# THE INSURANCE AND REINSURANCE LAW REVIEW

NINTH EDITION

**Editor**
Peter Rogan

THE LAWREVIEWS

# THE INSURANCE AND REINSURANCE LAW REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

**Editor**
Peter Rogan

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Jack Bagnall, Joel Woods

BUSINESS DEVELOPMENT MANAGERS
Katie Hodgetts, Rebecca Mogridge

BUSINESS DEVELOPMENT EXECUTIVE
Olivia Budd

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gracie Ford

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Jonathan Allen

CHIEF EXECUTIVE OFFICER
Nick Brailey

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 978-1-83862-787-4

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:

ADVOKATFIRMAET SCHJØDT AS

ANJIE LAW FIRM

BUN & ASSOCIATES

CLAYTON UTZ

CLYDE & CO LLP

DAC BEACHCROFT LLP

GBF ATTORNEYS-AT-LAW LTD

GROSS ORAD SCHLIMOFF & CO

GÜN + PARTNERS

HFW

INCE

JORQUIERA & ROZAS ABOGADOS (JJR ABOGADOS)

KENNEDYS

LC RODRIGO ABOGADOS

MAMO TCV ADVOCATES

MAPLES GROUP

MATHESON

NADER, HAYAUX & GOEBEL

NISHIMURA & ASAHI

PINHEIRO NETO ADVOGADOS

POUL SCHMITH

STOEVA, TCHOMPALOV & ZNEPOLSKI

STUDIO LEGALE GIORGETTI

TROUTMAN PEPPER HAMILTON SANDERS LLP

TULI & CO

VAVROVSKY HEINE MARTH RECHTSANWÄLTE GMBH

# CONTENTS

# PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant: it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with emerging markets in Asia and Latin America developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all the contributors for their work in compiling this volume.

One of the defining features of 2020 has been the covid-19 pandemic, which has inflicted terrible human misery around the world. The insurance industry, like most other aspects of the economy, has been badly impacted by the pandemic. Although the financial loss to the industry seems likely to be manageable, it has undoubtedly raised issues about the suitability of a range of policy wordings for the modern commercial environment, while also raising a range of legal issues related to, for example, causation and the quantification of loss. The different jurisdictions represented in this book will have different responses to these developments so it is vital to hear from the lawyers in each of those countries on the factors that will govern the international response.

The year 2020 looks likely to have been a very bad year for insured losses from natural catastrophes, with record numbers of severe windstorms and wildfires. These losses reinforce the continuing concern that climate change will see a long-term increase in the number and severity of such losses. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation to, for example, aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

The past year also saw no respite in the number or scale of cyber events, including the data breaches at MGM Resorts and California University and global organisations such as the World Health Organization. Events such as these test not only insurers and reinsurers, but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. Aggregation will also be an area of uncertainty in relation to the treatment of all losses of this kind, and again different jurisdictions are likely to provide different responses.

Most recently, the courts in England and Wales have held that cryptocurrencies such as bitcoin are 'property' for legal purposes.

Looking ahead, 2021 is likely to see new developments and new legal issues. In particular, the impact of insurtech on the way in which insurance is underwritten, serviced and distributed will continue to present challenges around the world. This is reflected in our chapter on artificial intelligence.

I hope that you find this volume of use in seeking to understand today's legal challenges, and I would like to thank once again all the contributors. Finally, I would like to thank Simon Cooper, a consultant at Ince and a colleague of many years, for his huge contribution to finalising this ninth edition of *The Insurance and Reinsurance Law Review*.

**Peter Rogan**
Ince
London
April 2021

**Chapter 22**

# ISRAEL

*Harry Orad*[1]

## I INTRODUCTION

The Israeli insurance market is an expanding and evolving environment. In this area, the focus of both the legislature and the relevant regulator is on the protection of the individual consumer. Courts of law have traditionally followed suit with this public policy, although, in recent years, a slight shift can be perceived towards a more balanced construction of insurance policies.

## II REGULATION

### i The insurance regulator

The insurance market is regulated by the Commissioner of Capital Markets, Insurance and Savings, appointed by the Minister of Finance. Two bodies advise the Commissioner: a four-member Advisory Committee and the Advisory Council, which has 15 members, of whom no more than six may be government employees.

The Commissioner is competent to resolve disputes between insurers and assureds. In practice, it will refrain from assuming this role in fact-laden cases. Its decision may be appealed to the district court.

### ii Licensing

Writing insurance requires a licence. Foreign insurance companies cannot write insurance business in Israel, but Israeli citizens may buy insurance abroad. Writing reinsurance business, however, does not require a licence and foreign insurers are therefore free to do so.

The Commissioner is authorised to license a foreign company if the latter is registered in Israel and subject to regulation in the country of origin.

