INSURANCE LAW BETWEEN NATIONAL LAWS AND GLOBALIZATION

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SUMMARY: 1. Insurance law, between a specialty field and a way of expanding on general law. – 2. Transparency: the general and special rules of insurance law. – 3. Transparency: main objectives. – 4. Transparency. Remedies ranging from prevention techniques to sanctioning measures: a comparative survey. – 5. Arbitration and Insurance. – 6. *Corporate Governance* and transparency. – 7. Transparency in management functions. – 8. Transparency and control functions. – 9. Management and supervision in insurance law: the Italian case. – 10. Supervision and European regulation. – 11. Civil liability. General overview. – 12. Continued. A particular sector: practicing and managing sports activities. – 13. Supplemental social security insurance. – 14. The insurance market: a few statistics. – 15. Conclusions.

1. *Insurance law, between a specialty field and a way of expanding on general law.*

Insurance law is sometimes considered to be "sector-specific", characterized by distinctive special-sector elements and enclosed in a *hortus clausus* for the restricted use of specialists.

In essence, it is a sort of territory restricted to the investigation of specialists, almost the child of a lesser god, marginally located compared to other segments of the legal system. This is a misconception because insurance law, as I will synthetically prove through examples drawn from issues relating to contracts, governance, supervision and civil liability, has a general and systematic relevance that needs to be adequately appreciated.

Insurance contracts, not only under Italian law but also in other legal

orders, pose a general problem, i.e. the relationship between general special clauses, and please excuse me for the play on words, meaning thereby first and foremost the clauses aimed at protecting consumers, and the "sector-specific" clauses protecting the "policy-holder consumer", and the relationship between the two and between these and the general terms of contract.

The issue is particularly topical because, albeit in the presence of numerous and sometimes redundant regulatory provisions, the solution of problems often ultimately lies in the general clauses providing for diligence and fairness in the performance of contract, thus proving that an excess of detail often needs to be offset by referring back to general provisions.

Secondly, banking law, compounded with insurance law, has greatly contributed to evolving the system of *corporate governance* by expanding the scope of general corporate law through special legal provisions. In Italy, for example, the ISVAP regulation n. 20/2008 provided for the adoption by the Board of Directors of a regulation aimed at coordinating control issues and procedures, thus anticipating a solution that was subsequently adopted in the 2011 Corporate Governance Code of Borsa Italiana.

Thirdly, attention should be focused on the issue of *supervision.* This domain raises problems that not only interest specialists but all of civil society: it is peculiar that attention has been mainly focused on the problem of supervising European banking operations while the issue of supervision is equally relevant to the insurance sector.

Lastly, shifting our attention onto *civil liability,* whose scope – ranging from professional liability to biological damage and existential damage – has expanded to include insurance controversies in which the size of compensation increasingly factors in elements arising from fundamental human rights.

This leads us to say that insurance law is not at all confined within the boundaries of the specific sector but raises problems and seeks solutions that are full of systemic implications that have a potential fallout on general provisions.

Here are some detailed examples:

2. *Transparency: the general and special rules of insurance law*[1].

All legal orders, for a contract to be valid, provide for a *bona fide* rule in negotiations, which entails imposing a general duty of fairness in negotiations, avoiding malicious or merely reticent behaviours, and providing the counterparty with all information available or knowable through normal due diligence.

However, many States have acknowledged the need to introduce specific rules aimed at outlining and laying down a due diligence standard as the one required from insurance companies. The case of Italy is paradigmatic: the Insurance Companies Supervisory Authority (ISVAP, now renamed IVASS) introduced a *General Regulation on Pre-contractual Information* which specifies the general principle enshrined in the Italian Civil Code – "parties must behave in good faith during the pre-contractual bargaining and contract drafting" (Art. 1137 of the Civil Code – and structures it into a 54-provision system.

In analysing the issue of transparency, special attention should be focused on the different groupings of norms that can be applied to different types of insurance contracts (life assurance, civil liability insurance, product liability insurance, etc.), to the status of insurance intermediaries and to the transparency and fairness of advertising.

