

A COMPARATIVE STUDY IN MEDICAL MALPRACTICE LIABILITY INSURANCE

Dr. Nguyen Thi Bao Anh¹, Can Tho University, Vietnam

Email: ntbanh@ctu.edu.vn

MSC. Nguyen Thu Huong, Can Tho University, Vietnam

Email: thuhuong@ctu.edu.vn

ABSTRACT

When offering healthcare services, healthcare professionals might make mistakes that lead to damage or injury to their patients. In an increasingly litigious world, medical professionals have to take out medical malpractice liability insurance to protect themselves from the possibility of ruinous medical malpractice lawsuits. In some countries, professional liability insurance is mandatory. Medical malpractice liability insurance is a system that indemnifies third parties who might incur damage or losses while receiving medical treatment. This article tries to determine: (i) Do France, Belgium, and Vietnam have medical malpractice liability insurance? (ii) Do France, Belgium, and Vietnam have a legal framework governing medical malpractice liability insurance? (iii) what are some legal/ regulatory challenges affecting medical malpractice liability insurance in Vietnam, France, and Belgium? (iv) What are the insurance principles applied in medical malpractice insurance policies in Vietnam, Belgium, and France?

Keywords: *Liability Insurance, Medical Malpractice Liability Insurance, Vietnam, France, Belgium*

1. INTRODUCTION

“If your business provides health-related services, such as nursing, nutrition, dietary advice, physical therapy, or renting and selling medical equipment, you’ll most likely need medical malpractice insurance. It can help pay for your legal defense if you are sued for injury or death claims. Medical malpractice insurance is a specialized form of business insurance for healthcare professionals. It’s also called “medical professional errors and omissions insurance.” Medical malpractice insurance covers claims of services that result in a patient’s injury or death.”² “Medical malpractice is defined as any act or omission by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community and causes an injury to the patient.”³ Moreover, medical malpractice liability insurance is “a specialized type of professional liability insurance; medical malpractice insurance provides coverage to physicians and other medical professionals for liability arising from disputed services that result in a patient’s injury or death.”⁴ Daily human life involves exposure to risks. The uncertainty of these risks pushes us to take measures to mitigate the impact of calamities when they happen. The unpredictability of calamities may involve the following: “whether or not the calamity will occur; if it is certain that it will occur, when it may occur; or the extent of the calamity should

¹ Main author

² Jackie Lam, 'What is Medical malpractice Insurance?' (Forbes Advisor 25 October 2022) <<https://www.forbes.com/advisor/business-insurance/medical-malpractice-insurance/>> accessed 25 December 2022

³ Bal, B Sonny, ‘An introduction to medical malpractice in the United States.’ 2009 (467)2 Clinical orthopaedics and related research : 339-47. < doi:10.1007/s11999-008-0636-2> accessed 18 December 2022

⁴ Insurance Information institute, ‘Understanding Medical malpractice insurance.’ (n.d) <www.iii.org/article/understanding-medical-malpractice-insurance> accessed 20 December 2022

it occur.”⁵ Investopedia defines insurance as “... a contract, represented by a policy, in which a policyholder receives financial protection or reimbursement against losses from an insurance company. The company pools clients’ risks to make payments more affordable for the insured.”⁶ Insurance is based on a system of transferring risk whereby the party who would have borne the insured risk transfers it to a separate entity (insurance company). Insurance companies charge a price known as premiums to bear the risk that another party would have been born.

All persons involved in a risky line of work desire financial stability. To protect themselves from potential financial ruin, practitioners in risky fields take out professional liability insurance (PLI).⁷ Medical malpractice is always a glaring possibility in the medical profession and could ruin a medical practitioner or institution. Many medical practitioners have used professional liability insurance to cushion themselves from the risk of a ruinous medical malpractice ruling. Professional liability insurance is aimed at cushioning medical practitioners and medical institutions against the risks that might arise from a medical malpractice lawsuit.⁸ “Insurance is, therefore, a means of reducing uncertainty. Buying an insurance policy for a smaller, known premium removes the possibility of a larger loss. By pooling premiums and insured events between groups of policyholders and over time, the financial impact of an event that could be disastrous for one policyholder is spread among a wider group.”⁹

The two major types of insurance are first-party insurance and third-party insurance. The policyholder takes out first-party insurance to protect themselves or their property. On the other hand, third-party insurance deals with losses suffered by a party other than the policyholder. “Many insurance policies will cover third parties. For instance, an auto insurance policy’s bodily injury and property damage coverage will cover harm caused to another driver or damage to another’s property. With first-party insurance, on the other hand, the policyholder is the named insured, meaning that the person purchasing the policy is also the one covered under it. If the insured suffers a loss, they file a claim against their insurer to acquire the compensation they are owed under their policy.”¹⁰

Professional liability insurance has provided a way for professionals in risky lines of work to protect themselves and the recipients of their services.¹¹ Medical malpractice lawsuits can be very costly for a medical practitioner or an institution offering medical services. As such, professional liability insurance is the primary vehicle for dealing with costs arising from medical malpractice lawsuits. It is normal for medical practitioners (in cognizance of the threat posed by an unfavourable medical malpractice ruling) to take out professional liability insurance. Professional liability insurance is a product offered by insurance companies to cushion medical practitioners, hospitals, and other personnel within the health sector from the legal and financial risks that might arise from a medical malpractice lawsuit.¹²

Unlike in the past, more people are now aware that they can sue medical service providers for

⁵ Van De Merwe, S., ‘The Concept of Insurance and the Insurance Contract.’ 1970 CILSA: p.1

⁶ Julia Kagan, ‘Insurance: Definition, How it Works, and Main Types of policies.’ (Investopedia, 18 July 2022) <<https://www.investopedia.com/terms/i/insurance.asp> > accessed 20 December 2022

⁷ Kourmatzis, D., ‘Professional Liability Insurance Coverage and Civil Law Juridictions,’ 2009 Revija za pravo osiguranja. p. 41

⁸ American Academy Pediatrics < <https://www.aap.org/> >

⁹ Insurance Europe, ‘How insurance works.’ 2022 < www.insuranceeurope.eu > accessed 20 December 2022

¹⁰ Insuranceopedia, ‘First party insurance’ (n.d) <<https://www.insuranceopedia.com/definition/5399/first-party-insurance>> accessed 20 December 2022

¹¹ Supra note 5

¹² Fontaine, M., ‘Droit des assurances (Insurance Law),’ 2016 Larcier: p. 518.

medical malpractice, which has negatively affected the professional doctor-patient relationship.¹³ The reality of this situation has forced medical practitioners to take out medical malpractice liability insurance. A Doctor who practices without medical malpractice liability insurance endangers his personal property whenever he attends to a patient.

In some countries, there is a specific statutory definition of insurance. Belgium¹⁴ and France have defined it in their civil code¹⁵. The same is evident in Vietnam, defined in the Vietnam law on insurance.¹⁶ The Belgian Insurance Act of 4th April 2014 (Insurance Act 2014) defines the insurance contract as “subject to the payment of a fixed or variable premium. A party (the insurer) undertakes another party (the policyholder) to provide a service stipulated in a contract if an uncertain event in which the insured or the beneficiary has an interest in and not being realised.”¹⁷ Unlike Belgium, France does not have a specific legal definition of insurance contracts. However, the French civil code (Article 1964) stipulates that insurance contracts fall under “aleatory contracts.” In France, an insurance contract is defined as a contract whereby the policyholder pays ‘premiums’ to an insurer who, in turn, covers a specific risk that the policyholder would have otherwise borne.¹⁸ In the case of Vietnam, an insurance contract is defined in both the Civil Code¹⁹ and the law on Business Insurance. The Law on Business stipulates that “an insurance contract means an agreement between a purchaser of insurance and an insurance enterprise, pursuant to which the purchaser of insurance must pay a premium and the insurance enterprise must pay a sum insured to the beneficiary or indemnify the insured person on the occurrence of the insured event.”²⁰ In Vietnam, France, and Belgium, the critical elements for a valid insurance contract are the insured party, the insurance company, the insured event, and the insurable interest. However, it is noteworthy that, unlike French and Belgian law, the law of Vietnam does not explicitly state whether the insured event is uncertain.

