GUY CARPENTER

RECENT LEGISLATIVE AND JUDICIAL DEVELOPMENTS IN CONTINENTAL EUROPE

AFFECTING THE CASUALTY INSURANCE INDUSTRY

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MARSH & McLENNAN COMPANIES

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INTRODUCTION

Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry is the latest installment in Guy Carpenter & Company Ltd.'s ("Guy Carpenter's") legislative update series, designed to provide our international clients and markets with a concise overview of key trends in the Continental European legal environment. These issues have had an impact on insurers and reinsurers or are expected to have an effect in the near future.

Guy Carpenter has produced this report thanks to a continued valued cooperation with the insurance practice of law firm Heuking Kühn Lüer Wojtek and its network of legal experts, who are acknowledged as leading insurance law practitioners in their respective jurisdictions across Continental Europe. The objective has been, as in previous reports in this series, to focus on the legislative or judicial developments that we consider to be of greatest impact in each selected country. It has not been our goal to produce an exhaustive review of the entire scope of legislative changes and judicial rulings of the past year in Continental Europe, but rather to highlight the main developments that we and our legal colleagues perceive as being worthy of attention, and where necessary, further in-depth study.

This issue of *Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry* covers the period September 2011 to March 2012.

1 ADMISSIBILITY OF THIRD PARTY LIABILITY INSURER PAYING INDEMNIFICATION TO INSURED IN AUSTRIA

In exceptional cases under Austrian law, a third party liability insurer may be obligated to pay an indemnification to an insured party. Such cases exist where the insured settled damages with an injured third party or where the injured third party agreed to a payment to the insured. The latter situation must be stated in a civil proceeding and has to be proven in court (OGH 30.3.2011, 7 Ob 241/10g).

RELEVANT LEGAL PROVISIONS

Section 154 Paragraph 1 of the Austrian Insurance Contract Act (AICA; Versicherungsvertragsgesetz, VersVG) stipulates that the insurer must transfer an indemnification within two weeks of: 1) the insured fulfilling a third party's claim, or 2) the validity of the third party's claim being determined by a legally binding judgment, an acknowledgement or a settlement. According to Section 156 Paragraph 1 of the AICA, dispositions over and above the claim for compensation are legally void in relation to a third party.

In the event that the insured requests a payment that obligates the insurer to pay an indemnification to a third party, Section 154 Paragraph 2 of the AICA allows for the possibility that a settlement, acknowledgement or court judgment establishes the compensation to be paid to a third party.

FACTS OF THE CASE

The underlying case was a dispute over structural refurbishment work for a shopping mall in Austria. Both parties in the civil proceedings before the Austrian Supreme Court (ASC; Oberster Gerichtshof, OGH) were insurance companies. The claimant was the third party liability insurer of the principal (Werkbesteller), which was in charge of doing electrical work at the mall and subcontracted that work to an external party. The defendant in the case was the subcontractor's third party liability insurer.

The subcontractor negligently caused water damage to the ventilation system of the shopping mall. Because the subcontractor was fully liable for the damage, it notified its third party liability insurer (the defendant) and requested an indemnification. The subcontractor confirmed in writing to its insurer (the defendant) that it would deduct the damage amount from its final invoice to the principal. The defendant then issued the indemnification to the subcontractor under the assumption that the subcontractor would indemnify the third party correctly. At a later point, the subcontractor and principal disagreed on the final payment for the work.

Meanwhile, the principal reported the loss from the water damage to its own third party liability insurer (the claimant) without knowing that the defendant had already paid the subcontractor, and the claimant indemnified the principal as well. Consequently, the claimant requested payment from the defendant for the indemnification payment to the principal based on Section 67 of the AICA that stipulates an assignment by law of the damage claim from an insured to its insurer to the extent of that claim. The defendant rejected the request, referring to its own compensation payment to the subcontractor.

Finally, insolvency proceedings had been opened over the assets of the subcontractor, and the claimant filed a claim in the insolvency proceedings. Although the insolvency liquidator rejected this claim, the claimant succeeded in a subsequent court proceeding. Based on this judgment, the claimant filed a motion for attachment and transfer of garnished claim against the subcontractor's third party liability insurer, according to Section 157 of the AICA. The defendant still refused payment to the claimant, thereby forcing the claimant to file a claim in court against the defendant.

The court of first instance, the District Court in Linz, granted the claim, and the Court of Appeals confirmed this decision. The ASC, however, accepted the defendant's appeal but rejected the defendant's motion on the merits.

FINDINGS

Initially, the ASC analyzed the legal basis of an insured's claim against an insurer arising out of third party liability insurance. In casualty insurance, according to the ASC, such claims consist basically of the right of exemption (Befreiungsanspruch) and may be directed to the exemption of a justified claim, as well as to the defense of an unjustified liability claim. The right of exemption of the insured becomes due as soon as a third party issues a claim against the insured based on a risk covered by the third party's liability insurance.

According to Section 154 Paragraph 1 of the AICA, a right of exemption becomes a pecuniary claim only in the event that the insured fulfilled the claim of the third party or the claim of the third party has been assessed by a binding court judgment, acknowledgement or settlement (cf, inter alia, case file no. 7 Ob 84/08s of the ASC). An acknowledgement under Austrian civil law may have declaratory or constitutive effect depending on the parties' intentions (cf Kajaba in Kletečka/Schauer, ABGB-ON 1.00 [Stand 1.7.2010] § 1375 Rz 2 ff [www.rdb.at]). According to the facts of this particular case, the damage claim of the subcontractor had been acknowledged by consent of the defendant, and the right of exemption was turned into a pecuniary claim.

However, Section 154 Paragraph 1 of the AICA regulates neither the due date nor the recipient of such due payment. In this regard, the ASC takes into consideration the intention of the AICA in making its decision, especially the fact that a third party shall be specifically protected in case of third party liability insurance. In the event that an insolvency proceeding is pending over the assets of an insured, a third party may claim a separate settlement of claims directly against the third party liability insurer based on a claim for compensation of the insured (cf Section 157 of the AICA).

Even though a third party has no direct claim against a third party liability insurer, except in automobile third party insurance, a third party may claim damages by way of attaching the insured's claim for indemnification against the insurer. In so doing, the third party may directly claim from the third party liability insurer and, therefore, enters into the legal position of the insured.

REMARKS

Undoubtedly the ASC's decision in this regard is neither surprising nor inconsistent. Nevertheless, it may serve as a reminder to the insurance industry that a third party's rights must be strictly observed.

In third party liability insurance, the insured has to allege and prove the consent of a third party to obtain indemnification from the insurer. Therefore, in this case, the defendant had to allege and prove in court that the principal agreed to the payment of an indemnification to the subcontractor. Any conversation between the insured and the third party regarding compensation at a later date is not interpreted as consent to a payment to the insured, taking into consideration the insolvency risk of the insured for the third party.

For these reasons, it is strongly recommended that the Austrian casualty insurance market request a duly signed confirmation in writing from a third party that it agrees to payment of the insurance proceeds to the insured.

2 TEST-ACHATS JUDGMENT OF EUROPEAN COURT: GENDER EQUALITY IN INSURANCE COVERAGE IN BELGIUM

BACKGROUND

Shortly before Christmas 2011, the European Commission published its guidelines for the insurance industry to help insurers implement necessary changes in light of the Court of Justice of the European Union (CJEU) judgment in the Test-Achats Case (C 239/06) of March 1, 2011. The guidelines' publication followed a meeting of insurers with European Union (EU) Justice Commissioner Viviane Reding in September 2011.

In the Test-Achats (Belgian consumers association) judgment, the CJEU held Article 5(2) of Council Directive 2004/113/EC, known as the Gender Directive, to be incompatible with European Law. This directive allowed member states to implement provisions in their national laws that allowed proportionate differences in individual's premiums and benefits where gender is used to assess risks based on actuarial and statistical data.

Article 5(2) reads:

> Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex as a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

The CJEU found that this directive runs counter to the achievement of equal treatment of men and women and constitutes discrimination, which is not compatible with the Charter of the Fundamental Rights of the EU. The expressed purpose of the directive, as stated in Article 1, is to achieve equal treatment and combat discrimination in the access to and supply of goods and services. Since there is no temporal limitation in the directive, the derogation in Article 5(2) may continue indefinitely and consequently would undermine the purpose of the directive indefinitely.

INDUSTRY IMPACT

Because the Test-Achats judgment will have a significant effect on insurance contracts and to provide the industry with time to adapt, the court held that Article 5(2) will be invalid effective December 21, 2012.

All member states currently allow gender differentiation for at least one type of insurance. Common examples are car insurance, life insurance and private health insurance. The impact of the court's judgment is that from December 21, 2012, onwards the requirements of Article 5(1) of Directive 2004/113/EC must be met without the possibility of a derogation. Article 5(1) states that:

> Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

To date, the directive has not been amended to reflect the Test-Achats judgment, and the Commission has only presented guidelines on the practical implications of the judgment. These guidelines are not binding, and courts may hold otherwise. An amendment to the directive would implement the view of the Commission and the European Council into a legislative framework, but it remains to be seen if and when this will take place.

GUIDELINES

The Commission's guidelines deal mainly with the impact of the Test-Achats judgment on new contracts and strive to clearly define the term "new contract" in order to achieve a uniform interpretation throughout the EU. Differing interpretations of this term would effectively undermine the objective of the directive and the Test-Achats judgment.

So, the Commission applies Article 5(1) to all situations in which a contractual agreement requires the consent of all parties involved, including amendments to existing contracts. Moreover, it covers contracts drafted and negotiated but not yet concluded and where the latest necessary expression of consent by one party occurs after December 21, 2012. Consequently, new contracts in that sense are contracts concluded for the first time after December 21, 2012. Contracts are also considered to be new if they were originally concluded before December 21, 2012, but have been extended through extension agreements completed after that date.

