

RECENT LEGISLATIVE AND JUDICIAL DEVELOPMENTS IN CONTINENTAL EUROPE

AFFECTING THE CASUALTY
INSURANCE INDUSTRY

September 2012



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 April 2012 to August 2012.

BACKGROUND

Under Austrian civil law, the basic provisions governing insurance contracts are stipulated in Section 1288 of the Austrian Civil Code. According to these provisions, the insurer assumes the risk of a no-fault loss by the insured, and in exchange for payment of a premium by the insured, pays the agreed upon compensation to the insured for a loss, if and when it occurs. These Austrian Civil Code provisions are supplemented in Austrian law by provisions in the Austrian Insurance Contract Act (Versicherungsvertragsgesetz, VersVG).

Additionally, as conceived by the Austrian legislature, the parties to any insurance contract are generally one insurer and one insured. In cases with multiple insurers assuming the risk of a single insured (for example, because the scope of risk exceeds the financial capacity of a single insurer), such contractual relationships are referred to as co-insurance. In these cases, multiple insurers mutually agree to underwrite a particular risk with each insurer assuming a pro rated share or a certain amount of the overall insured sum. Therefore, the insured enters into a contract with each of the insurers for the respective share of the sum assumed by each one. If a loss occurs, the co-insurers do not bear liability as joint debtors, but rather the insured has an independent claim against each of the insurers in the amount of the sum assumed by each insurer.¹

It is sometimes quite complicated for the insured to make and enforce a claim in these cases because the insured must deal with the insurers separately. To simplify claims management in cases of disclosed co-insurance, the parties may agree to a leadership clause, which allows one of the insurers to assume the role of lead insurer and handle business dealings among the insured and all of the insurers. With a passive leadership clause, the lead insurer is authorized to accept notices and declarations of intent from the insured with effect for and against all of the insurers. This is the predominant form of the leadership clause. The active leadership clause, by contrast, allows the lead insurer to acknowledge or reject coverage of the loss claim, to terminate or rescind the insurance contract and to amend the scope of the contract with effect for and against all of the other insurers.

RIGHT TO DIRECT LITIGATION CLAUSE

Regardless of whether the leadership clause is active or passive, the insured would be required to bring an action against all of the insurers if coverage of loss has not been acknowledged or has been rejected. To preclude multiple similar lawsuits, the insurers may enter into a “right to direct litigation” (RDL) clause with the insured (in addition to the leadership clause). Through this clause, the insured would litigate disputes only against the lead insurer and limit such suits to that insurer’s pro rata share. The lead insurer is obligated to keep all insurers informed in the event of litigation and to obtain their consent for any partial acknowledgements and settlements. Remaining litigation costs incurred by the lead insurer shall be reimbursed as claims adjustment costs by all of the insurers in proportion to their pro rata shares.

With a RDL clause, all of the other insurers acknowledge any res judicata judgment against the lead insurer as being binding for them as well. To protect the insured’s rights, the insured is entitled (and obligated upon request of one of the insurers) to include other insurers in addition to the lead insurer in order to meet the jurisdictional amounts necessary to proceed with the appeals process, if necessary, and obtain first- or second-level appellate decisions.²

A clause that comes close to a RDL clause in terms of economic effects is found in Section 18 (2) of the forwarders’ risk insurance policy (Speditionsversicherungsschein, SVS). This section states that “the lead company [...] is authorized by the participating companies to appear as the claimant or defendant and manage all litigation, including with respect to their pro rata shares.” Section 19 SVS identifies the lead insurer by name and simultaneously refers to the pro rata share assumed by each insurer as “excluding joint liability.”

¹ Koch/Weiss (Eds.), Gabler Versicherungslexikon [Insurance lexicon], 572 and 600.

² Koch/Weiss, Versicherungslexikon 318 f.

Typically, a RDL clause is agreed upon between the insurers and the insured³, but according to Section 18 SVS, the authorization in question is provided by the participating insurers to the lead insurer. However, Section 18 (2) SVS may be invalid, and any action by the insured against only the lead insurer may be dismissed for lack of standing because the insured's claim exceeds the pro rata share of loss assumed by the lead insurer.⁴

In Austrian civil procedure doctrine, the act of conducting litigation on behalf of a third party is referred to as "standing to sue" doctrine (Prozessstandschaft).⁵ It is permissible provided that the act of litigating on behalf of another relies on an authorization with a statutory⁶ or recognized common law basis.⁷ By contrast, both Austrian doctrine⁸ and the permanent jurisprudence of the Austrian courts deny the notion that it is possible to contractually delegate the right to direct litigation to a party that lacks substantive legal rights.

Because each insurer should retain its substantive legal rights with respect to its pro rata share (cf Section 19 SVS), the grant authorizing direct litigation to the lead insurer constitutes a form of voluntary standing to sue doctrine, which is not recognized in Austria.

As mentioned earlier, when a RDL clause is agreed upon between the insured and the insurers, the insured would file a claim only against the lead insurer and the claim would be limited to that insurer's pro rata share. Other insurers would acknowledge any subsequent res judicata decision as binding on them as well.

It initially appears questionable as to whether the RDL clause could constitute a waiver of the insured's right of legal protection. While the insured may be waiving assertion of a claim in a judicial context, a substantive claim⁹ and an imperfect obligation (Naturalobligation) under Austrian civil law still remains.¹⁰ Some academic writers regard a pre-litigation waiver of the right of legal protection as questionable from the point of view of constitutional law, in light of Article 6 of the European Convention on Human Rights and Article 83 (2) of the Austrian Federal Constitution.¹¹ Because the insured holds independent claims against each of the insurers in a case of disclosed co-insurance, this may be an issue. This concern may be relevant if the lead insurer – with effect for and against all of the insurers – rejects coverage of the loss in writing with an express reference to the one-year limitation period for litigation (cf Section 12 [2 and 3] VersVG).

The agreement to not sue the non-lead insurers because they will acknowledge a res judicata judgment as binding on them as well should be construed merely as a temporary waiver of legal protection. Accordingly, the insured should be able to file an action against the non-lead insurers if they fail to acknowledge a res judicata judgment as binding for them.

If the one-year limitation period for litigation expires and any of the insurers no longer regards itself as bound by its contractual obligation to acknowledge a judgment issued against the lead insurer, then such conduct might be subsumed under Section 12 (3) VersVG. In such a case, the insured will presumably be deemed to have been prevented "through no fault of his own" from litigating its claim in a timely fashion due to the conduct of one or more insurers, and the limitation period for litigation will be extended. Of course, this does not change the fact that Section 12 (2) VersVG stipulates an absolute limitation period of 10 years for claims under insurance contracts.

³ Koch/Weiss, *Versicherungswörterbuch* 656.

⁴ Csoklich in Jabornegg/Artmann (Eds.), *Kommentar zum UGB* [Commentary on Business Enterprise Code] (2010) sec. 19 SVS margin no. 3.

⁵ Schubert in Fasching/Konecny (Eds.), *Kommentar zu den Zivilprozeßgesetzen II/1* [Commentary on Civil Procedure Law II/1] (2002) comments to sec. 1 Austrian CCP, margin no. 81.

⁶ Cf sec. 84 (5) Stock Companies Act.

⁷ With respect to *actio pro socio* cf Schauer in Kalss/Nowotny/Schauer (Eds.), *Österreichisches Gesellschaftsrecht* [Austrian Companies Law] (2008) margin no. 2/354.

⁸ Cf references in Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts* [Textbook on Austrian Civil Procedure Law] (1990) margin no. 343.

⁹ Fasching, *Lehrbuch* margin no. 5 with further citations.

¹⁰ For further details on waivers of legal protection see also Holly in Kletečka/Schauer (Eds.), *ABGB-ON* 1.00 sec. 1444 margin no. 68 with further citations (www.rdb.at).

¹¹ Fasching, *Lehrbuch* margin no. 5 with further citations; Rechberger/Simotta, *Grundriss* [Outline] margin no. 30.

Many of the products people use every day are made in foreign countries – from coffee makers produced in China to cars built in Germany to cell phones manufactured in India. While many of these products fulfill their purpose without any complications, there are others that cause problems for their users. A coffee maker might spill boiling water or a car's airbag might not open properly. These problems can be caused by manufacturing errors or flaws in product design.

RAPEX

To remove deficient products from the Internal Market¹² as quickly as possible, or to prevent them from entering the market in the first place, the European Union (EU) established the Rapid Exchange of Information System (RAPEX) in 2004 as its official rapid alert system for unsafe consumer products and consumer protection. RAPEX allows for the quick exchange of information among member states and the European Commission on measures such as product recalls and other corrective actions.

The number of RAPEX notifications related to dangerous products steadily increased for several years. Between 2004 and 2010, the total number of notifications validated by the Commission rose more than fourfold from 468 to 2,244. However, in 2011 the number of notifications declined for the first time to 1,083. John Dalli, European Commissioner for Health and Consumer Policy, explained the possible reasons for the decrease in the 2011 report on the operation of RAPEX for non-food dangerous products:

This decrease, which occurred mainly in the first quarter of the year, may be due, partly, to budget cuts and subsequent resource constraints in the national administrations. The decrease in the number of notifications could also indicate that the RAPEX system has reached a certain level of stability and maturity, and that the more active use of the risk assessment guidelines has led to the streamlining of notifications, with improvements in their quality.¹³

PRODUCT SAFETY GUIDANCE

The majority of businesses wish to carry out their activities in a responsible manner, and a number of guides have been developed to support these efforts. One of the most established guides in recent years has been *Product Safety in Europe: A Guide to Corrective Action Including Recalls*. Published by PROSAFE, a non-profit professional organization, the guide is targeted to market surveillance authorities and officers from across the European Economic Area (EEA), and its primary objective is to improve the safety of products and services for consumers in Europe.

