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A golden scale of justice and a gavel are positioned on a wooden surface. The scale is the central focus, with its pans and beams clearly visible. The gavel lies to the right of the scale. The background is a warm, textured wood grain. A semi-transparent grid pattern is overlaid on the upper portion of the image.

# Recent Judicial Developments in Continental Europe

Affecting the Casualty Insurance Industry

May

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# Introduction

The May 2011 issue of *Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry* is the latest installment in Guy Carpenter & Company Ltd.'s (Guy Carpenter's) legislative update series, designed to provide our international clients and markets with a concise overview of key trends in the Continental European legal environment. These issues have had an impact on insurers and reinsurers or are expected to have an effect in the near future.

Guy Carpenter has produced this report thanks to a continued valued cooperation with the insurance practice of law firm Heuking Kühn Lüer Wojtek and its network of legal experts, acknowledged as leading insurance law practitioners in their respective jurisdictions across Continental Europe. The objective has been, as in previous reports in this series, to focus on the legislative or judicial developments that we consider to be of greatest impact in each selected country. It has not been our goal to produce an exhaustive review of the entire scope of legislative changes and judicial rulings of the past year in Continental Europe. Rather, we highlight the main developments that we and our legal colleagues perceive as being worthy of attention, and where necessary, further in-depth study.

We continue to expand the jurisdictions covered, and in this latest edition, we feature Poland for the first time. As our legal colleagues in Heuking Kühn Lüer Wojtek continue to expand their network, further Continental European jurisdictions may be included in future issues.

This issue of *Recent Legislative and Judicial Developments in Continental Europe Affecting the Casualty Insurance Industry* covers the period September 2010 to May 2011.

## 1

# Update on Legal Issues Regarding the Absolute Limitation Period for Insurance Claims in Austria

## Background

In a recent judgment dated September 1, 2010, the Austrian Supreme Court (Österreichischer Oberster Gerichtshof, (OGH)) ruled that in “timely stepped” insurance cases the insured is at least obligated to file a declaratory lawsuit in time to avoid a limitation of the insurance claim at hand.

The decision at issue involved a liability insurance agreement. Due to the occurrence of an insured event, the insured applied for insurance coverage with the insurance company on an unreserved basis, in time and in full compliance with the provisions of the insurance contract.

However, according to the ruling, if an injured third party files a claim against the insured party, even if only for a part of the damage, and the insured party is aware that the injured party might file a claim for the rest of the damage in the future, the insured party must file a declaratory lawsuit against the insurance company. This will avoid any limitation because the insurance claim was caused by one single insured event.

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

The claimant was the operator of a gas station and was the insured party of a public liability insurance contract. The contamination of earth and water resulting from oil tanks was an insured event under the relevant policy.

In May 1994, the claimant discovered some contamination and informed the competent public authority thereof on December 13, 1994. In addition, the insurance company was informed about the contamination and the duty of the claimant to clean it up. With official notification dated June 13, 1995, the competent public authority instructed the claimant to clean up the contamination and remove the relevant tank.

The polluted area was partly improved and partly cleaned up. Subsequently, the claimant’s insurance company paid for most of the clean-up invoices dated in 1995. Both parties – the insurance company and the claimant – had knowledge of the fact that pollution remained an issue in the area.

Nine years later, in 2006, the claimant sold the property and agreed to cover costs related to removing the remaining contamination. Because of a new instruction from the competent public authority, certain decontamination measures were undertaken in 2006 and 2007. In that respect, the claimant lodged a claim with the insurance company in 2006. However, the insurance company denied coverage under the policy based on the argument of limitation of the claim.

<sup>1</sup> OGH September 1, 2010, 7 Ob 91/10y.

## Underlying Austrian Legal Background

With regard to the absolute limitation period of insurance claims, Section 12 para. 2 of the Austrian Insurance Contract Act (Versicherungsvertragsgesetz, VersVG) provides that if an insurance company has been notified of an insured event, any limitation does not occur until receipt of a written reasonable denial of coverage by the insurance company. In addition, Section 12 para. 2 VersVG stipulates that after 10 years insurance claims are time-barred in any case.

In summary, 10 years is the absolute limitation period set out in the VersVG. In addition to this absolute limitation period, the VersVG sets out a general three-year limitation period. It includes a rather short period of only one year for filing a lawsuit after the insurance company justifies its denial of coverage towards the insured in writing and informs the insured party of such legal consequence (Cf Section 12 para. 3 VersVG).

## Decision of the Supreme Court

### Initial Legal Remarks in the Ruling

Initially, the Supreme Court noted that the decontamination measures from the insurance coverage at hand are included and that the instruction of the public authority dated June 13, 1995, can be qualified as a claim by a third party under third-party liability insurance law principles.

Since the legal question at hand was whether the claim for a cost exemption for the decontamination measures ordered by the authority in December 2006 is time-barred or not, the Austrian Supreme Court initially summarized the limitation scheme of the VersVG as follows:

- According to Section 12 para. 1 VersVG, insurance claims become time-barred within three years starting from the time at which one's right can be exercised for the first time. With regard to third-party liability insurance, the time at which a third party files its claim against the insured is relevant.
- According to Section 12 para. 2 VersVG, the notification of the insurance company about the insured event leads to the suspension of the limitation period until the insured receives a written reasonable decision from the insurance company about coverage.
- If the insurance company does not substantiate its decision sufficiently, makes no decision at all or does not issue a written decision, the suspension of the limitation period is still considered active. However, a suspension does not create an endless limitation period; claims are time-barred after 10 years in any case.

### Ruling with Regard to the Facts at Hand

With regard to the circumstances at hand, the Austrian Supreme Court ruled that the claimant's first notification to the insurance company years ago already qualifies as a notification leading to the suspension of the limitation period according to Section 12 para. 2 VersVG.

The official instruction by the competent public authority dated June 13, 1995, represents a third-party claim and, therefore, caused the maturity of the insurance claim. Since the notification of the insurance company at hand took place before the official instruction by the competent public authority, the start of the limitation period was avoided.

According to the Supreme Court, the fact that the insurance company paid for the invoices dated 1995 is not a decision according to Section 12 para. 2 VersVG. Rather, the insurance company at no time issued a decision in writing. Therefore, the limitation period of 10 years applies starting from the time of maturity of the insurance claim.

As mentioned, the Supreme Court ruled that maturity was caused by the official instruction of the competent public authority, more precisely at the time of its legal effectiveness, which the court set at October 17, 1995, at the latest. Whereas, the limitation period of 10 years ended on October 17, 2005.

The fact that the competent public authority passed a second notification instruction for the claimant to take further clean-up measures does not cause the start of a second limitation period. Moreover, since it was obvious to the claimant that the injured party might submit a claim for the rest of the damage in the future, the claimant was obligated to file a declaratory lawsuit within the absolute limitation period of 10 years in order to prevent the insurance claims from becoming time-barred.

## Implications

The decision at hand reminds those handling insurance claims of the importance of statutes of limitation. In particular, with respect to insurance law, correctly identifying the time at which a limitation period starts and ends can be a complicated matter. Therefore, we are all well advised to keep an eye on monitoring the development of an insured event.

Furthermore, Austrian insurance law sets out two different limitation periods (i.e., three and 10 years, respectively). It specifies the notification of the insurer as a reason for suspending the limitation period until the written decision has been issued, and a one-year period for filing a lawsuit after the insurance company justifies its denial of coverage in writing. Finally, the maturity of the insurance claim is relevant for the limitation period, which is set out in Section 11 VersVG and is often not easy to determine on its own, given the various forms of insurance contracts and claims.

In conclusion, the decision at hand meaningfully illustrates that the Austrian Supreme Court – allegedly for reasons of legal certainty – solves limitation cases quite formally and without any room for interpretation.

