Not so long ago underwriting agencies were a rara avis, most of them associated with Lloyd’s syndicates and used for covering risks that were not a priori attractive for local insurers, either because they were very high-risk or involved a complicated management or underwriting operation.

Before the latest amendment of the Private Insurance Organisation and Supervision Law (LOSSP in Spanish initials) there was a spate of applications for registration in the Insurance and Pension Funds Board (Dirección General de Seguros y Fondos de Pensiones: DGSyFP); small wonder in view of the market situation and also the consequences of the new regulation, currently in force.
But before going further into this matter, we need first to explain what is meant by underwriting agency (hereinafter UA), what they are for, how they work; this will shed some light, hopefully, on the regulation that is about to come into force.

UAs stem from English-speaking law and make full sense within Lloyd’s idiosyncratic structure.1

Lloyd’s is one of the oldest but, at the same time, least conventional of insurers.2 Its modus operandi is for its members, grouped in syndicates, to accept insurance of a given risk and back up the underwritten operation with capital.

Each syndicate has a given number of members, who in turn define their own strategy, which may or may not concur with Lloyd’s own. In other words the syndicate members have sovereignty over their own capital.

The syndicates are counselled by managing agents, who make the necessary technical analysis to serve as the basis of the syndicate members’ decision to accept or reject the transaction.

A situation could arise in which a broker seeks to place certain risks among various managing agents. The managing agent usually operates for the syndicate and the broker for the policyholder. Given that the managing agent underwrites risks on the syndicate’s behalf, these agents might often delegate the risk underwriting function to other «subagents», called coverholders.

Coverholders are in effect proxies of the syndicate’s managing agent. They can therefore accept the contracting of certain insurance policies in the name of their represented party. But this coverholder will be entitled not only to underwrite risks but also to collect premiums and settle claims. The limits of his or her representational powers will be only those laid down in the agency contract signed between the coverholder and the managing agent.

These coverholders are known under Spanish law as agencias de suscripción de riesgos (underwriting agencies).

The current Spanish Law on the Mediation of Private Insurance and Reinsurance (Ley de Mediación en Seguros y Reaseguros Privados: LMSRP) regulated the UAs (coverholders) very briefly in its third additional provision.

Even though the text set out ostensibly to regulate the insurance mediation activity, the law, rather surprisingly, forthrightly stated that the activity of the underwriting agencies was not to be considered as mediation.3

This legal situation has clashed with the opinion of the agents themselves and some legal theorists, who have indeed understood the UA’s work to be, effectively, mediation.4

---

1 Though not solely, because there is also, for example, the Institute of London Underwriters, which mainly integrates insurers based outside the UK.
2 Founded in the C17th by Edward Lloyd, who ran a cafeteria with this name at the time.
3 Much the same goes for the «auxiliary advisor» figure laid down in article 8 of the LMSRP.
THE PROBLEM OF ASCERTAINING EXACTLY WHAT IS TO BE UNDERSTOOD BY AN UA STEMS FROM THE INTERPRETATIONS GIVEN BY THE SPANISH REGULATOR TOWARDS INSURERS WITH A PARENT COMPANY, SUBSIDIARY OR BRANCH IN SPAIN

We ourselves believe that the work of the UAs does constitute mediation insofar as the whole set of activities carried out by an insurer can be defined as such. It should not be forgotten here that the LMSRP provides for the possibility of insurance companies carrying out mercantile insurance distribution work, a task that is regulated within the mediation law.5 The fact is that in any agency contract the empowerment given by the insurance company to the underwriter may entitle it to carry out many other tasks than just capturing business and/or offering products.

But the problem of ascertaining exactly what is to be understood by a UA, and how far-reaching its work is, stems from the interpretations given by the Spanish Regulator, perhaps with an over-protectionist zeal, towards insurers with a parent company, subsidiary or branch in Spain.

Witness the answer given to the Query «Lloyd’s on underwriting agencies» dated 5 July 2007, which entitled section 2 as «Relation between the underwriting agency and other mediators», when Additional Provision 3.1 of Ley 26/2006 states that «(...) it cannot be construed that they constitute private insurance or reinsurance mediation activities as defined in article 2.1 hereof».

We also find that the Dirección General excludes the possibility of an underwriting agency underwriting risks for more than one insurer, «(...) since its activities will be understood to have been carried out directly for said insurance company».

And this despite the fact that the former regulation expressly stated the following: «the activities carried out by underwriting agencies on behalf of and in representation of the insurance or reinsurance companies (...)».

In other words it spoke in the plural, and not by oversight but rather by express decision of the legislator. Note that the current regulation uses the plural anew as a reflection of the influence of community law.

