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This first edition of *The Professional Negligence Law Review* comes at a time of unusual political challenge to some elements of globalisation. Yet international trade and cross-border transactions are, and will remain, firmly entrenched in the day-to-day business of commercial institutions, and the fact that this is the 54th title published by *The Law Reviews* comes as little surprise. The insight that each title provides into the major commercial jurisdictions is invaluable to all those conducting and advising on modern commerce in specific areas.

Professionals play a vital role in the activities of most commercial entities. Value creation today is more sophisticated than it has ever been, and access to specialist expertise is an essential element of success. Equally, businesses now operate in the fastest ever period of technological development, and professional service providers are having to learn about and participate in these new areas. Understanding the varied conduct- and obligation-based duties of professionals involved in our transactions and engagements is an essential part of project management and enforcement of rights. And as we look forward to emerging developments, such as blockchain and artificial intelligence, the application of the core principles of professional obligations in this complex environment makes a guide like this indispensable.

In my own jurisdiction in England and Wales, the courts continue to be concerned with the scope of the professional’s duty, the principles that govern the imposition of duties in relation to non-clients, the type of loss that the professional should be responsible for, and whether it is enough that the professional give correct or non-negligent advice or whether the client also has to be told about the risks. In addition, data-loss incidents continue both in and out of the public gaze, and data collection and processing are an increasing and potentially severe risk concern for all firms. A survey of the chapters reveals a limited number of common themes and a striking amount of diversity of law and practice in the different jurisdictions. The absence of any substantial homogeneity further underlines the need for a work like this.

This first edition is the product of the skill and knowledge of leading practitioners in various jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.
I would like to thank all of those who have contributed to this first edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors’ biographies can be found on page 137 onwards. I would especially like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and to Sophie Newton in particular. Finally, the team at Law Business Research has managed this project from inception to delivery with huge passion and care; I am very grateful to all of them.

Nicholas Bird
Reynolds Porter Chamberlain LLP
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I INTRODUCTION

i Legal framework

In Brazil, professional civil liability is characterised as contractual, once it arises from the violation of a duty set out in a particular contract that governs the rendering of professional services. In other words, it is the obligation to indemnify the damage caused during the exercise of an independent or subordinate profession as a result of a professional error.

In general, legal regulation is provided by the Civil Code, the Consumer Defence Code and administrative rules governing specific professions, which are subject to special rules in view of their inherent risk, as will be addressed in Section II.

This is because, in some cases, a professional error can cause serious harm and therefore certain requirements, such as attainment of a university degree and membership of the competent professional association, must be observed for the exercise of the profession. This is the case, for example, for lawyers, doctors and engineers. However, regardless of the fulfilment of such requirements, the professional who is negligent and causes damage will be required to indemnify the injured party.2

In this sense, Article 14, Section 4 of the Consumer Defence Code establishes that the liability of the freelancer3 will be subjective or fault-based (i.e., the fault must be demonstrated, along with the professional error, the damage and the causal link).

However, not all cases of professional liability will be governed by the traditional regime of subjective liability, either because not all will be considered consumer relationships or because the nature of the obligation – whether of means or result – will be decisive for the definition of the nature of the civil liability itself.

In general, under an obligation of means the professional is obliged to undertake technique and diligence in his or her practice to obtain the required result, but without guaranteeing this result at the end.

As a rule, the obligations of a doctor and a lawyer are obligations of means, as they do not assure a particular outcome, such as healing a patient or being successful in a lawsuit.

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1 Marcia Cicarelli is a senior partner and Camila Affonso Prado and Laura Pelegrini are junior partners at Demarest Advogados.
3 Vanessa Donato de Araujo explains that a freelancer is ‘one who works independently, in an autonomous manner, and who exercises his activity with full freedom, choosing the clients he will meet, determining the value of the service rendered, and other conditions of the contract to be entered into with the creditor’. Araujo, Vaneska Donato de. A responsabilidade civil professional e a reparação de danos. Master’s Dissertation. Faculdade de Direito da Universidade de São Paulo, 2011, p. 157.
Nonetheless, such professionals must act diligently and in compliance with the available and adequate techniques, otherwise they will be responsible for any damage caused by negligent performance.

Consequently, the fault-based regime applies to obligations of means as the professional will be liable when executing professional obligations with negligence, recklessness or malpractice – in other words, fault.

On the other hand, under obligations of result the professional is not only required to act diligently, but also to obtain the expected result. Therefore, non-achievement of the result will entail liability for any damages arising.

As an example, the work of a contractor is an obligation of result because only the completion of the work within the agreed terms and conditions will discharge the contractual obligations.

Once these differences are understood, a question arises as to defining in practice whether the professional activity is classified as an obligation of means or of result.

According to doctrine, obligations of means occur in cases where the contract involves an inherent risk and therefore the professional cannot assure the result in view of factors beyond his or her control. Vaneska Donato de Araujo explains that ‘where there is risk, the obligation is of means, because, strictly speaking, the debtor cannot compromise to obtain a result that can only be eventually achieved. In cases where the achievement of a result is not random and only depends on his performance, it can be assumed that the debtor compromised to fulfil that particular outcome’.4

Once the nature of the obligation is defined, and given that an obligation of result does not require evidence of fault, an important distinction must be made as to whether the professional liability will be strict liability. The answer is negative. This is because fault is never discussed in strict liability, nor as a matter of defence. It is up to the creditor to simply demonstrate the unlawful act, the damage and the causal link.

In situations where civil liability involves obligations of result, the creditor does not have to prove the fault. However, the professional will be able to argue the lack of fault as a defence to demonstrate that he or she undertook all the necessary technique and diligence to obtain the result. This means that civil liability will be subjective, but with a presumption of fault.5

Therefore, it differs from the fault-based liability applicable to obligations of means, where the burden of proof regarding the fault lies with the creditor, who must demonstrate not only the damage and the causal link, but also the negligence of the professional.

Aside from the burden of proof, there are other defences, such as acts of God and force majeure, exclusive fault of the victim and third-party acts.

In addition, it is also possible to apply contractual clauses limiting or exonerating the obligation to indemnify. However, such clauses will not be valid in cases of liability for gross negligence or wilful acts, or, for example, when inserted in adhesion contracts or consumer agreements.

So far, we have addressed the responsibility of the professional who directly causes the damage as a result of his or her own act. However, there are situations where the professional

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is an employee or representative of a certain company, giving rise to civil liability through the act of a third party. This scenario is covered by Article 932(II), of the Brazilian Civil Code, which establishes, that ‘the employers or principals are also responsible for civil reparation for their employees, servants and agents in the exercise of their work, or in their name’. This responsibility does not depend on the employer being at fault, and the employer will have the right of recovery against the employee to be reimbursed for payment made on the employee’s behalf, as provided by Articles 933 and 934 respectively.

Thus, liability for a third party is strict, once the employer is liable ‘for the actions of its employees because it creates the risk of the damage that the employee may cause, by hiring him to develop activity in its benefit’.6 However, the employer will only respond if the subjective responsibility of the employee is demonstrated in accordance with the nature of the obligation, whether of means or of result.

Once the responsibility of the employee is established, he or she will be jointly liable with the employer, in accordance with Article 942 of the Brazilian Civil Code. In this context, the defences available to the employer are limited, such as acts of God or force majeure, the victim’s exclusive fault, and execution of the act by the employee outside the exercise of professional duties.7

ii Limitation and prescription

In general, where a consumer contract is operative, the limitation period for the client to file a lawsuit against the professional is five years, starting from the knowledge of the damage and of its agent, in accordance with Article 27 of the Consumer Defence Code.8

However, it is important to emphasise that the limitation period may change depending on the type of profession and whether it is defined as a consumer relationship.

For instance, the Superior Court of Justice understands that, in the medical field ‘the Consumer Defence Code is applied to medical services, including the five-year limitation period provided in Article 27 of the Consumer Defence Code’.9

However, the position is different regarding the civil liability of lawyers. According to the Superior Court of Justice, this professional relationship is not regulated by the Consumer Defence Code therefore the five-year period does not apply. This is in fact deemed to be a contractual civil relationship, to which the general term of 10 years applies, pursuant to Article 205 of the Brazilian Civil Code.10

The 10-year term also applies to the constructor’s liability for defects in the construction work. According to Article 618 of the Brazilian Civil Code, the builder will only be held liable if the defect is verified within five years of its delivery and, thereafter, the 10-year limitation period begins to run.11

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iii Dispute fora and resolution

The state courts are competent to judge the negligence lawsuits, which will follow the procedural rules of the Brazilian Code of Civil Procedure.

As a rule, lawsuits for damages must be filed at the place of the defendant’s domicile, as provided in Article 46 of the Brazilian Code of Civil Procedure. However, special rules may apply, such as in the case of lawsuits against professionals, which can be filed at the place of the domicile of the plaintiff or defendant, according to Article 101(I), of the Consumer Defence Code.

In general, the proceeding is public and based on conciliation as a form of consensual solution. The parties must bear the cost of filing a claim and certain appeals, which vary according to each state. In addition, the losing party will be sentenced to pay the costs incurred by the other party, as well as the legal fees for the lawyer of the winning party, and which will be set by the judge and may vary between 10 per cent and 20 per cent of the value of the award or the economic benefit obtained.

An arbitration procedure, regulated by Law No. 9307/1996, is also an option. Despite its advantages, such as confidentiality, arbitrators’ specialist experience, and speed, there is no recourse to appeal and the costs are high therefore this option is only commonly adopted in strategic cases.

Finally, there is the possibility of entering the lawsuit before the Special Civil Courts, offices of the judiciary who assess cases of a lesser degree of complexity and of a value up to 40 times the Brazilian minimum wage (currently 38,160 reais). The parties are exempt from the payment of costs and the lawsuit must be filed at the place of the defendant’s domicile or, if it is a lawsuit for damages, the author’s domicile or the place where the act took place, according to Article 4 of Law No. 9099/95.

iv Remedies and loss

A professional error can cause three types of damage: property damage, pain and suffering, and disfiguring damage. In Brazil, there is no concept of ‘punitive damages’ as in US law.

According to the general rule of Article 944 of the Brazilian Civil Code, ‘the indemnity is measured by the extent of the damage’. The principle of full compensation is applicable therefore the matter of fault does not bear on the amount of compensation, except in situations where there is ‘excessive disparity between the seriousness of the fault and the damage’, as provided in Article 944.

Specifically regarding obligations of means, both doctrine and case law have been applying the theory of loss of chance to quantify the compensation. This is because it is impossible to guarantee that had the professional acted diligently the result would certainly have been reached.

Thus, the compensation is proportionally reduced in relation to the serious and real probability that the client would have obtained the anticipated result if the professional had acted diligently. According to Sérgio Savi, the loss of chance is only established when it represents a probability higher than 50 per cent. Nonetheless, ‘the indemnification of the lost chance will always be less than the value of the expected useful result’.12

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In this context, the Superior Court of Justice has ruled that ‘in civil liability for the loss of a chance, the amount of the compensation does not correspond to the final loss, and must be obtained by valuing the lost chance as an independent interest’. 13

II SPECIFIC PROFESSIONS

i Lawyers

The activity of advocacy is regulated by Law No. 8906/94 and by Resolution No. 02/2015 of the Brazilian Bar Association (OAB), which approved the OAB Code of Ethics and Discipline.

While the Code of Ethics establishes the principles that guide the conduct of lawyers, Law No. 8906/94 provides for the practice of advocacy and the rights of the lawyer, the requirements for registration, disciplinary infractions and sanctions, among other things.

As to liability, Article 33 of Law No. 8906/94 states that ‘the lawyer is responsible for actions committed with fraud or negligence in the exercise of the profession’ (i.e., the subjective liability regime applies).

There is an interesting question regarding liability for advice given by means of legal opinions. Some authors believe that the lawyer would only be liable in cases of fraud, while there is an opposite view that the demonstration of fault is the only requirement. 14 In this regard, Article 32 states that ‘the lawyer is responsible for actions committed with fraud or negligence in the exercise of the profession’.

In addition, Article 33 provides for a singular situation of liability in cases of reckless claims, where ‘the lawyer is jointly liable with his client, if they have colluded to harm the opposite party, which will be verified in the specific lawsuit’.

In summary, the doctrine holds that the lawyer is liable for errors of fact as well as for errors of law, 15 but, in the latter case, only when they are serious. 16

Therefore, while it would be necessary to verify the lawyer’s performance in the particular case at hand, the following actions may, in principle, be indicative of the lawyer’s liability: filing an unfeasible suit, lacking knowledge of the law or jurisprudence, failing to submit a timely defence or appeal, and failing to pay or making incorrect payment of court fees. 17

ii Medical practitioners

The medical profession is governed by Resolution No. 1931/2009 of the Federal Council of Medicine, which approved the Medical Code of Ethics.

Article 1 of the Resolution establishes that the doctor is prohibited from ‘causing harm to the patient, by action or omission considered as malpractice, recklessness or negligence’. Article 1 adds that ‘medical liability is always personal and cannot be presumed’. In other words, it confirms the medical professional’s subjective responsibility derived from the obligation of means.

Also, Article 22 states that the physician must obtain consent from the patient or the patient’s legal representative after explaining and clarifying the procedure to be performed, except in cases of imminent risk of death. Even if the consent is obtained, the doctor shall assume responsibility for the professional act, in accordance with Article 4.

However, doctrine holds that certain activities may constitute an obligation of result, such as ‘plastic surgery and technical procedures of laboratory examination and others, such as radiographs, tomographies, magnetic resonances’. The position of the Superior Court of Justice is that cosmetic surgery is an obligation of result, while restorative surgery is an obligation of means.

The responsibility for anaesthesia has also been discussed. For Sílvio Venosa, it is an obligation of means. The Superior Court of Justice ruled that it only falls ‘to the joint liability of the head of the medical team when the person who caused the damage is part of the team in a subordinate position. Thus, in the case of an anaesthesiologist, who is part of the team but acts as an autonomous professional, following techniques specific to his or her medical speciality, he or she must be individually held responsible for the event’.

The same understanding applies to dentists, whose activity is regulated by Law No. 5081/66. The Superior Court of Justice has also decided that the dental surgeon has an obligation of means. However, in the case of cosmetic treatment or preventive dentistry, the obligation is one of result.

Finally, regarding the quantification of damages, the Brazilian Civil Code expressly establishes in Article 951 (through reference to Articles 948–950) that the professional who causes the death of the patient, or any injury or disability, shall make the following reparations:

**Article 948**

In the event of death, the indemnification consists in, without excluding other reparations:

I – payment of expenses for the treatment of the victim, his funeral and the mourning of the family;

II – the supply of food to the people to whom the victim owed them, taking into account the likely duration of the victim’s life.

**Article 949**

In the event of injury or other health offence, the offender shall indemnify the treatment expenses and lost profits until the end of the convalescence, in addition to other losses.

**Article 950**

In the event of a defect preventing the victim from exercising his or her profession or decreasing his or her ability to work, the compensation, in addition to treatment expenses and loss of profits until the end of the convalescence, shall include a pension corresponding to the importance of the work for which the victim is incapacitated, or the depreciation suffered.

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19 Superior Court of Justice, REsp 1.097.955, Judge Nancy Andrighi, ruling: 27 September 2011.
21 Superior Court of Justice, REsp 605.435, Judge Nancy Andrighi, p. 2 of Judge Raul Araújo vote, ruling: 14 September 2011.
22 Superior Court of Justice, REsp 1.184.932, Judge Castro Meira, ruling: 13 December 2011.
iii Banking and finance professionals

According to Article 3, Section 2 of the Consumer Defence Code, banking activity is governed by the Code, regardless of the credit operation practised, as stated in Superior Court of Justice Binding Precedent No. 297.

The banks’ liability is strict, according to Article 14 of the Consumer Defence Code, which establishes the general rule that ‘the service provider responds, regardless of the existence of fault, for the repair of damages caused to consumers by defects in the rendering of services, as well as by insufficient or inadequate information on their use and risks’.

The liability of banking institutions can only be waived if there is proof of non-existence of a defect in the service or if the consumer or third party’s exclusive fault is established in accordance with Section 3 of Article 14.

The Superior Court of Justice has also issued Binding Precedent No. 479, which states that ‘financial institutions are strictly liable for damage caused by fortuitous internal fraud and offences committed by third parties in banking transactions’.

iv Computer and information technology professionals

There is no specific regulation of computer and information technology professions, nor any applicable Professional Council.

The purpose of the ongoing Bills No. 5101/2016 and No. 3065/2015 is to regulate the profession of systems analyst and others related to it. These bills aim to regulate the technical and training requirements necessary for the exercise of the profession and the creation of the Federal Informatics Council and regional Computer Science Councils, agencies that would be responsible for supervising the exercise of the professions. However, there is no provision regarding the civil liability of such professionals.

Therefore, the general liability regime based on the assessment of fault applies to computer and information technology professionals.

v Real property surveyors

There is no professional category of real property surveyors in Brazil. Engineers and architects, whose responsibility is addressed in Section II.vi below, generally carry out this kind of work.

vi Construction professionals

Engineers, architects and contractors who assign a construction agreement are required to provide results, as the work must be delivered in accordance with the contracted project and the agreed term.

The fulfilment of the obligation will be discharged not only with the completion of the work, but also with the achievement of the purpose for which the professional was hired. Therefore, the professional will only be exempted from liability when there is a fortuitous event, force majeure, exclusive fault of the victim or third-party act.24

The contractor’s liability is different from that of the designer. If design defects arise from a design error and cannot be detected by the contractor, the designer will be liable.

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However, if the irregularities could have been identified during the work by the contractor – appointed by the designer and working under the designer’s supervision – the responsibility shall be joint and several.25

In this context, Article 622 of the Brazilian Civil Code establishes that ‘if the execution of the work is entrusted to third parties, the author’s responsibility for said project shall be limited to damages resulting from defects set out in Article 618, if the author is not in charge of leading or supervising the project’.

Finally, Article 618 of the Brazilian Civil Code establishes that liability shall be objective in building contracts or other significant constructions where the material and execution provider shall be liable for the irreducible period of five years for the soundness and safety of the work, and for the materials and the soil. In this case, the provider will respond for a period of five years, with the owner of the project having 180 days to file a lawsuit, according to Article 618.

vii Accountants and auditors

The profession of accountant is regulated by Decree-Law No. 9295/1946, which requires professionals to prove their attainment of a bachelor’s degree in accounting sciences, approval in the Sufficiency Examination and registration with a regional accounting council.

The above-mentioned Decree also created the Federal Accounting Council and the regional councils – administrative agencies responsible for monitoring the exercise of the accounting profession.

Law No. 6385/1976, which regulates the securities market in Brazil, establishes in Article 26 that ‘only accounting firms or independent accounting auditors registered at the Brazilian Securities Commission may audit the financial statements of publicly held companies and of institutions, companies or corporations that make up the system of distribution and intermediation of securities, for the effects of this Law’.

Furthermore, Paragraph 2 of Article 26 provides that such professionals ‘shall be subject to civil liability for any losses caused to third parties as a result of fraud or fault in the exercise of the functions provided for in this article’, thereby adopting the subjective liability regime.

viii Insurance professionals

The insurance professionals regulated in Brazil are insurance brokers and actuaries.

Insurance brokers are regulated by Law No. 4594/1964, Decree-Law No. 73/1966 and the resolutions and rules issued by the National Council of Private Insurance and the Superintendence of Private Insurance (SUSEP).

According to Article 1 of Law No. 4594/1964, the insurance broker, a legal person and entity, ‘is the intermediary legally authorised to get customers and promote insurance contracts, admitted by the legislation in force, between insurance companies and individuals or legal entities, of public or private law’. The exercise of the profession depends on obtaining the qualification certificate, issued by SUSEP, under the terms of Article 123 of Decree-Law No. 73/1966.

Civil liability of insurance brokers is regulated by Article 126 of Decree-Law 73/66, which applies the fault liability regime. Article 127 also establishes the professional responsibility of the broker for non-compliance with laws, regulations and resolutions in force.

Furthermore, Article 20 of Law No. 4594/64 specifically states that ‘the broker shall be professionally and civilly liable for inaccurate declarations contained in proposals signed by him, regardless of the sanctions that may be applicable to others responsible for the infraction’.

On the other hand, the actuarial profession is regulated by Decree-Law No. 806/1969 and Decree No. 66408/1970, which define the requirements for the exercise of the profession and the activities of the professional actuary. As there is no specific liability regime, the applicable general regime is provided by both the Civil Code and, where relevant, the Consumer Defence Code.

III YEAR IN REVIEW

i Legislative changes

Brazil has a civil law legal system, therefore, its primary source is codified law. Consequently, and considering the complex legislative procedure required to change the law, the legal framework for professional liability does not undergo frequent modification.

In this context, recent legislative changes in the professional liability have only been observed in the specific laws applied to lawyers and veterinarians.

A new Code of Ethics and Discipline for Advocacy came into force on 2 May 2016. Among the main innovations, we would highlight: (1) the regulation of pro bono advocacy; (2) new ethical duties for the directors of the OAB; (3) new rules to make the disciplinary process faster; (4) introduction of an ethical principle that obliges lawyers to encourage extrajudicial means of settling disputes, such as mediation and conciliation; and (5) permission to publicise legal services by electronic means, such as social networks, in a moderate manner and without attempting to attract clients.

Violation of any of the rules set out in the Code may give rise to a disciplinary proceeding to assess the administrative responsibility of the professional. It may be initiated by the OAB or by a complaint presented by the interested party, and the administrative liability will be independent of the civil responsibility towards clients or third parties.

Regarding the veterinary medicine professional, a new Veterinarian's Code of Ethics (Resolution No. 1138/2016 of the Federal Council of Veterinary Medicine) came into force on 9 September 2017.

The new Veterinarian's Code maintains the provision of subjective responsibility for wrongful or negligent actions. A modification proposed by the Code extends the professional responsibility of veterinarians in the administrative and civil spheres, even where the veterinarian has engaged in certain conduct at the client’s request. Therefore, it is the professional’s responsibility to advise the client about the safest and most recommended procedures, without exonerating himself or herself from responsibility for choosing an inappropriate treatment (even if it is at the express request of the client).
We highlight below relevant case law recently issued by the Superior Court of Justice.

On 10 November 2016, the Superior Court of Justice dismissed the civil responsibility of a hospital for a medical error caused by a physician who was not subordinated to the hospital. The Court found that the hospital’s facilities were used only for medical care, the professional had been individually chosen by the patient and the members of the hospital had no participation in the treatment provided.

As the doctor had no employment relationship, the hospital was not found liable because of the rupture of the causal link between the activity undertaken and the result, according to fault-based liability.

Moreover, the Superior Court of Justice has repeatedly accepted the application of the theory of the loss of chance in the civil liability of the physician. Even though it is recognised that the obligation of this professional is one of means, the liability is acknowledged in cases where the malpractice reduced the serious and real chances of recovery of the patient.

The Superior Court of Justice has held that the responsibility based on the theory of the loss of chance applies because: (1) there is a concrete and real chance of obtaining a benefit or decreasing the chances of suffering injury; (2) an action or omission of the defendant has resulted in the loss of opportunity to exercise the chance; and (3) the harm is not the lost benefit, because this is always hypothetical.

Professional liability insurance is an important instrument for the management of professional risks and its use is fully established and continues to develop and grow in Brazil.

According to data provided by SUSEP, liability insurance showed a 35.6 per cent increase from January to August in 2017 in comparison with the same period in 2015, with premium collection increasing from 154.5 million reais to 209.5 million reais. Still, the expectation is that it will grow 10 per cent in 2018, along with other civil liability insurance.

The increase in demand for professional liability insurance can be explained by the evolution of the civil liability system and the increasing number of cases where professionals are found liable.

Professional liability insurance, also known as errors-and-omissions (E&O) insurance, guarantees the insured the reimbursement of compensation that he or she is due because of the occurrence of a failure or professional error, in addition to the defence costs incurred in judicial or administrative claims filed by third parties.

The insured is the professional individual or legal entity. Insurers make available specific products according to the professional practice.

E&O insurance is commonly retained by health professionals (doctors, nurses and dentists, as well as hospitals and clinics), engineers, architects and designers, lawyers and law firms, accountants, real estate brokers, insurance agencies, advertising and publicity agencies, travel agencies, technology and information professionals, notaries, real estate managers and educational institutions.

26 Superior Court of Justice, RExp 1.635.560, Judge Nancy Andriighi, ruling: 10 November 2016.
The purpose of the insurance is to provide financial protection to the insured from failures committed in the exercise of the profession. E&O insurance guarantees the liability of the professional towards clients in respect of professional errors that cause damage, unlike general liability insurance, which guarantees the liability of the insured against third parties, whether or not they have a contractual relationship with the insured; and unlike the liability insurance of company directors and officers (D&O), which guarantees the personal liability of managers in respect of management acts.

E&O insurance is usually provided by way of a claims-made policy, which requires that: (1) the wrongful act (the professional failure) is committed during the policy period or the retroactivity period; and (2) the claim presented by the third party is filed during the policy period or within an additional term.

The retroactivity period shall be determined by the insurer when underwriting the policy, according to the risk, the previous policies and claims. The date will act as a deadline within which the professional failure, necessarily unknown to the insured at the time of contracting, must have occurred. In other words, any errors committed prior to the retroactivity period are excluded from coverage.

The additional period corresponds to an extra term for submission of third-party claims; this will be a term of at least one year, but the parties are free to negotiate this.

The main exclusions from coverage are: intentional illicit acts, as long as they are acknowledged as such by a final judicial or arbitral decision; payment of taxes; fines or penalties directly suffered by the insured; claims arising from labour liability; environmental damage; unfair competition; corruption, fraud and dishonesty; discrimination and assault; and bankruptcy and insolvency.

It is important to note that the coverage will be directly linked to the extension of the liability of the insured, in accordance with the applicable liability regime and the limits established by the contract with the client.

By means of such insurance, the insured's assets will be protected in the event that the insured is found liable to compensate the client for a professional failure. In this sense, E&O is an important instrument to mitigate risk and grant economic protection to the professional activity.
I INTRODUCTION

Professional negligence in Colombia is a developing legal category that is currently not regulated by specific legislation. Development in this area has been led by national legal doctrine, which closely follows French and Argentinian teachings. At court level (especially in the area of medical liability), there is also a series of rulings, but jurisprudence is far from being systematic.

It is difficult, therefore, to write about professional negligence where its development is merely incipient. However, in this chapter we will define the legal framework, as well as the remedies and procedure that must be followed to pursue compensation for damage, and review this framework with regard to specific professions. We will then conclude with an overview of what has happened in recent years and what is expected in the future.

i Legal framework

Colombian legal doctrine understands professional negligence as the responsibility that derives from the infraction of duties by certain subjects who, on account of having special theoretical and practical knowledge, must act with special diligence, abiding by the lex artis, under which they are bound by duties and obligations stricter than those demanded by the 'prudent-person' principle.

The main elements of this type of responsibility are clearly derived from this definition, but it is necessary to make special reference to certain points, such as who may be liable for professional negligence, the obligations and special duties of the professional, and the liability regime itself; these points are considered below.

What is understood by ‘professional’

In brief, it can be said that a professional is someone who regularly performs a licit activity in exchange for remuneration, whether or not that person has an academic degree that qualifies him or her to do so. National legal doctrine seems to agree that to be considered a professional it is not necessary to have an academic degree, and experience obtained by

1 Laura Restrepo Madrid is a partner at Tamayo Jaramillo & Asociados. The author greatly appreciates the active participation of Ana Isabel Villa and Laura Daniela Alzate, lawyers at Tamayo Jaramillo & Asociados, in the preparation of this chapter, and is especially appreciative of the guidance, support and confidence shown by Dr Javier Tamayo Jaramillo.

repeatedly practising the activity is sufficient. This is very important in a country such as Colombia, where access to higher education is restricted and the figures for those engaged in the informal economy have reached 48 per cent.

Another common characteristic is having an organisation, whether rudimentary or elaborate, to exercise their trade effectively and prevent or face the risks inherent in the activity.

Finally, and perhaps the most relevant feature, is the specialist knowledge particular to the profession and the competence of the professional compared with a normal citizen in relation to the techniques and rules of their trade (known as the lex artis).

In summary, it is said that the criteria for identifying a professional are the presence of the characteristics of specialism and habitual practice, and the onerous nature of the activity.

Special duties
Professionals have a series of special duties derived from but somewhat more stringent than the general duty of prudence and the principle of good faith.

Diverse classifications of the duties of the professional have been elaborated in legal doctrine, but we share the one given by Juan Bernardo Tascón:

a loyalty to the client and to third parties (i.e., acting transparently and respecting their rights, and avoiding inducing them into any deception);

b duty to act faithfully, that is, to execute the contract fully, on time and in the best possible manner, in accordance with the lex artis;

c information and advice;

d cooperation;

e confidentiality; and

f security duties, related to caring for the physical or patrimonial integrity of people and things with which the professional has contact in the exercise of his or her contractual obligations.

Liability regime
Failure to comply with any of the above-mentioned duties may lead to professional liability for damage caused to third parties.

There is no separate professional negligence regime, despite the different movements that advocate for the structuring of an autonomous regime. In any case, the principles of civil liability are applicable to professional negligence and, therefore, the causal connection between damage and conduct must be verified.

This responsibility will be of a contractual or extra-contractual nature, depending on the existence or non-existence of a contract between the professional and the victim.

In regard to the liability imputation factor, there is no general rule, but it is an eminently subjective responsibility, where it is necessary to prove the professional’s negligence (conduct

6 Tascón, J. B., 2011: 1147–1148 (see footnote 2).
7 Suescún Melo, J., 2005 (see footnote 5); Tascón, J. B., 2011 (see footnote 2).
that does not meet the due diligence requirement or is contrary to professional duties). In this regard, prominent teachers propose as a general foundation of professional negligence the rule contained in Article 2144 of the Colombian Civil Code (unless a specific rule applies), according to which the services of professions and careers that require long studies are subject to the rules of agency in which liability is of a subjective nature and in light of which the agent is liable even for slight negligence. The strictness of this responsibility will depend on the gratuity or paid nature of the contract and whether the agent has been forced to accept the assignment despite initially having rejected it.

However, there are events in which professional negligence may be a case of strict liability; for example, regarding warranty obligations, liability for defective products, obligations to achieve results, carrying out dangerous activities or, according to some authors, overseeing the physical or patrimonial integrity of people or things – although traditional legal doctrine establishes that security duties may be of best efforts or to achieve results, depending on the situation.

ii Limitation and prescription

The Colombian legal system foresees terms of prescription and expiration of the action. In the first case, the general prescription terms apply, depending on the liability regime applicable in the specific case (i.e., contractual or non-contractual). When the administrative jurisdiction is concerned in the action of professional negligence, there may be special rules relating to the time in which the action must be exercised (expiration).

Additionally, Colombian law establishes specific periods of limitation, as in certain kinds of contracts through which the professional activity is exercised, or in the case of consumer relations. For example, the law provides that in transport contracts the term within which to exercise the action is two years. In insurance contracts, there are two types of limitation period: ordinary prescription, which applies to the insured and runs from the moment he or she had or should have had knowledge of the event; and extraordinary prescription, which runs against anyone, and is five years from the occurrence of the event.

In the second case, Law 1480/2011 (the Consumer Protection Statute) sets forth special warranty terms, within which producer and supplier must respond for the quality, suitability, safety and good condition and functioning of the product, while the consumer must bring the claim within the established warranty period. Additionally, this Statute provides special deadlines for the exercise of consumer protection actions, applicable in all sectors of the economy regardless of whether the actions are brought to discuss contractual disputes.

At present, considering the limitation periods imposed by the Consumer Protection Statute, the problem arises as to whether these have become the general rule, since most

9 Civil Code, Article 2155.
10 In the case of liability for hazardous activities, since there is a presumption of guilt and it is disputed, whether the liability is strict or remains subjective.
12 Tamayo, J., 2007: 89 (see footnote 8).
13 Code of Commerce, Article 993.
14 Code of Commerce, Article 1081.
15 Law 1480/2011, Articles 7 and 8.
16 Law 1480/2011, Article 58 No. 3.
market relationships are consumer relations and for that reason the Consumer Protection Statute would be applicable. At present, there is no definitive answer to this question and the statute of limitations must be considered case by case in the jurisdiction where the claim is heard.

iii Dispute fora and resolution

Ordinary jurisdiction

Most professional negligence cases are brought in the ordinary jurisdiction. The quantum of the claims will determine whether it will be a single-instance or double-instance process. If the claims exceed 1,000 Colombian legal monthly minimum wages, the Supreme Court of Justice, the highest court of the ordinary jurisdiction, may hear the matter as a court of cassation.

Administrative jurisdiction

Some professional negligence conflicts are brought before administrative courts. Disputes are heard in this jurisdiction against public entities or individuals exercising a public function. The most important advances and rulings have occurred in the medical liability area.

As in the ordinary jurisdiction, in the administrative jurisdiction the processes may be of single or double instance, depending on the quantum of the claim. In cases involving more than 500 Colombian legal monthly minimum wages, the Council of State, the highest court of the administrative jurisdiction, may function as a second-instance court.

Procedure

Whether the claim is brought before ordinary or administrative courts, the stages of both procedures are quite similar. First, the parties will be integrated into the process by submitting the claim and its response. Subsequently, a pretrial hearing is held, where the matters to be discussed in the process are defined. Finally, the trial is held and the ruling made.

However, both procedures are governed by different codes: the ordinary jurisdiction is governed by the General Procedural Code and the administrative jurisdiction by the Code of Administrative Procedure and Administrative Litigation. Although both codes consider oral proceedings and procedural economy, there are differences between them (particularly in matters of evidence and remedies) that preclude the idea of a unified regime to facilitate the role of parties in judicial processes.

iv Remedies and loss

In Colombia, there are no specific remedies for each right. To claim damages for professional negligence, the general rule is to commence a declaratory procedure before the civil courts or a direct reparation action before administrative courts, depending on which is competent in the case. It will be very important to adequately formulate the claims in the lawsuit, distinguishing whether it is a contractual or non-contractual liability regime.

Regarding damages, Colombian case law recognises compensation for pecuniary and non-pecuniary damage.

17 The legal monthly minimum wage for 2018 in Colombia is 781,242 pesos (approximately, US$275).
Pecuniary damage

Our legal system divides pecuniary damage into costs incurred and lost profits.

‘Costs incurred’ means ‘an asset has left or will leave the victim’s estate’.\textsuperscript{18}

There is loss of profit ‘when an asset that should have, in the normal course of events, entered the victim’s estate did not nor will not enter the victim’s estate’.\textsuperscript{19} Documentary evidence and experts’ reports can be used to demonstrate these losses and their quantum.

Non-pecuniary damage

In addition to patrimonial assets, the Constitution and laws protect other non-pecuniary rights that may suffer impairment in professional negligence cases. Our judges recognise three principal types of non-pecuniary damage.

First, moral damage,\textsuperscript{20} which refers to the victim’s condition due to physical or emotional suffering.

Second, the damage that affects the victim in his or her relationship with another, or his or her conditions of existence.\textsuperscript{21} This type of damage refers to cases in which the victim suffers an impairment of his or her way of living, making it impossible or difficult to continue to perform activities that gave him or her pleasure and enabled his or her existence.

Thirdly, our jurisprudence recognises compensation for damage caused to other constitutionally protected rights, such as the right to a good name or honour.

All non-pecuniary damage must be proved in the process, although there are some specific cases in which its existence is judicially presumed.\textsuperscript{22} Unlike that of other jurisdictions, Colombian case law has defined standards to assess this damage. The High Courts, through their rulings, have indicated the maximum sums that may be granted in certain groups of cases, and these serve as guiding criteria for judges exercising discretionary power.

II SPECIFIC PROFESSIONS

i Lawyers

The responsibility of lawyers is a subject little debated in Colombian jurisprudence and legal doctrine, which are in default of having a serious discussion of the matter. Today, the act of an advocate can engender state responsibility when they act in the exercise of a state function, as in cases of judicial error; or civil liability, if the damage caused by the professional’s conduct arises when the latter acts as a private attorney. Considering the interest of this chapter, we will focus on the second case, where litigation may be based on contractual or non-contractual liability, depending on whether there was a professional services contract.\textsuperscript{23}

As a general rule, the responsibility of the lawyer is subjective, since the main obligation in the agency contract is to act with diligence, care, expertise and professionalism.\textsuperscript{24} This

\textsuperscript{18} Tamayo, J., 2007, Vol. II: 475 (see footnote 8).
\textsuperscript{19} Tamayo, J., 2007, Vol. II: 475 (see footnote 8).
\textsuperscript{20} i.e., pain and suffering.
\textsuperscript{21} i.e., loss of amenity.
\textsuperscript{22} The presumption also operates for moral damage suffered by the closest relatives of the deceased direct victim.
\textsuperscript{24} Tamayo, J., 2007: 526–529 (see footnote 8); Álvarez, A. O., 2009: 308 (see footnote 23).
does not exclude the existence of accessory obligations to achieve results in the contract. For example, the lawyer must use all his or her expertise to defend the client, without this implying that he or she must win the process, but he or he must submit a timely response to the lawsuit. The first is a best-efforts obligation, the second, an obligation to achieve results.

Furthermore, lawyer are subject to specific rules for the exercise of the profession compiled in the Disciplinary Code of the Legal Profession, which defines the guiding principles for the exercise of the profession, the disciplinary offences and their corresponding sanctions, as well as the entire disciplinary procedure. The Code also contemplates the period of limitation of these disciplinary actions (i.e., five years from the occurrence of the fault, in general). Disciplinary actions against lawyers are heard by the Superior Council of the Judiciary and its sectional councils.

Finally, our case law has used different institutions to distinguish which losses may be attributed to lawyers in the context of civil liability, and to determine how they are assessed. As to the first point, ‘loss of opportunity’ (brought from French law) has been coined for those cases in which the lawyer has deprived the victim of the possibility of earning a benefit. Under this institution, the compensable loss is not the loss of the case itself, but the loss of the possibility of winning it. Damages are calculated according to the ‘Theory of Prosecution Judgment,’ which is based on the same principle as the theory of loss of opportunity, in that damages are determined based on previous decisions in similar cases and other objectively applicable rules.

**Medical practitioners**

Health professionals can be prosecuted in two ways: first, with regard to medical ethics standards; and second with regard to civil liability. In the first case, the act of the professional is examined to determine whether it complies with the general ethical and technical standards of the medical profession such that, in the event of deviations, sanctions are imposed on the practitioner. These cases are heard by the National Medical Ethics Tribunal and regional medical ethics committees composed of doctors.

In the second case, the assessment also concerns the doctor’s behaviour and whether it complies with the standard required of a professional with similar characteristics in a similar situation, but particularly with a view to establishing whether there is civil liability for damage caused to the victims. As a general rule, the claimant must prove the practitioner’s negligence, because medical practitioners are, as a matter of course, required to practise using ‘best efforts’.

25 Law 1123 of 2007 (amending Decree 196 of 1971 (the Statute on the Practice of Law)).
29 Law 23 of 1981 (the Code of Medical Ethics) and Decree 3380 of 1981, which regulates the former.
Notwithstanding the above, as regards state liability for failure to provide medical services, there is a robust Council of State (CE) precedent where negligence on the part of the practitioner is presumed, especially in gynaecological services: according to the CE precedent, the patient’s healing is to be regarded as the normally expected outcome and, in the event of an abnormal result or damage, the practitioner must prove that the outcome was not caused by negligence on his or her part.

Consequently, courts have embraced the theory of a dynamic burden of proof – imposing the burden of proof on the defendant doctor – arguing that the technical knowledge and direct service provided put the health professional in a better position to prove the absence of negligence. What was initially a case-law precedent has turned into law and our most recent procedural laws order the application of this theory.

However, there is agreement in national legal doctrine and jurisprudence that the responsibility of the practitioner is subjective and therefore based on fault, although in some instances, strict liability applies. This is the case for aesthetic procedures, or improper handling of a hazardous object used in the medical act.

The absence of informed consent is a recurrent cause of liability in the Colombian jurisdiction. If informed consent is not duly taken, the practitioner will be held liable. Finally, it should also be mentioned that the Colombian High Courts have issued medical liability rulings under the theory of loss of opportunity.

iii  Banking and finance professionals

This group of professionals includes financial institutions, banks, finance companies and other companies that carry out activities in the financial market.

The applicable liability regime is the one explained in previous sections for professionals in general, which may be contractual or non-contractual, but with the distinction that these entities are subject to greater vigilance and control. This responsibility is usually subjective, but in contractual liability variations may arise, depending on whether the contractual obligation whose breach would give rise to liability is in the nature of best efforts or to achieve results.

This group of professionals is governed by Decree 663 of 1996 (the Organic Statute of the Financial System (EOSF)), which defines the participants in the market, their activities and their professional duties, as well as prohibitions and limitations on their activity. The EOSF also provides sanctioning regimes applicable to natural persons or institutions subject to supervision and control by the Financial Superintendence of Colombia (SFC), the entity in charge of supervising organisations that participate in the financial market, and to which

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34 CSJ. 26 November 1986.
36 EOSF and its complementary regulations.
37 EOSF, amended by Law 795/2003. Articles 208–212. Financial activity in Colombia is additionally regulated by Decree 2555 of 2010, as amended; Law 1328 of 2009 (the Consumer Protection Regime); the legal newsletters issued by the SFC; and the applicable regulations of the Code of Commerce.
jurisdictional functions have been attributed. These sanctions are administrative and their imposition does not preclude victims from initiating private actions, either civil or criminal, for the compensation of damage.

