Capital Ideas. GUY CARPENTER

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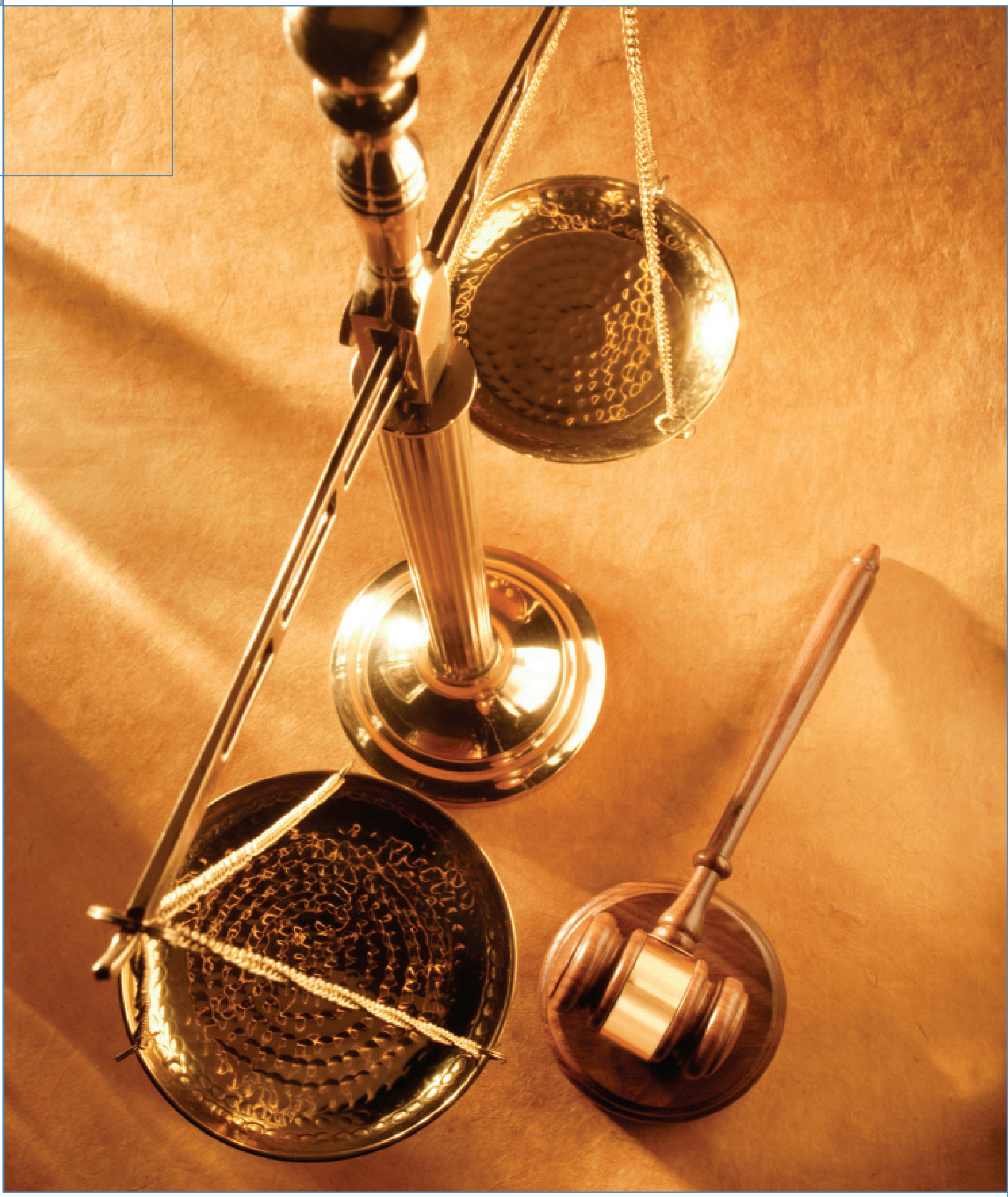
TWO THOUSAND NINE

Recent Legislative and Judicial Developments in Continental Europe

Affecting the Casualty Insurance Industry



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Introduction

Recent Legislative and Judicial Trends 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.

In developing this report, Guy Carpenter has once again worked with 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, 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 highlight 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 September 2008 to May 2009.