But the fact is that the Spanish law contradicts itself in accepting the underwriting of risks for different insurers in the Lloyd’s framework, on the grounds that it is considered in fact to be a single insurance company.6

The Regulator has forgotten here the general legal principle whereby what is not expressly forbidden in private law is ipso facto permitted; this differs clearly from public law where government authorities are entitled to carry out only that which they are expressly empowered to do so, the rest being prohibited.

Bringing these clarifications to bear on UAs and how they are understood by our Regulator, where do they fit in the legal scheme?

The current regulation of these UAs comes from point eight of additional provision 14 of the Sustainable Economy Law 2/2011 (Ley de Economía Sostenible), revoking additional provision 3 of the Ley de

5 Article 2.2 of Ley 26/2006.
Mediación en Seguros, and creating articles 86 bis and 86 ter of Royal Legislative Decree 6/2004, their regulation then being inserted in Section IV of Title III, On the activity of foreign insurance companies in Spain.

Their insertion precisely here is no coincidence

Firstly because it is understood that the activity of UAs is not mediation and is regulated in the overarching insurance-company law, the Ley de Ordenación y Supervisión de Seguros Privados.

Why are the UAs regulated in Title III, On the activity of foreign insurance companies in Spain?

Because the DGSyFP has always understood that underwriting agencies made sense insofar as they accepted risks in the name of foreign insurers, it never having been fully accepted or accounted for that an insurer with a parent company, subsidiary or branch in Spain should grant sufficient powers to an agent for underwriting risks directly on an insurer’s account or settle claims.

Our viewpoint is that regulation cannot be formulated and implemented looking solely inwards at our own market, especially when the markets of our competitors grant powers and permit transactions that place our own national operators at a disadvantage.

A very similar case occurred with legal expenses insurance in Germany. In Germany this line could be marketed only by specialist insurers so the foreign multi-line insurers traded under the Community principle of freedom to provide services and competed with the national specialists but not with the national multi-lines, generating a clear competitive disadvantage. In the FRG it was understood that insurers’ interests were better protected thus, which was not in fact the case, judging from the Solvency II Directive, whereas in fact Germany's own industry was being harmed. This is exactly what is now occurring with UAs in Spain.

It should be added here that everything bound up with the freedom to provide services and freedom of establishment is laid down as a fundamental right in the Treaty Establishing the European Community, seeking smooth interaction of the various economic operators throughout the Union.

Nonetheless a UA does not in fact constitute the establishment of an insurer in another country since it is not a branch or subsidiary thereof but rather an independent legal person in its own right.

A UA does not constitute the establishment of an insurer in another country since it is not a branch or subsidiary thereof but rather an independent legal person in its own right.

8 Articles 52 to 58 of the Treaty.
another country since it is not a branch or subsidiary thereof but rather an independent legal person in its own right; indeed the significant shareholding rule of insurance companies is applied thereto; we therefore do not understand its placing within the LOSSP, especially in view of the fact that this rule is not applied to the insurers’ branches.

Similar but with a subtle difference is the Portuguese legislation, where any agency, office or any other representational premise of an insurance company is considered to be a branch. In other words, UAs would indeed be included insofar as they are «any other form of representation»; this situation therefore differs from the wording of the Spanish law.

Furthermore, Spain’s current system rules out the possibility of a UA underwriting risks of an insurer outside the European Economic Area, thereby removing from its trawl US, Canadian, Japanese, Brazilian, Indian insurers, etc. This can only be harmful to any dynamic economy, as Spain’s strives to be, and might even be construed as a limitation of the freedom to conduct business.

In fact, a UA underwrites risks on behalf of an insurer, whether or not it can manage claims. It is not its representative in Spain nor a subsidiary of said insurance company.

But to understand a UA properly and hence be able to regulate them with any consistency we first need to ascertain exactly what their legal nature is.

To do so we have to start by clarifying what an agency contract is, since this underpins the whole existence of UAs.

The agency contract is one of the so-called atypical contracts. Under such a contract an agent undertakes to provide business operations in a constant manner in exchange for a remuneration. The agent is independent of the person for whom it mediates, with no more bond than the agreed remuneration, so it is not liable for the risks of said operations. In other words, it is not a branch or office of the entrepreneur on whose account it promotes the activity.

9 Articles 22, 22 bis, 22 ter paragraph two of LOSSP.
11 Article 86 bis 1 of LOSSP.
12 Article 38 EC.
14 Article 1 Of the Agency Contract Law 12/92 (Ley sobre el Contrato de Agencia).
As regards the underwriting of risks this is understood to be the set of activities geared towards the acceptance of a risk by an insurer, according to some pre-established terms and conditions.  

An underwriting agency is thus the institutional arrangement whereby an underwriter accepts risks on behalf of an insurer. But the mere acceptance by the underwriter already binds it to the insurer, even though it is not an organic part thereof, all in due accordance with the empowerment granted.  