Several Supreme Court rulings are worth mentioning regarding the liability of financial institutions, although they do not present an organised set of criteria to determine liability. Some of the most recurrent issues are: payment of counterfeit or adulterated cheques; breaches of direct-debit agreements; abuses of dominant position in contracts, in charging for financial services and in criminal investigations of employees; unjustified reporting to credit bureaus based on the collection of a non-owed capital; and fraud in transactions through unusual channels.

Dissatisfied financial consumers increasingly tend to bring their lawsuits before the SFC because it offers a quick resolution and puts pressure on the financial institution, which in addition to being ordered to pay damages may receive a disciplinary penalty. The most frequent cases involve fraudulent operations through unconventional channels, credit-card fraud and payment of counterfeit cheques.

iv Computing and information technology professionals

Computing and technology professionals are not subject to specific regulation. They are grouped under the category of ‘software engineers and related professions’ and, to that extent, their activity will be regulated by the same general rules applicable to all engineering professionals, defined by law as those that apply ‘the physical, chemical and mathematical sciences . . . to the use and invention of the subject’.

The most important legislation comprises Law 842 of 2003 and Law 1325 of 2009. Law 842 defines the engineering profession and indicates the requirements for these professionals to obtain their licences and practise lawfully. In addition, it establishes the functions of the National Professional Engineering Council, including the inspection, supervision and control of this professional practice. This body is also responsible for sanctioning the faults of these professionals in accordance with the procedure established in this Law and which may be initiated informally or by complaints filed by the public.

Law 842 establishes a code of ethics: the ‘framework of professional behaviour of the engineer in general’. This code contains some general duties that comprise the framework for professional behaviour, with an emphasis on the duty to guard and maintain the goods, valuables and information entrusted to them. The code of ethics does not deviate from the general duties that are required of all professionals, but it is particularly stringent in those cases where professionals undertake activities in which they fail to meet the minimum standard of conduct.

Any act or omission by an engineer, including software engineers, in breach of professional or legal duties, violation of the code of ethics or exercise of criminal activities is subject to disciplinary sanctions. And the victim may also pursue compensation for damage caused by software professionals, under the general rules considered above.

38 CSJ. Ruling of 8 September 2003. Exp. 06909.
40 CSJ. Ruling on Class Action 22 April 2009. Exp. 00624.
42 CSJ. Ruling of 5 August 2014. Exp. 3972.
43 CSJ. Ruling of 19 December 2016.
v Real property surveyors

Although property inspections can have multiple purposes, such as determining the boundaries of a site and preparing maps or reports, or establishing the limits of construction on a property, these tasks are exercised exclusively by the state, with the intention of creating or updating the cadastral registry.

In Colombia, the work of private property inspectors is only focused on commercial appraisal – that is, on inspecting a property to determine, under technical and economic criteria, its commercial value for different purposes.

The most important legislation in this matter is Law 1673 of 2013, which indicates all conditions under which the appraiser must operate, such as being registered in the Open Registry of Appraisers.

Law 1673 also establishes the Code of Ethics of Appraisers, which is ‘the framework of behaviour of the appraiser’, and violations of this Code are sanctioned. Appraisers’ duties include acting with ‘the utmost diligence’ in the matters they oversee, and maintaining the confidentiality of information related to their clients and the jobs carried out.

The same Law establishes that the appraiser is primarily an adviser and ‘guardian’ of the interests of his or her clients and must never act to the detriment of third parties. Although this mandate emanates from the general principle of acting in good faith, it is admirable that Law 1673 has expressly established this, highlighting the social importance of this profession.

In the case of appraisers, there is not only one disciplinary body. The Law permits the existence of several Recognised Self-Regulation Entities (RSEs) that, in addition to appointing assessors and contributing to the Open Registry of Appraisers, have sanctioning faculties regarding their members.

Finally, despite the merits of Law 1673, the adequacy of a system of inspection, monitoring and control of appraisers through RSEs is still at a very incipient stage (only one such entity has been created), and it is unknown how successful their coexistence may be.

vi Construction professionals

This group comprises all professionals who engage in construction. The general civil liability requirements explained in previous sections apply to these professionals, as do several other statutes, including the statutes regarding each professional and technical career, such as engineering and architecture. These regulations set out specific duties for construction professionals, who must comply with them to be considered diligent and careful. These duties tend to prevent the causation of damage, so their non-observance becomes a fault giving rise to liability.

However, it does not imply that the professional responds exclusively to a subjective type of responsibility. Indeed, construction is considered a dangerous activity by our case law and thus the general rule that negligence of the professional needs to be proven does not apply.

44 Law 9/1989, Law 388/1997 and complementary regulation (urban reform and territorial reorganisation); Laws 2 and 3 of 1991 (social dwelling); Law 546/1999 (the financial system for construction); and Law 400/1997 reformed by Law 1229/2008 (seismic resistant construction).

45 Law 14/1975.


Construction professionals are liable under the terms of Article 2060 of the Civil Code, which contemplates the rules applicable to the construction contract. This Article, in its third paragraph, imposes on the constructor an obligation to achieve results, consisting of a 10-year construction warranty, which is also set forth in the Consumer Protection Statute, which establishes that the constructor is liable for the stability of the construction for 10 years, but also for interior finishings for one year.

One must distinguish between an engineer working under a turnkey contract or delegated administration contract (and who is bound by the 10-year warranty and has an obligation to achieve results) and an engineer in charge of the soil survey, who is only liable if negligence is proven.

A final differentiation must be made with respect to the regime applicable to construction professionals when damage is caused in the exercise of a dangerous activity. In such cases, the construction professional is responsible under strict liability and can only be exonerated in the event of force majeure.

In light of recent events, in 2014 a compulsory insurance scheme for the stability of buildings was created by law, but this still needs further regulation and, therefore, is not yet in force.

vii Accountants and auditors

Our legal system considers accountants to be of great social relevance, particularly because they certify facts that come to their knowledge in the exercise of their duties, and because failure to offer reliable information can have significant economic consequences.

Law 43 of 1990, which regulates this profession, has instituted two bodies: the Technical Council of Public Accounting, in charge of the technical–scientific orientation of the profession; and the Central Board of Accountants, which works as a disciplinary court and ensures compliance with professional ethics, having sanctioning power for that purpose. The sanctions that can be imposed range from fines to the cancellation of the licence to practise as an accountant. However, behaviours that may constitute violations can be found in the professional code of ethics of Law 43. The code prohibits any alteration of the documents that serve as the basis for professional advice or accounting and auditing practice, or any lack of truth in opinions issued. In addition, it prohibits accountants from providing services for which they are not well suited, and from exposing their clients to unjustified risks; it also requires practitioners to avoid conflicts of interest.

Apart from the sanctions of the code of ethics, Articles 58, 207, 216 and 222 of the Colombian Code of Commerce sanction accountants for irregularities in accounting records, breach of confidentiality, negligent performance of their duties or failure to report an economic crisis within a company. The Colombian Tax Statute establishes sanctions for accountants who have been inaccurate in tax declarations they have signed.

48 This rule also applies to architects, according to Article 2061 C.C.
50 Law 1480/2011, Article 8.
Finally, Article 42 of Law 222 of 1995 makes auditors responsible for damage caused to the company, shareholders or third parties by not preparing or publishing financial statements. Of course, on top of this, all other conduct outlined would be a source of professional negligence of accountants.

viii Insurance professionals

Although there are other professionals in this group, we will deal primarily with insurers and brokers, and with particular focus on insurers.

First, insurance professionals and their activity are regulated mainly in the Code of Commerce, the EOSF, Decree 2555 of 2010, Law 1328 of 2009, the Basic Legal Newsletter and the Basic Accounting and Financial Newsletter; the last two of these are the responsibility of the SFC, which is in charge of the inspection, surveillance and control of people who perform any activity in the Colombian financial system, including insurers.

Complaints can be lodged with the SFC against insurers for inadequate provision of a service or for breach of a legal or regulatory standard that falls within the SFC’s remit. The SFC is also competent to sanction insurers in the event of a breach of standards, but as an administrative entity it cannot make decisions on a breach of contract, or order compensation or refunds. For the resolution of contractual disputes between a financial consumer and an entity of the same nature, the law has enshrined, among other things, the financial consumer protection action, which can be processed by an ordinary judge or by the SFC in exercise of the jurisdictional functions granted by the General Procedural Code.

Furthermore, there is a union called Fasecolda, which brings together insurance, reinsurance and capitalisation companies, and whose mission is to contribute to the development of insurance activity in Colombia by representing this sector before authorities and society in general in the formulation of policies and the promotion of insurance culture. However, unlike other bodies, it has no disciplinary powers or control over its members.

Finally, we note that there are no important deviations in the liability regime of insurance professionals.

III YEAR IN REVIEW

Bearing in mind that this is the first time that a chapter for Colombia has appeared in this publication, we will allow this review to cover more than a year and we will begin by reiterating that professional negligence is an incipient concept here. There is no specific legal regime, nor a clear jurisprudential line regarding the matter. Advances are made by national and foreign legal doctrine and, partly, by insurance policies that specifically exclude professional negligence of the insured or are designed to cover specifically responsibility negligence, which has led the doctrine to ask what this is. This has led to the publication of works such as that by Nicolás Uribe Lozada discussing directors’ responsibility, professional negligence and the legality of its exclusion in directors and officers policies.

The concept of professional negligence is slowly beginning to reach the rulings of the High Courts. Thus, for example, the decisions of the Labour Chamber of the Supreme Court

52 Law 1480/2011.
53 Law 1564 /2012, Article 24.
of Justice are interesting in the sense that, in recent years, the Chamber has been dedicated to defining the duty of information and advice of pension-fund managers, particularly in the case of advising future pensioners on the choice of the most suitable regime.\textsuperscript{55}

The Civil Chamber of the Supreme Court of Justice is not far behind. It has begun to discuss specifically professional negligence of financial institutions. For example, in a ruling by Justice Ariel Salazar Ramírez,\textsuperscript{56} a financial entity sued for the theft of a sum from the plaintiff’s savings account was sentenced for ‘pharming’, because the user accessed a false internet portal of the financial entity. Although the Court decided not to annul the appealed judgment, the ruling contains an interesting compilation of previous rulings in which it had already discussed professional negligence of financial institutions.

Furthermore, the ruling of 24 August 2016 regarding medical responsibility, institutes the theory of organic liability to explain how a medical service provider must answer for defects in its operation\textsuperscript{57} even if negligence cannot be attributed to a specific individual.

Accordingly, we see a clear tendency to consider ‘a professional’ to be not only the natural person who has pursued a career or practised a profession, but also legal entities created to provide professional services.

\section*{IV OUTLOOK AND FUTURE DEVELOPMENTS}

We believe that jurisprudence will continue to evolve in construction cases and cases of medical liability, although we cannot anticipate the same evolution for the other professions in the near future.

However, there may be an interesting surprise in the case of professional negligence of lawyers. The rulings issued by the Superior Council of the Judiciary are increasingly relevant and it is likely that mistakes committed by lawyers will be brought before the civil courts in claims for damages.

\footnotesize{\textsuperscript{55} CSJ, Labour Chamber. Ruling of 3 September 2014. No. 46292. See also Superior Tribunal of Medellín, Amparo Carvajal v. Protección S.A. and Colpensiones. No. 05001310502020140102001.}

\footnotesize{\textsuperscript{56} 19 December 2016.}

\footnotesize{\textsuperscript{57} Understood as ‘the execution of administrative decisions or the performance of acts adopted by the hierarchical chain . . . failures in planning, in controlling, in organising, in coordinating, in providing resources, in using technology, in providing communication channels, in providing prevention policies, among other variables’, according to the decision mentioned above.}
I  INTRODUCTION

i  Legal framework
In Danish law, a claim for professional negligence can be brought under a contractual or non-contractual relationship.

Contractual claims usually arise when the professional is required to complete a task under a contract and has failed to do so.

Non-contractual claims usually arise from an act or omission contrary to a profession’s standard of good practice. Such a standard can have various sources, such as statute, ministerial orders and rules of professional bodies.

The general comparator used is that of the reasonably competent professional. However, the comparator when providing specialist advice is usually that of the reasonably competent specialist.

As regards the standard of proof, there is no general rule and it is usually for the claimant to establish the standard, which is often done by asking the court to appoint an expert.

Common defences against professional negligence claims, whether contractual or not, include lack of proof, estoppel and failure to bring a claim in time.

Exclusion of liability is possible only in contract. Such contractual exclusion must be reasonable and is invalidated by gross negligence or intention to cause damage.

ii  Limitation and prescription
The Limitation Act is the principal act for limitation periods, including claims pertaining to professional negligence. In general, the limitation period is three years, from breach of contract for contractual claims, or from when the negligent act occurred for non-contractual claims. If the claimant is factually unaware of the claim, the limitation period normally

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1 Jacob Skude Rasmussen is a partner and Andrew Poole is a dispute resolution consultant at Gorrissen Federspiel. The authors acknowledge the valuable assistance of assistant attorney Mathias Mølsted Andersen in producing this chapter.
2 For example, regarding lawyers, see section 126 of the Administration of Justice Act, No. 1101 of 22 September 2017.
3 See Bo Von Eyben and Helle Isager, Lærebog i Erstatningsret, 8th ed. (Copenhagen: Jurist- og Økonomforbundets Forlag, 2015), p. 129f.
4 Act No. 1238 of 9 November 2015.
5 See section 3(1) of the Limitation Act.
6 See sections 2(3)–(4) of the Limitation Act.
commences from when the claimant becomes or should have become so factually aware, but the period can only be extended in this way up to a maximum of 10 years (30 years for personal injury claims).

### iii Dispute fora and resolution

Depending on the profession, there are disciplinary boards, which assess whether a professional has or has not acted in accordance with the rules of his or her profession, and there are complaints boards, which assess a professional’s service, mainly in cases brought by consumers. Not every profession has a disciplinary board or a complaints board, and certain professions have a combined board.

Where the boards exist, they are often the first step when resolving a professional negligence dispute, and they each have their own rules of procedure.

If a claim of professional negligence is not assessed at a disciplinary or complaints board, or a party is not satisfied with such an assessment, a party can generally bring a claim before the Danish courts, and such a claim does not differ from other claims under Danish law. The Administration of Justice Act applies, and the claim normally begins at the competent district court. The court is not bound by a board’s decision.

Arbitration is often used to resolve construction disputes, but arbitration and mediation are not common dispute fora for professional negligence otherwise.

### iv Remedies and loss

The remedies generally available to the parties depend on whether a claim is brought in contract or not.

For a contractual claim for professional negligence, a claimant generally has two options. The first is to be placed in the position as if the contract had been completed, and the second is for the claimant to be placed in a position as if the contract had never been entered into, both through an award of damages. If there has been a contractual material breach, termination is also possible.

For a non-contractual claim, the general remedy is to place the harmed party in the position as if the harm had not occurred. Remedies include damages and injunctions.

For all damages for professional negligence, causation and remoteness principles apply, indirect losses can be included, there is a duty to mitigate loss and one cannot be unduly enriched from a negligent act.

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7 See section 3(2) of the Limitation Act.
8 See sections 3(3)(1)–(4) of the Limitation Act.
10 For example, regarding accountants, see Lars Bo Langsted, Paul Krüger Andersen and Lars Kiertzner, Revisoransvar, 8th ed. (Copenhagen: Karnov, 2013), p. 500.
II  SPECIFIC PROFESSIONS

Each profession is often distinct and complex in how it approaches professional negligence. For comparison purposes, the sectors below focus on details such as applicable legislation, professional bodies, standards of good practice, disciplinary and complaints boards, and insurance.

i  Lawyers

The Administration of Justice Act sets out the conduct required of a lawyer, which includes completing a task thoroughly, in good conscience and with the appropriate client care.13 The Danish Bar and Law Society is the body that expands upon this standard of good practice to include rules on client privilege, conflicts of interest, fees, confidentiality, etc. The professional body for lawyers is the Association of Danish Law Firms, which works for the interests of law firms, their owners and employees.

The Danish Bar and Law Society has a combined disciplinary and complaints board, a decision of which is, unusually, final for a client. In other words, only the lawyer can contest a case in the courts that has already been decided by the board.14

Lawyers are required to have liability insurance of a minimum 2.5 million Danish kroner, for a period of five years after giving up practice.15

ii  Medical practitioners

The Act on Complaints and Claims in Healthcare16 covers negligence within the medical profession. Section 19 of the Act states that it generally covers every treatment of a healthcare professional who is a part of the Danish healthcare system. There are various professional bodies that work for the interests of their members; the example for doctors is the Danish Medical Association.

The Act sets out where medical professional negligence differs from other professions. For example, there is a statutory standard of proof for a successful claim for damages, namely more than probable;17 and the Act states that even if the professional is a generalist, the relevant comparator is an experienced specialist.18

There are three boards in the Danish healthcare system: one disciplinary; and two complaints, of which the first is for compensation and the second is for compensation appeals. It is these boards, along with two advisory boards,19 that contribute to the understanding of what is the standard of good practice for medical professionals.

13  See section 126 of the Administration of Justice Act.
14  See sections 147 d and 147 e of the Administration of Justice Act.
15  See section 61 of the articles of association of The Danish Bar and Law Society, which implements section 127 of the Administration of Justice Act, and is approved by ministerial order No. 907 of 16 September 2009.
17  See section 20(1) of the Act on Complaints and Claims in Healthcare.
18  See section 20(1)(1) of the Act on Complaints and Claims in Healthcare.
19  One for the disciplinary board and one for the complaints boards, see sections 12 and 12 a of the Act on Complaints and Claims in Healthcare respectively.
Private medical practices, hospitals and clinics must have liability insurance of a minimum of 20 million Danish kroner per year, but public practices (run by the state, municipalities, etc.) are not obliged to have such insurance.

### iii Banking and finance professionals

The Financial Business Act regulates all financial businesses such as banks (both retail and investment), insurance companies, mortgage providers and investment services companies.

The relevant standard of good practice is derived from Chapter 6 of the Act, which sets out the requirement for financial businesses to act in accordance with good business practices. As regards specific activities, the standard is at times further developed by ministerial orders.

There are various bodies that further the interests of banking and finance professionals; two examples are the Danish Insurance and Pension Association, and the Finance Society (the latter for banks’ employees). There are also different complaints boards for different financial activities (e.g., mortgages and investment funds).

One example of liability insurance within this sector concerns investment advisers, who must be covered at a minimum of €1 million per negligent act and at a minimum of €1.5 million for the combined number of negligent acts, per year.

### iv Computer and information technology professionals

There is not one act, standard of good practice or insurance scheme that applies to the whole sector of computer and IT professionals; disparate pieces of legislation apply to the sector. Legislation to bear in mind when looking for a standard of good practice, and if related to the case, includes the Act on Electronic Communications and Services, which sets out rights and obligations regarding internet access and the electronic provision of information or content. For considerations of data fraud, the Criminal Code contains relevant sections.

There are certain bodies such as the Danish ICT Industry Association and the Telecom Industry Association that comment on legislation and play a lobbying role for their members, in a similar manner to the above-mentioned Danish Insurance and Pension Association, and the Association of Danish Law Firms.

There are no disciplinary or complaints boards specifically only for computer and IT professionals, and so disputes would proceed directly to the courts, unless otherwise decided by the parties. If the case concerns data protection breaches, they can be forwarded to the Danish Data Protection Agency. Similarly, there is no insurance requirement that applies specifically only to computer and IT professionals.

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20 Subject to further qualifying factors, see section 8 of ministerial order No. 488 of 3 May 2018.
22 Act No. 1140 of 26 September 2017.
23 See sections 1 and 5 of the Financial Business Act.
24 For example, see ministerial order No. 332 of 7 April 2016 on good business practice in real estate credit lending.
25 See section 2(1)(4) of ministerial order No. 1228 of 31 October 2010.
26 Act No. 128 of 7 February 2014.
27 For example, see section 279 a of the Criminal Code, Act No. 977 of 9 August 2017.
v Real property surveyors

Real property surveyors are not a specific profession in Denmark. Various professions cater for real property in Denmark and this section focuses on real estate agents and building experts.

The tasks of real estate agents include appraising, negotiating sales and purchases, contacting mortgage providers and drafting sale contracts. A principal task of a building expert is to draft the structural survey in connection with a property’s sale.

The Danish Association of Chartered Estate Agents represents real estate agents and the Act on Sale of Real Property regulates these agents as regards consumer cases. Section 24 of the Act sets out the standard of good practice and Chapter 5 provides specific rules for areas that could give rise to professional negligence claims (e.g., Section 27 sets out rules for the appraisal of property and Section 35 sets out rules for conflicts of interest). Real estate agents have both a disciplinary board and a complaints board.

Ministerial order No. 1537 of 9 December 2015 provides the statutory basis for the requirement that real estate agents must have liability insurance, of a minimum amount of 3 million Danish kroner per year.

As regards building experts, the relevant legislation is the Act on Licensed Building Experts with its related ministerial order. Section 11 of the ministerial order sets out in specific terms how building experts should conduct their work, which provides a basis when considering the standard of good practice. The Association for Building Experts and Energy Consultants is an applicable professional body.

The building experts’ combined board comes under the Danish Business Authority, and assesses cases regarding whether building experts have or have not fulfilled their obligations pursuant to the Act on Licensed Building Experts and to the Act on Consumer Protection when Buying Real Estate. The board can criticise, caution and fine building experts up to 100,000 Danish kroner, as well as assess contested structural surveys.

Building experts’ liability insurance for structural surveys is required to be that ordinarily attainable in the insurance market, for a period of five years after the sales connected with the building expert’s survey.

vi Construction professionals

There is no general legislation under Danish law that governs the relationships between the parties in a construction project. Instead, a government committee comprising both governmental and non-governmental members has developed sets of default general contractual conditions. Examples include a set for civil engineering contracts (AB 92) and a set for turnkey contracts (ABT 93).
Section 10 of both AB 92 and ABT 93 sets out a standard of good practice that is the default if nothing specific is set out in the contractual terms or otherwise agreed by the parties. The standard is that work must be of a professional quality. How this quality is assessed depends on each construction profession’s requirements regarding applicable legislation, rules, guidelines, customs, etc.

Pursuant to Section 8(1) of both AB 92 and ABT 93, insurance must be bought by the project owner for fire and storm damage if a contractor requests it, and the contractor must have the usual liability insurance. However, further insurance can be made part of the agreement and this will usually be the case because the default set out in AB 92 and ABT 93 is generally seen as insufficient.

For both AB 92 and ABT 93, their respective Section 47s set out arbitration as the default dispute resolution mechanism, which parties often leave unchanged when adapting the conditions.

Outside the general contractual conditions, three complaints boards are relevant; one deals with electricians and plumbers, and two others deal with other construction professionals such as painters, masons and carpenters, where the cost of construction is not greater than 1 million Danish kroner.

For a professional body, the Danish Construction Association is one that comments on new legislation and is an employers’ organisation, comprising as members: major building contractors, small and medium-sized construction companies and manufacturers of building components.

vii Accountants and auditors

The standard of good practice is influenced by applicable legislation, such as Section 361(2) of the Companies Act as regards accountants within limited liability companies and Section 16 of the Act on Approved Auditors and Audit Firms, which requires skills of accuracy and swiftness, as adapted to the particular task. The standard is partly defined by the code of conduct of the regulatory and professional body of the Institute of State Authorised Public Accountants. The Institute has an expert committee, to which parties can pose questions, and a court can take the committee’s answers into account when deciding the standard.

The disciplinary board for accountants is the Account Practices Board, to which claims can be brought regarding an accountant’s statements and his or her related advice.

Accountants are obliged to hold insurance when acting within the scope of the Act on Approved Auditors and Audit Firms. Accountant companies with fewer than 10 qualified accountants must have a minimum cover of 2 million Danish kroner, and companies with 10 or more must have a minimum cover of 20 million Danish kroner, per year.

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38 See section 8(3) of both AB 92 and ABT 93. ‘Usual’ suggests the market standard.
40 For the purposes of this section, auditors fall under the description for accountants.
41 Act No. 1089 of 14 September 2015.
42 Act No. 1167 of 9 September 2016.
43 See ministerial order No. 727 of 15 June 2016, pursuant to section 47 of the Act on Approved Auditors and Audit Firms.
44 See sections 3(1)(6) and 3(4) of the Act on Approved Auditors and Audit Firms and sections 8(2)–(3) of ministerial order No. 1536 of 9 December 2015.
viii Insurance professionals

Insurance companies are included in the Financial Business Act. The Act on Insurance Brokerage applies to independent insurance brokers. These brokers have a separate standard of good practice and a separate professional body, the Danish Association for Insurance Brokerage. The complaints board for independent insurance brokers is the Insurance Complaints Board.

According to Section 20(1) of the Act on Insurance Brokerage, an insurance broker shall hold professional indemnity insurance covering potential financial claims resulting from the business. The minimum cover is 9,325,475 Danish kroner per negligent act and at least 13,801,703 Danish kroner for the combined number of negligent acts, per year.

III YEAR IN REVIEW

The following were notable cases concerning matters of negligence in different professional sectors in the past year. They focus on the calculation of loss and liability.

i Legal sector

The claimant was a company and held three mortgage bonds over a property. The defendant was the company’s lawyer.

The property was to be sold at auction and the lawyer was tasked with making a bid to ensure that the value of the mortgage bonds was covered by the sale price. The lawyer missed the auction and the property was sold for approximately 1 million Danish kroner.

The lawyer acknowledged that he had made a professional fault and so the claim focused on the loss’s amount. The company claimed that the lawyer’s negligence cost it approximately 2.6 million Danish kroner, as the company had agreed with another company that the latter would buy the property.

The lawyer argued that there was insufficient evidence that the agreement between the two companies was binding.

The court confirmed that the loss should be calculated as the difference between what the company would have obtained if it were not for the lawyer’s error and what the company actually obtained.

The decision affirms the principle that the amount of a loss in cases of a lawyer’s professional negligence is to be generally calculated as the difference between the positions of: (1) what would have happened if the fault had not occurred; and (2) what actually occurred following the fault.

As the case was before the Supreme Court, there is no appeal and the decision is final.

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45 See section II.iii of this chapter.
46 Act No. 1065 of 22 August 2013.
47 See ministerial order No. 455 of 30 April 2018.
48 The insurance rules are set out separately and in more detail at section 3(1) of ministerial order No. 481 of 3 May 2018.
49 Supreme Court decision of 5 January 2017 in case No. 215/2015, reported in the Danish weekly law reports: UfR 2017.1174 H.
ii **Banking and finance sector**

The claimant was an individual investor; the defendant was the investor’s bank.

The investor had made stock investments of approximately 4 billion Danish kroner between 2004 and 2007, partly financed by the bank. Due to the financial crisis the investments lost value and were sold at a loss.

The investor claimed that the bank was liable for the investments’ losses because the bank had not followed the required verification procedures and that, had the procedures been followed, they would have shown that the investor should not have completely invested in the stocks. The investor claimed approximately 65 million Danish kroner from the bank. The bank argued that the procedures required at the time had been met, that the investor did not rely on the bank’s advice, and that the investor knew the investment risk and had accepted it.

Given that the investor was experienced, the court found that he was fully aware of the risk. Accordingly, there was no basis for the bank’s liability, even though the bank had not met every verification requirement.

The decision affirms the principle that an investor’s attributes and actions are relevant when assessing a negligence claim within the banking and finance sector.

As with the previous case, this case was before the Supreme Court, and so there is no appeal and the decision is final.

iii **Banking and finance sector, including auditors**

The claimant was a state-owned company and the defendants were the former board of directors, management and auditors of a bank.

In the wake of the financial crisis, the bank was one of 12 that were wound up and taken over by the claimant to ensure the stability of the Danish economy.

The company claimed an estimated 1 billion Danish kroner for losses on the grounds of professional negligence. It argued that the board of directors and the management in general had managed the bank recklessly, giving rise to liability, and that the auditors did not fulfil their duties to the bank, pursuant to the Companies Act applicable at the time. The defendants denied liability and argued that no legal duties or obligations were neglected.

The court found that the bank had had large-scale exposure in the market-sensitive real estate sector, and that there had been negligent acts committed, such as the failure to perform credit evaluations prior to granting loans. However, the court found that the losses for the negligent acts had not been proved and that the general running of the bank, including its business strategy, did not give rise to fault.

The decision affirms the principle that a claim for professional negligence requires sufficiently certain evidence to obtain compensation for losses.

This case was before the Eastern High Court and has been appealed to the Supreme Court.

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50 Supreme Court decision of 9 March 2017 in case No. 347/2011, reported in the Danish weekly law reports: UfR 2017.1712 H.

51 Eastern High Court decision of 7 November 2017 in case Nos. B1291-10 and B1851-10, unreported in the Danish weekly law reports at time of writing.
Accountancy sector

The claimant was a company, which bought, sold and rented commercial real estate. The defendant was the company’s accountant.

The company had entered into an interest rate swap, which the accountant did not take into consideration when preparing the company’s financial reports. The company and its accountant agreed that this omission meant that the company had lost a tax allowance, and that this allowance had a value of approximately 1.7 million Danish kroner. The parties further agreed that, from the date the omission occurred, the company had recorded deficits.

The court found that the company had not yet realised a loss because the deficits were continuing, but also found that it was uncertain how long the deficits would continue.

Owing to the seriousness of the accountant’s error, the standard of proof was eased in favour of the claimant as regards calculating the amount of the loss, and the court awarded, in its discretionary estimation, 700,000 Danish kroner to the company.

This decision affirms the principle that, while losses must usually be sufficiently substantiated in order to be successful, if a negligent act is deemed sufficiently serious, the Danish courts are willing to ease the general standard of proof as regards calculating the amount of loss.

This case was before the Western High Court, and such cases can be appealed to the Supreme Court. To the authors’ present knowledge, no such appeal has been made.

IV OUTLOOK AND FUTURE DEVELOPMENTS

Developments that may affect the standards of good practice include a new EU regulation on data protection that applies from 25 May 2018 and that tightens rules and increases sanctions. For construction professionals, the AB 92 and ABT 93 general contractual conditions will be replaced by new conditions of AB 18, as from 21 June 2018, which update wording but broadly follow AB 92 and ABT 93 regarding insurance, the standard of good practice and default arbitration.

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ENGLAND AND WALES

Nicholas Bird and Sophie Newton

I  INTRODUCTION

i  Legal framework

The core obligation of a professional is to provide services to its client with reasonable care and skill. Such a term is implied by statute into the contract of retainer and usually arises concurrently in tort. A professional is rarely taken to have warranted to the client that it will achieve any particular outcome.

The scope of the professional’s duty of care is determined by a combination of the terms of the retainer, the client’s instructions and such matters as the relevant professional regulatory framework may require. The performance of the duty of care is usually judged by reference to ‘the standard of the ordinary skilled man exercising and professing to have that special skill’. In some cases, the court will depart from that standard if it imposes unacceptable risk or is illogical.

Increasingly, the issue of liability is determined by reference to the quality of risk advice given by the professional (e.g., in respect of the likelihood of future adverse events occurring). In some cases, the courts have adopted very nuanced and complex tests for assessing whether the client was properly informed of material risks.

The role of professional regulation is also significant: codes of conduct may be seen by the court either as the distillation of good practice or (sometimes) independently actionable where breached. Many professional regulatory arrangements also mandate a framework for client redress and compensation that exists alongside the courts. Such frameworks tend to adopt lower criteria for proof and are usually cost-free to the client. While these frameworks tend to be used for single, low-value claims, the applicable regulator may also have the power

1 Nicholas Bird is a partner and Sophie Newton is an associate at Reynolds Porter Chamberlain LLP.
2 See s. 13, Supply of Goods and Services Act 1982, ‘In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.’
3 See Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582.
4 See Montgomery v. Lanarkshire Health Board [2015] AC 1430. The test proposed was ‘whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should be aware that the particular patient would be likely to attach significance to it’. See also O’Hare and Anor v. Coutts & Co [2016] EWHC 2224 in the context of financial advisers.
5 For example, the Financial Ombudsman Service or the Legal Ombudsman.
to require the professional to carry out a past business review, identify all clients who have suffered harm and provide redress to them. The exercise of such powers may greatly increase the professional's liability exposure.

In addition to a failure to discharge the duty of care a professional may also be found liable on other grounds (e.g., for breach of warranty of authority, for breach of trust when safeguarding client funds, and for breach of fiduciary obligations of loyalty and of acting in good faith in the best interests of the client).

ii  Limitation and prescription

The limitation period that is most commonly engaged in professional negligence disputes is the six-year period for causes of action in contract and tort. This arises under Sections 2 and 5 of the Limitation Act 1980. The six-year period starts on the date that the cause of action accrues. In contract, it is usually quite straightforward to establish the date of the accrual; it will be when the defendant's breach of contract occurs irrespective of when damage is sustained. In tort, the cause of action accrues upon the claimant sustaining actionable damage. This is often later than the date on which the breach of duty occurs.

There are a number of possible extensions and alternatives to the six-year limitation period. Sometimes a claimant will not appreciate that it has suffered damage until after the expiry of the six-year period. Under Section 14A of the Limitation Act 1980, a claimant may bring a claim within three years of the date on which it first acquires the requisite knowledge for bringing the claim. There is a significant statutory and case law regime governing how this works and there is 15-year longstop provision.

The six-year period can be extended by agreement either at the outset of the professional’s engagement (for example, if the engagement is made by deed) or during the course of any subsequent dispute. It is also possible to extend the limitation period in certain other cases. If the case is based on the fraud of the defendant or where a material fact has been deliberately concealed, the limitation period will not begin to run until the claimant has or could reasonably have discovered the fraud or concealment (see Section 32 of the Limitation Act 1980). Limitation for claims in equity is subject to more complex provision and needs special care.

iii  Dispute fora and resolution

Civil claims against professionals are generally brought in either the business and property courts of the Chancery Division of the County Court and the High Court or in the Technology and Construction Court (TCC). The procedure for the prosecution of claims through the courts is set out in the Civil Procedure Rules (CPR), with Part 60 of the CPR and the related practice direction setting out procedure specific to the TCC. The TCC primarily deals with claims against engineers, architects, surveyors and accountants where the amount in dispute is in excess of £250,000. The TCC also deals with claims against solicitors that involve technical matters such as planning, property and construction. Additional guidance on the conduct of claims can be found in the Chancery Court Guide and the TCC Guide.

Prior to commencing proceedings, parties are expected to have adhered to a pre-action protocol. There is a Pre-Action Protocol for Professional Negligence Claims and a separate Pre-Action Protocol for the Construction and Engineering Disputes for claims against engineers, architects and quantity surveyors. The pre-action protocols provide a framework for the parties to resolve disputes without involving the court. The court may impose costs sanctions on parties who fail to comply with the pre-action protocols.
England and Wales

Even after proceedings have been issued, the courts encourage parties to engage in alternative dispute resolution (ADR). This can take the form of direct negotiations or mediation. Again, there is a risk of costs penalties being imposed by the court against any party or parties if they unreasonably refuse to engage in ADR, even if that party succeeds at trial.

Another method used for resolving claims against professionals is arbitration. It is most frequently used in claims involving construction professionals in circumstances where the parties have entered into a contract and it provides for any disputes arising from the contractual works to be referred to arbitration. Arbitration is a non-judicial means of resolving disputes where the parties appoint an arbitrator or panel of arbitrators. Arbitration is sometimes a quicker and cheaper means of dispute resolution than litigation. It has the benefit of being a confidential process but enforceable by the court. However, the arbitrator’s decision is generally binding on the parties and there are usually limited grounds of appeal.

iv Remedies and loss

Damages for professional negligence are usually assessed by reference to the principle that the client should be put in the position he or she would have been in but for the matters complained of. This test requires the careful identification of the nature of the advice that ought to have been provided and, thereafter, the claimant will have to prove on a balance of probabilities that he or she would have followed such advice so as to achieve some better outcome. Where the better outcome also involves the unrestricted volition of a third party the court may award damages for loss of the chance of achieving that outcome.6 Defences to professional negligence claims typically focus closely on this kind of causation argument.

In addition, the courts have shown a marked reluctance to compensate for loss arising from risks that it was no part of the professional’s duty to protect against.7 A client is therefore usually taken to have accepted the risks of a transaction in respect of which he or she has sought no advice. This principle may require the court to make fine distinctions between the nature of advice and information provided by the professional.8 The prominence of this principle when assessing a professional’s liability tends to displace legal devices that are used elsewhere for limiting damages (e.g., arguments that loss is too remote or not sufficiently foreseeable).

Compensation for the other forms of professional liability may be assessed on different bases: for example, the solicitor who incorrectly warrants authority to commence litigation may be liable for damages on the assumption the warranty was true; the professional trustee

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8 'In cases falling within [the] "advice" category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against . . . By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers).’ See BPE Solicitors at paragraphs 40 and 41.
may be required to restore in full lost trust funds regardless of issues of fault; and the fiduciary that receives an undisclosed profit may be required to disgorge it to the principal even if the principal would have agreed to its retention if it had been disclosed.

Finally, while contractual devices for limitation and exclusion of liability are often used in retainers as a means of reducing liability exposure, they do not feature prominently in reported cases. There are probably two reasons for this: the first is that such devices are subject to statutory control9 and therefore are not always effective; the second is that the professional’s regulatory arrangements often prohibit or limit their use.10

II SPECIFIC PROFESSIONS

i Lawyers

The Law Society is an independent professional body that represents the 167,200 solicitors in England and Wales. It provides support and advice to the legal profession and promotes the role of solicitors.

Solicitors are regulated by the Solicitors Regulation Authority (SRA). The SRA’s role is to prescribe standards for the solicitors profession to protect the public and to ensure that clients receive good service. The SRA sets out its required standards for the profession in the SRA Handbook. These standards include mandatory principles for all solicitors, such as upholding the rule of law and administration of justice, and acting in the best interests of clients. The SRA Handbook sets out a Code of Conduct for all solicitors and Disciplinary Procedure Rules.

A firm of solicitors must appoint a compliance officer for legal practice (COLP) and for finance and administration (COFA), who are responsible for the firm’s systems and for managing the risks to the firm’s delivery of legal services. The COLP and COFA must record any misconduct or breaches of compliance with the SRA Handbook, and self-report breaches promptly to the SRA. The SRA has statutory grounds to intervene in the running of a solicitors firm if it suspects dishonesty or material breaches of the SRA Handbook.

The Solicitors Disciplinary Tribunal (SDT) is an independent tribunal in which solicitors can be prosecuted for their conduct. The SDT is independent from the SRA and has its own powers and procedures. It can make findings of misconduct and impose sanctions, including fines, suspending a solicitor from practice or striking a solicitor off.

All solicitors firms are required to maintain professional indemnity insurance in the event of claims against the firm. The insurance policy must comply with the SRA Indemnity Insurance Rules. The insurance policy must be with an authorised insurer that has entered into a participating insurer’s agreement with the Law Society. The policy terms must include a limit of cover of £3,000,000 for any one claim.

9 See the Unfair Contract Terms Act 1977 and, where the client is a consumer, the Unfair Terms in Consumer Contracts Regulations 1999.

10 For example, mandatory Outcome 1.8 of the SRA Code of Conduct 2011 prohibits solicitors from excluding liability below the minimum mandated limit of insurance cover.
ii Medical practitioners

Negligence claims against medical practitioners can arise in any discipline and range from lower-value routine claims to multimillion-pound complex cases (such as brain injury caused by perinatal error or late diagnosis of cancer). They will almost always be claims for personal injury, including where the patient denies having given informed consent to treatment.

While such claims follow the general applications of the law of tort and negligence (duty, breach, causation), there are key differences, particularly in relation to limitation periods and remedies. For medical claims, the limitation period is three years and runs from the negligent event or (if later) the claimant’s date of knowledge.

In negligence claims against clinicians, the claimant’s most important remedy is that of damages, the aim being to put the claimant in the same position he or she would have been in had the tort not occurred. Damages are split into two parts: (1) general damages are awarded for pain, suffering and loss of amenity and are determined on a ‘tariff’ style basis (additional psychiatric injury will increase the award); (2) special damages are entirely case-specific to compensate a claimant for the financial loss suffered as a result of the clinician’s negligence. Provision is made for anticipated ‘future’ loss with complex calculations using discounts and multipliers to ensure an appropriate outcome. Different quantification principles apply when the patient has died.

Each medical professional body has its own regulator, including: the General Medical Council (doctors), the Nursing and Midwifery Council (nurses), and the Health and Care Professions Council (for example, psychologists and radiologists). Each regulatory body will set standards and codes for their members; for example, the GMC’s Good Medical Practice guidance for doctors. All regulators stipulate that medical professionals must have ‘adequate’ or ‘appropriate’ indemnity arrangements in place before they can practise.

iii Banking and finance professionals

The key legislation governing the regulation of banking and financial professionals is the Financial Services and Markets Act 2000 (FSMA). Under Section 19 of FSMA, a person cannot carry out a ‘regulated activity’ unless authorised or exempt. Regulated activities include accepting deposits and advising on, arranging or dealing in investments.

The three main regulators are the Bank of England, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). The Bank of England is primarily responsible for failing banks. The PRA promotes the safety and soundness of financial institutions and the FCA is responsible for protecting consumers and the conduct of business. Both the PRA and the FCA promote competition within the industry.