The issue of legal remedies is crucial to understanding the workings of the invalidity of contract, invalidity of contractual clauses and termination of contract. In this respect, arbitration, as an alternative instrument of dispute resolution, assumes unconfutable importance.

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[1] Reference should obviously be made to the broader and in-depth analysis carried out in the keynote speech by G. VOLPE PUTZOLU, *Transparency in contractual terms; pre-contractual information and bona fide in negotiations. (Trasparenza delle condizioni contrattuali; Informazione precontrattuale e buona fede nelle trattative).*

In this brief introductory note, I shall try to provide you with a few considerations on the issues dealt with herein, with the dual aim of highlighting the expansive effect that insurance law has on general civil and commercial law and briefly outlining the differences and similarities between legal orders in the ongoing general tendency to globalise legal regulations.

3. Transparency: main objectives.

It should be underscored that full transparency is essential in assuring general fair-play in the relationship between financial intermediaries and customers, even if a bias in the information provided cannot be entirely eliminated. In any case, it can be said that transparency and the duty of *disclosure* are generally accepted principles recognized to be the founding elements of insurance law in all the legal orders throughout the world.

Transparency has different connotations: providing information before closing the contract and throughout its duration; making contractual provisions comprehensible to the customer so that he/she can compare different contractual offers.

Insurance companies must therefore behave in compliance with criteria of diligence, fairness and transparency vis-à-vis policy-holders and must especially take into consideration the customer's personal characteristics (age, position at work, family status, financial standing, expectations with respect to the insurance coverage, duration and financial risks in case of life assurance). In this respect, insurance contracts are typically difficult to understand.

The complexity of insurance products makes it difficult for the average customer to fully understand the contents. This is why intermediaries are obliged to explain to customers the characteristics of the proposed contract in plain and comprehensible language.

This is all the more true for insurance financial products: intermediaries must give an analytical illustration of all the risks connected with the performance of contract. Several factors affect the perception and

comprehension of the investment risks, which make it necessary for insurance companies to outline the customer's financial profile, especially in case of non-professional customers, on the basis of appropriate criteria such as the customer's knowledge of and experience with financial products, the customer's financial situation and his/her investment objectives.

Different Countries rely on a plurality of legislative strategies, legal remedies and the intervention of Regulatory Authorities in case of lack of transparency.

4. *Transparency. Remedies ranging from prevention techniques to sanctioning measures: a comparative survey.*

In assuring transparency, protection techniques can be subdivided into prevention instruments and sanctioning measures.

Most Countries, and not only *civil law* countries (e.g. South Africa), have developed special rules of *general consumer law* as well as rules regulating contractual clauses. Generally speaking, there persists a difference between *common law* and *civil law* countries. The former are characterised by general *utmost good faith* principles, albeit supported by *Guidelines and Codes of practice*; the latter are regulated by more analytical provisions, also through the system of mandatory clauses (e.g. Belgium and New York State).

Still referring to prevention techniques, there is a clear-cut difference between European Union Countries and Latin American States. In the European Union, Supervisory Authorities cannot pre-emptily intervene on contractual clauses while general policy conditions are approved ex ante by Supervisory Authorities in the largest Latin American countries (Argentina, Bolivia, Mexico, Colombia and Chile) but also in Japan and Turkey.

As for the so-called "sanctioning measures", termination of contract and compensation for damages are the provisions generally applied in the case of violation of transparency rules.

5. *Arbitration and Insurance.*

For individuals and companies alike, persisting uncertainty over the outcome of a controversy unarguably constitutes a damage because the speed and firmness of decisions are an essential value and the length of trials increasingly give rise to costs difficult to bear and reasons of inefficiency.