Under the Test-Achats judgment, the term "new contract" does not cover automatic extensions of existing contracts; adjustments made to individual elements of existing contracts such as premium changes; top-up or follow-on policies activated by a unilateral decision of the policyholder and whose terms were pre-agreed in contracts concluded before December 21, 2012; and policies included in an insurance portfolio that is transferred from one insurer to another.

Additionally, the judgment does not cover the use of gender as a risk rating for insurance products, but only if such rating does not result in differentiation on an individual level. Further, this means that reinsurance products and prices do not fall within the scope of the Test-Achats judgment as long as there is no direct effect on the individual policyholder, nor is there collection, storage and usage of gender status or related information. Hence, for internal risk assessment or marketing and advertising purposes, the usage of gender is still possible. This way, insurers can proactively seek to maintain a balanced portfolio, as long as access to a specific product is not denied simply due to a person's gender.

It also remains possible for insurers to take into account risk factors, such as health status and family history, where gender may be relevant with respect to certain physiological differences between men and women. This may likely result in the circumvention of the gender issue by using other factors that are influenced by gender such as health and lifestyle.

However, Article 4(5) states:

> This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Offering gender-specific insurance products to cover conditions that exclusively or primarily concern men or women, such as breast cancer or prostate cancer, remains possible. However, this is prohibited for pregnancy and maternity according to Article 5(3).

In its guidelines, the Commission gives an example where gender indirectly plays a role but price differentiation is still possible. Car insurance may be priced differently based on the size of a car engine, even though statistically men may drive cars with more powerful engines than women.

Since the judgment and guidelines deal with a directive, the new changes have yet to be implemented into national law. The Commission will monitor related developments closely and report on the new legislation in 2014.

CONCLUSION

The practical impact of the Test-Achats judgment cannot be fully determined yet. Many members of the insurance industry claimed that it would lead to an increase in premiums. However, it is likely that some kind of equilibrium will be created because the judgment seems to lead to an increase in lower premiums and also a reduction of higher premiums. Furthermore, not all gender-based differences are outlawed. Since most member states have not amended existing legislation, most insurers are still uncertain of the legal requirements placed on the new products.

3 FRANCE – DOES THE PROHIBITION OF DISCRIMINATION IN THE INSURANCE INDUSTRY CONFLICT WITH THE PRINCIPLE OF EQUALITY?

BACKGROUND

The CJEU has continually shown its commitment to fight discrimination and just took another step in that direction. In a judgment delivered on March 1, 2011, in the case of Tests-Achats (Belgian consumers association) versus Belgium, the court found that Article 5 of Council Directive 2004/113 allows member states to maintain an exemption in the insurance field from the rule of unisex premiums and benefits without a time limitation and that this exemption is incompatible with the principles established by the European Charter of Fundamental Rights (ECFR), namely equality between men and women and non-discrimination on the grounds of gender.

The ECFR directive forbids any discrimination on the grounds of gender in the access to and supply of goods and services. It does, however, authorize exemptions to the rule of unisex premiums and benefits, provided that they are based on "relevant and accurate actuarial and statistical data."

Although the directive provided for a review of member states' use of the Article 5 exemption five years after December 21, 2007, the court considered that there was a risk that the exemption from equal treatment of men and women would be permitted indefinitely and that such exemption is contrary to the aim of equal treatment. Consequently, the court decided that the exemption should become invalid effective December 21, 2012.

Strict equality between men and women is now required in the insurance industry, and it matters little that gender is a determining factor in assessing risk. Uniformity must preside.

This judgment was delivered in accordance with the conclusions of the Advocate-General, Juliane Kokott. She considered that it was legally inappropriate to determine insurance risk on the basis of the insured individual's gender. According to her, individual differences linked to gender only in a statistical sense should not lead to different treatment of insured individuals based on their gender. Furthermore, she stressed that gender is a characteristic that is inseparable from the person of the insured individual – as is the case with race and ethnic origin. Essentially, the person has no influence over this characteristic.

While other objective factors – for example, lifestyle, environment or professional activity – may play a key part in assessing insurance risk, discriminating on the grounds of gender would not. According to Advocate-General Kokott, discrimination takes away the possibility of guaranteeing "that different insurance premiums and benefits for male and female insured individuals rely exclusively on objective criteria."

COMPARABLE OR DIFFERENT SITUATIONS

To apply the principle of equality, a central question must be asked: Regarding the insured risk, can it be known if women and men are in comparable or different situations?

According to CJEU case law, the principle of equality of treatment requires that comparable situations not be treated differently and that different situations are not treated equally, unless such treatment is objectively justified.

In the case of December 16, 2008, Arcelor Atlantique et Lorraine et alia, C-127/07, Rec. p. I-9895, point 23, the court alluded to the question of comparability between men and women. It indicated simply that "Directive 2004/113 is based on the premise that [...] the respective situations of women and men with regard to insurance premiums and benefits contracted by them are comparable."

While this premise is not questionable, the reasoning seems to be somewhat simplistic regarding the directive providing an exemption from the principle of unisex premiums and benefits. The levels of insured risk are likely to be different, statistically at least, for women and men.

Eliminating the difference in prices and benefits based on gender will affect all lines of insurance, including retirement, health, welfare and life insurance. In the case of life insurance, only statistics make it possible to measure the uncertain part of the policy, namely the date of occurrence of the "loss" (death).

This recent application of the principle of gender non-discrimination for "repartition" scheme pensions shows that the 1978 Council Directive 79/7/CEE on implementing equal treatment for men and women in matters of social security took into account all aspects of insurance coverage. The CJEU's October 20, 2011, decision confirms this directive's validity. In that decision, the court specified that Article 3(1) of Directive 79/7/CEE "must be interpreted as meaning that an annual pension adjustment scheme such as that at issue in the main proceedings comes within the scope of that directive and is therefore subject to the prohibition of discrimination laid down in Article 4(1) of that directive." Today, it is required that the aggregate of payments of annual pension adjustment schemes (repartition pension) be the same for males and females.

Notably, the European judge did not rule that capitalization type pensions were within the scope of this directive. Unlike repartition pensions, capitalization pensions are based on the sum of money given by the insured. Other criteria, such as gender, are therefore irrelevant.

The need for gender equality was one of the reasons why the French repartition pension regime was altered. Before the system was reformed, mothers were given additional contributions when a child was born. This measure was contrary to the EU principle of non-discrimination. Consequently, the November 2011 reform of the pension system ensured equality between father and mother in terms of extra paid leave when a child is born.

REACTION TO TESTS-ACHATS DECISION

The insurance industry strongly criticized the CJEU's March 1, 2011, Tests-Achats decision. The Fédération Française des Sociétés d'Assurance (FFSA) felt that the decision challenged a key principle of insurance – that insurance must be based on segmentation of the population in order to determine a price of insurance based on the insured risk. The FFSA opinion draws attention to the fact that the consumer's interest is in purchasing insurance at the best price, which is a premium calculated according to the insured risk and determined from actuarial factors.

In its determination to fight against any form of discrimination, the CJEU delivered a decision that is not only contrary to the interests of consumers, but also far from the French notion of equality. According to Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789, all citizens are equal before the law "without distinction other than that of their virtues and their talents."

The CJEU decision also goes against French legislation that used the exemption from the principle of equal treatment for one or more types of insurance business. For the purposes of Article L 111-7 of the Insurance Code, the exemption is invoked so that "[t]he Minister in charge of the economy may, by decision, authorize differences in premiums and benefits which are based on taking gender into account and proportionate to the risks when relevant and accurate actuarial and statistical data establish that gender is a determining factor in assessing the insurance risk."

If this provision has not been subject to the control of the Constitutional Council, there is a likelihood that, if this had been the case, it would not necessarily have been censored by the nine constitutional judges.

The difference in treatment between men and women in the insurance industry seems to be in line with the case law of the Constitutional Council. “The principle of equality does not prevent the courts either from ruling differently in different situations or from exempting equality for reasons of general interest, provided that, in both cases, the difference in treatment resulting from this is directly related to the purpose of the law that establishes it” (for example, Constitutional Council 2009-578 DC, March 18, 2009).

Furthermore, the principle of non-discrimination is not established by the French Constitution. (For the opposing view, see Félicien Lemaire’s notion of non-discrimination in French law, RFDA 2010, p. 311.)

The EU political organs are not in agreement with the French regarding the concept of non-discrimination. These political organs have been under significant pressure from insurance company lobbies and the public alike.

The European Commission Declaration of January 13, 2012, on the principal application of the Directive 2004/113/CE reflects a level of agreement between the European Court and the Commission. Indeed, in the Declaration, the Commission considered CJEU’s decisions, in particular, the Tests-Achats decision. The Commission endorsed the court’s views, announcing that after December 21, 2012, no insurance coverage may index prices based on the gender of the customer.

With this communication, does the Commission want to announce a “doomsday of discrimination” between men and women beginning on December 21, 2012?

We may question the trend in our modern societies to prohibit recognition, admittedly discriminating, of virtues, merits and talents and to impose, conversely, “positive” discrimination when these same virtues, merits and talents struggle to emerge.

However, this decision may be an indirect means of pressing for the development of Article 16 of Directive 2004/113 and, consequently, of strictly women’s insurance in the name of “promoting [...] the interests [...] of women.”