The pace of regulatory developments in Europe requires that this kind of guidance be revised periodically to keep it up to date. PROSAFE has reviewed its guide in the framework of the Enhancing Market Surveillance Through Best Practice (EMARS) II project, which aims to improve market surveillance of non-food consumer products in Europe and to achieve this through the practical application and further fine-tuning of the best practices originally developed by the EMARS I project. One of the project goals is to help market surveillance organizations in EEA member states achieve a basic level of expertise and practical experience.

¹² "Internal Market" refers to the common market of all EU member states.

¹³ *Keeping European Consumers Safe: 2011 Annual Report on the Operation of the Rapid Alert System for Non-Food Dangerous Products (RAPEX)*.

In November 2011, the Commission published the new *Corrective Action Guide: Guidelines for Businesses to Manage Product Recalls & Other Corrective Actions*.¹⁴ As noted previously, the guide's purpose is to support businesses when they are facing challenges such as the possibility of a product recall and/or the necessity of other corrective actions. The new guide is aimed particularly at managers with responsibilities for product safety compliance, quality control, legal affairs and public corporate relations.

The primary intent of the guide is to cover corrective actions for consumer products other than food, pharmaceuticals and medical devices. These corrective actions are designed to remove safety risks posed by consumer products and may include:

Changing the design of products; changing the manufacturing process; changing quality control procedures; withdrawing products from the distribution chain; sending information and warnings about correct use of consumer products; modifying or repairing products at the consumer's premises or elsewhere; and recalling products from consumers for repair, replacement or refund.¹⁵

Unlike the previous guide, the new version is directly connected to Directive 2001/95/EC of the European Parliament and of the Council of December 3, 2001, on General Product Safety, as well as to the Commission Decision 2010/15/EU that lays down guidelines for managing RAPEX, established under Article 12, and the notification procedure established under Article II of Directive 2001/95/EC (the General Product Safety Directive). This system of cross references not only facilitates the understanding of the guidelines but also strengthens legal certainty.

Furthermore, and maybe most importantly, a new risk assessment method in the guide is directly based on Commission Decision 2010/15/EU. This decision provides guidance for RAPEX procedures that are followed by member states in identifying dangerous products and notifying the European Commission of them as well as instructions on how to undertake a risk assessment. The new method certainly leads to a more accurate result when assessing the risk of products, but at the same time the assessment has become much more challenging.

According to the guide, a risk assessment usually consists of several phases incorporating these principles: identifying the hazard (what is the nature of the hazard, who is affected, which factors could affect the severity and probability of injury) and estimating the level of risk (the severity of possible injury to a person who uses or comes into contact with the product in question and the probability of possible injury). The overall risk may be at one of the following levels: serious risk (requiring immediate action), high risk (requiring rapid action), medium risk (requiring some action) and low risk (not requiring any action).

¹⁴ This revision of the original guide published in 2004 was not done by the Commission itself. However, the project received significant financial support from the Commission.

¹⁵ *Corrective Action Guide: Guidelines for Businesses to Manage Product Recalls & Other Corrective Actions*.

CONCLUSION

Whether or not the new guidelines will help with product recalls and other corrective actions will be determined in the future. We already know the guidelines cannot replace companies' individual action plans because even the most practically oriented and sophisticated guidelines cannot foresee all possible combinations of risks that may occur in reality. However, the revised guide is a real improvement when it comes to accurate risk assessment and legal certainty regarding questions of product recalls and other corrective actions.

BACKGROUND

France, which uses 80,000 tons of pesticides each year, is Europe's top pesticides user and ranks third among countries using pesticides around the world. In the 1960s, farmers in the country began using the powerful pesticide Lasso®, manufactured by the U.S. agribusiness giant Monsanto, to suppress weeds in cereal fields. The sale of Lasso® was authorized in France from 1969 to 2007, even as it was banned in Canada in 1985 and in Belgium and the United Kingdom in 1992.

On February 13, 2012, Monsanto was found liable for chemical poisoning in the Civil Court of Lyon (Tribunal de Grande Instance). A farmer, Paul Francois, had sued Monsanto alleging he became ill after accidentally inhaling the Lasso® weed killer. In this case, it was alleged that Monsanto had sold the Lasso® to a farmers' cooperative that had then supplied the weed killer to Paul Francois.

The decision is significant since it is the first time in France that a pesticide manufacturer has been held liable to a farmer for poisoning. This judgment could bolster other health claims against pesticides and consequently affect both industrial companies and insurers. Indeed, since 1996, hundreds of French farmers have reported pesticide-related (or potentially pesticide-related) health problems to the agricultural branch of the French social security system, but only 47 cases have been recognized as pesticide poisoning in the past 10 years.

Monsanto has appealed the Civil Court of Lyon's judgment so this may not be the final outcome of the case.

Frequently, the main difficulty in cases of this kind is establishing a causal link between the damage suffered by the claimant and the exposure to pesticides. In this specific case, Assurance Accident des EXploitants Agricoles (A.A.EX.A.), the association of insurers that handles the mandatory insurance scheme for workplace accidents involving farmers, refused to compensate Paul Francois for his illness relapses following his work accident and challenged the existence of a causal link between his health damages and his exposure to Lasso®. Yet the French Social Security Court of Charente recognized a causal link in a judgment dated November 3, 2008, in a case involving the farmer and A.A.EX.A.

That ruling was approved on January 28, 2010, by the Court of Appeal of Bordeaux, which ruled that Paul Francois suffered from a work-related disease. Furthermore, on February 13, 2012, the Civil Court of Lyon ruled that Monsanto had failed to provide adequate warnings on the product label. This ruling by the Civil Court of Lyon – even though it may not be the final outcome – raises interesting points regarding liability in French contract and tort law in light of the precautionary principle, described in more detail below.

ALLEGATIONS OF THE CASE

On April 27, 2004, Paul Francois accidentally inhaled Lasso® fumes while cleaning the tank for his weed killer spray. He suffered loss of consciousness, stammering and respiratory impairment immediately after inhaling, and a few weeks after the accident; he became amnesiac for eleven days and had to stay in a hospital for three weeks. Six months after returning to work, he had violent headaches and fell into a coma several times. He remained in a hospital for five more months and ceased his professional activities for nine months.

Since that time, he has suffered neurological and muscular disorders, including headaches and chronic fatigue syndrome.

Some medical doctors have opined that the dysfunction of his central nervous system is a result of inhaling Lasso®. To date, he can only work part time at his farm and has been forced to hire farmworkers as a result.

Paul Francois claimed that Monsanto failed in its informational duties by (i) commercializing Lasso® without providing comprehensive information about its composition and (ii) not providing adequate warnings and precautions for safety use.

It should be noted that on January 1, 2009, Regulation (EC) No 1272/2008 of December 16, 2008, on the Classification, Labeling and Packaging of Substances and Mixtures (CLP) became effective. This regulation incorporates the classification criteria and labeling rules agreed upon at the United Nations level, known as the Globally Harmonized System of Classification and Labeling of Chemicals (GHS); introduces new classification criteria, hazard symbols (pictograms) and labeling phrases and takes into account elements that are part of earlier European Union (EU) legislation. For example, labeling must mention (i) the name of the substance or mixture and/or an identification number, (ii) the name, address and telephone number of the “supplier,” (for example, the manufacturer, importer, downstream user or distributor that places a substance on the market) and (iii) the nominal quantity of the substance or mixture. However, the regulation was not in effect at the time of the accident.

Regarding the Lasso® composition, Paul Francois noted that the presence of alachlor and monochlorobenzene was mentioned on the pesticide label, but it did not include the quantity of monochlorobenzene even though it makes up half of the product. Additionally, the claimant blamed Monsanto for not mentioning human health risks related to inhaling monochlorobenzene.

Monsanto contended that it had complied with its duty to inform, noting that it had mentioned on the label the product’s dangers and the need to wear protective clothing, including protection for the eyes and face.

The Court of Lyon ruled that the manufacturer of a dangerous product has a duty to instruct (obligation d’information) and a duty to inform (obligation de renseignement). The court noted that the presence of monochlorobenzene is mentioned on the product’s back label but without any information about its quantity, the risks associated with inhaling Lasso® or the need to wear breathing-protective equipment. Consequently, the court held Monsanto liable for the damages suffered by Paul Francois after inhaling Lasso® and ordered the company to compensate for all of the damages he incurs.

BREACH OF INFORMATIONAL OBLIGATIONS

The ruling of the Civil Court of Lyon is grounded in Article 1147 of the Civil Code that is the basis for contractual liability in French law. In this particular case, the court ruled the contractual failure is constituted by Monsanto’s breach of the duty to inform and instruct contracting parties. The breach of this contractual duty toward the contracting party (the farmers’ cooperative) is a cause of action for tort liability by third parties, notably sub-purchasers like Paul Francois.

The difference between the duty to inform and the duty to instruct is tenuous. Under the duty to instruct (obligation d’information), the manufacturer must provide information regarding the chemical products used and their quantity, while under the duty to inform (obligation de renseignement), the manufacturer must provide information regarding the conditions and precautions for use, contraindications and level of danger. Using their strictest definitions, the duty to instruct is imposed under statutory law, while the duty to inform has been created by the courts.

The Cour de Cassation, the highest court in the French judiciary system, has already recognized the existence of such informational duties based on Article 1147 of the Civil Code (“the manufacturer has a duty to instruct the acquirer on the condition of use of its dangerous product” – Cass. 1ère, Civ, January 5, 1999), as well as on the EU Directive 85/374 dated

July 25, 1985, about the liability for defective products, which is defined as a product that “does not offer the safety that a person can legitimately expect.”