## 2

## European Free Trade Association Court Defines “Durable Media” in Directive on Insurance Mediation

On January 27, 2010, the European Free Trade Association (EFTA) Court handed down a judgment<sup>2</sup> defining and explaining the criteria by which Internet sites can qualify as “durable medium” under Directive 2002/92/EC of the European Parliament and the Council on Insurance Mediation.

### Directive 2002/92/EC on Insurance Mediation

The Directive specifies rules for the taking up and pursuit of insurance and reinsurance mediation activities by natural and legal persons established in a European Union (EU) member state or who wish to become established in one. Therefore, the Directive is relevant to intermediaries of liability insurance and liability reinsurance, as well as other kinds of insurance.

Enacted to allow insurance intermediaries to establish themselves and provide services in the EU, the Directive also guarantees a high level of protection for customers. The Directive introduces a registration system for all insurance intermediaries in their member states of origin and sets forth registration requirements concerning intermediaries’ professionalism and competence, including their knowledge level and reputation.

Moreover, the intermediaries must be covered by professional indemnity insurance for professional negligence and have sufficient financial capacity to handle customers’ money. The Directive allows intermediaries to carry out their business in member states other than their home countries or to open a branch in another EU member state.

Articles 12 and 13 of the Directive specify extensive and specific information requirements for insurance intermediaries. All information must be provided to customers on paper or any other “durable medium” available and accessible to the customer in a clear and accurate manner. The information must be comprehensible to the customer and in an official language of the member state where the commitment is taking place or in any other language agreed upon by the parties.

Article 2 (12) of the Directive defines the term “durable media” as follows:

“ ‘durable medium’ means any instrument which enables the customer to store information addressed personally to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored.

<sup>2</sup> Judgment of the EFTA Court of January 27, 2010; Case E-4/09; *Inconsult Anstalt v. the Financial Market Authority (Finanzaufsicht)*.

In particular, durable medium covers floppy disks, CD-ROMs, DVDs and hard drives of personal computers on which electronic mail is stored. It excludes Internet sites, unless such sites meet the criteria specified in the first paragraph.”

## The Judgment

Following a request by the Appeals Commission of the Financial Market Authority of Liechtenstein, the EFTA Court further defined and elaborated on this definition. The case concerned Inconsult Anstalt, a private entity based in Liechtenstein, and the Financial Market Authority of Liechtenstein. Inconsult contested an order issued by the Financial Market Authority whereby the Authority required Inconsult to comply with the information obligations of the Directive, which are also incorporated into Liechtenstein law. Inconsult offered the required information on a website and claimed that this met the requirements as stated in the Directive and Liechtenstein legislation.

In its advisory opinion, the court stated that, for the purposes of consumer protection, the criteria as laid down in the Directive are minimum obligations that must be fulfilled. The court then specified the following three criteria:

- *The instrument must enable the customer to store information addressed personally to the customer.*

The court held that this term includes information such as the address of the insurance intermediary, which remains the same regardless of whether it is published on a website freely accessible to the general public or sent only to a specific customer. In other words, “information addressed personally” to the customer need not be confidential.

The issue of whether information published on a website freely accessible to the general public may qualify as information “personally addressed” to a specific customer is linked to another element of Article 2(12) of the Directive, i.e., that the customer must be able to store this information. The court found it difficult to conceive of a website that allows a customer to reproduce the unchanged information without first receiving some kind of personalized message containing or referring to the information in question.

The court concluded that in order to qualify as a “durable medium,” a website must enable the customer to store the information listed in Article 12 of the Directive.

- *Accessibility for a period of time adequate to the purposes of the information.*

The court found that, in order to qualify as a “durable medium,” an Internet site must enable the customer to store the information required by the Directive in a way that makes it accessible for as long as it is relevant to the customer. This will protect the customer’s interests in relations with the insurance intermediary. This period may cover the time during which contractual negotiations were conducted even if they did not result in completion of an insurance contract, the period during which an insurance contract is in force and, to the extent necessary, the period after such a contract has lapsed.

■ *Unchanged reproduction of the information stored.*

The court noted that the protection of consumers concluding insurance contracts via insurance intermediaries is one of the key objectives of the Directive. This means, inter alia, that the information provided must be stored in a way that makes it impossible for the insurance intermediary to change it unilaterally. There may be several technical methods available for guaranteeing unchanged reproduction, and the insurance intermediary may decide which one to use in each case.

The court differentiates between three types of websites. There are “ordinary” websites that, generally, may be freely changed by the website proprietor. There are “sophisticated” websites, which either act as a portal for the provision of information on another instrument, which, in turn, may qualify as a “durable medium,” for example, storage of an e-mail attachment on the customer’s computer. Or, those “sophisticated” websites that may themselves constitute “durable media.”

Whereas an “ordinary” website can never be regarded as “durable medium,” the “sophisticated” websites may qualify as such, depending on the kind of website.

One kind of “sophisticated” website acts as a portal for the provision of information. In order to communicate information on a “durable medium,” it must contain features that would lead the customer almost certainly to either secure the information on paper or store it on another “durable medium,” such as the customer’s own hard disk drive.

The other alternative for a “sophisticated” website contains a secure storage area for individual users that is accessible by a user code and password. Provided that this method also excludes any possibility for the insurance intermediary to change the information, it can be compared to the user’s own hard disk drive and, therefore, fulfills the requirement of a “durable medium.”

Finally, the court held that for an Internet site to qualify as a “durable medium,” it is irrelevant whether the customer has expressly consented to the provision of information through the Internet.

## **The European Economic Area and the EFTA Court**

The European Economic Area (EEA) consists of the European Union, Norway, Iceland and Liechtenstein. It extends the Internal Market of the European Union to the EEA states, thus creating a customs union larger than that of the EU. The EEA covers 30 states where residents enjoy the same rights of free movement of goods, services, persons and capital.

As with the EU member states, the EEA states must implement EU legislation pertaining to the internal market, including the Directive on Insurance Mediation. Disputes in the EEA states concerning such legislation are resolved by the European Court of Justice (ECJ) where EU member states are also concerned, or by the EFTA Court, where only EEA States are concerned. The EFTA Court may, thus, be called on to interpret EU directives.

While the judgments of the EFTA Court do not bind the ECJ, the interpretations of the EFTA Court exert a certain influence on the ECJ, which has previously followed the EFTA Court's interpretations. Therefore, they are of interest to insurance and reinsurance companies established in the EU.

## Conclusion

This case gave the EFTA Court the opportunity to specify the term "durable media" in relation to Internet sites under Article 2(12) of Directive 2002/92/EC on Insurance Mediation. It provides additional guidelines, especially on the period of time the information must be available, and describes categories of websites, some of which qualify as "durable medium." This provides clarity for insurance and reinsurance intermediaries offering contracts through the Internet.

The guidance is fairly flexible and allows insurance intermediaries to use websites as a "durable medium" and allows for different website designs. The court has struck a good balance by maintaining consumer protection and allowing insurance intermediaries to remain flexible as they adapt to market and customer needs.

## 3

## France: Arbitration Agreement or Expert Determination Clause?

Differentiating between a proper arbitration agreement and an expert determination clause is often difficult. The difference is significant since the decision rendered as a result of arbitration proceedings is binding and subject to very limited review. However, the decision rendered as a result of expert determination proceedings leaves open the possibility of litigation before a court in case of disagreement on the expert's findings.

The difference between arbitration clauses and other types of dispute resolution clauses (in particular expert determination clauses) has been subject to a number of disputes. Courts and scholars have identified criteria to differentiate between those two types of clauses (Ch. Jarrosson, "Les frontières de l'arbitrage", *Rev. arb.* 2001.5; P. Duprey, "Arbitrage et expertise: où sont les frontières", *Gaz. Pal.*, 26 Apr. 2006, p. 967).

