CLYDE&CO

Insurance & Reinsurance

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Contents

01. Editorial

02. Financial Lines Days 2019

03. Connected Parametric Insurance

04. InsurTech Legal Day 2019

05. UK: Decision of the Court of Appeal on the duty of lawyers to warn about risks connected to matters outside the scope

07. D&O insurance and section 103 InsO

08. The #MeToo movement: Effects on D&O insurers

10. The changing face of environmental regulation: a challenge for multi-national business

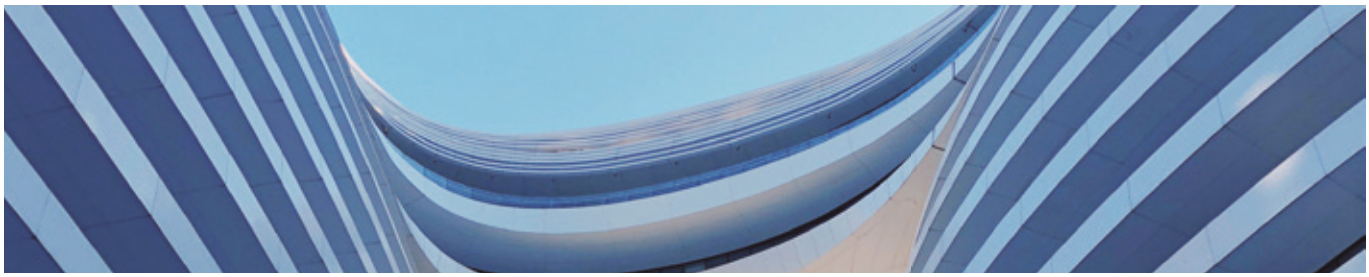
14. Glyphosate: a new toxic tort time-bomb?

16. GTC Law and Arbitration in Corporate Business Transactions

17. Court Decisions

21. Current Developments

22. Insight: Clyde & Co



Dear Readers,

Right before the summer break, we are pleased to present our current trends and developments in the field of insurance law from the second quarter of 2019.

For us, the last month was marked by our European FID&O Roadshow with stops in Germany, France and Spain. As in previous years, we held our Financial Lines Days in Düsseldorf and Munich at the beginning of June. We were delighted by yet another increase to over 150 participants. The focus of this event traditionally is set on trends and claims issues in the D&O, Cyber and W&I segments. A summary can be found in this update. If you did not participate but are interested in the presentations or an invitation for next year, please feel free to contact us.

In this context, we would also like to draw your attention to our Global FI&DO Conference, which will take place on 8 October 2019 in London and traditionally brings together several hundred market participants.

On 2/3 July we took part in the EUROFORUM Cyber Insurance Conference, which Dr. Marc Surminski and I moderated together. Amrei Zürn and I held two lectures. Since cyber topics, in addition to wording advice, are increasingly shaping our practice in the claims area, for example in international breach notification cases or in connection with liability issues such as class actions in the USA, we were happy to contribute to the event.

In addition to our event report on the Financial Lines Days, you will also find other cutting-edge topics in this update:

- Report from our InsurTech Legal Day in cooperation with InsurLab Germany

- Effects of #MeToo on D&O Insurance

- Jurisdiction on professional liability of lawyers with limited attorney mandates

- Trends in Product and Environmental Liability: Glyphosate and New Liability Risks for Companies