In a unique act, the Israeli government enacted a regulation in December 1951 exempting Lloyd's underwriters from the stipulations of the Law of Controlling Insurance Service. The practical effect of this is that Lloyd's underwriters are permitted to write business directly in Israel.

1 Harry Orad is a founding partner at Gross Orad Schlimoff & Co.

### iii Compulsory insurance

Israeli law imposes compulsory insurance requirements on professionals or individuals in several areas, including the following:

*a* The capital market: insurance requirements are imposed on investment advisers and distributors; investment portfolio managers, mutual fund managers and trustees; provident funds and their managing companies; and underwriting companies. This compulsory insurance ensures protection of clients against negligent acts and omissions and infidelity of employees.

*b* Bodily injury coverage: Israeli law imposes compulsory insurance requirements for the coverage of bodily injury in clinical trials on human subjects (insurance requirements are imposed on the clinical trial sponsor).

*c* Motor accidents: the Israeli Road Accident Victims Compensation Law provides compensation for all victims of motor accidents on a no-fault basis. Compulsory insurance by all vehicle owners provides the source of compensation. In addition, sport events organised by registered sports authorities and organisations are subject to compulsory accident insurance. Schoolchildren are covered by compulsory personal injury insurance.

*d* Banks: there is no statute that compels banks to acquire compulsory insurance; however, the Commissioner of Banks has issued a directive that requires banks to acquire employee dishonesty insurance.

*e* Aviation: current regulations impose compulsory insurance on operators of commercial aircraft to, from or in Israel, in respect of passengers, baggage and cargo; third parties; and acts of hostility, war or terror.

### iv Directors' and officers' insurance

Directors' and officers' (D&O) insurance, although not mandatory, has become a prerequisite for most high-ranking D&Os. Israeli courts have demanded accurate, full, updated reporting. The business judgement rule (BJR) has been adopted by the Supreme Court and affects D&O litigation.

In *Better Place Israel Ltd. (in liquidation) et al. v. Agassi et al.* (September 2018),[2] the district court ruled that the BJR is a preliminary defence available to D&Os, which is intended to encourage them to take difficult business decisions and business risks. It was ruled that this defence can and should be raised at very early stages, before a trial. In this case, the claim was dismissed.

The significance of this decision is that the court was willing to dismiss a claim that was filed by liquidators of a company following receipt of the approval of the liquidation court after extensive investigation into many officers of the company and other employees – and by dismissal of the claim the court made this very clear statement to the Israeli business community: Israeli courts will not intervene in informed business decisions reached by D&Os in good faith and without conflicts of interest. This applies to companies conducting their businesses in Israel in general and particularly to failed start-up companies. The claim was considered a challenge made in hindsight on a failed business logic and therefore should be dismissed *in limine*. An appeal to the Supreme Court is still pending.

2 CA 47302-05-16.

Recent years have seen an increase in the number of derivative claims and class actions in respect of breach of duties by D&Os, most of which end in settlements in which insurers play an important role.

The Israeli Companies Law prohibits the indemnification (as well as insurance and exemption) of a director or officer in respect of the following matters:

*a* breach of fiduciary duty towards the company, unless committed in good faith and with reasonable grounds to believe that the action would not prejudice the company's interests;

*b* acts committed intentionally or recklessly;

*c* acts committed with the intention of gaining unlawful personal benefit; and

*d* fines and penalties, including civil fines and monetary levies.

The new Insolvency and Economic Rehabilitation Law (2018) defines extensive duties of the chief executive officer (CEO) and the directors (but not the officers) in companies facing insolvency and holds them liable for breach of these duties. Israeli insolvency law also prohibits exemption and indemnification of directors for breach of these duties.

## III INSURANCE AND REINSURANCE LAW

### i Sources of law

The Israeli legal system is fundamentally a common law regime, without jury. However, throughout the years, civil law statutes have been enacted. The Insurance Contract Law 1981 (ICL) adopted principles of consumer protection. The Control of Financial Services (Insurance) Law provides regulatory provisions for the market. The ICL applies to all types of insurance other than reinsurance, marine, aviation and insurance of diamonds or valuable metals.

### ii Making the contract

The ICL does not specify a unique format for execution of the insurance contract. However, it does specify rules aimed at reinforcing consumer rights and imposing limitations on insurers, remedies and power. These rules aim to moderate the typical imbalance of power between the insurer and the insured.

### iii Duty of disclosure

The ICL imposes an explicit duty on the insured to answer the insurer's questions in full and truthfully, when presented in writing in respect of a material matter. A material matter is defined by the Law as one that could affect a reasonable insurer's willingness to assume the risk in general or to assume it under the terms specified by the policy.

