws are almost never agreed upon for insurance contracts. Several provisions regarding direct or indirect interest have recently been introduced for insurance contract law, although these do not touch upon the ICA's core. The provisions focus on related issues, such as the introduction of compulsory professional liability insurance for travel agents and travel service providers,[4] the amendment of the liability insurance regime for high-speed craft operators[5] and the establishment of compulsory liability insurance for payment institutions,[6] investment service providers[7] and insolvency practitioners within the meaning of Law No. 4738/2020.[8]

Some positive developments in insurance dispute resolution have occurred in recent years. The application of a system enabling the electronic submission of lawsuits and other legal instruments, as well as the expansion of the scope of mediation in retail cases, has the potential for a positive impact in insurance litigation. Brokers and experts play a major role in the resolution of commercial insurance disputes. Although, as a rule, insurance disputes in Greece are not resolved through arbitration, marine insurance disputes concerning ocean-going vessels are usually resolved through international arbitration, whereas disputes

1 Antonios D Tsavdaridis is a partner and Kosmas N Karanikolas is an associate at Rokas.

2 Law No. 2496/1997.

3 *Annual Report 2020*, published by the Association of Insurance Companies of Greece (EAEE), accessible at http://www1.eaee.gr/etisia-ekthesi (last visited on 30 June 2021).

4 Enacted by Presidential Decree 7/2018.

5 Introduced by Ministerial Decision No. 2133.1/39328/2018.

6 Art. 10 para. 1, letter b of Law No. 4537/2018.

7 Art. 14 of Law No. 4514/2018.

8 Introduced by Ministerial Decision 17192oik./2021; see I Rokas, 'Contractual Insurance Law', Part A of *Private Insurance Law*, 13th edn, 2021, Sec. II 180, 181, 199, 202 and 211.

related to short sea-shipping and yacht issues are typically referred to state courts. The aforementioned developments have contributed to the acceleration of dispute resolution and the curtailment of trials, which has in turn led to an increase in premium income this year.[9]

The trends in the fundamental developments in insurance law in Greece can be traced in the jurisprudence of the Supreme Civil and Criminal Court of Greece (the Court of Cassation),[10] certain decisions of which (issued mainly a few years before 2020) were of particular interest and remain significant now. Notably, following the issuance of the controversial Court of Cassation decisions Nos. 18/2015 and 19/2015[11] (in plenary session) there remains uncertainty as to whether and to what extent a derogation from the provisions of the ICA can be validly agreed simply on the basis of the policyholder having bought the insurance for professional or commercial reasons – rather than a derogation being permitted exclusively for large-risk commercial insurance contracts. Finally, the supervisory authority on insurance, the Bank of Greece (BoG), has shown itself to be particularly lenient in accepting insurance coverage of risks that are new and would not have been covered in the past.

II THE LEGAL FRAMEWORK

i Sources of insurance law and regulation

Insurance law comprises two interrelated segments: first, contractual insurance law and, second, the rules extensively harmonised at European Union level on supervision of reinsurance and insurance undertakings and on the distribution of reinsurance and insurance products.[12]

Contractual insurance law is mainly incorporated in the ICA, which introduced succinct and cohesive provisions on insurance contracts to replace the obsolete provisions of the Commercial Code, which had in turn been transposed from the repealed Italian Code of Commerce of 1882.[13] The ICA's provisions are rather few and concise, and because of this succinctness insurance law is extensively supplemented by customary law and business usage in the insurance sector, as well as by standardised terms and conditions.[14] In particular, in commercial risks insurance, the industry commonly applies international standards to insurance terms and conditions, with only slight amendments (or none). However, Greek law is almost always stipulated as the applicable law in policies.

Insurance law is regarded as special contractual law, with its own methodology and concepts, which, although constitutively literally identical to the civil law institutions, are sometimes interpreted differently from the understanding commonly applied in both civil and even commercial law.[15] Notwithstanding these different interpretations, the general provisions of the Civil Code also apply to insurance contracts in respect of, indicatively, contract formation, contracts voidable because of error, fraud or conclusion under duress,

9 'Production of insurance premiums January–May 2021', accessible at http://www1.eaee.gr/paragogi-asfalistron (last visited on 1 July 2021).

