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EIGHT

TWO THOUSAND

Recent Legislative and Judicial Trends in Continental Europe Affecting the Casualty Insurance Industry



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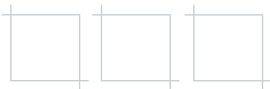
Introduction

Recent Legislative and Judicial Trends in Continental Europe Affecting the Casualty Insurance Industry is the latest instalment in Guy Carpenter & Company Ltd's ("Guy Carpenter's") legislative update series, designed to provide our international clients and markets with a concise overview of key trends in the Continental European legal environment. These issues have had an impact on insurers and reinsurers or are expected to have an effect in the near future.

In developing this report, Guy Carpenter asked the local Continental European offices of DLA Piper to highlight what legislative or judicial developments they consider to be of greatest impact in each country. Where there have been no significant legislative or judicial developments in a territory since our last report, no update is included. It has not been our objective to produce an exhaustive review of the entire scope of legislative changes and judicial rulings of the past year in Continental Europe, but rather to highlight the main developments that we and our legal colleagues from DLA Piper perceive as being worthy of attention, and where necessary, further in-depth study.

What follows is a series of short reports highlighting the most notable legislative and judicial issues to impact the casualty insurance and reinsurance industry in Continental Europe during the period September 2007 to May 2008.

We are greatly indebted to DLA Piper LLP for their very considerable assistance in preparing this review of the main legal and judicial developments in Continental Europe to impact the casualty insurance and reinsurance industry during the period September 2007 to May 2008. DLA Piper is a leading global law firm and has one of the largest insurance and reinsurance practices in Continental Europe.



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Austria

National Implementation of the Directive on Motor Liability

The insurance-related EU motor liability directive 2005/14/EC has been implemented in Austria by the casualty compensation law (Verkehrsofoper-Entschädigungs-gesetz, VOEG) and the motor traffic amendment law (Kraftfahrrechts-Änderungsgesetz 2007, KrÄG 2007). Both laws entered into force on 1 July 2007.

The VOEG endeavours to codify Austrian road casualty protection law. The VOEG treats the settlement and coverage of indemnity claims and states which road casualties cannot or can only partially claim against a motor liability insurer because:

- The vehicle was not insured despite the respective legal obligation.
- A person who is liable for the casualty claim was unascertainable.
- The vehicle was used without approval of the owner.
- The motor liability insurer does not grant insurance coverage because the casualty damage was caused intentionally and unlawfully.
- The insolvency proceedings concerning the assets of a motor liability insurer were opened or refused due to a lack of sufficient assets.

The VOEG also addresses the settlement and coverage of indemnity claims that result from damage caused by vehicles not subject to compulsory insurance or by a failure to wear required helmets and seat belts. Damages occurring abroad are covered as well.

In all cases mentioned above, the Austrian Insurers Association (Fachverband der Versicherungsunternehmen) has to provide insurance cover, as long as the third party's injury or damages resulted from an accident involving a vehicle. Only the parties suffering personal or material injury (or their surviving dependants) can be beneficiaries. The law had previously only applied to losses occurring in Austria, but Section 4 paragraph 3 VOEG widens the protection of the insured to accidents which have been caused abroad, provided the insured risk is located in Austria.

For accidents occurring outside Austria, the Austrian Insurers Association has to pay compensation to an Austrian citizen for damages caused by a vehicle insured with a foreign motor liability insurer.

Apart from the new VOEG, the directive requires a series of amendments to insurance and motor traffic law. The insurance law has accordingly been altered, with a double increase of the minimum sum insured (standard limit EUR 6 million). With respect to the amendments of motor traffic law, section 59 paragraph 2 KFG states that vehicles owned by regional corporations (such as the federal government, provinces or municipalities) are exempt from compulsory insurance. Voluntary insurance can be taken out for a sum insured below the statutory minimum.

National Implementation of the Directive on Environmental Liability

For the time being, there are no pending proceedings concerning the Federal Environmental Liability Act (Bundes-Umwelthaftungsgesetz, B-UHG) of March 2007.

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Belgium

BFIC's Ruling on Insurance Operations

Under the Belgian Royal Decree of 23 August 2004, any natural or legal person may ask the Belgian Banking, Finance and Insurance Commission (BFIC) for a ruling on the interpretation of “insurance company”, as defined under the Law of 9 July 1975, on the control of insurance companies, provided these natural or legal persons have the necessary interest hereto considering the activities they intend to pursue.

