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ESTONIA

LEGISLATION

Advisory guidelines from market regulator

The Estonian Financial Supervision Authority (EFSA) has issued several advisory guidelines.

On 01.06.2007 guidelines on "Outsourcing Requirements for Supervised Entities" entered into force. These recommend establishing internal action instructions and regulations to regulate the outsourcing process. The outsourcing guidelines suggest analysing the need for outsourcing, screening the service provider, and performing a risk analysis. Certain principles have to be followed and certain questions addressed in drafting a contract with a service provider, e.g. supervision must not be hindered, while confidentiality, IT-security, and consistency of services must be ensured.

The EFSA has also adopted guidelines on "Requirements for Insurance Mediation". These will enter into force on 01.02.2008. The aim of the guidelines is to clarify the requirements of the Insurance Activities Act (IAA) and to protect policyholders. The guidelines specify the tasks of a mediator listed in the IAA and require mediators to disclose their fee separately for each insurance contract. A broker must be objective and impartial and must not be affected by contracts concluded with insurers. A broker must obtain an insurance offer from at least three insurers. A broker must recommend the policyholder the best offer in a format which can be reproduced in writing; this recommendation must be based on the entire insurance contract, not only on some of the conditions. Brokerage guidelines specify brokers' duty to explain the terms and conditions of insurance contracts. A broker must have a client file for each client.

The EFSA adopted amendments to the guidelines on "General Requirements for Insurance Contracts". The amendments require the insurable interest of the policyholder to be ascertained and advice to be given to the policyholder.

RECENT CASE LAW

Insurer's performance obligation under advocates' professional liability insurance

The Tallinn Circuit Court (Court of Appeal) has taken a position on the basic principles of advocates' professional liability insurance.

The professional liability of an advocate covers only losses incurred due to professional misconduct. Non-return by an attorney of fees paid in advance does not constitute professional misconduct.

In this case, the client paid a law firm a large advance payment a few months after concluding a contract for legal services. The service contract, invoice, and other documents did not set out any specific assignment for the advocate. Two years later, the client submitted an insurance indemnity claim to the insurance company seeking reimbursement of prepaid sums due to the fact that the legal services (representation-defence in criminal proceedings) were never actually provided.

The Circuit Court held that making an advance payment to an advocate cannot be automatically considered an insured event under professional liability insurance provisions stipulated by the law. The court stated that knowingly and intentionally caused events are not insured. The court also decided that the fact of not returning sums received from a client cannot be considered as causing direct pecuniary loss in connection with provision of professional legal services by an advocate. Financial obligations of an advocate must be handled separately from performance of professional duties, which must be based on knowledge of the law.

The Supreme Court did not accept the appeal in cassation and thus the decision became final.

Interpretation of exclusion in standard terms of insurance

The Supreme Court has made a decision concerning interpretation of standard terms in insurance contracts.

The principle of actual common intention of the parties cannot be applied to interpreting standard terms of insurance. Standard terms must be interpreted according to the position of a so-called objective reasonable person

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Assisting a number of leading insurance brokerage companies in their legal matters in the Baltics

similar to the person against whom the standard term was used. In case of doubt, the standard term must be interpreted to the detriment of the party drafting the standard term.

In this case, the plaintiff claimed that a condition of insurance standard terms (based on a “named risks” insurance contract) excluding from cover damage caused by flooding of surface water, does not apply to flooding of sea water. The insurer pointed out that according to hydrographical science, the term “surface water” also covers the term “sea water”.

The court reached two important conclusions. Firstly, the Supreme Court held that a standard term must be interpreted according to the meaning that a reasonable person similar to the policyholder would give it under the same circumstances. According to the principle of reasonableness, terms used in standard terms cannot be interpreted according to a definition provided by scientists, who are not similar to the policyholder.

Secondly, the court held that if the standard term in question is ambiguous or unclear and the insurance contract itself does not contain explanatory agreements, terms, or references that allow the meaning of the term to be unambiguously established, the law requires the courts to interpret the standard term to the detriment of the party relying on standard terms who has previously created the terms and thus must bear the risks in relation to their interpretation.

Standard term as part of an insurance contract

The Supreme Court has made a decision concerning the question of whether an insurance standard term forms part of an insurance contract.

