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TWO THOUSAND EIGHT

Recent Legal Developments in Continental Europe

Affecting the Casualty Industry

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1 Introduction

Recent Legal Developments in Continental Europe Affecting the Casualty Industry is the latest instalment 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 impact in the near future.

In developing this report, Guy Carpenter asked the insurance practice of law firm Heuking Kühn Lüer Wojtek to set up a panel of legal experts, acknowledged as leading insurance law practitioners in their respective jurisdictions across Continental Europe, to highlight what legislative or judicial developments they consider to be of greatest impact in each country. It has not been our objective 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 emphasize the main developments that we and our legal colleagues perceive as being worthy of attention, and where necessary, further in-depth study.

What follows is a series of short reports highlighting the most notable legislative and judicial issues to impact the casualty insurance and reinsurance industry in Continental Europe during the period May 2008 to September 2008.

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Belgium

Environmental Liability in the EU

EU member states tend to have national civil liability regimes covering damage to persons and property. But what happens if certain human activities cause severe damage to the wider environment, such as toxic emissions from industrial plants or massive soil contamination? In 1998, when a dam containing toxic waste from a mine burst and released large amounts of toxic sludge into a natural park in southern Spain, the Spanish authorities ultimately had to assume the cost of clean-up operations. The effort cost more than €240m and was borne by Spanish taxpayers as a whole.

The national public law of EU member states used to be inconsistent with regard to remedies for environmental damage. Even national regimes that allowed public authorities to pursue water or soil polluters often allowed for substantial discretion, and did not always induce those whose activities could put the environment at risk to take measures to prevent and minimize damage. This situation also ran counter to Article 174 of the EC Treaty, which states that EU policy in the field of environmental protection "shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

For more than 15 years, the European Commission, in its capacity as "guardian of EU legislation," studied and debated the notion of an EU-wide legislative scheme establishing the basic criteria for environmental clean-up and liability. However, it was only in January 2002 that it presented a legislative proposal for a Directive on Environmental Liability with Regard to the Prevention and Restoration of Environmental Damage ("the Directive"), which was adopted by the EU co-legislators (i.e., the Council and the European Parliament) in 2004 and had to be integrated into the national laws of EU member states by 30 April 2007.

The Directive applies to major industrial activities, including energy and mineral industries, industries that generate large amounts of heavy metal waste, those manufacturing chemical substances and preparations (including pesticides and disinfectants), and waste disposal and incinerator operators. It aims to ensure that businesses focus on the environmental effects of their activities by encouraging operators to avoid causing environmental damage rather than gambling on regulatory action after the damage occurs. The Directive is based on the principle that the "polluter pays," ensuring that the original polluter pays for remediation – and not the taxpayer. By establishing a consistent set of minimum requirements for environmental liability throughout the EU, businesses cannot merely relocate to another EU member state to take advantage of less stringent environmental legislation. To this effect, the Directive provides for two distinct but complementary liability regimes.

First, operators that professionally conduct activities that are risky or potentially haz-

ardous for the environment (a list of which is contained in Annex III of the Directive) can be held liable even if they have not committed any fault. Activities covered by the Directive include, inter alia, industrial and agricultural activities requiring permits under the 1996 EC Directive on Integrated Pollution Prevention and Control (IPPC); waste management operations; the release of pollutants into water or air; the production, storage, use, and release of dangerous chemicals; and the transport, use, and release of genetically modified organisms (GMOs). In these cases, polluters can be exempted from liability only in cases of force majeure or where activities were expressly authorized by EU member state authorities. They may be exempted if they can demonstrate that their activities or emissions were not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time the damage occurred.

The second liability regime applies to all professional activities, including those outside Annex III of the Directive. However, an operator will be held liable if it was at fault or negligent and caused damage to either protected species or natural habitats covered at the EU level under the 1992 Habitats and 1979 Birds Directives; waters covered by the 2000 Water Framework Directive, which governs all water resources in the EU; or has committed land contamination that risks harming human health. This liability for biodiversity damage is new in the EU.

Another key aspect of the Directive is that duplication of international liability legislation effective in the EU (e.g., on nuclear activities and maritime safety) has been avoided, as have overlaps with the civil liability regimes of EU member states. The latter still will be the only means to claim for "traditional damages" (i.e., personal injuries and damage to goods and property), even if caused by hazardous and potentially hazardous activities covered by the strict liability regime of the Directive. Therefore, the Directive does not envisage compensation to individuals, but restricts its purpose to preventing environmental damage from occurring and to ensuring that it is remedied if it occurs.

