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Contents

European Union - Recent Cases

ADVOCATE GENERAL OPINION - GENDER SPECIFIC DIFFERENCES IN INSURANCE CONTRACTS INVALID UNDER EU LAW

The Gender Directive (*2004/113/EC*) prohibits discrimination on grounds of gender in the access to and supply of goods and services. Article 5(2) provides a derogation allowing insurance companies to use gender as a rating factor when pricing contracts where this can be substantiated by relevant and accurate actuarial data. This derogation was challenged by the Belgian Consumer Association.

The Advocate General's view was that the derogation should be declared invalid under EU law because it is incompatible with the principle of equal treatment. In her opinion gender is a characteristic, like race and ethnic origin, which is inseparably linked to an insured person and over which they have no influence. Any declaration of invalidity should not have retrospective effect and should apply only after a three year transitional period.

The European Court of Justice is expected to give its final judgment in early 2011.

Association Belge des Consommateurs Test-Achats and others
Case C-236/09
(Reference for a preliminary ruling from the Belgian Constitutional Court)
Opinion of Advocate General Kokott, delivered on 30 September 2010

European Union - Regulatory and Legislative Developments

EUROPEAN FINANCIAL REGULATION

The European Parliament published a press release announcing that it had voted to approve legislation reforming the European Union financial supervisory framework. The European Parliament, the European Commission and the Council of the European Union (the "Council") reached political agreement on the new framework on 2 September 2010. This agreement was endorsed by European Economic and Financial Affairs Council (ECOFIN), one of the configurations of the Council, on 7 September 2010. The Council formally adopted the regulations on 17 November 2010. The new framework will consist of:

1. European Systemic Risk Board (ESRB); and
2. Three European Supervision Authorities, that is:
   (a) the European Banking Authority (EBA);
   (b) the European Securities and Markets Authority (ESMA); and
   (c) the European Insurance and Occupational Pensions Authority (EIOPA).

EBA, ESMA and EIOPA will replace the existing Level 3 committees, the Committee of European Banking Supervisors (CEBS), Committee of European Securities Regulators (CESR) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), with effect from 1 January 2011.

INSURANCE MEDIATION DIRECTIVE:

The European Commission has launched a consultation to collect views from all stakeholders concerned on the necessary changes to address the main weaknesses in the current IMD, with the aim of establishing a real level playing field for all sellers of insurance products at EU level. It will also address cross-sectoral inconsistencies in rules on selling investment products.

On 11 November 2010, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) has published its advice to the European Commission on revision of the Insurance Mediation Directive (IMD). The advice, which contains 39 recommendations, focuses on the seven issues which the Commission asked CEIOPS to consider: (1) the legal framework of the revised Directive; (2) scope; (3) international dimension of insurance intermediation; (4) professional requirements; (5) cross-border aspects of insurance intermediation; (6) management of conflicts of interest and transparency; and (7) reduction of administrative burden.

IRAN: FURTHER EU SANCTIONS

Following UN Security Council Resolution 1929 (2010) and European Council Decision 2010/413/CFSP both promulgated over the summer, the EU has now published further sanctions against Iran. These include a sweeping ban on providing insurance and reinsurance to the Iranian Government and state agencies, Iranian (and Iranian-owned) companies and those acting on their behalf. Insurers can still legally provide cover for Iranian individuals acting in their private capacity. The ban applies to contracts entered into or renewed after 27 October 2010 and there are only very limited exceptions to it. There are other bans on the supply of key materials and related financial assistance to Iran's petrochemical sector.

It is anticipated that the criminal penalties for infringement of the Regulation will be introduced in England by way of regulations in the near future, although the Regulation has direct effect under European law and must be complied with from its effective date.

European Council Regulation 961/2010

EUROPEAN COMMISSION REVIEW OF P&I CLUBS

The European Commission has opened formal proceedings to investigate whether certain provisions in the marine insurance sector might infringe European Union anti-trust rules - they fear that provisions within the agreements between the 13 global P&I clubs may harm ship owners and non-P&I insurers.

EUROPEAN ENVIRONMENTAL LIABILITY DIRECTIVE

The European Commission has decided not to propose an EU-wide compulsory liability scheme to cover environmental damage, or imminent threat of environmental damage, under the Environmental Liability Directive.

OECD GUIDELINES ON INSURER GOVERNANCE

The Organisation for Economic Co-operation and Development (OECD) has published for consultation draft revised guidelines on insurer governance. The guidelines are non-binding and are intended to apply to any insurer which is licensed to underwrite life, non-life and reinsurance. There are four sections: (1) governance structure; (2) internal governance mechanisms; (3) groups and conglomerates; and (4) stakeholder protection.

European Union - Regulatory and Legislative Developments
Continued…

SOLVENCY II UPDATE

The European Commission has published a consultation paper to gather views on the potential impact of Solvency II Level 2 implementing measures on insurance markets, insurance products and consumers and also on the wider social or economic environments. Comments are required by 26 January 2011.

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UK - Recent Cases

INSURERS LIABLE DESPITE EXCLUSION OF LIABILITYFOR CONTRACTUAL CLAIMS

A meat processing company supplied animal carcasses to the insured which processed the carcasses for onward supply to a pet food manufacturer. In breach of the applicable regulations, the carcasses were unfit for such use and ought to have been destroyed. The insured was liable to pay damages to the pet food manufacturer and the original supplier was in turn liable to indemnify the insured. However, the original supplier was in liquidation and, therefore, the insured claimed against its product liability insurer. The insurance policy provided an indemnity in respect of sums which the insured became legally liable to pay but there was an exclusion for any liability in contract unless liability would also have attached had the contractual liability not existed. It was held that, although the claim against the insured had only been made by the pet food manufacturer in contract, the insured would also have been liable in tort and was, therefore, entitled to be indemnified by its product liability insurer.

Omega Properties Ltd v Aspen Insurance UK Ltd
High Court, Queen's Bench Division (Commercial Court)
Christopher Clarke J
10 September 2010

EL TRIGGER LITIGATION

The long awaited Court of Appeal's judgment in the EL Trigger Litigation deals with how certain EL policies respond to mesothelioma claims and therefore which insurer should meet those claims. The judgment is extensive and complicated and has not brought the clarity sought to this area. The three judges reached their conclusions for different reasons. The case is the subject of further appeal to the Supreme Court. The following strands can be extracted from the judgment. Where an employer's liability insurance policy covers employees for diseases "contracted" during the course of their employment, the insurer's liability to pay a claim is triggered on the date of the inhalation of the asbestos dust which causes the disease. This was the standard practice across the market until around 2006. However, where the employer's liability insurance policy covers employees for injuries "sustained" during the course of their employment, liability is only triggered if the policy was in force when the tumour developed - this was the point in time when the injury was "sustained".

