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GANADO  
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# INSURANCE AND PENSION LAW NEWSLETTER

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# INTRODUCTION

Dear All,

We are pleased to enclose our latest **Insurance & Pension Law Newsletter** which the Insurance and Pensions Team at GANADO Advocates has been publishing on a quarterly basis for the last decade or so. Over the years, GANADO Advocates has built a very strong and capable team of lawyers and other professionals with specialisation and depth in most aspects of insurance and private pensions law.

As we all witness both regulatory developments (on a European and Maltese level) in both insurance and private pensions, it is imperative to keep up with the wave of change and to keep well informed of such changes. The aim of this newsletter is to share ongoing developments with you as they arise from time to time and it will serve as an update on what is happening in the insurance and pensions markets. This newsletter is targeted at directors, managers and senior officers of insurance and reinsurance undertakings, captives, cell companies, managers, brokers and other insurance intermediaries, retirement scheme administrators, occupational pension schemes as well as service providers to such regulated entities, including legal counsel and asset managers.

In particular, the newsletter will include:

- i Recent news on the local and European insurance and pensions market, including legislative updates
- ii Latest developments in relation to the Solvency II Directive, including an analysis of the recently adopted Omnibus II Directive
- iii Selected court judgements
- iv Licensing Updates; and
- v Focus on IMD II: EP vote and recent industry views.

We trust that you will find this issue of the Newsletter to be of interest.

**INSURANCE &  
PRIVATE PENSIONS TEAM**

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## TALKS ON MALTA RSPV REGULATIONS IN LONDON

A seminar on the 'Setting up of a Reinsurance SPV and Listing of Insurance-Linked Securities in Malta' was held in Bloomberg, London on 10 April, 2014.

The use of reinsurance special purpose vehicles ("RSPVs") and insurance-linked securities to manage and transfer high-value, low frequency catastrophe risk has exploded in recent times and is now a fundamental part of the international risk transfer market.

Malta has recognised this opportunity. In December 2013, the Reinsurance Special Purpose Vehicles Regulations ("RSPV Regulations") entered into force. The RSPV Regulations provide for the authorisation and regulation of RSPVs in Malta and serve as a basis for catastrophe bonds, longevity risk transfer and other insurance risk securitisation transactions.

During the London seminar, Richard Ambery, a Partner at GANADO Advocates who heads the capital markets and securitisation team, presented the unique options offered by the RSPV Regulations in Malta. The RSPV Regulations already consider Solvency II measures and consolidate Malta's role as a domicile of choice among (re)insurers worldwide.

The RSPV Regulations can be accessed by clicking [here](#).

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## REVISED FEES FOR INSURERS AND INTERMEDIARIES AND RETIREMENT FUNDS

The revised fees for (re)insurers, intermediaries and retirement funds entered into force on the 1 January, 2014. The MFSA anticipates that these revised fees should remain consistent for the next five years (2014 - 2018) unless economic conditions dictate otherwise.

The revised fees can be accessed by clicking on the following links:

- The Insurance Business (Fees) Regulations (Subsidiary Legislation 403.04);
- The Insurance Intermediaries (Fees) Regulations (Subsidiary Legislation 487.03); and
- The Special Funds (Fees) Regulations (Subsidiary Legislation 450.03).

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## MFSA PROPOSES NEW RULE ON COMPLAINTS-HANDLING BY INSURANCE INTERMEDIARIES

The MFSA is proposing to issue a new Insurance Intermediaries Rule 25 of 2014 entitled "Complaints-Handling by Insurance Intermediaries". This new Rule will apply on a continuing basis to persons enrolled in the

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## REVISION OF THE IORP DIRECTIVE

On 27 March 2014, the European Commission adopted a legislative proposal for new rules on occupational pension funds. The proposal excludes revisions to Pillar I solvency requirements and instead aims at improving governance and transparency of these funds in Europe, promoting cross-border activity, and helping long-term investment.

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## EIOPA PUBLISHES ITS PRELIMINARY REPORT ON DEVELOPING AN EU SINGLE MARKET FOR PERSONAL PENSIONS

Following a consultation process with industry stakeholders, EIOPA has published its "Preliminary Report Towards an EU Single Market for Personal Pensions". This report lays down the foundation for future EU initiatives.

The full article can be accessed in the following link.

Agents List, Managers List or Brokers List and that carry out insurance intermediaries activities in terms of the Insurance Intermediaries Act.

The objective is to ensure that adequate levels of protection are available to policyholders by setting out standards and procedures to which insurance intermediaries are expected to comply when dealing with a complaint.

The proposed Rule can be accessed by clicking [here](#). The consultation period closed on 4 April, 2014. The MFSA is expected to publish a feedback statement shortly.

