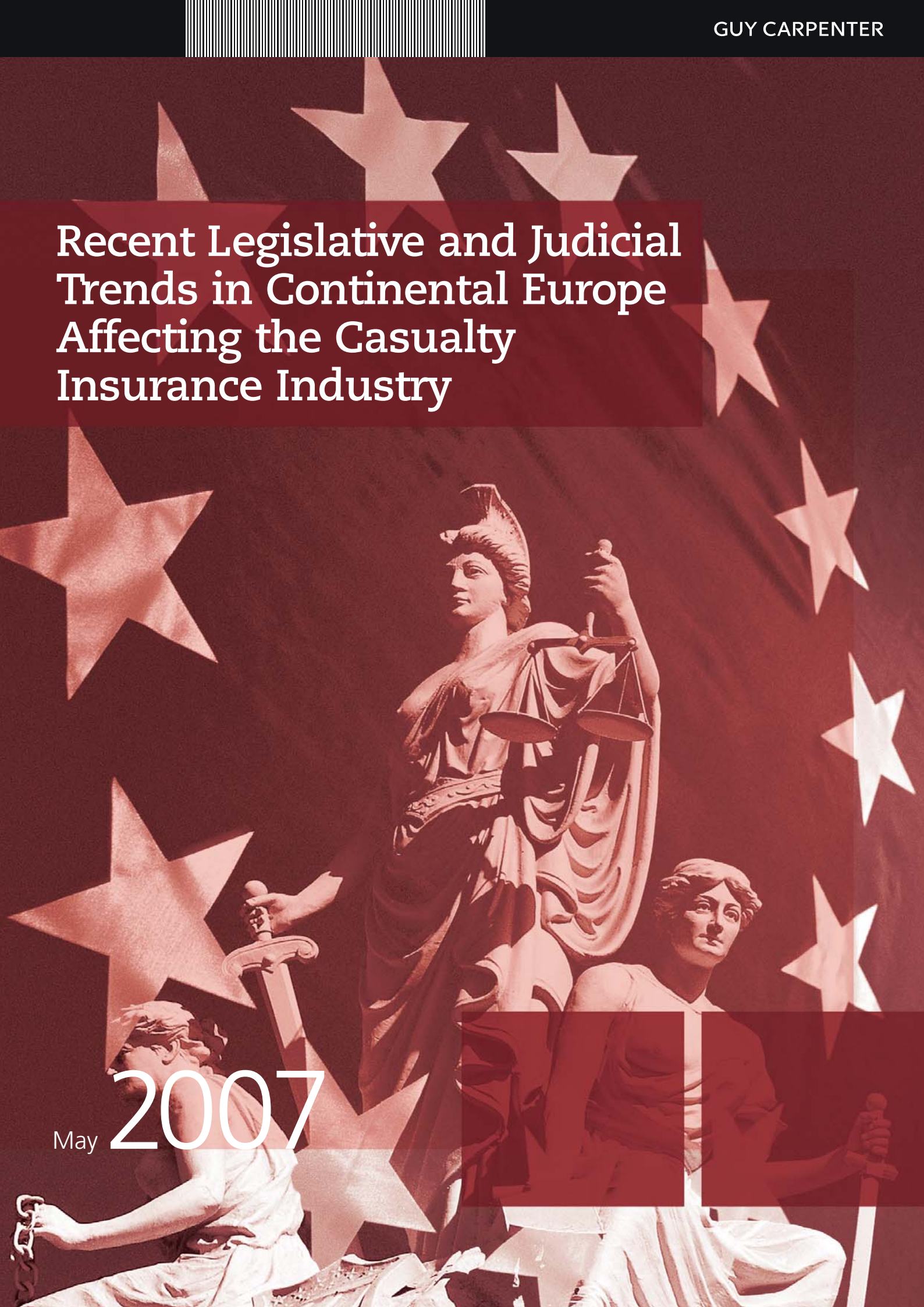


Recent Legislative and Judicial Trends in Continental Europe Affecting the Casualty Insurance Industry

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GUY CARPENTER

Guy Carpenter Casualty Specialty is a global practice within Guy Carpenter created to provide a working environment where the combined skills within our firm are harnessed for the benefit of our clients.

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 2006 to April 2007. DLA Piper was awarded 'Global Law Firm of the Year' at The Lawyer Awards in 2006 and has one of the largest insurance and reinsurance practices in Continental Europe.