10 Areios Pagos is the Supreme Civil and Criminal Court of Greece (http://www.areiospagos.gr/en/INDEX.htm).

11 See note by I Rokas on this decision in the Athens Bar Association law review, *Nomiko Vima* 2016, pp. 64, 297.

12 I Rokas, 'Greece' on Hellenic insurance law, in *International Encyclopedia of Laws Insurance Law* (ed. H Cousy), 4th edn, 2019, Sec. 32.

13 I Rokas, *Contractual Insurance Law*, op. cit., Sec. II 47.

14 R Chatzinikolaou-Aggelidou, *Private Insurance Law*, 6th edn, 2020, Sec. 47–49.

15 I Rokas (ed.), *Commentary on Insurance Contract Act*, 2014, Foreword, p. IX.

and interruptions of the limitation period.[16] Special legislation applies to marine insurance[17] and aviation insurance.[18] Furthermore, several dispersed provisions stipulate compulsory insurance, among which Law No. 489/1976 on motor vehicle third-party liability (MTPL) insurance stands out.

Legislation on supervision of insurance undertakings, namely on the taking-up and pursuit of insurance business, is structured in layers, as is the case in all EU countries, according to the Solvency II[19] system. Law No. 4364/2016 constitutes the first level, harmonising Greek legislation with Solvency II, followed by the European Commission's delegated regulations and decisions.[20] Applicable law also includes a number of decisions issued by the BoG, establishing strict legal provisions; most of the BoG decisions are issued in compliance with relevant European Insurance and Occupational Pensions Authority (EIOPA) Guidelines.[21] The provision of insurance services is subject to prior authorisation by the BoG upon fulfilment of certain conditions, with insurance undertakings licensed to carry out either life or non-life insurance business, according to the standing principle of business segregation.[22] Despite the national legislature's omission of a special rule on the minimum share capital of insurance companies, it has been suggested that this should be differentiated from that of common *sociétés anonymes* (i.e., €25,000[23]) and should not fall short of the minimum capital requirement for insurance undertakings, which varies among insurance branches, ranging from €2.5 million to €9.8 million.[24]

As regards distribution of insurance products, the relevant national legislation was recently modified following the transposition of the Insurance Distribution Directive[25] by Law No. 4583/2018, which has been extensively supplemented by European Commission delegated regulations inserting special provisions on the distribution of insurance-based investment products, on product oversight and governance, and on packaged retail and insurance-based investment products; in addition, regulations on applicable key information documents and insurance product information documents are also enforceable. The novel legal framework establishes requirements for the provision of pre-contractual information to prospective insureds that are, in principle, equally applicable to insurance intermediaries and insurance undertakings engaging in direct sales of their products. Insurance intermediaries can provide their services subject to prior enrolment in the relevant registry under one of three designated categories (insurance agent, insurance broker or coordinator of insurance agents), although they cannot act in the capacities of both an insurance agent and an insurance broker concurrently. Notably, according to a national arrangement, banks, investment firms or agricultural cooperatives wishing to distribute insurance products are required to register in the category of insurance agent.

16 I Rokas, on Hellenic insurance law, op. cit., Sec. 104, 183.

17 Arts. 257–288 of the Code of Private Maritime Law.

18 ibid, Sec. 29. See also Arts. 129–138 of the Private Aviation Code.

19 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

20 I Rokas, 'The Enterprise', Part B of *Private Insurance Law*, 13th edn, 2021, Sec. VII 131.

21 I Rokas, *Insurance Law: From theory to practice*, 5th edn, 2020, Sec. 5.

22 A Sinanioti-Maroudi, *Insurance Law*, 2nd edn, 2017, p. 75.

23 Art. 15 para. 2 of Law No. 4548/2018.

24 I Rokas, 'The Enterprise', op. cit., Sec. VII 197.

25 Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast).