A vehicle insurance standard term, stipulating that theft of a car by using keys stolen for that purpose is excluded from the cover, is surprising and unintelligible and therefore does not form part of the insurance contract.

In this case, a vehicle insurance contract stipulated that theft of a car is deemed an insured event only if the car keys were in the possession of the authorized possessor of the vehicle during the theft. According to the description given by the plaintiff, the keys were stolen from the office of the person possessing the car.

The court held that under the principle of reasonableness, the policyholder could not have expected the insurance contract to contain that exclusion, as the risk of theft was insured. Therefore, that term would be so unexpected (a so-called surprising standard term) to a reasonable policyholder acting in good faith that the term could not be deemed to form part of the insurance contract. Only standard terms that are presumably understandable by their content, way of expression and manner of presentation to a reasonable policyholder may form part of an insurance contract.

According to the court, a standard term concerning the issue whether theft of a car by using previously stolen keys was an insured event even if the

possessor had properly executed his duty of care while keeping the keys was unclear to a reasonable person similar to the policyholder.

Insurers may be forced to pay minimum insurance indemnity under interim injunction

The Tallinn Court of Appeal upheld that under the Code of Civil Procedure a policyholder has the right to receive part of an insurance indemnity under an interim injunction.

As this is an interim regulation of a disputed legal relationship it is not relevant if failure to secure the action may render compliance with the judgment difficult or impossible. **If the court finds on the basis of the application and documents submitted by the policyholder that an insured event has taken place and the sum claimed under interim injunction is the minimum indemnity, the action will be secured and the insurer has to pay out part of the indemnity before the dispute is over.**

This right is based on the Law of Obligations Act. An insurer is obliged immediately to establish the extent of damage to be compensated. If the process of determining the extent of the insurer's performance is not completed within one month after notification being given of an insured event, the policyholder may request that money be paid at the expense of the insurer's performance obligation in the minimum amount which the insurer should pay under the circumstances.

LATVIA LEGISLATION

New law regulating the reinsurance industry

New legislation has been developed to regulate the reinsurance industry in Latvia – the Reinsurance Law, which lays down rules for commencing reinsurance services and the procedure for reinsurance services in Latvia.

The draft law provides for supervision of reinsurers by determining requirements for commencing activity and undertaking activity in Latvia, as well as for extending it by launching activities in other EU Member States. The aim of the draft law is to introduce requirements of directives of the European Parliament and Council, ensuring unified regulation of reinsurance company supervision in the European Community, as well as securing international financial stability.

The draft law is directed at integrating Latvia into the EU and adjusting the international financial sector by providing for introduction of reinsurance company supervision and uniform regulations for such activity in EU Member States.

Notably, the law does not refer to:

1. reinsurance services provided by or fully guaranteed by a government of a EU Member State, if it operates as a reinsurer in the name of significant public interests, as well as in circumstances when appropriate reinsurance cover in the market is impossible to acquire;

2. state social insurance;

3. export credit insurance transactions guaranteed by the state and the like.

The draft law introduces Directive 2005/68/EC of the European Parliament and of the Council on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC and ensures proper formation of regulating provisions for reinsurance transactions.

It should be taken into account that reinsurance activities are not regulated and no additional special supervision of reinsurance enterprises is carried out.

Amendments to the law On Insurance Companies and Supervision Thereof

In order to implement Directive 2005/68/EC of the European Parliament and of the Council on reinsurance, amendments to the law On Insurance Companies and Supervision Thereof have been prepared.

Further on, a requirement to use only the services of such insurance or reinsurance intermediaries who are authorised to provide such services in the Republic of Latvia, will also apply to reinsurers.

The amendments stipulate that an insurer subject to additional supervision may not own a captive reinsurer.

An insurance company or a branch of a non-Member State insurer will be allowed to determine a higher solvency margin where their types of assigned reinsurance (retrocession) contracts and reinsurance conditions have significantly changed since the previous financial year, or if no risks are transferred under assigned reinsurance (retrocession) contracts of the respective insurers, or the scope of transferred risks is insignificant.