The Law further stipulates that fraudulent concealment of a matter that the insured was aware of as being a material matter is regarded as an untruthful and incomplete answer. Israeli courts have interpreted this in conjunction with the questions posed by the insurer on the proposal form: a subject not mentioned in a proposal form has been deemed to be immaterial and therefore there can be no positive duty of disclosure regarding such a subject and no sanction for non-disclosure.

### iv Interpreting the contract

An insurance contract is interpreted according to the (revised) Article 25 of the Law of Contracts and case law, which clarified rules of interpretation of insurance policies, such as *Cohen v. Migdal Insurance Company*[3] and *MS Aluminium Products v. Arie Insurance Company*.[4]

The stages of interpreting a policy are as follows:

*a* The first stage is based on the subjective intention of the parties to the specific policy. If possible, the parties' intentions will be ascertained literally from the language of the insurance contract. Otherwise, for the subjective intention, the court will look at external circumstances, such as communications exchanged between the parties.

*b* Second, if the subjective intention of the parties cannot be ascertained, then the court will seek the objective intention of the parties, namely the intention of reasonable and honest parties with respect to the policy in question. The objective intention can be ascertained, for example, from common practice among other insurers in the relevant type of insurance.

*c* A policy construction that gives it force and effect is preferable over one that voids the policy provisions.

*d* Only if the court cannot ascertain the subjective or objective intention of the parties will the court interpret ambiguities in the policy against the drafter (usually the insurance company).

*e* Courts also refer to the doctrine of the reasonable expectations of the insured, but only if there are several reasonable interpretations and one of them meets the reasonable expectations of the insured. This is generally used together with other rules of interpretation.

### v Warranties and conditions precedent

The ICL provides no basis for the doctrines of warranties and conditions precedent as implemented in common law countries. The Israeli law has adopted a proportionate remedy principle regarding breach of both contract terms and the duty of disclosure. The significance of this principle is that, other than in cases of fraud, there is no automatic exemption of the insurer from liability.

Where the insurer alleges breach, the court will consider its extent and effect and is authorised to reduce liability proportionately according to the ratio of the actual premium and the higher premium that would have been charged had the insured disclosed the material matter or had the insurer known that the policy condition would not have been adhered to (see Section VI).

The insurer bears the burden of proof that full disclosure or non-adherence to the condition would have had an effect on underwriting.

Furthermore, the ICL negates remedies where the breach of the duty of disclosure or the policy condition did not affect the risk.

3 CA 4688/02.

4 CA 453/11.

### vi Intermediaries and the role of the broker

The licensing of insurance brokers is regulated by law, requiring a licence, which follows on from practical training and examinations. The licensing is in three areas of expertise: general insurance, marine and pension insurance brokerage.

The licence may be granted to an individual or to a corporation.

The activities of insurance agents are regulated by law. An insurance agent is defined as 'one who engages in insurance brokering between the insured and insurers, and as a liaison between the insurer and the insured'. It is considered an agent of the insurer with regard to the negotiations leading up to the formulating of the insurance contract, unless appointed in writing by the insured as an agent of the insured. As the agent of the insurer, any fact brought to its knowledge regarding a material matter will be considered as known by the insurer for the purpose of the insured's duty of disclosure.

Payment of premium to the agent is also considered as payment to the insurer.

The agent is considered the insurer's agent for the purpose of receiving notice of the identity of the insured and the beneficiary unless the insurer informed the insured and the beneficiary in writing that notification must be sent to a different recipient.

The presumption that the insurance agent is the agent of the insurer serves as an obstacle that insurers must surmount to be allowed to rely on policy terms.

In *Clal Insurance Company Ltd v. Mussa Ally* (October 2004),[5] the court ruled that the insured was not deemed to have received a copy of the policy terms as the document had been sent to the agent and not to the policyholder. The fact that the agent in that case was a close relative of the policyholder did not suffice to overcome this obstacle. Furthermore, the insured had signed the section in the proposal form appointing the agent as his own agent. However, the court ruled that in the absence of clear-cut evidence that the insured fully understood the meaning of this waiver, the legal presumption prevailed and the agent remained the agent of the insurer. As a result, the court did not allow the insurer to rely on stipulations in the policy making cover conditional upon the insured taking measures to alleviate the risk. The court ruled that as the policy had not reached the hands of the policyholder, the insurer had not fulfilled the duty to ensure that the policyholder was fully aware of these conditions and the consequences of non-compliance.

### vii Claims

#### *Notification*

The ICL provides that the insured must notify the insurer of the insured event immediately after becoming aware of its occurrence. However, as with the approach to breach of policy terms or the duty of disclosure, the ICL does not sanction late notification with automatic dismissal of the claim. The burden of proof in this respect is on the insurer, who must prove substantive damage as a result of the failure to notify on time. To meet this burden, it is not sufficient to show a theoretical possibility that damage may be sustained by the insurer.

