Libera Università degli Studi Sociali "Guido Carli"

Department of Business and Management

MSc in Corporate Finance

Dissertation in Cases in Business Law

THE FUTURE OF INSURANCE BROKERAGE: THE UK MODEL IN A POST-PANDEMIC SCENARIO

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Academic Year 2020/2021

INDEX

INTRODUCTION

The insurance market

The insurance industry approached 2021 as a wounded beast willing to lift up its head and catch the huge opportunities the international economic and social landscape is going to offer. In the last months, the Covid-19 pandemic has impacted insurance businesses more globally, and heavily, than any previous virological shock and economic downturn.

Policy premiums have been shaped differently depending on the business line, but, in general, most of them decreased significantly as a result of the restrictive measures. For example, policymakers handling motor insurance covers were forced to reduce premiums as people drive much less and then face a lower accident risk. Operational costs keep on increasing due to internal issues, mainly crisis management. To make things worse, insurers' investments are not ensuring the desired returns due to very volatile financial markets.

Every insurance firms worldwide were forced to go through digital revolutions in order to adapt their business model to such a changing environment. Stabilizing remote work is likely to be one of the main challenges for insurers, also considering the many confidentiality requirements they regularly have to deal with. All existing operations, and related distribution channels, need to be reviewed in light of a fully digitalized value chain. In this sense, developing a proper system of infrastructures, security processes and stress test operations may be the key to success.

Furthermore, it will be interesting to investigate how policymakers, in the future, will approach risk and will restructure their product assortment on the basis of new customer demand.

The UK scenario

Not surprisingly, the crisis of the insurance world has also entered UK boundaries and affected English insurance businesses. Again, the most important changes have dealt with the introduction of technology in a historically well-oiled machine like UK insurance. In particular, adapting high-tech solutions to remote working approaches and claim management processes sounds like a very hard challenge. The nature of the UK insurance market, traditionally marked by a strong sense of heritage and timeless habits, make things even more complicated. How can an old system based on face-to-face relationships and long-term interpersonal networks survive such a disrupting revolution?

This and many other topics have been addressed by two of the main entities of the UK insurance world: the Financial Conduct Authority (FCA) and the Lloyd's of London. The former, in the capacity of a public regulator, issued a list of recommendations where topics such as the fair treatment of customers and insurers' risk profile are treated extensively. The latter found it necessary to review its programme "Future at Lloyd's" by developing the project "Blueprint Two", aiming at transforming the London marketplace, both in terms of business restructuring and product design. As a consequence of UK Brexit, finally, English insurers will have to be good at transposing European "Solvency II" capital regime measures with the proper margins of interpretation.

Agents involved: the insurance brokers

Most of the policyholders whose businesses have been seriously damaged had previously relied on professional advice when purchasing policies addressing business interruption risk. When some of them did not get re-payed by the respective insurers for the losses suffered during the pandemic blamed their professional advisors, known as insurance brokers, for having breached their duties. In order to have a clear idea about what risks brokers actually face, both from a financial and juridical point of view, it is necessary to deeply investigate the figure of the insurance intermediary, its duties, required competencies and responsibilities and to go through several policy types to understand the extent of coverage each of them provides.

Incoming legal battles: dynamics and prospects

As it was easily predictable, thousands of proceedings are currently ongoing and more will arise in the future. Damaged insurers ask for reimbursement for having been badly advised by insurance brokers.

Which is the most likely outcome all these trials are destined to? In a common-law-oriented country like the UK, it turns out necessary to look back to the past and analyse all relevant previous cases, in particular those dealing with BI claims. On whose head is the burden of proof? What determines brokers' negligence and how can be assessed whether the loss is directly attributable to the advisor? Many scenarios, addressing such topics, can be investigated by looking at comparable sentences such as the Dalamd and Arbory cases.

Also, it may result interesting to understand how brokers, mindful of the current situation, already in the next months, will react in terms of product offering and customer approach, in order to ensure that all the needed precautions are put in place.

The legal precedent

Leaving aside all the considerations made so far, it must be reported that January has been a crucial month for UK insurers since the Supreme Court has issued a judgment that is going to affect future trials on pandemic-related BI claims more than anything else.

On the heels of a massive class action initiated by hundreds of damaged BI policyholders, the FCA undertook a proceeding against a group of 8 insurers, aiming at solving once and forever some uncertainty issues floating around several BI insurance contracts.

After passing through the High Court, the case was presented directly to the Supreme Court, whose final decision is destined to have a huge impact on the whole UK insurance industry, and more importantly, will ensure that legal certainty the Covid-19 outbreak had put in serious discussion.

1. CHAPTER 1

The Covid-19 pandemic has strongly impacted our everyday lives, contributing to change our view of the present and our expectations for the future. Such state of affairs characterizes a multitude of aspects, fields and sectors, including economies and labour markets. Among these, the insurance industry has been one of the hardest-hit businesses and its agents are struggling to adapt their resources and competencies to a completely distorted scenario, in terms of priorities, challenges and potential issues.

Within this section we are going to analyse both numerically and, mostly, qualitatively such a disrupting impact on the insurance sector, the consequent response primarily provided by the industry in all its participants and, finally, some likely prospects for the years following.

1.1. Pandemic impact

1.1.1. Initial remarks: the insurance sector between criticism and good stories

To give the measure of the effort governments are putting into trying to rescue their respective insurance industries, in the UK the entire financial help amounted to more than £350 billion, as the sum of the initial package (95%), an additional £20 billion bailout addressed to the self-employed workers and another dozen billion as written off NHS[1] debt. If comparing these numbers to the 2018 total annual premium paid by all kinds of insureds, which was in the region of £300 billion, it becomes evident how huge the injection of funds was. However, if in the first place this will help the sector get up from the crisis, to pay back such a sum seems to be very hard for an industry with operating ratios hovering around an average of 90%, hence the high risk for insurers to get insolvent.

Concerning insurers' response to the last year's events, there has been a bit of criticism from both policyholders and sector operators, especially concerning the accuracy and timeliness of notifications and updates. In particular, insurance firms have proved to be even more lacking in their

1 The acronym stands for National Health Service.

communication systems if compared to other more equipped sectors. Firms belonging to the telecommunications sectors, such as financial services or utilities companies, gained their clients' appreciation by providing them with immediate support and additional free services.

Nevertheless, not all insurance industry disappointed customer's expectations. Indeed, there have been some isolated cases or, in some cases, entire insurance sectors that launched philanthropic initiatives aiming at properly accommodating policyholders. The New Zealand insurer AA expressed thankfulness to the NHS workforce by placing at the operators' disposal free breakdown covers. From the same cause, the whole motor insurance industry designed a cover extension provision that activates automatically for any NHS volunteer. Most of the home insurers decided to prolong the validity of those covers that were originally destined for the employees working from home. Admiral, a UK-based insurance firm, supported a local charity by dumping £100 thousand into their special Coronavirus Resilience Fund. Another business that excelled during the first Covid-19 wave refers to the Insurtech. The British pet insurer Bought By Many focused its resources on its communication management tools, in order to regularly update clients about the residual life of their covers, but at the same time invalidated any policy whose owner violated the T&C[2] agreement due to lacking periodical vet check-ups. During the lockdown period, So-Sure, an exponent of the new so-called "social insurance", offered free covers for theft and loss; simultaneously, a car insurance app named Cuvva, in collaboration with some of its main underwriters, went for a 50% cut-off on NHS operators' premiums. Ultimately, a UK insurtech Chief Technology Officer[3] built a digital platform deliberately designed for his "Helping Hand Project", a humanitarian program aimed at connecting volunteer foundations and social canteens with homeless people.

In the meanwhile, some remarkable insurance-related events shook up the flyaway insurance world. Specifically, three of the United States undertook litigations[4] with the scope of forcing policymakers to re-pay the insureds claiming in matters of pandemic coverage, which may result potentially overwhelming for the global insurance system.

2 The acronym stands for "Terms and Conditions".
3 Jonathon Valentine, executive director at ThingCo.
4 Look at Chapter 3 for more details.

1.1.2. Impacted areas: preposition management

The effects of the pandemic on insurers' preposition management will be evident mainly in the long run. As concerns pricing dynamics, for many business lines a big source of influence will be represented by the increasing number of claims. The ABI[5] estimated for the UK an overall £275 million losses only coming from travel claims.

However, the short-term effects are likely to move in the opposite direction, with policy premiums slightly decreasing as a result of the current stickiness of some markets. Always taking the travel industry as an example, the restrictions imposed by the governments against the spread of the epidemic have meant that travellers cancelled, or at best rescheduled, their holiday plans and, as a consequence, most of the business in the field of tourism and transports were forced to interrupt indefinitely their activities. With them, the related insurance industry experienced a massive drop in the demand for covers and was forced to temporarily lower premiums.

With respect to the insured's risk perception, the Covid-19 outbreak pulled the trigger on a real behavioural revolution. Today's customers identify more potential sources of risk, primarily pandemic risk, and therefore look for different coverage solutions in terms of scope and exclusions. Also the decrease in RTA[6]'s and related claims are strongly affecting insurers' pricing tactics. If, on the one hand, in the first place motor insurance firms will benefit from remarkable cost savings, however, in the medium-long run, despite the certain downwards adjustments of fuel prices, mileage and concurrent claims costs may increase back significantly.

The widespread phenomenon of remote working is seriously exposing insurers to cyber risk, whose threat is turning the spotlights on a renewed necessity of cybersecurity tools. This is likely to re-shape the whole insurance industry, which will be necessarily more IT-oriented, given the current lack of specific products of this kind. We will be back on this later on.

As for insurers' front-office activities, sales managers will probably opt to reduce the number of marketing initiatives with the purpose of avoiding an overload of in-bound new business calls which may get the firm's operators overcharged.

5 The acronym stands for "Association of British Insurers", an institute giving voice to the largest UK insurers.
6 The acronym refers to the "Road Traffic Acts", meant as colloquial liability agreements between two or more parties that have been involved in a traffic accident.

1.1.3. Impacted areas: distribution management

As easily foreseen, the insurance industry primarily reacted to the Coronavirus outbreak by trying to limit operational losses as much as possible. First of all, insurers observed a massive reduction in their sales volume, mostly as a result of the divestment of several business lines. It was estimated[7] that almost half of the largest insurance firms withdrew from the market their whole offering in matters of travel insurance.

The general uncertainty that characterizes today's markets has led customers to ask their insurers for some clarifications and assurances. Firms have reported a steep increase in questions from insureds about the extent of their covers, especially in the field of business interruption insurance or, more widely, about policies of a commercial nature.

Moving ahead with the insurance distribution chain, brokers and advisors are likely to experience difficulties in matters of digital working platforms. Such an issue seems to be particularly relevant to those intermediaries whose businesses are still closely based on old IT tools, which often means that the required digital upgrades may not be allowed because of strict technology restrictions. In the field of insurance consultancy, this problem is mostly connected with the standard practice of phone calls recording, whose feasibility is seriously at risk at this point. It is probable that, from now on, brokers will be back at relying on a note-taking approach to keep track of their conversations with clients.

1.1.4. Impacted areas: customer management

If on the one side customers seeking information about either insurance coverage or ongoing claims are blowing up insurers' call centres, from an industrial perspective maintaining adequate service levels while dealing with such an intense call traffic is becoming more than challenging even for the more equipped insurance companies. To make matters worse, policymakers' operational efficiency has been strongly impacted by the coronavirus epidemic, due to the required procedures of social distancing that necessarily led to staff reductions and working-from-home solutions. Moreover,

7 According to "Which?", a no-profit organization that works to protect UK consumers' interests, about 40% of a sample of 75 insurance champions pulled travel insurance policies.

policyholders are not only contacting insurers to have a better understanding of policies but also to make complaints against operators' management of claims and support services.

The potential reputational damage due to an improper understanding of covers is another factor to consider when assessing the importance of wise customer management, especially in times like these. Insurance companies will have to measure carefully the possibility of keeping on pursuing a traditional cross-and-up selling strategy to existing clients or, in the alternative, abandoning such an approach for fear of incurring an even higher dissatisfaction rate, and all the eventual legal claims that go with it.

Nevertheless, such a challenging environment may represent an opportunity for some insurers to show their potentiality in terms of competencies and resilience. In order to show evidence of an undiminished capability to provide high-quality support services, policymakers (and intermediaries) have to make clients, especially the more damaged or vulnerable ones, feel their closeness, by combining technical and professional skills with a good dose of empathy and moral integrity.

Within this context, it is also interesting to move the object of the analysis and look at customers' perspective. Many discussions have been made on clients' behavioural changes due to the Coronavirus outbreak. Among these, one of the more exhaustive was conducted by Accenture and presented on the occasion of the 2020 Digital Insurer Network meeting, where several European insurance leaders annually meet up to discuss the more burning issues. According to the report, the factors that triggered such attitudinal changes can be clustered into 5 macro-groups, each of which with its own industrial implications.

- Trust and confidence:
  Today's market is marked by a widespread sentiment of uncertainty. In such a scenario, consumers and businesses look for wider coverage, and products like reinsurance options and backup plans are the most popular ones. Just after the outbreak, the smartest insurers got closer to their customers and provided them with cover renewals and support services with the aim of limiting losses and, most of all, preserve their confidence in the system. Indeed, in this new environment where confidence is very likely to collapse, trust becomes an even more crucial factor. As a consequence, insurers' focus must shift on the preservation of a trust-based relationship with the clients, especially the existing ones, which can be pursued by the use of the so-called "trust multiplier actions". Showing proactivity and thoughtfulness in every kind of interaction with the customer can help in making each piece of advice more reliable in the

eyes of a damaged insured. Such approach is likely to enable the insurer to re-build a long-term trustful relationship with its customer base.

- Digitalization:

  The average consumer is nowadays used to take advantages of the online platforms and facilities that firms, via external service providers and retailers, provide to enable clients to purchase products or get instantaneous support and information. This was partially true even before the last-year market disruption. During the epidemiological crisis, however, industries have been forced to adapt to the “locked-down” economy, and so customers. Professional activities, recreational occasions and essential shopping have been all conquered by the fascination of the digital world. The pros of a digital approach (i.e. execution speed, accessibility, less purchasing commitment perceived…) revolutionised the purchasing experience and by now customers are unwilling to abandon such a virtual lifestyle. Therefore, also the emerging insurance market will be dominated by those forward-looking players who are pursuing creative strategies to better exploit the shift to the digital.

- Obsession with health:

  The Covid-19 pandemic created a huge wave of concern about health issues and the related measures to be taken. Once the virus will be definitively defeated, such people’s mindset is not going to recede with it, but, instead, our lives will be always more influenced by media bombings on healthcare and wellbeing recommendations. Such context may represent, once again, a big source of opportunities for insurance businesses. Firstly, each policymaker will have to position itself, and its value proposition, within the new "healthcare value chain". Insurance is traditionally connected with people's mindset, fears and risk perception, and in this historical period the entire business output may result particularly sensitive to these aspects.

- A “cocooning” trend:

  In parallel with the previous tendencies, the coronavirus outbreak also triggered consumers' desire to cocoon at home, where they necessarily feel safer and more comfortable than in such a threatful external world. Far-sighted insurers will capture this shade and convert it into an opportunity, by orienting the object of their business activities towards houses, remote workers, distance activities and security systems. In order to better promote the related new products, insurance firms will develop premium-service offerings and experience that may be welcomed by the more “cocooned” potential clients.

- Reimagining authority:

This is probably the most intricate behavioural aspect to analyse, understand and predict, given that the direction it will take is still quite uncertain. It all begins with the governmental restrictions in matters of travel limits, business interruption, lockdowns and self-isolation measures. In those countries where the people will have perceived that the government worked well in managing the crisis (both socially and economically), then the traditional top-down authority dynamic, based on the credibility of governance and administration procedures, is likely to prevail. In any other case, an inversion of the pyramid of authority may occur. Inside large companies, the shift to a remote-working approach threatens to eradicate employees' current perception of leadership. Many of these worked in first person to the design and the implementation of innovative working solutions with the purpose of improving efficiency and performance. This may therefore persuade insurance directors and executive to further empower the employees laying at the bottom of the pyramid in order to build a more flexible workforce.

1.1.5. Impacted areas: policy management

In the last challenging months, insurance companies recorded a steep increase in the level of operational pressure perceived by employees, which resulted in longer times to satisfy clients' demands and meet their targeted service levels. This problem applies mostly to the businesses that were unable to adapt their competencies and infrastructures to the above-mentioned disrupting digital shift. Policies of all kinds needed to be immediately revised, due to a higher number of customers working remotely and hence requiring customized covers, such as enterprises whose activities and sources of profit are nowadays reduced to a minimum. The terrible financial and health impact of the pandemic made plenty of policyholders more vulnerable, on both points of view, and more of them will stay in this condition for much longer. Customers and intermediaries already started asking for more flexibility in the standard procedures, in terms of deadlines and practical accomplishments to be carried out.

1.1.6. Impacted areas: business management

Similarly to the previous point, insurers recently experienced a big pressure on their call centre resource management function, especially for short and medium-term activities. This was primarily due to the conjunction of two opposite factors: rising demand and declining capacity. In addition to this, the systematic shift to “from-home” work modes determined an increase in compliance risk also, and especially, for the insurance sector.

Another relevant effect to take into consideration refers to a matter of duty turnover. At present, insurance executives tend to prioritise strategic activities and projects, since the short-term planning was completely re-adapted and resource availability reduced. Today’s insurers’ primary focus is all on issues of business continuity, with respect to both costumers’ businesses and their own business, always because many operators and employees were confined to a remote work mode.

1.1.7. Impacted areas: financial management

The item that was most impacted by the Covid-19 wave is investment income, whose decrease has been reflected in the global recession markets are now experiencing. The insurance market was severely hit by the pandemic as well, especially on the investment side. To have a clearer idea about the dimension of such financial implication, suffice it to say that, in the US, policymakers own 21% of all corporate bonds and about 20% of all municipal bonds on issue. In Europe, instead, insurers have €10 trillion invested and have a prominent role in the main strategic markets, given that it is estimated that they hold about 40% of euro-area investments in fixed income products presenting over-ten-year maturities. The breakdown of equity markets, along with steep increasing spreads on high-yield bonds, resulted in massive and instantaneous market value losses. To make things worse, such vicious circle is affecting insurers’ economic solvency. To make an example, the UK life insurance company Aviva, already at the beginning of March 2020, experienced such a collapse in market value that its solvency ratio decreased by 31 percentage points from December 2019, when it stood around 206%. The distress of the insurance market did not go unnoticed by investors, which is testified by the evidence that insurance share prices have generally decreased more than the whole equity market.

Nevertheless, insurers’ financial issues cannot be restricted to stock values and over-sloping curves alone. Insurance companies, especially in the field of health insurance, have to deal with a large number of claims due to the pandemic, including the medical and testing expenses related to the disease. This negative trend can be only partially and temporarily offset by a decreasing incidence of elective surgery and any other non-urgent medical operation.

Geographically discerning, the impact mostly depends on whether health services are publicly provided or not. In the first case, the deferral of non-urgent health procedures may overwhelm the spike in Covid-19-related claims, determining an overall decrease in the number of health insurance claims. In the opposite case, which refers to regions like the US and Switzerland where private health insurance represents a basic pillar of the entire healthcare system, claims are going to immediately increase, despite the limited capacity[8] of medical infrastructures. How the crisis will affect insurance premium is still an unresolved issue. Intuitively, recessions should result in a loss of insureds. Nevertheless, the first empirical shreds of evidence seem to move in a different direction: in China, insurance premiums registered an incredible increase as the result of a larger number of afraid consumers looking for further coverage. When Coronavirus was still a simple oriental epidemic, the Chinese Ping An Health Insurance Co. announced a stunning 83% increase in policy premiums.

Leaving aside health insurers, estimates say that life and P&C[9] insurance should identify the main source of their financial distress in investment losses, rather than pandemic-related claims. In case mortality incidence still increased significantly, life insurance companies, in particular those ensuring guaranteed annuities and then with higher longevity risk, will see their risk profile reduced. At least for the next few months, car insurers are not going to be impacted by a rise in the number of claims, given that the restrictions imposed by the pandemic are forcing people to drive much less. Totally different is the situation concerning insurance business lines such as event, travel and credit (i.e. trade credit coverage), whose main problem coincides with the current stickiness of their underlying businesses. Even though some of these policies (travel and business interruption, mainly) presented exclusions designed to limit losses, the same applicability of such provisions is sometimes very questionable, depending on legal and political risk factors. As for P&C insurance premiums, a significant decline is expected, consistently with the crisis the related economic sectors are experiencing.

The possibility for insurance firms to get financially supported by institutional liquidity providers, that release funds to compensate missed profits, is very conditioned by each insurer’s regulatory capital requirements. PRA's recommendation is to properly consider the impact of the virus when making decisions in matters of dividend distribution and executives' variable remuneration, while the European insurance regulatory authority EIOPA explicitly urged insurance firms to renounce

8 This problem has been generally addressed by outsourcing some services to cheaper delivery modes, such as telephone consultations.
9 The acronym refers to Property and Casualty insurers.

dividend payments. Other advice concerned the analysis of future fiscal implications coming from each new pandemic provision that policymakers may design to please the new market demand.

1.1.8. Impacted areas: regulation

The need to guarantee business continuity and to show more flexibility in satisfying the new demand required insurance supervisors to undertake several regulatory initiatives. One of them is the public statement released by the International Association of Insurance Supervisors (IAIS) that provides insurers with some operational guidelines about how to mitigate the heavy impact of the pandemic on their businesses. Moreover, the European Insurance and Occupational Pensions Authority is forcefully promoting an enhanced focus on flexible approaches according to the new Solvency II[10] normative scheme.