The advantages of a BFIC ruling are quite apparent. Market operators and legal practitioners can study the BFIC's view on certain transactions or operations, increasing legal certainty. This explains why any ruling issued by the BFIC is published on its website anonymously. However, a ruling is only binding for the BFIC vis-à-vis the party asking for it.

The BFIC ruled in December 2007 on the definition of “insurance company” under Belgian law. The ruling is important as it outlines the relationship between insurance agreements offered by insurance companies and financial guarantees offered by commercial companies. The ruling is based on the following facts.

A company within an international industrial group, manufactured engineering machines, which were commercialised and sold by a network of concession-holders based in several countries, including Belgium. The concession-holders offered their clients guarantees, which went beyond the standard guarantees offered by the manufacturer in case of breakdown or default of the products. As the concession-holders offered these guarantees under their own responsibility (not the manufacturer's), many entered into agreements with insurance companies to cover the financial risks they had assumed.

To reduce the cost of insurance premiums on the final product price, the manufacturer considered paying for the costs of repair as covered by the concession-holders' contractual guarantees, instead of using the insurance companies. This service would not be an automatic enlargement of the manufacturer's standard guarantee, but an optional service to the concession-holders against payment of a price, which would not be related to the existing insurance premiums. The question was therefore raised as to whether the manufacturer could enter into insurance operations with its concession-holders, which is a business that is exclusively reserved to duly authorised insurance companies.

The BFIC ruled that autonomy from other services is one of the essential characteristics of an insurance operation. In the case at hand, the service offered by the manufacturer to its concession-holders does not qualify insofar as it is offered in connection with (and not independently from) the sale of new products. Therefore, the BFIC ruled that the proposed activities of the manufacturer do not qualify as insurance operations and that, as a result, it does qualify as an “insurance company” for which an authorisation by the BFIC is required under the Law of 9 July 1975 on the control of insurance companies.

Although the BFIC is only bound by its ruling in the case at hand, the merit of this ruling goes beyond this case as it outlines the relationship between insurance agreements offered by insurance companies and financial guarantees offered by commercial companies. However, further examination of the circumstances surrounding each particular case remains necessary to determine whether a registration as an insurance company is required.

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France

Decision in the “Erika” Oil Spill Case: Environmental Liability

On 12 December 1999, the tanker “Erika” broke in two and sunk off the coast of Brittany, France, releasing thousands of tonnes of oil, killing marine life and polluting approximately 400 kilometres of coastline. This caused one of France’s worst environmental disasters.

After highly publicised legal proceedings, the Paris Tribunal de Grande Instance, in its 16 January 2008 decision, fined Total SA (which had chartered the single-hulled tanker) EUR 375,000 and ordered it to pay, along with other parties, a share of EUR 192m in damages to the civil parties (primarily the French State and local communities).

This decision is significant because it recognises the existence of an ecological loss “resulting from damage caused to the environment”, that gives rise, for example, to a right of recovery by environmental/communal organisations. In this regard, the court indicated that such entities have the right to claim recovery, not only for tangible and intangible losses (whether direct or indirect) caused to collective interests, but also for those resulting from “damage to the environment”.

While it is too early to evaluate the full impact of this decision, which is currently being appealed, the decision raises the possibility (subject to certain limitations) that environmental/communal organisations may join proceedings as civil parties in the event that they determine that damage has been caused to the environment, even if no economic loss has actually been suffered. In this regard, there are more than 100 civil parties to the Erika proceedings (including Greenpeace and various local communities).

This decision raises important implications as to how environmental liability may be evaluated by the courts and consequently may lead to a re-evaluation by insurers as to potential exposure.

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Germany

Reform of the German Insurance Contract Act: Specific Impact on the Liability Sector

On 1 January 2008, the German Insurance Contract Act (VVG) came into force following several years of continuing legislative procedures. The new regulations apply to all new contracts signed as of that date. Following a transition period up to 1 January 2009, the new insurance contract act is also applicable to existing contracts.