The Directive contains different remedial measures depending on the type of damage caused. For example, soil can usually be decontaminated, while damage to protected species and natural habitats (including water) might be more difficult to restore. Under the Directive, there is no financial limit on the amount that liable polluters will be required to pay to remedy environmental damage.

The importance of the consistent and efficient enforcement of environmental legislation in the EU has been emphasized further by the Commission's Proposal for a Directive on the Protection of the Environment through Criminal Law (the "Proposal"), issued in February 2007. EU member states initially refused to deal with the topic under EC treaty mechanisms and adopted a less integrated Framework Decision. The Framework Decision was repealed by the European Court of Justice (ECJ), which ruled that the European Union exceptionally has competence to adopt criminal law measures related to the protection of the environment if this is necessary to ensure the efficient implementation of its environmental policy.

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Studies carried out by the Commission showed large disparities in environmental crimes definitions in EU member states. In many, levels of sanctions were found to be insufficient. Therefore, the proposal was adopted to ensure a minimum level of environmental protection through criminal law, so that serious offenses (including the unlawful treatment, transport, and export or import of waste; unlawful trade in endangered species; emission of ozone-depleting substances; or the unlawful operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used) will be addressed similarly in all EU member states. Thus, perpetrators will not be able to benefit from existing differences in national legislation.

The level of proposed sanctions takes into account the principle of proportionality and therefore is limited to particularly serious cases. Regarding imprisonment, a three-step scale is based on the psychological element (e.g., serious negligence or intent) and respective aggravating circumstances, providing for prison sentences of five to ten years for the most serious crimes. The system of fines for legal persons also follows a three-step approach and can range from €750,000 to €1.5m.

As far as the legislative process for this proposal is concerned, the European Parliament (as one of the EU's co-legislators) adopted its First Reading on the Proposal on 21 May 2008, amending the initial proposal. It now remains to be seen how the Council, consisting of EU member state representatives, will treat this dossier, especially having in mind the struggle with legislative competence in this area in the past.

3

France

French Supreme Court Eases Proof of Defect in Medical Products

On 22 May 2008, the French Supreme Court handed down five decisions clarifying its earlier case law on product liability in the field of medical products – and especially on the plaintiff's burden of proof in such cases.

These cases involved actions by plaintiffs who received a vaccine against hepatitis B and later developed multiple sclerosis. French courts rejected such actions three times in the past, on the grounds that there was no proof of causation between the vaccine and the disease or that there was not sufficient proof of defect in the vaccine.

The difficulty in these cases arose from the fact that the causal link between the vaccine and the disease has not been established scientifically. The Court, however, recalled that scientific and legal causation are two different concepts. Therefore, the manufacturer could be liable even though the causal link was not yet established scientifically.

Proof of Defect and Causal Link by Way of Presumptions

In one of the cases rendered on 22 May 2008, the French Supreme Court confirmed that plaintiffs acting on the basis of product liability shall cumulatively bring evidence of a damage, defect, and causal link. The Court, however, held that this proof can result from severe, precise, and corroborating presumptions. The French Supreme Court thus quashed the decision of the lower court because it did not rule on whether the evidence submitted by the plaintiff constituted sufficient presumption of the causal link between the vaccine and the disease.

The presumptions of a causal link between a disease and the use of a medicine can be proved if there are a high number of similar cases, for example, or if it could be demonstrated by the chronology of the facts – and if the disease developed soon after the inoculation of the vaccine. French courts have considered that a causal link was established when the disease appeared a few weeks after the vaccination when the patient was in perfect health before, but they refused to consider that the causal link was established when the disease appeared more than 10 months after the vaccination.

Courts of appeal have also held that the causal link could be established by demonstrating that the injection was a likely cause of the damage and that other causes of the disease were excluded.

Defect Consisting of Insufficient Information on the Notice

In another of the three cases, the French Supreme Court quashed the decision of a court of appeal that rejected a patient's action. The French Supreme Court considered that the court of appeal had investigated defects in the product insufficiently, and it held that the court of appeal should have taken into account, when analysing the defect in the product, the presentation of the vaccine – especially its packaging. The court of appeal noted that a medical guide indicated in 1994 that one of the rare side-effects of the vaccine was the development of multiple sclerosis. The French Supreme Court held that the court of appeal should have checked whether the notice of the product mentioned this potential side-effect at that date before holding that the product was not defective. According to the French Supreme Court, it was therefore not possible to reject an action for lack of proof of the defect without verifying whether the notice properly indicated the side-effects of the medicine known at the time the batch in question was released. The opposing belief is that clear information on the severe risks of a product can preclude liability of the pharmaceutical company.