Analysing the evolution of the insurance regulatory framework is nowadays crucial to understand how consumers' trust in supervisory authorities is going to be affected by the crisis, which results primarily important to predict, and eventually face, any potential run on insurance businesses. With this in mind, any modification of solvency computations must be carried out with extreme transparency and this can be done only if all the required regulatory measures are in place. Those policymakers whose financials report serious distress have to produce very credible restoration plans to prevent short-term losses to drain their capital reserves below supervisory minima. At the same time, the anti-Covid-19 supervisory measures must be properly contained so that, ideally, neither of insurance businesses get forced to a fire sale of assets in order to stay within the regulatory parameters in terms of liquidity risk management.

10 The Solvency II framework and its implications will be more widely treated in Chapter 2.

1.2. Priorities and challenges

1.2.1. Digitalization, customer journey and distribution chain: innovating with an eye on costs

Most of today's consumers are already mentally set up to accept and face the challenges of the emerging digital market. During the lockdown period, they got accustomed to the purchase of digital products, through digital platforms. At the same time, the assortment of digital products and services at their disposal has grown exponentially. Such a substantial shift to the complete digitalization of touchpoints is forcing insurers to adapt their business models to this new environment, so that the resilience of the entire sector may be enhanced by a more agile approach, in reply to the forthcoming uncertain[11] times.

This transition process needs to be rationalised by identifying the main priorities insurance firms need to bear in mind when reorganizing their business models. Those who will develop clear restoration, maybe "renovation" in this case, plans and will follow each step blindly are likely to survive the challenging market is taking shape and, potentially, step up the ladder in the fields of adaptability and durability.

Firstly, as widely discussed, business digitalization is no longer an option. According to the Darwinian principles, the businesses who better faced the pandemic in terms of responsiveness and agility were those that already had digitally advanced production assets (knowledge, resources and infrastructures) which gave them a valuable competitive advantage over more traditional competitors. Today, even these last backwater players are forced to embark on the path of innovation, despite budget constraints, that are nowadays more significant than ever. The first step consists of re-balancing their investment priorities: the main decision is likely to be about whether to invest in product innovation or to build IT platforms aimed at better managing sales, support services and arising claims. Despite some initial physiological problems, all newly digitalized insurers are getting used to the new operating approach, supported by the new hardware and remote connectivity tools that have been gradually introduced. To a large degree, the emergency has accelerated a trend that, however, had already begun. A good portion of the insurance industry had in program a retrenchment

11 The current market uncertainty is also related to the impact of any potential geopolitical upheaval: governments are nowadays very focused on managing mere domestic issues, which may eventually result in scaled-down globalization, with all the obvious consequences on the previous economic and political established balances.

of in-person activities in favour of a stronger technological footprint in terms of operativity and connectivity. But the urgency of the context forced insurers to shorten the time and re-schedule such business revolution, which should have been undertaken within 2 or 3 years, for an imminent timescale (few weeks, usually).

Another substantial review to be conducted involves the customer experience. During the first lockdown, many insurers handled the emergency by implementing temporary measures that enabled, at least in the short run, operators to keep on serving clients remotely. In most of the cases, such backup plans demonstrated to be incredibly efficient in the cost-performance trade-off, apart from the obvious benefits in terms of organizational simplification. In this sense, applying their just gained IT knowledge (artificial intelligence tools, smart automation services, etc.) to customer's experience may be an optimal strategy to collect clients' support.

Along the insurance value chain, distribution is one of the functions that most of all must be re-designed in light of the current industrial context. Already at the beginning of the epidemiological crisis, a lot of policymakers implemented systems of remote video sales. The point is whether a face-to-face approach is still needed when clients demand additional guidance and extensive advice from their insurers or brokers. In this regard, the just-mentioned remote sales method proved the effective feasibility of a hybrid approach based on the conjunction of several distribution channels. Moreover, opting for videoconferences rather than in-person meetings represents not only a big source of savings but also a concrete opportunity for insurers to provide tailored advice services more easily. Turning the attention to more trivial and basic insurance policies, some firms looked at the telecommunications sector and are now introducing voice-activated smart devices to simplify customers' purchasing procedure. Remaining on the insurance distribution chain, it is essential for policymakers to cooperate with brokers and intermediaries clients are assisted by. Some brokers seem to be struggling in moving to digital business models and, at the same time, keeping on providing high-quality administrative services. Collecting updated information about clients' exposure and fulfilling numerous renewal contracts is getting always more complex for insurance advisors, for which reason insurers have to reduce the amount of information needed for such practices. In this regard, it is likely that, in the next years, insurance businesses will use approaches based on data assumptions and put in place common platforms for the sharing of public information. Nevertheless, in order to make the insurance context more inclusive and its component more collaborative, policymaking firms have to re-think their support divisions' traditional methods of approach towards advisors. Some brokers, especially in the US, tried to usher in this cross-sectional synergy by asking policymakers to consider downward rate adjustments or other substantial reviews of their covers.

This was the case of policies mainly related to businesses such as travel, hospitality and logistics. Some of these requests, for instance, concerned the potential revision of how hotel covers were structured: brokers' proposal consisted of changing the criteria on which such covers were based on, by moving the focus from the number of occupied rooms to revenues, because of the current occupancy issues. To evaluate the effective feasibility of these changes in pricing schemes, it is always more likely that insurers will rely on actuarial consultants' professional advice.

The economic downturn the insurance industry is currently experiencing is likely to last a bit longer, therefore policymaking firms would do better to re-think their cost structure by adjusting internal and external expenses according to a precise list of priorities. This would involve a substantial review of their operative systems. In this context, a winning solution may be that of undertaking zero-based budgeting that could enable insurers to handle unexpected costs and to implement a more agile operating model. Again, these opportunities refer to the IT world, involving, for example, the use of cloud services for better data storage. Another potential source of cost reduction may consist of the outsourcing of some function.

In parallel with cost management, insurers should pursue alternative strategies to collect revenues. For this purpose, it is useful to consider the impact of the pandemic on firms' risk-management priorities. Smaller-sized companies are looking for insurance products that could protect them from outbreak-related damages, namely business continuity covers, anti-pandemic policies and event-cancellation provisions. Offering these products may result even easier for insurers if the traditional distribution is supported by e-commerce tools and delivery services, which usually lead to an expansion of the customer base. Healthcare is another topic that is currently very in vogue among consumers. This sector, by its very nature, is closely related to the insurance world, so that an enhanced focus on the former opens great margins of profit for the latter. Not surprisingly, most insurers already designed innovative value-added healthcare-related products, such as patient-tracking apps, telemedicine and safety alert devices.

As briefly discussed, re-organizing the whole workforce for a remote approach is one of the most disrupting effects of the terrible biennium 2020-2021. What is particularly interesting is that, often, the same employees who were asked to work from home have been the first to significantly contribute to the good result of the transition. Among companies from all sectors, those who best succeed in such digital revolution were those who had cultivated, in their employees, principles of shared leadership, adaptability for a common purpose, lifelong learning and the like. This lesson must be fully assimilated by insurers so that they can turn it into a big source of opportunities. In this regard, soft skills like propensity to collaborate or adaptability to innovation, which are more relevant than ever during times of turmoil, can be pursued through digitalization itself. Using cross-sectional IT platforms, policymakers may have the opportunity to collaborate more closely with stakeholders like brokers and insurance agents. Devices of workforce analytics can help insurance companies develop employees' skills and productivity.

Undertaking such a disrupting process required, and will still require, the application of certain principles and behavioural attitudes before mere technical competencies. Each component of the business line needs to be constantly informed about operational priorities and changes so that every employee's engagement is triggered. This can only be pursued by focusing on internal communication campaigns and by organizing frequent "checkpoints" so that any operator has the opportunity to express its own concerns and executives can better capture any issue potentially affecting business performance.

From consumers' perspective, it is evident that the insurance industry, in terms of IT resources, infrastructures and competencies, started this "forced" digitalization journey behind other, more advanced, sectors, and this resulted in very high customer expectations for the future. In this regard, The Digital Insurer (TDI) has published a document treating such phenomenon as the "digital tipping point".

1.2.2. Priorities and challenges for tomorrow's claim managers

Nowadays insurers are getting flooded with inquiries and claim notifications by customers. Some UK insurers declared a 100% increase in policyholders' claims and complaints mostly about their travel covers or retirement policies. Such phenomenon is partially counterbalanced by a significant drop in inquiries coming from motor insurance customers.

In general, however, insurers' call centres have become busier than ever and this requires insurers to take measures against channel overload. First of all, it is essential to prioritize customers' needs, so that only the most urgent issues are treated personally by the operators, while the rest is diverted to dedicated digital platforms. This implies that insurers have to re-distribute their internal resources consistently with the above priority logic. A portion of the personnel may be dismissed from its previous responsibilities and be replaced, for instance, in the claim management. Similarly, some specialist teams may be re-thought to deal with the most pressing matters. Some operators may be even transferred from a “dead” department, such as motor insurance, to a steamier one, like travel or healthcare. This trend may result, eventually, in an overall more agile environment, where similar “volume shiftings” are seen as everyday occurrences.

The most farsighted, digitalized, insurers, as already explained, have a huge competitive advantage over those who struggle in embracing change, either for lack of resources or for their closed-mindedness. Large percentages of backwater insurers’ customer base will move towards more digitally advanced contexts, especially in personal business lines where clients’ willingness to waste time with crude IT processes is scarce. There is also another issue that needs to be addressed, and it deals with the consistency of this digital renewal with the related national regulations, some of which seem to impede remote working. It is the case of Hong Kong and its “wet” signatures, law provisions according to which most of the agreements do not accept e-signatures yet. Parallelly with this, many American states virtual notaries are not recognized. Despite difficulties, indeed internal dynamics can be adjusted to cope with emergencies, but changing national laws or institutional regulations is often out of insurers’ reach.

In parallel with the economic emergency, the pandemic outbreak resulted in a higher fraud risk for insurers. As for many issues previously treated, the insurance sector that is most involved in this trend is travel. There were several cases of customers blamed for fraudulent claim attempts, for having tried to get re-paid by the insurer by identifying the cause of the cancellation of their travel with a fake illness rather than the real provision of a travel agent or airline. Nevertheless, customer claims are not the only source of fraud risk. An increased number of operations conducted remotely implies a higher risk of being the object of hacking attempts, also considering the several security holes that new platforms may present. Customer data and commonly shared financial information are likely to be the focus of hackers' attention. In such context, it is crucial for insurance firms to properly educate every single employee in matters of IT security, remote connectivity best practice and confidentiality, other than providing them with clear guidelines for data sharing and distribution activities.

Nowadays, social responsibility issues hit the top of most firms' lists of priorities. In a pandemic scenario like today’s one, several insurance firms are proving to be faithful to their social commitment and are undertaking initiatives in favour of their policyholders. Such actions include extended deadlines for premium payments in one direction, accelerated practises for claim payments in the opposite direction, simplified bureaucratic requirements, etc. This philanthropic trend commenced in China, according to the route of the virus, and is today widespread among policymakers from all over the world.

1.2.3. Priorities and challenges in the world of insurtech

At the very beginning, the insurtech industry was exclusively composed of technologically advanced players with less than basic knowledge of insurance fundamentals. Nonetheless, these firms had noticed how traditional insurers were struggling to catch up with the times and therefore kept on failing to re-design their business models to provide customers with a competitive purchase experience. About 10 years ago, such non-insurance players, coming mainly from Silicon Valley, undertook a strategy of industry disruption, intending to rapidly dethrone incumbents, namely traditional insurers. Today's state of affairs appears slightly different. The primary exclusively competitive instinct has turned to a continuous search for cooperation between insurance giants and tech partners. Last years outlined the necessity of digital solutions but, at the same time, revealed that technology alone, without any further support from experienced insurance players, cannot be enough for policymaking business purposes.

However, the fact remains that, even before Covid-19, the insurance sector was already marked in a permanent way by several drivers towards business automation. Among these, we can mention the new consumers' expectations, the impact of the IOT[12] on risk management dynamics, the systematic vertical fragmentation and the incompatibility of some complementary regulatory frameworks. To respond efficiently to such challenges, both incumbents and new tech players are coming up with innovative solutions that are likely to shape the future of insurance. This is the case of customer journey and lean process mapping, intelligent automation and design thinking. In summary, the current concept of insurtech refers to an inclusive environment ruled by principles of innovation and coopetition[13].

Nowadays, insurtech is a sector that is often involved in M&A operations, as several insurance giants are seeking value-adding digital resources that may create internal synergies. At the end of 2019, for instance[14], Applied Systems, one of the main international providers of insurance brokerage management systems, acquired the American Indio Technologies with the aim of integrating digital

12 The acronym stands for “Internet Of Things", which refers to the extension of the use of the Internet to objects and non-virtual spaces, for telecommunication purposes.
13 Modern term coined to identify dynamics of cooperative competition.
14 For more similar M&A examples, look at Prudential – Assurance IQ (2019), Chubb - Bunker (2018), Munich Re - Slice Labs (2016).

solutions to core activities such as insurance application and policy renewal, managed by the Applied's management platform "Epic". As a result of the acquisitions, according to Applied's CEO, the customer's journey was significantly simplified and its experience improved in terms of workforce productivity. Similarly, in 2017 the business intelligence and insurance analytics firm Risk Match was incorporated into the insurtech Vertafore, whose ambitions was that of improving its productivity and profitability by accessing a larger portion of data and market information. In both the mentioned operations, the final outcome of the incorporation of a tech-advanced player was that of enhancing insurance customer experience and, at the same time, reducing operational complexities as a consequence of triggering synergies. According to Deloitte's estimates, only in the first half of 2019 insurtech investments amounted to $3.3 billion and, parallelly, the number of rising insurtech start-ups decreased.

Nevertheless, technology is not the answer to any kind of issue. This mostly applies to insurance claim management, which is increasingly important nowadays. AI, algorithms and other digital devices do not represent valid solutions for every operational problem, but are narrowly localized to small focuses. Since AI is only an individual component of a wider-ranging process, its relevance, albeit great, must be confined to matters of efficiency and customer data analytics. However, technology can express its huge potentiality only if inserted in a context where strategic plans are well defined, and this cannot prescind from human resources. Whenever proper strategic programmes do not underlie digital innovation, this is very likely to result in terrible inefficiencies, due to complexity issues and additional costs, also in terms of time and workforce. Referring back to insurance claim management, a digitalization strategy will surely be useful in collecting and processing activities, but, again, customers expect customer service operators to be empathic, comprehensive and intellectually creative with respect to their needs and complaints. Nowadays, no computer can ensure that yet.

In today's hard market, digitalizing has become far more challenging, but still necessary. Therefore insurers should keep in mind that pure AI approaches are excessively despotic, hence not suitable for a gradual adaptation. Conversely, it may be advantageous to look at peers that already faced hard-market dynamics, they came out from through integrated IT solutions.

To proceed with several little changes, so that these could be better assimilated, may be a winning strategy to get to a complete business digitalization. Some new-born insurtechs, in fact, committed the sin of greed and, after aggressively approaching the market, rapidly disappeared.

It follows that, given the several unanswered questions, undertaking such disrupting initiatives is likely to generate into insurers many concerns about the real riskiness of digitalization. This perception can be partially addressed by looking at the example of many successful insurtechs, whose merit was that of analysing with objectivity their own weaknesses in term of digital resources and eventually identifying the right tech partner to work with to develop better processes and wider digital culture.

In the context of a hard market, other challenges arise. Being the markets more restrictive, insurers are likely to struggle to manage submission flows. Volumes tend to increase proportionally with cover exclusions and exceptions. Again, technology can help brokers and insurers with the higher number of issues resulting from such an environment, but does not represent a universal problem-solver. In summary, combining technological devices with human-centric resources seems to be the best advice for years to come in the insurance industry.

1.2.4. How insurers managed the crisis so far

The application of digital platforms to insurance business models has represented a primary challenge for the whole industry over the last 12 months. This vision is fully shared by the director of BT's departments of insurance, wealth management and financial services, namely Alexandra Foster.

"As the pandemic has changed the needs of customers and made home working a necessity, the insurance industry has adapted by accelerating the adoption of cloud and undergoing digitalization to enable efficient remote working and claims processing. While the 'cloudification of insurance' has been a work in progress for several years, in 2020 the industry made great strides and this newfound agility in implementing technological changes has been key for businesses in continuing operations," Mrs Foster said.

In addition to enhanced customer service, however, such a rushed introduction of technology into consolidated business mechanisms resulted in some new potential issues, cybersecurity in the first place. This awareness, combined with the succession of Covid-19 waves during the year, has generated into insurers a strong sense of fear and uncertainty toward the future. Cybercriminals perceived these weaknesses and benefited from them, so that only phishing attacks[15] increased sixfold.

“Now more than ever it is important to educate customers and businesses on cybersecurity frameworks and solutions, including zero trust architecture, endpoint protection technology and multi-authentication models,” she added. “Protecting customer data is important for maintaining trust, and as the hybrid home-working model looks here to stay, upgrading and aligning cybersecurity measures to ensure they effectively tackle new threat vectors will be necessary to ensure that technological innovation continues to lead to progress.”

As it was easy to guess, the pandemic did not only result in digitalization, which was a very big step ahead for the entire industry, but also, and mostly, generated several headaches for insurers from all over the globe. Most of these refer to legal disputes in matters of business interruption policies and an overall uncertainty related to their comprehension (not to mention the reputational damage coming from social media activities). With respect to the interpretation of BI covers, the largest amount of work concerned manuscript wordings, in particular when issued by inexperienced policymakers. The situation degenerated very quickly, with huge misinformation produced by key sources, and ended up culminating in FCA's legal action[16] against British insurance brokers. The main misunderstanding deals with an erroneous perception of the same role of the insurer. Usually, insurance is misinterpreted as a business where "the many pay for the many", while the reality is that "the many pay for the few", otherwise the entire system is likely to collapse.

Nowadays, the situation of the insurance sector is neither black nor white, but it is characterized by a tricky game of shades, where positive and negative aspects balance each other out. Moreover, each insurance class represents a different story (i.e. travel and motor insurance are experiencing very times in terms of the number of claims to process) and the analysis of them is heavily influenced by the effective amount of information available. This is also reflected in customers' perception of the industry, since each individual policyholder can tell a different story basing on the typology of cover owned.

15 These are engineering attacks that allow cybercriminals to steal data, credentials or credit card numbers. Usually, the user is catfished by clicking on links, calling a phone number or writing to an email address provided by the hacker.
16 Go to Chapter 4 for more information about FCA’s litigation.

1.3. Adaptation process: the new insurance

1.3.1. Lessons from 2020

During the crisis, the insurance industries have been the object of almost overnight business adjustments, that completely revolutionized the customers' and insurers' perspective and their usual relationship. Despite few negligible exceptions, insurance has always been considered as a static industry. In the last year though, the forced shift to remote-working-based approaches has led policymaking firms to adopt hybrid business models where a long-term strategic vision is combined with short-term tactical measures aimed at enabling business continuity. Today's insurers' biggest priority is to assess whether such temporary remote-working model is an efficient solution and may eventually be sustainable also in the future.

"We've seen some of the syndicates and some of Lloyd's players say they're losing too much from everyone being at home, as it's simply not in-keeping with the culture of their organisations. And other organisations are at the other end of the extreme and are looking at this from a bit of a jaundiced cost-saving aspect. So, it will be interesting to see how the different strategies play out and which group of strategies delivers the best outcomes."

Dave Ovenden (Willis Towers Watson's Head of global pricing and underwriting)

The Covid-19 pandemic will pass on to the insurance world some important lessons and acknowledgements. One of these is the evident need for more pace and agility among all market players. Moreover, it is nowadays undoubtable that insurers cannot interrupt the digital growth path all of them have finally undertaken anymore.

Furthermore, in the distribution field, the huge amount of coverage issues 2020 has raised put in evidence that there is a wide margin of opportunities for brokers, advisors and intermediaries willing to extend their market coverage. These kinds of carriers, whether directly impacted or not, witnessed first-hand several coverage litigations, which enhanced the importance of good advice. Consequently, due to a renewed focus on brokers' role and responsibilities, the same attractivity of experienced advisors increased and, henceforth, policymakers will be always more looking for distribution partners with a good reputation in matters of customer engagement and technical competencies.

Another factor that will certainly affect the insurance of the future, especially in the UK, is the application of Lloyd's Blueprint[17]. Moving with the times, this directive turns the spotlight on very actual issues, most of which are related to digitalization. For instance, it mentions the electronic trading of commercial risk, so that each wording provision is ruled whether counterparties use Lloyd's digital infrastructures or intermediaries and policymakers negotiate privately. When approaching to electronic trading, insurers, so far, have focused on two aspects alone: pricing strategies and data collection, analysis and security. Tomorrow's insurance, instead, will concentrate its efforts on coverage potentialities, meaning that insurers' primary strength will be that of providing solutions that perfectly suit and properly cover any kind of risk.

If for some insurance sector policymakers are moving towards an overall product simplification in order to enable new models of digital efficiency, such as electronic trading, other businesses, instead, cannot prescind from a complex assortment. For these reasons, one of 2021's biggest challenges consists of preserving a sort of policy sophistication without arresting insurance digital development. In this regard, Willis Towers Watson's brokers are working to integrate concepts of intellectual property within the cognitive horizon of their new contract-reading computers. This directly implies that, in the future, insurers will be forced to develop a new language that allows wordings to be fully read and understood by tools of artificial intelligence. Such an achievement seems to be still far from being implemented, but, however, nothing prevents the market from getting prepared immediately, perhaps through intermediate, more conceivable, steps. In fact, it is highly likely that, already in the next months, insurers will draw up wordings that can be partially codified from machines, at least in terms of coverage suitability, exclusions and extensions. Aside from the real understanding of the policy, still unenforceable, such a compromise solution may facilitate enhanced systems of wording trading.