Therefore arbitration, as relied on in commercial and therefore also insurance legal issues, can be an effective dispute resolution instrument as it provides a quick alternative to court proceedings because of the speed at which cases are decided; because of the "competence" of the arbitrators, who are experts in the field; because of the "independence" of the arbitrators, which is grounded on an ethically sound arbitration tradition; and because of the "confidentiality" of the proceedings and of the final award.

The general recognition of the benefits of arbitration is worldwide[2].

Moreover, the current trend equating arbitration proceedings with the jurisdiction of local courts has progressed unevenly throughout the world, despite shared essential and procedural constraints such as the non-arbitrability of unalienable rights, the Common Law *privity of contract*, and the problems raised by the intervention of a third party.

In this respect, institutional or private *Alternative Dispute Resolutions* take on a special relevance.

In Italy, special notice should be taken of the existence of the *Camera di Conciliazione e Arbitrato of Consob* – the Conciliation and Arbitration Chamber of Consob, the Italian financial industry regulator – and of the *Arbitro Bancario Finanziario,* the banking and financial arbitrator.

Consob's Conciliation and Arbitration Chamber was established pursuant to Law n. 262 of 28 December 2005 ("Provisions for the protection of savings and of the financial market") and decides on disputes over the obligation of fairness and transparency in collective investment or asset management contracts (mutual investment funds) between non-professional savers or investors and banks or other financial intermediaries.

[2] For a clear and effective coverage, see P. BERNARDINI, *Insurance and Arbitration. General Report,* XIV AIDA WORLD CONGRESS, Rome 29 September – 2 October 2014.

The banking and financial arbitrator was established in 2009 pursuant to Art. 128-*bis* of Legislative Decree n. 385 of 1st September 1993, ("Consolidated Banking Law"), which was introduced by the Law on Savings n. 262/2005. It is an impartial and independent institution whose functions are supported by the Bank of Italy and constitutes an extrajudicial dispute resolution system for controversies over banking and financial services arising between banks and their customers or between these and intermediaries. The Arbitrator's decisions are not binding, meaning thereby that if the parties do not accept them, they can bring the case to court; nonetheless, if the intermediary does not respect the Arbitrator's decision, his/her non-compliance is made public.

These two institutions could represent interesting precedents with a view to transferring the service at the *Autorità di vigilanza in materia assicurativa (IVASS),* the Italian Insurance Supervisory Authority.

In the private sector, notice should be taken of the interesting experience acquired by the Italian Reale Mutua Assicurazione.

On April 28 2014, the Company passed a provision regulating the *Commissione di Garanzia dell'Assicurato* - the Policy-holder Regulatory Commission – a board comprising magistrates, lawyers, university professors of acknowledged prestige but no longer in service, who are called to examine the complaints eventually filed by policy-holders. The proceeding precedes arbitration, if provided for, or referral to an ordinary court. The Commission's decision is not binding for the claimant.

This proceeding is liable to deflate the amount of litigation as it is entirely gratuitous, optional and non-binding.

6. Corporate Governance and transparency.

Although corporate governance in insurance corporate law is not one of the topics of our conference, it nonetheless represents a guiding principle interlinking many of the topics addressed here because it constitutes, if I may

call it so, the precondition for the correct practice of insurance activities and because, at least in Italian legislation, the introduction of regulations has represented a forward-looking point of reference also for non-insurance companies, especially for those listed on the stock exchange.

The composition of the Board of Directors, the role of independent directors, the regulation of conflicts of interest and related party transactions, internal audits, risk management and compliance procedures, are all essential in putting up preventive barriers against the violation of laws, fraudulent behaviours and financial risks.

Moreover, guaranteeing all board members access to a transparent flow of information is not only dutiful for effective management but the very essence of directorship.

7. Transparency and the management function.

Transparency and *information* play a central role in the governance of joint-stock companies, both as the guiding principles of good directorship, for the "traceability" of behaviours and as the means whereby to build responsibility profiles.

For example, in Italian law, directors are required to act in an "informed manner" (Art. 2381, Para. 6 of the Civil Code), which is configured as the general behavioural paradigm for a good director.

