(only the Italian version is authentic)

SERVIZIO TUTELA DEL CONSUMATORE
DIVISIONE PRODOTTI E PRATICHE DI VENDITA

Rifer. a nota n. *del*

Classificazione III 2 1

All.ti n .

To insurance Undertakings
with head office in Italy
TO THEIR PREMISES

To insurance Undertakings
with head office in an EEA country licensed to pursue business by way of establishment or of free provision of services
TO THEIR PREMISES

To the branches in Italy
of the insurance undertakings
with head office in a third country with respect to the European Economic Area
TO THEIR PREMISES

Copy to

ANIA
National Association
of Insurance Undertakings
Via di San Nicola da Tolentino 72
00187 Rome (RM)

RE: Insurance contracts for cases of insolvency or bankruptcy of tour operators

1. Article 9 of Law no. 115 of 29 July 2015 (so-called European Law 2014), amending art. 50 of the Tourism Code, has – since 30 June 2016 – introduced the obligation, for tour organisers and retailers of travel packages (hereafter also called “tourism sector operators”), to obtain suitable banking or insurance guarantee to provide, even in cases of insolvency or bankruptcy, for the reimbursement of the price paid by the traveller-customer for the purchase of the tourist package and his immediate return.

With reference to the fulfilment of this obligation through the insurance cover, the need to protect the insured traveller takes on primary importance, on the basis of a functional interpretation of the above-mentioned art. 50, in line with the letter and the spirit

of Directive no. 90/314/EEC[1] implemented in the Tourism Code and the provisions of art. 183, paragraph 1, letters a) and d) of the Code of Private Insurance.

This insured traveller is, in fact, the only beneficiary of the guarantee, although the contractual conditions for the operation of the same are negotiated by third parties (organisers and retailers of travel packages/insurance agencies and undertakings) in the context of collective insurance policies on behalf of other persons.

Moreover, in the case of default of the tour operator, the need for protection is even greater if we consider that the protection of the insured traveller is totally entrusted to contractual and private law instruments, given that art. 9 of Law no. 115 of 29 July 2015 has eliminated any mechanism of public guarantee.

In these cases, the observance by the undertakings of the principles of diligence, fairness and transparency established by art. 183, paragraph 1, letters a) and d) of the Code of Private Insurance, become crucial factors, since these principles are expressly established and mandatory not only for the benefit of policyholders, but also of insured parties.

Given the above, in the performance of its duty to examine the complaints filed pursuant to art. 7 of the Code of Private Insurance, IVASS has examined the policy conditions proposed by two undertakings to allow the sector operators to comply with the insurance obligation referred to in paragraph 2 of article 50 of the Tourism Code.

[1] See art. 7 of Directive no. 90/314/EEC, interpreted on the basis of the CJEU case law, that has: ***a)*** identified the function of the EU regulation in the attribution to consumers of the right – to be guaranteed in the single countries in a practical and effective way - to be protected from the financial risks arising from the insolvency and bankruptcy of the organisers and retailers of tourist packages; ***b)*** qualify the regulation as directly attributing to the consumer the right to actually receive the reimbursement of the price paid and the costs of repatriation in the case of insolvency or bankruptcy of the organiser and retailer of the tourist package; ***c)*** recommend the interpretation of this provision in the sense most favourable to the consumer; ***d)*** consider national regulations and practices aimed at introducing conditions affecting the effectiveness and the scope of the guarantee of the consumer to be contrary to art. 7 (see CJEU, 8 October 1996, joined cases C-178/94, C-179/94, C-188/94, C-189/94 C-190/94; CJEU 14 May 1998, case C-364/96; CJEU 15 June 1997, case C-140/97). To this is added: ***1)*** the wording of art. 17 of the new directive on this subject (Directive 2015/2302/EU) that, although not yet implemented, emphasises the favour for the consumer already inherent in art. 7 of Directive no. 90/314/EEC, governing the subject and scope of the guarantee and requiring, significantly, that it is effective and pays the customer the reasonably sustainable costs; ***2)*** the values of the principles of collaboration and useful effect, of European matrix, that also oblige national institutions to avoid interpretations and practices of internal law that may affect the effects and the rationale of EU discipline and promote the general objectives of the Union legislation.

On this occasion, IVASS has identified several critical aspects that have led to the opinion that the contractual schemes used are unsuitable, in concrete terms, to provide full and effective protection to the insured traveller and, consequently, to allow the efficient fulfilment of the insurance obligation provided for in article 50, paragraph 2 of the Tourism Code. In relation to these critical aspects, interventions of a prescriptive nature have been taken with respect to the concerned undertakings, aimed at achieving the modification of the contractual conditions in order to ensure the effectiveness of the guarantee obligation towards the insured traveller.

Considering the sensitivity of the issues that have emerged and the relevance of the interests involved and taking into account the "*main purpose*" of insurance supervision[2], IVASS - pursuant to art. 5, paragraphs 2 last phrase[3] and 3[4] of the Code of Private Insurance - recognises the need to call the attention of the entire market to some general issues highlighted, in order to contribute to creating the proper conditions to ensure that the insurance guarantees available to tourism sector operators have features allowing the effective fulfilment of the insurance obligation in question, which consists in providing full, general and effective protection of the insured travellers.

