Summer 2011
Issue 5

Hogan
Lovells

Global Insurance and Reinsurance Bulletin

Summer 2011

Contents

European Union - Regulatory and Legislative Developments	**3**
UK - Recent Cases	**5**
UK - Regulatory and Legislative Developments	**7**
US - Recent Cases	**11**
US - Regulatory and Legislative Developments	**13**
France - Recent Cases	**14**
France - Regulatory and Legislative Developments	**15**
Spain - Recent Cases	**16**
Spain - Regulatory and Legislative Developments	**17**
Italy - Recent Cases	**18**
Italy - Regulatory and Legislative Developments	**19**
Latin America - Recent Cases	**20**
Latin America - Regulatory and Legislative Developments	**20**
China - Regulatory and Legislative Developments	**22**
Russia – Recent Cases	**24**
Russia - Regulatory and Legislative Developments	**24**
Contacts	**27**

European Union - Regulatory and Legislative Developments

OMNIBUS II DIRECTIVE UPDATE

On 19 January 2011 the European Commission published a **proposal for the Omnibus II Directive** which makes amendments to the Solvency II Directive and the Prospectus Directive to ensure that two of the newly established European Supervisory Agencies, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority can work effectively. The Directive must be formally adopted before the Commission can formally present the Level 2 implementing measures and Level 3 guidance for Solvency II. Prolonged political negotiations would therefore delay negotiations on Level 2 and Level 3, in turn reducing the amount of time available for insurers to implement changes before coming into force at 1 January 2013.

The Hungarian Presidency of the Council of the European Union has published a new **compromise proposal** (dated 24 June 2011).

The Legislative Observatory section of the **European Parliament website** now contains information showing that 17 January 2012 is the indicative date for the European Parliament plenary session on the proposed Omnibus II Directive, previously the date for the plenary session was 12 December 2011.

In May 2011, the European Parliament published an **opinion** of the European Economic and Social Committee (EESC) on the proposed Omnibus II Directive.

The European Central Bank's **opinion** (dated 4 May 2011) on the proposed Omnibus II Directive was published in the Official Journal on 28 May 2011.

SOLVENCY II UPDATE

QIS5: EUROPEAN COMMISSION LETTER TO EIOPA

The European Commission has published the text of a **letter** sent to the European Insurance and Occupational Pensions Authority (EIOPA) thanking EIOPA for its report on the fifth quantitative impact study (QIS5) and discussing the results.

The letter also mentions the potential impact of Solvency II on providers of insurance products with long-term guarantees, the issue of volatility of own funds and the further work that EIOPA is to undertake on the issue of expected profits included in future premium, where the Commission acknowledges there are diverging views.

SOLVENCY II LEVEL 2 IMPLEMENTING MEASURES: EUROPEAN COMMISSION PUBLISHES SUMMARY OF RESPONSES (MAY 2011)

In November 2010 the European Commission published a **consultation paper** on the Level 2 implementing measures for the Solvency II Directive. The aim of the consultation was to obtain feedback, supported by quantitative and qualitative evidence, on the impacts, costs and benefits to support the policy decision-making process for the level 2 implementing measures.

The European Commission has now published a **summary of responses** to the consultation paper, together with an annex listing the respondents. The responses have also been published. The summary says that a large majority of respondents had concerns on the following key issues:

- the impact on long-term products;
- volatility and pro-cyclicality;
- proportionality and limiting the reporting burden; and
- the need for transitional measures in certain areas.

The European Commission says that the Commission Services intends to focus its impact assessment on the Solvency II level 2 implementing measures on the policy issues relating to these issues.

SOLVENCY II IMPLEMENTATION: EUROPEAN COMMISSION RESPONSE TO CEA LETTER

In March 2011 the European Insurance and Reinsurance Federation (CEA) and three other pan-European insurance associations wrote to the **European Commissioner** for the Internal Market and Services, Michel Barnier, to urge him to ensure that the excessively conservative and prescriptive elements that remain in the draft implementing measures that will shape the forthcoming EU regulatory regime, Solvency II, were urgently addressed.

The **response** from Commissioner Barnier, dated 1 June 2011, has now been published. This acknowledges that there still a number of important issues to solve in relation to Solvency II and that working parties have been established by the Commission and the European Insurance and Occupational Pensions Authority to try to resolve these. The Commissioner says, however, that criticisms about the impact of Solvency II, particularly that the calibrations are excessively high, have not been confirmed by evidence and therefore, as planned, Solvency II will enter into force on 1 January 2013.

European Union – Regulatory and Legislative Developments

Continued…

INSURANCE MEDIATION DIRECTIVE REVIEW: EUROPEAN COMMISSION PUBLISHES SUMMARY OF RESPONSES TO CONSULTATION PAPER

In November 2010 the European Commission published a **consultation paper** on the review of the Insurance Mediation Directive (IMD), asking for comments on the current functioning of, and a number of possible changes to, the IMD.

The Commission has now published a **summary of responses** to the consultation paper, together with the responses. The Commission says that a majority of the respondents to the consultation paper were in favour of a revision of the IMD and there was a general consensus that the level of policy holder protection embodied in EU law on insurance intermediaries needed to be raised. This conclusion was shared by consumer organisations, as well as by public authorities and financial advisors.

A large majority of the respondents shared the view that there is a need for a new requirement to be introduced which obliges insurance intermediaries to indicate if they own a percentage of the capital of the insurance company which they represent, and whether they are entitled to any other incentives or bonuses provided by that company.

A majority of respondents agreed with the Commission proposal to extend the scope of the IMD to cover all market players which have insurance mediation as part of their activities: direct writers, banking and insurance companies, car rentals, etc.■

Sara Bradstock
Of Counsel, London
T +44 20 7296 2518
sara.bradstock@hoganlovells.com

UK – Recent Cases

INSURERS' CHALLENGE TO ASBESTOS ACT REJECTED BY SCOTTISH COURT

The Damages (Asbestos-related Conditions) (Scotland) Act 2009 allows individuals with pleural plaques (symptomless scarring of the lungs indicating exposure to asbestos) to seek compensation from their former employers. A number of insurers challenged the legislative foundation of the Act arguing that it contravened the established need for real or material damage in an action for negligence and was therefore unlawful. The Scottish Appeal Court rejected the insurers' challenge, stating that the decision to place financial responsibility for asbestos related pleural plaques upon insurers was within the powers of the Scottish Parliament.

Axa General Insurance Limited and ors v Lord Advocate and ors
Inner House, Court of Session, Scotland
The Lord President (Hamilton); Lord Eassie; Lord Hardie
12 April 2011

JUST AND EQUITABLE CONTRIBUTIONS

A fatal accident had occurred when an inflatable artwork containing tunnels for the public to walk through was lifted into the air by a gust of wind. The local authority accepted liability, having relied upon an inadequate risk assessment, but argued that the company responsible for organising the arts event should also take responsibility for paying any compensation. The court, finding the company was an occupier for the purposes of the Occupiers Liability Act 1957, due to its role in the construction, erection and control of the artwork, agreed that the company was responsible for the same damage as the local authority. However, when assessing contributions under the Civil Liability (Contribution) Act 1978, the court considered that acts and omissions that were not causative to the accident should be taken into account and, consequently, the company should contribute 55 per cent due to its prior knowledge of the artwork's instability in windy conditions.

Furmedge & Ors v Chester-Le-Street District Council [2011] EWHC 1226 (QB)
Central London County Court
HHJ Collender QC
29 - 30 June 2010

DAMAGES FOR FRAUDULENT MOTOR CLAIM

An insured had made a claim under a motor policy in respect of a collision between two cars, which the insurer believed to be false. The insurer brought an action for damages for deceit and fraudulent misrepresentation. The damages were in respect of the payment made under the insurance policy, rental car costs, medical reports and the internal investigations of the insurer. The court found the insured and another individual guilty of defrauding the insurer and awarded damages, allowing the costs of the insurer's in-house investigation despite the difficulty in establishing the cost to the company of the employee's investigative work when that employee would have been employed by the company in any event. Additionally, the court considered exemplary damages and, balancing the need to punish and deter with considering the means of the defendants, awarded sums significantly less than those proposed by the insurer.

