CMS Expert Guide to insurance law and regulation

Ten things every insurer should know

Insurance law and regulation in Romania
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1. Introduction

Insurance activities in Romania may be carried out only by (i) Romanian legal entities authorised by the Romanian Financial Supervisory Authority (the ‘FSA’); (ii) insurers authorised in other EU/EEA States operating in Romania on the basis of (a) freedom of establishment or (b) freedom of services; (iii) branches of insurance companies registered in third-party states (i.e. a non EU/EEA states), which have been authorised by the FSA; (iv) subsidiaries of insurers registered in third-party states, authorised by the FSA; or (v) insurers organised as SEs (Societas Europaea).

A. Romanian-based insurers

Setting up a Romanian-based insurer is subject to a procedure involving (a) prior approval from the FSA; (b) subsequent registration of the company with the competent Trade Registry; and (c) subsequently obtaining an insurance authorisation from the FSA.

An insurer cannot be registered with the Trade Registry prior to having obtained the approval from the FSA. This may take several months and usually involves legal assistance and legal representation of the insurer before the regulator. Incorporation procedures before the Trade Registry may take several days (once the incorporation file is complete), and there are minimum capital requirements for incorporation depending on the type of insurance (life/non-life) to be performed. Following incorporation, a specific insurance authorisation must be obtained from the FSA prior to engaging in the provision of insurance on the market. The authorisation procedure is customarily a time-consuming process which may span over the course of several months (the maximum deadline being four months from submission of the complete authorisation file). During this procedure, the applicant is required to produce substantial documentation, including with respect to its shareholders, business plan, feasibility study, etc. Filing taxes also apply and, due to the complexity of the authorisation procedure, for which qualified legal assistance would be recommended, legal fees for representing the insurer before the FSA may also need to be considered.

B. EU/EEA insurers

As a member of the European Union, Romania recognises the right of insurers/reinsurers registered in another EU/EEA state (and authorised by the competent authority in such state) to operate in Romania, on the basis of the freedom of establishment, through a branch opened in Romania, or directly on the basis of the freedom of services, without any other formalised presence. Branches of EU/EEA-based insurers remain subject to the supervision of the regulator in the country of origin, but the FSA must be notified about the establishment of the branch to ensure compliance with Romanian insurance legislation. An EU/EEA-based insurer may also undertake insurance activity in Romania on a freedom-of- services basis by direct selling/managing insurance policies without any corporate presence in Romania. In this case, the FSA must be notified of the insurer’s undertakings in Romania, but the EU/EEA insurer itself remains under the supervision and jurisdiction of its origin state’s regulator.

Both alternatives enjoy significant benefits (in terms of timeline and costs of authorisation, regulatory constraints and supervision) as compared to insurance businesses run through a Romanian subsidiary.

C. Third-party insurers acting through a Romanian branch or subsidiary

Expectedly, branches and subsidiaries of insurers registered in states other than EU/EEA states are subject to
increased scrutiny and regulatory supervision, and a stricter authorisation regime.

2. Effect of misrepresentation and/or non-disclosure

As a general rule, the insured is obliged to respond in writing to the insurer's questions, as well as declare, at the date of conclusion of the policy, any information or circumstances of which the insured is aware and which are essential to allow the insurer to adequately assess the risk. If essential conditions regarding the insured risk change during the course of the insurance policy, the insured is bound by law to notify the insurer in writing with respect to the same.

An insurance policy is null and void for inaccurate statements or bad-faith withholding of information by either the insured or the policyholder, provided that the inaccurate or withheld information relates to circumstances which – had they been known to the insurer – would have led to the latter not concluding the policy or issuing it under different terms. It is irrelevant in this context whether the giving of inaccurate information or the withholding of relevant information had any bearing on the occurrence of the insured risk. In this case, the insurer may retain any premium already paid, as well as request any premium due by the policyholder up to the moment when the insurer became aware of the relevant information.

If the party in default has not acted in bad faith, and the insured risk has not yet occurred, the insurer is entitled to ask for a premium adjustment or it may choose to terminate the contract unilaterally with ten days' prior notice to the insured. In this case, the insurer must reimburse the policyholder for the amount of premium paid for such period which is no longer covered under the policy. In case the misrepresentation/non-disclosure is discovered after the occurrence of the insured event, the indemnification to which the insured is entitled shall be reduced proportionally.

3. Effect of breach of warranty and condition precedent

The effects of a breach of warranty or condition precedent will generally be those afforded to such events by the contract. Parties to an insurance contract are free to contract on the terms which they agree to.

Under Romanian law, a right or obligation which is subject to a condition precedent does not arise and is not enforceable until and unless such condition precedent is satisfied (or the party in whose benefit it is stipulated waives it). If the insurer's liability is subject to (for example) the condition precedent that payment of the insurance premium be made first, then the insurer's liability is not born even if – after conclusion of the insurance contract – the insured event occurs.