In any case, the claim will not be dismissed but reduced proportionately with regard to the extent of the damage caused by the delay. Furthermore, as with most provisions of the ICL, the above are reinforced as the ICL mandates that these provisions cannot be modified by agreement unless the modification is in favour of the insured. The practical effect of these provisions is that, as a rule, insurers cannot rely on a 'late notification' argument unless

5 CA 2626/01.

their rights were significantly prejudiced as a result of the late notification. These provisions have been the subject of discussion in numerous Israeli court cases wherein the courts have consistently ruled that an insurer that wishes to benefit from the remedy provisions must show that its rights were actually prejudiced by the insured's non-compliance with the duty to notify.

The burden of proof borne by the insurer is not a light one. It must prove actual damage as a result of breach of the notification duty. Statements to this effect were made in several cases, including *Hassneh Insurance Co v. Asulin*,[6] where the burden imposed on the insurers to prove actual damage was emphasised.

In *Wile v. Phoenix Insurance Co*,[7] the court again ruled that it is not sufficient for the insurer to merely prove the breach of the notification duty, rather, actual damage as a result of the breach must be shown to have occurred.

*International Bank v. Prudential Insurance Co* was an extreme case.[8] The bank advised insurers of the court claim against it only after it had already lost the case in court. Prudential refused to indemnify the bank, dismissing the claim based on the argument of late notification. The bank filed suit and the court ruled in favour of the bank, holding that Prudential had not proved any damage as a result of the late notification. The court stated that the bank had defended the claim against it in a comprehensive and highly professional manner. Furthermore, the court ruled that the insurers had breached their duty to act in good faith by raising these 'technical arguments'.

### *Good faith and claims*

Section 27 of the ICL provides that the insurance benefits will be paid within 30 days of the day on which the insurer is in possession of the information and documents required for the ascertainment of his or her liability. However, insurance benefits not disputed on bona fide grounds will be paid within 30 days of the day on which a claim is submitted to the insurer and they may be claimed separately from the remainder of the benefits (see Section III.x).

### *Insurer's duty to issue a coverage position letter*

Coverage position letters have been the basis of limitations on insurers' practical rights and scope of defence in Israeli courts, where the coverage position letter did not meet the regulator's requirements. These requirements have been adopted by the courts as legally binding in the framework of the insured–insurer relationship. The Supreme Court added that insurers' obligations also apply to a third party that is entitled to direct privity with the insurer.

The first directive on the subject, issued in 1998, required the insurer to specify all grounds for denial of coverage, sanctioning failure to do so by precluding the insurer from raising any new argument in future litigation. The Commissioner cited the insured's right to receive all details to be able to seek advice regarding possible legal relief on the basis of the insurer's position as the rationale for this sanction.

6 CA 215/91.

7 CA 1438/02.

8 CF 7/88.

Later, a variation on the original directive was issued, clarifying that arguments based on events subsequent to the coverage position letter, or based on grounds that could not have reasonably been known to the insurer when issuing the coverage position letter, would be allowed to be introduced at a later stage.

The courts afforded the directives the power to limit the scope of insurers' rights to evoke defence arguments beyond those cited in the coverage position letter:

*a* the insurer is obliged to effectively investigate the circumstances of the loss or claim to form its coverage position as soon as possible after receipt of the claim;

*b* the coverage position must be provided to the insured in writing, within 30 days of receipt of information and documents required from insured;

*c* where coverage is declined (whether wholly or partially), all grounds for this position must be detailed therein;

*d* the insurer is precluded from raising any argument on circumstances, conditions or exclusions that were not mentioned in the coverage position letter; and

*e* the insurer will be able to broaden its defence only in rare cases where the circumstances material to its updated coverage position were not known and could not reasonably have been known. Such cases would certainly include intentional behaviour aimed at concealing material facts from the insurer.

### viii Reinstatement

Reinstatement clauses are common in property insurance and provide coverage beyond the scope of the ICL. Reinstatement (i.e., 'new for old') is an additional cover and is subject to a time limit, which may cause friction with the insurer.

The condition that reinstatement costs are due (beyond compensation for the actual damage) only after the insured covers his or her expenses independently and only after the reinstatement is complete is a basic condition for the implementation of reinstatement insurance.

The time limit will not apply where the insurer is found to have unlawfully denied insurance benefits and so prevented the insured from reinstating the damaged property. In *Hadar Insurance Co Ltd v. Ehad Ha'am Food and Investments Ltd*[9] the insurer claimed that the insured failed to reinstate the equipment in the allotted time and therefore was not entitled to reinstatement values. The Supreme Court rejected the insurer's argument, ruling that by detaining the insurance benefits for the actual damage, the insurer prevented the insured from reinstating the equipment and therefore could not invoke the time limit condition against the insured.