French courts had previously held that the fact that the product contains dangerous active principles was insufficient to prove defect. The Supreme Court ruled that "the absence of scientific evidence that the product is harmless does not imply a presumption that the product is defective." To appreciate whether a product is defective, French courts need to look at (i) the presentation of the product, (ii) the use a consumer could reasonably expect from the product, (iii) the date on which the product was released, and (iv) the severity of the side-effects. In this respect, it is interesting to note that the court referred to the medical guide dated 1994 to determine the conformity of the packaging. Therefore, according to the French Supreme Court, the release of each separate batch of the product constitutes a separate release in the legal sense. Consequently, the presentation of the product should conform to the state of knowledge at the time each batch was released.

The Patients Rights and Quality of the Medical System of 4 March 2002 created a national agency, l'Office National d'Indemnisation des Accidents Medicaux (ONIAM), which indemnifies patients in the event of medical accidents where medical liability cannot be established for vaccines or accidents after September 2001. ONIAM can indemnify the victim in cases of damage resulting from the use of a medicine when it cannot be demonstrated that the product was defective. This would be the case, for example, when a patient suffers from a side-effect of a medicine which is clearly identified on the notice of the product.

4

Germany

Year One under the New German Insurance Contract Law

In the first nine months of 2008, the German (re)insurance market felt the effects of the new Insurance Contract Law, which came into force on 1 January 2008. It replaced the former Insurance Contract Law which first was enacted almost 100 years ago. The primary insurers in particular are in the process of gaining new experiences with completely new requirements for designing and selling insurance products.

The existing Insurance Contract Law – although continuously amended – no longer corresponded to many aspects of modern jurisprudence and consumer protection. In part, the jurisprudence which had been developed over the last several decades was distinct from – and often contrary to – the law. This situation was no longer tolerable. Further, a number of EU directives had to be integrated in the Insurance Contract Law. Examples include the Distance Selling Directive and the Directive on Insurance Mediation.

The reform of the Insurance Contract Law modernizes the insurance regulatory landscape and improves consumer protection in German insurance law. Furthermore, the transparency of policy conditions has been improved by numerous duties which ensure the information of the insureds.

The latest iteration of the Insurance Contract Law applies to all new contracts which came into force on or after 1 January 2008. Existing contracts may still fall under the previous law. However, from 1 January 2009 onwards, even insurance contracts that came into force prior to 1 January 2008 will have to be treated in accordance with the new law. Insurance companies have the right to adapt the policy conditions of the old contracts to the new law. This has to be communicated to the insureds by 30 November 2008 at the latest, thus giving policy holders two months to become acquainted with their new situations.

The Essentials of the Reform's Impact on the Design and Sale of Casualty Insurance Products

The new Insurance Contract Law's most substantial changes include:

- Improved advice for insureds
- Improved information for insureds
- Greater transparency in pre-contractual duties to disclose
- Abandonment of the "all or nothing principle"

Duty to Advise

One of the most significant changes in the new Insurance Contract Law is the expansion of the insurer's duty to advise the insured. In the future, insurers will have to advise insureds before the conclusion of an insurance contract, and they will have to do so comprehensively – unless the insurance contract is concluded through the medium of an insurance broker or by way of distance selling. This duty to advise exists through the full duration of the insurance contract. Advice has to be given by the (tied) insurance agent or the insurer's in-house sales manager.

The advice has to be clear and comprehensible, and the wishes and needs of the insured have to be taken into account fully. The advice given has to be recorded in writing; therefore, the insurers have developed a unified form which is distributed for that purpose to all the agents, brokers, and in-house personnel.

The insured may renounce the advice or documentation, but only by special written declaration. Such renouncement is only effective if the insurer has informed the insured expressly about the potential negative effects, a process which has to be documented as well.

Duty to Inform

In the future, the insurer will have to inform the insured about the contractual and general insurance conditions well before the conclusion of an insurance contract. These conditions have to be handed over to the insured in written form or on other media (e.g., e-mail, compact disc, or memory stick). This procedure of concluding an insurance contract is called the "application model" (Antragsmodell), and it replaces the widely-used "policy model" (Policenmodell). According to the policy model, it was sufficient that the insured received the necessary contractual information together with the insurance policy.