Aside from FSMA, the main rules applicable to banks and financial professionals are contained within the PRA and FCA handbooks. Both the PRA and the FCA issue further guidance and thematic reviews, which establish expectations of banks and financial professionals.

The PRA and FCA can both take disciplinary action against a bank or financial institution that has contravened their rules. Claims can be brought through the courts, or through the Financial Ombudsman Service (FOS) or the Pension Ombudsman Service (POS). In contrast to claims brought through the courts, claims through the FOS or POS will not be decided on the basis of legal principles but on a ‘fair and reasonable’ basis.

The Financial Services Compensation Scheme (FSCS) acts as deposit insurance and is funded by financial services firms. Individuals can claim up to £85,000 for deposits and £50,000 against investment or mortgage advice (rising to £85,000 in April 2019) from the
FSCS, where the financial institution is insolvent. In addition, most FCA-regulated firms are required to have professional indemnity insurance as an extra financial resource and to prevent excessive claims on the FSCS.

iv  Computer and information technology professionals

Claims against computer and information technology professionals by their clients tend to be governed by standard form service contracts. There are a range of voluntary professional standards to which information technology professionals may subscribe and which can be written into service contracts. Among the range of issues most likely to arise in disputes are: (1) the incorporation of terms and conditions into the service contract; (2) interpretation of client requirements for the scope of services; (3) representations relating to scope, price and timescale; (4) effect of limitations of liability; and (5) contract termination.

Information technology services will often include controlling or processing data. To the extent that this includes personal data, the impact of the General Data Protection Regulation (GDPR) is likely to be significant. The GDPR came into force on 25 May 2018. It is a substantial overhaul of data protection laws across the EU. It introduces a number of additional and, compared with those under current English law, more stringent requirements for those who control or process personal data.

Article 24(1) of the GDPR requires that data controllers ‘shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with [the GDPR]’. Breach of this requirement by a data controller could lead to enforcement actions against it by the Information Commissioner’s Office. It is also likely to become increasingly common that these requirements are written into contracts involving the control or processing of data.

The GDPR also contains rights of recourse for individual data subjects (Articles 79 and 82) if their data is not processed according to GDPR requirements. Direct claims by data subjects against data controllers appear to be increasing (for example, Various Claimants v. Morrisons [2017] EWHC 3113). This is likely to be a growing area of potential exposure to professional service providers controlling personal data.

v  Real property surveyors

We have reached the point at which the vast majority of claims against valuers arising from the property crash in 2008 have become time-barred. Valuers are still seeing a limited number of negligence claims arising from valuations in or after 2011, but 2017 was probably the most benign year as far as valuation claims are concerned for the past decade.

In terms of case law, the most significant judgment in 2017 was handed down by the Supreme Court in November, in the case of Tiuta International Ltd v. De Villiers Chartered Surveyors, in which the court addressed the issue of causation. The valuer had conducted two valuations of the same property and the lender had made two loans, the second redeeming the first. The Supreme Court, overruling the Court of Appeal, held that the valuer was not liable for loss caused by the first mortgage in circumstances where the lender had not alleged that the first valuation was negligent. Following the Court of Appeal’s decision in the case of Preferred Mortgages Ltd v. Bradford & Bingley Estate Agencies Ltd [2002], there could be no loss as a matter of law where the first loan had been redeemed by the second.

There was also success for the surveyor in the case of The Governors and Company of the Bank of Ireland (1) Bank of Ireland (UK) plc (2) v. Watts Group plc [2017], in which the court dismissed the lenders’ allegations of negligence against a monitoring surveyor, noting that the
modest fee charged by the surveyor could not be ignored when considering the scope of the
surveyor’s duties, and holding that the lender’s loss was caused by its own negligent decision
to make the loan in contravention of its own lending policy.

In 2017, RICS published an update of the guidance note, first published in 2013,
that covers the main risks and liabilities associated with valuation work. It provides a clear
explanation of the legal principles underlying valuation claims and seeks to guide members
in the negotiation of contracts with clients, to reduce their risk.

Surveyors who are members of RICS are subject to its regulatory code and must obtain
insurance that complies with its minimum requirements, the level of which is calculated in
part by reference to the previous year’s turnover but which, as a minimum, will be £2500,000,
with cover being provided on an ‘each-and-every-claim’ basis.

vi  Construction professionals
The Grenfell Tower fire has had, and will continue to have, a significant impact on
construction professionals. A large number of claims are expected against contractors and
consultants involved in the design and construction of high-rise buildings that have cladding,
where issues of compliance with building regulations will be hotly debated.

That debate will be affected by the conclusions of the government’s review of the
building regulations relevant to fire safety, led by Dame Judith Hackitt, which includes
recommendations on the appropriate future regulatory system, seeking to ensure that
a disaster on the scale seen in June 2017 does not occur again. Disputes are now arising
over whether the cladding on other buildings will need to be replaced, with what, and at
whose expense.

The most significant judgment in 2017 came in the case of MT Højgaard A/S v. E.ON
Climate & Renewables UK Robin Rigg East Limited and Another [2017] UKSC 59, in which
the Supreme Court found that a contractor was liable to comply with a fitness-for-purpose
obligation contained in a technical schedule appended to the contract, despite the fact that
there were more limited obligations to exercise reasonable skill and care elsewhere in the
document. The decision has significant implications for the interpretation of construction
contracts, which often incorporate technical schedules and other specification documents
within their terms.

Anyone wishing to describe themselves as an architect is required to register with the
Architect’s Registration Board and will then be regulated under its Code of Conduct. This
includes the requirement to maintain professional indemnity insurance of at least £250,000
for each and every claim. For engineers, the relevant regulatory body is the Engineering
Council, although it does not have any requirement for members to obtain insurance. While
the Institution of Civil Engineers also does not require its members to obtain insurance, it
strongly recommends that they should.

vii  Accountants and auditors
The accountancy and audit professions are regulated by their professional accountancy bodies,
with individuals and firms being enrolled as members of one or other of them, subject to the
oversight of the Financial Reporting Council (FRC).

The FRC has statutory oversight of the audit profession pursuant to the Companies
Act 2006. The FRC discharges these responsibilities by recognising certain professional
accountancy bodies as ‘recognised supervisory bodies’ (RSBs) and ‘recognised qualifying
bodies’ (RQBs). Currently, the RSBs are the Institute of Chartered Accountants for England
England and Wales (ICAEW) and Scotland (ICAS), Chartered Accountants Ireland (CAI) and the Association of Chartered Certified Accountants (ACCA), and the RQBs are the ICAEW, ICAS, CAI, ACCA and the Association of International Accountants.

The FRC delegates certain regulatory tasks, including registration and authorisation, monitoring, professional conduct and discipline, to the RSBs in respect of their members who are statutory auditors and audit firms. The issue of recognised professional qualifications for statutory auditors is delegated by the FRC to the RQBs. The FRC ensures that each RSB and RQB properly carries out its delegated functions and undertakes certain non-delegated functions itself, including investigation and disciplinary action for public interest cases. The FRC has power to impose enforcement orders or penalties against any RSB or RQB that does not comply with its responsibilities.

Accountants and accountancy firms who are not exercising an audit function are regulated by the professional accountancy bodies to which they belong. By agreement with six professional accountancy bodies, the ICAEW, ICAS, CAI, ACCA, the Chartered Institute of Public Finance and Accountancy and the Chartered Institute of Management Accountants, the FRC has a non-statutory role for the oversight of the regulation of their members beyond those that are statutory auditors. This oversight also includes registration and authorisation, monitoring, professional conduct and discipline.

Each professional accountancy body has its own insurance scheme requirements, although all require their members have some form of professional indemnity insurance, including compulsory limits of indemnity and minimum terms.

viii Insurance professionals

Insurance professionals have been heavily scrutinised in recent years. The FCA’s thematic review, a tough line taken by judges in negligence claims against brokers and the implementation of the Insurance Act have all contributed to ensuring that insurance professionals have high standards to uphold.

Insurance professionals are governed by the FCA. The FCA’s thematic review of insurance professionals was a thorough exercise that investigated issues such as broker conflicts and the transparency of broker commission. The FCA’s findings included real concerns in relation to conflicts and transparency. Insurance professionals are expected to reflect on how they manage any conflicts of interest within their business models and make necessary changes. It has not come as a great surprise that, since the review, there has been a lot of merger and takeover activity within the broker community.

Case law has further highlighted that brokers must understand (1) their client’s business, (2) their client’s insurance requirements, and (3) the insurance that they are placing for their clients. Finally, a broker must take time to ensure that its client understands the insurance that it has procured, including highlighting any particularly onerous aspects of the policy. The cases of Jones v. Environcom, Ground Gilbey v. JLT and Eurokey v. Giles provide good guidance for brokers in this area.

Finally, insurance professionals must understand the Insurance Act, which came into force in August 2016. As part of the duties highlighted in the paragraphs above, a broker has a duty to understand and highlight the impact that the Insurance Act has on the policies that it is placing for its client.

Brokers must truly understand the insurance that they are placing and the nature of the business for which they are seeking to procure insurance. The developments in case law, the Insurance Act and the FCA’s thematic review have made this clear.
III YEAR IN REVIEW

The standout event this year was the Supreme Court’s first review in 20 years of its 1996 SAAMCo decision. SAAMCo is the decision in which the court held that professionals giving advice about a transaction are only liable for the consequences of the advice being wrong and not for all the consequences of entering into the transaction in reliance on the advice. In BPE Solicitors and another v. Hughes-Holland, the Supreme Court upheld this principle. It also overruled certain earlier cases in which the principle had been applied too restrictively in cases involving dishonesty. The decision was widely welcomed by professionals.

Defendant professionals have been less fortunate in relation to duty-of-care issues. In particular, the duty-to-warn jurisprudence is incrementally gaining traction. This is happening in cases where professionals have relied on their advice being either correct or at least within the range of advice that a reasonably competent professional could have given. Claimants are increasingly focusing on the failure by the professional to advise on the risk that their advice may be wrong. A number of decisions in the past year have supported this approach.

IV OUTLOOK AND FUTURE DEVELOPMENTS

On 30 April 2018 the Professional Negligence Pre-Action Protocol was amended to require claimants to set out in their letter of claim whether they wish to refer the dispute to adjudication and, if not, set out the reasons. Adjudication is defined as a process by which an independent adjudicator can provide the parties with a decision that resolves the dispute permanently or temporarily pending subsequent court determination. The new protocol does not apply to construction disputes. There is no reference in the protocol to the scheme advanced in the course of the two-year pilot period and, in particular, the £100,000 limit for the scheme.

Disclosure is similarly undergoing change following the conclusions of the May 2016 working group chaired by Lady Justice Gloster. The Rolls Building Disclosure Working Group identified a number of defects in the manner in which standard disclosure was operating in practice and in particular in relation to disclosure of electronic documents. The next stage is for the Civil Procedure Rules Committee to consider a draft practice direction for a two-year pilot. That is likely to do away with the default entitlement to standard disclosure and replace it with a first stage Basic Disclosure process followed by an Extended Disclosure much more tailored to the particular case.

The economic climate may become less benign as the EU–UK Article 50 negotiations proceed. The incidence of claims is likely to increase dramatically if that occurs, with claims arising out of economic losses that might otherwise not have occurred. In the longer term, the uncertainty over the legal relationship between the EU and the United Kingdom may give rise to unexpected liabilities in contracts and transactions taking place during the period of change. A number of firms are holding themselves out as being able to future-proof those obligations. Others are not but are nonetheless advising clients in circumstances where clients may expect them to.
I  INTRODUCTION

i  Legal framework

Professional liability primarily follows the rules German civil law recognises for contractual and tort liability in general. While there exist several codes containing specific rules for different professions, the German Civil Code (BGB) provides the core legal framework from a liability perspective. It contains the applicable rules regarding both liability on the merits in contractual (Sections 280 et seq.) and in tort law (Sections 823 et seq.) and the material rules for calculating the amount of damages (Sections 249 et seq.).

The BGB generally requires faulty conduct by a contracting party or a tortfeasor in liability claims.

As one can see, it is a peculiarity of German civil law that it recognises a strict segregation between liability from contracts and from tort. While it is possible that the facts of the case establish liability from both legal doctrines at the same time, the legal requirements of both regimes are quite different. The most striking differences between both regimes are:

a  the law assumes fault by a contracting party while the plaintiff has to positively show and prove the tortfeasor’s fault; and

b  contractual liability recognises damage consisting of pure financial loss, while tort liability only does so to a very limited extent.

German liability recognises strict liability, of course, but not necessarily in terms of professional liability – rather in such areas as product liability pursuant to the EU product liability directive, or motor liability.

The first question to be answered is whether an individual indeed breached a duty of care. This question is largely dependent on case law and there exists a vast multitude of judgments of German courts addressing various professions (e.g., doctors and other medical professionals, architects and engineers, lawyers, tax advisers and accountants, insurance brokers and banking professionals). Claims pursuant to tort law, however, are merely triggered if the tortfeasor violates certain ‘absolute’ legal positions (e.g., life, health, freedom, property) as defined by law. Thus, a breach of duty may lead to liability under contractual provisions, but not in tort. Needless to say, tort law only plays a role in certain areas of professional liability (e.g., medical malpractice and liability of construction professionals) while it is not applicable in other areas (e.g., insurance-broking malpractice and lawyers’ liability).
Once a plaintiff is able to establish a certain breach of duty, one has to consider whether this breach indeed resulted in the damage claimed by the plaintiff. This causation aspect is one of the most relevant issues in professional negligence litigation and the German Federal Court of Justice (FCJ) has decided on these matters several times. Since it has not always taken the same legal position, and, in particular, has resolved questions of onus and proof differently in different areas, such as lawyers’ or banking professionals’ liability, or in medical malpractice, the core issues of this very important aspect of professional liability are worth dealing with even at this stage.

As stated above, the client bears the onus of showing and proving causation between a breach of duty (especially wrong advice or omission of certain advice) and damage. The FCJ has acknowledged (from the early 1970s onwards, following a case that dealt with liability of an advertising agency)\(^2\) that it will generally be difficult for plaintiffs to prevail in such litigation since it is nearly impossible to show and prove that one would have acted differently in full knowledge of the matter. The different senates of the FCJ have used different approaches to this issue. Some have taken the position that it is not incumbent on the plaintiff to show that it would have complied with the (omitted or wrong) advice provided by the defendant, and accordingly have proceeded on the assumption that the plaintiff would have complied, had the advice been rendered correctly.\(^3\) Some senates have taken the view that \textit{prima facie} evidence rules are to be applied, which requires a situation that is suited to a generalised approach because of the circumstances at hand. According to the FCJ, this is the case when only one decision could reasonably have been made by the plaintiff, had correct advice been rendered to him or her.\(^4\) There might at first seem to be little difference in these positions, but the truth is that these different rules shift the onus onto the defendant significantly: if the legal assumption is made that the plaintiff would have complied with the defendant’s advice (had it been given correctly), the defendant must strictly show and prove that this was not the case (which is usually impossible). If the court (merely) applies \textit{prima facie} rules, it is sufficient for the defendant to show that there is no state of affairs that indicates a generalised approach, thus quashing the \textit{prima facie} evidence.

A court will then determine whether a contracting party or a tortfeasor acted with fault, meaning at least a slight form of negligence is required. As described above, fault is assumed by law in contractual liability while the plaintiff has to positively show and prove the tortfeasor’s fault. This distinction leads to different procedural requirements and eventually to a shift in the onus that can make the difference between winning and losing in litigation. Another notable difference is that a contracting party has to assume fault by its servants and auxiliary personnel while the tortfeasor is merely liable for its own conduct and only has to bear its own \textit{culpa in eligendo}.

\(^{2}\) German Federal Court of Justice (FCJ), decision of 5 July 1973 – VII ZR 12/73, NJW 1973, 1688.

\(^{3}\) FCJ, decision of 22 November 1983 – VI ZR 85/82, NJW 1984, 658 (medical malpractice); same, decision of 16 November 1993 – XI ZR 214/92, NJW 1994, 512 (banking professionals); Federal Constitutional Court, decision of 08 December 2011 – 1 BvR 2514/11, NJW 2012, 443 (banking professionals).

Common defences consist of contributory negligence by the plaintiff (or its servants and auxiliary personnel) and objections to the amount of loss alleged by the plaintiff. Those defences are available against both contractual and tort claims.

This is just a short introduction to the legal framework at hand, and to the most common legal issues that parties argue about. It is, however, safe to say that the applicable legal doctrines regarding liability differ considerably across the various professions, and these doctrinal differences are characteristic of the main legal questions – both material and recurring – that bear on the matter of liability in the different professions.

ii Limitation and prescription

Claims under German civil law are subject to limitation. There exist several different limitation periods, but practitioners have seen an effort over the past few years to align those different periods to a similar standard to make the statute of limitations more predictable. However, there still exists a multitude of limitation periods, be it six months in certain claims arising from rental contracts, one year in certain commercial contracts, two years in warranty claims pursuant to sales contracts or even 30 years pertaining to rights in rem. The standard limitation period for liability claims is three years.

The standard limitation period depends on whether the plaintiff has gained knowledge of the defendant and of further circumstances establishing a claim. The three-year period commences on expiry of the year that the aforementioned requirements are fulfilled. However, to provide legal certainty, the law provides for a maximum limitation period of 10 or 20 years, depending on the violated right.

Other limitation periods merely depend on objective circumstances. For example, warranty and liability claims in sales contracts fall under the statute of limitations upon the elapse of two years after the good was handed over to the buyer (special rules apply to real estate).

Negotiations between the parties suspend the limitation period. Since it often is unclear when negotiations have begun and were eventually terminated, relying on this provision is usually not preferable. Parties would usually choose to waive the statute of limitations for a certain amount of time, which is legally possible. However, since German courts interpret this provision quite broadly, there is usually at least a short period, of a few days or weeks, in which the limitation period is suspended and the plaintiff given the time it needs to commence litigation.

German law recognises means by which limitation periods can be suspended for a longer period. These means suspend the limitation period and thus, ultimately, annul the defendant’s potential objection that a claim has expired under the statute of limitations. The most usual means are by commencing litigation, entering into alternative dispute resolution (ADR) or serving third-party notices. Since the standard limitation period usually elapses at the year’s end, it is often at this time of year that plaintiffs commence litigation. Third-party notices are an adequate procedural means for a defendant seeking to secure possible subrogation claims from becoming time-barred.

Limitation under German civil law is an objection (i.e., the defendant has to raise this objection to make it effective). The fact that a claim has expired under the statute of limitations does not need to be reviewed ex officio by the judge. In fact, if a claim is raised, even if it has obviously become time-barred – but the defendant does not raise this objection – the court will not (and is not even allowed to) dismiss the claim for this reason. The
legal theoretical effect of this is not that the claim will cease to exist but rather will become unenforceable. In practice, it does not make a difference except that the defendant has to plead limitation.

The legal term ‘prescription’ is (obviously) used with different senses in common law countries. It can mean acquisition of a right or of an obligation as a result of a certain amount of time having elapsed. It can, however, also be used in a negative sense, meaning that a claim ceases to exist after a certain time has elapsed. While German civil law recognises this concept (e.g., Section 13 of the Product Liability Act contains this rule), it does not play a role in professional negligence claims pursuant to common German contractual or tort law.

iii  Dispute fora and resolution

The civil court system in Germany consists of county courts, district or regional courts, higher regional courts and the FCJ. The county courts deal with matters of a value up to €5,000, and certain areas of law regardless of the amount at stake (e.g., family law and rental law). Matters concerning an amount in dispute of above €5,000 have to be brought before a district court. County and regional courts are virtually the only courts of first instance. District courts also serve as appellate courts for decisions by county courts. The higher regional courts serve as appellate courts for appeals against county court decisions in family law and against all regional court judgments where the procedural requirements for lodging an appeal are fulfilled. They serve as courts of first instance in a very limited way only (e.g., for litigation pursuant to the Capital Markets Investor’s Model Litigation Act). The FCJ only deals with appeals against appellate judgments (and very seldom with first instance decisions) and only on the legal aspects of a matter (i.e., it does not serve as a trial court). As professional liability claims usually involve damages in excess of €5,000, they are generally dealt with in a district court or – upon appeal – in a higher regional court. Most district courts have established special chambers (e.g., for medical malpractice cases). The FCJ has issued several decisions in various professional areas as well.

Various means of ADR are recognised in Germany, such as arbitration, mediation or ombudsperson procedures. However, none of these proceedings is mandatory (at least not in professional liability matters) before litigation in court is commenced. Since litigating cases in Germany is not extraordinarily expensive and legal costs insurance is common, there seems to be a smaller call for ADR (except in medical malpractice cases) than in other countries. Moreover, courts are bound by law to try to settle cases at every stage of litigation, and most courts offer mediation by specially qualified judges, thus there is simply no need to get involved in ADR proceedings when these means are addressed as part of litigation anyway.

Mediation through ombudspersons has become established in quite a number of areas over the past few years, especially since the Alternative Dispute Resolution for Consumers Act came into force. While ombudspersons existed beforehand and were active in professional liability cases, especially in insurance and banking, the past few years have seen an increase in ombudspersons acting in matters such as lawyers’ professional indemnity (and fee disputes), investment funds or real estate. Decisions of those ombudspersons are binding only to a limited extent, usually dependent on the amount in dispute (e.g., below an amount of €15,000 or €5,000, depending on the respective ombudspersons’ procedural rules). That said, since professional liability claims are generally higher than the aforementioned amounts, they are commonly litigated in the courts.

Civil litigation is predominantly governed by the German Act on Civil Proceedings (ZPO). While other codes, such as the German Act on the Constitution of the Courts are
also relevant, the ZPO covers all principal aspects. For example, it contains rules regarding the course of litigation (including all appeals) and the court’s conduct, service of documents, requirements regarding the parties’ submissions, means of taking evidence, rules regarding judgments (including appellate judgments) and their enforcement, rules on arbitration, and so on. As such, the ZPO is applicable to all professional liability claims litigated in court.

iv Remedies and loss

German civil law recognises a multitude of remedies, depending on the particular area of law.

The most important contractual remedy is ‘performance’. A contracting party can claim for performance by its counterpart. In particular, in sales and working contracts when, under certain circumstances, it is possible to repeat performance of a contractual duty (usually when the original performance was not successful), remedies for performance and repeated performance are relevant in litigation practice.

Many professional liability claims, however, are based on irreversible damage (e.g., injuries that cannot simply be undone or progressive diseases that have been overseen and have become untreatable in the interim). Claims for performance would be preposterous in such situations.

Basically, four remedies must be considered that may serve the plaintiff’s desire best:

- avoidance (thus urging both parties to a contract to restitute all contractual performances);
- disclosure of certain information or documents;
- claim for damages (from contract or tort); and
- claim in restitution for unjust enrichment.

Avoidance and claims in restitution for unjust enrichment are certainly limited to rare occasions since they do not result in an award of damages. Disclosure and claims for damages are the remedies generally sought by plaintiffs – usually in an action by stages – since plaintiffs need disclosure of information or documents and use those to substantiate their claims for damages (e.g., in medical malpractice). German civil procedural law does not recognise discovery.

Where damages are concerned, it is important to know which damages a plaintiff may demand. Basically, German civil law differentiates between pecuniary (especially property and personal injury damages) and non-pecuniary loss (especially bereavement damages and damages for pain and suffering). Another categorisation differentiates between damages for positive interest and damages for preservation of the legal status quo (comprising negative interest and loss of integrity). Positive interest describes the plaintiff’s interest to be awarded the equivalent of the promised bargain of a contract. Negative interest describes the plaintiff’s interest to be awarded the loss resulting from the plaintiff’s belief in a contractual declaration or avowal. Loss of integrity means the violation of the right to the integrity of certain legal positions (life, body, health, freedom, etc.), which is usually protected not only by contract, but also by tort law. German law recognises neither punitive damages nor ‘bad-faith’ claims.

It is usually incumbent on the plaintiff to show there was damage that resulted from professional faulty conduct. If the existence of damage or the amount of damages claimed by the plaintiff are in dispute, it is incumbent on the plaintiff to prove the facts in dispute. While the strict rules of proof pursuant to Section 286 ZPO apply, Section 287 ZPO contains relaxations of the aforementioned burden of proof that apply to the existence of damage and the amount of damages.
II SPECIFIC PROFESSIONS

i Lawyers

Lawyers in Germany are bound to become members of the lawyer’s chamber that supervises the area in which their firm or their office is located by way of compulsory membership. There exist several chambers (one in each higher regional court’s circuit, and a federal one). The relevant chamber gives advice to its member lawyers in, for example, fee disputes, disputes between lawyers, advice regarding employments, acquisitions of other firms and assessments of firm values. Furthermore, it represents the interests of its member lawyers in legislative and executive affairs, licensing questions and questions of education and training, and serves as the regulatory body for disciplinary affairs. Lawyers’ courts are affiliated to each chamber, dealing with violations of rules of professional conduct.

The German Federal Code for the Legal Profession (BRAO) governs the profession itself, and the Rules of Professional Practice for Lawyers govern professional conduct. Moreover, lawyers’ fees are regulated in the Scale of Lawyers’ Fees.

All lawyers (and law firms) offering their services in Germany need to obtain and maintain compulsory insurance pursuant to Sections 51 et seq. BRAO. All licensed liability insurers may offer professional insurance for lawyers, but it must fulfil the requirements of the aforementioned provisions. Sections 51 et seq. BRAO, for example, provides for certain minimum limits, maximum deductibles and a catalogue of admissible coverage exclusions. The most relevant procedural effect of the lawyer’s liability insurance being a compulsory insurance is that (e.g., in cases of bankruptcy or where the policyholder vanishes) the plaintiff can commence litigation directly against the liability insurer pursuant to Section 115 of the German Insurance Contract Act (VVG), which is impossible otherwise.

As explained above, the FCJ has dealt with causation matters in different ways and one way of handling this issue is to apply prima facie evidence rules. Especially the FCJ senate dealing with lawyers’ professional liability is of the opinion that wrongful or omitted advice by a lawyer typically falls under the prima facie evidence rules. This doctrine is, however, inapplicable if, according to the lawyer’s advice, more than one form of conduct is reasonable, since in that case a generalised situation leading to only one reasonable reaction on the plaintiff’s part does not exist.5

Courts in the past applied the doctrine of ‘secondary liability’. This doctrine dated back to case law of the Supreme Court of the German Reich6 and was adopted by the FCJ.7 This doctrine says that there is a duty of care for a lawyer to apprise its client of its own professional liability and on the statute of limitations that would apply in a claim against the lawyer. However, this obligation on the lawyer was justified by the fact that the BRAO recognised a special limitation that would be beyond the scope of the client’s knowledge of the defendant and of further circumstances establishing a claim (unlike the current rules under the BGB, as mentioned above). Since the aforementioned special limitation has ceased to exist, it is doubtful that the doctrine of secondary liability still exists. On abrogating the

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6 RGZ (civil law decisions of the Supreme Court of the German Reich), 158, 130.
aforementioned special limitation, the new legislation explained that since the standard rules have become applicable and these are dependent on the client’s knowledge, there was no call for the doctrine of secondary liability any more.

ii Medical practitioners

Medical practitioners in Germany are bound to become members of the medical practitioners’ chamber that supervises physicians in their particular state (only the German state of North Rhine-Westphalia maintains two chambers, and there also exists a federal chamber organised in the form of an unincorporated association). The chambers’ areas of competence are similar to those of the lawyer’s chambers.

The Federal Medical Practitioners’ Act governs the profession (and especially the licence to practise medicine), and professional conduct is governed by the (Model) Professional Code for Medical Practitioners, which serves as a model for the (binding) Code of Professional Conduct of Medical Practitioners that each state chamber issues for its members. Moreover, physicians’ fees are regulated in the Scale of Physician’s Fees.

Those acts promulgated by the state chambers contain the requirement for medical practitioners to obtain and maintain ‘sufficient’ insurance cover. These provisions may serve as an order to obtain and maintain compulsory insurance (without explaining what ‘sufficient’ coverage means, but the minimum requirements of Section 114 VVG will apply in this case). The fact that the duty to obtain and maintain sufficient liability insurance is not enacted in an act of parliament but only in acts promulgated by the state chambers is sufficient to qualify the insurance as compulsory pursuant to Section 113 VVG as the respective states have empowered the chambers to impose the obligation (although this is contested in German literature with regard to some states). The legal effects of Section 115 VVG are the same as described in the chapter concerning lawyers above.

ADR plays a relevant role in medical liability cases. First of all, patients may ask their statutory health insurance to cover the issue of expert reports (at no charge) when they believe a physician’s conduct has amounted to malpractice. Furthermore, the chambers have introduced arbitration boards that can conduct expert procedures upon the consent of both parties (patient and physician), thus giving parties an opportunity for early settlement; the results, however, are non-binding. These procedures are also free of charge for the patient, as the costs are borne by the medical practitioner’s liability insurance.

Medical practitioners in hospitals are usually liable under tort law, and the patient’s contractual partner – either the hospital or the medical practitioner who entered into a contract with the patient – is (additionally) liable under contract law. Any breaches of duty by employed physicians are to be attributed to its employer (usually a hospital) by law. German courts have developed a differentiated system of liability resulting from medical malpractice and from violation of the duty to inform the patient. Medical malpractice is established when a medical practitioner is in breach of medicinal standards that derive from medicinal science and clinical experiences, and this must be shown and proven by experts in litigation. This breach of medicinal standards must cause damage to the patient’s health to establish the physician’s or hospital’s liability. Liability from a breach of duty to inform the patient is led by the idea that a physician’s medical intervention violates the patient’s bodily integrity even if this conduct is lege artis. The intervention may be justified if the patient has given prior consent; this, however, requires prior and proper elucidation of the proposed medical procedure for the patient’s benefit, which again requires an explanation of the general risks of the procedure, so that the patient may form an accurate picture of the
medical intervention that will be suffered. The level of detail to be provided to the patient depends on the medical indications for the planned intervention. The patient must then show and prove that the risk that was not explained to him or her has indeed been realised in the health damage suffered.\(^8\)

Medical malpractice litigation recognises some peculiarities especially regarding substantiation of a claim: the patient does not need to substantiate his or her claim in detail – it is sufficient to allege the facts establishing a claim. While the onus lies with the patient, the courts have developed an assumption of the physician’s malpractice when entirely controllable risks materialise or when the physician’s documentation in the patient’s file is incomplete. Furthermore, the patient will usually not be able to show causation between the breach of duty and his or her health issues. Thus, the courts have developed a shift in the onus onto the medical practitioner in cases where the malpractice was grossly negligently or where the physician abstained from proper assessment of diagnostic findings. Ultimately, proper conduct regarding informing the patient is to be shown and proven by the physician.

### iii Banking and finance professionals

Unlike lawyers, accountants, auditors, architects and medical practitioners, banking and finance professionals are not organised in chambers since the existence of chambers is first and foremost justified historically by the idea that certain professions complement governmental duties and responsibilities, and thus access to and the conduct of such professions should be properly monitored. From a regulatory perspective, that is not the case for banking and finance professionals. German civil law, however, recognises special banking law in several regulations contained in the German BGB and in other acts such as the Securities Trading Act or the Banking Act.

It is common that banking products (e.g., funds, company shares, derivative instruments or bonds) are sold by banks (through their employees) themselves, thus professional liability of banking and finance professionals is usually litigated against the bank itself. Any breaches of duty by those professionals are attributed to their employers, usually a bank. Besides, there exist other professionals engaged in selling banking products, such as investment brokers or financial services brokers. Their professional conduct (especially the requirements to be fulfilled to obtain a licence) is governed by Sections 32 et seq. of the Banking Act and Section 34f/34h of the Trade, Commerce and Industry Regulation Act (GewO), depending on which type of business they specialise in.

Section 34f/34h GewO requires liability insurance for finance brokers, making such coverage compulsory pursuant to Sections 113 et seq. VVG. The option, under Section 33 Paragraph 1 Section 2 of the Banking Act, to fulfil the statutory capital requirements by substitute insurance coverage does not qualify as compulsory insurance.

As explained above, the FCJ has dealt with causation issues in different ways and one way of handling this issue is to concede to the plaintiff that it would have complied with the defendant’s advice, had it been rendered correctly.\(^9\) The FCJ applies this doctrine

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8 Hierzu noch Entscheidungen? Wo passt NJW 1984, 658 hin?
in banking and finance professionals’ liability.\textsuperscript{10} In 2012, the FCJ extended this judicial principle to professional liability in investment broking cases (and especially with regard to kickback fees).\textsuperscript{11}

Another notable example of the FCJ case law regarding banking law and banking professionals’ liability pertains to the FCJ’s tendency to assume that contracting parties (bank and customer) enter into an advisory contract virtually upon the ‘first meeting’ of the parties. While German literature has discussed and criticised this standpoint multiple times for imputing to parties a non-existent will to enter into a contract,\textsuperscript{12} the FCJ has adhered to this position so far and it has been upheld by the German Federal Constitutional Court.\textsuperscript{13}

iv  Computer and information technology professionals
There are no notable peculiarities regarding professional liability of computer and information technology professionals.

v  Real property surveyors
There are no notable peculiarities regarding professional liability of real property surveyors, unless they are construction professionals.

vi  Construction professionals
Architects in Germany are bound to become members of the architects’ chambers that supervise architects in their respective states; the state chambers are members of the federal architects’ chamber, which is organised as an incorporated association. The chambers’ areas of competence are similar to those of the lawyers’ and medical practitioners’ chambers. There also exist engineers’ chambers, which are assigned to the respective architects’ chambers.

Individual state architect acts govern the profession itself, and a code of professional conduct issued by each state chamber governs professional conduct. Architects’ and engineers’ fees are regulated in the Scale of Architects’ and Engineers’ Fees. Ultimately, architects and engineers are subject to a multitude of federal and state laws (building codes, safety regulations, public procurement laws, etc.).

The situation regarding compulsory insurance is the same as that faced by medical practitioners: rules for compulsory insurance are not regulated in one specific law but in each applicable state law (because the professional architect’s and engineer’s law is state law for constitutional reasons). To a very limited extent, there exist rules for compulsory insurance of real property surveyors, mainly in eastern Germany.

The doctrine of secondary liability (which has probably ceased to exist in legal professions) is still applicable in the liability law of construction professionals. According to this doctrine, there is a duty of care for an architect or construction professional to apprise his or her client of building defects and the root causes of the defects, as well as the legal situation arising, even if that pertains to planning or supervisory errors by the construction

\textsuperscript{10}  FCJ, decision of 16 November 1993 – XI ZR 214/92, NJW 1994, 512.
\textsuperscript{11}  FCJ, decision of 08 May 2012 – XI ZR 262/10, NJW 2012, 2427; same, decision of 15 March 2016 – XI ZR 122/14, NJW-RR 2016, 1187.
\textsuperscript{13}  Federal Constitutional Court, decision of 8 December 2011 – 1 BvR 2514/11, NJW 2012, 443.
professional himself or herself. Since the limitation of professional liability claims is (like the above-noted legal situation in legal professions) still independent from the client’s knowledge of the defendant and of further circumstances establishing a claim, there still exists a necessity for this doctrine.

vii Accountants and auditors

Tax accountants and auditors in Germany are bound to become members of their respective chambers. There exist 21 tax accountants’ chambers, which supervise the area in which their firm or their office is located by way of compulsory membership. Furthermore, there exists one federal tax accountants chamber and one federal auditor’s chamber. The aforementioned chambers’ areas of competence are similar to those of the lawyers’ chambers, but, unlike the lawyers’ chambers, they also execute and supervise the exams that must be passed to become a tax accountant or an adviser.

The German Tax Accountants Act governs the profession itself, and the Act of Professional Conduct of Tax Accountants governs professional conduct. Moreover, tax accountant’s fees are regulated in the Scale of Tax Accountant’s fees. The German Auditors Act governs the profession itself, as well as professional conduct and auditors’ fees.

All tax accountants and auditors (and tax accountancy and auditing companies) offering their services in Germany must obtain and maintain compulsory insurance pursuant to Sections 67 et seq. of the German Tax Accountants Act and Section 54 of the German Auditors Act. All licensed liability insurers may offer professional insurance for accountants and auditors, but it must fulfil the requirements of the aforementioned provisions. Like Sections 51 et seq. of the German Federal Code for the Legal Profession, the aforementioned provisions provide for certain minimum limits, maximum deductibles and a catalogue of admissible coverage exclusions. The procedural effects of Section 115 VVG also apply.

The causation issues as explained in the chapter on lawyer’s liability pertain to tax accountant’s and auditor’s liability as well since these professions’ liability is supervised by the same FCJ senate as the lawyer’s liability.

The secondary liability of tax accountants and auditors is likely to have ceased to exist as well pursuant to the same reasons as explained in the chapter regarding lawyer’s liability.

viii Insurance professionals

Like banking and finance professionals, insurance professionals are – for the same reasons – not organised in chambers. German civil law, however, recognises special insurance law in several regulations contained in the VVG, the GewO and the German Insurance Supervision Act.

It is common that insurance products are sold by either insurance agents (usually as salesmen for one or a few insurers) or insurance brokers, who enter into a contract with the policyholder.

That differentiation is picked up in Section 6 VVG, which provides for duties of information and elucidation to be fulfilled by the insurer, except when the policyholder has entered into a contract with an insurance broker. Violations of Section 6 VVG give rise to

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claims against the insurer itself. As insurers working with insurance agents usually fulfil their duties under Section 6 VVG through these insurance mediators, any breaches of duty by such persons are attributed to the insurer.

Sections 61 et seq. VVG provides for the same duties to inform, and explain to, the policyholder, but these duties pertain to the insurance agent and insurance broker only. Any breach of these duties by insurance agents or brokers may give rise to claims against the aforementioned insurance mediators.

The professional conduct (especially the requirements regarding obtaining a licence) of both insurance agents and insurance brokers is governed by Section 34d GewO.

Section 34d GewO requires liability insurance for insurance agents and insurance brokers, making such coverage compulsory pursuant to Sections 113 et seq. VVG. The extent of the minimum coverage is regulated by Sections 8 et seq. of the German Regulation on Insurance Mediation.

The causation issues explained in the section on banking and finance professionals’ liability also pertain to insurance professionals’ liability.\(^\text{15}\)

### III YEAR IN REVIEW

The BGB contains provisions for working contracts that, until the end of 2017, applied to architects’ and engineers’ contracts, under the FCJ’s authority. As of the beginning of 2018, following new legislation, a completely revised law of building contracts entered into force. The most relevant provision regarding professional liability is the new Section 650t BGB, which addresses the following issue. Since the 1960s, it had been a commonly held view in Germany that a contractor and the architect (despite legal concerns) are jointly and severally liable to the builder if the contractor executes a planning error by the architect, or if the architect fails to recognise faulty work by the contractor and fails to correct defects although the architect has been retained to supervise the work.\(^\text{16}\) This regime led to the problem that the builder could choose whom to make a claim against, the architect or the contractor. Since the contractor had a right to repeat its performance, the builder often instead raised direct claims against the architect and went for damages, thus effectively taking the chance to obtain repeat performance from the contractor, while coercing the contractor to satisfy the architect’s internal subrogation claim that resulted from the joint and several liability pursuant to Section 426 BGB. Section 650t BGB now eliminates this flaw by granting the architect a right to deny the claim if the builder has not requested, unsuccessfully, repeat performance from the contractor beforehand.

The FCJ amended its decades-old regime dealing with damages arising from a building defect. While previously the builder was generally able to make a claim for correction costs even if the defect was remediated, the FCJ has now taken the exact opposite view. In February 2018, the FCJ decided that builders can only make a claim for correction costs if indeed

\(^{15}\) FCJ, decision of 22 May 1985 – IV a ZR 190/93, NJW 1985, 2595; same, decision of 30 November 2017 – I ZR 143/16, VersR 2018, 349.

\(^{16}\) FCJ, decision of 01 February 1965 – GSZ 1/64, NJW 1965, 1175; same, decision of 22 December 2011 – VII ZR 7/11, NJW 2012, 1071.
the defect was remediated. This is also the case for damages claims against construction professionals if the claim is based on planning or supervision errors that have already been executed in a building.\textsuperscript{17}

The FCJ amended its position in relation to tax adviser’s liability at the beginning of 2017. It ruled that the tax adviser is liable for damages resulting from a delayed insolvency filing if the adviser’s duty was to issue the annual financial statements and if, on the basis of the figures made available to the adviser or upon other indications, the adviser failed to point out to the board that the company might be on the verge of falling into bankruptcy.\textsuperscript{18}

The FCJ decided that in the matter of insurance professionals’ liability, claims in relation to damage resulting from improper claims-handling are to be assessed pursuant to Section 280 BGB, not special provisions of the VVG, and that insurance brokers are generally obliged to support policyholders in claims-handling. The insurance broker cannot defend itself by using the objection that the insurer had already advised the policyholder about obligations that must be fulfilled under German insurance law to maintain coverage (this concept differs significantly from the English concept of conditions precedent).\textsuperscript{19}

\section*{IV \hspace{1em} OUTLOOK AND FUTURE DEVELOPMENTS}

As explained in Section I, the FCJ has in the past shown inclinations to be quite consumer-friendly. There have not been any indications that this trend will stop in the near future.

For example, liability of legal advisers, especially lawyers, has been expanded significantly over the past few years. A notable judgment of the FCJ in 2015\textsuperscript{20} – despite claiming the opposite – overturned the Roman law axiom of \textit{iura novit curia} in deciding that a lawyer has to not only accurately show the facts of the case, but also convince the court that its legal assessment is incorrect – and even rectify the legal errors the court is succumbing to, thus asking more from a lawyer than from the court itself.