The very title of the clause, "clause d'arbitrage," or "arbitration clause," is not decisive. Courts are not bound by the wording used by the parties and must analyze the nature of the mission conferred on the third party to determine the qualification of the clause (French Supreme Ct, 31 March 1862; Paris Ct App., 12 Jan. 1979; French Supreme Court, 2nd civ. div., 7 Nov. 1974; 1st civ. div., 26 Oct. 1976, *Bull. civ. I*, No 305). The court may nevertheless take into account the wording to determine the intention of the parties (Lyon Ct App., 12 Oct. 1953; Paris Ct First Instance, 22 Apr. 1985). The Court may also have a tendency not to disqualify clauses entitled "arbitration," but to qualify clauses entitled expert determination as arbitration agreements (J-Cl. Fasc., 1005 § 71, *Rev. arb.* 1990.717; Paris Ct App., 24 Oct. 1991, *Joyaux v Gan*).

The criteria that are usually relevant in differentiating the two types of agreements are:

- First criterion: A **dispute with diverging positions must exist**. This criterion is not sufficient by itself. The existence of a legal dispute is a condition for the qualification of the clause as an arbitration clause because the referral to a third party in the absence of a dispute is not considered to be a reference to arbitration. However, a dispute can be submitted to an expert for decision.
- Second criterion: A clause can only be qualified as an arbitration clause if the parties vest the third party with the power to render a decision that is **binding upon them**. If the parties ask for the intervention of the third party without conferring the power to render a binding decision, then the clause is not an arbitration clause.
- Third criterion: The **nature of the mission conferred on the third party must be ascertained**. As a general rule, the arbitrator must give a decision on a legal dispute as opposed to a purely technical analysis. The arbitrator goes beyond a mere analysis of facts and provides the legal consequences of a given actual situation. On the contrary, expert determination proceedings generally comprise the acquisition of a factual and technical analysis from a third party and presentation of the result in a written report. Hence, whereas third parties empowered to assess the amount of damage suffered as a result of a loss are experts (French Supreme Court, 21 Feb. 1887, DP 1887.1.297) – those

who have, in addition, received the mission to render a decision to which the parties must abide, are arbitrators (Paris Ct First Instance, 25 Jan. 1984, Rev. arb. 1984.376, cited in B. Moreau, *Arbitrage en droit interne*, Rép. civ. Dalloz, para. 10, Apr. 2008).

- Fourth criterion: The decision of the third party must result from a **procedure** that meets specific demands, such as the observance of a due process. The fact that the clause refers to the appointment of a **third “expert”** in case of disagreement between the two party-appointed experts has been seen as indicating that the clause is an arbitration clause (Versailles Ct App., 17 Jan. 1979, RGAT 1980.361).

French courts are very careful to not hinder the parties’ intention to have recourse to arbitration and **often favor the qualification as arbitration**. Charles Jarrosson, a leading French Professor on arbitration, wrote: “Unless it appears from the interpretation of the parties’ intent that the parties wanted to have recourse to something other than arbitration, one should favor the qualification as arbitration as frequently as possible, not only because its regime is well defined and offers serious warranties to the parties, but also because arbitration often corresponds to what the parties intended.” According to this author, if there is any doubt, the qualification as arbitration clause should be preferable.

However, the fact that an insurance policy also contains a **choice-of-forum clause** could be used to interpret the intention of the parties and to conclude that the clause provided in another part of the contract is a mere expert determination clause since the parties have expressed their intention to submit their disputes to a national court. As a general matter, under French law, an arbitration agreement would prevail over a choice-of-forum clause (French Supreme Ct, 2nd civ. div., 18 Dec. 2003, No 02-13410, Gaz. Pal., 22 May 2004, No 143, p. 20).

The expert determination clause is binding in the sense that it precludes any legal action before a court as long as the party-appointed experts’ opinions are not delivered (French Supreme Court, 19 Jan. 1942; Paris Ct App., 4 March 1981). It has been held that the expert determination clause precludes the recourse to judicial appraisal as long as the

party-appointed experts have not passed their opinions (French Supreme Court, 1st civ. div., 26 Apr. 1978; on the contrary: Paris Ct App. 13 March 1978, *La Protectrice*).

If the parties want to challenge the decision of the party-appointed experts, they have to demonstrate “manifest errors” in the finding of the experts (J. Kullmann [dir.], *Lamy Assurances* 2008, para. 4702). Courts and tribunals have been consistent in rejecting objections against party-appointed experts’ opinions, when the parties, seeking to obtain a new expertise, did not articulate precise arguments demonstrating severe mistakes of the party-appointed experts (French Supreme Ct, 1st civ. div., 10 March 1992, No 90-19.147; French Supreme Ct, 1st civ. div., 29 Apr. 1997, No 94-20.688, RGDA 1997.865). There is, therefore, a presumption that the expert opinion is authoritative.

Before deciding if the parties are bound by the opinion, the courts nevertheless verify whether the expert’s finding is a serious piece of work and whether the opinion is sufficiently detailed (S. Pinguet, *J.-Cl. Resp. civ. Ass.*, 2007, Fasc. 520-20, para. 94). This is in line with the case law prevailing in cases of sales, when the determination of the price is left to a third party. In those cases, the price fixed by the third party is binding on the parties. They can only challenge the price fixed by the expert if they can demonstrate gross negligence or manifest errors by the expert (for example French Supreme Ct, com. div., 6 June 2001, JCP E, 2002, 1292).

## 4

## Decision of the Federal Court of Justice of Germany on Liability for Energy Installations

Some utility supply models are more frequently leading to situations where energy is no longer delivered directly by the producer to the ultimate customer. Rather, the supply is delivered by way of intermediate, smaller, and, as a rule, more efficient networks.

Energy contracting is gaining importance because of rising energy prices and ever-increasing environmental awareness.

However, this development raises issues in liability law, especially when it results in damage between network operators. The Federal Court of Justice of Germany [Bundesgerichtshof] in Karlsruhe recently ruled on such a case.

### The Case<sup>3</sup>

An electric utility company brought an action for damages against its client, particularly from the viewpoint of liability under Section 2 of the German Public Liability Act [Haftpflichtgesetz, HPflG] for damage caused in the delivery of electricity. The client-defendant itself operates an electricity grid controlled through its own switching station.

In March 2006 a short circuit occurred while the switching station was connected because someone had neglected to remove the grounding of the switching station first. The operating error resulted in an extremely heavy draw of electricity from the plaintiff's grid, leading to a heavy short-circuit current at one of the plaintiff's transformer substations. The heavy current triggered and destroyed a circuit breaker. The plaintiff demanded compensation from the defendant for the cost of repairing the circuit breaker in the amount of EUR4,511.65.

### Legal Background

Because of the special risks to the public associated with operating such a network, each network operator fundamentally bears liability for the effects and condition of its networks, irrespective of fault.

Under Section 2(1) sentence 1 of the Public Liability Act, the owner of an installation is liable for bodily injury or property damage caused by the effects of electricity, gases, vapors or liquids emitted from a system of power lines or pipelines.

In addition to liability for effects, Section 2(1) sentence 2 of the Public Liability Act also indicates strict liability for the condition of the installation irrespective of fault – in other words, for damage caused without the effects of electricity, gases, vapors or liquids, unless the installation was in proper condition (known as “liability for condition”).

<sup>3</sup> Federal Court of Justice of Germany, June 22, 2010 – VI ZR 226/09.

## The Decision

The local court upheld the plaintiff's claim, and the appellate court overturned that decision. The Supreme Court appeal, filed by leave of the appellate court, was not successful.

The Federal Court of Justice of Germany fundamentally viewed the defendant's switching station as an installation within the meaning of Section 2 of the Public Liability Act, finding that it was intended and suitable both to transport and to deliver electricity to the defendant's grid, which was used for commercial purposes. Nevertheless, taken by itself, the transportation and delivery function does not yet fall within the scope of protection of the law.

The court also found that the defendant would be subject to liability for effects only in the event of damage that was also caused in the performance of the transportation and delivery function. However, the court found this was not the case here. The flow of energy that resulted in damage to the plaintiff's circuit breaker did not derive from the defendant's switching station. The defendant's installation merely demanded an extremely large amount of electricity from the plaintiff's grid. Although this resulted in damage, it does not yet touch upon the law's protective intent.