The amount and quality of the information which has to be conveyed to the insured – and the manner in which it has to reach the insured – is prescribed in the Regulation on Duties of Information, which came into force on 1 July 2008. In accordance with the regulation, a so-called "product information sheet" (Produktinformationsblatt) has to be handed over to any consumer who is neither a tradesman (Gewerbetreibender) nor a freelancer (Freiberufler). This product information sheet is the cover note for all following contractual information, and it has to contain the essential parameters of the insurance policy and relevant duties of the insured in a brief and comprehensive form.

Again, the insured may renounce such information even before applying formally for the insurance policy. However, this is only possible with a special written declaration which must be signed by the insured. If such a renouncement occurs, the necessary information has to be given immediately upon the conclusion of the contract (i.e., with the sending of the insurance policy at the latest). In fact, this procedure closely resembles the above-described procedure concerning the policy model.

Pre-Contractual Duties of Disclosure

In principle, the insured is obliged to disclose only those circumstances and perils for which the insurer has asked expressly in the application form. In the event that the insurer asks expressly for risk-relevant circumstances and the client violates his duty of disclosure, the insurer has a variety of grounds for rescinding the insurance contract. An intentional or malicious violation of the duty of disclosure by the insured entitles the insurer to rescind the contract, even up to 10 years after the contract's conclusion. Grave negligence in violation of the pre-contractual duty of disclosure can entitle an insurer to rescind the contract within five years from its conclusion (three years for health insurance). Such a rescission has the effect of invalidating the insurance contract ab initio.

In the event that the insured violates his duty of disclosure only negligently, the insurer may cancel the insurance contract within five years from conclusion (three years for health insurance) with an effect for the future only.

The insured has to be informed in advance by the insurer about its duties, and the corresponding penalties may be executed by the insurer only if the circumstances for which the insurer had asked are risk-relevant (i.e., would have led to a declination of the risk or to additional risk premiums).

Abandonment of the "All or Nothing Principle"

The "all or nothing principle" was relevant particularly in the areas of non-life and accident insurance. The absolutely inflexible principle of the expiring law (i.e., that the violation of duties of disclosure and of contractual obligations of the insured would lead to the effect that the insured would lose any right on his insurance claim) frequently led to unjust results – even in the view of the legislator. The Insurance Contract Law reform therefore has introduced completely new and general principles for consequences of violations of contractual obligations.

Now, the legal consequences are differentiated, particularly in cases of increased perils or the violation of contractual or legal obligations of the insured. Intentional and malicious acts still lead to a complete release of the insurer from its obligations. Grave negligence by the insured results in a claim decrease, depending on the gravity of the insured's fault. Acts by the insured that are merely negligent (i.e., not "gravely") no longer have any consequence on the amount of the claim. Except in the event of malicious acts by the insured towards the insurer, the consequence of a decrease of the claim occurs only if the violation of the duty of disclosure or a violation of the insured's obligations have caused an error or misconception on the side of the insurer.

Conclusions

Time will tell if primary insurers will be able to comply with the new legislative requirements and if the new situation will have the expected negative effects on the calculation of premiums, insurance benefit amounts, and insurance product design. Further, the market is interested in seeing how the courts will interpret and apply the new rules in litigious cases. Even now, it seems clear that the increased demands for administration which are added to the burden of the insurers will be added to the cost of insurance products. Nevertheless, it will take a few years – on the basis of the so-gained experience – until a conclusion may be drawn as to long-term co-operation with reinsurers. Therefore, all market participants have high financial and factual interests in future developments.

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Netherlands

Dutch Attention to European Trends in Case Law and Legislation Regarding the "Action Directe"

Member states still make their own national insurance laws, even with cross-border initiatives, such as the principles of European Insurance Contract Law. Nevertheless, the influences from Brussels are not to be ignored – in both the rules of compliance or financial reporting standards, and the field of private international law. This area of law deals with questions such as which national court is competent to hear the case of insured against insurer and which law applies to the insurance contract. New case law and legislation have grown in influence across the Netherlands. Dutch insurers have become increasingly aware of this trend and have tried to take into account recent developments, including matters of jurisdiction and applicable law in matters where an "action directe" is at stake.