This is just one example showing that the FCJ is prone to assume liability on the merits quite quickly. It is, however, a completely different matter when it comes to amounts of damages awarded to plaintiffs in the past.

While this issue is not exclusive to professional liability, it has certainly had some impact in this area, and especially in relation to medical malpractice. Traditionally, German courts have been reluctant to award extensive damages for pain and suffering. Seldom has a German court awarded damages for pain and suffering in excess of €500,000. This Pandora’s box could, however, be opened in the near future in the wake of new legislation regarding damages for pain and suffering for survivors: pursuant to German law \textit{de lege lata} until mid-2017, survivors could not be awarded damages for pain and suffering had they not suffered a condition that culminated in shock or even in their own injury. Suffering the ‘usual’ feelings that attend the loss of loved ones was not deemed sufficient. The aforementioned new legislation now dispenses with personal shock or injury as a requirement to be awarded damages for pain and suffering upon injury or death of loved ones (although harm from

\begin{itemize}
\item \textsuperscript{17} FCJ, decision of 22 February 2018 – VII ZR 46/17, NZBau 2018, 201.
\item \textsuperscript{18} FCJ, decision of 26 January 2017 – IX ZR 285/14, NJW 2017, 1611.
\item \textsuperscript{19} FCJ, decision of 30 November 2017 – I ZR 143/16, VersR 2018, 349.
\item \textsuperscript{20} FCJ, decision of 10 December 2015 – IX ZR 272/14, NJW 2016, 957.
\end{itemize}
shock or bereavement may still be incurred). Legal professionals will have to wait and see if this new law will lead to a more liberal handling of damages for pain and suffering, and in turn lead to new ‘record-breaking damages’ in the near future.

It will be interesting to see how – and if – the downside of these developments will be absorbed by the insurance industry. In the face of constantly increasing claims expenditures in relation to medical malpractice, some well-known insurers have retreated from that business. This has led to discussions in Germany as to whether and how medical malpractice coverage, especially in obstetric medicine, will sustain in the years to come.
I  INTRODUCTION

i  Legal framework

General grounds for professional liability and their legal bases

The main grounds for a claim concerning professional liability are breach of contract, negligence and breach of fiduciary duty. As a general rule, where there are claims for tort and breach of contract available, liability should be determined by reference to contract rather than by reference to tort.  

Negligence

The primary line of authority for professional negligence claims stems from the UK decision of Bolam v. Friern Hospital Management Committee as approved in Ireland by Ward v. McMaster. The standard of care applicable in professional negligence cases is by reference to the ‘ordinary skilled man exercising and professing to have that special skill’.

Contract

There is an implied term that a professional will exercise reasonable care and skill in providing services to their client. The scope of the services to be rendered will usually be defined in the contract and disputes frequently arise where there has been an element of ‘mission creep’.

Fiduciary duty

Some professions also owe fiduciary duties to their clients, such as a duty of confidentiality. These may arise where the relationship is one of trust and loyalty. A plaintiff can claim equitable remedies in the event of a breach of fiduciary duty.

Limitations on the extent of the professional’s liability

Professionals may limit their liability with regard to the contractual obligations owed to their clients. This can be done, for example, by way of exclusion clauses, clauses limiting the scope of the duty, or indemnity clauses.

1  April McClements and Rebecca Ryan are partners at Matheson.
2  Pat O'Donnell & Co. Ltd v. Truck & Machinery Sales Ltd (1 April 1988).
Common defences to liability claim

Defences

A defendant may defend a professional negligence claim by establishing that one of the required elements of negligence was not present. The defendant can argue that the service provided was of a reasonable standard, or that the defendant’s actions did not cause the damage complained of. The defendant may also argue that the particular duty of care owed did not extend to cover the damage complained of, as it was outside the terms of the retainer. A professional has a duty to protect the client’s interests and carry out instructions in the matter to which the retainer relates; however, this duty does not extend to advising on unrelated matters. While this principle can limit the scope of the obligations arising in contract, it does not prevent a duty from arising in tort.

It should be noted that compliance with an accepted practice will not always provide a full defence, and the fact that a practice is universal within a profession will not of itself protect the professional concerned from liability (Roche v. Peilow, ACC Bank Plc v. Johnston, Kelleher v. O’Connor).

Partial defences that reduce the level of costs awarded

Section 34 of the Civil Liability Act 1961 provides for apportionment in cases of contributory negligence. The court can reduce damages owed to a plaintiff as ‘the Court thinks just and equitable, having regard to the degrees of fault of the plaintiff and the defendant’ Further, claimants must mitigate their losses, which is a question of fact as opposed to one of law.

Finally, while not strictly a defence, a professional may also be in a position to seek a contribution or indemnity from another party or a ‘concurrent wrongdoer’, pursuant to the Civil Liability Act 1961. Two or more persons will be concurrent wrongdoers where they are liable to the same party in respect of the same damage. This commonly arises in cases involving construction professionals.

Limitation and prescription

Time limits

The Statute of Limitations 1957 (as amended) prescribes the time limits applicable to professional negligence claims. These time limits run from the date the cause of action accrued except in cases of concealment, fraud or mistake, where the limitation periods may be extended. A plaintiff who has a cause of action in both contract and tort is entitled to pursue whichever claim provides the most advantageous limitation period.

Contract

Generally, there is a six-year time limit to institute proceedings based in contract, from the date on which the cause of action accrued, unless otherwise provided in the contract. A 12-year limitation period operates for contracts executed as a deed.

6 [2010] 4 IR 605.
7 [2010] IEHC 313.
8 Carroll v. Clare County Council [1975] IR 221.
**Tort**

A six-year time limit applies to bring an action in tort, from the date on which the cause of action accrued.

In certain cases of financial loss, where the cause of action is in tort, the Supreme Court has held\(^\text{10}\) that the cause of action does not accrue when the wrong is committed but when actual damage is suffered.

### iii Dispute fora and resolution

**Courts or tribunals in which professional liability claims are in general brought**

The jurisdiction in which court proceedings are brought will depend on the monetary value of the claim. The District Court has jurisdiction over claims up to €15,000 and the Circuit Court deals with claims with a value of up to €75,000 (or €60,000 for personal injury claims). Claims with a value in excess of this limit are heard by the High Court, which has an unlimited monetary jurisdiction. Each court has its own set of procedural rules.

High-value professional liability claims may also potentially be heard by the Commercial Court, a fast-track division of the High Court established to deal exclusively with disputes of a commercial nature valued in excess of €1 million. Cases in the Commercial Court are case-managed and tend to progress at a much quicker pace than other High Court cases.

**Alternative dispute resolution**

Professional liability disputes may also be dealt with by way of alternative dispute resolution (ADR) and it is common for contracts to require disputes to be determined by ADR. Mediation and arbitration are the most common forms of ADR used in Ireland; however, conciliation and adjudication are common in construction disputes. Conciliation is similar to mediation, except that the parties can opt for the conciliator to issue a binding recommendation. Other forms of ADR, such as expert determination and early neutral evaluation, are also available but less commonly used.

In addition, following the Mediation Act 2017, any court may adjourn legal proceedings on application by either party or of its own initiative to allow the parties to engage in mediation. Failure by either party to engage in ADR following such a direction can result in that party being penalised in relation to costs. Further, solicitors must now advise their clients of the option of mediation prior to issuing proceedings.

In Ireland, the law on arbitration is codified in the Arbitration Act 2010, which incorporates the UNCITRAL Model Law on International Commercial Arbitration. The arbitrator’s decision is binding on the parties and there is no means of appeal. Where parties have entered into a valid arbitration agreement, the courts are obliged to stay proceedings. Ireland is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, allowing Irish arbitral awards to be enforced in any of the 157 countries party to the Convention.

The Construction Contracts Act 2013 provides for adjudication in construction disputes regarding payment. The Act applies to all construction contracts entered into after 25 July 2016. Adjudication has the benefit of providing a decision within 28 days of

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the referral to adjudication (or 42 days if the referring party agrees to this extension). The decision will bind the parties until the dispute is finally settled, such as by arbitral award or a decision of the court.

iv Remedies and loss

Types of remedies
There is a range of remedies available in professional negligence claims, including orders for specific performance, rescission and declarations, as well as interim remedies such as injunctions. Damages, however, are the primary remedy sought.

The method of assessing loss and damage
Calculating loss
Generally, damages for a contractual claim should place the plaintiff in the same situation, in monetary terms, as if the contract had been performed. The courts have developed various means of assessing damage in professional negligence claims. The expectation approach involves assessing the actual financial position of the plaintiff against the position the plaintiff expected to be in as a result of the advice given or the service received.

The decision of the House of Lords in *Banque Bruxelles SA v. Eagle Star (SAAMCo)*11 has been applied in Irish cases, particularly concerning solicitors’ negligence. In that case, the House of Lords held that where a person is under a duty to take reasonable care to provide information on which someone else would decide on a course of action, that person is, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong.

Further, the ‘no-transaction’ approach to damages has been adopted in a number of cases to compare the actual financial state of the plaintiff with the position it would have been in had it not been provided with the allegedly negligent advice or service.12

II SPECIFIC PROFESSIONS

i Lawyers
Barristers and solicitors are regulated by separate professional bodies. However, the Legal Services Regulation Act 2015 establishes a new Legal Services Regulatory Authority (LSRA), which (once the Act is fully commenced) will regulate the provision of legal services by all legal practitioners. The only sections of the Act that are currently commenced relate to the establishment of the LSRA and public consultations, and consequently solicitors and barristers continue to be regulated separately pending commencement of the relevant provisions.

Solicitors

*Professional bodies and key regulatory and disciplinary codes and bodies*
Solicitors are currently regulated by the Law Society of Ireland pursuant to the Solicitors Acts 1954 to 2015. The Law Society investigates complaints, including allegations of excessive fees, misconduct or inadequate professional services. The Complaints and Client Relations

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Committee can uphold or reject a complaint, or direct the solicitor to take certain steps, including paying compensation of up to €3,000. The Committee may also refer the solicitor to the Solicitors Disciplinary Tribunal, an independent statutory tribunal that considers complaints of misconduct. A client may also go directly to the Tribunal. The Tribunal may direct restitution of up to €15,000 and may refer its finding to the president of the High Court, who will determine the sanction to be imposed on the solicitor.

**Compulsory insurance scheme:**

Solicitors must maintain a minimum level of professional indemnity cover of €1,500,000 for every claim, excluding defence costs, as prescribed by the Solicitors Acts 1954 to 2015 (Professional Indemnity Insurance) Regulations 2017. The Regulations also set out additional minimum terms and conditions required in a solicitor’s professional indemnity policy. Cover may only be provided by ‘participating insurers’ with a minimum financial strength rating of BBB.

**Barristers**

*Professional bodies and key regulatory and disciplinary codes and bodies*

Barristers are regulated by the Bar Council of Ireland. The Barristers’ Professional Conduct Tribunal hears complaints of misconduct but does not consider claims regarding professional negligence, which are dealt with by the courts. The Tribunal can uphold or reject a complaint and can suspend or disbar a barrister, require return of the client’s fee and impose a fine or a caution. It cannot award compensation. Decisions can be appealed to the Barristers’ Professional Conduct Appeals Board.

**Compulsory insurance scheme**

The Bar Council Code of Conduct requires barristers to have professional indemnity insurance, currently set at €1,500,000 (any one claim).

**ii Medical practitioners**

*Professional bodies and key regulatory and disciplinary codes and bodies*

**Irish Medical Council**

Doctors are regulated by the Irish Medical Council (IMC), which maintains a register of practitioners, sets standards for professional competence and investigates complaints. The Preliminary Proceedings Committee (PPC) considers all complaints. If there is a *prima facie* case, the PPC must refer the complaint to the Fitness to Practise Committee (FPC) for a Fitness to Practise Inquiry. If the complaint does not warrant further action, the PPC may refer the dispute for mediation or refer the doctor to performance assessment. At the conclusion of an inquiry the FPC may recommend: a written censure, a fine not exceeding €5,000, attaching conditions to registration, suspending or cancelling registration, or prohibiting the doctor from applying to have his or her registration restored for a certain period.

**Nursing and Midwifery Board of Ireland**

The Nursing and Midwifery Board of Ireland (NMBI) is the independent statutory organisation responsible for regulation of nurses and midwives and its functions are defined
in the Nurses and Midwives Act 2011. The NMBI complaints procedure is very similar to the IMC procedure, as are the available sanctions. All complaints are initially sent to the PPC and transferred to the Fitness to Practise Committee for Inquiry where required.

Dental Council of Ireland

The Dental Council of Ireland (DCI) is the regulatory body for the dental profession, created under the Dentists Act 1985. Dentists must be on the DCI register to practise dentistry. Private patients may complain to the Dental Complaints Resolution Service (DCRS), a voluntary service that offers a free mediation service; however, patients must first raise their complaints with the dental practice concerned. Serious complaints and issues relating to fitness to practise may be referred to the DCI by the DCRS, or by patients. In addition, public patients may complain to the Health Service Executive (HSE) Complaints Officer and, if this outcome is not satisfactory, the patient may seek a review from the HSE’s Director of Advocacy, or complain to the Office of the Ombudsman.

Pharmaceutical Society of Ireland

Pharmacists and pharmaceutical assistants must be registered with the Pharmaceutical Society of Ireland (PSI), whose functions are prescribed under the Pharmacy Act 2007. Each pharmacy must have a superintendent pharmacist and a supervising pharmacist, each of whom must have at least three years’ experience. Complaints may be made to the PSI and the procedure is similar to that of the IMC, with complaints going to the PPC. If further action is warranted, the complaint will go to mediation or to either the Professional Conduct Committee or the Health Committee for an inquiry (depending on the nature of the complaint). At the conclusion of the inquiry, the committee will prepare a report containing the evidence presented and the committee’s findings. The PSI Council can then decide what, if any, sanctions to impose.

Compulsory insurance scheme

The Medical Practitioners (Amendment) Act 2017 requires registered doctors to obtain medical indemnity insurance, except in certain circumstances. The Act only affects doctors in private practice, as practitioners working in the public health service (including private consultants practising in public hospitals) are covered under the state’s clinical indemnity scheme, which also covers nurses and midwives. Under the NMBI Guidelines, nurses must have professional indemnity insurance. Nurses working in private practice may be covered by their employer’s insurance, and the Irish Nurses and Midwives Organisation Medical Malpractice Scheme provides covers for members who are self-employed or employed outside the public sector. Dentists are required to hold appropriate professional indemnity cover.

Matters varying from Section I or matters from Section I specific to each group of professionals

Medical negligence claims must be brought within two years of the date of injury or the date of knowledge that an injury has occurred. This time limit does not apply to cases involving injuries to minors. In general, medical practitioners will not be found negligent if they have followed a general and approved practice; however, practitioners cannot rely on a general and approved practice with inherent defects that ought to be obvious to any person giving the matter due consideration. If the claim is based on the fact that the practitioner has deviated
from a general and approved practice, it must be proved that the course taken was one that no medical practitioner of similar specialisation and skill would have followed taking ordinary care.

iii Banking and finance professionals

Professional bodies and key regulatory and disciplinary codes and bodies

The Central Bank of Ireland

The Central Bank is responsible for the regulation and supervision of financial services firms. It has the power to conduct investigations, issue warnings, impose conditions on licences, revoke licences or impose administrative sanctions. As part of the Central Bank's Fitness and Probity Regime, it has enforcement powers against individuals found to be in breach when carrying out controlled functions within a financial institution. Finance professionals may appeal certain Central Bank decisions to the Irish Financial Services Appeals Tribunal.

Financial Services and Pensions Ombudsman

Consumers may lodge complaints against a financial services provider or pension provider with the Financial Services and Pensions Ombudsman (FSPO) (formerly two separate bodies, the Financial Services Ombudsman and the Pensions Ombudsman). The FSPO can resolve the matter informally through mediation or provide formal complaint resolution, which is legally binding and may be appealed to the High Court. The FSPO may award compensation of up to €52,000 per year where the subject of a complaint is an annuity, and €500,000 for all other complaints. These levels came into effect on 8 May 2018 and represent a significant increase from the previous maximum award of €250,000.

Compulsory insurance scheme

Investment intermediaries (under the Investment Intermediaries Act 1995) are required to hold adequate professional indemnity insurance of €1,250,000 per claim and €1,850,000 aggregate cover per annum (as set by the Insurance Mediation Directive). Compliance is monitored by the Central Bank.

iv Real property surveyors

Professional bodies and key regulatory and disciplinary codes and bodies

Society of Chartered Surveyors Ireland

The Society of Chartered Surveyors Ireland (SCSI) is the competent authority for the registration of quantity surveyors and building surveyors under the Building Control Act 2007, and is responsible for regulating its members. Failure to comply with SCSI by-laws may result in an action being taken by the Director of Regulation and the Professional Conduct Committee.

Property Services Regulatory Authority

The Property Services Regulatory Authority (PSRA) is responsible for licensing and regulation of property services providers (including property managers and auctioneers), including the investigation and adjudication of complaints. If the PSRA determines that a provider has engaged in improper conduct, it may caution the provider, revoke or suspend the provider's licence or impose penalties up to €250,000. Additionally, the Property Services Regulation Act
2011 introduces offences such as providing property services without a licence, obstructing an investigation or mismanaging client funds. These offences carry penalties of up to €5,000 or 12 months’ imprisonment on summary conviction, or both, or fines of up to €50,000 or five years’ imprisonment on indictment, or both.

**Compulsory insurance scheme**
The SCSI requires members to ensure all work is covered by adequate and appropriate professional indemnity insurance cover.

The Property Services (Regulations) Act 2011 and the Property Services (Regulation) Act 2011 (Professional Indemnity Insurance) Regulations 2012 impose a minimum level of professional indemnity insurance of €500,000 for all property services providers licensed with the PSRA.

**Construction professionals**

**Professional bodies and key regulatory and disciplinary codes and bodies**

*The Royal Institute of the Architects of Ireland*

The Royal Institute of the Architects of Ireland (RIAI) is the regulatory and support body for architects, and the official registration body under the Building Control Act 2007. It produces codes of conduct and standards, and complaints regarding poor professional performance may be made to the Professional Conduct Committee.

*Engineers Ireland*

Engineers Ireland is responsible for the maintenance and development of professional conduct and standards for its members, as well as for enforcement and disciplinary actions. While membership is optional, the title of chartered engineer is reserved to members of Engineers Ireland. Complaints may be made to the Registrar of Engineers Ireland. The Registrar can refer the complaint to the Ethics and Disciplinary Board, which is responsible for enforcing the Code of Ethics. It will appoint an investigative and disciplinary panel to investigate and adjudicate on a complaint of professional misconduct. The panel may require an undertaking from the member not to repeat the conduct complained of, issue a reprimand or suspend or exclude the member from membership. The panel may also require a contribution towards the costs of the investigation and adjudication.

**Compulsory insurance scheme**
The RIAI requires practising members to hold adequate and appropriate levels of professional indemnity insurance.

Members of Engineers Ireland must comply with the Code of Ethics, which obliges them to maintain appropriate professional indemnity cover.
vi  Accountants and auditors

**Professional bodies and key regulatory and disciplinary codes and bodies**

**Irish Auditing and Accounting Supervisory Authority**

The Irish Auditing and Accounting Supervisory Authority (IAASA) is responsible for supervising the manner in which the prescribed accountancy bodies regulate their members, including admissions, licensing, complaints, investigations and appeals. It also conducts inspections of auditors and audit firms, investigates auditors and can impose sanctions.

**Chartered Accountants Ireland**

There are numerous accountancy bodies in Ireland, but Chartered Accountants Ireland (CAI) is the dominant body responsible for regulating members of the audit and accountancy professions. It handles complaints and takes disciplinary action against members, including for misconduct and poor professional performance.

While the CAI Council remains responsible for the regulation and disciplining of members, the CAI established the Chartered Accountants Regulatory Board to oversee the fairness, impartiality and integrity of the regulatory responsibilities of the CAI.

**Compulsory insurance scheme**

The Companies Act 2014 (Professional Indemnity Insurance) (Liquidators) Regulations 2016 require liquidators (regulated by the IAASA) to hold professional indemnity insurance. The Regulations require a cover of €1,500,000 for each and every claim, plus defence costs, provided that this level of insurance is commensurate with the value and nature of the work undertaken by the liquidator.

The CAI requires all members to ensure they are covered by their firm’s professional indemnity insurance policy. The CAI’s Public Practice Regulations set a minimum level of aggregate cover of €2,140,000 with some exceptions available. Failure to adhere to this requirement will result in disciplinary action.

vii  Insurance professionals

**Professional bodies and key regulatory and disciplinary codes and bodies**

**Central Bank of Ireland**

The Central Bank is responsible for the prudential supervision of insurance and reinsurance undertakings authorised in Ireland. Undertakings must be authorised by the Central Bank and it is an offence to engage in such activities without prior approval. The Central Bank issues standards, policies and guidance with which undertakings should comply, and has powers of enforcement.

**Financial Services and Pensions Ombudsman**

Complaints against insurance companies can be lodged with the FSPO, as outlined above.

**Compulsory insurance scheme**

Insurance intermediaries are required to hold professional indemnity insurance. This is set at €1,250,000 per claim and €1,850,000 aggregate cover per annum (pursuant to the Insurance Mediation Directive).
III  YEAR IN REVIEW

There have been a number of Supreme Court decisions on cases involving professional negligence in the past year and while these have predominantly been in the area of solicitors’ professional negligence, many of the decisions have implications for professionals generally.

The Supreme Court very recently delivered its judgment in the case of *Rosbeg Partners v. LK Shields Solicitors*¹³ (18 April 2018), acknowledging that even where a defendant is negligent it does not follow that the measure of damages is all losses that follow the negligent act. The case related to the calculation of damages for professional negligence occurring in the context of a property market that experienced considerable fluctuations in value. The High Court had awarded damages of €11.2 million against the defendant and this award was upheld by the Court of Appeal. However, the Supreme Court allowed the subsequent appeal before it and reduced the award of damages to €5.2 million.

It was not disputed that the defendant was negligent in failing to secure a registration of the plaintiff’s title. However, it was common case that the problem was a failure to take certain steps within a reasonable timescale and that the transactional steps that were left undone were always capable of being carried out and were eventually completed by other solicitors when the problem came to light.

O’Donnell J observed that ‘the butterfly may beat its wings and cause an earthquake on the other side of the world, but this is not the principle on which loss is to be recoverable in law’. The Court considered that it was incorrect to say that the defendant’s negligence was the ‘direct’ or ‘factual’ cause of the plaintiff’s loss other than in the sense that ‘but for’ the defendant’s negligence the plaintiff would not have suffered the loss and while that is a necessary step in the recovery of damages it is never sufficient. The Court considered there were other ‘but for’ causes that could be identified in this case, most obviously the collapse in the property market but also the plaintiff’s decision not to sell.

Considering the recent decision of the UK Supreme Court in *Hughes-Holland v. BPE*,¹⁴ O’Donnell J noted that the law is concerned with assigning responsibility for the consequences of the breach and a defendant is not necessarily responsible in law for everything that follows from his or her act, even if it is wrongful. ‘Where the negligence is failing to do something which can yet be done, then at least, *prima facie*, the measure of damages is, first, the cost of the substitute performance of the duty and, second, any foreseeable loss in value caused by the delay in doing so. If the market is static or rising, it may be that the defendant escapes without any liability for damages under this latter heading, but whereas here the market is falling, then the plaintiff is entitled to recover the difference in value of the property between the date at which the works ought to have been done, which would have allowed for a sale, and the point at which that problem could have reasonably be remedied (assuming it can be established that the plaintiff intended to sell, and was deprived of a sale by the defect).’

In another recent decision of the Supreme Court concerning solicitors’ professional negligence, *Martin Murray v. Budds, Hanahoe and Michael E Hanahoe Solicitors*,¹⁵ the Supreme Court considered that a claim framed as a professional negligence action seeking damages for negligence and breach of contract, where the loss and damage claimed was for ‘worry and stress’ short of a recognised physical injury, should be treated as a personal injury

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action, subject to the limitation period applicable to personal injury actions and the claim was therefore statute-barred. The Supreme Court also affirmed the decision of the Court of Appeal that damages would not lie for worry and stress in the absence of a psychiatric illness.

The Supreme Court went on to consider whether the loss and damage claimed by the plaintiff for worry and stress may be recoverable in an action for breach of contract or professional negligence and held there was no exceptional reason to depart from the position in *Addis v. Gramophone Co Ltd*, and rejected a stand-alone ‘right of claim for being upset’ as damages would not be capable of being awarded for this breach of contract. The plaintiff had been represented by a solicitor and counsel and there was no breach of professional standards as he was competently represented. The Court was satisfied that *Addis* remains the law in Ireland and the plaintiff’s claim did not come within one of the recognised exemptions to *Addis*. This case demonstrates the restrictive approach of the Irish courts to non-pecuniary loss (i.e., emotional distress).

The Supreme Court delivered its judgment in the case of *Brandley v. Deane & Anor* on 15 November 2017. This case involved a claim for damages against an engineer and a builder for breach of contract and negligence arising from defective foundations. The High Court dismissed the claim on the basis that it was statute-barred as the structural defects complained of occurred more than six years after the foundations were laid and the certifications issued. However, the Supreme Court upheld the Court of Appeal’s finding that the point at which the damage occurred was when the cracks appeared in the building and thus the claim was not in fact statute-barred. The Supreme Court concluded that the date of manifestation is the appropriate starting point in property damage claims and the Statute of Limitations 1957 should be construed accordingly. The Court found there was a distinction between a ‘defect’ and the subsequent damage it causes. Damage is manifest when it is capable of being discovered. Time runs from the manifestation of the damage rather than the underlying defect (and thus it is the subsequent physical damage caused by the latent defect, rather than the latent defect itself, that must be capable of discovery).

In the June 2017 decision of *Walsh v. Jones Lang Lasalle Limited*, the Supreme Court considered an estate agent’s liability to a purchaser for errors in a sales brochure, clarifying the validity of disclaimers of liability by professional service firms to third parties. The High Court had awarded the plaintiff damages in the sum of €350,000 in respect of a negligent misstatement in a sales brochure produced by the defendant. The decision of the High Court was overturned on appeal by the Supreme Court (by a majority of 3:2). The measurement of the premises as set out in the sales brochure was incorrect and the legal issue for determination was whether, in light of the disclaimer contained in the brochure, the defendant was liable for the misstatement.

Laffoy J considered that the core issue was whether in furnishing the brochure to the plaintiff, having regard to the disclaimer, the defendant could be found to have assumed responsibility to the plaintiff for the accuracy of the information in the brochure. This question must be determined objectively by reference to what the reasonable person in the position of the plaintiff would have understood. Reading the disclaimer as a whole, it was clear that the disclaimer made clear the defendant was not guaranteeing the accuracy of the information and the plaintiff was told in clear terms that he should satisfy himself as to its

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16 [1909] AC 488.
17 At the time of writing, the approved judgment has not yet been published.
18 [2017] IESC 38.
accuracy. What is required is that a person in the position of a defendant should clearly and unambiguously state that it is not assuming responsibility for the task of ensuring that the information is accurate and that the recipient of the brochure has responsibility for that task. The Court was satisfied that the defendant had done so. Laffoy J considered that the High Court had erred in failing to recognise that the starting point for the analysis should have been whether the defendant owed a duty of care to the plaintiff.

O’Donnell J, also allowing the appeal, considered that this was a case of negligent misstatement (rather than a negligent act) and that the High Court judgment blurred the distinction between the two. In the case of a negligent misstatement, O’Donnell J held that the disclaimer is one piece of evidence in determining whether or not there has been an assumption of duty and therefore a duty of care. O’Donnell J found that the defendant had not assumed responsibility to all purchasers for the accuracy of statements in the brochure.

McMenamin J (dissenting) placed emphasis on the form and words of the disclaimer and distinguished the disclaimer before the court from another disclaimer, the terms of which he considered to be ‘crystal clear’.

Emerald Island Assurance and Investments Limited v. Coakley Moloney Solicitors19 dealt with the scenario in which a client does not wish to follow his or her solicitor’s advice and the Court of Appeal considered how far a solicitor must go in warning the client of the consequences of not following the advice. The Court of Appeal set out the warning that might be given by a solicitor in this scenario in the following terms: ‘Obviously, the more perilous the situation, the more explicit and compelling the warning needs to be, and if the warning was not appreciated fully or complied with or responded to appropriately in the first instance, then it would call for a second warning to be given by a competent professional adviser. What the solicitor cannot do is simply to say that the client would not have paid attention to any warning and therefore he is not liable.’

i Legislative developments

Legislation affecting the legal profession

The Legal Services Regulation Act 2015 will involve a significant change to the regulation of the legal profession, once fully commenced. It establishes the Legal Services Regulatory Authority (LSRA), which will be responsible for regulating the provision of legal services by barristers and solicitors. It also establishes a Legal Practitioners Disciplinary Tribunal, which will hear complaints against solicitors and barristers. The Act also provides for a mediator to assist in the complaints procedure and, failing this, a determination to be made by the LSRA. It introduces new practice structures and a new costs system. Currently, the only provisions that have been commenced relate to the establishment of the LSRA, a report by the LSRA on the operation of multidisciplinary practices, and public consultation on operation of legal partnerships and issues relating to barristers.

The Mediation Act 2017 came into force on 1 January 2018 and imposes an obligation on legal practitioners to advise their clients to consider mediation before bringing court proceedings. Where clients choose to bring proceedings without engaging in mediation, solicitors must sign a statutory declaration confirming that they advised the client of the
option of mediation. The Act also gives courts the power to suspend proceedings to facilitate mediation and provides that an unreasonable refusal or failure to attend mediation may be taken into account in awarding costs.

**Legislation affecting banking and finance professionals**

A new office of the FSPO was created by the Financial Services and Pensions Ombudsman Act 2017, which came into force on 1 January 2018. Notably the Act also extends the limitation period for customers to bring a complaint against a financial services provider regarding long-term financial services to either six years from the date of the conduct giving rise to the complaint, or three years from the date on which the person making the complaint first became aware or ought to have become aware of that act or conduct, or such longer period as may be permitted by the FSPO. The matter complained of must have occurred during or after 2002.

With effect from 8 May 2018, the FSPO may award compensation of €52,000 per annum where the subject of the complaint is an annuity, or €500,000 in respect of all other complaints. This is an increase from the previous maximum level of compensation, which was €250,000.

The Minimum Competency Framework replaces the Minimum Competency Code 2011 with effect from 3 January 2018. The Framework comprises the Minimum Competency Code 2017 and the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1) Minimum Competency) Regulations 2017. It sets out minimum professional standards for persons providing financial services. It also sets out base levels of qualification and experience for staff of financial services providers.

**Legislation affecting medical practitioners**

The Medical Practitioners Amendment Act 2017 Act introduced a mandatory requirement for doctors in private practice to hold professional indemnity insurance (with limited exceptions). Doctors in the public health service are covered under the state’s clinical indemnity scheme.

The Civil Liability Amendment Act 2017 was enacted on 22 November 2017 and at the time of writing is expected receive a commencement date shortly. The Act introduces a legislative basis for the courts to make periodic payment orders in catastrophic injury cases. At present, damages are awarded in a lump sum at the conclusion of an action; however, periodic payment orders allow a plaintiff to have the compensation paid in a series of index-linked payments, over the course of the plaintiff’s life, limiting the possibility of being undercompensated.

**IV OUTLOOK AND FUTURE DEVELOPMENTS**

i **General Data Protection Regulation**

The General Data Protection Regulation (GDPR) came into force on 25 May 2018, making data protection a priority issue for professionals. The GDPR will have wide-ranging implications for professionals, most notably for solicitors, banking, finance and insurance professionals, given the nature of the data they hold in relation to their clients. In essence, the GDPR strengthens existing protections and introduces new rights for individuals. The obligations that will be imposed on professionals include ensuring appropriate record-keeping and implementing adequate security standards, which will involve cost implications, as well as the possibility of regulatory recourse in the event of a breach.
The Data Protection Act 2018 was signed into law on 24 May 2018 and is intended to give further effect to the GDPR in Ireland and to transpose the accompanying directive into Irish law. The Act outlines additional details regarding the technical and organisational measures that should be implemented to comply with key obligations.

ii Cyberattacks
Cyberattacks have been on the rise and it is likely that there will continue to be an increased number of cyberattacks against professionals, particularly those who manage client funds or hold valuable data. Law firms hold a vast array of sensitive information on their servers, from intellectual property to medical records and bank details. This information is highly valuable and recently law firms have become popular targets for cyberattacks. The Garda National Cybersecurity Bureau has advised the Law Society of Ireland that various cyberattacks on Irish law firms have been reported in recent months, with a surge in cyberattacks resulting from business emails being compromised, and has warned of an ongoing campaign against legal firms in Ireland. These attacks appear commonly to be phishing attacks; however, they can also take many other forms, such as using ransomware to lock firms out of their information and firms being targeted by cybercriminals seeking information on mergers to be used for inside trading. Under the GDPR, firms will be obliged to report a cyber-breach within 72 hours, which will open the firms up to significant reputational damage, as well as the potential for negligence actions, and, if the firm is in breach of GDPR standards, it may be liable for fines of up to 4 per cent of annual global turnover or €20,000,000 (whichever is greater).

iii Increased use of technology
Emerging technologies also present opportunities and challenges for professionals. Automation is increasingly a feature of professional life and various professions, including the legal profession, are investing in new technologies and automation.

The use of commercial drones is increasing in the construction industry, particularly among surveyors. The technology surrounding drones is rapidly developing and, to mirror the emerging technology in this area, legislative reform is proposed. The draft Small Unmanned Aircraft (Drones) Bill 2017 proposes to place an obligation on commercial drone operators to have insurance in place, and imposes criminal liability for certain drone offences. It prohibits the use of a drone for surveillance, capturing images, videos, etc. where there is a reasonable expectation of privacy, and without consent. There is currently no timeline for implementation.

In the insurance sector, in future there is likely to be litigation challenging the claims decisions made by automated claims-processing systems and regarding the interpretation of the specific GDPR articles that confer rights on individuals in relation to automated decision-making.

iv Limitation periods
Following the recent decision of the Supreme Court in Brandley v. Deane & Anor,20 there is potential for claims being successfully brought against construction professionals outside the traditional six-year limitation period on the basis that the damage in question manifested at

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20 At the time of writing, the approved judgment has not yet been published.
a later date, and this may lead to an increase in claims by plaintiffs who previously believed their claims were statute-barred. An extension of the limitation period applicable to claims brought before the FSPO in respect of long-term financial services may also lead to an increase in claims previously thought to be statute-barred being brought against financial services providers.
I INTRODUCTION

i Legal framework

Under Italian jurisdiction, professional liability could be defined as professionals’ liability (for professionals such as attorneys, accountants and doctors) or semi-professionals’ liability (for professionals such as consultants or real estate brokers), incurred as a result of errors or omissions, that causes an economic loss to a third party, which is usually the client.

It is a branch of the civil liability regulated mainly by Italy’s Civil Code, as well as by statutes and case law.

It differs, in terms of requirements and consequences, both from criminal liability – which may arise, for example, from the illegal conduct of a professional – and from the disciplinary liability that originates from a violation of the code of conduct issued by a professional body.

In the Italian legal system, civil liability can be contractual or tortious in nature, consequently professional liability will be regulated by the general principles governing contractual as well as tortious liability under Italian law, as set out, on one hand, under Articles 1176, 1218 and 2229 and, on the other, under Articles 2043 et seq. of Italy’s Civil Code (CC).

Ultimately, the main difference between these two categories depends on whether a contractual relationship exists between the parties, in this case represented by the professional and the client.

Depending on the type of category to which the relationship is ascribed, a different regime, in the form of requirements, consequences, limitations and prescriptions, applies.

Over the years, the role of the Italian Supreme Court has been essential in identifying the most suitable kind of liability – contractual or tortious – for each specific profession.

Nevertheless, since case law is constantly developing, we cannot exclude the possibility of current orientations undergoing further changes in future.

Depending on the nature of the action to be brought against a professional, the plaintiff must comply with different burdens of proof. According to Article 1218 CC, which is one of the pieces of legislation that establishes the founding principles of contractual liability, ‘the debtor who fails to perform his payment obligation is obliged to restore the damage if he does not prove that the non-performance or his delay has been determined by the impossibility arising from a cause that is not attributable to him’.

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1 Serena Triboldi is a partner at PMT Studio Legale.
2 Royal Decree No. 262 of 16 March 1942, as subsequently amended.
In addition, Paragraph 2 of Article 1176 CC – whose first paragraph prescribes that the debtor should use the diligence of a ‘good father’, meaning the diligence of a reasonably prudent person – specifies that, ‘in the performance of a professional activity, the diligence should be evaluated with reference to the professional activity to be carried out’.

Moreover, since the activity of professionals is often considered an intellectual activity, the relevant regime is provided by Articles 2229 et seq. CC.

In particular, according to the provision of Article 2236 CC, ‘in the event that the performance requires the solution of particularly difficult problems of a technical nature, the professional will be held responsible exclusively in the event that he acted with intent or gross negligence’.

In the case of a contractual action, the burden of proof – established pursuant to the above-mentioned Article 1218 CC – charges the debtor with a presumption of fault, in the face of which he or she has to demonstrate his or her diligence and the impossibility of his or her performance.

In contrast, Article 2043 CC, which sets out the legal ground for tortious liability, states that the person alleged to have been damaged must prove all the elements of the cause of action, including the defendant’s negligent or intentional conduct.

Failure to prove the elements of the cause of action leads to a rejection of the action by the judge.

Ultimately, for the sake of completeness, we must also address the fact that, because of the litigious nature of the society we live in, professionals increasingly decide to take out an insurance policy that covers their professional activities. Moreover, frequently professionals belong to a professional body or industry association in which professional indemnity insurance is compulsory.

ii Limitation and prescription

The legal action aimed at assessing a professional’s liability can be barred because of the expiry of a statutory limitation period, which varies depending on the nature of the civil action to be started (i.e., contractual versus tortious).

According to the general principle set out under Article 2946 CC, the ordinary term after which a contractual action becomes barred is 10 years, from the execution of the relevant agreement.

On the other hand, Article 2947 CC provides that a tortious action for the compensation of unjust damage is time-barred if it is not started within the shorter term of five years, from the occurrence of the fact that damaged the claimant.

iii Dispute fora and resolution

Under the Italian jurisdiction, the determination of dispute fora is mainly governed by the Civil Procedure Code – which provides both general and special criteria, depending on the subject matter – as well as by certain statutes that set out special criteria, such as the Consumer Code.³

The Civil Procedure Code provides for two different sets of general criteria, depending on whether the defendant is a company – in which case, the competent court will be the one

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³ Legislative Decree No. 206 of 6 September 2005, as subsequently amended.
of the place where the company has its legal seat⁴ – or an individual, who shall be sued before the court of the place where he or she is resident or domiciled, or, if not an Italian resident, before the court of the place where the claimant lives.⁵

According to the Consumer Code – whose aim is to assure the consumer of protection and facilitate his or her legal action – the dispute forum is the place where the consumer lives.⁶

Recently, the Supreme Court, ruling on a professional liability lawsuit, applied the special forum provided by the Consumer Code,⁷ deeming the client of the professional (a lawyer) to be a consumer.

Proceedings for the assessment of professional liability are governed by the procedure rules set out by the Civil Procedure Code, in the absence of a specific regime provided by statutes on this matter.

In addition, as already explained (see Section II.i above), Italy’s Civil Code provides for a different regime regarding the burden of proof according to the nature of the action (i.e., whether the claimant qualifies the nature of the professional liability as contractual or tortious).

Pursuant to Article 5 of Legislative Decree No. 28/2010, as subsequently amended, claims for damages arising out of medical liability cannot be brought without first filing a request for mediation or conciliation.

iv Remedies and loss

Under the Italian jurisdiction, the main remedy available to a person alleged to have been damaged by the conduct of a professional – whether by omission or action – is reimbursement for the suffered damage, which is governed by the provisions of Articles 1223–1229 CC, both of which apply to tortious and contract liability cases.

Pursuant to Article 1223 CC, reimbursable damage includes the loss sustained and the profit lost as the immediate and direct consequence of an illegal act.

In addition, under Article 1225 CC, if there is no intentional conduct, the reimbursable damage is limited to the damage that could be foreseen when the obligation arose.

Again, under Article 1227 CC, if the creditor contributed to the cause of the damage through his or her fault, the reimbursement is reduced in proportion to the seriousness of the fault and the extent of the consequences. Then, reimbursement is excluded for that damage that the creditor could have avoided by exercising the ordinary level of care.

Article 1226 CC also provides that where the damage cannot be quantified in its exact amount, it will be liquidated by the judge on an equitable basis.

According to Italian case law, the judge does not require unequivocal evidence of the damage caused to the client through the performance of an activity or an omission by the professional.

This is because the judge will assess loss and damage, examining the causal connection between the omission and the damage and, in particular, will decide on the basis of the outcome that would most probably have occurred in the case at hand.

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⁴ Article 19 of the Civil Procedure Code.
⁵ Article 18 of the Civil Procedure Code.
⁶ Article 33, paragraph 2(u) of Legislative Decree No. 206/2005.
⁷ Supreme Court Sec. VI – 3, order No. 1464 of 24 January 2014.
This means that the judge will examine the matter and decide whether the omission or the activity performed by the professional should have had different results from the actual results.