Introduction

This review is the second in a biannual series, started in September 2006, designed to provide our international clients and markets with a concise overview of key trends in the legal environment which have already had or will shortly have an impact upon insurers and reinsurers covering legal liability risks in Continental Europe.

Guy Carpenter asked the local Continental European offices of DLA Piper to highlight what they consider to be of greatest impact in each territory during the period September 2006 to April 2007. Where there have been no significant legislative or judicial developments in a territory, no report is included. It has not been our objective to produce an exhaustive review of the entire scope of legislative changes and judicial rulings in Continental Europe, but rather to highlight the main developments that we and our expert 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/judicial issues to have impact on the casualty insurance and reinsurance industry in Continental Europe between September 2006 and April 2007. We have divided them by territory.

Austria

Implementation of Insurance Law Amendment Act

Austria is bringing into force its Insurance Law Amendment Act (BGBl. I 2006/95) on 1 December 2007. One of the goals of the Act is to implement Council Directive 2004/113/EC on the principle of equal treatment of men and women. The amendment concerns all types of insurance companies, including casualty insurance companies.

The Austrian legislator refrained from applying a general unisex principle to every kind of insurance policy since the Directive provides for differentiation on legitimate and proportionate grounds (Art. 5 para. 2). Instead, the Act states that generally different premiums and benefits on the grounds of gender are only admissible if (a) gender is a determining factor in the assessment of risk and (b) the difference in premiums is based on relevant as well as accurate actuarial and statistical data, which must be published by the insurance company. The exception is where costs related to pregnancy and maternity do not result in differences in individuals' premiums and benefits for men and women in health insurance contracts concluded after 30 November 2007 (Art. 178b para. 5 Insurance Contract Act).

Any insurance company that provides for differentiated individuals' premiums and benefits must submit this information to the Financial Market Authority (FMA), the insurance supervisory authority, as well as the relevant risk assessments and accurate actuarial and statistical data, according to Art. 9 of the Insurance Supervisory Law. In addition, the insurance company must regularly update its risk assessment calculations.

Whilst the Insurance Law Amendment Act will have no major impact on the way insurance companies operate, insurers are now required to generate, submit and publish risk assessments and accurate data relevant to gender as a determining actuarial factor.

Transposition of Environmental Liability Directive and Motor Insurance Directive into Austrian law

Following the general elections in October 2006 and the change of government in January 2007, Directive 2004/35/CE on environmental liability and Directive 2005/14/EC on motor insurance have yet to be transposed into Austrian law. Furthermore, the legislator is yet to publish a draft bill on motor insurance, which means that at the time of publication it was impossible to predict when the directive is to be transposed into Austrian law.

In early February 2007, the Federal Ministry of Agriculture, Forestry, Environment and Water Management published a draft bill of the Federal Environmental Liability Act (Bundes-Umwelthaftungsgesetz, B-UHG), which was anticipated to enter into force on 30 April 2007. Due to constitutional law issues, the law did not come into force that date and is now to be expected to become effective in summer 2007. As the draft bill has been published recently and has not as yet passed through the Council of Ministers, its future impact for casualty insurance companies could not be evaluated at the time of going to press.

Precise and Non-Surprising Standard Insurance Conditions

The Austrian Supreme Court (OGH) regarding the bonus/malus clause in an insurance company's standard insurance conditions (SIC) for comprehensive insurance products. The disputed clause concerned the possible impact of a loss event on the premium, which is based on a nine-merit bonus/malus system within a period of reference. According to the SIC, the period of reference was defined as running from the start of the comprehensive insurance policy to the day after which the next premium was issued.

The disputed clause had the following wording:

- > In a period of reference without any loss event the premium is assessed according to the next higher rate.
- > For each loss event within a period of reference in which the insurance company has paid an indemnification and/or has made provisions that do not exceed 50% of the yearly net premium (without taxes and without loading) there will be no other rating. The current rate remains.
- > For each loss event within the period of reference in which the insurance company has paid an indemnification and/or has made provisions exceeding 50% of the yearly net premium, the premium of the next following maturity is assessed on a basis three ranks lower than the previous premium.