2. Methodology

This article is based on the library research data collection method. Library research is done by “collecting many references from many research results to evolve new theoretical framework in the social value, cultural, norm and education fields. The data were in the research paper, journal, book, and so forth, which related to the study without any research participants or respondents.”²¹

3. Medical Malpractice Liability Insurance in Vietnam, France, and Belgium.

3.1 Liability insurance

“Liability insurance is an insurance product that protects against claims resulting from injuries and damage to other people or property. Liability insurance policies cover any legal costs and

¹³ Goold, D. and Lipkin, M., ‘The Doctor-Patient Relationship,’ 1999 JGIM: p. 26

¹⁴ Article 5(14) - Belgian Insurance Act 2014; De Ridder, C., *Essentiële bestanddelen van de verzekeringsovereenkomst* (Essential Components of the Insurance Agreement) in Vansweevelt, T. and Weyts, B. (eds.), *Handboek Verzekeringsrecht* (Insurance Law Handbook), 2016 Intersentia, p. 253

¹⁵ French Civil Code

¹⁶ Vietnamese Law on insurance contract, No. 24-2000 – QH10

¹⁷ Article 5(14) - Belgian Insurance Act 2014; for an extended description: Vansweevelt, T. and Weyts, B. (eds.), *Handboek Verzekeringsrecht* (Insurance Law Handbook), 2016, Intersentia, p.253 and following

¹⁸ Lambert-Faivre, Y. and Leveneur, L., ‘*Droit des assurances* (Insurance Law),’ 2011 Dalloz, p. 484-485; <https://uk.practicallaw.thomsonreuters.com/>

¹⁹ Civil Code No. 91/2015/QH13 (was adopted in 2015 and came in to force January 1st 2017).

²⁰ Article 12.1. Insurance contracts, Law on Insurance business, No. 24-2000-QH10 and Law to amend and supplement a number of articles of the Law on Insurance business, No. 61/2010/QH12.

²¹ George Mary, ‘The Elements of Library Research: What Every Student Needs to Know.’ (2008) DOI: 10.1515/9781400830411. Accessed 25 December 2022

payouts the insured party is responsible for if they are found legally liable. Intentional damage and contractual liabilities are generally not covered in liability insurance policies.”²² In a nutshell, Liability insurance is a cover against injuries and damage to a third party or another person's property. The insurance company that sold the policy usually covers litigation and settlements that the policyholder would have paid. Also, liability insurance does not cover "intentional damage, contractual liabilities, and criminal prosecution." In many jurisdictions, taking out liability insurance for motor vehicles is mandatory if you are in product manufacturing and practicing medicine or law. Liability insurance policies cover business owners, drivers, medical practitioners, and legal professionals. Professional liability insurance is a third-party insurance that covers anyone at risk of being sued for damages and injuries. This policy provides cover for the policyholder (by making a payout that would otherwise have been made by the insured) and the third party (by repaying them in case of injuries and damages)²³. A liability insurance policy that covers bodily injury is referred to as a bodily injury liability policy. Liability insurance is a policy that deals with liability arising from harm caused to others or their property.²⁴

3.2 Professional Liability Insurance

“Professional liability insurance protects professionals such as accountants, lawyers, and physicians against negligence and other claims initiated by their clients. Professionals with expertise in a specific area require this type of insurance because general liability insurance policies do not offer protection against claims arising from negligence, malpractice, mistakes, or misrepresentation.”²⁵ In Summary, professional liability insurance policy cover businesses against claims of negligent conduct. It also covers professionals like accountants, doctors, lawyers, etc., from claims of negligent conduct.²⁶ Therefore, professional liability insurance is an insurance policy taken out by professionals who want to cover their expertise from risks. If an insured professional incurs a substantial financial liability to a third party, the insurer indemnifies the third party. Some professions require practitioners to take out professional liability insurance against liabilities that may arise as they exercise their professions.²⁷ The policyholder needs to read the fine print thoroughly while taking out professional liability insurance. Sometimes the wording could be confusing to non-legal practitioners. Engaging the services of a lawyer who is familiar with PLI would be of great help. "For example, consider these two phrases:

Negligent act, error, or omission

Negligent act, negligent error, or negligent omission

Coverage for "negligent act, error or omission" indemnifies the policyholder against loss/circumstances incurred only due to any professional error, omission, or a negligent act. A negligent error or negligent omission would not be covered because of the wording.

The "negligent act, negligent error, or negligent omission" clause is interpreted differently than the previous clause. For an error or omission to be covered, it must be

²² Julia Kagan, 'Liability Insurance: what it is, How it Works, Major Types.' (Investopedia, 21 June 2022) <www.investopedia.com/terms/l/liability_insurance.asp> accessed 21 December 2022

²³ Id.

²⁴ Groner, M., 'Third Party Property Damage Liability Explained,' 2016; <www.frontrowinsurance.com/articles/third-party-property-damage-liability>

²⁵ Julia Kagan, 'What is professional Liability Insurance? Costs and coverage.' (Investopedia, 3 September 2022), <www.investopedia.com/terms/p/professional-liability-insurance.asp> accessed 21 December 2022

²⁶ Id.

²⁷ Merkin, R., 'Colinvaux's Insurance Law,' 2006 Sweet & Maxwell, p.684.

*determined to have been negligent and not simply an error or omission. If you wanted all five types of incidents to be covered, the clause might need to read "negligent acts, negligent errors, negligent omissions, errors, or omissions."*²⁸

3.3 Medical malpractice liability insurance

Medical professionals have to deal with the possibility of a ruinous medical malpractice lawsuit every time they handle a patient. Hence, medical professionals need to take out professional liability insurance against such an eventuality.²⁹ Medical malpractice liability insurance is a type of insurance policy that falls within the broader professional liability insurance. Medical malpractice liability insurance covers medical service providers, e.g., nurses and doctors, against liability that might arise from a medical malpractice lawsuit.³⁰ This insurance policy may cover litigation costs, medical expenses, and bodily and property damage. It is taken out to protect a medical practitioner from the outcome of a medical malpractice lawsuit. Medical malpractice liability insurance covers healthcare workers and medical facilities from liabilities that might arise from malpractice lawsuits, indemnifies third parties for injuries sustained due to medical malpractice, and prevents medical malpractice.³¹

To ensure that healthcare professionals and healthcare facilities remain solvent in case of a significant medical malpractice lawsuit and settlement, some countries have made Medical malpractice liability insurance mandatory. However, these stipulations sometimes seem to legally burden insurance service providers with liability risks without a ceiling. In France, certain medical service providers had their insurance coverage declined by insurance companies since the enactment of the Kouchner Act of March 2002. In such a case, the potential policyholder has to present the matter to the "*Bureau Central de Tarification*," which would set a coverage rate for insurers.³² Vietnam has also made medical malpractice liability insurance mandatory.³³ However, Belgium has not made medical malpractice liability insurance mandatory in its civil code, unlike Vietnam and France.³⁴ Moreover, even though the Civil Code of Belgium does not explicitly stipulate that healthcare providers must take out medical malpractice liability insurance, it is a requirement for healthcare providers. Belgium's Deontological Code of Physicians, 2016 states that medical malpractice victims must be compensated for the damages arising from MM, and physicians must take out insurance for this purpose.³⁵

Notably, the Civil Code of France does not obligate professional liability insurance. However, the issue of civil liability insurance contracts is covered under Article L1142-2 of the Public Health Code of 4th march 2002 and article L251-2 of the Insurance Code.³⁶ The law states that "*health professionals who practice independently, health institutions, health services and organizations and any legal person other than the state, that is engaged in activities of prevention, diagnosis or care shall be obliged to subscribe to an insurance destined to cover their third party and administrative liabilities susceptible to be engaged when third parties*

²⁸ Supra, note 22

²⁹ Duke, J., 'Risk Control in Professional Liability Insurance,' 1996 Duke Law Journal, p. 106.

³⁰ Jackson, J. and Powell, R. 'On professional Liability,' 2012 Sweet & Maxwell, p. 305; *Medical Professional Liability Insurance Commissioners*, 2016 National Association of Insurance, p. 2 <www.naic.org/>

³¹ Houses of the Oireachtas, 'Joint Committee on Health and Children, Joint Committee on Health and Children,' 2015, p. 9.