In response to the withdrawal of the licences of two large life insurance undertakings that led to losses for hundreds of thousands of long-term insureds[26] and resulted in the launching of numerous lawsuits, the Life Insurance Guarantee Fund was established,[27] entrusted with the duty to ensure the portfolio transfer of life insurance undertakings in liquidation and, should a transfer prove impossible, to provide coverage in place of the insolvent insurance company. Moreover, the liability of the Auxiliary Fund has been extended by national law[28] to cover insurance companies in bankruptcy or whose licence has been withdrawn or against which the execution of a judgment has proved fruitless.[29] The Auxiliary Fund is the body responsible for providing compensation for damage to property or personal injuries caused by unidentified vehicles or vehicles whose use fails to comply with the civil liability insurance requirement.

ii Insurable risk

Every risk capable of causing damage to a person or property, namely any risk that can harm tangible or intangible assets or generate liability, is deemed to be insurable.[30] There is a great deal of freedom in the formulation of insurance contracts, with the only condition to insurability being, in principle, the avoidance of fraud and collusion, without attachment to dogmatic positions given that the risk of fraud or collusion is not apparent.

In this regard, in view of public order considerations, non-insurable risks include liability for intentional damage caused to third parties and coverage for fines imposed for criminal offences, with the disputed exclusion of fines imposed in circumstances not constituting crimes punished by the Greek Penal Code. Although legal costs incurred for the defence of a claim regarding a fine are borne by the insurer, these have to be refunded if the final judgment of the criminal court goes against the insured. Moreover, intangible values are non-insurable because they cannot be damaged, therefore the specific risk does not actually exist and this is also the case for items without objective value and whose value is exclusively subjective for the policyholder. Furthermore, the risk of the death of a person is non-insurable without the written approval of the person at risk. Finally, an insurable risk must already be present at the time of effective commencement of the coverage but not necessarily at the time of conclusion of the insurance contract.

The ICA[31] contains certain risks that are, as a rule, excluded from coverage (acts of war, civil war, rebellion, civil commotion and natural deterioration of the insured items), in the sense that these risks are deemed not to be covered in the absence of an agreement to the contrary (the existence of which would be complemented by payment of an additional premium).[32] The presence of these statutory exclusions in the ICA signifies that if for any reason whatsoever the policyholder is not bound by the terms and conditions of the policy that exclude coverage, the aforesaid statutory exclusions will still apply. However, these risks are not uninsurable and the insurer is entitled to cover them if so agreed, as is the established practice in, for instance, marine insurance. Finally, the provision requiring an insurance

26 R Chatzinikolaou-Aggelidou, *Private Insurance Law*, op. cit., Sec. 579–580.

27 Pursuant to Law No. 3867/2010.

28 Art. 19 para 1, letter d of Law No. 489/1976.

29 I Rokas, *Contractual Insurance Law*, op. cit., Sec. IV 178.

30 I Rokas, on Hellenic insurance law, op. cit., Sec. 97.

31 Art. 13 Insurance Contract Act (ICA).

32 R Chatzinikolaou-Aggelidou, *Private Insurance Law*, op. cit., Sec. 333–334.

undertaking to be licensed to legitimately conclude insurance of the class specified by the licence does not render 'uninsurable' a risk covered in default of the appropriate licence; rather, covering a risk in default of the correct licence only exposes the insurance undertaking to the risk of an administrative fine.

All types of non-life insurance presuppose that the policyholder has, according to the ICA,[33] an 'insurable interest' that is 'a legal interest in the preservation of the property that is threatened by the risk against the materialisation of which coverage is sought'.[34] Greek insurance law distinguishes between insurable interest *lato sensu* and insurable interest *stricto sensu*; the existence of the former entitles the insurance applicant to conclude the insurance contract, while the latter means that as a result of the occurrence of the risk the policyholder shall suffer no less damage than the insurance money claimed. In the absence of the policyholder or insured having an insurable interest, coverage of damage or loss is null and void, irrespective of whether the insurer is seeking to benefit from avoiding the policy.[35]

iii Fora and dispute resolution mechanisms

The resolution of disputes arising between the insurer and the policyholder, insured or beneficiary are resolved, as a rule, by referral to the competent state courts, while other methods include arbitration, mediation and expert adjudication.