Liverpool Victoria v Nitin Ghadhda & Zafar Iqbal (2010) (unreported)
High Court, Queen's Bench Division
Foskett, J
16 May 2011

APPLICATION TO SET ASIDE PERMISSION TO SERVE OUTSIDE OF JURISDICTION

A policy contained an English governing law clause but no jurisdiction clause. The insured vessel suffered mechanical failure during a voyage resulting in a constructive total loss. The insured brought a claim for its loss, but the insurer alleged breach of warranty. The insured applied to serve their claim on the insurer out of jurisdiction; and the insurer applied to set aside that order. It was held that the onus was on the claimant (insured) to demonstrate that England was the most appropriate forum - but they had failed to do so. The governing law clause was of little significance to the issue of appropriate forum, as the parties and evidence was all in/near Malaysia, none was in/near England. The Malaysian courts apply English law to marine insurance matters as if the dispute were being administered in England, and furthermore the issues in dispute were relatively straightforward and did not involve any complex/undecided issues of English law, so there was no juridical detriment to the claimant.

Mujur Bakat Sdn Bhd v Uni Asia General Insurance Bhd [2011] EWHC 643
High Court, Queen's Bench Division
Commercial Court
Eder, J
18 March 2011

UK – Recent Cases

Continued...

PAYMENT PROTECTION INSURANCE – JUDICIAL REVIEW CHALLENGE DISMISSED

The Judicial Review challenge brought by the British Bankers' Association against the Financial Services Authority ("FSA") and the Financial Ombudsman Service ("FOS") relating to the regulatory standards applicable to the sale of payment protection insurance ("PPI") was dismissed on 20 April 2011.

In rejecting the challenge, the court emphasised that:

- the FOS has an extremely broad discretion when assessing consumer complaints;
- firms must take account of the FSA's Principles for Business in addition to the specific conduct rules in their complaint handling processes; and
- firms will need to pay very close attention to the Principles when assessing any sale of a regulated product even where there are specific rules which apply.

The Queen on the application of British Bankers' Association v
(1) The Financial Services Authority and
(2) The Financial Ombudsman
High Court, Queen's Bench Division
Administrative Court
Justice Ouseley

UNDERWRITERS ENTITLED TO CANCEL POLICY

The issue was whether, pursuant to the Council Regulation (EU) No.961/2010 Article 26, the underwriter was entitled to serve a cancellation notice under an insurance contract containing the Iran Sanctions Clause which incepted before the Regulation came into force. The insured with an Iranian entity argued the underwriter had a mandatory obligation to extend the period of insurance where its loss ratio did not exceed the threshold. After considering the views of HM Treasury, the European Commission and the High Court judge, the insured's appeal was dismissed. Article 26 prohibits the provision of insurance after the Regulation's operative date and bans the extension of insurance with Iranian entities. While the Regulation does not provide for a derogation for automatic policy renewal, the underwriter's cancellation notice was valid where the insured had exposed or might expose it to specific risk (although the Iran Sanctions Clause did not require any act or omission on the insured's part giving rise to that risk).

Arash Shipping Enterprises Co Ltd v Groupama Transport
Court of Appeal (Civil Division)
Stanley Burnton LJ, Elias LJ, Tomlinson LJ
25 May 2011

FRAUD, RES JUDICATA AND ABUSE OF COURT PROCESS

The insurer issued proceedings against the employee of the insured for damages for fraud in the settlement of an earlier personal injury action. The employee applied to strike out the insurer's claim on grounds of res judicata and abuse of court process because the insurer's fraud allegation was essentially the same as its defence of exaggeration pleaded in the earlier action. The Court of Appeal ruled in favour of the insurer and allowed it to establish its case of fraud at trial albeit on different grounds. All three judges agreed that the insurer's fraud claim was not an abuse of process.

Zurich Insurance Company PLC v Colin Richard Hayward
Court of Appeal (Civil Division)
Smith LJ, Maurice Kay LJ, Moore-Brick LJ
27 May 2011

Judgment texts available on
www.bailii.org

UK – Regulatory and Legislative Developments

BRIBERY ACT 2010 UPDATE

ACT COMES INTO FORCE AND MINISTRY OF JUSTICE GUIDANCE PUBLISHED

The **Bribery Act 2010**, which came into force on 1 July 2011, creates a new offence under section 7 which can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf. It is a defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.

Section 9 of the Act requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. In September 2010 the Ministry of Justice published a consultation paper setting out proposals for this guidance.

The Ministry of Justice has now published the **guidance** which is designed to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery from occurring within them and is designed to be of general application.

The guidance sets out six principles that are intended to give all commercial organisations a starting point for planning, implementing, monitoring and reviewing their bribery free business regime. These are proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training) and monitoring and review.

A **quick start guide** has also been published setting out the key points of the guidance.

PROSECUTION GUIDANCE PUBLISHED

The Director of Public Prosecutions (DPP) and the Serious Fraud Office (SFO) have issued **joint guidance** for prosecutors on the Bribery Act 2010.

The Bribery Act, which came into force on 1 July 2011, creates four distinct criminal offences of: bribing another, being bribed, bribing a foreign official and (for commercial organisations) failing to prevent bribery.

The purpose of the guidance is to set out the approach of the DPP and SFO to deciding whether to bring a prosecution under the Act.

LLOYD'S MARKET BULLETIN

Lloyd's has published a **market bulletin** with the aim of updating managing agents on the implementation of the Bribery Act 2010 and the Ministry of Justice's guidance on the Act. This bulletin should be read in conjunction with another market bulletin on **bribery and corruption**, published in May 2009.

The key points addressed in the market bulletin relate to:

- associated parties: managing agents will need to review their relationships to determine who may be associated persons performing services for or on their behalf and once a managing agent has determined its associated persons, it should consider the level of due diligence it should carry out by assessing the risk factors presented by each category of associated person;
- coverholders: the market bulletin states that it is clear from the guidance that a coverholder would be considered an "associated person". Managing agents may need to review the adequacy of their diligence processes for appointing new coverholders and monitoring them on an ongoing basis. As described above, the due diligence process may vary, according to the risks arising from the coverholder relationship and the level of control the managing agent exercises or intends to exercise over the coverholder. Lloyd's is progressing a number of work streams in relation to the management of coverholders and anti-bribery compliance. It is hoped that action taken centrally by Lloyd's will support managing agents in fulfilling their responsibilities to ensure that coverholders operate in compliance with the Bribery Act. Details of the work streams are given in the market bulletin;
- brokers: managing agents will also need to assess their relationships with brokers on a case by case basis to determine if they may be associated parties. The market bulletin also states that Lloyd's will be writing to all Lloyd's accredited brokers asking them to confirm their compliance with the Bribery Act. This confirmation will be obtained on an annual basis and is intended to assist managing agents fulfill their responsibilities to ensure that brokers are compliant;

UK – Regulatory and Legislative Developments

Continued...

- commissions: Lloyd's is of the view that payment of normal commission, which is generally paid to the insurance intermediary out of the premium payable to it by the insurance intermediary's client, should not constitute an offence under the Act provided that it is reasonable and commensurate with such things as the work involved. Lloyd's is however aware that there are other forms of remuneration which may be paid by insurers to insurance intermediaries. Analysis on whether such forms of remuneration would fall foul of the Bribery Act need clearly to be considered on a case by case basis by both the insurer and the broker;
- corporate hospitality;
- facilitation payments;
- reporting: in addition to reporting to the Serious Fraud Office (SFO) and the Serious Organised Crime Association (SOCA), a firm's FSA supervisory contact should be notified of any bribery a firm uncovers. Lloyd's requests that any reports made to the SFO/SOCA are brought to its attention.

