

## Global Insurance and Reinsurance Bulletin

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## European Union - Recent Cases

### **LEGAL EXPENSES INSURER NOT ENTITLED TO SELECT SOLE LEGAL REPRESENTATIVE FOR INSURED**

The primary issue was in relation to Article 4(1) of the Council Directive (EEC) 87/344 relating to legal expenses insurance. The court considered whether the Directive should be interpreted to preclude a clause restricting the right of the individual insured to choose his own lawyer. The clause was contained in the general conditions applicable to legal expenses insurance. It entitled the insurer to select the legal representative who was to act on behalf of all insured persons suffering loss as a result of the same event. The court ruled that the Directive had to be interpreted as not permitting a legal expenses insurer to reserve the right to select the legal representation of all insured persons concerned, where a large number of insured persons suffered loss as a result of the same event.

***Eschig v UNIQA***

***Sachversicherung AG***

***Court of Justice of the European Communities (Second Chamber)***

***Judges Timmermans (President of the Chamber), Bonichot, Makarczyk, Kuris and Toader (Rapporteur)***

***10 September 2009***

### **ASSIGNEE UNABLE TO BRING ACTION IN OWN MEMBER STATE JURISDICTION**

The case concerned the interpretation of the reference in Article 11(2) of the Council Regulation (EC) 44/2001 (on jurisdiction/recognition and enforcement of judgments) to Article 9(1)(b) thereof. The court considered whether a social security institution (as statutory assignee of the rights of an injured party in a motor accident) could bring an action directly before the courts of its own Member State against the insurer of the person allegedly liable for the accident, where that insurer was established in another Member State. The court ruled that the social security institution could not rely on the combined provisions of Articles 9(1)(b) and 11(2) of Regulation No 44/2001 and was therefore unable to bring an action in its own Member State.

***Vorarlberger***

***Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG***

***Court of Justice of the European Communities (Third Chamber)***

***Judges Rosas (President of Chamber), Caoimh, Klučka (Rapporteur), Lohmus and Lindh***

***17 September 2009*** ■

## UK - Recent Cases

### MISREPRESENTATION IN INSURANCE PROPOSAL FORMS

The claimant, a property development company, entered into an insurance contract with the defendant insurance company. The policy covered theft and damage to contract works on a building site. In the proposal form one of the claimant's directors answered "no" to the question "Have you or any ... directors either personally or in connection with any business in which they have been involved ... ever been declared bankrupt or are the subject of any bankruptcy proceedings or any voluntary or mandatory insolvency?" In fact, the director in question had been a director of another company that had been placed into administrative receivership. The court held that the questions in the proposal form related only to the insolvency of the insured or any of its directors and did not extend to the insolvency of any company or other entity in the business in which they had been involved and that there had therefore been no misrepresentation.

**R&R Developments Limited v Axa Insurance UK plc**

**High Court, Chancery Division**

**Nicholas Strauss QC**

**28 September 2009**

### COST CAPPING - NOT LINKED TO ATE POLICY LIMIT

The defendant applied for an order to cap the costs the claimants could recover if their claim succeeded the limit of their after the event ("ATE") policy (£1 million). The defendant argued that this would address the inequality between each party's potential liability for costs should they lose - the maximum the defendant could recover being £1 million. The court rejected the application. A costs capping order would be made if there was a substantial risk that costs would be incurred disproportionately and this risk could not be controlled by case management directions and detailed cost assessment. Cases where this would occur would be exceptional. Any costs cap would not be linked to the limit of an ATE policy.

**Barr and others v Biffa Waste Service Limited and others**

**High Court, Queen's Bench Division, Technology and Construction Court**

**Coulson J**

**2 October 2009**

### CHOICE OF LAW AND JURISDICTION IN REINSURANCE CLAIMS AGAINST ENGLISH AND SWISS REINSURERS

The case concerned a dispute over the applicable law and jurisdiction in proceedings between the claimant Bermudian insurance company (G) and the second defendant Swiss reinsurance company (X). X contended that the applicable law was Swiss law. G contended that there was an implied choice of English law in X's slip and that the English court had jurisdiction under the Lugano Convention 1988. The court held that on the evidence, English law was applicable. The underlying policy was a London market policy and the use of a Lloyd's slip (incorporating a number of the London market wordings) and policy indicated a choice of English law. The English court did not have jurisdiction as G had failed to establish that there was an obligation to pay claims to the brokers in London and the practice of doing so was insufficient but G's claims against X and the first defendant were so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

**Grid Marine & Energy Ltd (a company incorporated in Bermuda) v Tunnicliffe (sued on his own behalf and on behalf of all other members of Lloyd's Syndicate 780 for 2005 year) and others**

**Commercial Court, Queen's Bench Division**

**Hamblen, J**

**9 October 2009**

## Continued...

### **PPI, CLAIMS MANAGEMENT AND CHAMPERTY**

The court was required to determine whether the claimant, a claims management company, should be allowed to pursue two claims in relation to the alleged misselling of payment protection insurance policies by the defendant financial institutions, which had been assigned to the claimant by individual policyholders. The court ruled that the assignments were invalid because they were champertous and the claims were struck out. The claimant had no connection with the policyholder until the policyholder made contact and had no propriety or genuine commercial interest in the PPI arrangement until assignment.

***Claims Group Direct Limited v Lloyds TSB Bank Plc and Progressive Financial Services Limited trading as Welcome Financial Services***

***Manchester County Court***

***Judge Holman***

***14 October 2009***

### **SANCTIONING SCHEMES OF ARRANGEMENT - NO POWER TO DELAY UNTIL MARKET CONDITIONS MORE FAVOURABLE**

Various applicant insurers applied to court to sanction a proposed scheme for the transfer of insurance business. The proposed programme of rationalisation following the transfer included a reattribution of the inherited estates of two of the applicants. The policyholder advocate had to negotiate on behalf of the "with profits" policyholders regarding the benefits they would be offered in return for the rights they would give up and was satisfied with the negotiated offer. The FSA was satisfied with the scheme and the majority of "with profits" policyholders had voted to accept a cash incentive payment for giving up their right to participate in any future distribution from the inherited estates. The court granted the application and sanctioned the proposed scheme. The court held it had no power to direct that a different offer be made at a time when the market might be more favourable and it would have sanctioned the scheme even without a majority vote from "with profits" policyholders as there was no proper ground to deprive electing policyholders of a choice; no policyholder was obliged to accept the offer and the interests of non-participants were entirely protected.

***Commercial Union Life Assurance Co Ltd, Re & others***

***High Court, Chancery Division***

***Norris, J***

***16 October 2009***

## Continued...

### **CORRECT CAUSATION TEST IN MESOTHELIOMA CASES - WHETHER TORTIOUS EXPOSURE MATERIALLY INCREASED RISK**

The case concerned the application of section 3 of the Compensation Act 2006 and the relevant test of causation in mesothelioma cases. The daughter of a deceased who died of mesothelioma, alleged that the deceased had been exposed to asbestos dust in breach of the defendant's employer's duty of care and that she had contracted mesothelioma as a result. The judge held that the total tortious exposure was modest compared with the total environmental exposure and concluded that the claim failed because it had not been shown that the tortious occupational risk more than doubled the non-tortious environmental exposure. It was held on appeal that in a mesothelioma case it was not open to a defendant to put a claimant to proof of causation by reference to a twofold increase in risk. The correct test on causation was whether or not the tortious exposure had materially increased the risk, the answer plainly was yes.

***Sienkiewicz v Greif (UK) Ltd***

***Court of Appeal, Civil Division***

***Lord Clarke of Stone-cum-Ebony MR, Scott Baker and Smith, LJ***

***6 November 2009***

### **LIMITATION OF ACTION - ACCRUAL OF CAUSE OF ACTION**

The appellant was the assignee of an insurer that provided ATE legal expenses insurance to clients of panel solicitors, at the request of those solicitors, under a scheme run by a claims management company. It was contended that those solicitors had been negligent in the initiation of those policies (vetting claims) and in the conduct of the litigation on the client's behalf, or the failure to notify the ATE insurer when the prospects of success had fallen below 50% pursuant to the terms of the agreement entered into with the claims management company. The Court of Appeal ruled that damage for the purpose of the accrual of a cause of action in the tort of negligence would not be constituted by a mere contingent liability. In the case of the vetting breaches the ATE insurer's causes of action against the solicitors accrued when the policies were issued. Similarly where the panel solicitor had failed to notify the ATE insurer or had failed to progress the case as it should have done the damage occurred when the conduct breach took place.