Courts' jurisdiction is defined in accordance with the standing separation between civil, criminal and administrative courts. In this regard, civil and commercial disputes arising between the insurer and either the insured or the collaborating insurance intermediary are resolved by civil courts and the handling of criminal prosecutions is entrusted to criminal courts. Disputes arising between insurance undertakings and the regulator (the BoG) concerning, inter alia, the latter's refusal to grant a licence or the licence's definitive or temporary withdrawal, as well as sanctions imposed by the BoG, are subject to an 'application for annulment' before the Council of the State (i.e., the country's supreme administrative court).[36]

In principle, civil courts' material competence is dependent on the monetary value of the object of the dispute: if the value does not surpass €20,000, the case is brought before the magistrate's court; if it exceeds €20,000 but is less than €250,000, the single-member court of first instance is competent; and if the object exceeds €250,000 in value, the dispute is resolved by the multi-member court of first instance. However, as an exception, lawsuits concerning compensation for damage resulting from car accidents and disputes regarding the amount and the payment of insurance premiums are brought before the single-member court of first instance, even if the monetary value of the dispute's object exceeds €250,000,[37] as they are subject to the special procedural rules on the resolution of property disputes.[38] Nevertheless, if the value of the object of the dispute does is less than €20,000, the magistrates' court is competent. Shipping law disputes, including marine insurance claims, are heard by the Piraeus Court of First Instance Maritime Disputes Department. Given that the trial process in the country is lengthy (with issuance of an irrevocable decision by the Court of Cassation taking several years from the initiation of proceedings), to avoid the risk of failing to obtain

33 Art. 11 para 4 ICA.

34 I Rokas, *Insurance Law: From theory to practice*, op. cit., Sec. 176.

35 G Psaroudakis, *Insurable Interest*, 2014, p. 77 ff.

36 I Rokas, 'The Enterprise', op. cit., Sec. VII 909.

37 Art. 16 Civil Procedure Code (CPC).

38 Art. 614 CPC; see also A Sinanioti-Maroudi, *Insurance Law*, op. cit., p. 58.

satisfaction from the defendant because of the latter's potential insolvency, a request for precautionary or interim measures until the trial's conclusion constitutes common practice; the decision on such measures is executable within days or even hours (e.g., in the context of marine insurance, the liability insurer who paid the insurance money and was therefore subrogated to the right to the insured's claim against the liable third party could ask for the precautionary seizure, or arrest, of the third party's ship).[39]

Notably, with a view to expediting court trials, as well as imposing a duty on lawyers to inform their clients of the possibility of resolving a dispute by way of mediation, Law No. 4640/2019 introduced a requirement for a mandatory initial mediation session in civil and commercial disputes falling within the competence of either the multi-member court or the single-member court of first instance (provided that the value of the dispute exceeds €30,000, in the latter case). Lawsuits launched in violation of this obligation will be deemed inadmissible. The new legal framework for mediation entered into force following advisory decision No. 34/2018 of the Court of Cassation (in plenary session), which declared as unconstitutional the pre-existing provisions of Law No. 4512/2018, providing for the compulsory submission of car accident compensation-related disputes to mediation (with the exception of bodily injury or death), insofar as the costs incurred in this process jeopardised the right to free and unimpeded access to justice.[40]

With the exception of marine insurance, resort to arbitration is rather limited. Legislation for domestic arbitration is found primarily in the Civil Procedure Code[41] and in Law No. 2735/1999 (adopting the UNCITRAL Model Law) for international arbitration, both providing, inter alia, that in the event of the parties failing to agree on the appointment, the presiding arbitrator will be appointed by the competent single-member court of first instance. Furthermore, the arbitration award cannot be challenged in the courts on the accepted facts and their legal assessment; it can only be annulled in cases of procedural rule violation (e.g., breach of fair trial principles) or if the award contravenes public policy.[42]

Alternative dispute resolution mechanisms encompass expert adjudication and amicable settlement: expert adjudication is commonly agreed upon in commercial property insurance cases (e.g., fire insurance) with a view to determining the extent (quantum) of the damage, excluding the issue of liability;[43] whereas the amicable settlement system (knock-for-knock contracts) is applicable in motor liability insurance cases, and the non-liable injured party's insurer pays the insurance money (for property damage) directly to the injured party then settles with the liable injuring party's insurer.[44]

