



# Recent Legislative and Judicial Developments in Continental Europe



April, 2010

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## 1

## 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 the continued and valued cooperation of the insurance practice of law firm Heuking Kühn Lüer Wojtek and its network of legal experts, 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, warrant further in-depth study.

We continue to expand the jurisdictions covered, and in this latest edition, Italy is featured for the first time since May 2008. As our legal colleagues in Heuking Kühn Lüer Wojtek continue to expand their network, further Continental European jurisdictions may be included in future issues.

This issue of *Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry* covers the period October 2009 to March 2010.

## 2

## The Eschig Case: Recent Developments Regarding Legal Expenses Insurance

### Austrian Supreme Court Confirms Free Choice of Attorney in Mass Claim Actions

Most Austrian insurers include a clause in their general conditions applicable to legal expenses insurance “that entitles the insurer, where the interests of several insured persons are directed against the same opponents, to limit its performance to the bringing of test cases, or where appropriate, to collective redress or other ways of asserting legal interests by legal representatives selected by it.”<sup>1</sup> This type of clause was developed in response to the risks arising from mass claim actions. It is therefore referred to as the “Mass Claim Clause.”

In a recent decision dated October 28, 2009, the Austrian Supreme Court (namely the division responsible for insurance law, 7. Senat) ruled that clauses stipulating the insurer’s right to select a legal representative with regard to mass claim actions are invalid.

The ruling in question was based on a preliminary decision of the European Court of Justice (“**ECJ**”). The relevant proceedings were initiated by the Austrian Supreme Court. This ruling may create a need for amendments to the Austrian Law on Insurance Contracts (“**VersVG**”) and may have a corresponding impact on insurance terms and conditions applicable to legal expenses insurance. To date, no changes or amendments have been made to the law.

It is not yet possible to know how extensively the latest ruling will affect Austria’s insurance market. However, it is very likely that insurance claims payments will rise, at least for the insurers involved, because the “Mass Claim Clause” allowed insurers to limit their costs (e.g. by means of collective proceedings).

### 1. The Case<sup>2</sup>

Mr. Eschig, an Austrian citizen and holder of a legal expenses insurance policy, lost money that he had invested due to the collapse of a financial syndicate. Besides Mr. Eschig, thousands of others were involved, some of them insured by the same insurance company as Mr. Eschig.

<sup>1</sup> ECJ 10.9.2009, C-199/08, *Eschig v Uniqa*.

<sup>2</sup> OGH 28.10.2009, 7 Ob 68/09i.

Mr. Eschig started civil proceedings in Austria against various parties that he considered responsible for his losses (including the Austrian authorities) and consequently instructed a law firm that he chose, to represent him in the proceedings. His legal expenses insurer refused to cover certain lawyers' fees, relying on the above-mentioned "Mass Claim Clause."

In response to this denial of cover, Mr. Eschig took action to have the lawyers' fees covered and declare invalid the respective clause in the general conditions applicable to legal expenses insurance that limited his right to use a lawyer of his choice.

## 2. Underlying Austrian Legal Background

### 2.1 The "Mass Claim Clause"

The Austrian Insurance Association ("VVO") provides sample policy general conditions for various insurance classes. Austrian insurance companies generally use these, sometimes (slightly) adapted, in their business.

The sample policy general conditions applicable to legal expenses insurance contain a clause stipulating that the insurer is entitled to limit its performance under the policy to the bringing of test cases, or to collective redress or other ways of asserting legal interests by legal representatives chosen by it.<sup>3</sup> As a rule, this clause has been adopted by Austrian insurance companies and used in their general conditions applicable for legal expenses insurance.

The reasoning behind developing such a clause and using it in business was the increased frequency of collective actions over recent years, the length and expensive nature of such proceedings<sup>4</sup> and the difficulties in coordinating different lawyers.

### 2.2 Article 158 k VersVG

Article 158 k VersVG provides that policyholders are free to select a lawyer of their choice in court and administrative proceedings. Outside of such proceedings, the policyholder only has free choice of lawyer if there is a conflict of interest on the insurer's side.

The free choice of lawyer principle set out in Article 158 k VersVG serves to implement Article 4 of Council Directive 87/344 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance<sup>4</sup> which sets out that "Any contract of legal expenses insurance shall expressly recognize that:

<sup>3</sup> ARB 6.7.3.

<sup>4</sup> Univ.-Prof. Dr. Martin Schauer, *Freie Anwaltswahl in der Rechtsschutzversicherung, Der Fall Eschig/Uniqqa vor dem EuGH, RdW 2009/714, 702.*

where recourse to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose a lawyer or other person.”

Article 158 k VersVG, implementing the respective provision, is compulsory in favor of the policyholder.

### 3. The Rulings

With the decision dated October 28, 2009, the Austrian Supreme Court ruled that the “Mass Claim Clause” (described above) restricts the principle of free choice of a lawyer set out in Article 4 of Directive 87/344, which is implemented in Austria by Article 158 k VersVG; accordingly the clause is invalid as a consequence. This ruling is inconsistent with prior rulings of the Austrian Supreme Court, which held the “Mass Claim Clause” to be valid.<sup>5</sup>

The ruling of the Austrian Supreme Court follows a preliminary ruling of the ECJ, which was based on the question of whether Article 4 of Directive 87/344 is to be interpreted as entitling the legal expenses insurer to reserve the right, where a large number of insured persons suffer losses as a result of the same event, itself to select a legal representative for all the insured persons concerned.<sup>6</sup>

In answering, the ECJ stressed that when interpreting a provision of Community law, it is necessary to consider not only the wording but also the context in which it occurs and the objects of the rules of which it is a part. In this case, the Directive’s main goal is protection of the insured person’s interests, in particular – but not only – by removing any potential conflict of interest. In this regard the ECJ referred to Article 3 of the Directive, in which certain organizational and contractual measures are set out, allowing the insurer to employ separate staff within the same undertaking or to subcontract the claims management in order to avoid conflicts of interest. Moreover, the Directive implements the insured person’s freedom to choose a lawyer in legal and administrative procedures as a general principle. According to the ECJ, the Directive’s provisions set out the minimum level of freedom that must be granted to a policyholder.

The ECJ did not follow the contrary interpretation of the Directive proposed by the insurance company involved and the Commission. Their interpretation was that the Directive’s principle of free choice of a lawyer must only be granted where a conflict

<sup>5</sup> Cf. OGH 128/08i.

<sup>6</sup> ECJ 10.9.2009, C-199/08, *Eschig v Uniqia*.

of interest arises. Rather, the ECJ held that such a principle has to be granted in general, and not be limited to the occurrence of a conflict of interest. It is restricted to legal and administrative procedures.

Consequently, the ECJ found that Article 4 of the Directive “must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned.”<sup>7</sup>

#### 4. Implications

Following this decision, various journalists and lawyers have stressed that such rulings necessitate a modification of the provisions of the Austrian Law on Insurance Contracts and the relevant general conditions applicable to legal expenses insurance.

At least with regard to Article 158 k VersVG, there is, in our opinion, no need for change. Its wording, setting out the freedom to choose a representative in legal court proceedings, is quite clear and in accordance with the provisions of the Directive.

With respect to the general conditions applicable to legal expenses insurance, however, the ruling’s impact is the subject of lively discussion all over Austria. The “Mass Claim Clause” contains provisions covering both extrajudicial actions and court proceedings.