To sum up, there is little doubt that, starting from 2021, hybrid business models will be the new normal.

17 Blueprint Two and its implications will be treated more exhaustively in Chapter 2.

1.3.2. Product adaptation

Before investigating how to adapt policies to the new perception of risk of today's consumers, a brief digression on the role of insurance and funding during epidemics and natural calamities must be done. The main difference between these two events relates to the impact of pandemic externalities on risk. In presence of global infectious disease, not only the countries that are hit the most, but also more remote regions are at risk. This moves insurers' focus on how to come up with fair premiums and reasonable payment deadlines.

The two risks present some similarities, and clients' disinclination to pay premiums in the years just after the triggering event[18] is one of them. Moreover, in correspondence with natural disasters, the minister of finance is personally involved in any supra-constitutional financial plan (when international institutions such as the World Bank cooperate with public authorities, for example). A good prediction of the financial effects (tax, national budget, markets, growth, etc.) of an outbreak is vital to help governments react efficiently in matters of risk management and funding strategies. In the last sessions, funding has generally represented a short-term emergency, so that minsters have demonstrated to prefer long-term, low-rate, funding sources.

Besides the definition of the amount of credit, designing valid budget plans is crucial. For doing that, ministers of finance usually collaborate with health ministers. However, according to the opinion of the World Bank's expert Oliver Mahul, whatever the funding source the bank provides governments with (insurance, promissory notes, bonds or a hybrid solution), the underlying strategy is more relevant to the outcome of the project. Practically, pure insurance solutions are more suitable for the coverage of extreme or very unlikely events, whilst the use of internal reserves should be limited to recurrent contingencies. Nowadays, disaster finance experts tend to undertake bottom-up approaches, where, in the use of national money reserves, a sort of priority is given to immediate needs, over the extreme ones. Such vision often clashes with ministers' attitude, according to which recurrent issues are perceived as less significant, and hence generally set aside, when extraordinary emergencies arise. Applying these concepts to a country facing a pandemic, it is desirable for the minister of finance to focus its work and resources on the financing of enhanced routine help systems rather than on exceptional epidemiological monitoring.

18 According to Panos Varangis (World Bank), the same happens recurrently in the Caribbean in the periods following great storms, with respect to policies against hurricane risk.

All of these are factors that drive the computation of disaster insurance premiums. These are generally related to one cost other than the mere financial expense connected with the premium, that is essentially a political cost. Policymakers, indeed, have to explain to politicians the reason why it is convenient to pay for a premium even though there will probably be several years, maybe decades, of nothing in return. Moreover, policies provide for pay-out sums that are significantly lower than the total losses countries usually face during an epidemiological emergency, and this represents another source of political cost. In fact, sector specialists assert that these political issues affect negatively the trading of disaster covers more[19] than an excessively high premium. Within these mechanisms of cost-benefit trade-offs, pandemics introduce another indirect cost that needs to be quantified and monetized, namely the loss of human lives. In such situations, often a risk-layering approach is pursued, meaning that the risk financing liability is fragmented and eventually re-distributed among players (banks and insurers, mainly) on the basis of the features of the risk, such as size and frequency.

According to Simon Young, from ARC[20], insurance value can only be assessed by looking at it not as an individual product, but rather as a complex activity built on precepts of risk evaluation and risk management. Besides the mere product insurers sell, the main output of such business consists of the transformation of an abstract issue into a concrete, then actually manageable, problem. ARC’s model is founded on countries priorly recognizing their partial responsibility for calamity mitigation (i.e. hurricanes), and applying a similar approach also to health issues seems to be perfectly possible. Parametric insurance policies establish in advance under which circumstances the policymaker has to pay, basing on the hazard level of the calamity, in order to prevent any regulatory gaps to escalate into troublesome claims. Dealing with too complex claims makes their management excessively expensive, with the risk of endangering insurers’ financial stability. The simpleness of parametric insurance contracts is the main reason underlying an overall cheaper risk on worldwide markets. Beyond pricing, parametric insurance can help reduce significantly administrative costs and complexity issues, especially when epidemics or natural calamities occur.

Parametric insurance might represent an even more winning solution for emerging or less developed countries, whose capability to reduce risk premiums is historically limited. Parametric risk analytics allow insurers to provide pre-emptive advice about measures these countries may put in place to prevent premiums from being unsustainable. For this reason, the countries for which such type of

19 This is less true in some emerging countries, such as Mexico, where crisis are usually managed with a mix of insurance policies and complex reserve financing.

20 The acronym refers to the African Union agency “African Risk Capacity", which specialized in advising African countries on disaster risk management and financing.

insurance is most effective are those that can barely afford it, provided that the recommended measures are undertaken within certain deadlines.

Gunther Kraut, Global Head of epidemic risk solutions from Munich Re Group, highlighted the importance of diversification, given that no insurer is completely covered from such kind of risk. Similarly, the entire world is exposed to epidemic risk, but lacks proper insurance coverage. In such a context, insurers should move to a "double bottom-line approach", according to which policymaker design profitable contracts for the purchasing firms and, only in case an epidemic breaks out, the profitability margin gets spread across the whole society. To those who argue that the diversification offered by some parametric insurance[21] violates the moral principle of solidarity, whose relevance in public health is widely recognized, experts answer by reminding them that pandemic risk can be compared to the group risk in a health insurance pool, given that it is globally shared. Similarly, someone[22] questioned the use of insurance policies to face pandemic risk, because of a significant difference in the difficulty to come out with reliable occurrence percentages for pandemics (more uncommon and then highly challenging to model) and natural calamities (for instance, storms can be easily monitored and predicted). To these perplexities, insurers and risk managers responded that quantifying pandemic risk is equally difficult for insiders of the sector like them and also underlined that producing occurrence percentages does not have anything to do with predicting when a new epidemic will break out.

Modelling pandemic risk will be an always more relevant activity in the future, mostly due to the relevant role accurate outbreak scenario assume in the development of pandemic containment strategies. In fact, after looking at predictions on most likely-to-occur events, enterprises may opt to preventatively buy non-physical business interruption policies, whenever the probability of their employees getting ill during an epidemic is deemed to be significantly high.

Following this logic, the World Bank’s Pandemic Emergency Finance Facility is expected to support the introduction and development of other innovative insurance products, also considering that, as time goes on, both the industry and the market will have a wider and deeper awareness of the most under-covered areas. Despite the price constraints that some new and sophisticated products may initially bring along, the eventual rise in their popularity, hence demand, is going to make these covers much less expensive over time. With respect to the definition of the triggering thresholds to be applied

21 For example, Jeanette Vega from the Chilean National Health fund criticised ARC’s risk-diversified parametric insurance offer across several African countries.
22 For example, Martin Melzer from the US Centers for Disease Control and Prevention.

to pandemic insurance, experts recommend not to look at the number of fatalities alone. Indeed, if on one side parametric insurance strength consists of the ability to simplify complex processes, on the other side it must be reminded that any risk, including the pandemic one, generates from an intricate complex of shades and the more comprehensively analysed it is, the easier identifying the right trigger will be.

World Bank's insurer José Ángel Villalobos likes to look at insurance as part of the final stages of a risk management activity. He particularly underlined the need to fall back on historical data for insurance pricing mechanisms, even where going back hundreds of years seems to be necessary. Furthermore, Villalobos supported the use of pre-emptive measures against pandemic risk and highlighted the importance for pharmaceutical businesses to start practising with significant liability insurance.

Regarding the potential suitability of banks or insurers to established categories of risk, World Bank's professionals acknowledged that, probably, insurance represents a more efficient tool against natural disasters, provided that what the term "natural disasters" includes is clearly assessed. On the other hand, banking products seem to focus more on creditworthiness, rather than risk, implications. In other words, while securitizing loans is quite a difficult practice, insuring them, instead, is much handier, since insurance relies on the cost of risk alone.

2. CHAPTER 2

2.1. Insurance in the UK: a post-Covid-19 story

The Covid-19 pandemic has forced each insurance firm to review and restructure organizational models and approaches to make them more properly suitable to the 2021 market. The implementation of these changes represented the right occasion to demonstrate their natural predisposition to deal with both the short and long-term issues raised by the pandemic. Nevertheless, it is still too soon to measure to what extent the whole insurance industry succeeded in handling the complexity of these effects and challenges.

2.1.1. The digital revolution

The technological development already constituted an urgent priority for the insurance sector in early 2020, until the economic crisis ulteriorly evidenced the importance of such a disruptive and invasive revolution. The Covid-19 pandemic has made the digital transformation a necessary and critical step for the operational resilience and the business continuity of every single component of the insurance supply chain, such as insurers and brokers, whose key functions (sales, distribution channels, service, claims, etc.) will be strongly affected in this respect.

Along with the introduction of the “smart working”, the insurance industry had to prepare immediately for the tech enablement. The adaptation process included facilitating the remote building of insurance policies, mainly for reasons related to the commercial risk. Most of these changes are likely to last far beyond this period dominated by the Covid-19 restrictions, especially if they will turn out to be cost-efficient, as well as effective in terms of functionality and operational performance. Therefore, it is highly probable that, in the near future, technology will be always more relevant for the insurance industry and digital development will include the collection of real-time big data, which will allow analysts to build more accurate pricing policies and more complex behavioral models. Clearly, also the underwriting risk assessment is likely to have significant advantages thanks to the enhanced analysis systems that will result from this process. Today's insurance market already presents on large-scale technology-led claim handling solutions: the automation of the First Notification of Loss (FNOL) and the widespread use of chatbots to process claims in a more efficient way are very explicative in this sense. The introduction of drones to replace the traditional loss adjusters, along with the improvement of advanced algorithms, will probably represent the next step in the digital revolution of insurance firms. Moreover, the refinement in terms of forensic capabilities could help the fraud management system be more targeted and focused on elaborating and analysing data. The risk management enhancing process will be certainly affected by more frequent usage of cloud services in the field of third-party-provided services.

Nevertheless, the technological renewal will come along with a higher cyber vulnerability, either related to internal technology errors and liability or in terms of external cyber exposure that in 2020 constituted a main interest topic for the insurance market. Indeed, cyber criminals' attacks on the firms IT weak points (strongly watered down by the fears surrounding the Corona crisis) became more frequent during the pandemic: a large number of ransomware and malware infections and cyber threats hit the IT infrastructures of thousands of companies in the last months. The huge number of employees working from home nowadays contributes to weaken the IT security systems, which are increasingly more exposed to hacker attacks; to make matters worse, most of the smart workers are not able and trained to limit, or at least recognize, these cyber threats. If the increased use of technology might seem to be the source of the vulnerability, on the other hand it represents itself the most effective instrument of defence against cyber-attacks, when sustained by the proper digital safety systems.

As stated above, the IT revolution of the insurance industry occupies the first places on the regulators' list of priorities, since technology is destined to be the main source of delivery of products and services. Not surprisingly, the FCA considered a lot of tech-related matters when drafting the 2020-2021 Business Plan. These are just some examples:

- Insufficient operational resilience/inadequately controlled outsourcing
- Addressing the potential increase in harm due to complex and ageing IT systems
- The complexity of changes to systems and procedures
- Disruption from technology outages and cyber-attacks
- Increasing use of third-party service providers

The European Insurance and Occupational Pensions Authority (EIOPA) recently published a document that goes on the same page, discussing the evolution of the reinsurance value creation chain and the prospects for the business models of the future, in the light of the current technological and regulatory changes.

2.1.2 New and renewed products

The stringent focus on digitalization will necessarily lead to a more personalized and flexible approach in terms of product design and offerings, including the further adoption of usage-based services. An enhanced ability in collecting and elaborating big data concerning the customers' needs and preferences will help insurers construct more targeted policies, that will be more likely to meet the clients' satisfaction requirements for sure. Besides the main idea of restructuring exiting products in terms of pricing and added value, the shock given to the industry by the advent of the Covid-19 epidemic will push the main insurance companies to build their future plans on new products and offerings that go beyond the historical tradition of the industry. Again, the digital component is bound to constitute the foundation of all these long-term projects. Many of the new products firms are experimenting in these days do not fall within the boundaries of the mere distribution of insurance and related infrastructure, but evolve consistently with the most imperative issues raised by the pandemic, such as income loss products, and go hand in hand with the tendency to push the limits widely shown by the most avant-garde Insur-Techs.

The parametric insurance is very explicative in this sense, as it constitutes the perfect example of a new policy format that is destined to conquer the market. A pre-defined amount of money is charged by the insurer whenever a pre-defined event occurs; the strong point of this product consists in the fact-based and automated nature of the trigger, which enables the possibility to provide a safe and easy payment without any need for loss adjusters.

On top of that, there is the possibility to collect precise and instantaneous data by linking insurance products to smart devices, such as telematics boxes in vehicles or advanced monitoring systems of commercial vessels. Such an approach could represent an extraordinary tool for insurance firms to develop innovative and swift pricing models and cheaper offerings.

Another critical developing area refers to the concept of "smart contracts", although in this case the perspective of a quick and worldwide growth is strictly tied and bound to the legal compatibility to the national regulatory framework. In addition to this issue, the risks (and related liabilities) that such arrangements may involve.

As it results evident, the common thread of all the innovations that are so strongly hitting the insurance market lies in the enormous potential inherent in the application of data sources within the context of business modelling and rethinking. If on the one hand a massive use of personal data is obviously limited by strict regulatory requirements and scrutiny, on the other hand the same FCA recognizes data sharing as a unique chance to build up successful solutions to the issues of the insurance sector. The perspective of an increasing number of bespoke offerings, based on the client's financial lifestyle, brings us back to the idea of a digitally-driven personalization strategy.

There is no doubt that the range of insurance products will keep on growing in line with the technological development, but it is also true that, in case regulation does not keep pace with such a frantic innovation rate, insurance firms will be forced to take into serious consideration the potential risk implication of their disruptive strategies.

2.1.3 Insur-Techs and labour market

A recent study conducted by the McKinsey Global Institute previewed a 55% growth in the demand for employees with technological skills within 2030. Actually, the insurance market already experienced a significant rise in labour demand with regard to back-office positions. From today on, this increasing trend will keep on being observed in the insurance industry, especially for roles requiring outstanding digital and analytics skills, such as underwriting and frontline sales, but also claims and actuarial jobs.

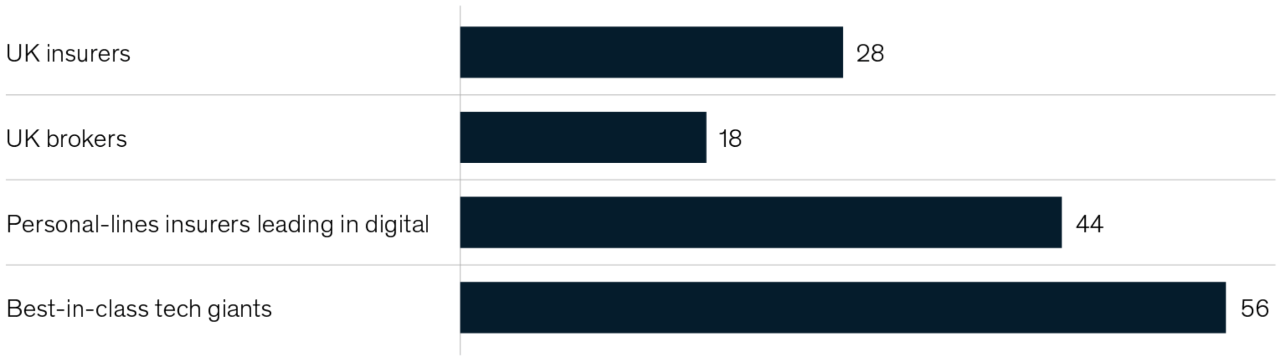
Nevertheless, even if every UK insurance firm's top management would not hesitate to recognize the ineluctability of a digital revolution, most of them are showing some difficulties to reshape their workforce and adapt it to this running environment, even in advanced contexts like London, where talent and labour supply are historically not likely to lack. In order to deeply investigate the quality (in terms of technological skills) of the insurance workforce in London, the McKinsey Institute collected and reviewed the tech skill set of the UK workers of the sector and compared it to the results provided by an identical analysis conducted over peers belonging to other markets or working for firms which excel in technology. The study evidenced a staggering unbalance in terms of digital capabilities when comparing the British insurers with the worldwide average: only 30% of UK employees satisfies the requirements to be included into at least one of the six categories of tech skills owners, against the 60% registered by the insurers from the global tech giants. To make matters worse, the research revealed a clear and direct correlation between the overall economic performance of a company and the presence of analysts and employees with a certain level of analytical and digital knowledge within the same company: beyond a negligible number of small UK insurance firms, the higher the number of digital and IT experts a company boasts, the more performing it is.

The results imply that each insurance company that aspires to turn into a successful insur-tech should implement winning strategies to attract and retain the best tech talents in the market. Although it becomes apparent the link between a company’s profitability and its digital and analytical resourcefulness, at the same time it is equally clear that the UK insurers are dangerously lagging behind in collecting these key resources. Keeping into consideration the sample of 32 insurance firms used by McKinsey's researchers, only 28% of employees count digital and tech abilities among their soft skills, and just 12% of insurers fill digital or analytics roles (e.g. data scientists, product managers, software engineers).

If one looks at these numbers in comparison with the opposite reality of the global technology giants, the overview of the British insurance landscape becomes pretty critical. The percentage of employees from best-in-tech tech giants that have any digital or analytical skill equals 56%, while 30% of them work in digital or analytics positions.

Shifting the focus of the analysis towards the different sets of skills owned by the professionals of the insurance sector, it can be noted that the best-in-class personal lines insurers occupy the top of the list ahead of the more traditional insurance carriers. The insurance brokers fall even further behind: only 18% of them can boast skills in digital and analytical fields, and the ones who actually work as tech analysts or digital experts are even less (6%). To sum up, the results suggest that insurers and brokers ended up chasing both the employees from the tech giants and the category of the elite personal-line insurers, whose pace of innovation seems to be relentless.

Employees[1] with any digital and analytics skills, %

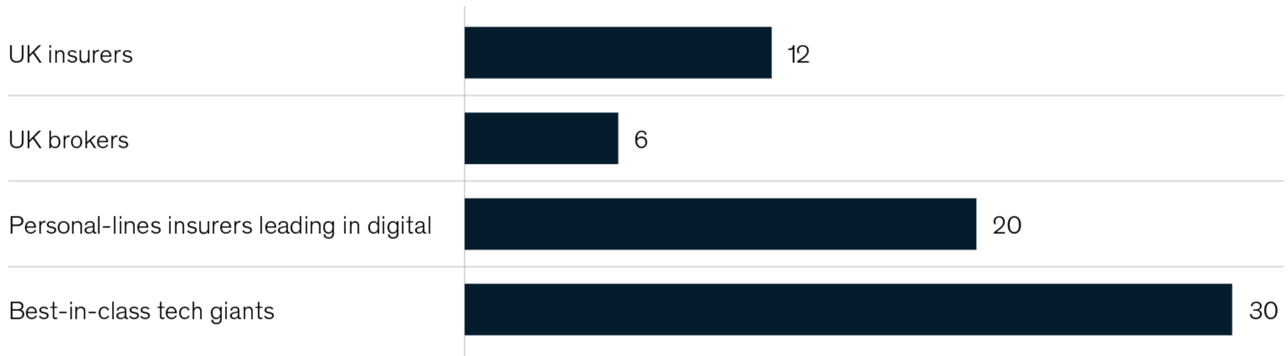


[1] At 32 companies analyzed.
Source: McKinsey analysis

McKinsey & Company

The composition of this bunch of digital and analytics skills is quite various and comprehends competencies of different nature. Nevertheless, most of them refer to the ability to collect, manage and interpret significant amounts of data. Such is the case of roles related to data science, data storage, data engineering and data analysis, but also application and development, which generally imply programming back-end and front-end platforms or tools. In particular, being qualified and experienced in data analysis techniques represents a remarkable credit for every employee who aspires to master the insurance business model. Indeed, data management skills are crucial to deal with an always increasing customer demand, to enable each potential policyholder to know, understand, value and purchase products online and to keep up on the latest innovations in the insurance market.

Employees in digital roles,[1] %



This includes software engineers, designers, product managers, and data and analytics roles at 32 companies analyzed.
Source: McKinsey analysis

McKinsey & Company

Another worthwhile finding from the McKinsey research is that, on average, digital and analytics insurers and insurance brokers have been in their workplaces for a longer period than the employees at tech-oriented personal-lines insurance firms. This figure could help explain the widespread perception of an asphyxiating, repressive and outdated culture within the insurance companies manifested by some millennial employees who have worked within and outside the insurance industry. Therefore, it is vital for most UK insurers to change course towards the most technologically advanced frontiers of 2021 insurance in order to disprove the generalized sensation of immobility and anachronism. Promoting stimulating job positions that are suitable to young tech analysts may help overcome this overall perception and shift the interest in a renewed, more challenging environment.

At 32 companies analyzed.
Source: McKinsey analysis

McKinsey & Company

The above analysis underlines not only the importance of recruiting young tech talent, but also the urgent need to enable the current insurers to collect the proper amount of skills and knowledge to face the new digital frontier, possibly by means of intensive training courses. Within this context, the decision-maker management of a UK insurance firm must succeed at building up a corporate culture that gives these talents the possibility to fully express themselves.

2.1.4 Insurance pricing and sectors

The impact of the Covid-19 pandemic on the insurance price levels differs from industry to industry, moving from sectors with price increases to others where lowering prices were observed. To make an example, the motor market, already highly competitive and price-sensitive by nature, the reduced presence of vehicles on the road is going to lead to a lower number of claims, which would result in a general drop in premiums. On the contrary, in other industries the crisis is likely to generate even more pressure for an increase in prices: such is the case of the Directors and Officers (D&O) insurance premiums which are going to register a remarkable rise in prices (already growing even before the pandemic) as a consequence of a higher probability of claims. A similar reasoning applies for the reinsurance sector, which was experiencing a period of hardening after some years marked by overcapacity (demand for claims higher than the market supply) and that expects its rate increases to accelerate even further in the next months.