Introducing Direct Claims for Compulsory Liability Insurance

The Federal Ministry of Justice responsible for this legislative venture originally intended to introduce direct claims for all types of compulsory liability insurance. However, this plan was met with sharp protest and criticism, in particular from the German Insurance Association (GDV) but also from other organisations.

The GDV argued that legal uncertainties existing under current law regarding the extent of possible limitations of coverage of compulsory liability insurance are not eliminated by the new provision as set forth in Sec. 114 para. 2 VVG. This provision states that the content and extent of compulsory liability insurance may only be determined by the insurance contract itself. Such regulations may not compromise the intention of the compulsory liability insurance, which is most commonly the protection of victims.

This undetermined provision also was seen as constituting a danger for necessary risk limitations common in the market. In connection with a direct claim against the insurer, it was even felt that there would be an increased possibility that the risks subject to compulsory liability insurance would not be covered appropriately or only at unjustifiably high premiums.

The Ministry of Justice has acknowledged this criticism by limiting direct claims in compulsory liability insurance to three cases as per Sec. 115 para. 1 VVG. A direct claim is only possible if one of the three following conditions is met:

- It refers to an automobile liability insurance (here, direct claims are already known practice under current legislation).
- Insolvency proceedings have been started over the assets of the insured or have been rejected due to a lack of assets or if a temporary insolvency administrator has been appointed.
- The residence of the insured is not known.

Abolishment of Prohibition on Acknowledgement, Settlement of Claims and Assignment

Another important issue in practical terms is the abolishment of the prohibition on acknowledgement, settlement and assignment of claims by the insured without the insurer's approval.

Existing legislation permitted general insurance terms and conditions that enabled the insurer to refuse the liability insurance protection if the insured acknowledged his liability to the claimant without the insurer's approval, paid damages or assigned the right of recourse. Such clauses are now rendered ineffective as per Sec. 105, Sec.108 para. 2 VVG.

These regulations have been criticised as well, as they obstruct the insurer in adjusting claims by making the liability check more difficult and in many cases rendering impossible the rejection of unjustified claims. In particular, the regulations make it easier for collusion between claimant and insured.

Problems may also arise from cases where the insured is economically dependent on the claimant. The dependencies between automotive manufacturers and their suppliers in the event of necessary recalls due to presumed production errors on the supplier's part exemplify this problem.

In assigning the right of recourse, the insured may de facto effectuate the same constellation that exists in the case of a direct claim against the insurer. The claimant can even corrupt the insurer's position, if he is not willing to cooperate by giving the necessary information to his liability insurer.

It remains to be seen how these issues are dealt with in practice and to what extent this will have impact on liability insurance products and premiums.

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Italy

The Italian Parliament Approves a Reform of the Consumer Code Introducing Class Action

The Italian legal system does not provide for class actions or similar procedures. A number of attempts have been made to introduce such proceedings in recent years, but the bills were not approved by either chamber of Parliament. A new bill to establish collective actions was recently approved by the Senate and, on 14 December 2007, by the Chamber of Deputies (the second chamber of the Italian Parliament). The chambers of the Italian Parliament approved the Financial Act for the year 2008 (a financial document for the economical management of the government). In particular, the Financial Act will introduce significant modifications to the Consumer Code currently in force in Italy (Legislative Decree no. 206 of 6 September 2005).

The key aspects of the new provisions are the following:

- The consumer protection associations and other associations and councils which duly represent collective interests have legal capacity to sue under the new system.
- Consumers and users who intend to benefit from the protection afforded by this article must notify the promoter in writing of their intentions to join the class action.
- The promoter may be informed of this even during the appeal and up until the hearing scheduled in order to specify the conclusions of the parties.
- Any individual consumer or user who wishes to file claims having the same subject matter may in any case intervene in the action brought pursuant to paragraph 1.
- Collective actions may be brought before the court of the place where the defendant has its residence (or legal seat) for claiming reimbursement or damage compensation with respect to:
 - Infringement of certain (one-sided or standard form) contracts.
 - Illicit conduct.
 - Unfair commercial practices.
 - Unfair competition activities.
- The Italian class action would follow the opt-in system (according to which a class action will comprise the class members who opt for the class action). In any case, each individual will maintain his own right to access courts in order to defend his rights.
- Commencement of the class action will be submitted to a previous authorization of the competent court.