The Supreme Court has applied the above-mentioned criteria to several professions and, recently, affirmed its application with reference to lawyers.\(^8\)

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers’ professional liability is predominantly contractual in nature since it is based on a contract executed between the lawyer and the client for the provision of legal services, both judicial and extra-judicial.

It is assessed having regard to the general provisions on contractual liability set out by the Civil Code.

The professional body institutionally representing the legal profession in Italy is the Italian Bar Council (CNF), which is vested with a regulatory and disciplinary authority.

It enacts and updates the Lawyers Code of Conduct, which sets out the obligations to be observed in the performance of the legal profession (probity, dignity, competence, secrecy, confidentiality, decency, diligence, etc.), disciplinary breaches and the applicable sanctions (warning, censorship, suspension and disbarment).\(^9\)

Disciplinary power is exercised by disciplinary district councils, established at each district Bar,\(^10\) pursuant to a procedure set out under Regulation No. 2/2014.\(^11\)

The obligation that a lawyer assumes towards his client is a relative obligation (an obligation of means) and not an absolute obligation (an obligation of result) since the professional is engaged to diligently carry out the assignment but cannot guarantee achievement of the result sought.

The Court of Cassation clarified that a right to compensation for damage suffered does not automatically arise as a result of any non-fulfilment on the part of the lawyer, as it is necessary to consider, on the basis of a probabilistic evaluation, whether in the absence of the mistake made by the lawyer the negative outcome for the client would have occurred anyway.\(^12\)

A recent ruling extended lawyers’ liability based on a probabilistic evaluation in a case where a judicial action was time-barred because of a lawyer’s negligent failure to contest a ruling within the legal term; the client’s right to be reimbursed was recognised even though it was not certain that he would have been successful before the court of appeal.\(^13\)

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8 Supreme Court, Sec. III, order No. 25112 of 24 October 2017.
9 Law No. 247 of 31 December 2012 on the Reform of the Legal Profession vested the Council with the authority to update the Lawyers Code of Conduct. The new Code was enacted on 31 January 2014 and became effective on 15 December 2014.
10 Article 50 of Law No. 247/2012.
11 CNF Regulation No. 2 of 21 February 2014 on Disciplinary Proceedings.
12 Supreme Court ruling No. 297/2015.
13 Supreme Court ruling No. 25112/2017.
According to Italian jurisprudence, lawyers can be held professionally liable in the following cases:

a. even when client and lawyer share the defence strategy and when the client himself or herself requests specific defence tools (since the choice of the technical path in the performance of the professional activity is the exclusive task of the lawyer);  

b. when the lawyer omits to indicate the means of proof necessary to uphold the action; and  

c. when, after complying with the duties of solicitation, dissuasion and information towards the client, informing him or her of ‘any factual or legal issue, regardless of how it arises, that might prevent achievement of a result, or in any manner produce a risk of detrimental effects’, and advising him or her against ‘starting or continuing a proceeding whose outcome is likely to be unfavourable’, the lawyer does not provide the relevant evidence, since the release of the power of attorney by the client is not sufficient proof of compliance with the information duty.

Article 12 of Law No. 247/2012, as subsequently implemented, requires Italian lawyers to take out professional liability insurance covering civil liability and injuries resulting from the performance of the professional activity.

Coverage must include the lawyer’s civil liability for any damage that he or she may cause to clients and to third parties in the performance of his or her activity, and also for gross negligence. Any type of damage is insured: monetary, non-monetary, indirect, permanent, temporary and future.

It includes civil liability deriving from faulty or wilful conduct of collaborators, practitioners, employees or procedural substitutes, and liability for damages arising from the custody of documents, sums of money, securities and valuables received as deposit from clients or from the counterparts of clients in proceedings.

Coverage for injuries must be provided in favour of a lawyer’s collaborators, practitioners and employees who do not benefit from National Institute for Insurance against Accidents at Work (INAIL) mandatory insurance coverage. This coverage is extended to injuries that occur during, because of and in connection with the performance of the professional activity and that cause death or permanent or temporary invalidity, as well as medical expenses; and to injuries that occur during displacements necessary through carrying out of the professional activity.

Lawyers shall communicate the data of the insurance policy to the local bar association to which they belong, to the CNF and to the client.

ii. Medical practitioners

In a departure from the past jurisprudential orientation of Italian courts with respect to the nature of medical practitioners’ professional liability, the ‘Gelli Law’, enacted on
28 February 2017\textsuperscript{19} clarified that, unless they have entered into a contractual relationship with the patient, medical practitioners belonging to a healthcare facility are liable in tort whereas the healthcare facility is liable in contract for negligent or fraudulent behaviour on the part of the medical practitioner.\textsuperscript{20} Therefore, different provisions regarding the burden of proof and statutes of limitation apply, depending on the contractual or tortious nature of the action.

If the liability is in tort, Article 2043 CC applies, and the patient must prove all the elements of the cause of action and the action becomes time-barred after five years.

In the case of a contractual relationship between the medical practitioner and the patient, the provisions of the Consumer Code on dispute fora apply.

With respect to the assessment of the medical liability, the Court of Cassation ruled that it is possible to ascertain the existence of a causal link between the omission of the doctor and the damage suffered by the patient when, according to a probabilistic evaluation, it is possible to state that the activity of the doctor, if diligently and promptly performed, would have had serious and important possibilities of preventing the damage that occurred; the relevant burden of proof lies with the damaged person.\textsuperscript{21}

In another case, the Court of Cassation stated that "the proof of the existence of a causal link is given when there is no certainty that the cerebral damage suffered by the newborn derived from natural or genetic causes and it appears “more likely than not” that a prompt or different intervention by the doctor would have avoided damage to the newborn".\textsuperscript{22}

The patient cannot bring a claim for damages arising out of healthcare liability without having first filed a recourse for a prior expert inspection or, alternatively, a request for mediation. Attendance at the proceedings is mandatory for all parties, including the insurance companies, which shall submit their offer for damage compensation or state the reasons why they refuse to make an offer.\textsuperscript{23}

In cases of gross negligence or fraudulent behaviour, the healthcare facility can bring a recovery action against the medical practitioner. If the latter was not part of the proceedings for the compensation of the damage, the healthcare facility can bring a recovery action after payment of the damages, no later than one year after the mentioned payment.\textsuperscript{24}

The Gelli Law introduced the obligation to take out an insurance policy covering the risks arising from the medical profession for all private and public healthcare facilities and medical practitioners.

A professional’s insurance must cover gross negligence in the carrying out of the activities. The healthcare facility shall cover civil liability towards third parties and any damage caused to the professionals themselves while they are working at the healthcare facility.

A patient can also directly sue the insurance company of the healthcare facility or the professional for reimbursement for damage (in addition to suing the healthcare facility and the medical practitioner themselves).\textsuperscript{25}

\textsuperscript{19} Law No. 24 of 8 March 2017.
\textsuperscript{20} Article 7 of Law No. 24/2017.
\textsuperscript{21} Supreme Court, ruling No. 12686/2011.
\textsuperscript{22} Supreme Court, ruling No. 11789/2016.
\textsuperscript{23} Article 8 of Law No. 24/2017.
\textsuperscript{24} Article 9 of Law No. 24/2017.
\textsuperscript{25} Article 12 of Law No. 24/2017.
In the absence of insurance coverage, patients can have recourse to the Guarantee Fund (a fund for damages arising from medical liability), which guarantees the damages arising from medical liability. The Guarantee Fund is also available when the insurance limits are lower than the reimbursement due to the patients or if the insurance company with which the healthcare facility or the professional took out the insurance coverage is insolvent or under compulsory administration.26

iii Banking and finance professionals

Banking and finance professionals’ liability is tortious in nature since the client usually enters into a contractual relation with the financial institution and not directly with the professional.

Under Article 31, Paragraph 3 of Legislative Decree No. 58 of 24 February 1998 – setting out the Unified Rules on Financial Intermediation – the financial institution is jointly liable with the finance professional qualified for door-to-door selling for damage caused to third parties.

Recently, the National Commission for Companies and the Stock Exchange (CONSOB), which is the supervisory authority for the Italian financial products market, issued Regulation No. 17130 of 12 January 2010,27 which enacted Articles 18 bis and 18 ter of Legislative Decree No. 58/98 concerning finance professionals qualified to practise door-to-door selling (now defined as ‘independent financial advisers’), and financial institutions.

Article 12 of the above-mentioned Regulation states that in the performance of investment advisory services, financial consultants must behave with diligence, correctness and transparency.

In addition, and except in specific cases,28 they must maintain the confidentiality of the information acquired from their clients or potential clients, or that is made available to them because of their activity.

The finance professional whose conduct does not comply with these rules shall be subject to the penalties provided by Article 27 of Regulation No. 17130/2010.

In particular, depending on the performed activity, the professional can be struck off the register, suspended for one to four months or obliged to pay a penalty of between €500 and €25,000.

Finance professionals have to be enrolled on the Unified Register of Financial Advisers administered by the Supervisory Organisation of Financial Advisers (OCF).29

26 Article 14 of Law No. 24/2017.
27 CONSOB Regulation No. 17130/2010, subsequently amended by Resolution No. 19548/2016, has been recently repealed by Regulation No. 20307 of 15 February 2018, of which Article 4 Paragraph 5 expressly extended the application of Regulation No. 17130/2010 to the effective operation of the Unified Register of Financial Advisers.
28 The cases contemplated by Article 18 bis, Paragraph 6(e),(f), of Italian Legislative Decree No. 58 of 24 February 1998 and in any other case in which the law allows or imposes disclosure.
29 The Register of Financial Advisers was instituted according to Legislative Decree No. 58 of 24 February 1998. Law No. 208 of 28 December 2015 (the 2016 Stability Law) – effective from 1 January 2016 – introduced the Unified Register of Financial Advisers. At present, the relevant supervisory body, the OCF, exclusively handles the Unified Register of Financial Advisers with respect to finance professionals qualified for door-to-door selling under Article 31, Paragraph 2 of Law No. 58/98, since CONSOB still has not enacted the necessary implementing regulations concerning other sections of the register, which are expected by 31 October 2018.

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iv  Computer and information technology professionals

The liability of computer and information technology professionals can be either contractual or tortious, depending on the specific case.

In fact, this kind of professional may have a contractual relationship with the client or, on the other hand, may be exclusively a producer of, for example, a specific software program that does not work.

In the first case, the contractual liability regime will apply and the professional should demonstrate his or her diligence and should prove, pursuant to Article 1218 CC, that the non-performance or delay is due to a cause that has arisen but is not attributable to him or her.

In addition, the professional may also be able to demonstrate the participation of the client in causing the damage.

In contrast, when the professional is the producer and does not have any contractual relationship with the client, he or she will be liable pursuant to Article 2043 CC.

Given the growth of global computerisation, the activities of these kinds of professionals have increased greatly. As a consequence, it is becoming more and more usual for computer and information technology professionals to take out insurance policies for their activity.

v  Real property surveyors

Since real property surveyors act as mediators, their liability is governed by Article 1759 CC, which was originally aimed at mediators, and whose obligations they should respect.

In particular, real property surveyors should inform the parties about all the known circumstances that can influence the evaluation and the conclusion of the business.

In addition, recently Italian jurisprudence introduced more duties for real property surveyors, specifying that they should also verify the information given to the client and that they should avoid providing their client with unverified information.30

There is actually debate in Italian doctrine and jurisprudence about the nature of real property surveyors’ liability, which can be either contractual or tortious, depending on the specific conduct of the professional.

In particular, Italian legal doctrine – and, in some part, jurisprudence – maintains that the liability is contractual, with specific reference to cases in which the real property surveyor fails to discharge the duty to correctly inform the client about the relevant circumstances of a matter.

In contrast, in other cases the jurisprudence recognises the liability of the real property surveyor as tortious. This happens in particular when the professional acts unlawfully on behalf of another individual.31

To perform their activity, real property surveyors must be enrolled in a specific register with the Chamber of Commerce. This enrolment is subject to specific requirements, such as subscription to an insurance policy for their professional activity.

vi  Construction professionals

Liability may be considered in relation to various construction professionals, such as the contractor, the project manager and the designer.

30  Supreme Court, ruling No. 7178/2015.
31  Supreme Court, ruling No. 16382/2009.
Article 1669 CC, with exclusive reference to the contractor, states that this professional is liable if, within 10 years of the end of the works, the building suffers a partial or total collapse because of defects in the soil or in the construction, or there is a manifest risk of collapse, or serious defects become apparent.

Pursuant to this Article, notification of the defects should be made within one year of discovery of the damage, and the judicial action for damage compensation is time-barred if it is not started within one year of notification of the defects.

Italian jurisprudence has also extended this regime to the project manager and the designer.32 The nature of the construction professionals’ liability is both contractual and tortious, depending on the particular profession.

In fact, while the liability of the contractor will be contractual by virtue of the procurement contract, the liability of both the project manager and the designer will be tortious, and the principal must prove all the elements of the cause of action, including the defendant’s negligent or intentional conduct.

In addition, despite the difference in the nature of the liability of the contractor and the project manager, the Italian jurisprudence maintains that they are jointly liable for damages arising from the project.33 Because of the numerous figures that are involved in the construction profession, it is not feasible to provide here an exhaustive account of all the applicable professional bodies and insurance regimes.

However, by way of example, the project manager can be a professional or an employee, enrolled in the register instituted for his specific profession – for example, the Register of Engineers.

In addition, in the event that the professional is VAT registered, with a VAT registration number, he or she must have an insurance policy for his or her professional activity, which is not required of employees.

vii Accountants and auditors

While accountants’ liability is predominantly contractual in nature, auditors’ liability can be both contractual and tortious in nature, since their behaviour can ultimately damage both the company with which they have a contractual relationship and third parties.

Recently, the Supreme Court specified a few principles governing the client–professional relationship with respect to accountancy and fiscal duties, including the principle that the accountant drafts the accounts on the basis of the data provided by the client and is not under any obligation to find autonomously items of expenditure to record in the accounts; and that the accountant’s liability cannot be declared in the absence of a causal link between the accountant’s conduct and the claimed damage if the client does not prove that diligent practice by the accountant would have prevented the damage.34

To carry out their professional activity, accountants must be enrolled in the bar association of their place of residence and must have an insurance policy for their professional activity.

Similarly, auditors must be enrolled in the register instituted by the Minister of Finance.35

32 Supreme Court, ruling No. 8811/2003.
33 Supreme Court, ruling No. 20294/2014; Supreme Court, ruling No. 18521/2016.
34 Supreme Court, Sec. II, ruling No. 12463/2016.
Also, auditors should have an insurance policy. However, insurance companies do not provide a specific insurance policy for auditors and this kind of coverage should be added to the ordinary content of a professional liability insurance policy.

Article 9 and 9 bis of Legislative Decree No. 39/2010, which reformed the regime governing the auditing of accounts, impose on auditors and auditing firms an obligation to comply with deontological principles of confidentiality and secrecy. Furthermore, pursuant to Article 15, auditors and auditing firms are jointly liable, together with the directors of the audited company, towards the company, its shareholders and third parties for damages resulting from failure to fulfil their duties. In the inner relation among the joint debtors, each of them is liable within the limit of their actual contribution to the damage caused. The action for compensation of the damage is time-barred if it is not started within five years of the date of the auditing report on the balance sheet issued at the end of the auditing activity.

viii Insurance professionals

The liability of insurance professionals is considered here in relation to the figures of the agent and the sub-agent.

The insurance agent deals with the management of an agency on behalf of one or more insurance companies. The agent is paid, entirely or partially, a commission and carries out the activity at his or her own risk and expense, and is liable for a specific area and for directing the staff he or she has hired.

The second is an auxiliary of the agent who collaborates with the agent in the agency. The agent must be enrolled in the Single Register of Intermediaries (RUI), instituted according to Legislative Decree 209/2005 and currently maintained by the Italian Insurance Supervisory Authority.

To be enrolled in the RUI, each agent must have an insurance policy for his professional activity.

The sub-agent must also be enrolled in the RUI, but in Section E, which is different from the one in which the agent is enrolled.

Regarding their liability, as with banking and finance professionals, the professional’s liability is tortious since the client usually enters into a contractual relation with the insurance company and not directly with the professional.

Further, the agent is liable under Article 2049 CC for damage caused by the sub-agent. In the same way, the insurance company is liable under Article 2049 CC for damage caused by the agent.

The liability set out by Article 2049 CC is attributed to a person, generally the employer, for the act of a third person, the employer’s employee, by virtue of an employment relationship.

The person held liable pursuant to this Article is not provided with any opportunity to prove his or her lack of negligence.

However, the injured person should demonstrate the damage, its connection with the agent or the sub-agent and an employment relationship between the employer and the employee.
III YEAR IN REVIEW

The major developments in Italian law and case law affecting professional liability over the past year are briefly described in this section.

With respect to dispute fora, in 2017 the Supreme Court confirmed that the special forum of the Consumer Code was applicable to a dispute between a lawyer and a client,36 and in 2018 it clarified that this forum cannot be waived by the parties, not even by means of an oral contract, or as a result of the client’s procedural behaviour, unless the professional proves that the waiver has been specifically negotiated by the parties before the start of the proceedings. (In the case at hand, the client had refrained from contesting the territorial jurisdiction of the court; rather the court itself had raised this objection by its own motion.)37

With respect to lawyers’ professional liability, the Supreme Court in 2018 announced the principle that the assessment of a lawyer’s liability for negligent behaviour requires a positive prognostic evaluation – not necessarily certainty – on the likely positive outcome of the lawyer’s activity, had it been carried out correctly and diligently.38 The Supreme Court clarified that the lawyer’s liability cannot be declared solely as a result of his or her negligent behaviour, as it is necessary to verify whether diligent conduct would have allowed the client to obtain the recognition of his or her rights, which would in turn represent evidence of the causal link between the conduct of the professional and the consequent result.

Further, concerning insurance policies covering civil liability and injuries, despite the fact that the relevant obligation became mandatory in 2012, it only became effective in November 2017, after the enactment of the implementing Decree of the Ministry of Justice of 22 September 2016.39 Initially, Article 12 of Law No. 247/2012 provided for coverage of injuries to the lawyer himself or herself; however, Law No. 284 of 4 December 2017 subsequently amended the provision and currently coverage is mandatory only for injuries to a lawyer’s collaborators, practitioners and employees who do not benefit from INAIL mandatory insurance coverage.

As regards medical practitioners, the Gelli Law, enacted in 2017, represented a major reform of the healthcare liability system, introducing new principles and obligations. However, some of provisions (concerning insurance, etc.) of the Law are not yet effective because the relevant implementing decrees have still to be enacted (see Section IV below).

As regards the issue of ‘informed consent’, which medical practitioners are required to obtain from any patient before carrying out any medical treatment, the Supreme Court, in 2018, confirmed the principle of law whereby a doctor has a duty to inform the patient about the health treatment to which he or she will be subject; consequently a lack of information both damages the patient’s health and infringes his or her right to self-determination. However, in the case at hand, the doctor was discharged from any liability since he provided evidence – through witnesses testimony – that the patient had verbally given her informed consent to the medical treatment.40

With respect to banking and financial professionals qualified to undertake door-to-door selling, the Supreme Court clarified in 2017 and 2018 that, despite the provisions set out under Article 31, Paragraph 3 of Legislative Decree No. 58/98 and Article 2049 CC,

36 Supreme Court, Sec. VI – 3, order No. 21187 of 13 September 2017.
37 Supreme Court, Sec. VI, order No. 1951 of 25 January 2018.
38 Supreme Court, Sec. III, order No. 6862 of 20 March 2018.
40 Supreme Court, Sec. III, order No. 9179 of 13 April 2018.
a financial institution is not necessarily held jointly liable with a financial adviser (who had cashed a cheque received by a client) for misconduct if the judge ascertains that he or she acted for personal purposes and not within the scope of the labour relationship with the financial institution (the name of the beneficiary was not specified on the cheque and the client had not signed any contract for the purchase of the securities).\textsuperscript{41}

Having regard to accountants, the Supreme Court recently assessed the liability for negligence of an accountant whose client had been subject to several sanctions. The Supreme Court clarified that, to be partially discharged from liability, the accountant should have demonstrated that the client did not behave with the ordinary degree of diligence, and that had he behaved diligently the sanctions could have been reduced.\textsuperscript{42}

IV \hspace{0.3cm} OUTLOOK AND FUTURE DEVELOPMENTS

As indicated in Section III above, with reference to medical practitioners, over the coming year a number of decrees implementing the Gelli Law should be enacted, pursuant to Articles 10 and 14 of the Law.

In particular, pursuant to Article 10 of the Law (regarding insurance obligations):

\begin{itemize}
\item \textit{a} the Ministry of Economic Development together with the Ministry of Health should set out the criteria according to which IVASS shall supervise insurance companies taking out insurance policies with healthcare facilities and medical practitioners;
\item \textit{b} the Ministry of Economic Development together with the Ministry of Health and the Ministry of Economy should issue a decree stipulating the minimum requirements for insurance policies for private and public healthcare facilities, and for medical professionals; and
\item \textit{c} the Ministry of Economic Development, the Ministry of Health and IVASS should issue a decree on good practice regarding security in the healthcare system, providing for the means and the terms of data transmission between healthcare facilities (both public and private), medical professionals and the National Observatory.
\end{itemize}

In addition, on the basis of Article 14 of the Law (regarding a guarantee fund), the Ministry of Health together with the Ministry of Economic Development and the Ministry of Economy should issue an implementing decree defining the activities of a guarantee fund for damages arising from healthcare liability.

Finally, with respect to banking and financial professionals, CONSOB Regulation No. 20307/2018 – which is not yet currently effective but is expected to enter into force soon – provides that, under Article 18 \textit{bis} and 18 \textit{ter} of Law No. 58/98, finance professionals are required to take out an insurance policy to perform their activity, and the details of the policy have to be communicated to the OCF upon registration.\textsuperscript{43}

\textsuperscript{41} Supreme Court, Sec. I, No. 8267 of 3 April 2017; Supreme Court, Sec. I, No. 3909 of 16 February 2018.
\textsuperscript{42} Supreme Court, Sec. III, No. 26823 of 14 November 2017.
\textsuperscript{43} Regulation No. 20307/2018, Article 153, Paragraph 1(h).
Chapter 8

MEXICO

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I INTRODUCTION

Under Mexican law, professionals are obliged to act diligently in accordance with their expected skills. Individuals are bound by a general duty of care; however, Mexican law recognises, in statute and precedent, that professionals are held to a higher standard. Regardless of whether professional service obligations arise from a contract, professionals are liable if they fail to observe this higher standard of diligence.

The first part of this chapter sets out the general legal framework applicable to professional liability. To that end, it explains the different types of liability that individuals may face in the exercise of their profession, the procedures applicable when claims of professional liability are brought, and the direct and immediate damages and lost profits that the service receiver may recover for the professional’s misconduct.

Moreover, the chapter sets out examples of professions with particular regulations, authorities and sanctions; these laws generally relate to areas of social interest and public order.

Finally, the chapter outlines recent and future developments with respect to case law derived from the recent Mexican educational reform, the new regulation on corporate liability, the possible introduction of punitive damages in Mexico, the increasing attempts to make bar association affiliation mandatory, the effects of the ‘new’ corporate liability and the tendency towards orality in judicial proceeding.

i Legal framework

Article 5 of the Mexican Constitution provides for the lawful right to perform a profession, industry, business or work. This right may only be revoked by a court decision or by government order when third parties’ rights or society’s rights are infringed, respectively. Thus, the right to perform a profession contains limits and restrictions.

According to the Regulatory Law of Article 5 of the Mexican Constitution concerning the Exercise of Professions in the Federal District (the Regulatory Law), which applies to professionals in Mexico City and on a federal level, a professional service includes the

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rendering of any service specific to a particular profession, and includes the use of cards, announcements, plaques, badges or other means\(^2\) to indicate the characteristic features of a particular profession.

To exercise a profession, the individual is required to: (1) be in full exercise of his or her civil rights, (2) hold a duly registered degree, and (3) hold a permit to exercise the profession issued by the Directorate General of Professions.\(^3\) A professional is obliged to put all scientific knowledge and technical resources into practice at the service of their clients, as well as to perform the work that was agreed upon by the parties.\(^4\) Also, a professional is obliged to keep strict secrecy regarding the matters entrusted to them.\(^5\) Note that, unlike in other countries, Mexican law does not provide for mandatory allegiance to a bar association.

Individuals may exercise their profession on their own or as employees. Professionals who exercise their profession as employees are subject to the Federal Labour Law.\(^6\) Governmental professional employees are also subject to other administrative laws.

In the exercise of their profession, individuals are subject to the applicable laws – whether specific to their profession (\textit{lex artis}),\(^7\) or general – as well as to the contracts they conclude with the service receivers. Professionals should act diligently in accordance with their professions. Breaches of contract or of law expose them to different types of liability.

\textbf{Civil liability}

All 32 states of the Mexican Republic have their own civil codes, most of which mirror the Civil Code of Mexico City.\(^8\) Also, all 32 states have their own civil procedural codes. The Federal Civil Code serves as a gap filler for federal laws, but the regime it promulgates is almost identical to that of the Civil Code of Mexico City. For the purposes of this chapter, we will refer to the provisions of the Federal Civil Code of Mexico (the Federal Civil Code), which are almost identical to the local civil codes.

Chapter V Article 1910 of the Federal Civil Code establishes that anyone acting unlawfully or against good practices who causes damage to another shall repair the damage. This Article enhances the core premise of civil responsibility. Under this premise, civil responsibility arises whenever the following elements are met: (1) commission of an unlawful act; (2) direct and immediate damage; and (3) a causal relationship between the unlawful act and the damage so caused.

Acts are unlawful when they violate a specific legal rule or good customs.\(^9\) Mexican law requires that damage must be the ‘direct and immediate’ consequence of the unlawful

\(^2\) The Regulatory Law, Article 24.
\(^3\) Id., Article 25.
\(^4\) Id., Article 33.
\(^5\) Id., Article 36.
\(^6\) Id., Article 37.
\(^7\) \textit{Lex Artis} means the universally accepted rules for the exercise of a profession. It serves as an assessment criterion for evaluation of the level of diligence that can be demanded in the execution of a certain professional act.
\(^8\) On 29 January 2016, Mexico City began its transition towards a federal state. A political reform allowed the Mexican capital (formerly officially named the ‘Federal District’) to become the 32nd state of the Republic, which has been renamed as Ciudad de México. The new federal entity has managerial autonomy and its own Constitution, while continuing to be the country’s capital.
\(^9\) Federal Civil Code of Mexico, Article 1830.
Mexican case law has dealt with what should be understood by the terms ‘direct and immediate’. The benchmark is that the damage will be the direct and immediate result of a cause when it is the ‘effective cause’. The effective cause analysis states: had the unlawful act not occurred, the damage would not have occurred.

Civil liability may arise from two sources: contractual liability and extra-contractual liability (known as ‘tort’ in other jurisdictions).

**Contractual liability**

Contractual liability derives from a breach of an agreement or contract. As a general rule, the parties to a contract may agree on the terms and obligations that they freely choose, as long as the subject matter is lawful. However, the law also establishes certain limitations to the freedom of contract taking into consideration the nature of the contract and the rights at stake.

For example, with respect to professional services, the Federal Civil Code provides that the individual who exercises any profession without the proper licence will lose the right to charge remuneration for the professional services so rendered. Also, when a professional can no longer render services, he or she should promptly notify the client and will still be liable for damage and loss of profits caused by the withdrawal of the services.

A claim on breach of contract has two main requirements: (1) that the non-breaching party is in compliance with its obligations under the relevant contract to seek relief; and (2) that the breaching party has indeed breached the contract.

**Extra-contractual liability**

Extra contractual liability under Mexican law may be considered as premised on the principle of *alterum non laedere*, which states that everyone has the duty not to inflict harm upon others.

Therefore, extra-contractual liability or tort may arise independently of any contractual relationship between the parties. Extra-contractual liability may be (1) objective, which exists independently and the conduct of the agent was not guilty or negligent, and (2) subjective, which necessarily constitutes unlawful, negligent and damaging conduct.

The degree of guilt or fault will be determined by the type of responsibility or duty of care that the agent has towards the victim. In Mexican law, there are several types of guilt. The degrees of guilt are not defined in statute but are referenced in precedent and doctrine.

Guilt *stricto sensu* exists whenever the damage would have been foreseeable and could have been avoided had the agent acted diligently. Wilful misconduct exists when the agent...
intentionally wants to damage the victim. Gross negligence constitutes extreme negligence, recklessness or incompetence, for not being able to foresee or understand what a normal person foresees or understands, omitting the most elemental care, diligence, etc.\textsuperscript{18} Ordinary negligence is the omission of diligence of an ordinary person in the conduct of his or her affairs; and slight negligence, is the omission of diligence of a person who is extremely diligent.\textsuperscript{19}

The professional should be diligent in accordance with his or her expected professional skills. In a recent precedent, the Supreme Court found employees of a school liable for damage caused by bullying between students, since the teachers were expected to act diligently and in accordance with their profession, which includes actively preventing and detecting any acts of bullying.\textsuperscript{20}

Specifically, the Supreme Court ruled that the unlawful act was the consequence of two sources: (1) the breach of an obligation to act in accordance with a certain legal provision, and (2) the breach of a general duty of care expected of a professional.

\textit{Coexistence of contractual and extra-contractual liability}

The Mexican Supreme Court rendered a decision whereby it recognised that a contractual and extra-contractual liability may coexist when dealing with medical malpractice. The Supreme Court reasoned that even if the patient has a social security contract or a contract for professional services with a physician, the doctor is still bound to act diligently in accordance with his profession. In this case, the Supreme Court found that even where the patient had given consent regarding the administration of anaesthesia, damage caused by the negligent administration of this medical component gave rise to an extra-contractual liability or tort independent of the contractual relationship between the parties.\textsuperscript{21}

\textit{Liability for lack of diligence in professional services}

Apart from identifying whether a contractual or extra-contractual liability may arise within a professional service relationship, it is important to assess who is the responsible individual. Article 2615 of the Federal Civil Code establishes that whoever renders professional services is only liable towards the persons that he or she is serving, for negligence, lack of skill or wilful misconduct, regardless of sanctions that may apply in the event of a crime.

This legal provision can be construed in different ways: the first is that a professional is not liable to third parties that are not clients; the second is that a professional is liable to clients only for negligence, lack of skill or wilful misconduct. There is no legal precedent that answers this question.

However, to obtain relief under a suit for damage and lost profits arising out of negligence, a claimant has to prove that the defendant had a duty of care, that the alleged negligent actions of the defendant breached the duty of care, and that the actions resulted in, as a direct and immediate consequence, the damage and lost profits that the plaintiff is seeking, otherwise a Mexican court would not find for the plaintiff. Plaintiffs will need to

\textsuperscript{18} Id., p. 16.
\textsuperscript{19} Id.
\textsuperscript{20} Bullying at school may generate damage and losses through actions or omissions. Thesis: 1a. CCCXIII/2015 (10a.) p. 1641.
\textsuperscript{21} Damage originating from the negligent administration of anaesthesia generates a subjective civil responsibility. Jurisprudence: 1a/J.22/2011 (10A).
demonstrate the necessary connection between the alleged negligent action or omission and the direct and immediate damage and lost profits. The available type of damages and redress for lost profits are explained in Section I.ii.

Criminal liability

Title XII of the Federal Criminal Code of Mexico considers that certain conduct or acts constitute a crime within the arena of professional responsibility. Chapter I of Title XII provides that professionals, artists or technicians and their assistants will be responsible for crimes committed in the exercise of their profession, and without prejudice to liability contained in regulations applicable to the specific profession.22 The individuals who commit such crimes are subject to, among other things: (1) one month to two years’ suspension from exercising the profession, and (2) reparation of the damage so caused. This is applicable to physicians who without cause stop the treatment of an injured or sick person.

The directors, managers or administrators of any health centre may be subject to imprisonment (of two months up to two years) and fines for any of the following conduct: (1) preventing the departure of a patient, when he or she or family members request it, on account of debts of any kind; (2) unnecessarily retaining a newborn, on account of debts of any kind; (3) delaying or denying for any reason the delivery of a corpse – except when an order from a competent authority is required. The same sanctions apply to managers, employees or dependants of a pharmacy who substitute medicine specifically prescribed with another medicine that causes damage or is evidently inappropriate for the condition for which the original medicine was prescribed.23

Chapter II provides that lawyers, representatives and litigators are subject to penalties including two to six years’ imprisonment, fines and disqualification or suspension from the exercise of their profession for two to six years if they engage in the following conduct:24

a. allege false facts or non-existent or repealed laws;

b. use certain illegal dilatory tactics;

c. base their action or defence on false or worthless documents or witnesses; or

d. simulate a legal act or writ, alter evidence and present it at trial, to obtain a ruling, resolution or administrative act contrary to the law.

In addition to the above-mentioned sanctions, lawyers, representatives and litigators may be subject to three months’ to three years’ imprisonment for:

a. sponsoring or assisting divers contenders or parties with opposing interests, in the same or a related business;

b. abandoning the defence of a client or business without just cause; and

c. accepting the position of defence counsel but merely requesting the cautionary freedom of his or her client without presenting further evidence.25

22 Federal Criminal Code, Article 228.
23 Id., Article 230.
24 Id., Article 232.
25 Id., Article 233.
Chapter VII of Title XIII of the Federal Criminal Code of Mexico, among other things, regulates conduct and applicable sanctions in connection with the exercise of a profession without the corresponding title or authorisation issued by the competent authorities. The applicable sanctions for this crime are one to six months’ imprisonment and a fine.

Moreover, the Regulatory Law also provides several kinds of conduct or acts that constitute a crime by professionals or individuals who present themselves as professionals. The Regulatory Law provides administrative sanctions for these crimes; however, while describing criminal conduct, this Law almost always refers to the applicable articles of the Federal Criminal Code of Mexico with reference to a specific type of conduct and the corresponding sanction. However, criminal sanctions may also be provided for in legislation other than the criminal codes (see Section II below for legislation applicable to specific professional activities).

Administrative liability

Administrative liability may arise in certain cases. Some professions (e.g., the medical and finance professions) are regulated by their lex artis, which establishes specific obligations, competent authorities and sanctions. Specifically, all health industry professionals, technicians and auxiliaries who provide medical services in the public and social security sectors are subject to administrative liability.

In addition, individuals may exercise their profession on their own account or as employees. Professionals who exercise their profession as employees are subject to the Federal Labour Law. Public officers are also subject to other administrative laws.

ii Limitation and prescription

Civil claims

As a general rule, and unless specified as an exceptional case, the right to enforce an obligation is only extinguished upon the expiry of a 10 year-term from the date on which the right became effective. Notwithstanding this, a two-year statute of limitations applies to civil liability arising from unlawful acts that do not constitute a crime.

Both Article 1161-V and Article 1934 of the Federal Civil Code provide a two-year statute of limitations for claims arising from unlawful acts. However, pursuant to Article 1161-V, the statute of limitations starts running on the day that the act takes place, while according to Article 1934 the statute of limitations starts running on the day that the damage is caused. Therefore, these provisions are apparently contradictory.

While analysing Article 1934 of the Federal Civil Code, the Mexican Supreme Court issued a binding precedent stating that it is necessary to consider the moment at which the

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26 The Regulatory Law, Articles 61–73.
28 Federal Civil Code, Article 1159.
29 Federal Civil Code, Article 1161-V and Article 1934.
affected person becomes aware of the damage so caused for the statute of limitations to start running. Therefore, it seems that Article 1934 of the Federal Civil Code should apply with respect to when the statute of limitations starts to run.\textsuperscript{30}

\textbf{Criminal claims}

The Federal Criminal Code establishes specific rules for the statute of limitations of crimes. There are four main criteria for the determination of the statute of limitations in criminal actions:

\begin{enumerate}
\item for crimes punishable only by a fine, the statute of limitations for a criminal action expires after one year;\textsuperscript{31}
\item for crimes punishable by imprisonment, the statute of limitations is equal to the arithmetical average punishment term;\textsuperscript{32}
\item for crimes punishable only by removal from post, suspension or disqualification from office, the statute of limitations is two years;\textsuperscript{33} and
\item for crimes that can only be prosecuted following a complaint by the aggrieved party, the statute of limitations for a criminal action expires after one year.\textsuperscript{34}
\end{enumerate}

These terms may vary according to the applicable \textit{lex artis}.

iii \hspace{1em} \textbf{Dispute fora and resolution}

As noted in the previous sections, professional liability is mainly governed by civil law and, to a lesser extent, by provision in criminal law for specific crimes.

In this context, professional liability claims arising from contractual or extra-contractual liability should be brought before a civil court in the state in which the offence was committed. Likewise, the commission of a crime must be heard by a criminal court.

Nonetheless, Mexican case law dealing with professional liability is largely based on medical malpractice.

In light of the growing number of lawsuits against doctors, the Mexican government decided, in June 1996, to create, by a presidential decree, an independent national institution attached to the Ministry of Health to resolve conflicts between doctors and patients using alternative dispute resolution methods with the intervention of medical experts – the National Medical Arbitration Commission (CONAMED). As a result, the majority of professional liability claims alleging medical malpractice are brought before CONAMED.

\textsuperscript{31} Federal Criminal Code, Article 104.
\textsuperscript{32} Federal Criminal Code, Article 105. The arithmetical average is the sum of the minimum imprisonment time set for a specific crime plus the maximum imprisonment time (both in years), divided by two. For example, imprisonment for serious fraud ranges from three to 12 years under the Federal Criminal Code. Therefore, the arithmetical average is 7.5 years.
\textsuperscript{33} Federal Criminal Code, Article 106.
\textsuperscript{34} Federal Criminal Code, Article 107.
CONAMED deals only with acts or omissions derived from the rendering of health services and medical malpractice. It does not have the authority to decide matters involving the commission of crimes, matters that are already being litigated in civil courts, labour matters, or matters in which the only relief sought is the penalisation of the medical professional.\(^{35}\)

Professional liability claims brought before CONAMED are decided through arbitration, in accordance with the CONAMED Rules of Procedure for the Attention of Medical Complaints. As the process takes the form of an arbitration proceeding, an arbitral agreement is required for a complaint to be resolved by CONAMED.

The proceeding before CONAMED begins with a conciliatory stage. If the parties do not reach an agreement, CONAMED presents a settlement proposal. If a settlement is not possible, CONAMED, or another person appointed as arbitrator, decides the arbitration through an arbitral award,\(^{36}\) which, despite not being a judicial resolution, has the authority of \textit{res judicata}.\(^{37}\)

Finally, all proceedings (arbitral proceedings or proceedings of a different nature) are free of charge.\(^{38}\)

Along with medical malpractice claims, following an educational reform in 2012 and 2013, there has also been an increase in the number of claims related to professional teaching services, which have typically been resolved through \textit{amparo} proceedings. This new trend is considered further in Section III of this chapter.

\section*{iv Remedies and loss}

Under the Federal Civil Code, the governing principle in damages cases consists in the restoration of the damaged item to its previous condition. If restoration is impossible, the responsible party must then pay for the corresponding damage and losses.\(^{39}\)

‘Damage’ is the loss or lessening of someone’s patrimony as a result of a failure to comply with an obligation,\(^{40}\) and ‘loss’ is the preclusion from obtaining lawful gains that would have been received in the future if the unlawful act had not taken place.\(^{41}\)

Damage and losses must be the direct and immediate consequence of the failure to comply with the obligation, whether they have already occurred or will necessarily occur.\(^{42}\)

Civil liability may be entirely regulated by the contract between the parties, except for liability for damage caused by gross negligence. The parties may stipulate in the contract a set penalty (in the form of compensation) whenever certain contractual obligations are not met as set out in the contract and are, therefore, breached.\(^{43}\) Therefore, Mexican law permits limitation of liability clauses. These clauses are normally valid, unless bad intent is found, which could render the clause null and void.

\begin{itemize}
  \item \(^{35}\) CONAMED Rules of Procedure for the Attention of Medical Complaints, Article 50.
  \item \(^{37}\) The parties should reach an agreement; otherwise, the right to bring their cases before a civil court still stands.
  \item \(^{38}\) CONAMED Rules of Procedure for the Attention of Medical Complaints, Article 6.
  \item \(^{39}\) Federal Civil Code of Mexico, Article 1915.
  \item \(^{40}\) Id., Article 2108.
  \item \(^{41}\) Id., Article 2109.
  \item \(^{42}\) Id., Article 2110.
  \item \(^{43}\) Id., Article 2106.
\end{itemize}
The Federal Civil Code stipulates that, in the presence of conventional penalties, the non-breaching party cannot seek other compensation for damage and losses, but can only obtain the compensation specified in the agreed clause.\(^{44}\)

Reparation for moral damage is also available for the victim. Moral damage is understood as the detrimental impact suffered by a person in her or his feelings, affections, appearance, honour, reputation, private life, physical integrity and physical aspect, or in the opinion that others have of her or him. When an unlawful act causes moral damage, the offender has the obligation to repair it by means of monetary compensation. This is independent of any other compensation that may arise as a result of material damage.\(^{45}\)

In a moral-damage claim, in determining the amount of the monetary compensation, the judge takes into account the nature of the injury, the degree of responsibility and the economic situation of the offender and the victim, as well as other circumstances of the case.