Regarding breach of informational duties specifically, the Cour de Cassation has decided that a lack of information about a product’s risks is sufficient to characterize a defect under the EU Directive (Cass. 1ère Civ, March 1, 2005). Based on such a ruling, Lasso® would be considered a defective product, and the special liability would have been applicable. Yet, it should be noted that Lasso® entered the market in 1968 before this EU Directive came into force.

By providing Article 1147 of the Civil Code as the legal ground for its decision, the Court of Lyon indicated that myriad special contract and tort law regimes in France are not necessary to protect victims.

A MORE FLEXIBLE APPROACH TO CAUSATION

Before this particular case, courts were reluctant to admit proof of a causal link. In these types of pesticide-related illness cases, farmworkers have found it difficult to establish a causal link between their medical conditions and pesticide exposure.

Pesticide-related illnesses remain difficult to diagnose notably because the symptoms of pesticide poisoning are common to many ailments. Undoubtedly, the burden of proof, and more precisely the risk of proof (the risk of losing the case for lack of evidence), has deterred many farmworkers from filing claims against pesticide manufacturers.

Monsanto claimed that inhalation of Lasso® usually results in acute short-term poisoning, not the chronic intoxication claimed by Paul Francois. In this case, the court used some statements of a medical expert’s report to prove the causal link. The judges ruled that the facts raised by the victim constitute a serious and concordant body of evidence, which demonstrates the reality of the intoxication by inhalation of Lasso®. Pesticide poisoning was easier to demonstrate in this case than in others because the victim could pinpoint a specific incident: inhaling Lasso® while cleaning the tank of his crop sprayer. Pesticide poisoning is much more difficult to discern in cases where farmers are trying to show the accumulated effects from various products.

The decision may be considered rather generous because it did not consider the victim’s attitude and behavior as contributing to the health issues. Monsanto claimed that at the time of the accident Paul Francois was not wearing a protective mask. This could have been recognized as one cause of the damages suffered by Paul Francois and declared a fault by the court since the victim is a professional farmer. This could have led to the farmer and Monsanto sharing responsibility for the damages. However, the judges did not declare the farmer’s negligence and instead required Monsanto to compensate the victim for all damages.

The court grounded its decision on a non-adversarial medical report stating that the victim’s symptoms are linked to Lasso® inhalation. Another example of this trend for facilitating compensation is the April 23, 2012, decision rendered by the Compensation Board for Offended Victims (Commission d’Indemnisation des Victimes d’Infraction, CIVI) of the Court of Epinal. CIVI ordered the French state to compensate for the damage suffered by a French farmer who had developed cancer due to pesticides and toxic substances in weed killers. The state was directed to pay through the Guarantee Fund for Victims of Terrorist and Other Criminal Acts (Fonds de Garantie), which indemnifies victims when the party responsible for their damages is not insured or not known.

In that particular case, around 20 products commercialized by seven manufacturers were involved. Therefore, unlike the Monsanto case, it was not feasible to impose liability on a single company. This is the reason why the case was referred to CIVI, which has jurisdiction to compensate victims even in cases where the offender is not known. The judges stated that failing to mention benzene on the product label constituted a failure to meet a safety obligation, considering that “since 1982, manufacturers of phytopharmacological products could not ignore that the presence of benzene in their products exposed their users to an important risk of illness.”

It is too early to tell if this decision will set a precedent and be used by others claiming injuries caused by exposure to pesticides. Still, these kinds of cases are worth watching closely, and such rulings are in line with the overall approach of French authorities for facilitating successful claims for victims.

AN OVERALL APPROACH FOR COMPENSATING DAMAGES

Less than three months after the decision against Monsanto, French statute law regarding pesticide-related Parkinson’s disease has evolved considerably. By a decree dated May 6, 2012, the causal link between the use of pesticides and Parkinson’s disease is presumed by law.

The farmers’ health insurance now recognizes Parkinson’s disease as a work-related illness for those who have been exposed to pesticides within the framework of their professional activity. This means it was usual for them to handle or use pesticides through contact with cultures, surfaces or treated animals; inhalation; or during maintenance of machinery for pesticide application.

The decree also clarifies that it does not matter whether pesticides were authorized for sale or not at the moment of the request. Monsanto had raised this point before the Court of Lyon because it had been granted a marketing authorization for its Lasso® product by the relevant French authorities when the accident in question occurred. The Court of Lyon held that putting a dangerous product on the market is not to be faulted as long as the legal requirements, including marketing authorization, have been met by the manufacturer.

With this ruling, the judges referred to government/parliament authorities whose role is to decide which risks are acceptable or not for citizens by authorizing or refusing a product to be on the market. This raises the question of the liability of public and private operators under the precautionary principle.

THE PRECAUTIONARY PRINCIPLE

Being part of the French Constitution since 2005, the precautionary principle refers to the fact that the absence of scientific consensus cannot stop the adoption of regulations designed to prevent environmental damages.

Lasso® was ultimately banned in France in 2007 following an EU Directive, after the product had been withdrawn in Canada and the United Kingdom in the 1980s and 1990s. This brings up the question about whether or not a manufacturer can be held liable for not removing a product that presents safety risks – even before any damage is caused. According to the law on defective products, manufacturers may be exonerated of liability by demonstrating that scientific knowledge did not reveal a safety default issue at the moment the product was put on the market.

However, the precautionary principle implies that manufacturers also track scientific advances after putting products

on the market, and if a product's safety is in doubt, the manufacturer should stop production and recall the products. In that sense, the precautionary principle in some ways adds a duty of safety in civil liability. Insurers should take this into account when working to control the extent of their existing contracts and in the drafting of new policies, particularly with regard to the obligation for manufacturers to track scientific advances relating to products they already have on the market.

The decision against Monsanto could encourage other farmers and consumers who suffer from illness to claim a link to pesticides. If the ruling is later confirmed by higher courts, it could lead to additional lawsuits against pesticides manufacturers. Any persons whose health and/or business activity may be affected by a product could be motivated to seek compensation from manufacturers, for example, those people living close to pesticide-treated fields or employees of pesticide manufacturers and farmers. Consequently, the outcome of the Monsanto appeal will be followed very closely by chemical products manufacturers, their clients and their insurers.

It should be noted that France does not yet authorize class action suits in the way they exist in common law countries and particularly in the United States, but French authorities and lawmakers are considering enlarging the scope of French law to include class action suits in 2013.

COMMENTARY

Monsanto, a major corporation, has previously been associated with alleged health issues involving dioxin, genetically modified organisms and growth hormones. Given that it already has a history of defending claims in the courts, it is likely to wage a strong battle to obtain a favorable ruling before the Court of Appeal and possibly before the Cour de Cassation. With Monsanto strongly contesting the impact of the victim's negligence and the non-adversarial medical report, the Court of Appeal of Lyon may not affirm the decision.

Several recent decisions by French authorities indicate that they are determined to avoid new health scandals like those relating to asbestos, blood contaminated with HIV and hepatitis C and the Mediator® drug. In fact, the newly appointed French Minister of Agriculture Stéphane Le Foll withdrew the marketing authorization of a pesticide named Cruiser OSR®, manufactured by Syngenta, in June 2012.

This decision was made after a report by the French health and environmental safety agency pointed out Cruiser OSR®'s adverse effects on bees. Delphine Batho, the new Minister of Ecology, declared that the decision applies the precautionary principle regarding the product's dangerousness.

The general trend of French authorities is to apply the precautionary principle. Insurers, manufacturers and acquirers must take into consideration that applying the precautionary principle means victims' rights will also be reinforced, meaning a responsible party must be designated for every victim. Labor law provides a good example of the trend with the very sensitive and current issues of health at work and moral and sexual harassment.

INTRODUCTION AND BACKGROUND

The Insurance Contract Act (Versicherungsvertragsgesetz, VVG) contains provisions about risk exclusions and incidental obligations. A risk exclusion means the insurer does not provide insurance cover for a specified excluded risk, and in cases of an incidental obligation, the policyholder loses insurance cover if he/she does not observe the specified incidental obligation.

Both the risk exclusion and the breach of an incidental obligation can have the same legal consequences, namely fully or partially releasing an insurer from its obligation to pay a policyholder. This would apply to the excluded risk of “causing the occurrence of the insured event” noted in Section 81 VVG and to the breach of contractual incidental obligations in general, the legal consequence of which are provided in Section 28 VVG.

According to Section 81 VVG, the insurer is fully released from its duty to pay if the policyholder caused the occurrence of the insured event intentionally. If the policyholder only acted with gross negligence, the insurer can reduce its payment commensurate with the severity of the policyholder’s fault. That means the more gross negligence on the part of the policyholder, the more the insurer can reduce its payment.

If the policyholder breaches a contractual incidental obligation intentionally, pursuant to Section 28 VVG, the insurer may deny payment completely. If the contractual incidental obligation is violated due to gross negligence, the insurer can reduce its payment commensurate with the severity of the policyholder’s fault.

The legal consequences of Section 81 VVG, which concerns a policyholder causing the occurrence of the insured event, and Section 28 VVG, which focuses on the breach of incidental contractual obligations, is the same. In cases of intentional behavior, the insurer does not have to pay, and in cases of gross negligence, it can pay less. The latter is known as the reduction model.

In contrast to the reduction model, the former VVG, which was in effect until December 31, 2007, was based on the all or nothing principle whereby the insurer was fully released from its obligation to pay in cases of gross negligence. This was considered unfair to the policyholder, particularly if the degree of gross negligence was rather close to ordinary negligence.

Under the new VVG, a dispute arose about whether an insurer could reduce its payment to zero if the degree of gross negligence was very close to intentional behavior in cases where the policyholder caused the occurrence of the insured event or failed to observe an incidental obligation due to gross negligence.