- Arbitration proceedings and GTC-law questions

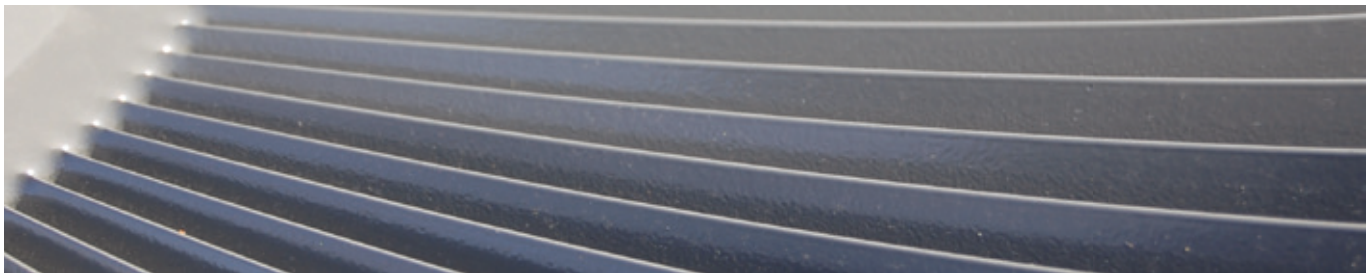
Furthermore, a lot has happened in terms of personnel: In May, we welcomed Eva-Maria Goergen and Dr. Styliani Ampatzi, LL.M. to our team! Eva-Maria Goergen is well known in the market and strengthens our practice especially in the areas of product liability, technical insurance and property insurance. Styliani Ampatzi focuses on liability law, litigation and arbitration.

A further highlight was the opening reception of our Hamburg office on 7 June, where we welcomed over 300 guests together with our Hamburg team and colleagues from other locations.

We are looking forward to more events after the summer break: We will continue with current and exciting topics: On 1 October 2019, we will organize an expert roundtable on the subject of hospital liability. On 10 October 2019, we invite you to our Casualty Day in Düsseldorf with a focus on product and environmental liability as well as on France and the USA. If you are interested in these events, please do not hesitate to contact us!

On behalf of our entire team, I wish you an interesting read and a relaxing summer time - we look forward to seeing you again soon!

Dr. Henning Schaloske



Financial Lines Days 2019

With over 150 participants, this year's 3rd Financial Lines Days in Düsseldorf and Munich were fully booked and, as in previous years, we were very pleased with the good response and lively exchange. The Financial Lines Days again took place as part of the European Roadshow with further stops in Paris and Madrid.

In the morning, presentations focused on current loss trends and case law on directors' and officers' liability and D&O insurance. Dr. Tanja Schramm and Dr. Daniel Kassing provided an overview of current (legislative) initiatives and the new GDV model conditions before presenting current case law on insolvency law, the statute of limitations for directors' and officers' liability claims and the handling of concurrent second liability clauses as well as current loss trends in more detail.

Afterwards in Düsseldorf Prof. Dr. Jochem Reichert of SZA Schilling, Zutt & Anschütz and in Munich Dr. Viola Sailer-Coceani of Hengeler Mueller gave a look behind the scenes and spoke about what moves policyholders and their advisors in coping with directors' and officers' liability cases. Both emphasized that in these situations, companies often feel compelled to assert claims against board members based on the ARAG/Garmenbeck case law. Dr. Sailer-Coceani also stated that early and constructive communication between the policyholder and the D&O insurer or its advisors can help to avoid escalation and find an economically reasonable solution in the interest of all parties involved.

Another highlight was the guest lecture by Mr. Milos Rusic of Deepset GmbH, who explained the possibilities of artificial intelligence in claims processing and in particular in coping with mass claims. Among other things, he presented descriptive examples of how machines can process language through text and speech processing ("Natural Language Processing (NLP)") or understand language and its meaning in terms of content and execute corresponding instructions. This technology is also useful, for example, for coping with mass proceedings with a large number of similar documents. Clyde & Co and Deepset GmbH are currently developing joint solutions, e.g. for prospectus liability lawsuits and other proceedings with a large number of plaintiffs, which are intended to considerably simplify the administrative handling of such claims.

Another traditional part of the Financial Lines Days was the International FID&O Panel with our colleagues Stuart Maleno (Great Britain), Edward Kirk (USA), Pablo Guillén (Spain), David Méheut (France) and moderated by Dr. Henning Schaloske. In a panel discussion we discussed important liability and coverage trends as well as practical tips for claims handling. Topics included typical D&O claims, the possibility of a direct action against the insurer, the treatment of defence costs and the interaction between basic and excess insurers in the various legal systems.

Presentations by Dr. Henning Schaloske and Amrei Zürn on GDPR and its effects on cyber insurance, by Dr. Henning Schaloske and Dr. Michael Pocsay on W&I insurance and practical questions with claims handling, and by Daniel Kreienkamp and Dr. Rebecca Hauff in the context of the "Open Space", in which we discussed topics proposed by our audience in advance, gave further broad insights beyond the core D&O topics.