A special ombudsman for disputes arising between consumer insureds and insurance undertakings does not exist. Out-of-court settlements are arrived at with the valuable assistance of insurance intermediaries, experts and loss adjusters, and with the Hellenic Consumers Ombudsman, which is a general ombudsman service covering several kinds of consumers, but it is not 'insurance-focused'.[45] In addition, pursuant to BoG Executive Committee Act No. 88/5.4.2016, impelmenting relevant EIOPA guidelines, insurance undertakings are

39 I Rokas, on Hellenic insurance law, op.cit., Sec. 38.

40 I Rokas, *Insurance Law: From theory to practice*, op. cit., Sec. 36.

41 Art. 867–903.

42 I Rokas, on Hellenic insurance law, op. cit., Sec. 39.

43 ibid., Sec. 40.

44 I Rokas, *Contractual Insurance Law*, op. cit., Sec. II 112.

45 R Chatzinikolaou-Aggelidou, *Private Insurance Law*, op. cit., Sec.129.

required to adopt and implement a written policy on complaints handling and maintain a corresponding business function with a remit to address and investigate complaints thoroughly. Finally, an insured that lodges a complaint with an insurance undertaking but does not receive a timely response or receives an unsubstantiated answer, is entitled to file a complaint with the BoG, which will evaluate the matter albeit solely in the context of its supervisory competence as it lacks jurisdiction to settle disputes.

III RECENT CASES

The following Court of Cassation decisions are irrevocable and represent a significant evolution in the jurisprudence on insurance over the past two years.[46]

The Court of Cassation dealt with a case in which the MTPL insurance undertaking for a harvester, a 'complex or combined' vehicle, whose driver damaged a third party disputed liability under MTPL law.[47] The case concerned the question whether the harvester should be characterised as a vehicle or as a machine, since it had both capacities. The Court, in alignment with CJEU jurisprudence, ruled that damage occurring during the operation of a complex vehicle (i.e., simultaneously a car and a machine) while operating as a machine is not recoverable under MTPL insurance, which presupposes that the damage to the third party stems from the operation of the injuring vehicle as a means of transportation. Hence, MTPL insurance did not extend to damage caused by the harvester at a standstill but with its engine in full operation powering the blades' threshing function to process corn cob residues, as the accident was not connected with the dangers typically arising from the operation of a car.

In another important decision, the Court of Cassation[48] delineated the prerequisites for the valid termination of sickness insurance contracts in which the insurer has elected to use a questionnaire to assess the risk to be undertaken. In the case in question, the insurer had asked the policyholder pre-contractually to fill in a questionnaire on his health condition, including whether the latter had been examined, consulted or treated by a doctor or been subjected to medical examination – preventively or because of discomfort – that revealed findings requiring medical advice or treatment during the three years preceding the conclusion of the insurance contract. The Court affirmed the lower courts' findings of the invalidity of the insurer's notice of termination, accepting that the policyholder, who had not indicated in the questionnaire the conduct of regular, preventive examinations that revealed no medically pertinent findings, could not be considered to have intentionally concealed his state of health from the insurer.

In a case concerning commercial insurance of goods against the risk of theft, the Court of Cassation[49] ruled that the policyholder's failure to take precautionary measures against the risk relieves the insurer of its obligation to pay out the insurance money in the event of theft, despite the fact that the policy did not provide for a penalty for such omission. The Court ruled that if the theft (committed by unknown perpetrators benefiting from the policyholder's

46 Decisions of lower instances are not included because they are not final and can be annulled. Citation of CJEU decisions is purposely avoided insofar as these findings are uniformly applicable throughout the EU.

47 Case No. 167/2020; see this decision with a note by K Karanikolas in *Commercial Law Review* 2020, p. 875 ff.

48 Case No. 1047/2019; see this decision in *Commercial Law Review* 2019, p. 843 ff.

49 Case No. 190/2021.

gross negligence) would not have occurred if the policyholder had taken such measures, the insurer is released. The Court relied on an ICA provision whereby occurrence of the insured event due to gross negligence by the insured relieves the insurer of its obligation without inquiring whether the specific omission was capable of leading *in concreto* to the occurrence of the insured risk (i.e., the theft) in the normal course of events.

