Insurance Claims & Coverage

Professional Indemnity

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Your speakers today

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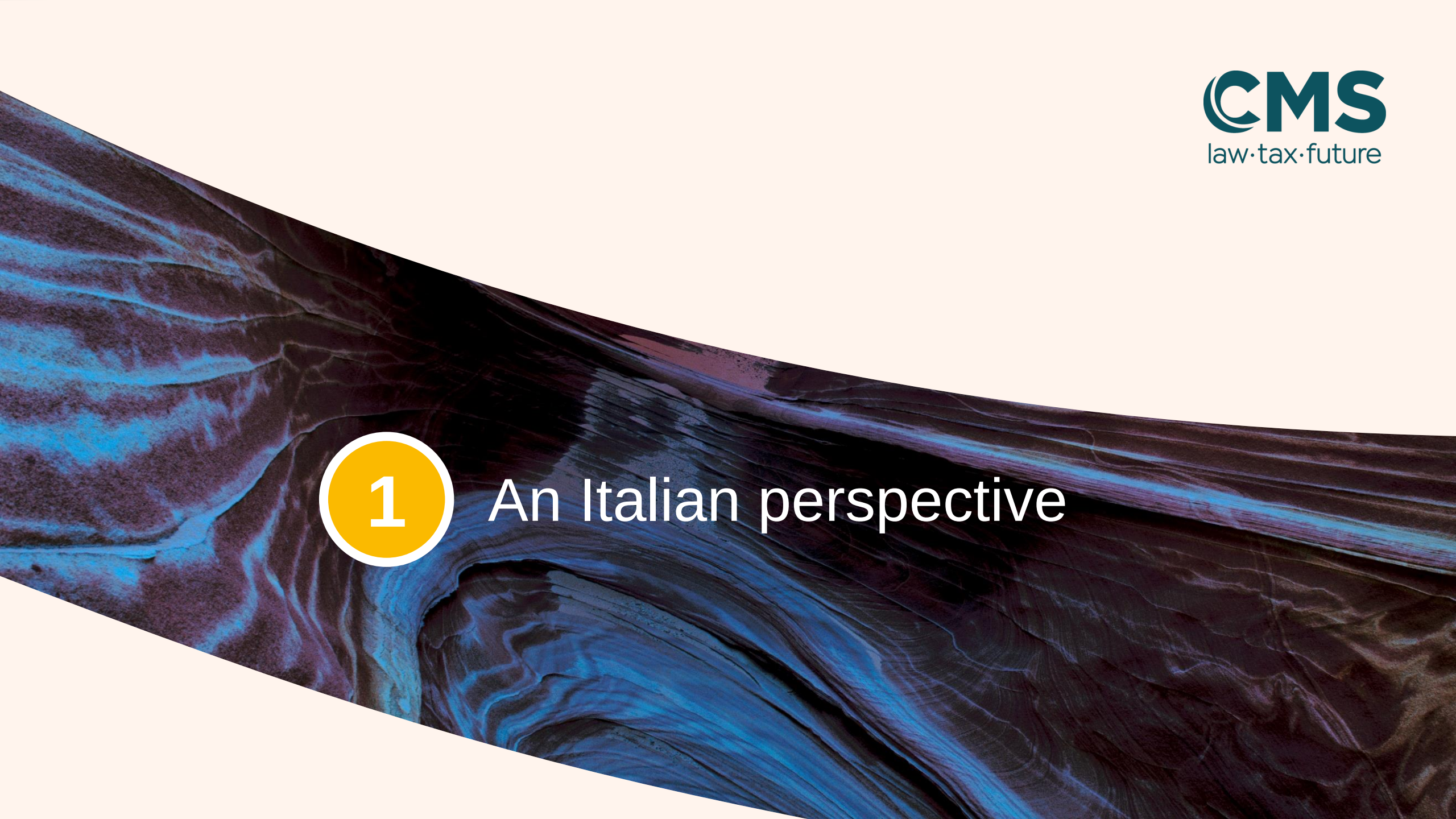
What we will cover

1. An Italian perspective
2. An English perspective
3. A Dutch perspective
4. An Austrian perspective



1 An Italian perspective

Mandatory insurances

Insurance obligation for all the professions enrolled with professional associations – introduced by Presidential Decree no. 137/2012.