Following the ruling of the ECJ and the Austrian Supreme Court, the latter clause, which limits the freedom to choose a legal representative with regard to administrative and court proceedings in case of mass claim actions, should be dropped.

As far as we know, the VVO has already established a special task force to work on the clause in its guidelines that provide sample general conditions applicable to legal expenses insurance. The result of the task force’s work is awaited with eager anticipation, since there is a huge financial interest on behalf of the insurance business in limiting legal expenses costs with regard to mass claim actions. Lack of such a provision might lead to higher insurance premiums for legal expenses insurance or even to the designing of new insurance products. The products may omit situations of mass claim occurrences from the standard legal expenses insurance product as it is now known, a consequence that would not be in the interest of the insureds.

<sup>7</sup> ECJ 10.9.2009, C-199/08, *Eschig v Uniqa*.

## 3

## Renewal of the EU Insurance Block Exemption Regulation

### Background

In 1992, the European Commission (Commission) adopted the first Block Exemption Regulation (EEC) No. 3932/92 applicable to the insurance sector. The Regulation exempted particular forms of cooperation in the insurance industry from the prohibition of restrictive practices regarding competition under Article 101, Treaty on the Functioning of the European Union (TFEU) (ex Article 81, EC). The Regulation expired in 2003 and was replaced by the current Regulation (EC) No. 358/2003 after the Commission conducted a thorough consultation process with the insurance industry, the public and consumer organizations.

Regulation (EC) No. 358/2003, which expired on March 31, 2010, granted an exemption from the application of competition rules concerning four types of agreements that were considered specific to the insurance sector. The exclusion included joint calculations, tables and studies, standard policy conditions, security devices and the common coverage of certain types of risks by means of co-insurance or co-reinsurance pools. Concerning the latter type of cooperation, a distinction was made between pooling arrangements covering exclusively “new risks” and other pools dealing with risks aside from “new risks.” Co-insurance or co-reinsurance groups dealing exclusively with “new risks” were exempted for only a three year period after the particular group had been established. Co-insurance or co-reinsurance groups not covering a “new risk” or existing for more than three years could not exceed certain thresholds in the relevant markets in order to benefit from the suspension of competition rules. For co-reinsurance groups, the threshold was set at 25 percent, while in the case of co-insurance groups, a threshold of 20 percent applied.

The provisions of the implementing Regulation (EEC) No. 1534/91 oblige the Commission to review the functioning of the Block Exemption not later than six years after its entry into force. The Commission began to consult national authorities on competition in 2007 and the public in 2008. As a result of the consultation process, the Commission tabled a report on the Block Exemption to the European Parliament and the Council of the European Union, which reflected the preliminary views of the Commission on a renewal of the Block Exemption Regulation in the insurance sector. Basically, the document recommended that the exemption from antitrust rules should be maintained for agreements referring to joint calculations,

tables and studies and the common coverage of certain types of risks. Still, the report pointed out that forms of cooperation in the area of standard policy conditions and security devices should not be covered by a new Block Exemption. These views were included in the Draft Block Exemption Regulation, which led to the new Block Exemption Regulation, to be discussed below.

## The Current Block Exemption Regulation

The major change in the new Block Exemption Regulation (EU) No. 267/2010 of March 24, 2010 lies in the deletion of the exemption for agreements on standard policy conditions and security devices. These forms of cooperation are no longer considered specific to the insurance sector. As a consequence, only joint calculations, tables and studies, as well as co-insurance or co-reinsurance groups, fall under the proposed Block Exemption. Even though exemptions are sustained for these types of agreements, several amendments are introduced.

A formal change was made to the area relating to joint calculations, tables and studies, where the term “joint calculations” has been replaced by “joint compilations.” Apart from the condition that joint compilations, tables and studies must be made available to any insurance company, even if the company is not active in the geographical or product market to which the data refer, Article 3 (2) (e) of the Draft Regulation adds a further disclosure requirement. In accordance with this provision, compilations, tables and studies shall be made available to consumer organizations or customer organizations, unless non-disclosure is justified on grounds of public security.

In the context of the exemption referring to common coverage of certain types of risks, two reforms proposed by the Commission are significant. First, the definition applicable to “new risks” has been expanded. Under the new Regulation, new risks include “in exceptional cases, risks the nature of which has, on the basis of an objective analysis, changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover such a risk.” Another major reform concerns the calculation of market share thresholds for pools not covering “new risks.” The former Block Exemption identified the market share thresholds in relation to the insurance products “underwritten within the grouping arrangement by the participating undertakings or on their behalf.” The new Regulation defines it as the market share held by a participating undertaking inside and outside any pool on the relevant market. The proposed provision, therefore, takes into account the combined market share of the participating companies in and outside any pool, thereby limiting the scope of the Regulation.

## Response from the Insurance Industry on the New Regulation

During the public consultation phase that occurred from October to November of 2009, the insurance industry had the opportunity to respond to the Commission's envisaged alteration of the Block Exemption Regulation. The European insurance industry has generally demanded that the Block Exemption Regulation be renewed completely. The industry has articulated its support for an exemption concerning standard policy conditions and security devices. In addition, the industry has been critical of most of the modifications to the retained exemptions that have been introduced. Correspondingly, the obligation to disclose to any interested third party the framework of joint compilations, tables and studies, has aroused the concern of the industry. The industry warns that such a requirement would likely reduce this form of cooperation to the detriment of the whole sector. As a consequence, the provision's scope was reduced to consumer and customer organizations. Another issue facing disapproval among insurance industry associations is the new calculation of market share thresholds of co-insurance or co-reinsurance groups covering risks other than "new risks." Due to the narrowed scope of this exemption, medium-sized or large insurers would not be able to participate in pooling arrangements, as argued by the insurance industry. It remains to be seen what changes the new Block Exemption Regulation will bring to the insurance sector in practice.

## 4

## Developments in French Compulsory Construction Works Insurance: Amendment of Standard Clauses

In France, construction operations are subject to tight regulations that provide for strict liability under Article 1792 ff. of the Civil Code. Under the Loi Spinetta of 1978, they are also subject to two types of compulsory insurance coverage: insurance of the construction contractor's decennial liability (*assurance de la responsabilité décennale du constructeur*) and insurance of damage to the construction works (*assurance des dommages à l'ouvrage*). The scope of the compulsory coverage is specifically described in standard clauses that have been fixed through Ministerial Order (Arrêté). Article L. 243-8 of the French Insurance Code clearly states that any insurance policy acquired to fulfil compulsory construction insurance is expected to provide guarantees that are at least equal to coverage under the standard clauses. Any wording in a policy that does not comply with the standard clauses and is less favorable to the insured, is presumed to be invalid by the courts.

The standard clauses are attached to Article A. 243-1 of the French Insurance Code. Their last revision by the Ministerial Order dated November 19, 2009 was the most significant in several years. Provisions of this Order came into force on November 28, 2009 (*Arrêté du 19 novembre 2009 portant actualisation des clauses-types en matière d'assurance-construction*, JO du 27 novembre 2009 p. 20428, also available on the website [legifrance.gouv.fr](http://legifrance.gouv.fr)).

The standard clauses applicable to liability insurance (Annex I) and the standard clauses applicable to damage insurance (Annex II) have been reviewed in order to integrate amendments implementing legal provisions of Acts of Parliament (Loi n° 2006-1771 du 30 décembre 2006, JO 31 décembre 2006 p. 20228 and Loi n° 2008-735 du 28 juillet 2008, JO 29 juillet 2008 p. 12144) and of a Decree (Décret n° 2008-1466 du 22 décembre 2008, JO 31 décembre 2008 p. 20606). Additionally, an Annex III has been created that concerns group liability insurance expressly authorized by the Decree dated December 22, 2008.