In addition, the Court of Cassation issued a notable ruling[50] on a car accident that occurred in Greece resulting in injury to the insured driver, and involving a vehicle with Swiss registration plates. The Court declared that the Swiss insurance company covering the Swiss driver's liability was entitled to be subrogated to the rights of the insured against the injuring third party, pursuant to a bilateral agreement between Greece and Switzerland.[51] The Swiss insurance company paid out to the insured to cover the costs of his hospitalisation and medical care, and of sickness benefit paid to him. The subrogation of the Swiss insurance company to the rights of the compensated insured against the injuring third party domiciled in Greece presupposes that such subrogation is provided for in the law of both countries, which is the case insofar as Swiss law[52] contains a provision equivalent to that of Article 14 Paragraph 1 of the ICA, establishing the insurer's right of subrogation.

Greek MTPL legislation[53] features some *ex lege* exclusions from coverage, including for damage caused by a driver without a driving licence. These exclusions do not affect the right of direct action of the injured third party against the insurer, which has a recovery right against its insured. The Court of Cassation adjudicated on a case[54] in which a car accident was caused by a driver whose licence had expired and not been renewed, albeit he was fit to drive. The Court of Appeal had ruled that the aforesaid exclusion was inapplicable as the lack of a licence was not causally linked to the damage. However, the Court of Cassation overruled the decision on the grounds that the application of the exclusion does not require the existence of a causal link between the absence of a driving licence and the damage caused.

In a recent case,[55] the Court of Cassation accepted the tortious liability of both the executive and non-executive members of an insurance company's board of directors, and of the collaborating insurance intermediary, regarding the misleading representation of the insurance company's solvency, which contributed to an insured's decision to conclude a long-term life insurance contract with the company and ultimately to the insured sustaining damage because of the insolvency of the company. Notably, the case was brought before the court prior to the implementation of Solvency II. The insured's compensation claim was founded on the law on service providers' liability to consumers.[56] It was judged that the insurance company's board of directors' liability consisted in their breach of the duty to effectively supervise and control the undertaking, while the liability of the insurance intermediary consisted in his concealment of the insurance company's financial difficulties, given that the company had already been constrained from freely disposing of its assets at the time of conclusion of the insurance contract.

50 Case No. 640/2019; see this decision in *Commercial Law Review* 2019, p. 825 ff.

51 Enacted by Legislative Decree No. 20/1974.

52 Art. 72 Insurance Contracts Code.

53 Law No. 489/1976.

54 Case No. 628/2019. See this decision with a note by I Rokas in *Commercial Law Review* 2020, p. 128 ff.

55 Case No. 54/2019. See this decision in *Commercial Law Review* 2020, p. 372 ff.

56 Art. 8 of Law No. 2251/1994.

Furthermore, the Court of Cassation[57] decided on a case in which a bank had concluded an 'open' group insurance policy against the risks of death and total permanent incapacity of its existing and prospective clients (borrowers). The bank was acting as the contracting party for the group insurance, that is as a kind of policyholder or 'group organiser', and its borrowers were the insureds, who had agreed to assign to the bank, up to the amount of the outstanding debt, the insurance money they could possibly receive in the event of the realisation of the risk.

Although the ICA[58] provides that the duty of pre-contractual disclosure of any information that could objectively be considered material to the risk assessment by the insurer is borne by the policyholder, in this case an insured borrower's false negative answer to a question regarding his pre-existing diseases was considered a breach of this duty on his part, entitling the insurer to terminate the contract, irrespective of the absence of a causal link between the occurrence of the insured event and the concealed pre-existing illness.

This ruling confirms that obligations of a personal nature (such as the provision of information on an insured's state of health) must be borne by the insured, in place of the policyholder.[59]

IV THE INTERNATIONAL ARENA

As far as insurance contracts with cross-border elements are concerned, the EU Rome I Regulation[60] determines the applicable law[61] and the Brussels IA Regulation[62] applies to court jurisdiction and the recognition and enforcement of judgments.[63]

As provided in Article 9 of the Rome I Regulation in respect of uniform rules, the applicable law (either chosen by the parties or determined in accordance with the special conflict rules set out in Article 7 of the Regulation) cannot override the rules of Greek insurance law, which prevail mandatorily if a dispute is heard before the Greek courts (Greek law being the *lex fori*).