TRAVEL INSURANCE: NEW ABI CONSUMER GUIDE

The Association of British Insurers (ABI) has published a **travel insurance consumer guide.** The guide explains why travel insurance is necessary, explains what is commonly covered in standard travel insurance policies, and what may not be covered.

TRAVEL INSURANCE: FOS UPDATES ONLINE TECHNICAL RESOURCE

The Financial Ombudsman Service (FOS) has updated the **travel insurance section** of its online technical resource. The page gives information about the type of complaints that the FOS sees and how it looks at complaints. It also contains the **FOS' final decision**, dated March 2011, on a complaint relating to a travel insurance claim for delay caused by the volcanic ash cloud.

INSURANCE CONTRACT LAW: LAW COMMISSION AND SCOTTISH LAW COMMISSION PUBLISH SUMMARY OF RESPONSES TO ISSUES PAPERS 8 AND 9

The Law Commission is conducting a joint review of insurance contract law with the Scottish Law Commission. The Law Commissions have published summaries of responses to two issues papers dealing with sections of the Marine Insurance Act 1906. These are a summary of **responses to issues paper 8** ("*The Broker's Liability for Premiums: Should Section 53 be Reformed?*") and a summary of **responses to issues paper 9** ("*The Requirement for a Formal Marine Policy: Should Section 22 be Repealed*?").

After analysing the responses from each of their issues papers, the Law Commissions intend to draw together a more focused set of proposals in a second main consultation paper, which due to be published during Winter 2011/2012, which will include proposals in relation to business insurance.

GOVERNMENT INTRODUCES BILL TO OVERHAUL CONSUMER INSURANCE LAW

On 16 May 2011 the **Consumer Insurance (Disclosure and Representations) Bill**, a Government Bill which aims to radically change the relationship between consumers and insurance providers, had its first reading in the House of Lords. It had its second reading on 13 June 2011.

The Bill will give certainty to consumers and insurers by shifting the emphasis away from a consumer's duty to disclose all necessary information, to a requirement for insurers to ask particular questions and obtain specific information about their customers, before they issue an insurance policy.

The current law has changed little since 1906, and with additional layers of regulation, has become complex and confusing for consumers, and expensive for the industry to administer.

The reforms are based on the recommendations made by the Law Commission and the Scottish Law Commission in their report published in 2009.

A set of **explanatory notes** has also been published.

UK – Regulatory and Legislative Developments

Continued...

SOLVENCY II VALIDATION REPORT: LLOYD'S GUIDANCE NOTES PUBLISHED

The Society of Lloyd's has published **guidance notes** on completion of the Solvency II validation report.

Lloyd's requires all managing agents to submit a validation report as part of their application for internal model authorisation under Solvency II. A draft report is expected on 26 August 2011 and a final version on 31 October 2011. More detail around the level of information expected in each of these will be covered ahead of the submission dates.

The guidance states that the validation report should be a primarily internal document that the agent uses to give its board comfort that the internal model, and corresponding solvency capital requirement calculation, is appropriate for the business and meets the relevant regulatory requirements.

For this reason, Lloyd's does not intend to mandate the exact format or content of the validation report. However, a template report is provided in the appendix to the guidance notes which agents can use to structure their validation report if they wish.

The guidance notes state that agents should note that the validation report is not a one-off exercise, and should consider the need to produce validation reports on an ongoing basis in line with their validation policy. Lloyd's expects that this will be at least annually for all agents.

The guidance notes are intended to give agents more details on what Lloyd's expects to see in agent validation reports and assist in interpreting relevant requirements and guidance when compiling the reports. Agents should also refer to Section 5 of Lloyd's "*Detailed guidance notes for dry run process*" issued on March 2010 as this includes further detail on the level 1 and level 2 requirements relating to validation.

Agents should note that both the regulations and market practice in this area are still evolving. Lloyd's will keep this guidance under review, and issue further clarification as appropriate.

Lloyd's has also published other documentation including the slides from a workshop on Solvency II validation held earlier this month, as well as a reporting and disclosure evidence template for use by agents in relation to the Solvency II reporting and disclosure requirements.

TRACING EMPLOYERS' LIABILITY INSURERS: NEW WEBPAGES (MAY 2011)

The FSA published a policy statement, **PS11/04**, on tracing employers' liability insurers in February 2011. The rules require all general insurers to notify the FSA if they have any actual or potential liability for UK commercial lines employers' liability claims. If they have such liability, they have been required to publish an employers' liability register from 1 April 2011.

The policy aims to help consumers by changing the way employers' liability information is recorded so as to help those who are trying to establish the insurer for their employers' liability claims. The FSA has now published a webpage for firms explaining what they have to do, a **webpage for consumers** on what to do if they have a claim and a **list of insurers** so that consumers can check which insurers may be responsible for their employers' liability insurance claim.

SELLING OF GENERAL INSURANCE POLICIES THROUGH PRICE COMPARISON WEBSITES: GUIDANCE CONSULTATION

Between June and September 2010 the FSA conducted thematic work to better understand how firms which sell regulated insurance products and services online have developed their business models and how they are designing these models to ensure the fair treatment of consumers. This built on previous undertaken on price comparison firms in 2008. Through the thematic work the FSA identified two main business models in the insurance market. The first is the use of a proprietary price comparison tool which redirects the customer to an insurer or other intermediary. The second model is the same in substance, except that the price comparison tool is not proprietary but "white labeled".

The FSA's review highlighted concerns in three areas in particular:

- failures to observe the general prohibition and restrictions on financial promotion in sections 19 and 21 of the Financial Services and Markets Act 2000 (FSMA) respectively and firms not having appropriate permissions in breach of section 20 of FSMA;
- non-compliance with the requirements in the Insurance: Conduct of Business sourcebook (ICOBS); and
- non-compliance with the Senior Management Arrangements, Systems and Controls sourcebook (SYSC).

The FSA found that there was a lack of understanding within the industry generally about the regulated activity being conducted by these firms leading to failures to comply with the FSA's rules which could lead to consumers not being treated fairly. It has therefore published a guidance consultation in the form of a letter addressed to firms operating online price comparison websites. Appendix A to the letter sets out the FSA's investigations and findings in more detail and refers to some of the relevant Handbook or other regulatory requirements. This represents the specific requirements where the FSA considers there is a risk of non-compliance and how firms might be expected to avoid such non-compliance.

UK – Regulatory and Legislative Developments

Continued...

Firms are being asked to:

- review their regulated activities, ensure they are appropriately authorised or otherwise exempt;
- ensure they only enter into contracts with firms holding the appropriate authorisation and permissions to conduct that regulated activity (or who are exempt);
- withdraw their assistance from third parties if the party is in breach of the general prohibition;
- review their disclosure documentation, sales procedures and terms and conditions and make sure that these are compliant with all relevant regulatory requirements including the FSA's Principles, ICOBS and the Unfair Terms in Consumer Contracts Regulations 1999. In particular, they should ensure they comply with requirements on customer eligibility, status disclosure, advice suitability, providing a proper statement of demands and needs and do not seek in their terms and conditions to exclude liability for the regulated activities they are undertaking; and

establish, implement and maintain adequate policies and procedures to ensure the firm complies with all relevant obligations under the regulatory system and for countering the risk of furthering financial crime, in particular breaches of the general prohibition and restrictions on financial promotion.