4 GERMAN COURT DECISION: NON-ADAPTATION OF GENERAL INSURANCE CONDITIONS TO THE INSURANCE CONTRACT ACT 2008

INTRODUCTION AND BACKGROUND

The Insurance Contract Act 2008 (Versicherungsvertragsgesetz 2008, VVG 2008) became effective on January 1, 2008, and reformed the "old" VVG fundamentally. Until January 1, 2009, insurers were allowed to adapt general insurance conditions in older insurance contracts to the new VVG 2008 if the old conditions did not comply with the new act. Many insurers accepted the opportunity to adapt their old conditions, but some did not.

The old general insurance conditions requiring adaptation generally deviated from Section 28 Paragraph 2 Sentence 2 of the VVG 2008, which deals with policyholder non-observance of contractual incidental obligations (Obliegenheiten). Typically, with an incidental obligation, policyholders cannot be legally forced to observe obligations, but they may lose certain rights if they do not. For example, the policyholder could lose the right to demand compensation from an insurer.

Pursuant to Section 28 Paragraph 2 Sentence 2 VVG 2008, an insurer is entitled to include a provision in its general insurance conditions that fully releases it from the obligation to pay if the policyholder breaches an incidental obligation intentionally. If a policyholder does not observe an incidental obligation due to gross negligence, the insurer is entitled to reduce any benefits payable commensurate with the severity of the policyholder's fault.

However, according to Section 6 of the former VVG, the insurer was entitled to include a provision in its general insurance conditions that allowed it to fully deny payment in case of grossly negligent non-observance of the incidental obligation. General conditions in older contracts often contained such provisions.

The consequences of not adapting old insurance conditions to the VVG 2008, in particular Section 28 Paragraph 2 Sentence 2 VVG 2008, was the subject of a recent decision of the Federal Court of Justice of Germany (Bundesgerichtshof).[1] The case deals with contractual incidental obligations under residential building insurance. Since the question of not adapting old insurance conditions to the VVG 2008 applies to all direct lines of insurance, the court's findings can be transferred to other types of insurance, in particular, liability insurance.

CASE FACTS

The policyholder sued the insurer under a residential building insurance contract, claiming reimbursement for water pipe damage. The incidental obligations to be fulfilled by the policyholder were regulated in Section 11 of the General Residential Building Insurance Conditions (Allgemeine Wohngebäudeversicherungsbedingungen, VGB 88) included in the insurance contract. Pursuant to that section, the policyholder was obliged to take preventive measures, in particular to control the water pipes regularly, to empty the water pipes if the house was not occupied and to heat the building in winter.

Section 11 VGB 88 further stated that the insurer shall be released from its obligation to pay if the policyholder did not observe any of these incidental obligations, either intentionally or with gross negligence, in accordance with Section 6 of the former VVG. The defending insurer did not adapt Section 11 VGB 88 to the VVG 2008.

The policyholder did not fulfill his contractual incidental obligations. The insured building was not inhabited during the winter, and the water pipes were not emptied. On January 8, 2009, water pipe damage occurred.

The insurer denied payment arguing that the policyholder had breached both his contractual incidental obligations and the statutory incidental obligation to not cause an insured event (Section 81 VVG 2008). The plaintiff prevailed in the

1 Federal Court of Justice of Germany, October 12, 2011 – IV ZR 199/10

proceedings before the court of first instance. The insurer then paid 50 percent of the damages to the plaintiff and filed an appeal to the Appellate Court.

After dismissal of the appeal by the Appellate Court, the defendant insurer decided to appeal to the Federal Court.

FEDERAL COURT FINDINGS

The Federal Court found that neither Section 11 VGB 88 (the former general condition) nor Section 28 Paragraph 2 Sentence 2 VVG 2008 (the new statutory provision) released the insurer from its duty to pay. Furthermore, the insurer could not reduce payment to the plaintiff on the grounds that the plaintiff was grossly negligent for not observing its contractual incidental obligation.

The Federal Court held that the former general condition was no longer effective since that section referred to Section 6 of the old VVG. According to this old regulation, grossly negligent non-observance of a contractual incidental obligation fully releases the insurer from its obligation.

However, the old regulation of Section 6 VVG did not comply with the new fundamentals laid down in Section 28 Paragraph 2 Sentence 2 VVG 2008. Therefore, the former general condition (Section 11 VGB 88) led to an inappropriate and unreasonable disadvantage for the policyholder and was found null and void by the Federal Court, according to Section 307 Paragraph 1 Sentence 1, German Civil Code (Bürgerliches Gesetzbuch, BGB). The result found that a gap existed in the general insurance conditions of the insurance contract.

Generally, when contract terms are ineffective, the contents of the contract are determined by statutory provisions (Section 306 Paragraph 2 BGB). However, the gap stemming from the ineffectiveness of Section 11 VGB 88 could not be filled by the statutory provision of Section 28 Paragraph 2 Sentence 2 VVG 2008 because this would have resulted in unfair treatment of the policyholder. The court held that it is reasonable for the insurer to have to bear the ineffectiveness of its own general insurance conditions because it did not adapt old general conditions to the new VVG 2008.

The court further found that Section 28 Paragraph 2 Sentence 2 VVG 2008 cannot entitle the insurer to reduce its payment due to a grossly negligent breach of a contractual incidental obligation if the contract itself does not contain such a provision. In the case at hand, the contract did not include such a provision, and therefore the defendant insurer could not reduce its payments on the grounds of breach of a contractual incidental obligation.

Finally, the Federal Court referred the case back to the Appellate Court for another reason: The Appellate Court improperly limited the insurer's right to claim for "causing of the occurrence of the insured event" (Section 81 VVG 2008).

SUMMARY

The Federal Court judgment is sound. If insurers did not make use of the opportunity to adapt their old general insurance conditions to the VVG 2008, the old conditions not in compliance with the VVG 2008 are ineffective. They cannot be replaced by the respective provision of the new VVG 2008 as this would create a disadvantage for the policyholder. Without a provision addressing the policyholder's failure to observe a contractual incidental obligation due to gross negligence, the insurer may not reduce its payment. However, the insurer can argue that the policyholder also breached statutory incidental obligations, for example, that the insured event was caused by the policyholder's gross negligence (Section 81 VVG 2008).

5 ENVIRONMENTAL DAMAGES IN ITALY: MOVING TOWARDS A NO FAULT LIABILITY SYSTEM?

EU DIRECTIVE AND ITALIAN STATUTORY PROVISIONS

With EU Directive n.35/2004 on Environmental Liability (ELD), the European legislator aimed to establish a harmonized legal framework based on the principle that "the polluter pays." The main objective of ELD is to prevent and remedy environmental damage, which is defined as damage to protected species and natural habitats (nature), damage to water and damage to land (soil).

Normally, the liable party is the operator that performs occupational activities. Operators that perform certain dangerous activities, as listed in Annex III of the ELD, are strictly liable (without fault) for environmental damage. Operators performing other occupational activities are liable for any fault-based damage they cause to nature. Operators may benefit directly from certain exceptions and defenses, for example, force majeure, armed conflict and third party intervention. They may also benefit from defenses introduced via transposition, such as permit defense and state of the art defense.

Another feature of the directive is that the operators subject to strict liability are also obliged to provide for a direct remedy for damages caused by their activity.

The directive was implemented in Italy in 2006 with D.Lgs n.152/2006. The Italian statute replaced a previous bill (D.Lgs n.22/1997) that provided a very similar set of rules in terms of the structure of liability. In particular, as far as the abandonment of polluted waste is concerned, Article 192 of D.Lgs n.152/2006 (former Article 14 of D.Lgs 22/1997) stipulates all parties that cause environmental damages by the abandonment or stockage of certain waste are liable and must provide remedies.

The provision also states that the owner of the land where polluted waste is stocked is jointly and severally liable together with the operator causing those damages, provided the landowner acted with negligence or willfully. In any case, on land where polluted waste is stocked, a statutory fixed charge for the entire value of the property is levied in order to secure reimbursement for clean-up costs borne by a public authority.

The system conceived under the ELD is substantially different from the one provided by Italian law.

The ELD stipulates that:

- An operator that carries on the occupational activities specified in Annex III of the ELD is strictly liable for the pollution caused by its acts, whether or not it is negligent or intends to cause damages.
- Other operators engaged in different occupational activities are liable when they have caused pollution negligently or intentionally.

Italian statutory rules provide that:

- Liability for environmental damage is based on negligence, requiring this element in order to hold parties liable.
- The owner of the property is jointly and severally liable with the operator if the landowner acted negligently or intentionally.

On various occasions, the EU Commission expressed its disappointment and concern about the way Italy implemented the ELD into domestic law. The absence of a strict liability system has been interpreted as an infringement of the spirit and provisions of the directive. While the Italian government introduced some important amendments to the Environmental Code in 2010, it is still not a strict liability system.

Renewed awareness about the weakness of this Italian legislation may explain why the Italian Supreme Court set forth in a recent decision some important principles on the specific issue of negligence by the owner of a property where polluted waste was produced and abandoned by a tenant operator.

SUPREME COURT DECISION

In a ruling dated March 22, 2011, n.6525, the Italian Supreme Court issued important and innovative principles in a case that focused on a landlord's responsibility for pollution caused by a tenant.

The facts of the case include:

- The owner of a piece of land had leased its property to a tenant.
- The tenant left a significant quantity of polluted waste on the land.
- The property owner, being aware of the situation, negotiated an agreement where the tenant would clean up the land within a fixed number of months. A penalty would be applied if it failed to do so.
- A public prosecutor investigated the situation.
- The investigator began a criminal proceeding and seized the area.
- For quite a long time, the stocked polluted waste remained on the land, situated unfortunately close to a riverbank. Six years after the tenant had left the property, a flood hit the area and spread the waste, which contaminated the surrounding neighborhood.