In 7 Ob 216/05 y, the Supreme Court stated that these provisions were not objectively uncommon, not hidden and not surprising in terms of Art. 864a of the Civil Code (ABGB), because the SIC clearly explained the bonus/malus system. Furthermore, the clause was proportionate and did not constitute inappropriate discrimination against the insured. The clause did not contradict the Consumer Protection Act (Art. 6 para. 1), which requires escalator clauses to be two-sided because the premium relating to comprehensive insurance either increases or decreases depending on the loss event. In addition, the clause was clearly formulated and complied with the transparency rule. The Supreme Court therefore dismissed the claim.

Belgium

Outsourcing of Business

The Banking, Finance and Insurance Commission (BFIC) – the Belgian supervisory body – issued a circular on sound management practices with regard to outsourcing by insurance companies (PPB-2006-1-CPA) on 6 February. When outsourcing parts of their business, insurance companies are expected to comply with a number of standards. Some of the most important of these standards are as follows:

- > ultimate responsibility for proper management of the risks associated with outsourcing lies with the management of the insurance company;
- > any outsourcing arrangements must be based on a clear written contract or Service Level Agreement;
- > the service provider must at all times adequately preserve the confidentiality and integrity of all data relating to the insurance agreement;
- > internal audit and compliance functions of the insurance company must also cover outsourced activities;
- > the BFIC and the insurance company's auditor must have unlimited access at all times to the outsourced activities and must be able to conduct on-site inspections at the service provider's premises.

The BFIC's circular applies to outsourcing agreements signed after 6 February 2006 but existing agreements must be adjusted accordingly at their first modification or extension.

France

Legal Protection Insurance	<p>The French insurance sector is opposing the recent reform to the French Insurance Code with regard to legal protection insurance (<i>assurance de protection juridique</i>). Law n°2007 – 210 of 19 February 2007 provides that an insured with legal protection coverage must be assisted or represented by legal counsel (and not only by their insurer) if they or their insurer are informed that the opposing party is being assisted or represented by counsel. Legal fees are to be negotiated by the lawyer and the insured, not the insurer. The legislation further provides that an insurer may not provide an insured with the name of a lawyer unless such information is requested by the insured in writing. The insurance industry has argued that such changes will lead to increased costs for insureds (some estimates are as high as 50%) and, as a result, will limit access to coverage.</p>
Exception to Mandatory Coverage for Acts of Terrorism in Property Insurance (Transportation)	<p>Under French law (Article L. 126-2 of the French Insurance Code, amended by Law n°2006-64 of 23 January 2006 relating to the fight against terrorism), property insurance contracts covering fire damage must also cover certain damages to that property caused by an act of terrorism. Property insurance contracts covering damage to the hulls of railway vehicles, aircraft, marine, lake and river vessels, as well as goods in transit, are exempt under Decree n°2006-1202 of 29 September 2006, which amended Article L. 126-2, except for:</p> <ul style="list-style-type: none"><li data-bbox="432 958 1509 1048">> property insurance contracts covering damage to the hulls of aircraft used for non-commercial purposes or for non-lucrative purposes when the per unit value of the hulls declared in the contract is less than € 1,000,000;<li data-bbox="432 1081 1509 1137">> property insurance contracts covering damage to the hulls of marine, lake and river pleasure craft when the per unit value of the hulls declared in the contract is less than € 1,000,000. <p>The Decree also provides that in respect of 'large risks' as defined in Article L. 111-6 of the French Insurance Code, certain property insurance contracts under Article L. 126-2 may provide, in certain circumstances, for deductibles and coverage limits that are different to those applicable under the policy in respect of fire-related coverage.</p>

Germany

Reform of the German Insurance Contract Act

The current German Insurance Contract Act (*Versicherungsvertragsgesetz (VVG)*) is set to be reformed, 100 years after it was enacted. The revision process has been comprehensive and thorough. A commission of experts, appointed by the Federal Ministry of Justice in June 2000, published its conclusions in April 2004, and the Ministry submitted a Bill in March 2006, based on this report. Following comments from other departments, Federal States and involved organisations, this Bill was revised and finally, on 11 October 2006, the Governmental Bill (*Regierungsentwurf zur VVG-Reform (VVG-RE)*) was issued. Further revision to the Bill is not expected and it will come into force on 1 January 2008. The new law will fundamentally change Germany's insurance law. Below we review the most important elements of the VVG reform.