### ix Dispute resolution clauses

The insertion of dispute resolution clauses is not widely accepted in standard policies, as this is considered an infringement of the insured's rights to take up matters with the courts.

### x Punitive interest

The amended Section 28 of the ICL stipulates that in personal insurance (life, auto, home, health – but not liability) the court is obliged to award, and in non-personal insurance the court may award, an additional interest award of up to 20 times the basic interest rate, when

9 CA 7298/10.

an insurer did not indemnify the insured the amounts not in dispute in good faith on the appropriate date (in long-term care insurance – up to 10 times). If the court decides not to apply this special rate, it should explain the reasons for its decision.

In *Dudi v. Phoenix Insurance Company Ltd* (August 2019)[10] – a claim for life insurance benefits – the court decided that according to the amended Section 28a of the ICL the insurer acted in bad faith in delaying payment, and ordered payment of 20 times the basic insurance rate on the undisputed benefits for the period of the delay. An appeal to the district court is pending.

Section 27 provides that the insurance benefits will be paid 30 days after the insurer received all information and documents required to ascertain the insurer's liability under the insurance contract. For insurance benefits that are not in dispute, the payment should be made within 30 days of the date the insurance claim was notified to the insurer. If this Section is breached, the insurance benefits will accumulate the above-mentioned interest. According to a Supreme Court precedent, the 30-day period will be calculated from the date the insured notified the insurers regarding the insured event.

***Insurance Arbitration Institute***

A new bill proposed by the Ministry of Finance in 2018 stipulated the establishment of an Insurance Arbitration Institute and compulsory arbitration of insurance claims in this Institute (except for claims by big companies (according to turnover and number of employees) and claims against third parties). If, and to what extent, this proposed bill will be approved is yet to be determined.

## IV DISPUTE RESOLUTION

### i Jurisdiction, choice of law and arbitration clauses

As a rule, insurance contracts, other than those concerning reinsurance, marine, aviation, diamonds and precious metals are subject to Israeli law. Jurisdiction is local and the competent court is determined by the amount claimed – up to 2.5 million shekels with the lower court and above this amount with the district court, as first instances.

### ii Right of appeal

There is an automatic right of appeal against judgments of the court of first instance to the appeal court within 45 days. As a rule, the appeal court will not intervene on points of fact unless a severe and obvious error is clearly evident.

Leave to appeal is required to allow access to a second appellate instance and to appeal interim decisions.

Most district courts will now complete hearing of an appeal within three years. At the Supreme Court, however, a case may take much longer.

### iii Arbitration

Arbitration is very similar to a court process – evidence is brought and discovery and testimony can be compelled by the arbitrator by using the court's mechanism. Rules of evidence do not apply where parties have not agreed otherwise.

10 CF 55587-11-18.

As stipulated by the Commissioner, an insurance policy may not include a clause binding the insured to arbitration in the event of a future dispute. This clause is considered to be prejudicial to insured's rights. This stipulation does not apply when the insured specifically agreed to the arbitration clause.

### iv Alternative dispute resolution

Mediation is the most common form of alternative dispute resolution and a recent amendment to the Civil Procedure Rules mandates referral of all litigants in all claims for over 75,000 shekels (excluding damages for victims of motor vehicle accidents) to hold a meeting with a mediator to discuss holding mediation talks. This is a general rule and not specific to insurance cases. This is a precondition for continuing to trial, but the court is not authorised to penalise parties for not agreeing to mediation or for not making an offer to settle.

A positive incentive for early settlement is afforded by rules regarding payment and refund of court charges. Court charges are levied on monetary claims at the rate of 2.5 per cent of the claim. Half of the court charges is paid on filing the claim and the second half is paid only if the case goes to trial. Furthermore, the first half of the court charges will be refunded automatically to parties that settle before three pretrial hearings have been held and the court is authorised to refund the entire charges paid if a resolution is reached, at any stage, by mediation or arbitration.

## V SUBROGATION

### i Stricter rules

Subrogation in Israel stems from Section 62 of the ICL, which transfers to the insurer any rights that the insured may have for remedy in relation to the insured loss upon payment of the insurance benefits. It is seemingly a simple matter of transferring rights from the insured to the insurer regarding the insured damage, against third parties. However, as shown in a ruling by the Supreme Court in *Lloyd's Underwriters and IEC v. Ashdod Port* (December 2014),[11] the subrogating insurers may have to make additional efforts to prove the elements of the claim to ensure the full transfer of rights and benefits.