³² OECD, 'Medical Malpractice: Prevention, Insurance, and Coverage Options,' 2006 OECD-Publishing, p. 4; <pcsi.pa.go.kr/files/2106051E.pdf>

³³ Decree on Liability insurance in Medical examination and treatment, No.102/2011/ND-CP.

³⁴ Supra note 27, p. 305-309.

³⁵ Article 34 §2 - Deontological Code of Physicians, 2016

³⁶ Serwach, M., 'Medical Insurance in Polish and French Legal Systems,' 2015 Prawo Asekuracyjne, , p.54.

suffer damages or as a result of personal injuries incurred within the framework of their activities of prevention and diagnosis or care."³⁷

3.5 Insurable Interest

An insurance contract is hinged on the basic principles of "*uberrimae fidei*" (utmost good faith) and insurable interest. "Insurable interest is an investment that protects anything subject to a financial loss. A person or entity has an insurable interest in an item, event, or action when the damage or loss of the object would cause a financial loss or other hardships. To have an insurable interest, a person or entity would take out insurance protecting the person, item, or event in question. The insurance policy will mitigate the risk of loss if something happens to the asset- like becoming damaged or lost."³⁸ Therefore, insurable interest is the foundation for all insurance policies and creates a link between the insured and the policyholder. It may be an item, such as property, that would cause financial challenges to the policyholder if it is destroyed. Hence, a policyholder buys an insurance policy on the said object to "exercise insurable interest."³⁹ Further, insurable interest is "the interest that a person has in something such as a particular property or another individual, which means that the person would suffer a loss should that property or individual be harmed. In insurance law, you can only buy insurance for something or someone in which you have an insurable interest."⁴⁰

For Insurable interest to be valid, it must satisfy some primary conditions.

- “1. The interest should not be a mere sentimental or emotional right or interest;*
- 2. It should be a right in a property or a right arising from a contract made concerning that property;*
- 3. The interest must be pecuniary; mere inconvenience or disadvantage cannot be regarded as an insurable interest;*
- 4. The interest should be lawful and must not be illegal, immoral, or opposed to public policy.”⁴¹*

For an insurance contract to be deemed valid in Belgium, the policyholder must demonstrate an insurable interest. Insurable interest exists whereby the policyholder proves that the occurrence of the event insured against would cause a loss to the person or entity.⁴² The Belgian Civil Code Article 91 of the Insurance Act of 2014 stipulates that "the insured must demonstrate an economic interest in the preservation of the property or the integrity of the estate."⁴³ On the other hand, the French Insurance Code Article L.171-3 stipulates what qualifies insurable interest and the conditions that must be met. However, the French Civil Code does not make insurable interest mandatory after the contract but must be indicated in the contract.

³⁷ Article L251-1- Public Health Code, March 4th 2002.

³⁸ Alexander, Twin, 'Insurable Interest.' (Investopedia, 17 May 2022)

<<https://www.investopedia.com/terms/i/insurable-interest.asp> > accessed 21 December 2022

³⁹ Id.

⁴⁰ The Association of British Insurers (ABI). 'Insurable Interest' 2002 <www.abi.org.uk/data-and-resources/tools-and-resources/glossary/insurable-interest/ > accessed 21 December 2022

⁴¹ Prashanth, V., 'Necessity of Insurable Interest in Insurance Contracts.' 2008;

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1302372>

⁴² Supra note 10, p. 525.

⁴³ Belgian Insurance Act 2014

Moreover, Articles 1108 and 1126 of the Civil Code state that if the risk insured against occurs before the contract is completed, the same cannot be concluded.⁴⁴

In the Laws of Vietnam, “insurable interest means a right of ownership, the right of possession, right of use, or a property right, [or] the right and obligation to bring up and support the subject-matter insured.”⁴⁵ Therefore, insurable interest refers to the financial loss the policyholder would incur should the contingency insured occur. It appears that Vietnam’s regulation of insurable interest is vague. The regulations do not state explicitly whether “a person has an insurable interest to the extent of any potential liability which may be incurred due to damages and other costs.” Hence, it can be deduced, and rightly so, that, in Vietnam, the law does not stipulate whether insurable interest provides insurance to the third party on behalf of the policyholder or not. Also, in France, Belgium, and Vietnam, an “insurable interest” is a mandatory requirement by law for any insurance policy contract to be valid. Also, it should be noted that insurable interest varies as per the insurance policy.

3.6 Insured Risk

“Insurance companies normally only indemnify against pure risks. A pure risk includes any uncertain situation where the opportunity for loss is present and the opportunity for financial gain is absent. Speculative risks might produce a profit or loss, namely business ventures or gambling transactions. Speculative risks lack the core elements of insurability and are rarely insured.”⁴⁶ Insurance underwriters have to manage the risk covered by an insurance policy. This is achieved by carefully wording the insurance contract as well as selecting clients very carefully. The insured risk is “malpractice, error, or mistake in the practice of the insured’s profession.” All Liability insurance policies explicitly state the possible cause(s) of the insured risk.⁴⁷ Moreover, “for a loss to be covered, the policyholder must be able to demonstrate a definite proof of loss, normally in the form of bills in a measurable amount. If the extent of the loss cannot be calculated or cannot be fully identified, then it is not insured. Without this information, an insurance company can neither produce a reasonable benefit amount nor premium cost.”⁴⁸

The Insurance Act 2014 of Belgium Article 5.14⁴⁹ the insurable risk is defined as “an occurrence in which the insured or the beneficiary has an interest which is not in a proceeding. To be insured, the risk must be (1) uncertain: the uncertainty may concern either the realization of the event or the moment of such realization; (2) possible: the insurance contract is null and void if the risk does not exist or has already realized itself after the insurance contract; (3) and independent from the will of the insured.”⁵⁰ Moreover, Belgian law expresses that the insurance is null and void when the risk does not exist or has already occurred at the time of the conclusion of the contract.”

French law, like Belgian law, stipulates that a valid insurance contract must have the element

⁴⁴ Noussia, K., ‘The Principle of Indemnity in Marine Insurance Contracts: A Comparative Approach.’ 2007 Springer, , p. 51

⁴⁵ Article 3.9 - Law on Insurance Business, No. 24-2000 - QH.10

⁴⁶ Sean, Ross, Elements of Insurable Risks: A Quick Guide (21 June 2021)

<www.investopedia.com/articles/insurance/082616/elements-insurable-risks-quick-guide.asp> accessed 22 December 2022

⁴⁷ Supra note 26, p.108

⁴⁸ Supra, note 43

⁴⁹ Supra note 40

⁵⁰ Supra note 10, p. 201;

Keulers, H. and Catteau, A., ‘The Legal Nature of Insurance Contracts.’ 2013, IBA Insurance Committee Substantive Project, International Bar Association, p.17.

of uncertainty. The French *Cour de Cassation* in (Cass., 1st Civ. Div., 4th November 2003, appeal on the point of law No 01-14942) ruled that uncertainty is a critical element of an insurance contract. The importance of uncertainty in an insurance contract cannot be over-emphasized, and the lack of it provides sufficient grounds for either the insured or insurer to void an insurance contract. Professional liability insurance policies are products developed to cover a particular contingency that might arise while the insured professional is undertaking their duties.⁵¹

The stipulations regarding an insurance contract's validity are similar in France and Belgium. The critical point is that a valid insurance contract must be pegged on an element of uncertainty because a personal liability insurance policy covers a risk, not a certainty. The benefits of an insurance policy must be indemnifiable only upon an occurrence of a contingency that was uncertain concerning *whether or when it would occur*.⁵²

In the case of Vietnam, “the insured event is an external event agreed upon by the parties or provided for by law. Upon the occurrence of which, the insurance enterprise must pay the insurance proceeds to the insurance beneficiary or indemnify the insured person.”⁵³ A look at the Vietnamese regulations regarding insurable risk reveals that none deals with the occurrence of the insured contingency as being predictable or uncertain. In contrast, Belgium and France have clear regulations stipulating that the contingency insured must be unpredictable. However, the insurance companies in Vietnam define the insured contingency. For example, Bao Viet Insurance Company defines risk as “an unfortunate and unpredictable event regarding time, space, severity, and consequences.”⁵⁴