Furthermore, notice should be taken of the board chairman's obligation to provide "adequate information" to the board (Art. 2381, Para. 1), the executive directors' obligation to periodically inform the board (Art. 2381, Para. 5), the central function of information as an instrument whereby to evaluate the organizational set-up and the general performance of management (Art. 2381, Para. 3), the power-duty of directors to inform the board (Art. 2381, Para. 6), the obligation to provide information on directors' interests (Art. 2391), on transactions with related parties (Art. 2391-*bis*), and on transactions

performed in the interest of the group (Art. 2497-*ter*), of *leveraged buyout* operations (Art. 2501-*bis*, Para. 3), and so on.

In fact, receiving insufficient information constitutes the grounds for contesting any resolution on transactions taken in the presence of directors holding interests therein (Art. 2391, Para. 2).

In the light of the objective complexity of modern-day large corporations, the "information process" plays a fundamental role in the *power of management* which, despite its hierarchical set-up, is highly articulated and widespread. This leads us to state that "also top-level business management" on the one hand materializes by setting general guidelines and, on the other, by checking the effectiveness of other people's actions (executive corporate bodies, top management, managers, department heads, directors of subsidiaries, etc.).

In Eisenberg's *monitoring board* model, directors are under the obligation to examine all the documents received, verify that they are complete, sufficient, comprehensible and appropriate for an informed exercise of power and, if necessary, request additional or supplemental information.

These principles, thanks to the globalization of markets and governance models, are the same in most legal orders, albeit with some variations.

I think it would be significant to recall the relevant example that the principle enshrined in the *Principles of Corporate Governance of the American Law Institute* can represent for other national legislations: «*in performing his or her duties and functions, a director or officer who acts in good faith, and reasonably believes that reliance is warranted is entitled to rely on information, opinions, reports, statements.. prepared, made, or performed by one or more directors, officers or employees of the corporation…, legal counsel, public accountants engineers or other persons who the director or officer reasonably believes merit confidence*» (§ 4.02).

In conclusion, information and transparency are configured as the regulatory paradigm for the management function and the criterion on which to base responsibility profiles.

8. Transparency and the control function.

The above considerations can similarly apply to the *control function.*

Italy's 2003 corporate law reform upgraded the *principles for a correct management* to the status of general provision regulating the behaviour of directors (according to Art. 2403 of the Civil Code, a provision that previously only applied to listed companies (Art. 149, letter b), and to the Consolidated Law on Financial Intermediation).

The notion of *control* expands the traditional notion of "*ex post verification*" (derived from Administrative Law) and evolves into a *co-essential element in the exercise of entrepreneurship and the management of a company, as it is intrinsic to the management function.* Interpreted from an axiological viewpoint, the notion should evolve from a concept of control meaning "cost" to the idea of control conceived as an "opportunity".

The core element of controlling the effectiveness of management is represented by the *control on the adequacy of organization,* meaning thereby control over the adequacy of the entire control procedural system in terms of the company's function and staff charts, with a special focus on control procedures, which range from risk monitoring (the so-called *risk management function*) to the verification of compliance with legal provisions, both primary and secondary (the so-called *compliance function*): a control prevalently performed on informative documents and procedures.

Moreover, there is a difference between *direct and indirect control:* it is a distinction that is transversal to all corporate bodies and functions but that, in economic and social enterprises, *sees a net prevalence of indirect controls over direct controls.*

In the implementation of *control procedures*, control activities do not always arise from direct inspections but from the control of "lower-ranking situations" requiring verification, such as the correct application of control procedures and the adequacy of the organizational set-up of which control procedures form an integral part.

In the case of indirect controls, precisely because they are many and widespread, there is more feedback, thus entailing the possibility of "self-correction". However, since they are based on direct controls (the so-called "line control"), they too risk going into "chain default" in case these are insufficient or ineffective and therefore require an ad hoc instrument and the introduction of a "comptroller of comptrollers" mechanism. Again, information is the linchpin making the system work.