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## POSSIBLE SURGE IN INSURANCE TAKE- UP AS EP VOTES IN FAVOUR OF NETWORK AND INFORMATION SECURITY DIRECTIVE

The European Parliament (EP) has adopted the draft Network and Information Security Directive, commonly referred to as the Cyber Security Directive. The new Directive forms part of a package of legislation that will replace the 1995 Data Protection Directive (95/46/EC) and is set to introduce some significant changes to data protection regulation in the EU.

Under the new Directive, firms found in breach of data protection rules may be subject to fines of up to €100 million or 5% of their global turnover (whichever is the greater). This could lead to a surge in cyber insurance policies taken across the EU. Cyber insurance would offer firms protection against the costs of dealing with a security breach. It would also provide cover against claims from third parties who would have suffered damage as a consequence of the breach.

The EP will next negotiate with the EU Council to reach an agreement on the final text of the Network and Information Security Directive. More information on the proposed Directive can be found by clicking [here](#).

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## DOUBLE TAXATION TREATY – ISRAEL

On 7 February 2014, Legal Notice 57 of 2014 was issued. It was notified that the “Convention between the Government of Malta and the Government of the State of Israel for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income” published as a Schedule to Legal Notice 343 of 2013 has entered into force on 8 December 2013.

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## DOUBLE TAXATION TREATY – INDIA

Legal Notice 67 of 2014 was published on 21 February 2014. It was notified for general information that the “Agreement between the Government of Malta and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income” published as a Schedule to Legal Notice 448 of 2013 has entered into force on 7 February 2014.

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## EIOPA PUBLISHES ADDITIONAL INFORMATION ON MEMBER STATES’ GENERAL GOOD PROVISIONS

EIOPA’s website now contains a list of key general good provisions by category for each EU/EEA Member State. This move is intended to further promote the transparency and ongoing development of cross-border activity in the EU.

The webpage on the EIOPA website dedicated to the General Good Provisions may be accessed by [clicking here](#).

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## FINAL REPORT ON EUROPEAN INSURANCE CONTRACT LAW PUBLISHED

An expert group set up by the European Commission has published a report on 27 February 2014 on the differences in contract laws of Member States which may hinder the free movement of insurance services within the Internal Market.

The report noted, in particular, that the requirement to have insurance policies regulated by the law of the policyholder’s habitual residence, if he is a consumer, oblige insurers selling life, motor or liability insurance products to adapt their policies to the respective Member State’s laws. This increases costs and creates legal uncertainty for consumers and businesses which are willing to take out insurance from cross-border service providers. The European Commission is expected to issue a consultation process to follow up on the report.

Please find the full report [here](#).

# OMNIBUS II VOTE: SOLVENCY II DIRECTIVE ON TRACK FOR 2016 IMPLEMENTATION DATE

The European Parliament (EP) has adopted in plenary the Omnibus II Directive ensuring that the implementation of the Solvency II Directive is on track for the start of 2016.

The Omnibus II Directive finalises the Solvency II Directive by introducing some significant amendments. These amendments include the provision of specific tasks for the European Insurance and Occupational Pensions Authority (“EIOPA”). In particular, EIOPA will be responsible for ensuring that harmonised approaches are undertaken for the calculation of the capital requirements and technical provisions under the Solvency II regime.

The Omnibus II Directive also contains a set of measures that clarify the treatment of insurance products with long-term guarantees, including annuities, in order to mitigate the effects of artificial volatility and a low interest rate environment. These measures are set to smooth the transition from the current Solvency I regime, thereby calming initial concerns from the European insurance industry.

Following the EP’s vote on the Omnibus II Directive, the European Commissioner for Internal Market and Services, Michel Barnier, declared: “The European Parliament has just taken a very important step towards the introduction of a modern and risk-based solvency regime for the insurance industry in Europe as of 1 January 2016, making it both safer and more competitive. This long-awaited and vital reform will finally become a reality”.

The Omnibus II Directive will now need to be formally adopted by the EU Council and published in the Official Journal. It will enter into force the day following the publication.

On its part, the European Commission is also preparing for the next stage of the Solvency II implementation process. This will include the adoption of a Commission Delegated Act providing for various implementing rules, which is planned for the summer of this year.

EIOPA is currently working on a package of Implementing Technical Standards to also ensure that the Solvency II regime is implemented by the 1 January, 2016.

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## EIOPA INVITES INDUSTRY TO PROVIDE FEEDBACK ON NEW MEASURES FOR SOLVENCY II

EIOPA has requested market participants and (re)insurance stakeholders to provide their feedback on:

1. The first set of draft Implementing Technical Standards (“Draft ITS”); and
2. The draft Guidelines on the Operational Functioning of Colleges of Supervisors (“Draft Guidelines”).