Additionally, liability for condition under Section 2(1) sentence 2 of the Public Liability Act cannot come under consideration. While the court conceded that a device that causes a short circuit due to faulty grounding is not in proper condition, it found that liability for condition also requires a context of imputation adequate to the law's protective intent. This context exists, the court held, if the damage is caused by the mechanical action of the installation and specifically is not based on the effect of the electricity. In the present case, the court said, the damage occurred precisely because the defendant's installation could not perform its function in accepting the electricity delivered by the plaintiff because of the short circuit. In the court's view, a mechanical effect was therefore to be denied.

Moreover, as the court held, it should be noted that liability for an installation under Section 2 of the Public Liability Act is not intended to govern the liability relationship between energy suppliers and their clients.

Liability claims for fault under contract and/or owing to tort were rejected because of lack of fault on the defendant's part. The installation previously had been accepted by the plaintiff, and the court therefore found that the defendant could not have foreseen that the damage would occur.

Finally, the court also rejected claims based on agency of necessity. First, the parties had an energy supply contract that governed their mutual obligations, particularly the client's obligation to pay. This compensation covers all ongoing safety measures in the grid that benefit the client. Therefore, to this extent, agency of necessity is subsidiary.

Second, there is no outside transaction because it is solely the plaintiff's affair to place and maintain itself in a state of ability to perform.

## Summary

Even within a system of strict liability, the constituent elements for liability for effects and liability for condition under Section 2 of the Public Liability Act are decidedly strict provisions of liability law, which appear justified because of the elevated danger such installations pose to the public. Thus, for example, for a similar strict liability of a property owner under Section 836 of the German Civil Code (BGB), the claimant must additionally show that the building situated on the property was not in proper condition. By contrast, an absence of proper condition is presumed in the context of liability for condition under Section 2(1) sentence 2 of the Public Liability Act, and an absence of proper condition is not even required at all among the constituent elements of liability for effects.

Despite these strict rules under liability law, it is not surprising that the plaintiff's action ultimately failed, particularly because the claims would have had to be denied anyway on account of the exceptional situation under Section 2(3)(2) of the Public Liability Act. The fact that the plaintiff nevertheless persisted in the suit may be understandable in light of the fact that the plaintiff itself is an operator of an installation within the meaning of Section 2 of the Public Liability Act. Thus the plaintiff surely would not find the court's commentary on content and partial restrictions pertaining to the context of functions and the protective intent of Section 2 of the Public Liability Act entirely unwarranted. On some occasion in the very near future, the plaintiff itself might find itself exposed to claims under Section 2 of the Public Liability Act. Moreover, because of the minimal value at issue, the plaintiff was exposed to only a low litigation risk.

By contrast, the court's comments about the applicability of the rule between a power utility and the customer would be undesirable for the plaintiff. Moreover, in contrast to the court's examination of content, its rejection of applicability creates misgivings.

The inapplicability of the rule between an energy supplier and a customer is supported in particular by the historical interpretation of the rule. The protective intent of the previous rule – under Section 1a of the Reich Public Liability Act of 1943 – was supposedly to protect the public from the special risks associated with the operation of such installations. In particular, the often awkward position of the injured party in the bringing of proof was supposed to be improved. For that reason, among others, there was fundamentally only a unilateral liability on the part of the energy supplier.

However, the rule was not intended to place the energy supplier at a general disadvantage. The purpose of the rule is only to place the customer in a better position. Moreover, legislators at the time presumably did not take into account the situation of downstream grid operators. For that reason, it is not understandable why the plaintiff – merely because it is itself the operator of an installation within the meaning of Section 2 of the Public Liability Act – should not be entitled to derive claims under Section 2 of the Public Liability Act. This is the case even when the opponent, for its part, is a commercial installation operator within the meaning of Section 2 of the Public Liability Act.

In contrast to the plaintiff, the downstream power supplier defendant will certainly find the rejection of the applicability of Section 2 of the Public Liability Act welcome, and given the ecological and economic importance of such small downstream grid operators, the finding will be appreciated. But it appears rather doubtful that this decision will really have any effects with regard to applicability, given the background of the exceptional situations under Section 2(3) of the Public Liability Act.

Finally, in any case, one must expect that in the future the large power suppliers upstream will attempt to impose similarly strict liability provisions, at least by contract. At that point, it will have to be examined in further detail whether such liability clauses will hold up in a court of law.

## 5

## Claims-Made Insurance Policies: Recent Developments in Italian Court Rulings

In recent years insurance companies have most commonly offered professional civil liability insurance through policies based on a *claims-made* system, rather than on a *loss occurrence* one. While the loss occurrence system was used more frequently in the past, claims-made policies now are dominant in the fields of professional indemnity, medical malpractice, directors and officers and, of course, product liability insurance.

The economic reasons provided by insurers justifying such a substantial change are quite understandable: the claims-made system allows insurers to cancel/recalculate/reallocate the reserves every year, whereas with loss occurrence policies, insurers are obliged to keep and manage reserves for quite a long time (five to ten years) after the occurrence of the harmful event.

However, the introduction of claims-made policies in Italy may be problematic because the system does not follow specific features of civil liability insurance as provided in the Italian Civil Code.

### Article 1917 of the Italian Civil Code

The first paragraph of Article 1917 of the Italian Civil Code states: “*In liability insurance the insurer is bound to indemnify the insured for the damages which the latter must pay to a third party as a result of the events occurred during the period of insurance and depending on the liability provided by the contract. Damages deriving from fraudulent acts are excluded...*” The wording of this provision supports the fact that the legal framework for the liability insurance contract is designed on a loss occurrence basis. Therefore, insurance contracts based on a different scheme imply a derogation of the Civil Code’s basic framework.

As a general principle, standard contract clauses that provide a limitation to the range of the statutory liability of the offering party are deemed to be unfair. Therefore, they are not valid unless they are specifically approved by the client with another signature in addition to the signature for general conditions.

This is the reasoning that underlies the Supreme Court ruling n.5264/2005, in which the judges affirmed the following principles:

- Claims-made policies are special contracts of third party liability insurance that do not exactly fall within the scope of Article 1917 of Italian Civil Code (which defines the contract of third party liability insurance). Indeed, claims-made contracts cover the consequences of the claim, whereas Article 1917 c.c. refers to a loss occurrence coverage.
- Although not typical, claims-made policies are deemed to be legitimate, since they fulfill some genuine needs arising from the market.

- Notwithstanding the above, the scope of claims-made coverage is somehow less broad than that described in Article 1917 c.c. (which should be considered a minimum requirement). As a result, the Supreme Court ruled that claims-made clauses are to be considered “unfair” and therefore null and void, unless they are not expressly signed for acceptance pursuant to Articles 1341 and 1342 c.c. (Italian discipline of unfair contract terms), in addition to the normal signing of the contract.

In summary, according to the rulings of the Supreme Court, claims-made clauses are potentially unfair, but they are valid if signed twice for specific acceptance.

## Other Opinions

This position has not always been shared by the courts of the merit (Tribunale di Roma, 1.8.2006; Tribunale di Roma 5.1.2007). These courts issued some drastic rulings that have not been appealed as far as we know, though the content in these rulings is quite revolutionary.

The opinion of these judges is that claims-made insurance, through which an insurance company undertakes to cover damages that have already occurred prior to the inception of the insurance and before the claim is made, is to be considered null and void because the risk has already happened. The only case where it is allowed to insure a past risk is “putative risk insurance,” which is provided for marine claims only. On the contrary, a recent court ruling (Tribunale di Milano 18.3.2010) states the full validity of the so-called “pure” claims-made policies.