With respect to the renewal terms, it is highly probable that the policymakers (both insurers and reinsurers) will be mindful of the 2020 lesson, hence they will put in place all the needed caution to prevent themselves to be taken by surprise in the future. What is crucial is to avoid "panic drafting" exclusions since there is the risk to exclude more than the necessary on the side of caution. Also, the higher premiums and stricter terms combo is going to generate commercial tensions between the market participants. The demand-side, composed of actual and potential policyholders, is going to claim better offerings in terms of price and comprehensiveness. From the point of view of the supply-side, there is no doubt that the Covid-19 pandemic affected the number of claims insurers had and still have to face: the restrictions that impacted the possibility and the freedom to travel and conduct normal business operations were the main discriminating factors in this sense. International personal travel was limited, physical events were cancelled, all lines of businesses (including the same insurance sector) were forced to convert to remote working; the health crisis quickly took the form of an economic recession when liquidity issues arose for each component in the value chain.

Specifically, these are the insurance lines that were hit the most during 2020:

- Event cancellation insurance,
- Credit insurance,
- Travel insurance,
- Health and life insurance,
- Business interruption insurance.

Looking to the future, even when employees will have been physically back at their workplaces and the whole economic cycle will have adapted to a new normal, businesses will be still trying to absorb the negative impacts of the pandemic. Furthermore, they will have to learn to live under the constant threat of further Corona waves and related limitations, not to mention lockdowns. This sad awareness is going to be reflected on rising liability insurance claims. Listed below are just some examples:

- Public liability,
- D&O,
- Employers and employment practices liability.

2.1.5. Some law-related considerations[23]

As is easy to understand, legal disputes originate from the refusal, by the insurer, to grant the coverage to the damaged policyholder. Very often nowadays the parties involved opt for a resolution for arbitration, without resorting to the judgment of the public courts. In fact, mediation and the other ADR[24] constitute a valid and reliable way to get to the resolution of a dispute and, considering the current restrictions, they are adapting (in alignment with the traditional justice system) to a remote working approach. All small entities, including businesses, consumers and charities can also make complaints to the Financial Ombudsman Service (FOS), enabled by the Parliament in 2001 to resolve disputes in a fair and impartial way.

In this hard time, a lot of policyowners are sharing the need to assert their own interests by making claims against policymakers. As a consequence of the similar nature of such claims, some policyholder action groups are being formed, in order to benefit from a double advantage: a resource sharing system and an increased pressure (further enhanced by the media and the public opinion) on the insurance industry.

With regard to the insurance business lines listed in the previous paragraph, the sector of business interruption insurance turned out to be the most characterized by a phenomenon of claims aggregation. In the end, this joint approach can flow into collective legal proceedings against policymakers; such actions are not unlikely to be sustained also by third-party litigation fundings. A large number of proceedings in the field of non-property damage business interruption by Covid-19 convinced the UK Financial Conduct Authority (FCA) to undertake an urgent test case, by looking for and collecting all the recent court declarations about causation and coverage matters. The FCA initiative aimed to shed some light on the legal framework regarding coverage issues, albeit it did not succeed (it was not supposed to, though) in ruling out with respect to all the individual claims beyond the scope of the test scope. Another issue the FCA tried to investigate refers to the late payment of claims, an issue that is ruled by the 2015 Insurance Act, specifically under section 13A. the provision states that the insurer who faces claims payments is required to charge the sum due within a reasonable time, on pain of an additional payment for damages, as it is reported below:

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

(2) A reasonable time includes a reasonable time to investigate and assess the claim.

23 What is treated in this subparagraph will be analysed more in depth in chapter 3 and chapter 4.

24 ADR stands for Alternative Dispute Resolution and generally includes mediation (including conciliation), negotiation, arbitration and collaborative law.

(3) What is reasonable will depend on all the relevant circumstances […].”[25]
It is evident that such a provision leads to confusion in a period marked by a health emergency, which can definitely be seen as a “relevant circumstance” the payment term is going to be affected by.

If the long-run economic implications are destined to stay under the shadow of mystery for a while longer, both equity and bond markets were immediately impacted by a peak of price volatility. As previously anticipated for insurers, this unstable environment represented a big issue for insurance regulators as well. They were immediately aware of the necessity to promptly review risk, capital assessments and thresholds on the basis of the latest developments caused by the pandemic. Fortunately, the Prudential Regulation Authority (PRA) has found out that the UK major insurance firms were properly capitalised when approaching the Corona crisis, so that it was determined to keep the aggregate solvency ratios around 150%. Moreover, other elements contributed to limit the impact of such market fluctuations: it is the case of some counter-cyclical adjusting provisions in Solvency II[26], like the Volatility Adjustment, the Matching Adjustment, the Standard Formula Symmetric Adjustment Of The Equity Capital Charge and the Traditional Measure On Technical Provisions (TMTP). Nevertheless, in order to avoid some elements of Solvency II to be misleading or misinterpreted, the PRA opted to provide guidance about the Authority's vision of the treatment of covenant breaches and about its position on the insurers' internal ratings issue and suggested insurance companies recompute their TMTP taking into consideration the substantial changes in interest rates. In the meanwhile, many UK insurers (with a special mention for the London-quoted Lloyd’s and the Bermudian) are taking benefit from such market movements in raising new capital through equity issues, aiming at getting ready to exploit profitable market opportunities in the future, hardening rates above all.

The just outlined situation, characterized by an apparently solid regulatory framework, may suggest that the current crisis is quite unlikely to generate distressed situations that could shake the M&A activity in the future. Even if some solvency-related or regulatory concerns arose, the PRA seems to be well-equipped to intervene successfully. However, in the long run, the aftermath of the crisis, combined with a prolonged period of low-interest rates, may prompt some large insurance firms to seek value-additive synergies through mergers or acquisitions, not to mention the disposal of unprofitable business divisions in case they wanted to pursue a niche strategy. Within the M&A context, the private equity intermediators are going to be the most urged operators by such an enterprising environment. The perspective of very low, perhaps negative, interest rates may

25 Source: legislation.gov.uk
26 More about it in the last paragraph of the chapter.

encourage insurers to tack on illiquid long-term investments (e.g. debt portfolios, infrastructures, private equity funds) since they usually ensure higher yields than more conventional risk-averse investments.

As is briefly mentioned above, it is vital to not undervalue the weight carried by mass media over the insurance market. In the last months, the increasing number of claims and related disputes contributed to shaping an adverse public opinion, partially generated and sustained by a sort of aggressive press reaction. Although some circumstances tied to the pandemic seemed to constitute valid reasons to explain a claim denial, the common impression among consumers is that all insurers tend to reject any claim, even the lawful ones. It is then reasonable that such an overriding prejudice may have influenced some considerations by the same FCA, which blamed the policymakers for refusing to pay any claim in a generalized sense. This probably helps explain the insurers' low expectations when trying to object to undue claims. To make things worse, the mismanagement of many Covid-19-related claims badly affected the reputation of the whole insurance system, also considering that, even before the pandemic, both individual consumers and SMEs[27] did not look favourably on it.

How did policymakers try to handle the situation within the different insurance sectors? The motor insurance, to make an example, opted to reimburse its customers for all those policies made ineffective by the traffic stop. Other companies belonging to the sector, at the very least, showed understanding to little premium adjustments that could meet the demands of customers who are driving less due to force majeure. The exponents of the life insurance industry did even better in managing such reputational issues, even though in the last period they have been subjected to press attacks because of some delays to applications for medical personnel's life insurance policies. Commercial insurers, instead, seemed to be behind in the reputation management path. Following the lead of the other insurance realities, it is vital that, at the time of policy renewals, they will be able to combine the open-mindedness and foresight of properly preserving their costumers' value and the precaution of limiting exclusions to what is strictly necessary. Policyowners will indeed push to remove exclusions in sight of further potential pandemics. With respect to the ongoing claims, proactivity and constructive collaboration are the main ingredients to quickly get to an effective and lasting rehabilitation of the sector.

27 The SME acronym usually refers to small and medium enterprises.

2.2. Regulatory and legal changes in the UK

2.2.1. An insider's testimony

"In terms of changes to regulation and the Black Letter Law, however, I suspect there is not going to be a huge amount of difference. Other than the potential bringing in of new vehicles such Pandemic Re, which may have some regulatory impact depending on how that is funded and operated. And the FCA may take a different view on this, but we will have to wait and see what's coming out of those test cases."[28]

These words belong to Gavin Coull, member of the executive committee at London Forum Of Insurance Lawyer (FOIL), who also investigated the possibility that some pandemic-related insurance disputes may be presented to the Supreme Court, assessed the potential impact of such judgments on the domestic market and remarked the chance of some cases being settled by the reinsurance industry. With respect to both direct insurance and reinsurance realities, Coull's conviction is that the market is going to assist at a tightening of terms and conditions. It is always more evident, in fact, that whether claims have been covered or are still outstanding, many policy draftings are fatally affected by some legal vacuums of the system. He believes that, although similar regulatory inefficiencies can be positively exploited by the parties, uncertainty is never recommendable to the market and within this context brokers' responsibilities will gain in importance, as they will be essential in their role of promptly communicating any remarkable changes to the clients. As intermediaries, "brokers will see that they are caught in the middle. They have a big role in, firstly, saying to their insurers what their clients actually want cover for and communicating that specificity but also in reporting clearly to their clients what insurance is actually on offer, and available to them. And that will include letting them know that times have changed since 2018/2019. The market is its own creature and is ultimately a commercial enterprise."

Coull's belief is that the current crisis did nothing but strengthening the figure of the insurance broker, who are slowly seeing their duties and responsibilities being always more defined. These hard times also evidenced that most of the buyers (including entrepreneurs from the SME sector) approaching insurance products lack in knowledge and experience: usually, they merely provide the intermediaries with their company's financials and insights and rely completely on brokers' professional advice[29]. Probably, in such a complex economic environment, policyholders as well as insurers would better

28 Source: www.insurancebusinessmag.com

29 More about insurance brokerage along the entire chapter 3.

invest in their own financial services education, to avoid trust from being their unique weapon against unexpected shocks.

However, Coull seems to be pretty confident in the industry's capacity for resilience and places trust in the future of insurance. Its chances of bouncing back from the deep crisis it sank into lay on extensive capital raising strategies and, eventually, on the ability of the reinsurance agents to exploit the opportunities generated by the hardening conditions of the market. If, as widely treated, the whole insurance industry will have to deal with the disappointment of many customers, on the other hand the pandemic will have the effect of help commercial policyholders understand the huge importance of the insurance and reinsurance sector. This represents a crucial step to start overcoming the widespread view of a business interruption policy just as a "sleep-easy" purchase for the most risk-averse entrepreneurs. Filling the already mentioned legal gap, instead, is going to be a much more demanding challenge.

“Alongside the significant negatives [of this crisis] for individuals as well as the markets, with this, as with all things, you have to embrace the changes and opportunities that come with this and that’s what the market has always done.”

The current crisis is going to bring with it a disrupting wave of innovation and modernization. The whole UK insurance industry, in the footsteps of the Lloyd’s of London’s digitalisation plan[30], must pursue development policies in terms of remote working adaptation and claims management. Nevertheless, the London market is a very peculiar one, as it is characterized by the strong sense of heritage of its participants, which implies that the future insurance dynamics will be still based on face-to-face relationships and ongoing long-term interpersonal linkages.

2.2.2. Regulators’ activity and support

The FCA and the PRA, the two main regulatory authorities in the UK insurance context, took action immediately face to the biggest concerns arising from the pandemic, by trying to intervene at the same time in support of both policyholders and policymakers. The challenge consisted (and still consists) of protecting the lawful interests of the formers and ensuring their fair treatment, without undermining insurers' credibility and bargaining power. The European counterpart of the two named

30 More about it in the last paragraph of the current chapter.

above, the EIOPA[31] similarly set to work to absorb the effects of the economic recession on the insurance market components.

In the first place, both regulators focused on what they identified as major priority issues, namely firms' business continuity, capital preservation (and restoration) and contingency planning. This last target refers to the operational risk assessment of insurers and the management of a product delivery business model based on remote working tools. The PRA (and the EIOPA) solicited UK insurance firms to act to preserve their capital resources, especially by urging them to pay particular attention to the payment of distributions and to their remuneration policies. Simultaneously, the regulatory authorities decided to put in place some measures to assist firms in implementing the necessary operational changes. These are some:

- Enhanced flexibility with the notification requirements of senior managers' responsibilities.
- Extended deadlines for the submission of several regulatory documents.
- Flexibility with the use of electronic signatures on those documents.
- Enhanced transparency about the treatment of loans and unrated assets.

2.2.3. Customer-oriented initiatives

The FCA for the UK and the EIOPA for the EU have released a list of recommendations about the topic of the fair treatment of customers. Such guidance met the expectations that wanted the insurance sector (including the emerging reality of brokerage) to provide clear communications with its clients and highlighted the importance of demonstrating flexibility in drafting new and renewed policies and defining payment deadlines. The regulators have also encouraged insurers to review their products (and the related issues that may arise) to guarantee an appropriate value proposal to the customers. Furthermore, all insurance companies have been exhorted to intervene in case they detected any relevant change in their risk profile or whenever they realized to be no longer able to provide some benefits. The FCA's guidance in question took effect on June 2020 and is expected to be reviewed every 6 months to assess whether is still appropriate or even necessary.

31 Acronym of the European Insurance and Occupational Pensions Authority.

2.2.4. The future regulation: pandemic impact and expectations

With the purpose of letting the insurers and the regulatory authorities focus completely on the current crisis, a quite large amount of pre-determined FCA and PRA initiatives have been temporarily set aside. At the end of the emergency, when it will be the moment for such projects and measures to be back on top of the priority list, it is highly predictable that these will be reviewed and redrafted in the light of the aftermath of the pandemic. Above all, the measures dealing with operational resilience targets are going to be significantly influenced. The first document about the operational resilience in the financial services sector was released in December 2019 (just before the pandemic exploded) in the form of a joint consultation by the Bank of England, the FCA and the PRA. In the first place, the deadline for the comments had been fixed to the following April; the advent of the pandemic had it move to October 2020, but the regulators took time until the end of the current year for the effective implementation of the measures. The priority role assumed by the topic of the operational resilience in the minds of the regulators was openly declared even by the PRA Executive Director of Insurance Supervision Charlotte Gerken, who, during her speech[32] at the Association of British Insurers held in the last May, referred to:

- the utter unsuitability of some disaster recovery plans made evident by the today effects of the recession;
- the urgent need to develop proper digital infrastructures that can support large-scale remote working and at the same time meet the basic security requirements;
- the importance of cyber risk management;
- the unfamiliarity of most of the firms with the operational and financial resilience basis fundamentals.

The PRA is also currently working to define the terms of the Operational Resilience Reporting, a set of information that all insurers impacted by operational incidents must deliver to the regulatory authority. Another important point touched by Gerken and which the FCA and the PRA are very concerned about is related to the risk management of third-party services providers. It is probable that

32 Source of the entire original speech: https://www.bankofengland.co.uk/speech/2020/charlotte-gerken-speech-prudential-regulation-association-of-british-insurers

this trend of considering the impact of the shocks in relation to the binomial insurers-providers will be confirmed in the next future.

2.3. Actual cases: Solvency II and Project Blueprint Two

2.3.1. Solvency II

The EIOPA recently declared that it is going to review its Solvency II capital regime, by considering the effect of the crisis on the insurance environment. All the components of the industry, indeed, have been heavily impacted by the ultra-lowering of interest rates that reached the below-zero threshold, which affected the profitability of any potential investment. This resulted in the trend, showed by EU insurers, of holding capital rather than focusing on long-term policies. In these market conditions, the regulator decided to rethink some terms of the regime so that they could be readapted in view of the new pandemic-related issues, especially those concerning capital requirements and interest rate risk.

But, taking a step back, what is the aforementioned Solvency II regime? Originally, it was published five years ago after several agonizing months of negotiations and delays and it was seen as the first real operational revolution of an excessively bureaucratic system. Before it was launched, policymakers were strongly complaining that the current regime did not encourage enough the exploit of long-term investment opportunities and limited the industry development through stifling and useless reporting requirements. Anyway, the insurance authority anticipated that the Solvency II would have represented an additional evolution of the previous regime rather than a disrupting revolution. The same philosophy holds for the last regime revamp, as the EIOPA's chairman Gabriel Bernardino's words testify:

"The proposed changes would ensure that Solvency II will continue to be a credible and fit for purpose regime, capable of protecting policyholders and contributing to market stability even in stress situations."

Beyond the attention the regulator pays on the effects of decreasing interest rates, the new adjustments are also thought to support the recovery of the most distressed insurers and to protect their interests even in case of bankruptcy, by providing them with pre-emptive guarantee schemes. However, the industry has shown more than some perplexities on the actual effectiveness of the proposed changes, still disappointed by the poor results generated by the original Solvency II. The insurers' position can be resumed by the words of the Insurance Europe deputy director-general Olav Jones, who affirmed that the EIOPA's advice "would, in the long run, result in a less competitive European insurance industry that could invest less in the economy and provide fewer long-term savings products and offer lower returns to customers.” Apart from insurers’ worries, the final decision on the Solvency II adjustments will be up to the European Commission, the European Parliament and the EU Council and will be not disclosed before 2022, when the shape of the post-pandemic insurance industry is expected to be more defined.

2.3.2. UK insurance between Solvency II and Brexit

In the UK context the situation is different, given that insurers are no longer forced to pursue a community-based approach since Brexit’s entry to application. In this respect, the UK announced its intention to interpret the regime and consider changes its own way. Actually, British insurers and regulatory authorities had long questioned the regime’s suitability to the UK environment, especially referring to the Risk Margin section. in particular, since the very first introduction of Solvency II, most of the UK life insurers openly expressed their disappointment about two sections of the new regime: the risk margin one and the one determining the capital requirements for the riskier assets (equity, property, high-yield corporate bonds, etc…). They had argued that a drop in interest rates would have impacted too heavily on the insurance market, marked by large volumes of long-term liabilities: it comes obvious that the issue is more relevant than ever. If you add to this that the already mentioned risk margin has always been considered as excessively capital-intensive as well as other provisions too difficult to adopt, then it is easily understandable the UK intention to revise the EU rules. On the flip side of the coin, the vast majority of the non-life (mostly commercial) UK insurance stood up for the preservation of a sort of normative equivalence between the future UK rules and the EU Solvency II measures.

In the last October, the UK government proposed its personal review of the Solvency II norms, with the final purpose of developing the number and the quality of the available insurance products. In detail, the government published a call for evidence on this topic, encouraging all politicians to come up with some proposals for the revision.

"We are undertaking this review to ensure that Solvency II properly reflects the unique structural features of the UK insurance sector. By design, the current regime is tailored to the EU insurance sector as a whole but in several important ways, the UK insurance sector is different."[33]

The issue regarding the risk margin was considered as the most urgent one, hence it was put on top of the agenda. The original approach suggested by the regime was built on the concept of cost of capital; this computational line used to result in exorbitant margins for a low-interest-rate context where insurance companies were prone to sub-writing long-term liabilities (and related guarantees). Moreover, the risk margin approach presents the inner flaw of being highly sensitive to changes in the interest rate which it is inversely related to, adding uncertainty and stagnation to an already unstable environment (just like today's one). Consequently, the UK authorities proposed alternative methods that better fit the domestic insurance framework.

Another key measure subject to revision involves the Matching Adjustment (MA) mechanism, very common especially in the life insurance industry because it results in very efficient lowering the capital requirements referred to long-term contracts (e.g. the annuities). The MA, indeed, consists of a procedure that enables the policymaker to adjust the discounting risk-free rate in all those cases where the insurer manages a separate portfolio composed of assets with similar characteristics in terms of cash flows and ties it to an insurance obligations portfolio along its all lifetime. To make such a mechanism effective, regulatory approval is needed. As pointed out by the government, "an insurance firm that meets these conditions is less exposed to the risk of asset price movements, because the short-term volatility of asset prices does not affect its ability to make contractual payments on its liabilities as they fall due." In relation to the MA, the topics potentially subject to revision were basically three: the modalities of the regulatory approval, the technical computation of the adjustment and the criteria for the assets' eligibility, which tended to result too complex.

Below these two top-priority topics, the government agenda included other secondary points about the possibility of making changes in the following measures, all of which explained by purposes of adaptation and/or simplification:

- Solvency Capital Requirement (SCR): a series of adaptations aimed to a better alignment of the regime to the specific risk profile of the UK insurance industry (and the simultaneous

33 From the HM Treasury "Review of Solvency II", October 2020.

introduction of a climate-change-related risk), including adjustments to the current regulatory approval procedure and the SCR computation.

- Branch capital requirements for foreign insurance firms: introduction of simplified branches for the foreign insurance companies, whose number increased as a result of the Brexit.

- Calculation of the Transitional Measure of Technical Provisions (TMTP): simplification of the procedure.

- Reporting requirements: simplification of several levels of reporting.

As briefly anticipated above, if the whole life insurance sector welcomed such proposals of revision, as aimed at reducing capital requirements and encouraging long-term sustainable investments, on the other hand the commercial insurers and reinsurers seemed to turn their noses up at the perspective of a more domestically-oriented market. These policymakers, with the London Lloyd's on the front line, appeared concerned of such a regulatory detachment because of the fact that their customer base has always been more international, and hence a sort of harmony (or even better a coincidence) between the internal UK rules and the EU Solvency Two provisions was highly favourable.