According to provisions of the Italian Environmental Law (Article 14 of D.Lgs n.22/1997), the owner of land where polluted waste is stocked is jointly liable with the tenant operator that actually caused the pollution – only if the landowner acted negligently or intentionally.

Therefore, the owner claimed that he was not liable because he had made the tenant operator sign an agreement promising that he would clean up the property. He also noted that the land had been put under seizure and that the flood was not foreseeable. The property owner was confident in his presentation to the court that he had made his best efforts to compel the operator to clean up the leased land and that the events leading to more widespread pollution in the area had been beyond his control.

However, the court found the owner liable for the cost of cleaning up on the following grounds:

- Article 14 of D.Lgs n.22/1997 (and similarly Article 192 of the more recent D.Lgs n.152/2006) states that:
    i. It is forbidden to abandon, stock on land or disperse polluted waste of any kind into water.
    ii. The person who commits the said actions is jointly and severally liable with the owner of the land, the mortgagee or the tenant if they acted negligently or intentionally.
    iii. The liable persons must remove, recycle or clean up the waste.
    iv. The mayor of the city may issue an order compelling the liable persons to perform clean-up activities within a fixed period of time. Failure to do so will result in the City Council completing clean up at its own effort and expense, which will be reimbursed by the liable persons.

- The property owners will be found negligent when their acts or omissions contributed to allowing the activities described above. These actions or omissions may involve either expressly permitting the operator to carry on forbidden activities or not taking possible action after receiving notice of forbidden activities taking place.

- Evaluating the extent of liability of the owner or the tenant of the land must be done in a rigorous and extensive manner so that the potentially liable persons are found negligent when they do not take all reasonable actions required to guarantee safe custody of the property.

- When land is leased to a third party, the owner can nevertheless be found liable for omission if he does not take legal action (whether ordinary or through interim injunctions) to force the tenant to remove, recycle or clean up the rented property.

- The owner is not to be discharged from his duties if the land has been seized by a criminal court. If this is the case, the owner should inform the judge about the dangers and suggest the most appropriate actions to be taken to prevent the pollution of the seized land as well as the surrounding areas.

COMMENTARY

This recent court decision sets forth some innovative principles that are not completely in line with traditional jurisprudence opinions on the matter of attributing liability based on fault. In simple terms, the Supreme Court affirms the principle that a landowner can be found jointly liable in negligence if he did not initiate the most effective legal proceedings against a tenant operator in order to force compliance with relevant environmental laws.

Moreover, according to the court ruling, a signed agreement stating that the tenant operator will take care of removal and clean-up activities is not sufficient for the landowner to discharge his duties. On the contrary, such an agreement can be considered as implied permission for the tenant to carry on polluting activities for the period agreed in the contract.

The Supreme Court also affirmed that the public prosecutor seizing the land where the waste is kept does justify inactivity by the landlord. Instead, the landowner is expected to communicate the possible risks from the waste.

On the other hand, according to general principles of civil liability in different matters of law, a person cannot be found liable for omission of an action if he could not execute the action since the land area in question was under someone else's control. Similarly, in the case of public authority seizure of an area, the owner of the property cannot be found liable if he does not insist on trying to interfere with such authority. These general principles, which stem from the fundamental rule stating "ad impossibilia nemo tenetur," may ultimately lead to an overruling of the principles set forth in Supreme Court decision n.6525/2011.

The Supreme Court is aware that the EU criticized the Italian legislation on environmental damage for being structured on fault-based liability rather than the strict liability system of the EU directive. As a result, the court is taking a very rigorous approach to the application of environmental laws and therefore putting the legal framework in jeopardy. Furthermore, property owners should take this new trend in Italian jurisprudence seriously when leasing properties to operators that may be subject to Italian environmental code provisions.

6 BOOK 10 OF THE DUTCH CIVIL CODE: CONSOLIDATION AND CODIFICATION OF DUTCH PRIVATE INTERNATIONAL LAW

BACKGROUND

Since 1980, a large number of issues from Dutch Private International Law (PIL) have been regulated by statute. Legislation established Book 10 of the Dutch Civil Code. It consists of a compilation of all relevant statutes into the "PIL Act" and includes an introductory title containing general provisions. The compilation project included a careful examination of existing provisions in light of the proposed general provisions and of case law since the individual statutes had come into force. No significant amendments were found necessary except in the title of divorce. However, the conflict-of-law acts were not consolidated in Book 10 concerning three subjects – life insurance, general insurance and unlawful acts – because the Rome I and Rome II regulations (EU regulations governing contractual and non-contractual obligations) cover these.

Book 10 of the Dutch Civil Code became effective on January 1, 2012. It provides a classification, consolidation and codification of previous PIL legislation that came from three different legal sources: conventions, European regulations and statutes. The book contains both statutory provisions of PIL and references to conventions, such as several Hague Conventions, and to European regulations such as Rome I and Rome II. It does not cover all issues of PIL, and further pieces of legislation can be inserted. The codification focuses on applicable law and does not contain procedural PIL rules on areas such as competency or recognition. Book 10 is mainly concerned with choice-of-law rules and contains a number of unilateral rules such as those that designate the law of the forum (Dutch law) as applicable and that outline its reach. The codification does not contain unilateral rules that designate a specific foreign law as applicable.

The main purpose of this codification is to make PIL rules more accessible and transparent by facilitating access to them. Additionally, the codification helps legal practitioners further understand Dutch PIL and illustrates the connections with non-Dutch sources of law. This codification is not intended as a revision of Dutch PIL, but more as a consolidation and organization of the previous labyrinth of rules and regimes of Private International Law (internationaal privaatrecht, IPR). Modifications have only been made on a few points.[2]

WHAT'S NEW

One new element in the first title of Book 10 is a section with a few general provisions that precedes the rules governing choice of law. The first title sets out the main principles underlying the codification and reflects the general approach taken in the Netherlands when there is a conflict of laws. In this first title, Article 9 introduces a new exception for use in every area of conflict of laws. This provision aims to adjust the result of an application of a Dutch conflict-of-law rule. This may occur when the Dutch rule is found to be unacceptable because the parties involved assumed that a foreign conflict rule that referred the case to a different law was, in fact, applicable. It is remarkable that this "fait accompli" exception is codified as a universal exception to all conflict rules because it has never been treated this way in case law or literature.[3]

Title 14 of Book 10 of the Dutch Civil Code deals with non-contractual obligations. Article 159 of Book 10 declares the Rome II regulation as applicable to non-contractual obligations that fall outside the scope of the Rome II regulation and are considered a tort/delict. This means that, in principle, the Rome II regulation is applicable to all subjects that are excluded from the scope of Rome II through Article 1(2). However, the legislator's intent is not to make Rome II applicable to all fields of law that fall outside of the substantive scope of Rome II. Article 159 also makes Rome II applicable to non-contractual obligations arising out of tort/delict as a result of acta iure imperii.

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2 This article is limited to the changes relevant for the casualty insurance industry.

3 M.H. ten Wolde, "De mysteries van het fait accompli en boek 10 BW", NIPR 2010 aflevering 3, p. 430.

Consequently, according to Article 4 Rome II, the liability of the Dutch government (or government body) would fall under the law of the lex loci damni instead of the lex loci delicti. To prevent a situation in which a Dutch government body in the unlawful exercise of Dutch public authority is confronted with the applicability of a foreign law, Article 159 declares Dutch law applicable to obligations resulting from the exercise of public authority.

The last title of Book 10, Title 15, contains some provisions on conflict of laws relating to maritime, inland water and air transport. In this title, the new Article 164 deals with collisions on the high seas. In Rome II, which also deals with collisions, a reference is made in Article 4 to the law of the country in which the damage occurs (lex loci damni), but this is not helpful because the high seas do not belong to any country. If no applicable law can be determined according to Article 4 Rome II, Article 164 of Book 10 determines the law of lex fori as the applicable law.

CRITICISM

Much has been written about the introduction of the new Book 10 in the Dutch Civil Code. A few points of criticism are specifically highlighted here:

- The new Book 10 of the Dutch Civil Code comprises very little innovation in the field of Dutch PIL. The rules it contains do not waive any international instruments in force. There is a need to focus attention on the growing body of European legislation, and users should not blindly trust Book 10 because its references to supranational legislation can be incomplete or quickly outdated.

- With the conflict-of-law rules, the method of consolidation chosen by the legislator may give a practitioner a false sense of security. Book 10 does not completely address the applicable international and community level instruments and the national PIL legislation. To remedy the lack of complete information, each title or section in Book 10 should begin with an overview of all the potentially relevant international, European or national legislation on the topic discussed.

- The Dutch Book 10 does not include general provisions on interpretation and/or characterization, as do some foreign PIL acts. Their inclusion would have been helpful because different methods of interpretation and characterization need to be used for different provisions of this book. The choice of which method to use is not obvious.

CODIFICATION OF DUTCH PIL: TO BE CONTINUED

The new Book 10, which has been criticized by legal authors, does not cover all PIL topics, nor does it contain many innovations. However, it does update and categorize Dutch PIL, which will help in managing PIL and facilitating the integration of new international and European instruments in the future. With the introduction of the new Book 10, it will be easier for legal practitioners to find their way in the IPR labyrinth.

The PIL is still not complete with the consolidation in Book 10. In fact, no part of the law is ever finished, and Book 10 will be amended at some point in the future. At best, this is an intermediary step in the ongoing process of codifying PIL at the international, European and national levels.

7 MOTOR LIABILITY IN NORWAY

INTRODUCTION

Motor liability insurance is legally defined as being part of general liability insurance coverages in Norway. In order to have a valid claim in Norway under the rules of general liability, three cumulative conditions must be fulfilled: a basis of liability must be established, the claimant must prove an economic loss, and such economic loss must be caused by the act that is the basis of liability. The following is a discussion about how motor liability is regulated in Norway.