In a decision on June 22, 2011 (IV ZR 225/10), the Federal Court of Justice (Bundesgerichtshof) found that if an insured event is caused due to gross negligence, the insurer is entitled to reduce its payment to zero in exceptional cases where the degree of gross negligence is close to intention, according to Section 81 VVG. More recently in January 2012, the Federal Court considered whether reducing an insurer’s payment to zero should be possible if a contractual incidental obligation is breached due to gross negligence (IV ZR 251/10).

FACTS OF THE CASE

In this case dealing with contractual incidental obligation, the policyholder drove despite being unfit to drive because of a blood alcohol concentration (BAC) of 0.21 percent. He was involved in an accident, driving through a wall of a nearby landowner and causing damages in the amount of EUR4,657.17. The liability insurer reimbursed the injured landowner and took recourse against the policyholder.

Section D.2 of the insurance contract specifically noted the incidental obligation to refrain from driving in cases where the driver is unable to drive due to alcohol consumption. The contract defined the legal consequence of the breach of this incidental obligation as follows: "If you breach one of the obligations contained in Section D.2 intentionally, you have no insurance cover. If you breach your obligation grossly negligently, we are entitled to reduce our payments commensurate with the severity of your fault."

Before the court of first instance, the policyholder declared the claim against him was justified for an amount of EUR1,877.95 and denied making any further payment. He argued that he had not breached the obligation intentionally and that he only had to bear half of the damage costs since the insurer's payments could not be reduced to zero under Section 28 VVG.

The court of first instance decided that the insurer was entitled to take recourse against the policyholder, and the policyholder was obliged to pay the liability insurer the claimed sum. After the Appellate Court dismissed the policyholder's appeal, he appealed to the Federal Court.

FEDERAL COURT FINDINGS

The Federal Court found that in exceptional cases an insurer can be fully released from its obligation to pay if the policyholder breaches a contractual incidental obligation grossly negligently. This is the case when the policyholder violates an incidental obligation contained in the insurance contract with a degree of gross negligence that comes close to intention. The insurer, then, can reduce its payments to zero.

The court argued that there is no reason to judge the failure to observe a contractual obligation due to gross negligence differently from causing the occurrence of an insured event due to gross negligence (Section 81 VVG). Referring to its June 22, 2011, decision (IV ZR 225/10), the court argued that it had already allowed a payment to be reduced to zero when an insured event was caused due to gross negligence (Section 81 VVG) and that the same reduction should be allowed if a contractual incidental obligation was breached due to gross negligence.

The court pointed to the fact that the wording, the legislative procedure and the purpose of Section 81 and Section 28 VVG are the same. With regard to legal consequences, the wording of both Section 81 and 28 VVG is identical and does not exclude a reduction to zero. First, Section 81 Paragraph 1 and Section 28 Paragraph 2 clause 1 VVG contain the provision that the insurer is fully released from its obligation to pay if the policyholder intentionally causes the occurrence of the insured event or does not fulfill the incidental obligation, respectively.

Second, Section 81 Paragraph 2 and Section 28 Paragraph 2 clause 2 VVG state that in cases of gross negligence the insurer is entitled to reduce its payments commensurate with the severity of the policyholder's fault, meaning the degree of gross negligence. Neither Section 81 nor Section 28 VVG say an insurer should only be released from its obligation to pay in cases of intentional behavior. In addition, neither section includes a provision that the insurer's obligation to pay must remain in cases of gross negligence.

Furthermore, the court held that the legislative procedure of both Section 81 and Section 28 VVG did not provide a reason why fully releasing an insurer from its obligation to pay should not be possible in cases of gross negligence. In its June 22, 2011, judgment (IV ZR 225/10), the court found that the final report of the legislative commission that reformed the Insurance Contract Law noted that "the reduction of the obligation of the insurer to pay, exceptionally, can lead to a full release of the insurer." Although the government's statements regarding the VVG draft did not expressly mention the possibility of fully releasing the insurer from its obligation to pay, this did not mean the legislator wanted to exclude this possibility.

The Federal Court also found that even though the new VVG abandoned the all or nothing principle, it provided no reason why a reduction to zero would not be possible in cases where the policyholder acted grossly negligently. In its June 22, 2011, judgment (IV ZR 225/10), the court said a difference remained between fully releasing the insurer in cases of intention and fully releasing the insurer in cases of gross negligence. If the policyholder acted intentionally, the insurer was not obligated to pay by law. If the policyholder acted grossly negligently, the circumstances could be weighed, leading to different payment amounts, including a reduction to zero in exceptional cases. The court further held that the opposing view, which considered a reduction to zero not possible in cases of gross negligence, would allow reductions of up to 99 percent and that such quotas were artificial and arbitrary.

In addition, the court noted in its June 22, 2011, judgment (IV ZR 225/10) that all circumstances of a case must be considered in detail in order to guarantee that a reduction to zero is the absolute exception if the policyholder acts with gross negligence.

By applying these standards to the case at hand, the Federal Court found that the Appellate Court had considered the circumstances in detail. It had based its decision on the grounds that the policyholder's BAC of 0.21 percent was significantly beyond 0.11 percent, the point at which a person is unable to drive, and that driving a car in this condition is one of the most severe traffic violations. Furthermore, the Appellate Court found that the policyholder's inability to drive was the only reason for the damages.

The Federal Court, therefore, confirmed the decision of the Appellate Court.

SUMMARY

The Federal Court judgment is sound. The abandonment of the all or nothing principle enabled the insurer to reduce its payments commensurate with the severity of the policyholder's fault, if the policyholder breached an incidental obligation grossly negligently. The more grossly negligently the policyholder acts, the more the insurer can reduce its payment. In exceptional cases where the degree of gross negligence is very close to intention, the insurer can reduce its payment to zero – in other words, the insurer is fully released from its obligation to pay. The Federal Court first decided this for cases involving the causation of an insured event's occurrence (Section 81 VVG) in its June 22, 2011, judgment (IV ZR 251/10) and has now clarified that the same applies to the breach of incidental obligations contained in an insurance contract.

BACKGROUND OF THE CASE

On December 12, 2007, there was a fire in an industrial plant in Turin that was owned and managed by ThyssenKrupp Acciai Speciali Terni S.p.a. (ThyssenKrupp), an Italian subsidiary of ThyssenKrupp Stainless group. The violent fire occurred in a cold annealing and pickling line, called APL5, where there is typically a significant amount of lubricant oil and paper, as well as sparks generated by the plant's industrial process.

As some workers were trying to stop the fire using light hand fire extinguishers, a large flash fire hit them and other workers present in the area. The flash fire was caused when a pipe carrying lubricant oil under pressure burst. As a result, seven workers died in the accident, and three others were seriously injured.

The public prosecutors brought several ThyssenKrupp employees to trial: the chief executive, two executive directors, a general manager, the chief engineer of the plant and a representative of the workers entrusted with monitoring the company's industrial safety.

All of these ThyssenKrupp employees were charged with manslaughter committed due to gross negligence for not having ensured safe working conditions at the Turin plant and failing to comply with several rules and protocols set forth in relevant industrial safety laws.

In addition to these crimes, the chief executive was also charged with voluntary manslaughter committed with a special kind of willful misconduct. Technically speaking, this kind of fault is known as "dolo eventuale" according to Italian criminal law doctrine. This type of intentional willful misconduct is characterized by the following:

- a) The tortfeasor is aware that a harmful event is very likely to occur due to a failure to comply with duties related to industrial safety.
- b) The tortfeasor is aware that if the event takes place there is a high probability that it may result in the death of people.
- c) Nevertheless, the tortfeasor accepts the consequences that the possible outcome of the harmful event is the death of one or more persons.
- d) The tortfeasor does not change conduct in order to avoid these consequences.
- e) The omissions attributable to the tortfeasor can be linked to the event and the death of workers based on a correct and legal chain of causation.

Another kind of fault very similar to willful misconduct in Italian doctrine is "colpa cosciente." This is a psychological state that is very similar to "dolo eventuale" but without the items "b" and "c" noted previously. Under "colpa cosciente," the tortfeasor does not accept the consequences of death caused by the misconduct and is reasonably confident that such consequences would not take place.

TURIN COURT FINDINGS

The court, in the case at hand, found that all of the accused persons were guilty of the crimes specified in the charges brought by the prosecutors. The court stated that the type of fault called “dolo eventuale” is very difficult to apply in practice, and it referred to a recent case of the Italian Supreme Court (Ruling 10411/11 rendered on March, 15, 2011) for a complete explanation of this type of fault.

In order to draw an understandable and clear difference between “dolo eventuale” and “colpa cosciente,” the court suggested imagining what would be the behavior of the tortfeasor if he knew that one or more persons were certain to die as a consequence of a very highly probable harmful event. If the tortfeasor decided to carry on with the same omissive behavior in this situation, then the tortfeasor’s psychological element can be construed as “dolo eventuale” (imputed intention to commit a crime). On the other hand, if the tortfeasor would change behavior in order to try to avoid deadly consequences due to misconduct, then the behavior would be construed as “colpa cosciente” (willful misconduct).

In the case of the chief executive of ThyssenKrupp, the court confirmed the charge of manslaughter committed with “dolo eventuale” (imputed intention). The following are the specific facts of the case:

- The chief executive had solid experience in industrial safety and fire prevention, and had full authority to decide to invest in fire prevention.
- He had decided not to spend any money on fire prevention and industrial safety at the Turin plant as he planned to close the local plant and transfer the production to Terni.
- Insurance experts, fire brigades and a working group of ThyssenKrupp’s parent company had recommended intervention for fire prevention and industrial safety in APL5 at the Turin plant.
- Despite the fact that the Turin plant was to be shut down shortly and further investment in maintenance was not authorized, the chief executive decided to continue production there for 15 months.
- The chief executive decided that his staff would handle matters related to fire prevention and industrial safety, even though this group did not have the power to reach autonomous decisions.
- The chief executive was perfectly aware of the poor situation regarding safety equipment in the Turin plant.