Sara Bradstock
Of Counsel, London
T +44 20 7296 2518
sara.bradstock@hoganlovells.com

Claire Paget
Senior Associate, London
T +44 20 7296 5920
claire.paget@hoganlovells.com

Dan Screene
Senior Associate, London
T +44 20 7296 5157
dan.screene@hoganlovells.com

Nina Tulloch
Senior Associate, London
T +44 20 7296 5667
nina.tulloch@hoganlovells.com

Helen Ward
Associate, London
T +44 20 7296 5348
helen.ward@hoganlovells.com

US - Recent Cases

NEW YORK COURT OF APPEALS RULES THAT LIQUIDATOR OF INSOLVENT INSURER MUST PERFORM CHOICE-OF-LAW ANALYSIS FOR EACH POLICYHOLDER CLAIM

On 5 April 2011, the New York Court of Appeals, the state's highest court, held that for each policy of an insolvent insurer in dispute in the insurer's New York liquidation proceeding "*an individual choice-of-law analysis must be conducted to determine which jurisdiction's law should apply*." Midland Insurance Company ("Midland") had been placed into liquidation in New York in 1986. In 2006, the Superintendent of the State of New York as Midland's Liquidator (the "Liquidator") disallowed the claims of certain major policyholders of Midland (the "Major Policyholders"). The disallowances were based in part on the Liquidator's decision to apply substantive New York law exclusively to all policyholder claims. In making this decision, the Liquidator relied upon a prior decision in the Midland liquidation proceedings by the Appellate Division (New York's intermediate appellate court) that the Liquidator contended stood for the proposition that New York substantive law must apply to all policyholder claims in the Midland liquidation. The Major Policyholders objected to the disallowance of their claims and litigation regarding the choice-of-law issue ensued.

Before the Court of Appeals, the Liquidator contended that New York's liquidation statute abrogated the normal common law rules for choice of law and that as a matter of public policy in order to treat all claimants equally New York law must be applied to all claims. Applying an individual choice-of-law analysis, according to the Liquidator, would create "subclasses" among the Major Policyholders since different policyholder claims might be determined under different substantive laws. The Court of Appeals rejected this argument, noting that the claims of the Major Policyholders sounded in common law principles of contract. Finding that the New York insurance law did not require any abrogation of common law on this point, "the Major Policyholders are entitled to an evaluation of their claims by the Liquidator under the same common law choice-of-law principles that clearly applied to their claims prior to Midland's insolvency."

In the Matter of the Liquidation of Midland Insurance Company
New York Court of Appeals
5 April 2011

THIRD CIRCUIT RULES THAT INSURERS HAVE STANDING TO CHALLENGE BANKRUPTCY PLAN OF INSURED

On 4 May 2011, the US Court of Appeals for the Third Circuit, en banc, held that two insurers, Hartford Accident and Indemnity Co. and Century Indemnity Co. (the "Insurers"), had standing to challenge the confirmation of a plan of reorganization filed by their insured, Global Industrial Technologies ("GIT"), and related entities. The Third Circuit overturned the District Court's decision that the Insurers lacked standing to participate in bankruptcy proceedings concerning GIT's Chapter 11 reorganization. The Third Circuit held that, "when a federal court gives its approval to a plan that allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed".

GIT acquired A.P. Green Industries, Inc. ("APG") in 1998. Prior to 1976, APG had manufactured refractory products, using asbestos as an ingredient. From the 1980s onwards, APG faced an avalanche of asbestos-related personal injury lawsuits. APG also faced a smaller number of silica-related personal injury claims. In February 2002, GIT and APG sought protection under Chapter 11 of the Bankruptcy Code. The bankruptcy plan called for the entry of two channelling injunctions diverting asbestos-related claims to an asbestos trust and silica-related claims to a silica trust. The Insurers were among insurers whose policies were to be assigned to the silica trust by APG to fund that trust. The Insurers objected to the plan on the grounds that GIT and APG had improperly colluded with the asbestos claimants' counsel. However, the plan was confirmed by the Bankruptcy Court which held that the Insurers lacked standing as they retained their coverage defenses and thus had suffered no injury. The Insurers appealed the Bankruptcy Court's decision to the District Court, which affirmed. The Third Circuit, over a dissenting opinion signed by four judges, held that the Insurers did have standing to object to the confirmation of the bankruptcy plan as they had a "personal stake" in whether the plan was approved.

In Re Global Industrial Technologies, Inc.
US Court of Appeals for the Third Circuit
4 May 2011

US – Recent Cases

Continued…

COURT REFUSES TO APPOINT REPLACEMENT PARTY-APPOINTED ARBITRATOR OVER PARTY'S OBJECTION

Insco, Ltd. ("Insco") reinsured Northwestern National Insurance Co. ("NNIC") pursuant to a reinsurance agreement. The agreement contained an arbitration clause which allowed each party to appoint one arbitrator and for the umpire to be chosen by the two party-appointed arbitrators. In an ensuing arbitration, the parties selected their respective arbitrators and the umpire was chosen by lot. The panel was accepted as properly constituted by both parties at the organizational meeting. Subsequently, additional potential conflicts of interest arose. Three days prior to oral argument on NNIC's summary judgment motion, Insco alleged partiality and demanded that the panel resign. Insco's party-appointed arbitrator resigned but the umpire and the arbitrator appointed by NNIC refused to resign. NNIC then filed a petition in the US District Court for the Southern District of New York, asking the court to appoint an arbitrator to replace Insco's arbitrator. Insco subsequently appointed a replacement arbitrator, prior to the court's ruling. NNIC objected to this replacement appointment on the grounds that the arbitration clause did not expressly permit a party to appoint a replacement arbitrator. NNIC maintained that the court, rather than Insco, should appoint the replacement arbitrator.

The court stated that the Federal Arbitration Act looks first to the agreement between the parties for the method of appointing arbitrators. The court held that it did have the power to appoint a replacement arbitrator in instances where the agreement did not specifically provide for a method of doing so. However, the court held that it would not exercise this power but would rather defer to the party seeking to replace its party-appointed arbitrator, Insco in this case. The court pointed out that the intent of the reinsurance agreement was for both parties to appoint an arbitrator and expressed reluctance to frustrate this intent.

Northwestern National Insurance Company v Insco, Ltd.
United States District Court for the Southern District of New York
12 May 2011

US - Regulatory and Legislative Developments

RHODE ISLAND SOLVENT SCHEME

As we have reported in prior Bulletins (see Winter 2010), Rhode Island is the only state in the US to offer a solvent exit solution similar to solvent schemes in the UK, and last summer GTE Reinsurance Company Ltd ("GTE Re") became the first insurer to bring a Commutation Plan before the Rhode Island courts for approval. As we reported, certain creditors had objected to the plan on constitutional grounds, arguing that Rhode Island's Voluntary Restructuring of Solvent Insurers Act (the "Act") violated both the Contract Clause and the Due Process Clause of the U.S. Constitution. On April 25, 2011, the Rhode Island court issued a decision rejecting those constitutional challenges and entered an order on April 27 implementing the commutation plan. A copy of the court's decision is available on the website of the Commutation Plan Advisor at http://runoffresolve.com/pdf/gte-re-court-decision-042511.pdf. In rejecting the Contract Clause challenge, the Court found that the mere fact that the acceleration of GTE Re's payments under the Commutation Plan may expose creditors to some risk that those payments will amount to less than their actual claims, does not constitute substantial impairment of the creditor's reinsurance and was insufficient to violate the Contract Clause. The Court added that the Act achieved a legitimate public purpose as it addresses the State's economic concerns and protects commercial insurance creditors against the harms of run-off. The Implementation Order requires that all creditors submit Claim Form information to the Run-Off Manager on or before 1 August 2011.