2.3.3. Potential prospects for the international framework

From the opposite point of view, the EU one, it will be interesting to measure the impact of this UK change of direction on the communitarian firms' performances. The main concern among the European insurers is that such changes may result in an unfairly competitive international environment, with the danger of several EU-based companies and investors deciding to move their headquarters and businesses to the City. Nevertheless, such a prospect, although realistic, represents the most pessimistic scenario: the post-Brexit years are probably not going to affect the pre-existing market equilibrium that much.

On the life insurance side, the UK market was already pretty close in terms of the customers-insurers turnover. Indeed, if on one side UK life insurance firms have traditionally been focused on a domestic customer-base, on the other side the European market already started a process of assimilation of new made-in-UK insurance products (e.g. the modern unit-linked insurance plan).

On the commercial side, it should be noted that the London market already had a sort of brand leadership among the other international players in terms of insurance and re-insurance products supply. The years to come will do nothing but confirm the current situation of both UK players, whose competitiveness is going to increase, and European players, whose current market equilibrium is not going to be particularly threatened. Moreover, the incoming Brexit revolution encouraged a lot of UK insurance firms to distribute some local entities in European financial markets, especially in the Benelux area, sustained by quota-share reinsurers towards UK syndicates. Such contracts, which are usually built on a huge ceding ratio, enable these entities to move their underwriting risk back to the City and at the same time to contain the default risk thanks to their counterparties' good ratings. Within this framework, the streamlining of some UK regulatory provisions may lead to lighter capital requirements, resulting in advantages for the EU entities that are linked to the UK reinsurance industry. Anyway, for the seek of completeness, it must also be remarked that the UK reform includes measures aimed at simplifying these local branches with the purpose of welcoming new firms in the domestic insurance market.

Another interesting point to highlight is referred to the common opinion inside the EU boundaries that the brave regulatory revolution the UK is conducting could represent a sort of outsourced stress test for the EU insurance reality. By having the possibility to follow the evolution and the final outcome of the British implementation strategy, EU insurance firms, brokers and regulators will have a better perception of the effectiveness or, on the contrary, the worthlessness of the new, experimental, insurance products and regulatory solutions, with basically no risk but a kind of opportunity cost (in case such products outperform).

To sum up and come up with some conclusions, we can say that the EU insurance market can monitor the effects of UK revisions of the original Solvency II regime and eventually reckon to follow the British example, still relying on the certainties of its traditionally prudential approach. At the same time, the UK regulators are pretty sure their divergent approach will result in an overall improvement of the current market conditions, because while commercial insurers' leadership is unlikely to be tarnished, at the same time the life insurance sector will be relieved of the long-standing burden of the annuities.

2.3.4. Lloyd's response to the pandemic: the project Blueprint Two

In November 2020 Lloyd's of London officially initiated the third chapter of the programme "Future at Lloyd's", commonly known as the project "Blueprint Two". "Future at Lloyd's" is the brainchild of the CEO John Neal and consists in a turnaround of the corporation. At the end of September 2019, the original Prospectus had been replaced by its updated revamp named Blueprint One, which was built on six pillars consisting in separate action lines aimed at the transformation of the London insurance marketplace and finally resulted in £300 million allocated for funding, around 1000 stakeholders involved and some preliminary tests conducted. Blueprint One actually succeeded in rationalizing some time-wasting processes (e.g. different people collecting the same data but on different platforms) and facilitating the distribution of new insurance products and the development of new insurance businesses.

The advent of the Covid-19 pandemic forced the corporation to review the project by reassessing its priorities in April 2020. Indeed, the lockdown forced a traditionally face-to-face marketplace like that (insurers and intermediators used to physically meet in Lime Street in London to negotiate products and set policy terms) to convert to a remote-working reality through the implementation of the so-called "virtual underwriting room". These have been the Gallagher's CEO for brokering and underwriting Simon Matson's words thereupon:

"Relationships and personal networks remain a big part of doing business effectively in London. If we can find a balance between harnessing the value of these relationships and [digitising], this evolution of Lloyd's will result in a model that will reinforce why business should come to London."[34]

The already mentioned April update is resumable in three main solution paths: engineering a more advanced electronic placing platform, delivering digital coverholder[35] solutions and development of fast-tracking claims processes. Specifically, Blueprint Two's focus is on the implementation and delivery, but unlike its predecessor it envisages compressing the six pillars into one unique digital workstream, in a sort of cross-sectoral customer journey. The target is to save operating costs by 3% of the total (for an estimated amount of £800 million) within the end of 2022 by automating purchasing and/or claiming procedures and lightening them of the burden of bureaucracy. The funding resources have been identified on the debt raised by Lloyd's market at the beginning of 2020, when the project was not conceived yet. According to Lloyd's COO Jen Rigby, the programme is expected, within two years, to "deliver truly revolutionary change for the market, ensuring the future of Lloyd's market is digital from start to finish, with data at its core"[36].

As anticipated above, Blueprint Two mainly treats two of the most appreciated solutions by Lloyd's clients, namely open market and delegated authority (through coverholders) operations. These two journeys alone cover 80% of the corporation's premium and 90% of the arrangements. The residual

34 Source: Financial Times, https://www.ft.com/content/f739ef07-2d2f-4f57-8ef9-d3aac2175bc6

35 "A company or partnership authorised by a Managing Agent to enter into a contract or contracts of insurance to be underwritten by the members of a syndicate managed by it in accordance with the terms of a Binding Authority." (www.lloyds.com)

36 Source: Financial Times, https://www.ft.com/content/f739ef07-2d2f-4f57-8ef9-d3aac2175bc6

categories (reinsurance placements, above all) will be subject to review over the course of the current year. Both open market and delegated authority journeys can be divided into two sub-phases, coverage and claim. Blueprint Two was enforced also to absorb such a clear distinction by harmonizing the two stages, which include in their turn placement, renewal, claim notification and loss recovery, thanks to the development of the "Data Store" infrastructure and the "Digital Spine" business digitalization software.

With respect to the placement strategies in open market customer journeys, Blueprint Two, in contrast with its parent Blueprint One, resized the importance given to the ownership of a single placement platform (PPL) and rescheduled the discussion on the new PPLs to the current and the next year. In the meanwhile, the programme turned into setting data standards for vendors such as Whitespace and other market participants. The traditional placement path is now supported by new complementary tools, like collaboration agreements with external facilitators (e.g. the virtual underwriting room) or other digital applications for tax computation or compliance checking purposes. Similar innovative tools were thought on the claims management side as well: together with some news in terms of automation and digital tools (e.g. geospatial detectors, hurricane tracking devices, etc.) in support of the pre-existing claims handling services, Blueprint Two enabled the immediate validation of the electronic First Notifications of Loss (eFNOL) through the simultaneous development of a Core Data Record (CDR) system.

Shifting the focus on the delegated authority path, the main introduction consists of an end-to-end digital platform including tools for policies registration, trading services and data input facilities[37] at the coverholders' disposal. As concerns delegated authority claims and loss adjusting management, instead, the new programme did not provide for any substantial changes in the pre-existing process, mainly coordinated by the Delegated Claims Administers (DCA), but simple back-up services, focused on the digitalization of data collection, workflows, funding schemes and cash flows.

Blueprint Two is going to keep on innovating and developing the business model in 2021 as well, marking the path for the future of UK, and not only, insurance. Data management will be always more the domain of the CDR infrastructure. The qualitative analysis and the distribution through the workstream of the same data will be conducted by the Digital Gateway platform. On the wave of boldness shown during these challenging times, 2022 will be the year of the consolidation of the new claims solution as well as the time to extend such innovation to the other classes of business, such as the reinsurance sector.

37 Specifically, the reference is to the Delegated Contract and Oversight Manager (DCOM) system for an early-stage binder validation analysis.

3. CHAPTER 3

As highlighted in the previous chapters, the Covid-19 pandemic impacted heavily on worldwide insurance industries, including the British one. Insurers and intermediaries are still struggling to re-assess their business models and, above all, to predict what the market will look like in the medium term. Starting from the very beginning of the epidemy, commercial policyholders have been delivering several claims on the business interruption (BI) policies they owned (or they assumed to own). In May 2020 the Financial Conduct Authority had expressed itself in this regard, stating that it would have referred back to any eventual declaration by the court about the suitability of the BI policies to the pandemic-related notifications. Nevertheless, the FCA was careful to stress its prominent position, asserting that most of the BI contracts were not shaped to face similar emergencies and then are very unlikely to cover the damages due to the current scenario. Within this section, we are going to investigate whether insurers, especially insurance brokers, might respond to such claims and eventually be subject to prosecution for shirking their duties and responsibilities.

3.1. Insurance brokers: duties and responsibilities

3.1.1. Breach of duty

For the purposes of the analysis, it is important to premise that all UK insurance brokers are required by the same FCA to sign long term professional indemnity covers and moreover they are protected by errors and omissions provisions (E&O policies) that usually are complex and wide enough to overcome any issue raised by consultants' potential carelessness. However, the insurance brokerage presents some areas of vulnerability, mostly related to the concept of "breach of duty", that claimants may aim at.

Among the several duties of an insurance broker, there may be the one of advising the insured entrepreneur about the possibility (or even convenience) of taking into consideration the purchase of BI policies as individual contracts or as part of a more complex insurance position, notwithstanding the fact that each customer and each case, in general, has to be treated differently. Another distinction has to be made and refers to the different approaches dedicated to those commercial clients that already have in mind what they need and those who completely rely on the professional advice they are paying for. In any case, however, drafting the proper cover requires a knowledge mix-up between the professional and insurance-related competencies of the broker and the information about the nature and the risks on the commercial activity to be covered that often only the entrepreneur can provide. Having said that, it is necessary to draw the line that determines where the client's contribution ends and the advisor's competencies implementation must begin. At first glance it seems, legally speaking, that the broker's compliance with its duty is not influenced at all by the level of expertise coverage provided by the insured, although the information the client failed to report was particularly relevant[38]. Besides the different nature of each situation, the insurance broker can be blamed for breaching his duties if he has simply neglected to inform the customer of the possibility of a BI policy. Even in the case a client explicitly made it clear to look for a very slim, so long as cheap, cover, in fact, the professional advisor should point out that the incorporation of some BI provision in the contract would represent a convenient, if not vital, option to protect the entrepreneur's commercial interests.

When drafting a new policy with the client, the broker must follow some basic communication steps to ensure that, if eventually the policyholder may ever feel unsatisfied with the efficacy of the coverage, the advisor's liability could not be questioned. Referring back to the JW Bollom & Co vs Byas Mosley & Co case (1999), the underlying logic of such steps consists of ascertaining whether the policy subscriber has fully understood either the fundamentals of the cover and the potential consequences of being underinsured, including the relevant sum[39] computation methods.

To provide an empirical example of what just explained, it is useful to refer back to a 2014 trial, "Eurokey Recycling vs Giles Insurance Brokers", where the subpoenaed advisors found themselves forced to acknowledge the breach of duty, although they strongly dismissed any charge of causation. Mr Justice Blair recognized the brokers' negligence in properly informing the customers about the kind and complexity of policy that best fitted their commercial needs but also in extensively showing them the risks the actual cover was exposed to. In this case, the judgment was widely based on the behavioural guidelines laid down in the Insurance Conduct Of Business Sourcebook[40] by the FCA. According to the judgment at issue, the following principles were to apply to a case treating drawings up of BI policies:

38 FNCB LTD (formerly First National Commercial Bank PLC) vs Barnet Devanney (Harrow) LTD (1999) Lloyd's Rep IR 459.
39 “relevant sum” meant as the aggregate assured value of the insurance cover at the time of the signing of the contract.
40 The sentence specifically referred to the ICOBS sections 5.2.2(1), 5.2.2(2), 5.2.2B and 5.2.2D.

- Established that the broker does not owe the client a detailed computation of the relevant business replacement sum or a justified choice of the indemnity period, however, he has the duty to provide the commercial insured with the proper amount of information and explanations to enable him to determine the aforementioned items himself. Such explanations must include how the relevant sum should be calculated and possibly a clarification of the item "estimated gross profit"[41], given that its meaning differs from that average entrepreneurs may attribute to it, as well as for the concept of "maximum indemnity period".
- Another duty for the broker consists of taking the proper number of steps to be absolutely sure to have fully understood the nature of the client's commercial activity and the risks and needs that come along with it. Nevertheless, the insurance intermediary is not required to verify the accuracy of the information provided by the client, unless there are valid reasons to question it[42].
- Although the insurance broker who is about to deliver a standard policy like the one for Eurokey does not have to conduct a deep investigation into the customer's activity, the proper extension of the business analysis conducted by the former depends on the latter's professional expertise and on the number of times the two parties have met before. Indeed, despite the strictly commercial nature of a BI cover, the professional background at the client's disposal can widely vary, especially in the case such policies are directed to small and medium enterprises.
- In case the brokerage firm's personnel changed from the last time the client got its advice, it could be reasonable to opt for a re-assessment of the assured risk exposure and an eventual change in the final advice. Both the first and possible following pieces of advice should be properly recorded and certified. The duty of well-documentation is totally up to the insurance broker.
- Beyond the above obligations, in compliance with the "Colinvaux's Law of Insurance" the broker has the duty to always exercise reasonable care when adhering to the client's instructions.

The court finally stated that in the Eurokey case the brokers had succeeded in providing the client with enough information to enable them to understand either the fundamentals of a BI cover and the actual composition of their insurance policy along the several meeting between the parties so that the insured could assess themselves the adequacy of the cover. On the other hand, the advisors had no

41 Arbory Group Ltd vs West Craven Insurance Services (2007) Lloyd's Rep IR 491.
42 Jackson & Powell on Professional Liability and Synergy Health UK Ltd vs CGU Insurance Plc (2011) Lloyd's Rep IR 500.

reason to question such adequacy on the basis of the business information at their disposal. Whatever the outcome of the trial, this case was a watershed for the following litigations on BI insurance, since it made it clear that the obligation to prove the provided advice falls on the insurance brokerage firm, although sometimes such evidence may be hard to demonstrate.

The judgment on the “HIH Casualty & General Insurance Ltd vs JLT Risk Solutions Ltd” (2007) case was instead focused on the post-placement duties of an insurance broker and its relationship to two other components of the insurance supply chain, namely insurers and reinsurers. The cover at issue was characterized by high risk and high premium provisions and was thought by the brokerage firm for insurers and reinsurers who aimed at covering the production costs of three low-budget Hollywood movies. The problem raised when none of these films resulted successful nor profitable. In this case, the advisor has been judged liable for not having monitored properly the risk exposure of its clients, even when the failure of the film project became evident, the losses huge and hence the cover was inappropriate. Among the duties of an insurance broker, indeed, the continuous monitoring of its customers' position is as important as the primary advice. Not coincidentally, also in the Eurokey case the judge long investigated the broker's compliance with its monitoring duty trying to assess whether the advisor had lacked care when analysing the post-placement draft accounts periodically provided by the client. In 2014 the broker was finally acquitted for being, according to the sentence, a "mere postbox" for such documents, and not having any analytical tasks then. So, the final judgment differed from the HIH Casualty one; the reason lies in the fact the duty to monitor the after-placement position of the insured basically depends on the agreements concluded (and, hence, accepted by the intermediary) at the time of the primary drafting of the BI insurance contract. On the basis of these considerations, also the burden of proof of an improper monitoring activity moves towards the claimant's heads. In order to avoid nasty surprise and insidious future claims, brokerage firms will only have to be really thorough about the individual duties they agree to undertake in the first place.

Trying to apply these concepts to a Covid-19 scenario, some considerations can be made on the eventuality brokers became the target of damaged entrepreneurs’ frustration and claims. The advisors who got blamed for having not appropriately informed, advised or update customers about the availability of pandemic insurance provisions or about a renewed necessity of adjustments in their outstanding BI covers may rely on the expensive and specialist nature of such options and then challenge their adequacy to the client's needs. In the case this did not result enough, a detailed reportage of the given advice can represent the last lifeline at the brokers' attorneys' disposal, on condition that the monitoring and advising activity was actually properly conducted.

To sum up the above findings, the recent judicial history in matters of BI insurance first revealed that the amount of explanation owed by the broker depends on the client's level of sophistication and knowledge. Secondly, the post-placement monitoring activity includes a duty of care equal to that related to the initial advice, although this depends on the same primary agreements signed by the parties. In all cases, well-detailed documentation of each step of the advising activity is essential for the broker's interests self-protection.

3.1.2. The insurance broker

As largely predictable, the huge impact of the pandemic on the financials of many companies from each industrial field (except some tech and healthcare firms) has lead, and still does, a lot of entrepreneurs to arise claims on their insurance policies and to question their adequacy. What are the main lines of argumentation the parties involved are nowadays pursuing? On the claimants' side, policyholders are reclaiming the high and constant premiums paid for decades for BI covers, asking for equally important reparation sums. On the other side, policymakers tend to underline the specificity of today's emergency and, consequently, its prior exclusion from any provision subscribed. Their position is built on the traditional scope of a BI cover, which mainly consists of repayments in case of damages to the physical infrastructures the business is established on. To provide a practical example, the policy is triggered if a factory gets destroyed as a result of a natural disaster and covers the operational losses resulting from the period of inactivity of the structure. But like all insurance products, the BI contract includes a list of exceptions for which the cover does not intervene, and epidemics are usually enumerated among those. As it will going to happen in the post-Covid19 insurance industry, the advent of the Sars epidemic at the beginning of the century had already re-shaped the insurance products assortment, with the introduction of the first epidemic provisions, as the words of the Debevoise & Plimpton chair of the insurance regulatory practice, Eric Dinallo, reveal: "The insurance industry foresaw what we are seeing now. The insurance companies managed this exact risk and exposure appropriately."[43] In fact, at that time, insurers did not hesitate to give insureds the chance to purchase additional covers specifically thought to face the threat of future infectious diseases, although these solutions seemed to not meet the tastes of the demand and so felt into oblivion very soon. However, the prominent idea of the industry is that even if such policies had conquered the market, they would have never assured enough commercial protection against the devastating impact of Covid-19 on businesses profitability. "These covers were written to protect,

43 Source: www.ft.com

say, a restaurant against an employee getting norovirus, coming into the restaurant, spreading the norovirus around the premises and then the premises having to be shut for a period to be deep cleaned and the loss of business that would follow,”[44] says Huw Evans, executive of the Association of British Insurers. “Some people have argued they should cover a global pandemic which affects everything, but that’s not what these policies are for.”

Anyway, the issue is way more complicated than it might seem. Besides the fact that the above reasoning may potentially present a lot of exceptions, the claimants’ lawyers firmly object to the conviction according to which BI covers would have been inapplicable to the current pandemic-risk exposure. One of them is the Covington & Burling associate Ben Lenhart, who recently remarked his, and that of other insureds’ attorneys, position thereupon, by underlining once again his certainty on the effectiveness of such provisions in a post-Covid-19 loss scenario. Mr Lenhart and his colleagues aim at focusing their claiming strategy on a meticulous linguistic analysis of the provisions. Some of them do not seem to explicitly exclude epidemics and infectious diseases as potential triggering events. Again, details are going to move the needle.

3.1.3. BI provisions as pandemic-friendly covers, is it conceivable?

As previously reported, BI insurance was originally conceived to provide coverage against physical damages to business infrastructures and buildings. Logically reasoning, such structured policies may ensure the agreed reparation sums if a correlation between the coronavirus outbreak and eventual damages to insured properties was proven. As we all tragically know, a lot of governments ordered generalized lockdowns to contain the spread of the virus. The effective impossibility to visit and physically monitor the state of their enterprise properties, factories and headquarters could open a window for the insureds’ financial aspirations. Basically, this is what legal consultants are suggesting to policyholders who are intent on claiming. Nevertheless, the most scrupulous advisers also recommend entrepreneurs to carefully check their actual capability to raise claims on the basis of "non-damage denial of access" provisions, since these usually do not apply to mere physical damages emergencies. What is the insurers’ destiny, then? One viable option could be identified overseas, given that some US legislature decided to give priority to BI policyholders by forcing insurers to repay them for the damages suffered, but eventually assuring insurance firms of access to public funds. Nevertheless, an approach like this may encounter opposition not only from the whole insurance industry but also from the same regulatory authorities, in order to safeguard the financial

44 Source: www.ft.com

health of the sector and prevent insurance companies, especially the smallest ones, from ending up in deep financial distress. As it is evident, the many expectations and theories that surround the topic are children of the uncertainty of this time and, as such, are going to erupt into a huge number of lawsuits. To make matters worse, the complexity and the variety that characterize BI provisions, as well as the relevance of the reparation sums on the table, will make trials last for years (letting alone the huge legal costs insurers and claimants are going to incur).

Waiting to know the implications of the situation, policymakers are already trying to protect themselves from future unpredictable outbreaks by adjusting their policy assortment: the vast majority of the BI covers today available on the market include explicit exclusions linked to epidemiological plagues. This has led to criticism around the sector; insurers are blamed for having traced an excessively drastic line in their product structuring policy to avoid further pandemic-related claims starting from the very beginning of the epidemic. The same insurance brokers tend to recognize that today's insurance offer has been emptied of all those covers that constituted a viable solution against infectious disaster risks but at the same time exposed insurers to potential future costs. This vicious trend applies to all types of policies and both new and renewable contracts. The common fear is that, on the wave of the concern, policymakers could extend such exclusion beyond what is necessary. For instance, the CEO of Mactavish One insurance ordered to exclude from the assortment every single product that covered losses even indirectly attributable to communicable diseases. Others reduced to the minimum the "denial of access" provisions in their products to eradicate BI covers (and related claims) at the root. Such a reaction was initially triggered by the pressing requests by rating agencies and regulatory authorities for additional information regarding the industry's overall risk exposure to pandemic-related claims. That sort of dynamic, now spread far beyond Lloyd's area of competence, is potentially very harmful to the entire economic system other than deadly for the insurance sector. According to many UK insurance brokers, policymakers should keep alive each of their covers, to ensure the proper market coverage, maybe introducing higher premiums for those whose implications they are most worried about.