Consultation and Documentation Duties

VVG-RE creates duties of advice, information and documentation (arising from Sec. 6) for insurers. The content and extent of the duty to consult are defined in Sec. 7 of the VVG-RE. The consumer's needs and wishes must be complied with and the consultation interview must be documented. In principle, this duty applies not only when new contracts are concluded but also when, for instance, adjustments are made to existing contracts. Exceptions to the duty to advise exist in cases of distance selling. Under the legal concept of an insured being a 'responsible citizen', the insured may renounce the consultation through a separate written statement. However, such a renunciation is only valid if the insurer has first expressly pointed out the disadvantages of renunciation to the insured. If there is culpable breach of consultation duties, the consumer has a claim for damages.

Cancellation of the 'Policy Model' (*Policenmodell*)

VVG-RE abolishes the 'policy model' (*Policenmodell*, Sec. 5a of the VVG) and creates an 'application model' (*Antragsmodell*) in order to improve consumer protection. Under the Governmental Bill, the insurer must fulfil his clarification, consultation and information duties (Sec. 6 and 7 of the VVG-RE) before the insured releases his declaration of intent to conclude the insurance contract.

Under the policy model, all the insured receives with the insurance policy are consumer information and the terms and conditions of the insurance contract. Consumer protection is provided by the insured's right to appeal (Sec. 5a of the VVG). The government did not consider this kind of downstream consumer protection as sufficient. The Governmental Bill follows the draft Bill from the Federal Ministry of Justice (*Referentenentwurf*) and sets out a process for implementation of the application model. The consumer will be able to familiarise himself with the details of the insurance contract before he releases his declaration of intent in conclusion of the insurance contract. Should the insurer violate his information duties, the period for the right of appeal of the insured pursuant to Sec. 8 of the VVG-RE will not be initiated.

Abolishment of the 'All-or-Nothing Principle'

The general basis of current German insurance law is the 'All-or-Nothing Principle'. This is to be abolished under VVG-RE and the following alterations are planned:

Contractual Obligations (Obliegenheiten)

Under the law as it currently stands, an insured stands to lose his or her insurance protection if he or she is in breach of a contractual obligation before the insured event takes place, even if the breach is due to slight negligence. The new Governmental Bill allows for degree of default to be considered. VVG-RE will only allow an insurer to cancel in cases of grossly negligent or intentional infringement of contractual obligations by the insured (Sec. 28 para. 1). The new law will no longer distinguish whether or not the breach took place before or after an insured event. In cases of intentional infringements, the former regulation remains, i.e. the insurer will be released from its obligation to carry out the requirement. Simple negligence will not have any consequences for the insured. In a case of grossly negligent breaches of provisions by the insured, it will be possible to shorten the performance according to the degree of breach.

Pre-Contractual Duty of Disclosure/Increased Risk

Modifications depending on the degree of default are also intended as the consequences of an increased risk (Sec. 24 *et seqq.* of the VVG-RE) within the period of a current insurance contract and

also for the consequences of violated pre-contractual disclosure duties (Sec. 19 of the VVG-RE). Furthermore, VVG-RE removes the risk of misinterpretation of whether a circumstance is material to the insured risk or not from the insured. The insured will only be bound to disclose those circumstances that the insurer has requested in writing.

Gross Negligence within Indemnity Insurance

In indemnity insurance, VVG Sec. 61 currently releases insurers from the obligation to act in cases where the insured has caused the insured event through gross negligence. VVG-RE will bring changes. Under Sec. 81, release from the obligation to act will only be provided in cases where there was intent. In future, grossly negligent causation of the insured event will only give insurers the right to shorten the insurance benefit subsequently to the degree of default, but not – as currently – a release from the obligation to perform.

Provisional Cover

Until now, provisional cover was not regulated within German insurance contract law but due to the significant importance for the practice it is now regulated in detail in VVG-RE Sec. 49 *et seqq.* In contrast to the Federal Ministry of Justice's Bill, the Government Bill does not exclude the possibility of retroactive omission of provisional cover in cases where the insured has not paid the premium within a specific agreed period.