Durham v BAI (Run Off) Limited
Court of Appeal, Civil Division
Rix LJ, Smith LJ, Stanley Burton LJ
8 October 2010

INSURER NOT ENTITLED TO AVOID

The insured claimed against its insurers following a fire at their premises. Insurers refused to indemnify the insured and alleged non-disclosure and/or misrepresentation. On the facts, the judge found that insurers had not been induced to renew the policy by the alleged non-disclosure/ misrepresentation and were therefore liable to indemnify their insured.

Synergy Health (UK) Ltd v CGU Insurance PLC (t/a Norwich Union)
High Court, Queen's Bench Division (Commercial Court)
Flaux, J
19 October 2010

INSURER ENTITLED TO AVOID

The insured claimed an indemnity from the insurer for a fire at its industrial estate. The general policy conditions entitled insurers to avoid the policy from inception if a claim was fraudulent or intentionally exaggerated or a false declaration or statement was made. The principal shareholder/director of the insured had previously exaggerated a claim for a damaged drain by obtaining a false invoice, had previously made a fraudulent claim for damage to a holiday lodge and had made false declarations when presenting to other insurers. The insurer was entitled to avoid the policy. Even if one non-disclosure was innocent, the collection of past non-disclosures was material.

Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd
High Court, Queen's Bench Division (Mercantile Court)
HHJ Waksman QC
23 August 2010

UK - Recent Cases

Continued…

SCOPE OF UK PROHIBITION ON P&I CLUB'S INSURANCE OF IRANIAN SHIPPING LINES

The Iranian claimant was a member of the defendant P&I Club which provided cover for its fleet of ships. HM Treasury issued the Financial Restrictions (Iran) Order 2009 (the "Order") prohibiting transactions and business relationships between persons operating in the financial sector and the Iranian claimant save as permitted by two licenses: one which expired on 30 October 2009 and another which came into effect from that date. The licenses permitted insurance cover and claims payments for oil pollution within certain circumstances. The P&I Club terminated cover on 30 October 2009 on grounds that the insurance had been discharged by reason of frustration or supervening illegality - it took the view that the terms of the license issued on that day meant that it was no longer permitted to provide insurance to the claimant. On 31 October 2009, one of the claimant's ships suffered a constructive total loss. The High Court considered that the second license permitted the P&I Club to provide insurance cover and pay claims to the claimant. As the nature of the insurance remained unchanged in part, the purpose of contract as a whole was not frustrated: the claimant could recover its loss.

Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd
High Court, Queen's Bench Division (Commercial Court)
Beatson J
26 October 2010

INSURER'S RELIANCE ON SURVEYOR PREVENTED AVOIDANCE

The first claimant sold to the second claimant a floating dock and a towage plan was prepared to ensure safe delivery of the dock. The draft policy contained a warranty requiring the claimants to provide certain details of the towage plan to insurers but that warranty was removed on the basis that the towage plan was approved by surveyors so details were not ultimately provided to insurers. During its journey, the dock encountered bad weather and had to be abandoned. Insurers avoided the policy for material non-disclosure of the details of the towage plan. It was held that the risk was not unfairly presented to the insurers and that disclosure had been made of the towage plan. The insurers had been prepared to blindly accept the towage plan provided that it had been approved by surveyors and had waived disclosure of specific information by not making enquiries.

Garnat Trading & Shipping (Singapore) PTE Ltd v Baominh Insurance Corporation
High Court, Queen's Bench Division (Commercial Court)
Christopher Clarke J
19 October 2010

UNDERWRITERS' REPORTS NOT PRIVILEGED

Ship owners incurred costs of US$1.25million in defending a fraudulent claim brought against them by the owners/charters of another vessel. The claimant owners sought recovery of their defence costs from the defendant's insurers on the basis that they had supported and funded and instructed the solicitors who acted in pursuing the claim that had proved to be fraudulent, to which they were subrogated and in respect of uninsured losses. The claimant sought disclosure of certain documents from underwriters, including privileged communications with the solicitors. The solicitors and the underwriters were not party to the fraud. The question was whether the fraud exception applied to remove privilege where the documents had innocently been used by a third party to facilitate a fraud. It was held that the innocent insurers and the innocent solicitors (instructed in part by the innocent underwriters and in part by the fraudulent client) were used as a mechanism for achieving the fraud. As a result, the fraud exception applied and neither legal advice nor litigation privilege was available to the underwriters or the solicitors - the underwriters were ordered to disclose the documents.

The Kamal XXIV
High Court, Queen's Bench Division (Commercial Court)
Burton J
14 October 2010

UK - Recent Cases

Continued…

TIME LIMIT IN POLICY WAS BINDING

An insurance policy contained an arbitration clause that provided that any dispute between the insured and the insurer in respect of the insurer's liability under the policy was to be referred to arbitration within nine months of the dispute arising. If it was not referred to arbitration within this period, the claim would be deemed to have been abandoned. No arbitration was commenced and the claimants, who were making claims under the Third Parties (Rights against Insurers) Act 1930, sought an extension of time to do so. The court held that it did not have jurisdiction to extend time under section 12 of the Arbitration Act 1996, on the basis that the insurance policy was governed by Irish law.

William McIlroy Swindon Ltd v Quinn Insurance Ltd
Queen's Bench Division (Technology & Construction Court)
Edwards-Stuart, J
12 October 2010

ENGLISH JURISDICTION FOR REINSURANCE DISPUTE

A Swiss reinsurer appealed against a decision permitting a Bermudian reinsured to bring proceedings in England under an excess of loss reinsurance. The Swiss reinsurer had issued proceedings in Switzerland and applied to the English court to dismiss the claim against it. The Court of Appeal upheld that the English court had jurisdiction since the contract was governed by English law being a London market placement on standard London market terms.