## Annex I and Annex II: Standard Clauses Applicable to Liability Insurance and to Damage Insurance

### - *Limit of coverage*

The Act dated December 30, 2006 expressly authorized a coverage limit for work on buildings other than homes. Prior to the introduction of this Act, compulsory coverage under contractors guarantee insurance could not be subject to a limit. The limit should be at least equal to the cost of construction (based on the cost declared by the owner) or at least EUR150 million if the cost of construction is larger than this amount.

This limit also applies to coverage of damage to work being constructed, according to a Parliamentary Act of July, 2008. Standard clauses regarding this type of insurance had already referred to the limit of the cost of the construction of the works, but the new Act introduced the option of limiting coverage to EUR150 million.

### - *Integration of the existing property*

According to Article L. 243-1-1 of the French Insurance Code, amended by a Governmental Order dated June 8, 2005, compulsory coverage does not apply to the property existing prior to the construction works, “except for the buildings which are totally incorporated in the new works and become technically inseparable from it.” This information is now reproduced in all the standard clauses (Annexes I, II & III).

## Date of Opening of Building Works

When creating compulsory construction insurance in 1978, the Legislator referred to the notion of “statutory declaration of opening (or beginning) of the works” (*déclaration réglementaire d’ouverture de chantier, hereafter DROC*). The date of the DROC is key as there is a need to establish initiation of compulsory insurance on a specific date. Unfortunately, no definition of the DROC was provided in French regulations until a decree, dated January 5, 2007, was introduced into the French Urbanism Code. Article R. 424-16 of the Code refers to a declaration made to the mayor of the city where the structure will be built, by the person permitted to build (In France, permission to build is granted by the mayor’s office). Now the amended standard clauses refer in principle to either of these situations:

- The date of the DROC mentioned in Article R. 424-16 of the French Urbanism Code, regarding works for which permission to build is required
- The date of the first order to work or the date of the actual beginning of work, for construction projects for which permission to build is not required.

### **Annex III: Standard Clauses Applicable to Group Liability Insurance**

Parallel to lobbying for a change in the limit of coverage, a practice has developed in France where a group policy is used to provide decennial liability coverage in situations where several insureds are required to acquire compulsory coverage.

The Decree dated December 22, 2008 expressly authorizes this practice (Article R. 243-1 of the French Insurance Code). The Ministerial Order dated November 19, 2009 creates standard clauses regarding group policies (Annex III attached to Article A. 243-1 of the French Insurance Code). Insurers have entered into an agreement to facilitate, for works with a value exceeding EUR15 million excluding VAT, the underwriting of such group policies.

The group policy complements the many policies purchased by the insureds whose decennial liability is incurred. It works as a second line where the first line is coverage under the individual policy taken out by each insured. The standard clause states that the deductible is equal to the limit of coverage stipulated in the individual policy.

In conclusion, the new standard clauses resulting from the Order dated November 19, 2009 do not really bring innovation, but they clarify elements of existing legal provisions issued by the Parliament or by the Government. However, standard clauses serve as important references for policy comparison in order to ensure that the policies comply with the regulation of construction compulsory coverage.

It is important to note that the new standard clauses apply to policies in force on November 28, 2009 or acquired after this date. As standard clauses set the minimal coverage for compulsory insurance contracts, it is advisable for insurers operating on the French construction risk market to review the wording of policies in order to check their compliance. In addition, it is recommended that reinsurers closely examine the new standard clauses in order to assess the risk they take when covering insurers acting on the French construction market. As the coverages promulgated in the standard clauses are mandatory, they are considered to be more relevant in cases where different policy wording exists that may be less favorable to the insured.

## 5

## Personal Liability Insurance Cover in Germany for Athletic Injury?

In a judgment handed down on October 27, 2009 (VI ZR 296/08) and subsequently published, the Federal High Court of Justice in Germany (*Bundesgerichtshof*, in the following, “High Court”) seized the opportunity to restate the basic principles of liability for athletic injury. Also, the High Court ruled on several interesting legal items generated by the existence or non-existence of insurance protection in this context.

Prior to the decision described above, the same Senate (Chamber) of the High Court issued a decision in 2003. As a basic rule in a sporting competition with high risk potential and as a consequence of an implied exclusion, the injured party has no claim against the injuring party if the rules of the sporting competition have not been breached in a culpable way (BGH 1st April 2003 – VI ZR 321/02). However, in 2008, the Senate modified its former decision and held that these principles do not apply to cases where the injuring party is insured by a casualty insurance company (BGH, 29th January 2008 – VI ZR 98/07).

### The Case

At a particular moment in a soccer match, the claimant and the injuring party (defendant) both fell to the ground after a tackle where they both attempted to gain control of the ball. The claimant suffered a fractured leg and sued the defendant for his material damage and compensation for pain and suffering. Lower courts dismissed the claim. The claimant was admitted to appeal, but the High Court approved the prior judgments. The claimant, charged with the burden of proof, was not able to provide evidence that the injuring party had breached the rules of the sporting competition, in a culpable manner.

### The Rulings

The High Court pointed out that liability of athletes requires evidence that they violated the rules of the sporting competition in a culpable way, causing injury to another person. Liability is excluded for physical injury that is suffered by one of the combatants in a clash where the rules of the game and concepts of fairness common to all sports are respected. In this case, the injuring party did not neglect any diligence as a precondition for liability and did not act in a culpable manner.

According to the High Court the requirements of diligence for the participation in any sporting event are defined by the particularities of the sport itself. Therefore, the factual situation and the legitimate expectancy for security of the participation in the sport have to be taken into consideration. Such requirements are generally defined by the rules and standards of the respective sport.

Following these principles, the High Court ruled in this case that a duel for the ball in a soccer match that may bring down one or both of the players, would correspond to the character of the game and would not constitute a claim for indemnity.

Finally, the High Court stated that the existence of insurance cover on the side of the injuring party did not change the question of liability. The High Court held that the existence of such insurance cover could not substitute the missing default of the injuring party and that the insurance coverage generally would not originate a claim.

## Conclusion

In conclusion, the High Court made good law in accordance with the general Principle of Separation (“*Trennungsprinzip*”) under German Casualty Insurance Law.

According to the Principle of Separation, as a basic rule, it has to be proven **in every case** that the injuring party (insured) is liable for the injury of the other party. Unless the question of liability between the claimant and the insured is not decided by a court, the insurer is not obliged to indemnify the insured party. Sometimes a second lawsuit is needed to clarify the question of coverage between the insured and the insurance company. Therefore, the insurance coverage complies with the liability and not conversely, where the liability complies with the insurance coverage.

The new decision of the High Court is of particular importance for the insurance industry, since it provides clarity. As the judgment of the High Court in 2008 did not formally give attention to the Principle of Separation, one could take the view that the question of liability of the injuring party (insured) in a sporting competition is of secondary importance or even irrelevant as long as there is coverage granted by a third party liability insurer.

However, the new decision of October 27, 2009 has confirmed again that the determination of liability is always a condition for insurance coverage and that existing insurance coverage cannot lead to liability of the insured. Thus, there is no need for liability insurers to implement exclusions for liability in sporting competitions in their insurance terms and conditions.

## 6

# Class Action and Compulsory Mediation Enter the Italian Litigation Scene: How Will These Provisions Affect Insurance Litigation and Business?