Effective supervision is based on an adequate system of procedures for the "processing" of information.

9. Management and supervision in insurance law: the Italian case[3].

This is the general backdrop for the introduction of ISVAP Regulation n. 20, of 26 March 2008, subsequently amended by ISVAP Provision n. 3020 of 8 November 2012, which comprehensively regulates the matter by closely interrelating corporate rules with legal precepts – in terms of internal controls, system components, information flows, risk management and outsourcing – and analyses a specific provision, Art. 17, which deals with the *coordination between control bodies through a board regulation,* an issue that is of general and systemic relevance.

More specifically, the provision anticipated the Corporate Governance Code of Borse italiane S.p.A. by expressly providing that: "the management *body* defines and formalizes the connections between the different functions responsible for carrying out control tasks".

The provision sets forth individual autonomy as the solution to one of the most sensitive problems of management and control, an area of corporate law which raises the challenging question of if a plurality of control actions stimulates virtuous synergies or instead produces inefficient overlaps and redundancies.

[3] The following paragraphs summarise a lengthier text: *Internal control systems in the insurance sector, Il sistema dei controlli interni nel settore assicurativo,* in *Assicurazioni,* 2013, pages 193-215.

It is the virtuous compounding of individual autonomy with primary and secondary rules that, if the mix is right, can lead to effective regulation. This was indeed the case, for example, in the field of related party transactions.

Secondary regulation dictates an articulated system of internal controls.

A good example is represented by the general principles (Chapter II, Section I of ISVAP Regulation 20/2008) which, by anticipating some of the objectives now integrated into both the secondary regulation of the banking sector and into the Corporate Governance Code, specify the "efficiency and effectiveness in corporate processes, and adequate control of risks, the reliability and integrity of accounting and operational information, the protection of corporate assets and the corporate activity's compliance with existing legislation, directives and corporate procedures" (Art. 4). All these objectives rely on the *risk management*, *audit*, and *compliance* functions which have now become common jargon.

The regulation surveyed herein contains numerous detailed provisions aimed at regulating the role of corporate bodies. After specifying the responsibility of the executive body (Art. 5, Para. 1), the regulation analytically specifies the "strategic orientation and organization tasks provided for under Art. 2381 of the Civil Code", with an effective focus on operations that are not necessarily configured as *ictu oculi* as they form part of the general precept[4].

Later, ISVAP Provision n. 3020/2012 laid down that the executive body may set forth adequate emergency plans (called "contingency arrangements") in case it decides to take upon itself all delegated powers [Art. 5, Para. 2, letter c)].

The provision expressly regulates the Corporate Governance Committee (Art. 6), the tasks of the Corporate Governance body (Art. 8), and the functions of executive officers (Art. 7).

[4] By way of example, note should be taken of the duty of care in providing "an appropriate separation of functions", "control instruments over delegated powers, the periodical (annual) revision of procedures, the obligation for the management body to request to be "periodically informed on the effectiveness and adequacy of internal control and risk management" (*see* Art. 5, Para. 2 of the quoted Regulation).

Article 10 of the regulation imposes promoting a corporate governance culture as an instrument to make the system more efficient in terms of the adequate training of personnel, of the effectiveness of the control function and of compliance with ethical and legal standards[5].

Article 11 provides for specific procedures – such as "double signature, authorisations, checks and comparisons, checklists and ledger reconciliation" – with the aim of establishing an efficient *check and balance* system.

Article 12 sets forth the procedures relative to information flows and communication channels, specifying the distinctive features of the information system's guiding principles such as the principles of accuracy, completeness, timeliness, coherence, transparency and pertinence.

Once having established the general principle of cooperation between corporate bodies and between "all the structures performing control functions" (Art. 8, Para. 2 of the Regulation), the regulation under scrutiny provides for specific obligations to collaborate with the auditors and with the control bodies of other companies belonging to the group – already provided for by law – but above all it imposes the obligation to have an active dialogue with the executive body that, on the basis of past experience, reveals to have particular relevance. Art. 8, Para. 3, lett. f sets out that the control body "indicates to the executive body eventual abnormalities or weaknesses in the organizational and internal control systems and highlights the appropriate corrective measures".