In simple terms, claims-made insurance is considered valid as long as all losses deriving from acts or omissions that took place before the inception of the contract are covered, regardless of how far in the past such events occurred. In this situation the Court of Milan found that there is no harm in the fact that damaging events that happened during the insurance period will not be covered unless the claim is made in the same period, since the insured can benefit from the insurance coverage for the past events that are not yet time-barred.

Such policies could be considered unfair or invalid only in cases where the policy features a short period of retroactivity that does not cover the moment in which the harmful event took place.

This ruling does not take into consideration the fact that, in any case, insurers do not normally cover claims related to events that the insured knew about, or ought to have known about, before the execution of the contract.

## Conclusion

In Italy the validity of claims-made clauses is still under scrutiny. Currently, judges have taken the following three positions:

- Claims-made clauses are deemed to be unfair contract terms. Therefore, they are valid only if they are specifically accepted in writing (double signature) pursuant to Articles 1341 and 1342 c.c.

- Claims-made clauses are null and void since they tend to cover putative risks.
- Claims-made clauses are valid if they are “pure claim made.” Clauses where claims refer to harmful acts committed prior to the inception of the policy are covered without any limit of retroactivity.

Some have the view that claims-made clauses are deemed to be valid under Italian law, providing the clause determining the subject matter insured states in clear terms that the policy covers the consequences of the claims-made in a certain period of time and not liabilities arising from the commission of certain acts or omission in a given period of time. The occurrence of this situation is described in Article 1917 c.c.

In the former case, the clause would not be considered unfair, pursuant to Articles 1341 and 1342 c.c., since it is not a question of limiting the range of liability already undertaken by the insurance company, but rather of specifying the exact object of the coverage. Of course, as a consequence the amount of the premium must also be proportioned according to the probability that a claim is actually made in the insured period.

Obviously, the position proposed by the Supreme Court holds the most weight at present, although the principle of ‘stare decisis’ is not formally recognized by Italian law. Nonetheless, given the fluctuation of the solutions provided by the courts of the merit, the Supreme Court could provide insurers and other stakeholders with more certainty on this important issue by focusing on the matter in its plenary session.

## 6

## Statute of Limitation and the Obligation to Complain About Professional Legal Malpractice in the Netherlands<sup>4</sup>

*It is a lawyer's duty to act with integrity, honesty and good faith in all dealings with, or on behalf of, his/her clients.*

### Overview of Legal Malpractice

Legal malpractice occurs when a lawyer's misconduct or failure to use adequate level of care, skill or diligence in the performance of duties causes damage to the lawyer's client. There is an established standard of conduct in the Netherlands by which lawyers must abide. A breach in this established standard of conduct can be defined as legal malpractice. Possible causes for legal malpractice may include failure to file a claim within the statute of limitation period, failure to serve a writ or attachment on a third party, failure to file necessary legal documents or settling a case without a client's full consent.

This issue of legal malpractice raises a number of questions. Where do clients stand when confronted with such a situation? Is it required that clients are aware that their lawyers have committed legal malpractice in order to complain? Are clients required to have legal knowledge to bring claims against lawyers? What is the statute of limitation for clients to start claims against lawyers? Are clients obligated to voice dissatisfaction to their lawyers?

### Statute of Limitation

Numerous legal disputes relating to the statute of limitation concern the reduced limitation period of five years in respect to claim for damages regulated in Article 3:310 of the Dutch Civil Code (DCC).<sup>5</sup> This reduced period of five years begins on the day following the day on which the aggrieved party became aware of the extent of the damage suffered and the identification of the party liable for it. A person wanting to invoke discharge by limitation based on Article 3:310 DCC against an aggrieved party must prove that the aggrieved party was aware of the extent of the damage suffered and the person liable for the damage.

According to settled case law of the Supreme Court, it is not important what the aggrieved party should have known, but rather when the aggrieved party became aware of the extent of the damage suffered. The term "became aware" must be interpreted as a subjective criterion. Therefore, in the event that an aggrieved party disputes awareness of the damage suffered and who is liable, the court may infer from facts and circumstances provided at trial whether the aggrieved party indeed was aware of the extent of the damage suffered.<sup>6</sup>

<sup>4</sup> This article is limited to the professional malpractice of lawyers.

<sup>5</sup> The regular statute of limitation period for legal claims in the Netherlands is 20 years (Article 3:306 DCC), but considering that different sections of the DCC apply lesser periods for statutes of limitation, it can be said that the 20-year period has become an exception.

<sup>6</sup> HR 6 April 2001 (Vellekoop/ Wilton Feijenoord), NJ 2002/383; LJN: AB0900, C99/158HR.

As a result, the mere suspicion of the existence of damage is insufficient to amount to actual awareness, and aggrieved parties are not required to have absolute certainty that damage caused was due to inadequate or insufficient performance of their lawyers. The moment when one is able to initiate a legal action for compensation may therefore differ from the moment of actual awareness of the damage and the identity of the person liable for the damage. Hence, the limitation period in article 3:310 DCC begins on the day following that day on which the aggrieved party is actually able to bring an action for compensation against the lawyer for the damage suffered.<sup>7</sup>

## Obligation to Complain

Under Dutch law, a person receiving inadequate or insufficient performance must complain (“protest”) within a reasonable period (“binnen bekwame tijd”). The obligation to complain is regulated in Article 6:89 DCC and begins the moment the complainant becomes aware or should have been aware of the inadequate or insufficient performance. There is no prescribed form that a complainant must use to protest. It is also not required that the complainant sever further relationship with the counterparty.<sup>8</sup>

Because there is no general consensus or definition by law on what “a reasonable period” entails, the circumstances of each case will determine what may be considered a reasonable period. However, the basic principle under Dutch law is that immediate action is of the essence when it comes to protesting inadequate or insufficient performance.<sup>9</sup>

A complainant will lose all rights relating to an inadequate or insufficient performance by failing to complain within a reasonable period. This severe sanction is justified by the legislature, which makes the point that failure of the complainant to comply with the obligation to complain will, in the interest of the counterparty, put an end to any further discussion of whether the counterparty acted in accordance with the agreement regarding performance.<sup>10</sup>

## Conclusion

According to Article 3:310 DCC, clients have a limitation period of five years to initiate legal action for compensation against their lawyers for damages suffered. This period begins on the day following that day on which the client actually becomes aware of the damage and the fact that the lawyer is responsible for it. Clients are not required to know

whether their lawyers committed legal malpractice in order to initiate legal action or to complain, nor do they need to have legal knowledge to do so. However, clients do have an obligation to immediately complain to their lawyers in the event that they are dissatisfied with their performance – otherwise clients may risk losing all rights regarding their lawyers’ inadequate performance.

<sup>7</sup> HR 20 Februari 2004, NJ 2006/113; LJN: AN8903, CO2/288HR.

<sup>8</sup> HR 11 Juni 2010; NJ 2010/331; LJN: BL8297, 08/04748.

<sup>9</sup> Parl. Gesch. Inv. Boek 7, blz. 148.

<sup>10</sup> MvA II, Parl. Gesch. Boek 7, p. 151.

## 7

# From Communist Economy to Full European Union Membership: The Insurance Law Perspective in Poland

## Introduction

Polish civil law, including the law of obligations and tort law, belongs to the continental law systems, as it has drawn inspiration from German, French and Swiss law. The Polish civil law system underwent a rather radical transformation after the political changes and the abolishment of the socialist system in 1989.

However, these changes did not result in the introduction of a completely new civil code. (The code of 1964 was compiled by the civil law practitioners who had received their education during the pre-communist era, so it was never fashioned on the classical Soviet solutions.) Instead, the changes in civil law were due to the elimination of the old epoch's relics and the introduction of a series of amendments and additional acts.

In relation to Poland's accession to the European Union, a number of additional regulations that impacted civil law relations were introduced, including those in the area of consumer protection.

## Insurance and Reinsurance in Poland: General Issues

In turn, Polish law regulates the issues related to insurance activities (including reinsurance) by the Act on Insurance Activity of May 22, 2003 (Journal of Laws of 2010, no. 11, item 66) and is fully compliant with the corresponding European standards in this scope.