The risks covered by insurers can be classified into the following categories: (1) “baseline risk”, which is the existing risk of loss based on experience, assuming no change; (2) “developments risk”, which is the risk relating to developments that change the rate or cost of loss during the insured period; (3) “contract risk”, which is the risk relating to the drafting and interpretation of insurance policies; and (4) “financing risk”, which is the risk relating to changes in investment performance and the insurance pricing cycle.⁵⁵

3.7 Insured Premium

“An insurance premium is the amount of money an individual or business pays for an insurance policy. Insurance premiums are paid for policies that cover healthcare, auto, home, and life insurance. Once earned, the premium is income for the insurance company. It also represents a liability, as the insurer must provide coverage for claims against the policy. Failure to pay the premium on the individual or the business may result in the cancellation of the policy.”⁵⁶ When a policyholder takes out an insurance policy, they are charged a ‘premium’ by the insurer. An insurance premium is an amount you pay for the insurance policy. Depending on the insurer,

⁵¹ Etzbach, P., Atkins, N., Tulloch, N., Sails, H., and Merrick, A., ‘Legal Nature of Insurance Contracts.’ 2013 IBA Insurance Committee Substantive Project, The International Bar Association, p.132

⁵² Prudential Insurance Co v Commissioners of Inland Revenue, [1904] 2 KB 658.

⁵³ Article 3.10, Vietnamese Law on Insurance Business.

⁵⁴ Risk and the Relevant Definitions of Insurance; <<http://www.baoviet.com.vn/>>

⁵⁵ Baker, T., ‘Insuring Liability Risks.’ 2004 (29) Blackwell Publishing Ltd, p.128

⁵⁶ Julia Kagan, ‘Premium Defined, How It's Calculated, and Types.’ (Investopedia, 03 March 2022)

<www.investopedia.com/terms/i/insurance-premium.asp> accessed 22 December 2022

the policyholder may be offered several options regarding the premium payment. The possibilities range from one-off advance payments to monthly, quarterly, or even bi-annual installments. The cost of the insurance premium depends on various factors, for example, the type of coverage, the policyholder's age, area of residence, previous claims, occupation, etc.⁵⁷

In Belgium, the law demands that the insurance premium payable and how it is computed must be indicated clearly.⁵⁸ Also, in Belgium, insurers may terminate an insurance contract if the policyholder does not pay the premium on time. However, the policyholder must be notified by a bailiff or registered mail before taking this step.⁵⁹ The formal notice requires the policyholder to pay the expected premium. The policyholder is given a minimum of fifteen days from the day of service or the day the mail was registered to pay the premium. The notice should also state clearly when the premium would mature, the amount of the premium, and the consequences the policyholder will face if he does not pay within the given time.⁶⁰

Article L. 111-4 of French insurance gives the government the power to define standard insurance contract clauses and make their application mandatory. In France, the professions. Article L113-2 states that "the insured shall be obligated to pay the premium or contribution at the agreed time." Article L113-3 states that "the premium may be payable at the insurer's address or the representative appointed for this purpose. However, the premium may be payable at the address of the insured or any other place agreed upon in the cases and terms restrictively set by decree in *Conseil d'Etat*. The premium or premium installment shall be payable at the insurer's premises in all events after formal notice has been served on the insured. In the event of non-payment of a premium or a part of a premium within ten days of its due date, and irrespective of the insurer's right to sue for the performance of the contract, the cover may be suspended thirty days after the insured has been served with the formal notice. The insurer shall be entitled to terminate the contract ten days after the expiry of the thirty days."⁶¹

In Vietnam, an insurance premium is the money "the purchaser of insurance must pay to the insurance enterprise within the time-limit specified and by the method agreed on by the parties in the insurance contract." Just like in France and Belgium, the premium payable and payment method in Vietnam must be part of the insurance contract.⁶² If the insurer terminates the insurance contract, the regulations provide that the insurer must refund the policyholder an amount equivalent to the remaining insurance period. However, the insurer is at liberty to deduct any related expenses.⁶³ Hitherto Vietnam has not established guidelines for the legitimate expenses that an insurer can deduct upon the termination of an insurance contract. As a result, the insurer has a carte blanche regarding the costs to deduct upon the termination of an insurance contract.

Consequently, the policyholder usually receives an amount less than what they had paid by the time the contract was terminated. Moreover, the rule states that the policyholder must pay an insurance premium until the agreement is terminated.⁶⁴ Therefore, it is clear that this regulation obligates the policyholder to pay an insurance premium until the insurance contract was

⁵⁷ Id.

⁵⁸ Re George and Goldsmiths' Ins. [1899] 1 Q.B. 595, 611.

⁵⁹ Article 68 - Belgian Insurance Act 2014; Supra note 10, p. 259.

⁶⁰ Article 70 - Supra note, 40

⁶¹ Article 252-1, French Insurance Code.

⁶² Article 13.1.g - Vietnamese Law on Insurance Business 2000.

⁶³ Article 24.2 - id.

⁶⁴ Article 23.3 - id.

terminated. Ironically, the regulation overlooks the responsibility of the insurance company. The regulation does not require the insurer to refund the premium paid by the policyholder when the contract is terminated. If insured contingency occurs after the termination of the agreement but within the grace period, the insurer must indemnify the policyholder.

On the other hand, the policyholder must pay the premium up to the end of the grace period as stipulated in the contract.⁶⁵ It is noteworthy that Vietnamese law is silent regarding what should happen if the policyholder does not pay the premium within the grace period. It does not explicitly state the steps the insurer should take in case of this eventuality.

3.8 Indemnification

“Indemnity is a comprehensive form of insurance compensation for damages or loss. When the term indemnity is used legally, it may also refer to an exemption from liability for damages. Indemnity is a contractual agreement between two parties. In this arrangement, one party agrees to pay for potential losses or damages caused by another party. A typical example is an insurance contract, in which the insurer or the Indemnitor agrees to compensate the other (the insured or the indemnitee) for any damages or losses in return for premiums paid by the insured to the insurer. With indemnity, the insurer indemnifies the policyholder—that is, promises to make whole the individual or business for any covered loss.”⁶⁶

Most insurance contracts have what is termed an indemnity clause. “Indemnity clauses are written into contracts to allow an indemnifier to take on any losses incurred by a party in the contract. They can also be used to absolve the indemnifier or the other party of liability if a breach of contract occurs, or damages/loss of goods are incurred. Most commonly, indemnity clauses are used to compensate service providers in the event their goods are damaged.”⁶⁷ Nevertheless, what an insurance policy covers depends on the specific policy. All indemnity contracts specify the time within which the payment is valid; this period is known as the “period of indemnity.” Also, most insurance policies have written guarantees that decree that both the insurer and the insured abide by the contractual agreements of the said policy. In the event either of the parties breaches the contract, they must indemnify the other party.⁶⁸

In Belgium, the law states that an insurer’s indemnity obligation is capped at a loss incurred by the policyholder. The loss may relate to damage to property or loss of profit.⁶⁹ Also, the law explicitly states that unless otherwise agreed, the insurer cannot reduce the benefits to be paid out for an indemnity insurance policy.⁷⁰

French law states that “a loss means for risks mentioned under Article L1142-2 of Public Health Code, any damage or group of damages caused to third parties, engaging the liability of the insured, resulting from one event or group of events, having the same technical cause attributable to the activities of the insured covered by the insurance policy and having given rise to one or several claims.”⁷¹

⁶⁵ Article 23.4 – id.