NEW YORK DEPARTMENT OF FINANCIAL SERVICES

The New York State Insurance Department ("NYID") and the New York State Banking Department will merge to create the New York State Department of Financial Services ("DFS"). The merger was proposed as part of Governor Cuomo's 2011-2012 budget, which was approved in late March of 2011. The consolidation has been motivated, in part, as a response to perceived failings in regulation before and during the credit crisis, in order to reduce costs and increase efficiency. The merger will become effective on 3 October 2011 and, with certain exceptions, the DFS will have jurisdiction over persons providing financial products and services in New York. The DFS will contain separate divisions for the regulation of the banking sector and the insurance industry. The DFS will have an initial annual budget of US $564 million and proposes to make more on-site examinations of insurance companies. Benjamin Lawsky has been confirmed as the first Superintendent of the DFS. Mr Lawsky was previously a federal prosecutor and is currently Gov. Cuomo's Chief of Staff, James Wrynn, the current Superintendent of the NYID, will be Mr Lawsky's deputy.

Sean Keely
Partner, New York
T +1 212 909 0675
sean.keely@hoganlovells.com

Ben Lewis
Associate, New York
T +1 212 909 0646
ben.lewis@hoganlovells.com

France – Recent Cases

UNENFORCEABILITY OF THE 2-YEAR LIMITATION PERIOD

Under Article R.112-1 of the French Insurance Code, an insurance policy must provide for the specific (and short) limitation period which applies to actions arising from an insurance contract. In the case at hand, the insurance contract merely provided that "*all legal actions arising from the insurance contract shall be time-barred after two years as from the date of the event which gave rise thereto*". The French Supreme Court decided that such a provision was not sufficient to comply with Article R112-1: in addition to the time period, it is necessary to recall the whole legal regime, including the causes of interruption.

Cour de Cassation, Civ. 2°, 28 April 2011

SCOPE OF THE INSURER'S SUBROGATION

This case gives the opportunity to assess the limits of the subrogation from which insurers benefit. An insurer paid compensation to a victim of a criminal offence and became, therefore, subrogated to its rights against the offender. As a result of financial difficulties, the offender requested (and obtained) the initiation of a civil bankruptcy procedure, entailing the writing-off of all his non-commercial debts. Under Article L333-1 of the Consumer Code, pursuant to which damages awarded to victims of a criminal offence can only be cancelled with their consent, the Court of Appeal held that the insurer's claim could not be written-off. The French Supreme Court quashed this decision and held that the insurer could not benefit from this specific provision since it was not the victim.

Cour de Cassation, Civ. 2°, 31 March 2011

ENFORCEABILITY OF A FORFEITURE CLAUSE INCLUDED IN GENERAL CONDITIONS

Following a flood, the owner of a castle asked its insurer a few years later (after the repairs were made) to cover the damage. The insurer denied coverage on the grounds of a forfeiture clause included in the general conditions of the insurance contract but not in the contract itself. The owner brought a claim against its insurer and the Court of Appeal followed him, considering that the forfeiture clause was not applicable as the insurer could not prove that the policyholder was aware of the general conditions of the contract. The Supreme Court quashed this decision considering that the contract was explicitly referring to the general conditions and that, therefore, the included forfeiture clause should apply.

Cour de Cassation, Civ. 2°, 3 March 2011

CONSEQUENCES OF A FALSE STATEMENT MADE BY THE POLICYHOLDER

In this case, an insurer brought an action against one of its policyholders and requested the nullity of the insurance contract as a result of a false statement regarding a health assessment. The Court of Appeal awarded the claim but the French Supreme Court quashed this decision: pursuant to Article L113-8 of the French Insurance Code, an insurance contract is null and void in the event of an intentional false statement on the part of the insured, only if such fraudulent misrepresentation "*changes the subject-matter of the risk or decreases the insurer's assessment thereof.*"

Cour de Cassation, Civ. 2°, 12 May 2011

France - Regulatory and Legislative Developments

RECOMMENDATION RELATING TO ADVERTISING COMMUNICATIONS OF CERTAIN LIFE INSURANCE CONTRACTS

The French regulator, the Autorité de Contrôle Prudentiel ("ACP") published a **recommendation on advertising communications** related to unit-linked life insurance contracts composed of bonds and other debt securities in its official register on 25 March 2011. This recommendation aims to enhance the quality of advertising materials relating to debt securities which qualify as eligible assets of unit-linked life insurance contracts in order to limit any confusion for consumers between debt securities offered as unit of account and the funds in Euros of such contracts. To this end, rules of good practice have been adopted such as setting out clear, accurate and not misleading information about the nature of the account units of the contract, their performance and fees. Insurance companies and insurance intermediaries will have to establish an internal control procedure to ensure compliance with these provisions. This recommendation applies to distribution actions after 30 June 2011.

EXTENT OF THE RECOURSE OF THE GUARANTEE INSURER

Further to the implementation of Law n°2010-737 of 10 July 2010 on consumer credit reform, the French Insurance Code was amended to include a new Article L.443-1 on guarantee commitments. This new provision came into force on 1 May 2011 and sets out the extent of recourse of the guarantee insurer. It reproduces the general principle of the right to subrogation and specifies against whom the insurer may take action to obtain repayment of the guarantee paid by him.

RECOMMENDATION RELATING TO THE MARKETING OF LIFE INSURANCE CONTRACTS COMPOSED OF UNIT-LINKED DEBT SECURITIES ISSUED BY AN ENTITY RELATED FINANCIALLY TO THE INSURANCE UNDERTAKING

The French regulator, the Autorité de Contrôle Prudentiel ("ACP") has published a **recommendation of best practice rules**, the purpose of which is to manage conflicts of interest related to the distribution of debt securities of an issuer linked financially to the insurance undertaking, to policyholders of unit-linked life insurance contracts. The rules apply to both insurance companies and intermediaries, including those marketing such unit-linked contracts in France by means of a European passport. The measures adopted by the ACP are designed to encourage an objective valuation of the security proposed to the policyholder both at the time of issue and during the term of the contract. They also serve to inform the policyholder before selecting the relevant units of account, that, in case of request of repurchase or arbitration or settlement of the contract before maturity, the issuer or a related financial entity may decide to acquire the debt. Such information must take the form of a provision expressly stating the risk of a conflict of interest. This recommendation applies to distribution actions after 30 July 2011.

Ghina Farah
Associate, Paris
T +33 1 5367 1803
ghina.farah@hoganlovells.com

Christophe Garin
Counsel, Paris
+33 (1) 5367 1817
christophe.garin@hoganlovells.com

Spain - Recent Cases

INDEMNITY ACTION UNDER SECTION 38 OF THE INSURANCE CONTRACT ACT

The Spanish legal system provides, through Section 38 of the Insurance Contract Act 50/1995 of 5 October of the Act ("Section 38"), a special dispute resolution process between an insured and insurer. By means of this special procedure, if both the insurer and the insured agree with the assessment of the damages made by the insured and with the way of paying the indemnity, the insurer shall pay the corresponding indemnity and the procedure will terminate. In this case, the Supreme Court dismissed the applicant's claim that was filed against 5 insurers, in connection with a loss that took place in a hydraulic power station covered with a *"Big Risk Insurance Contract"* and declared that there was a dispute between the parties involved relating to coverage of the disaster. The Supreme Court concluded that the Section 38 procedure "*does not apply to this particular case, because there is not an agreement between parties regarding the reasons for the accident*" (the insurers rejected the expert report provided by the plaintiff). Taking into account that the plaintiff's civil action was based on a disaster report that was not shared with all insurers, the legal procedure established in Section 38 was inapplicable and, consequently, the expert report could not be accepted. For this reason, the Supreme Court held that the plaintiff should have exercised their right to compensation before the ordinary civil courts and not by the Section 38 procedure.