Default of Payment

Compared to the current regulation (VVG Sec. 39), in future, the consequences of a default of payment will be alleviated in cases of non-payment of the first premium. In contrast with the current legislation (VVG Sec. 39), under VVG-RE Sec. 37, the insurer is in future only allowed to withdraw if the insured is responsible for the non-payment. Furthermore, it will no longer be considered a rescission if the insurer does not legally assert the first premium within three months. The insurer is only allowed to withdraw from the contract by way of explicit declaration and emphatic information before conclusion of the contract. The current regulation regarding the follow-up premium, cf. Sec. 39 of the VVG, is considered appropriate and will not be meaningfully changed by Sec. 38 of the VVG-RE.

Abolishment of 'Indivisibility of Premium' (*Unteilbarkeit der Prämie*)

According to Sec. 40 of the VVG, the insured must pay the full annual premium, even in cases where the insurance contract terminates earlier than normal. This principle of the current VVG will be abolished. In future, if the insurance contract terminates during the insured period by way of rescission or cancellation, the insured must pay only the premium for the period of coverage (VVG-RE Sec. 39). In rescission cases, the insurer can demand a reasonable fee.

Limitation and Preclusion Period

Under current law, generally, claims from insurance contracts become time-barred in two years whereas claims for life insurances become time-barred in five years. VVG-RE (Sec. 15) dispenses with defining prescription periods. The general regulation from German civil law (which sets a prescription period of three years) will apply instead. In addition, the hitherto preclusion period to bring a suit will be abolished. Until recently, the insured was required to legally assert his claim to insurance benefit within six months of the insurer rejecting the benefit in writing and pointing out the preclusion period. The government no longer considers this special regulation – which resulted in a unilateral shortening of the limitation periods at the insured's expense and did not correspond to anything else in German law – justifiable.

Regulations for Liability Insurance

For the liability sector, the scheduled modifications to compulsory liability insurance are of importance. The claimant's direct claim against the insurer, which until now has existed only in motor liability insurance, will be transferred to the remaining compulsory insurances according to Sec. 115 of the VVG-RE. The purpose of this regulation is to alleviate the implementation of a claim for the claimant.

Italy

Amendments to Motor Liability

The Italian motor liability insurance sector has been affected by major legislative changes in the last few months. Motor liability insurance rates in Italy are amongst the highest in Europe. Last year's Presidential Decree 18th July 2006 n. 254 – 'Regulation of direct liquidation of damages resulting from vehicular traffic' – aims to reduce the costs of motor liability disputes between policyholders and their insurers. The Decree took effect on 1 February 2007.

Section 5 of the new law has introduced the option for the damaged party to claim directly from his insurer (or from the insurer of the vehicle in which he was travelling), thus abandoning the traditional rule that the damaged party should claim from the insurer of the party responsible for the accident.

Section 9 creates a duty for the insurer to assist in the presentation of the indemnity request, providing all relevant information on the basis of which the damaged party can assess the liability and quantify the damages. Section 9 also excludes the possibility for the damaged party to seek recovery from the insurer for any legal expenses he may have incurred once he has been offered the indemnity money and has accepted it. The government trusts that this provision will make a significant contribution in reducing the high legal costs in the motor liability claims handling procedures.

Under Section 3, the new regulation applies to material damages and minor injuries, and does not affect the provision under section 141 of Legislative Decree 7th September 2005 n. 209, which entitles passengers injured in a road accident to claim damages from the insurer of the registered owner/policyholder.

Section 4 states the new regulation applies to vehicles registered in Italy (or in the Vatican State or San Marino when insured in Italy).

The new regulation requires insurers to formally agree a system dealing with the economic and procedural aspects. More specifically, an offsetting system for indemnity payments/recoveries must be agreed (Section 13). Insurance companies having their registered offices in another EU Member State and transacting business in Italy on the basis of Freedom of Establishment/Freedom of Providing Services may adhere to the direct liquidation of damages procedure by signing the agreement mentioned above (Section 13, paragraph 8).

Netherlands

Liability Developments

In 2006, the Dutch Supreme Court made two important rulings regarding liability doctrine in the Netherlands. One affected the liability of accountants towards a third party; the second addressed the possibility of proportional liability.