Jurisdiction

On 13 December 2007, the ECJ rendered a judgement about the status of injured parties in international proceedings. It entailed a case between Jack Odenbreit, domiciled in Germany, and the private limited liability company FBTO Schadeverzekeringen N.V., established in the Netherlands. Odenbreit was injured in a traffic accident in the Netherlands, and FBTO Schadeverzekeringen N.V. insured the person responsible for that accident. The question of whether German courts have international jurisdiction for this claim, on the basis of Articles 11(2) in conjunction with 9(1)(b) Brussels I Regulation, arose in this case.

In the first instance (Amtsgericht Aachen), this question was answered in the negative. The Court of Appeal (Oberlandesgericht Köln), though, held differently. It decided that the action was admissible, and the case was referred subsequently to the Federal Court of Justice (Bundesgerichtshof), which pointed out that the crucial question was whether the injured party can be regarded as a "beneficiary" in terms of Article 9(1)(b) Brussels I Regulation or whether the term "beneficiary" only refers to the beneficiary of the insurance contract. The latter has been the prevailing opinion in German doctrine, so far. This meant that the injured party could not sue the insurer in his/her domicile.

However, the ECJ ruled in favour of the injured party, and hence in favour of the jurisdiction of the courts at the domicile of the injured party. Thus, even though the injured party is not mentioned in Article 9 (1)(b) Brussels I Regulation, the mere reference to this article by Article 11(2) has to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts in the member state where that injured party is domiciled, provided that such a direct action is permitted under the relevant applicable law and that the insurer is domiciled in a member state.

Thus, the ECJ has decided to grant the same protection to injured parties that has been granted to policy holders, insureds, and beneficiaries. In other words, not only the parties to the insurance contract will find ample grounds for jurisdiction under the Brussels I Regulation, this now is valid as well for parties who were not a party to the insurance contract at all.

Applicable Law

The question that remained unanswered by the Court is which law should deal with the question of whether an injured party has a direct action against the insurer of the liable person. So far, the answer has not been addressed in European rules of conflicts of law. As of 11 January 2009, this will change, as the Rome II Regulation will come into force (i.e., Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations). Article 18 of this regulation provides that the person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

Initially, this appears to be a clear rule. If tort is committed in France by a Dutch person holding liability insurance which is governed by Dutch law, the question of whether the injured party has a direct action against the Dutch insurer is governed either by French law or by Dutch law. The injured party may choose.

However, when thinking about this rule a bit more, problems seem to arise. For instance, whether this rule only addresses the question of whether an injured party has a direct action or if it also addresses the contents of that action is ambiguous. Also, this rule means that insurers cannot anticipate whether they will be confronted directly by an injured party, simply because it is impossible to predict where an unlawful act is going to take place. Article 18 therefore represents an unfortuntate choice for the European legislator. It should not have given the opportunity to the injured party to choose between the law of the underlying non-contractual claim and the law of the insurance contract. Only the law governing the insurance contract should govern the question of whether an injured party has a direct action against the insurers. This should be a clear-cut rule, bringing clarity both for the injured parties and the insurers. With the current provision of Article 18, the European legislation has missed an opportunity to create clarity and has brought confusion instead.

6

Spain

Spanish-Style Punitive Damages in Casualty Insurance

The Spanish Supreme Court provided guidance on a controversial issue arising from the possible dual interpretation of Article 20 of the Spanish Insurance Contract Act 1980 (ICA) in a decision handed down on 1 March 2007.

Article 20 is a crucial provision that can increase the financial burden on insurers substantially. As a general rule, punitive damages awarded to punish or deter especially wicked or wilful misconduct are not admitted under Spanish law. Insurers must pay a special interest rate in the event of late claims payment. Article 20 provides that an insurer will be in default if it does not pay either the full indemnity within three months from the date of loss or at least the minimum amount estimated to be paid under the circumstances known within 40 days of loss notification. Failure to pay will result in the insurer's paying the special interest, which is calculated at the annual legal interest rate for each of the first two years the payment is in arrears and increased by 50 percent – and no less than 20 percent per year thereafter, as defined in the annual budget law. To be released, the insurer would have to prove that there were justified causes that prevented it from settling the insured's claim earlier.

This special interest rate is clearly punitive, particularly as it is unrelated to the actual loss sustained by the insured and because compensation for the late payment is based on the legal interest rate (absent any other agreement) under the general civil rules.