Anyway, these are the consequences of the industry’s immediate fear response, but long-term dynamics work differently and the insurance international offer is therefore likely to provide the demand with cover solutions that also apply to the pandemic risk. According to the already mentioned Mr Evans, “There is a need for a long, hard look at how we provide pandemic cover to businesses. What we need to do is look at whether there is a public-private partnership model, which would have to involve very significant state support to enable the provision of affordable insurance to businesses."[45]

Apart from the final outcome of the trials in matters on BI claims, the market generally predicts a widespread rise in policy prices, not only as a consequence of an increased demand from entrepreneurs seeking warranties and financial stability, but also as a strategy for insurers to recoup the enormous losses are waiting for them. Estimates indicate a minimum of $50 billion losses due to claim repayments of all sorts, including those ascribable to policies for executives' and directors' liability.

3.1.4. The burden to be a director in the 2020s

In the last period, many prominent figures of the UK economy and politics have expressed concern about the huge increase (more than 100%) in directors' salaries, an issue that is strongly correlated to the rising number of corona-related claims. Hiring or retaining directors costs more than ever because being a director could potentially cost more than ever nowadays. Since directors' fees are part of the insurance industry's production cost, the insurance of the future is necessarily expected to be even more expensive for the average consumer. According to the directors' point of view, the reason behind their increasing demand relies on the conviction that soon regulators will introduce provisions ruling that insurance executives are to be considered liable for the financial state of the company.

As already anticipated, firms usually resort to D&O covers and professional indemnities (PI) in order to protect their executives from being sued for decisions and strategies implemented collectively as a board. Nevertheless, such solutions are destined to be always more expensive and then unaffordable for UK companies, precisely because the same insurance sector is raising prices. We are going towards a dangerous vicious cycle that might seriously damage the smaller and weaker businesses, especially in a historical period when cash flows are universally reduced at a minimum. As happened in the US, also UK tribunals have been recently inundated with instruments of denunciation against boards' members coming from shareholders. This phenomenon did nothing but increase concerns over the personal liability of directors implementing decisions to face the financial distress caused by the pandemic; creating such unease among boards' members could further worsen the British economic landscape and eventually trigger high rates of insolvency within the most fragile businesses (e.g. aviation, food&beverage, lodging). To make things worse, the enhanced scrutiny firms are going to be subjected to is very likely to increase the demand, and price though, of D&O covers, which are

45 Source: www.ft.com

generally bought to make up to potential errors in regulatory compliance. While insurers vindicate the fairness of their covers' increased prices by referring back to the claim-related losses lastly suffered, companies from their side could react by opting to renounce insurance and bear the risk themselves.

In the meanwhile, the British government is continuously keeping in contact with the most relevant executives of the insurance sector to monitor such an unprecedented scenario. According to the UK Treasury, the department that traditionally represents the main government reference for insurers, a close correspondence with the industry is taking place “to understand what factors are affecting the availability, or increased premium price, of cover across sectors”.

3.2. Potential risks

3.2.1. Background and premises

After the economic disaster caused by the pandemic, companies turned an eye towards their outstanding insurance policies, trying to understand if such covers may constitute a source of partial recovery from the suffered losses. In those cases (a lot, actually) entrepreneurs realize to have few chances to get re-payed directly by insurers, the focus of their disappointment is destined to move towards their insurance brokers, who were expected to advise them properly and apparently did not. This is the reason why advisors’ compliance with their responsibilities is particularly under scrutiny in times of Covid-19.

As previously explained, insurance intermediaries’ main role consists of analysing their clients’ firm, business and sector, identifying the related risks and, in accordance with the client’s primary instructions, finding the best available insurance solution. This workflow is very fact-specific and does not follow standardized steps, if not the general rule of shaping the final outcome according to the circumstances. Depending on the case, the broker can be asked to provide a basic advisory service or a more complex opinion on the right scope of the insurance contract. Consequently, each of the current cases will be investigated individually to assess whether the intermediary should have included pandemic covers within its final proposal to the client. The only real guiding thread of all the potential roles undertaken by the insurance broker is the use of a reasonable amount of care in fulfilling such tasks.

The disappointed policyholder must be able to prove that its advisor had the duty to include a pandemic cover in the contract or at least to warn the client of the suitability of a similar cover to its risk profile. Once assessed the existence of the duty, to demonstrate one of these deficiencies is likely to be enough to make the court recognize the evidence of the broker's breach of duty. Nevertheless, the main prerequisite for these concepts to be valid is that the prior acknowledgement of the breached duty refers to very clear tasks and is in no way vague. For example, assessing that the broker was required to only provide advice on policies and covers that its client should have considered undertaking do not identify enough the extent of the broker's duty, hence it is not going to easily ensure the claimant of the required repayment sum[46].

However, even once the breach of duty is ascertained, the claimants' job is not over. Indeed, they will be also asked to provide evidence of the fact that, if well informed and advised by the broker, they would have had the possibility to buy the cover (against pandemic risk, in our case). This involves that the client effectively had the financial resources to afford such an expensive policy (pandemic covers are very specific and hence present very high periodical premiums).

Moreover, the claimant is supposed to also demonstrate that, at the time breach of duty occurred, the optimal cover the broker should have informed the client about was actually available on the market. Understandably, not many claiming businesses succeeded in getting through all these steps and consequently did not receive any compensation. Anyway, this might not be true in case the policy was undertaken from January 2020 onwards, when, even if remotely, Covid-19 started being a reasonable threat for market operators and businesses of all sectors.

3.2.2. Risk categories

Over the last months, many articles extensively discussed the risks of the pandemic relatively to the most various businesses. Differently, the insurance broking sector has not been investigated by such deep research and treated in such detailed reports and indeed it is surrounded by one of the poorest commentaries. Obviously, the same applies to BI covers in terms of wasted potentiality and operators' liability, despite the role they assumed in the context of the action[47] conducted by the FCA and Hiscox Action Group respectively with the purpose of providing legal and regulatory certainty around

46 The amount of money due to the claimant is generally equal to the sum of the totality of the suffered losses that the business would not have incurred in presence of an optimally structured cover.
47 See chapter 4 for the extended treatment of the case.

brokerage selection and consultancy activities and questioning advisors' responsibilities with respect to pre-pandemic exclusions and post-pandemic uncovered damages.

As can be easily imagined, some existing BI covers had, and have, the characteristics to face Covid-19's financial disruption, even though the majority of them were not built with the precise scope of covering businesses from the effects of infectious diseases. In other words, some covers for business interruption act as pandemic covers without actually being pandemic covers. However, as these first months are telling us, a heavy increase in claims against insurance intermediaries is highly predictable, given that the first response of any policyholder facing financial and operational issues due to the epidemic will be that of pointing the finger at its policy advisor. Even though, as previously explained, such actions might turn out to be hard to carry on successfully, at the same time the risks brokers could run are not to be underestimated. In comparison with a Court trial, policyholders willing to pursue claims against their brokers have the capability to undertake legal actions with relative ease by simply passing through the Financial Ombudsman Service, whose jurisdiction covers most of such initiatives.

However, the risks for insurance brokers cannot be reduced to those related to the moment of the placing of the policy. There are other risks connected to the pandemic outbreak that are likely to arise at a later time, namely:

- Operational risks:
  From the very first moment Covid-19 started affecting each aspect of our lives, also businesses, small and bigger enterprises, were forced to make disrupting and immediate operational changes in order to deal with the new economic environment. Every worker, except for some key executives, became familiar with remote working approaches from home. Brokers are not excluded from the list of *smart workers*. In order to ensure their businesses continuity, they will have to be good at collecting the necessary resources to fund IT platforms and systems that could support a whole workforce connecting and working from home. Moreover, such tech infrastructure must be built so that they can overcome the problem of ensuring timely notifications, otherwise both policyholders and broker themselves may suffer serious financial damages. Another massive challenge connected with remote working refers to issues of confidentiality and data exchange. Insurance consultancy, indeed, has always been based on a face-to-face approach towards both the chain extremes mediated, costumers and insurance market participants. Nowadays, such a personal relationship is no longer conceivable. This generates concern around the confidentiality risks brokers may run while exchanging private information and hard copy files, for instance. Moreover, since the most

scrupulous brokers used to rely on recorded conversations with their clients, now they will have to make it very clear to the counterparts the importance of transparency and accuracy in their correspondence (in terms of primary instructions and related advice provided respectively by the client and the broker).

- Advisory risks:

  Among the effects of the pandemic on the insurance market, there is certainly a steep increase in some key variables of the sector. One of them is the higher scrutiny of risks that actual and potential underwriters are going to conduct. Secondly, the insurance industry will offer the market higher-risk products, as a result of higher production costs and a renewed focus on the legal implications of this profession, as well as more restrictive wordings will flood the market. Given that such an environment will make placing risk much tougher for insurance brokers, the accuracy of the broker's advice, in terms of clarity in communication and personal enforcement (i.e. recordings of the meetings), will be vital.

  Among the things brokers should be concerned about, timing is probably the most important one. Insurers are going to over-scrutinise, by asking for additional information when necessary, each proposal to sign or renew policies. Specifically, policymakers are likely to pay particular attention to each client's position in matters of business continuity, and related likelihood to perceive it, and solvency capability. This trend is very likely to affect the amount of workload for insurance broking firms since they will have to assist insurers in collecting such additional data and information. To make things harder, in years to come, such an enhanced process will have to be conducted remotely, hence an increase in difficulties due to eventual inaccessibility issues (some data may be precluded to remote users). As a result, insurers, as well as intermediaries, might, and should, assess whether they need more time to finalise both first-sign and renewal contracts. In case they effectively opted to ask their clients additional time to best accomplish these monitoring operations, then brokers should consider whether an extension of the pre-existence cover is in their clients' interest. Moreover, it is crucial that insurance advisers bear in mind how important is that insureds grasp their duty of fair presentation, given that the data provided to the broker constitute the basis of the subsequent analysis and final advice, even though the business information is given on a "best estimate" basis because of the unavailability of any more detailed records. Insurance brokers, in fact, act on behalf of insurers as well as policyholders, then they must be considered responsible and eventually liable for any inaccurate data reported.

  Another point to be seriously taken into account coincides with the scope of the cover under scrutiny. As previously said, one of the effects of the hardening of the market is the increase in the number of restrictive policy wordings and, potentially, the related coronavirus exclusions. Again, brokers are always more likely to follow blindly their clients' instructions on how to manage policies and, possibly, re-shape and enhance them in light of the epidemical impact on the economic environment (i.e. D&O provisions and cyber-insurance covers). By the same token, advisers will have to be careful to properly compare the scope of new covers to that of pre-pandemic policies. Furthermore, heightened care must be taken when investigating cover-triggering events and, analogously, when identifying the scenarios that would exclude the cover. Finally, the policyholder must be very aware of the characteristics of the policy owned and, in that respect, it is the broker's job to explain to him how the cover works and to what extent it differs from the original one in terms of scope, risk coverage and triggering scenarios. Recording and taking track of the fulfilment of this last requirement of transparency might be crucial in view of future claims.

- Regulatory risks:
  In April 2019 the Financial Conduct Authority stated that, on occasion of the annual review of the wholesale brokers market, the entire industry would have been analysed on the basis of five aspects. The first, and most important one, refers to the system of compensation and incentives for market operators. The other four issues under the FCA's magnifying glass were identified into: governance and culture, conflict of interest, market abuse and, lastly, financial crime. In the current pandemic scenario, such scrutinising activity is going to become more overriding than ever, especially considering the substantial changes (both in business models and product assortments) that broking firms are undertaking nowadays, which requires regulatory authorities to be extremely alert. In particular, the FCA will likely address the current compensation trend consisting of intermediaries receiving fees from policyholders and, at the same time, demanding commissions from insurers.

To sum up, the coronavirus wave is having a huge impact on the insurance broking sector, as well as on everyday life. Brokers are potentially walking into many claims due to their pre-pandemic advice such as claims triggered by the current restrictive trend and today's impediments towards a clear communication and a transparent relationship with the client. Consequently, times of hard work are waiting for insurance intermediaries and in this context it is crucial to have a proper view of such a wider array of risks that might arise from now on.

3.2.3. Possible scenarios

Firstly, it is fundamental to underline that insurance broking firms are in a different position than that of a pure fall-back insurer, who simply guarantees the payment of claims arising from the absence of a proper cover.

The first scenario to be investigated refers to a situation where no BI policies are in place, due to the misleading, improper advice provided by the broker. In such a condition, it is up to the brokers to undertake an action of professional negligence by persuading the court that the impropriety of their advice is primarily attributable to a deceptive or too simplistic disclosure activity by the policyholder. Nevertheless, in the past cases where brokers' defence attorneys put in place a similar approach, the favour of the courts has generally leant towards claimants' arguments[48]. Such a defence strategy turned out to be ineffective in most of the cases where an insurance broker failed to recommend to its client to purchase a BI cover[49].

Another scenario refers to the circumstance where the intermediary has purchased, on behalf of the client, a cover for BI on certain terms the broker had found to be convenient or at least acceptable. If such a policy turns out, in the future, to be ineffective to cover damages, the policyholder can blame its advisor for not having recognized the impropriety of the terms agreed. This scenario recalls, for instance, all the trials undertaken as a result of policies previously purchased to cover infectious diseases (especially SARS) and now revealed as inappropriate to cover damages due to Covid-19. The defence strategy connected to this situation opens to very unexpected scenarios, given that it is not likely to run into circumstances where no insurance solutions existed, but, weirdly, this is what is happening with Covid-19 related claims. Within such a context, the evidence of what assortment of policies was actually available on the market at the time of the advice is going to be the key turning point of the trial. In case the claiming policyholder fails to prove the existence of an alternative, more suitable, cover at the moment of the purchase, then the court is very likely to support the view according to which a better BI cover[50], signed on the basis of the preferable terms demanded by the insured, could not be included in the brokers' advice, hence the risk and related damage could not be avoided, regardless of the intermediary's negligence. There is another possible defence weapon at the disposal of brokers indicted for improper policy placement or renewal. Indeed, undertaking alternative insurance policies, even if potentially more valid, may have entailed higher premiums which, at the time, could have been financially out of reach for the client. To provide a practical

48 Simpson, Professional Negligence and Liability (Chapter 10, paragraph 149) and Eagle Star vs Natwest Finance Australia (1985).

49 Simpson, Professional Negligence and Liability (Chapter 10, paragraph 255) and Charles vs Altin (1854) 139 ER 335.

50 The same applies to any even cancellation provision that does not cover the effects of the current crisis.

example, it is possible to mention the Dalamd vs Butterworth case (2018), where claimants winded up with a fistful of flies since it was proofed that, even though the brokers had not been in breach of duty for not advising on the availability of a rental income insurance policy, the client would not have accepted to pay such a high premium for such cover.

At this point, another question arises: would the alternative policy have responded to the particular claim in any case? At present, it seems that intermediaries have more possibilities to come out the winners by relying on a defence strategy based on the evidence that, in presence of cover, insurers would have made use of the right to repudiate their own liability, which is triggered by the breach of any relevant condition of the contract. This would mean that the damage suffered by the claimant is not directly attributable to the broker, or at least would have occurred even if the advisor had fulfilled all of its duties. In fact, the court is obliged to look beyond the current state of affairs, namely no BI cover in place, but instead must assess if a more diligent advisory activity could cut the policyholder's losses. From a legal viewpoint, if insurers could anyway exercise an exclusion clause that would have prevented the insured from being re-payed, then any correlation between the broker's breach of duty and the eventually suffered damage would fade away[51]. According to the sentence "Fraser vs BN Furman Ltd vs Miller Smith & Partners" (1967), the damage that hit the insured had to be investigated not only under the point of view of whether insurers could exercise the right to repudiate liability under the policy, but also through a mere probabilistic approach to assess with what probability the insurance firm would have opted to such loophole.

In the above-mentioned Dalamd case, Butcher J. agreed with the brokers' causation defence according to which the claim would not have ever overcome the alternative defence put in place by the policymaker. It was assessed that the broker did not fail to properly advise one client on the necessity of a BI cover but rather did when advising a second client on the appropriateness of lost rental income policy. Moreover, the policyholder claimed of not having been properly informed about its own disclosure obligations towards insurers before the first activation of the cover. The brokers asserted that the non-response of the policy was due to reasons for which they were not liable, specifically the client's breach of an external storage provision under which some items were to be stored internally. The claimant objected that causation needed to be proved and that there was clear evidence of the impairment of their chances of recovery towards policymakers, hence there was margin to question the ascription of liability. Moreover, the client tried to remind the court that it is an advisor's duty to absorb any kind of unnecessary risk, including that of unforeseen litigation. Nevertheless, such objection was promptly rejected by the court, which highlighted the correct structure of a causation

51 Simpson, Professional Negligence and Liability (Chapter 10, paragraph 262).

analysis, which develops in two main steps. At first, it must be determined whether the brokers' request of voidability of the policy, when affected by factors that are out of their responsibility, is juridically valuable and then can be accepted. Moreover, it must be assessed whether such valuation must be conducted through a purely legal approach or on the basis of probabilistic computation. The second stage consists of investigating the position of the insurer involved. The determination of the ideally correct course of action to be put in place by the insurer depends on a “loss of a chance” approach.

What was ruled in the Dalamd case is likely to act as a general guideline for all the similar circumstances to come, especially for the identification of the question of causation, for example those concerning the availability of an alternative defence that may let insurers evade a BI policy.

It is also noteworthy the eventuality that the claiming client may have interfered with the chain of causation in other unpredictable ways, so that the intermediary shall not be held liable for the suffered damages.

However, how can we determine whether the loss (and in what measure) is directly attributable to the insurance broker? In this respect, it may be useful to recall the 2007 sentence “Arbory Group Ltd vs West Craven Insurance Service, where the insurance broking firm was sued on charges of being responsible for the economic damages following a fire that resulted in the liquidation of the subsidiaries and for which the policyholder was not adequately covered. The sentence referred back to the case “South Australia Asset Management Corp vs York Montague Ltd” (1997) in order to evaluate the extent of the loss for which the advisors could be considered liable. The final judgment stated that they were to consider liable for having failed in recommending to the client a proper BI policy that could prevent the policyholder from finding themselves underinsured. The court based its judgment on two main considerations: 1) firstly, it was up to the policyholder to make evidence of the broker’s duty and the correlation between such duty and the type of loss that was suffered; within the context of the Arbory trial, what had to be determined concerned the degree of the advisor’s negligence and, more specifically, the effective possibility according to which the broker could have predicted the occurrence of that specific loss and hence obtained a more adequate BI cover on behalf of the insured; 2) secondarily, the investigation should move on the damage and its real cause, so that it could be assessed whether the loss is attributable to the breach of the above-mentioned duty.

Again, such considerations developed as part of the Arbory sentence are likely to constitute the juridical pillar the coming sentences on BI claims are going to be based on. In particular, the most important heritage such case provided consists of the following arrangements:

- BI cover is a fundamental component of a business insurance policy as it comprehends all costs arising from incidents that result in losses of business opportunities or affect the normal production capability.
- Unlike other similar provisions, the BI clause acts by injecting additional liquidity into an ongoing activity to preserve its ability to make a profit.
- BI insurance is designed to take the insured business back to fully operativity as soon as possible.
- Policymakers generally recommend over-insurance.
- In Arbory case, the broker's duty was recognized in that of identifying a BI cover that could enable the damaged business to recover and record the pre-incident margin of profit. BI insurance was to take out in addition to the insurance traditionally designed for the material damages caused by the fire, such as PPE destruction.
- The liability related to the failure to provide adequate cover was considered to be reasonably predictable, whilst the same does not apply to the consequences of the incident on the business profitability.
- In case the broking firm had recommended a proper level of BI cover, the insured businesses could have drawn enough financial resources to trigger the quick re-activation of production and trading operativity. Due to the intermediary's negligence, the subsidiaries were forced into liquidation and, consequently, the desired pre-incident level of profitability could not be pursued.
- The advisor had the duty to understand the nature and stage of evolution of its client's business and so deduct its risk exposure as well as the consequent need of a BI provision to face potential eventualities of temporary or permanent business stoppages.

In conclusion, the court sustained the claimant's view according to which the extra-premium a more adequate BI cover required was not unaffordable for the business financial resources, then there was the real possibility for the losses to be promptly and integrally recovered.

As ruled by section 13A of the 2015 Insurance Act, this case did not fall within the situations of a claimant demanding the recognition of damages for the late payment of damages, given that the insurer had fully and promptly complied with its BI-derived obligation of repayment. Indeed, the case revolved around a charge of under-insurance. In absence of under-insurance, in fact, the insured would have fully received the agreed repayment and this would have been enough for its business continuity purposes. Nevertheless, according to the final judgment, the claim against the broking firm was not to be restricted to the hypothetical amount due to the insured had an adequate cover been in place, but it also included compensation for loss of profit opportunity. Such amount was computed on the basis of the earnings the business would have potentially produced in case business continuity had been preserved. Obviously, this resulted in another issue, the one concerning the assessment of damages to be attributable to the missed profits, which had to be forecasted themselves.