Accountants' Liability

In the case of *Vie d'Or*, a life insurance company was judged to be bankrupt and the aggrieved former policyholders held the accountant liable for their loss. The point of law before the court was whether or not accountants have a duty of care towards a third party who is not their client but who has an interest in their annual financial statements, and if the accountants can be held liable by that third party if they neglect this duty. The Supreme Court decided in October 2006 that a third party must be able to account for his actions with the information published in annual financial statements with a clean opinion. This creates a public responsibility for accountants. Accountants can be held liable by a third party if they have not acted in accordance with what can be expected from a reasonably skilled accountant when performing his task in a thorough manner. Important factors that must be reviewed are the specific legislation, the severity of the error with respect to the precautions that could have been taken and the warnings that were given, and to what extent the danger of loss was foreseeable.

Proportional Liability

The issue of proportional liability was addressed in the case of a worker who died of lung cancer. The person had been a long-term cigarette smoker and had also been exposed to asbestos at work for many years. It was medically impossible to ascertain whether the cancer could be attributed to smoking or to asbestos. The Supreme Court ruled in March 2006 that whenever the causal relationship between the breach of this duty and the alleged damage cannot be determined due to at least two alternative possible causes, proportional liability should be applied. An expert must be appointed to determine the probability of causality between the alleged damage and a possible cause that must be imputed to the employer. If the probability that this possible cause is the actual cause is very low, then the claim must be dismissed. If, on the other hand, it is very high, the claim must be awarded in full.

When the probability is neither very low nor very high and multiple causes are deemed probable, the solution presented by the Supreme Court is to award the damages that are to be paid by the employer, reduced by the percentage of probability, based on a reasoned estimation, that the actual cause was a cause that must be imputed to the employee.

Spain

Impact of Implementation of Directive 2004/35/EC on Environmental Liability Insurance in Spain

On 21 April 2004, the European Parliament and EU Council approved Directive 2004/35/EC on Environmental Liability, which established the EU legal framework on the prevention and reparation of environmental damages under the 'polluter pays principle'.

At the time of publication of this report, the Spanish government was drafting an environmental damages liability law, in preparation for implementing Directive 2004/35 into Spanish Law. With the implementation of Directive 2004/35, the Spanish government will attempt to control operators whose industrial activities have caused environmental damage by making them pay for or rectify the damage they have caused. One of the aims of the Directive will be to include an increased level of prevention and precaution among operators. These changes will affect the Spanish insurance market.

Purpose of the Implementation

The main aim of Directive 2004/35 is to ascertain the effectiveness of the possible environmental liability that may be imposed on operators. This means that potential polluters will be made aware that they can be held financially liable and accountable for their activities. The Draft is being prepared on the basis of two complementary liability regimes:

- > The first liability regime applies to operators who habitually conduct risky or potentially risky activities (including industrial and agricultural activities or waste management operations) listed in Annex III of the Directive 2004/35. Under this regime, an operator can be held liable under the Draft even though the operator has not committed any default (that is to say, there will be liability subject to the 'objective liability principle').
- > The second liability regime applies to all professional activities in which the liability of the operator is 'persona', that is to say, an operator will only be held liable if the operator was negligent and the operator has caused effective damage to protected species and natural habitats protected under EU levels (i.e. habitats).

Exemptions of Liability

The Draft will include reasonable operator defences, which are also contained in the Directive 2004/35. These are as follows:

Force Majeure Defences

The Draft will cover events that can be identified as force majeure cause (i.e. storms or armed conflict). These will not give rise to a liability.

Discretionary Defences

The Draft contains defences which must be accepted by the Public Administration in the corresponding administrative sanction proceedings. In general, these defences are subject to several conditions that must all be met. These defences would enable the Public Administration to exempt operators who have caused environmental damage if they can demonstrate that the damages were caused by activities expressly authorised by the Public Administration and if they can also prove that they were not at fault or negligent.

State of the Art Damages

The Draft provides for exemptions from liability if operators can demonstrate that their activities or emissions were not considered likely to cause environmental damage according to the scientific and technical knowledge at the time when the emissions were released or the activity took place.

Notwithstanding the above, the defences contained in the Draft are of a restrictive nature and the Draft will regulate the same comprehensive and complete liability regime for damage to the environment applicable in Spain and other countries in the EU.

It is important to note that 'Public Administration' applies to both State administration and regional administration. The Public Administration has discretion in deciding which measures the relevant person must adopt, considering the remedial options available in accordance with the contents of the Draft to restore the damaged natural resources. The Public Administration, before deciding on the best remedial option, must take into account several factors, such as the effect of each option on public health or safety, the benefits to the environment overall, the cost of the remedy or implementation of the repair measures, and the impact on social, economical or cultural concerns in accordance with specific factors to be evaluated case by case.