We are already looking forward to the Financial Lines Days next year, which will take place in June 2020. Feedback and ideas, especially regarding our Open Space, are always welcome, either personally to us or via **dusseldorf.office@clydeco.com**. We are looking forward to seeing you again!

Dr. Rebecca Hauff

Connected Parametric Insurance

On 15 May 2019, we launched a first-of-its kind off the shelf connected parametric insurance contract for use by insurers through our smart contract consultancy, Clyde Code.

The contract has been built in collaboration with smart legal contracts platform Clause and according to the specifications developed by the Accord Project, although it can be deployed on other systems and platforms.

The connected parametric insurance contract – which consists of a data model, a logic code and a supporting natural language contract – covers the insurance of a solar energy producer against the risk of a shortfall in expected energy generation due to unfavourable weather. It automates the performance of the policy by receiving weather data, calculating potential claims obligations, and producing an exportable report of insurance premiums or losses. We will use this model to build other bespoke or off the shelf connected contracts for clients.

The use of parametric products is on the rise in the insurance sector and are being rapidly adopted at local, regional and national levels as they provide a solution for risk-transfer concerns, often for populations that were previously uninsured and for whom the so-called protection gap has traditionally been widest.

Further details about the connected contract can be found in a case study on our website. In our report Parametric Insurance: Closing the protection gap, we provide an overview on how parametric insurance is being used in the insurance industry and legal considerations it raises.

This launch is part of Clyde & Co's focus on innovation, led by the firm's Innovation Board. In September 2017 we launched Clyde Code, a hybrid technical-legal consultancy advising insurers on every aspect of smart contracts, blockchain and tokens – from creation through to implementation and enforcement. Since September 2018, we have been providing legal services to Komgo, a consortium of leading banks, trading and energy companies that digitalise trade and commodities finance processes through a blockchain-based open platform. In November 2017, we launched a Data Lab, which uses data analysis supplemented with machine learning tools to explore workflow efficiencies as well as products and services for clients.

Lee Bacon (London)

Lukas Wagner, MSc (Oxon)

InsurTech Legal Day 2019

The second InsurTech Legal Day took place in May. We co-organize this event as part of our membership in InsurLab Germany, an initiative to form a network between the insurance industry and the Insurtech scene.

On the one hand, the event is intended to help start-ups from the InsurLab network with specific legal issues; on the other hand it is also supposed to provide a general platform for discussing legal issues in connection with the development and use of new technologies in the insurance industry. While last year's Legal Day took place as an individual event, it was embedded in the InsurTech Week this year, a theme week with more than ten interactive formats for the exchange between start-ups, insurance companies, industry experts and students, organized by InsurLab together with the Startplatz incubator. Accordingly, among the more than 50 participants there were many young entrepreneurs as well as some representatives of our more traditional clients with an interest in current developments. The event started off with keynote speeches. Carsten Dietert, VP Legal/Compliance/Reinsurance, General Counsel and Compliance Officer at Element Insurance AG, reported on his daily work at Element. Element is the risk carrier of Finleap Group, a so-called company builder for Fintech companies. Partner Nigel Brook and Associate Wynne Lawrence from our London office provided an overview over current technological and legal developments in Insurtech. Another speech dealt with legal issues of cross-border insurance concepts. The keynotes were followed by workshops, which were also aimed at start-ups and anyone interested in technological developments. Dr Henning Schaloske and Dr Kathrin Feldmann held workshops on "Getting Started – Regulatory Legal Framework for InsurTechs" and "Working with Insurers – Outsourcing & Co", targeted at companies in the start-up phase. Nigel Brook and Wynne Lawrence introduced the concept of parametric insurance under the title "Sensors Pulling the Trigger – IoT and Parametric Insurance" and presented the parametric insurance solution developed as part of our smart contract consultancy Clyde Code (for further information, please refer to the article "Connected Parametric Insurance" in this edition). Under the title "Smart Insurance Contracts – Neither Smart Nor Contracts?" Lukas Wagner introduced Distributed Ledger Technology, especially Smart Contracts, and the questions that arise for insurers when using these. Following the workshops, there was an opportunity for further individual exchange before the event ended with a get-together where "Kölsch" – the traditional beer from Cologne – was served.

