Lovells

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# Global Insurance and Reinsurance Bulletin

## Introduction

**Welcome to the December issue of the Global Insurance and Reinsurance Bulletin.**

We are delighted to report that at the recent JUVE Legal Awards the Lovells team in Germany won the Insurance Law Firm of the Year award.

As the current financial crisis continues and its effects are felt ever more widely, the cover provided under directors and officers insurance policies is obviously extremely important and is increasingly falling under the microscope. To this end, we enclose a special supplement with this issue of the Global Insurance and Reinsurance bulletin.

As part of our continuing effort to highlight our global offices, we turn to Chicago and our US insurance and reinsurance dispute resolution practice. Founded in 1995, the Chicago office is one of the centres of our firm's highly regarded international insurance and reinsurance practice which has a breadth of experience that, we believe, is unrivalled by any other international law firm. Led by Joe McCullough, the US insurance and reinsurance dispute resolution attorneys, along with the corporate insurance attorneys, represent one of the largest and most sophisticated practices in the nation.

We represent many of the world's largest leading insurance and reinsurance companies. Our practice not only is national in scope, but also frequently involves matters with an international reach.

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Appearing before arbitration panels and in courthouses throughout the United States, our lawyers have particular skill in representing both US companies doing business in the US and globally and non-US companies conducting business in the US in a wide variety of matters. Our experience in disputes with a cross-border dimension is considerable.

Ranked first in the US for litigation and dispute resolution by Reactions magazine in its Legal Survey 2008, our litigation team has helped clients resolve disputes involving virtually every significant issue that has impacted the insurance industry, including disputes relating to September 11 losses, the personal accident/London Market Excess spiral, brokers' contingent commissions, the collapse of the Fortress Re and Unicover pools, asbestos pollution and health hazard coverage, the EMLICO redomestication to Bermuda, financial product mis-selling and laddering claims, auditor misconduct claims, aviation bodily injury carve outs, and financial reinsurance pools. We represent insurers and reinsurers in the life and health and property and casualty sectors, as well as liquidators and scheme administrators of such companies in insolvency proceedings.

Several of our US partners are consistently ranked among the best insurance and reinsurance attorneys in the nation. For example, Chambers USA recognises our litigators Gail Goering, Eric Haab, Joe McCullough and Neal Moglin as leaders in the insurance and reinsurance industry. Lovells was also voted "Insurance Law Firm of the Year" by Who's Who of Business Lawyers for four consecutive years (2005, 2006, 2007, and 2008) and named "Law Firm of the Year" at the 2007 US Insurer Awards.

Because our lawyers in the Chicago office frequently represent international insurers and reinsurers based in other countries, our office works closely with the insurance and reinsurance teams in New York, London, Germany, Tokyo and other jurisdictions. As an integral part of this global network of experienced lawyers, we welcome the opportunity to work with you.

With season's greetings and our best wishes for a happy and prosperous New Year. ■

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# Legal update – UK: Recent cases

## NO RECOVERY OF LOSS ADJUSTER'S FEES

In a costs assessment relating to a personal injury claim, an attempt was made to recover the fees of loss adjusters who had been appointed by insurers to investigate the case before solicitors were instructed. These fees were then included as a disbursement in the solicitors' bill at the costs assessment. It was held by the costs judge that these fees were not recoverable.

*Cuthbert v Gair*
*Costs Judge, Master Haworth*
*3 September 2008*

## ORDER FOR NON-PARTY COSTS ALWAYS EXCEPTIONAL

Following an action for breach of contract the defendant was found liable to Equitas and ordered to pay Equitas' costs. The defendant subsequently went into voluntary liquidation and Equitas applied to the court for one of the directors of the defendant to be added to the proceedings for the purpose of a non-party costs order being made against him. The court decided that the director would not be joined for the purpose of a costs order. An order for payment of costs by a non-party would always be exceptional and as Equitas could have made the director a party to the original proceedings they had not made out a sufficient case for him to be joined solely for the purpose of costs.

*Equitas Ltd v Horace Holman & Co Ltd*
*Commercial Court*
*Andrew Smith J*
*3 October 2008*

## ENGLISH COURT HAS JURISDICTION OVER DISPUTE BETWEEN FRENCH AND LONDON CO-INSURERS

A French company was co insured by a market of London and French insurers. Separate London market and French market policies were issued. The French market policy contained a Paris arbitration clause. The French market considered that it had claims settlement authority on behalf of the London insurers. A claim was settled and the French market indicated that an arbitration would be started in Paris to recover the London market's contribution to the settlement.
The London insurers started proceedings in England seeking a declaration of non-liability to the French market. Tomlinson J held that the English court had jurisdiction and that the arbitration clause in the policy issued to the insured was inapplicable to the dispute between co-insurers.