⁶⁶ Adam Hayes, ‘Indemnity: What it Means in Insurance and the Law.’ (Investopedia, 12 April 2022) <<https://www.investopedia.com/terms/i/indemnity.asp>> accessed 23 December 2022

⁶⁷ Paul Britton, ‘What is an Indemnity Clause?’ (*Britton & Time*, 13 May 2019) accessed 23 December 2022 <<https://brittontime.com/2019/05/13/what-is-an-indemnity-clause/>> accessed 23 December 2022

⁶⁸ Supra, note 63

⁶⁹ Article 93 - Supra note 40

⁷⁰ Article 94 – Supra note 40

⁷¹ Methodological Guide E11 templates relating to medical professional liability, p.3; <<https://acpr.banque-france.fr>>

Like the case in France and Belgium, Vietnamese law tackles the issue of repaying the third party. The law holds that the indemnity payable to a third party shall not be above the amount insured unless provided for in the insurance contract.⁷² In addition to the amount of indemnity, “an insurance enterprise must also pay the insured person the necessary and legitimate expenses to avoid and minimize loss and damage. In addition, the costs arising must also be paid, and the insured person must bear to implement instructions from the insurance enterprise.”⁷³ In Vietnam, medical malpractice liability insurance is regulated by Decree on Liability insurance for medical examination and treatment⁷⁴

The Decree clearly states that liability insurance has a maximum indemnity that an insurer shall pay for each claim. Moreover, it states that the indemnification shall not exceed the amount insured as contained in the insurance contract. Healthcare facilities and insurers can assess the risks associated with medical examination and treatment and then establish the scope of the liability and the premium payable.⁷⁵

Moreover, a look at Vietnamese Law shows that compared to France and Belgium, Vietnam seems to have what may be seen as ‘extra regulations.’ The regulations dictate that the indemnifiable amount shall be pegged on market forces at any time. Also, the same will all be determined by the place in time when the loss is incurred unless the policy otherwise provides. This regulation is informed by the phenomenon of unstable and varying market prices in Vietnam when it comes to assessing the damage. For example, “upon getting treated after a medical incident, if the third party went for treatment in a private hospital where fees are higher than in public ones or where fees in big city hospitals are higher than rural area hospitals even though the third party had Social Health Insurance.”⁷⁶

3.9 Third party

“The third party is a party that is unrelated to your businesses but does come in contact with it in some way. It could be a client, customer, partner, supplier, distributor, or any other entity that interacts with your business but is not in any other way associated with it.”⁷⁷

In France and Belgium, a third party can launch a claim directly with the insurer.⁷⁸ In Belgium, the insurance policies falling under the Insurance Act 2014 allow third parties to launch indemnification claims directly with the liability insurer for any damages or loss incurred. (Article 86, Insurance Contract Act 1992).⁷⁹ The same regulation is restated in Article 50 of the 2014 Insurance Code of Belgium.⁸⁰ Therefore, it is evident that in Belgium, all losses or damages (whether physical injury, damage to property, or financial losses) may be claimed from the liability insurer to the limit covered by the insurance company. The same leeway is also given to all non-marine or non-transport liability insurance, including professional,

⁷² Article 46.2 - Vietnamese Law on Insurance Business

⁷³ Article 46.3 - Vietnamese Law on Insurance Business

⁷⁴ Article 5.3 - Decree on Liability Insurance for Medical Examination and Treatment, No. 102/2011/ND-CP

⁷⁵ Article 5- Decree on Liability Insurance in Medical Examination and Treatment, No. 102/2011/ND-CP

⁷⁶ Joint Circular No. 41/2014 / TTLT-BYT-BTC of November 24, 2014 of the Ministry of Health and the Ministry of Finance guiding the implementation of health insurance.

⁷⁷ Embroker, ‘What is Third- Party Liability Insurance?’ (18 August 2022) <www.embroker.com/blog/third-party-insurance/> accessed 23 December 2022

⁷⁸ Insurance Day, ‘International Comparative Review of Liability Insurance Law,’ Barlow Lyde & Gilbert, p. 8;

⁷⁹ Supra note 10, p. 561;

Hugo Keulers, H. and Lodewijckx, S., ‘Lydian, Insurance and Reinsurance in Belgium: Overview.’ 2012; <www.lydian.be/sites/default/files/uploads/publications/plc_insurance_and_reinsurance_handbook_2011_belgium.pdf>

⁸⁰ Article 50 – Supra note, 40

contractual, and non-contractual insurance.⁸¹

In the case of France, the law also allows a third party to claim indemnification directly from an insurance company.⁸² In case of damage to property (unlike the case in Belgium, where a third party can claim directly from the insurer), the law does not grant the third party a legal leeway to launch an indemnification claim directly with the insurer. However, the law recognizes the right of a third party to establish an indemnification claim against the insurer on behalf of the insured. This is when the insured fails to do so by way of an *action oblique* subject to Article 1166 of the Civil Code (*Article 1341-1, revised Civil Code*). However, the funds recovered are not paid directly to the third party but to the insured.⁸³

In this case, it is noteworthy that in the case of Vietnam, the right of a third party to launch a direct indemnification claim from an insurance company has not received much attention. Unlike Belgium and France, in the case of Vietnam, the law does not allow a third party to launch an indemnification claim directly with the insurance company. The law clearly expresses that a third party shall not have the right to directly require an insurance enterprise to indemnify the third party unless otherwise specified by the law. Also, the law is silent on whether there are any other exceptions for a third party to claim indemnification directly from the insurance company. Liability of the insurer only arises if the third party claims an insured person for indemnity, loss, or damage caused by the insured's fault during the duration of the insurance.

3.10 Trigger of coverage

“A coverage trigger is an event that must occur for a liability policy to apply to a loss. Coverage triggers are outlined in the policy language, and courts will use different legal theories about triggers to determine whether policy coverage applies. Insurance companies use coverage triggers to ensure that the policies they underwrite only apply when specific events occur. They do this to ensure that they only pay claims under certain circumstances. However, this can shift the burden of proving that a policy should apply to the insured.”⁸⁴ The term “trigger of coverage” or “policy trigger” refers to the legal test used to determine if the policy has coverage obligations regarding the claim asserted against the policyholder. As conceptualized, the trigger concept is not obliged to determine coverage; instead, it acts as a gatekeeper, matching particular claims with particular periods and hence particular policies.⁸⁵

Traditionally, the choice of a trigger is often based on practicability, legal requirements, and traditions in the country where the liability policy is placed. Some countries also have legal restrictions on the choice of trigger. For instance, the occurrence trigger is not allowed in France

⁸¹ Keulers, H., and Catteau, A, ‘Direct Third-Party Access to Liability Insurance in Belgium.’ 2012 IBA Insurance Committee Substantive Project .International Bar Association, p.21;

<<https://webcache.googleusercontent.com/search?q=cache:BXKvbnKFzGIJ:https://www.ibanet.org/Document/Default.aspx%3FDocumentUId%3D334C288E-984D-4870-9905-192AFF65A398+&cd=1&hl=en&ct=clnk&gl=vn> >

⁸² Article L124-3 - French Insurance Code.

⁸³ Pierre-Olivier, L, Arroyo, P. and Lefort, C., Holman Fenwick Willan France LLP, ‘Insurance and Reinsurance in France: Overview, 2017;

<<https://webcache.googleusercontent.com/search?q=cache:lFrq7CFIbA4J:https://uk.practicallaw.thomsonreuters.com/9-501-3248+&cd=1&hl=en&ct=clnk&gl=vn> >

⁸⁴ Lucas, Downey, ‘Coverage Trigger.’ (Investopedia, 31 January 2022)

<www.investopedia.com/terms/c/coverage-trigger.asp > accessed 23 December 2022

⁸⁵ Fischer, J., ‘Insurance Coverage for Mass Exposure Tort Claims: The Debate over the Appropriate Trigger Rule.’ 1997 (45) Drake Law Review, p.631-632.

(only fact occurrence and claim-made).⁸⁶ Belgium allows three systems of trigger coverage: fact occurrence, loss occurrence, and claim-made.⁸⁷ Regarding Vietnam, only Article 12 of the Law on Insurance Business mentions the occurrence policy. However, the Article does not define it.⁸⁸ The regulation fails to clarify the conditions of the occurrence. Supposedly, the conditions of the occurrence policy are freely agreed on in an insurance contract.⁸⁹

3.11 Fact-occurrence policies

An occurrence policy covers claims made for injuries sustained during the life of an insurance policy. Under these types of contracts, the insured party has the right to request compensation for damages that occurred within the timespan that the policy was active, even if several years have passed. The insurance agreement is no longer in force.”⁹⁰ “This covers claims made during the policy period, regardless of when the claim is made, even after your policy has been canceled. While these policies are less prevalent, some insurance companies offer occurrence-made policies. They are generally more expensive than claims-made policies.”⁹¹

In the system of “fact occurrence” or “an act committed,” the insurance policy covers a damage-causing occurrence provided it took place during the term of the insurance contract. The damaging fact can exist in an unlawful act of the insured person (doctor/hospital).⁹² In a fact-occurrence system,⁹³ the insurance policy covers any eventuality within the policy’s validity period. Any damage that might have occurred before the policy became active is not covered. For example, when the duration of the policy is from 1995 to 2005, all damaging facts (errors, negligence) committed during this period are covered. The errors committed before 1995 are not covered (no anteriority risk).