Security

Security has been one of the key issues during the preparation of the Draft. The Draft will establish that the operators of the activities included in Annex III must have financial security to secure environmental liability in respect of their activities. The Draft provides for three types of financial security that an operator can implement for the guarantee:

- > An Insurance Policy, which complies with the legal requirements established in the Spanish Insurance Contract Law 50/1980, executed between the operator and an insurance entity authorised to carry out insurance business in Spain.
- > A bank guarantee (*aval*) granted by a financial entity authorised to carry out financial activities in Spain.
- > A technical reserve through an *ad hoc* fund to cover the environmental risks of operator activities.

The Spanish insurance market is developing several products complying with the legal requirements that are established in the Draft in order to offer operators attractive insurance policies to secure their liabilities in environmental matters.

In preparing and drafting insurance policies, the insurers take into account the following factors:

- > The Draft provides exemptions to the obligation to show financial security, eg for business activities producing environmental damage, which have a turnover of less than € 300,000; for operators who carried out activities causing minor or moderate damage (i.e. which caused damage costing less than € 2,000,000) who prove, by means of certification issued by independent entities, that they permanently adhere to the EU system of environmental management and audit regulated by EU Rule 761/2001, of the European Parliament of 19 March 2001; utilisation of sanitary products and biocides which are referred to in letters c) and d) of point 7 of Annex III with agricultural and forestry purposes.
- > The guaranteed amount must be created at the beginning of the activity and must remain in place until the end of said activities. However, it is important to point out that, in principle, the Draft does not establish a guaranteed maximum limit.
- > In drafting future environmental insurance policies, an insurance company must take into account that, in principle, the guaranteed amount established in the aforementioned financial guarantees will be decided by the Public Administration according to the seriousness or severity of the environmental damage caused by the operator.
- > Each guaranteed amount will be applied for each accident and for an annual period. For an accident, we must understand all environment claims that are linked to a same emission, incident or event, even those emissions, incidents or events that take place at different times or that affect several people.
- > One important provision in the Draft discusses an environmental damages fund, to be administrated by the Insurance Clearing Consortium (*Consorcio de Compensación de Seguros*).

The main purpose of the Environmental Damages Settlement Fund is to extend environmental damage insurance policies to cover damage caused by authorised activities to cover a period of up to three years after a policy has expired. The Environmental Damages Settlement Fund will also cover incidents or events insured by companies that are in an insolvency situation.

The Fund will be created and managed by the Insurance Clearing Consortium (Consortio) out of contributions from operators who execute the environmental damages policy to secure their environmental liability. The Consortio is a public administrative entity, authorised to carry out its legal functions and with independent status. Its legal framework is established in the Legal Statute of Insurance Clearing Consortium, approved by Law 21/1990, 19 December, and modified by subsequent amendments (Law 30/1995, 8 November, Law 44/2002, 22 November, Law 22/2003, 9 July and Law 34/2003, 4 November). The Consortio allocates compensation for losses and injuries arising from a series of natural events and from certain sociopolitical acts. This is conditional on the previous subscription to an insurance policy in one or several lines of insurance for which the current Law provides the obligation to include these risks cover.

Conclusions

- > The Spanish legislation implementing Directive 2004/35 will create a qualitative change in the administrative liability regime for environmental damage and in the insurance market in Spain as a whole.
- > The main addition to the future Spanish environmental liability legislation will be the establishment of a strict liability principle that will not require an administrative infraction to have been committed and that will cover environmental damages and damages risks. Insurers will have to take this objective liability principle into account when they draft future environmental insurance policies.
- > The new Law will establish the obligation of each operator to implement financial securities in order to guarantee their environmental liabilities in connection with their own activities. In this regard, we confirm that the insurance products to be offered by the Spanish and foreign insurance entities that are authorised to conduct insurance business in Spain will be highly complex in order to allow the operators to cover their environmental damage risks derived from their activities.