*Youell and Others v La Reunion Aerienne and Others*
*Commercial Court*
*Tomlinson J*
*22 October 2008*

## FAILURE TO NOTIFY CIRCUMSTANCES

The Court of Appeal considered the application of a notification of circumstances clause in a professional indemnity policy. A firm of accountants appealed against a decision of Gloster J regarding a notification to its insurers of circumstances that could give rise to a claim relating to the activities of its tax planning subsidiary. It was held that a notice which was not given "as soon as practicable" as required by the policy terms did not qualify as a valid and effective notice. Even though the notice clause was not stated to be a condition precedent it was interpreted as having this effect. The Court of Appeal upheld that there had not been a valid notification to the following market who were not notified until 11 months after the two Lloyd's leads. The Court of Appeal found that the scope of the circumstances that had been notified was wider than had been found at first instance, but was still not effective to cover all claims arising out of the relevant tax schemes

*HLB Kidsons v Lloyd's Underwriters*
*Court of Appeal*
*Rix LJ, Toulson LJ and Sir Richard Buxton*
*31 October 2008*

# Legal update – UK: Regulatory and legislative developments

### DP08/04: INSURANCE RISK MANAGEMENT: THE PATH TO SOLVENCY II (SEPTEMBER 2008)

The FSA has published DP08/04 which represents the start of a programme of preparation for Solvency II for the UK insurance market. The discussion paper highlights and explains key elements of the Solvency II regime, with the aim of stimulating and helping UK insurers' preparations. Whilst drawing primarily from the Solvency II Directive, it is not a summary of the Directive. Instead, it concentrates on some of the key elements of change for UK regulatory requirements and practice and identifies areas in which firms might best focus their preparations through the coming 12-18 months. Comments are requested by 31 December 2008.

### PAYMENT PROTECTION INSURANCE: THEMATIC UPDATE PUBLISHED (SEPTEMBER 2008)

The FSA has published the latest update on Payment Protection Insurance (PPI) and says that in view of the poor results gathered during its recent work it is escalating its regulatory intervention. It is considering the appropriate action to deal with on-going non-compliant sales practices and identify and remedy non-compliant past sales. The results of the latest update showed that:

- very few customers were told that the cost of the payment protection would be added to the loan as a single premium and that interest would be charged on this amount
- only half of all customers said that they were told about the key limitations and exclusions of the policy. This is fundamental to establishing a customer's need and eligibility and shows unacceptably poor levels of sales competence
- many customers were not told of both the monthly and total cost of their PPI. At the worst performing firms very few customers were given adequate information on the cost of their policy.

The FSA plans to publish a further update on the third phase of its thematic work in early 2009. It says that it is considering the Financial Ombudsman Service's (FOS) concerns, raised in its wider implications letter, about PPI complaints and will be working with the FOS on the appropriate response to this serious matter, in the context of FSA's broader strategy.

### RETAIL PAYMENT PROTECTION INSURANCE: COMPETITION COMMISSION PUBLISHES PROVISIONAL FINDINGS REPORT (OCTOBER 2008)

The Competition Commission (CC) has published its provisional findings report on retail Payment Protection Insurance (PPI), together with a Notice of Provisional Findings. Retail PPI is a small part of the overall PPI market relating to protection taken out on repayments for shopping through home catalogues. Although part of the ongoing investigation into the whole PPI market, the CC decided in June (when it published its provisional findings on the rest of the market) that it needed further information before reaching its provisional findings on this sector. The report concludes that, as with other types of PPI policy, retail PPI is highly profitable for distributors and there is little competition between providers on price and other factors, limited ability for customers to search for alternatives or switch products and a considerable point-of-sale advantage for the providers.

The CC has also published a Notice of Possible Remedies for retail PPI, inviting views on how best to remedy the problems identified. The notice includes most of the remedies consulted on for other types of PPI policies, as well as a possible requirement to sell retail PPI separately from merchandise cover.

### REFORMING INSURANCE CONTRACT LAW: LAW COMMISSION PUBLISHES A SUMMARY OF RESPONSES TO CONSULTATION (OCTOBER 2008)

A summary of the responses which the Law Commission and the Scottish Law Commission have received to their joint consultation in relation to business insurance has been published. Part 3 of the summary paper reports on the responses the Law Commissions received to their proposals on misrepresentation and non-disclosure and warranties of past or present fact (the proposals and questions posed in Part 5 of the consultation paper). Part 4 of the summary paper reports the responses received to the proposals on warranties of future conduct (the proposals and questions posed in Part 8 of the consultation paper). Part 5 of the summary paper reports on the responses received to the proposals on intermediaries (the proposals and questions posed in Part 10 of the consultation paper). The Law Commissions state that they have not yet formulated their recommendations on this subject.

# Legal update – US: Recent cases

### INSURERS CANNOT DENY COVERAGE AFTER BAD FAITH INVESTIGATION

A general contractor was sued for construction defects allegedly caused by subcontractors. The contractor tendered the claim to the subcontractors' insurers, and each insurance company denied the claim on the grounds that the claim was for completed operations. One insurer requested documents but did not receive them, then denied coverage without further investigation – the adjustor assumed that because the claim was assigned to a claims unit that does not handle ongoing operations claims, the claim must be for completed operations. The other insurer investigated, but denied coverage based on an unsupported conclusion about the date of completion. The court said "both insurers' investigations were so unreasonably defective that reasonable minds could not differ that they constitute bad faith." Under state law, because the insurers acted in bad faith, and because they could not prove that their actions did not harm the contractor, the insurers would be barred from denying coverage.

*Aecon Bldgs, Inc v*
*Zurich North America*
*US District Court for the Western District of Washington*
*4 August 2008*

### INSURER HAS DUTY TO DEFEND ADDITIONAL INSURED

A Texas federal judge has ruled that an excess insurer does have a duty to defend an additional insured (Willbros) added through a contractual agreement between the original insured and Willbros' predecessor. The insured's policy contained a "blanket" endorsement that extended coverage to any person or organisation with whom the insured agreed to add as an additional insured. The insured entered into an agreement through which it agreed to list Willbros' predecessor as an additional insured in its insurance policies. Due to the "blanket" endorsement, the court determined Willbros was an additional insured under the policy and the insurer had a duty to defend the Company. The court also found that Willbros must first exhaust its primary insurance before the excess policy is triggered.