Supreme Court
Civil Division
11 February 2011

INSURANCE MEDIATION CONTRACT RESOLUTION

The dispute arose from the termination of an insurance mediation contract carried out unilaterally by the insurer (the defendant) to its insurance broker (the plaintiff). The reason for this termination was based the inaccurate information provided by the insurance broker to the policyholders that had purchased unit-linked insurance products. The broker filed an appeal before the Supreme Court due to the termination of the mediation contract by the insurer. The question was whether the lack of fulfilment by the broker of its obligation to inform the policyholders about the amendments to the unit-linked product entitled the insurer to terminate the mediation contract. The Supreme Court dismissed the broker's appeal *"because the latter had seriously breached its contractual obligations to the insurer".*

Supreme Court
Civil Division
3 January 2011

INTEREST RATE PAYMENT

The surcharge for late payment of compensation by an insurer, provided by Section 20 of the Insurance Contract Act 50/1995 of 5 October ("Section 20"), is not applicable to an insurer of the person who caused the damage when the insurer of the injured party exercises the "*action of subrogation*" expressly established in Section 43 of the Insurance Contract Act 50/1995 of 5 October ("Section 43").

In this particular case, an insurer indemnified its insured in respect of damage caused by a fire. The insurer then sued both the person responsible for the fire and its insurer, claiming both the compensation paid to the injured party, as well as the interest rate set out in Section 20. The claim for repayment of the interest rate was rejected by the Court of Appeal on the grounds that Section 43 limits the "*action of subrogation*" only to the amount of the compensation paid to the injured. The Supreme Court upheld the ruling of the Court of Appeal.

Supreme Court
Civil Division
24 March 2011

Spain - Regulatory and Legislative Developments

Felipe Vazquez
Associate, Madrid
T +34 91 3498 8297
felipe.vazquez@hoganlovells.com

NEW INSURANCE REQUIREMENT FOR CIVIL LIABILITIES FOR NUCLEAR DAMAGE

A new law on coverage for nuclear power stations ("Law") states that owners of nuclear power stations are required to purchase insurance coverage for civil liabilities (for nuclear damage) of EUR 1,200 million compared to EUR 700 million that was previously required before the entry into force of this Law. The main object of the Law is to regulate the civil liability for nuclear damage, in compliance with the Paris and Brussels' International Conventions. The Law is further completed by the establishment of a specific regime of civil liability for damages that may be caused in accidents related to radioactive materials other than nuclear materials.

Law 12 2011, 27 May

EQUAL TREATMENT IN THE COST OF INSURANCE CONTRACTS FOR MEN AND WOMEN

A new Draft Law on Equal Treatment ("the Draft Law") prevents insurers from taking into account the driver's sex in order to calculate the premium of the insurance contract. Currently, women tend to pay lower premiums than men of their same age because statistics show that the former have less risk of accident than the latter. As noted in the Draft Law: *"Regarding insurance contracts, the sex shall not be a factor that determines a different treatment in premiums or benefits for insured persons."* In this respect, the European Insurance Committee (CEA) previously established that insurers have the obligation to comply with the ruling of the European Union Court of Justice which stated that there cannot be differences in treatment based on sex.

Draft Law on Equal Treatment

Italy - Recent Cases

THE INTERMEDIARY'S LIABILITY FOR THE CONDUCT OF FINANCIAL SALESMEN

By this decision the Italian Supreme Court has expanded the scope of intermediaries' liability to also include damage caused by financial salesmen whose services it engaged. Article 31.3 of the Financial Intermediation Consolidated Act provides that an intermediary is jointly responsible for damage caused to third parties by the financial salesmen appointed. According to the court, the financial intermediary is liable for the damage caused by the appointed financial salesmen even if the damage was not caused while selling the intermediary's products but whilst carrying out an activity functionally connected to its duties.

Italian Supreme Court
Sec. III, no. 1741
25 January 2011

TERMINATION OF POLICY FOR NON-PAYMENT OF PREMIUM

The Italian Supreme Court recently clarified the scope of contract termination provided for by Article 1901 of the Italian Civil Code. In the event of termination of non-life policies for non-payment of premium, the insurer has the right to the premium relevant to the current period of the insurance coverage. In this judgment the court stated that in the event of termination as per Article 1901, the "*current period*" of the insurance coverage is the period that would have been covered by the policy if the premium had been paid by the policyholder. As a consequence, in relation to insurance contracts with an annual duration and premium payments made in instalments, the "*current period*" is that period covered by a single instalment.

Italian Supreme Court
Sect. III, no. 23264
18 November 2010

CLAIMS MADE CLAUSE IN LIABILITY INSURANCE CONTRACTS

The Italian Court of Appeal of Rome recently clarified the application of the claims made clause ("the Clause") included in liability insurance contracts. In particular the court clarified that the Clause extends the insurance coverage to claims notified during the period of the insurance coverage. As a consequence, the Clause is to be considered as a legal exception to the general provision of Article 1917, paragraph 1 of the Italian Civil Code (according to which liability insurance contracts cover risks relevant to events which occurred during the period of validity of the coverage, regardless of when the claim was notified). In fact, in the presence of the Clause the purpose of the coverage is the "*request for compensation for damages*" and not the event that caused the damage to third parties. In light of the above, parties may legitimately provide in the contract that the insurance coverage is also to be extended to events which occurred before the contract was entered into.

Court of Appeal of Rome
Sect. III
22 March 2011

Italy - Regulatory and Legislative Developments

Chiara Cimarelli
Senior Associate, Rome
T +39 06 675823 43
chiara.cimarelli@hoganlovells.com

ISVAP CLARIFICATIONS ON STRESS TEST

On 11 May 2011 ISVAP published on its website clarifications to queries raised by ANIA (the Italian insurance category association) on the terms and modalities by which stress tests should be run for companies participating in QIS5, together with the relevant deadlines.

Among the clarifications provided by ISVAP, in particular ISVAP specified that:

- the deadline for insurance companies' boards of directors to resolve the outcomes of the stress tests was scheduled for 20 June 2011;
- the stress test must be run both at group and at single companies' level, for companies being part of an insurance group;
- the resolution by the board of directors must include also the "satellite" stress tests; and
- companies not drafting consolidated financial statements are not required to run stress tests at group level.

ISVAP ENQUIRIES ON INSURANCE POLICIES ATTACHED TO LOANS AND OTHER FINANCING CONTRACTS

On 29 April 2011, ISVAP published on its website a request addressed to all Italian life insurance companies, Italian non-life insurance companies and establishments of extra-EU insurance companies to provide the insurance regulator by 23 May 2011 with a report on the distribution agreements in place as of 31 December 2010 for the offer of insurance policies attached to loans and other forms of financing. In the event that a company has no insurance policies attached to loans/financing in its portfolio, it should nonetheless inform ISVAP by sending a communication signed by a legal representative of the company to the insurance regulator.

THE ITALIAN TAX AUTHORITIES CLARIFY THE PROCEDURES TO BE FOLLOWED BY EU INSURANCE COMPANIES UNDER THE FOS REGIME WITHOUT APPOINTING AN ITALIAN TAX REPRESENTATIVE

On 21 February 2011 the Italian Tax Authorities issued Ruling No. 19/E, which clarifies the procedures which should be followed by insurance companies operating in Italy under freedom of services regime. The said ruling was of a particular importance since when the duty of insurance companies established in the EU and operating in Italy under the freedom of services regime to appoint an Italian tax representative was abolished by Italian Decree Law No. 135/2009, converted into Law No. 166/2010, no clarifications were initially released on how companies should fulfil all the Italian tax duties from abroad without the aid of an Italian tax representative.

Click **here** for the ISVAP website.

Latin America – Recent Cases

THE INSURER'S DUTY TO PROVE THE SCOPE OF THE INSURED'S ILLNESS IS EXTENDED

An insured who suffered an illness as a consequence of their profession, was granted with an invalidity pension for life after appealing to the Constitutional Court of Perú in the second instance.

According to the judgment of the Civil High Court of Justice of Lima in first instance, an illness caused as a consequence of a profession had to be proved only by an independent medical commission which evaluates the incapacity of the insured in accordance with Article 26 of the Royal Decree 1990. Nevertheless, the Constitutional Court of Peru understood, by its judgment of 28 April 2011, that the documentation provided by the hospital was not complete, as they mentioned a personal inspection which was not contained in the medical records of the hospital. Therefore, the Constitutional Court of Peru granted the pension for life to the insured, in addition to interest and the costs of the proceedings.

