



19 November 2019

Countries' Reports at the General Council Meeting on 7 November 2019

South Africa:

LegalWise, member of our Association since 2001, has now existed for 31 years, the past 15 years licenced as insurer. Recently, LegalWise has been restructured to separate the legal services from the insurance. Accordingly, LegalWise will continue to exist as legal services company and intermediary of LeZa, the company housing the insurance. Jan Luwes will be serving as Group CEO, Siva Gegan is the new CEO of LegalWise and Eon du Toit is CEO of LeZa, the insurer. Siva Gegan succeeds Jan Luwe as member of the General Council.

The Legal Practice Act 28 of 2014 took effect on 1 November 2018. Some of its provisions will enter into force at a later date. The goal of this Act is to improve access to justice for South Africans and to restructure the fragmented and divided legal profession while retaining its independence.

Areas affected by the Legal Practice Act are:

1. Self-regulation: the South African Legal Practice Council replaces the four statutory provincial Law Societies and takes over their assets and staff in order to regulate the profession.
2. Fees: fees used to be set independently and without purview of any Regulator or the profession by the Rules Board. Now the Rules Board is obliged to take certain aspects into account when determining tariffs. Moreover, the Legal Practice Act requires legal practitioners to provide clients with cost estimates for their services, detailing hourly rates, the work likely to be necessary etc.
3. Nature and scope of legal services: legal services as such are not defined but only legal practitioners who are admitted and enrolled are allowed to provide legal services. Before, only attorneys, notaries and conveyancers fell under the definition of a legal practitioners while now also advocates are included. Hence the assistance provided in-house by legal protection insurers is covered.
4. Ownership of entities rendering legal services: presently, only legal practitioners can own such entities but the Legal Practice Council is requested to make recommendations by the end of 2020 on the issue of alternative business structures.

For more details read the reflections of Siva Gegan, CEO of LegalWise, in annex 1.

More information: sivag@legalwise.co.za

Austria:

Judgement 6 Ob 226/18f of the Austrian Highest Court of 25 April 2019

In Austria there has always been a value adjustment clause (*Wertanspassungsklausel*), which had provided for an adjustment of the premium in the event of inflation-related price increase, based on the development of the consumer price index (CPI).

The standard contract clauses were designed in such a way that, in addition to the premiums, the sum insured was increased to the same extent. The surprising finding of the Supreme Court is the assessment of the equivalence of mutual obligations.

The Court says that:

- the main obligation of the legal protection insurance is the provision of the sum insured (and not the assumption of costs!)
- the ratio between premium and sum insured is determined once at the beginning of the contract. Since both, the premium and the sum insured, are subject to the same

inflation-related influences, there is no room for a one-sided adjustment of the premium.

Thus, all objections that the costs increase in the course of the time (dispute values, lawyers' tariffs, SV costs, ...) miss the mark.

The basic problem is that in Austria there is no law regarding a value adjustment in legal protection insurance and that courts now have clearly noticeable reservations against long-term contractual relationships in the insurance sector (in Austria 10-years contracts still apply!). This is evident in all decisions (value adjustment, permanent discount, ...).

DAS Austria has now solved the problem in such a way that, as the first legal protection insurer in Austria, it dispenses with a sum insured in private business (paradoxical intervention!) and tries to initiate a legal solution via the insurance association.

More information: ingo.kaufmann@das.at

Estonia:

The market has been stable. DAS/ERGO still has the monopoly in the Estonian market and has seen a portfolio increase in private stand-alone business while the company has recently started to sell also add-on legal protection insurance.

More information: maiko.kalvet@ergo.ee

Belgium:

In September 2019 a new law entered into force allowing Belgian citizens to deduct part of their legal protection insurance premium from tax. So far, this new product has been selling well and it has had a positive effect since legal protection insurance is better known now. For more details please read annex 2.

ARAG Belgium offered its clients a product which allowed for reduced premiums if the policyholder agreed to use the insurer's in-house lawyers. ARAG had to stop offering these contracts because it allegedly breached the insured's right of free choice of lawyer.

The Belgian non-life market has seen further concentration after the Baloise Group has acquired the non-life insurance portfolio of Athora Belgium for EUR 60 million. This transaction follows the acquisition of the Belgian insurer Fidea NV earlier this year and further strengthens the Baloise Group's position as one of the top four non-life insurers in the Belgian non-life market, especially in the Belgian Walloon region.

More information: erik.vanpoucke@euromex.be

France:

The French legal protection insurance market has been growing (approx. 5%) and in 2019 LaDAS and GMF merged into Covéa Protection Juridique which now, with a premium income of more than 200,000.00€, has a 19% market share.