***Axa Insurance Ltd v Akther & Darby Solicitors and others***

***Court of Appeal, Civil Division***

***Lord Justices Arden, Longmore and Lloyd***

***12 November 2009***

*Continued...***EFFECT ON POLICYHOLDER OF INCORRECT COVER PLACED BY NEGLIGENT BROKER**

The claimants were property consultants. They employed a broker, HPC, to obtain professional indemnity cover, including valuation cover. HPC placed the cover through a sub-broker in two layers. The claimants sought payment under the policy. The claims were accepted by the primary insurers but rejected by the excess insurers, because the excess policy contained an endorsement limiting liability to commercial property management activities only.

The issues were:

- (i) Whether the excess insurance policy covered the valuation activities on the basis of its true construction. The court ruled that the relevant question was what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to mean. The court held that the endorsement did not cover valuation claims and the excess insurers were not liable to the claimants.
- (ii) Whether the damage suffered by the claimants was contributed to by any negligence on their part by failing to notice the endorsement. The court held that that the claimants relied on their professional brokers to do their job properly. This was reasonable and there was no fault on the claimants' part.
- (iii) Whether the sub broker had been contributorily negligent. The court held that duties owed between broker and sub broker were similar to the duties arising between client/broker. Although primary responsibility for failing to obtain the required cover rested with HPC, the sub

broker was contributorily negligent by failing to identify that the instructions given to it were incorrect.

***Dunlop Haywards (DHL) Ltd and others v Barbon Insurance Group Ltd and others***

***Commercial Court, Queen's Bench Division***

***Hamblen, J***

***19 November 2009*** ■



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## UK - Regulatory and Legislative Developments

### BLOCK EXEMPTION REGULATION FOR INSURANCE SECTOR: EUROPEAN COMMISSION CONSULTATION ON REVISED DRAFT

The European Commission has published a revised draft of the Block Exemption Regulation (BER) for the insurance sector. The current insurance BER, which will expire on 31 March 2010, exempts certain agreements between insurance companies from the EC Treaty's ban on restrictive business practices (Article 81). Agreements currently covered by the BER include the establishment of non-binding standard policy conditions, the exchange of statistical information for the calculation of risks, the creation and operation of insurance pools as well as agreements on security devices. The revised draft BER proposes to renew two of the four categories of agreements currently exempted by the BER, these are information exchange and insurance pools, with certain amendments.

Key changes that the Commission is suggesting to the exemption for information exchange are:

- (i) an amendment of the term to "joint compilations, tables and studies";
- (ii) exchange of information only where it is necessary; and
- (iii) access to data shared for interested third parties such as consumer organisations, with a public security exception.

Key changes that the Commission is suggesting to the exemption for pools are:

- (i) a change to the approach to market share calculation in order to bring it into line with other general and sector-specific competition rules;

- (ii) a rise in the flexibility percentage for market share thresholds by three per cent; and
- (iii) an amendment to the definition of "new risks".

The Commission's findings also show that neither agreements on standard policy conditions nor agreements on security devices appear to be specific to the insurance sector. Standard policy conditions are also agreed in other sectors such as in the banking sector, without the need for a BER. Security devices and their installation fall into the general domain of standard-setting, which currently benefits from guidance under the EU Guidelines on horizontal cooperation agreements. The Commission is currently considering expanding these guidelines to also cover standard policy conditions.

### SOLVENCY II IMPLEMENTING MEASURES: CEIOPS PUBLISHES THIRD SET OF ADVICE FOR CONSULTATION

In June 2009 the European Commission asked the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) to provide final advice on most of the Solvency II Level 2 implementing measures by October 2009, and also to agree on a third set of advice, which was to be finalised by January 2010, on other areas where changes had been made to the text of the Level 1 Solvency II Directive during the final stages of negotiation. In response to this CEIOPS has now published 16 consultation papers on its third set of advice on Solvency II Level 2 implementing measures.

### THIRD PARTIES (RIGHTS AGAINST INSURERS) BILL

The Third Parties (Rights against Insurers) Bill has had its first reading in Parliament. The Bill is designed to make it easier and less expensive to claim compensation from insolvent defendants by enabling claimants to sue the insolvent defendant's insurer directly without having to sue the wrongdoer first. Current laws require claimants to establish the wrongdoer's liability before bringing a separate claim against their insurer. The Bill would:

- (i) reduce time and costs because separate proceedings would no longer be needed to establish the insured's liability before suing the insurer;
- (ii) give claimants a right to obtain insurance policy information quicker in order to establish the likelihood of success;
- (iii) clarify the law in cases where a foreign company is involved; and
- (iv) remove the legal requirement for a dissolved company to be restored to the register of companies.

## Continued...

### REVIEW OF INSURANCE CONTRACT LAW: UPDATE FROM THE LAW COMMISSIONS

The Law Commission and Scottish Law Commission are conducting a joint review of insurance contract law and have published an update on their work. In April 2009 the two Law Commissions published an issues paper on micro-businesses and pre-contractual information and unfair terms and have now published a summary of the responses to this paper. The consultation revealed that a majority supports a change in insurance contract law so that micro-businesses would be treated like consumers for the purposes of pre-contractual information and unfair terms. The two Law Commissions now intend to develop their policy on micro-businesses and larger businesses in light of the responses they have received. They hope to publish a policy statement on non-disclosure, misrepresentation and warranties in business insurance contract law in Spring 2010.

The two Law Commissions say that there is a wide consensus that consumer insurance law is in urgent need of reform, not only among consumer groups, lawyers and brokers, but also among most insurance companies. They are giving priority to drafting a Bill on this issue and plan to publish a final report and draft Bill in December 2009.

The two Law Commissions say that there is also support for reform of pre-contractual business insurance law. They are planning a programme of future work for early 2010 which includes:

- (i) an issues paper on damages for late payment;
- (ii) an issues paper on the insured's post-contractual duty of good faith; and
- (iii) a policy statement on non-disclosure, misrepresentation.

### THE FINANCIAL SERVICES AND MARKETS ACT 2000 (LAW APPLICABLE TO CONTRACTS OF INSURANCE) REGULATIONS 2009 (NOVEMBER 2009)

These Regulations, SI 2009/3075, which come into force on 17 December 2009, implement the Rome 1 Regulation provisions relating to the law applicable to contracts of insurance in the UK. The Rome 1 Regulation on the law applicable to contractual obligations enters into force on 17 December 2009. The Regulations preserve existing law for certain contracts of insurance entered into before 17 December 2009, and, for contracts made on or after that date make provision necessary for the effective application of Article 7 to contracts of insurance with a connection to the United Kingdom. The Rome 1 Regulation replaces the Rome Convention and, in relation to contracts of insurance, Article 32 of the Life Insurance Directive and Article 7 of the Second Non-Life Insurance Directive. These were implemented in the UK through the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001. Although Recital 45 of the Rome 1 Regulation stipulates that the UK is not taking part in its adoption and is not subject to its application, the UK requested to opt in July 2008. The European Commission's agreement was given in December 2008. ■



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## US - Recent Cases

### **INSURER THAT BREACHES DUTY TO DEFEND DOES NOT FORFEIT THE RIGHT TO CHALLENGE REASONABLENESS OF SETTLEMENT**

After a policyholder was sued in class actions, its liability insurer denied liability and refused to provide a defence. The policyholder settled the lawsuits under an agreement that provided for collection of the settlement amount from the insurer, and a court approved the settlement. The Appeals Court held that the insurer was not automatically bound by the settlement, and the plaintiff had to demonstrate it was reasonable and not collusive. However, the insurer was barred from asserting any coverage defenses because it had breached the duty to defend.

***Stonecrafters Inc v Wholesale Life Insurance Brokerage, Inc***

***Illinois Appellate Court***

***13 July 2009***

### **COMPANY CANNOT CONTEST MID-ARBITRATION REPLACEMENT OF ARBITRATOR AFTER FINAL AWARD**

A federal court of appeals held that the replacement of an arbitrator did not invalidate the final arbitration award. Mid-way through an arbitration, one party's arbitrator resigned. The second party initially objected before agreeing to a collaborative process by which a replacement was named. The arbitration proceeded to an award, and then the second party filed a motion to vacate the award. The Appeals Court held the second party had waived its right to contest the appointment by failing to timely invoke section 5 of the Federal Arbitration Act, which provides for immediate relief in disputes over panel vacancies. Furthermore, the court found, the second party could not challenge the appointment because it had participated in the arbitrator substitution process.

***WellPoint, Inc et al v John Hancock Life Insurance Company***

***US Court of Appeals for the Seventh Circuit***

***7 August 2009***

### **FAILURE TO ENFORCE INTERNAL POLICY WAS COVERED ERROR**

A state court found insurers liable for damages caused by a producer's breach of its purchasing policies. After spinach products caused a disease outbreak and government-mandated recall, the insured claimed for recovery under the "accidental contamination" provision of its food and beverage policy. The insured's investigation revealed the spinach was grown near a cattle feed lot, in violation of its safety policies. The court found coverage because the error occurred during the manufacturing, mixing, or blending of the food product as required by the policy. The court also said the costs of a government-mandated recall were not excluded by the policy's "governmental ban" or "loss of confidence" exclusions.