Gard Marine & Energy Ltd v Tunnicliffe
Court of Appeal (Civil Division)
Ward, LJ; Thomas, LJ; Richards, LJ
6 October 2010

ENGLISH LAW GOVERNED REINSURANCE

A dispute arose as to the interpretation of a reinsurance contract written in the Lloyd's market on standard London market clauses. The reinsured commenced proceedings in Ontario and the reinsurers in turn commenced proceedings in England. It was held that there was a strong case that English law was applicable as a London market placement on London terms amounted to an implied choice of English law. English law was also applicable as a result of the presumption in favour of the place of business of the reinsurers. The implied choice of English law was of considerable significance in determining that England was the proper place for hearing a dispute under the reinsurance.

Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange
Queen's Bench Division (Commercial Court)
Christopher Clarke, J
10 September 2010

POLICY AVOIDED FOR NON-DISCLOSURE

The claimants owned a number of nightclubs through separate companies. The original companies went into administration and new companies were formed with very similar trading names. A fire occurred at a nightclub. The insurer avoided the policy for material non-disclosure because the claimants had failed to disclose that the name change was not merely to record a change in the name of the operating companies but was due to the old companies going into administration. It was conceded that the administration had not been disclosed to the insurer. Accordingly, the insurer was entitled to avoid the policy on the grounds that the old companies going into administration was a material fact that should have been disclosed. Further, the failure to comply with the safety recommendations were in this instance breaches of warranty.

Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Plc
High Court, Queen's Bench Division (Commercial Court)
Burton J
26 October 2010

AFTER THE EVENT POLICY FOUND TO RESPOND

The claimant solicitors sought to represent miners who had not received all compensation awarded to them under a government scheme. The defendant insurer issued an After The Event ("ATE") policy to clients of the claimant to protect against the risk of any order for adverse costs and any liability for disbursements. On the advice of counsel, the claimant unsuccessfully applied for a Group Litigation Order ("GLO") for the miners' claims. The ATE insurer refused to cover the adverse costs. The claimants' professional indemnity insurer paid and sought recovery from the ATE insurer. The court held that the claimants could recover under the ATE policy as neither the solicitor nor counsel had been negligent in the pursuit or handling of the GLO application.

Greene Wood McLean LLP (In Administration) v Templeton Insurance Ltd
High Court, Queen's Bench Division (Commercial Court)
Cooke J
26 October 2010

UK - Recent Cases

Continued…

NO PRE-ACTION DISCLOSURE IN ARBITRAL PROCEEDINGS

The applicant sought an order for pre-action disclosure in circumstances where the parties had entered into an arbitration agreement. The application was refused. The main reason for this decision was that, as a matter of construction, the power to order pre-action disclosure in accordance with section 33(2) of the Senior Courts Act 1981 could only be invoked by an applicant who appeared to the High Court to be likely to be a party to subsequent proceedings in that court. Therefore, section 33(2) did not apply if the underlying dispute was to be referred to arbitration and the court had no jurisdiction to allow the application.

Travelers Insurance Co Ltd v Countrywide Surveyors Ltd
Queen's Bench Division (Technology & Construction Court)
Coulson, J
6 September 2010

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UK - Regulatory and Legislative Developments

PAYMENT PROTECTION INSURANCE - UPDATE

In October 2010 the British Bankers' Association filed for Judicial Review of the FSA rules on PPI complaint handling which were published in August 2010 and which came into force on 1 December 2010. The FSA has announced that it will contest the BBA's judicial review of the new measures. The date for the hearing is 25 January 2011. The FSA says that in the interests of consumers, firms will be expected to continue handling complaints while the judicial review process is ongoing. If consumers are unhappy with how their complaint has been handled they may refer it to the FOS. Further, the FSA has stated that its open letter (originally published with the new rules in August 2010) was misinterpreted and it has sought to clarify its approach to PPI common failings by issuing a further statement. It explains that it has been the FSA's experience that sales on which one or more of the common failings occurred usually involved, on a proper construction of all the circumstances of the sale, a breach of at least one of its Principles for Business, or other FSA rules, or the general law.

INSURANCE CONTRACT LAW REFORMS UPDATE

Further to our update on the Law Commission and Scottish Law Commission's joint review of insurance contract law, the Law Commissions have issued the last in their series of short papers on insurance contract law: Issues Paper 9: The Requirement for a Formal Marine Policy: Should section 22 be repealed? This examines whether section 22 of the Marine Insurance Act 1906, which provides that a "contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy" is compatible with modern electronic commerce and whether marine policies should fall under normal contract rules as non-marine insurance policies do.

A summary of responses to issues Paper 6 on damages for late payment and the insurer's duty of good faith has now been published. The issues paper asked whether an insurer should be liable for a policyholder's loss suffered as a result of a late payment or non-payment of an insurance claim. The consultation indicated strong support for change, arguing that if an insurer has declined a valid claim and acted unreasonably, then insurance law ought to be brought into line with general commercial contractual principles and the policyholder should be offered an appropriate remedy.

The two Law Commissions are now developing their proposals, with a view to publishing them in a joint consultation in spring 2011.

INSURANCE MEDIATION DIRECTIVE - FSA UPDATE

The FSA, together with the Treasury, has established an industry working group with trade body and industry representatives to help inform their views on the review of the Insurance Mediation Directive.

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US - Recent Cases

STOLI APPROVED IN KRAMER BY NEW YORK'S HIGHEST COURT

New York's highest court, the New York Court of Appeals, has approved certain policy sales of stranger-owned life insurance ("STOLI") in New York for policies that pre-date recent anti-STOLI legislation. STOLI schemes generally involve the purchase of a life insurance policy by an individual and, in return for consideration, the beneficial interest in the policy is then transferred and eventually held by an investor who is a stranger to the individual. To date around half of the states, including New York in 2009, have enacted legislation prohibiting STOLI schemes.

In 2005, Mr Kramer took out life insurance policies providing $56,200,000 in coverage. The beneficial interest in the policies was then transferred by Mr Kramer's children to investors. Mr Kramer died in January 2008. His wife refused to provide copies of his death certificate to the investors holding beneficial interests in the policies. Mrs Kramer filed a law suit, claiming that the policies violated New York's insurable interest rule and that she should receive the proceeds of the policies, as representative of the decedent's estate. The plaintiff and the insurers both argued that the policies were required to comply with the insurable interest requirement of New York law, but sought differing outcomes.