The subject of how the special interest rate had to be calculated was debated at length in the Spanish courts, which were divided because of the relative ambiguity of the legal text. One position held that the 20 percent interest rate had to be applied retroactively from the date of loss, if payment was in arrears for more than two years. The other considered that interest accrues by the day and in stages, meaning that in the first two years, the rate should be calculated at the legal rate plus 50 percent and at 20 percent starting with the third year.

The Supreme Court endorsed the second position on 1 March 2007, setting the principle that the 20 percent interest rate would only be applicable beginning on the third anniversary that payment of the claim has been in default. For the first two years, interest would accrue at the legal interest rate plus 50 percent.

Undoubtedly this was good news for insurers. Due to the peculiarities of the Spanish procedural rules, though, there was concern that this principle would not be applied consistently by the courts. Fortunately, the Civil Law Chamber of the Supreme Court has adopted this standard (as recently as 1 July 2008). Specifically, the calculation method of the 20 percent penalty interest as endorsed by the Supreme Court should be regarded as consolidated doctrine. Hence, future changes are quite unlikely. At the same time, however, the Supreme Court has fixed certain guidelines for ascertaining when an insurer's delay may be deemed justified.

The market has gained substantial legal certainty and predictability. Some concern remains, however, as to whether criminal courts will consider themselves bound by these decisions. In cases where a criminal offence may be a source for indemnification by insureds and their insurers (e.g., crimes arising out of recklessness involving third parties), one cannot assume that the criminal courts will not apply the old criteria. Efforts should continue, therefore, to amend the law in order to bind the whole court system effectively.

7

Sweden

Five Years of the Swedish Group Proceedings Act – Time for an Evaluation

On 1 January 2003, Sweden, as the first country outside the Anglo-American legal sphere, introduced a representative form of legal action: the "Group Action." The Group Action is governed by the Group Proceedings Act (2002:599).

Under the Group Proceedings Act, one plaintiff can litigate on behalf of a defined group of "class members" who are not parties to the legal proceedings (i.e., the "group action") but nevertheless become bound by the court's decision. It is a prerequisite that the dispute concerns questions of facts common or similar to the entire group.

There are three types of group action:

- **Private Group Actions** – Any person or entity may initiate this type of action provided that the person or entity has a claim of its own and is a member of a defined group.
- **Public Group Actions** – An authority appointed by the Government may act as a plaintiff and litigate on behalf of a group of class members. The purpose is to permit authorities to pursue claims where the public interest, in a broad sense, suggests that action should be taken. Such authorities are the Consumer Ombudsman and the Environmental Protection Agency.
- **Organisational Group Actions** – Certain organisations may file group actions without having claims of their own. Such actions may be initiated by consumer and labour organisations and must, as a general rule, concern disputes between consumers and providers of goods and services.

By an amendment to the Swedish Environmental Code, an action for damages under the code may be pursued as a group action. The Swedish Group Action is based on an opt-in system.

As to litigation costs, the Swedish Procedural Code applies. This means that the losing party is liable for paying the winning party's costs. The plaintiff is liable only whilst the passive group members, not being parties to the proceedings, normally are not liable for costs. Settlements entered into by the plaintiff on behalf of the group members must be approved by the court.

A novelty introduced by the Group Proceedings Act is that so-called "risk agreements" are allowed. This means that the plaintiff may agree with counsel that the fee shall depend on the outcome. Such agreements must be approved by the court.

To date, around 10 group proceedings have been initiated. Some have been dismissed or settled, and a few are still pending. So far, none has resulted in a court award. Among the pending cases is a claim for damages due to disturbances caused by the air traffic related to Stockholm Arlanda Airport; 7,000 of 20,000 identified group members have opted in.

When the Group Proceedings Act was introduced, considerable concern was expressed that Sweden had embarked on a route towards US-style class action and that enterprises would be exposed to "settlement blackmail" and other misuse of the system, which would have an adverse impact on business and discourage companies from investing in Sweden.

After five years, the time has come for an evaluation of whether the act has fulfilled its purposes, the primary of which being to facilitate access to justice. Also, the extent to which the act has been misused – including adverse impact on business and effects on the "appetite" to invest in Sweden – should be determined. The government has commissioned research on these issues and proposals for legislative changes, if necessary. A report is expected in the near future.