Although, under Mexican law, damages have traditionally been limited to compensatory damages, in a tort case decided by the Mexican Supreme Court in 2013 (the *Mayan Palace* case) moral damages were awarded to compensate a victim for the ‘damage so suffered’. The Supreme Court noted that moral damage redress must be fair and sufficient to compensate the victim. Likewise, the judgment provided that damage redress should be sufficient to be ‘dissuasive’, to prevent further damage. This ruling has been construed by some practitioners as an implicit recognition of Mexican courts’ ability to award ‘punitive’ damages when necessary.

Under a binding judicial precedent, issued on April 2017 by the First Chamber of the Mexican Supreme Court, limiting liability by fixing a monetary cap implies unfair compensation of damage. Thus, judges should quantify damages fairly, on a case-by-case basis.\(^{46}\)

In short, this kind of punitive damages (more adequately moral damages) will probably start being awarded in contractual liability cases by Mexican courts.

### II SPECIFIC PROFESSIONS

#### i Lawyers

In Mexico, lawyers are not obliged to belong to a professional bar, nor is there a binding code of ethics or conduct applicable to the legal profession. There are three main private bar associations in Mexico: the Illustrious and National Lawyers Bar Association of Mexico; the Mexican Lawyers Bar Association; and the National Association of Company Lawyers. All these associations try to standardise legal practice and have specific codes of ethics. While many legal professionals adhere to these bar association codes, affiliation to a bar association is not mandatory.

Regardless, there have been many attempts in recent years to make affiliation to a bar association mandatory for Mexican lawyers. For example, in 2004, the ex-president Vicente Fox filed an initiative before the Senate requesting a certification mechanism for defence

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\(^{44}\) Id., Article 1840.

\(^{45}\) Id., Article 1916.

\(^{46}\) Fundamental right to complete reparation or just indemnification. Its concept and scope. Thesis: 1a./J. 31/2017 (10a).
attorneys in criminal proceedings.\textsuperscript{47} The National Development Plan of 2007–2012 had as one of its objectives, to ‘promote a culture of legality’.\textsuperscript{48} A possible standard by which to measure the achievement of this goal was mandatory affiliation to a bar association. Later, in 2010, there was a proposal to amend the Constitution, establishing that there should be a mandatory affiliation to a bar in all professions directly linked to life, health, security, freedom and patrimony of people.\textsuperscript{49}

In 2016, the Federal Economic Competition Commission (COFECE) issued a non-binding opinion suggesting ‘disregarding the mandatory affiliation as one of the mechanisms to regulate the exercise of a profession, for the effects that this particular mechanism could generate on the process of competition and free access’.

At present, there is no mandatory professional ethics code for lawyers, and any breach of the existing codes of ethics is hardly punishable because of their voluntary nature.

\section*{ii Medical practitioners}

The medical industry is perhaps the most regulated one in terms of professional liability in Mexico. In cases where a medical professional causes harm to a patient, the medical professional is exposed to administrative, civil and criminal liability.

Administrative liability may arise regardless of whether damage was caused. This type of responsibility arises from violations of the General Law of Health and particularly from violations of the regulatory law of the General Law of Health, which governs the rights and obligations of the users of medical services and establishes provisions in connection with consulting services, hospitals, maternal and child care, family planning, mental health, rehabilitation and auxiliary diagnostic and treatment services, in private, public and social fields.

Health authorities are responsible for sanctioning violations of the above-mentioned provisions. Administrative sanctions may extend to an admonition with warning; a penalty fee; temporary or definitive closure; and arrest for up to 36 hours.

Health professionals in the public sector are subject to the duties of legality, honesty, loyalty, impartiality and efficiency that govern public service, and they may be also subject to sanctions established in the Federal Law of Administrative Responsibility.

Litigation arising from civil liability in medical practice may be resolved by a judicial process before a civil judge or through alternative dispute resolution proceedings before CONAMED.\textsuperscript{50} In the case of a civil court proceeding, as well as civil liability for malpractice, the aggrieved party can also claim moral harm.

Finally, the actions of medical professionals can also give rise to criminal liability for crimes of professional responsibility. Criminal liability is personal, thus the medical professional may face imprisonment. Should the medical professional have malpractice insurance, it will only serve to indemnify for the harm caused.\textsuperscript{51}

\begin{flushright}
\textsuperscript{47} La Colegiación Obligatoria de Abogados en México. Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. México: n/d, p. 93.
\textsuperscript{48} National Development Plan 2007–2012.
\textsuperscript{49} Ibid., p. 94.
\textsuperscript{50} The CONAMED procedure is described in Section I.iii above.
\end{flushright}
iii Banking and finance professionals

Both securities brokers and investment advisers, and individuals holding managerial positions in financial institutions, are subject to administrative, criminal and civil liability for professional malpractice.

In connection with administrative liabilities, the National Banking and Securities Commission (CNBV) is authorised to remove members of a board, directors, managers, securities brokers and investment advisers from their positions and suspend them from occupying a position within a financial entity or a publicly traded company for a term of up to five years; these measures can be taken in addition to economic sanctions provided under the Securities Exchange Act (LMV) and the Credit Institutions Law.

The LMV provides that securities brokers will be accountable for direct damage caused if they breach broker–client confidentiality. Furthermore, pursuant to the LMV, investment advisers and securities brokers must be certified by a self-regulatory organisation, prior to rendering their services. Self-regulatory organisations are in charge of issuing conduct manuals and implementing conduct standards among their members to strengthen the ethical conduct of their members and related persons. These self-regulatory organisations are also empowered to impose sanctions provided under their internal rules. Certification of banking professionals (who are subject to ethics codes of the banking self-regulatory organisation) may also be required if so determined by the CNBV.

Furthermore, managerial positions within financial entities entail higher levels of responsibility and accountability, such as being considered jointly liable with the financial entity in certain circumstances (e.g., failure to communicate to the auditing committee irregularities of which they were aware). Professional liability insurance is not mandatory for banking and finance professionals, but directors’ and officers’ insurance and professional liability insurance is permitted, and it is common practice to take out such insurance.

iv Computer and information technology professionals

In Mexican law, there is no specific regulation of professional liability of computer and information technology professionals. However, certain norms may apply specifically to information technology professionals.

For example, Article 67 of the Federal Personal Data Protection Law sets out a criminal penalty for a breach of database security by individuals authorised to work with personal data.

Also, regarding information leaks, the Federal Criminal Code provides that professionals or technicians who leak an industrial secret are subject to a criminal penalty: imprisonment from one to five years and suspension from the exercise of their profession.52 Also, individuals who leak, disclose or misuse information or images obtained through an unlawful interception of private communications are subject to imprisonment of between six and 12 years.53

Moreover, the Federal Criminal Code contains a chapter titled ‘Unlawful access to computing systems’, which refers to conduct and applicable sanctions for the unauthorised modification, destruction, loss, accessing, collection, copy or use of individuals’ or state information contained in computing equipment and protected by security mechanisms.54

52 Federal Criminal Code, Article 211.
53 Id., Article 211 bis.
54 Id., Articles 211 bis 1, bis 2, bis 3, bis 4 and bis 5.
Finally, Articles 119 to 122 of the Fintech Law, which recently came into force in Mexico, provides criminal penalties for those individuals who wrongfully use, obtain, transfer or divert resources, e-payment funds or virtual assets owned by clients of financial technology institutions.

v Construction professionals

Construction professionals must observe a substantial duty of care. They are liable for many obligations, established by law, in respect of the owner of a construction.

Articles 2617 and 2634 of the Federal Civil Code provide that construction professionals are liable to the owner during and after the construction. The constructor has responsibility for any defect caused by irregularities in the construction process, low quality of the materials used or of the ground where the project is built. Moreover, the constructor is liable for the actions or omissions of the personnel under its authority when these cause defects in the construction.55 Finally, the constructor is answerable to the owner and has responsibility for any defects in the construction for six months after completion.56

Construction professionals will be criminally liable if the construction licence is breached during construction and a prison sentence of four to six years can be imposed in such cases.57

vi Accountants and auditors

A distinctive mark of the accounting profession is acceptance of the responsibility to serve the public interest; therefore, a public accountant is responsible not only for satisfying the needs of a specific client or of the entity that he or she works for.

The public accountant is bound to disassociate himself or herself from reports, relations, communications or other information that he or she believes causes confusion or mistakes through the omission or concealment of facts, data or circumstances.58

The diligence required of public accountants encompasses the responsibility to act according to the requisites of a particular task, carefully, thoroughly and in a timely fashion. 59

Regarding tax reports, Articles 52 and 52-A of the Federal Tax Code (the Tax Code) provide that tax authorities are empowered to request any information and documentation regarding expert opinions prepared by certified public accountants (e.g., external auditors).

The public accountant (i.e., external auditor) who prepares an audit report may be required by tax authorities to:

a provide any information that the Tax Code, its regulations, the Omnibus Tax Ruling and the Mexican Financial Reporting Standards require to be included in financial statements;

b provide the working papers prepared in connection with the audit related to the report (the working papers are understood to be the property of the public accountant); and

c provide any information considered relevant to ensure that the taxpayer’s tax obligations have been fulfilled.

55 Federal Code, Article 2633.
56 Id., Article 2149.
57 Mexico City Criminal Code, Article 329 bis.
58 Ethical Code of the Mexican Institute of Public Accountants, Article 110.2.
59 Id., Article 130.
A registered public accountant who fails to comply with the provisions of the Tax Code or its regulations will be subject to a warning or suspension of registration for up to three years.

In cases of repeat offences or if the accountant commits a tax offence, or fails, after receiving a request from the authorities, to file the working papers prepared in connection with an audit carried out on a taxpayer’s financial statements for tax purposes, the accountant’s registration shall be definitively cancelled.

In such cases, written notice shall immediately be given to the professional association and, as applicable, to the confederation of professional associations to which the public accountant belongs.

In addition to the previous penalties, if the tax authorities consider that the expert opinion rendered by a registered accountant contributes to, totally or partially, the omission of payment of any contribution in violation of tax provisions, the accountant will be subject to a fine.

vii Insurance professionals

Since the enactment in 2015 of the Insurance and Bonding Companies Law (LISF), insurance professionals\(^{60}\) have been subject to specific obligations in the performance of their duties.

Under the LISF, insurance and bonding entities are jointly liable for the acts of their directors, officers and employees in the performance of their duties, without prejudice to the administrative, criminal and civil liability that these persons may incur as individuals.

The National Insurance and Bonding Commission (CNSF) has the authority to impose several sanctions on insurance professionals at all levels.

The CNSF may remove or suspend (for up to five years) any officers or auditors\(^{61}\) from their appointments if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations.

In addition, the CNSF may ban directors, chief executive officers, statutory auditors, managers, fiduciary delegates and officers from performing any other role within the Mexican financial system – for up to five years – without prejudice to the penalties set out in the LISF and other applicable laws.

The LISF also regulates insurance and bonding agents. Agents may be individuals or companies authorised by the CNSF to intermediate insurance and bonds. The LISF, however, does not distinguish between agents and brokers, as many other jurisdictions do.

The authorisation of agents, as individuals, is valid for three years and may be renewed for an equal term. The authorisation of agents as companies may be for an indefinite term.

The CNSF may suspend or revoke agents’ authorisation, without prejudice to the warnings and fines that may be imposed on them; and suspend or remove their directors, chief executive officers, statutory auditors, managers, legal representatives and officers if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations.

\(^{60}\) As a consequence of the LISF implementation, (1) insurance and bonding entities, (2) insurance and bonding agents, (3) reinsurance brokers, (4) insurance adjusters, (5) external auditors and (6) independent actuaries have had to strengthen their internal control processes for the performance of their duties.

\(^{61}\) This includes directors, chief executive officers, statutory auditors, managers, fiduciary delegates, officers, external auditors that evaluate the financial statements and the independent actuaries that evaluate the adequacy of technical reserves.
Pursuant to the Rules for Insurance and Bonding Agents and the Sole Provisions on Insurance and Bonding, agents must take out an errors-and-omissions insurance policy and must submit it to the CNSF.

Furthermore, reinsurance brokers are companies duly authorised by the CNSF to intermediate reinsurance. This authorisation may be for an indefinite term.

Reinsurance brokers operate through reinsurance agents, who also need to be previously authorised by the CNSF. This authorisation is valid for five years and may be renewed for an equal term.

The CNSF may suspend (for up to two years) or revoke the reinsurance brokers’ authorisation, without prejudice to the warnings and fines that may also be imposed on them; and suspend, remove or remove from post their directors and officers if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations, without prejudice to the economic sanctions that may also be imposed on them pursuant to the LISF and other applicable laws.

Moreover, insurance adjusters may be individuals or companies duly registered with the CNSF and appointed by an insurance company. The insurance adjusters evaluate the reasons for a claim or loss and calculate the resultant compensation.

The duties of the insurance adjusters must comply with the LISF, its regulations and the internal manuals that include the policies and procedures applied by the insurance company.

Insurance companies are jointly liable for the acts of their insurance adjusters.

The CNSF may cancel – or suspend, for up to two years – the insurance adjusters’ registration (without prejudice to the warnings and fines that may also be imposed on them) if they fail to comply with the requirements set out in the LISF or if they commit a violation of the LISF and its regulations (also without prejudice to the economic sanctions that may be imposed on them pursuant to the LISF and other applicable laws).

The LISF provides that both external auditors that evaluate financial statements and independent actuaries that evaluate the adequacy of technical reserves shall be duly registered with the CNSF and appointed by the board of directors of the insurance or bonding company.

The CNSF sets the requirements for external auditors and independent actuaries, along with the measures necessary to guarantee an adequate alternation of these professionals in the insurance and bonding companies, and it indicates the information to be presented in the reports of these professionals.

Pursuant to the LISF, external auditors and independent actuaries must keep at least five years’ records.

The CNSF may suspend or cancel the external auditors’ and the independent actuaries’ registration (without prejudice to the warnings and fines that may also be imposed on them) if they fail to comply with the requirements set out in the LISF or commit a violation of the LISF and its regulations (also without prejudice to the economic sanctions that may be imposed on them pursuant to the LISF and other applicable laws).

External auditors and independent actuaries incur liability for damages if their report is made with malice, without considering the information provided by the insurance or bonding company and without observing the applicable rules, procedures and methods in accordance with their profession.
III YEAR IN REVIEW

There have been two principal notable developments in the past few years. First, the recent educational reform in Mexico created the General Law of the Professional Service of Professors, the purpose of which is to raise educational standards. To comply with the new standard, teachers are bound to take an exam that appraises their professional ability. Many teachers refused to take the exam and were removed from their jobs.

As a result of this situation, unemployed teachers filed amparo claims (constitutional challenges) requesting to be reinstalled in their jobs by means of an interim measure. In a related case, the First Chamber of the Supreme Court ruled that the interim measure could not be applied to address this issue, since education was a matter of public policy and social interest. This decision may have ramifications for a number of professions that deal with matters related to public policy and social interest.

The second development deals with corporate liability. In 2015 and 2016, there was a significant anti-corruption reform in Mexico. Where previously the fight against corruption was mainly focused on public servants and their possible punishments, the reform introduced a focus on the punishment of corruption by private individuals.

The reform included two main features: circumstances in which the private individual is liable for corruption (which may include negligence, among other things), and also tools for companies and individuals to obviate this liability. Article 25 of the General Law of Administrative Responsibilities provides for ‘integrity policies’ that may reduce the liability of corporations, and these policies include:

a. an organisational manual;
b. a public code of conduct;
c. adequate and efficient control mechanisms;
d. adequate reporting systems;
e. adequate training procedures;
f. procedures for ‘secure’ recruitment (e.g., background checks); and
g. transparency and publicity mechanisms.

Proceedings for corporate liability may be introduced in the near future as part of this reform, and the adequate implementation of the above-mentioned integrity policies will play an important role.

IV OUTLOOK AND FUTURE DEVELOPMENTS

There are four particular matters that may affect professional liability and conduct in the future: the possibility of punitive damages in Mexico, the increasing attempts to introduce mandatory bar affiliation, the effects of the ‘new’ corporate liability and the tendency to orality in court proceedings.

First, as mentioned in Section I.iv above, Mexican law has traditionally been understood as only allowing for compensatory damages. However, there was a 2013 landmark decision

62 Professional teaching service. It is inadmissible to grant an interim relief in an amparo proceeding filed in respect of acts issued by an authority in an administrative proceeding that have the effect of separating a teacher from a group or a teacher from his or her position; or in respect of the application of a penalty for not adhering to the process of evaluation provided in the applicable law. Thesis: PC.XXI.J/11A (10a.).
allowing for punitive damages under the moral-harm provision in the Civil Code. This decision could shortly prompt other decisions with similar interpretations of moral harm, thus expanding the degree of exposure resulting from professional liability. This new level of exposure will certainly be followed by the need for, and obligation to have, professional liability insurance.

Second, the attempts to introduce mandatory bar-association affiliation have not stopped. There are continual attempts by the existing bar associations and by several practitioners to standardised practice through the introduction of compulsory affiliation to a bar association. There are many professionals who oppose such a move, but should these attempts be successful, the regulation of the legal profession (and even other professions) will undergo an important shift.

Third, there are no relevant cases yet on corporate liability, whether administrative or criminal. Nevertheless, these precedents could be set in the near future, following the changes introduced by the anti-corruption reform.

Last but not least, following recent reforms to criminal procedural law and the Code of Commerce (regarding commercial cases), a tendency for orality has started to become prevalent within court procedures, as opposed to the written processes traditionally predominant in Mexico's legal system; and although professional services are a civil contract by nature, it is highly possible that this tendency towards orality will start to permeate civil cases too.
I INTRODUCTION

i Legal framework

As general rule, professional liability is subject to the tort liability or contractual liability legal framework, depending on whether or not there is a contractual relationship between the parties to the dispute. Pre-contractual liability may be applicable in some cases.

On one hand, professional liability claims may be brought by the professional’s client. The terms and conditions of the agreement entered into between the professional and client govern the extent of the duties and liability of the professional. Nevertheless, professional standards should also be taken into consideration in the assessment of a possible act of professional misconduct through negligence. In this case, professional misconduct should be assessed under the contractual liability framework.

On the other hand, the conduct of professionals may also have a legal impact on third parties. For instance, there is no contractual relationship between investors in bonds issued by a specific company and a rating agency that overrated those bonds as a result of a negligent evaluation that in turn led those investors to subscribe to those bonds, which were not refunded because the issuer became insolvent. In this scenario, the potential professional liability of the rating agency towards the investors should be assessed under the tort liability regime.

The general legal framework of tort and contractual liability is established in the Portuguese Civil Code (PCivC) (Articles 483 et seq. and Articles 798 et seq., respectively). Specific acts of professional misconduct may also be considered crimes or administrative infractions governed by the Portuguese Criminal Code or specific criminal and administrative laws (for instance, the Legal Framework of Credit Institutions and Financial Companies, the Portuguese Securities Code and the Legal Framework on the Taking-up and Pursuit of the Business of Insurance and Reinsurance).

Additionally, there are sectoral laws that set out specific rules on the liability of specific professionals or complement the general legal framework established in the PCivC. For instance, the Portuguese Companies Code sets out specific provisions on directors’ liability, such as the business judgement rule, which exempts directors from liability when they act on a duly informed basis, free from any personal interest and according to reasonable business criteria. In this regard, Law No. 53/2015 of 11 June 2015 on the legal framework

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1 Adriano Squilacce is a senior associate and Nair Maurício Cordas is an associate at Uría Menéndez – Proença de Carvalho.
of professional corporations regulated by professional public associations and the statutes of professional public associations should also be highlighted, as it contains relevant provisions on professional liability, disciplinary measures and administrative infringements.

As general rule, professional liability claims must meet all the following requirements: (1) unlawful conduct (either by act or omission) of the professional defendant; (2) guilt of either wilful or negligent misconduct (except in cases of strict liability); (3) causal link between the conduct of the professional and the relevant damage claimed by the claimant; and (4) damage suffered (either actual losses or the loss of profit).

While these general requirements should apply to both, there are important differences between the legal frameworks for tort and contractual liability; for example: (1) the claimant has the burden of proof under both regimes, but the professional is presumed guilty in cases of contractual liability and has the burden to rebut this presumption; (2) limitation periods applicable to contractual liability are longer than limitation periods applicable to tort liability; (3) in tort liability the court may award compensation lower than the amount of the actual damage (based on the ex aequo et bono criterion) with reference to the degree of guilt of the professional, financial status of the parties and further circumstances of the case; (4) unlike the contractual liability established in the PCivC, joint and several liability is applicable to tort liability (and also to commercial obligations).

Where there is concurrent tort and contractual liability, the majority of case law and legal scholars argue that the claimant is entitled to choose the applicable legal framework and should, therefore, weigh up the pros and cons of each regime.\(^2\)

Unlawful conduct by the professional defendant may consist of a breach of contractual conditions or a specific duty of care (either by act or omission). In this regard, the claimant will have to prove that the professional defendant acted below the standards of a reasonable and competent professional with reference to the average standards applicable to his or her profession at the time that the relevant facts occurred (for instance, a surgeon who performed surgery without complying with the mandatory sterilisation protocol or a contractor who carried out work contrary to the terms requested by the client or to the conditions of the licence issued by the municipality).\(^3\)

In some specific cases, the applicable criterion is more demanding than the average standard of conduct. For instance, matters of liability resulting from the preparation and approval of prospectuses are assessed with reference to high standards of professional diligence pursuant to Article 149 of the Portuguese Securities Code. Furthermore, financial intermediaries and their professionals should always act in accordance with high standards of diligence, loyalty and transparency (Article 304 Section 2 of the Portuguese Securities Code).

In a number of cases, professional defendants will try to challenge and discuss the level of the relevant professional standard to demonstrate that his or her conduct meets the applicable professional standard. For this purpose, it is common to produce evidence through expert witnesses and experts on the applicable professional standard. In extremely technical disputes, lawyers and judges may be advised by technical advisers during examination and cross-examination of expert witnesses and experts.

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2 Ruling issued by the Supreme Court of Justice on 7 February 2017, Case No. 4444/03.8TBVIS.C1.S1, www.dgsi.pt (a different understanding was upheld in the ruling issued by the Supreme Court of Justice on 22 September 2011, Case No. 674/2001.PL.S1, www.dgsi.pt).

3 See the ruling issued by the Appeal Court of Lisbon on 8 May 2014, Case No. 220040/11.OYIPRT.L1-8, www.dgsi.pt.
From a practical point of view, one of the most significant difficulties that claimants face is proving that the conduct of a professional defendant should be considered a suitable or adequate cause of the relevant losses (causal link), especially in cases of negligence. The claimant has the burden of proof as to the causal link regardless of whether tort or contractual liability is applicable. This causal link does not require the proof that the relevant damage resulted directly from the specific negligent misconduct, but rather that certain misconduct was suitable or adequate to cause the damage.

A professional may have been negligent, but if this negligent conduct was not suitable or adequate to cause the losses borne by the claimant, then the claim should be dismissed.

Claimants often encounter obstacles to the proof of the relevant causal link, particularly in disputes related to losses resulting from subscription to unsuccessful investments in financial instruments upon the advice of a financial intermediary. In this regard, professional defendants often argue that the financial losses borne by investors resulted from the investment risk rather than any breach of information duties.

Regarding professional negligence cases, some case law relates the causal link to the loss-of-opportunity theory. This theory may reduce the practical difficulty of producing evidence regarding the causal link, but compensation should not correspond to the total loss borne by the claimant. In this case, the amount of compensation should be set according to the likelihood of success of the claimant in obtaining a relevant profit or avoiding a specific loss.4

Lastly, professionals may enter into professional liability insurance policies. Actually, professional liability insurance is mandatory for some professionals (for instance, lawyers, notaries, auditors, certified accountants, doctors, insurance intermediaries, gas assemblers and operators, real estate agents, port operators, real estate appraisers for property investment funds, credit intermediaries and credit or financial consultants services and travel agents).

ii Limitation and prescription

Limitation periods for the commencement of professional liability claims depend on the nature or type of civil liability. If a professional liability claim is based on tort liability, the right to compensation generally expires after three years (Article 498 Section 1 PCivC) and, in any event, no later than 20 years from the date of the misconduct.

In cases where the misconduct is considered a crime, the limitation period will be extended to that of the crime in question.

In the case of liability for breach of contract, the general limitation period applies, meaning that any claim to compensation becomes time-barred 20 years after the occurrence of the contractual breach (Article 309 PCivC).

Specific professionals or acts of misconduct may by subject to special rules on limitation periods. This is the case, for instance, with directors’ professional liability (subject to a five-year time limitation), liability resulting from non-compliance with rules applicable to prospectuses (subject to a six-month limitation and a two-year expiry period) and liability of financial intermediaries (subject to a two-year limitation), as described below.

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4 See the rulings issued by the Supreme Court of Justice on 2 November 2017 and 5 February 2013, Case No. 23592/11.4T2SNT.L1.S1 and Case No. 488/09.4TBESP.P1.S1, www.dgsi.pt. See also Orlando Guedes da Costa, Responsabilidade Civil Profissional, March 2017, Centro de Estudos Judiciários, pp. 190 et seq.
The limitation period generally starts to run on the date on which the claimant becomes aware of his or her right to compensation, irrespective of whether he or she has knowledge of the persons liable or the full extent of the damage incurred (which is usually the date on which a claimant becomes aware that the requirements for civil liability have been met).

The running of the limitation period may be interrupted or suspended. The PCivC provides for several causes of interruption or suspension. For instance, the limitation period is interrupted by the judicial notification of a writ of summons, or of any other act that, directly or indirectly, expresses the claimant's intention to enforce his or her right to compensation.

Interruption of the limitation period renders the time already elapsed without effect and restarts the applicable limitation period (Article 326 Section 1 PCivC). The new limitation period does not begin to run until a final decision is issued on the claims submitted to the court (res judicata), putting an end to the legal proceedings (Article 327 Section 1 PCivC).

In this regard, it should be noted that the Portuguese Supreme Court has considered that in cases where the misconduct is considered a crime, pending criminal proceedings are a continued cause of interruption of the limitation period, which will only start running again once the proceedings are closed.5

The PCivC also sets out several causes of suspension of the limitation period, such as the claimant being prevented from enforcing his or her right because of force majeure, during the final three months of that period, as well as the claimant not enforcing his or her right because of the fault of the liable party (Article 321 PCivC).

Claims for damages based on expired rights become time-barred, which may be invoked as a defence in proceedings regarding professional liability.

iii Dispute fora and resolution

Professional liability claims for damages are generally brought in first instance judicial courts with jurisdiction over civil matters.

The Portuguese Civil Procedure Code (PCPC) establishes the criteria for the competence of judicial (civil) courts.6 When a claim is brought under the tort liability regime, jurisdiction usually lies where the relevant facts (e.g., the unlawful misconduct) took place (Article 71 Sections 1 and 2 PCPC). When a claim is related to the performance or breach of contractual obligations, either the court of the location where those obligations should have been performed or the court of the defendants' registered office or place of residence is competent (Article 80 PCPC).

In certain circumstances, professional liability claims can also fall within the scope of jurisdiction of the administrative courts. This is generally the case for professional liability claims relating to medical practitioners exercising their duties as public health providers.

5 See ruling issued by the Portuguese Supreme Court on 22 May 2013, Case No. 2024/05.2TBAGD.C1.C1, www.dgsi.pt.

6 Pursuant to the PCPC, Portuguese courts are deemed to be internationally competent when (1) according to the applicable rules on territorial jurisdiction the claim may be filed in a Portuguese court; (2) the facts constituting the cause of action have taken place in Portugal; (3) the claimant's rights may only be made effective by an action filed in Portuguese courts or initiating the lawsuit in a foreign country may impose significant difficulties for the claimant, provided there is a strong element of connection between the claim and the Portuguese legal system (Article 62 PCPC). Regulation (EU) 1215/2012 (Recast Brussels Regulation) also applies to the issue of jurisdiction in claims brought against defendants who are domiciled in other EU Member States.
In this case, professional liability claims fall within the jurisdiction of the court where the unlawful misconduct took place (Article 18 of the Portuguese Administrative Courts Procedure Code).

Judicial proceedings in both civil and administrative courts are initiated by means of a filed written petition, in which the claimant must argue the material facts constituting the cause of action. Subsequently, the defendant must present his or her defence, either asserting that the facts alleged by the claimant are not true, do not produce the consequences claimed by the claimant or that the claimant's petition must be dismissed because of some other circumstance, such as a legal objection. The claimant and the defendant must file their requests for evidence along with their pleadings.

The pleadings phase is usually followed by a preliminary hearing in which procedural matters are discussed by the parties and decided upon by the judge. Witnesses and experts are examined at the trial hearing. Subsequently, the parties present their closing arguments and the court renders its decision. In litigation involving sums exceeding €5,000, the decision may be appealed to the court of appeal, and cases exceeding €30,000 may be appealed from the court of appeal to the Supreme Court of Justice.

In cases where civil liability arises from damage caused by an act of misconduct considered to be a crime, damages claims generally have to be brought within the criminal proceedings and will be decided by the same court deciding the criminal issue. The claimant either files his or her damages claim within the deadline for the submittal of the indictment by the public prosecutor when he or she is a party to the criminal proceedings or within 20 days of the claimant or the perpetrator being notified of the indictment. Subsequently, the defendant must present his or her defence. The pleadings phase is followed by the trial hearing and subsequent decision by the court. The above-mentioned rules on appeals also apply here.

When civil liability arises from damage caused by an act of misconduct considered to be a crime, damages claims can only be filed separately and in civil courts in limited circumstances.

Professional liability claims can also generally be submitted to arbitration, as, pursuant to Article 1 Section 1 of the Voluntary Arbitration Act, disputes that (1) are not subject to the exclusive jurisdiction of state courts or to mandatory arbitration, and (2) involve an interest of an economic (patrimonial) nature, may be submitted to arbitration by the parties by means of an arbitration agreement.

Portuguese arbitral proceedings tend not to differ significantly from judicial proceedings, which is to say that they usually have the same procedural phases (i.e., a pleadings phase followed by a preliminary hearing and subsequently by the trial hearing).

iv Remedies and loss

Under Portuguese law, the general principle is that compensation should place the injured party in the position that he or she would have been in but for the event causing the damage (Article 562 PCivC), including for pecuniary and non-pecuniary or moral damage (restitution in natura).
Whenever this is not possible, does not fully repair the damage or is excessively costly, the injured party is entitled to claim the equivalent monetary compensation for all damage caused by the unlawful misconduct, including actual loss, loss of profit and future damage, if its occurrence can be predicted (Article 564 PCivC).

Pursuant to Article 566 Section 2 PCivC, pecuniary compensation for damage should compensate the difference between the claimant’s financial status ‘at the most recent date that may be considered by the court’ and the financial status he or she would be in were it not for the damage.

A claimant seeking compensation for damage is not required to specify the exact amount of the damage in the initial written petition and may formulate a generic claim in this respect when it is not possible to assess the full extent of the damage on the date the lawsuit is filed, or when the claimant warrants that it is not possible to specify the exact amount of the compensation (Article 569 PCivC and Article 556 Section 1(b) PCPC). If, in the course of the proceedings, the claimant concludes that the existing damage is of a greater amount than previously claimed, he or she may review the claim accordingly.

In cases based on tort liability, the court may award compensation determined on grounds of equity for an amount lower than the existing damage when the professional’s liability, based on the degree of guilt, financial status of the parties and further circumstances, justifies such an option (Article 494 PCivC).

Compensation for non-pecuniary or moral damage may also be awarded. The amount of this compensation is determined on grounds of equity (Article 496 PCivC).

Punitive damages are not provided for in Portuguese law and there is no cap on the amount of damages that can be awarded.

II SPECIFIC PROFESSIONS

i Lawyers

The practice of the legal profession as a lawyer in Portugal is regulated by the statutes of the Portuguese Bar Association, approved by Law No. 145/2015 of 9 September 2015.

The Portuguese Bar Association is the public professional association representing professionals who are practising lawyers acting in accordance with the Association’s statutes. It ensures access to the law, regulates the profession and takes disciplinary action against lawyers and trainee lawyers.

To practise as a lawyer it is necessary to be registered with the Portuguese Bar Association. The practice of law without inscription in the Portuguese Bar Association is considered a crime of usurpation of functions under the Portuguese Penal Code and is punishable with a prison sentence of up to two years or a fine of up to 240 days.

As a profession subject to registration with a professional association, lawyers’ liability is linked to their own disciplinary rules, and breaching these may lead to the lawyer incurring disciplinary or administrative liability, depending on whether the breaches are ethical or administrative.

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8 Ruling issued by Supreme Court of Justice on 25 February 2014, Case No. 287/10.0TBMIR.S1, www.dgsi.pt.
Lawyers are subject to the Portuguese Bar Association’s statutes, which state that lawyers must, *inter alia*, act with honesty, probity, uprightness, loyalty, courtesy, sincerity and independence.

Lawyers’ liability to clients is generally considered to be based on contractual liability, although it can be based on tort liability when it arises out of ethical breaches. In any case, it should be noted that, generally, the obligation assumed by a lawyer in relation to a client is only a best-endeavours obligation and not a results obligation, meaning that the lawyer assumes the obligation to use the most suitable means and knowledge in his or her power in conducting the client’s matter in accordance with the law. In other words, for a professional negligence claim to be successful, the claimant will have to demonstrate, *inter alia*, that the lawyers’ conduct did not comply with the *leges artis* (best practices of the profession).

The statutes of the Portuguese Bar Association set out the requirement of mandatory professional liability insurance for lawyers.

### Medical practitioners

The practice of medical doctors in Portugal is regulated by the statutes of the Portuguese Medical Association, approved by Law No. 282/77 of 5 July 1977, as amended.

The Portuguese Medical Association is a public professional association representing medical doctors in Portugal. To practise as a doctor, it is necessary to be registered with this body. The practice of medicine without inscription in the Portuguese Medical Association is considered a crime of usurpation of functions under the Portuguese Penal Code.

Medical professional liability proceedings may be brought under the rules of tort liability or contractual liability, depending on the public or private nature of the medical practice. In any case, similarly to lawyers, medical practitioners do not assume a results obligation in relation to their patients but only a best-endeavours obligation. Likewise, medical practitioners undertake to use the most suitable means in their power in treating their patients in accordance with the advances of medical science. For a professional negligence claim to be successful against a medical practitioner, the claimant will have to demonstrate that the medical practitioner’s conduct did not comply with the *leges artis* (best practices of the profession).

Medical practitioners in public hospitals and practices are generally subject to tort liability proceedings brought against them under Law No. 67/2007 of 31 December, which approved the Regime of Civil Liability of the State and Other Public Entities.

Under the Regime of Civil Liability of the State and Other Public Entities, state and other legal entities governed by public law are exclusively liable for damage resulting from unlawful actions or omissions committed negligently by medical practitioners in the performance of their administrative duties and resulting from that performance. Medical practitioners are only liable when their acts or omissions are caused wilfully or when their diligence and care is significantly lower than that expected for the position they hold, with the public healthcare provider remaining jointly and severally liable. If the medical practitioners working for the healthcare institution act with the expected level of diligence and in accordance with the technical rules of medical science, they cannot be held liable, regardless of the outcome.

Medical practitioners in private healthcare providers are, in the absence of specific legislation, generally subject to the general rules of contractual liability set out in the PCivC, although the rules of tort liability may also apply.
Other medical practitioners such as dentists and nurses are all also regulated professions that require prior inscription with a public association and are subject to the above-mentioned rules.

Private healthcare providers are required to enter into mandatory professional liability insurance policies. Although public healthcare providers are not required to enter into professional liability insurance, the Portuguese Medical Association currently offers professional liability insurance to all doctors validly registered with the Portuguese Medical Association.

Lastly, professional misconduct by medical practitioners may also raise disciplinary issues (to be addressed by the relevant disciplinary body).

iii Banking and finance professionals

Liability of banking and finance professionals is governed by the Legal Framework of Credit Institutions and Financial Companies (RGICSF) and the Portuguese Securities Code together with other specific regulations on these matters (for instance, Decree-Law No. 81-C/2017 of 7 July 2017 on the rules for credit intermediary activities and for providing credit consulting services) and, alternatively, by the general legal framework established in commercial and civil law (such as the Portuguese Companies Code and the PCivC).

Banking professionals (including directors, managers and employees) must act with scrupulous and thorough professional diligence, neutrality and loyalty (Articles 74 and 75 of the RGICSF). Credit institutions must ensure that all their professionals comply with a high level of technical expertise (Article 73 RGICSF). The prudential assessment of the reputation of banking and finance directors is also guided by high standards for the expertise and skills required (Articles 30-D and 31 RGICSF). Decree-Law No. 81-C/2017 on the rules for credit intermediary activities and for providing credit consulting services sets similar rules on the duties of care of the professionals in these areas (Articles 45 and 66). This Decree-Law also sets out the mandatory requirement for professional liability insurance for these professionals.


Specifically with regard to the personal liability of banking and finance directors, note that the business judgement rule, which exempts directors from liability as mentioned above, is applicable. In this regard, the directors have the burden of proof on the relevant facts, as also mentioned above.

Unless the relevant misconduct is considered a crime, directors’ professional liability is subject to a five-year time limitation from the date of the unlawful misconduct, or from the disclosure of this misconduct if it has been covered up, and the causing of damage, regardless of whether or not the full extent of the damage has already occurred (regarding the liability of directors towards the company itself, the limitation period does not start to run before the end of the term of office) (Article 174 of the Portuguese Companies Code and Article 318(d) PCivC).

Additionally, the Portuguese Securities Code contains several provisions on professional liability, such as the liability of specific professionals resulting from the preparation and approval of prospectuses (Articles 149 et seq.), investment advisers (Article 301), financial intermediaries and directors (Articles 294-C, 304-A, 305-D and 324).
Regarding the liability of professionals resulting from the preparation and approval of prospectuses (e.g., directors, supervisory board members, auditors and any professionals that have assessed or certified financial statements used in the prospectus), their conduct is also assessed with reference to a high standard of professional diligence and they are jointly and severally liable for damages caused by inaccurate or false content (Articles 149 Section 2, 151 and 152 of the Portuguese Securities Code). If liable professionals prove that the relevant damage was also caused by reasons other than the lack of information or forecasts contained in the prospectus, the amount of compensation will be reduced accordingly (Article 152 Section 2 of the Portuguese Securities Code). The right to compensation resulting from non-compliance with rules applicable to the prospectus must be exercised within six months of the knowledge of the fault in the prospectus content, and expires, in any case, within two years of the end of the effective term of the prospectus or its disclosure or amendment, as applicable (Articles 153 and 243 of the Portuguese Securities Code).

Beyond contractual liability cases, the guilt of financial intermediaries is also presumed (and rebuttable) in pre-contractual liability disputes, and also when information duties have been breached (Article 304-B Section 2 of the Portuguese Securities Code). Except for fraud or serious misconduct, liability is subject to a two-year time limitation from the date on which the client becomes aware of the conclusion of the business transaction and its terms (Article 324 Section 2 of the Portuguese Securities Code).\(^9\) In the event of fraud or serious misconduct, a 20-year time limitation is applicable to contractual liability.\(^{10}\)

Furthermore, investment advisory professionals (Article 301 Section 39(c) and Section 4 of the Portuguese Securities Code), real estate appraisers that render services for banking, insurance and finance institutions and pension funds (Law No. 153/2014 of 14 September 2014) must enter into mandatory professional liability insurance policies.

Executive or remunerated directors appointed for companies that issue securities admitted to trading on a regulated market and companies that fulfil certain minimum requirements on business operations and number of employees must be secured by means of a proper security for the amount of at least €250,000. This security may be replaced by a director and officer’s professional insurance policy (Article 396 of the Portuguese Companies Code).

Lastly, specific professional misconduct of banking and finance professionals may be considered an administrative infraction pursuant to the RGICSF, Portuguese Securities Code and other specific legal regulations. The Bank of Portugal and the Portuguese Securities Market Commission (CMVM) have jurisdiction to conduct and decide on administrative infringement proceedings regarding these matters, as applicable. Administrative infractions may be punished, *inter alia*, by warnings, fines and ancillary sanctions; for example, a prohibition against providing banking and financial activities for a certain period (applicable to both companies and individuals). Administrative infractions are subject to specific time limitations.


iv  Computer and information technology professionals

There are no specific rules under Portuguese law governing the professional liability of computer and information technology professionals.

In the absence of specific legislation, the liability of these professionals is generally subject to the general rules of contractual liability set forth in the PCivC.

Rules of tort liability may also apply when there is not a contract in place between the professional and the injured party (e.g., when there is an accidental disclosure of personal data of an individual who has not entered into a contract with the computer and information technology professional).

In this regard, note that, while not specifically directed at computer and information technology professionals, the new General Data Protection Regulation (with effect from 25 May 2018) specifically provides for a right to receive compensation from a data controller or processor for any person who has suffered material or non-material damage as a result of an infringement of the Regulation (Article 82).11

v  Real property surveyors

In Portugal, the taking-up and pursuit of business by real property surveyors who render services for banking, insurance and finance institutions and pension funds is governed by specific rules defined by the CMVM and approved by Law No. 153/2015 of 14 September 2015.

These professionals are liable towards the contracting entity, its shareholders or participants in collective investment entities, banking clients, insurance policyholders, insured persons and beneficiaries of insurance contracts, and towards members, participants and beneficiaries of pensions funds for any damage arising from errors or omissions contained in evaluation reports attributable to them (Article 16 of Law No. 153/2015 of 14 September).