***Fresh Express, Inc v Beazley Syndicate 2623/623 at Lloyd's, et al***

***California Superior Court***

***18 August 2009***

## Continued...

### **LATE NOTICE WAIVED PRIVILEGE OVER SETTLEMENT DOCUMENTS**

A trustee was sued for environmental contamination nearby a property the trust owned. The trustee hired lawyers, settled the litigation, and then sued its insurers for the settlement amount plus attorneys fees. One insurer denied liability because of late notice and sought documents reflecting legal advice on the settlement. The court ordered the trustee to turn over the documents, reasoning that the insurer needed the documents to assess if a better settlement could have been reached with its participation. By tendering its claim for insurance coverage, the court said, the insured placed its late notice and any prejudice to the insurer at issue.

***Bank of America v Travelers  
Indem Co, et al***

***US District Court for the Western  
District of Washington***

***18 August 2009***

### **POOL ADMINISTRATOR CANNOT SUE ONE POOL MEMBER ON BEHALF OF OTHERS**

The administrator of a reinsurance pool sued AIG and its affiliates in federal court for allegedly underreporting its premium collections and, therefore, underpaying its pool premiums. The court dismissed the lawsuit, on the grounds that the administrator did not have legal standing to bring suit on behalf of the pool members. It found that the administrator did not have legal title to the pool members' claims and did not sustain a direct injury. Furthermore, it did not have standing as an association because a suit by some pool members against others created a conflict of interest, and because damages due to the fraud would have to be assessed on a company-by-company basis.

***National Council on  
Compensation Insurance, Inc v  
American International Group, et  
al***

***US District Court for the Northern  
District of Illinois***

***20 August 2009***

### **COST TO RELOCATE EMPLOYEES DURING ENVIRONMENTAL CLEAN UP COVERED**

A federal court ordered an insurer to pay for relocating employees during environmental clean up. Following a storage tank leak, the insured arranged for excavation and remediation. Local building and fire laws required the insured to move staff to a temporary location during clean up work. The insurer agreed to pay for environmental clean up but refused to reimburse relocation costs, saying the policy only covered "clean up costs" required by a "governmental authority" due to contamination. The court said relocation expenses were necessarily incurred during the clean up process, and were required by a "governmental authority" even though the requirement was not directly associated with the cleanup programme.

***Mears Transportation Group, Inc  
v Zurich Am Ins Co***

***US District Court for the Middle  
District of Florida***

***26 August 2009***

## Continued...

### **NO DEFENCE REQUIRED FOR CLAIMS THAT DO NOT ALLEGE BODILY INJURY**

A federal court declared that liability policies do not require a defence against lawsuits that do not allege bodily injury. The insured faced numerous class action suits arising from the sale and manufacture of plastic baby bottles and accessories containing the allegedly toxic chemical BPA. The claimants did not allege actual bodily injury, but sought disgorgement of profits, punitive damages, and injunctive relief. The court noted that the policies only covered damages due to bodily injury or property damage, and that there was no allegation of actual bodily injury or any other covered occurrence in the suits.

***Medmark Cas Ins Co v Avent America Inc, et al***

***US District Court for the Northern District of Illinois***

***31 August 2009***

### **POLICYHOLDERS OF INSOLVENT CARRIER CAN DIRECTLY ACCESS REINSURANCE**

A state court allowed a policyholder to bypass a fronting insurer's liquidation and directly access reinsurance. A hospital group agreed to buy malpractice coverage from a newly incorporated insurer. Until the insurer was fully licensed, a fronting carrier issued policies and the new insurer reinsured 100% of the risk. The fronting carrier became insolvent. The court allowed the policyholder to claim directly from the reinsurer and rejected the liquidator's argument that, because the treaty lacked a "cut-through" clause, reinsurance should be paid to the estate. A cut-through clause was unnecessary if circumstances showed the policyholder was an intended third-party beneficiary of the reinsurance. The court noted that the Company chose the reinsurer for its expertise, and the reinsurer had exclusively handled all claims in the past.

***In re Reliance Insurance Co***

***Pennsylvania Commonwealth Court***

***4 September 2009***

### **THIRD PARTY'S LAWSUIT BARRED BY PRIOR ARBITRATION**

Two insurance companies entered into a risk sharing agreement that required the second company to obtain excess reinsurance on its behalf. The reinsurer later denied that any reinsurance was in force. An arbitration between the first insurer and the reinsurer found no credible evidence of a reinsurance agreement. That award was confirmed in federal court. Later, the second insurer sued the reinsurer for damages. The court held that the lawsuit was barred by the prior arbitration under the principle of *res judicata*. The two insurance companies were in privity during the arbitration, the court found, since they had a shared interest in proving that the reinsurer was in breach of contract.

***Guarantee Trust Life Insurance Co v First Student Programs, LLC***

***US District Court for the Northern District of Illinois***

***9 September 2009***

*Continued...***COURT VACATES ARBITRATION AWARD AS IRRATIONAL**

A federal court vacated a reinsurance arbitration award that provided for payments not expressly allowed by the agreement and eliminated a material provision of the contract. The parties disputed a deficit carry-forward provision allowing the reinsurer to offset losses against future years. After arbitration, the panel ordered the cedent to immediately pay the deficit balance and declared the provision "removed from the contract." The court vacated the award, saying that eliminating a material provision of the contract "cannot be rationally derived" from the agreement, exceeded the panel's powers and the scope of the parties' submissions, and was "completely irrational."

***PMA Capital Ins Co et al v Platinum Underwriters Bermuda, Inc***

***US District Court for the Eastern District of Pennsylvania***

***17 September 2009***

**INSURANCE COVERAGE TRANSFERRED TO NEW BUYERS ALONG WITH LIABILITIES**

A state court ruled that insurers of a company that sold two subsidiaries must indemnify the subsidiaries' new owners for asbestos liabilities, despite anti-assignment provisions in the policies. The sale agreements transferred the companies together with all of their liabilities. One agreement permitted the buyer to use the seller's insurance coverage. The other provided the seller was liable for old liabilities to the extent of any available insurance. The court said both agreements transferred insurance coverage associated with the liabilities. It also found the anti-assignment provisions were invalid under New York law, to the extent that they barred assignment after a loss occurred.

***Viking Pump, et al v Century Indem Co, et al***

***Delaware Court of Chancery***

***14 October 2009***

**ABSENCE OF EXPLICIT ARBITRATION CLAUSE NO BAR TO ARBITRATION, WHERE RETROCESSIONAL AGREEMENT INCORPORATED ARBITRATION CLAUSES OF REINSURANCE TREATIES**

A federal district court compelled arbitration between a retrocessionaire and its reinsured based on retrocession agreements that did not contain an explicit arbitration clause, but had language referring to and incorporating "all" of the underlying treaties. A court ordered arbitration based on the clauses in the underlying treaties, and the panel found in favour of the retrocessionaires. The district court refused to vacate the award, finding there was a valid arbitration agreement. The Third Circuit Court of Appeals affirmed, holding that the contracts' incorporation language was unambiguous and that there was no language in the arbitration clauses limiting their applicability to certain parties or disputes.

***Century Indemnity Company v Certain Underwriters at Lloyds, London***

***US Court of Appeals for the Third Circuit***

***15 October 2009*** ■



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# US - Regulatory and Legislative Developments

## US Federal Developments

### LEGISLATIVE PROPOSALS FOR FINANCIAL REGULATORY REFORM

As reported in the last Lovells Global IRE Bulletin, in June the Obama Administration unveiled its comprehensive regulatory reform plan for the Financial Services Industry. At this time, the US Congress is considering particular proposed pieces of legislation for Financial Services regulatory reform. As described further below, the proposals call for fairly significant changes to the regulation of financial services in the United States, including broad new systemic risk regulation of financial services at the federal level, federal powers for "resolution" of any major troubled financial companies whose failure would pose a risk to the financial system, new regulations for hedge fund advisers and over-the-counter derivatives, and a new federal consumer protection agency for financial products and services.

### OVERVIEW OF PROPOSED FEDERAL REGULATORY CHANGES FOR THE INSURANCE INDUSTRY

For the insurance industry, the proposals call for relatively limited direct federal regulatory changes at this time (as described further in the sections below) and instead leave intact the US state-based regulation of insurance. However, the US Congress is considering creating a new federal office of insurance to promote national coordination in the insurance sector. In addition, large insurance companies may become subject to federal systemic risk regulation and oversight and the new federal resolution powers for systemically-risky financial companies. Although the proposals do not otherwise call for direct federal regulation of insurance, they leave open the possibility of greater federal regulation of insurance in the future.