The second edition of the Legal Day was another success. The lively discussions with the speakers and among the participants show that we have established the format as a platform for the exchange on technological developments in the insurance industry. In addition to our activities as members of InsurLab, we, are also driving these developments forward ourselves in other initiatives, including concrete projects on the use of artificial intelligence to cope with mass claims and to comply with regulatory requirements. Please do not hesitate to contact us if you are interested in learning more about our global activities in this field.

Lukas Wagner, MSc (Oxon)

UK: Decision of the Court of Appeal on the duty of lawyers to warn about risks connected to matters outside the scope[1]

Are lawyers obliged to warn their clients of risks associated with matters not covered by the original scope? This question is raised in many compensation lawsuits against lawyers worldwide for breaches of duty to advise.

Supreme Court jurisdiction in Germany

In Germany there is a well-established supreme court jurisdiction in this respect. The German Federal Court of Justice (Bundesgerichtshof, "BGH") has ruled several times that the scope and content of a lawyer's contractual obligations depend on the client-lawyer relationship and circumstances of the individual case.[2] Within the scope as defined by the client, the lawyer is generally obliged to provide the client with general, comprehensive and as exhaustive information as possible. In case of a limited scope, the lawyer may nevertheless be obliged to provide information and warnings outside the actual subject matter. Such warning and notification obligations are linked to the information and knowledge gap between the lawyer and the client. The prerequisite for such obligations, however, is that the risks threatening the client are obvious to the lawyer, that the lawyer is aware of these risks, or that these risks become obvious to the lawyer during proper handling of the case.[3] The risks are obvious if they are closely related to the limited scope and are evident to the average consultant at first glance.[4] Furthermore, the lawyer must have reason to believe that his client is not aware of the risks. The requirements for a warning and information obligation going beyond the agreed scope must be presented and proven by the client if he wants to hold the lawyer liable and claim damages for failure to provide warnings and information.

The case law in Great Britain is generally in line with these principles established by the Federal Court of Justice. A decision of the Court of Appeal of 25 October 2018 in the *Lyons v. Fox Williams* case has attracted much attention.[5]

Decision of the Court of Appeal in *Lyons v. Fox Williams*

The plaintiff was CFO and Managing Partner of Operations for Ernst & Young ("EY") in Moscow. He was seriously injured in a motorcycle accident. As a consequence of the accident, part of his right foot had to be amputated. His right shoulder and right arm were permanently damaged. The plaintiff asserted claims under two insurance contracts - Accidental Death & Dismemberment Insurance and Long Term Disability Insurance.

The plaintiff hired a law firm - the defendant - to advise on his claim under the first insurance policy which had been challenged by the insurers. The scope as agreed in the engagement letter did not mention the second insurance contract. After the plaintiff left EY, he instructed the defendant to assist him in an amicable agreement with EY. The settlement reached between the plaintiff and EY also covered any non-existing claims under the first insurance. Possible claims under the second insurance became time-barred later.

The plaintiff was of the opinion that the defendant had warning and information obligations with regard to his claims from the second insurance and had violated these obligations. The court of first instance rejected this view. The plaintiff had not instructed the defendant to advise on the enforcement of claims against the second insurer. The law firm had not been obliged to warn the plaintiff of a statute of limitation of any claim against the second insurer.

[1] First published in PHi No. 3/2019.
[2] German Federal Supreme Court, decision of 1 March 2007, case ref.: IX ZR 261/03, published in BGHZ 171, 261 with further authorities.
[3] German Federal Supreme Court, decision of 26 June 2018, case ref.: IX ZR 80/17, published in NJW 2018, 2476 with further authorities.
[4] German Federal Supreme Court, decision of 29 September 2011, case ref.: IX ZR 184/04, published in NJW-RR 2012, 305 note 6.
[5] *Lyons v. Fox Williams LLP*[2018] EWCA Civ 2347.