*Willbros RPI, Inc v*
*Continental Casualty Co*
*US District Court,*
*Southern District of Texas*
*27 August 2008*

### DISPUTE OVER SLIPS TO BE DECIDED UNDER TREATY'S ARBITRATION CLAUSE

A federal court has ordered arbitration of a dispute arising from reinsurance placement slips that did not contain an arbitration clause, based on the broad arbitration clause in a related reinsurance treaty. The parties entered into a reinsurance treaty and also executed four placement slips providing additional coverage for the same business segment. A dispute arose relating to the slips, and the reinsurer asked the court to order arbitration. The court noted that the agreements between the parties covered the same ongoing relationship, the same subject matter and overlapping time periods. There was some evidence the reinsured accounted for the various agreements as one contract and described them to state regulators as one contract. The slips could also be seen as "cut-through coverage" – enhancing or modifying the coverage provided by the treaty. Thus, the court found, it could not be said with "positive assurance" that the arbitration provision in the treaty could not be interpreted to cover the dispute and the court ordered arbitration.

*Northbrook Indemnity Co. v*
*First Automotive Service Corp*
*US District Court for the*
*Middle District of Florida*
*1 August 2008*

### TEXAS ADOPTS ACTUAL INJURY RULE FOR PROGRESSIVE DAMAGE

The Texas supreme court has determined that an insurer's duty to defend pursuant to occurrence-based policy language is triggered when hidden damage is alleged to have occurred during the policy period. The relevant policy covered property damage that occurred during the policy period. It went on to define property damage as "physical injury to tangible property". Based on the specific language of the policy, the court determined that the critical date for determining coverage is when the injury occurred, not when the damage is discovered. The court found that under the actual-injury rule applicable to the policy, the insurer's duty to defend is triggered if any amount of physical injury to tangible property occurred during the policy period and was caused by the insured's defective product.

*Don's Bldg Supply, Inc v*
*OneBeacon Ins Co*
*Supreme Court of Texas*
*29 August 2008*

# Legal update – US: Recent cases *continued...*

**AUDITOR LIABLE FOR DEEPENING INSOLVENCY**

A federal court of appeal has upheld a judgement against an auditor based on its audits of an insurance company that later went into receivership. The auditor gave unqualified and favorable audit opinions for the Company's 1981 and 1982 accounts. The Company went into receivership in early 1983. The receiver sued the auditor and certain former officers. A jury found the auditor jointly and severally liable for US$182 million in damages and interest. Because the other defendants could not pay their share, the auditor was liable for the entire judgement. The appeals court found that although New Jersey's supreme court has not recognised a claim of "deepening insolvency," the trend in the state's courts has been to recognise such damages. Traditional tort law, the court said, would also support a claim for "wrongful conduct that results in increased liabilities, decrease in fair asset value and lost profits."

*Thabault ex rel Ambassador Ins Co v Chait*
*US Court of Appeals for the Third Circuit*
*9 September 2008*

**GASOLINE FUMES FOUND TO BE EXCLUDED POLLUTANT**

An Oregon district judge has determined that insurers bore no duty to defend or indemnify an insured due to the explicit language in the policies' pollutant exclusion. The insureds had settled a lawsuit brought by a patron who claimed he sustained damages as a result of inhaling gasoline fumes as a result of the alleged negligence of the insureds' employee. When the insurers refused to defend and indemnify the insureds, they filed this action. The policy excluded bodily injury arising out of the dispersal, seepage, migration, release, or escape of pollutants. The court found that the insurance policy was unambiguous and clearly defined "pollutant" as including petroleum products and their derivatives regardless of whether those products have a function in the insureds' business. The court rejected the insureds' argument that, as gas station owners, it would be unreasonable to anticipate the policy language to apply literally and exclude losses arising from ordinary mishaps that do not involve environmental pollution. The court refused to ignore or reinterpret the policy language.

*K-T Tracy, Inc v Allied Ins Co*
*US District Court,*
*District Court of Oregon*
*3 September 2008*

**POLICYHOLDERS CANNOT CHALLENGE MUTUAL COMPANY'S DIVIDEND POLICY**

The California court of appeals has rejected a policyholder class action suit against a mutual company's decision not to pay dividends. The policyholders sued the insurer for unpaid dividends saying that the Company had improperly withheld dividends to increase its surplus. The policyholders claimed, among other things, that the board did not act independently because it based its decisions on analysis by the Company's officers, and that the board's decisions were insufficiently informed, tainted by fraud, and without merit. The court found that the board had followed proper procedures, and that its decisions were protected by the "business judgement rule." The court refused to examine the board's decisions, saying that the legal protection given to business judgements focuses only on process, and not the merits of the decisions.

*Hill v State Farm Mutual*
*Automobile Ins Co*
*California Court of Appeal*
*19 September 2008*

**INSURER CANNOT SUE REINSURER TO ESTABLISH POLICY COVERAGE**

A California court has rejected an insurer's attempt to establish reinsurance coverage before it paid the underlying insurance claim. The policyholder claimed for costs to defend a class action lawsuit. The insurer asked the reinsurer to confirm it would reimburse the defence costs. The reinsurer refused, saying there was no coverage under the policies. The insurer asked the court to declare that the insurer was required to reimburse the policyholder for defence costs. The court dismissed the claim, saying courts only decide actual controversies, and there was no controversy between the policyholder and the insurer. Any dispute between the insurer and reinsurer was premature, because the "follow the fortunes" doctrine requires a good faith payment, and until the claim was paid the reinsurer could not tell whether the insurer paid the claim in good faith.