2. It is considered that contract terms are not in compliance with the previously illustrated regulation when they render the content and purpose of the insurance guarantee meaningless. They cannot in fact be in opposition to the rights of the insured traveller if fulfilment of such contract terms relates to the relationship between the insurance undertaking and the policyholder (tour operators and travel agencies), **even following the purchase of the guarantee**. Events such as, for example, the non payment, even partial, of premiums, the omission/incompleteness of communications having a bearing on the determination of the risk and maximum amounts, are, in fact, completely extraneous and unknown to travellers themselves, the only bearers of the

[2] That, as specified by art. 3, paragraph 1 of the CAP, consists in ensuring *"adequate protection of the policyholder and those having right to insurance benefits"* through the pursuit, among other things, of *"... transparency and fairness"* of the behaviour of the supervised subjects *"towards the customers"*.
[3] According to this provision, IVASS *"discloses every useful recommendation or interpretation"* necessary, among other things *"for the transparency and fairness in the behaviour of supervised entities"*.
[4] Pursuant to this regulation, "*IVASS performs the activities necessary to promote an appropriate level of consumer protection..."*.

insured risk, as well as holders of a reasonable and qualified reliance on the effectiveness of the guarantee, purchased at the time of the reservation of the tourist package.

Specifically, in similar hypotheses, the problems connected with the compliance with art. 50 of the Tourism Code, as well as with the principles of art. 183, paragraph 1, letters a) and d) of the Code of Private Insurance arise not so much from the abstract use of legal schemes, in themselves legitimate, by their nature necessarily neutral, but from their effect of rendering the content and the function of the guarantee ineffective or greatly limited, thus ensuring no protection of the financial position of the insured traveller against the risks of insolvency and bankruptcy of the travel agency and tour operator.

In our view, the obligations of transparency towards the insured party, which according to art. 183, paragraph 1, letter a) of the Code of Private Insurance lie with the undertakings and intermediaries, may not be considered fulfilled where contractual provisions simply shift to the policyholder the obligation to inform the insured, third party beneficiary that the guarantee may become ineffective following the occurrence of not better specified and not reasonably known or verifiable events concerning a contractual relationship to which the insured is extraneous.

3. As regards cases where insurance intermediaries are also involved in the distribution of the policies, particular attention should be paid by the undertakings to ensure full transparency in their relationship to the insured traveller, and to keep separate the roles of policyholder and insurance intermediary. These roles cannot coincide, since this would potentially create a conflict of interest contrary to the principles of transparency and fairness set forth in art. 183, paragraph 1, letters a) and d) of the Code of Private Insurance, and with the provision referred to in letter c) of the same article[5].

Specifically, in the cases of distribution of the policies in question by insurance intermediaries, attention is called to the need to guarantee that the obligation to deliver pre-contractual and contractual documentation are fulfilled with regard to the insured travellers, according to the clear and unconditional obligation provided for in art. 56 of

[5] The undertakings are required to make arrangements so as to identify and prevent conflicts of interest and, in case of conflict, make policyholders aware of the possible adverse effects, and anyhow manage conflicts of interest so as to exclude any detrimental consequences for policyholders;

ISVAP Regulation no. 5/2006, whose binding nature is confirmed in this case, having regard to the fact that this is a collective policy *"in which the insured party maintain, in full or in part, the economic burden connected with premium payment [..].*" and *"are directly [...] vested with an interest in benefits"*.

4. Other critical elements have emerged in relation to contractual clauses that simply establish the reimbursement of the services not enjoyed only in the case the insolvency of the agency or tour operator occurs before the departure date, without also providing for the reimbursement for any services already paid and no longer usable, due to the insolvency/bankruptcy of the policyholder, occurring once the trip has begun.

On this point, the undertakings are invited to review the contractual provisions so as to ensure a full and complete guarantee in favour of the insured traveller against the insolvency risk of the tourism sector operators. This guarantee may not in fact contain limitations in relation to the irrelevant extrinsic circumstances of whether or not the voyage has begun at the moment of the occurrence of the claim.

5. Finally, the attention of the undertakings is drawn to the need to avoid clauses that, establishing inadequate maximum amounts of cover and/or unjustifiably heavy burdens on the client, have the effect of excessively limiting the scope of the insurance cover: these are contractual provisions that, in addition to jeopardising the effectiveness of the guarantee of the traveller, could also leave itself open to allegations of being unfair towards the same pursuant to articles 33 and the following of the Consumer Code, when one considers that the traveller is also the consumer, substantial part in the negotiation.

6. To sum up, it is held that the insurance obligation introduced by art. 50, paragraph 2 of the Tourism Code may be effectively fulfilled only through contractual conditions suitable to creating a full, effective and prompt protection of the financial situation of the consumer/insured for cases of insolvency and bankruptcy of the tourism sector operators.

Therefore, it is recommended that the undertakings which intend to offer their insurance covers to said operators, make a critical review of the contractual conditions currently in use, revising contents and form on the basis of the previous observations, in order to put the tourism sector operators in the proper conditions to fulfil the insurance

obligation provided for by article 50, paragraph 2 of the Tourism Code, taking into account the domestic and European rationale underlying the regulation.

Best regards.

By delegation of the
Joint Directorate