Under Israeli law, subrogation is contingent on the insurer establishing all the following conditions:

*a* the obligation to pay insurance benefits on the basis of a valid policy;
*b* actual payment of insurance benefits on the basis of this obligation; and
*c* proof of the insured's right for compensation from a third party in relation to the insured event or damage.

The above-mentioned Supreme Court judgment emphasises the fact that to preserve and ensure the prospects of subrogation, the insurer must invest efforts, beyond those necessary to determine coverage, to investigate and preserve evidence necessary for the future subrogation claim by determining the exact nature of the damage, and cannot rely on the advice of an interested party, such as the manufacturer or supplier of the damaged product.

11 CA 12/7287.

In a recent district court decision in *Clall Insurance Company Ltd v. Vaxman Engineering* (July 2020),[12] the court stated that a subrogation right is not an absolute right. In a case regarding contractors' all-risk insurance, the court dismissed a subrogation claim against a subcontractor that was included as an additional insured in the policy. The court stated that when an insurer agrees to include additional insureds in the policy, such as a subcontractor, it waives its right of subrogation against the additional insureds, even if they are responsible for damage to the main insured. An appeal to the Supreme Court is pending.

### ii Subrogation by a foreign insurer

In *Vienna Insurance Group v. Sharon Drainage and River Authority* (January 2017) (*VIG*),[13] the Supreme Court in dismissing an appeal issued a decision determining that a foreign insurer (not licensed as an insurer in Israel) has no right of subrogation in its own name in Israeli courts. In view of this, in some cases, an agreement is made between the foreign insurer and the insured who was paid insurance benefits, pursuant to which the insured initiates a claim against the wrongdoer for the amount of the insured's deductible and the insurance benefits received from the insurer, as trustee for the insurer.

Having said that, in November 2019, two conflicting decisions in this respect were given in two different district courts. One decision, in *Teva Pharmaceutical Industries Ltd et al. v. T&M Goshen – Security Services Ltd et al.*,[14] clarifies and broadens the scope of the *VIG* precedent; it determined that a foreign insurer cannot circumvent the prohibition against filing a subrogation claim by authorising the insured to file a claim on its behalf. In *Aras Romorkor Hizmelteri et al. v. the ship 'Chrysopigi' et al.*,[15] the other court declined a motion to dismiss a subrogation claim by a foreign marine insurer (in Israel, marine insurance is regulated differently from other insurance sectors). The court opined, inter alia, that any insurer that paid insurance benefits on account of an insured event, whether it held an Israeli licence or not, would be entitled to file a subrogation claim. The court also opined that acceptance of the argument that the foreign insurer is not entitled to file a subrogation claim (in the specific circumstances of this case) may undermine the essence of the subrogation principle.

Both cases were appealed to the Supreme Court to clarify this issue. The first is still pending. In December 2020, the Supreme Court upheld the second decision stating, for the first time, that Section 62 of the ICL applies to marine insurers, whether Israeli or foreign (and distinct from foreign insurers in other fields of insurance), entitling the marine insurer to the subrogation right detailed in Section 62.

In *Noble Energy et al v. Zim et al.* (November 2020),[16] Haifa District Court explained why *VIG* does not constitute a binding precedent. It further explained that a foreign insurer that does not have to comply with the Supervision Law is still entitled to subrogation rights in Israel, since preventing this right will only protect the wrongdoer, granting that wrongdoer unlawful enrichment. Last year we wrote 'regarding Lloyd's underwriters, our view is that the legal position of Lloyd's underwriters in Israel is different from other foreign insurers because

12 CC 18638-11-18.
13 CA 8044/15.
14 CC 67314-03-18.
15 CC 35583-11-18.
16 CC 31521-01-20.

they are permitted to write insurance business in or from Israel on the basis of being exempt from the requirements of the Insurance Supervision Law'. This has now been explicitly confirmed by the Court in this decision.

## VI YEAR IN REVIEW

### i Civil procedure reform

The reformed Rules of Civil Procedure came into effect on 1 January 2021. The overriding objective of this reform, as with the Lord Woolf reform in England, is to enable the court to deal with cases justly and at a proportionate cost, while improving the efficiency and speed with which they are dealt. The new procedure places severe time constraints on litigants while expanding the court's discretion regarding case management.

Because the reformed Rules of Civil Procedure are expected to accelerate proceedings, they warrant particular attention from the claims departments of insurers, who will have to review claims handling procedures to meet the new requirements.

### ii Effects of covid-19

***Covid-19 exclusions – Directive of the Commissioner of Insurance***

On 8 December 2020, the Commissioner of Insurance issued a directive to insurance companies regarding exclusions in reinsurance regarding covid-19 in elementary insurances.