*Tall Tree Ins Co v*
*Munich Reins. America, Inc*
*US District Court for the Northern*
*District of California*
*29 July 2008*

### POLLUTANT EXCLUSION BARS CLAIM FOR CARBON MONOXIDE POISONING

The Georgia supreme court has ruled that carbon monoxide is an excluded pollutant under a commercial general liability policy. The insured was a landlord who was sued as a result of a tenant's exposure to carbon monoxide. Relying on an earlier Georgia case, in which it was determined that asbestos released in a home during renovations is a pollutant, the court opined that as the asbestos was not an environmental pollutant in that instance, it is indistinguishable from the carbon monoxide at issue in this case. The court determined that the plain language of the pollution exclusion clause required the court find that carbon monoxide is an excluded pollutant. While noting a split in court decisions on this issue, the court stated those who determine carbon monoxide is not a pollutant do so based on extra-textual sources of interpretation. The court refused to do so because it determined the pollution clause was unambiguous.

*Reed v Auto-Owners Ins Co*
*Supreme Court of Georgia*
*22 September 2008*

### ASSIGNMENT OF CLAIMS CREATES NO CHANGE IN CREDITOR PRIORITY STATUS

The Vermont supreme court has held an insured's assignment of payment rights does not change the priority status of its claim against an insurer in liquidation. After the assignment of payment rights, the liquidator determined that pursuant to the state's priority statute, the claims were no longer class four policyholder claims, and reclassified the claims as priority five general-creditor claims. On appeal, the lower court held the priority status changed because the assignment changed the nature of the relationship between the insured and the insurer and exposed the insurer to an increased risk of loss. The supreme court first determined that post-loss assignment of payment under the policy at issue is not subject to the consent-to-assignment clause and that the assignment did not change the nature of the relationship between the insured and its insurer and lead to an increased risk of loss. The court also found that the lower court misinterpreted the priority statute and stated the critical question the court must consider is the character of the claim as opposed to the claimant's identity. The court held the claims met the statutory criteria of priority four claims and must be classified as such regardless of the assignment.

*In re Ambassador Ins Co Inc*
*Supreme Court of Vermont*
*14 August 2008*

### COURT WILL NOT ENFORCE SIR REQUIREMENT AGAINST INSOLVENT INSURED

A Michigan federal court has refused to enforce a policy's self-insured retention (SIR) requirement against an insolvent insured. Under the policy, the insured's failure to pay the SIR is considered a breach of contract; however, the policy also provides that insolvency will not relieve the insurer of its obligations under the policy. The insurer denied coverage based on the insolvent insured's failure to pay the SIR.
The court determined that while the insurer did not explicitly deny coverage due to the insured's insolvency, there is no distinction between enforcing the SIR policy and denying coverage due to the insolvency. The court noted that the policy states that all of its terms apply "irrespective of the application of the Self-Insured Retention" and found that that language prohibited the insurer from using the SIR requirement to avoid application of the insolvency provision.

*Gulf Underwriters Ins Co*
*v McClain Industries, Inc*
*Michigan Court of Appeals*
*5 August 2008*

# Legal update – US: Regulatory and legislative developments

### NAIC REINSURANCE TASK FORCE AND FINANCIAL CONDITION COMMITTEE APPROVE REINSURANCE REGULATORY REFORM PROPOSAL

At the Fall National Meeting of the National Association of Insurance Commissioners ("**NAIC**"), the NAIC's Reinsurance Task Force ("**RTF**") adopted its proposed reinsurance regulatory modernisation framework, which includes proposals for a single home state for "national reinsurers" and entry of non-US reinsurers through a port-of-entry state. Prior to the Fall National Meeting, the RTF had engaged in various regulator-to-regulator meetings as well as meetings and conference calls open to interested parties to review and revise the draft framework. The NAIC's Executive Committee and the full membership will consider adoption of the proposal at the NAIC's Winter National Meeting in December.

### NEW YORK INSURANCE DEPARTMENT'S MOUs WITH FOREIGN REGULATORS

The NYID has entered into additional memoranda of understanding ("**MOUs**") with foreign regulators, including the United Kingdom Financial Services Authority, the Bermuda Monetary Authority, and Taiwan's Financial Supervisory Commission. As reported previously with respect to the MOU between NYID and Germany's BaFin, NYID's MOUs with the foreign regulators allow for closer co-operation between the agencies; establish formal basis for consultation, co-operation and co-ordination between them; and provide for exchange of information. The NYID is negotiating similar arrangements with other foreign regulators.

### EMERGENCY ECONOMIC STABILISATION ACT OF 2008 ("EESA") AND TROUBLED ASSETS RELIEF PROGRAM ("TARP")

To address the credit and financial crisis, the US government enacted the EESA on 2 October 2008. Although the initial plan under EESA was for the US government to purchase troubled mortgage and mortgage-related assets from financial companies under TARP, the US Treasury Department has instead used about half of the $700 billion "bailout" funds for direct capital investments in qualifying US controlled banks, savings associations, and certain bank and savings and loan holding companies engaged only in financial activities. As insurance companies are regulated at the state level instead of federally, they have generally not been qualified to apply for assistance under TARP. However, some insurance companies that are part of federally regulated bank holding companies or thrift savings institutions are eligible, while some other insurance companies have recently acquired banking entities and applied to becoming federally regulated banking companies in order to qualify.