### OFFICE OF NATIONAL INSURANCE

The US Congress is considering bills for the creation of a federal insurance office. Such an office would be located within the US Treasury Department and would cover all lines of insurance except health. Its functions would include monitoring the US insurance industry, gathering industry information (including potentially from insurers and their affiliates), identifying insurers that could pose a systemic risk to the financial system, coordinating federal policy regarding insurance, and representing the United States internationally such as at the International Association of Insurance Supervisors and in negotiating international insurance-related agreements. However, insurance would remain regulated at the state-level, although the proposed bills call for preemption of state regulations if they are inconsistent with international agreements entered into by the United States or if they result in less favourable treatment of a non-US insurer compared to a US insurer.

### SYSTEMIC RISK REGULATION

The US Congress is considering proposed legislation for the identification and regulation of financial services companies that may pose a risk to the financial system including insurance companies that may meet the regulatory thresholds. Such companies would become subject to heightened regulatory supervision and requirements intended to monitor them more closely and subject them to restrictions to avoid risk to the system; the restrictions may potentially include asset sales and break-ups to reduce size, limitations on acquisitions, examinations, and restrictions on certain businesses and practices. The proposed bills do not clearly address whether and to what extent such regulations would reach non-US parents and affiliates of companies that may become regulated as systemically risky.

## Continued...

### **FEDERAL RESOLUTION AUTHORITY**

The US Congress is also considering proposed bills that would give the Federal Government resolution authority for significant financial services companies that fail. A systemically risky financial services company will be required to maintain resolution plans ("living wills") regarding how the failure of the company would be handled, which would need to be submitted for regulatory review. It would have to maintain a certain amount of contingent capital (such as in the form of long-term hybrid debt to be convertible into equity in the event of the Company's failure). Under the current proposals, the resolution authority could cover holding companies that own insurers. The proposals do not clarify, in the event that the Federal Government takes control of a failing insurance company, how the federal resolution authority would be coordinated with the state insurance regulators who would remain responsible for insurance company insolvencies.

### **NONADMITTED INSURANCE AND REINSURANCE**

On 9 September 2009, the US House of Representatives passed the Nonadmitted and Reinsurance Reform Act of 2009; similar legislation is being considered by the US Senate. The proposed legislation would establish national standards for states' regulation of surplus lines and reinsurance, a uniform system of surplus lines premium tax allocation and remittance, sufficiency of compliance with a single state's regulations on multi-state surplus lines risks, and direct access to the surplus lines market for sophisticated commercial buyers.

### **NATIONAL ASSOCIATION OF REGISTERED AGENTS AND BROKERS REFORM ACT OF 2009**

The National Association of Registered Agents and Brokers Reform Act of 2009 was introduced in the US House of Representatives on 21 May 2009. No corresponding bill has been introduced yet in the US Senate. Similar to legislation that passed in the US House in previous years but did not get a vote in the US Senate, this bill would create a national organization for establishing a uniform set of licensing, continuing education and other insurance producer standards that would apply in all the states in which the member producers conduct business. However, states would retain the right to license, supervise, discipline and impose licensing fees for insurance producers.

### **CONSUMER FINANCIAL PROTECTION AGENCY**

The proposals being considered by the US Congress also call for the creation of a federal consumer financial protection agency, which would be responsible for regulating and enforcing standards with respect to consumer financial products and services. This agency will try to ensure that consumers receive concise and clear information that they can understand and use, are protected from unfair or deceptive practices, have access to fair, efficient, and innovative financial services markets, and have access to financial services. However, under the current proposals, the agency would not cover the business of insurance except for credit insurance, mortgage insurance and title insurance.

*Continued...***NAIC and State-Level Developments****REINSURANCE REGULATORY MODERNISATION EFFORTS OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS ("NAIC")**

At the NAIC's Fall National Meeting in September, the NAIC's Government Relations Leadership Council approved for submission to the US Congress the proposed Reinsurance Regulatory Modernisation Act of 2009. Based on the NAIC's Reinsurance Task Force's Reinsurance Regulatory Modernization Framework Proposal Memorandum, the proposed legislation would provide for National Reinsurers (US) to be licensed through a single Home State and Port of Entry Reinsurers (non-US) to be certified through a single Port of Entry State. Reinsurers could also continue to operate under the existing regulatory approach. A new federal Reinsurance Supervision Review Board would evaluate and certify states as Home or Port of Entry supervisors and would evaluate non-US jurisdictions to determine whether reinsurers domiciled there could be eligible to apply for Port of Entry status. The National and Port of Entry Reinsurers would receive one of five possible ratings, which would determine how much collateral they would be required to post. This proposed legislation has not yet been introduced in the US Congress.

**NAIC'S CONSIDERATION OF GROUP SOLVENCY ISSUES**

The NAIC's Solvency Modernization Initiative (EX) Task Force is continuing its efforts to coordinate NAIC's solvency modernisation efforts. The task force and its Group Solvency Issues Working Group are evaluating changes that may be needed to the NAIC Insurance Holding Company System Regulatory Act as a result of the existing model's limitations identified during the ongoing economic crisis as well as international initiatives for group-wide supervision. Among the changes being considered are the role of "supervisory colleges" for insurers to assess their business strategy, financial position, legal and regulatory position, risk exposure, risk management and governance processes as well as transactions among affiliates and related disclosure requirements.

**UNITED STATES INSURANCE FINANCIAL SOLVENCY FRAMEWORK**

The NAIC's Financial Condition (E) Committee has unveiled a draft paper titled "The United States Insurance Financial Solvency Framework" as part of the NAIC's Solvency Modernisation Initiative. The paper provides a description of the US framework for insurance financial solvency and identifies ongoing collaborative regulatory peer review, regulatory checks and balances, and risk focused financial surveillance as the foundation of the US regulatory process in this area. The US insurance regulatory mission is identified as protecting "the interests of the policyholder and those who rely on the insurance coverage provided to the policyholder first and foremost, while also facilitating an effective and efficient market place for insurance products." The committee is soliciting comments on the paper until 17 December 2009.

**NAIC'S RESTRUCTURING MECHANISMS FOR TROUBLED COMPANIES SUBGROUP**

In October, the NAIC's Restructuring Mechanisms for Troubled Companies Subgroup of the Financial Condition (E) Committee exposed a draft white paper titled "Alternative Mechanisms for Troubled Companies". The paper focuses on financially troubled insurance companies that could potentially go into insolvency in the foreseeable future; it does not address situations where a company is "merely inconvenienced by a particular book of business" and wishes to exit the business. It considers the advantages and disadvantages of alternative mechanisms for troubled companies; explores the possible mechanisms available in the United States (voluntary run-off, New York's Regulation 141 and Rhode Island's statute and regulation for voluntary restructuring of solvent insurers); looks at alternative mechanisms outside of the United States (specifically the solvent schemes of arrangements and Part VII portfolio transfers in the United Kingdom); and discusses the considerations for various stakeholders including US policyholders/claimants, insurance regulators, and state insurance guaranty funds. The Subgroup is now considering comments it has received on the paper.

## Continued...

### PROPOSALS FOR CAPITAL AND SURPLUS RELIEF FOR LIFE INSURERS

The NAIC is continuing to consider various capital and surplus relief proposals for life insurers, which were originally requested by the American Council of Life Insurers in November 2008. At the Fall National Meeting, the NAIC adopted four of the proposals, which may provide relief to life insurers; further work is continuing at the NAIC to consider additional capital and surplus relief approaches for life insurers.

### STANDARD VALUATION MODEL LEGISLATION ADOPTED BY NAIC

At its Fall National Meeting, the NAIC adopted changes to the Standard Valuation Model Law ("SVML") with the goal of modernising the regulation of life insurance and annuity products. Instead of the current static formulas for calculation of reserves, the new principles-based approach, after it is enacted by state legislatures, will allow for use of risk analysis techniques such as modeling and simulation for establishing adequate reserves. For these changes to have an effect, the NAIC must update the NAIC's Standard Valuation Manual, which the NAIC aims to complete by the end of 2009.

### NAIC'S NEW RATING MODEL FOR RMBS

The NAIC Plenary approved in November a proposal for developing a new rating model for ratings designations of residential mortgage-backed securities ("RMBS") held by US insurers. The goal is the production of a set of NAIC designations used by insurers for calculating risk-based capital ("RBC") charges for each specific RMBS that they own, which would apply only for year-ending 2009 reporting. On 17 November 2009, NAIC announced that PIMCO has been selected to work with regulators for developing a set of price ranges for designations one through to six to be used by insurers.