A priori it could be likened to the work of the mediator; in fact most of the UAs registered in the DGS derive from brokers who were driven to become UAs by the natural market evolution.  

Nonetheless, it should be noted here that for some time underwriting agencies have not been subsumed under insurance mediation in Spain; this situation is similar in other comparable countries.  

It is true that mediators may issue policies and these bind the insurer, a situation which also obtains in the case of insurance brokers, which have no relationship of hierarchical dependency with the insurer, as the UAs do.  

Nonetheless the UAs might come to manage claims, whenever the empowering company has delegated this function on them. This situation is prohibited for insurance brokers in Spain and not in other comparable countries.  

An agent can indeed manage claims but does not take on the risk on behalf of another, the insurer, but rather, as

15 Castelo Matrán, J. y otros; Diccionario MAPFRE de Seguros, Madrid, Edición 2008.  
17 Eg. the Portuguese case, article 8 of Decreto-Lei 144/2006. Along the same lines as the Spanish case in Portugal the UAs are regulated within the insurance law with the proviso that "(…)
permanent presence (…)" that is carried out "(…) through a simple office run by the personnel of the firm itself or an independent person but empowered to act permanently on behalf of the company as an agency would". Article 1 c of Decreto-Lei 94-B/98.  
19 Articles 31 and 32 Ley 26/2006.
representative of the insurer, acts directly as said company.

**WHAT ARE THE DIFFERENCES?**

In Spain, at the moment, UAs can underwrite risks only on behalf of insurers not based in Spain, being bound to present a programme of activities.

Although they can also work only for re(insurers) authorised to trade in Spain, agents are not bound to present a programme of activities or ask the Regulator for authorisation, since the responsibility for notifying the entry in the Registry of Mediators falls on the insurance company or companies for which the agent is working.

Another important difference that stems from the current wording is that the UAs can only be legal persons whereas the agents and brokers can also be natural persons.

If we are going to analyse what the insuring activity is, we understand that they are the rightful activities of an insurance company, ranging from marketing and sale of policies, the management of the premiums received to, as the case may be, the operations deriving from claims.

**WHAT IS THE DIFFERENCE FROM THE UAS?**

Simply that the UA underwrites a risk on behalf of another; it does not stand security itself for the risk since the party that takes on these capital-based consequences is the insurer directly.

It should be pointed out here that the future Insurance Supervision Act (*Ley de Supervisión de Seguros*) is to be worded in

---

21 Articles 13 and 21 of the Ley de Mediación en Seguros.
22 Briefly, we might add that there are other differences like the regime of significant shareholdings, the eligibility of the management staff, etc., but we have centred on those we believe to be most important. See Morillas Jarillo, Mª J., «Ley de Economía Sostenible y mercado de seguros y planes y fondos de pensiones», in *Diario La Ley*, N° 7615, Sección Tribuna, Year XXXII, April 2011.
identical fashion insofar as UAs are concerned. The bill as currently drafted lays down specifically in Section 4 of Title II of Chapter II on Access to the activity in Spain of insurance and reinsurance companies of other EU states. Underwriting agencies, and the control thereof will be ruled in a similar way to the (re)insurance companies dealt with in Chapter I of Title IV.

Given this characterisation of the underwriting agencies, are we dealing here with a mediator *sui generis* or a particular type of insurance company? In our opinion it would fit more neatly into the concept of mediation, since, at the end of the day, it does not take on as its own the risks it accepts, and for this work of capturing premiums it receives a remuneration, not from the policyholder – as a broker might do – but only from the company for which it underwrites the risks.

The main difference in Spain from brokers is that the UAs can manage claims, so in our opinion Spain’s law wished to avoid any confusion whatsoever with the policyholders. Note, however, that agents can in fact manage claims on behalf of the insurers.

Although it is true that, before the *Ley de Mediación* there was a large legal loophole, where the UA could be a limited company or even a natural person, the current framework seems to have swung too far the other way, placing great stress on the control exerted by the Regulator, since the same regime is now applied to the UAs as to the insurers. This smacks of overkill, since UAs do not assume as theirs the underwritten risks.

We believe this to be because the law was drawn up without a full and proper understanding of the true legal nature of UAs. In our opinion, in light of all the above, this nature chimes in more with the mediation activity than the insurance activity strictly speaking.

---

BEFORE THE *LEY DE MEDIACIÓN*
THERE WAS A LARGE LEGAL LOOPHOLE, BUT THE CURRENT FRAMEWORK SEEMS TO HAVE SWUNG TOO FAR THE OTHER WAY, PLACING GREAT STRESS ON THE CONTROL EXERTED BY THE REGULATOR

23 Project Nº 121/000142.
24 STSJ (Judgment of the Higher Court of Justice) of Madrid, 2050/2009, Sala Contencioso Administrativa, Sección 8ª, 19 November.