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Belgium/European Parliament

Maritime Transport: Civil Liability and Financial Guarantees of Ship-Owners

An important turn in European Union (EU) shipping regulation was brought about by the breakdown of Maltese single-hull oil tanker "Erika" in 1999 and the ensuing ecological disaster near the coast of Brittany, France. This accident led to the pollution of almost 400 kilometers (252 miles) of French coastline and aroused considerable public concern about the safety of maritime transport. The wreckage of Erika prompted the European Commission ("Commission") to improve its rules on the safety of ships used to transport high tonnages of oil in European waters and – if possible – to prevent a similar disaster in the future.

The first attempt to enhance maritime safety at the EU level was the "Erika I" package, adopted on March 21, 2000. It provided an immediate response to the regulatory shortcomings highlighted by the Erika accident, strengthened the control of ports, and accelerated the phasing out of single-hull oil tankers. The second set of measures – Erika II – was adopted in December 2000, improving maritime traffic safety, more effectively preventing marine pollution, and establishing the European Maritime Safety Agency (EMSA) to assist the Commission in an effective implementation of European Community (EC) legislation on maritime safety.

A third step towards safer maritime transportation began on November 23, 2005, when the Commission proposed Erika III, which sought to improve existing EC legislation on maritime safety by means of a more proactive and preventive policy. The seven measures proposed in the Erika III – five of which were adopted – are aimed at strengthening accident and pollution prevention and creation of healthy, sustainable and competitive conditions for operators complying with international rules. The package includes provisions on flag states' obligations, inspection regimes in EU ports, places of refuge for ships in distress, passenger protection standards, insurance obligations, classification societies, and civil liability issues. The adoption of these measures would strengthen Europe's maritime environment protection framework and align it with international best practices.

Despite the fact that most of the Erika III Directives were accepted without undue negotiations, two proposals – stricter insurance requirements for ship-owners and the obligations of flag states – encountered opposition at the Member State (MS) level. Some worried that the proposed rules would generate too many additional costs for MS administrations and that, given the global nature of shipping, the Commission had no right to take action in a field which allegedly belongs under international law. Consequently, the two proposals were deadlocked until December 2008. During its Presidency, France took the initiative and re-opened the negotiations on both.

Current State of Play and the Path to Stricter Regulation for Ship-Owners' Civil Liability

Under the current system, civil liability regimes for ship-owners in Europe are not harmonized, and no compulsory insurance scheme exists. Ship-owners are able to limit their liability even if their professional misconduct resulted in major pollution, as a ship-owner can be held accountable for oil spills only if they resulted from a personal act or omission committed with the intent to cause such damage or recklessly and with the knowledge that such damage would probably result. Consequently, in cases where oil spills do not result from a ship-owner's personal omission or reckless conduct, the clean-up and compensation costs must be borne by taxpayers of a MS in whose territory the accident occurred.

The initial proposal from the Commission for the Directive on Civil Liability and Financial Guarantees of Ship-Owners sought to put an end to this system by introducing a joint compensation scheme for victims of maritime pollution. The Commission proposed that at least proof of ship-owner gross negligence should trigger unlimited liability. To achieve this result, the Commission proposed a two-phased strategy. As a first step, the 1996 International Maritime Organization (IMO) Convention on Limitations of Liability for Maritime Claims (1996 LLMC Convention) would be implemented within the EU. However, the Commission planned that it would be compulsory for all ship-owners to cover their civil liability for an amount no less than double the limitation amounts laid down in the 1996 LLMC Convention – a level of compensation sufficiently high to cover most accident scenarios. Subsequently, the Commission would have asked for a mandate to launch a revision of the Convention at the IMO, so ship-owners eventually would lose their traditional rights to limit their liability in the event of gross negligence.

The European Parliament ("Parliament") approved the proposed rules during its First Reading on March 29, 2007. Moreover, Members of the European Parliament (MEPs) voted to strengthen the Commission proposals to increase the liability of ship-owners and compensate third parties and passengers in the event of an accident. The Parliament's amendments included the establishment of a solidarity fund, which would compensate third parties that have suffered damage caused by ships sailing in EU territorial waters not covered by financial guarantee certificates. In addition, MEPs voted to establish a Community office that would keep a full register of issued certificates, monitor and update their validity, and check the existence of financial guarantees registered by third countries. MS would also monitor compliance with the rules laid down in the Directive and establish penalties for infringements.

The vote in the Parliament was widely echoed among concerned stakeholders. The Vice President of the Parliament's Transport Committee described the vote as "historic," because for the first time, the tradition to limit legal accountability of maritime operators was overturned.