### NEW YORK'S REGULATION OF LIFE SETTLEMENTS

In November, the New York state legislature passed a Bill for the regulation of life settlements in New York. It makes life settlement providers and brokers subject to regulation by the New York Insurance Department, and imposes certain disclosure requirements and restrictions on compensation of life settlement brokers. The Bill also prohibits stranger-originated life insurance practices involving solicitation of a person to buy a policy for the purpose of sale to outside investors. ■



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## Germany - Recent Cases

### PROHIBITION OF SET-OFF AGAINST CLAIMS THAT ARE PART OF AN INSURER'S COVERAGE ASSETS

The Cologne Higher Regional Court held that, even in cases which occurred before 2008, a reinsurer is forbidden to set off claims of an insolvent insurer with own claims. After the initiation of insolvency proceedings in 2006, the insurer had sued for the balance of invoices given to the reinsurer. The reinsurer set off these claims with its own claims for outstanding premium. In 2006, there was no statutorily regulated prohibition of such set offs, which, since 2008, does exist in Article 77 paragraph 2 of the Insurance Supervision Act ("VAG") in order to protect the insurer's coverage assets. Nevertheless, the court denied the reinsurer's right to set off in 2006 (that is prior to the change of Article paragraph 2 of the VAG) using analogy and justified this decision with the higher-ranking interest of the insureds.

**Cologne Higher Regional Court,**  
**7 July 2009**

### HIGHER REGIONAL COURT DENIES THE RECOGNITION OF SOLVENT SCHEMES OF ARRANGEMENT

The Celle Higher Regional Court held that a British solvent scheme of arrangement cannot be recognised as legally binding by German courts. The judges denied the qualification as a "decision" within the meaning of Article 32 of the EU Directive 44/2001/EC. The court demanded a preliminary contradictory procedure before a judge and held that a solvent scheme of arrangement requires no such procedure. Rather it qualified it as an out-of-court settlement which is only confirmed by a judge. This judgment is not final and will be reviewed by the Federal Court of Justice. We expect the Federal Court to consider a recent decision by the European Court of Justice (judgment, 14 October 2004, C-39/02) in which the European judges held that a "decision" within the meaning of Article 32 of the EU Directive 44/2001/EC does not necessarily require a contradictory procedure before a judge.

**Celle Higher Regional Court**  
**8 September 2009**

### FIRE INSURANCE: REDUCTION OF THE REPLACEMENT VALUE VALID

The Federal Court of Justice confirmed an insurance clause in a fire insurance contract according to which the insurer was entitled to reduce its payment under the contract to the object's fair value if the fair value fell below 40% of the replacement value. The insured claimant had bought fire insurance cover from the defendant. When he applied for the insurance cover, he chose the option "replacement value" as opposed to "fair value". However, the insurance contained a provision according to which the insurer did not have to pay the replacement value if the fair value fell below 40% of the replacement value. According to the insurance contract, in such a case, the insurer had to indemnify the insured only for the fair value. Despite the appeal court's opinion the Federal Court of Justice confirmed the clause and held that such a provision was not surprising and was not inadequately disadvantageous for the insured.

**Federal Court of Justice**  
**30 September 2009** ■

## Germany - Regulatory and Legislative Developments

### D&O-INSURANCE: DIFFERENT CONCEPTS OF INSURANCE AGAINST THE DEDUCTIBLE FOR BOARD MEMBERS

On 5 August 2009, the Act on the Appropriateness of Management Board Remuneration (*Gesetz zur Angemessenheit der Vorstandsvergütung - VorstAG*), an amendment of the German Stock Corporation Act (*Aktengesetz - AktG*), came into effect. Inter alia, the Act contains a provision which obligates companies to agree a deductible when purchasing insurance to protect board members against job-related risks. This deductible must amount to at least 10% of the damage up to at least one and a half times the fixed annual income of the board member (Section 93 paragraph 2 sentence 3 of the AktG).

As a reaction to this new legislation, many board members presently intend to purchase insurance against the deductible. Since such insurance could counteract the disciplinary effect which the new provision is aiming for, it is, however, questionable whether a respective insurance is admissible. Insurers and brokers hold the - at least doubtful - view that the omission of the legislator to comment on this question has to be understood as its tacit assent to the admissibility of the respective insurance. On this basis, many insurers currently place their policies for board members on the German market.

Up to now, there is no standard view regarding the design of the insurance against the deductible. Therefore, the policies available diverge considerably with respect to the insurance conditions as well as to the insurance rate. Dependent on the insurance product and, of course, on the remuneration of the board member, insurance rates can range from EUR 200 to EUR 50.000. With regard to the design of

the policies, insurers particularly use, with varieties in detail, two concepts. Partially, the insurance against the deductible reproduces the conditions of the D&O-policy of the company and is thus construed as an "individual D&O-policy" insuring the liability claim against the board member in the amount of the deductible. Partially, the insurer accepts the obligation to indemnify the company in the full amount of the liability claim, that is also pays in advance the amount owed by the board member as deductible. In return, the insurer is entitled to claim for recourse against the board member in the respective amount. This recourse claim, then, functions as the basis for the insurance against the deductible. Furthermore, some insurers do not provide an additional insured sum for the insurance against the deductible. Rather, the insured sum provided under the D&O-policy shall include the insured sum available under the insurance against the deductible. This raises the question which insurance has to be satisfied primarily.

There are objections against all these types of insurance against the deductible. In some cases, it is doubtful whether the proposed concept is admissible at all. Whether these objections will lead to the development of a standard concept has to be awaited. ■



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## France - Recent Cases

### EXCLUSION CLAUSES MUST BE EXPRESS AND LIMITED EVEN WHEN THE INSURANCE CONTRACT IS GOVERNED BY FOREIGN LAW

A Belgian construction company concluded an insurance contract under Belgian law, to cover damages arising from its activities. Following the collapse of a ceiling in France, the company and its insurer were jointly ordered by a French court to pay compensation for the damage sustained. The insurer argued that coverage would not apply, on the basis of an exclusion clause of the contract. Despite the fact that this insurance contract was governed by Belgian law, the French Supreme Court held that the Court of Appeal validly ruled that the exclusion clause was not enforceable, based on Article L113-1 of the French Civil Code according to which exclusion clauses must be express and limited. The Supreme Court asserted that Article L113-1 is a mandatory provision which must be complied with regardless of the law applicable to the contract.

***Cour de cassation, Civ 2***

***n°08-13.149***

***8 October 2009***

### EXCLUSION CLAUSES ARE NOT "EXPRESS AND LIMITED" IF INTERPRETATION IS NEEDED

The owner of a nightclub had insurance against fire. Following two failed attempts in the previous days, his nightclub was destroyed by arson. The insurer denied coverage, relying on an exclusion clause of the insurance contract. The clause excluded, inter alia, loss resulting from "either a repair or a modification that became necessary notably following a previous occurrence of a damage with respect to the premises or installations belonging to the insured." The first instance judges dismissed the claim of the insured, ruling that the latter did nothing to prevent the arson from happening even though he was aware of its likelihood. The Supreme Court quashed this decision, on the basis of Article L 113-1 of the French Insurance Code, under which exclusion clauses are valid only if express and limited. The Supreme Court rules that if an interpretation is needed, then the exclusion clause cannot be express and limited. It also ruled that, since the first instance judges interpreted the clause, the latter was not enforceable.

***Cour de Cassation, Civ 2***

***n°08-19.646***

***8 October 2009***

### A REQUEST FOR EXPERT PROCEEDINGS IS A "LEGAL ACTION"

Pursuant to Article L 114-1 section 3 of the French Insurance Code, "*when the insured's action against the insurer arises from a third party's recourse, the limitation period [that is two years] shall run only from the date on which said party brings a legal action against the insured or the latter has paid it compensation*". Following a blood transfusion, an individual had been infected with the Hepatitis C virus. This victim and the EFS (the French Blood Service) jointly asked the court to appoint a medical expert to analyse the cause of the contamination. Following the expert's report, the victim brought a claim against the EFS which, in turn, asked that the expert operations be declared opposable to its insurer. The French Supreme Court ruled that the Court of Appeal lawfully dismissed this action against the insurer, considering that the time period under which an action could be brought had elapsed. According to the French Supreme Court, serving summons for the mere appointment of an expert as an interim measure, that is, even without claiming compensation, qualifies as a legal action.