The amendments increase the amount of the minimum guarantee fund for those insurers whose annual reinsurance premium income exceeds 10% of their total insurance and reinsurance premium income, if their annual reinsurance premium income exceeds EUR 50 million or if technical reserves established under reinsurance contracts exceed 10% of the total sum of technical reserves established according to their insurance and reinsurance contracts. Henceforth, the minimum guarantee fund for those insurance companies active in reinsurance and corresponding to these criteria will be EUR 3 million.

The FCMC is not entitled to object to a reinsurance (retrocession) contract with a reinsurer or an insurance broker assigned by a branch of an insurance company or a non-Member State insurer due to the financial stability of the respective reinsurance broker or insurance broker.

The amendments stipulate several changes in relation to the Insured protection fund One of these is that deductions from the Insured protection fund cannot be made for life assurance linked to the market, where the sum insured depends only on the value of assets chosen according to the conditions of an insurance agreement concluded under the provisions of the insurance contract.

The amendments specify requirements in relation to limited access information – the FCMC according to its competency will be entitled to exchange limited access information with supervision institutions of financial and capital market members in EU Member States. Moreover, the FCMC is entitled to conclude information exchange contracts with supervision institutions of non-Member State insurers.

Conclusion of compulsory civil liability insurance contracts in electronic form to be introduced

The Parliament has approved a draft amendment to the Compulsory Motor Third Party Liability (“MTPL”) of Owners of Motor Vehicles Law, which would allow the conclusion of MTPL contracts electronically.

Starting from 2008, insurers will be allowed to offer MTPL contracts via remote media. E-policy is an additional type of MTPL contract. Additionally, MTPL contracts will be available in paper format after purchase of the policy.

New insurance and reinsurance intermediary

The Parliament has conceptually approved amendments to the Activities of Insurance and Reinsurance Intermediaries Law, whose aim is to increase competition in the insurance intermediaries market. The amendments introduce a special insurance intermediary category – credit institutions – who may engage in insurance mediation on behalf of and in the interests of several insurance brokers or branches of non-Member State insurers, if insurance is additional to services provided as basic activities of the credit institution. Simultaneously, credit institutions may not advise or prepare an offer on the basis of analysis of offers.

The draft amendments remove the requirement on share capital of insurance brokers that are legal entities - so far, at least EUR 50,000. Predictably, officials and employees of an insurance agent (legal entity) directly involved in insurance mediation are forbidden from employment with another insurance intermediary. Furthermore, an insurance broker and insurance agent must inform the FCMC on suspending or ceasing insurance and reinsurance mediation services.

The draft amendments stipulate penalties for proven violations, including cases when an insurance or reinsurance agent violates money laundering laws, where the FCMC will be entitled to impose a money penalty up to LVL 100,000.

Obligatory health insurance not yet to be introduced

A Ministry of Health proposal to introduce obligatory health insurance for employees of risk group professions in Latvia as of 2009 was not approved. This decision is linked with payments into and out of the state budget.

Previously, obligatory health insurance as of 2009 were to have been introduced for those employed in professions with increased risk of occupational disease, accidents, and lethal accidents. These individuals would receive guaranteed health care together with obligatory health insurance, finances within the health care sphere would increase, while the employer's share of responsibility would

increase by insuring the employee. The Ministry of Health believed that introducing the new payments would encourage patients' responsibility for their own health and would secure additional funds for health care, which would in turn solve the problem of insufficient staff in medicine.

According to calculations made by insurers, approximately 45% of the population in Latvia have health insurance policies.

LITHUANIA LEGISLATION

Draft amendments to the Law on Insurance

On 23.08.2007 the Government submitted to Parliament a draft law amending the Law on Insurance.

The main set of draft provisions relate to implementation of Reinsurance Directive 2005/68/EC, i.e. the draft imposes requirements of direct supervision for reinsurers. Note that under the existing legal regime reinsurers are supervised indirectly, i.e. insurers have to ensure that they place risks with a reinsurer who fulfils the requirements of the Lithuanian insurance supervisor (Insurance Supervisory Commission).

In addition, the draft foresees that WTO insurers would be allowed to provide marine and aviation insurance cover in Lithuania on a cross-border basis.

Another important amendment – insurance brokers will be allowed to sell Pillar III investment products.