It concerns, among others:

- notaries
- lawyers
- accountants
- engineers
- architects
- insurance agents
- brokers

Mandatory 10-year extended reporting period

“Claims made” clause overview

The Italian Civil Code (ICC) only provides insurance contracts on a loss occurrence basis (Article 1917 ICC).

The rise of the “claims made” clause on the Italian market – since it was not codified – created contrasting judgments on their validity even by the Supreme Court in the past decade significant.

“Claims made” clause overview

Judgment no. 9140 of 6 May 2016: the “pure” claims made clause is legitimate. However, insurance contracts containing “mixed claims made” clauses limit the liability of insurance companies. For this reason they are null and void as vexatious under Article 1341 of the ICC, unless the “claims made” clause is explicitly approved by the insured’ written consent.

Judgment no. 22437 of 24 September 2018: The Joint Chambers of the Supreme Court finally declare that the “claims made” clauses, both pure and mixed, do not limit the liability of the insurance company and, therefore, they are compliant to Italian law. However, their validity still need to be assessed by Italian Courts on a case-by-case basis based on its worthiness (the so called “*meritevolezza*”) compared to the parties’ underlying interest.

Judgment no. 8117 of 23 April 2020: The “claims made” model has recently found express legislative recognition by “Gelli” Law 124/2017 (regulating compulsory insurance for healthcare facilities and healthcare professionals). The scrutiny of worthiness does not apply anymore. The “claims made” policy must comply only with the limits imposed by law. It is therefore now necessary to assess whether there has been an “arbitrary legal imbalance” between the insured risk and the premium paid and if the inclusion of the clause is not consistent with the concrete cause of the contract (i.e. the purpose or socio-economic function of the contract).