There is a new report about the public legal sector, a permanent point of discussion between the public sector, lawyers and insurers. The discussions are mainly about finding financial resources for access to justice, i.e. supporting vulnerable citizens who do not dispose about the necessary funds to defend their rights. The public budget is presently at 400,000.00€ but insurers are constantly targeted to find more funding in particular by increasing the taxes on insurances. Fortunately, there has been no tax increase this year. The new report now also looks at the other legal professions, for instance notaries, whether they can provide funds.

Finally, the relationship between insurers and lawyers has been improving after starting a permanent exchange between the Bar Association, the French Insurance Association and, in particular, the former French members. The result is a kind of Charta of good understanding with a code of cooperation which will ease the relationship by introducing a collaboration in regard of training, recruiting interns and regulating the notion of legal advice. This last point is of particular interest for the lawyers since they consider that the activities of insurers have been violating their monopoly in this regard.

More information: ldesbrest@cfdp.fr

Switzerland:

The market has been growing by 5% and the merger between CAP and DAS has been concluded.

The Swiss consumer association launched a new legal protection insurance product. Presently this is still small but it is an interesting move.

At the end of November the Swiss Insurance Association organises a legal protection seminar on Cybercrime, LegalTech, AI for approx. 140 participants.

More information: daniel.siegrist@cooprecht.ch

Germany:

The German Insurance Association forecasts a 2.5% growth for 2019 (4.2% in 2018). The market volume amounts to 4.3€ billion and is increasing due to an active demand for the first time following the ongoing discussions about the Dieselgate case. Until now legal protection has been a push product and therefore this is quite a remarkable development. The forecast for the combined ratio in 2019 is 98%, i.e. legal protection is slightly profitable. So far German insurers have paid out substantial amounts (ROLAND alone: 35€ million) but presently many claims are being settled at the expense of VW which gives hope that the outcome will not be as bad in the end as expected.

The market behaviour among competitors is still very dynamic, for instance many new LegalTechs are launched and there is a lot of collaboration between LegalTechs and insurers (<https://legal-tech-verzeichnis.de/rechtsschutzversicherung-steigt-in-grosse-legal-tech-firma-fuer-verbraucherrechte-ein/>), meaning the attitude on both sides has changed. Also, many insurers have started their own platforms for legal services (ROLAND: www.yourpartner.de).

The German High Court decided this week about a particular question regarding the validity of revocation instructions within credit contracts of car manufacturers. If they were incorrect, buyers would be able to cancel the credit contract immediately and return the car which would have been of particular interest if it was a Diesel car. The High Court ruled that the terms were valid and consequently neither the car manufacturers nor insurers need to worry.

More information: rainer.brune@roland-rechtsschutz.de

Czech Republic:

The insurance sector has been targeted by the state in search for funding of public employees. Due to the low unemployment rate of 2% the unions are extremely strong in the Czech Republic and pushed the finance minister to raise a onetime sum of 10 billion CZK for the public employees from the technical reserves of insurers. The insurance market with the support of the opposition in the parliament has fought back since this action severely endangers in particular small insurance companies. The outcome is still open.

Another attempt to raise money is an increase of court fees by 200-300% at the beginning of 2020. This initiative has met strong opposition within the legal sector and the outcome is to be seen.

More information: chizzola@das.cz

The Netherlands:

The Minister of Justice is working on an overhaul of the legal aid system. Presently, citizens get support from so-called social advocates who are asking for a higher pay which is denied by the state. Instead the Ministry wants to increase the use and availability of LegalTech which would ask citizens to get engaged themselves in a kind of self-service. The initiative is highly contested and discussions will go on for a long period of time without knowing what the outcome will be.

In January 2020 the *Labour Market in Balance Act* will overhaul Dutch dismissal law significantly and – for the first time – specific rules for government employees will be lifted and regular labour law will apply to the public sector. The Dutch government intends to encourage employers to offer longer-term or permanent employment agreements and, consequently,

the change is reducing the gap in legal protection and monetary differences between fixed- and indefinite-term employed employees.

More information: jam.nanninga@das.nl

Norway:

The Nordic market is still young and expanding. However, there have been changes, for instance DAS has pulled out of the market because of the Brexit. ARAG has been doing well and is now expanding into Sweden and Denmark as is Legal Insurance, Henrik Jensen's company.

There was a legal scandal in Norway concerning a misinterpretation of labour law over a period of 5 years. This concerned the beneficiaries of social welfare who could receive their benefits and live anywhere in Europe.