Practical experience has shown that despite the detection of critical points, there are frequent shortcomings in the timeliness of reporting, making consequent counter-measures tardy.

As I shall say in my conclusions, primary legislation should provide for systematic reporting, obliging the control body to submit *periodical reports* to the executive body, thus establishing an effective operating chain between control and management.

[5] It provides for the adoption of a *code of ethics* "defining behavioural rules, regulating possible conflicts of interest and envisaging adequate corrective actions in case of non-compliance with the guidelines".

The issue of risk management, as has already been stated, is now at the core of the "governance rules" passed in the secondary regulation of the banking sector, of the Corporate Governance Code and the forward-looking ISVAP regulation, especially from the point of view of the objectives, the types of risks and procedural techniques[6].

Also the *procedural method* set forth in Art. 19 is regulated by integrating the type of analytical process, risk measurement techniques and risk policies into a single approach based on *asset-liability management*[7] models.

Going from business management literature to practice, which frequently suffers from shortcomings, the regulation sets out the rules for *risk management* (Art. 21) and *compliance* (Art. 22) from an organizational and functional perspective.

Art. 2497 of the Italian Civil Code considers the executive and coordination responsibility of a group as the basis on which to infer the legitimisation of the guidance and orientation exercised by the holding company on single subsidiaries, in a unitary group logic. The ISVAP Regulation defines the role of the mother company in risk management and control procedures by drawing a parallel with banking regulations and, more specifically, with the regulation of a unitary management to ensure the stability of the group (*see* Art. 61, Para. 4, of Legislative Decree n. 385/1993).

We can conclude from the foregoing illustration that we can rightfully say that in the Italian legal system, insurance law has represented a focal point of reference in corporate governance, providing valuable indications also to other regulatory systems ranging from the Corporate Governance Code to the latest banking regulations (Bank of Italy, Supervision Rules, Circular letter n.

[6] The "most significant" risks are defined as those that *(i)* "can undermine the solvency of the company" and that *(ii)* can "constitute a serious hindrance to the achievement of corporate objectives" (Art. 18, Para. 1).
The classification must "at least" include risk-taking, the underwriting risk, market risk, credit risk, liquidity risk, operating risk, the risk of belonging to a group, the risk of non-compliance with the rules, the reputational risk (Art. 18, Para. 2).

[7] It expressly imposes the duty of a "timely detection" and of preparing "adequate emergency plans" (Art. 19, Para. 7).
Further specific rules are also set out for the application of a "*stress test*" (Art. 20).

285, of 17 December 2013, First Amended on 6 May 2014, First Part – Transposition in Italian law of CRD IV, Title IV, Corporate Governance, internal controls, risk management, Chapter 1 – Corporate Governance), which could also be referred to by Common Law legislators in view of a much-awaited reform of the matter.

10. Supervision and European regulation.

Also in the field of supervision, attention has generally been focused on the European Banking Union and a single supervisory mechanism, even if the issue raises comparable and equally relevant problems also in the insurance sector. The Omnibus 2 Directive, on which EU legislators found a political agreement and passed in November 2013, marks the transition towards new and more prudential rules in the insurance sector. The so-called Solvency 2 Regulatory Framework shall come into force on the 1st of January 2016[8].