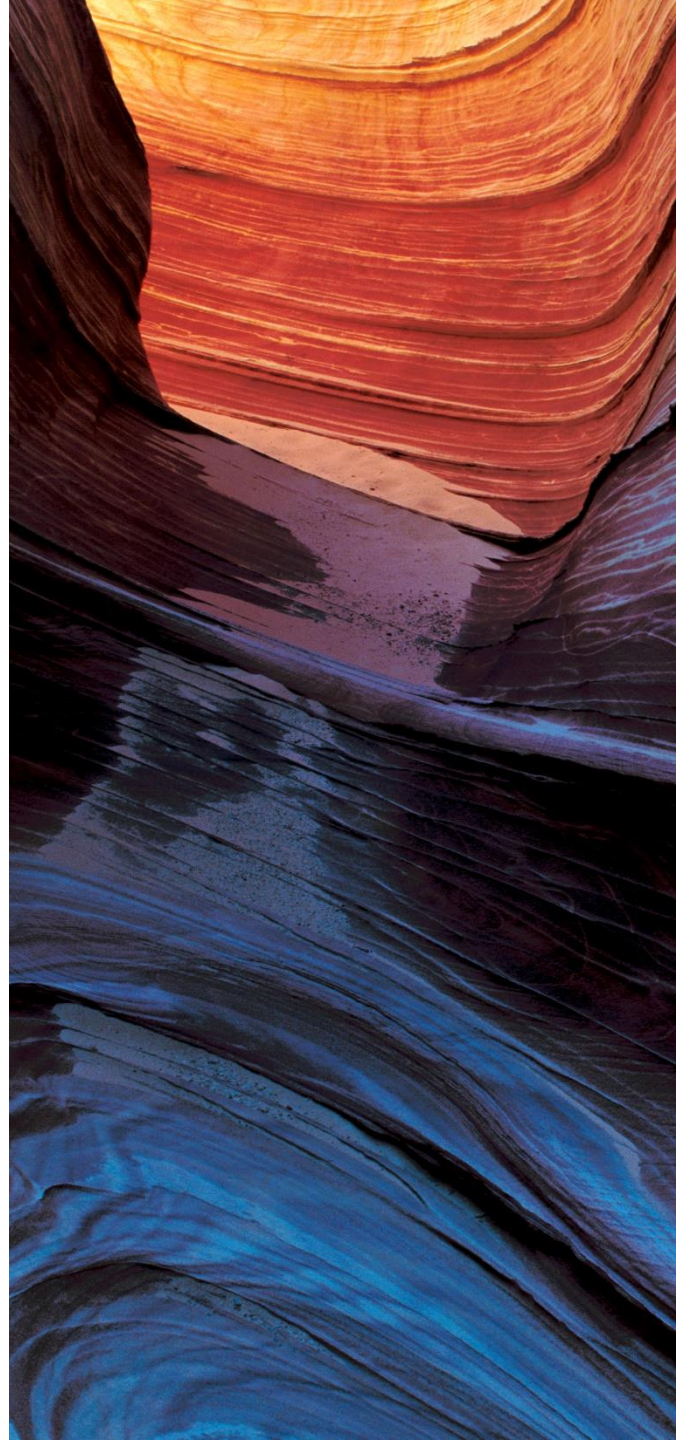
“Claims made” clause overview

Judgment no. 8894 of 13 May 2020: The Supreme Court ruled on the validity of a “claims made” clause providing for a reporting period of 12 months from the expiry of the policy period.

“*According to the Supreme Court, any reporting period of this kind is null and void since too burdensome for the insured. It sets a time limit for the exercise of the right to indemnity which depends exclusively on the conduct of the third party (i.e. the notification of the claim to the insured within the policy period), which is autonomous and not predictable by the insured*”.

Any provision limiting the insured’s right to file a claim within the limitation term of 2 years from the claim for compensation set forth by Article 2952 ICC might be declared null and void.

According to some Italian doctrine, the “claims made and reported clause” might be null and void since it does not distinguish between the insured’s negligent or intentional breach of the obligation to notify the claim within the given term.



Insurers’ late payment of claim

- It is considered as insurer’s “mala gestio”
- Potential insurer’s liability for compensation above the policy limit
- Burden of proof of damage is on the insured
- Insurer might also be ordered to pay legal and default interests above the policy limit

2 An English perspective

Mandatory insurance

- Professional indemnity insurance is not mandatory in England
- Regulatory bodies may require it:
  - Solicitors
  - Accountants
  - Architects
  - FCA Regulated entities e.g. brokers
- May also be required by contract

Cover for “claims made and reported”

- Claims made policies provide certainty for insurers
- “Claims made” or “claims made and reported”?