The directives of the regulator are as follows:

*a* It is not permissible to exclude by way of a pandemic exclusion losses that had already materialised, or to implement a 'continuity rule' so that an exclusion will be retroactively applied to policies that were already purchased, including extensions of periods of existing policies, even in cases where the policy period had not been concluded. In claims made against policies to be sold starting from 2021 onwards, it is permissible to apply an exclusion regarding insured events that occurred prior to 2021.

*b* A pandemic exclusion will be limited to losses from a pandemic declared by the World Health Organization or any authorised governmental entity (a declaration that will also be valid for insured events prior to the declaration itself). In property insurance, it is also permitted to exclude contagious disease viruses, bacteria or other microorganisms, etc.

*c* It is permissible to exclude damage that is covered by the state of Israel.

*d* An insurance company requesting to exclude pandemic cover will present a designated disclosure to the insureds regarding the exclusion, in a specific and highlighted manner, in any policy sold until 31 December 2022.

*e* An insurance company seeking to include a pandemic exclusion in a specific policy shall submit to the Commissioner details regarding the relevance of the exclusion to the coverage afforded under the policy and an assessment of the economic implications that the company attributes to the exclusion, based on, inter alia, the information available regarding the pandemic at that time. In addition, the company will detail the extent of loss that the company is intending to retain and in which instances. Companies may submit one overall document relating to all the policies in which an identical exclusion is to be adopted.

*f* The declaration page (schedule) will include for the insureds a clarification that the onus to prove that the circumstances specified in the exclusion had materialised (namely that the damage results from a pandemic) attaches to the insurance company that intends to repudiate coverage on this basis.

***Cover under property insurance – business interruption losses***

Generally speaking, most property policies in the Israeli market require physical damage to the insured property and only then is the insured entitled to business interruption cover. The view in the market is that such policies are not triggered by covid-19.

There are a few policies in the market (mainly issued to hotels) that include specific endorsements, under which booking cancellations due to the coronavirus may be covered, even in the absence of physical damage. In principle, and depending on the language of the policies, insurers have paid benefits under such specific endorsements.

***Liability claims due to Covid-19***

Until now, only very few liability claims have been filed, mainly against employers who breached instructions or against management of nursing homes for deaths of members due to covid-19.

One class action was filed against D&Os of a company alleging misleading information in the company's financial reports regarding the implications of covid-19.

**iii Cyber technology**

The new Regulations for the Protection of Privacy (Information Security) became effective in May 2018. The Regulations establish, for the first time in Israel, a specific arrangement regarding protection of databases, including establishing organisational procedures and risk management enhancement steps. They also include a duty to report any severe data breach to the Database Registrar, which may instruct that notification be given to persons who may be affected. This constitutes a substantial development in the data breach regulatory regime in Israel and highlights the importance of purchasing cyber insurance.

The Privacy Protection Authority has regulatory authority to investigate privacy breaches and may instigate criminal or regulatory proceedings against the party in breach, as well as imposing penalties.

A pending bill for amendment of the Israeli Privacy Protection Law suggests imposing a duty on database owners and holders to notify data subjects of data breaches as soon as practicable.

A draft Cyber Security and National Cyber Directorate Bill from 2018, which was redrafted during 2020, intends to regulate the activities of the Israeli National Cyber Directorate and the scope of its authority. The draft bill also includes provisions relating to the involvement of the Cyber Security and National Cyber Directorate in cybersecurity events. According to this draft bill, the Cyber Security and National Cyber Directorate will be the regulator in cyber matters.

The EU General Data Protection Regulation, which became effective in May 2018, applies to Israeli companies that either target the European Union (by offering goods or services to individuals from EU Member States) or monitor the behaviour of individuals from EU Member States (e.g., by tracking them online).

Several class actions have been filed against companies for breach of privacy protection following cyberattacks. As far as we know, several companies that were the victims of cyberattacks that caused information leaks have reached settlement agreements with their insurers.

According to a survey of the Israel National Cyber Directorate regarding cyber insurance, only 13 per cent of Israeli companies purchase cyber insurance. However, penetration of cyber

insurance is increasing following increased awareness and the impact of the new regulations, as well as published reports on significant events in 2020, which increased the appetite of Israeli companies to purchase cyber insurance.

### iv D&O insurance

The new Insolvency and Rehabilitation Law imposes liability on the CEO and the directors of companies in any case where these individuals knew or could have known that the company was insolvent and did not take reasonable measures to mitigate the scope of the insolvency. In such cases, the directors and the CEO could be held liable towards the corporation for the losses sustained by the creditors, as a result of their failure to prevent or mitigate the losses. Certain provisions of the law provide a safe harbour defence for directors and CEOs; however, the law prohibits the corporation from granting them exemption or indemnification.

Insurers that write D&O policies in Israel may wish to address the extended duties of directors and CEOs under the law.

There are also new duties attached to D&Os of companies regarding cyber risk management and reporting that could be included in the company and D&O insurance.