## Class Action: Overview and Possible Impact

After numerous postponements, effective January 1, 2010, class action has officially entered the Italian litigation scene as a remedy for consumers against unlawful conduct committed by enterprises after August 16, 2009.

The action is structured by the law as a common initiative for the protection of consumers' individual rights in three cases:

- Rights deriving from contracts between consumers and enterprises;
- Non-contractual rights consumers have with producers of goods (e.g. in cases of damages deriving from product liability);
- Rights deriving from unfair commercial practices or anti-competitive conduct.

The action – which may be brought by individual consumers directly (with the assistance of a lawyer) or by the appointment of a consumers' association – may seek judicial determination of the breach of consumers' rights by the defendant, as well as the award of damages or restitution of sums paid. Unlike similar legislation in effect in other countries, which provide for the award of punitive damages, the Italian law only allows compensatory damages.

The claim is subject to a preliminary judicial review which determines whether the action is admissible. Grounds for the early dismissal of the action are clearly indicated by the law as (i) the manifest groundlessness of the action; (ii) the existence of a conflict of interest; (iii) the lack of identical individual rights for which protection is sought; (iv) the claimant's inability to care for the interest of the entire class.

The introduction of such preliminary judicial review is particularly important as it may have the effect of avoiding a reckless and political use of the class action. Such review is performed before the action is advertised and prior to allowing any opt-in of other consumers. Moreover, when an action is declared inadmissible by the Court, the decision is advertised by means of publication and the claimant is required to bear the expenses.

In addition to the admissibility outcome, the Court may rule for a suspension of the action if an investigation by a regulatory authority (e.g. Antitrust) on this issue is pending.

In the decision admitting the action, the Court defines the terms and conditions for advertising the action in order to allow the opt-in of interested consumers.

The rules of procedure for these actions are simpler than those stated by the Italian Code of Civil Procedure for regular actions before the civil courts. The Court handling the case establishes the procedure in compliance with the principle of equal right of defense in civil proceedings in order to ensure a fair, effective and prompt management of the proceeding.

If the Court finds for the claimants, it will liquidate the sums or state the criteria for determining the sums due to the consumers who are part of the action. In addition to ruling in favor of all the consumers who have opted in, the decision prevents any other class action against the defendant on the same issue. Individuals who have not opted in may obviously still file individual claims against the defendant in separate actions.

While the first class actions have been brought against banks and public institutions, insurance companies are potential targets of such actions.

Collective actions have been a topic of discussion between the Italian government and the Italian consumers' association for many years. An issue relating to the motor insurance business was a key issue in the discussion seeking a collective action remedy. After the Antitrust Authority (in 2001) investigated and found a cartel among a group of motor insurers – resulting in insureds/consumers paying unfair premiums – the costs and time needed to pursue individual actions discouraged individual consumers.

In today's legal framework, it is likely that those consumers would have grouped together with the aid of a consumers' association to exploit the class action remedy. The class action remedy provides an advantage by reducing expenses and strengthening the consumers' position.

Italian consumers' organizations were ultimately unhappy with the enacted legislation creating the class action. The absence of punitive damages, the fact that publicity costs were borne by consumers rather than by the consumers' association and the limiting of the remedy to actions occurring only after August 16, 2009, were some of the reasons.

It is likely that the new class action remedy will impact insurance companies conducting business in areas of claims handling and underwriting. Such insurers may benefit by building a claims handling and underwriting strategy that incorporates the full ramifications of the availability of class action suits for Italian consumers.

### **Compulsory Mediation in Insurance Cases: Overview and Possible Impact**

New legislation (D.Lgs. 4-3-2010 num. 28) has recently been enacted with the aim of reducing litigation in Italian Courts and providing compliance with Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

The new law contains three types of mediation procedures:

- Voluntary mediation, chosen as an ADR method by the parties;
- Compulsory mediation: imposed by the law regarding certain issues of litigation;
- Judicial mediation: proposed by the judge to the parties of a lawsuit at any stage prior to the submission of final conclusions.

Disagreements over insurance contracts and medical malpractice are among those for which mediation will be compulsory. Prior unsuccessful mediation will be a condition for the admissibility of an action before a civil judge. The law states that compulsory mediation will be in effect for proceedings beginning twelve months after the enactment of the law, which will occur on March 20, 2011).

Compulsory preventive mediation is not new to the Italian legal system and has been in effect for many years with respect to labor and employment disputes, albeit not very successfully. This new piece of legislation is expected to have an important impact on the Italian litigation scene. The implementation of mediation procedures in the areas of insurance contracts and medical malpractice may accelerate the settlement of a large number of disagreements. The new law states that the mediation process may last no longer than four months, ultimately rendering the judicial system more efficient.

Insurance companies are likely to see their claims handling procedures impacted by the new compulsory mediation legislation.



# Dutch Insolvency Law and Directors & Officers Liability

The worldwide economic downturn has had a huge effect on the Dutch economy. Many companies in the Netherlands face the risk of bankruptcy. In 2009 almost 11,000 enterprises were declared bankrupt, an increase of more than 51 percent compared with 2008. A similar number of companies are expected to enter bankruptcy in 2010. An even greater number of companies will be affected as they become entwined with the insolvencies of their contractual counterparties.

This short report provides a summary of Dutch insolvency law in the context of directors' and officers' liability. It specifically addresses the risks that directors and officers face when a receiver (curator) is appointed to closely examine the actions and inactions of the company and its management as they may relate to the causes of a bankruptcy. The intent is to provide further insight into Dutch practices to directors & officers (D&O) liability insurers and reinsurers. We also review the need for (re)insurers to re-examine terms and conditions of applicable D&O policies in light of the legal issues.

## Dutch Insolvency Law – A Brief Summary

In the Netherlands, insolvencies are primarily regulated by the Dutch Bankruptcy Act (*Faillissementswet*) – which is currently under review – and the European Insolvency Regulation<sup>8</sup>. The Bankruptcy Act focuses on two different situations:

- i) Suspension of payment (*surseance van betaling*), with the appointment of an administrator (*bewindvoerder*). Suspension is primarily designed to allow for an opportunity of recovery and reorganization;
- ii) Bankruptcy (*faillissement*), with the appointment of a receiver (*curator*) whose primary instruction is to take control over the estate and to prepare the liquidation of assets.

A petition for bankruptcy may be filed by any interested party, such as (i) the debtor/company itself, (ii) any creditor and (iii) the Public Prosecutor's Office.

The Court that rules on the petition will apply the so called “cash flow test,” which is normally considered passed if the petitioner demonstrates that more than one creditor remains unpaid. Normally, the Court will deliver a decision following the hearing. The order is immediately enforceable with a possibility for appeal within eight days.

<sup>8</sup> In this contribution only the Dutch Bankruptcy Act is discussed. The summary given applies to regular enterprises in general, not to financial or insurance institutions. Such institutions are subject to a special regime.

The Court will appoint a supervisory judge (*Rechter-Commissaris*) and – in most cases – one receiver, with the possibility of appointing more receivers if the complexity of the insolvency or the nature of the activities of the company requires it. The receiver will generally be a lawyer, although it is not unusual for a finance expert to be appointed, as well.

The primary goal of the bankruptcy and of the receiver's task is the administration and liquidation of the estate. The Bankruptcy Act however, also provides for an optional offering to the creditors that avoids the liquidation of assets.