The Parliament position was not consistent with the general approach of the Council of the European Union (Council), though. A large majority of MS said they did not support the Directive on Civil Liability and Financial Guarantees of Ship-owners because it was "unnecessary" and "unworkable." Given their deep economic entrenchment in the maritime sector, several MS – including the UK, Greece and Cyprus – believed that the Commission Proposal would jeopardize their maritime interests. Malta, one of the leaders in European maritime activities, was against most of the initial Erika III proposals, as the package was expected to provide a considerable shakeup to its lucrative flag state regime.

During its Second Reading, the Parliament did not agree with the Council's modified legislative proposal. MEPs refused to abandon their strict demands and threatened to reject the entire package of maritime safety laws if Ministers did not reevaluate their positions. To demonstrate its determination, the Parliament's Transport Committee voted unanimously on the Erika III package, reintroducing all the amendments from the First Reading, which the Council has not accepted. MEPs stressed that they did not want the Council to water down important suggestions and deplored the fact that, after more than a year since the First Reading, Transport Ministers were still blocking the obligation for ship-owners' civil liability.

Ultimately, the package was rescued by France, which had the EU Presidency and was one of the only supporters of the proposal at that time. It put MS under pressure to soften their opposition. During the conciliation talks with Council representatives in early Fall 2008, the Parliament managed to extend the scope of the Directive.

Final Adoption of Erika III

On March 11, 2009, three years after the initial proposal, the Parliament approved the conciliation agreement bringing the Erika III package to conclusion. The subsequent vote at the Council of Transport Ministers on March 30, 2009 finalized the adoption procedure, as it is required by the EU legislative procedure. Even though the final package falls short of the Commission's initial ambitions, the adoption of Erika III marks an important step in the development of environmental legislation at sea. The Community now has a completely overhauled system for monitoring vessels in its ports and better tools for sea accident prevention and liquidation of their consequences.

Despite the fact that the Parliament strongly favored the initial Commission proposal, which sought to put in place "core" rules governing civil liability, insurance for ship-owners and the liability of any person responsible for operating a ship, the final version of the Directive on Civil Liability and Financial Guarantees of Ship-Owners is significantly watered down. The agreed text no longer concerns the civil liability of ship-owners, but contains the obligation for ship-owners to have insurance covering possible maritime claims. As a result, the adopted Directive was renamed the Directive on the Insurance of Ship-Owners for Maritime Claims so the title would correspond to the contents.

The adopted Directive requires that all vessels flying the flag of an MS and all ships entering a maritime territory under the jurisdiction of an MS must be insured. However, the initially proposed provision to remove the ceiling of liability established in the 1996 LLMC Convention was dropped because, otherwise, MS would have been obliged by Community law to breach the LLMC limits. According to the current requirements, insurance must be at the maximum levels set by the 1996 LLMC Convention.

The administrative burden on MS has been reduced compared to the Commission's initial proposal. MS will be required to obtain proof of insurance from ships flying their flag or entering their maritime territory. During inspections, the port state control authorities will verify whether or not the ship is carrying a commercial insurance certificate. There was a debate about what to do if a ship were found to be under-insured: expel it or detain it. However, the adopted Directive states that ships which do not provide sufficient proof of insurance are to be denied entry into any EU port until the situation is rectified. The penalties for any potential breach will be determined by national legislation. MS are obliged to adjust their laws to comply with the Directive before January 1, 2012, and the Commission is required to present a report to the Parliament and Council every three years on the application of the Directive.

Despite the difficult legislative process, the Commission perceives the Erika III package as a "major step forward for safer maritime transport." Experts estimate that the insurance required by the Directive covers sums to which 80 percent of the global fleet currently are not subject.

Comments from Industry

The reaction to the adoption of the Erika III package was generally positive, since the proposals were proactive. Unsurprisingly, the Directive on the Insurance of Ship-Owners for Maritime Claims still raised debates within various shipping organizations, which claimed that this Directive would entail significant additional costs for the shipping industry and increase the administrative burdens.

The Oil Companies International Marine Forum (OCIMF), for example, gave its full support for the objectives of the Directive; however, it had some concerns regarding the meaning of "gross negligence" that it contained. The OCIMF suggested introducing a clearer definition or guidance on this term so the application of the Directive would be more consistent throughout the EU. Moreover, the OCIMF supported closer cooperation and exchange of information between MS while checking the proof of insurance. None of the OCIMF proposals was taken into account, though, as the adopted Directive contains neither a definition for "gross negligence" nor a cooperation requirement for MS.