The aim of the new regulatory framework is to enhance the effectiveness of supervision. In particular, the regulation will introduce indicators for the risk implicit to all asset and liability entries, with a view to up-stepping the speed of top-level governance interventions and standards in order to guarantee effective internal risk governance as the precondition for guaranteeing the solvency of a company. To this end, the EIOPA (European Insurance and Occupational Pensions Association) has developed guidelines that the Italian Insurance Supervisory Authority, IVASS, has deemed advisable to implement in order to facilitate growing compliance with the new rules. Insurance companies are requested to modify their corporate governance and make a prospective estimate of capital risk planning and reporting. In this context, IVASS is drafting a "Handbook for supervisory activities" based on an integrated and interactive Supervisory Review Process, SRP, aimed at providing a reasoned corporate risk report. In the future, a *risk-oriented*

[8] In relation to this, see IVASS, *Relazione sull'attività svolta dall'Istituto nell'anno 2013, Considerazioni del Presidente*, Rome 26 June 2014.

supervision of the capital adequacy and governance system of insurance companies will play a crucial role. The Authority has also intended to promote two projects aimed at protecting consumers: the survey of effective automobile liability insurance premiums (IPER), a quarterly statistics sample survey conducted in collaboration with all insurance companies and ANIA, the National Association of Insurance Companies – the only initiative of this kind in Europe – and the establishment of AIA, an integrated anti-fraud register.

Considering the relevance of the insurance market as an integral part of the financial market, as we will illustrate below, the European harmonization of supervision undoubtedly constitutes a significant step forward in the globalization of rules, at least at federal level.

11. Civil liability. General overview.

As is widely known, the evolution of civil liability is closely linked to the development of the insurance system from the traditional automobile liability insurance and the liability of the car owner to new frontiers like the civil liability of enterprises and professionals – special notice should be taken of the liability of physicians and surgeons and the so-called D&O insurance policies for directors and officers – the exercise of dangerous activities and transport and credit insurance.

Suffice it to consider the role played by insurance contracts in developing the issue of biological damage, in its different forms[9].

Following on with this brief introductory note, I would like to point out how insurance law not only expands general legal provisions but also impacts fundamental human rights.

12. Continued. A particular sector: practicing and managing sports activities.

[9] I would just like to mention the latest and most comprehensive treatise by M. ROSSETTI, *Il diritto delle assicurazioni,* Vol. III, Padoa, 2013, page 623 ff.

If we focus on the civil liability arising from sports activities and managing sports facilities, the problem arises of the relationship between third-party protection and self-responsibility. For example, in the case of mountain sports[10] (think of the recent dramatic accident of Michael Schumacher), in tracking responsibilities, and therefore with evident consequences in terms of insurance liability, a crucial role is played by the relationship between protection by third parties and the principle of precaution, namely the relationship between the duties of third parties vis-à-vis those who perform sports activities – the manufacturers of special equipment, ski-lift operators, Alpine guides, skiing instructors, managers of indoor sports facilities – and the duty of "self-protection" – in terms of training, competence, hazard assessment, risk assessment – of the person who performs the activity (skier, mountain climber, skier-climber, etc.).

The same issue arises for a multitude of sports activities: just think of sailing, underwater diving, snorkelling, paragliding, parachuting, mountain bike racing, bungee jumping, motocross, skate-boarding, fitness centres, etc.

In the United States there is an ongoing debate that goes beyond the mere legal framework and assumes a philosophical dimension, in terms of a critical reflection on the risks arising from an excess of protection in a system in which insurance coverage is extremely advanced and pervasive.

The issue raises the crucial question of whether the excess of protection risks increasing the risk – and please excuse the play on words – because of an excess of confidence. It should be noted that sports activities require an adequate level of training and competence, albeit differentiated into objective profiles (type of activity) and subjective profiles (type of practitioner: professional, expert or beginner): this is the principle of self-responsibility.

When the activity is performed professionally, the *principle of self-responsibility and correct cooperation* combines with the duty for the professional to assess the skills of the customer and the duty to supervise the

[10] I dealt with the issue in *Montagna e assicurazione: profili generali*, in *Assicurazioni*, 2013, page 627 ff.

exercise of the activity.

In this respect, the issue of specialist insurance policies is a particularly sensitive one. In the field of sports activities, it is necessary to promote a close cooperation between the consumers who operate in the sector – the insurance company – in singling out the specificities of the areas of activity, obviously privileging mass activities like skiing, for instance, and in defining the typical risks with a view to providing adequate protection.