This case was before the Court of Appeals following a certified question from the US Court of Appeals for the Second Circuit. The New York Court of Appeals held that, "New York law permits a person to procure an insurance policy on his or her life and immediately transfer it to one without an insurable interest in that life, even when the policy was obtained for just such a purpose". The court held that New York's anti-STOLI legislation did not apply in this instance as the legislation did not go into effect until 18 May 2010.

Kramer v. Phoenix Life Ins Co
State of New York Court of Appeals
17 November 2010

REINSURER NOT OBLIGED TO FOLLOW THE SETTLEMENT OF CEDENT WHERE REINSURED POLICIES EFFECTIVE AFTER REINSURANCE AGREEMENT TERMINATED

Connecticut Specialty issued a general liability policy to Equity Residential in December of 1999, which was 100% reinsured by Westport's predecessor. Westport terminated the reinsurance agreement in August 2000. In 2002, Royal Surplus Lines Insurance Co. assumed Connecticut Specialty's liabilities. In 2007, Royal Surplus Lines Insurance Co. changed its name to Arrowood Surplus Lines Insurance Co. Equity Residential filed a complaint alleging claims against Connecticut Specialty and, in an amended complaint, against Royal Surplus Lines Insurance Co. for losses occurring between December 2000 and December 2002. Arrowood paid $4,100,000 to settle the claims and incurred further costs of $2,609,326 in claim expenses. Arrowood sought reimbursement from Westport for the settlement and claim expenses. Westport refused to pay, arguing that the reinsurance cover only applied to occurrences that took place prior to the August 2000 termination of the reinsurance agreement. Arrowood disagreed, and argued that the follow-the-fortunes clause in the reinsurance agreement obliged Westport to reimburse Arrowood.

The District Court granted Westport's motion to dismiss, holding that only the first year of the policy was covered by the reinsurance agreement because Westport terminated the reinsurance agreement prior to the policy's next anniversary date. The reinsurance agreement stated that a policy issued for more than one year was considered as becoming effective at each anniversary date of the policy. The US Court of Appeals for the Second Circuit held that Westport was only obliged to follow the fortunes of its cedent for matters falling under the reinsurance agreement. The court held that Westport did not have to fund its cedent's settlement because the reinsured policies became effective *after* the reinsurance agreement terminated.

Arrowood Surplus Lines Ins Co v Westport Ins Corp
US Court of Appeals for the Second Circuit
8 October 2010

US - Recent cases
Continued...

ARBITRATORS EXCEEDED THEIR AUTHORITY BY REWRITING CONTRACT.

Platinum Underwriters Bermuda, Ltd, ("Platinum") reinsured PMA Capital Insurance Company ("PMA"). The Reinsurance Agreement included a "deficit carry forward provision" which entitled Platinum to reimbursement for losses carried over from one year to the next. In 2008 a dispute arose as Platinum sought to carry over $10.7million in losses from 1999-2001 and PMA challenged Platinum's rights. Platinum demanded arbitration.

The arbitration ran its course. The Panel's award ordered PMA to pay Platinum $6,000,000 and removed all references to the deficit carry forward from the Reinsurance Agreement. The Panel also extinguished any future rights and claims which required a deficit carry forward. PMA successfully petitioned the district court to vacate the award.

The US Court of Appeals for the Third Circuit affirmed the district court's decision, stating that courts should not simply rubber stamp the decisions of arbitrators. The Third Circuit held that an award is only enforceable to the extent that it does not exceed the scope of the parties' submissions. The Third Circuit agreed with the district court that the award in this instance "was not sought by either party, and was completely irrational because it wrote material terms of the contract out of existence". The Third Circuit also agreed with the district court's holding that the honorable engagement clause did not authorize the award. The Third Circuit stated that the honorable engagement clause did not permit the arbitrators to reinvent the contract before them.

PMA Capital Insurance Company v Platinum Underwriters Bermuda
US Court of Appeals for the Third Circuit
8 November 2010

US - Regulatory and Legislative Developments

RHODE ISLAND SOLVENT SCHEME

In 2002 Rhode Island enacted the *Voluntary Restructuring of Solvent Insurers* statute. Rhode Island is currently the only US state to offer a solvent exit solution similar to UK solvent schemes. On 28 June 2010, GTE Reinsurance Company Ltd ("GTE Re") became the first insurer to bring a Commutation Plan before the Rhode Island courts. GTE Re is a solvent reinsurer, which redomesticated to Rhode Island on 24 June 2010, and is owned by Verizon Communications Inc. GTE Re has an assumed reinsurance book and has been in run-off for over 20 years. On 21 July 2010, Providence County Superior Court issued an order creating a single class of creditors, allowing the Commutation Plan to move forward and permitting GTE Re to present the plan to its creditors.

GTE Re was required to send notice and an explanation of the Commutation Plan to all creditors. A Meeting of Creditors was held on 30 November 2010. The Commutation Plan approval requires positive votes from 50% of creditors in number and 75% of creditors in value.

As required by the statute, the Providence County Superior Court in Rhode Island scheduled a hearing to determine whether the Commutation Plan would materially adversely affect the objecting creditors or the interests of assumption policyholders. Certain creditors objected to the plan on constitutional grounds. The Contracts Clause of the US Constitution (Article I, section 10, clause 1) prohibits states from, *inter alia*, creating laws that impair the obligations of contracts. Certain objecting creditors maintain that the Commutation Plan and the Rhode Island rules offend the Contracts Clause. The Superior Court heard argument on this point at the hearing on 15 December 2010. The court did not decide the issue, but adjourned the hearing and asked that the Rhode Island Attorney General's office to submit briefing regarding the issues raised. The hearing is scheduled to continue on 12 January 2011.

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Germany - Recent Cases

GERMAN INSURANCE GUARANTEE FUND NOT ACCESSIBLE FOR EU/EEA INSURERS

The Administrative Court in Berlin ruled that a non-independent German subsidiary of a life insurance undertaking domiciled in the European Union or the European Economic Area cannot be member of the insurance guarantee fund according to section 124 paragraph 1 of the German Insurance Supervision Act (VAG). According to the ruling compulsory membership is only applicable to German and non-EU/EEA insurance undertakings authorized according to VAG. The Administrative Court in Berlin ruled that optional membership for EU/EEA insurance companies carrying out insurance business in Germany by means of freedom to provide services or freedom of establishment can neither be granted under German law nor does European law oblige the German legislator to provide for such option. The claimant filed an appeal to the Federal Administrative Court.