***Cour de Cassation, Civ 2***

***n°08-18.092***

***3 September 2009***

## Continued...

### **TORT LIABILITY OF LIFE INSURERS FAILING TO COMPLY WITH THEIR PRECONTRACTUAL DUTY OF INFORMATION**

A party to a life insurance contract was faced with a decrease in the amount of its savings under the contract. She brought an action against her insurer, claimed that her consent was mistaken and also claimed that the insurer failed to comply with its duty of precontractual information (under the former Article L 132-5 of the French Insurance Code). The Court of Appeal dismissed the claim and ruled that the failure to comply with this obligation could not give rise to damages but is sanctioned by an extension of the period under which the insured is allowed to withdraw its consent to the insurance contract. The Supreme Court quashed this decision and ruled that, pursuant to Article 1382 (usual ground for tort liability) of the French Civil Code and Article L 132-5 of the French Insurance Code, the tort liability of insurers can be engaged if they did not comply with their precontractual duty to inform.

***Cour de cassation, Civ 2***

***n°08-18.928***

***8 October 2009***

### **BANKER'S DUTY TO WARN THE BORROWER REGARDING THE LATTER'S FINANCIAL CAPACITIES**

A woman whose monthly income was EUR 690 purchased a loan in order to buy a car, with monthly repayments of EUR 1,827. When the banker brought an action for repayment against the defaulting borrower, the latter alleged that the banker did not fulfil its precontractual obligation of advice as regards her financial capacity. The Court of Appeal dismissed this defence and ruled that it is not for the banker to get involved in the borrower's private life. The French Supreme Court quashed this decision. It held that the Court of Appeal should have analysed whether the borrower was skilled or not - if not, the Court of Appeal should have ruled that, as a professional, the banker should have proved that it had fulfilled its obligation to warn the borrower with respect to her financial capacity.

***Cour de Cassation, Civ 1***

***n°08-16.345***

***24 September 2009*** ■

## France - Regulatory and Legislative Developments

### FRANCE – DRAFT ORDINANCE CREATING A COMMON SUPERVISORY AND APPROVAL AUTHORITY FOR THE BANKING AND INSURANCE FIELD

On 2 October 2009, the Minister of the Economy and Finance, Christine Lagarde submitted a draft ordinance, which creates a common supervisory and regulatory authority for the banking and insurance field, for public consultation (which closed on 30 October 2009). This new authority, to be created following the merger between the Banking Commission (*Commission bancaire*), the Insurance Supervisory Commission (*Autorité de Contrôle des Assurances et des Mutuelles – ACAM*), the Committee of Insurance Companies (*Comité des Entreprises d'Assurance – CEA*) and the Committee of Credit Institutions and Investment Companies (*Comité des Etablissements de Crédit et des Entreprises d'Investissement – CECEI*) has been temporarily named the Prudential Supervisory Authority (*Autorité de Contrôle Prudentiel – ACP*). This authority will be subject to the control of the *Banque de France*, as it is already the case for the Banking Commission and the CECEI. The draft ordinance which will now be submitted to the Council of State (*Conseil d'Etat*) should be adopted by the end of the year.

### EUROPEAN LAW – BRUSSELS ADOPTS THE CREATION OF A EUROPEAN INSURANCE AUTHORITY

In order to set up a financial supervision system, the European Commission adopted on 26 October 2009, the creation of three new supervisory authorities, one of which is dedicated specifically to the insurance field. This new authority, called the European Authority of Professional Insurance and Pensions, will work in coordination with the Insurance Supervisory Commission (*Autorité de Contrôle des Assurances et des Mutuelles – ACAM*) and the Ministry of Economy and Finance (MINEFI). This authority will be in charge, together with the European Banking Authority and European Authority of Capital Markets, of drawing up proposals for technical standards in accordance with the principles of the strategy "Better Legislation", to resolve differences between national supervisory authorities, to favour coherent application of technical Community rules and to assume a role of coordination in times of emergency.

### INTERNATIONAL – THE ACAM SIGNATORY OF THE "MULTILATERAL MEMORANDUM OF UNDERSTANDING" AGREEMENT

During the annual conference of insurance supervisors which ended on 23 October 2009, the Insurance and Supervisory Commission (*Autorité de Contrôle des Assurances et des Mutuelles – ACAM*) signed the multilateral agreement "Multilateral Memorandum of Understanding". The intention is to reinforce the exchange, the coordination and cooperation between the different local supervisory authorities. This agreement provides for the cooperation and the exchange of information within the International Association of Insurance Supervisors (IAIS) relating to the regulated entities when cross-border aspects are involved and guarantees an environment of confidence and a harmonised procedure to the signing parties. This agreement ought to be signed by all the members of the IAIS. Several States signed up through their national supervisory bodies, notably Germany (in June 2009) and Australia (on 26 October 2009). ■



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## Spain - Recent Cases

### EDUCATIONAL CENTRE RESPONSIBILITY FOR ON-SITE ACCIDENTS

The Spanish Civil Code, under Article 1903 (extra contractual civil liability) compels educational centres to act diligently. The Supreme Court has ruled that this diligence requirement includes the need to adopt different organisational measures according to the circumstances, being those directly related to the activity of the pupils. In this case, during a rainy break 300 children had to stay within a 200 square metre 'L' shaped corridor. During the break, a small child died as a result of the push of another one. The Supreme Court ruled that the school acted negligently due to the fact that it was predictable that something like this could have happened - there not being enough teachers to supervise correctly. In conclusion, the educational centre should have adapted its organisational measures to the circumstances, and so it must be held liable.

**Spanish Supreme Court**

**Civil Division**

**June 2009**

### LUGGAGE LOSS DAMAGES

The High Court of Barcelona has amended its criteria regarding the interpretation of Article 22 of the Montreal Convention which determines the damages due to luggage loss. The court previously ruled that the limit established on the aforementioned Article was applicable to moral and material damages separately. That said, this judgment expressly declares that the established limit shall be applicable to both, moral and material damages, jointly.

**Audiencia Provincial Barcelona**

**18 September 2009**

### INSURANCE GUARANTEEING COMPLEMENTARY BENEFITS OF WORKERS

A bank established a fund in order to guarantee the rights and the improvements envisaged under the Collective Bargaining Agreement of Banking sector. In order to grant these complementary benefits in case of illness, total or absolute permanent disability, retirement or death, the bank purchased a collective life insurance policy on 15 November 2002, including its workers as insureds of the policy. A worker fired on 20 November 2002, filed a claim on 3 October 2006 asking for the amounts within the bank's fund that he believed he was entitled to. The Supreme Court ruled that, when the worker was fired, the bank fund that had been established could not be considered a pension fund, and therefore, no rights of the fired worker had been consolidated. Hence, the Supreme Court rules that the worker only had a mere expectation of the right to obtain a complementary benefit for his retirement pension in case the contingency occurred whilst the working relationship was alive.

**Spanish Supreme Court**

**Labour Division**

**21 September 2009** ■

## Spain - Regulatory and Legislative Developments

### INSURANCE COMPENSATION CONSORTIUM'S FUNCTIONS AMENDMENT

Law 6/2009 was approved on 3 July 2009. As a result of this law, the functions of the Insurance Compensation Consortium related to compulsory insurance for passengers and hunters have been abolished, and the surcharge destined to finance insurer's liquidation has been reduced.

**Law 6/2009**

**3 July 2009**

### DOCUMENTATION REQUIREMENTS

Royal Decree 1298/2009 establishes the documents to be filed in case of merger or spin-off, the details that directors and liquidators shall communicate to the Spanish Insurance Authority, as well as Death Insurance information duties.

**Royal Decree 1298/2009**

**31 July 2009**

### PENSION PLANS RESCUE

Royal Decree 1299/2009 determines the circumstances when long lasting unemployment will be recognised in order to rescue consolidated rights of pension plans.

**Royal Decree 1299/2009**

**31 July 2009** ■



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## Latin America - Regulatory and Legislative Developments

### THE SVS ISSUES NEW RULES TO IMPROVE UNDERWRITING TERMS AND CONDITIONS IN HEALTH AND GROUP INSURANCE

The SVS (the Chilean stock and insurance authorities) issued in August new rules in order to simplify the insurance bid process and guarantee information rights and transparency in the underwriting of group insurance. Insurance companies will be required to communicate the effects that existing illnesses declared by the insured (when underwriting the insurance contract) have on the terms and conditions of the policy. If this communication is not duly done, the coverage of these illnesses can not be excluded. These new rules are aimed at improving the information submitted to the client when underwriting the insurance contract so as to avoid the insured's coverage restrictions based on non-explicit conditions.

#### **SVS announcement**

**1 September 2009**

### THE SIB ANALYSES THE CHANGES ON THE INSURANCE ACT BEFORE THE NICARAGUAN NATIONAL ASSEMBLY

The director of the SIB (the Nicaraguan financial authorities), Víctor Urucuyo, attended a meeting held with members of the "*Comisión Económica de la Asamblea Nacional*" (Economic Commission of the National Assembly) in order to analyse the proposal of Insurance Act, Reinsurance and Finance. Mr Urucuyo stated that this proposal could lead to the modification of the current Insurance Act so as to fulfil the commitments Nicaragua undertook after the underwriting of the Free Trade Treaty DR-Cafta consisting on the liberalisation of the Nicaraguan insurance market to allow foreign insurance companies to set up branches in Nicaragua.