The International Chamber of Shipping (ICS) firmly opposed the initial proposal of the Directive on Civil Liability and the Financial Security of Ship-Owners, saying that it would "lead to the creation of a mandate for the EU to negotiate unwelcome changes to the IMO Convention on Limitation of Liability for Maritime Claims (LLMC) – with the possible ultimate goal of removing ship-owners' right to limit liability." Further, the ICS argued that the rule asking for a ship certificate issued by an MS would create a cumbersome bureaucracy and could amount to a technical barrier to trade in insurance services, contravening EU obligations under World Trade Organization (WTO) law. Since these provisions were not adopted in the final version of the Directive on the Insurance of Ship-Owners for Maritime Claims, though, the ICS seems to be less concerned.

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France

Toward the Recognition of a Duty to Mitigate Damage in French Law?

Under French law, the principle that damage must be made good in full (known as *réparation intégrale du préjudice*) is absolute. One of the main statutory bases for this principle is Article 1382 French Civil Code: "any human act whatever that causes damage to another obliges the one by whose fault it occurred to make it good." French legislation and case law do not impose a general duty for aggrieved parties to mitigate their damage. Only where the aggrieved party has contributed to bringing about the accident or the breach of contract through his own negligence or where the damage is not directly linked to the accident or the breach of contract may the right to full compensation be limited. The only area in which the duty to mitigate is applied in France is international sale of goods.

Under Article 77 of the 1980 Vienna Convention (which constitutes French law with respect to contracts for the international sale of goods), a party who pursues legal action on account of a breach of contract must take reasonable measures to mitigate the loss – including loss of profit – resulting from the breach. If he fails to take such measures, the party in breach may request a reduction in the damages in the amount by which the loss should have been mitigated.

In French law, the victim of a tort or a breach of contract is under no obligation to seek to minimize his loss or prevent it from worsening. As a matter of fact, the French Supreme Court has repeatedly held: "the person liable for damage must make it good in full. The aggrieved party is not required to mitigate his damage in the interest of the person responsible for the accident."

The courts, however, have sometimes used the concept of good faith (or, the requirement for a direct link between the tortious or negligent act and the damage) or the doctrine of *perte de chance* (loss of an opportunity to make a gain or avoid a loss) to limit the amount of damages awarded to aggrieved parties.

Under the influence of common law, the question of recognition of a duty to mitigate has arisen. Some recent decisions pave the way for the establishment of such a duty.

On January 22, 2009, the French Supreme Court quashed a decision of a court of appeal that had refused to award the victim of an assault full compensation for economic loss arising from the assault. As a result of his injuries, the victim was unable to run his business, in which he was the majority shareholder. He therefore sold his shares. As the price he got for them was well below their market value, he sought compensation for his economic loss from his attacker.

The court of first instance awarded him full compensation for the loss on the sale of his shares under market value.

The court of appeal overruled the decision, taking the view that the victim had contributed to his loss by selling his shares prematurely without taking the time to find a buyer at a higher price. The court of appeal characterized the victim's loss as a *perte de chance* and awarded the victim damages for the loss of the opportunity to sell his shares at a better price – not for the loss he actually incurred.

The Supreme Court quashed the appellate judgment on the grounds that the findings of fact made by the court of appeal showed that the loss consisted of the loss made on the sale of the shares and that the sale of shares, decided as a direct result of the offense, was an appropriate management decision.

Although the Supreme Court reiterated in its decision the principle that damage must be made good in full, it reviewed the appropriateness of the victim's conduct, which is a key criterion for mitigation. This decision could therefore open the door to scrutiny of the victim's conduct by the trial and appeal courts when assessing the damages to be awarded.

This decision confirms the position adopted in a previous case on May 3, 2006. A person infected with hepatitis C through a blood transfusion had refused to allow medicine to be administered to him because the chances of recovery were only 50 percent. The Supreme Court ruled that the victim's refusal could not limit his right to compensation, given that there was little chance that the medicine would cure him.

A commission chaired by Professor Pierre Catala in 2005 released an outline plan for reforming the law of contracts and torts and limitation periods (*Avant-projet de réforme du droit des obligations et de la prescription*) in which the commission suggests introducing an article into the French Civil Code worded as follows: "Where the aggrieved party failed to use safe, reasonable and appropriate means available to him to limit the extent of his loss or prevent it from worsening, his compensation shall be reduced, unless such means were likely to cause bodily injury." The Supreme Court, in its report on the projected reform, supported this duty to mitigate

The January 22, 2009 decision could therefore be perceived as a first step towards widespread recognition of a duty to mitigate under French law.