KEY ISSUES RELATED TO MOTOR LIABILITY

All motor vehicles in Norway must have liability insurance to cover damages caused to persons and third party property. If a vehicle is not insured, or if the vehicle causing damages cannot be identified, all insurers underwriting motor liability in Norway are jointly and severally liable for the damages.

In a departure from the rules regarding general liability, motor liability is a strict liability as opposed to liability in negligence. This means that all damages caused by the relevant vehicle shall be covered regardless of whether the driver was negligent or not.

Another significant difference from general liability rules is that the claimant files a direct action with the insurance company that covers the vehicle causing damage. A claimant can also choose to file against the party causing the damage, but such a claim must be based upon general liability rules. Since general liability is not a strict liability as described above, this alternative is very seldom used.

MOTOR LIABILITY ACT

GENERAL

Motor liability is regulated by the act of February 3, 1961, known as the Motor Liability Act (MLA), including its later amendments. MLA applies to “compensation for and insurance against injury which motor vehicles cause to person or property.” [4]

DEFINITION OF MOTOR VEHICLE

Article 3 MLA defines motor vehicle as the following: “any vehicle with power machine as means of propulsion is designed to be driven on the ground without rails, including also trolley buses.” A trailer or other attachment to a motor vehicle is deemed part of the vehicle. Excluded from the definition of motor vehicle are all aircraft and vehicles that do not reach speeds of more than 10 kilometers per hour, unless the vehicle can be easily set up to go faster.

STRICT LIABILITY AND DIRECT ACTION TOWARD THE INSURER

The strict liability and the insurance company’s direct liability are noted in Article 4 MLA: “When a motor vehicle caused injury, the injured party may claim compensation from the insurance company with which the vehicle, pursuant to chapter IV, is insured, even if no one is to blame for the injury.”

4 Article 1 MLA

EXCLUDED FROM MLA'S COVER

Excluded from the MLA's coverage are damages caused by the vehicle if it is used for purposes other than as a vehicle; while the vehicle is standing or safely parked outside any street, road or other place open to public traffic; or while the vehicle is participating in a racing contest held on dedicated grounds by special permission of police authorities.

EXCLUDED DAMAGES

Furthermore, some damages are not included in the mandatory insurance obligation regarding motor liability, including damages to the vehicle itself (unless additional insurance coverage has been purchased by the owner/user) and damages to goods/equipment of the vehicle's owner/user (unless additional insurance coverage has been purchased by the owner/user).

TOTAL LIABILITY CAP

For damages to a person, there is no total liability cap provided in the MLA. With regard to property damages, the MLA specifies a total liability cap in the amount of NOK10 million. Additional claims for damages must be based upon the rules regarding general liability in Norway.

COLLISION

MLA has a specific provision regarding collision in Article 8. The main rule is that both parties shall claim compensation from the insurance company covering the vehicle causing the damage. According to the MLA, this may change in some cases. Specifically, the act states:

> Damage caused by a motor vehicle to another motor vehicle, or to person or property in another vehicle, shall be covered by the insurance company of the first mentioned vehicle only if the injury is due to:
>
> i. The fact that the owner, user or driver of this vehicle, or some person who accompanied the vehicle, did not act with due care,
>
> ii. Some defects or shortcoming of the vehicle itself or
>
> iii. That the vehicle otherwise was not driven, parked or treated in a way that conflicts with prevailing traffic regulations.

Insurers also use this provision as a basis of liability for recourse action towards the insurer covering the vehicle that caused the damages, if such insurer has paid damages to its own customer.

RECOURSE ACTION AND REDUCTION OF CLAIMS

The MLA's provisions regarding recourse action and reduction of claims are mostly in accordance with provisions regarding general liability. However, some claims set forth on behalf of passengers have proved to be of interest for insurers. These cases have focused on whether passengers will receive no compensation or a reduction in compensation if they were passengers while the driver was under the influence of alcohol or if they did not use a safety belt. Since there is no general rule, each individual case must be tried based on its individual facts.

RECENT TRENDS

Since the MLA was enacted in 1961, only minor changes have been made to the act, and many cases related to damages caused by vehicles are still being tried. The legal issues mostly deal with the extent of damages and whether or not the vehicle caused injuries.

The most interesting case in recent years was a ruling by the Supreme Court on December 16, 2010 (Rt 2010/1547), that referred to medical research as a basis for stating that damages to a person were not caused by a car accident. The finding suggests that claimants may now face a more challenging line of arguments.

8 INSURANCE MARKET FOR PUBLIC SERVANTS IN LIGHT OF NEW ACT ON FINANCIAL LIABILITY OF PUBLIC SERVANTS FOR THE GRAVE VIOLATION OF THE LAW IN POLAND

INTRODUCTION

A new regulation, the act on the Financial Liability of Public Servants for the Grave Violation of the Law (FLPS), may impact the Polish insurance market in the next few years. FLPS concerns the financial liability of public servants towards the State Treasury, the territorial government unit or other legal persons that bear liability for damages inflicted while exercising public authority. The Polish Parliament passed the act on January 20, 2011, and it became effective on May 17, 2011.

The main purpose of the regulation is to prevent public servants' decisions from gravely violating the law and possibly becoming the basis for future liability of the State Treasury. Presently, public servants in Poland still commonly impose disproportionately high fines or may act negligently when interpreting existing law. There may be an incentive for this behavior. Bonuses granted to public servants for outstanding public service often depend on the volume of decisions, controls or fines levied. An individual public servant may benefit by punishing more entities in a more severe manner, rather than interpreting regulations in the entities' favor. This behavior has contributed to declining trust in the public administration and has had a negative impact on the state's authority.

Under the current Polish system, public servants' behavior can easily cause irreparable damage to citizens. For example, the faulty and restrictive decisions of the Polish Internal Revenue Service have often led to unnecessary bankruptcies of companies. The owners of these enterprises can pursue claims in court and receive compensation from the state. However, the outcome is hardly beneficial to anyone – the companies are closed, and workers lose their jobs.

The new act imposes some liability on individual public servants who make decisions in the name of the state. This financial liability can be a useful instrument for balancing the motivation of public employees.

LIABILITY OF STATE TREASURY

In the previous legislation, only the State Treasury (or territorial local unit or other legal person exercising public authority) could be held responsible for damage inflicted by unlawful activity or the cessation thereof that occurred in the course of exercising such authority (Article 417.1 of the Civil Code). The individual who suffered damage was not able to sue an individual public servant, but was required to file a claim against the State Treasury according to the seat of the unit that inflicted damage, pursuant to Article 29 of the Code of Civil Procedure (CCP). The damage could consist of the actual loss (damnum emergens) and lost profits (lucrum cessans).

According to the judgment of the Polish Constitutional Tribunal, the term "public authority" should be generally but not only understood as the competence to autonomously shape the situation of an individual.[5] The term can also be interpreted broadly and used to enhance situations that are not within the scope of this definition. However, the meaning of "public authority" does not include public services provided by the state (a sphere of the state's activity where no prerogative for enforcement actions of the state exists).

In this judgment, the Constitutional Tribunal stated that the term "unlawful activities" needs to be understood in compliance with the constitutional regulations regarding the sources of law (Article 87-94 of the Constitution). It also stated that this term does not enhance the moral norms, customs or principles of community life. Such a view is criticized in the literature as, for example, the principles of community life became a part of the disposition of a norm and, consequently, a part of the legal order.

5 See the Judgment of the Constitutional Court, December 4, 2001 (SK 18/2000).

For example, a public servant employed in the Polish Internal Revenue Service misinterprets law in favor of the State Treasury and renders a decision that results in a company's insolvency. If the company wishes to recover damages, the lawsuit could be filed against the State Treasury. Under the previous regulations, the financial liability would not apply to the public servant, and the Treasury would be liable for the broad scope of the damages. After the adoption of the new FLPS act, the State Treasury may recover at least part of the damages that it was required to pay out.

RULES FOR FINANCIAL LIABILITY OF INDIVIDUAL PUBLIC SERVANTS

The FLPS defines a public servant as a person acting in the role of an organ of public administration, acting as a member of the bodies of public administration entities or working in the public administration (either through employment contract, nomination or civil contract). A certain category of public servants is precluded from the scope of the act: employees working for the Chancellery of the Sejm, the Chancellery of the Senat, the Chancellery of the President, the Supreme Court and the Constitutional Tribunal, the office of the Public Rights Defender, the office of the Defender of Children's Rights and several other entities.

According to Article 5 of the act, a public servant shall bear liability if three premises have been jointly fulfilled:

i. The compensation for damages caused by a grave violation of the law in connection with the exercising of public authority stipulated in a final judgment has been paid to the claimant.

ii. The grave violation of the law has to be caused by the action of the public servant or his omission.

iii. The grave violation of the law has to be stipulated in a final judgment or final decision according to a detailed list specified in Article 6 of the act. The list includes the final decisions on the issue of the validity of the decision rendered by the public servant, according to the Code of Administrative Procedure, the Code of Procedure for the Administrative Courts or the CCP.

The grave violation of the law has not been defined in the FLPS, but can be interpreted from the rulings of the judiciary and should be an evident and clear mistake in the interpretation of the legal provisions.[6] Simultaneously, the outcome of the violation needs to be irreparable from the perspective of lawfulness. Also, according to Article 2.2 of the FLPS, the grave violation of the law also involves an exercising of the state's authority without a legal basis.