Sweden

Sweden's new government, which was elected in the autumn of 2006, was still taking shape and very little was happening in legislative matters at the time of publication. However, two directives were due to be implemented:

Motor Insurance

Motor insurance constitutes an important part of non-life insurance business in the Community. One of the aims of Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 is to adjust the minimum amounts of insurance cover. The directive is to be incorporated into national law no later than 11 June 2007. In Sweden, the proposition for new rules on motor insurance indemnity was published on 8 March 2007. Based on this, the fifth motor insurance directive is set to be implemented in Sweden through an act that comes into force on 1 July 2007.

Reinsurance

The European Directive on Reinsurance 2005/68/EC of European Parliament and the Council of 16 November 2005 applies exclusively to pure reinsurance companies. The goal is harmonisation of the different national supervisory systems as well as an improvement of the EU domestic insurance market. The Directive is a priority measure under the EU's Financial Services Action Plan, which ultimately aims to establish an effective and integrated European market for financial services. The directive is to be incorporated into the national law of the various EU Member States on 10 December 2007.

Sweden was due to publish a proposal on reinsurance in May 2007.

Switzerland

Overall Revision of Swiss Federal Law on Insurance Contracts

After the partial revisions of the Swiss Federal Law on Insurance Contracts, which became effective on 1 January 2006 and 1 January 2007, the Federal Finance Department (Eidgenössische Finanzdepartement (EFD)) communicated on 21 September 2006 that the draft of the overall revised Swiss Federal Law on Insurance Contracts was available. The draft of the commission of experts (under the direction of Professor Anton K. Schnyder) is, amongst other things, designed to increasingly and extensively allow for the needs of consumer protection as well as the development of international insurance contract law. The EFD has instructed the Federal Office for Private Insurances (Bundesamt für Privatversicherungen (BPV)) to construct a bill based on this draft by the end of 2007. Before entering parliament, this draft will, however, still be made available for all concerned parties (particularly professional associations, companies and political parties) to comment on. The adoption of an overall revised law on insurance contracts will therefore presumably still take some time.

Revision of Swiss Federal Law on Accident Insurance

The Swiss Federal Law on Accident Insurance (Schweizerische Bundesgesetz über die Unfallversicherung (UVG)) as well as the corresponding regulation are due to be revised. In April 2006, the Federal Council of Switzerland ordered the preparation of the UVG revision. It has confirmed the multi-carrier system between the Swiss Accident Insurance Institution (Schweizerischen Unfallversicherungsanstalt (SUVA)), private insurers and approved health insurance companies in compulsory accident insurance. In order to prepare the reform, the Federal Health Office (Bundesamt für Gesundheit (BAG)) appointed a group of experts who submitted a bill to the Swiss Ministry of the Interior (Eidgenössisches Departement des Innern (EDI)) in November 2006. It is to be expected that discussion and processing in parliament will take some time. The law will probably not be adopted until 2010.

The revision of the law and its approval is seen as a major opportunity for more competition and efficiency.

Reforms to Enhance Competition

With regard to tariff configuration, developments designed to encourage competition took place in the run-up to legislative reform. According to previous practice and upon agreement with the supervisory authorities, the Swiss Insurance Association (Schweizerische Versicherungsverband (SVV)) had, until January 2005, given tariff recommendations for the accident insurance to its member companies. In order to resolve any doubts in terms of anti-trust law against this collective tariff of the private accident insurers, the SVV decided, after consulting with the competition commission, not to give any further tariff recommendations. Since 1 January 2007, all private insurers have used individual tariffs.

Another important factor within the reform is the distinct demarcation of the ranges of activity of the partial monopolist SUVA and the private accident insurers. The options available to SUVA to commit companies to the conclusion and maintenance of an accident insurance with SUVA, have in recent years consistently led to legal disputes. The main criticism is that SUVA has extended its range of activity at the private insurers' expense. It has been debated whether a public institution disposing of a partial monopoly should be permitted to develop additional fields of activity within open competition.

Conclusions

In this latest set of reports, there is new evidence – in particular, emanating from the fifth Motor Liability Insurance Directive and the latest Environmental Liability Insurance Directive – of further moves by the European Union to harmonise the diverse laws of European territories as they relate to the rights of the consumer, protection of the individual and the liability insurance coverage available.

The pace and volume of legal and especially judicial change is slower than in territories such as the US, UK and Australia, where common law principles apply and case law drives developments. Nevertheless, globalisation is affecting the ways in which local governments and judiciaries can influence liability insurance practice.

We shall continue to track these developments and report on significant new legal and judicial trends as they emerge.

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