A general effort is needed to simplify contractual information in order to avoid, on the one hand, a twisted use of insurance policies with a view to receiving undue compensation and, on the other hand, to avoid an excessively limited protection of the insured deriving from the complexity or fuzziness of contractual clauses: the experience of *Patti Chiari* ("Clear Terms") in the banking sector can be taken as a source of inspiration.

In conclusion, I think it is possible to state that the issue of insuring sports activities – which, if considered comprehensively, involve ever-larger population segments and significant economic interests – represents an interesting challenge for insurers, professionals and scholars in finding techniques and solutions to match the peculiarities of the sector and also in terms of systematically enforcing general civil and commercial law principles and provisions.

13. . Supplemental social security insurance

Insurance law also has a general social relevance: just think of life assurance policies and supplemental social security insurance.

Recent developments in numerous legal orders have witnessed new contractual forms and products which have enriched life assurance with a multitude of social security and financial investment functions and new forms of handing down one's inheritance after death.

Life assurance constitutes an essential product on financial markets. In Italy, it has spread less than in other countries: in 2007, the average number of insurance policies per number of inhabitants was the lowest of all

industrialized Countries (4.4) and the average number of life assurance policies per inhabitant (0.2) was only half the average of other Countries. However, the sector is expanding in Italy too. In 2012, life assurance was offered by 66 companies, with overall premium income amounting to 70 billion euros and technical provisions for over 423 billion euros; during the same year, life assurance premiums represented 66.3% of all insurance premiums paid, both life and non-life[11].

14. The insurance market: a few statistics.

As already stated, the insurance market, alongside the banking sector, is a fundamental part of the financial market. Suffice it to consider the phenomenon of credit insurance and securitization operations which have become all the more critical following the 2008 financial crisis. In their typical performance of risk transfer and management functions, insurance companies also fulfil a crucial role in the allocation of financial resources. By investing their premium income, insurance companies contribute to financing both the public and private economy: European insurance companies currently have investments for 8,000 billion euros, Italian companies for 560 billion euros; Italian insurance companies have 270 billion euros invested in government bonds and 90 billion euros in corporate bonds.

The Supervisory Authority is making an effort to add momentum to re-launching Italy's production system by advancing the implementation of norms aimed at facilitating the access to financial markets of credit-worthy companies, especially small and medium-sized, in compliance with the 2013 "Destinazione Italia" decree-law which extends the possibility of investing in instruments like mini-bonds and securitized assets. The initiative is called "Finanza per la crescita" ("Finance for Growth") and it aims at advancing the regulatory framework of Solvency 2 in replacing the current risk control

[11] Data are taken from M. ROSSETTI, *op. cit.*, Vol. III, page 814 ff.

systems with financial requirements calibrated to the effective risk profile, making them more efficient and stringent in terms of risk management[12].

15. Conclusions.

Allow me to make a few conclusive remarks.

First of all, it should be underscored that the insurance market today represents an integral and indivisible part of the global financial system.

Secondly, all the specific provisions that make up insurance law – from the transparency of contract to the transparency of corporate governance, from the evolution of the principles underlying compensable damage, to dispute resolution techniques, preventative provisions and the role of Supervisory Authorities – all show that, far from being a sectorial law confined within the boundaries of sector-specific regulation, it represents a pillar of the system and especially an efficient laboratory for processing problems and solutions that can be extended to many other sectors of civil and commercial law.

Thirdly, despite the regulatory differences between different Countries, there is an undeniable convergence process under way in the European Union thanks to the issue of EU Directives and Regulations and also a regulatory rapprochement between culturally and geographically distant systems: globalization does not do away with *path dependence* but it surely accelerates homogenization processes and the spontaneous harmonization of rules, as it has always happened in commercial relations.

[12] In relation to this, see IVASS, *Relazione sull'attività svolta dall'Istituto nell'anno 2013, Considerazioni del Presidente*, cit., page 9 f.