#### **SIB announcement**

**4 September 2009**

### FASECOLDA COMMENTS THE "PROYECTO DE LEY ANTITRÁMITES" (PROJECT ACT AIMED AT SPEEDING PROCEDURES)

The Colombian Association of Insurers (FASECOLDA) commented, in relation to the Project Act number 24 which came out in 2009, also known as "Proyecto de Ley Antitrámites" (Project Act aimed at speeding procedures), that it is positive for the country since it leads to a significant decrease of regular procedures. FASECOLDA mentions, for instance, the banning of the requirement for authentic copies of the documentation submitted in any procedure. This new provision states that this prohibition is not applied to documents required by Pension Funds Managers. FASECOLDA agrees with this new provision and points out that it should be also extended to all kind of paying pensions entities except Social Security managing entities. FASECOLDA also refers to the indication to the commerce chambers to stop registering commercial institutions or entrepreneurs, natural or legal entities using commercial names, brands or expressions which can only be used by institutions supervised by the "*Superintendencia Financiera de Colombia*" (Colombian financial authorities). FASECOLDA agrees with this provision. However, it also suggests that "*entidad aseguradora*" (insurance company) is added to the list words whose use is restricted since insurance companies are also supervised by the Colombian financial authorities.

## Continued...

### COLOMBIA AND THE EUROPEAN UNION AGREE THE LIBERALISATION OF INSURANCE TRADE

The Colombian Association of Insurers (FASECOLDA) echoes the agreement between Colombia and the EU on financial services regarding the TLC (Free Trade Treaty). Regarding the insurance market, FASECOLDA states that this agreement confirms the regulation on trade liberalisation as per Act 1328. The liberalisation of insurance services regarding the TLC enables insurance companies of the EU to set up in Colombia as subsidiaries or as branches regulated or supervised by the Colombian authorities. They must also be provided with a minimum amount of share capital in the country where it is established.

**FASECOLDA announcement**

**29 September 2009**

### THE SVS STARTS RUNNING THE MARKET COMPLIANCE DEPARTMENT AND PROTECTION OF INVESTORS AND INSURED DEPARTMENT

The SVS (the Chilean stock and insurance authorities) has agreed to the creation of two new departments aimed at protecting and strengthening the rights of investors and insureds by improving conduct and procedures of the markets it supervises. According to the SVS this is a coordinated system which consists of the implementation of supervision models based on insolvency risk and new methods to supervise the market conduct related to stock and insurance markets.

**SVS announcement**

**23 October 2009** ■



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## China - Regulatory and Legislative Developments

### **CIRC REQUIRES INSURANCE COMPANIES TO STRENGTHEN AUTO INSURANCE CLAIMS INVESTIGATION PROCEDURES**

The *Circular on Risk-prevention for Automobile Insurance Claims Settlement* (effective 18 August 2009) requires that property insurance companies strengthen measures to fight against false claims and prevent money laundering. For example, insurance companies must verify the identity of the insureds, particularly for claims submitted by repair shops or other third parties collecting compensation. The Circular also requires insurance companies to remit compensation above RMB 1000 through bank transfer. Stricter requirements apply for compensation exceeding RMB 10,000 for the purpose of complying with relevant anti-money laundering regulations.

### **PROPERTY INSURANCE COMPANIES MUST ESTABLISH CONSUMER INQUIRY SYSTEMS BY 31 DECEMBER 2010**

On 13 October 2009 the CIRC issued a circular and two implementing measures requiring all property insurance companies to commence trial operation of a customer inquiry system by the end of the year. The system must enable customers to check the scope of coverage, premium amounts, and claims settlement processing status for their property insurance policies either through telephone, the Internet or in person. Initially, the trial operation of these systems will cover compulsory automobile insurance and commercial automobile insurance.

### **MANDATORY ELECTRONIC RECORD-KEEPING PRACTICES FOR PERSONAL ACCIDENT/INJURY INSURANCE PRODUCTS**

The *Operating Standards for Personal Accident/Injury Insurance* (effective 1 October 2009) requires insurance companies to standardise computer files on policy records, policy issuance, product promotion, accounting records, inquiry services and product types. Maintaining paper only records of such policies is no longer allowed. The operating standards further prohibit co-promotion of such products with any other non-insurance goods or services to the public. Personal accident/injury insurance records must be centrally managed by the insurance company's head office and reported to the CIRC. Currently the operating standards only apply to personal accident/injury insurance, a sector constituting around two per cent of China's insurance market premium revenues.

### **INCREASED REGULATION OF BOND REPURCHASE FINANCING BY INSURANCE INSTITUTIONS**

The CIRC issued the *Circular on Strengthening Management of Bond Repurchase Financing by Insurance Institutions* (effective 28 August 2009), imposing quantitative caps on bond-secured borrowing by insurance institutions and increasing related reporting requirements. Under the Circular, insurance institutions satisfying CIRC solvency requirements may use up to 20% of the previous quarter's total assets as security for borrowing, while companies failing to meet CIRC solvency standards may only use up to 10%. Additionally, financing from any given counterparty may not exceed 20% of an insurance institution's net assets at the end of the previous quarter. Stricter reporting obligations on bond repurchase financing are also introduced: for example, insurance institutions must notify the CIRC when:

- (i) any bond-secured loan payments are overdue by more than seven days; or
- (ii) aggregate unpaid bond-secured loan payments exceed RMB 50 million or 0.1% of the insurance institution's total assets for the previous quarter.

*Continued...***ADJUSTMENT OF BOND INVESTMENT POLICIES FOR INSURANCE INSTITUTIONS**

On 22 September 2009, the CIRC issued several adjustments to the *Provisional Measures on Bond Investment Management of Insurance Institutions* to ease compliance burdens and allow insurance institutions more flexibility in investing. Changes include:

- (i) lowering the profitability threshold qualifications for bond issuers in which insurance institutions may invest;
- (ii) increasing the threshold of permitted insurance institution investment in corporate bonds to 40% of the previous quarter's total assets from 30%; and
- (iii) specifying the long term credit rating for investee enterprises must be BBB or higher for bonds or convertible bonds offered by large-scale state-owned enterprises, H share companies and "red chip" listed companies in Hong Kong.

**CIRC REVISES ADMINISTRATIVE RULES FOR INSURANCE COMPANIES**

The revised rules, effective 1 October 2009, increase regulation of the establishment and operation of insurance companies, including:

- (i) requiring newly approved insurance companies to file an additional application including clear operational information before opening for business;
- (ii) changing the registered capital requirements relating to opening branch offices;
- (iii) requiring CIRC approval of all shareholding changes of five per cent or more (previously the threshold for requiring regulatory approval was 10%); and
- (iv) regulating the establishment and approval of sales service branches. Previously effective *CIRC Administrative Rules for Sales Service Branch* have now been rescinded.

**CIRC REVISES RULES ON INSURANCE ASSET ASSESSMENT INSTITUTIONS**

The revisions to the regulations, effective 1 October 2009, revise the *Provisions on the Administration of Insurance Assessment Institutions* (issued in 2001) and enact a variety of changes, including standardising the minimum registered capital for establishing an insurance asset assessment company to RMB 2 million regardless of the entity's legal form, increasing mandatory levels of professional liability insurance, and implementing more stringent qualifications for senior managers and rules for business management.

**CIRC REVISES RULES ON SUPERVISING INSURANCE AGENCIES**

The new rules, effective 1 October 2009, enact a number of major changes to the previously effective regulations published in 2004. Changes include:

- (i) removing partnership as a permitted form for insurance agencies;
- (ii) increasing minimum the registered capital for establishing an agency to RMB 2 million;
- (iii) a requirement that officials in insurance companies receive shareholder approval prior to becoming stakeholders in an insurance agency;
- (iv) simplifying the process for establishing branches; and
- (v) increasing mandatory levels of professional indemnity insurance for insurance agencies.

*Continued...***CIRC REVISES RULES ON SUPERVISING INSURANCE BROKERAGES**

The revised rules, effective 1 October 2009, introduce stricter rules for establishing and operating insurance brokerages, including

- (i) removing partnership as a permitted form for insurance brokerages;
- (ii) increasing the minimum required registered capital to RMB 10 million;
- (iii) a new requirement that officials in insurance companies receive shareholder approval prior to becoming stakeholders in an insurance brokerage;
- (iv) simplifying the process for establishing branches,
- (v) stricter requirements for brokerages to maintain adequate professional indemnity insurance; and
- (vi) eliminating the requirement of CIRC approval for changes in shareholding structure (though brokerages are still required to notify the CIRC of such changes).