- At the first hearing, the court, having heard parties and gathered brief information (to any necessary extent), shall declare the admissibility or inadmissibility of the claim by way of an order that may be challenged before the Court of Appeal, which shall rule in Chambers.
- The claim is declared inadmissible if it is clearly groundless, if there is a conflict of interest or whenever the court does not ascertain the existence of any collective interest deserving protection pursuant to this article.
- The court is entitled to postpone the assessment of the admissibility of the claim if preliminary investigations concerning the same subject matter are underway before an independent authority.
- Should the court declare the admissibility of the claim, then the party who has promoted the class action is ordered to duly advertise the content of the claim, and actions are also taken for the continuation of proceedings.
- The collective action will interrupt prescription deadlines for individuals.
- The court can establish the criteria based on which damages compensation awarded will have to be transferred to individual consumers and users who have joined the class action or who have intervened in the proceedings.
- The court shall also establish the minimum amount to be paid to each consumer or user, should this be possible, on the basis of the documents at his or her disposal.
- Within 60 days of filing of the judgment on the admissibility of the claim, the company is entitled to make its offer for payment by way of a written deed to be served upon any entitled party and to be filed with the clerk's office.
- Any form of proposal accepted by the consumer or user shall be enforceable vis-à-vis the company.
- The parties will be allowed to enter into settlement agreements before the entrusted Judge.
- In case of claim acceptance, and if the company fails to make an offer for payment in a timely manner (or should its offer remain unaccepted after 60 days of its service) the competent court will be entitled to establish a mediation chamber, accessible also by individual consumers, which may attempt to determine, according to the relevant parties involved, the amount to be paid.
- The mediation chamber shall set, by way of minutes to be signed by its chairman, the terms, methods and amounts to be paid in order to compensate the individual consumers and users for damages. Said minutes shall be enforceable.

- Alternatively, should the party who has promoted the class action and the defendant jointly request so, the chief judge of the court shall order out-of-court settlement before one of the conciliation bodies referred to in article 38 of Legislative Decree no. 5 dated 17 January 2003, as subsequently amended, operating in the same municipality as that of the court.
- Specifically with respect to one-sided or standard form contracts, if it is ascertained during the relevant class action that the general public has been provided with any misleading information, all individual contracts concluded during the period of diffusion of the incorrect messages are automatically considered void.
- The winning party's attorney fees are limited to a maximum of 10% of the global amount awarded in damages.

Understandably, the proposal of the class action legislation led to a general outcry and heavy protest from many sides and interest groups (i.e. the National Industry Entrepreneurs Association, which immediately predicted a disastrous perspective for its members' competitiveness). While the Consumer Protection Associations did not fail to stress the importance of the new provisions, they felt that they merely had to be considered a first step towards even more effective enforcement measures (i.e., the provision of 'punitive damages' which are currently denied by Italian Courts).

The new class action rules are expected to enter into force 180 days after the Financial Act becomes effective (i.e., 1 July 2008). However, further postponement cannot be ruled out as the debate is ongoing.

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Spain

Implementation of the Environmental Liability Directive 2004/35/UE in Spain

Implementation of the Directive

The EU Environmental Liability Directive 2004/35 was implemented in Spain by Law 26/2007 of 23 October 2007 on environmental liability (“Ley de Responsabilidad Medioambiental”, LEL).

With the implementation of the Directive 2004/35, the Spanish government (and the Autonomous Regions) gain control over operators whose industrial activities have caused environmental damage, causing them to pay for or remedy said damage. This aims to allow an increased level of prevention and precaution between the operators which will have an impact on the Spanish insurance market.

Purpose of the Law

In accordance with Article 1, the main aim of the LEL is to regulate an operator’s liability in order to prevent and remedy environmental damage in accordance with the “polluter pays” principle established in the Directive 2004/35.

Applicability Scope

Article 2.1 of the LEL provides one generic definition of “environmental damage” in order to ensure the full protection of all protected species and natural habitats prevalent in Spain. In this respect, the LEL identifies “environmental damage” as:

“(…) to protected species and natural habitats which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species (…”. The basic state of the mentioned effects will be evaluated pursuant to Annex I of the LEL.

Notwithstanding the above, the damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator who is expressly authorised in accordance with respective environmental regulations issued by the State and the Autonomous Regions.