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Germany

Implications of the Financial Crisis for D&O Insurance

The premiums of Directors and Officers (D&O) insurance policies in Germany have nearly doubled in recent months because of fallout from the global financial crisis – after several years of declines. The market has hardened especially for financial institutions risks on account of the steadily rising number of financial services industry D&O claims.

Claims for damages are stipulated by disgruntled clients of the banking industry – as well as by shareholders complaining of management and supervisory board decisions that led to substantial losses. A central allegation is the false valuation of real property, with declining property prices increasing the financial risks associated with mortgages and mortgage-backed securities (MBS). Consequently, some D&O insurers are considering excluding subprime risks during the next D&O insurance renewal.

At present, D&O claims related to the financial crisis are estimated to reach approximately USD6 billion.

Environmental Damage Insurance Coverage Approach

The German Environmental Damage Act (*Umweltschadengesetz* – USchadG) came into force on November 14, 2007, based on Directive 2004/35/CE (dated April 21, 2004) on environmental liability with regard to the prevention and remedying of environmental damage. Its purpose was to establish a legal framework for environmental liability – based on the "polluter-pays" principle – to prevent environmental damage and make any necessary repairs.

The Act establishes liability for natural habitat and protected species damage, subject to public law. According to Sec. 2 USchadG, biodiversity, water (including groundwater), and soil (i.e., nature in general) are protected. Therefore, legal positions subject to private law and damages to individual goods are not affected by USchadG. Sec. 3 para. 1 USchadG stipulates that the liability of the polluter involves not only culpable breaches of duty but also strict liability in tort, provided certain requirements are met.

Once ecologic damage has occurred, the party responsible is obligated to remedy it and will be held liable. Correcting environmental damage, according to Annex II of the basic Directive, is achieved through the restoration of the environment to its baseline condition by way of primary, complementary, and compensatory remediation. To this end, the new Act stipulated a new kind of liability for which no insurance protection was available previously. Liability insurers regularly granted coverage for claims for damages subject to private law, but the general liability conceptions of the insurers did not comprise any liability subject to public law.

It was a challenge for the German insurance industry to react rapidly and deal with these new types of damages – not to mention to address how a damaged environment could be restored. The required coverage had to comprise, inter alia, emerging biodiversity damage, consisting of protected animal and plant species and protected natural habitats. Insurers' risk assessments had to include a new point of view, especially operational risk and location risk to calculate appropriate premiums for coverage.

Once the new Act came into force (with retroactive reach) on April 30, 2007, the insurance industry worked with provisional cover concepts to accommodate the demand for protection. Subsequently, the German Insurance Association (GDV) developed non-binding model conditions on the basis of the earlier implemented Environmental Liability Act (*Umwelthaftungsgesetz*) to provide a compliant insurance solution. The basic cover grants insurance protection for environmental damage on foreign property and may be extended by various additional modules, such as coverage for unlawful activities by unknown third parties who fly-tip (i.e., litter) on the premises of the insured whereby a land contamination may be caused.

In the meantime GDV – in cooperation with various member companies – has developed a special software solution which helps carriers classify and evaluate location risks.

The first insurers have entered the market with individual cover based on the non-binding model conditions of GDV with variations because there is little uniformity among products, coverage extent, and liability insurance conditions.

The German insurance industry is now looking back on 18 months of experience in the environmental damage coverage market. Already, this form of coverage has become a matter of course for the responsible business and will join the ranks of commercial third party liability insurance and the environmental pollution policy as a reasonably complete solution.

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Netherlands/European Parliament

Rome I Regulation – Applicable (Insurance) Law

Regulation (EC) n° 593/28 of June 17, 2008 comes into force on December 17, 2009, making "Rome I" contractual obligations law. Rome I contains specific insurance-related private international law provisions (in Article 7) to ensure an adequate level of protection for policyholders – a change from its predecessor, the 1980 Convention. Notwithstanding the integrated European market, insurance law still differs among the EC member states. Private international law therefore remains of the utmost importance. But, a question of complexity remains: do Rome I's provisions for insurance actually help, or do they only make things more complicated?

Parties to an insurance contract covering so–called "large risks" as defined in article 5 (d) of the first counsel directive 73/239/EEC of 24 July 1973 (with reference to article 7 § 2 in Rome I), are free to choose the law applicable to an insurance contract in accordance with article 3 of Rome I – for instance, risks connected to a carrier's liability qualify as "large risk."