### NEW YORK'S NEW CONTRACT CERTAINTY REQUIREMENT

On 16 October 2008, the New York Insurance Department ("**NYID**") issued a circular letter regarding contract certainty to insurers, reinsurers and insurance producers, in which the NYID has announced that all terms of insurance and reinsurance contracts "should be complete and finalised, memorialised, executed, and provided to the insured before, at, or promptly after inception". The circular letter explains that "promptly" should be generally interpreted to mean within thirty days. Moreover, within twelve months of the date of NYID's circular letter, insurers and producers doing business in New York must develop and implement practices to assure prompt contract documentation.

### RESCUE OF AIG BY THE US GOVERNMENT

On 17 September 2008, the US government announced a rescue plan for American International Group, Inc. ("**AIG**") in the form of an $85 billion credit facility to help meet AIG's liquidity needs, in return for which the US government received a 79.9% stake in AIG. On 8 October 2008, AIG received an additional $37.8 billion in federal assistance to meet AIG's need for cash for its securities lending program. However, on 10 November 2008, the US government announced a restructured aid package for AIG, which amounts to approximately $150 billion and consists of three main parts:

a) $40 billion investment by the US Treasury in AIG's preferred shares

b) reduction of the earlier $85 billion credit facility to $60 billion and reduction in the interest rate charged

c) creation of two new lending facilities to alleviate the burden that AIG faces from the credit default swaps that it wrote through its financial products unit and residential mortgage-backed securities in its securities lending program.

In addition, AIG can issue up to $20.9 billion in commercial paper to the US Federal Reserve's new commercial paper funding facility.

### NAIC CONSIDERING CREATING NEW RATING AGENCY

The NAIC is considering creating a new rating agency that would issue ratings in competition with the existing agencies such as S&P, Moody's, and Fitch. The proposal is at early stages, and the NAIC is still considering basic questions such as whether the NAIC and the state insurance regulators could undertake such a venture and the legal issues surrounding the issuance of such ratings. The idea has gained strength due to criticisms that the private rating agencies failed to assess properly the financial strength of firms and their investments in subprime mortgages and CDSs.

### NEW YORK'S REGULATION OF CREDIT DEFAULT SWAPS

NYID has announced that, beginning 1 January 2009, it will begin regulating certain credit default swaps ("**CDSs**") as insurance. Under new guidelines issued on 22 September 2008, NYID will regulate as insurance contracts those CDSs for which the buyers own the underlying security on which the buyer obtains protection; such CDSs will only be allowed to be sold by licensed entities in New York and be subject to additional risk and capital regulations. Previously, NYID had not regulated CDSs based on the view that they are not insurance. The US government is also expected to begin considering federal regulation of CDSs on a broader scale, which regulations would likely also cover "naked" CDSs (that is, where the buyers do not own the underlying securities).

### NAIC'S COMPARISON OF INTERNATIONAL SOLVENCY SYSTEMS

The NAIC International Solvency and Accounting (E) Working Group has exposed a draft document this Fall comparing the solvency systems in the US and EU. The document compares and contrasts the systems with respect to various aspects such as accounting and group supervision issues. The NAIC is seeking to study international solvency standards to consider potential improvements to the US regulatory system.

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# Legal update – France: Recent cases

### THE GROUP INSURANCE CONTRACT SUBSCRIBED BY THE BANK TO COVER THE BORROWER'S POTENTIAL PAYMENT DEFAULTS CAN PROVIDE FOR TERMINATION WITHOUT FORMAL NOTICE

Article L.141-3 of the French Insurance Code provides that the subscriber to a group insurance contract can exclude a co-insured the benefit of the contract, if their relationship ends, or if the co-insured stops paying the insurance premium. Under this article, such exclusion requires that the subscriber previously sends to the co-insured a formal notice giving the latter a certain time to pay the premium due. In the case at hand, the borrower in a credit contract with a bank had adhered to a group insurance that the latter had set with an insurance company to provide coverage against potential payment defaults by the borrower. This group insurance contract mentioned that the coverage of the co-insured borrower would be terminated if the latter:

a) failed to pay back its loan

b) failed to pay its premium for the credit insurance coverage.

Since these two conditions were met, the insurance company refused to provide coverage. The heirs of the insured borrower claimed that, despite this contractual clause, the insurance company should have sent a formal notice in compliance with Article L.141-3 of the French Insurance Code. The Court of Appeal dismissed their claim. The French Supreme Court confirmed the court's reasoning, by ruling that the lender could lawfully exclude the borrower's insurance contract as of right, pursuant to the provisions of the insurance policy. Therefore, according to this decision, the requirement of formal notice provided at Article L.141-3 can be altered by contractual provisions.

*Cour de Cassation, Civ 2, 10 July 2008*

### THE SCOPE OF COVERAGE OF A CONTRACTOR'S LIABILITY FOR CONSTRUCTION AND REPAIR WORK MUST BE CONSTRUED IN LIGHT OF THE CONTRACTOR'S FIELD OF INSURED ACTIVITY

An individual had used the services of a contractor to redo the waterproofing of his roof terrace. The contractor carried out these repairs using synthetic resins. Following the repairs, the roof started to leak inside the house. The victim brought a legal action against the contractor's insurer. The latter denied coverage and argued that, although the insurance contract indeed provided coverage for roof-terrace waterproofing work, it did not encompass works of installation of synthetic resin. The Court of Appeal's decision, which had accepted this argument, was quashed by the Supreme Court. The scope of the coverage must be interpreted in light of the field of activity insured, and not according to the various specific means to carry out this activity.