Consequences of bankruptcy include, but are not limited to:

- Automatic termination of all individual attachments on assets (as the bankruptcy itself is considered to be an attachment for the benefit of all creditors on all assets and liabilities of the company);
- Enforcement rights of unsecured creditors are immediately suspended;
- The receiver assumes all external representational powers;
- The receiver has the power to rescind certain contracts and to immediately lay-off employees;
- The receiver has the option to initiate claw-back actions against pre-bankruptcy transactions which may be regarded as detrimental to the estate or to some of the creditors (*Actio Pauliana*).

## The Powers and Duties of the Receiver – D&O Liability

Immediately upon appointment, the receiver is charged with the administration and liquidation of the bankruptcy estate. The receiver represents the bankrupt company externally and is granted powers to take actions that will preserve the estate. The receiver directly reports to the supervisory judge and is required to file three monthly reports, which are open for review by the public.

Part of the receiver's role involves the investigation into the cause(s) of the bankruptcy. There is a growing tendency in the last few decades to specifically focus on the role of the management board. As in many other European jurisdictions, Dutch law stipulates that a director of the company is, in principle, liable for the shortfall (deficit) if the bankruptcy is determined to have been the result of mismanagement.

Because there is likely to be an economic shortfall in most bankruptcies the receiver needs to thoroughly investigate potential directors' and officers' liability. Article 2:248 of the Dutch Civil Code ("DCC") gives the receiver useful tools to perform that activity.

If the findings demonstrate that the directors have failed to draw up and publish/deposit in a timely fashion (within 13 month after the close of the financial year) the annual accounts, or have breached their obligation to keep books, mismanagement is assumed to have occurred. This mismanagement is presumed to be an important cause of the bankruptcy. The director does however, have the ability to deliver proof to the contrary or proof of other (more) important causes of the bankruptcy.

The receiver will immediately investigate whether the annual accounts have been published in time and whether the books have been properly kept.

In addition, the receiver will also closely examine all acts and admissions by the company and its directors during the period prior to the bankruptcy. In the Netherlands no formal “twilight period” (the period prior to the bankruptcy during which the acts of a company may be questioned or undone) exists. Although claims relating to mismanagement may only be based on circumstances in the period three years prior to the date of the company being de facto bankrupt (thus not per definition the date of the bankruptcy order), the possibility to question certain transactions is, in principle, unlimited in time.

The receiver has the power to annul certain transactions that may be regarded as advantageous to some creditors and harmful to others. The receiver may additionally hold a director liable for any damage that the bankrupt company itself has suffered as a result of mismanagement.

Besides actions of the receiver, individual creditors will specifically look at transactions that occurred while directors knew or should have known that bankruptcy was unavoidable. Those creditors will either try to convince the receiver to take action against the directors or take actions themselves. The bankruptcy itself does not affect the right of third parties to directly file a claim against the directors.

The claims from the receiver or other stakeholders in the company (creditors, shareholders, employees) will be based on general concepts of law (tort, negligence, breach of duty of care, mismanagement or fraud). Distinction should be made between the director’s *internal* liability towards the company (for which situation article 2:9 DCC provides a broad basis) and the director’s *external* liability (towards third parties such as creditors, for which in general article 6:162 DCC is applicable).

We have provided a brief overview of examples of only some of the risks a director or officer may face in light of his/her personal liability.

## D&O Liability Insurers

D&O liability insurers and reinsurers need to be aware of the broad possibilities where receivers, creditors and other stakeholders (both within as well as beyond insolvency proceedings) may make claims against directors and officers and the need to closely review applicable policy terms, especially the exclusions.

Most D&O liability policies stipulate that the insurance will terminate automatically in the case of a bankruptcy, with the possibility of an extension (“loss occurrence”). The insurer will probably want to assess whether the insurance premium still is in balance with the (increased) risks involved, considering the growing tendency of both the receiver and the creditors to actively pursue management for either the entire deficit in the bankruptcy or the loss suffered by individual creditors or the company itself.

The uncertainties and huge impact of an economic downturn creates specific risks. At the conclusion of a transaction with a third party (future creditor) it may prove to be difficult for directors and officers to determine if bankruptcy is unavoidable. It is extremely difficult to weigh all relevant factors. In the aftermath of the bankruptcy, a creditor faced with the bankruptcy of his/her counterparty will go the extra mile to demonstrate that the so called “Beklamel” situation applies. This can be interpreted to mean that the director knew or should have known that bankruptcy was unavoidable. These kinds of claims may increase in the future. An extra burden is likely to be created for D&O liability insurers and (re)insurers in managing and financing the additional litigation that will emerge.

Considering the huge financial impact that a failure to publish and deposit the annual accounts may have, the insurer will need to closely monitor the timely deposit of those annual accounts. The insurer will also need to pre-warn the directors and communicate the potential consequences that failure to do so may have on insurance coverage. Although many insurance policies burden the company with the obligation to annually provide the insurer with those annual accounts, insurance companies may benefit from closely monitoring this obligation as well as requesting evidence of timely publication.

## Yet Another Trend: Reclaiming Criminal Fines on Directors

Separate from the concept of insolvency, another issue that may be of interest to D&O insurers and reinsurers is the attempt by a company to claim repayment of a criminal fine from its directors.

In a recent ruling from a civil court<sup>9</sup>, a company successfully made a claim against its (former) director in relation to violation of the Iraqi Sanctioning Decree. The matter related to a transaction involving the sale of potatoes, which had been approved by the United Nations. Part of the transaction included a kick-back payment by the company to the Iraqi Government, to which payment was not exempt from the Sanctioning Decree. The payment was however, imperative for the company's being awarded this and consecutive contracts. Considering the violation of the Sanctioning Decree, the company was criminally investigated and in order to avoid further prosecution, it paid an amount of EUR170,000 to the public prosecutor in a settlement. The Civil Court was called to rule on the claim of the company against its (former) director for repayment of the out-of-court settlement amount. On the basis of article 2:9 DCC (duty to correctly fulfil the managerial tasks) and article 6:162 DCC (tort) the Civil Court rejected all defenses raised by the director.

In this specific matter, the court attached considerable weight to the fact that the former director was aware that payment to the Iraqi Government was in fact punishable and awarded the claim in full.

Although many D&O liability insurance policies exclude coverage for fines and penalties for fraudulent acts of the director, it is questionable whether the latter exclusion also applies to fines/penalties being imposed on the company itself and not the director. Insurers may also want to review if similar situations are sufficiently dealt with properly in policy terms and conditions.

<sup>9</sup> Civil Court Zwolle d.d. 25-03-2009



## Workers Compensation – Update on Recent Cases and Legislative Developments in Norway

On December 12, 2008 the Norwegian Ministry of Labor submitted a white paper regarding the Industrial Injuries Insurance Act, which will replace the existing provisions on industrial injuries in the National Insurance Act (*folketrygdløven*) and the Industrial Injuries Insurance Act.

The white paper, based on two earlier Norwegian Official Reports (NOU), recommended, among other things, a widening of the scope of occupational injuries.

The deadline for filing comments expired on March 12, 2008, but the Ministry of Labor has not yet put forward a new bill regarding occupational injuries and diseases. The delay has been caused by the authorities' indecision on whether or not to follow-up on recommendations in the white paper and on subsequent comments.

### Existing Background Rules of Law

Beyond the common benefit scheme provided by the National Insurance Act, Norway has two supplementary schemes that focus on industrial injuries: The first is Chapter 13 of the National Insurance Act, which provides a more favorable government benefit scheme for occupational injuries and diseases compared to non-occupational injuries and diseases. Under the second scheme, every employer is obliged to have industrial injury insurance to cover occupational injuries and diseases according to the Industrial Injuries Insurance Act, after which economic compensation is paid on top of the National Insurance Act's standard and special government benefits.