Greek insurance law prevails optionally if a dispute is heard before other EU Member State courts provided that the obligations arising out of the insurance contract are to be or have been performed in Greece; for example, the 'over-insurance rule' stipulates that in property insurance if the declared value of the insured object exceeds its current value, the insurer shall not be liable for the excess should the risk occur. This rule is regarded as being in the nature of Greek public policy and is therefore mandatory.[64]

57 Case No. 1333/2018; see this decision with a note by I Rokas in *Commercial Law Review* 2019, p. 601 ff.

58 Art. 3 para. 1 ICA.

59 Art. 9 para. 2 ICA.

60 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

61 See A Tsavdaridis, 'The Private International Law of Insurance Contracts: From the Rome Convention and the Community insurance directives to the "Rome I" Regulation', in *Nomiko Vima* 2010, p. 1952 ff.

62 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

63 See extensively A Tsavdaridis, 'Jurisdiction in Insurance Matters', in P Arvanitakis and E Vassilakakis (eds), *Regulation 1215/2012: Brussels IA Regulation: Article-by-Article Commentary*, 2020, Art. 10–16, pp. 233–351.

64 I Rokas, *Insurance Law: From theory to practice*, op. cit., Sec. 35.

By way of derogation from the provisions of Solvency II regarding the determination of the 'Member State where the risk is situated' (which also operate as a connecting factor in determining the laws potentially applicable to the insurance contract under the Rome I Regulation), Greek law and that of some other EU Member States envisage the risk as being located in the country of 'registration where insurance concerns all means of transport', as opposed to the Solvency II provision that the risk is situated in the country of registration 'where insurance relates to vehicles of any type'.

The practical implication of this verbal imprecision is that Greece may be regarded as the country where the risk is located, including for vessel hull insurance, as long as the ship is entered in the Greek registry and even if it has never sailed in Greek waters – as is usually the case with large, ocean-going vessels.[65] Furthermore, the ICA provides that the insurer is obliged to pre-contractually inform the insurance applicant of the set law or the proposed applicable law and, if the contract is to be subject to a law other than Greek law, this should be marked on the first page of the policy containing the individual elements particular to that contract, rather than merely being included with the preformulated insurance terms.

As far as courts' jurisdiction regarding the settlement of insurance disputes is concerned, by way of derogation from the general rule that the courts of the defendant's place of residence have territorial jurisdiction, a lawsuit against the insurer may also be filed before the courts of the place where the policyholder, insured, beneficiary or injured third party (who has a right of direct action against the liability insurer of the injuring party) is domiciled.[66] Hence, the Court of Cassation[67] approved the jurisdiction of the Greek courts in respect of a car accident that occurred in Germany, for the launch of a lawsuit against the German liability insurer of the liable German driver by the injured third party, who was domiciled in Greece.[68] Notably, the procedural advantage in favour of the weaker claimant does not extend to disputes between insurance undertakings.[69] Moreover, although the validity of a clause in the insurance terms providing for the prorogation of courts' territorial jurisdiction presupposes the signing of the terms by the policyholder, jurisprudence has affirmed that such a clause can be validly contained in unsigned terms, provided that there is another signed document (i.e., the insurance contract) referring to the terms.[70] The Court of Cassation has accepted that the agreement on the prorogation of jurisdiction may also be oral,[71] on condition of a subsequent written confirmation; however, the Court also clarified that the letter of guarantee granted by the vessel's insurer cannot be regarded as the necessary verification.[72]

Apart from the location of the insurance company's head offices, the sites of its branches and agencies are also regarded as places in which it is domiciled. The mere existence of an office necessary for the exercise of insurance under the 'freedom to provide services' regime within the EU internal market does not suffice on its own to establish jurisdiction for the courts of the place where the office is situated (neither does it indicate that the undertaking

65 I Rokas, *Solvency II – Supervision of (Re)insurance Companies* (critical remarks and commentary by article on Law No. 4364/2016), p. 41, note 38.