More information: henrik.jensen@legalinsurance.no

United Kingdom:

The legal protection insurance market has seen a number of unrated capacity providers cease trading. It is preparing for the effect of the Civil's Liability Act which comes into force on the 1st April 2020. This will cause net BTE premiums for motor to increase up to 6 or 7 times because low value claims for soft tissue injuries will now go through the small claim's courts. Therefore, there will be no incentive for lawyers to pursue these claims since there is no recoverability of fees for such claims. For legal protection insurers (ATE) volumes will go down dramatically, probably around 80%. For consumers there will be little perceptible difference, they will just make their claims in a different way.

Overall the market is dealing with Brexit and most insurers have obtained licences through subsidiaries in jurisdictions that are not leaving the EU.

More information: simon.warr@amtrustgroup.com



Reflections on the changes to legal services in South Africa

In the South African legal profession, the winds of change blew to usher in the Legal Practice Act 28 of 2014 (here-in after referred to as the Act), which was the subject of intense discussion over the past few years. The effective date of most of the provisions in the Act took effect on 1 November 2018 (note some portions of the Act are still not yet in force). The intention of the Act was clear, the profession was required to transform to give effective to a Constitutional imperative -access to justice, whilst retaining the independence of the legal profession.

This article will highlight some of the significant changes that have been implemented in South Africa relating to the legal profession in this regard.

Establishment of the South African Legal Practice Council

The Act has, by virtue of its implementation, repealed the Attorneys Act 53 of 1979 in its entirety and has also abolished the four statutory provincial Law Societies. The South African Legal Practice Council (LPC) has been established to take over the Law Societies, their assets and staff, and to regulate the profession by exercising jurisdiction over all Legal Practitioners (admitted Advocates and Attorneys) and Candidate Legal Practitioners.

Note the recent Code of Conduct published by the LPC also regulates and requires non-practising attorneys and advocates to pay a subscription to the LPC, which previously was not the case. Endeavours are being made for LegalWise SA to be recognised as a key stake-holder to the LPC, given that a majority of our staff comprising of non-practising attorneys and advocates are regulated. A submission has been made to the LPC pursuant to an invite for comment in terms of Section 95(4) of the Legal Practice Act 28 of 2014, on the issue of subscriptions payable.

Note some of the key functions of the LPC include:

- the publication of Rules governing the South African legal practice;
- the establishment of Provincial Councils and their areas of jurisdiction;
- the structure, powers and functions of the Provincial Councils;
- the practical training requirements for candidate legal practitioners;

- preparing and publishing a code of conduct for legal practitioners, candidate legal practitioners and legal entities

Fees

Section 37 of the Act regulates this very contentious issue of the profession.

Traditionally fees were set by the Rules Board, outside the purview of any Regulator or the profession. However now the Rules Board must take several aspects into consideration when determining tariffs in relation to litigious and non-litigious legal services rendered by Legal Practitioners, juristic entities, law clinics or Legal Aid. These tariffs are yet to be published. An invitation by the South African Law Commission inviting comment on the issue of legal costs pursuant to the publication of its Legal Fees Project 142 Issue Paper 36 resulted in LegalWise South Africa making a submission.

Note the Act also imposes on a Legal Practitioner to provide a client with a *written cost estimate* notice specifying all the details relating to the estimated costs of the legal services, including:

- fees, charges, disbursements and other costs;
- the Legal Practitioner's hourly rate (including the explanation to the client of their right to negotiate the fees payable);
- an outline of the work to be done;
- the likelihood of appointing an advocate (and the associated costs thereof);
- the legal and financial consequences of withdrawal from litigation

Furthermore, the Legal Practitioner must also verbally explain each aspect contained in the notice and must obtain the client's written agreement to the estimated costs. It is worthwhile to point out that the written cost estimate clause was made by LegalWise SA whilst the Act was in Bill stage for inclusion.

Nature and scope of legal services

Only legal practitioners, who are admitted and enrolled by the court are allowed to render legal services. Note no definition has been provided for legal services in the Act, suffice to stipulate that no -one other than a practising attorney/advocate can appear in court or draw up any document or instrument to be used in a court. Hence the assistance provided in-house by LPI's in South Africa does not transgress the provisions of the Act. A Legal practitioner means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively. The LPA now

includes advocates in the definition of a legal practitioner whereas the Attorney's Act definition was limited to attorneys, notaries and conveyancers. The result of this is that advocates practicing with trust accounts will be subject to the same rules that apply to attorneys with trust accounts. Accordingly, Advocates are now able to accept briefs directly from the public, provided that they have trust accounts and hold fidelity fund certificates.

Note in terms of the Act the LPC must recommend to the Minister of Justice for the recognition of paralegals within 2 years of the commencement date of the Act.