Another point that the court judging the Arbory case took into consideration concerned the claimant's potential contributory negligence. In this sense, what needed to be considered was whether the insured itself had somehow caused the loss or, alternatively, had been careless in promptly realizing that the relevant sum for which BI cover was in place was inadequate. This second possibility mainly dealt with the moment of the renewal of the policy, when the policyholder, basing upon the updated notes provided by the insurer, had the chance to re-assess the adequacy of the contract to its industrial needs. In Arbory, the crucial factor was the identified consequentiality between the broker's failure in its duty to explain the concept of "insured gross profit" to the client and the insured's incapability to grasp it. This was key in bringing down the broker's attempt to invoke contributory negligence. The advisor's attorneys tried to pin the blame of underinsurance on the insured, but relentlessly collided with the same reason why brokers are usually hired, that is providing the client with professional support so that some specialistic concepts (including insured gross profit) can be better understood. Therefore, it can be easily ascertained that, wherever an insurance broking firm lacks care in adequately advising a client in a matter of under-insurance, the eventual judgment will tend to recognize the broker's liability for the damage and, hence, will be very likely to support claimants' arguments.

At the current stage of the pandemic, it is not completely clear yet how damaged insured are going to enforce their Covid-19-related claims. Nonetheless, according to the considerations just made, it is possible to easily predict the outcome of all the cases dealing with brokers who failed in properly informing the client about the characteristics (and limitations) of its cover and the foreseeable scenarios in case of infectious outbreaks. With such premises, it is highly difficult to imagine that the claimant might be held liable for having misunderstood a technical provision and underrated the related implications. Anyway, within the framework of a judgment on causation and contributory negligence regarding pandemic-related claims, very sophisticated and qualified clients may represent an exception to the above-described claimants-friendly trend. Moreover, in this regard, the determination of the extent of a broker's duty is going to represent a very relevant factor for tipping the balance in favour of the indictee.

Despite the predominant halo of juridical uncertainty surrounding the topic of broker's negligence in times of Covid-19, there have been hundreds of notifications on BI covers seen as very likely to be contested. Also, brokers are delivering several notifications on their PI policies facing events that may escalate into claims. To sum up what extensively described above, with respect to advisors' prospects of having their defence arguments recognized by the court, any causation and loss trial will be very fact-specific, hence the conclusion highly variable. Specifically, advisors' chance of winning will be very affected by their capability to prove that no covers that could absorb the effects of the pandemic were available for purchase at the time of the advice. As an alternative, brokers may rely on their client's incapability to afford the high premium a more adequate cover would have required. Nevertheless, whenever such arguments failed, the case law records a high incidence of succeeding claims for BI covers as a result of the direct liability of brokers for under-insurance, which is generally reflected in the insured's inability to pursue "normal" financial performances.

3.3. How to face pandemic-related claims in the near future

3.3.1. UK insurance between overseas inferences and future prospects: an insider's testimony

In order to better determine the future prospects of the UK insurance industry, especially in juridical terms, it can be useful to look at how other countries are dealing with the impacts of the pandemic on the sector and with the consequent claims. Being the UK law a unique reality as a result of its common-law approach, only looking at equally stand-alone contexts can be meaningful for the purposes of our analysis. In this respect, the US judicial system works very similarly to the British one. Over the last months, the US lawmakers took into consideration the possibility to enact specific laws that force insurers to pay for every pandemic-related claim. Such a strong position may have a strong influence on worldwide insurance industries, including Lloyd's market.

Gavin Coull, executive director of London FOIL and associate at EC3 Legal, expressed himself on this topic and confirmed that almost the totality of the states opted for such a retroactive cover. According to him, this trend falls within the framework of progressive de-privatization of insurance that should turn the sector into a form of public sector. This trend is going to strongly hit the cumulate resources of the industry, especially in case some state decided to mandate the financial impact on direct insurers and re-insurers. Moreover, such a disruptive review of the insurance system is likely to affect the risk tolerance of insurers given that many might be unwilling to subscribe US property and BI covers. Only time will tell us whether US insurance will survive these implications (even if substantially re-shaped) or not. Coull's words are very indicative in this direction:

"Without a doubt, this could go all the way through to the Supreme Court as a constitutional issue as it would be such a wholesale change in established law. I would not be surprised to see at least one state try to put it into practice as there is so much political pressure to find the solution. And while insurance is a potential solution to pandemics, I do not think this is the right way to do it. It will be challenged without a doubt, but it will likely lead to a similar discussion as over here in the UK, as to whether something akin to Pool Re or Flood Re is possible on the pandemic side. In my view, the industry should not be charged with resolving what is a worldwide pandemic, which calls for a governmental response in place of an insurance or reinsurance response."[52]

Remaining within the context of the international implications of such changing legislation, plenty of disputes dealing with re-insurance policies will arise, on the grounds of mid-term changes to a direct insurance contract. If, on the US side, there are no doubts about how costly this will be for the smallest local insurers, on the UK side, it is still unknown whether such changes are going to restrict Lloyd's field of operation. The likelihood of this scenario will revolve around one question: do the operators who are authorised to write policies in a certain country have to fully adhere to its rules and laws?

To be specific, the financial implications of this legislation are going to particularly interest any insurer (or re-insurer) who is even partially exposed to a US PD[53] risk. Moreover, the innovative US choice to make insurance a more public sector may act as a bandwagon for other countries, including the UK, seeking political purposes, even though Coull is doubtful about this contingency. In his opinion, indeed, it is very unlikely that such a governmental interference on the insurance market may ever sound attractive to an overseas audience.

The US potentially mandating coverage threatens to aggravate insurers' tendency to tighten policy wordings up. However, Coull seems to be optimistic about the post-pandemic scenario of the insurance industry. In his opinion, the survival of the sector mainly depends on the capability of the insurance operators to re-invent their range[54] of policies and extend their coverage to more risk categories.

52 Source: Insurance Business Mag.

53 The acronym stands for "probability of default".

54 There is an ongoing debate about the growth potentiality of parametric insurance, but most of the literature expresses concerns about such bespoke coverage solutions because of the little demand and poor performances collected in the past.

Consistently with our observations up to now, also an insider of the sector like Coull underlined the importance of transparency in brokers' future pieces of advice and the need to pursue a full and constantly active communication in the relationship with the insured. Obviously, this concept is true for brokers working with both the insurance and the re-insurance industry. Moreover, it is vital for advisors placing covers on behalf of their clients to carefully consider all the available alternatives so that the adequacy of the advice can be better assessed and their compliance to the duty of care gets hard to be questioned. As well as insurers and re-insurers are used to be condemned for their apparent unwillingness to pay for claims, at the same time also the brokers' compliance with their responsibility is currently under the microscope of the market. Coull's words about the potential reputational impact of the crisis on the whole sector go in this direction:

"My take is that the insurance market has reacted very well to the crisis. Certainly, the market view has always been that if there is a covered claim then we will pay it. Industry bodies have responded appropriately and managed expectations correctly and I think it would be very unfair for the reputation of the industry to be tarnished because insurers are not paying out for claims they should not have to pay out on. In a rational world, insurers are doing exactly what they are meant to be doing, which is paying valid claims while at the same time responding to changing market conditions."

3.3.2. Other professional feedbacks

As formerly investigated, nowadays brokers' main concern is that those clients whose business has been damaged by the coronavirus epidemic may sue them on the charge of having provided inadequate cover for such scenario. In particular, this contingency revolves around BI covers, generally dealing with the risk of property damage, whose correlation with the outbreak of the virus is highly debatable. In this context, insureds are seeking additional insurance solutions that could preserve their business operativity from a potentially long period of inactivity and ensure them with pre-pandemic levels of profitability.

Intermediaries are very free-standing professional figures within the insurance world; hence their risk exposure is unique and must be treated differently than that of the other insurance operators. Most of the policyholders got surprised by the financial distress their businesses went through since they felt safe under their covers, unaware of the exclusions included in such contracts. This problem is not only typical of BI policies, but also involves other uncovered areas, such as that concerning damages for travel cancellation.

On this matter, it is useful to look at the testimony[55] of two associate partners at the UK law firm Reynolds Porter Chamberlain, namely Richard Booth and Tim Bull. Below are the words they respectively used to frame the question regarding the risks borne by insurance brokers and intermediaries.

“Clients with these kinds of policies are now going to be turning to their broker and asking whether there is cover, and if there isn’t cover, why not? The risk to the broker" Booth affirmed, "is that they will be exposed to criticism that they haven’t properly advised their clients about the scope of cover within the policies that they have, or indeed that they don’t have.”

Bull’s considerations go in the same direction: “We are hearing at the moment, at least anecdotally, from our insurance company clients but also from the placing brokers we work with about a spike in contact, if not outright notification from brokers, who are being contacted by their clients who are asking whether they have certain cover.”

Another crucial point in any BI negligence claim involves the broker’s degree of understanding of the risks they embrace. It seems obvious that this issue loses most of its relevance if applied to the bigger UK and international insurance broking players, whose large risk management departments, often assisted by legal consultants and insurance lawyers, are very unlikely to develop an insufficient understanding of the threats potentially arising. Contrarily, the more local intermediaries are more subject to misinterpretations or underestimations, as confirmed by Bull’s recommendations: “I think the smaller brokers are ones which may not fully appreciate that there is an issue, but it’s wrong to generalise because I know some small brokers who are absolutely on top of these things. And brokers specialising in placing certain types of risk such as all-risks commercial policies, including property and business interruption, should be aware by now that there are potential issues arising out of the pandemic.”

About the likelihood that a broker sued for negligence may finally be forced to re-pay the claimant, we already explained why this closely depends on the argumentations that the parties intend to pursue. Nevertheless, in the very first stage of this legal battle, a dynamic of speculative litigation will prevail, given that many obstacles will initially prevent insureds from convincing the court of the brokers’ liability.

“The liquidator will have to show that the broker was in breach of what a reasonable broker should have done at the time, and also that the insurer and the cover were available. Were the insurers offering cover for pandemics or were there exclusions that did not include COVID-19, which

55 Source: Insurance Business Mag.

arguably is a derivative of SARS, which was a general exclusion in many policies. And if the cover was available would the policyholder have bought it before they went into liquidation?", Bull wondered.

Despite the huge amount of claims insurance advisors will have to face, when looking at the legal dynamics underlying such trials, it turns out that brokers themselves will rely on an equally high number of defence weapons. In the UK context, emphasis will be on policyholders' hypothetical unwillingness to buy more expensive alternative policies. Mustering the speed at which a remote epidemic turned into a business-disrupting pandemic may represent another popular defensive strategy.

Apart from the legal loopholes at brokers' disposal, there is no doubt that every insurance advisor has a moral obligation to learn the lesson of these times and this will result in an increase in notifications and in enhanced controls to make the advice as incontestable as possible. And this is especially relevant because the damages and losses insurance broking firms are going through will be very hard to quantify in the short run, also because of the overall uncertainty surrounding the government's long-term bailout[56] initiatives. Indeed, according to Booth, "another key issue when claims start to be advanced will surround how to properly quantify a client's loss, there's going to be a lot of debate around the government's response and whether clients have mitigated their losses by taking the benefit of the different schemes available. So we must wait to see how these claims, as and when they arrive, will actually be formulated and how sustainable they are."

Another issue previously treated is about how, in the following years, brokers' business models and cover engineering procedures will capitalise today's heritage. Tomorrow's advisors will be mindful of the threats connected to bad policy placement and the risks arising from an infectious outbreak. The above-mentioned enhanced controls will not only involve BI covers and contingency risks, but will be also extended to policies of other kinds and the related potentially relevant exclusions.

In this regard, Bull recommended that "what brokers should then do is consider if this can be improved upon, and discuss with the insurers that they place businesses with what can be provided. Insurers, of course, are going to start reviewing cover and the brokers have to try either individually, if they're powerful enough, or in a coordinated fashion, to ensure that policy coverage is as wide as possible."

56 Such initiatives, also known as "capital injections", consist of significant provisions of money or resources to failing companies or, in general, firms belonging to a distressed system, aiming at preventing them from collapsing. These interventions, which are usually pursued by governments, individuals or other businesses, can take the form of loans, cash injections, purchasing of stocks and bonds. The eventual reimbursement depends on the terms of the bailout.

All the advisors that will not be able to properly manage such a wide product assortment, at least, will have to reduce their overall risk exposure by giving priority to the client's full understanding of the available policy in terms of scope and price. The insured must be unquestionably satisfied with the purchased policy, but it is equally important that the conversations proving such appeasement are clearly recorded.

It is quite unlikely that a broker fulfilling all these precautions may be held liable for negligence, provided that the advice at issue was correct. It is therefore vital, even for a small insurance broking firm, to rely on small risk managements devices that may substantially limit the risk exposure of its operators.

4. CHAPTER 4

The global disruption caused by the Covid-19 outbreak resulted in thousands of businesses forced to close down for not being able to recover after suffering huge financial losses. Such sad economic implications have coincided, for policyholders from each corner of the world, with increasing claims, especially in the field of BI insurance. In the previous chapter, it was explained how this phenomenon generated many concerns in terms of legal clarity and regulatory uncertainty.

These issues have been globally regarded as a serious threat for the future of both policyholders and insurers, whose professional relationships were (and still are, partially) in danger of being damaged by an excessively confusing, if not missing at all, legislation. Basing on these assumptions, in the UK, the Financial Conduct Authority (FCA) applied to the High Court, as part of a test case, with the purpose of securing for the entire insurance system a definitive certainty in matters of BI contracts ad claim validity. On the occasion, the regulatory authority represented the interests of UK policyholders, and the whole judgment was based on a representative sample of wordings. The sentence issued by the High Court was eventually followed by a leapfrog[57] appeal to the Supreme Court.

On last 15 January, the Supreme Court delivered its judgment, according to which policymakers' appeals were dismissed in favor of FCA's arguments. This decision resulted in many insurers forced to pay back their customers claiming for BI losses due to the Covid-19 outbreak.

Besides the arguments of the two opposite parties during the trial and its final outcome, the sentence finally had the desired effect: both the insurance industry and the related consumer market were provided with a proper amount of clarity about the effectiveness of covers and the validity (and outstanding sum) of BI claims.

57 A leapfrog appeal is a special form of appeal where the parties appealing to a High Court’s decision do not pass through the Court of Appeal but go directly in front of the Supreme Court.

4.1. FCA vs Arch Insurance: events behind the quarrel

4.1.1. The story

It is March 2020, the coronavirus disease has just reached the western world, including Great Britain, Northern Ireland to be specific. UK Prime Minister Boris Johnson has ordered that all dining activities be temporarily closed, aiming at arresting the spread of the virus. In Belfast, among the impacted restaurateurs there is Daniel Duckett, whose bakery and café "The Lazy Claire Patisserie" is about to celebrate its two-year birthday. However, no party will be celebrated, given that in June The Lazy Claire's doors are still locked down.

"We followed the advice; we believed that was the right thing to do and that was what was mandated,"[58] is Duckett's complaint.

The owner has one comforting awareness, anyway. Some time ago, he has entered into a BI policy, that should provide cover for financial losses due to unpredictable events, which the activity cannot be held accountable for. Duckett's personal battle begins here.

The outstanding amount of the above-mentioned insurance should be equal to £100.000, but, after some weeks, such compensation is denied. The insurer, namely Hiscox, justifies the denial by asserting that a pandemic was not included in the bunch of triggering events for which its BI insurance ensures coverage. This forced Duckett to buy new debt just some months after having paid off his primary loans.

Nevertheless, Mr. Duckett's vicissitudes did not represent an exception in the 2021 UK insurance system. After ascertaining the presence of several other entrepreneurs whose Hiscox's BI covers had resulted to be ineffective against the pandemic effects, he became one of the founders of the Hiscox Action Group. The group was composed of 750 "Mr. Ducketts" who banded together to invoke their rights against the insurance firm and even demand additional repayments on the basis of the suffered damages.

58 Source: nytimes. com

4.1.2. Policyholders' side

A large part of SME insurance contracts is built on the concept of property damage and simply provides cover for BI losses due to traditional forms of property damage. However, there exist some less conventional policies that provide for potential compensation in case other events occur. These contracts generally include "disease clauses" (trigger: notifiable infectious disease) and/or "prevention of access clauses" (trigger: public restrictions and any governmentally imposed closure). Some insurers acknowledged their liability under such conditions, others did not and challenged customers' requests. On the opposite side, policyholders claimed about the unclarity of their covers, which had resulted, in their opinion, in a commonly shared confusion.

As already stated, the FCA's prime purpose was that of solving once and for all such contractual uncertainties for the highest number of counterparties of the UK insurance market. With this in mind, the regulator referred to a representative sample created by collecting 21 different covers designed by 8 different policymakers. Again, the FCA took the responsibility, during the proceeding, to be a voice for the damaged policyholders and to represent their interests with a view to the collective benefit. When the action was about to start, the FCA estimated that the effects of the judgment would have impacted 370.000 policyholders owning 700 different kinds of covers and about 60 insurers would have been interested in the sentence.

4.1.3. Lloyd's of London's side

Already in past years, the insurance world had been heavily hit by tragic events or natural disasters. 2005's hurricane Katrina[59] and the terrorist attacks in 9/11/2001 are the most representative examples of this. But, according to Lloyd's CEO John Neal, the Covid-19 outbreak is bound to surpass (by far!) these two major events in terms of financial losses reported by the whole insurance machine. "Coronavirus outbreak is no doubt the largest insurance challenge the industry has ever faced, I think by some way. You are into tens of billions, if not hundreds of billions of loss that will be discussed over time,"[60] he observed. And also, "the chances of the market making anything other than a notable loss in 2020 are zero" he correctly anticipated.

59 To give an idea, Katrina's financial impact on the insurance industry, in matters of pay-outs due to policyholders, was estimated to be around $50 billion.
60 Source: ft.com

As a consequence of the pandemic, insurance firms were unquestionably forced to pay for a wide range of policy types. Event cancellation covers and management liability insurance, above all. The same does not apply to most BI policies, whose extent of coverage was very likely to be objectionable. Apart from the huge pay-out sums, Lloyd's of London's top management immediately appeared concerned about the need to refund insurance premiums in response to the industry downturn. This implied great amounts (millions of pounds) of premiums to be paid back by insurers.

When the Hiscox Action Group was constituted and its components appointed the law firm Mishcon de Reya to manage the whole proceeding (also, a litigation funder had been initially contacted for financing purposes), Hiscox insurers cautionary recused themselves by claiming the incompatibility of their BI covers with pandemic events, at least in the ambit of SMEs. As an official response to customers' attacks, Lloyd's of London communicated its willingness to cooperate with the UK insurance industry, comprehensive of customers and regulators, to get to a quick resolution.

A 2016 law already provided for claims related to insurers' late payments, even though, up until the outbreak, there is no record of successful late-payment claims. Nevertheless, just after the constitution of the new action group, some lawyers warned insurers about the possibility that things might change. The hypothesis of a truly successful claim for late payments "it is a risk that insurers should be taking into account,"[61] according to the lawyer Richard Mattick, from Covington & Burling. This and several other warnings drove Lloyd's CEO to urge its colleagues to take into serious account the problem of BI claims. To prevent this issue from recurring in the next years, Neil opted to put aside £15 million to invest in research to shed some light on how insurers could approach epidemics and similar events in the future.

4.2. Early developments and first judgment

4.2.1. The precedent: Orient-Express Hotels vs Assicurazioni Generali s.p.a.

In 2010 the sentence on the case Orient-Express Hotels vs Assicurazioni Generali s.p.a. had analyzed the terms of a BI insurance cover. In this specific trial, the triggering case coincided with the

61 Source: ft.com

tremendous impact of the hurricanes Katrina and Rita on the city of New Orleans, more specifically on the claimant's hotel activity.

In that case, the interruption of the hotel business had been due to a couple of primary factors: the physical property damage and the closure of the whole New Orleans to external visitors. By contract, the extent of the BI cover referred to any interruption “directly arising from damage”, intended to be damage to the hotel itself or any other direct physical loss destruction.

However, few doubts arose on the effective presence of huge physical damages to the structure and their direct implication in the interruption of the activity. Actually, the problem centred around the additional losses flowing from such a business interruption.

The insurer involved in the case, namely Generali, denied any kind of indemnity and eventually undertook an arbitration procedure. According to Generali’s lawyers, by contract the policyholder only had the right to be compensated for the losses which had not arisen “but for” the mere damage to the structure, and, given that the damage to the entire city represented an alternative and more relevant trigger, no indemnity had to be ensured on the basis of the BI provision of the policy. In other words, hypothetically, even in the absence of any physical damage to the hotel structure, the activity would have been locked down as the result of the damages suffered by the entire city of New Orleans.

The Court of Appeal took charge of investigating whether the "but for" test suited the situation or not. This case was indeed characterized by two alternative and completely independent potential causes, one of which was included in the terms of the BI cover and the other one that was explicitly excluded.

Appeal’s outcome was based on the difference between independent and inter-dependent concurrent triggers. If in the case of two inter-dependent causes the "but for" test appeared to be properly valid, the same cannot be said for causes that are regarded to be independent one to the other.

Finally, Mr. Justice Hamlen established that this did not constitute a situation where, due to lack of reasonableness and fairness, a "but for" test seemed necessary. On the contrary, after going through the terms of the policy, the judge detected nothing else than clarity and exhaustiveness.

4.2.2. The legal battle at the High Court

On 15 September 2020, the High Court issued its sentence. Even though most of the declarations related to the judgement were eventually replaced by the Supreme Court's sentence, some sections of the High Court's outcome were not appealed and can be therefore considered on a par with a sentence of the last degree of judgement. In general, the High Court had provided a complete resolution of the issue but, because of an overall disagreement between the parties, both policymakers and customers (represented by the FCA) directly appealed to the Supreme Court.

During a fast-track appeal to a previous verdict from the High court, insurers' defendants contested the decision (which basically accepted all claimants' requests) by leveraging on the cause and computation methods of financial losses. In response to this, the regulator brought in front of the High Court a test case in favor of several BI policyholders whose rightful pay-outs were never delivered due to strict policy interpretations. The Court sided with the FCA and related damaged consumers assessing that both the Covid-19 pandemic and the public restrictions constitute a "single and indivisible" source of loss or at least a set of jigsaw pieces that compose the final picture. As a consequence of this decision, thousands of covers would have been triggered.