In summary, to commit a crime with “dolo eventuale” the conditions noted previously must be met. Specifically, items “b” and “c” are crucial to meeting this charge. Moreover, courts may judge that a chief executive knowingly accepted a very probable risk to harm or kill people as a result of failing to comply with industrial safety rules and protocols in the following situation:

- Industrial safety conditions and fire prevention systems at a plant are of poor quality.
- The chief executive is aware of dangerous conditions and has the power to decide that interventions are needed and to make the necessary investments.
- Despite that, the chief executive does not decide to pursue any technical intervention and does not invest in safety intervention since the plant is going to be shut down. However, in the meantime, he continues production at the plant.

CORPORATE LIABILITY

Crimes related to the violation of industrial safety rules and, more generally, to the protection of workers, are included in the list of corporate crimes governed by Legislative Decree 231/2001 and its modifications and amendments. This decree has introduced into Italian jurisdiction the “administrative liability” of companies for corporate crimes committed by their legal representatives or personnel in the interest of the companies. In other words, with the adoption of this statute, a company is subject to a criminal charge for acts of its representatives or personnel, and it is liable along with the person who committed the specific crime listed in Legislative Decree 231/2001.

The decree includes sanctions against corporations that are primarily administrative fines that may have an impact on a company's balance sheet. Other sanctions may be more intrusive and disruptive to a company's activities, including:

- Forfeiture (confisca) of the profit or cost cutting that the company gained through the corporate crime.
- Restriction on conducting company business for a maximum period of one year.
- Revocation of licenses and authorizations for conducting certain kinds of business.
- Ban from the ability to enter into contracts with public entities.
- Ban from having access to public subsidies.
- Ban from advertising the sale of products or services.

In addition, during pre-trial investigations, prosecutors can require the seizure of a company's assets to prevent the company from receiving any advantages as a result of a crime and to secure payment of fines.

Legislative Decree 231/2011 also provides that a company can be exonerated from this kind of responsibility if it is able to demonstrate that it has a compliance program in place dedicated to preventing crimes noted in the decree. The program must be adequate, effective and monitored by a specific supervisory body.

In the original version of Legislative Decree 231/2011, crimes that involve violation of industrial injury laws were not included in the list of crimes that would trigger this new corporate liability. In fact, the provisions of the original decree were mostly aimed at preventing crimes related to corruption of public officers or fraud relating to public funds.

In August 2007, the decree was amended so that corporate liability would also apply to the crime of manslaughter or causation of personal injuries as a result of violation of industrial safety rules. This legislation made companies more aware of the need to comply with the regulations of Legislative Decree 231/2011 to prevent corporate crimes since almost every commercial company is exposed to the risk of causing injuries to workers when industrial safety rules are violated.

The ThyssenKrupp case has put a number of companies on alert since the failure to ensure safe working conditions in the plant led to a lethal accident and was construed as an imputed intention to cause harm to or the death of workers.

IMPACT ON INSURANCE COVERAGE

If the ruling of the Turin Court in the ThyssenKrupp case is not overruled on appeal, it will have considerable impact on both corporate liability and corporate insurance risk.

Two conclusions emerge from the court's finding that the chief executive of a company is liable for committing a crime with imputed intention: The special kind of psychological element known in Italian criminal law doctrine as "dolo eventuale" is something more than gross negligence or even willful misconduct and is comparable to a real intention to commit a crime. This intentional behavior of the legal representative can be attributed to the company given the theory of "immedesimazione organica." In simple words, it is as if the company, through its legal representative, intentionally caused the harmful event by failing to take the necessary actions to provide the plant with new and functioning fire prevention and industrial safety equipment.

In this type of situation, insurers may wonder if damages resulting from a harmful event are still indemnifiable. According to Article 1900 of the Italian Civil Code, insurers are not obliged to pay any indemnity in cases where the insured party causes the loss intentionally. Since a chief executive's intention in committing the crime is directly attributable to the company itself, insurers may have grounds for denying payment of an indemnity.

COMMENTARY

The court decision rendered in the ThyssenKrupp case must be carefully considered by companies that decide to do business in Italy along with their insurers.

Companies must try to put in place a solid system of fire and industrial injury prevention along with an adequate and effective compliance program to avoid the corporate liability stated in Legislative Decree 231/2001. Such compliance efforts would also help avoid possible involuntary violations of industrial safety rules.

Insurers should ensure that corporate clients doing business in Italy act in strict compliance with the relevant rules governing industrial safety and fire prevention and with the provisions of Legislative Decree 231/2001, which can be considered as prima facie evidence that the company is in control of managing industrial risks.

Most companies trading in military goods and products that can be used for both civil and military purposes (so-called dual-use items) are familiar with the laws and regulations that control the physical export of such goods. What is less known is that there are also provisions at the international and national levels that govern the performance of services connected to such goods. Since there is no physical crossing of borders when providing these services, it is not immediately obvious that strategic services may also be subject to a disclosure and/or licensing requirement.

A new Strategic Services Act (Wet Strategische Diensten) that covers these services took effect in the Netherlands on January 1, 2012. This act has a much broader scope than the European Union (EU) Dual-use Regulation¹⁶ and requires the reporting of brokering services with respect to dual-use items to the competent Dutch authorities. This chapter provides highlights of the new Strategic Services Act.

THREE TYPES OF STRATEGIC SERVICES

The new Dutch Strategic Services Act applies to services with respect to both military and dual-use items, and it deals with three types of service provision:

- Non-physical transmission of software and technology
- Technical assistance
- Brokering services

In practice, the non-physical transmission of software and technology is considered equal to the physical transmission of the same software and technology. Therefore, it makes no difference whether there is a physical export transaction or if the dual-use software or technology is provided by e-mail, telephone or uploaded via the Internet or an intranet. If the export of a physical item would normally require a license, then the non-physical transmission by electronic means – also defined as an export – would require a license as well. The exporter is the party that decides to transmit or make available the software or technology by electronic means.

The second type of service provision noted, technical assistance, includes all kinds of technical support, in particular, support provided in connection with the development, production, testing, maintenance and repair of the strategic goods. Technical assistance can also be given in the form of transfer of knowledge and advice.

STRATEGIC BROKERING SERVICES

Without elements that limit geographical scope, the EU Dual-use Regulation defines brokering services as:

- The negotiation and the arrangement of transactions for the purchase, sale or supply of dual-use items; and
- The selling or buying of dual-use items for the interest of one or more parties.

¹⁶ Council Regulation (EC) No 428/2009 of May 5, 2009, setting up a community regime for the control of exports, transfer, brokering and transit of dual-use items.

This is a rather broad concept and also comprises the actual sale/purchase transaction, which may not be immediately recognized as a service. However, the provision of sole ancillary services is excluded. These services, which include transportation, financial services, (re)insurance and general advertising or promotion, fall beyond the scope of brokering services. Delineating clearly between brokering services and sole ancillary services may not always be simple, and several questions emerge. What is meant by 'sole,' especially when many logistics services providers offer broad packages of services? Is the list of ancillary services limited? And how is "general advertising and promotion" identified? These questions should be addressed when considering the regulation of brokering services.

Currently, the EU Dual-use Regulation only deals with brokering services with respect to the flow of goods located outside Europe between two third countries and services rendered by a broker residing or established in an EU member state from the territory of the EU into the territory of a third country.

Parties that provide brokering services associated with dual-use items should be aware that the Dutch Strategic Services Act has a much wider scope in many respects. It applies to brokering services with respect to dual-use items that are located in the EU and that are designated for export to a third country. Moreover, the act is not limited to brokering services provided from the territory of the EU. Dutch nationals or foreign nationals with permanent residence in the European section of the Netherlands who provide brokering services in another country are subject to the act's requirements as well as the applicable Dutch criminal statutes if the law is violated.

AUTHORIZATION REQUIREMENT

Providing brokering services with respect to dual-use items can be subject to a notification and a subsequent authorization requirement. This is the case when brokering services are rendered with respect to dual-use items listed in Annex I of the EU Dual-use Regulation if the broker has been informed by the authorities that such authorization is needed. In addition, the Netherlands has expanded the application of the rules to non-listed dual-use items designated for certain specific purposes and dual-use items for military end use. In addition to a possible authorization requirement, brokers have a registration obligation and an obligation to keep and save records.

DUTY TO REPORT

In order to make sure that the Dutch authorities have sufficient information to impose an authorization requirement when necessary, brokers now have a duty to report their services effective January 1, 2012. There are two options:

- One-time notification requirement: With this non-recurring notification, the broker reports the dual-use items for which services are usually provided as well as the usual destinations. Changes in products or destinations must be reported as well. The one-time notification must have been made by June 30, 2012, at the latest.
- Duty to report on a transaction basis: This applies to services associated with more sensitive goods and destinations.

Brokers who did not make the notification in time are in breach of the law and in principle, risk a fine. In these cases, it is advisable to make the notification as soon as possible.

CRIME AND REPUTATION

Violation of the relevant provisions of the Strategic Services Act constitutes an economic offense. Apart from the fact that the penalties for the offenses are significant, publication of the criminal judgment can be ordered, particularly when the violation is intentional or in cases where the fine category for legal entities would be increased. The ordered publication of the judgment would damage the reputation of a broker.

EXAMPLES OF THE ACT'S IMPACT

Two examples illustrate the impact of the new legislation. The first involves a group of companies operating in the telecommunications equipment and information security business, including a U.S. parent company and Dutch and German affiliates. The Dutch company arranges the commercial transaction with respect to equipment listed in Annex I of the EU Dual-use Regulation between the German entity and a buyer in a third country. The export declaration is made in the name of the German company, which applies for an export license. The fact that the brokering services are provided within the group is not relevant. The Dutch company has an independent duty to report its services to the Dutch authorities.