The following can be chosen only in case of insurance contracts not covering large risks:

a) The law of any member state where the risk is situated at the time of conclusion of the contract
b) The law of the country where the policyholder has his habitual residence
c) The law of the member state of which the policy holder is a national (in the case of life insurance)
d) The law of that member state, for insurance contracts covering risks limited to events occurring in one member state other than the member state where the risk is situated
e) The law of any of the member states concerned or the law of the country of habitual residence of the policy holder, where the policy holder of a contract falling under this paragraph pursues commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different member states

There is one exception to this rule. In the cases set out under the points a), b), and e) above, if the relevant member state grants greater freedom of choice of law applicable to the insurance contract, the parties thereto may take advantage of that freedom. If no applicable law has been chosen along the above lines, the non-large risk insurance contract shall be governed by the law of the member state in which the risk is situated at the time of the conclusion of the insurance contract. If the insurance contract covers risks situated in more than one member state, the contract shall be considered as constituting several contracts, each relating to only one member state. Article 7 § 4 contains additional rules regarding insurance contracts covering risks for which a member state imposes an obligation to take out insurance.

Rome II Regulation – Subrogation

Rome II contains a provision on legal subrogation in regards to non-contractual claims – like Rome I, which includes a provision for contractual claims in Article 15. With Rome II is meant directive (EC) n° 864/2007 of July 11, 2007 on the law applicable to non-contractual obligations, in force as of January 11, 2009. Basically, when a person (the creditor) has a non-contractual claim against another (the debtor) and a third party (the insurer of course) has the duty to satisfy the creditor – or, the third party has in fact satisfied the creditor in discharge of this duty – the law governing the third person's (the insurer's) duty to satisfy the creditor determines whether and to what extent the third party (the insurer) is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

The Principles of European Contract Law (PEICL)

The easiest way to solve often complicated private international law issues – of course – is through a uniform European insurance law. A common frame of reference (CFR) for insurance contracts is currently being drafted by the project group "reinstatement of European contract law" as a first step to (perhaps agree upon) one European uniform insurance law. The project group delivered a clear message to the commission on December 17, 2007 with parts I and II of their paper. The remaining parts (III and IV) are expected to follow before 2010. The CFR shall apply to private insurance in general, but not to reinsurance. It is meant to be a model for the European legislator and an optional instrument for parties to the insurance contract to choose for the CFR instead of the law of one of the member states (including mandatory provisions). For more information on PEICL and the CFR and what is coming, see www.copecl.org or www.restatement.info.

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Spain

Financial Crisis: Impact on Casualty Insurance

Claims under credit insurance policies have increased dramatically to the point where it is difficult – if not impossible – to purchase cover in the market. For this reason, the Spanish government has authorized the Consorcio de Compensación de Seguros (CCS), a Government-owned insurance entity in charge of compensating carriers for extraordinary risks, to reinsure credit and bond risks covered by local insurers. This demonstrates clearly how seriously the credit crunch has affected trade and real estate business – and consequently the related insurance lines.

The collapse of the real estate market has led to an exponential increase in mortgage foreclosures. Banks now hold thousands of properties. This has compelled banks to review property values … and in turn has triggered claims against valuation service providers. Mortgage lending is legally limited to 80 percent of a property value, although it may be increased to 95 percent if guarantees are provided. Valuations are required from the so-called "valuation societies," which are regulated and supervised by the Bank of Spain. Valuation societies are required to insure their professional liability with authorized insurance companies, at all times keeping an insured sum of EUR600,000 plus 0.5 percent of the properties valued the preceding year – up to a limit of EUR2.4 million.

Banks are claiming against the valuers' policies for incorrect – even inflated – valuations used to support loans. In Spain, injured third parties may bring a direct action against the civil liability insurer. Some insurers are resisting these claims on the basis that the valuations were fraudulent and therefore that the bad faith exclusion applies. The outcome of these claims is uncertain but it is likely that a court would endorse the insurers' position if fraud is proved.

Another significant concern is the potential liability of directors, which may trigger claims under D&O policies. This is particularly relevant in the context of insolvencies, especially for real estate promoters and developers. From a corporate standpoint, directors may be jointly and severally liable if the company should be closed as set forth by the law and if they fail to convene the shareholders to discuss the dissolution. Liability extends to debts incurred after the cause for dissolution arose. Under certain circumstances the court must qualify the insolvency as fortuitous or guilty. If the insolvency is found to be guilty the court must characterize the actual position of the individuals involved and can order a series of measures – including the forfeiture of any rights directors may have as creditors, payment of any shortfall of creditors' rights, return of any assets obtained unlawfully, and suppression or reduction of any golden parachutes.

