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CLAIMS FOCUS

Claims-Made Clause Legitimacy in Italy – An Overview of the May 2016 Court Decision

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On 6 May 2016 the full bench (extended panel of nine judges, united sections) of the Italian Supreme Court of Cassation issued a long-awaited judgment on the validity and enforceability of claims-made clauses in liability insurance. The judgment is of particular relevance in the area of Professional Indemnity, where insurance was made mandatory for professional activities in 2013.

The legitimacy of the claims-made clause has been a frequent topic of discussion in the last 20 years, mainly because the Italian Civil Code provides for a liability insurance system clearly based on the occurrence principle.

"In liability insurance the insurer is bound to indemnify the insured for the damages which the latter must pay to a third party as a result of the ***events occurred during the period of insurance*** *and depending on the liability provided by the contract."*
(Para. 1 of Art. 1917 of the Italian Civil Code)

As a result of this, and the fact that the vast majority of third-party liability insurance policies have been issued on the basis of the "occurrence principle" until the late 1990s, it is quite easy to understand why some members of the legal community (mainly judges) were against the claims-made concept. Their argument was mainly based on the fact that insurance contracts based on a different trigger implied deviation from the Civil Code, which unfairly limits the obligations of the insurer.

In 2005 the same Corte di Cassazione, Civil Section III made the initial step to legislate the claims-made principle in Italian law (verdict no. 5624, 15 March 2005). The court affirmed the legitimacy of the clause, provided that the insured approved the clause with an additional and specific signature under the clause. The signature served to establish the observance of Art. 1341 Civil Code requirements, i. e., when a contractual party relinquishes or limits one of its contractual rights.

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Despite this clear position of the court, the discussion on the legitimacy of the claims-made clause remained somewhat active in the last decade in the Italian legal community, with a final act being a verdict issued by the same Corte di Cassazione in 2014 (no. 5791, 13 March 2014). In this ruling, the court stated that the claims-made principle was not in line with art. 1917 of the Civil Code. The harmful act, which triggers the risk covered by the policy, potentially already occurred prior to the policy inception, the court reasoned. Therefore, in this case, the insurance policy lacks the aleatory element required by art. 1895 Civil Code, according to this section of the main Court.

This discrepancy caused the case to be sent to the main Court. When there are conflicting decisions among the sections or within the panel of judges, the President of the main Court convenes the "united sections" (a panel of nine judges) to come up with a clear decision aimed at resolving the conflict and clarifying the situation linked to the relevant topic for the Italian insurance market.

The ruling (Verdict 9140) issued on 6 May 2016 is very important for Italy's legal community and the insurance industry because there is no longer any doubt about the legitimacy of claims-made clauses in liability covers.

The Court starts its argument by clearly describing the two types of clauses that are currently the most popular in the market:

a) **"Pure claims-made"** clauses where the trigger of coverage (the claim being made during the policy period) is the sole temporal element that governs coverage; as a result, claims attributable to harmful acts committed prior to the inception of the policy are covered (without any regard when they were committed);

b) So-called **"impure or mixed claims-made"** clauses, which require that the harmful act was committed during the policy period or after a retroactive date, which may be set just a few years before the policy inception.

The Court continues with the following clarifications:

1. The claims made-clause does not constitute any significant violation of the Civil Code in relation to good faith in the execution of a contract (art. 1175) that could result in the nullity of contractual covenants;

2. A claims-made clause does not efface the "aleatory" element of an insurance contract, as with this clause only the element linked to the harmful act might have happened in the past where the other elements potentially resulting in the detriment of the insured's estate (in particular, the claim raised by the damaged party) are uncertain and still to come;

3. "Impure" claims-made clauses (and moreover the "pure" ones) are not to be considered frivolous per se because they only limit the object of the coverage but not the covered liability.

With these three points, the Court appears to have put an end to a 20-year debate about the legitimacy of the claims-made principle.

Nevertheless, the Court seemed to be unwilling to really clarify the legitimacy of the claims-made clause. Instead, it focused on the legal protection of the injured party. The final part of the verdict states that the value of the claims-made clause needs to be finally established, taking into consideration that it constitutes a deviation from Art. 1917 Civil Code. Moreover, the Court declared that this evaluation might have a negative effect when the application of the clause would lead to a "gap" in the coverage (which could happen with the "impure claims-made" clauses). The social function of insurance covers (which were finally made mandatory for professional activities in 2013) is supposed to be aimed more at protecting the injured (third) party rather than governing the contractual relationship between insured and insurer, according to the Court.

The conclusion of the verdict leaves us with some doubts. At the moment it is quite difficult to evaluate the implications of the final part of the verdict. In our opinion, the Court appears to allow territorial courts to interpret each clause that might be argued in a claim independently from the trigger of the underlying insurance policy, even if this would mean to declare the illegitimacy of a claims-made clause, thus turning it into an occurrence clause or just disregarding the part of the clause where a limited retroactivity is stipulated in the policy.

The Court expressly and clearly mentioned that when professional liability cover is required by law, the injured party's protection needs to be evaluated to assess the value of a policy. This judgment will unlikely lead to positive results in cases where the claims-made clause, no matter how it is written, exposes the insured to coverage gaps (in particular, in cases of a "mixed claims-made clause").

We think that, as a first reaction, the local insurance market might switch to a general "pure claims-made" approach (with full retroactivity) to satisfy the Court's requirements. "Impure claims-made" clauses, if applied in future contracts, will probably need a previous examination of the insured's history in terms of professional liability cover to ensure provision of an insurance product in line with these requirements.

It will be very important to monitor how this verdict is applied by territorial courts and, moreover, how the insurance market reacts. We also need to keep in mind that the reform of insurance law on medical malpractice is currently being discussed in Italy. A provision on claims-made clauses might be included in the new rules. Therefore, Italian lawmakers will probably be called upon by the Corte di Cassazione to rethink and regulate the legal scheme of the claims-made trigger.

About the Author

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