Administrative Court Berlin, 25 September 2009

Germany - Regulatory and Legislative Developments

AMENDMENTS TO THE GERMAN INSURANCE SUPERVISION ACT (*VERSICHERUNGSAUFSICHTSGESETZ,* "VAG") BY THE ANNUAL TAX ACT 2010 (*JAHRESSTEUERGESETZ 2010,* "JSTG 2010")

Having passed the final stage of legislative process on 26 November 2010, JStG 2010 amending the VAG will enter into force before the end of the year 2010. With the coming into force of JStG 2010 every transformation of reinsurance undertakings pursuant to the German Transformation Act (*Umwandlungsgesetz*, UmwG) will require the authorisation of the German Federal Financial Supervisory Authority, BaFin. Furthermore, in case of portfolio transfers between reinsurance undertakings the amended provisions require obligatory information of the ceding companies in writing forthwith after the effectiveness of the portfolio transfer. Mixed insurers domiciled outside the European Union and the European Economic Area will be allowed to carry out pure reinsurance business in Germany without authorisation under certain conditions.

France - Recent Cases

INCORRECT ABSENCE OF INFORMATION GIVEN A POLICYHOLDER NOT FATAL TO CLAIM

When entering into a policy, the policyholder made a false statement that he was not affected by any previous infection requiring medical treatment. When he claimed on his insurance, the insurer denied coverage because of the false statement. The Court of Appeal upheld the insurer's argument and held that because of the false statement, the policyholder had no right to benefit from the insurance. Pursuant to Article L. 113-8 of the French Insurance Code, the French Supreme Court quashed this decision and criticised the Court of Appeal for not having checked whether the omission changed the subject of the risk or if it modified the insurer's opinion.

Cour de Cassation, Civ. 1°,
14 October 2010

NO COVER FOR SUBCONTRACTOR'S CLAIM

A construction firm entrusted part of the construction work to a subcontractor which was insured pursuant to a 10 year warranty. The contractor never acknowledged the completion of the work. After damages were claimed, the subcontractor claimed against its insurer. The Bordeaux Court of Appeal dismissed the request of the subcontractor, considering that without express or tacit acknowledgment of the works by the contractor, the 10 year warranty could not be activated. The French Supreme Court upheld this decision. In its decision, it confirmed that:

(i) the 10 year warranty could only be activated when acknowledgment takes place; and

(ii) the acknowledgment has to be done by the contractor.

Cour de Cassation, Cv. 3,
21 September 2010

France - Regulatory and Legislative Developments

CONSUMER CREDIT AND INSURANCE REFORM

Law 2010-737 of 1 July 2010 came into force on 1 September 2010 to permit the possibility of a disconnection between a mortgage and payment protection insurance that is to say the option for a customer to purchase an insurance policy from the insurer of its choice when making an application for a mortgage. Consequently, credit institutions are now required to justify their refusal to accept the payment protection insurance cover purchased by the borrower, and they can no longer adjust the interest rate on the credit according to the type of policy to which the borrower has taken out. These provisions are laid down in articles L. 312-8 and subsequent articles of the French Consumer Code.

ACP - INCREASE OF THE MAXIMAL AMOUNT OF FINANCIAL SANCTIONS

Law 2010-1249 of 22 October 2010 on financial and banking regulations has modified Article L. 612-39 of the French Monetary and Financial Code in relation to the sanctions that the French regulator, called the *Autorité de Contrôle Prudentiel* ("ACP"), can impose upon the financial entities under its supervision, among which are the insurance undertakings, by increasing the maximum amount of pecuniary sanctions against such entities to Euros 100 million.

INSURANCE UNDERTAKINGS: REMUNERATION AND RISKS MONITORING

Law 2010-1249 of 22 October 2010 on financial and banking regulations has introduced the obligation for insurance undertakings and banks to establish within their companies a Remuneration Committee and Risk Committee. This measure will come into force in May 2011.

REFORM OF TRANSPORTATION INSURANCE

Law 2010-1249 of 22 October 2010 on financial and banking regulations has introduced the possibility for the Government to take, by way of Ordinance, the necessary measures in order to reorganise Title VII of Book I of the French Insurance Code regarding insurance relating to transportation. Such Ordinance, which would recast the regime of transportation insurance, should be taken within nine months as from the publication of the law.

RECOMMENDATION OF THE ACP IN RELATION TO COMPLEX INSURANCE PRODUCTS

On 15 October 2010 the ACP issued a recommendation to frame the risk of bad marketing of unit-linked life insurance contracts which are made up of complex financial instruments. The ACP specifies the conditions under which the insurance undertakings and insurance intermediaries will meet their legislative and regulatory obligations relating to the duty of information and advice, and imposes, in particular, a requirement for the insurers to justify the means implemented to ensure that policyholders are able to understand the risks associated with such products. This recommendation applies to the distribution procedure after 31 December 2010.

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Spain - Recent Cases

PERMANENT TOTAL DISABILITY AFTER A CAR ACCIDENT

By means of a judgment issued by the Civil Section of the Supreme Court on 29 September 2010, when the insured claims for further long-term damages as a result of non established injuries after a car crash, the connection with the loss has to be proved. According to the facts, the insured party suffered from Crohns disease a year after the loss which made him unable to carry out his job as a waiter. The court did not consider that there was a proximate cause, which is essential for non-contractual liability, rejecting any damage for that reason.

Spanish Supreme Court
Civil Division
29 September 2010

INAPPLICABILITY OF A CLAUSE EXCLUDING SLIMMING SURGERY

According to the judgment, even if there is a delimitation clause within the policy excluding any slimming treatment, the insurer shall be obliged to cover such costs if these are related to an illness. In this case, the insured suffered from morbid obesity. As it was proved that the claimant suffered this illness after underwriting the policy, the Provincial Court of León agreed with the First Instance Court number 7 in his judgment whereby the insurer shall cover the surgery expenses.

Appeal Court of León
Civil Division
7 July 2010

PRESCRIPTION INTERRUPTED DUE TO AN EXTRAJUDICIAL CLAIM

By means of its judgment of 10 September 2010, the Spanish Supreme Court has ratified that in case of an extrajudicial claim after the loss inside of a non-contractual liability litigation, the new term shall start the following day after the claim is made. In the case at hand, the second extrajudicial claim by the plaintiff was brought within two years after a fire but later than a year from the first extrajudicial claim. Therefore, the Supreme Court held that the time foreseen in the statute of limitation had elapsed, releasing the defendants from any liability.