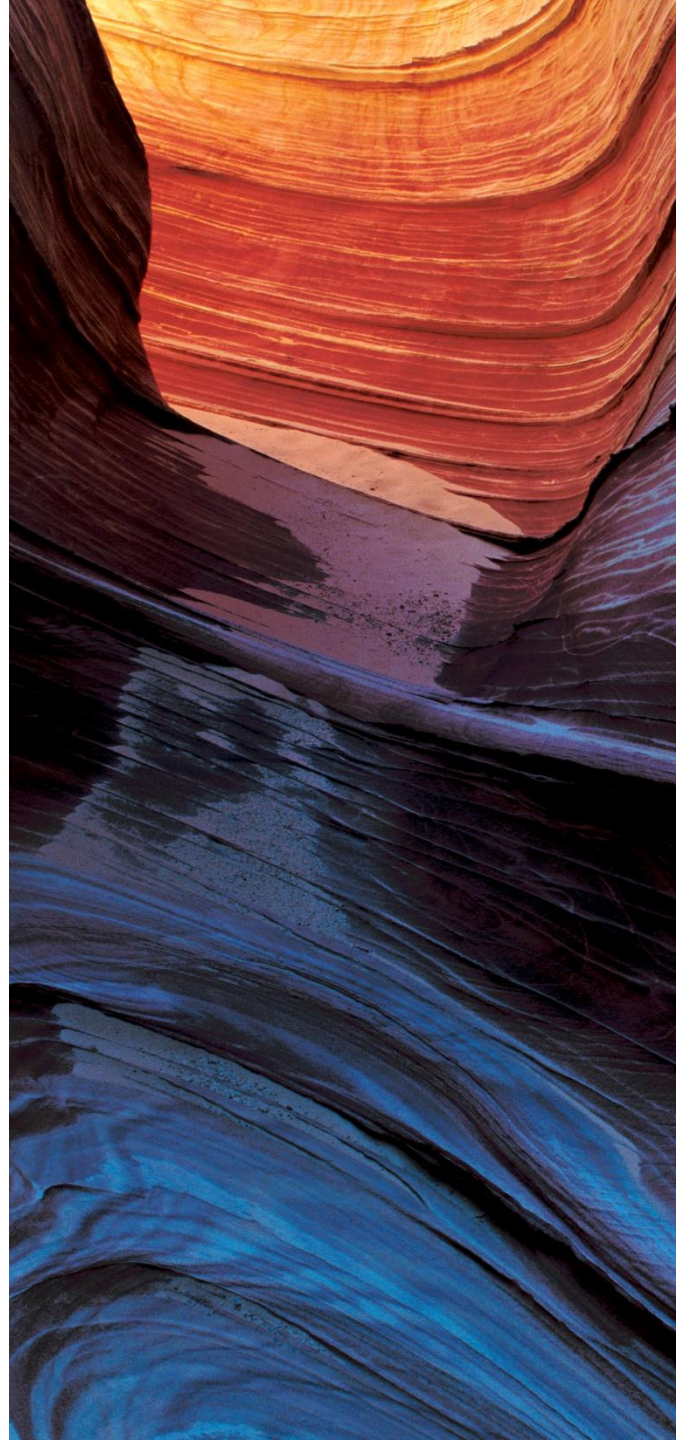
  → Check insuring clause

“Claims made”:

Cover for any claim made against the insured during the policy period regardless of when reported (although take note of any notification provisions)

“Claims made and reported”:

Cover for a claim made against the insured and reported to insurers during the policy period



Gaps in cover

- Policy period 1 = claim is made against insured on final day of cover
- Insured notifies insurers the next day i.e. day 1 of policy period 2
- Insurer 2 declines as claim was made prior to policy period
- Insurer 1 declines as the insured did not notify within policy period 1
- High burden of notification on insured

English law position

- What does the policy say?

Is there cover under the insuring clause?

Has there been a breach by the Insured of the terms of the policy?

Can insurers rely on that breach to decline cover?