Real property surveyors must take out mandatory professional liability insurance policies.

Lastly, real property surveyors are subject to the oversight and disciplinary action of the CMVM.

vi  Construction professionals

The execution of public works in Portugal is governed by Decree-Law No. 18/2008 of 29 January 2008, which enacted the Public Contracts Code, as amended. Construction works that are procured by private entities are governed by the PCivC.

Construction activities are governed by several legal instruments, such as (1) Law No. 41/2015 of 9 January 2015, which establishes the framework applicable to the undertaking of construction activities, and (2) Decree-Law No. 555/99 of 16 December 1999 as amended, which sets out the legal framework for urbanisation and building.

The contractor may be liable to the party who commissioned the works or to the purchaser of a building for losses caused by and arising from: (1) the collapse of the building due to problems with the land or the construction; (2) repairs carried out or changes to the construction; (3) faults during the construction; or (4) defects in the building that appear

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within five years of completion of the works or any repairs. The collapse or defects in the construction must be notified to the contractor within one year of the date of the collapse or the defects becoming known, and any indemnity must be claimed within the subsequent year.

The liability of construction professionals can fall under contractual liability, for breach of the construction contract, as well as under tort liability, for breaching the rights of third parties.

Except for the limitation period of five years regarding claims for defects, the general limitation period of 20 years applies.

With respect to construction activities, only work-accident insurance is mandatory, pursuant to Law No. 41/2015. Notwithstanding this, it is usual for parties who commission works to request the existence of a more comprehensive insurance policy.

In certain circumstances, Law No. 41/2015 requires that contractors must prove their economic capacity to execute some types of works; the contractor may circumvent this by taking out a civil liability insurance policy covering an amount equal to the amount of the works to be executed.

Furthermore, Law No. 31/2009 of 3 July 2009 establishes the framework for technicians responsible for: coordinating, drafting and underwriting projects; inspection of public and private works; and management of such works; it is also mandatory for these technicians to take out professional liability insurance policies.

vii Accountants and auditors

Regarding the performance of duties in connection to the public interest (for instance, audit companies and the issuance of relevant legal audit reports), auditors are liable towards audited companies and third parties in accordance with the terms and conditions set out in the Portuguese Companies Code and other relevant corporate legal provisions. Except for these services in connection to the public interest, auditors’ liability for minor acts of negligent misconduct may be excluded under the terms and conditions set out in civil law (the exclusion of liability for gross negligent professional misconduct is void) (Article 115 of the Statutes of the Statutory Auditors Association and Article 82 of the Portuguese Companies Code).

Auditors should act independently and in accordance with the best practices, in accordance with national and international auditing rules (including the International Standards on Auditing (ISA)) and maintain professional scepticism (Articles 61 and 70 of the Statutes of the Statutory Auditors Association and ISA 200 on the overall objectives of the independent auditor and the conduct of an audit in accordance with the ISA).

Auditors are also bound to duties of disclosure and whistle-blowing resulting from their monitoring duties (Article 304-C of the Portuguese Securities Code, Article 420-A of the Portuguese Companies Code, Article 79 of the Statutory Auditors Association and Articles 4 Section 1(e), 11 Section 1(c) and 43 et seq. of the Law on the Prevention of Money Laundering and Terrorist Financing). In the event of failure to comply with these duties, and where the general requirements on auditors’ liability are met (e.g., serious or negligent misconduct), auditors will be held liable.

Auditors’ liability towards audited companies falls under contractual liability for damage caused by their serious and negligent misconduct (Article 82 Section 1 of the Portuguese Companies Code). Regarding companies that are issuers of securities, Article 10 of the Portuguese Securities Code expressly states that auditors will be jointly and severally liable for shortcomings in their audit reports and opinions.
If an audited company proves that there were errors in audit proceedings (which would represent a contractual default), an auditor may rebut the legal presumption of his or her guilt by proving that he or she acted in accordance with best professional practices and auditing standards.\textsuperscript{12}

Auditors will be liable towards creditors of audited companies for serious or negligent breaches of legal or contractual provisions intended to protect creditors only if corporate assets become insufficient to pay corporate debts as a result of this breach (Articles 78 and 82 Section 1 of the Portuguese Companies Code). In this regard, the legal regime on directors’ liability is applicable to auditors \textit{mutatis mutandis}. Directors may be exempt from liability on the basis of proof of the application of the business judgement rule. However, this rule should be applicable to auditors on a mitigated basis because auditors are subject to technical and legal criteria rather than rational business logic. Nevertheless, it should be considered that auditing requires a wide scope of professional judgement in several cases without prejudice to criteria of best professional practices.\textsuperscript{13}

In any case (professional liability in relation to audited companies, their creditors or third parties), auditors are not subject to strict liability. Therefore, auditors cannot be held liable for all failures (for instance, shortcomings in the financial statements) regardless of wilful or negligent misconduct.\textsuperscript{14} In this regard, it is common for auditors to argue that they were not provided with the relevant financial information during auditing proceedings.

Unless an act of misconduct is considered a crime, auditors’ professional liability is subject to a five-year time limitation from the date of the unlawful misconduct, or from the disclosure of this misconduct if it has been covered up, and the causing of damage, regardless of whether or not the full extent of the damage has already occurred (Article 174 of the Portuguese Companies Code).

Auditors may also be held liable for prospectuses according to the terms described above with regard to finance professionals.

It is mandatory for auditors to take out professional liability insurance policies. Usually, these insurance policies are taken out through the Auditors Association (Article 87 of the statutes of the Statutory Auditors Association and Article 10 of the Portuguese Securities Code).

Lastly, professional misconduct by auditors may raise disciplinary issues (to be addressed by the Statutory Auditors Association) and may be considered administrative infractions that should be addressed in the scope of administrative infringement proceedings to be conducted, for instance, by the Supervising Authority for Insurance and Pension Funds (ASF), the Bank of Portugal or the CMVM, as applicable. Administrative infractions are subject to specific time limitations.

Accountants’ professional duties and liability are governed by the statutes of the Chartered Accountants Association and, alternatively, by Law No. 53/2015 of 11 June 2015 on the legal framework of professional corporations regulated by professional public associations and statutes of professional public associations.

\textsuperscript{12} Gabriela Figueiredo Dias, \textit{Fiscalização de Sociedades e Responsabilidade Civil}, Coimbra, 2006, pp. 93–94.


Chartered accountants must act in accordance with best professional practices, independent criteria and subject to whistle-blowing obligations on public crimes and money laundering (Articles 70, 76 and 121 of the Statutes of the Chartered Accountants Association, Articles 2–4 of the Code of Ethics and Articles 4 Section 1(e), 11 Section 1(c) and 43 et seq. of the Law on the Prevention of Money Laundering and Terrorist Financing). In the event of failure to comply with these duties, where general requirements on liability are met, chartered accountants will be held liable.

Whether chartered accountants render consultancy services when they undertake the obligation to prepare clients’ financial statements is a controversial issue; in any case, it is undisputable that chartered accountants should prepare financial statements in the most favourable way to meet the client’s needs.\textsuperscript{15}

Lastly, the professional misconduct of auditors may also raise disciplinary issues (to be addressed by the Chartered Accountants Association).

\section*{Insurance professionals}

Insurance activities in Portugal are regulated and insurance professionals are subject to the oversight of the ASF, the competent authority for the regulation and prudential and behavioural supervision of insurance, reinsurance, pension funds (and corresponding managing entities) and insurance and reinsurance intermediation activities.\textsuperscript{16}

The pursuit of the insurance and reinsurance business is governed by Law No. 147/2015 of 9 September 2015, which implemented the Solvency II Directive, while insurance and reinsurance intermediation activities are mainly governed by Decree-Law No. 144/2006 of 31 July 2006 as amended (which implemented the Insurance Mediation Directive into Portuguese law).

It is mandatory for insurance and reinsurance intermediation professionals, such as intermediaries, agents and insurance brokers, to take out professional liability insurance policies (Decree-Law No. 144/2006 of 31 July 2006).

\section*{III YEAR IN REVIEW}

Professional liability cases involving banking and finance professionals have been increasing in recent years as a result of the financial crisis of the past decade.

The past year was still marked by litigation resulting from the resolution measure applied by the Bank of Portugal to the Banco Espírito Santo, SA (BES) in August 2014 and its impact on clients’ investments (both the clients who invested directly in BES and the clients who invested in the non-financial branch of the Espírito Santo Group upon the intermediation of BES). The biased media coverage on this case also triggered several judicial proceedings for professional liability related to BES. Several civil liability proceedings are still pending and a significant number of cases were dismissed because the legal requirements were not even properly argued, or because of a lack of proof of unlawful conduct and lack of evidence of the required causal link.

\textsuperscript{15} See the ruling issued by the Supreme Court of Justice on 10 July 2012, Case No. 5245/07.0TVLSB.L1.S1, and the ruling issued by the Supreme Court of Justice on 26 April 2012, Case No. 417/09.5TBVNO. L1.S1, www.dgsi.pt.

\textsuperscript{16} The CMVM also has some supervisory powers in respect of rules of conduct relating to unit-linked life insurance products and transactions.
In addition, although in Portugal there are no official statistics on medical negligence, there has been a considerable increase in the number of cases of alleged medical negligence in recent years. For instance, in 2017, the office of the Public Prosecution Service in Lisbon opened 60 criminal investigations into medical negligence. Nevertheless, medical negligence cases also raise significant difficulties, both in terms of the proof of unlawful conduct and the evidence of the required causal link.

IV OUTLOOK AND FUTURE DEVELOPMENTS

The losses resulting from the financial crisis in recent years indicate that professional liability cases in the banking and financial sectors will continue to mark the upcoming year.

Nevertheless, the developments in corporate governance best practices and guidelines also anticipate and prompt the implementation of preventive measures to avoid litigation on the civil professional liability of directors. Currently, the prospective amendments to the legal framework on the assessment of reputation of directors of financial and credit institutions by the Bank of Portugal, and also discussions on a similar legal regime for listed companies, are a clear indication of the intention to enhance preventive measures to avoid professional negligence in these areas.¹⁸

Chapter 10

SPAIN

Alejandro Ferreres Comella

I INTRODUCTION

i Legal framework

Professional liability is governed in Spain by general tort regulations. In those cases in which there is a contractual relationship between the professional and the damaged party (client), the contract is the main source of the provisions on the liability arising from the former's performance. Professionals' duties of care are normally standardised by sector or profession and usually supplement contractual provisions. Standardised duties of care are either set forth in codes of conduct or protocols (such as in the case of lawyers or medical practitioners), or in case law.

Professionals' malpractice may have an impact on third parties that do not have a contractual relationship with the negligent professional (e.g., injury caused to pedestrians by the collapse of a building with construction defects).

The general legal framework of tort and contractual liability is set forth in the Spanish Civil Code (Articles 1101 et seq. and Articles 1902 et seq., respectively). Specific acts of professional misconduct may also be considered crimes or administrative infractions governed by the Spanish Criminal Code or specific criminal and administrative laws (for instance, the regulations applicable to lawyers can give rise to administrative sanction proceedings that are separate from their civil liability in relation to clients arising from misconduct).

Professionals' liability is subject to the regulation and principles of liability for defective service. This means that professionals are generally not obliged to guarantee a specific outcome, but their performance needs to conform to certain standards of due diligence (thus, lawyers are not obliged to guarantee a specific outcome to the cases on which they advise, in the same way that doctors are not obliged to guarantee that patients will be cured as a result of their treatment, but the legal counsel provided and the medical treatment administered must meet the applicable standards of care).

As general rule, for there to be professional liability there must be: (1) unlawful conduct (either an act or omission) of the professional; (2) wilful or negligent misconduct (except in cases of strict liability); (3) a causal link between the professional's conduct and the damages claimed by the claimant; and (4) damage (either actual losses or loss of profit).

Professional negligence is normally related to the professional's failure to comply with rules set forth in sector-specific regulations, codes or protocols or with standards of care defined in case law (developed over time and when there are no specific regulations). Thus, it will normally be sufficient for a plaintiff to prove that the professional did not honour the

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standard of care set out in the regulations or case law. Furthermore, in some specific cases (such as medical malpractice), professional malpractice can be presumed or indirectly proven (i.e., the res ipsa loquitur doctrine applies to medical malpractice, as discussed below).

Proving causation may be difficult for plaintiffs. In Spain, the standard of proof of factual causation is, in theory, high. The Supreme Court formally requires that the evidence of the existence of a causal link must be clear and precise, and not based on mere deduction, conjecture or probability. Therefore, in principle, it requires absolute evidential certainty.

Consequently, in Spain, doctrines such as that expressed in the ‘more-probable-than-not’ rule are, in theory, excluded. As such, statistics (or epidemiology, which may be relevant in medical malpractice cases) would not be sufficient by themselves to prove a causal link.

In practice, however, on many occasions judges and courts reach decisions that come close to applying the more-probable-than-not rule, in particular by recourse to a judicial presumption (praesumptio juris). This presumption allows the judge or court to apply rules of human logic to deduce a fact and deem it proven (deduced fact) on the basis of the evidence of one or more ‘basic facts’.

On other occasions, judges and courts have used statistics and epidemiology –which are insufficient by themselves to establish the causal link– in combination with other basic facts provided as evidence to determine the causal relationship.

Spanish case law has developed legal causation theories similar to proximate-cause theories. For example, the courts have identified the ‘objective imputation criterion’, which includes theories aimed at limiting liability such as foreseeability (commonly referred to as the adequate-cause defence in Spain), ex post events (known as the German rule of regressverbot und Garantenstellung), the ‘harm-within-the-risk’ rule, etc.

In those cases in which the professional’s negligence is particularly serious and sufficient to amount to a criminal offence, the civil liability arising therefrom is dealt with as part of the criminal prosecution proceedings.

Finally, as a general rule, professionals take out professional liability insurance. In fact, professional liability insurance is mandatory for some professionals, including lawyers, medical practitioners, auditors, insurance intermediaries, real estate agents, credit intermediaries and credit or financial consultants.

ii Limitation and prescription

The statute of limitations rules applicable to professional liability depend on whether or not there is a contract between the professional and the damaged party.

Contractual liability, unless the contract provides otherwise (which is unusual in Spanish contracts), is subject to a five-year limitation period. However, this statute of limitations rule results from a recent amendment of the 1889 Civil Code (passed in October 2017). This amendment includes transitory provisions that apply to legal actions related to the infringement of obligations that existed prior to the entry into force of the amendment. These actions must be brought within 15 years of the infringement occurring, or within five years of the date the reform entered into force (i.e., by 7 October 2020), whichever date falls first.

Specific limitation periods exist for some sectors, such as construction or auditing, which we address below.

Non-contractual liability is subject to a one-year statute of limitations rule. The Spanish Supreme Court has clarified that the one-year period runs only from the moment that the
aggrieved party is fully aware of the existence of the damage suffered and it is definitive (i.e., in the case of ‘continuing damages’, the statute of limitation period does not start until the arising of damages ceases).

A limitation period can be interrupted by the damaged party issuing an out-of-court request claiming the damages from the professional. Every time that an out-of-court request is issued, the one-year term restarts from the beginning.

iii Dispute fora and resolution

Professional liability claims are normally dealt with by the judiciary in Spain. Arbitration clauses may be used in some cases, such as construction claims, to resolve an issue connected with the contractual liability of the professional in relation to the damaged client. Obviously, arbitration clauses do not exist in non-contractual liability cases. And even in those cases in which there is an arbitration clause, certain types of damages claims may not be subject to arbitration (e.g., personal injuries arising from professional negligence).

Professional liability claims are normally dealt with by the civil courts and in particular by the courts of first instance.

There are two basic declarative procedures for seeking payment of compensation: verbal proceedings and ordinary proceedings. These are regulated in the Civil Procedure Law of 7 January 2000. Which stream a case falls under depends on the amount claimed: (1) where compensation of up to €6,000 is sought, the claim is handled in verbal proceedings; and (2) where the amount claimed is more than €6,000, the claim is handled in ordinary proceedings.

Professional negligence cases will normally be handled in ordinary proceedings.

In both cases, the civil procedure starts with the filing of the claim. The claim must include all factual allegations, set out in as much detail as possible, as well as the legal grounds on which it is based. However, under the principle of jura novit curia, (1) the plaintiff is not required to set out the legal grounds in thorough detail, and (2) the legal grounds invoked are not binding upon the judge, who may uphold the action based on alternative legal grounds.

If verbal proceedings are initiated, once the claim has been filed and given leave to proceed, the defendant is given a term to file a defence (or a counterclaim brief) of 10 working days (which includes every day of the year except Saturday, Sundays, national holidays, non-working days in the autonomous region or city where the proceedings take place, and the month of August). This period cannot be extended except when both parties agree to stay the proceedings. Subsequently, the court will call the parties to a hearing in which they propose the evidence they are going to submit, the evidence is produced and the final conclusions are presented – all in the same hearing.

If ordinary proceedings are initiated, once notified of the lawsuit, the defendant has a 20-working day term to file a brief of response. This period cannot be extended except when both parties agree to stay the proceedings. Any allegation, documentary evidence and expert reports on the facts or events on which the defence is based must be attached to the brief of allegations. It is unlikely that any other documents will be accepted subsequently.

The court then calls the parties to a preliminary hearing in which they propose the evidence they are going to submit. The court then summons the parties to the trial where the evidence and final conclusions are presented. Although the Civil Procedure Law sets forth that the trial should be held within one month of the preliminary hearing, it is very common for the trial to be scheduled for between 2 and 12 months after the preliminary hearing, depending on the court’s workload. If there are a lot of witnesses and experts to be heard, the court may schedule more than one day for the trial.
No discovery proceedings for plaintiffs

The Spanish legal system does not provide for a general disclosure procedure. However, provision is made for coercive measures in relation to document disclosure in two specific situations.

Preliminary proceedings

Preliminary proceedings are simply aimed at preparing the proceedings (and therefore take place before the lawsuit is filed) and allow the potential plaintiff to verify that its intended claim and defendant are appropriate. In other words, the preliminary proceedings are very short and specific proceedings that the plaintiff is entitled to start if it needs to verify basic aspects of the claim. An example of a situation in which a plaintiff may consider using preliminary proceedings is to request the exhibition of an insurance policy when the exact scope of the insurance coverage will be under discussion in the main proceedings.

If the court gives leave for the preliminary proceedings to proceed, it will call the parties to a hearing where the request will be made (either to disclose documents, show the object of the claim or respond to the plaintiff’s questions). The decision to call the parties to this hearing can be challenged by the defendant, but if this opposition is dismissed, the law provides that, depending on the type of request, the court may consider responding affirmatively to the questions that the plaintiff poses or even entering and searching premises to obtain documents requested by the plaintiff in cases where the person or entity to which they refer or who is in possession of the documents refuses to disclose them.

Ordinary proceedings

During the ordinary proceedings, each party may request the others to disclose documents referring to the object of the proceedings. The requesting party must provide a photocopy of the requested document or, in the absence thereof, indicate the contents of the requested document as accurately as possible.

Should the party or parties unjustifiably refuse to disclose the requested private documents, the court may either (1) rule that the copy provided by the requesting party has evidentiary value, or (2) issue an express order for the documents to be furnished, when it is advisable given the nature of the documents, the other evidence brought to the proceedings and the contents of the allegations and claims made.

Unlike in preliminary proceedings, here the law does not allow for premises to be entered and searched in the event of a refusal to disclose documents. However, the party who refuses to disclose documents requested by the court may be considered guilty of the criminal offence of disobedience, which can be sanctioned with imprisonment of up to 12 months.

The role of expert witnesses

Expert witnesses can play a vital role in professional negligence cases in establishing whether or not the professional has met the standards of care applicable to his or her performance, proving the damage suffered by plaintiff or the causal link between the professional’s negligence and the damage suffered.

Expert reports must be proposed and submitted by the parties in their respective briefs of allegations. Only in the following exceptional circumstances can they be submitted afterwards:

- for reasons of lack of time, a party may announce that the report will be attached to its pleadings brief at a later date (but in any case before the preliminary hearing);
b as a consequence of the allegations made by the defendant in its response, or as a result of the occurrence of new facts, or as a result of additional allegations made by the parties before or during the previous hearing; and
c when a request to extend the scope of the expert witness report is made during the hearing.

Moreover, a party can request the court to appoint an expert:
a when it waives its right to appoint an expert in the brief of allegations; or
b as a consequence of the allegations made by the defendant in its response, or as a result of the occurrence of new facts, or as a result of additional allegations made by the parties before or during the preliminary hearing.

Either at the time of attaching the expert witness report to the initial brief of allegations or to the additional allegations, or during the preliminary hearing, the parties (and sometimes the court, when it deems it necessary) must indicate whether they want their expert or the one proposed by the opposing party to appear during the trial for the purpose of (1) further explaining the report; (2) answering questions; (3) undergoing cross-examination by the opposing party; or (4) challenging the other parties’ expert witness.

iv Remedies and loss

The Spanish civil liability system is based on compensatory grounds. Consequently, indemnifiable damages should match the impairment or loss suffered by a person (or his or her property) as a result of a given event or fact.

Indemnifiable damages include both purely economic damages and ‘non-material damages’ (which includes, for instance, for suffering or pain). In the Spanish legal system, whenever compensation is sought, the plaintiff must prove not only the existence of damage, but also the scope and the means of calculating the compensation being claimed.

Punitive damages are not contemplated in the Spanish legal system.

Spanish tort law does not ban *in natura* compensation, by virtue of which a consumer seeks to be restored to a situation as similar as possible to that in which he or she would have been had the service provided by the professional not been defective.

In the specific case of medical practitioners’ liability, *restitutio in natura* might be a possibility in certain specific cases. For example, in the case of a negligent late diagnosis of a disease, the patient may be awarded the right to receive medical monitoring as compensation for the anxiety that the late diagnosis caused.

Compensation includes direct damages, indirect damages (although remoteness theories are applied to some extent by Spanish courts, with the purpose of limiting the damages that are awarded) and loss of profits (*lucrum cessans*).

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers in Spain are subject to the regulations set out in the 2001 Spanish Lawyers General Regulation and the 2002 Spanish Lawyers Deontological Code. The General Regulation sets out lawyers’ obligations and duties of care in their dealings with peers and in providing legal services to clients. Lawyers’ obligations towards their clients include the obligation to (1) keep clients appropriately informed of developments in the case and to provide them...
with a minimum and fair assessment of the probabilities that the clients’ position will prevail; (2) store appropriately the documents provided by clients; (3) return the documents to clients at the end of the case; (4) comply with confidentiality rules; and (5) know the law and the case law.

The infringement of the Deontological Code gives rise to administrative sanctions imposed by the Spanish bar associations and may also give rise to professional liability claims.

However, beyond the eventual infringement of the Deontological Code, lawyers’ negligence in their rendering of legal services may additionally involve civil liability for the damage caused to clients.

The Spanish Supreme Court has issued several decisions on lawyers’ civil liability. In this case law, the Court has held that to establish the amount of the damages arising from the lawyers’ negligence, the cost of the loss of opportunity must be assessed. Thus, the court that has to decide on a lawyer’s liability has to assess what the result of the case would have been had the lawyer not acted negligently. Thus, if the lawyer negligently failed to file a brief of defence or an appeal in due time, or negligently addressed a legal issue, the court needs to assess whether the defence or the appeal would have prevailed or whether the legal action would have been successful if the lawyer had approached it properly. This is not an easy assessment, as the Spanish Supreme Court has confirmed in most of its case law. For that reason and unless the assessment of the probability of a different result is very clear, the Spanish Supreme Court limits clients’ compensation to something equivalent to moral damages for the loss of opportunity.

Lawyers must have civil liability insurance. As a matter of fact, all Spanish lawyers obtain insurance coverage through their compulsory membership of a Spanish bar association. Additionally, law firms are obliged to take out an insurance policy to cover their civil liability, in addition to the individual policies that each of their lawyers are also obliged to take out.

ii Medical practitioners

Medical practitioners are subject to the general Spanish law of tort. However, the Spanish Supreme Court has developed a set of specific rules and principles that apply to their activity.

a Medical practice is the provision of a service. This means that medical practitioners are not obliged to deliver (to guarantee) a given result (i.e., medical practitioners cannot be found liable if a patient is not cured, provided that they have diligently performed their duties). However, cosmetic surgery and odontology are an exception to this general rule; practitioners are subject to strict liability if they are not able to deliver the cosmetic result or the dental treatment solution requested by the patient.

b There is a set of standards of care that derive from past clinical experience and generally accepted protocols for clinical diagnosis and treatment, which is known as lex artis.

c The disproportionate-result or res ipsa loquitur theory (which is applicable when the damaging effect suffered by the patient as a result of clinical treatment is not proportionate to the one normally expected) results in a presumption that the medical practitioner did not comply with lex artis. Thus, the burden of proof passes to the medical practitioner to show that he or she acted correctly.

d Proving causation in cases of treatment malpractice is not a simple issue when the underlying disease or condition is at an advanced stage. Expert witness testimony is particularly relevant in these civil liability cases.

Insurance coverage is also mandatory for medical practitioners.
In the case of medical practitioners who have an employment or contractual relationship with private or public hospitals, medical malpractice legal actions are normally directed against both the hospital and the medical practitioner on the basis of their joint and several liability.

iii Banking and finance professionals

Banking and finance professionals are not subject to any specific civil liability regime but to the general Spanish law of tort.

However, banking and finance professionals are subject to some sector regulations that set out duties of care in the provision of financial services, and in particular in the offering of investment products to clients.

Law 10/2014 of 26 June 2014 on the Regulation, Supervision and Solvency of Credit Institutions (which regulates, among other matters, the suitability of senior officers, corporate governance and remuneration policies in banks and other financial entities), Law 24/1988 of 28 July 1988 on the Securities Market (which regulates the obligations of bankers and finance professionals to inform investors, and prospectus requirements), and Law 35/2008 of 4 November on Collective Investment Institutions together form the basic legal framework setting out the obligations and duties of care applicable to banking and finance professionals.

It should be noted, though, that if a banking or finance professional fails to meet the standard of care required in the sector regulations, civil liability claims will normally be addressed to the bank or financial entity and not the professional.

iv Computer and IT professionals

There is no specific legal regime applicable to computer and IT professionals in Spain. Computer and IT professionals may be civilly liable for damage caused to their clients – or to third parties – because of the defective design of computer applications and programs or defective maintenance of the same. Disruptions to the functioning of computers (or computer programs) is the most frequent source of conflicts.

Civil liability of computer professionals will normally be based on contractual liability (for the failure of the computer program to fulfil the provisions of the contract), but may also give rise to non-contractual liability in cases in which third parties alien to the contractual relationship have been damaged by the computer professional’s negligence (e.g., in those cases in which the lack of sufficient firewalls in a computer program facilitated hackers’ access to personal data or corporate financial information). While the existence of a cyberattack may allow the computer professional to argue proximate-cause defences (such as superseding-cause theories), the courts may still find him or her partially liable for the damaging result.

Computer and IT professionals are under no obligation to contract a civil liability insurance policy. However, as a general rule they tend to do so and this is a growing insurance market.

v Property surveyors

When acting as construction developers, property surveyors are jointly and severally liable under the civil liability regime applicable to construction professionals (see Section II.vi).

Property surveyors acting as real estate agents are subject to the specific regulation set out in Royal Decree 1294/2007 on the General Bylaws of the Associations of Real Estate Agents. This Decree establishes obligations that real estate agents must comply with in their role as intermediaries between real estate sellers and buyers. The infringement of these
obligations can result in administrative sanction proceedings, but also in civil liability actions initiated by any person or company that suffers financial damage as a consequence of the infringement. This regulation obliges real estate agent associations to take out insurance that covers the civil liability of their members.

vi Construction professionals

Construction professionals are governed by the 1999 Construction Law (Law 38/2005 of 5 November 1999). It establishes that the plot developer and construction professionals (including the constructor, architect and – when applicable – engineers) are jointly and severally liable.

As such, the owner of a building who has suffered damage as a result of defective design or construction of the building can start a legal action against any of the construction professionals and the developer, or against all of them when it is not possible to determine who is liable for the damages ex ante.

vii Accountants and auditors

Article 26.1 of Law 22/2015 of 20 July on Account Auditing states that ‘auditors of accounts and audit firms shall be liable for damages resulting from non-compliance with their obligations under the general rules of the Civil Code, with the particularities established in the aforementioned article’.

As regards the specific provisions applicable to accountants and auditors, Law 22/2015 sets forth the following:

a The civil liability of auditors and audit firms is proportional and directly corresponds to the economic damage caused to both the audited entity and third parties by their professional performance.

For these purposes, a third party means any physical or legal person, public or private, that proves that they acted or failed to act on the basis of the audit report and this was an essential and appropriate factor for them to take into account in giving their consent, to motivate their actions or take their decisions.

b A civil liability action should be brought against each individual separately and as a distinct issue from the damage or injury caused by the audited entity itself or by third parties.

c When the audit is carried out by an auditor on behalf of an audit firm, the auditor who has signed the audit report and the audit firm are jointly and severally liable, subject to the limits indicated in the preceding section.

The civil liability of auditors can, in turn, be of two types: contractual and non-contractual.

A legal action for the contractual liability of an auditor or audit firm is subject to a four-year limitation period beginning on the date of the audit report. Non-contractual liability claimed by third parties who relied on the auditor’s report is subject to the general one-year limitation period applicable to non-contractual liability.

viii Insurance professionals

Insurance professionals who advise insured parties and represent them before the insurer (insurance mediators) are civilly liable to their clients (the insured party) if they fail to fulfil the obligations and standards of care set out in the sector regulations, in particular, in Law 26/2006 of 17 July on Private Insurance and Reinsurance Mediation.
Insurance mediators must (1) provide independent, impartial and informed advice to clients on risk coverage; (2) appropriately manage the funds provided by the client to contract insurance coverage and pay premiums; (3) assist clients in the event of a loss or incident, providing them with the necessary information as to the scope of the coverage and the steps to be taken in relation to the insurer and taking them directly on behalf of their clients.

Insurance mediators must have an insurance policy to cover their potential civil liability for professional negligence.

III YEAR IN REVIEW

Banking and financial professionals’ civil liability has been the origin of most of the myriad of cases brought by consumers before the civil courts in Spain during 2017. Although the defendant is normally the financial entity or bank and not the professionals who work for them, the legal basis for the compensation sought by clients is, as a general rule, the negligent performance of those professionals.

The Spanish Supreme Court issued an important decision in November 2017 concerning the civil liability of a lawyer who failed to submit a collective redundancy petition within the statutory term. As a consequence of his negligent performance, the client was obliged to pay its employees an additional compensation, which it would not have had to pay otherwise (i.e., if the collective redundancy petition had been filed with the authorities in due time). The Court concluded that the analysis of causation could be based on the fact that the collective redundancy petition would reasonably have been accepted (i.e., it now seems that a reasonability test is sufficient to find causation between the lack of diligence of lawyers and the damaging result for their clients).

IV OUTLOOK AND FUTURE DEVELOPMENTS

Professionals’ liability has developed considerably in Spain in recent years. Construction professionals are facing an increasing numbers of claims as a result of the construction boom in Spain in the past decade. The number of construction liability cases should decrease in the coming year as a result of the entry into force in 2007 of a new Construction Technical Code, which imposed improved technical specifications and requirements for all constructions.

Litigation against banking and finance professionals will continue to grow in the coming years as a result of the financial loss suffered by many financial services clients as a result of the crisis. However, as mentioned above, this litigation will be directed against the financial entity itself and not its employees or individual professionals.
Chapter 11

SWEDEN

Johannes Ericson and Carl Rother-Schirren

I INTRODUCTION

i Legal framework

Negligent acts or omissions conducted by a professional may give rise to various sanctions, including criminal charges and disciplinary actions, but this article mainly addresses the remedy of damages.

To establish professional liability, the aggrieved party essentially needs to establish that it has incurred financial loss (including the quantum of the loss) because of the professional’s breach of his or her duty of care (negligence), that the breach was the cause of the loss (causation) and that the cause was adequate (to a certain extent foreseeable and within reasonable remoteness). Only the negligence test will be briefly described in this section although all the requirements are indeed interesting and complex.

The standard of negligence is fairly high under Swedish law; a substantial breach of the professional’s duty of care is typically required, although an adviser is also under a fairly strict standard of care regarding his or her obligation to inform a client of risks associated with matters on which advice is provided.

Many professions are subject to statutory regulation: inter alia, financial advice to consumers, insurance brokering, real estate brokering, and auditing. These statutes typically stipulate general principles and rules that the relevant professionals must adhere to. These principles are in turn set out in more detail in various sources, many of which are traditionally considered ‘soft law’. Examples of these sources include recommendations from business organisations, agreements between such organisations and authorities, guidelines provided by relevant authorities and precedents set by courts and by non-judicial policy-makers (e.g., disciplinary committees). Where a professional has acted in breach of the norms intended to safeguard the interests of a client, there is generally a presumption for negligence.

Also, a test similar to the common law Learned Hand formula is commonly applied for establishing negligence. This test is of particular use and importance where there has been no breach of a relevant norm. In essence, the following four factors are assessed in this test:

a the probability that loss will be incurred;
b the gravity of the loss;
c the foreseeability of the loss; and

d the options for preventing the loss.

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In a situation where there has been a high probability of major loss and the risk for the loss has been simple to foresee and could have easily been avoided, the professional would probably be considered negligent.

A professional’s liability is often limited through limitation of liability clauses or monetary caps in the parties’ agreement or through caveats made. Contractual limitations of liability are generally upheld by Swedish courts and arbitral tribunals. Exceptions are, however, possible where a provision is deemed unconscionable in accordance with Section 36 of the Swedish Contracts Act, having regard to the contents of the agreement, the circumstances prevailing when the agreement was entered into, subsequent circumstances and other circumstances in general.

Where the party in breach is an individual who has provided his or her services under employment, any claim would typically be directed against the employer under the Swedish legal principle on the principal’s liability.

Defences to professional liability claims are in general the same as those to any liability claim (i.e., objections as to negligence, the existence and quantum of loss, causation and adequacy, contributory negligence or the aggrieved party’s failure to mitigate its loss). It is typically the aggrieved party that has the burden of proof for the circumstances resulting in liability, although it can fall to the party in breach under certain conditions; for instance, when the professional has omitted to document the advice rendered.

ii Limitation and prescription

The general statutory time limitation for monetary claims is 10 years. This applies for most claims relating to professional negligence, with the result that no claim may be brought after 10 years from its ‘occurrence’ (a point in time that can be complex to establish but is typically when the alleged negligent act was committed) unless the period of limitation is interrupted prior thereto. The period of limitation is interrupted by any of the following events: (1) the debtor offers payment, makes payment of interest or principal amount, or otherwise acknowledges the claim of the creditor; (2) the debtor receives from the creditor a demand in writing or other written reminder in respect of the debt; or (3) the creditor commences legal proceedings otherwise pleads the claim against the debtor in any court, before the Swedish Enforcement Authority, in arbitration proceedings, bankruptcy or insolvent liquidation proceedings, or in negotiations in respect of judicial composition in an insolvency procedure.

An exception is made where the professional is deemed a trustee. A trustee may be defined as anyone who is tasked by a principal to perform a legal act on the principal’s behalf or represent the principal in relation to authorities. Claims against a trustee must be made by commencing legal proceedings within a year. However, as most professionals that provide advice are not deemed trustees, this exception to the 10-year main rule is, in practice, of limited significance.

In addition to the above, a claim may be time-barred or precluded if the aggrieved party has failed to provide the professional with a valid notice of its claim in due time. A valid notice requires that the aggrieved party make clear to the professional that the services provided were deficient (i.e., not of an acceptable standard) and that the professional is or will be held liable. Certain aspects of the time-bar issue are currently uncertain under Swedish law, but clarifications are expected from the Swedish Supreme Court during 2018 (see Section IV, below).
iii Dispute fora and resolution

Professional liability claims may be subject to litigation and arbitration. Litigation is governed by the Swedish Code of Judicial Procedure and as a general rule the domicile of the defendant decides which court is competent in a particular case. A company (and similar entities) is domiciled where it has its registered office.

Arbitration is the favoured method of dispute resolution where the subject matter has been agreed upon, and many professionals provide for arbitration in their standard terms and conditions. Arbitration clauses are upheld by Swedish courts unless deemed unconscionable in accordance with Section 36 of the Contracts Act, which essentially never applies in commercial contexts. Arbitration is most commonly conducted under institutionalised arbitration rules, primarily the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and secondarily the Rules of Arbitration of the International Chamber of Commerce.

Alternative dispute resolution (ADR) proceedings such as mediation are also available. ADR has gained some popularity over the past decade but is not frequently applied.

iv Remedies and loss

Several remedies are available to the claimant if professional liability applies. The claimant may, under certain conditions, demand that the professional perform the agreed service adequately or demand a reduction in price. For practical reasons, however, damages are virtually exclusive as the means of remedy. As a starting point and in the absence of an agreement on how to calculate damages, the aggrieved party is entitled to its actual loss incurred and nothing more. The ‘doctrine of difference’ is the primary tool in calculating the amount of damages that the aggrieved party is entitled to. According to this principle, the liable party is obliged to pay damages in the amount that puts the aggrieved party in the hypothetical position where it would have been had the negligent act not been performed (i.e., the aggrieved party is entitled to full financial compensation, including loss of profit). In other words, the aim of the calculation is to put the aggrieved party in the situation that it would have been had the professional provided the services in accordance with the agreement or standard of care.

A professional’s liability to pay damages is limited to the immediately aggrieved party; a professional can as a general rule (with a few exceptions, such as real property valuations and professional advice rendered in bad faith) not be liable to pay damages to a third party, (i.e., anyone who incurs financial loss as a result of the aggrieved party’s loss). In addition, the compensation to the aggrieved parties may be reduced with reference to, for example, contributory negligence or failure to mitigate loss.

II SPECIFIC PROFESSIONS

i Lawyers

Lawyers in Sweden are not governed by any specific regulations. However, lawyers who hold the title advokat (i.e., members of the Swedish Bar Association) do, as does any lawyer working under an advokat’s supervision. The Code of Judicial Procedure states that an advokat must observe ‘good mores’. Essentially, this means that an advokat is bound by the Swedish Bar Association’s Code of Conduct, which serves as a framework for various ethical norms that an advokat and his or her employees must adhere to. The obligations of an advokat are further specified in precedents from the disciplinary committee of the Swedish Bar Association, as

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well as declarative statements by the board of the Swedish Bar Association. The Code of Conduct contains disciplinary actions only; there are no provisions on remedies available to an aggrieved client. An *advokat* must carry liability insurance.

ii  **Medical practitioners**

Various statutes regulate medical practitioners. It follows from the Swedish Security of Patients Act that all medical practitioners are under an obligation to ensure they provide their services in accordance with proven experience and science. Any medical practitioners who do not comply with these requirements may lose their licence or be subject to criminal proceedings and be held liable for damages. All medical practitioners come under the supervision of the Swedish Health and Social Care Inspectorate. A medical professional is not obligated to carry liability insurance, but anyone who provides medical services must have insurance for patient injuries, according to the Swedish Patient Injury Act.

iii  **Banking and finance professionals**

Banking and finance professionals who provide financial advice to consumers regarding investment of the consumers’ assets in financial instruments or in life assurance with an element of capitalisation are governed by the Swedish Financial Advice to Consumers Act. Professionals are required to have sufficient skills and observe generally accepted practices. Furthermore, the statute provides that a consumer is entitled to damages for pure financial loss and contains a notification provision that the consumer must adhere to.

iv  **Computer and information technology professionals**

Computer and information technology professionals are not specifically regulated in Swedish law.

v  **Real property surveyors**

Real property surveying may be provided either by Lantmäteriet, the Swedish authority responsible for property division, or by professionals in the private sector. However, legally binding property divisions may only be based on surveying provided by Lantmäteriet. Professionals engaged in the private sector are not regulated specifically under Swedish law.

vi  **Construction professionals**

Construction professionals are not specifically regulated in Swedish law. However, there are standard agreements that regulate the conditions of liability for construction services. These agreements are frequently applied on the market and may serve as a source of general principles and commercial usage in resolving issues of liability, even where the parties have not agreed to apply the agreements. The general principle of due care that the parties must exercise under the agreements is known as the standard of professionalism, although the agreements also impose strict liability in certain situations.

vii  **Accountants and auditors**

Under Swedish law, auditors and accountants are regulated by the Swedish Public Accountants Act, which stipulates general principles auditors must adhere to. Detailed regulation is provided by FAR (a Swedish trade organisation for auditors and accountants), mainly in the form of an adapted version of the International Standards on Auditing, and precedents.
established in disciplinary matters addressed by the Swedish Inspectorate of Auditors. Auditors and accountants must carry liability insurance, unless the Inspectorate of Auditors has granted an exemption. Consultancy services (such as tax advice) provided by accountants and auditors are not specifically regulated under Swedish law.

viii Insurance professionals

Insurance brokers are regulated by the Swedish Insurance Mediation Act. Generally, insurance brokering may only be conducted under a licence from the Swedish Financial Supervisory Authority. A licence is only granted where the broker meets certain criteria (including possession of appropriate knowledge and skills for the business to be conducted) and holds liability insurance.