According to the Industrial Injuries Insurance Act and the corresponding provisions in Chapter 13 of the National Insurance Act, "industrial injuries" are defined as physical injuries and diseases resulting from "occupational accident" incurred by the employee at work, at the place of work and during working hours.

An "occupational accident" is a sudden and unexpected external occurrence to which the employee is exposed during work or a concrete time-limited occurrence which results in unusual strain or stress compared to what is common for the particular line of work being performed.

## Three Recent Supreme Court Judgments

In three recent judgments, the Supreme Court considered the scope of industrial injuries in connection with the Industrial Injuries Insurance Act and Chapter 13 of the National Insurance Act. The previously mentioned white paper submitted by the Ministry of Labor was discussed in one of the judgments.

### **Mosquito Bite Resulting in Streptococcal Infection (Group A) and Kidney Failure**

By a judgment dated December 21, 2009 the Supreme Court denied a long-haul transport driver workers compensation payment under the Industrial Injuries Insurance Act. The question revolved around whether or not streptococcal infection (group A) and kidney failure, resulting from a mosquito bite, were caused by an “occupational accident” in accordance with the Industrial Injuries Insurance Act.

The driver was stung by a mosquito in Belgium. The bite began to itch, and led to streptococcal infection (group A) and kidney failure. The driver was hospitalized two days after being bitten and was then put on a respirator for two weeks. Subsequently, the driver suffered from chronic kidney failure and reduced sensibility and power in the right arm and leg.

The Supreme Court maintained that the mosquito bite took place at work, at the place of work, during working hours. Subject to an overall assessment, the Supreme Court concluded that a mosquito bite with a subsequent infection was not an industrial injury which could provide grounds for a workers compensation claim under the Industrial Injuries Insurance Act.

The Supreme Court observed that a mosquito bite, per se, has few similarities with an accident and hardly causes injury-like results by itself. Furthermore, the Supreme Court stated that a mosquito bite with a subsequent infection, severally or as a whole, falls within the common risks of everyday life, and is accordingly not to be considered an industrial injury under the Industrial Injury Insurance Act.

However, the Supreme Court did not disregard mosquito bites as grounds for workers compensation in cases of acute poisoning, allergic reactions or collisions resulting from uncontrolled movements.

### **Cartilage Injuries of the Knee Sustained during Dance Instruction**

By a similar judgment dated December 21, 2009, the Supreme Court concluded that cartilage injuries of the knee sustained during dance instructions in a music lesson were not caused by an “occupational accident” resulting in an industrial injury as stipulated in Chapter 13 of the National Insurance Act.

During the dance instruction, the teacher faced away from some of the pupils. When these pupils became noisy, the teacher turned around and twisted her knee.

The Supreme Court observed that dance instructions are common in music lessons, that there was not an element of danger, that there was nothing extraordinary about how the music lesson, including the dance instructions, were conducted, and that there was nothing unusual or wrong with the floor.

The Supreme Court stated that there is a fine distinction between occupational and non-occupational injuries, but that the legislator explicitly stated that this is the intent of the law. In the context of the white paper from the Ministry of Labor, the Supreme Court commented that even though the scope of industrial injuries could be widened, the Ministry of Labor had upheld the distinction and stated that certain work-related injuries may fall outside the scope of industrial injuries.

With this reasoning, the Supreme Court concluded that the cartilage injury of the knee sustained during a music lesson was not an occupational injury. The court concluded that a decision in favor of the injured teacher would widen the scope of industrial injuries, for which the Supreme Court did not have a justification. Widening the scope of the law is, ultimately, the responsibility of the legislator.

### **Food Poisoning in Dammam, Saudi-Arabia**

In a judgment on November 20, 2009, the Supreme Court concluded that reactive arthritis caused by food poisoning during work abroad was not an occupational injury. However, the majority of the Supreme Court judges found that food poisoning with the subsequent onset of reactive arthritis could be viewed as equal to an occupational disease and therefore decided in favor of the injured.

The engineer was food poisoned during a lunch in Dammam, Saudi-Arabia, and shortly after, experienced pain. He was diagnosed with reactive arthritis, a form of joint inflammation.

Corresponding with the long-haul transport driver and the music teacher, the Supreme Court concluded that the engineer had not been exposed to an occupational injury and the demand for an “accident” was not fulfilled.

However, the majority of the Supreme Court viewed the food poisoning combined with the subsequent reactive arthritis as equal to an occupational disease and based their decision on the higher element of risk to which workers abroad, for example, those in Saudi-Arabia, may be exposed, compared with a normal situation.

## **Conclusion**

Based on these three rulings, it can be seen that more cases related to workers compensation claims can be expected. It is likely that the scope of occurrences that will be covered by workers compensation will be broadened, but it remains to be seen how much broader and under which circumstances such amendments will be made. The likely broadening of the scope is relevant in light of the fact that premiums related to workers compensation insurance have decreased in the last year.

## 9

## Draft Bill on the Amendment of the Spanish Accounts Audit Act: Potential Impact on Professional Indemnity Policies

In the September 2009 issue in this series, *Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry*, we referred briefly to the ongoing discussions around the controversial topic of auditors' liability.

Following publication of the draft bill on November 13, 2009, this is a good time to provide more detailed insight.

Under Section 1.1 of the current Accounts Audit Act (Law 19/1988 of July 12, AAA), as amended, the main purpose of an audit is the issuance of a report on a company's accounts that may produce effects relating to third parties. The audit of the annual accounts attests that the accounts provide a fair view of the company's business, financial position, results, and resources obtained and applied during the period reviewed. The auditor is required to affirm that the report of management agrees with the accounts reviewed (Section 1.2, AAA).

Section 11.1 of AAA provides that auditors are liable for any damage arising out of the breach of their obligations in accordance with the general civil law rules. In essence, this means that the auditor can be liable in contract and in tort to the client (the audited company) and/or third parties. In principle, that liability is based on fault and is unlimited to the extent that the auditor will respond with all his/her current and future assets pursuant to the general rule set forth in Section 1.911 of the Civil Code. Section 11.2 of AAA adds that whenever the audit is carried out by an auditor working in or for an audit firm, both the auditor and the firm shall be jointly and severally liable.

Both the auditors and their firms are required to set up various forms of security to enable them to respond to all damages they may cause in the performance of their activities. Security shall be provided in several forms, one of which is professional indemnity insurance. The limits of cover are fixed, with an initial base

amount (currently EUR300,506), subject to increase depending on annual revenues. For audit firms the base amount will be multiplied by the number of partners at the firm.

Circumstances have not been positive for auditors in recent years in Spain. There is a general perception that auditors are “guarantors” of the financial health of companies, or, as one Justice of the Supreme Court described it, “notaries.” Case law has highlighted the public interest of audit reports and extended the duty of care of auditors not only to the audited company itself and the shareholders, but to third parties that may maintain relations with the company. Consequently, third parties may also rely on the audit report.