In addition, the definition of “damage” is also extensive and includes all kinds of measurable adverse changes in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

Exemptions of Liability

In accordance with Article 3.4, the LEL will not apply to environmental damage or to any imminent threat of such damage arising from an accident with regard to those types of liability or compensation falling within the scope of any International Conventions listed in Annex IV of the LEL or damage caused by armed conflict, hostilities, civil war or insurrection or a natural phenomenon of exceptional, inevitable and irresistible character.

Security

Article 24 of the LEL will establish that the operators of the activities included in Annex III (which has the same content as Annex III of the Directive 2004) must have a financial security to secure its environmental liability with respect to its activities.

Article 26 of the LEL provides three modes of financial securities which the operator could constitute for the guarantee:

1. An insurance policy which complies with the legal requirements established in the Spanish Insurance Contract Law 50/1980 executed between the operator and the insurance company authorised to carry out insurance business in Spain (both under freedom to provide services regime or under right of establishment regime).
2. A bank guarantee (“aval”) granted by a financial entity authorised to carry out financial activities in Spain (both under freedom to provide services regime or under right of establishment regime).
3. The constitution of a technical reserve to establish an “ad hoc fund” for the purpose of fulfilling potential responsibilities for environmental risks arising out of the operator’s activities.

Article 28 of the LEL stipulates certain exemptions to the obligation to grant financial security if:

- (i) The business activities which cause environmental damage are calculated as having an amount of less than EUR 300,000.
- (ii) The operators of minor or moderate damage (that is to say, activities of damage worth less than EUR 2m) which proves, by means of certification issued by independent entities, that said operators permanently adhere to the EU system of environmental management and audit (EMAS) or the environmental management system (UNE-EN ISO 14001-1996).
- (iii) The utilisation of sanitary and biocides which are referred to in paragraphs c) and d) of no. 7 of Annex III with agricultural and forestry purposes.

Further, Article 28 of the LEL states that:

- (iv) The guaranteed amount has to be set up at the beginning of the activity and held up until the end of said activities.

Article 30 of the LEL establishes that the mandatory guaranteed amount to be secured by the financial guarantees mentioned above must not exceed Euro 20m.

- (v) Each guaranteed amount will apply to each accident and to an annual period. In this context, “accident” means all environmental damage which is linked to the same emission, incident or event, even those emissions, incidents or events which take place at different times or affect several people.

(vi) The financial guarantees have to be installed by the operator at the same date at which the operator has obtained administrative authorisation to carry out the commercial activities submitted to the objective scope of the LEL.

Article 33 of the LEL provides that the constitution of an environmental damage fund is to be managed by the Insurance Clearing Consortium ("Consortio de Compensación de Seguros").

The Insurance Clearing Consortium is a public administrative entity with the capacity to fulfil its legal functions and with independent worth. Its legal framework is established in the Legal Statute of Insurance Clearing Consortium ("Statute").

This rule was approved by Law 21/1990 of 19 December, and modified by subsequent amendments (amongst them, Law 30/1995 of 8 November, Law 44/2002 of 22 November, Law 22/2003 of 9 July and Law 34/2003 of 4 November).

The Insurance Clearing Consortium compensates for losses and injuries arising from a series of natural events and from certain socio-political acts. This is conditional upon the previous conclusion of an insurance contract in one or several lines of insurance for which the current Law provides the obligation to include these risk covers.

In this regard, Article 33 provides that the Insurance Clearing Consortium will establish and manage an Environmental Damage Settlement Fund through the contributions of the operators who hold the environmental damage policies so as to secure their environmental liability.

The main purpose of the Environmental Damage Settlement Fund is to extend the coverage of the environmental damage insurance policies with regard to damage caused by the authorised activities when the insurance policies have expired and the insured event takes place after the termination of the insurance policy. The Environmental Damage Settlement Fund will also cover the incidents or events covered by insurance policies issued by insurance entities which are in insolvency.

Article 34 of the LEL also establishes the creation of a state-run fund to cover the repair costs caused by environmental damage and to pay the costs derived from preventing and remedial measures on public goods (bienes de dominio público). This public fund will be managed by the Environmental Ministry and financed by the Public Treasury. The Autonomous Regions can also participate in the above-mentioned public fund.

This public fund will be subject to legal developments in the next two years.