An insurance broker must observe ‘good insurance brokering practice’ and attend to the client’s interests with due care. What constitutes good practice follows primarily from soft-law sources. The regulations and general guidelines issued by the Financial Supervisory Authority are a source of particular importance.

III YEAR IN REVIEW

i Introduction

There is no significant recent legislation concerning or affecting professional negligence and it is primarily rulings of Swedish courts that have been of interest during the past year. We present below a few interesting cases that have been of particular importance, including the BDO case, which arguably remains the most important case in recent years.

ii The HQ case

The background to the HQ case (one of Sweden’s largest and most spectacular commercial litigation proceedings ever) was, in short, the following. A Swedish bank named HQ Bank had a trading portfolio containing financial instruments. In May and June 2010, the portfolio was discontinued, which resulted in a loss of approximately 1.2 billion Swedish kronor. Shortly thereafter, HQ Bank’s licence to provide banking services was withdrawn by the Financial Supervisory Authority with reference to the bank’s handling of its trading portfolio. Following this decision, the bank was put into a winding-up procedure but was subsequently sold to one of its competitors holding a bank licence.

The claimant, HQ AB (former parent company of HQ Bank, and which had been assigned HQ Bank’s claim for damages) initiated legal proceedings against the board members and the auditor of HQ Bank claiming, inter alia, that the defendants were liable for damages amounting to approximately 3.2 billion Swedish kronor plus interest.

HQ AB argued that there had been a negligent management of HQ Bank, including an incorrect valuation of the financial instruments in the trading portfolio for the financial years 2007–2009. Furthermore, HQ AB argued that the auditor was aware, or at least should have been aware, of the negligent management. The auditor had made no remarks on the annual reports nor notified the board members or the Financial Supervisory Authority of the negligent management. Based on this, the claimant argued that the auditor had acted with negligence, resulting in the negligent management being allowed to continue, which

2 Case No. T 9311-11, 14 December 2017.

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ultimately led to HQ Bank’s licence being withdrawn by the Financial Supervisory Authority. Consequently, argued the claimant, the negligence of the auditor caused HQ AB loss. HQ AB incurred loss primarily amounting to HQ AB’s and HQ Bank’s decrease in value, approximately 3.2 billion Swedish kronor, as a result of HQ Bank’s licence being withdrawn. HQ AB alternatively argued that the loss incurred corresponded to the loss relating to the trading portfolio (i.e., approximately 1.2 billion Swedish kronor).

The auditor rejected the claims and stated, *inter alia*, the following: there had been no negligent management of HQ Bank and the auditor did not have, nor could be expected to have had, any knowledge of the alleged negligent management. The auditor also argued that, in any case, he did not have an obligation to make any remarks regarding alleged negligent management in the annual reports of HQ AB or HQ Bank; in addition, any loss incurred by the claimant had not been caused by the auditor.

**Stockholm District Court’s assessment**

*The claimant’s primary claim for damages (approximately 3.2 billion Swedish kronor)*

**Negligence**

Stockholm District Court held that HQ Bank had to a large extent been negligently managed. *Inter alia*, the Court held that the financial instruments were considerably overvalued as a result of the valuation being highly dependent on arbitrary estimates by the bank’s traders.

The Court held that the auditor knew at the beginning of 2009 that HQ Bank’s valuation of its trading portfolio was not in accordance with the auditing standards prescribed in IAS and IFRS. In addition, the auditor knew in autumn of the same year that the bank had not adhered to his instructions and recommendations pertaining to the portfolio. Consequently, the auditor should have realised that the portfolio was overvalued. The auditor had also, without remark, signed the annual report for the financial year 2009, despite knowing that the valuation of the trading portfolio had been erroneous. Based on this, the Court held that the auditor had been negligent. However, the auditor’s negligence was only in part related to the circumstances on the basis of which the Financial Supervisory Authority decided to withdraw HQ Bank’s licence.

**Causality**

The Court stated that the issue of causality depended on whether the auditor’s actions had any effect on the alleged cause of the loss (i.e., the Financial Supervisory Authority’s decision to withdraw HQ Bank’s licence). The Court held that the hypothetical scenario presented by the claimant (i.e., what would have transpired if the auditor had fully complied with the required duty of care) was unreasonable. By analysing the reasoning of the Financial Supervisory Authority’s decision to withdraw HQ Bank’s licence, the Court found that the authority would have withdrawn the licence irrespective of the auditor’s possible actions (i.e., the loss would have been incurred regardless of the auditor’s negligence). The claim was rejected on this basis.

*The claimant’s alternative claim for damages (approximately 1.2 billion Swedish kronor)*

As follows from the above, the Court deemed the financial instruments to be considerably overvalued. However, according to the Court the precise cause of the losses of roughly 1.2 billion Swedish kronor was not clear. The Court emphasised that the trading had been unsuccessful and that the shut-down of the portfolio had been rushed. The Court also held
that the actual decision to discontinue the portfolio was an act of due care, rather than negligence. In conclusion, the Court held that the claimant had failed to prove that any alternative course of action by the auditor would have prevented the losses.

**Judgment and appeal**

Ultimately, the Court dismissed the merits of all claims (including claims not presented in this chapter) with the exception of a claim for damages regarding a penalty imposed on HQ AB by Nasdaq OMX amounting to 480,000 Swedish kronor, concerning errors in HQ AB’s annual report of 2009. The defendants were awarded full compensation for their litigation costs, amounting to approximately 260 million Swedish kronor.

HQ AB, as well as the defendants, has been granted leave to appeal in the Svea Court of Appeal. However, as shortly after the district court’s judgment HQ AB declared itself bankrupt, it is currently uncertain whether the proceedings will continue.

### iii The Q-Company case

In December 2017, the Supreme Court rendered an award in which it confirmed that an auditor, as a general rule, cannot be held liable to members of the board for loss incurred by them as a result of a negligent audit of an annual report.³

In short, the circumstances were the following. An auditor had been appointed in a company that was subsequently declared bankrupt. Following the bankruptcy, four former members of the board were held liable for the company’s debts (four million Swedish kronor) and they brought a claim against the auditor to recover their loss. The claimants argued that the auditor had provided his services negligently by accepting a valuation of a monetary claim on the company’s parent company, as well as neglecting to inform the board members of the company’s financial distress and the board members’ obligation to execute a balance sheet for liquidation purposes. Under Chapter 29 of the Swedish Companies Act, an auditor acting negligently may be held liable for damages in relation to the company’s shareholders or ‘other persons’ who have incurred a loss. The claimants argued that those other persons included members of the board, and that the auditor could be held liable for the loss incurred by the board members.

The Supreme Court held that ‘other persons’ is to be construed based on the interest that the applicable rule of liability is intended to safeguard, and that the issue of what constitutes a relevant interest is determined by, *inter alia*, the object of the audit and the purpose of the norm that the auditor has failed to adhere to. In brief and based on the above, the Supreme Court held that the auditor was not liable for damages in relation to the board members. This decision means that members of a board will, in practice, never be able to recover financial loss incurred by them as a result of an auditor’s negligent audit of an annual report.

### iv The BDO case

The *BDO* case remains the most significant case on professional liability in recent times.⁴ In this case, the Supreme Court rendered an important precedent on the causality test to be applied in professional negligence claims.

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³ Case No. T 4823-16, 15 December 2017, ‘the Q-Company’.
⁴ Case No. NJA 2014 s. 272.
In short, the claimant had purchased shares in a company to which auditing firm BDO and one of its auditors provided auditing services in their capacity as registered auditors. The claimants had relied on the annual report in their valuation of the company and the auditors had made no remarks regarding the report in connection with the audit. The claimants incurred loss as a result of the transaction and sought compensation from the auditor claiming negligence in accordance with Chapter 29, Section 1 of the Companies Act (there was no contractual relationship between the investors and the auditors). The claimant argued that the annual report, which contained two errors, had misled them into making the investment on the agreed terms (loss) and that this was a result of the auditors’ negligence (causality). The auditors were held liable in the district court and the court of appeal; the main issue at dispute before the Supreme Court was whether causation applied between the negligence and the damage incurred by the claimant (there were also other issues that will not be addressed in this chapter).

The Supreme Court held that the causation test in cases concerning incorrect annual reports, generally, should be based on the question of what would have happened if the annual report had been correct. It further stressed that the relevant test was not what would have happened if the annual report had remained incorrect but the auditor had made due remarks regarding the errors.

The Supreme Court continued by stating that the errors in the annual report must have affected the claimant (i.e., if the annual report had been without errors, the correct evaluations would have had the effect on the claimant that it would have seriously considered not purchasing the shares). Furthermore, the Court stated that the issue of determining a hypothetical scenario should primarily be resolved with reference to hypothetical scenarios that, objectively, were reasonably likely to happen, taking into account all the circumstances presented by the parties.

By referring to the purpose of the merger, the Supreme Court held that even if the annual report had not been erroneous, the claimant would not have seriously reconsidered proceeding with the transaction. Consequently, the errors in the annual report had not adequately caused the claimant to purchase the shares and the claim was therefore rejected.

IV OUTLOOK AND FUTURE DEVELOPMENTS

i General observations

We expect to see a continued increase in professional negligence claims in the Swedish market during the next few years. Over the past decade, there have been a number of major claims brought before Swedish courts, including Prosolvia, HQ, and Kraft & Kultur. A few claims have been successful, resulting in auditors, board members and other professionals being held liable for, in some cases, substantial damages. These claims may result in an increased willingness to litigate among aggrieved parties and their insurers, based on the risk–reward test. In our view, the number of large claims against auditors and board members may increase, but we also expect a general increase in claims against legal and financial advisers, especially in relation to M&A transactions.

The Swedish economy has had a long boom, arguably in part because of low interest rates, after having made a rather swift recovery from the credit crunch. The finance and construction sectors have been blooming and the real estate market in Stockholm has seen increased prices and extensive production. There are, however, concerns in the real estate market, as prices have been decreasing since the autumn of 2017 and well-known construction
companies have found themselves in financial difficulties. Although these companies are not yet in financial distress, we believe it likely that some of them will eventually reach that stage. The extensive production, falling prices and distressed construction companies are all factors leading us to believe that the real estate sector is likely to produce professional negligence claims in the years to come.

The transaction market is also a potential source of future disputes. There have been a few years of intensive IPO activity, but this has yet to result in any major public professional negligence claims similar to the Danish *OW Bunker* case. We now expect a decrease in the number of IPOs but a continued strong market for private M&A deals, and this is likely to result in further post-M&A disputes concerning the professionals involved.

In summary, the general willingness to litigate professional negligence claims in combination with an expected recession is likely to result in such claims also being made in the years to come.

### ii Landmark cases of 2018

As for cases coming up in 2018, there is one in particular that has attracted attention in the market.

We expect the Supreme Court to deliver an interesting decision in the *Havsbrisen* case in late spring or early summer 2018, concerning alleged professional negligence in relation to a Swedish lawyer’s advice to a client. The judgment will hopefully shed some light on a couple of open issues relating to the duty of notification and the duty of care.

The lawyer, who is a member of the Swedish Bar Association and works for a reputable firm, acted for a client in an unsuccessful construction litigation case. The client brought a claim against its former counsel, alleging that he had negligently failed to identify a legal argument based on a construction contract and that this failure had resulted in the client losing the construction case and incurring loss. The two main questions of interest (negligence and duty to notify) were both addressed by the court of appeal, which found the counsel liable, and are expected to be addressed by the Supreme Court.

**The standard of negligence**

The standard of negligence is fairly high under Swedish law; a substantial breach of the adviser’s duty of care is typically required, although an adviser is also under a fairly strict standard of care regarding the obligation to inform a client of risks associated with matters on which advice is provided. The court of appeal stated in the *Havsbrisen* case that the counsel’s failure to invoke a certain argument was negligent and that this failure indeed resulted in the client losing the case in that part. The negligence issue is expected to be addressed by the Supreme Court.

**The duty of notification**

The duty of notification is the other main issue of the *Havsbrisen* case. As explained above, a claim may be time-barred or precluded under Swedish law if the aggrieved party has failed to provide the professional with a valid notice of its claim in due time (the notice period), unless agreed otherwise. In March 2018, the Supreme Court confirmed in a judgment on

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5 As explained above, a valid notice requires that the aggrieved party make clear to the professional that the services provided were deficient (i.e., not of an acceptable standard) and that the professional is held liable.
transportation law issues that an aggrieved party is under a general obligation to provide notice within a reasonable time, and that failure to do so results in the aggrieved party’s right to claim compensation being lost (a consequence that has previously been subject to some debate). Although the judgment concerned transportation law and not professional negligence, we find it likely that the precedent covers professional liability as well, entailing an obligation to notify, and failure to do so will result in any rights of compensation being precluded. Two questions, however, remain uncertain regarding professional negligence claims: when does the notice period start and how long is it?

The Supreme Court is expected to address these two issues in the *Havsbrisen* case. Based on the court of appeal’s award in that case and the opinions of leading scholars as expressed in legal literature, we believe that the answers would currently be as follows:

\begin{enumerate}
  \item the notice period starts when the aggrieved party has gained, or ought to have gained, knowledge not only of its (likely) financial loss, but also of the fact that the party in breach probably acted with negligence when providing the services. However, certain scholars are of the opinion that the notice period starts when the aggrieved party ought to have realised that the adviser acted with negligence; and
  \item the notice should be made within a reasonable time and the notice period varies according to the specific circumstances at hand but is normally at least six months.
\end{enumerate}

The Supreme Court’s ruling on the above issues is expected during the first half of 2018.

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6 Case No. T 2659-17, 15 March 2018, 'the Flight to Antalya'.
I INTRODUCTION

Legal framework

Article 383 of Federal Law No. 5 of 1985 on the Civil Transactions Law of the United Arab Emirates (the Civil Code) states:

(1) if that which is required of an obligor is . . . the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the contrary. (2) In all cases, the obligor shall remain liable for any fraud or gross negligence on his part.

This Article is the cornerstone for claims for professional negligence in the United Arab Emirates (UAE). Gross negligence is not defined in the Civil Code; however, the wording above indicates that if the conduct is beyond what a reasonable person would exercise, there is argument that it may constitute gross negligence.

Under DIFC Law, tortious liability requires the following elements to be satisfied:

a the party at fault owed the party who suffered loss a duty of care;

b the party at fault breached the duty of care owed; and

c damage arose as a result of the breach of the duty (causation).

Further, the principle of remoteness is determinative in establishing whether the damage was foreseeable. If the damage is considered too remote, the third limb of negligence will not be satisfied.

The above elements (at common law) are not as well settled in the UAE arising from the Civil Code. Rather, the test is dependent upon satisfying whether there was an exercise of care in the performance of the obligations.

Pursuant to Article 124, the personal obligations may arise from either contract, unilateral acts, acts causing harm (torts) and acts conferring a benefit, and the law. Article 196 of the Civil Code states that 'any condition purporting to provide exemption from liability for a harmful act shall be void'. It is considered that this article concerns both

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1 Michael Kortbawi is a partner and Adam Tighe is an associate at BSA Ahmad Bin Hezeem & Associates LLP.
claims for breach of contract and any tortious claims. Despite that, Article 390 indicates that contractual liability can be limited (i.e., in the form of liquidated damages); however, it is not permissible under the law to reduce liability arising from tortious claims.

Given that professional negligence can lead to significant loss and damage, there are a number of insurance providers in the UAE who provide coverage for professional indemnity. The most common forms of professional indemnity policies available in the UAE are industry-specific, such as the following:

- directors’ and officers’ insurance to cover the management of companies;
- errors-and-omissions insurance for brokers, consultants, lawyers, etc.;
- construction professionals’ (such as architects and engineers) insurance;
- accountants’, auditors’ and financial consultants’ insurance; and
- medical malpractice insurance for doctors, specialist or hospitals.

It is also worth noting that it is not uncommon for professional indemnity insurance products in the UAE to exclude coverage for wilful misconduct, fraud or gross negligence. It is in those instances that the companies (and, in certain circumstances, the individual at fault) may be liable for damages. Otherwise, those parties may be liable for any damages that exceed the limit of the policy.

Pursuant to Article 292 of the Civil Code, ‘In all cases, the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that this is a natural result of the harmful act’.

If the harm was caused by a number of different persons, then they shall be liable to the extent of their contribution, pursuant to Article 291 of the Civil Code.

There are a number of defences to professional negligence, including those related to the lapse of time (limitation periods as discussed below) or demonstrating that the party at fault exercised such care as a reasonable person (in the same circumstances) would have exercised. Further, the doctrine of contributory negligence has been raised in a number of UAE cases; however, its application to professional negligence has yet to be tested in the UAE.

ii Limitation and prescription

Given that professional negligence can arise from a breach of contract or through a breach of duty (i.e., in tort), there are two limitation periods that may apply.

The limitation period in respect of professional negligence arising from contract is 15 years according to Article 296 of the Civil Code; and the limitation period arising from a breach of duty is three years pursuant to Article 298 of the Civil Code. The latter would also apply to medical malpractice claims.

iii Dispute fora and resolution

In the UAE, claims for professional negligence are typically commenced in the court of first instance, which has jurisdiction to hear all civil lawsuits. Further, the Dubai International Financial Centre has the jurisdiction to hear professional negligence matters and has been host to a number of high-profile cases thus far.
**Remedies and loss**

Those who have suffered loss arising from someone else’s negligence can apply to the court for compensation by virtue of Article 389 of the Civil Code. That section states that ‘if the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof’.

Further, actions for specific performance are covered by Article 338 of the Civil Code, which states that ‘A right must be satisfied when the legal conditions rendering it due for performance exist, and if an obligor fails to perform an obligation, he shall be compelled to do so either by way of specific performance or by way of compensation in accordance with the provision of the law’.

In respect of medical negligence claims, compensation shall be payable for any harm caused to a person, pursuant to Article 299 of the Civil Code.

**II SPECIFIC PROFESSIONS**

**i Lawyers**

The governing law for lawyers in the UAE at a federal level is Federal Law No. 23 of 1991. Dubai Law No. 32 of 2008 is relevant for Dubai legal practices. The Government of Dubai Legal Affairs Department is the relevant authority, established under Article 3 of the above Law, responsible for regulating the legal industry in Dubai and the Abu Dhabi Judicial Department is the reciprocal authority in Abu Dhabi.

Lawyers who breach their duties as stipulated in Federal Law No. 23 of 1991 may be issued a caution, suspended from practising for a period not exceeding two years or be struck off the roster permanently.

Professional indemnity insurance is a prerequisite for legal practices in Abu Dhabi and Dubai.

**ii Medical practitioners**

Medical malpractice matters previously fell within the scope of the Civil Code; however, since the introduction of Federal Law No. 10 of 2008 and its successor, Federal Law No. 4 of 2016, medical negligence is now covered by Article 3 of the latter instrument, whereby: ‘Any person who practises the profession in the state must perform the duties of his job with the level of accuracy and honesty as required by the profession, in accordance with the recognised scientific and technical standards and in a way that guarantees the due care of the patient’. and Article 14, whereby a medical error is deemed to be committed by the practitioner through his or her: ignorance of the technical issues that every practitioner of the profession of the same degree and specialisation is supposed to be aware of; a failure to follow the recognised professional and medical standards; a failure to act with the necessary due diligence and; negligence and a failure to act carefully and with precaution.

The above Articles indicate that a breach of duty (in a medical context) is determined by the failure to follow prescribed practices or standards and it is not dependent upon the outcome of the medical intervention.

The Medical Liability Supreme Committee (the Committee), comprising 10 members, was established pursuant to Article 18 of Federal Law No. 4 of 2016. The Committee is responsible for determining whether a medical error has occurred, the damage caused and
whether a causal relationship exists between the fault and the damage. The Committee responds to matters presented through the Ministry of Health and Prevention (or local health authorities), the Public Prosecution or the UAE courts.

Pursuant to Chapter IV of Federal Law No. 4 of 2016: ‘the [medical] profession may not be practised in the UAE without an insurance against civil liability for medical errors [by] an insurer licensed in the UAE’.

iii Banking and finance professionals

The UAE Central Bank is the overarching regulatory authority in the UAE, except for the Dubai International Financial Centre, which is governed by the Dubai Financial Services Authority.

iv Computer and information technology professionals
The Telecommunications Regulatory Authority, established pursuant to UAE Federal Law No. 3 of 2003, is the authority responsible for regulating the information technology sector in the UAE.

In carrying out its functions, the Telecommunications Regulatory Authority has the following objective, pursuant to Article 13 of Federal Law No. 3, *inter alia*: ‘ensure that the telecommunications sector provides high quality and efficient services to subscribers’.

v Real property surveyors
Specifically in relation to Dubai, Law No. 6 of 2017 on the Regulation of Land Survey Work was introduced to provide guidance to the surveying industry. Specifically, Article 4 of Law No. 6 states ‘This law aims to achieve the following: 1. Regulating and implementing Land surveys, Water Surveys, and Seismic Surveys in the Emirate (of Dubai), in accordance with the best international practices applied in this regard’.

Pursuant to Article 5 of Law No. 6, the Municipality of Dubai is the ‘competent authority to regulate the survey works in the Emirate (of Dubai) and the official authorised source for providing the data and information resulting therefrom’.

vi Construction professionals
There are a number of insurance policies that need to be considered in the construction industry from a negligence perspective. The obligation to obtain professional indemnity insurance does not arise from statute in the UAE but rather from the provisions of the construction contracts between the parties. There are two major types of negligence-related actions that are considered herein, namely professional indemnity and decennial liability.

The necessity for professional indemnity insurance arises out of the professional aspects of the construction industry, such as drafting and preparing designs for projects. These policies are usually on a ‘claims-made’ basis, whereby the policy in force at the time of the event leading to the claim is the applicable policy, as opposed to the policy in force at the time when the negligent event occurred.

Decennial liability arises out of the operation of Articles 880 to 883 of the Civil Code. In essence, architects and contractors carrying out works may opt to obtain and renew project-specific insurance for a period of 10 years (unless the contract specifies a longer
period) commencing from the time of delivery of the work as they are ‘jointly liable for a period of 10 years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building’. The problem arises in the UAE that this type of coverage is difficult to acquire and is very expensive, particularly when held over a period of more than 10 years.

vii Accountants and auditors

The Accountants and Auditors Association is the national accountancy body in the UAE. That body was established in accordance with Ministerial Decree No. 227 of 1997.

Pursuant to Article 5 of the above Decree, one of the major objectives of the above regulatory body is: ‘To propose the suitable organisation for the field control to ensure the implementation of the accounting and auditing standards by the chartered accountants and auditors so that they observe the rules and regulations of the profession and the prevailing economic laws in the country’.

Pursuant to Article 9 of the above Decree, the duties of the members of the Accountants and Auditors Association are as follows:

1. The member shall endeavour to attain the goals of the association and shall abstain from any acts that harm others or the association or damage its reputation.
2. To follow the statute of the association, its bylaws and the resolutions of the Board of Directors. He shall inform the Board of Directors about any violation committed by others . . .
4. He shall be a good example in his conduct and behaviour.

viii Insurance professionals

The Insurance Authority is the regulatory body responsible for the regulation of insurance professionals in the UAE. That body was established pursuant to Federal Law No. 6 of 2007.

Pursuant to Article 7 of the above Law, the Insurance Authority ‘aims at organising and overseeing the insurance sector in a way that would ensure suitable environment to develop it and enhance the role of the insurance industry to secure lives, properties and liabilities against risks to protect the national economy’. Further, the Insurance Authority shall carry out the following duty: ‘Enhancing performance and efficiency of the insurance companies and binding them to observe the profession’s code and rule of conduct to enhance their capabilities to render the beneficiaries of the insurance the best services and attain constructive competition’.

III YEAR IN REVIEW

The introduction of laws specific to medical negligence have been the most significant development from a professional negligence perspective over the past 18 months in the UAE. Pursuant to Article 3 of Federal Law No. 4 of 2016 doctors may now be liable for medical negligence if they do not ‘perform the duties of [their] job with the level of accuracy and honesty as required by the profession, in accordance with the recognised scientific and technical standards and in a way that guarantees the due care of the patient’.

The standard of care required by doctors is now defined by Article 14 of the above Federal Law, whereby a medical error is deemed to be committed by the practitioner through his or her: ignorance of the technical issues that every practitioner of the profession of the
same degree and specialisation is supposed to be aware of; failure to follow the recognised professional and medical standards; failure to act with the necessary due diligence; and negligence and failure to act carefully and with precaution.

IV OUTLOOK AND FUTURE DEVELOPMENTS

It will be interesting to see if the above laws relating to medical negligence will open the floodgates for other professions. One would assume that lawyers would be next in line to be bound by specific negligence provisions; however, for the moment it is only doctors in the UAE that are under the spotlight. Actions brought against professionals (other than those within the medical profession) remain governed by the Civil Code for the time being.
Appendix 1

ABOUT THE AUTHORS

MARTIN ALEXANDER
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Dr Martin Alexander, LLM is a specialised insurance lawyer and lecturer for product and general commercial liability insurance at the University of Münster as well as for international insurance law at the University of Applied Sciences in Cologne.

He completed his education in Germany, the United States and Scotland.

He was admitted to the Bar and has been a lawyer with BLD in Cologne since 2006. He was promoted to partner at BLD in 2009 and he co-heads the firm’s product liability team.

Martin has specialised in contentious and non-contentious liability and coverage claims in product, environmental, industrial and commercial disputes (especially in relation to plant engineering and construction, and the automotive industry) in national and international matters and works on all kinds of professional liability matters. Martin has vast experience in arbitration as well as in aviation.

He is frequently recommended by German publication JUVE for product liability law and by Chambers for insurance law.

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Nick Bird is a leading insurance and professional negligence lawyer at RPC. He acts for a number of the leading legal, accountancy and architecture practices and is top-ranked in the leading lawyer directories.

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Marcia Cicarelli obtained her LLB from the University of São Paulo (USP) school of law in 1996; her postgraduate degree in insurance and reinsurance from the Getúlio Vargas Fondation (FGV/SP) in 2002; and her LLM in civil law from the University of São Paulo (USP) in 2011. She is highly recommended in Chambers 2018, The Legal 500 2017, Análise Advocacia 500 and Who’s Who Legal.

Marcia is the senior partner in the insurance practice at Demarest. She is in charge of high-complexity cases in all fields of insurance and provides consulting services in contracts, operations, regulatory issues, product development and claims adjusting; in addition, she is an active lawyer in arbitration courts and chambers.
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Nair Maurício Cordas is an associate in the litigation area of _Uría Menéndez – Proença de Carvalho_’s Lisbon office. Nair joined the firm in 2012 and worked in several areas, namely the commercial area and the labour department. In September 2014, Nair joined the litigation department as a junior associate and became a senior associate in September 2017. She works mainly in civil, commercial and criminal litigation, insolvency and arbitration.

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Johannes Ericson is a partner in Hamilton’s dispute resolution practice. He is specialised in domestic and international arbitration as well as commercial litigation. Johannes has extensive experience in dispute resolution and represents Swedish and international companies in their most challenging disputes relating to, among other things, supply agreements, share and asset purchases, professional liability and product liability. He advises clients in a wide range of industries, such as audit, securities and finance, insurance and construction. Johannes is ranked as a leading lawyer within dispute resolution by _Chambers and Partners_ and is recommended by _The Legal 500_.

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Alejandro Ferreres Comella is a partner at _Uría Menéndez_ and the head of the litigation and arbitration practice areas of the Barcelona offices of the firm.

He is a practising litigator in the jurisdictions of Madrid and Barcelona, among others, and concentrates his practice in the areas of contractual liability and tort. In particular, he has taken part in the defence of car manufacturers, pharmaceutical companies, tobacco companies and the chemical industry in some of the most important product liability cases in Spain, including several collective claims.

He is considered a leading lawyer by the noted international legal directories _Chambers and Partners_ and _Who’s Who Legal_, among others.

OMAR GUERRERO RODRÍGUEZ
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Based in Mexico City, Omar Guerrero Rodríguez co-heads the arbitration and litigation practice and the antitrust practice for the Hogan Lovells Mexico offices. Omar knows the importance of being a team player and providing bold solutions for clients, as well as the merits of being a fierce competitor. Omar joined Hogan Lovells (formerly Barrera, Siqueiros y Torres Landa) in 1993, immediately after graduating top of his class and _summa cum laude_. He became partner in 2000. He holds three postgraduate degrees, including an LLM from LSE (with merit). Since joining the firm, Omar has advised companies in the pharmaceuticals, hospitality, telecoms, food, construction, IT and agrobusiness industries to advance their business objectives, in relation to both disputes and antitrust matters. Omar is a passionate litigator. His persuasive oratory and advocacy has convinced domestic and international arbitral tribunals, judges throughout Mexico and even justices at the Supreme Court to rule
in his client’s favour. He has also acted as arbitrator in domestic and international disputes, where he has garnered experience of decision-making while sitting on the other side of the table – deciding the types of cases in which he is retained as counsel.

Omar has also developed a significant practice in administrative litigation, including discrimination cases; antitrust is his other passion. He helps companies in mergers, cartel investigations and other antitrust-related proceedings. He embraces a hands-on approach when tackling cases and he advises, trains, teaches and lives antitrust law. Omar tries cases before competition authorities and federal courts, including the Supreme Court. He is equally at home in academia and has written more than 40 thought-leadership pieces on competition, litigation and arbitration, and he speaks on these topics regularly. These experiences instil in Omar a commitment to providing valuable solutions for his clients.

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Carsten Hösker, LLM is a specialised insurance lawyer and lecturer on product liability insurance at the University of Münster, as well as on international insurance law at the University of Applied Sciences in Cologne.

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He was admitted to the Bar and has been a lawyer with BLD in Cologne since 2013; he was promoted to partner at BLD in 2018.

Carsten has specialised in contentious and non-contentious liability and coverage claims regarding product liability and safety, and product recalls (especially in relation to plant engineering and construction, and the automotive industry) in national and international matters, and he frequently advises foreign insurers on drafting matters and works on all kinds of professional liability issues.

He was recently recommended by *The Legal 500* for insurance law.

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Michael Kortbawi is a partner in BSA’s corporate practice with a strong focus on insurance, based in Dubai, UAE. Michael has gained hands-on experience in the Middle East and North Africa region having practised in the UAE for over 11 years and supervised the organic growth of BSA into the six countries in which it now operates.

Michael’s specific areas of experience include directors’ and officers’ duties under UAE and DIFC laws, the setting up of insurance and reinsurance companies in the GCC, business acquisitions in the energy sector, joint ventures in various industries and deregistration of commercial agencies, and corporate and regulatory advice in relation to cross-border business transactions, real estate, insurance and mergers and acquisitions across the Middle East.
About the Authors

ELISA LEGORRETA PASTOR  
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Elisa Legorreta is a passionate lawyer with substantial experience in domestic and international dispute resolution, including litigation and arbitration. She is also active in human rights matters.

Elisa is a litigator in different sectors involving complex commercial litigation, including in relation to insurance, product liability, construction, technologies, oil and gas and other matters.

Elisa’s arbitration practice comprises arbitration proceedings under the rules of the International Chamber of Commerce (ICC) and the Arbitration Center of Mexico (CAM). Her experience also includes the annulment, recognition and enforcement of domestic and international arbitration awards before national courts.

Since the beginning of her professional career, Elisa has also been engaged in human rights matters, involving both local and international law. While pursuing her LLM degree, Elisa was a member of a human rights clinic, serving as special rapporteur for a project on international due diligence obligations regarding people trafficking, which was presented before the UN in Geneva, Switzerland.

Elisa began her professional career in two boutique Mexican law firms. She joined Barrera, Siqueiros y Torres Landa – now Hogan Lovells – in 2011.

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Eduardo Lobatón Guzmán joined Hogan Lovells in March 2017 and is currently an associate in the commercial arbitration and litigation practice. He is also involved in antitrust litigation. Eduardo obtained his law degree from the Monterrey Institute of Technology and Higher Education (ITESM), graduating top of his class and with the highest honours. He also studied diverse aspects of international law in London and obtained his certificate in transnational law from Georgetown Law at the Center of Transnational Legal Studies London.

Eduardo has been involved in litigation and arbitrations in various sectors, including insurance, food and construction.

Eduardo’s academic background includes the captaincy of his university’s international arbitration team for two consecutive years and obtaining an honourable mention for his performance in the competition.

Finally, Eduardo’s practice also extends to academia. He is a professor of civil law at his alma mater, he served as head coach for the Georgetown Center of Transnational Legal Studies’ team in the most prestigious international arbitration competition and he currently serves as the head coach for his university’s team for the same competition. In the past, he also served as head coach for his university’s team in the domestic arbitration competition, in which it obtained first place.

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April advises insurance companies on policy-wording interpretation, complex coverage disputes (in particular relating to financial lines policies), D&O claims, cyber, professional indemnity claims, including any potential third-party liability, and subrogation claims. April manages professional indemnity claims for various professionals, including insurance brokers, architects, engineers and other construction professionals, for a variety of insurers.

April also works in the area of general commercial litigation with a particular focus on contractual disputes, most of which are litigated in the Commercial Court. She is also a strong advocate of ADR and has acted for clients in mediation and arbitration.

April is a member of the Law Society of Ireland, the Insurance Institute of Ireland and the British Insurance Law Association. She has contributed to various industry publications and has participated in seminars as a speaker on insurance issues.

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Laura Pelegrini obtained her LLB from the Faculty of Law of São Bernardo do Campo (FDSBC) in 2009; her specialisation in contract law from the Paulista School of Law (EPD) in 2011; and her postgraduate degree in consumer rights from the Pontifical Catholic University of São Paulo (PUC/SP) in 2016, where she is also studying for her LLM. Laura currently renders legal advisory services, especially to life insurance-related companies, on matters regarding civil liability, financial lines and transport insurance fields. She is a recommended lawyer in *The Legal 500 2017*.

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Camila Affonso Prado obtained her LLB from the Armando Alvares Penteado Foundation (FAAP) law school in 2006; her postgraduate degree in civil law from the Mackenzie Presbyterian University in 2009; and her LLM in civil law, in 2012, and her LLD in civil law, in 2016, both from the University of São Paulo (USP). Her practice is focused on claims
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Camila Affonso Prado was recommended as a ‘next generation lawyer’ in The Legal 500 2017.

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Jacob Skude Rasmussen is a partner at the Copenhagen office of Gorrissen Federspiel. He specialises in dispute resolution and appears regularly before Danish courts, as well as in national and international arbitrations. He completed a Master of Laws (LLM) at the University of Lund in 2004, and the following year he graduated with a master’s degree in law from the University of Copenhagen. He was admitted to the Danish Bar in 2009 and obtained the right of audience before the Supreme Court of Denmark in 2017.

For several years he has been assistant professor in international and European commercial law at the University of Copenhagen. He is a member of the Danish branch of the Comité Maritime International and the International Law Association, as well as a member of the Danish Arbitration Association. He is also a member of the advisory board of the Danish Institute of Arbitration on Maritime Disputes.

Jacob has acted as counsel (advocate) in national as well as international arbitrations (institutional and ad hoc) and large-scale domestic litigation. His recent work as counsel includes disputes in relation to oil and gas, shipping and professional liability (inter alia, liability following the bankruptcy of one of Denmark’s then largest banks).

LAURA RESTREPO MADRID

Tamayo Jaramillo & Asociados

Laura Restrepo Madrid is a lawyer and partner at Tamayo Jaramillo & Asociados. A graduate of the Pontifical Bolivarian University (UPB), she also has graduate degrees in liability and insurance law from EAFIT University (degree work: ‘Physiological Damage in Colombian Law’) and insurance law from the Pontifical Xavierian University; she also holds a master’s degree in economics and law from the University of Manchester, England (thesis: ‘Economic Analysis of Civil Liability in Latin America’).

CARL ROTHER-SCHIRREN

Hamilton Advokatbyrå

Carl Rother-Schirren is a senior associate in Hamilton’s dispute resolution practice. He is specialised in arbitration as well as commercial litigation and is particularly experienced in disputes relating to professional negligence, M&A transactions, supply agreements and insolvency matters.
REBECCA RYAN
Matheson

Rebecca Ryan is a partner in the healthcare group in the commercial litigation and dispute resolution department at Matheson. She has over 18 years’ litigation experience in Ireland and the United Kingdom in clinical malpractice, professional negligence, product liability, diseases litigation and personal injury.

Rebecca is a leading healthcare lawyer and advises clinical practitioners and the Medical Protection Society on the defence of high-value and complex medical malpractice claims in the superior courts. Rebecca also appears before the Medical Council regarding regulatory proceedings, at inquests and other tribunals of inquiry held by bodies such as the Health Service Executive and the Health Information and Quality Authority. Rebecca provides general healthcare advice to healthcare professionals. Rebecca is an accomplished advocate with a keen interest in mediation and alternative dispute resolution. She advised on one of the first clinical negligence mediations to take place in Ireland.

Prior to joining Matheson in 2008, Rebecca qualified as a solicitor with UK law firm Russell Jones and Walker, practising in all areas of personal injury and disease litigation. During her time with RJW, Rebecca was involved in the pilot scheme for the pre-action protocol prior to its launch in 1999. She proactively pursues the opportunity to utilise her experience in developing a training programme for law firms in Ireland on the launch of the long-awaited Irish pre-action protocol. Rebecca was invited by Ms Justice Mary Irvine to make recommendations to the Working Group on Medical Negligence Litigation and the upcoming reforms based on her UK experience of CPR.

Rebecca lectures to the industry and the Law Society of Ireland on healthcare-related topics and is a regular contributor to leading healthcare journals.

Rebecca is a member of the Medico-Legal Society of Ireland and is also on the board of the Rotunda Hospital.

ADRIANO SQUILACCE
Uriá Menéndez-Proença de Carvalho

Adriano Squilacce has been a litigation lawyer at Uriá Menéndez-Proença de Carvalho's Lisbon office since 2006. He focuses his practice on civil, commercial and corporate litigation, arbitration, white collar crime and administrative offences dealing with financial regulation. Over the past few years he has represented clients in complex matters and disputes related to white collar crime (both judicial proceedings and corporate compliance) and administrative infringement proceedings on banking, finance and securities issues. Adriano has ample experience in disputes related to financial products, securities, prospectus liability and liability of directors and auditors, as well as fraudulent insolvencies. He obtained his law degree from the University of Coimbra (2006). Adriano Squilacce is recommended for dispute resolution in Portugal by Chambers Europe (2016–2018) and The Legal 500 2017, and by Best Lawyers in Portugal (2016–2018 editions).
ADAM TIGHE
BSA Ahmad Bin Hezeem & Associates LLP
Adam Tighe is an associate in BSA's corporate and insurance practices, based in Dubai, UAE.
Adam specialised in personal injury (claimant) and insurance litigation for two years post qualification in Australia before relocating to London. Adam worked in the UK Government Legal Department and a private firm in London, where he was on the litigation team and had exposure to various insurance disputes. His areas of expertise are product liability, public liability, property damage, general insurance, personal injury and recovery claims.

SERENA TRIBOLDI
PMT Studio Legale
Serena Triboldi is a partner at PMT Studio Legale and has extensive experience representing both international and Italian clients in the commercial and corporate, insurance, banking and finance sectors. She also has significant experience in energy and environmental matters, as well as in dealing with questions of private and procedural international law and international contracts.

She is the author of the chapter on the Italian jurisdiction published in Directors' Liability and Indemnification: A Global Guide (Edward Smerdon, ed., 2016), and has participated as a speaker on the subject at various international meetings. She also organises and teaches courses on legal English for Italian lawyers.

Before co-founding PMT Studio Legale, she worked at several international Italian firms, including Pavia e Ansaldo and Studio Legale Cieri Crocenzi in Rome and Milan, and collaborated as stagiaire at the law firms Hughes Hubbard & Reed, in Paris, and R Castilla, in Barcelona.

Ms Triboldi obtained a law degree from the Catholic University of the Sacred Heart in Milan in 1999, specialising in international law. She also has a number of postgraduate qualifications, culminating in a LLM degree in international business and trade law in 2005 from Fordham University School of Law, New York. She has been a member of the Rome Bar since 2002. She speaks fluent English, Spanish and French.

JORGE VALDÉS KING
Hogan Lovells
Jorge Valdés King has a keen eye for assessing risks in legal strategies and for keeping surprises to a minimum. He ensures that he knows the ins and outs of a case and handles all dispute matters with perseverance and passion – Jorge leaves no stone unturned.

Having been involved in the area of dispute resolution since the beginning of his career, Jorge has developed robust trial experience, which allows him to remain calm and creative even in the most pressing circumstances.

As well as working on the annulment, recognition and enforcement of domestic and international arbitration awards and foreign judgments, Jorge has represented both creditors and debtors in complex reorganisation and bankruptcy proceedings. He has briefed and argued before federal courts and the Supreme Court, setting precedents on the unconstitutionality of legal provisions.
From a commercial litigation perspective, Jorge has a background in cases dealing with contractual disputes, torts, shareholder controversies, moral damage claims, real estate issues and all kinds of collections.

Jorge’s dispute resolution skills have helped clients in many sectors, including the automotive, banking, construction, entertainment, gambling, insurance, media, mining, transport and IT industries. As part of his diverse practice, Jorge assists clients in both English and Spanish.

Before joining Hogan Lovells (formerly Barrera, Siqueiros y Torres Landa), Jorge clerked at the legal clinic of the school of law of the Panamerican University. He graduated with honours from law school and was elected president of the student board. Jorge holds two postgraduate degrees, including an LLM from Harvard Law School.
Appendix 2

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