Until November 2005 directors were liable for all existing corporate debts if they failed to convene the shareholders – even if losses pre-dated the cause for dissolution. From that date, they are only liable for debts incurred after the cause for dissolution arose. Also, companies can exclude 2008 and 2009 losses caused by the deterioration of certain balance sheet items (e.g., fixed assets, real estate investments, and stocks) for the purposes of calculating the loss of equity and therefore the need to convene the shareholders in order to decide about the winding-up of the company.

Legal Developments and Case Law

Several laws have been enacted which intend to deal with the financial crisis, among others, the authority to reinsure credit and bond risks given to the CCS and the temporary exclusion of certain losses for the calculation of equity impairment mentioned above.

Likewise, recent case law has clarified (or confirmed): (i) when it is justified for an insurer to delay payment of the relevant indemnity and (ii) causation in the context of auditors' liability.

7

Sweden

Update: The Swedish Group Proceedings Act

The Swedish government published a report (Ds 2008:74) on experiences related to the Group Proceedings Act (2002:59), which came into force on January 1, 2003. The Swedish Group Proceedings Act provides the possibility for a group of private persons, an organization or a public authority to institute a group action in any civil matter. The group must be represented by a non-profit organization or association or ombudsman who will act as plaintiff to bring the action on behalf of those opting in to the action and appoint an attorney on their behalf. Litigation costs can be funded thanks to a "risk agreement" between the plaintiff and the attorney which allows for contingency/success fees.

To date 10 group proceedings have been initiated, with four still pending. It is still too soon to determine whether the Act will improve access to justice, though. Some minor technical changes have been suggested, but there has been no evidence suggesting that the act has been misused (e.g., by "settlement blackmail" or indications of adverse impact on business and negative effects on the "appetite" to invest in Sweden).

The first judgment in a group action was rendered in March 2009: the Swedish University of Agricultural Sciences was found guilty of gender discrimination. Male students' chances to be accepted for veterinary education were 38 times higher than those of female students. This discrimination resulted in 44 female applicants being awarded damages of SEK35,000 (EUR 3,350) each. The judgment has been appealed.

Some progress has also been made in the pending case regarding a claim for damages due to disturbances caused by air traffic related to Stockholm Arlanda Airport. Seven thousand of 20,000 identified group members have opted in and sued The Swedish Civil Aviation Administration. The Environmental Court decided in January 2009 that the group fulfills specific conditions stipulated by the act. The decision is considered an important victory for the group although there are further procedural hurdles to overcome.

Secret Filming: How Closely Can Claimants Be Watched?

A claimant allegedly suffered a whiplash injury as a result of a road traffic accident and sought compensation from the insurance company insuring the car in which she traveled as a passenger. To establish whether the claim was genuine, the insurer arranged for covert surveillance and secret filming. The purpose was to produce evidence of the claimant's movement pattern in order to establish whether her subjectively stated problems could be verified, as part of the claims handling process. The surveillance and filming was carried out from public areas when the claimant was outside her home. The video evidence showed that the claimant appeared to be able to perform her daily tasks – including quite heavy work in a riding stable – without visible difficulties. As a result, the claimant's claim was denied.

The claimant sued the insurer and claimed compensation alleging that the secret surveillance and filming amounted to a criminal offence – i.e., molestation – and also violated Article 8 (the right to privacy) and Article 13 (the right to effective legal remedies) of the European Convention on Human Rights. In a judgment handed down in October 2008 the first instance Court found in favor of the insurer.

The Court stated inter alia that under Swedish law there is no general prohibition against covert surveillance and documenting observations by footage. The Court found no evidence that the claimant had perceived herself as observed and further that the insurer's surveillance had not been unlawful and was justified for the purpose of investigating a claim for insurance indemnity.

With reference to a previous decision rendered by the Swedish Supreme Court (*Högsta domstolen*) the Court declared that the European Conventions on Human rights does not apply directly between the insurer and the claimant.

Although the Court found that surveillance and video footage was not unlawful in this particular case, it is of course essential in each case to ensure that covert surveillance does not amount to a disproportionate intrusion into the claimant's privacy.

When Is a Recourse Claim between Insurance Companies Time-Barred?

The position under Swedish law on time limit issues relating to claims for insurance indemnification has been unclear for a long time and thus problematic for both claimants and insurers. Statutory limitation of the right to insurance indemnification is regulated by the Swedish Insurance Contract Act and the Traffic Injuries Act. The limitation period is three years and can be suspended by commencement of legal proceedings or arbitration.