Ownership of entities rendering legal services

Note at present the status quo relating to ownership remains as under the previous Act, that only practising legal practitioners can own entities rendering legal services.

Note in terms of the Act the LPC must make recommendations to the Minister of Justice within 2 years of the commencement date of the Act on the issue of alternate business practices, a suggestion made by LegalWise SA at Bill stage, which would create a mechanism for LPI's to own legal firms and thus regulate and control the entire value chain of its operations.

Complaints Handling

Effective and transparent procedures for the resolution of complaints against legal practitioners are in place and is currently being handled by the LPC. In addition, the Act refers to oversight by a Legal Services Ombud. Note at present provisions relating to the Legal Ombud are not yet effective.

Continuous Professional Development and Community Service

Provisions not yet implemented if the Act.

Conclusion

With the purpose of the Act very clear in its intent to transform and restructure, as well as unify what was once a fragmented and divided legal profession, a new playing field has certainly been created requiring all role-players to adapt.

#BeLegalWise

Siva Gengan
Chief Executive Officer

"Courage is the most important attribute of a lawyer. It is more important than competence and vision. It can never be an elective in any law school. It can never be de-limited, dated or out-worn" **Robert F Kennedy, San Francisco, 1962**



ANNEX 2

Will the new legislation on legal protection insurance improve access to justice in Belgium?

In September 2019 a new law will enter into force allowing Belgian citizens to deduct part of their legal protection insurance premium from tax.

In order to be tax deductible, the insurance contract must meet certain minimum conditions (please see below). If these conditions are met, a 40% tax reduction is granted on insurance premiums up to 310 euros which amounts to a reduction of ca. 124 euros per year. Only premiums paid after the law comes into force will be tax deductible.

After introducing in 2007 the so-called *Onkelinx policy* this is the second attempt of the Belgium government to use tax incentives for increasing the take up of legal protection insurance among Belgians with the goal of making justice accessible to more citizens. The project of 2007 was, however, short-lived and is replaced by the present law because tax incentives of around 13 euros per year were too little, ceilings relatively low and materials covered not enough to make the product attractive.

Currently, only 10% of Belgians (approx. 80% of Germans) have an extended, stand-alone legal protection insurance cover and the thresholds for obtaining full legal aid are relatively low. Consequently, people with "middle" incomes are unable to benefit from legal aid, do not have sufficient funds to pay legal costs and often face a problem of access to justice. It is therefore crucial for the success of the government's initiative that the conclusion of legal protection insurance contracts increases significantly within this middle-income segment of the population. This, however, will only be the case if Belgians find the insurance policy attractive enough to buy and if the new legislation gives insurers enough freedom to construct an insurance policy that is economically viable.

To monitor the application and possibly improve the law, the law obliges Belgian Bar Associations and the Insurance Association (Assuralia) to evaluate the situation and send every two years (for the first time in 2021) a joint report to the Government. This report must contain proposals for improving the law and enhancing access to justice for citizens, as well as a detailed and quantified overview of contracts concluded under the new law. It must also quantify the cases in which lawyers agree to fix their fees and expenses at the amounts established by a tariff (Article 11 of the law). N.b. in these cases the insureds must bear the excess amounts (Article 8 § 2 of the law).

At present, it is too early to judge whether the law will be effective and actually improve access to justice since insurers are only now developing the products which will have to transform the legislation into reality. It appears, however, that some of the prescribed conditions could raise issues for insurers or that some effects might be unfavourable for policy holders. Below are some of the minimum cumulative key features that a legal protection insurance contract must satisfy in order to benefit

from the tax reduction; the full text of the new law can be found here:

http://www.etaamb.be/fr/loi-du-22-avril-2019_n2019041139.html

- The insurance contract must be taken out on an individual basis;
- The insurance contract must comply with a minimum coverage specified in the law (damages actions, criminal defences, tax law disputes, disputes in family matters etc.);
- The guarantee must cover a certain number of specific costs (lawyers' fees and expenses, bailiffs' fees and expenses, enforcement costs, etc.);
- When a lawyer handles a legal dispute under this new legal protection insurance scheme, the lawyer's fee is capped;
- The waiting period may not exceed five years for construction disputes, three years for divorce/legal cohabitation disputes and one year for disputes relating to certain specific matters (family law, administrative law, tax law, etc.). Apart from these limited cases, the principle is the absence of a waiting period;
- The insurer must cover its clients up to a minimum of 13,000 euros in civil cases, 13,500 euros in criminal cases and 6,750 euros in construction or divorce disputes.

It should be noted that these conditions do not apply to all legal protection insurance contracts, but only to those that potentially offer a tax reduction.

Brussels, 26 June 2019 (author: Antje Fedderke)