Another example involves a Dutch employee of a French company active in the composite industry who renders brokering services with respect to exports of this French company from France to a party in a third country such as the United States, Brazil or Israel. Again, there is a notification obligation because the Strategic Services Act has extraterritorial effect and applies to all Dutch nationals and foreign nationals with a permanent address in the Netherlands, regardless of the place where the services are provided.

CONCLUSION AND RECOMMENDATION

The Dutch legislation with respect to strategic services is far-reaching in nature. Companies and persons who are in a broad sense involved in commercial transactions with respect to dual-use items and have some link to the Netherlands are advised to make a detailed analysis of their responsibilities. Inter-company transactions and transactions within groups must be acknowledged as well. Which types of goods are involved? What are the destinations? Does involvement in a commercial transaction constitute the concept of brokering services? If so, who is considered the broker? Because strategic brokering services are invisible, the legal definition used to capture those services is necessarily abstract as well. However, in terms of export control policy, non-physical services are as real as the dual-use items to which they are connected.

INTRODUCTION

The Norwegian Supreme Court regularly deals with casualty law. This report provides reviews of three recent cases involving casualty law, including brief commentary about each of the decisions.

The three cases relate to different parts of Norwegian casualty law: motor insurance, status of an injury as occupational and county authority liability for damages caused to houses after flooding.

MOTOR LIABILITY

Case: When exiting a tank truck, a driver fell about 1.5 meters after losing his footing and sustained a permanent injury in his shoulder as a result. The case centered on the question of the coverage of the injury by motor liability insurance according to the Motor Liability Act.

The Supreme Court (Rt 2012, page 233) considered the objectives of the Motor Liability Act and other court decisions and concluded that the conditions in the Motor Liability Act were fulfilled. The injury was indeed covered by motor liability insurance. In this particular case, the prevailing cause of the injury was the tank truck's design and height. The driver was not to blame for his actions when exiting the tank truck.

Commentary: The Supreme Court's decision confirms that the strict liability contained in the Motor Liability Act is indeed very strict for insurers. The decision, which is in line with previous decisions, affirms that the courts are willing to stretch the act's strict liability to find in favor of the injured party in cases where damages are related to vehicles regulated by the Motor Liability Act.

OCCUPATIONAL DAMAGE

Case: Due to freezing temperatures, a student at an officers' training school sustained permanent injuries to three toes during an exercise. The case focused on whether or not the student could file a claim under the Occupational Injuries Act for damages caused by freezing during an exercise.

Based on the motives of the Occupational Injuries Act and other decisions made by the courts, the Supreme Court (Rt 2011, page 368) found that the regulation in the Occupational Act regarding damaging work processes could not be applied because the exercise in question was part of the student's training and not a "work process."

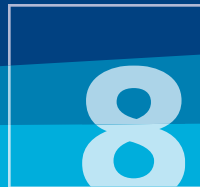
Commentary: In contrast to the strict liability under the Motor Liability Act, the Supreme Court took a more conservative approach in this case based on the language of the Occupational Injuries Act, a more conservative description of the act's objectives and previous decisions related to the act. Accordingly, insurers should carefully consider whether or not a successful defense can be made for claims that are on the "periphery" of coverage under the Occupational Injuries Act.

RECOURSE ACTION

Case: A severe amount of precipitation, combined with fully packed catch basins, led to water from two roads entering the basements of two homes and causing water damage. The roads are under ownership of the county authority.

The homeowners' insurance company paid damages to the homeowners and sought recourse from the county authorities based on the Pollution Act. The majority (four to one) of the Supreme Court judges found in favor of the insurance company (Rt 2012, page 820), noting that the damages would have been avoided if the county authority had performed better maintenance on the catch basins. According to the court, the water was considered "waste water," and the catch basins were considered to be part of a "sewage system" as defined by the Pollution Act. The Pollution Act's exception of pollution from roads did not apply since the damages were not caused by "pollution" but by water damage.

Commentary: The decision is interesting because it demonstrates that insurance companies should carefully review alternatives when considering recourse actions. The other key point of interest is that the basis of liability for the authorities was lack of maintenance. In the future, it will be interesting to see if other recourse actions against authorities will be successful when based on lack of maintenance.



POLISH SUPREME COURT DETERMINES STRICTER RULES IN ESTABLISHING DUE COMPENSATION IN VEHICLE HOLDERS INSURANCE MARKET

BACKGROUND

According to many insured car holders in Poland, insurers have been underestimating compensation for losses, and the majority of auto insurance cases in Poland have been settled for amounts far below the actual costs of restitution. The most frequent reason is that the value of a loss has been determined based on the prices of used spare parts rather than new ones.

A recent resolution by the Supreme Court of Poland may put an end to these activities committed by insurers and may be another indication that the courts are favoring insurance holders in recent car insurance cases.

INTERVENTION OF POLISH INSURANCE OMBUDSMAN

This market practice of applying used spare parts prices captured the attention of the Polish Insurance Ombudsman, who subsequently requested that the Supreme Court issue a resolution to explain the following issue:

Is the injured, in light of the regulation of Article 363.1 in conjunction with Article 361.2 of the Polish Civil Code (PCC), who pursues claims against the insurer under the agreement on civil liability insurance of the car holders in regard to the damage of the car, entitled to demand compensation established according to prices of the new spare parts, without any deduction due to amortization?

The Supreme Court responded by adopting a resolution on April 12, 2012 (case number III CZP 80/11).

SUPREME COURT FINDINGS

As a result of the Polish Insurance Ombudsman's intervention, the Supreme Court decided that the insurer is obliged to pay an injured party substantiated damages, including the reasonable and economically grounded cost of new parts and materials used to make restitution of the damaged vehicle. This payment should be made within the framework of the insurance agreement held by the motor vehicle holder. If the insurer proves that repair costs would lead to an increase in the value of the vehicle, the damages may be reduced to maintain its value to the level before the accident occurred.

The Supreme Court approves of the standpoint of the Ombudsman, who argued that the practice of insurers was based on the wrong interpretation of Article 363.1 in conjunction with Article 361.2 of the PCC. The insurers concluded that payments should be based on the value of used spare parts because car parts are already used when they are destroyed in accidents. The insurers would adjust the compensated value of the parts based on the period of time that the parts were used.

However, as the Ombudsman indicated, insurers did not adopt any clear criterion when calculating the value of used parts. The Supreme Court emphasized that insurers' claim that using the prices of new spare parts would unfairly enrich the injured is incorrect. The estimation of a part's value before installation must be strictly divided from the assessment conducted after it is installed because a part cannot be considered a separate subject when it is installed as part of the whole vehicle. Therefore, establishing the value of a part individually without considering the value of the car as a whole is impossible.

The court explained that using the price of a new spare part is substantiated when an old part cannot be repaired to its condition prior to an accident. In order to apply the price of a used spare part, the part in question must restore the use of the vehicle and provide for a level of comfort and driving safety similar to before the accident. Moreover, the court noted that in most cases the value of a vehicle as a whole is not restored even when the spare parts used for repair are new. After a vehicle has been involved in an accident – even when it is repaired – its value is substantially decreased. Potential buyers of pre-owned vehicles often want to purchase vehicles that have not been in any accidents.

If an insurer claims that a car gains additional value when compared with its value before an accident, then the insurer is responsible for proving this increase in value before the payment can be reduced.

OTHER TRENDS IN AUTO INSURANCE

Determining payments based on used parts prices is not the only problematic practice implemented by insurers. For some time now, the Polish Insurance Ombudsman and the Polish Insurance Association have been engaged in discussions about the car holders' insurance market, which have led to several noteworthy resolutions and judgments by the Supreme Court and the Court of Competition and Consumer Protection.

The cost of renting a car while an insured car is being repaired is among the most important car insurance issues in Poland. In a resolution last year, the Supreme Court determined that in a situation when a car is damaged while being used for non-business purposes, the insurer should be liable for the substantiated and economically reasonable expense of renting a substitute vehicle. The court added that it was irrelevant whether the injured person was able to use public transportation or not.¹⁷

Shortly before the resolution regarding used spare parts prices, the Supreme Court ruled that the insurer may be liable for certain costs of legal assistance that are incurred in pre-court proceedings conducted by the insurer.¹⁸

Another judgment worth mentioning is the decision last year by the Court of the Competition and Consumer Protection regarding insurance agreement provisions that invalidate insurer liability if a car did not possess a valid technical inspection document at the time of an accident. The court moved to enter these provisions into the Register of Prohibited Clauses, a collection of provisions considered illegal.¹⁹

Finally, in recent years, insured vehicle holders achieved significant victories when the Supreme Court questioned the conduct of insurers regarding a car being the subject of a transfer of ownership agreement or a leasing agreement and their practice of not including value added tax (VAT) in the estimation of due compensation.

In the first situation, the Supreme Court ruled that the holder of two vehicles involved in an accident with one another is entitled to compensation under the car holder insurance.²⁰ In the second situation, the court decided that compensated value includes the amount of VAT to the extent that the injured may not reduce the payable tax by the amount of input tax.²¹

¹⁷ Case number: III CZP 5/11, 17.11.2011.

¹⁸ Case number: III CZP 75/11, 13.03.2012.

¹⁹ Case number: XVII AmC 1509/10, 7.04.2011.

²⁰ Case number: III CZP 99/04, 22.04.2005.

²¹ Case number: III CZP 150/06, 17.05.2007.

CONCLUSION

The most recent resolution of the Supreme Court, as well as several previous judgments and resolutions, indicates positive trends for insured vehicle owners in the establishment of due compensation amounts. These trends may be significant for areas other than car insurance since Supreme Court rules and decisions can be applied to other forms of insurance activity as well.