Constitutional Court of Peru
Civil Division
28 April 2011

Regulatory and Legislative Developments

BASIC REGULATIONS AFFECTING REINSURERS SETTLED IN ARGENTINA

The Insurance Superintendence of Argentina has recently issued a decision by which it has established the basic regulations applicable to national reinsurers who intend to operate in the Argentinean insurance market.

Some of the main regulations include the following:

- All risks amounting up to 50 million US dollars shall be covered by Argentinean reinsurers, whilst it is possible to cover higher risks by national or foreign reinsurers authorised to operate in Argentina;
- national reinsurers shall retain at least a 15 per cent of the premiums charged;
- national insurers shall be entitled to allocate the risk in reinsurers in a 10 per cent of their risks, instead of seven per cent; and
- reinsurers will not be allowed to allocate more than the 40 per cent of the premiums in foreign linked entities or foreign companies part of the same holding.

Insurance Superintendence of the Nation of Argentina
Decision 31 May 2011

BILL OF THE PRIVATE PENSIONS SYSTEM REQUESTED IN PERU

Congress shall prepare a Bill of the Private Pension System after an official communication by the Peruvian Government. The main purpose of the reform is intended to lead to an improvement of the fair competence in the market, a reduction of the costs and protection of the affiliated parties, a wider offer of funds and a more efficient private administration of pensions.

Peruvian Government communication
26 May 2011

Latin America – Regulatory and Legislative Developments

Continued…

A NEW INSURANCE ACT FORESEEN IN BOLIVIA

The Tax and Control Authorities of Insurance and Pensions of Bolivia have announced that a new Insurance Act is being drafted and could be issued within the following months. This new legislation will reinforce the insured position, especially by establishing the obligation of the insurer to pay indemnities within a shorter period of time. Nevertheless, the Insurers Association of Bolivia ("ABA") has indicated that there is no need to radically change the content of the Act, but argued that it would be appropriate to insert some Solvency II rules to the Bolivian legislation.

Tax and Control Authorities of Insurance and Pensions Communication
3 May 2011

DELAY ON THE REGULATION TO OPEN COMPULSORY INSURANCE MARKET IN COSTA RICA

The new Act of Insurance Market Regulation in Costa Rica was intended to open up the Compulsory Insurance Market on 1 January 2011 at the latest, but the Regulation has not yet been approved by the National Council of Financial System Supervision ("Conassif"). The Regulation is essential for the Compulsory Insurance market activity to start. It shall establish the operational rules concerning competence on the Compulsory Car Insurance and Labour Risks, such as the information which has to be provided to the insureds or the registration duties of the intervening Insurance Undertakings. The new Act will enter into force as soon as it is finally published in the Official Bulletin.

General Insurance Superintendence of Costa Rica
29 March 2011

Rafael Fernandez
Associate, Madrid
T +34 91 349 82 24
rafael.fernandez@hoganlovells.com

China - Regulatory and Legislative Developments

DRAFT PROVISIONS ON SUPERVISION OF BANCASSURANCE

The CIRC published the **Draft Provisions on Supervision and Administration of Financial Institutions Commissioned by Insurance Companies To Engage in Insurance Agency Business** on 7 April 2011, seeking public comments until 27 April 2011. Under the draft provisions, financial institutions acting as insurance agents would be required to apply to the CIRC or its local counterparts to obtain an insurance agency business operating license and financial institution employees selling insurance products would be required to obtain certification from the CIRC as insurance agents. Insurance companies authorizing financial institutions to sell insurance products would be required to execute written agency and commission agreements with qualified financial institutions and assume responsibility for activities of financial institutions within the scope of authorization.

DRAFT PROVISIONS FOR SUPERVISION AND ADMINISTRATION OF ONLINE INSURANCE BUSINESS

The CIRC issued the **Draft Provisions for Supervision and Administration of Internet Insurance Business** on 15 April 2011, seeking public comments until 3 May 2011. The draft provisions would apply to insurance companies and agents selling insurance products or providing related services via self-operated websites or third party websites. Under the draft provisions, the internet access provider for the website would be required to be located in mainland China and records on the website would have to be filed with the CIRC within 10 working days after beginning online insurance business operations. Insurance agencies selling insurance products online would be required to have a registered capital of at least RMB 10 million. Operators of third party websites providing online insurance business would also be required to have net assets of at least RMB 10 million at the end of the previous fiscal year.

CIRC AMENDS THE INTERIM PROVISIONS FOR ADMINISTRATION OF INSURANCE ASSET MANAGEMENT COMPANIES

The CIRC issued the **Circular on Adjusting Relevant Articles of the Interim Provisions for Administration of Insurance Assets Management Companies** (effective 20 April 2011), changing the requirements for establishment, registered capital and business scope of insurance asset management companies. The main changes include:

- the principal shareholder of the insurance asset management company must be an insurance group company or an insurance company (previously such an entity need only have been one of the shareholders);
- the principal shareholder must have been engaged in the insurance business for at least five years (previously eight years was required);
- the principal shareholder must have a solvency ratio of at least 150 per cent, total assets of at least RMB 10 billion and total group assets of at least RMB 15 billion (previously the criteria was a lower net assets threshold without reference to solvency);
- the registered capital of the insurance asset management company must be at least RMB 100 million (previously the minimum was RMB 30 million); and
- the scope of activities of insurance asset management companies has been broadened to include management of entrusted assets generally (previously the regulation limited an insurance asset management company to managing the assets of its shareholder insurance companies and their affiliates).

DRAFT PROVISIONS FOR SUPERVISION AND ADMINISTRATION OF INSURANCE BROKERS AND ASSESSORS

On 27 April 2011, the CIRC published the **Draft Provisions for Supervision and Administration of Insurance Brokers and Assessors** for public comments until 30 May 2011. Under the draft provisions, individual insurance brokers and assessors would be required to obtain a qualification certificate and practice certificate in order to provide insurance brokerage and assessment services. Insurance brokers and assessors would be prohibited from:

- advertising or engaging in insurance brokerage and assessment service by using their own names;
- concealing any important information relevant to the insurance contract;
- defrauding insurance companies by colluding with an applicant, insurant or beneficiary; or
- disclosing commercial secrets or invading the personal privacy of any insurance applicant, insurant or beneficiary. Violations would be punished by warnings, fines, or revocation of qualification certificates, depending on the severity of the offense.

China - Regulatory and Legislative Developments

Continued…

CIRC AMENDS INTERIM MEASURES FOR ADMINISTRATION OF CAPITAL GUARANTEE FUNDS OF INSURANCE COMPNAIES

The CIRC published the **Draft Measures for Administration of Capital Guarantee Funds of Insurance Companies** on 11 May 2011 for public comment until 25 May 2011. The draft measures would replace the *Interim Measures for Administration of Capital Guarantee Funds of Insurance Companies* issued in 2007. The main changes and additions include:

- a requirement that insurance companies must deposit capital guarantee funds with more than two commercial banks;
- the net assets of depository banks must be at least RMB 20 billion;
- capital guarantee funds must be deposited at banks located in the same location as the insurance company's head office;
- the nature of the capital guarantee funds cannot be changed during the deposit period;
- capital guarantee funds cannot be pledged for financing; and
- the deposit agreement for capital guarantee funds will be void if it is not filed with the CIRC.