The new amendment to the Economical Competition Law (formerly known as the Anti-Trust Law (ECL)), imposes a positive duty on an officer of a company to observe the law and to do his or her utmost to prevent violations of the law. If an offence is committed by the company (or one of its employees) the officer will be deemed to have breached this duty unless it can be proved that the officer took all possible measures to fulfil his or her duty.

In recent years, D&O insurers have been facing a challenging legal environment as a result of the broadening of the scope of D&Os' duties by Israeli courts. This trend manifested especially in respect of directors' supervisory duties over the implementation of company policy. In the absence of any substantial court decisions, the accepted legal position is that the ordinary concept of duty of care also attaches to supervisory duties. Without clear guidelines on this crucial issue, insurers have preferred to settle derivative actions against directors based on cases of breach of supervisory duties to contain significant costs and the risk of adverse judgments and very high compensatory awards. The author's firm, Gross Orad Schlimoff, has in the past met and communicated with different relevant regulators (the Commissioner for Insurance, Savings and Capital Markets, the Ministry of Justice) to express insurers' concerns in these matters. In January 2021, a major breakthrough occurred when the State Attorney exercised his prerogative to intervene in derivative actions and requested the courts to consider forming clear guidelines on the required standing and nature of directors' supervisory duties. The State Attorney suggested that the standard of fault on the part of directors required for imposition of liability be somewhere between the standard formed by the US Delaware Court of Chancery and 'merely' negligence.

### v Breach of policy conditions – proportionate benefits

In *Piccali v. Hachshara Insurance Company Ltd* (June 2019),[17] a motor vehicle insurance included an age limitation provision. At the time of the accident, the driver was under the permitted age. The question under discussion was whether, under these circumstances, the policyholder is not entitled to insurance benefits or whether the fact of the driver being underage can be regarded as aggravation of the risk, pursuant to Section 18 of the ICL, thus

17 Motion for CA 9849/17.

entitling the policyholder to reduced insurance benefits in proportion to the premium paid in respect of a 'regular' policy and the premium paid in respect of a policy that includes an age limitation provision.

The Supreme Court ruled that the breach of this provision should not preclude the policyholder from his or her right to receive insurance benefits and that non-compliance with the age limitation provision should be regarded as aggravation of the risk, entitling the policyholder to reduced insurance benefits in accordance with Section 18 of the ICL.

Because this decision created a novel ruling on an important issue, the Supreme Court granted a request for an additional hearing. This additional hearing by five Supreme Court judges is still pending.

### vi Cooperation with Dubai insurers and reinsurers

Following the peace agreement between Israel and Dubai, Lloyd's representative in Israel, Sigal Schlimoff, of Gross Orad Schlimoff & Co, co-chaired a historic online conference with Lloyd's Middle East CEO Andrew Woodward and Lloyd's underwriters in Dubai, forming an initial framework for future cooperation between Lloyd's syndicates in Dubai and the Israeli insurance market.

## VII OUTLOOK AND CONCLUSIONS

Although covid-19 cast a pall on the insurance market in Israel, the momentum and trend for innovation in this market has not been slowed by the pandemic. In fact, the pace of technology and the number of new insurtech start-up companies has actually surged. Many new products, underwriting tools and methods for marketing these products have been developed and introduced to the market.

Significantly, interest has especially increased in both cyber and environmental insurance.

**Appendix 1**

# ABOUT THE AUTHORS


**HARRY ORAD**

*Gross Orad Schlimoff & Co*


Harry Orad began his legal career as a commercial lawyer specialising in corporate and property law. He also served as a municipal court justice. In 1983 he joined the highly acclaimed National Fraud Unit of the Israeli Police, rising to the rank of chief superintendent, where he investigated complex financial institution fraud and white-collar crimes. Since 1986 Harry has specialised in insurance and reinsurance law. He drafted some of the first D&O policies in Israel and later redrafted these policies to comply with new legal provisions. He has lectured on corporate governance issues in Israel and abroad. Between 1988 and 1989, Harry worked in London as a consultant to one of the major insurance law firms. Harry's expertise in insurance law includes D&O liability, banking insurance (bankers' blanket bonds), financial institutions, crime insurance, credit insurance, product liability and pollution and contamination.

Harry acts for underwriters and insurers worldwide on complex financial insurance matters and has been inducted into the *The Legal 500* Hall of Fame.


**GROSS ORAD SCHLIMOFF & CO**

Gibor Sport Building
7 Menachem Begin Road
Ramat-Gan 5268102
Israel
Tel: +972 3 6122 233
Fax: +972 3 6123 322
harry@goslaw.co.il
www.goslaw.co.il

an LBR business

ISBN 978-1-83862-787-4