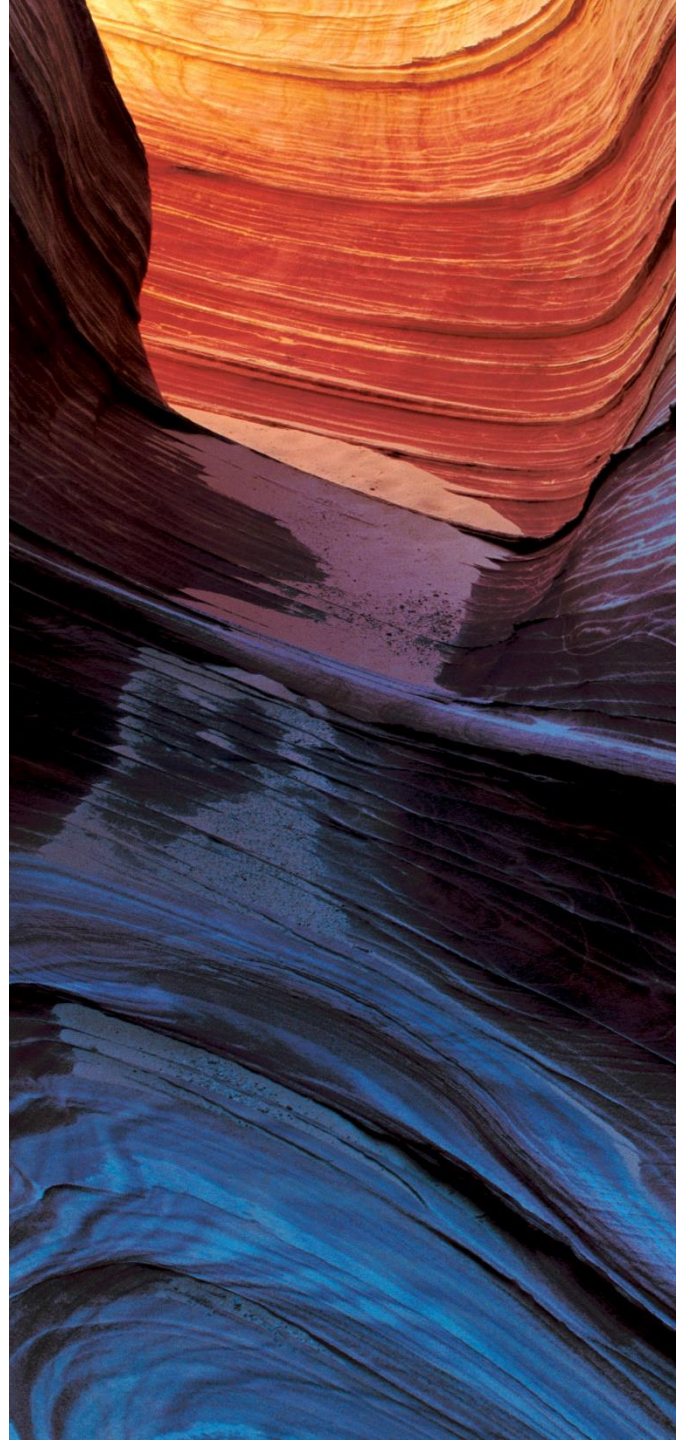
- The Court will not overrule the terms of the policy

Recent developments: Damages for late payment by insurers

- Historically no right to damages for late payment of claims under English law
- Introduced in Section 13A Insurance Act 2015:

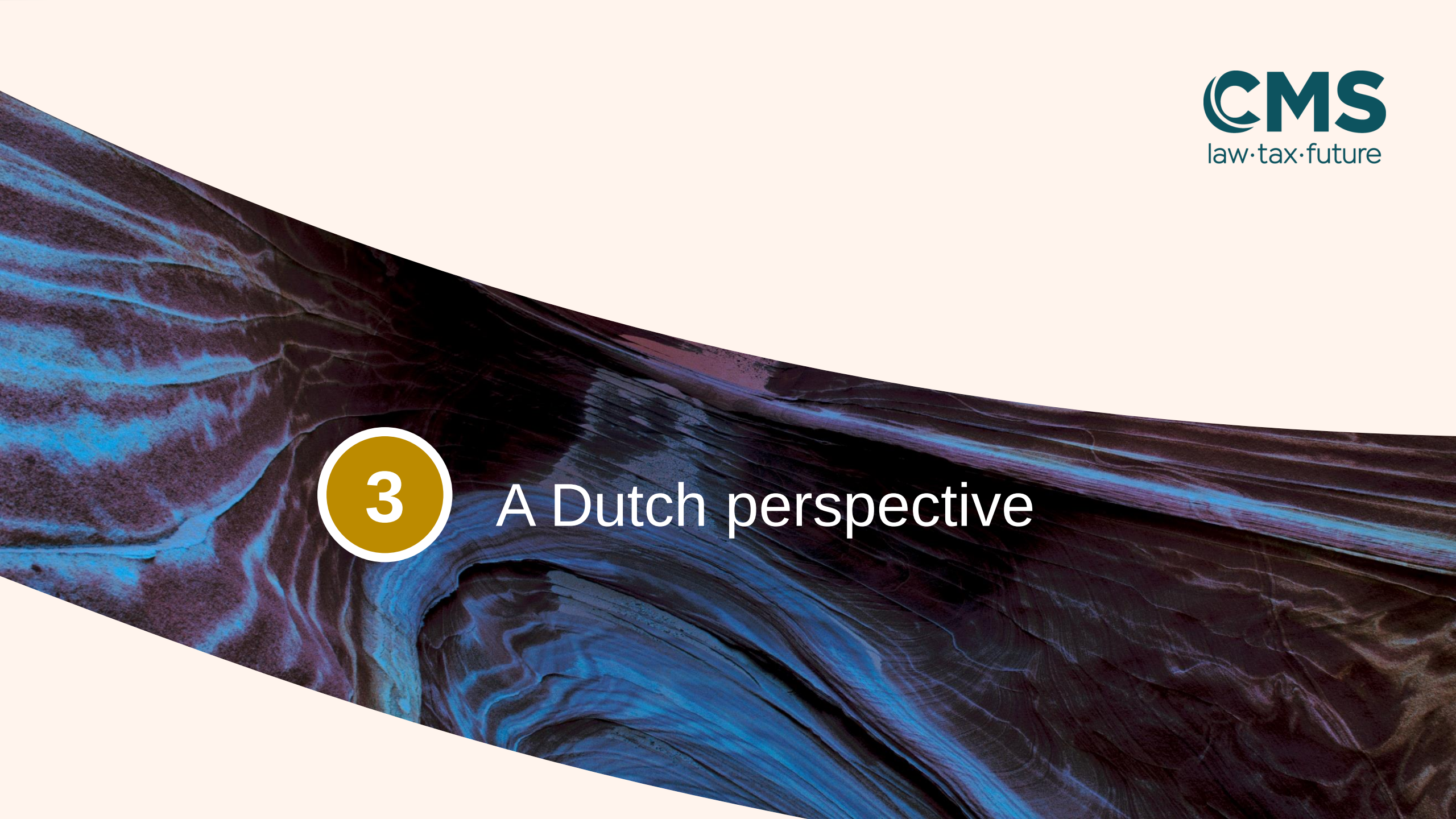
"It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time."

- Considered for the first time in Quadra Commodities S.A. v XL Insurance & Ors [2022]



Quadra v XL

- February 2019 - Quadra made a claim under its marine policy
- May 2020 – No coverage decision by Insurers and so Quadra commences proceedings
- Insurers said there was no delay and also they had reasonable grounds to dispute the claim
- Court held: A “reasonable time” under s13A would have been about a year
- But that insurers did have reasonable grounds for disputing the claim so there was no breach of implied term