The Supreme Court has pursued a variety of theories to assert causation between the auditor’s actions and a harmful result. It has applied the doctrine of improper joint and several liability.<sup>10</sup> According to this doctrine created by case law, liability can be imposed on a joint and several basis where it is impossible to discern or individualize the conduct of the people involved in the event giving rise to damage. The so called “PSV case” is representative of this approach. The claimants in this case were 450 individual members of a building cooperative association. They sued the association’s auditor, the audit firm and the audit firm’s insurance company. They did not sue the managers and administrators of both the cooperative and their management company who were directly culpable for the financial disaster that ended in the bankruptcy of the cooperative. The manager was found guilty of several criminal charges and convicted. All efforts of the defendants to join the other potential defendants to the proceedings were useless. The Supreme Court on October 14, 2008 ruled against the auditor, the audit firm and their insurer. They were ordered to indemnify jointly and severally for all damages claimed, without any limitations on the extent to which the auditor or the audit firm contributed to the causation of the damages suffered by the claimants.

## The Draft Bill

The proposed reform of the AAA is based on the Directive 2006/43/EC of the European Parliament and the Council of May 17, 2006 and the Commission Recommendation of June 5, 2008, concerning the limitation of the civil liability of statutory auditors and audit firms.

The most significant proposed change includes the introduction of a new Paragraph 2 and the amendment of current Paragraph 2 which is numbered 3, in Section 11 of the AAA.

<sup>10</sup> Decisions of October 9 and 14, 2008 (RJ 2008\6042 and RJ 2008\6931); March 5, 2009 (RJ 2009\1631); and May 27, 2009 (JR 2009\279232).

The liability of an auditor or of the audit firm shall be enforceable on a personal and individualized basis, excluding any damage caused by the audited company or the third party. Joint and several liability may be asserted only where the cause of the damage cannot be individualized or the degree of contribution to the harmful result of the agents involved cannot be established precisely.

The proposed amendment to current Paragraph 2, future Paragraph 3, provides that both the auditor and his/her firm will be jointly and severally liable for the audit report issued on behalf of the audit firm, but “**within the limits indicated in the preceding paragraph**” (our emphasis). This means that they will be jointly and severally liable for their share or quota of liability that has been individually identified and allocated.

The proposed reform also seeks to reduce the limitation term of contractual actions against auditors from the current 15-year term to four years. This term would begin on the date of the audit report.

It would seem that the Spanish legislator has followed the method outlined in Section 5 of the Commission Recommendation. This establishes a set of principles by virtue of which a statutory auditor or an audit firm is not liable beyond its actual contribution to the loss suffered by a claimant and is, accordingly, not jointly and severally liable with other wrongdoers.

From an insurance perspective, it would be reasonable to assume that auditor professional indemnity cover requirements and, therefore, premiums, will be reduced.

However, the question arises as to whether the proposed legislation effectively limits the auditor’s liability. The fact that joint and several liability may be asserted where the cause of the damage cannot be individualised or liability cannot be allocated among the various wrongdoers, paves the way to imposing joint and several liability. In practice it may be very difficult to ascertain who is to be blamed and in what percentages for the damage. From this perspective, the auditor’s legal position may not have improved, and may have worsened to some extent. The doctrine of improper joint and several liability created by recent case law has been codified as law.

In conclusion, the resulting limitation of liability should logically lead to the reduction of insurance cover requirements, but it remains to be seen how the proposed new rules, if they are finally approved in the current terms, will be construed by courts.

## 10

## Road Tanker Accident Causes Millions in Repair Costs: Who Will Finally Settle the Bill – Swedish Taxpayers, or Motor Insurance?

### Facts

In November of 2005 four private cars and a tanker-truck were involved in a traffic accident on one of two parallel bridges in Sweden. The cab and the tanktrailer overturned, landing between the bridges. About 55,000 liters (14,529.46 US gallons) of an explosive and flammable liquid poured down between the bridges and ignited. The resulting fire caused extensive damage to the bridges.

The Swedish National Road Administration (Administration) (*Vägverket*), the government body responsible for maintenance of roads, arranged and paid for the repairs of the damage caused. Repair costs amounted to SEK23,833,422 (approximately USD169,948,000). The cab and tanktrailer were covered by the mandatory motor third party liability insurance (*Trafikförsäkringen*) issued by the Swedish insurance company *Länsförsäkringar*.

### The Dispute

The Administration claimed indemnity, as a representative of the public, through motor third party liability insurance, for the property damage caused by the cab and the tanktrailer accident.

*Länsförsäkringar* rejected the claim. According to *Länsförsäkringar*, the Administration had a legal obligation under the Swedish Road Act (*Väglagen*) to perform the repairs for which indemnity was claimed. The repairs were of a nature that did not give right to indemnity from motor third party liability insurers unless there was legal authority for such right. In *Länsförsäkringar*'s view such legal authority did not exist.

The Administration argued that the repairs done and the reconstruction undertaken were very costly, extensive, time-consuming and complicated. The damage that occurred as a result of the traffic accident was highly unusual. The strong heat of the spill caused the concrete on the bridges to loosen. The work required new application of reinforcement, new casting of concrete, strengthening of the underside of the bridges with fiber composite, completion of trestle work and exchanging of bridge bearings. The repairs were not completed until 2008, three years after the accident. The repairs did not constitute normal protection and maintenance of the bridge, where the costs would be borne by the government body responsible for road maintenance.

### **The District Court's Decision**

The Stockholm District Court referred to a Supreme Court Judgment, NJA 2004, p. 566, which deals with the Administration's obligations under the Swedish Road Act. These obligations must be of such a nature that the public is not entitled to indemnity from a road-user involved in a traffic accident for repairs of a protective nature. The responsibility for this work normally lies with the body charged with road maintenance. The repairs performed did not deviate from what normally would be performed in connection with a traffic accident.

The District Court found further that the extent and character of the necessary repairs performed by the Administration in order to restore the bearing capacity of the bridges were dependent on the traffic accident's character and extent. The court found further that there was no demonstration that the repairs deviated from what would be considered normal in relation to a traffic accident of this kind. Since there was no legal authority for the public, through the Administration, to seek recourse in this situation, the Administration was not entitled to indemnity under the traffic insurance process.

### **The Court of Appeal**

On appeal, the Svea Court of Appeal overturned the first judgment and found in favor of the Swedish National Road Administration. Here is the reasoning behind the Court of Appeal's judgment, in summary:

The Traffic Damage Act (*Trafikskadelagen*) does not provide for any particular limitation of the right to indemnity where the public suffers property damage due to traffic with a motor vehicle.

The Swedish Supreme Court has established (NJA 2008 p.100), as a general principle, that costs for repairs that public authorities are required to perform must be of such a nature that they cannot be reclaimed, unless there is specific supporting legal authority. The reason behind this principle is that costs for certain repairs within the frame of publicly financed protective establishments of society normally will be carried by the public.

In the Court of Appeal's opinion, the extent as well as the character of the repairs undertaken in this case have deviated from what is normal in relation to a traffic accident situation. The repairs cannot be considered normal maintenance or operation of the road. The repairs are not of a protective character. Therefore, the Administration is entitled to indemnity in accordance with the Traffic Damage Act.

### **The Next Step**

Länsförsäkringar have appealed against the Court of Appeal's judgment. It has still not been decided whether the Supreme Court will grant leave to appeal. We will follow up with an updated report on this situation after the Supreme Court has made a final ruling.

## 11

# Toward a Unified Swiss Code of Civil Procedure

On January 1, 2011 the new Swiss Code of Civil Procedure (CCP) will finally come into law. For the first time in history, Switzerland will have a unified civil procedure law. This development will end a unique situation in Europe, where 26 separate cantonal codes of procedure co-exist.