*Cour de cassation, Civ 3, 10 September 2008*

### THE BUYING BACK OF A LIFE INSURANCE CONTRACT NECESSARILY ENTAILS THAT THE INSURED WAIVED ITS FORMER CLAIM TO CANCEL THE CONTRACT

An individual had purchased a life insurance contract. She then invoked her right to cancel the contract on the grounds that the insurer had allegedly not communicated to her the mandatory information documentation. The insurer denied this allegation and refused the cancellation. The insured then bought back her life insurance contract. She brought a legal action for a declaration that the life insurance contract had been cancelled. Her claim was dismissed by the Court of Appeal. According to the Supreme Court, the Court of Appeal rightly decided that, by buying back her insurance contract, the insured had necessarily waived the right to claim that she had previously cancelled the said insurance contract.

*Cour de Cassation, Civ 2, 11 September 2008*

### THE DATE OF THE FIRST CLAIM DETERMINES WHICH OF SUCCESSIVE MEDICAL CIVIL LIABILITY INSURANCE CONTRACTS WILL APPLY IN PRIORITY TO COVER THE DAMAGE

A person who had surgery later died, on 19 March 2002. His heirs brought a legal action against the surgeon on 7 March 2003. The latter was covered by a medical civil liability insurance contract up until 31 December 2002 and then, from 1 January 2003, by another contract with another insurance company. On 11 March 2003, the surgeon claimed against the first insurance company, who dismissed his claim. The Court of Appeal ordered this insurance company to cover the damage resulting from the death of the patient. The Court of Appeal stated that according to Article 5 of law n°2002-1577 dated 30 December 2002, as regards insurance contracts entered into before the official publication of this law and not renewed afterwards, for claims made during a period of five years as from the date of termination of the insurance contract, the damage is covered by the contract in force at the date of the damageable event, that is, in the present case, the first insurance contract. The Supreme Court quashed this decision in light of Article 5 paragraph 1 of the law n°2002-1577 and Article L 251-2 of the French Insurance Code, regarding medical civil liability insurance, which notably provides that when damage is potentially covered by several successive policies, it is covered in priority by the contract in force at the time of the first claim.

According to the Supreme Court, since the surgeon had subscribed to a new insurance contract on 1 January 2003 and the first claim made by the deceased' heirs, that is, their summons was on 7 March 2003, this second insurance policy should have applied in priority, pursuant to Article L. 251-2 paragraph 7 of the French Insurance Code.

*Cour de Cassation, Civ 2, 2 October 2008*

### IMPLEMENTATION OF THE REINSURANCE DIRECTIVE COMPLETE

On 7 November 2008, the French government adopted Decree n°2008-1154 on reinsurance (the "**Decree**") and an order on the supervision of reinsurance undertakings amending the French Insurance Code applying Ordinance n°2008-556 implementing in French law directive 2005/68/EC (the "**Directive**") on reinsurance and reforming the legal framework for special purpose vehicles.

The Ordinance, which came into force on 15 June 2008, sets out the general principles amending the legislative section of the French Insurance Code (the "**FIC**"). In particular, it prescribes the conditions for administrative authorisation and the European passport, as well as the portfolio transfer procedure. It also allows securitisation ("***titrisation***") of insurance and reinsurance risk by considerably reworking the section of the Monetary and Financial Code on securitisation entities.

Following adoption of the Decree, the Reinsurance Directive is now completely implemented. The Decree, which amends the regulatory section of the FIC, sets out in particular the regime for financial supervision of reinsurance undertakings including the requirement for a minimum solvency margin and a minimum guarantee fund, provisions for reinsurance liabilities, requirements to hold matching assets and the powers of intervention available to the *Autorité de Contrôle des Assurances et des Mutuelles* ("**ACAM**") in respect of undertakings in difficulty.

If you need any further information, please refer to the Newsflash using the link, http://www.lovells.com/newsletterimages//PDF/France/2008/20081118Newsflash.pdf

*We apologise for the error in our October 2008 issue which indicated that the Decree was adopted in September 2008.*

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# Legal update – Spain: Recent cases

## COMPATIBILITY BETWEEN CIVIL AND LABOUR INDEMNITIES

The Civil Section of the Supreme Court has issued an important judgement establishing the compatibility between civil and labour indemnities in the event of a labour accident. The Civil Division of the Supreme Court has modified its previous position and now requires that the damages to be paid by the employer, or his insurer, must be reduced taking into account the amounts paid to the aggrieved party by Social Security or through life and accident policies contracted by the employer, provided that those indemnities derive from the same accident. This outcome is based on two major principles in Spanish law:

a) the principle of ''total reparation of damages'', established in article 1902 of the Civil Code

b) the principle that a person should not be permitted to unjustly enrich himself at the expense of another.

*Spanish Supreme Court*
*Civil Division*
*24 July 2008*

## VALUATION OF DAMAGES ACCORDING TO THE SCALE LEGALLY FORESEEN IN CASE OF MOTOR ACCIDENTS

In Spain, personal damages due to motor accidents must be valued according to a scale called ("Baremo"). This is included as an annex to the Consolidated Act of Liability and Insurance of Motor Vehicles.
The Supreme Court did not initially accept the application of this scale to the valuation of personal damages that were not due to motor accidents. However, this judgement of the Civil Division of the Supreme Court confirms that the current position of the court is that this kind of valuation is acceptable even in relation to labour accidents. Further, valuations made by First Instance Courts and/or by the High Courts according to the scale cannot be reviewed by the Supreme Court unless that the valuation is not proportionate.