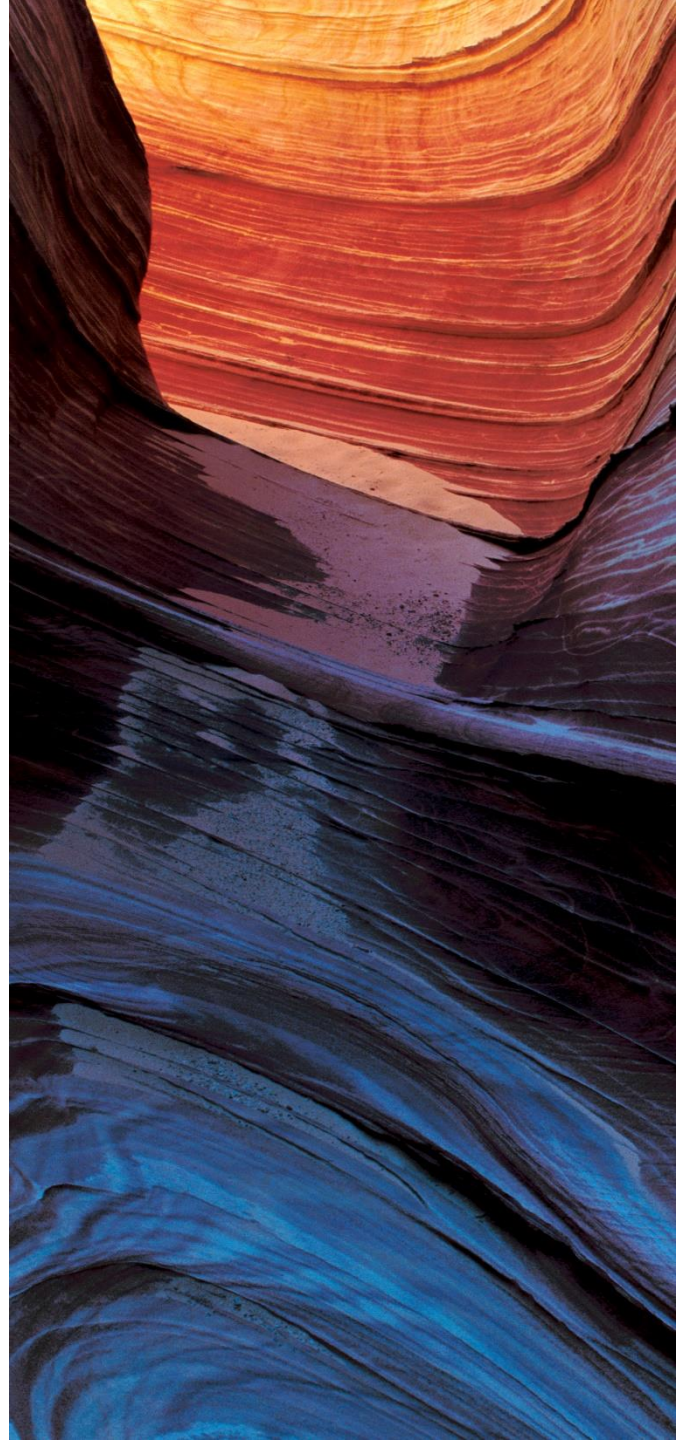
3 A Dutch perspective

Mandatory insurance

- Professional indemnity insurance is not mandatory in the Netherlands
- Regulatory bodies may require it
  - Solicitors
  - Accountants
  - Architects
- May also be required by contract

“Claims made and reported”

- Generally accepted in the Netherlands
- The insurer can define the scope of the coverage
  - Insuring clause
  - Exclusions
- VolkerWessels/Lloyds etc.



PI policies: scope of coverage

- Valley project in Amsterdam, professional error sub-contractor
- Settlement with subcontractor against instructions insurers
- Remainder covered under the (PI) policy?
- Professional Indemnity Policy - London market wording

> *Vicarious Liability: The insurers will indemnify the Insured in respect of its liability arising out of negligence by specialist designers, consultants or sub-contractors of the Insured (…) provided that the rights of recourse against such specialist designers, consultants or sub-contractors are not waived.*

PI policies: scope of coverage

- Interpretation of insurance contracts
  - Objective approach?
    - Chubb/Dagensteadt
  - Subjective approach?
    - Intention of the parties
      - Haviltex
  - Market practice
      - Philips/Polygram
- Conditions of the *Vicarious Liability* clause were not met.
  - The insurer can define the scope of the cover in the insuring clause.
  - Reliance on the insuring clause not unacceptable (reasonableness and fairness)
- See VolkerWessels/Lloyds c.s. (ECLI:NL:RBROT:2022:2677)