In this short report we provide an overview of the CCP and highlight several key points. Our goal is not to provide an exhaustive examination of the CCP but to point out issues that may be of particular interest to the casualty insurance industry.

## Need for Renewal

Currently, each of the 26 cantons of Switzerland has its own laws on civil procedure, creating a scenario where legal action is both onerous and expensive. The federal regimes currently need to adjust and update each of the separate cantonal codes to reflect new developments and requirements that emerge from new national legislative regulations. This process is a product of the strong role of federalism in the Swiss political system. In order to provide the Swiss Confederation with the legislative power to draft the CCP, it was necessary to modify the Swiss Constitution.

The new code was drafted with the intent of incorporating the established and well proven provisions of cantonal law, rather than drafting a newly-created civil procedure code. An important decision was also made to reject the incorporation of foreign legal concepts that were not part of Swiss law. For example, the introduction of the foreign legal concept of the “class action” was reviewed and then rejected for the new law on the grounds that the existing concepts of “association” claims and general consolidation of claims in Swiss law were already adequate. The same applies to the legal concept of “pre-trial discovery,” which was not added to the CCP.

There was also no intent to reregulate the organization of the judiciary system. When the CCP comes into law the cantons will organize their own cantonal judiciary systems. The cantonal system activities will include the continuation and formation of specialized courts, such as the commercial courts. However, the cantons will remain responsible for the establishment of chargeable costs and attorneys’ fees for all courts.

## Characteristics of the New Code

The CCP strengthens the procedure allowing for amicable settlements. Therefore, prior to the filing of a lawsuit, the CCP demands – as a basic principle – mandatory conciliation. Taking a legal action basically requires an initial attempt at conciliation or mediation. This rule is not mandatory if the amount in dispute exceeds SFR100,000.

The CCP specifies different types of legal procedures for different types of disputes. The Simplified Procedure (*Vereinfachtes Verfahren*) is applicable to lawsuits where the amount in dispute does not exceed SFR100.000 or the proceedings concern “social” matters, such as equal rights or employment. In the simplified procedure the judge has an extensive right to interrogate the parties and is enforced to act *bona fide*, giving the parties the opportunity to bring an action to court even without an attorney. As a result, the judge is legally obliged to ensure that the parties provide evidence and bring the full circumstances to court. The judge also is required to provide notice to the parties regarding the kind of evidence that is needed to substantiate the claim.

Cases where the disputed amount is in excess of SFR100,000 are conducted according to the Ordinary Procedure (*Ordentliches Verfahren*). Commercial disputes, such as those involving commercial contracts, corporate intellectual property or competitive issues also will use the Ordinary Procedure. In these proceedings, the parties are required to use the classic and complete civil procedure framework.

Finally, the Summary Procedure (*Summarisches Verfahren*) applies to proceedings where the facts are clearly stated and immediate jurisdiction is needed in order to ensure a legal position.

The implementation of a protective brief (*Schutzschrift*), accepted only in certain cantons, is intended to improve the legal position of a defendant who fears that a provisional measure, such as an injunction, will be ordered against him/her.

Because of Switzerland’s role as a global venue for legal disputes, the concept of arbitration requires different rules for domestic versus international proceedings. The CCP does not change the fact that the rules for international arbitration are part of Chapter 12 of the Private International Law Act. But, the rules for domestic arbitration have been revised and are integrated into the third part of the CCP. The need to strengthen the role of arbitration in Switzerland and to create a real alternative compared to ordinary procedures was the rationale for the change in domestic arbitration rules.

Of particular importance for the casualty insurance industry is the new remedy of the *Streitverkündungsklage*, which entitles the defendant to give a third party notice and, most importantly, to assert a claim against the third party if the initial proceedings were not successful. Additional requirements are a connection between the main procedures, recourse and indemnity claims. For example, a salesperson who is sued for damages by a consumer would be entitled to take recourse from the distributor under the remedy of *Streitverkündungsklage*. The same would apply to a situation where an insurance company is sued for compensation and then seeks recourse from a third party.

### **In Summary**

The CCP brings a far-reaching modification to the Swiss justice system. By harmonizing the different cantonal procedural laws, the CCP will end the fragmentation and the associated legal uncertainty that currently exists. Foreign companies doing business in Switzerland are among those entities that may profit most from the introduction of the CCP.

## 12

## Conclusion

Continental Europe's legal framework continues to change and develop. This is evident at both the "macro" and "micro" levels.

At the "macro" level, governments across Europe are increasingly looking to reduce states' cost burdens for healthcare. This has resulted in more restrictive judgments on cases involving accidents at work. We see this currently in the changes to workers compensation legislation in Norway, as well as in the acceptance of recourse measures against the private insurance industry by state bodies, evidenced by the current successful appeal (which could nevertheless be reversed) of the Swedish National Road Administration against the motor liability insurerer Länsförsäkringar.

We see two trends emerging in new legislation. One is a movement towards a sharing of the claims burden with the private insurance industry. The other is a simplification of certain legal processes to enable individuals to pursue their civil legal rights more easily. This may, as in the example of Italy, result in the introduction of mass tort litigation but, in contrast to the United States, this is designed to minimize legal costs. Mass tort litigation also attempts to set sensible indemnity limits which are not influenced, for example, by the limit of insurance purchased by the defendant. The upholding of the "Trennungsprinzip" – the principle of maintaining a strict separation between the question of liability of the insured and the question of coverage – is underlined in the recent German Federal High Court ruling described in this report.

At the "micro" level we should not miss important legal changes that influence statutory legal liability coverage, such as those affecting "RC Decennale" in France, nor should we ignore individual judicial decisions which affect the legal liability position of certain industrial/ commercial and professional risk segments in individual territories. This is exemplified by the changing liability position of liquidators in the Netherlands and accountants in Spain.

Together with our legal colleagues from Heuking Kuehn's network, we will continue to watch individual cases as well as more general legal trends and developments across the region.

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Guy Carpenter & Company, LLC is the world's leading risk and reinsurance specialist and a part of the Marsh & McLennan Companies. With 50 offices worldwide, Guy Carpenter creates and executes reinsurance solutions and makes available capital market solutions\* for clients across the globe. The firm's full breadth of services includes line of business expertise in Agriculture; Aviation; Casualty Clash; Construction All Risk and Engineering All Risk; Excess and Umbrella; Life, Accident and Health; Marine; Medical; Political Risk and Trade Credit; Professional Liability; Property; Retrocessional; Surety; Terrorism and Workers Compensation. GCFac®, our dedicated global facultative reinsurance unit, provides the placement strategies, information and timely market access that are critical to obtaining strategic facultative reinsurance. In addition, Guy Carpenter's Instrat® unit utilizes industry-leading quantitative skills and modeling tools that optimize the reinsurance decision-making process and help make the firm's clients more successful. Guy Carpenter's website address is [www.guycarp.com](http://www.guycarp.com).

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Heuking Kühn Lüer Wojtek is a German law firm represented in Berlin, Chemnitz, Cologne, Düsseldorf, Frankfurt, Hamburg and Munich, as well as in the EU capital of Brussels and in Zurich. The cornerstone for today's partnership was laid in Düsseldorf. About 200 lawyers are working in various locations in all fields of competence.

Across all offices, the partners work together professionally and personally. Thereby, clients enjoy personal care by a permanent contact partner in their immediate proximity, and profit from the network of legal specialists working in the firm's other offices.

The international law firms in the above contact list have contributed to this report. They are European cooperating partners of Heuking with widespread expertise in all aspects of insurance and reinsurance law.

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