*Spanish Supreme Court*
*Civil Division*
*22 July 2008*

## TREATMENT OF PERSONAL DATA WITHOUT CONSENT

In its judgement of 23 April 2008, the National High Court (''Audiencia Nacional'') clarified its position regarding the treatment of personal data without consent. The defendant, a Spanish bank, gave data provided by a client to an insurance company that belonged to the same group as the bank. This insurer used the data to draw up an insurance contract. The contract signed between the bank and its client contained a clause authorising the bank to use the client's data to develop commercial operations. Nevertheless, the Audiencia Nacional stated that the conclusion of a specific contract (the insurance contract) cannot be included among the commercial operations for which consent had been given. Consequently, the Audiencia Nacional confirmed the sanctions imposed by the Administration to both the bank and the insurer, due to the infringement of Article 4.2 and Article 6.1 of the Spanish Data Protection Act.

*National High Court*
*("Audiencia Nacional")*
*Contentious-Administrative Division*
*23 April 2008*

# Legal update – Spain: Regulatory and legislative developments

## ACCOUNTING OF INSURANCE COMPANIES

The Accounting General Plan of the Insurance Companies was approved on 24 July 2008 but will come into force on 31 December 2008. The aim of this new plan is the implementation of Regulation 1606/2002/EC, which incorporates the new International Rules applicable to Insurers' accounts. The new plan supersedes the plan approved in 1997.

*Royal Decree 1317/2008*
*24 July 2008*

## NEW COMPULSORY MOTOR INSURANCE REGULATION

The Spanish Government approved, on 12 September 2008, the new regulation concerning compulsory liability and insurance for motor vehicles. This regulation came into force on 13 October 2008 and supersedes the regulation of 2001.

*Royal Decree 1507/2008*
*12 September 2008*

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# Legal update – Germany: Recent cases

**THE DUSSELDORF COURT OF APPEALS HAS OVERRULED A DECISION BY THE GERMAN COMPETITION REGULATOR PROHIBITING CO-INSURANCE OF ACCOUNTANCY RISKS**

The Appeal Court ruled in mid-September that the German competition regulator ("**FCO**") erred in its market definition when it issued a prohibition on 10 August 2007 against German insurers Allianz, AXA, R + V Allgemeine Versicherung and Victoria Versicherung jointly offering financial loss insurance (Vermögensschaden-Haftpflicht) for auditing companies and public accountants through the Versicherungsstelle Wiesbaden, a co-insurance platform set up in the 1930s. The court adopted a considerably wider market definition than the FCO, holding that not only financial loss insurance for chartered accountants, but also for lawyers and tax specialists need to be included into the relevant market. As a result, Versicherungsstelle Wiesbaden benefits from the applicable EC block exemption regulation that exempts co-insurance pools with a market share of less than 20% from the prohibition of agreements restrictive of competition. This ruling will make it more difficult for the FCO in the future to intervene against co-insurance pools on the basis that they restrict competition.

*Higher Regional Court Düsseldorf (Oberlandesgericht Düsseldorf) 17 September 2008*

**TENDERING PROCEDURES FOR PURCHASE OF INSURANCE COVER**

In a recent decision the Federal Court of Justice had to decide whether public authorities are allowed to obtain insurance cover without following the respective tendering procedures if the public authority is member of a mutual insurance company. The Federal Court of Justice held that non-compliance with tendering procedures is a violation of the rules of fair competition. The fact that the public authority obtains the insurance cover by becoming a member of a mutual insurance company has no relevance to way in which the public authority obtains insurance – otherwise the law could be circumvented.

However, an exception can apply in cases which appear as an "in-house award". Following the European Court of Justice, this exception requires that members of the respective mutual insurance company are only public authorities. Furthermore, the possibility of shareholding by private companies must be excluded. These requirements were not met in the case that the Federal court of Justice decided.

As regards the mutual insurance company, the Federal Court of Justice held that an insurer may not encourage or support public authorities in acquiring insurance cover violating the competition law. Competitors are entitled to initiate proceedings against an insurer violating these rules and move for an order of restraint.

*Federal Court of Justice 3 July 2008*

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# Legal update – Italy: Recent cases

## LIABILITY OF INSURANCE COMPANIES FOR BREACH OF COMPETITION LAWS

The Italian Court of Appeal of Salerno has clarified, in an action commenced by a policyholder against an insurance company for alleged losses and damages suffered as a result of a breach of competition laws, that it suffices for the policyholder to exhibit the insurance policy and the decision of the anti trust authority stating the breach of the competition laws that has occurred. The decision, which is in line with previous decisions on the matter, further recognises the possibility for policyholders to claim that they have suffered extra contractual losses and damages due to the unfair conduct of insurance companies acting as a cartel in the determination of the level of tariffs and premiums to be applied. However, what is new in this decision is that the Court of Appeal of Salerno stated that it is on part of the defendant insurance company to prove that the premiums were determined on an autonomous basis and not based on the cartel. Furthermore, the court also stated that the time limit for the plaintiff policyholder to start a legal action is five years starting from the decision of the anti trust authority, whereas for insurance matters the time limit is one year from the date when the insured event occurred.