Conclusions

The LEL implemented the Directive 2004/35 which determines a qualitative change in the administrative liability regime for environmental damage and, in addition, in the Spanish insurance market.

The LEL establishes an objective liability principle which will not demand the commission of an administrative infraction and it will cover the environmental damage and the damage risks. This objective liability principle must be taken into account by the insurance entities to draft the coverage and exemptions to be included in future environmental insurance policies.

The LEL stipulates the obligation of each operator to constitute financial securities in order to guarantee the fulfilment of their environmental liabilities in connection with their business activities. The current insurance products which are offered to the operators by the Spanish and foreign insurance entities authorised to conduct insurance business in Spain are very complex in order to allow the operators to cover their environmental damage risks derived from their activities attending the main commercial activities to be guaranteed or insured by the insurance companies.



Sweden

Final Implementation of the EU Directive on Reinsurance (2005/68) in Sweden

The Swedish Financial Supervisory Authority proposes new and amended regulations and general recommendations on debt covering in Swedish insurance companies and amended regulations on operational plans for Swedish insurers, EU and non-EU insurers operating in Sweden. The new and amended regulations and general recommendations are mainly intended to complement and finalise the implementation of the EU Directive on Reinsurance (2005/68). The main part of the directive has already been implemented and this part of the implementation will enter into force on 1 April 2008.

For debt, the main proposed change is that debt-covering assets consisting of bonds and shares shall be evaluated to their real value instead of their acquisitional value.

As concerns operational plans, the main proposed change is that companies applying for concession to carry out insurance business must set out the reinsurance cover for the intended insurance business activities in the operational plan. A further proposed change is that the prognosis to be applied to the operational plan may be required to cover a longer period than three years.

The changes are planned to come into force on 1 January 2009.

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Switzerland

Legal Developments in the Insurance Sector in Switzerland

International Developments

The process to implement integrated insurance supervision (Federal Financial Market Supervisory Authority, FINMA) and transition from rules-based to risk-based supervision in Switzerland is a key topic in the insurance sector. The foundation of risk-based supervision is the so-called Swiss Solvency Test which has already been introduced in Switzerland. While activities take place on a national level parallel developments are also occurring at the EU level. Work regarding the Solvency-II-Directive is of key importance to Swiss insurers and has a direct impact on their international competitiveness.

Financial Market Supervision Act Hits Home Stretch

In the autumn of 2007, the Swiss federal boards adopted the Federal Financial Market Supervision Act (FINMAG). This law aims to merge three authorities – the Federal Banking Commission, the Federal Office for Private Insurances and the Anti-Money Laundering Control Authority – into one, FINMA. The correspondent law (FINMAG) will become effective on 1 January 2009.

Data Protection Act Revised

On 1 January 2008, the Federal Council enacted both the revised Data Protection Act and the execution provisions. Individuals whose data are collected and processed are to be more thoroughly informed in the future. Also, in the event of cross-border notifications there will be stricter guidelines to be met. Another purpose of the revised Data Protection Act is to strengthen self regulation.

Equity and Accounting Act under Revision

In revising the Equity and Accounting Act, the Federal Council intends to modernise corporate law and adapt it to the needs of the economy. The bill is to improve corporate governance, extend the scope for companies to organise alternative capital structures, enable the use of electronic means to hold annual general meetings and replace antiquated accounting legislation.

Revision of Accident and Insurance Contract Act

Currently, Switzerland sees the revision of the Federal Act on compulsory accident insurance (UVG) and of the Insurance Contract Act (VVG). Both revisions are of major importance to the insurance sector. The draft bill consultations of the Insurance Contract Act are likely to take place during the year 2008. The Federal Council's draft bill to the parliament regarding the revision of the VVG is expected during the second quarter of 2008.

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Conclusion

This latest set of reports highlights two important legal developments affecting liability insurers in the Continental Europe: namely the parliamentary approval of class action legislation (in Italy), and the first example of inclusion of a financial guarantee obligation within the local adoption of the new EU Environmental Liability Directive (in Spain). The position on class actions in Italy is still not final, but it nevertheless is likely that class action legislation will pass into law in Italy. Italian consumer associations are expected subsequently to exert pressure for the introduction of punitive damages. It is also interesting to note the growing influence of pressure groups and non-governmental organisations in relation to environmental damages in France.

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