It often happens that the harmful event does not coincide with the damage's emergence or determination. On the other hand, the outflow or posteriority risk has covered all damage occurring after 2005 or claims filed after 2005 until the end of the limitation period is covered in this system. This system benefits the doctor in respect of his liability which remains covered even after the insurance contract has been terminated.⁹⁴

In Belgium, many medical liability insurance companies use this system. This type of insurance

⁸⁶ Under article L.124-5 of the French Insurance Code, the cover shall be, according to the choice of the parties, triggered either by the event causing liability or by a claim. However, where it covers the liability of natural persons outside their professional activity, the cover shall be triggered by the event causing liability;

<https://gettingthedealthrough.com/area/62/jurisdiction/28/insurance-litigation-france/> >

Rasmussen, R., ‘The Trigger on A Liability Policy, 2010’;

www.ifinsurance.com/web/industrial/ifnews/pages/liability_newsletter_4_2010.aspx >

⁸⁷ Article 142: Insurance Act 2014; Weyts, B., ‘De dekking in de tijd van aansprakelijkheidsverzekeringen: een delicaat evenwicht tussen contractuele vrijheid en dwingende regelgeving in Vansweevelt, T. and Britt Weyts (eds), *De aansprakelijkheidsverzekering in ontwikkeling*, ALLIC II, Intersentia, 2016, p. 97-120;

Dubuisson, B., *Rapport belge concernat l’assurance de la responsabilité civile: couverture dans le temps* (Belgian Report on Liability Insurance: Cover over time), *Assurance de la responsabilité: couverture dans le temps* (*Liability Insurance : Cover intime*, Maklu, 1997, p. 69.

⁸⁸ Article 12 - Law on Insurance Business, No. 24-2000-QH10.

⁸⁹ Article 13 - Law on Insurance Business, No. 24-2000-QH10.

⁹⁰ Daniel Liberto, ‘Occurrence Policy.’ (Investopedia, 18 July 2021).

www.investopedia.com/terms/o/occurrence-policy.asp > accessed 23 December 2022

⁹¹ Supra note 1

⁹² Vansweevelt, T., ‘*De Beroepsaansprakelijkheidsverzekering van Artsen en Ziekenhuizen: een Vergelijkende Analyse*’ (*The Professional Liability Insurance of Doctors and Hospitals: A Comparative Analysis*), 1997 Mys en Breesch, p.56.

⁹³ Rhodes M., ‘*The Law of Liability Insurance*,’ 1990 Long, R. (ed.), New York, Matthew Bender, § 12.11.

⁹⁴ Vansweevelt, T., ‘*De Civielrechtelijke Aansprakelijkheid van de Geneesheer en het Ziekenhuis* (*The Civil Liability of the Doctor and the Hospital*),’ 1997 Antwerpen, Maklu, 797, nr. 1296.

is suitable for healthcare practitioners because liabilities remain insured even after the lapse of the insurance period, provided the fact occurred with the insured period. The harmful event often does not coincide with the damage's emergence or determination. On the other hand, the system has a downside for the insurer. This is manifested that; the insurance company may have to be content with providing cover for a long time even after the lapse of the insurance policy (the after-effects).

3.12 Loss Occurrence Policy

This type of insurance “offers protection against financial loss on incidents that happened while the policy was in effect, regardless of when they're flagged and became apparent. In other words, it's possible to file a claim long after the contract has expired, provided there's evidence that its cause or triggering event occurred during the period the insurance was active.”⁹⁵

This insurance policy covers any losses that occur during the insured period, irrespective of when the original cause that led to the loss happened. This liability insurance system is sometimes invaluable if the eventuality can be pinpointed to a specific point.⁹⁶ In this type of policy, the insurance company must indemnify any loss that resulted from the policyholder's actions or omission within the policy period. The policy does not demand that the policyholder launches an indemnification claim within the policy period. Moreover, it does not obligate a third party who suffered an injury or loss to launch an indemnification claim within the insurance period. Therefore, this leads to a situation whereby a third party can legally demand indemnification long after the insurance policy has lapsed⁹⁷

Four legal theories may be applied to determine the date(s) of “occurrence” depending on the type of injury or damage. Each jurisdiction looks to its case law and legal precedent to decide which theory of occurrence pertains to a particular incident:⁹⁸

1. *“Injury-in-Fact theory”*: a liability insurance policy is triggered if the claimant was actually injured during the policy period; or
2. *The “Manifestation theory”*: claims are identified to the policy in effect when the injury became reasonably apparent or known to the claimant; or
3. *The “Exposure theory”*: Courts consider the dates of exposure to be the dates of the “occurrence” (multiple policy potentials); or
4. *The “Continuous trigger theory”*: (or multiple triggers) theory provides that all policies in effect during the aggregate trigger, for example, during the period of exposure or injury, are activated and may be called on to respond to a loss.⁹⁹

In spite of the fact that this type of insurance policy has an upside of permanency (the insured is not required to renew his policy to maintain insurance for the lapsed insurance period), it also has some challenges to the insured because a claim can sometimes be filed many years after

⁹⁵ Supra note 90

⁹⁶ Fenyves, A., Kissling, C., Perner, S., Rubin, D., ‘*Compulsory Liability Insurance from a European Perspective*, De Gruyter,’ 2016, p. 357.

⁹⁷ Fenyves, A., Kissling, C., Perner, S., Rubin, D., *Compulsory Liability Insurance from a European Perspective*, De Gruyter, 2016, p. 357.

⁹⁸ <<http://www.insurancejournal.com/blogs/academyjournal/2016/06/13/411266.htm>>

more in detail: Vansweevelt, T., *De Beroepsaansprakelijkheidsverzekering van Artsen en Ziekenhuizen: een Vergelijkende Analyse* (The Professional Liability Insurance of Doctors and Hospitals: A Comparative Analysis), Myn en Breesch, 1997, p.60-65.

⁹⁹ **Occurrence vs. Claims Made Coverage Forms, Insurance Journal, 2016;**

<www.insurancejournal.com/blogs/academy-journal/2016/06/13/411266.htm>

a professional liability incident, the policyholder may have the following uncertainties:

1. Tracking which occurrence policy in the past will respond to the claim just filed;
2. The former Insurance Company may no longer be solvent;
3. Whether the past policy has adequate limits now due to inflation.¹⁰⁰

3.13 Claims-made policies

“In this policy type, a claim must occur and be reported while your policy is in effect with your insurance company. Claims-made policies are the most common type of medical malpractice insurance. If you want coverage for a claim made after your policy is no longer in effect, you’ll need to pay extra for “tail coverage.” Tail coverage extends your policy for a certain period, such as five years after your policy ends. While this option can be expensive (up to three times the amount of your annual premium), it can help cover you for any claims that arise later. It can be a good option if you are switching policies, starting a new position, or retiring.”¹⁰¹ “A claims-made policy (also a fact-occurrence policy) refers to an insurance policy that provides coverage when a claim is made against it, regardless of when the claim event occurred. A claims-made policy is a popular option when there is a delay between events and when claimants file claims. However, the policy only covers claims made while the policy is active. Businesses often carry claims-made policies or occurrence policies, which extend coverage for claims made on inactive policies if claim events occurred when the policies were active.”¹⁰²

A claims-made policy is a policy that provides liability insurance cover for any indemnification claim launched against a policyholder within the period of insurance. This policy does not indemnify any claim or circumstance that might give rise to a claim that an insured is aware of before taking out the insurance policy.¹⁰³ This insurance coverage also does not indemnify claims which are filed after the expiration of the policy. These are some critical challenges regarding this type of medical malpractice liability insurance. It is necessary to look into them because claims-made policies are today's most widely available form of medical malpractice coverage.¹⁰⁴

¹⁰⁰Claims Made vs. Occurrence Form Professional Liability Policies; <www.americanprofessional.com/wp-content/.../Claims-Made-vs-Occurrence_AC.pdf>

¹⁰¹ Supra note 1

¹⁰² Julia Kagan, ‘Claims-Made Policy: Definition, How it works, and Coverages.’ (Investopedia, (31 May 2021) <www.investopedia.com/terms/c/claimsmade-policy.asp> accessed 23 December 2022

¹⁰³ Supra note 31, p. 313.