Romanian law does not address “warranties” separately – a breach of warranty may therefore either qualify as a misrepresentation (if it refers to a statement on which a party to the insurance contract relied in its decision to enter into contract, or which affected the terms on which such party would have entered into the contract), or a separate condition of the insurance contract.

A misrepresentation would have the effects/consequences discussed in Section 2 above. If a “warranty” were in fact an undertaking by a party to do or not to do something as a condition to a certain performance (e.g. the payment of the insurance indemnity), then a breach of such warranty would amount to cause for refusal to effect such performance.

4. Consequences of late notification

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The policyholder must inform the insurer as to the occurrence of the insured event within the timeline provided by the insurance policy. Late notification may allow the insurer to refuse indemnification, but solely to the extent such delay makes it impossible for the insurer to establish the cause of the insured event or the extent of the losses.

5. Entitlement to bring a claim against an insurer

Generally, the insured (or the beneficiaries of the policy) is/are entitled to raise claims based on the insurance contract against the insurer. For third-party liability insurance, the third party suffering a loss covered by such a policy may file a direct claim against the insurer within the limits and in accordance with the terms of the policy and the law.

6. Entitlement to damages from an insurer for late payment of claim

In accordance with the Romanian Civil Code (2011), if the insured event occurs (and all other conditions of the contract are met), the insurer must assess and pay the insurance indemnity in accordance with the terms of the insurance contract concluded between the parties. The law does not prescribe mandatory payment terms except in very limited circumstances (i.e. payment under third-party motor liability insurance).

In case of disagreement, the competent court shall determine the amount due to the insured. The Romanian Civil Code does provide, however, that the undisputed part of the insurance indemnity will be paid to the insured, even if the full amount has not yet been agreed or determined in a court of law.

If the insurer fails to make payment within the terms of the contract, the insured may request that the insurer be liable for delay penalties - such penalties shall be calculated in accordance with the contractual provisions or, in the absence thereof, by the court (or the enforcement officer), in accordance with Romanian statutory rules on penalising interest. Under Romanian law, in the absence of express contract provisions, the legal interest rate for failure to effect payment or a certain performance by the due date is the reference interest rate communicated by the National Bank of Romania, plus 4%.

If the court finds that the insurer refused or limited payment of the insurance indemnity (as awarded by the court), then interest would be payable on the amounts found to be owing to the insured, calculated as from the date of filing the court case.

7. General rules concerning the limitation period for claims

The statute of limitation applicable under Romanian law to insurance/reinsurance claims is of two years as from the date when payment of premium/indemnification became due according to the contract. However, claims by the aggrieved party based on a mandatory third-party liability insurance contract for motor vehicles are subject to the general three-year statute of limitations.

8. Policy triggers with respect to third-party liability insurance
The law does not contain specific provisions related to policy triggers in the particular case of third-party liability insurance. In practice, the only known exception would be mandatory third-party liability insurance for motor cars, which are usually triggered on the basis of the “loss occurrence” rule. Other than that, as a general rule, third-party liability insurances are governed by the terms and conditions established by the parties within the insurance contract.

9. Recoverability of defence costs

To the extent the insured has been forced by the insurer’s conduct (limiting or refusing a claim for indemnification) to bring suit against such insurer, then the insured should be able to request – in addition to the principal claim – payment also of defence costs (consisting of legal/attorney fees, stamp duties and other costs).

Defence costs may be awarded by the court in full or in part. While stamp duties and other disbursements (e.g. translation or notarisation costs) do not usually render themselves well to a reduction by the court, attorney fees may be censored by the court. Under the Civil Procedure Code, the court may – even ex officio, without a request to this effect by the relevant party – reduce the attorney fees if they are “evidently disproportionate” par rapport to the value or complexity of the case, or with the activity carried out by the attorney.

10. Insurability of penalties and fines

In principle, based on the principle of contractual freedom, parties are free to decide on the scope of their relationship and the terms of the contract. However, under general principles of Romanian law, any contract (including therefore an insurance contract), must have a lawful and moral cause, and it should not be concluded to avoid the application of mandatory laws. Also, no person is allowed to invoke its own turpitude (fault) to escape an obligation.

While this is not settled in Romanian law, it may be held that allowing a party to shield from liability for a breach of law, by insuring the risk of receiving a fine or penalty, is a matter of public order or public morale. It could be held that the public objective of the law in prescribing a fine or a penalty (which is to deter future misconduct and induce compliance) is eliminated if a person can insure that risk (and therefore, not bear the consequences of a breach of law).

This approach certainly appears legitimate when the misconduct in question is of a criminal nature (and the insured risk is a criminal fine), but may be debatable in case the fine refers to a misdemeanour or other offence not of the same gravity as a criminal offence (and the misconduct is not intentional).

We would note, in this sense, that under the Romanian Civil Code, in asset insurance and third-party liability insurance, the insurer may refuse payment of the indemnity if the insured event has been produced intentionally by the insured or the beneficiary of the insurance (or a member of the management of the insured entity).
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