Initially, the FCA had approached the proceeding by arguing that those policymakers demanding proof of local disease cases and sustaining that policyholders' activities would have incurred losses in any case were denying a sort of common sense. On the other side, insurers' lawyers made fun of the FCA's argument; Argenta's defendant Simon Salzedo openly declared that the idea of an indivisible cause of loss looked like a huge leaf and a "euphemism" being used by the claimant to obscure the substantial weakness of its arguments. Similarly, Gavin Kealey, MS Amlin's legal representative, with regard to the opponent's position expressed himself as follows: "The idea that there is one indivisible cause of business interruption losses and […] cases beyond a 25-mile radius are somehow harvested does not work as a matter of logic. The jigsaw allusion makes no sense. The two metaphors are not even compatible with each other. A jigsaw is divisible into separate parts […] causation generally runs in chains not in jigsaws."[62] From Kaeley's point of view, the covers were specifically designed to ensure coverage only in case an infectious disease started spreading within a certain geographic area: "My illness is not your illness, my pathogen is not your pathogen. Distinctions are required to be drawn […] that dispatches the FCA argument of indivisibility. The idea that there is one indivisible cause of business interruption losses and […] cases beyond a 25-mile radius are somehow harvested does not work as a matter of logic."[63]

In accordance with Mr. Kealy's opinions, all defendants pointed out that, in order to better assess the entity of the loss, one should have pretended the risk was not covered at all by the policy. In case the insured risk was identified in a simple disease being localized in a small area, then all related claims

62 Source: ft.com
63 Source: ft.com

would be reduced by a widespread trend of decreasing earnings due to public restrictions. In this respect, they mentioned the Orient Express case, which resulted in the Court only recognizing the damages due to the two hurricanes, excluding any other implication of such catastrophes in the tourism in that area.

In the period of the proceeding, other insurance lawyers, not directly involved in the trial, tried to encourage the claimant to change its strategy and focus on different aspects. Instead of keeping on highlighting the indivisible nature of Covid-19 disease and restrictive measures, the FCA should have suggested the idea of these two factors as distinct but concurrent causes of financial losses for policyholders. Among these external observers there was the law firm Brown Rudnick's partner Ravi Nayer, who used to insist that "if the Supreme Court won't accept the High Court's approach to causation it might still uphold the decision by applying an alternative concurrent cause approach."[64]

4.3. The sentence: logics and implications

4.3.1. The Supreme Court's final judgement

It was on 15 January 2021 when the Supreme Court finally submitted its decision of the appealed High Court's judgements. In the sentence, references to the interpreting rationale of the previous grade are evident. On the 21 BI contracts constituting the FCA's representative sample, in 13 cases the Supreme Court's interpretation of contractual provisions coincided with the appealed one. In addition, this last juridical outcome took into account whether the presence of Covid-19 cases in or in proximity to the activity could be identified as the primary cause of losses.

The entire sentence is quite long (112 pages) and complex as several issues are treated in it. However, the main points and implications can be explained as follows.

On behalf of damaged policyholders, the FCA contended that the disease and prevention of access provisions the sample of 21 different insurance contracts included had to be considered as covering customers from the effects of the coronavirus epidemic; hence, the outbreak needed to be treated as the trigger for the overall financial losses their businesses reported.

64 Source: ft.com

Similarly, September 2020's High Court verdict had indeed ruled that 12 (one less) policies, designed and sold by six different insurers, out of the representative sample provided cover, pursuant to the same just mentioned disease and prevention of access clauses. In other words, the damages for business interruption were to be addressed to the lockdown measures and, more generally, to the public and social response to the coronavirus pandemic. The six policy issuers appealed High Court's decisions for 11 out of the 12 contracts involved. The Supreme Court, in January's sentence, dismisses defendants' appeals, but on a different basis than that of the High Court.

According to the Supreme Court, covers are triggered in any case of partial (or fully, obviously) business closure as well as in the case of a mandatory instruction of closure, even if not legally binding. Basing on these assumptions, the fact that losses would have occurred anyway as a result of the pandemic cannot be singled out for reducing the amount of a valid claim. Moreover, as anticipated, to the 11 policy types involved in the appeal the Supreme Court added two more policies (issued by the insurance firm QBE UK) deemed to provide effective cover. Consequently, much more customers were entitled to demand re-payment sums from their respective insurers.

To be more specific, the 8 insurers involved in such sentence, as they previously accepted to take part in the FCA's test case, are those listed below:

1. Arch Insurance UK Ltd
2. Hiscox Insurance Company Ltd
3. MS Amlin Underwriting Ltd
4. Argenta Syndicate Management Ltd
5. Zurich Insurance Plc
6. Royal & Sun Alliance Insurance Plc
7. Ecclesiastical Insurance Office Plc
8. QBE UK Ltd

The sentence is also a source of juridical guidance in the eventual interpretation of comparable insurance wordings, clauses and related claims. In particular, this judgement can be recalled in any other trial in the UK, clearly including Scotland and Northern Ireland, by authorities such as the Financial Ombudsman and the same FCA, when judging on claim fairness. Nevertheless, the sentence does not provide certainty in matters of payable amounts in any individual case but gives insurance parties the basis for doing so themselves.

4.3.2. The meaning behind the sentence

The Supreme Court produced, by definition, a truly end legal document which rules irrevocably not only the 14 policy types and the six issuers involved, but also a much larger number of wordings that will be eventually considered similar to these and therefore will be the object of undoubtedly successful claims. In other words, the legal action the FCA undertook on behalf of policyholders was intended to have the effect of relieving many future insurance customers from the burden of an individual proceeding against their policymakers, which might be unaffordable for most of them. The regulator basically provided the whole community of policyholders with an expert (and expensive) legal team, aiming at solving once and forever the issue of legal uncertainty about BI covers.

Nevertheless, it should be underlined that the FCA's action was not meant to get to the bottom of all possible disputable issues but just to shed some light on the above-mentioned themes, cover extent and the causation topic to be specific.

After the Supreme Court's judgement, it is or will be up to insurance firms to get in touch with all affected customers to comply with their new re-payment commitments. On their side, policyholders entertaining any doubt on their rights can always turn to their insurance broker or insurer itself. In case of further disappointment by the insured, the next degree of judgement is represented by the Financial Ombudsman Service[65], which usually deals with unresolved individual disputes.

4.3.3. Main implications

First of all, with the Supreme Court January's judgment, it can be easily asserted that the primary objective of the FCA's class action, namely more clarity for the parties involved in BI claims, has been achieved. To get this accomplished, all parties, both claimants and defendants, closely cooperated to get to a fast resolution of the proceeding. Even insurance firms, indeed, estimated that paying more insureds would have been still more convenient than incurring further legal expenses for protracted or emerging disputes.

65 Instituted in 2000 and statutorily empowered in 2001, the Financial Ombudsman Service's role is to provide consumers e importance of these documents consists and financial institutes with an alternative system of dispute settlement.

For its part, the FCA, throughout the next months, will keep on cooperating with the parties involved in the case and the Supreme Court itself, in order to facilitate the issuance of the declarations[66] following the sentence.

The judgement, however, is poorly effective for all SME holding very basic and standardized covers for property damages or, in the alternative, BI wordings whose trigger is merely identified in direct consequences of property damage. In such cases, insureds are highly unlikely to get re-payed for Covid-19-related losses.

On the other hand, all those customers owning BI policies that provide cover for losses due to other factors, and therefore including “infectious or notifiable disease” provisions or "non-damage denial of access" as well as "public authority restrictions" clauses, are enabled to demand pay-out sums from their insurers. Similarly, some rejected claims or complaints can be revised in light of the Supreme Court's declarations so that their validity may eventually be reconsidered.

What is apparent from the above statements is that, in any case, the FCA's test case had the intended effect, that is providing insurance brokers and firms with the proper amount of juridical clarity to finalise most of the BI claim processes due to the coronavirus outbreak.

In such a post-judgement scenario, the role of insurance advisors and intermediaries is increasingly important as they have to work on damaged insureds’ behalf by ensuring that the respective policymakers arrange for any valid BI claim to be finalised as soon as possible. By doing so, brokers prevent and will keep on preventing slow pay-out processes from further affecting their clients' financial stability. For the same reason, January's judgement has resulted in many brokers (or customers themselves) asking insurers for interim pay-outs, even partial, on the condition that the final outstanding relevant sum was not changed. This leads to another point to be made: besides the achieved legal certainty, with the Supreme Court's sentence the FCA can claim to have achieved an additional goal, that is enhanced support to several activities and entrepreneurs the Covid-19 pandemic had severely hit in terms of financial losses and business continuity perspectives.

Specifically, with respect to insurers’ claim management, January’s sentence has established that some wordings provide cover even for partial closure of activities and for any mandatory closure order not legally binding. Additionally, it results that all those claims whose validity had been, even previously, recognized cannot be object of reduction on the basis of the argument according to which the loss would have occurred in any case as a consequence of the pandemic. Each insurance firm has the duty to ensure that its claim managers promptly reassess the processes being affected by the

66 The importance of these documents consists of summarizing the Court’s decisions in matters of BI policies.

judgement and, contextually, inform the client on the outcome of such revision. At the same time, policymakers needed to make haste in adjusting any settlement offer that was made and still not accepted by the policyholder up to the day the Supreme Court submitted its decision.

Let us now examine what the Supreme Court and High court sentences mean to those wordings that go beyond the scope of the FCA's test case. In this case, the judgements are likely to act as guidelines for the eventual interpretation, mainly in terms of cover extent, of types of policies transcending the scope of the proceeding initiated by the regulator. In practice, the judgements may result useful to interpret different kinds of insurance contracts including provisions that are similar to those investigated during the trial; wedding and landlord insurance for example. Moreover, basing on the outcome of the case, future counterparties will be facilitated in the proper comprehension and interpretation of terms such as “event”, “incident”, “occurrence” and as well as expressions such as "competent local authority" will be better circumscribed. More generally, all insurers dealing with risks of wide-area damages (hurricane or flooding insurance, for instance) are going to be reminiscent of the Supreme Court's complete upturning of the conclusions drawn by the Orient Express sentence.

Only time will be able to shed additional light on the actual implications of the Supreme Court's judgement for the UK insurance industry.

4.3.4. Recommendations from the FCA

At the direct suggestion of the FCA, for reasons of fairness, policymakers should not consider the days elapsing between 17 June 2020 and 15 January 2021 when referring to time limits within which insureds could have made affected claims or other actions in relation to their contracts (i.e. notifying any relevant circumstance). By the same logic, insurance firms are not allowed to charge clients with reduced pay-outs under the guise of a potentially affected claim being made out of time. For any full and final settlement connected to an affected claim, instead, regulatory authorities will verify that insurers had properly provided the client with fair, clear and in no way misleading pre-emptive information. Additionally, in the months before the sentence, it is crucial that any potentially affected customers have been informed, by the insurer, on the outstanding test case and related proceeding, as well as on its potential implications, so that they could assess better the eventual settlement offer, if full and final, and maybe opt to wait for the Supreme Court's declarations to compare the two alternative scenarios. If this does not happen, insurers are expected to re-get in touch with affected policyholders to reimburse them through residual payments. In cases where the Financial Ombudsman Service is involved in individual complaint procedures and accepts the complaint as valid, then the related insurance firm will have the duty to keep the ombudsman informed. For purposes of consistency, even when the Financial Ombudsman Service intervenes, it does not fall the FCA’s directive according to which insurers cannot take into account the period going from 17 June 2020 and the issuance day of the Supreme Court's final declarations as a potential deadline for insured to get in touch with the ombudsman for affected complaints.

More widely speaking, the FCA has announced that they expect insurance businesses to proactively approach clients and their interests during the necessary adjusting processes to affected claims, since only transparency, pragmatism and operational consistency can contribute to breaking down the barriers between the parties as well as limiting further delayed payments of valid claims. The term "transparency" is particularly referred to the processes aimed at ascertaining the presence of the infectious or notifiable disease for the trigger of the corresponding provisions. In that respect, the regulator has produced dedicated guidance so that both insurers and insureds may have less difficulty in proving the presence of coronavirus.

Depending on the case, some pay-outs due to damaged policyholders may be object of fiscal deductions on the basis of the amount and kind of support national Governments provided those customers with during the Covid-19 epidemic. Together with the public support, the decision on whether a payment is deductible or not depends on other factors, such as the type of cover ensured by the policy and its characteristics and claim process. In any case, each assessment or conclusion made by the Board of the insurance firm in matters of deductibility must be properly documented and justified.

Just after the sentence, the FCA committed itself to regularly reach out to affected policymakers to collect updates about the status of their non-damage BI claim processes. Such updates will include a quantitative section where insurers will have to report total numbers and values of outstanding non-damage BI claims, eventual full, initial and interim settlement payments and offers, and all collected reserves. Under this section, a special reference must be dedicated to all complaints received, still outstanding or dismissed, in relation to all Covid-19 BI claims. Furthermore, the regulator has announced that some of these data from insurance firms are likely to be made public.

In presence of further legal disputes aimed at seeking ulterior clarification, all firms are suggested to take into serious consideration the impact of legal expenses on customers' financials. In this regard, insurers' fairness, professionality and intellectual honesty should be reflected in their commitment to keeping proceedings and related disputed issues at a minimum so that the trial may be the quickest and cheapest possible.

The words spoken by Sheldon Mills, executive director at the FCA, suggest that regulator's guidelines represent much more than simple recommendations to insurance businesses: "Where we see that insurers are not meeting the expectations set out here, we will use the full range of our regulatory tools and powers to ensure they do so."[67]

4.3.5. Final remarks and reactions[68]

The Supreme Court's verdict has responded to all the thousands of customers and businesses that had been waiting several months to get their claims recognized as valid and paid. The judgement has directly affected over 700 different insurance policy types and 60 policy issuers. As a consequence of what the Supreme Court established in January 2020, each damaged policyholder is now enabled to claim for losses being suffered as a result of the impact of the Covid-19 outbreak on their area and the effects due to public restrictive measures imposed by the Government. Furthermore, the Court legitimising claim pay-outs went against the argument according to which losses would have reasonably decreased due to consumers' enhanced health worries independently of restrictions.

Before the sentence was issued, the regulator had estimated that successful claims could trigger tens of thousands of pounds worth of related pay-outs. At the end of the first national lockdown, the ABI evaluated that the totality of arose BI claims in the UK amounted to £900 million.

Just after the Supreme Court's judgement, Hiscox's shareholders saw their equity value drop by 5% in one day. The "Mr. Ducketts" action group, referring to the sentence, spoke of a "humiliation" for insurers working at the insurance firm. However, Hiscox's share price subsequently rebounded up to a 3% gain when the firm announced that only less than 30% of outstanding claims would have been successful and, as a consequence, extra expenses should have been re-sized down to less than £50 million.

Royal and Sun Alliance Insurance's shares, on the contrary, stayed basically unchanged.

Nevertheless, several affected insurers will likely undertake further legal proceedings, also for the fact that most of the additional losses they incurred are attributable to the substantial overturn of the

67 Source: fca.org.uk, "Dear CEO letter, business interruption (BI) insurance"
68 Source for all quotes: ft.com

Supreme Court of the Orient Express legal precedent, which represents the reason why many insurance firms found themselves unprepared for such a verdict.

Below are some of the most relevant quotes by those directly involved in a trial that is likely to revolutionise, one and for all, the entire UK insurance market.

> “Our aim throughout this test case has been to get clarity for as wide a range of parties as possible, as quickly as possible, and today’s judgment decisively removes many of the roadblocks to claims by policyholders.”
> (Sheldon Mills, executive director at the FCA)

> “The FCA’s appeal is substantially allowed and the insurers’ appeals are dismissed.”
> (Nicholas Hamblen, the Supreme Court judge responsible for handing down the verdict)

> “Today’s result is very positive.”
> (Paul Lewis, the FCA’s lawyer for the case)

> “This is a landmark victory for a small group of businesses who took on a huge insurance player and have been fully vindicated.”
> (Richard Leedham, the Hiscox Action Group’s lawyer)

5. CONCLUSION

Having reached the end of this path of analysis in the maze of the British insurance system, it is now time to take stock, by briefly dusting off some of the main conclusions reached so far.

The two main topics addressed, whose developments appear to be particularly relevant within the analysis carried out, relate to the professional figure of insurance brokers, and the legal risks they are currently facing, and to the most recent regulatory developments on the subject of BI insurance and its capacity to provide coverage for damage caused by the Covid-19 outbreak.

With respect to the first issue, in the last decades there have been several representative trials whose outcomes constitute an important heritage today's brokers may rely on. Since most of the proceedings against insurance intermediaries refer to potential breaches of duty, it results crucial to conduct a deep investigation on the true meaning, legally speaking, of each of a broker's duties. First of all, any insurance advisor approaching a new client must provide him some basic information about the features of the BI cover he is interested in (i.e. indemnity period, relevant sum and computation methods). In parallel, the broker has the duty to take enough steps to be completely sure to have fully grasped the nature of the client's business, in order to better assess its risks and the related policy type needed. The extent of this analysis is very subjective and depends on multiple factors such as the broker's professional expertise or the number of times the parties have met before. A broker's duties are not confined to the area of the pre-emptive advice, but continue during the entire post-placement period and include constantly monitoring insureds' risk position. When fulfilling all these obligations and complying with clients' instructions, advisors must always exercise reasonable care. In case an insurance brokerage firm gets sued on charged of negligence, one option might be that of relying on the specialist nature of the provisions under consideration so that their adequacy to the client's needs might be challenged. In every trial dealing with breach of duty issues, it will result fundamental how clearly such duties are defined at the very first moment of the relationship with the client. Last remarks that must be made concern the importance for brokers of always recording every conversation with their commercial counterparties so that clients' satisfaction, and comprehension of the insurance product, cannot be questioned at a later time. Setting aside the juridical field, it is highly likely that the survival of the survival whole insurance broking sector will depend on agents' capability to re-invent their activities and their product assortment in order to pursue a wider coverage of each risk category and better satisfy their customer base.

Most of the proceedings against insurance brokers were caused and affected by a large legal vacuum in BI insurance regulation, since the validity of BI policies against the effect of a pandemic was fully assessable by simply looking at the existing laws. This is the main reason why the FCA, some months ago, had undertook a legal action against a group of 8 UK insurers, where the issue concerning BI covers would have been addressed. On January 15, the sentence of the Supreme Court has established that such BI policies including provisions for “infectious or notifiable disease” or “non-damage denial of access” do provide cover against losses attributable to Covid-19 effects and related public restrictive measures. The effect of the judgement was that the FCA was seeking: both policyholders and insurance businesses can today benefit from juridical certainty on matters of BI claims and pandemic implications. Furthermore, the sentence is likely to act as a guideline for the interpretation of a much higher number of policy types and insurance contracts. The sentence can be recalled during any trial treating matters of claim fairness in the UK by authorities like the FCA and the Financial Ombudsman. Focusing more on the private field, with its decision, not only has the Supreme Court provided counterparties of any individual case with the basis for the computation of payable amounts but it has also had the effect to relieve hundreds, maybe thousands, of future claiming policyholders from the burden of an individual proceeding against their insurers.

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ACKNOWLEDGMENTS

It is a true pleasure to express all my gratitude to my relator Professor La Cognata, for always supporting me unreservedly with all his professional competencies and humanity. Through his mentoring he pushed me to try my hardest and demonstrated once again his love and commitment to this profession.

I am extremely thankful to my friends. Having you by my side unconditionally, especially in my darkest hours, is my lifeline.

I owe my deepest thanks to my whole family, as large as precious. You are my home, wherever I am. My thoughts and kisses go to the sky, where my aunt is watching over me, acting as a fanatic supporter.

My sweetest thanks to my better half Giorgia. You push me everyday to be a better person. My accomplishments are your accomplishments and your happiness is my happiness.

I owe a sincere sense of gratitude to my beloved grandparents, for feeding me with their love and passing a treasure chest of timeless values down to me.

It is a privilege for me to thank my mother and my father, my first teachers and best friends. Throughout my entire life, my deepest aspiration will be to make you proud of your son.

Finally, thanks to my dear little sister. Sole, you are the star that brightens my days. I love you.

RINGRAZIAMENTI

Ci tengo a esprimere, con grande piacere, tutta la mia gratitudine al mio relatore Prof. La Cognata, per avermi sempre sostenuto senza riserve, dando prova di tutta la sua professionalità e umanità. Lungo tutto questo percorso, mi ha spinto a fare del mio meglio e ha dimostrato ancora una volta il suo amore e la sua dedizione nei confronti di questa professione.

Sono estremamente grato ai miei amici. Avervi al mio fianco incondizionatamente, specialmente nei miei giorni più bui, sarà sempre la mia ancora di salvezza.

Devo il mio più sentito ringraziamento a tutta la mia famiglia, tanto grande quanto preziosa. Siete la mia casa, ovunque io sia. I miei pensieri e i miei baci sono rivolti al cielo, da dove mia zia veglia su di me, come la più sfegatata delle fan.

I miei più teneri ringraziamenti alla mia dolce metà Giorgia. Mi spingi ogni giorno ad essere una persona migliore. I miei successi sono i tuoi e la tua felicità è la mia.

Ai miei amati nonni, per avermi nutrito del loro amore e per avermi tramandato un forziere di valori senza tempo.

A mia madre e mio padre, i miei primi insegnanti e migliori amici. Nel corso di tutta la mia vita, la mia aspirazione più grande sarà quella di rendervi orgogliosi di vostro figlio.

Infine, grazie alla mia cara sorellina. Sole, sei la stella che illumina le mie giornate. Ti voglio bene.