Supreme Court
Civil Division
10 September 2010

Spain - Regulatory and Legislative Developments

AGRICULTURAL INSURANCE PRODUCTS DEVELOPMENTS

Ministerial Order ARM/2815/2010 dated 27 October 2010 provides the conditions of agricultural insurance. It includes insurable productions and yield, minimum technical conditions, scope, guarantees' periods, dates of subscription and unitary prices regarding agricultural products.

Order ARM/2815/2010
27 October 2010

NEW DISPOSITION IN INSURANCE CONTRACT ACT ABOUT NON-DISABILITY DISCRIMINATION

The draft bill Implementing the International Convention on the Rights of Persons with Disabilities, foresees in its Article 10 an additional provision to be included in the Insurance Contract Act prohibiting any kind of disability discrimination at the time of insurance underwriting, in particular with respect to the establishment of different underwriting procedures, contract rejection or more onerous conditions due to disability.

Draft Bill Implementing the International Convention on the Rights of Persons with Disabilities

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Italy - Recent Cases

DUE CONDUCT REQUIREMENTS FOR INSURANCE BROKERS

In judgment no. 12973 of 27 May 2010, the Italian Supreme Court (the "Court") reaffirmed the due conduct requirements for Italian insurance brokers. Idromeccanica Bertolini S.p.A. ("Bertolini"), brought an action before the Court of Milan and then before the Court of Appeal of Milan against the broker, MARSH S.p.A. alleging that the latter did not assist and advise Bertolini with the level of diligence required under Italian law in the execution of non-life insurance contracts. The broker's defence was grounded in Bertolini's failure to provide sufficient and exhaustive information to the broker. In addition the broker objected to the Court of Appeal's erroneous assumption that it was the broker's duty to carry out technical and financial research on the potential assured, even without a specific mandate for this. The court confirmed the judgment of the Court of Appeal, stating that a broker is a professional who puts insurance companies (with which he has no contractual links) in contact with those of his clients who intend to enter into an insurance contract. The broker assists clients both in the determination of the content of the contract and in the management and execution of the contract itself. As a consequence, a broker, at least prior to the contract being executed by the client and the insurer, is not neutral to the parties. Rather it acts on the client's initiative as the client's personal adviser, with the duty of analysing which contractual models on the market best match the client's interests in order to offer it the most suitable insurance coverage.

Bertolini vs Marsch
Italian Supreme Court decision no. 12973
27 May 2010

DIFFERENCES BETWEEN THE ROLE OF BROKER AND INTRODUCER ("PROCACCIAMENTO D'AFFARI")

In judgment no. 12694 of 25 May 2010, the Italian Supreme Court clarified the unresolved question on the difference between a "broker" and an “introducer” (so called "*procacciatore d'affari*") under Italian law. The company M.D. (the "Broker") started proceedings against G.M. and F.G. (the "Companies") before the Court of Milan in order to obtain the payment of commissions equal to IT L. 97.875.600, resulting from the execution of a mediation contract. The Court of Milan ordered the Companies to pay only Euro 1,300,00 since the judge classified the contract as a "unilateral mediation" contract, with the Broker enjoying a right to commission subject to the Broker executing an insurance agreement. The Broker brought an action before the Court of Appeal of Milan and afterwards before the Italian Supreme Court which stated the inadmissibility of the claim since the Broker's request to classify the contract as an "introducer agreement" (instead of a mediation contract) was a new judicial matter, introduced for the first time before the Court of Appeal (which is inadmissible under Italian procedural law).

The court reaffirmed the distinguishing features of the role of introducer, which is characterised by the existence of a contractual relationship between the parties. This contractual relationship does not exist in a mediation contract as per Article 1754 of the Italian Civil Code. In fact, the introducer performs his activity even on a non-continuous basis to, and only to, the advantage of his client by collecting contract proposals and contacts and sending them to the client. This means that the activities performed by the introducer are not of a neutral nature. The court specified that if the intermediary performs activities not only with the purpose of transferring contacts and "deals" to the client, but also all the activities necessary to the execution of the contract itself, this intermediary is to be classified as a broker (with a duty entailing for the latter to comply with all the relevant provisions under Italian law for example; enrolling with the relevant register).

M.D. vs G.M. and G.F
Italian Supreme Court decision
25 May 2010, no. 12694

Italy - Regulatory and Legislative Developments

THE ITALIAN ADMINISTRATIVE COURT ANNULS ISVAP PROVISION ON BANKS' CONFLICTS OF INTEREST

On 28 October 2010 the Italian Administrative Court ("TAR") of Lazio allowed the claim brought by the Italian Banking Association ("ABI") and a number of Italian banks (Banca Nazionale del Lavoro s.p.a., Cassa di Risparmio di Parma e Piacenza s.p.a., Deutsche Bank s.p.a., Intesa San Paolo s.p.a., Unicredit Family Financing Bank s.p.a) aimed at annulling Article 52 of ISVAP Regulation no. 35 of 26 May 2010 (the "Regulation") which, in its original wording, prevents banks from being both intermediaries and beneficiaries of the same policy, as often happens, particularly in insurance policies attached to loans provided by banks and in the case of card protection insurance.

The judgment was grounded on ISVAP's failure to include the above provision in the public consultation procedure as required by Italian law, and accordingly for not having sufficiently informed insurance operators and evaluated the impact of such a provision on the market. The judgment being immediately effective, Article 52 of the Regulation is therefore annulled. ISVAP may now appeal the judgment (within 30 days from notification or three months from publication of the judgment) requesting the Court of Appeal to suspend the enforceability of the annulment of article 52, even before the Regulation enters into force on 1st December 2010.

ISVAP may start a new consultation procedure on the specific provision, aimed at issuing a regulation on this point and the judgment is based on procedural issues and does not deal with the merits of the provision itself.

ANIA ISSUED INTERPRETIVE GUIDANCE ON ISVAP REGULATION NO. 35

On 7 November 2010, the Italian Association of Insurance Companies ("ANIA") produced a document providing insurance companies with interpretive guidance regarding ISVAP Regulation no. 35 of 26 May 2010 (the "Regulation"). The document brings together all the questions on interpretation received from insurance companies since the Regulation was issued and it aims to clarify various questions linked to the application of the Regulation. The document is made up of five sections: (1) general questions; (2) questions on life insurance products; (3) questions on non-life insurance products and on policies linked to loans; (4) other provisions; and (5) questions on annexes to the Regulation.