If two or more public servants participated in rendering a decision, they will all bear liability in proportion to their contribution to the act of the grave violation of the law and to the degree of their fault. When it is impossible to establish the degree of contribution of the individual public servants, they shall bear liability in equal share.

The financial amount of liability of an individual cannot exceed more than 12 monthly salaries of the public servant (Article 9.1 of the act). The violation of the law concerns one decision made by a public servant. Therefore, it is possible that one person would be liable for an amount up to 12 monthly salaries in several cases if more than one of the individual's acts fulfills the premises of financial liability. The liability is joint and several, meaning that multiple public servants involved in a decision can each be liable to the sum of 12 monthly salaries. Finally, the limitation does not apply in the event that the fault of the public servant (or multiple public servants) was intentional.

6 Judgment of the Supreme Administrative Court, September 9, 1998, II SA 1249/97.

PROCEDURE

The head of the entity whose liability was recognized in a final judgment has 14 days, beginning with the day the compensation was paid, to file a motion to the Regional Public Prosecutor for conducting the explanatory proceedings. Both the transfer and the final judgment have to be attached to the motion. The prosecutor's examination of the case constitutes a premise for the successful filing of the lawsuit. If evidence is produced to support the claim, then the prosecutor calls on the public servant to pay the amount in question within one week.

The role of the public prosecutor in the proceedings is rather controversial. The function stipulated for the public prosecutor by the act includes executorial functions, which is atypical for this office. However, on the other hand, public prosecutors are independent from the public administration and guarantee the impartiality of the trial. During the proceedings governed by the CCP, the prosecutor establishes whether there are grounds for suing the public servant for damages. To ensure that the directors of liable entities file the motion, the act sanctions their negligence in doing so with a penalty of imprisonment or the restriction of liberty for up to three years (Article 10).

INSURANCE INDUSTRY APPLICATIONS

Shortly after the act became effective, insurance companies started to advertise a new product – insurance for public servants against the financial liability for grave violation of the law. The annual premium amount for such an insurance policy depends on the sum insured. Not surprisingly, the product has not gained much popularity. This may change in the long term.

According to Article 16 of the act, the new regulations apply to actions or negligence of public servants that occurred after the act entered into force. Even under the presumption that the Treasury will have to pay for damages to citizens or legal entities based on the decision made by the public administration this year, it will take at least a year to finish the two proceedings against the Treasury and then the explanatory proceeding against the public servant.

Additionally, awareness of liability in this professional group is still quite low. According to the insurance companies, the most interest in this new insurance product has been among public servants working for the Internal Revenue Service and Customs. Unless some spectacular cases take place and gain extensive media coverage, the market for insurance policies for public servants is not likely to bloom in the next year or so. The new market's value is estimated between EUR25 million and EUR50 million.

9 AUDITORS' LIABILITY IN SPAIN, FROM UNLIMITED TO LIMITED

BACKGROUND

The September 2010 issue of this series covered the controversial topic of auditors' liability, and subsequently the September 2011 issue referred to the Consolidated Text of the Accounts Audit Act of July 1, approved by Royal Legislative Decree 1/2011 (RLD 1/2011), which abrogated the Accounts Audit Act (AAA) then in force. The RLD 1/2011 has been in force since July 3, 2011. The following provides an update to the September 2010 report and expands on the issue.

UNLIMITED AUDITORS' LIABILITY UNDER SPANISH ACCOUNTS AUDIT ACT

To review, subsections 1.2 and 1.3 of the AAA (in force until July 3, 2011) stated that the main purpose of an audit is the reporting on a company's accounts that may produce effects regarding third parties. The audit of the annual accounts purports to check that the accounts give a fair view of the company's business, financial position and results, and also of the resources obtained and applied during the period reviewed. The auditor must also ensure that the management report agrees with the accounts reviewed. This is the scope of the lex artis ad hoc, or professional diligence of the auditors. These rules, which remain unchanged, are now set forth in Section 1 of the RLD 1/2011.

Under Section 11.1 of the AAA, auditors were liable for any damage arising out of the breach of their obligations in accordance with the general civil law rules subject to the qualifications made in the subsections. In essence, this meant that the auditor could be liable in contract and in tort to clients (audited companies) and/or third parties. In principle, that liability was based on fault and was unlimited to the extent that the auditor would respond to obligations with all current and future assets pursuant to the general rule set forth in Section 1911 of the Civil Code. Section 11.2 of the AAA added that when an audit was carried out by an auditor working in or for an audit firm, both the auditor and the firm would be jointly and severally liable.

As discussed in the September 2010 issue of this series, there is a general perception that auditors are "guarantors" of companies' financial health. Case law has highlighted the public interest of audit reports and extended the auditor's duty of care not only to the audited company and its shareholders, but also to third parties that may engage with the company.[7] Consequently, third parties are entitled to rely on audit reports.

So although auditors do not issue the annual accounts of a company, and their activity is limited to expressing an opinion on whether the financial situation of a company reflects its "true image" or not, the markets consider that such opinion plays an essential role. This is reflected in the relevant case law.

PSV COOPERATIVE CASE OVERVIEW

The Supreme Court case of October 14, 2008 (RJ 2008/6913) involving the bankruptcy of the PSV housing promotional cooperative (PSV cooperative) is the leading case in defining the role of the audit report in cases of damages to third parties. It also establishes the joint and several and unlimited liability of the auditor, the audit firm and their insurer.

7 Supreme Court decision of December 10, 1998 (RJ 1998/9883).

This judgment concerns one of the major audit firms in a case with strong political and social implications, the bankruptcy of PSV cooperative. The management company of the cooperative did not use all of the money deposited by the individual members for the purchase of land and payment of construction work, but instead diverted it to other purposes. As a result, PSV cooperative went into bankruptcy in 1993, construction stopped, and the cooperative members were obliged to make additional payments to re-start the work and enter into new agreements with building companies to finish the construction of houses. These agreements incurred higher costs.

In 1992, PSV cooperative did not call the mandatory annual meeting to review the 1991 accounts, and none of the PSV cooperative members requested that it be held or took any other action. In 1993, PSV cooperative called the annual meeting to approve the 1991 and 1992 accounts that were already audited. This audit had a substantial qualification, stating that the accounts had been properly prepared save for an amount of EUR30 million. Despite this significant qualification, the members of PSV cooperative (including the claimants) approved the annual accounts.

However, the accounts of PSV cooperative contained even larger irregularities, and the auditors overlooked other issues. The claimants (450 individual members) sued the auditor and its insurance company but did not sue the managers and administrators of PSV cooperative and its management company, which were blamed for the financial problems that caused the bankruptcy. The managers were ultimately found guilty of several criminal charges and convicted.

PSV COOPERATIVE CASE FINDINGS

The Supreme Court applied two theories when it analyzed the case: the theories of conditio sine qua non (the necessary condition) and the equivalence of conditions. In the theory of the necessary condition, any condition necessary or indispensable for the effect is considered a cause of the result. In the theory of the equivalence of conditions, when there are several contributory causes to damage, all of them should be considered equal in their influence as a cause because if by theoretically removing one, the consequence disappears as well.

In order to analyze whether the wrongful audit report could be considered a "cause" or not, the judgment recognized that all of the causal background of the damages needed to be considered along with an assessment of whether the audit report was material or adequate to produce the damage, taking into account the assessment of likelihood.

Contrary to the Court of Appeal's opinion, which considered that the material cause of damage to PSV cooperative was fraudulent mismanagement, the Supreme Court stated that the failures in the audit work are to be considered a "cause." Even if it was not the main cause of the PSV cooperative's financial crisis, it contributed to it, depriving the PSV cooperative members of information about its equity and financial situation. To this end, the court made a dual assessment of likelihood and concluded that if PSV cooperative members would have had such information available, it is likely that they would have changed their attitude towards the PSV cooperative. They would have been likely to replace the periodic approvals of accounts with a reaction against the mismanagement of the cooperative. Therefore, in the opinion of the Supreme Court, it is likely that the claimants would have "reacted" against such an irregular situation.

The court did not take into consideration some alien events that would have interfered with the causation process or contributed to the harmful result. The court did not address PSV cooperative management and the fact that some members were convicted and served time in jail.

Lastly, the Supreme Court stated that the claimants' interests and those of the remaining members of PSV cooperative were protected by the rule that the auditors breached. Accordingly, the harmful result had to be attributed to them. The duty of care is extended not only to the client (the PSV cooperative association) but to its members and third parties that may engage with the company. Consequently, the implication of the judgment is that third parties are entitled to rely on the audit report.

The Supreme Court found against the auditor and its insurer and ordered them to indemnify the PSV cooperative members jointly and severally the extra apportionment (EUR1,955,049.45) plus legal interest accrued from the date of the claim filing and the extra costs that the PSV cooperative members had to pay due to shutting down and then recommencing construction.

The Supreme Court confirmed this doctrine in other decisions,[8] ruling for the unlimited liability of the auditor and the audit firm. It stressed the importance of the audit report as a warranty for the audited company and interested third parties.

The PSV cooperative case is an example of the scope of the joint and several liability doctrine. It allowed the claimants to address their indemnity claim not against the directors who produced the incorrect accounts, or the company that approved them in a general members meeting, but against the auditor and the audit company.

AMENDMENTS OF THE ACCOUNTS AUDIT ACT, ACCORDING TO EUROPEAN TRENDS

The trend in European legislation is directly opposed to the Spanish case law doctrine of unlimited liability based on the AAA. In November 2009 there was a proposed reform of the AAA based on the Directive 2006/43/EC of the European Parliament and the Council of May 17, 2006, and the Commission Recommendation of June 5, 2008, concerning the limitation of the civil liability of statutory auditors and audit firms. During the legislative process, several amendments to the draft bill were included. Finally, this reform became Law 12/2010, which amended the AAA. It was published on July 1, 2010, and took effect on July 2, 2010.