Changing regulatory regime for insurance brokers: further developments

In the spring edition we mentioned that on 09.03.2007 the Insurance Supervisory Commission announced that the draft law amending the Law on Insurance had been submitted to the Lithuanian Government, and that the main aim of the draft was to introduce a new regime requiring insurance brokers to be paid by the client (and not by insurers, as is now the case).

As the draft law provoked a negative reaction from insurance brokers' organizations, the Government set up a working group composed of representatives of the Ministry of Finance, the Insurance Supervisory Commission, Securities Commission insurance brokers and insurers.

A likely compromise between all counterparties is disclosure of brokers' remuneration at clients' request.

Amendments to the MTPL Insurance Law adopted

On 17.05.2007 the Lithuanian Parliament adopted a Law amending the existing MTPL Insurance Law.

The law implemented Directive 2005/14/EC of the European Parliament and of the Council of 11.05.2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the

European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles.

RECENT CASE LAW

Customs bonds: Customs Office strikes back

In the spring edition we mentioned that on 29.01.2007 the Court of Appeal announced its decision in the civil case of Klaipeda District Attorney (defending the interests of Klaipeda Territorial Customs Office) v. UADB “Baltijos garantas”. A claim of LTL 6,800,000 (ca. EUR 1,969,000) filed against the insurer was recognized as groundless.

However, following cassation appeal, the Supreme Court rejected the position in the ruling of the Court of Appeal and awarded the Customs Office LTL 6,800,000 insurance indemnity.

The Supreme Court repeated its position, as stated in several previous decisions, that if an insurer issues a customs bond guaranteeing payment of customs duties, the insurer accepts all risks related to non-payment of such duties, even the risks of fraud and forgery.

Thus the limits of insurers' liability are expanded to the maximum, and custom bond insurance remains a very risky business in Lithuania (as insurers practically have no possibilities to use defences against Customs Office claims).

INSURANCE MARKET CHANGES IN THE BALTICS

In September, the Swedish insurance group Länsförsäkringar announced plans to enter the Lithuanian and Latvian insurance markets.

In Summer 2007, German insurer Vereinigte Hagel started preparations to commence crop insurance activities in Lithuania.

In July, Colemont Holdings AS acquired UADBB Hansa draudimo brokeris, a major Lithuanian insurance broker company.

In June, insurance company UAB Baltic Polis became a branch of Latvian insurer Parex Insurance Company (a subsidiary of Gjensidige Forsikring).

In June, the Insurance Supervisory Commission issued a permit to merge Lithuanian life assurance company AB Seesam Lietuva gyvybės draudimas with Estonian company Seesam Elukindlustuse Aktsiaselts.

Contributed by: Andrus Kattel, Marika Oksaar, Estonia; Anete Rubene, Latvia; Tomas Kontautas, Lithuania. Editor: Anete Rubene, Latvia.

NEWS IN SORAINEN

■ Recent deals

Colemont Holdings acquires major Lithuanian insurance broker

Vilnius office advised Colemont Holdings AS in acquisition of one of the largest Lithuanian insurance broker companies UADBB Hansa draudimo brokeris, formerly a member of Hansabank Group. Colemont Holdings AS belongs to Colemont Global Group, one of the major and fastest-growing insurance global brokerage networks. The name of the acquired company will be changed to UADBB Colemont draudimo brokeris. Our team was led by partner Laimonas Skibarka and senior associate Tomas Kontautas.

Advising Lithuanian Chamber of Insurance Brokers on planned amendments to Insurance Law

The head of our Pan-Baltic Insurance Team – senior associate Tomas Kontautas – advised the Lithuanian Chamber of Insurance Brokers in relation to planned amendments to the Insurance Law in Lithuania.

Achieving unprecedented injunction for payment of ca 400 000 EUR

Tallinn office achieved an unprecedented interim injunction for immediate payment of ca 400 000 EUR while representing a real estate investment company in a large insurance claim based on fire damage. The order of the court of first instance was upheld by the court of appeal. The case was handled by partner Carri Ginter, senior associate Andrus Kattel and associate Marika Oksaar.