RECENT TRENDS

The financial crisis has triggered a number of criminal investigations against companies and their directors. In light of these developments, this chapter provides an overview of the recently introduced Spanish regulation concerning criminal liability of companies and the real impact this reform will have on directors and officers (D&O) policies.

LEGAL FRAMEWORK

A significant reform of the Spanish Criminal Code (SCC) took effect on December 23, 2010, by means of Organic Law 5/2010 of June 22, 2010.

The law allows companies in Spain, with the exception of government-owned entities, to be held criminally liable for certain crimes committed by their directors or employees. This is a significant change from the country's longstanding tradition of not assigning criminal liability to companies.

Pursuant to Section 31 bis of the SCC, companies can be held criminally liable in the following cases: for crimes committed in their names and for their benefit by their legal representatives, their directors and their de facto directors, and for offenses committed for their benefit by employees performing functions without adequate control or supervision by the company.

Under the new rules, the criminal liability of the individual and that of the company remain absolutely independent from each other. This means that a company may still be held criminally liable even if the individuals involved are not.

The criminal responsibility of directors is regulated in Section 31.1 of the SCC, which has not been changed. The law continues to make directors personally liable if their company meets the conditions, qualities or relations required to be an active subject of the crime at hand – even if they as individuals do not meet these requirements. However, this provision of the SCC should not be understood to be an automatic attribution of criminal liability to directors by the mere fact that a crime has been committed, nor as a case of strict liability. The individual responsibility of the director must be proved.

In summary, the criminal responsibility of directors is regulated in Section 31.1 of the SCC, and companies are now regulated for the first time in Section 31 bis of the SCC.

Another key point of this reform is the creation of new criminal offenses, the establishment of new modalities in already existing crimes and the increase of penalties. The offenses for which a company may be held liable include, but are not limited to, the following: fraud, bribery and corruption, money laundering, falsification of financial information, punishable insolvencies, the discovery and disclosure of secrets, offenses against environmental resources and workplace mobbing.

Section 31 bis of the SCC expressly provides that criminal offenses should result from a company's lack of "due control" over its employees. That means that the law punishes a company for an internal lack of control that allows its employees to commit crimes. The company is responsible for not exerting the "due control" necessary to avoid those crimes.

COMPLIANCE PROGRAMS AND INTERNAL CONTROLS

The wording of Section 31 bis of the SCC suggests that a company may prove it has introduced reasonably tight internal controls and plans to prevent criminal offenses in the corporate organization. In such a case, there may be room to argue that a company should be exempt from liability if an employee craftily avoids its controls to commit a crime.

Section 31 bis of the SCC does not expressly mention a lack of control that allows the company's directors or representatives to commit a crime as a basis for the criminal liability of companies. Arguably, the existence of corporate compliance programs to prevent criminal conduct does not exclude the criminal liability of a company if one of its directors or representatives commits a crime. Yet most observers maintain that directors' actions committed outside of corporate policy, as set forth in existing specific corporate compliance protocols, do not necessarily mean the company should be held criminally liable.

There is no specific regulation concerning whether due control or a company's diligence will exclude the company's criminal liability as envisaged in Section 31 bis of the SCC. Furthermore, the courts have not yet set forth any solid doctrine on this matter. As a safeguard, and to avoid potential liability for the actions of employees and directors, companies have implemented crime prevention and compliance programs in order to adapt themselves to the SCC.

The existence of a criminal compliance program is useful not only for minimizing the risk of employees and directors committing a crime, but also for use in a defense strategy when a company is accused of a crime.

For a court to allow a company to be exempt from criminal liability because of its compliance program, a company should be able to demonstrate that it conducts regular compliance risk assessments and compliance program reviews. It also should be in a condition to review and update its own compliance programs. In this context, a company must periodically assess the risk of incurring criminal liability due to the actions of directors or employees and update this risk in every sphere of its business. The company must engage in these efforts to continually improve performance.

JOINT LIABILITY

Following the general rule that a crime may be a source of civil liability, the company's criminal liability may give rise to civil liability as well. Formerly, as a general rule, a company could only be civilly liable, but never criminally liable. One notable exception was that a company was liable on a joint and several basis for payment of a fine imposed on a director (under paragraph 2 of Section 31 of the SSC, now repealed by the reform). This means that a company facing these circumstances would now be subject to a criminal penalty (normally a fine) and would also be required to indemnify the injured party.

Finally, the penalties for companies that violate the SCC are serious and include fines; being wound-up; disqualification from public procurement; court action; and temporary closure of the business, premises and establishments.

IMPACT OF REFORM ON D&O COVERAGE

There has been some bustle in the Spanish insurance market about the reform and its impact on the potential liability of directors and officers. But what is the real impact on D&O coverage?

The obvious conclusion is that the reform broadly widens the scope of criminal liability. It is widened, firstly, for companies themselves – in fact, companies are criminally liable for the first time while directors had previously been subject to criminal liability. It is also widened for the directors and officers of companies as a result of newly established criminal offenses, new modalities within existing crimes and aggravated penalties. Criminal risk is definitely wider.

However, it is also clear that losses resulting from acts perpetrated in bad faith by the insured are excluded from coverage (Section 19, Insurance Contract Act 1980). To that extent, the coverage position for D&O remains unchanged since intentional criminal acts or omissions are not covered. It should be noted that certain policies in the Spanish market cover specific items such as administrative fines, which are uninsurable according to the law.

Therefore, how does the new criminal context impact D&O policies? Arguably, the new crimes and new modalities of already existing crimes noted in the SCC may lead to an increase in criminal litigation against both companies and directors and officers. Among other reasons, claimants favor this criminal liability option because criminal proceedings exert more pressure on defendants and allow for wider investigations.

Moreover, defense costs for directors and officers will be higher if criminal proceedings become more frequent as expected. Some insurance carriers, especially those providing coverage to small and medium-sized companies, are providing a predetermined allocation of defense costs with a 20 percent deductible for the defense of claims against the company and the directors. These carriers require a joint defense for the company and the directors, which could lead to conflicts between the company and its directors under the new criminal liability scenario. Under normal conditions, defense costs are reimbursable to an insurer if the insured is convicted for an intentional crime. However, there are policies in the market that effectively waive this requirement.

Additionally, two types of bonds (*fianzas*) may be set up: bails and civil bonds. The latter would cover the civil liability arising from criminal offense. Again, the sums involved may increase in light of the new law.

Regarding fines, they can be civil, regulatory (administrative) or criminal in nature. Generally, the insurability of fines is contrary to public policy and to the principle of individual penalties in the sense that they cannot be “passed on” to another person. This is the official position of the Insurance Supervisory Authority.

However, there are arguments to allow the insurability of fines. In the case of fines for criminal activity, which are typical when companies and directors are convicted, unintentional crimes arising out of serious imprudence may be insurable. In addition, in cases of regulatory fines, the principle of proportionality requires authorities to consider the existence or degree of intent. This suggests that fines for negligent – but not intentional – conduct are possible and that this type of fine may be insurable.

Finally, in closing, insurers need to consider the position of companies and the covers they can expect on general liability policies.

BACKGROUND

On an early winter morning, a woman, H.U., left her home to go to her workplace. She walked on the pavement and noticed a tractor that she perceived to be driving straight towards her. In order to avoid being hit by the tractor, H.U. stepped into the roadway and then slipped and fell. She suffered a severe foot fracture as a result, and the injury ultimately led to a permanent disability of 25 percent along with disfigurement.

H.U. claimed and received compensation for permanent disability and disfigurement from the industrial injuries insurance system (trygghetsförsäkringen), which works as strict liability insurance financed by employers. Her claim was based on the fact that she sustained the injury on the way to her workplace – in other words, she was a victim of a work-related travel accident (färdolycksfall).

In addition, H.U. claimed compensation for the same injury from the traffic insurance (trafikförsäkringen) coverage of the tractor's owner. This claim was based on the fact that she was a traffic accident victim (trafikolycka). The insurer denied the claim on the grounds that H.U. was fully compensated by the payment she received from the industrial injuries insurance.

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 through a work-related travel accident, or who suffers from a work-related disease, to the position he or she would hold if the injury had not occurred. The model is a three-tier system:

- In principle, a person 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 under the social insurance system and the Social Insurance Code is supplemented by industrial injuries insurance. Industrial injuries insurance covers gaps in coverage 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.

SWEDISH TRAFFIC DAMAGE ACT

According to the Swedish Traffic Damage Act of 1976, the owner of a motor vehicle registered in Sweden is obligated to maintain insurance for the vehicle. The right to indemnity is objective, (on a no-fault basis) and traffic accident victims are entitled to benefits that are regulated by the general Tort Liability Act (Skadeståndslagen). The possible reasons for compensation are costs incurred as a result of the accident, loss of income and non-pecuniary loss, such as pain and suffering, permanent disability and inconveniences. The level of compensation is set by the Road Traffic Injuries Commission (Trafikskadenämnden) in a tabular form and is based on the table that applies when the compensation is fixed. The general principle is that losses shall be fully compensated but not overcompensated.

THE DISPUTE

H.U.'s Position: The foot injury she suffered resulted from the use of the tractor in traffic. Therefore, she is entitled to indemnity from traffic insurance for permanent disability and disfigurement.

Insurer's Position: H.U. is already fully compensated for permanent disability and disfigurement by the compensation she has received from the industrial injuries insurance.

COURT DECISIONS

Stockholm District Court (Case No 4149-08): The District Court found in favor of the insurer. In summary, the court stated that H.U. had already received compensation for the same injury through the industrial injuries insurance.