Section 11.2 introduced by Law 12/2010 provided that the liability of auditors and audit firms would be enforceable in proportion to the direct liability for the damages and loss of profits they could cause by their professional activity. The liability of an auditor or the audit firm would be enforceable on a personal and individualized basis, excluding any damage caused by the audited company itself or a third party.

The most significant change of Law 12/2010 was the introduction of the limitation of the auditor's liability, which seems to follow the method outlined in Section 5 of the Commission Recommendation. It establishes a set of principles by virtue of which a statutory auditor or an audit firm is not liable beyond its actual contribution to the loss suffered by a claimant and accordingly is not jointly and severally liable with other wrongdoers. However, Law 12/2010 did not clarify which criteria would have to be followed to set out the proportion of liability for which the auditor and the audit firm would be liable.

The limitation term of contractual actions against auditors was also reduced from 15 years to four years. This term would run from the date of the audit report.

8 Decisions of October 9, 2008 (RJ 2008/6042); March 5, 2009 (RJ 2009/1631); May 27, 2009 (JUR 2009/279232); and December 15, 2010 (RJ 2011/1550).

CURRENT STATUS OF AUDITORS' LIABILITY

The RLD 1/2011 was published on July 2, 2012. The main goal of the text is to consolidate the rules that govern the account's audit activity by regulating, harmonizing and clarifying the rules that amended the original wording of Law 19/1998. The resulting consolidated text is not a mere reproduction of the former legal texts, but goes further in modifying their structure and makes some adjustments and terminology clarifications.

Liability of auditors is now set forth in Section 22.2 RLD 1/2011, which in principle contains the same wording as Section 11.2 of the AAA as amended by Law 12/2010. It introduces a new paragraph in Section 22.2 by which the liability of auditors comprises the damages and loss of profits they could cause both to the audited company or a third party.

In addition, Section 22.2 defines third party as any person or entity, public or private, which proves that she/he/it acted or failed to act in reliance of the audit report, with it being the essential and appropriate element for forming their consent, motivating their conduct or making their decision.

The Section 22.2 now in force maintains the Law 12/2010 criterion of the enforcement of liability of auditors and audit firms in proportion to the direct liability for the damages and loss of profits they could have caused by their professional activity.

Furthermore, the rule has introduced a new paragraph that expressly provides that the audit report is the essential and appropriate element to form the consent or motivate the conduct of third parties, that is, to directly attribute the proportion of liability to the auditor.

The requirement for auditor liability regarding third party claims is that the act or decision adopted by the third party was rationally based on the audit report. This means that the claimant must have been led by the information contained in the audit report to make the investment decision that went wrong.

Finally, auditors and audit firms will continue to face the requirement to set up a security (bond) in order to respond to all damages that may arise while their activities are being performed. The bond required for the first year of activity is EUR300,000 for individuals. For audit firms, the amount is multiplied by the number of firm members. After the first year of activity, the bond will be increased by 30 percent of the turnover that exceeds the amount equivalent to that of the minimum bond corresponding to the audit activity of the previous year's accounts.

CONCLUSION

This system of proportional limited liability may signal a change in the auditors' liability regime. In our opinion, this new system does not provide a place for decisions like PSV, in which the auditor, the audit firm and their insurer were found jointly and severally liable for all damages suffered by third parties. Under RLD 1/2011, the sued auditor would be responsible to the injured third party only for the amount of damage equal to its share of liability in the event triggering the claim.

There have been no court decisions since the recent enactment of the rule. The question arises as to whether the new legislation effectively limits the auditor's liability and how this is determined. However, we should assume that this significant amendment may lead to a reduction in insurance premiums and lower indemnity awards. The potential risk of substantial damages based on unlimited liability has decreased, but it remains to be seen how the courts will construe the new rules.

10 SUPREME COURT CLARIFIES MEANING OF OCCUPATIONAL INJURY EXCLUSION IN PRODUCT LIABILITY INSURANCE IN SWEDEN

BACKGROUND

A Swedish manufacturer of industrial fire protection systems sold and delivered equipment to a manufacturing company in the state of Michigan, United States. In May 2001, two employees of the U.S. company were seriously injured during working hours when they tried to extinguish a fire on company premises.

The injured workers began legal proceedings before a U.S. court against the Swedish fire protection system manufacturer. Based on product liability, the workers claimed compensation for personal injuries allegedly caused by the manufacturer's negligence or alternatively by the breach of an implied warranty.

The workers also sued their employer and claimed compensation based on employers' liability. While the claim against the Swedish manufacturer was eventually withdrawn, the manufacturer had incurred defense costs and expenses related to the claim.

SWEDISH MODEL FOR COMPENSATION OF OCCUPATIONAL INJURIES

In principle, the purpose of the Swedish model for compensation of occupational injuries is to restore the economic position of a person who is injured at work or suffers from a work-related disease to the position he/she would be in if the injury/disease had not occurred. The model is a three-tier system:

- In principle, anyone living in Sweden injured or suffering from a disease caused at work is entitled to basic compensation from the social insurance system (allmän försäkring).
- In addition, anyone who works in operations in Sweden is insured in accordance with the Social Insurance Code (Socialförsäkringsbalken).
- For most employees, protection provided by the social insurance system and under the Social Insurance Code is supplemented by industrial injuries insurance (Trygghetsförsäkringen), which is a kind of strict liability insurance financed by employers. Industrial injuries insurance covers the gaps in coverage that are not provided under the other two insurance schemes, for example, compensation for pain and suffering and permanent disability.

In practice, this model excludes private employers' liability insurance in the Swedish market.

SCOPE OF THE MANUFACTURER'S LIABILITY INSURANCE COVER

The policy under review here, a general liability and product liability policy, applies worldwide with the exception of the United States and Canada. Through a separate agreement, the coverage was extended to encompass product liability, personal injury and property damage worldwide, including the United States and Canada, at an additional premium.

The policy encompasses two forms of obligations on the insurer (a Swedish insurance company):

- The obligation to conduct the insured's defense in proceedings instituted by a third party, including bearing the insured's legal costs.
- The obligation to indemnify the insured in the event that the insured is found to be legally liable to the third party.

Among the applicable exclusions in the policy, the occupational injury exclusion is the one of interest. It states "the insurance does not cover occupational injury (arbetsskada). The insurance covers, however, injury occurred in Sweden, excluding compensation paid by The Occupational Injuries Insurance (Arbetsskadeförsäkringen) or the social insurance or compensation scheme or as an occupational benefit."

DISPUTE

Insurer's position: Referring to the occupational injury exclusion, the insurer denied coverage and refused to conduct the manufacturer's defense in the U.S. proceedings. The insurer took the position that the exclusion applies to all occupational injuries, meaning all injuries that arise out of work.

Policyholder's position: The manufacturer maintained that the exclusion does not apply since the liability for occupational injuries lies with the employer and the injured workers were not the manufacturer's employees. The manufacturer's liability, if any, concerned injuries caused by the products they had manufactured and delivered.

DISTRICT COURT AND COURT OF APPEAL

The District Court and the Court of Appeal both found in favor of the insurer. In summary, the courts stated that the manufacturer's interpretation was more reasonable since the insurer's interpretation would result in very narrow insurance coverage. In reviewing the meaning of the term "occupational injury," its meaning, from an everyday language perspective, was clear and left no room for interpretation.

SUPREME COURT FINDINGS

The Swedish Supreme Court found that there was no common party intent as to how the occupational injury exclusion should be interpreted. The exclusion was not discussed during the insurance contract negotiations, including the separate agreement to extend the coverage to encompass product liability, personal injury and property damage worldwide, including the United States and Canada, at an additional premium. The court also found that no settled trade custom exists and that the linguistic formulation does not exclude any of the interpretations maintained by the parties.

The exclusion appears in numerous standard business insurance policies and is related to the creation of industrial injuries insurance (Trygghetsförsäkringen) in the 1970s and the Act (1976:380) on Occupational Injuries Insurance (Arbetsskadeförsäkring). Industrial injuries insurance and the legislation, which constituted an obligation to indemnify regardless of the employer's guilt, meant that employers essentially had no need to insure themselves against liability for occupational injuries. Accordingly, there was no reason that insurance policies should encompass such protection. This highlights the fact that the exclusion is meant for occupational injuries that affect the policyholder's employees.

An interpretation that stems from the term "occupational injury" is fraught with difficulties since the meaning of the term depends on its context. The term might relate to a description of the injury and the fact that the injury arises out of work. The definition of "occupational injury" found in the Swedish Social Insurance Code (Socialförsäkringsbalken) states that the term encompasses injury due to an accident or other harmful impact at work. This definition does not address the issue of who is liable for indemnity. Therefore, the term itself cannot form the basis for interpreting an exclusion in a liability insurance contract where the liability to indemnify is first priority.

The term “occupational injury” might also focus on the relationship between employee and employer and refer to an injury suffered by the employee for which the employer is liable. When private liability insurance is issued, the liability must affect the policyholder for payment of compensation. In this context, it is natural to assume that the term “occupational injury” focuses not only on the injury but also on the employer/policyholder’s liability for the injury.

The scope of product liability includes the workplace where products are used, and in these cases employees may sometimes be injured in the workplace using these products. If these injuries were not covered by product liability insurance, the employer/policyholder’s protection against liability to indemnify personal injuries would be strongly limited. Product liability insurance provides protection against claims for damages due to injuries caused by products, and if coverage was excluded for situations where the injury might be described as an occupational injury, the protection would be inconsistent and dependent on random factors.