8

Switzerland

Overview of 2007 Legal Developments

According to a press release issued by the Federal Office of Private Insurance (FOPI), the instruments of insurance supervision are working. In this reporting year, insurers fulfilled the legal requirements for Solvency I more than sufficiently, even though the solvency ratio of the life and non-life insurers declined. In contrast, the situation for the supervised insurance companies improved significantly with respect to risk-based solvency, as the Swiss Solvency Test (SST) shows.

Executive Board of FINMA Appointed

The Swiss Federal Council approved on 21 May 2008 the appointment of Patrick Raaflaub as Director of the Swiss Financial Market Supervisory Authority (FINMA). FINMA will commence operations on 1 January 2009. René Schnieper will be the head of integrated insurance supervision. He started his professional career as an actuary with the reinsurance department of Winterthur Insurance. In 1994, he moved to Zurich Financial Services, where he was responsible for reinsurance underwriting in Europe. In 2005, he joined FOPI Schnieper, where he was in charge of the reinsurance department until he became head of integrated supervision in 2007.

Judgement of the Federal Administrative Court of 13 December 2007 (B-1296/2006)

Pursuant to Article 44 Paragraph 1b of the Swiss Insurance Supervision Act, an insurance intermediary must register with FOPI only if it (or the individual) submits evidence with regard to professional liability insurance or an equivalent financial security. The court held that a temporary limited guarantee contract by a foreign insurer not admitted (licensed) to transact insurance business in Switzerland does not fulfill the requirements of Article 44. Regarding the concrete circumstances of the matter, the court denied an exemption for the foreign insurer to need a concession despite the small economic significance of the business.

9

Conclusion

The latest set of reports highlights several new important legal developments affecting liability insurers in Continental Europe. New rulings on product liability, enhanced environmental regulatory regimes, and new levels of oversight add to an already labyrinthine legal landscape for insurers. The trend toward US-style class action continues, though the outcomes are uncertain.

If we have learned anything from past reports, we know that change is constant. The legal environment in Continental Europe will continue to change in the coming months, and insurers would be well-advised to remain vigilant as these developments continue to unfold.

Questions or comments regarding this report should be addressed to:

Guy Carpenter
George Carrington – e: george.carrington@guycarp.com, t: +44 20 7357 5237
David Lewin – e: david.lewin@guycarp.com, t: +44 20 7357 2056

Belgium	**Gabrielle H.Williamson** **Eric Rieger** HEUKING KÜHN LÜER WOJTEK Avenue Louise 326 B – 1050 Brüssel Phone: +32 (0)2 646 20-00 Fax: +32 (0)2 646 20-40 E-mail: brussels@heuking.de
France	**Christian Bouckaert** **Romain Dupeyré** SCP Bouckaert Ormen Passemard Sportes – Cabinet BOPS 47 rue Dumont d'Urville F – 75116 Paris Phone: +33 1 70 37 39 00 Fax: +33 1 70 37 39 01 E-mail: christian.bouckaert@bopslaw.com romain.dupeyre @bopslaw.com
Germany	**Herbert Palmberger** **Manfred P. Oesinghaus** HEUKING KÜHN LÜER WOJTEK Partnerschaft von Rechtsanwälten, Steuerberatern und Attorney-at-Law Cecilienallee 5 D – 40474 Düsseldorf Phone: +49 211 60055 585 Fax: +49 211 60055 580 E-mail: h.palmberger@heuking.de m.oesinghaus@heuking.de
The Netherlands	**Judith Spiegel** Padberg Spanjaart Advocaten Gebouw „Willemswerf" Boompjes 40 NL – 3011 XB Rotterdam Phone: +31 (0) 10 7104602 Fax: +31 (0) 10 7104666 E-mail: spiegel@padbergspanjaart.com
Spain	**Jorge Angell** L.C. Rodrigo Abogados Lagasca, 88 – 4a planta E – 28001 Madrid Phone: +34 914 355 412 Fax: +34 915 766 716 E-mail: jangell@rodrigoabogados.com
Sweden	**Rose-Marie Lundström** Wistrand Advokatbyrå Box 7543 SE – 103 93 Stockholm Visit: Regeringsgatan 65 Phone: +46 (0) 8 50 72 00 00 Fax: +46 (0) 8 50 73 00 00 E-mail: rose-marie.lundstrom@wistrand.se
Switzerland	**Donald Reichenbach** Spahni Stein Attorneys at Law Florastrasse 44 CH – 8008 Zurich Phone: +41 43 488 52 40 Fax: +41 43 488 80 56 E-mail: reichenbach@lawbiz.ch

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