The insurance activity in Poland, as in the majority of European countries, concentrates on personal insurance (including life insurance, marriage insurance, birth insurance, annuity insurance, accident insurance and sickness insurance) and property insurance (including motor insurance, goods-in-transit insurance, insurance against damages caused by natural forces, civil liability – including various professionals – and financial risk insurance).

However, until recently (June 2009), Polish law had no regulation whatsoever related to the scope of reinsurance activity. This changed on June 18, 2009, when an amendment on the Act of Insurance Activity and certain other acts became effective. The amendment adjusted Polish law to the requirements of European law through the implementation of "Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC". Until the amendment became effective there was no basis for recognizing reinsurance as an insurance activity.

In addition to the mandatory implementation of Directive 2005/68/EC, in keeping with the possibility provided by Annex no. I to this directive, the Polish legislature provided for a specific legal form that is “a mutual reinsurance society” for the purpose of conducting reinsurance activities. Due to the fact that the provisions regarding reinsurance activity and its statutory form are relatively new, we have yet to see any significant publications dealing with these issues. There is not any substantial case law from the courts in this area.

The significance of property and personal insurance increases with economic development, and the advantages of diverse insurance forms are becoming increasingly known in the marketplace. During several decades of the so-called socialist system in Poland, the insurance market did not exist in practice – only state insurance institutions were allowed to operate, and the main focus of their operations was communication insurance (which was mandatory in regards to civil liability insurance) and transport insurance. After 1990, in the free market economy, private insurance entities and institutions began offering diversified types of insurance, both in terms of conditions as well as prices.

### **Regulatory Changes in the State’s Compensatory Liability: A Significant Impact on the Insurance Market**

The increasing significance of insurance in Poland, especially property insurance, is associated with the momentous changes in the regulation of the State’s compensatory liability for damages inflicted in the performance of a variety of tasks. Over the last half century, specific acts and the 1964 Civil Code have set out an extraordinarily vast scope for the State’s tortious liability for damages inflicted by State officers in their activities.

In the communist state, the state monopolized practically all instruments of power, administration and economy. As a consequence, practically all employees were “officers of the State” because the State and its agencies were the only employers, with the exception of individual farmers. Hence, the officers for whom the State was held liable were not only those employed directly in government positions, but also doctors, teachers, municipal services employees and others.

Tortious compensatory liability was, and is still, based on the principle of full compensation (Article 361 of the Civil Code), extending to the loss and to lost profits. The State Treasury (the State as a civil law entity) was no doubt a solvent entity – encumbering it with this liability was broader than it would have been in the case of insurance, since it extended the burden of damages to a large number of citizens.

With the new Constitution going into effect in 1997, Article 77 provided that the State be held fully liable for damages inflicted by unlawful actions in the exercise of public authority. The constitutional regulation and case law of the Constitutional Tribunal based on this regulation forced the amendment of the provisions on tortious liability of the State Treasury. The Act of June 17, 2004 changed the then current wording of Articles 417-419 of the Civil Code, adjusting the regulation included in the Civil Code to the provisions of the Constitution.

According to the present regulation, the State Treasury or a territorial government unit is held liable for damages inflicted by an unlawful action or desistance in the exercise of public authority. Admittedly, the notion of “acts of public authority” is understood broadly since they are not solely actions related to the exercise of the state imperium in the strict meaning of the phrase, but also include other acts and actions characteristic of the bodies of public authority.

## Overview of Recent Issues

The role of insurance has been a momentous influence shaping “legal and economic security” in several areas of the community and economic life. The following are examples:

- **Health Services:** As in other European countries, health services institutions of various types that remain in the hands of territorial governments (municipalities) struggle with financial problems that are difficult to overcome. While a number of hospitals, outpatient clinics and inpatient clinics provide good medical assistance for patients, several others do not. Personal damages to patients occur across the board, only with more frequency in weaker institutions, resulting in disability or the loss of health or life. The compensatory liability in these circumstances may be assumed by the health institutions and, in some cases, by doctors.

Admittedly, the compensation awarded has yet to reach the amounts granted to injured patients in such countries as Germany, France or the UK. However, under Polish conditions, the awards are already very high and continue to increase. Moreover, the necessity to pay these awards may endanger the financial stability of a given institution and may ruin a medical practitioner who may be held personally liable for damage.

The personal liability of a doctor is becoming a common phenomenon in the areas of medicine that have been privatized to a large extent, first and foremost, dentistry and cosmetic medicine. Under current circumstances insurance becomes the sole means of providing security to doctors and owners of private health service institutions when turning to the public purse is no longer possible.

- **Floods:** Over the last 10 years, several floods have afflicted vast areas of Poland on a scale that has not been recorded in several decades. Thousands of people lost all of their property in very brief periods of time. People across the country underestimated – some to the point of negligence – the necessity of securing insurance in order to protect their property from the effects of natural disasters. Because of Poland’s past history, many assumed and expected that damages would be compensated by the State.

In fact, a previous prime minister told flood victims that the State would come to their aid as it was able but noted that they “should have purchased insurance policies.” This message may have contributed to his defeat in an election several months later.

In the recent past, people have become only slightly more aware of the need to purchase insurance, particularly in areas frequently threatened by flooding. This was made evident when floods ravaged vast areas of the Wisla (Vistula) Valley in spring 2010. The number of policyholders increased but not to the extent where it would be considered a widespread phenomenon. Moreover, insureds were rather frugal in their insurance outlays and the sums insured were often much lower than the damages sustained as a result of the flood.

The bitterness of the injured parties continued to be aimed at the State, which was charged with the failure to fulfill a number of its public law obligations. The victims thought the State should have done more to prevent flooding or reduce the scope of its disastrous effects.

In 2010 the injured parties were equipped with a new weapon in their legal struggle against the State Treasury. As of July 19, 2010, the Act on Class (Group) Action (The Act) became effective in Poland. The Act allows a class action lawsuit to be filed when at least 10 persons pursue claims of one type, based on the same factual basis (Act on Class Action, Article 1, Item 1), while the amount of claims pursued by each member of the “plaintiff group” shall be made uniform to one sum or to sums for subgroups consisting of at least two people.

The first class action suits have been concerned precisely with the compensatory claims against the State Treasury and the territorial administration units regarding the impact of floods. The insurance and reinsurance sector has been viewing this situation with interest, and the introduction of a new institution may force a reaction on the part of the insurance market.

## **Legal Backyard**

The number of attorneys, legal counsels, notaries, tax advisors and recovery offices that provide broadly understood legal services is increasing. As a result, legal assistance is becoming more readily available and cheaper, even though the quality of such services is frequently insufficient.

The number of clients dissatisfied with the services of lawyers is increasing rapidly, and more and more clients are coming forth with compensatory claims. For this reason, territorial organizations that bring together attorneys, legal counsels and notaries have introduced the obligation to conclude civil liability insurance agreements and specify the minimum of sums insured. Simultaneously, lawyers are encouraged to purchase additional insurance policies for sums exceeding the mandatory level. A noted majority of renowned law offices do this to protect the interests of clients and themselves.

## 8

## Spanish Supreme Court Judgment on Simultaneous Payment and Claims Control Clauses

On April 8, 2010, the Spanish Supreme Court handed down an interesting judgment regarding the simultaneous payment and claims control clauses inserted in the particular conditions of a direct insurance policy and in a reinsurance contract, respectively (JUR\2010\123412).

Reinsurance is lightly regulated in the Insurance Contract Act 1980 (ICA) as a type of casualty insurance. Only three articles deal with reinsurance. Pursuant to the definition contained in Section 77 of ICA, by the contract of reinsurance, the reinsurer undertakes to indemnify the reinsured within the limits set forth in the law and the contract in the amount of the debt that the reinsured has incurred as a consequence of the obligation accepted by the latter in an insurance contract.