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Latin America - Recent Cases

NULLITY OF A LIFE INSURANCE CONTRACT CONTAINING CLAUSE REGARDING CRIMINAL LIABILITY

In a judgment of 1 September 2010, the Colombian Supreme Court of Justice (*"Corte Suprema de Justicia")* rendered ineffective a life insurance policy in which the insured had expressly lied, stating in one of the policy attachments that he had no criminal convictions. According to the judgment, the ratification by the insured and his wife of the non-existence of criminal liabilities is justifiable cause enough to leave null the life insurance policy with no place for any damages to their beneficiaries.

Supreme Court of Justice of Colombia
Civil Division
1 September 2010

INSURANCE CLAIM UNFUNDED: INADEQUACY OF MINIMUM SALARIES

The Civil High Court of Justice of Lima rejected a claim by an insured against his insurer, whereby the insured had claimed on his life insurance policy for 600 times his "minimum salary" (where "minimum salary" is the amount set out in his contract of employment). The insured then appealed his claim to the Constitutional Court of Peru which rejected his appeal. The Constitutional Court of Peru stated that in light of Supreme Decree 054-90-TR every reference to "minimum salary" should be understood as "minimum legal income" (where "minimum legal income" is the minimum salary that can be paid for the insured's job as established by law) and therefore the insured's claim would be smaller than the amount claimed.

Constitutional Court of Peru
Civil Division
21 October 2010 ■

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Latin America - Regulatory and Legislative Developments

SUGESE APPROVES THE RULES TO BECOME AN INSURANCE BROKER IN COSTA RICA

The Insurance General Superintendence of Costa Rica ("SUGESE") has finally approved the conditions which have to be fulfilled by companies that intend to become insurance brokers. This new regulation provides for the prior conditions that must be complied with, registration requirements and the content of the initial plan of activities that must be filed. The Insurance law will allow these companies to allocate more than one insurance product from different insurers simultaneously.

SUGESE announcement
21 October 2010

COLOMBIA STARTS A VALIDATION PROCESS CONCERNING THE COMPULSORY INSURANCE OF TRAFFIC ACCIDENTS

The Federation of Colombian Insurers ("FASECOLDA") has recently requested Colombian insurers to submit all their compulsory insurance policies to the RUNT (National Unique Register of Traffic) in order to double-check and guarantee the veracity of their information. Thanks to this announcement, which was entered into force through a Circular issued by the Ministry of Transportation of Colombia, FASECOLDA has reiterated the need to have a compulsory insurance covering traffic accidents in order to register a car.

Ministry of Transportation
Circular Number 20104010423271
21 October 2010

COALITION TO DEAL WITH THE CLAIMS RECEIVED REGARDING THE INSURANCE ACTIVITY LAW IN VENEZUELA

The Venezuelan National Assembly has entrusted the Subcommittee of Financial Politics, Bank, Insurance and Financial Cooperation ("Subcomisión de Política Financiera, Banca, Seguro y Cooperación Financiera") to deal with all the claims received regarding the Insurance Activity Law. In light of the afore-mentioned, the Subcommittee established a coalition between the Ombudsman ("La Defensoría Del Pueblo"), the Superintendence of the Insurance Activity ("SUDESEG") and the Institution for the Defence of Assets and Services Access ("Indepabis"), as the result of a strategic alliance based on cooperation, solidarity and assistance in order to protect the rights and guarantees of policyholders, insured and beneficiaries in insurance agreements.

Finance Permanent Committee
4 November 2010 ■

China - Regulatory and Legislative Developments

CIRC ALLOWS INVESTMENT OF INSURANCE FUNDS IN CERTAIN REAL ESTATE AND REAL ESTATE RELATED FINANCIAL PRODUCTS

The *Provisional Measures on Investment of Insurance Funds in Real Estate*, issued by the CIRC and effective 3 September 2010, allow investment of up to 10% of an insurance company's funds in certain types of domestic real estate and real estate related financial instruments. Insurance companies investing in the real estate sector must satisfy a series of criteria, including: (1) having solvency ratios of at least 150% in the most recent fiscal year and quarter; (2) earning profits of at least RMB 100 million in the previous fiscal year; and (3) employing a team of experienced real estate investment specialists.

Insurance companies are still prohibited from investing directly in the development or sale of commercial residential buildings.

CIRC ALLOWS INVESTMENT OF INSURANCE FUNDS IN UNLISTED EQUITIES

The *Provisional Measures on Investment of Insurance Funds in Equities*, issued by the CIRC and effective 3 September 2010, allow investment of up to five percent of an insurance company's funds in equities of unlisted domestic companies and funds of such unlisted equities. Insurance companies investing in these equities must satisfy a series of criteria, including: (1) having solvency ratios of at least 150% in the most recent fiscal year and quarter; (2) earning profits of at least RMB 1 billion in the previous fiscal year; and (3) employing a team of experienced equities investment specialists.

CIRC REGULATES JOB PERFORMANCE AUDITS FOR SENIOR INSURANCE COMPANY MANAGEMENT

The *Administrative Measures for Auditing Insurance Company Directors and Senior Management* (effective 1 November 2010) strengthens the CIRC supervision of directors and senior management of insurance companies by requiring regularly scheduled "objective evaluations" of job performance during employment at least once every three years, additional evaluations upon occurrence of serious regulatory violations, and final evaluations upon departure. Audits of the chairman of the board of directors, the general manager and internal auditors of insurance companies must be performed by external auditors. Job performance audit reports of the chairman of the board of directors and senior management personnel of the head company should be examined by the Company's board of directors and then submitted to the CIRC.

CIRC UPDATES RULES ON INTERNAL CONTROLS OF INSURANCE COMPANIES

The *Basic Rules for the Internal Control of Insurance Companies* (effective 1 January 2011) replace guidelines previously issued in 1999 and were issued to improve the risk prevention capabilities of insurance companies and strengthen internal controls. The rules set out four basic types of internal control activities: sales control, operational control, control of basic management and control of fund utilisation. The Basic Rules apply to all insurance companies incorporated in China (including insurance group companies, reinsurance companies and insurance asset management companies).