66 EU Regulation 1215/2012, Art. 11; *forum actoris*.

67 Decision No. 37/2012.

68 See this decision with a note by S Giannimpas in *Commercial Law Review* 2013, p. 104 ff.

69 I Rokas, *Contractual Insurance Law*, op. cit., Sec. II 86.

70 Court of Appeal, decision No. 4106/1995, *Nomiko Vima* 1995, p. 1094.

71 Decision No. 1580/2011.

72 See this decision in *Commercial Law Review* 2012, p. 419 ff.

operates under the 'freedom of establishment' regime[73]). Moreover, the appointment of a claims representative by undertakings providing MTPL insurance is not regarded as sufficient basis to establish court jurisdiction, although claims settlement business other than MTPL claims representation could in principle establish jurisdiction.[74]

The Brussels IA Regulation[75] provides that any co-insurer may be sued before the courts of the Member State where the case against the lead co-insurer has already been brought, without defining the concept of the 'lead' co-insurer. This term should be interpreted autonomously, in view of the fact that it is also used in other EU legislation.[76] Any other interpretation would lead to uncertainty. In a case of this kind, the admissibility of proceedings against a co-insurer before the courts of the country where the lead co-insurer has already been sued would depend on the meaning ascribed to the term 'lead' by the law applicable in the court before which the dispute has been brought (the *lex fori*). Under Greek law,[77] co-insurance presupposes that the insurance contract was concluded by joint agreement, with each of the co-insurers being proportionally liable for the insured amount. Thus, if the lead co-insurer was sued in Greece, the Greek courts could dismiss a lawsuit initiated against another co-insurer if they found that there was no joint agreement – a conclusion that could not be reached by the courts of a country where the existence of a joint agreement was not considered a *conditio sine qua non* for the establishment of co-insurance. To counter the possibility of uncertainty in this matter, the inclusion of a jurisdiction clause in the policy should be accompanied by a governing law clause.[78]

V TRENDS AND OUTLOOK

Over time, a considerable volume of insurance-related litigation has been focused on MTPL disputes, albeit in recent years there has been a remarkable decrease in car accidents, which, in view of their frequency, have extensively occupied Greek jurisprudence. Notwithstanding the recent introduction of legislation regarding the circulation of e-scooters, the issue of whether the owner or driver of these vehicles should compulsorily conclude MTPL insurance remains unclear.[79]

Although businesses are facing ever growing risks associated with network hacking, malware infection, cyberattacks, etc., and in spite of the theoretical discussion on the necessity of the introduction of compulsory cyber risk insurance (either on a stand-alone basis or as part of a directors and officers policy[80]), only a few insurance undertakings have concluded such insurance. Finally, as far as losses related to the covid-19 pandemic are concerned, no claims with a judicial dimension have been reported to date. Although the operation of hotels has been compulsorily discontinued by acts of state, hotel insurance policies generally

73 See Commission Interpretative Communication No. 2000/C 43/03 on 'Freedom to provide services and the general good in the insurance sector'.

74 A Tsavdaridis, 'Jurisdiction in Insurance Matters', op.cit., Art. 11, pp. 268–270.

75 Art. 11 para. 1, letter c.

76 See Art. 190 Solvency II; A Tsavdaridis, 'Jurisdiction in Insurance Matters', op.cit., Art. 11, p. 276, fn. 75.

77 Art. 15 ICA.

78 See I Rokas, *Contractual Insurance Law*, op. cit., Sec. II 96-98.

79 A G Kritikos, Summary of new essential legislative regulations of recent Law No. 4784/2021, amending, inter alia, the Road Traffic Code, *Transportation Law Review* 2021, p. 93 ff.

80 I Rokas, *Contractual Insurance Law*, op. cit., Sec. III 210.

only provide insurance payouts for business interruption coverage in limited cases, namely where the business interruption constitutes a direct consequence of a covid-19 outbreak. Standard insurance policies distributed in the local market only cover business interruption if it constitutes a further, indirect element of damage deriving from the occurrence of another insured risk (e.g., fire).[81]

81 I Rokas, 'Insurance and coronavirus (COVID-19): An initial approach', *Commercial Law Review* 2020, p. 265 ff.

Appendix 1

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ISBN 978-1-83862-788-1