Under ICA, the reinsurer is clearly a third party to the insurance contract and thus to the insured. The insured is neither concerned by any arrangements and/or agreements made between the insurer and other insurers/reinsurers (Section 77 of ICA). The insured is not given the ability to sue the reinsurer directly (Section 78 of ICA).

Currently, ICA does not make any reference to simultaneous payment and claims control clauses, nor to others such as cut-through and insolvency clauses that are found in reinsurance contracts, although they have been controversial in the Spanish market.

Spanish case law in reinsurance matters is very scarce. The case law that does exist focuses mainly on the legal autonomy between the underlying insurance contract and the reinsurance contract from the perspective of the insured, who has no right of action against the reinsurer.

### Background of the Case

Musini, a local insurer, was sued by Real Sociedad, a football club, which claimed the indemnity agreed to under a policy afforded protection to Real Sociedad in the events of death and/or disability of its players. The policy excluded any pre-existing health condition of the players under the terms described therein. The policy also gave the control of claims to the reinsurers. Musini retained two percent of the risk and ceded the remainder to Lloyd's and London market reinsurers. One of the players was declared physically disabled for the practice of the game and Real Sociedad claimed the agreed indemnity in the amount of EUR3.6 million. Musini denied the claim based on the pre-existing health condition exclusion.

Musini based its defense in court on three main arguments: firstly, the pre-existing health condition exclusion; secondly, that it had merely fronted for the foreign reinsurers and retained a very small portion of the risk, hence, it was not a contract of reinsurance but of

coinsurance; and lastly, that Real Sociedad had accepted a simultaneous payment clause whereby the insurer was bound to pay on or after it had been paid in turn by the reinsurers. In Musini's view, this last point strengthened its argument that this was a coinsurance and not a reinsurance arrangement. In line with this strategy, Musini raised a procedural defense arguing that the case could only be adjudicated if reinsurers were brought into the proceedings.

## Court Decisions

The Court of First Instance dismissed all three arguments and the procedural defense and ordered Musini to pay the agreed indemnity plus punitive interest and costs. Both the Court of Appeal<sup>11</sup> and the Supreme Court dismissed the successive appeals lodged by Musini and confirmed the first judgment.<sup>12</sup>

Musini's defense was dismissed on the following grounds:

- The injury sustained by the player was found to differ from the one suffered before he was incorporated into the policy taken out by Real Sociedad. Consequently, the pre-existing health condition exclusion was not applicable.
- The contract entered into between Musini and the foreign reinsurers was not a coinsurance arrangement but a reinsurance contract proper. The courts reached that conclusion after a detailed analysis of both types of contracts.
- The simultaneous payment clause was not valid since it was not singled out in the particular conditions of the policy and accepted explicitly by the insured as required by Article 3 of ICA. In Article 14 of the general conditions, the explicit acceptance of any limitative terms was referred solely to the special conditions of the policy but not to the particular conditions of the policy where the clause was inserted.

Further, the court questioned the validity of the clause even if it was singled out and accepted explicitly by the insured. Even if the contract involved a large risk – in which case such clause could have been valid since the parties to an insurance contract involving a large risk are free to depart from the otherwise mandatory provisions of ICA – Musini did not prove that it was in fact a large risk as defined in ICA.

- The claims control clause inserted in the reinsurance contract only bound the reinsured and the reinsurers but not the insured. Further, even if such clause would have been inserted in the direct insurance contract, it would not be admissible to release the direct insurer from its obligations under the policy and the law pursuant to the mandatory provisions of ICA. Therefore, the insurer could not raise this clause to release itself from the “rigorous” rules that required it to settle the claim adequately and swiftly.

<sup>11</sup> Decision of the Audiencia Provincial of Guipúzcoa of November 15, 2005 (JUR/2006/66548).

<sup>12</sup> Please note that the remedy at the Supreme Court is not technically an appeal but a cassation recourse, “appeal” is used here for explanatory purposes.

## Conclusions

These judgments allow observers to reach some interesting conclusions, both explicit and implicit:

- A simultaneous payment clause, even if singled out and accepted explicitly in the direct insurance contract by the insured, may not be valid. The direct insurer cannot rely on this clause to oppose or delay payment of the claim. However, it may be valid if the insurance contract refers to a large risk, provided the parties have specified this circumstance in the contract.
- A claims control clause inserted in a reinsurance contract is valid. The insurer, however, cannot rely on it, even if accepted by the insured, to release itself from obligations under the insurance contract to settle the claim fairly and quickly. It is unclear if it would be admissible in the event that the insurance involved a large risk.

## 9

# Swedish Supreme Court Decision on Enforcement of Romanian Judgment in Sweden

## Background

According to a judgment rendered in October 2006 by a Romanian court, a Swedish insurer was ordered to pay compensation to a traffic injury victim for loss of income and medical care, as well as USD700,000 for non-economic loss. The awarded amount was said to be nine times what the victim could have been awarded by a Swedish court.

## Enforcements of Foreign Judgments in Sweden

Some foreign judgments – in principle, final judgments rendered by a court in the European Economic Area – would be enforced in Sweden following a simplified procedure. This is in contrast to the procedure that applies to judgments rendered by courts outside of the European Economic Area. The latter are not directly enforceable in Sweden – rather, the matter would have to be tried *ab initio*. In the Swedish proceedings, these final foreign judgments would be admissible in evidence as proof of how the relevant foreign court would adjudicate the matter.

## Case Details

The injured person filed an application to the competent Swedish court, the Svea Court of Appeal, seeking a declaration that the Romanian judgment was executable in Sweden under the Brussels I Regulation (Sw. Bryssel I-förordningen).

The insurer took the position that the application should be denied for the following reasons:

- The Brussels I Regulation applies only to legal proceedings that have been initiated after the date the regulation came into force or, under certain circumstances, to legal proceedings that were initiated before it came into force.
- Romania became a member of the European Commission (EC) on January 1, 2007, which accordingly, was the date when the Brussels I Regulation came into force regarding Romania.
- Hence, the proceedings were initiated and the judgment was rendered in October 2006, before the Brussels I Regulation came into force regarding Romania.

In addition, the insurer asserted that the Romanian judgment was in contrast to basic principles under Swedish law due to the fact that the awarded amount was nine times that which the victim would have been awarded by a Swedish court.

## The Svea Court of Appeal Decisions

The enforcement procedure before the Svea Court of Appeal is a two-tier system. An application is first decided upon by a sole judge. In this case the judge merely stated that the Brussels I Regulation applies in regards to Romania. Hence, the necessary requirements to declare the judgment enforceable in Sweden are fulfilled.

The decision was then appealed to the Svea Court of Appeal, which consists of three judges. The court found that Romania became a member of the EC on January 1, 2007; basic treaties, laws and other legal regulations adopted by the EC as of the date of Romania's joining are binding on Romania and no exceptions as to time or otherwise apply to Romania regarding the applicability of the Brussels I Regulation. Accordingly, the regulation is applicable regarding Romania with respect to judgments rendered before it joined the EC.

The court further stated that the Ordre Public Clause in the Brussels I Regulation may apply in case an acknowledgment or enforcement of a foreign judgment in an unacceptable manner involves a conflict with fundamental local law in the state where the judgment is maintained, or with a fundamental right acknowledged as basic under local law. In summary, the court found that the circumstances put forward by the insurer did not mean that the Romanian judgment was in conflict with fundamentals of Swedish law.

## The Supreme Court Decision

The insurer appealed to the Supreme Court. In summary, the Supreme Court stated that: the Brussels I Regulation became binding on and shall apply in Romania as of January 1, 2007, when Romania joined the EC; there are no exceptions or specific rules for Romania with respect to the Brussels I Regulation and there is nothing supporting the regulation's provisions on enforcement as being applicable to judgments rendered in Romania before the Brussels I Regulation came into force regarding Romania. Article 66 of the Brussels I Regulation cannot be given any meaning other than the fact that the regulation's provisions on enforcement apply regarding judgments rendered after the regulation came into force in the respective member country.