**CIRC ISSUES MEASURES FOR PUNISHING ILLEGAL ACTIVITIES BY INSURANCE INTERMEDIARIES**

The measures, effective 1 October 2009, apply to insurance companies, insurance agents, insurance brokers and insurance asset assessment institutions, and the most severe penalties include fines of up to RMB 500,000 and permanent cancellation of operating licenses. Under the measures, insurance companies are responsible for implementing a supervisory system over their intermediaries and must report illegal activities such as commercial bribery to the Public Security Bureau and other relevant authorities. The measures aim to depute insurance companies in targeting unethical and criminal activities by insurance intermediaries.

**NEW DISCLOSURE OBLIGATIONS FOR INNOVATIVE LIFE INSURANCE PRODUCTS**

Under the *Measures on Managing Disclosure for Innovative Life Insurance Products* (effective 25 September 2009), life insurance companies are obliged to disclose:

- (i) investment return rates for unit-linked insurance, universal insurance and dividend insurance;
- (ii) historical records of the investment account's unit price; and
- (iii) rights and possible risks to insureds within the 10 day period during which consumers may cancel policies without penalty under China's recently revised *Insurance Law*.

In addition, caps are imposed on advertised rates of return for certain types of insurance: for instance, six per cent, four and a half per cent, and three per cent limits apply for high, medium and low risk dividend insurance respectively. Regulated disclosure methods include media publications, product promotion seminars, sales pitches, and telephone interviews. Disclosed information must be consistent with the insurance product's terms and product brochures.

## Continued...

### **SUPREME PEOPLE'S COURT ISSUES INTERPRETATION ON SEVERAL ISSUES CONCERNING THE APPLICATION OF THE REVISED *INSURANCE LAW***

The Supreme People's Court interpretation, issued on 21 September 2009, clarifies a number of issues relating to retroactive application of the revised *Insurance Law* (effective 1 October 2009) to contracts executed prior to the Law's effective date. For example, the revised *Insurance Law* is applicable:

- (i) for any insurance contracts where the establishment, transfer, accident, settlement of claim or subrogation occurs after 1 October 2009; and
- (ii) when an insurer claims for termination of an insurance contract on the grounds that the insured failed to provide accurate or authentic information after 1 October 2009.

However, cases which have already been adjudicated or settled under the previously effective version of the *Insurance Law* may not be retried.

### **FURTHER DEVELOPMENT OF INSURANCE PRODUCTS FOR THE SERVICE OUTSOURCING INDUSTRY ENCOURAGED**

On 7 September 2009 the *Opinions on Supporting the Development of Service Outsourcing Industry* were jointly released by the China Insurance Regulatory Commission ("CIRC"), the People's Bank of China, the Ministry of Commerce, the China Banking Regulatory Commission, the China Securities Regulatory Commission, and the State Administration of Foreign Exchange. The opinion calls on the China Export & Credit Insurance Corporation (also known as Sinosure, the state-owned provider of export credit insurance) to decrease premium rates for the purpose of increasing market coverage. The opinion also calls for further developing intellectual property infringement insurance, employee loyalty insurance, product liability insurance and product quality insurance to insure. ■



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## Russia - Recent Cases

### **INJURED PARTY'S INSURER CAN CLAIM HIGHER PENALTIES UNDER THE COMPULSORY ROAD INSURANCE ACT**

The State Court of Cassation held that the insurer of an injured party to whom it has paid compensation can recover a penalty from the insurer of a tortfeasor for a delay in payment at the rate set out by the Federal Law on the compulsory third party liability insurance of the owners of the motor vehicles (the "Compulsory Road Insurance Act"). This rate is about five times higher than other statutory penalties available otherwise. Delivering their reasoning the court pointed out that, unless the insurance contract states otherwise, an insurer who has paid compensation shall have the same claim to the insurer of a tortfeasor under the Compulsory Road Insurance Act as an injured party has. This claim includes the right to recover a penalty for a delayed payment at the higher rate.

***The Federal Arbitrazh Court of the North-West Region***

***Case No A56-6014/2009***

***13 August 2009.***

### **INJURED PARTY CAN RECOVER WITHOUT REDUCTION UNDER COMPULSORY ROAD INSURANCE ACT - EVEN IN THE CASE OF MUTUAL FAULT**

The Presidium of the High Arbitration Court held that under the Compulsory Road Insurance Act an injured party can recover damages in full, within the statutory compensation limit, even when there is mutual fault of the injured party and the tortfeasor. The inferior courts deciding the case halved the compensation payable to the injured party due to the negligence contributed by that party. The Presidium of the High Arbitration Court reversed the decision pointing out that the Compulsory Road Insurance Act sets the obligation of the insurer to compensate damages to the injured establishing only a limit of compensation per injured. The fact of contributed negligence (mutual fault) was held irrelevant to the case.

***The Presidium of the High Arbitration Court***

***Case No 4769/09***

***29 September 2009*** ■

## Russia - Regulatory and Legislative Developments

### RELAXATION OF QUALIFICATION REQUIREMENTS FOR MANAGEMENT OF MUTUAL INSURANCE SOCIETIES

The Russian Parliament has passed the Federal Law relaxing the academic qualification requirements applicable to the top-management, including the chief executive officer and the chief accountants, of Russian mutual insurance companies. The law came into force on 14 November 2009. The current law requires the top-management and the chief accountant to have higher education in any area, while the previous law required higher education in economics or finance areas. This is also supplemented by the generally unchanged requirement to have at least two years of relevant professional experience. Therefore the law liberalises the regulation of mutual insurance companies, which are non-commercial organisations, offering limited insurance services to a limited number of their members.

### INSURANCE OF PUBLIC PROCUREMENT CONTRACTS

The Russian Parliament has passed the Federal Law changing a list of acceptable guarantees securing the interests of the public bodies in the public procurement contracts. The law came into force on 23 August 2009. Suretyship contracts, along with the requirements to the guarantors, were introduced as an allowable security for public procurement contracts. At the same time insurance was excluded from the public procurement contracts to be entered into through electronic auctions. The public bodies tendering the procurement contracts may now also exclude insurance from a list of securities applicable to the public procurement contracts concluded through a tender or an ordinary auction.

### SELF-GOVERNING ORGANISATIONS OF ACTUARIES

The Russian Parliament is debating a Bill introducing regulations for self-governing organisations of actuaries. To date the Bill has passed the first reading. The Bill requires actuaries to have membership of one of the self-governing professional organisations of actuaries. It is expected that the self-governing organisations will be responsible for the attestation of actuaries, establishing professional rules and standards, control over their professional activity and taking disciplinary actions against their members. ■



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# Insurance and Reinsurance Planner

Everyone in the insurance and reinsurance market will know that the number of insurance and reinsurance related events is huge and that it is difficult to keep track of training and information gathering opportunities. The aim of the Insurance and Reinsurance Planner is to provide a one-stop source of information on forthcoming major international insurance and reinsurance conferences, seminars and symposia around the world.

The Planner is a valuable notice board for the international insurance and reinsurance community, providing information on what is taking place, when and where.

It is available online (entirely free of charge) at [www.reinsuranceevents.com](http://www.reinsuranceevents.com) where it is possible to search for events and courses by date, country or organisation and drop those you are interested in attending into your electronic diary. You can also use the online form to submit events which can be viewed online.

The screenshot shows the homepage of the International Insurance & Reinsurance Planner 2009. At the top, there is a navigation bar with links: Home, Tell us about your event/course, Join our mailing list, Give us your feedback, Organisations, and Advanced search. Below this is a 'Quick Search' section with a search box and a 'GO' button. To the right of the search box is a world map. The main heading reads 'Welcome to the International Insurance & Reinsurance Planner'. Below the map, there is a 'Forthcoming Events' section listing:
 

- 27 August 2009: Arizona (Annual)
- 29 August 2009: CPCU Society Annual Meeting and Seminar
- 31 August 2009: 2nd Annual Effective SOX & MAR Strategies in the Re/Insurance Industry

 A 'COMING SOON' section features a thumbnail for the 'International Insurance & Reinsurance Planner 2008 PDF Format'. On the left side, there is a calendar for August 2009, showing dates from 1 to 31. At the bottom of the page, there is a footer with legal information and the copyright notice: © Lovells LLP 2009.

This bulletin contains short reports of significant recent developments in the law of insurance and reinsurance and related topics around the globe. In this form, and due to the vast pace at which legislative and regulatory issues develop, it cannot be fully comprehensive. It is written in general terms and its application to specific circumstances will depend on the particular facts. The contents of this bulletin are current as at the date of publication.

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