The Draft ITS list all the information that (re)insurers will need to submit to national authorities for the approval of the

- i. Matching Adjustment;
- ii. Ancillary Own Funds;
- iii. Undertaking-Specific Parameters;
- iv. Internal Models;
- v. Special Purpose Vehicles; and
- vi. Joint Decision Process on Group Internal Models.

On the other hand, the Draft Guidelines aim to clarify and enhance cooperation among national authorities in relation to the supervision of cross-border (re)insurance groups and to facilitate the functioning of supervisory colleges.

Any feedback on both the Draft ITS and Draft Guidelines is to be submitted by 30 June, 2014.

The consultation papers and the templates can be accessed by [here](#).

## MIDDLESEA INSURANCE PLC vs EMANUEL CIANTAR AND OTHERS (COURT OF APPEAL – MALTA)

*The Maltese Court of Appeal confirmed the judgement of the First Hall of the Civil Court which held that the non-disclosure of material facts and false representations on proposal forms entitle an insurance company to cancel the policy.*

Middlesea Insurance Plc had insured 3 cars belonging to Mr Emanuel Ciantar. At the time the proposal forms were completed, although in full knowledge that his son would use his cars, Mr Ciantar failed to disclose that (i) his son had been involved in a serious accident in which he had ran over 2 minors; (ii) his son's criminal record; and (iii) the claims made with a previous insurer that had refused to insure him.

During the proceedings, the Fund for Protection and Compensation and the Motor's Insurers Bureau were joined into the suit as defendants. They claimed that an insurance company is obliged to pay damages to third parties even if the policy for a car was null owing to the non-disclosure of a material fact.

The Court noted that it is a cardinal principle that contracts of insurance are regulated by utmost good faith. The insured is bound to act in good faith during the whole period of the insurance cover. Since the proposal form is an integral part of the policy of insurance, a false declaration on the form is tantamount to a false declaration on the policy.

The Court noted that "A fact is material for the purposes of both non-disclosure and misrepresentation if it is one which would influence the judgement of a reasonable and prudent insurer in deciding whether or not to accept the risk or what premium to charge".

The non-disclosure of Mr. Ciantar was a non-disclosure of a material fact and the insurance company had a right to revoke the policies.

In addition, the Court pointed out that since Middlesea Insurance Plc took legal action under article 10(3) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Chapter 104 of the laws of Malta) and since it proved the requisites under this provision, Middlesea Insurance Plc was not responsible to pay damages to other third parties as the policy was obtained fraudulently by the non-disclosure of a material fact.

## EQUITAS LTD AND ANOTHER vs WALSHAM BROTHERS & CO LTD

*The Commercial Court of the UK High Court of Justice held that a reinsurance broker is obliged to promptly remit premiums to insurers or risk paying interest.*

In this case, Equitas claimed that Walsham ought to have remitted substantial funds which it had received, and that as a result of its failure to do so Equitas had lost substantial investment income.

The funds in question broadly fell into two categories:

1. Client funds which Walsham had received from reinsurers or retrocessionaires in payment of claims or by way of returns of premium; and
2. Reinstatement premiums for passing on to reinsurers or retrocessionaires.

The Commercial Court held that Walsham had a continuing duty to Equitas to remit funds due to it. Hence, Equitas' claims to those funds were not time-barred. In addition, the Commercial Court held that Equitas was entitled to recover its lost investment returns on those amounts and that Walsham was not entitled to set off amounts it alleged were due to it against those sums.

The Commercial Court held that the broker's duty to remit funds promptly is an absolute duty which co-exists with a duty in tort to exercise reasonable skill and care (provided that the duty was not inconsistent with, or excluded by, contract).

Walsham's obligation to remit the funds to the syndicates was a continuing obligation which was breached afresh every day that Walsham failed to make a remittance. The Commercial Court reached this conclusion on the basis that the parties had a long-term continuing relationship in which the broker's role in collecting and remitting funds was central.

This interim decision of the Commercial Court is important since it is now essential that brokers are vigilant to ensure that any funds due are remitted to reinsurers and reinsureds as promptly as possible. In fact, brokers may have to establish new systems and administrative processes in order to ensure that unremitted funds are not missed.

## RECENT MFSA AUTHORISATIONS & LICENSES

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### LICENSES ISSUED

#### **Insurance Undertakings**

- Licence issued to Building Block Insurance (Malta) PCC Limited to carry on business of insurance in all classes of the general business.
- Licence issued to White Rock Insurance (Netherlands) PCC Ltd to carry on business of affiliated insurance and reinsurance in 17 classes of the general business.