Accordingly, the Supreme Court found that the provisions on enforcement in the Brussels I Regulation shall not be applied retroactively and that consequently the judgment is not enforceable in Sweden based on the Brussels I Regulation. With this outcome, the Supreme Court had no reason to consider the public policy issue raised by the insurer.

## Conclusion

The Swedish Supreme Court decision is in line with a fundamental deprecation of giving retroactive effect to international treaties, which is reflected also by the 1969 Vienna Convention on the Law of Treaties. The principle has been followed by courts in other member states, such as Austria's Supreme Court (OGH April 5, 2005).

## 10

## The New Swiss Product Safety Act: Produktsicherheitsgesetz (PrSG)

On March 12, 2009, the Federal Convention of the Swiss Confederation enacted a new federal law covering product safety, which became effective on July 1, 2010. The new law is intended to replace the Act on the Safety of Technical Facilities and Equipment (STEG) of May 19, 1976, as well as to comply with international regulations.

First and foremost, the law aims to bring the safety requirements of products under Swiss law in line with European law and to ease the free movement of goods in the economic area of the European Union (EU) and Switzerland. Accordingly, Swiss producers are likely to benefit from the new law. At the same time, the introduction of the new law marks the implementation of the so-called “Cassis de Dijon” principle of Swiss law. In short, the “Cassis de Dijon” principle generally permits products authorized in one member state of the EU to also be traded in Switzerland without any restrictions.

### Scope of the PrSG

The Produktsicherheitsgesetz (PrSG) is designed as a framework law that will always be applied if there are no specific sectoral federal regulations with the same objectives. Compared with the STEG, the scope of application of the PrSG is expanded to all products. It is not, therefore, restricted to only technical devices and facilities.

With the PrSG in effect, products that meet the requirements according to the former law (STEG) but not the requirements of the new law (PrSG) may continue to be placed in circulation until December 31, 2011. Additionally, all producers, importers and traders need to establish the preconditions for discharging their duties after they bring products on the market, until December 31, 2011.

The PrSG applies to any entity that puts products into circulation, either commercially or professionally. Products placed on the market include those that are non-gratuitous, gratuitous, new, used, recycled or essentially modified (Section 2, para. 3 PrSG). In addition to affecting product producers and importers, the PrSG affects traders and service providers (Section 1 para. 2 PrSG). Placing a product on the market also includes the use or application of a product within the bounds of the performance of services or the holding of a product in stock for the use of a third person (Section 2 para. 3 lit. c PrSG).

### Responsibilities for Placing Products

Pursuant to Section 3 PrSG, products can only be placed on the market if they do not endanger the security and health of users or third parties by normal or rational foreseeable use. This means that products may not endanger the safety and health of users and

third parties – not even to a small extent. The burden of proof that a product fulfills the basic safety and health requirements belongs to the entity that places the product on the market (Section 5 para. 1 PrSG).

Even after placing products on the market, producers and others will continue to be responsible, according to Section 8 PrSG. Appropriate measures must be taken during the stated or scheduled operating life of products to recognize and avert dangers, for example, by revocation, recall or warning and to make products clearly traceable. Complaints concerning the safety of a product must be assessed carefully. If producers or any other parties placing products on the market have reason to believe that their products may cause danger to safety and health, they must inform the enforcement authority.

Also, the law regulates the representation and description of products. In particular, presentation and labeling, warnings and cautions, product-specific notes and manuals and instruction materials must comply with the specific risk potential of a product. Even the details and information in advertisements or publicity campaigns must not convey a false image of the risk potential or tempt users to use the goods in risky ways.

## Sanctions and Liability

If public authorities find that the safety requirements are not strictly observed further placement of the product on the market may be prohibited. Additionally, public authorities can order danger warnings for products, redemption of products or product callbacks (Section 10 para. 3 lit. b PrSG), ban the export of products (Section 10 para. 3 lit. c PrSG) or revoke and destroy or dismantle products if an imminent and serious danger originates from those products.

Furthermore, the PrSG contains penalty provisions that include a threat of fine or imprisonment of up to three years (Section 16 PrSG) for the willful or negligent attempt to place products on the market that do not meet safety requirements and endanger the health or safety of others.

In terms of liability, the Product Safety Act does not address the liability of the producer. The regulations of the Product Liability Act dated June 18, 1993 must be applied.

## Insurance Law Implications

### Product liability insurance

If a product lacks a clear indication of the time frame of its safe use, it must have been proven to be absolutely safe during the presumable service life, which may last even longer than the general limitation period of 10 years applicable in product liability law. Until now, product liability insurance has been limited to manufacturers and importers. In the future, anyone who places products on the market can potentially be held liable for a loss related to a product's lack of safety. However, many of the parties newly affected by the law will not carry corresponding product liability insurance.

## Reimbursement of costs

A company that notices a presumable or actual lack of safety in its product is required to take safety precautions in accordance with the issue. If a company underrates a dangerous situation and does not recognize the need for a response, it can be forced to recall the product by the state executive (Section 10 para. 3 lit. b PrSG). If, however, the company does not recall the product, then the state executive may take corrective action on its own.

Furthermore, a product's manufacturer or importer is committed to verify and investigate complaints and feedback concerning a product's safety with the level of diligence required by the statute. The company must make random spot checks of the product's use, if necessary (Section 8 para. 3 PrSG).

Both of these actions may incur enormous costs, making reimbursement of the outlays essential in the future.

## Insurance industry implications

Especially small companies and service providers are often not aware that the new PrSG contains new product monitoring and reporting obligations. Because the state executive has the ability to recall dangerous products, recall coverage is recommended for all companies subject to the PrSG. As a result of the new law the danger of coverage gaps has increased rapidly. While policyholders are responsible for minimizing losses, insurers and insurance intermediaries must respond to the new product safety act by adapting existing insurance protection or providing sufficient insurance protection.

However, the insurance industry faces new challenges because the liability risks are not yet completely foreseeable. It is now possible for a party dealing with damage from a dangerous product to seek redress from a distributor if there is proof of an infringement of the protection norms. Moreover, the PrSG facilitates proof of infringement by including many concrete demands for product safety.

## Conclusion

In the future, it will be an absolute necessity for employers to carefully check the safety standards of their products. If there are any doubts about safety the responsible authority should be contacted to clarify further actions. Manufacturers and importers should also create systems that ensure their products are monitored closely to meet all safety requirements. Finally, all risks should be covered by appropriate liability insurance.

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## Conclusion

The topics covered by our latest update are wide-ranging and indicate the complex diversity of legislative and judicial developments that insurers and reinsurers must keep track of in Continental Europe:

- The reports from Austria and the Netherlands underline the importance of paying full attention to prescription periods.
- The reports from Germany and from the EFTA Court in Brussels indicate the dynamism of judicial developments in the light of technological change. Judgments are handed down that set the practical considerations of modern supply networks and information technology against previously understood legal principles of responsibility.
- We learn that claims-made policies in Italy can still be overturned if the claimant has not actively agreed and counter-signed his understanding of the policy trigger.
- In Switzerland the new Product Safety Law follows EU principles and in effect creates a more level playing field for EU manufacturers to compete in the Swiss market. The new law simplifies but also heightens product safety requirements and legal liability for maintaining safety standards.
- We learn of the particular requirements in France that have been developed by the judiciary to ensure objective arbitration standards.

Our inaugural report on Poland provides insight into the development of legal and judicial activity in a recently joined EU member in the post-Communist era, highlighting the changes that are leading to the growth of insurance law.

Finally, we include an interesting insight into the workings of the courts of appeal in Spain and Sweden. Decisions by the Supreme Court of each country have re-stated principles already laid down in other EU territories – an indication, perhaps, that in spite of multifarious underlying practices and standards, the Supreme Courts in EU territories will strive to establish common European Union standards.

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

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