¹⁰⁴ *Types of Medical Malpractice Insurance Policies*, American Academy of Actuaries, 2008, p.1; <www.actuary.org>

Claims-made insurance covered is hinged on four pillars:

1. The insured professional must receive their first notification of a claim or potential claim during the policy period;
2. The claim or potential situation must be reported to the insurer during the policy period;
3. The negligent act, error, and omission giving rise to the claim must occur after a “prior acts” or retroactive date that is outlined in the policy declarations (in other words, claims resulting from actions or services, respectively, which occurred or were provided prior to the inception date of the current or new policy covered or no retroactive data is applicable);
4. The insured must take a “good faith” statement (in some cases, certification or warranty) that the professional and the firm did not know the mistake, error, or controversy on the date the coverage was purchased.¹⁰⁵

Every claims-made policy has a mandatory sunset clause or reporting period in which claims can be reported after the end of the policy period to protect insured persons who are confronted with claims after the policy period. In Belgium, this reporting period is 36 months, and in France, a minimum of five years. In Belgium and France, legislation has been passed (partially) to address this problem of posteriority coverage.¹⁰⁶

4.0 Conclusion

It has been established that in France, Belgium, and Vietnam, the parties involved in an insurance transaction (the insurer and the insured) have been given legal leeway to agree on the insurance contracts. However, in the three jurisdictions, specific mandatory regulations must be maintained in an insurance contract to ward off the possibility of nullifying an insurance contract. The three countries apply insurance principles – insurable interest, insured risks, insurable premium, etc.- alongside additional legislation passed in the individual countries to regulate medical malpractice liability insurance.

In the case of Vietnam, medical malpractice liability insurance might be said to be in its infancy years. Vietnam is in the process of legislating laws that govern medical malpractice liability insurance. Currently, Vietnam has not yet passed legislation that would cover professional liability insurance. Moreover, many gaps are evident in the Decree on Liability insurance in Medical Examination and Treatment. Also, medical malpractice liability insurance has been used for quite a while in Belgium and France, and is mandatory.

It has also been established that Vietnam doesn’t allow a third party to launch a liability indemnification claim directly with an insurance company. Also, Vietnam has not yet passed sufficient regulations to protect third-party rights. These weaknesses in the medical malpractice liability insurance regulatory framework have weakened MMLI in Vietnam compared to France and Belgium.

Typically, there are three kinds of coverage triggers: fact-occurrence, loss-occurrence, and claims-made. Among them, the fact occurrence or act-committed system is undoubtedly the

¹⁰⁵ Cavignac and Associates, ‘Professional Liability Update, Understanding Claims-Made Insurance,’ 1998, p.2; <www.cavignac.com/publications/professional-liability-update-understanding-claims-made-insurance/>

¹⁰⁶ L. 124-5 French Insurance Code; for a more detailed analysis: Bloch, L., *Assurances terrestres* in *Jurisclasseur Civil Annexes*, Fasc. 11-10, 2017, n° 78, <www.LexisNexis.com/fr>

most beneficial system for the physician-insured. The three policies have been recognised in Belgium and France but not Vietnam. Vietnam only admits claims-made policy. The main reason for this restriction is the limited legal capacity of medical malpractice liability insurance, which has not been developed as in other countries. As mentioned earlier, medical liability may take considerable time between the mistake, the discovery of the claim, and the lodging of a claim. Apparently, for the physician, it is essential that, in the case of this system, the liability risk remains covered even after the insurance contract has been terminated.

Also, in spite of medical malpractice liability insurance being a product meant to protect medical professionals and their patients, in Vietnam, it has developed at a sluggish pace, and its uptake is slow. In Vietnam, many healthcare facilities have declined or delayed taking out medical malpractice liability insurance. Such institutions proffer various reasons, including costly insurance premiums, short contract periods, and inadequate liability indemnification. On the other hand, the uptake of medical malpractice liability insurance in France and Belgium has been stable and upward.

REFERENCES

- Adam Hayes, 'Indemnity: What it Means in Insurance and the Law.' (Investopedia, 12 April 2022) <<https://www.investopedia.com/terms/i/indemnity.asp>> accessed 23 December 2022
- Alexander, Twin, 'Insurable Interest.' (Investopedia, 17 May 2022) <<https://www.investopedia.com/terms/i/insurable-interest.asp>> accessed 21 December 2022
- American Academy Pediatrics* <<https://www.aap.org/>>
- Baker, T., 'Insuring Liability Risks.' 2004 (29) Blackwell Publishing Ltd
- Bal, B Sonny, 'An introduction to medical malpractice in the United States.' 2009 (467)2 Clinical orthopaedics and related research : 339-47. <Doi:10.1007/s11999-008-0636-2> accessed 18 December 2022
- Belgian Insurance Act 2014; De Ridder, C., *Essentiële bestanddelen van de verzekeringsovereenkomst*(Essential Components of the Insurance Agreement) in Vansweevel, T. and Weyts, B. (eds.), *Handboek Verzekeringsrecht* (Insurance Law Handbook), 2016 Intersentia
- Caevignac and Associates, 'Professional Liability Update, Understanding Claims-Made Insurance,' 1998
- Civil Code No. 91/2015/QH13 (was adopted in 2015 and came into force January 1st 2017)
- Claims Made vs. Occurrence Form Professional Liability Policies; <www.americanprofessional.com/wp-content/.../Claims-Made-vs-Occurrence_AC.pdf>
- Daniel Liberto, 'Occurrence Policy.'(Investopedia, 18 July 2021. <www.investopedia.com/terms/o/occurrence-policy.asp> accessed 23 December 2022
- Decree on Liability insurance in Medical examination and treatment, No.102/2011/ND-CP.
- Deontological Code of Physicians, 2016
- Dubuisson, B., *Rapport belge concernat l'assurance de la responsabilité civile: couverture dans le temps* (Belgian Report on Liability Insurance: Cover over time), *Assurance de la responsabilité: couverture dans le temps* (Liability Insurance : Cover intime, Maklu, 1997
- Duke, J., 'Risk Control in Professional Liability Insurance,' 1996 Duke Law Journal
- Embroker, 'What is Third- Party Liability Insurance?' (18 August 2022) <www.embroker.com/blog/third-party-insurance/> accessed 23 December 2022
- Etzbach, P., Atkins, N., Tulloch, N., Sails, H., and Merrick, A., 'Legal Nature of Insurance Contracts.' 2013 IBA Insurance Committee Substantive Project, The International Bar Association
- Fenyves, A., Kissling, C., Perner, S., Rubin, D., 'Compulsory Liability Insurance from a European Perspective, De Gruyter,' 2016
- Fischer, J., 'Insurance Coverage for Mass Exposure Tort Claims: The Debate over the Appropriate