Svea Court of Appeal (Case No T 4306-09): The Court of Appeal disagreed and found in favor of H.U. In summary, the court referred to a Governmental Committee (Personskadekommittén, SOU 2002:1) that was of the opinion that compensation for non-pecuniary loss from another source should not be deducted from the compensation paid by traffic insurance. The committee even expressed doubts if losses of a pure non-pecuniary character can be overcompensated at all.

The Supreme Court (Case No T 950-11): The Supreme Court has now granted leave of appeal. Many are awaiting the Supreme Court's judgment with great interest. The prevailing view among insurers seems to be that compensating twice for the same non-pecuniary loss amounts to double compensation.

INTRODUCTION

The current Swiss Insurance Contract Act (Versicherungsvertragsgesetz, VVG) prohibits retroactive insurance. Therefore, an insurance contract is usually void if the risk no longer exists or the feared event has already occurred before the contract is concluded (Article 9 VVG).

The Swiss Supreme Court (Bundesgericht) recently decided whether the ban on retroactive insurance applies only to new contracts or also to reinstatements of suspended insurance contracts (judgment of April 2, 2012, 4A_580/2011). While the case dealt with daily benefits insurance, the ban on retroactive insurance applies to other types of insurance as well. The court's findings, therefore, can be transferred to liability insurance.

FACTS OF THE CASE

The policyholder had been insured under a daily benefits insurance contract since May 2004. He did not pay the premium for the period from July to December 2006, which was due in June 2006. The insurer sent a reminder on September 4, 2006, requesting that the policyholder pay the premium due within 14 days or face the consequences of default. The policyholder paid the premium on May 29, 2007, and began inpatient treatment for mental illness on this same day.

In July 2007, the policyholder claimed daily benefits from the insurer based on incapacity for work due to mental illness that had existed since November 2006. The insurer denied payment because of the gap in coverage from September 19, 2006, to May 29, 2007.

The policyholder sued the insurer under the daily benefits insurance contract and partially prevailed in the proceedings before the Cantonal Court, specifically regarding the daily benefits for the period of time after May 29, 2007. The insurer then filed an appeal to the Supreme Court and applied for dismissal of the case in total.

SUPREME COURT FINDINGS

The Supreme Court found that the insurer had no duty to pay since payment would mean a breach of the ban on retroactive insurance.

According to Article 20 Paragraph 1 VVG, the insurer reminded the policyholder to pay the premium due within 14 days (by September 18, 2006). Because the payment was not made until May 29, 2007, the insurance ceased to be in effect on September 19, 2007, according to Article 20 Paragraph 3 VVG. Since no payment was made within two months to resume the insurance coverage, a rescission of the insurance contract is assumed according to Article 21 Paragraph 1 VVG. Thus, the contract expired by law.

Coverage is revived if the insurer accepts a subsequent payment of the premium, according to Article 21 Paragraph 2 VVG. The coverage is revived in the moment when the outstanding premium is paid together with interest and costs. In the case at hand, this occurred on May 29, 2007. However, the Supreme Court decided that Article 21 Paragraph 2 VVG refers only to Paragraph 1. Therefore, the coverage is only revived if payment occurs within a period of two months.

Since the premium was paid after the expiration of the two-month period, the old contract was not reinstated. Rather, a new contract was concluded with the same conditions that were contained in the old contract, meaning the original agreement was restored but only for the future.

According to Article 9 VVG, the insurance contract is void if the “feared” event has already occurred before the contract’s conclusion. The insured risk must refer to a future event. Retroactive insurance that provides coverage for existing events is inadmissible even if the existing event is not known.

The Supreme Court clarified that the ban on retroactive insurance applies not only to a contract conclusion but also to an alliteration or reinstatement of a contract. If the contract ceases to be effective because of premium in arrears and the “feared” event occurs before the contract is revived, the contract cannot be continued without further ado (Article 20 Paragraph 3 VVG). It is also not admissible that an expired contract is concluded just after a subsequent receipt of the outstanding premium if the “feared” event has already occurred (Article 21 Paragraph 1 VVG).

The Supreme Court referred the case back to the Cantonal Court for a new decision with these considerations in mind.

SUMMARY

The Supreme Court clarified that the ban on retroactive insurance applies to all contract instances, such as conclusion, alliteration or reinstatement of a contract.

However, the VVG is being revised currently, and part of the revision deals with the permissibility of retroactive insurance. This revision is still in progress, so it remains to be seen whether there will be a significant modification of the final draft of the new VVG. It is likely that the ban on retroactive insurance will not remain in the new VVG.

According to Article 130 of the final draft of the new VVG, the new VVG will be applicable to the conclusion or alliteration of a contract that takes place after this revised act has come into effect. Therefore, the judgment for this case is only important for cases in which the conclusion, alliteration or reinstatement of a contract takes place before the new VVG becomes effective.

In this issue of our latest legal update, it is demonstrated once again, that there is a wide range of legislative and judicial developments that insurers and reinsurers must follow in Continental Europe. However, one main trend can be identified. In order to avoid liability, companies must meet additional and expanded requirements.

Related to this trend, our Belgian contributors have provided detailed insight into the scope of the new *Corrective Action Guide* of the European Commission, which provides guidelines for businesses to manage product recalls.

Our French legal contributors highlight the general trend of French authorities in applying the precautionary principle, which forces manufacturers to track scientific advances following the placement of products on the market and recall them if their safety is in doubt.

In Italy, companies must put in place a solid system of fire and industrial injury prevention along with an adequate and effective compliance program to avoid corporate liability.

The report from the Netherlands highlights that companies that are involved in commercial transactions with respect to dual-use items are advised to make a detailed analysis of their far-reaching responsibilities under the new Strategic Services Act.

After a significant reform of the Spanish Criminal Code, companies now can be held criminally liable for certain crimes committed by their directors or employees. This may lead to an increase in criminal litigation against both companies and directors and officers.

LEGAL CONTRIBUTORS

AUSTRIA

Dr. Andreas Theiss

andreas.theiss@wolftheiss.com

Ralph Hofmann-Credner

ralph.hofmann-credner@wolftheiss.com

WOLF THEISS

Rechtsanwälte / Attorneys-at-Law

Schubertring 6

A - 1010 Vienna

Phone: +43 1 515 10 2020

Fax: +43 1 515 10 2520

BELGIUM

Simon Hirsbrunner

Ines Litzenberger

brussels@heuking.de

HEUKING KÜHN LÜER WOJTEK

A Partnership under German Law of Lawyers,

Tax Advisors and Attorney-at-Law

Avenue Louise 326

B - 1050 Bruxelles

Phone: +32 (0)2 646 20-00

Fax: +32 (0)2 646 20-40

FRANCE

Patrick Vovan

patrick.vovan@vovan-associes.com

Anne-Cécile Louisgrand

Anne-cecile.louisgrand@vovan-associes.com

VOVAN & ASSOCIÉS

7, rue de Madrid

F - 75008 Paris

Phone: +33 1 44 90 17

Fax: +33 1 44 700 164

GERMANY

Dr. Herbert Palmberger

h.palmberger@heuking.de

René Schnichels

r.schnichels@heuking.de

HEUKING KÜHN LÜER WOJTEK

Rechtsanwälte, Steuerberater, Attorney-at-Law

Georg-Glock-Str. 4

D - 40474 Düsseldorf

Phone: +49 211 60055 585

Fax: +49 211 60055 580

ITALY

Carlo F. Galantini

carlo.galantini@ghc.it

Carlo Heilbron

carlo.heilbron@ghc.it

GALANTINI HEILBRON COCCO ORDINI

Studio Legale Associato

Via S. Sofia n. 27

I - 20122 - Milano

Phone: +39 02 5830 6022

Fax: +39 02 5830 6104

NETHERLANDS

Marc Padberg

mpd@kneppelhout.nl

Jikke Biermasz

jbi@kneppelhout.nl

KNEPPELHOUT & KORTHALS N.V.

Boompjes 40

NL - 3011 XB Rotterdam

Phone: +31 (10) 400 5100

Fax: +31 (0) 10 400 5111

NORWAY

Jan Sindre Egseth

jse@simonsenlaw.no

SIMONSEN ADVOKATFIRMA DA

Filipstad Brygge 1

P.O. Box 2043

Vika 0125

NO - 0252 Oslo

Phone: +47 21 955 00

Fax: +47 21 9555 01

POLAND

Dr. habil. Andrzej Kubas

andrzej.kubas@kkg.pl

Kamil Zawicki

kamil.zawicki@kkg.pl

KUBAS KOS GAERTNER – ADWOKACI sp. p.

Budynek „Focus”

al. Armii Ludowej 26

PL - 00-609 Warszawa

Phone. +48 22 321 83 00

Fax +48 22 321 83 02

Nowa Kamienica

ulica Rakowicka 7

PL - 31-511 Kraków

Phone: +48 12 619 4040

Fax: +48 12 619 4059

SPAIN

Jorge Angell

jangell@rodrigoabogados.com

L.C. RODRIGO ABOGADOS

Lagasca, 88 - 4a planta

E - 28001 Madrid

Phone: +34 914 355 412

Fax: +34 915 766 716

SWEDEN

Rose-Marie Lundström

rose-marie.lundstrom@rml-law.se

ROSE-MARIE LUNDSTRÖM

ADVOKAT AB

Nybrogatan 6

P.O. Box 5216

SE - 102 45 Stockholm

Phone: +46 769 45 16 11

SWITZERLAND

Dr. Herbert Palmberger

h.palmberger@heuking.ch

Pierre Rattay

p.rattay@heuking.de

HEUKING KÜHN LÜER WOJTEK

Rechtsanwälte, Steuerberater, Attorney-at-Law

Bahnhofstrasse 3

CH - 8001 Zurich

Phone: +41 44 200 71 00

Fax: +41 44 200 71 01

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