*OG v Assicurazioni Generali S.p.a.*
*4 July 2008*

## CONDITIONS OF SUBROGATION OF THE INSURANCE COMPANY IN THE POSITION OF THE RECEIVER OF TRANSPORTED GOODS

The Court of Salerno has confirmed that an insurance company which has paid an indemnity to the receiver of goods – as the owner of the same and as a third beneficiary of the insurance contract for shipment – may subrogate against the transporter, in pursuance with Article 1916 of the Italian civil code. Since the claim for contractual liability for loss or damage of transported goods suffered by the owner is restricted to the owner, the insurance company, which pays the damages, may have a subrogated claim against the transporter for compensation or damages. This judgement is in line with the previous decisions of the Supreme Court regarding subrogation by insurance companies.

*Assicurazioni Generali S.p.a.*
*v MA S.r.l.*
*24 June 2008*

## LIMITATION TO THE PARTICIPATION TO A TENDER FOR INSURANCE SERVICES

The Supreme Italian Administrative Court ("Consiglio di Stato") has stated that the Italian public administration may now accept tenders for insurance services where tenders are received from insurance companies but not from agents acting on behalf of insurance companies. There are no other judgements on this matter. However it is a principle of Italian administrative law that if a public administration does accept tenders from insurance companies then the public administration may set certain limitations, other than those provided by the law, with which the insurance companies have to comply – and such limitations must be reasonable, pertinent, fair and adequate. However, the exercise of such powers must not be unlawful for excess of power, inconsistent or unreasonable. ■

# Legal update – Italy: Regulatory and legislative updates

## CONSOB DRAFT ON CONCILIATION AND ARBITRATION CHAMBER

On 4 August 2008, The Italian Stock Exchange Commission (Commissione per le Societa e la Borsa – "**Consob**") issued a document for public consultation with the view of creating a conciliation and arbitration chamber. The conciliation and arbitration chamber shall have the task of dealing with any dispute arising between intermediaries and their retail clients. The draft regulation also indicates among others:

a) the organisation

b) appointment modalities of the arbitrator and conciliators members' list

c) requirements of impartiality, independence, professionalism of the members of the mentioned list

d) other functions of the chamber

e) conciliation and arbitration proceedings rules

f) other provisions necessary for establishment of the chamber.

One of the main novelties introduced by this draft regulation is the simplified arbitration procedure, through which the appointed arbitrators shall only determine the indemnification for clients that have been damaged by an intermediary.

## ISVAP NOTIFICATION DUTY FOR LOAN BACKED INSURANCE PRODUCTS

On 23 July 2008, ISVAP issued a circular requesting Italian insurance companies and branches of non-EU insurance companies to indicate whether their portfolio includes policies linked to loans and financings. The Italian Insurance Regulator issued a circular, requesting Italian insurance companies and branches of non-EU insurance companies to file a document specifying:

a) whether their portfolios include policies (both life and non-life ones) linked to loans and financings or not

b) in the positive, whether such policies comply with the recent Italian legislation in matter of portability of loans and renegotiation of their terms.

In the case under (b) above, companies shall also:

a) describe the policies in force at the date of 30 June 2008 and the relevant securities attached to the loans

b) describe the terms and conditions by which prepayment of the loan and transfer to another lender may take place

c) describe the distribution agreements in place with the intermediaries, detailing the names respectively of the policy, the policyholder, the beneficiary and of the intermediary in charge for the distribution.

Companies under (a) and (b) should have had filed the requested representation within the last 20 September 2008.

## ISVAP REGULATION ON INSURANCE REGISTERS

On 14 October 2008, the Italian insurance regulator (Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo – "**ISVAP**") issued Regulation n°27 concerning the keeping of insurance registers, which implements Article 101 of the Legislative Decree n°209, 7 September 2005 (the Italian insurance Code). This regulation is addressed to:

a) Italian insurance and reinsurance companies

b) branches of non-EU insurance and reinsurance companies.

The main aims of this regulation are:

a) safeguard policy holders by giving certainty to the commitments undertaken by insurance companies vis a vis them

b) provide the insurance undertaking of a useful management tool

c) ease internal and external control over insurance companies' business.

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# Legal update – Latin America: Regulatory and legislative developments

## NATIONALISATION OF THE PRIVATE PENSION SYSTEM IN ARGENTINA

The Argentinean Premier, Ms Cristina Fernández de Kirchner has announced that a law is going to be passed to eliminate the private pension system created in 1994. As a consequence of the financial turmoil experienced in September and October 2008, the Argentinean Government has taken the decision of assuming the management of the funds which until now have been under the control of the AFJP ("**Administradoras de Fondos de Jubilación y Pensión**").

*Announcement made by the Argentinean Premier, 20 October 2008*

## BRAZIL
## KIDNAP AND RANSOM INSURANCE PRODUCTS ADMITTED IN BRAZIL

The Brazilian Insurance Authority ("**SUSEP**") is going to liberalise the kidnap and ransom insurance products underwriting in Brazil. SUSEP's plan implies that kidnap and ransom policies should be approved by this regulator. Previously, these kinds of policies were prohibited in Brazil.

*Announcement made by the SUSEP in October 2008*

## CHILE
## NEW REGULATOR FOR THE INSURANCE SECTOR

The Superintendence of Securities and Insurance ("**SVS**") has presented a project for conversion of this regulator into a Securities and Insurance Commission ("**CVS**").

*Published on the SVS website on 18 August 2008*

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, it cannot be fully comprehensive. It is written in general terms and its application to specific circumstances will depend on the particular facts.

Please refer to the back of this bulletin for office details. If you would like to follow up any of the issues please contact any of the following:


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