CONCLUSION

The actual policy condition is part of a standard policy provided by the insurer. In this case, the insurer was provided with information regarding the manufacturer’s business operations and its need for insurance before entering into the contract. The insurer must have known that the actual policy condition was interpreted differently among insurance companies in the Swedish market. The insurer could have worded the condition to clearly indicate that the exclusion applied to all injuries suffered by employees at work, regardless of whether the injury took place at the policyholder’s workplace or some other employer’s premises. Notably, other insurance companies have taken measures to clarify the clause so the exclusion is explicitly limited to the policyholder’s employees.

The clause should therefore be interpreted as the policyholder asserts. The occupational injury exclusion does not apply in the case of the injuries suffered by the U.S. company’s employees.

11 REVISION OF SWISS INSURANCE CONTRACT ACT: RECENT DEVELOPMENTS

INTRODUCTION

The Swiss Insurance Contract Act (Versicherungsvertragsgesetz, VVG) has been the subject of growing criticism for a number of years. In particular, the VVG does not provide for equivalence between the obligations of the insured and those of the insurer. Also, there has been deficient coordination between the VVG and the Swiss Code of Obligations (OR). As a consequence, the 100-year-old VVG is being modernized and oriented more towards the future.

Revisions to the VVG will provide the act with a more modern, better-arranged structure that is relevant to the current market. Furthermore, new content will create more equality between contracting parties and will improve the position of the insured.

The recent VVG revision constitutes a major overhaul that builds upon the partial revision of the act in 2006. At that time, several important rules were changed, and the Swiss Insurance Supervision Act (Versicherungsaufsichtsgesetz, VAG) was renewed. Recently, a final draft of the new VVG (E-VVG) and the associated explanatory report (Botschaft des Bundesrates) were given to the Swiss Parliament (Bundesversammlung).

OVERVIEW OF THE NEW AND CONTROVERSIAL REGULATIONS

DISPUTED RULES IN THE REVISED VVG

- **Right of Revocation**
  A right of revocation that benefits the insured is provided in Article 7 E-VVG. This allows the insured to revoke a contract within two weeks without any need to provide grounds for revocation. As a result, the insured will no longer be obliged to enter into the contract. This rule aims to protect the insured against the consequences of hastily completed contracts and applies to all types of insurance contracts.

- **Information Requirement**
  Article 12 E-VVG details the insurer's requirements for information on the insured. The extended information requirements implemented by the E-VVG aim to remedy the lack of information provided to the insured.

  One concern with the information requirement is the calculation of premiums by gender (Article 12 Paragraph 1, d) E-VVG). The rule clarifies that premium differentiation by gender is allowed (in contrast to EU law) if it is based on actuarial and statistical data.

- **Duty of Disclosure**
  Article 15 E-VVG implements the insured's pre-contractual duty of disclosure, which extends to all relevant risk factors (erhebliche Gefahrtatsachen). According to Paragraph 3, such risk factors are limited to past and present factors. Future assumptions do not have to be disclosed because the insured should not be forced to speculate. However, insurers may ask for reasonable developments on the basis of current circumstances.

  Additionally, the insurer must request information in a comprehensive and precise manner. Previously, significance could be placed on risk factors subject to vague and unclear queries by the insurer. This was a highly disputed area. In such cases, the insurer only had to prove that the undisclosed risk factor influenced its decision to move forward and complete the contract. With the new law, however, the insurer must provide evidence that a risk factor is significant.

If the insured violates the duty of disclosure, the insurer is entitled to cancel the contract within four weeks (cf. Article 18 Paragraph 2 E-VVG). This type of cancellation requires that the insurer had made an incorrect risk assumption on the basis of disclosed information. In addition, it is required that in a case where if the insurer had been provided with correct information the insurer neither would have completed the contract nor would have completed the contract with different content.

Moreover, the degree of fault is significant. Only an intentional breach of duty frees the insurer from the duty to perform. If the policyholder acts with conditional intent or even carelessness, the insurer can reduce its performance by degree of fault. However, according to Article 19 Paragraph 3 E-VVG, the insurer does not have the duty to perform if the risk would not have been covered in the case of a truthful notification. In view of the far-reaching consequences of this rule, the insurer must prove unambiguously that it would not have covered the risk – not even at a higher premium.

Instead of refusing to indemnify the policyholder (partially or completely), the insurer is entitled to adjust the premium retrospectively for the whole insurance period, according to Article 19 Paragraph 2 E-VVG. This allows the insurer to collect the difference between the paid premium and the premium that would have been invoiced if the risk factor had been disclosed correctly at the beginning of the contract.

According to Article 20 E-VVG, there is a special rule for jumbo risks that states that Articles 18 and 19 E-VVG are basically applicable. However, Article 20 E-VVG is more rigid and rules that a failure to disclose risk factors might constitute a breach of obligation even in cases where the insurer did not request the disclosure.

- **Costs of Preventing, Minimizing and Establishing the Loss**

  Article 40 E-VVG determines that the insurer must pay for loss prevention and loss minimization. In contrast to the previous regulation, the insurer is not obliged to make any payment exceeding the insured sum unless the costs of loss prevention and loss minimization are attributable to the insurer. This may be important as minimization costs can be significant in some insurance cases.

  According to Article 40 Paragraph 2 E-VVG, the insurer must bear the costs of investigating and establishing the loss. The previous regulation allowed for such costs to be divided. It is questionable as to what extent the regulation can force the insurer to pay for expert, court and attorney fees.

- **Insurance Broker**

  Article 65 E-VVG addresses the insurance broker's tasks. While there are no fundamental changes, it does feature improvements that aim for better disclosure and advice, including documentation of duties.

  Article 66 E-VVG requires disclosure of broker fees because it involves a situation where the broker should be acting in the interest of the insured even though its services are paid for by the insurer. To avoid conflicts of interest, the broker must disclose the details of its own remuneration, including not only the amount of payments, but also their type and frequency.

- **Direct Claim in Liability Insurance**

  Article 91 Paragraph 1 E-VVG now provides for the injured party to make a direct claim against the insurer. The previous law granted the injured party only a lien on the insured's claims against the insurer – a solution that was not considered pragmatic. However, according to Article 91 Paragraph 3 E-VVG, this ability to make a direct claim is not available for non-obligatory liability insurance lines with only pure financial losses.

To ensure that the injured party is aware of the direct claim option, Article 91 Paragraph 2 E-VVG provides the injured party with a disclosure right against the insured. However, the right of disclosure does not differentiate between private customers and business clients. This aspect has faced criticism. Business clients may be required by law to provide detailed information about how the company is insured along with details of its coverage.

FURTHER IMPORTANT RULES

- **Retroactive Insurance**
  Under certain circumstances, Article 24 E-VVG allows the possibility of retroactive insurance coverage (insurance coverage for the past).

- **Premium Adjustment Clause**
  Article 48 Paragraphs 1 and 2 E-VVG contain the requirements for an insurer increasing premium levels. If the premium is increased, the insured receives the right to cancel, pursuant to Article 48 Paragraph 3 E-VVG.

- **General Right of Cancellation**
  Article 52 E-VVG contains a general right to cancel that may be exercised at the end of the third year of the contract or every year following. If agreed upon, the cancellation right may even be exercised at an earlier stage, according to Article 52 Paragraph 2 E-VVG. In view of this general cancellation right, there is no special termination right in case an insured event occurs.

- **Notification**
  According to Article 55 Paragraph 1 E-VVG, the insured has ten years to notify the insurer of the insured event. This regulation applies only if the insured event has occurred during the contract term. According to the previous legal situation, loss and notification must both fall in the contract period.

- **Extension of Limitation Period**
  The limitation period that applies to insurance indemnifications is extended to ten years, according to Article 64 Paragraph 1 E-VVG. In addition, the limitation starts with the occurrence of the insured event. Similarly, the limitation period for premium receivables is extended to five years according to Article 64 Paragraph 3 E-VVG.

SUMMARY

The complete revision of the VVG aims to strengthen consumer protection. As part of this effort, existing rules that may be detrimental to the insured have been weakened. At the same time, several instruments that benefit the insured have been implemented in the new version.

However, the proposed draft is being significantly criticized from different sides. Major insurance buyers state that the E-VVG tends to limit the freedom of contract in their evenly balanced negotiations with insurers and insurance brokers. Therefore, revision of the current VVG would be more important for private customers than for business-approved major clients.

In conclusion, the entire upcoming parliamentary procedure is subject to a significant level of controversy, and it remains to be seen how lobbying groups will influence the final version of the Swiss Insurance Contract Act.

12 CONCLUSION

In this issue of our latest legal update we include some intellectually stimulating insights into the interaction with EU and international law of local legislation and jurisprudence in Austria, Belgium, France, Germany, Italy, Netherlands, Norway, Poland, Spain, Sweden and Switzerland.

The leading theme in this issue is the continued adaptation of individual country legislation to the requirements of EU law. The path to enactment of EU Directives is strewn with obstacles and involves a variety of conflicts with existing local legal provisions and long-standing legal principles. A particularly interesting example of such conflict can be seen in Italy's enactment of the Environmental Liability Directive, where the strict liability principle is challenging Italy's existing negligence-based legal framework and requiring some innovative decision-making on the part of the Italian Supreme Court. The conflict of long-standing legal principles is also evidenced by the implementation of EU Gender Non-Discrimination legislation and by a variety of consumer protection laws affecting insurance contract law.

The dominance of EU legislation does not prevent individual EU territories from pursuing their own agendas to create new legal liabilities specific to their own jurisdictions. The creation in Poland, for example, of new financial legal liability of public servants for violations of their legal duties towards the Polish State Treasury opens a whole new field of business for the casualty insurance market.

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