#### **Protected Cells**

- Approval of Finance One Cell as a cell of Abbey International Insurance PCC Ltd to carry on business of insurance in one class of the general business.
- Approval of Oxford International Financial Management as a cell of Jatco Insurance Brokers PCC Ltd to carry out insurance intermediaries activities.

## IMD II: EP VOTE AND RECENT INDUSTRY VIEWS

In February 2014, the European Parliament (“EP”) voted in favour of the recast Insurance Mediation Directive (“IMD II”). The EP’s Report has introduced some notable amendments to the legislative proposal published by the European Commission back in July 2012.

It is now up to the EU Council to provide its own version of the IMD II text. Once the Council has agreed on its approach, Triologue discussions between the European Commission, Parliament and Council will begin to find a compromise on the final text. Those discussions are not expected to take place before the elections for the new European Parliament in May 2014.

The IMD II as amended by the EP’s Report still applies to (re)insurance undertakings that sell products directly to customers without using intermediaries (i.e. direct writers) and comparison websites. Market players that sell insurance products on an ancillary basis (such as travel agents and car rental companies) (“secondary intermediaries”) also remain within the scope of the IMD II. The EP’s Report has however introduced additional provisions to further ensure that secondary intermediaries are subject to a lighter regulatory framework, which considers their core activity and the cost, risk and simplicity of the products distributed.

On the other hand, claims management companies and loss adjustors have been excluded from the IMD II framework. The EP’s decision to exclude claims management companies and loss adjustors has been received with approval, since their activities do not relate to the sale of insurance products and should not be considered as insurance mediation activities.

The definitions as to when insurance intermediaries are operating under “freedom of services” and “freedom of establishment” are another welcome development introduced by the EP’s Report. BIPAR, the pan-European Federation of Insurance Intermediaries, had in fact requested that more clarity be brought to complement the new provisions on passporting in the IMD II.

The new passporting framework is considered to be the major selling point of the new IMD II regime. Insurance intermediaries should now find

it easier to conduct business across the single market as the IMD II will provide greater clarity as to whether a particular issue is subject to 'home' or 'host' Member State regulation. Each Member State will also be required to publish 'general good rules' that regulate the carrying on of insurance mediation business by incoming firms in their respective jurisdictions.

On the other hand, there are other aspects of the EP's Report that have raised concerns. Firstly, the EP's Report adds a requirement that members of staff of both insurance undertakings and intermediaries should undergo at least 200 hours in a five-year period of continuing professional development. This requirement is not proportionate and stricter than the requirements imposed in terms of the Mortgage Credit Directive (2014/17/EU) and the revised Markets in Financial Instruments Directive (MiFID II). Industry stakeholders are claiming that a European Directive should not require a specific number of hours of continuing professional development and that the matter should be determined by each Member State.

Secondly, the EP's Report has retained the controversial ban on 'tying' practices. Tying involves offering one or more ancillary services with an insurance service/product in a package, where this insurance service/product is not made available to the customer separately.

If the ban on tying is not removed under the IMD II, insurance products would be treated differently from other investment products in terms of MiFID II. Under MiFID II, if the components of a package cannot be bought separately, the investment firm need not inform the customer. The position in terms of the IMD II is different. It requires the components of a package to be offered for sale separately at all times.

Despite serious opposition from the industry, it appears that the mandatory remuneration disclosure rules will also form part of the new IMD II regime. The EP's Report has included the additional requirement that intermediaries should include the source of their remuneration, namely whether the remuneration will derive from (i) the policyholder; (ii) the insurance undertaking; (iii) another insurance intermediary; or (v) a combination of (i) – (iii). The mandatory remuneration disclosure rules, which will be applicable to both insurance undertakings and intermediaries, are set to mark a significant shake-up to the European insurance industry.

Finally, the EP's Report introduces a recital seeking to "ensure alignment" between IMD II and MiFID II. The EP's Report provides an initial indication of this proposed alignment by introducing a number of MiFID II-based rules in the sections dealing with insurance investment products. However, the exact details of what is meant by the alignment still remain largely unclear. The EP has indicated that the details would have to be worked out during Trialogue negotiations, meaning that the industry will have to wait patiently before it can fully assess the true impact of the proposed alignment.

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We trust that this issue of **Insurance & Pension Law Newsletter** was of interest to our readers, however, should you have any queries or suggestions to make, please feel free to contact:

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We will be pleased to hear from you.

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This update is not intended to impart advice; readers are advised to seek confirmation of statements made herein before acting upon them. Specialist advice should always be sought on specific issues.