What frequently causes problems is ascertaining when the three year limitation period begins. A series of Supreme Court judgments from 1997 to 2001 has clarified this issue based on when an insured or other entitled person claims insurance indemnity from an insurance company. All cases mentioned involve personal injuries caused in traffic accidents. According to the Traffic Injuries Act the limitation period starts running "when the claimant became aware that the claim could be made." The requisite "awareness," simply, is fulfilled only when the claimant has gained knowledge from a doctor's assessment that there is a causal link between the accident and the symptoms and also when the claimant knows it is possible to get insurance indemnity and which insurance company is liable to pay, according to recent Supreme Court developments.

A recent judgment rendered by the Supreme Court in March 2009 concerned a different situation – a recourse claim pursued by one insurance company against another. Although the same limitation provision in the Traffic Injuries Act applies on an insured's claim against an insurance company and on recourse claims between insurance companies, the requisite "when the claimant became aware that the claim could be made" was given a totally different meaning by the Supreme Court. Accordingly, for a recourse claim, the limitation period runs from the date on which the regulating/paying insurance company's cause of action against the "responsible" insurance company has concretized (i.e., when the regulating insurer paid out insurance indemnity to the insured or otherwise entitled person).

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Switzerland

The Impact of the Financial Crisis on the Swiss Insurance Market

Swiss Insurance Association (SVV) President Erich Walser offered an optimistic outlook at a press conference early this year. Despite falling insurance company share prices, there are signs of resilience in Switzerland's insurance industry.

Premium volume increased by approximately 0.5 percent (up 1.2 percentage points from the previous year) to CHF21.4 billion (EUR14.1 billion) in the property and casualty market and 2.3 percent (a gain of 1.5 percentage points) for the life insurance sector to CHF29.4 billion (EUR19.4 billion) a remarkable result for 2008. Motor insurance sector the premium income remained at CHF5.3 billion (EUR3.5 billion) in Switzerland because of premium discounts. Walser warned that requirements for insurance cover may be reduced as a result of a cooling off economy this year – in addition to lower premiums as a result of falling values for the objects that are insured.

Earthquake Insurance

Insured losses from the recent earthquake in southern Italy provide something of a reminder to Swiss insurers. Though Swiss insurers usually do not cover earthquake losses, some do offer additional cover for household contents and movable and immovable property – though at a substantial deductible.

Currently, the SVV, Cantonal Fire Insurance Institutions, and the Federal Insurance Supervision Authority are working on a way to provide earthquake protection in addition to the existing elementary loss cover. At the same time, the Swiss Federal Council should take care of enacting of up-to-date regulations for the construction of new buildings, particularly given the earthquake risk in Basel and Valais.

Revision of the Insurance Contract Act

The Swiss Federal Council has proposed a new version of the Insurance Contract Act for comments. A first partial revision of the Act pertaining to urgent consumer protection requirements was enacted in 2006. A total revision of the hundred-year-old Act should strike a balance between the rights and duties between insurers and the insureds. An important new feature will be the right of revocation with regard to the conclusion, modification, or extension of insurance contracts within a period of two weeks. The right of revocation already applies with regard to an insurance period of one month. Also new will be the ability to complete an insurance contract retroactively, as long as neither the insurer nor the insured knows of a covered loss that has already occurred.

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Conclusion

In this latest edition of our legal update, the focus is on the continuing pressure of the European and national parliaments to institute new laws to grant power of remedy to public interest groups. These laws – whether related to the extended accountability of ship-owners for compensation of affected members of the public, the requirements of restoring environmental habitats, or the assertion by associations and non-profit organizations of the rights of certain interest groups – expand casualty insurers' fields of exposure and call for new insurance products, such as the German environmental damage liability insurance policy.

We benefit from the proximity of lawyers based in Belgium and the Netherlands to the corridors of power within the European Union Commission, and gain an insight into significant areas of new EU-wide legislation that will affect the casualty insurance community.

No legal report at this time would be complete without some assessment of the legal liability implications of the current financial crisis. The reports from Germany, Spain, and Switzerland indicate the types of legal liability and litigation that may be expected, and this experience is likely to be reflected in other Continental European jurisdictions over the course of the next few years.

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About Guy Carpenter
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.

About Heuking Kühn Lüer Wojtek
Heuking Kühn Lüer Wojtek is a German law firm represented in Berlin, Chemnitz, Cologne, Düsseldorf, Hamburg, Frankfurt 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 the 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 mentioned in the contact list and having contributed to this report are European cooperation partners of Heuking Kühn Lüer Wojtek with widespread expertise in all questions of insurance and reinsurance law.