4 An Austrian perspective

Mandatory insurance

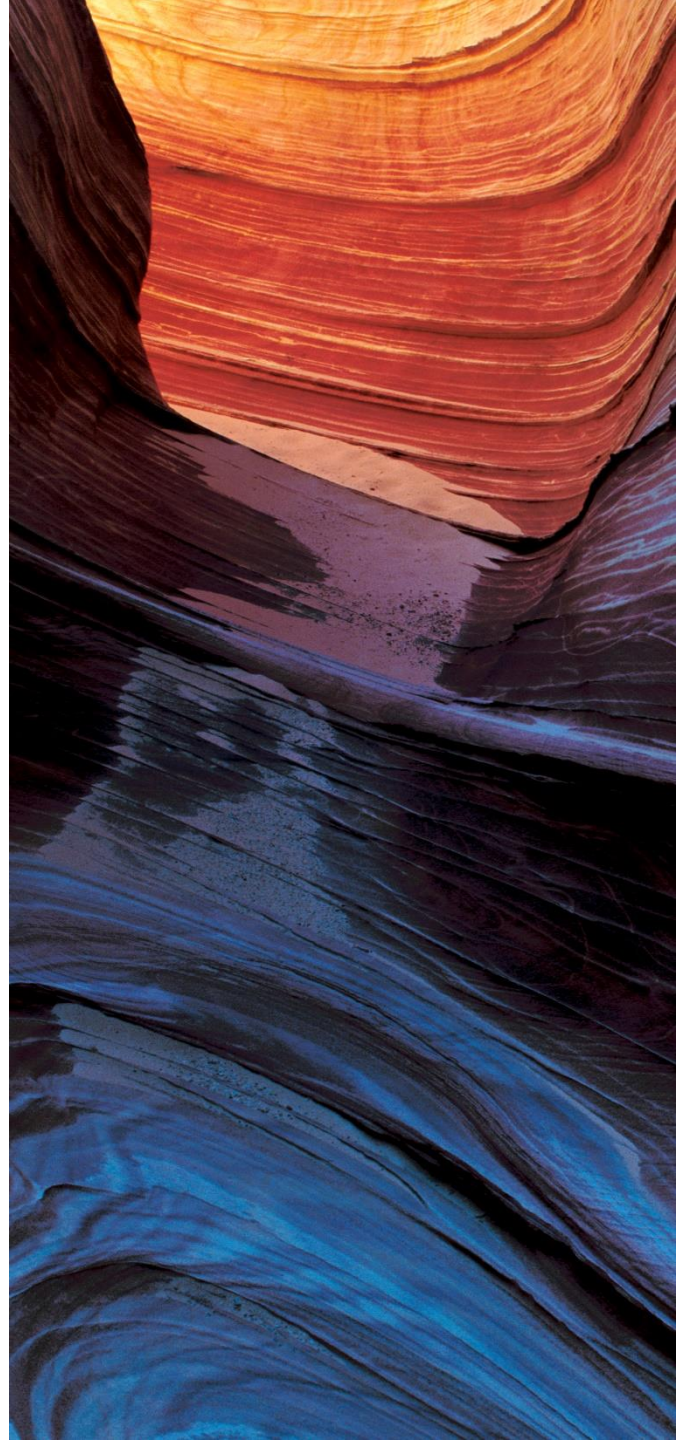
- Professional indemnity insurance mandatory in Austria, if expressly required by law, e.g.
  - Manufacturers / importers
  - Lawyers
  - Accountants
  - Architects
  - Insurance intermediaries (agents and brokers)
  - Airlines
- No direct claim of injured third party against insurer (very few exceptions)

“Claims made and reported” policies

- No definition of the “insured event” under Austrian law
  - PI policies usually define the insured event on ‘act-committed’ basis
  - “claims made” policies possible but (very) rare on Austrian PI market

- “Claims made” policies permissible in Austria but subject to sec. 864a and 879 para 3 Civil Code

- “Claims made and reported” policies potentially problematic in light of sec. 153 Insurance Contract Act (mandatory)
  - Policyholder must notify insurer of a claim made out of court within 1 week
  - Policyholder must immediately notify insurer of a claim asserted in court



Damages for late payment by insurers

- Policyholder has right to damages for late payment of claims under Austrian law

- Claims against PI insurer arise and become due, if a serious claim for damages is made against the policyholder by a third party
  - Payment to be made within two weeks as of when the third party was satisfied, or when the third party's claim was established by a final judgment, by acknowledgement or by settlement
  - Costs must be reimbursed to the policyholder within two weeks after notification of the calculation

- If the insurer defaults on payment or in case of late payment, policyholder may claim damages, if there is fault on the insurer’s part

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