CIRC ISSUES DETAILED IMPLEMENTING GUIDELINES FOR COMPREHENSIVE RISK CONTROL IN LIFE INSURANCE COMPANIES

The Guidelines, issued and effective from 24 October 2010, expand upon guidelines issued in 2007 and provide detailed rules for life insurance companies on risk management systems, risk recognition and assessment, risk measurement, risk response and control, and asset liability management. The Guidelines identify seven types of risks: market risk, credit risk, insurance risk, operational risk, strategic risk, reputational risk and liquidity risk. The Guidelines require all life insurance companies to establish a comprehensive risk management department with sound risk classification systems and notify the CIRC of the individual responsible for the department by 30 November 2010. Life insurance companies must also establish a risk management committee before 1 October 2013, and annual comprehensive risk control reports must be submitted to the CIRC starting in 2014.

NON-VESSEL OPERATING COMMON CARRIERS (NVOCCS) ALLOWED A CHOICE BETWEEN INSURANCE COVERAGE OR CASH DEPOSITS TO COVER LIABILITY

Following consultations with the CIRC, the Ministry of Transportation ("MOT") issued the *Notice on Trial Implementation of NVOCC Operating Liability Insurance* (effective 1 November 2010), providing NVOCC business operators the option to purchase NVOCC liability insurance to cover risk. Previously, a cash deposit of RMB 800,000 with the MOT was required. Insurance companies offering NVOCC liability insurance products must: (1) be registered in China; (2) be recognised and approved by the CIRC; (3) obtain approval from the MOT for all NVOCC liability insurance products and file those products with the CIRC; and (4) sign a form letter of undertaking to the MOT.

China - Regulatory and Legislative Developments

Continued…

NATIONAL PEOPLE'S CONGRESS APPROVES *SOCIAL INSURANCE LAW*

The *Social Insurance Law* (effective 1 July 2011), regulates five basic types of social insurance as common rights for all citizens: (1) basic social security insurance; (2) basic medical insurance; (3) occupational injury insurance; (4) unemployment insurance; and (5) maternity insurance.

The law provides for improving the social security insurance system for rural areas and allows individuals to transfer their basic social security insurance accounts and basic medical insurance accounts from their former places of residence to their current residences. The law specifies restrictions on government use of social insurance funds as well as basic management and control systems for those funds.■

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Russia - Recent Cases

THE CONSTITUTIONAL COURT CLARIFIED THE COMPULSORY ROAD INSURANCE ACT

On 30 September 2010 the Constitutional Court handed down their judgment on the constitutional review of certain provisions of the Compulsory Road Insurance Act and Russian Civil Code. Although the application was struck out by the judges as being intended to re-hear the case on its merits, the Constitutional Court has clarified the law and directed judges on its application. It was not clear if dependants of a deceased victim of a road accident, entitled to the statutory retirement pension, can claim compensation from the tortfeasor's insurance company under the Compulsory Road Insurance Act. The inferior courts dismissed the claim disqualifying the claimant having statutory pension as not being financially dependant on the deceased. The Constitutional Court set out that a mere fact of the pension entitlement or other income of a dependant does not disqualify them form the award automatically. The court deciding the case should consider all the circumstances and decide if the financial support from the deceased was a permanent and principal source of income of the dependant (claimant).■

Russia - Regulatory and Legislative Developments

REGULATIONS ON COMPULSORY CLINICAL TRIAL INSURANCE

The Russian Government adopted the regulations on compulsory clinical trial insurance which came into force on 28 September 2010. The regulations were adopted to give effect to the provisions of the Federal Law "On the Circulation of Pharmaceuticals" which came into force on 1 September 2010. The regulations set out the standard terms of insurance, approved insurance application and policy forms, insurance premium and a more detailed procedure of entering into the insurance contract. These also indentify a class of beneficiaries under the insurance policy and set out the compensation claiming procedure.

LEGISLATIVE PROPOSALS CONCERNING RESIDENTIAL MANAGING COMPANIES

A new bill was introduced and has passed the first reading in the Russian Parliament making it compulsory for independent residential managing companies to join one of professional self-governing organisations (the "SGO") starting from 1 January 2013. In addition to contributing to the compensation fund of an SGO, a residential managing company will have to purchase insurance with a statutory minimum coverage of RUR 500,000 (around EUR 12,000) to cover a number of risks arising from its business, including damage to the managed property. The SGOs shall make publicly available the information of their members' insurers and their local offices.■

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Insurance and Reinsurance Planner

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

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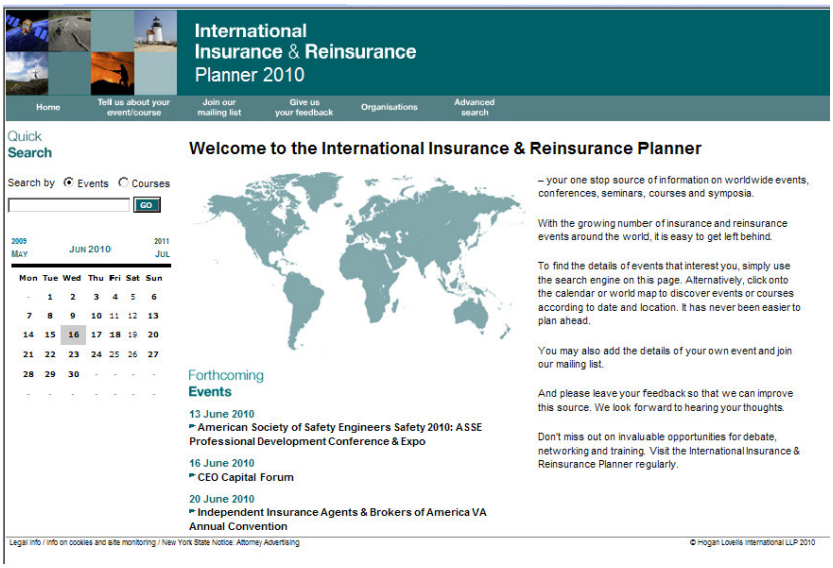

This bulletin contains short reports of significant recent developments in the law of insurance and reinsurance and related topics around the globe. In this form, and due to the vast pace at which legislative and regulatory issues develop, it cannot be fully comprehensive. It is written in general terms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

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