CIRC AMENDS INTERIM MEASURES FOR ADMINISTRATION OF SUBORDINATED TERM DEBTS OF INSURANCE COMPANIES

The CIRC published the **Draft Measures for Administration of Subordinated Term Debts of Insurance Companies** on 18 May 2011, seeking public comment until 30 May 2011. The draft measures would amend currently effective regulations issued in 2004, and the main proposed changes and additions include:

- insurance companies with a solvency adequacy ratio less than 150 per cent or forecast to be less than 150 per cent within the next two years may apply to raise subordinated debt;
- insurance companies applying to raise subordinated debt must have been operating for at least 3 years and after collection, the aggregate unpaid principal and interest of subordinated debt must not exceed 50 per cent of the unaudited net assets of the insurance company at the end of the previous year;
- insurance companies, their shareholders and other third parties may not provide security for the subordinated debt;
- insurance companies must issue the subordinated debt within six months of receiving CIRC approval;
- funds obtained by issuing subordinated debt may not be used to invest in equities, real estate or infrastructure; and
- insurance group companies may not raise subordinated debt.

CIRC LAUNCHES PILOT PROJECT FOR VARIABLE ANNUITY INSRUANCE

On 5 May 2011, the CIRC released the **Circular on Implementing a Pilot Project for Variable Annuity Insurance** and the *Interim Measures for Administration of Variable Annuity Insurance*, allowing qualified insurance companies to sell variable annuity insurance in Beijing, Shanghai, Guangzhou, Shenzhen and Xiamen. Under the pilot program, variable annuity insurance is defined as a type of life insurance, the policy interest of which is connected with the unit price of an investment account with the minimum policy interest contractually guaranteed by the insurance company. Insurance companies selling variable annuity insurance products under the pilot project must obtain CIRC approval. During the trial period, each company may only apply for one variable annuity insurance product and the policy period must be at least seven years.

Gaston Fernandez
Associate, Beijing
T +86 10 6582 9590
gaston.fernandez@hoganlovells.com

Russia – Recent Cases

JUDICIAL REVIEW OF REGULATIONS UNDER THE COMPULSORY ROAD INSURANCE ACT

On 19 April 2011 the Supreme Court handed down their judgement on the judicial review of the Government's Regulations under the Compulsory Road Insurance Act concerning the calculation of damages and repair costs. The judicial review application was brought by an individual contending that these are not consistent with the Russian consumer protection law in part where the notion of "use" or "exploitation" of a vehicle is defined.

The Supreme Court dismissed the claim pointing out that the Government lawfully acted in their authority and there is no inconsistency between the laws and regulations. Resolving the matter the court referred to another Government legislation concerning the technical regulations on the safety of wheel-vehicles providing for its own definition of use being a period between the first acquisition for this purpose and full utilisation.

Regulatory and Legislative Developments

THE NEW RUSSIAN INSURANCE REGULATOR RECEIVES AUTHORITY

Following the Federal Financial Markets Service taking over the Federal Insurance Supervision Service to become a single financial services market regulator (the "Insurance Regulator", except for banking and audit) the Russian Government adopted the Regulation No. 326 of 26 April 2011 authorising them to exercise licensing, supervision and regulatory functions under the Federal Law "o*n the organisation of insurance business in the Russian Federation*" (the "Russian Insurance Law"). The local offices of the Federal Insurance Supervision Service will be integrated into the Insurance Regulator with their lower-rank officials carrying on their functions in ordinary way.

(Link in **Russian**)

NEW REGULATIONS ON SOLVENCY SUPERVISION AND APPOINTMENT OF TEMPORARY MANAGEMENT OF INSURERS

Along with that the Ministry of Finance also adopted the Order No. 13n of 8 February 2011 which came into force on 3 May 2011 governing the decision-taking procedure on the removal of the management of an ailing insurer and their replacement with the temporary management. Depending on the circumstances, the Insurance Regulator may either limit the incumbent management's powers to enter into certain transactions while analysing the financial position of the insurer or suspend the management completely transferring their authority to the temporary management. These also establish the lines of reporting and communication between the Insurance Regulator, insurer and a professional self-governing organisation.

(Link in **Russian**)

Russia - Regulatory and Legislative Developments

Continued…

NEW REGULATIONS ON PROFESSIONAL INDEMNITY INSURANCE FOR INSOLVENCY PRACTITIONERS

The Ministry of Economic Development adopted the Order No. 102 of 12 March 2011 setting out a code of conduct for insolvency practitioners in respect of their obligation to obtain and maintain a professional indemnity insurance policy. The order requires an insolvency practitioner to obtain the policy from one of the insurance companies accredited with the self-governing body where he holds the membership and maintain the full liability coverage all the time. The insurance policy should follow the standard terms approved by the All-Russian Union of Insurers.

(Link in **Russian**)

QUOTA FOR FOREIGN INSURERS

The Russian Insurance Law sets out a 25 per cent quota on the participation of foreign insurers in the aggregate share capital of Russian insurance companies.

The Insurance Regulator issued the calculation showing that as of 1 January 2011 the total share capital of Russian insurance companies amounted to 153,369 million rubles (EUR 3,834 million) as compared against 147,788 million rubles (EUR 3,695 million) as of 1 January 2010. As of 1 January 2011 foreign insurers have utilised 22.42 per cent of the quota as against 16.02 per cent a year earlier, making available 1.435 million rubles (EUR 36 million) for further equity investments.

(Link in **Russian**)

Eugene Suslov
Senior Associate, Moscow
T +7 495 933 8155
eugene.suslov@hoganlovells.com

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.

If you would like to follow up any of the issues please contact any of the following:

General matters
Nick Atkins and Sara Bradstock
(Editors)

Amsterdam
Jan de Snaijer

Beijing
Steven Robinson
Gaston Fernandez

Dusseldorf
Christoph Kueppers
Christoph Louven
Peter Hoffmann-Foelkersamb

Frankfurt
Marc Zimmerling

Hamburg
Joerg Paura

Hong Kong and South East Asia
Tim Fletcher
Neil McDonald
Allan Leung

London
Nick Atkins
Joe Bannister
Sara Bradstock
Victor Fornasier
Tim Goggin
Stuart Hill
Charles Rix
Jane Sparkes
Robin Spencer
David Sullivan
Peter Taylor
Christian Wells
Alexander Wood
John Young

Madrid
Joaquín Ruiz Echauri,
Luis Alfonso Fernández

Moscow
Oxana Balayan
Eugene Suslov

Miami
Laura Besvinick

Munich
Detlef Hass
Karl Pörnbacher

New York
Sean Keely
Pieter Van Tol

Paris
Thomas Rouhette
Bénédicte Dénis
Jean-Georges Betto

Philadelphia
David Newmann

Prague
Miroslav Dubovský

Rome
Paolo Ricci
Leah Dunlop

Shanghai
Andrew McGinty

Warsaw
Beata Balas-Noszczyck

Washington
David Hensler
Peter Bisio
Lisa Bonanno
Jonathan Constine
Ellen Kennedy
Michelle Kisloff
Sandy Mayo
Christopher Zaetta

www.hoganlovells.com

Hogan Lovells has offices in:

Abu Dhabi	Caracas	Hong Kong	Munich	Shanghai
Alicante	Colorado Springs	Houston	New York	Silicon Valley
Amsterdam	Denver	Jeddah*	Northern Virginia	Singapore
Baltimore	Dubai	London	Paris	Tokyo
Beijing	Dusseldorf	Los Angeles	Philadelphia	Ulaanbaatar*
Berlin	Frankfurt	Madrid	Prague	Warsaw
Brussels	Hamburg	Miami	Riyadh*	Washington DC
Budapest*	Hanoi	Milan	Rome	Zagreb*
	Ho Chi Minh City	Moscow	San Francisco	

Hogan Lovells" or the "firm" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (a Swiss Verein), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia.

The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Rankings and quotes from legal directories and other sources may refer to the former firms of Hogan & Hartson LLP and Lovells LLP. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. New York State Notice: Attorney Advertising.

© Copyright Hogan Lovells 2011. All rights reserved.

*Associated offices