- Trigger Rule.’ 1997 (45) Drake Law Review
- Fontaine, M., ‘*Droit des assurances* (Insurance Law),’ 2016 Larcier
French Civil Code
French Insurance Code.
- Goold, D. and Lipkin, M., ‘The Doctor-Patient Relationship,’ 1999 JGIM
- George Mary, ‘The Elements of Library Research: What Every Student Needs to Know.’ (2008) DOI:
10.1515/9781400830411. Accessed 25 December 2022
- Groner, M., ‘*Third Party Property Damage Liability Explained,*’ 2016;
<www.frontrowinsurance.com/articles/third-party-property-damage-liability>
- Houses of the Oireachtas, ‘Joint Committee on Health and Children, Joint Committee on Health and
Children,’ 2015
- Hugo Keulers, H. and Lodewijckx, S., ‘Lydian, Insurance and Reinsurance in Belgium: Overview.’
2012;<[www.lydian.be/sites/default/files/uploads/publications/plc_insurance_and_reinsurance
_handbook_2011_belgium.pdf](http://www.lydian.be/sites/default/files/uploads/publications/plc_insurance_and_reinsurance_handbook_2011_belgium.pdf)>
- Insurance Act 2014; Weyts, B., ‘De dekking in de tijd van aansprakelijkheidsverzekeringen: een
delicaat evenwicht tussen contractuele vrijheid en dwingende regelgeving in Vansweevelt, T.
and Britt Weyts (eds), *De aansprakelijkheidsverzekering in ontwikkeling*, ALLIC II,
Intersentia, 2016
- Insurance contracts, Law on Insurance business, No. 24-2000-QH10 and Law to amend and
supplement a number of articles of the Law on Insurance business, No. 61/2010/QH12
- Insurance Day, ‘International Comparative Review of Liability Insurance Law,’ Barlow Lyde &
Gilbert
- Insurance Europe, ‘How insurance works.’ 2022 < www.insuranceeurope.eu > accessed 20 December
2022
- Insurance Information institute, ‘Understanding Medical malpractice insurance.’ (n.d)
<www.iii.org/article/understanding-medical-malpractice-insurance > accessed 20 December
2022
- Insuranceopedia, ‘First party insurance’ (n.d)
<<https://www.insuranceopedia.com/definition/5399/first-party-insurance>> accessed 20
December 2022
- Jackie Lam, ‘What is Medical malpractice Insurance?’ (Forbes Advisor 25 October 2022)
<<https://www.forbes.com/advisor/business-insurance/medical-malpractice-insurance/>
> accessed 25 December 2022
- Jackson, J. and Powell, R. ‘On professional Liability,’ 2012 Sweet & Maxwell, p. 305; *Medical
Professional Liability Insurance Commissioners*, 2016 National Association of Insurance
<www.naic.org/>
- Joint Circular No. 41/2014 / TTLT-BYT-BTC of November 24, 2014 of the Ministry of Health and
the Ministry of Finance guiding the implementation of health insurance.
- Julia Kagan, ‘Claims-Made Policy: Definition, How it works, and Coverages.’ (Investopedia, (31 May
2021) <www.investopedia.com/terms/c/claimsmade-policy.asp> accessed 23 December 2022
- Julia Kagan, ‘Insurance: Definition, How it Works, and Main Types of policies.’ (Investopedia, 18 July
2022) < <https://www.investopedia.com/terms/i/insurance.asp> > accessed 20 December 2022
- Julia Kagan, ‘Liability Insurance: what it is, How it Works, Major Types.’(Investopedia, 21 June 2022)
< www.investopedia.com/terms/l/liability_insurance.asp > accessed 21 December 2022
- Julia Kagan, ‘What is professional Liability Insurance? Costs and coverage.’(Investopedia, 3
September 2022), <www.investopedia.com/terms/p/professional-liability-insurance.asp >
accessed 21 December 2022

- Julia Kagan, 'Premium Defined, How It's Calculated, and Types.' (Investopedia, 03 March 2022) <www.investopedia.com/terms/i/insurance-premium.asp> accessed 22 December 2022
- Keulers, H., and Catteau, A., 'Direct Third-Party Access to Liability Insurance in Belgium.' 2012 IBA Insurance Committee Substantive Project .International Bar Association <<https://webcache.googleusercontent.com/search?q=cache:BXKvbnKFzGIJ:https://www.ibanet.org/Document/Default.aspx%3FDocumentUId%3D334C288E-984D-4870-9905-192AFF65A398+&cd=1&hl=en&ct=clnk&gl=vn>>
- Keulers, H. and Catteau, A., 'The Legal Nature of Insurance Contracts.' 2013, IBA Insurance Committee Substantive Project, International Bar Association
- Kourmatzis, D., '*Professional Liability Insurance Coverage and Civil Law Juridictions*,' 2009 Revija za pravo osiguranja.
- L. 124-5 French Insurance Code; for a more detailed analysis: Bloch, L., *Assurances terrestres* in Jurisclasseur Civil Annexes, Fasc. 11-10, 2017, n° 78, <www.LexisNexis.com/fr>
- Lambert-Faivre, Y. and Leveneur, L., '*Droit des assurances* (Insurance Law),' 2011 Dalloz, <<https://uk.practicallaw.thomsonreuters.com/>>
- Law on Insurance Business, No. 24-2000 - QH.10
- Lucas, Downey, 'Coverage Trigger.' (Investopedia, 31 January 2022) <www.investopedia.com/terms/c/coverage-trigger.asp> accessed 23 December 2022
- Merkin, R., 'Colinvaux's Insurance Law,' 2006 Sweet & Maxwell.
- Methodological Guide E11 templates relating to medical professional liability, <https://acpr.banque-france.fr>
- Noussia, K., 'The Principle of Indemnity in Marine Insurance Contracts: A Comparative Approach.' 2007 Springer
- Occurrence vs. Claims Made Coverage Forms, Insurance Journal, 2016; <www.insurancejournal.com/blogs/academy-journal/2016/06/13/411266.htm>
- OECD, 'Medical Malpractice: Prevention, Insurance, and Coverage Options,' 2006 OECD-Publishing; <pcsi.pa.go.kr/files/2106051E.pdf>
- Paul Britton, 'What is an Indemnity Clause?' (*Britton & Time*, 13 May 2019) accessed 23 December 2022 <<https://brittontime.com/2019/05/13/what-is-an-indemnity-clause/>> accessed 23 December 2022
- Pierre-Olivier, L, Arroyo, P. and Lefort, C., Holman Fenwick Willan France LLP, 'Insurance and Reinsurance in France: Overview, 2017; <<https://webcache.googleusercontent.com/search?q=cache:lFrq7CFIbA4J:https://uk.practicallaw.thomsonreuters.com/9-501-3248+&cd=1&hl=en&ct=clnk&gl=vn>>
- Prashanth, V., 'Necessity of Insurable Interest in Insurance Contracts.' 2008; <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1302372>
- Public Health Code, March 4th 2002.
- Prudential Insurance Co v Commissioners of Inland Revenue, [1904] 2 KB 658.
- Rasmussen, R., 'The Trigger on A Liability Policy, 2010; <www.ifinsurance.com/web/industrial/ifnews/pages/liability_newsletter_4_2010.aspx>
- Re George and Goldsmiths' Ins. [1899] 1 Q.B
- Rhodes M., '*The Law of Liability Insurance*,' 1990 Long, R. (ed.), New York, Matthew Bender, § 12.11.
- Risk and the Relevant Definitions of Insurance; <<http://www.baoviet.com.vn/>>
- Sean, Ross, Elements of Insurable Risks: A Quick Guide (21 June 2021) <www.investopedia.com/articles/insurance/082616/elements-insurable-risks-quick-guide.asp> accessed 22 December 2022
- Serwach, M., 'Medical Insurance in Polish and French Legal Systems,' 2015 Prawo Asekuracyjne

- The Association of British Insurers (ABI). 'Insurable Interest' 2002 <www.abi.org.uk/data-and-resources/tools-and-resources/glossary/insurable-interest/> accessed 21 December 2022
- Types of Medical Malpractice Insurance Policies*, American Academy of Actuaries, 2008 <www.actuary.org>
- Van De Merwe, S., 'The Concept of Insurance and the Insurance Contract.' 1970 CILSA
- Vansweevelt, T., '*De Beroepsaansprakelijkheidsverzekering van Artsen en Ziekenhuizen: een Vergelijkende Analyse*' (*The Professional Liability Insurance of Doctors and Hospitals: A Comparative Analysis*), ' 1997 Mys en Breesch
- Vansweevelt, T., '*De Civielrechtelijke Aansprakelijkheid van de Geneesheer en het Ziekenhuis (The Civil Liability of the Doctor and the Hospital)*,.' 1997 Antwerpen, Maklu, 797, nr. 1296.
- Vietnamese Law on insurance contract, No. 24-2000 – QH10
- Vietnamese Law on Insurance Business 2000.