Assistance regarding cross border provision of insurance services

Tallinn office assisted a leading global insurance company's Estonian branch in drafting insurance terms and conditions and a global financial security company regarding cross-border provision of insurance services in Estonia. The transaction was advised by senior associate Andrus Kattel.

International financial company interested in establishing in Estonia

Tallinn office advised an international financial company regarding establishing an insurance company in Estonia. The client was advised by partner Kaido Loor and associate Marika Oksaar.

Assistance to major US investment management company

Riga office advised one of the largest USA investment management companies as to possibilities of concluding outsourcing agreements with Latvian insurers. The advice was provided by senior associate Anete Rubene.

Coface develops trade credit insurance products in the Baltics

Our offices advised the Lithuanian branch of leading global credit insurance company Coface Austria Kreditversicherung in developing their trade credit insurance products in the Baltics. The project was led by senior associate Tomas Kontautas.

Assistance to leading European insurance company

Tallinn office represented one of Europe's leading insurance companies in responding to an appeal in cassation to the Estonian Supreme Court regarding professional liability insurance of attorneys-at-law. The case was handled by senior associate Andrus Kattel.

Assistance to leading global insurance brokerage company

Riga office advised one of the world's leading insurance brokerage companies regarding directors and officers liability under Latvian law. The case was handled by senior associate Anete Rubene.

Assistance to lender in aircraft deregistration

Vilnius office advised an international lender focused on providing a broad range of capital solutions primarily to midsize business in issues related to aircraft deregistration in Latvia and registration in Lithuania. Advice also involved issues on perfecting ownership and aviation insurance. The client was advised by senior associate Tomas Kontautas and associate Regina Derkintyte.

Assistance in claiming process

Riga office successfully assisted a policyholder (a carrier) in claiming against a leading Latvian insurance company regarding grounding of a ship. The transaction was led by senior associate Anete Rubene.

Advising a leading Latvian insurance company on competition-related issues in cooperation

Riga office is maintaining the interests of one of Latvia's leading insurance companies on aspects in cooperation between Latvian insurers and dealing with competition-related enquiries from EU institutions. The transaction was advised by senior associate Anete Rubene.

Advising Lithuanian branch of major global insurance group

The insurance team of Vilnius office led by senior associate Tomas Kontautas advised the Lithuanian branch of one of the largest insurance groups in the world in regulatory issues related to their insurance products, and relations with Lithuanian Insurance Supervisory Commission.

Advising leading global financial services provider regarding non-admitted insurance issues

Vilnius office advised the world's leading financial services provider in operations spanning every continent and in all of the world's major financial centers regarding non-admitted insurance issues in relation to activities of Bermudan insurer in Lithuania. The client was advised by senior associate Tomas Kontautas.

■ Other news

International Conference "Insurance and Reinsurance in the Baltics 2007"

Sorainen is supporting the 11th Annual International Conference "Insurance and Reinsurance in the Baltics 2007" organized by the Latvian Insurers Association. The conference takes place on 11 October 2007 at the Hotel Radisson SAS Daugava in Riga, Latvia. Tomas Kontautas, senior associate from Vilnius office, delivers a presentation on the topic "Provision of Insurance Services in the Baltics by Foreign Insurers: Outstanding Issues". Additional information: www.laa.lv

Dr. Tomas Kontautas has joined Common Principles of European Contract Law (CoPECL) Economic Impact Group

Dr. Tomas Kontautas, Head of our Pan-Baltic Insurance Team, has joined the Common Principles of European Contract Law (CoPECL) Economic Impact Group to perform an economic assessment of the European rules on insurance contracts. CoPECL network of excellence has been established under the auspices of the European Commission's Sixth Framework Programme to deliver a Common Frame of Reference, containing principles of European Contract Law that will serve as a model law for national and European authorities as well as for private parties. Members of the Economic Impact Group are leading European academics in the law and economics field. The work of the Economic Impact Group is coordinated by Tilburg University.

Monograph by Dr. Tomas Kontautas published

Major Lithuanian legal publishing house Justitia has published a monograph on Insurance Contract Law by Dr. Tomas Kontautas, head of the Baltic Insurance Team at Sorainen. The monograph is the first book on the topic in Lithuanian legal history. The monograph is available in Lithuanian.