The Court of Appeal upheld the first instance decision. In its reasoning, the Court referred to two court rulings that also concerned the scope of a lawyer's contract (*Credit Lyonnais SA v. Russell Jones & Walker and Minkin v. Landsberg*).[6] In the case of *Credit Lyonnais SA v. Russell Jones & Walker*, the judge stated that the duties of a lawyer arise from the specific retention and that lawyers are not generally obliged to spend time and effort on other matters. However, if a lawyer becomes aware of a risk (or potential risk) to the client while performing his duties, he is also obliged to inform the client. In the case of *Minkin v. Landsberg*, the Court of Appeal established the following key principles on the duties of lawyers to provide legal advice:

- Lawyers are obliged to perform the tasks which they have agreed upon with the client
- Lawyers are also obliged to carry out work reasonably related to these tasks
- In determining what reasonably relates to the scope, all circumstances of the case should be taken into account, including the client's level of experience and the amount of fees the client is prepared to pay for the lawyers' work
- Lawyers may limit the scope. If possible, such limitation should be agreed with the client in writing

In light of these principles, and having assessed the circumstances of the individual case, the Court of Appeal concluded in *Lyons v. Fox Williams* that the law firm had no general duty to warn the client in regard to the enforcement of claims under the second insurance contract. The scope was limited from the outset.

Consequences for engagement letters

Lawyers and professional indemnity insurers welcome the clarification in the ruling of the Court of Appeal in *Lyons v. Fox Williams*, that there is no general warning obligation for a lawyer and that the scope of lawyers' duties can be limited. In this respect, particular attention must be paid to the drafting of engagement agreements. The content and scope of the agreed services should be recorded in writing and described as precisely as possible. However, during engagement negotiations onemust keep in mind that the lawyer is obligated to clarify facts and to provide information on the agreement itself. Overall, limiting the scope - in addition to limiting liability - is an effective and simple way for law firms to limit risks.

Dr. Tanja Schramm

Jane Williams (London)

[6] Credit *Lyonnais SA v. Russell Jones & Walker*[2002] EWHC 1310 (Ch) and *Minkin v. Landsberg*[2015] EWCA Civ 1152.

D&O insurance and section 103 InsO

In a final ruling dated 6 March 2019 (Case ref.: 5 O 234/17), the Regional Court of Wiesbaden decided that the insolvency administrator and all insured persons are not entitled to claim insurance coverage for claims attributable to an insurance period for which the insolvency administrator has chosen not to fulfil the D&O insurance contract.

The background to this decision is the insolvency administrator's so-called right to choose performance pursuant to section 103 German Insolvency Statute. In accordance with this provision, the insolvency administrator may choose whether or not to fulfil mutual contracts which have not yet been entirely fulfilled by both parties. If he chooses performance, he must pay the outstanding consideration (i.e. the insurance premium) and is personally liable for any non-fulfilment in accordance with sections 60, 61 of the German Insolvency Statute. If he decides not to perform, he is irrevocably bound to this and can no longer demand performance from the contractual partner.

In the event in dispute, three plaintiffs (the same insolvency administrator for three insolvent group companies) demanded direct payment from the D&O insurer upon assignment of the alleged claims for indemnification of the two insured persons. The insured events occurred upon receipt of the out-of-court claims of the two managing directors in December 2014. Previously, however, the premium for the last insurance period from 1 January 2013 to 1 January 2014 had not been paid and the insolvency administrator notified the D&O insurer within the running insurance period that he chooses non-performance in accordance with section 103 of the German Insolvency Statute. The Regional Court of Wiesbaden dismissed the action on the above mentioned grounds among others. Furthermore, it rejected the insolvency administrator's request to assign the claims not to the last insurance period but rather to the last paid insurance period. According to the insurance conditions, an insured event which occurs during the additional notification period – as was the case at hand – was exclusively to be allocated to the last actual insurance period. In addition, the ruling contains remarks on the deliberate breach of duty in connection with granting loans as well as on delays in applying for insolvency, qualifying each as breaches of cardinal duties.

Dr. Daniel Kassing, LL.M.

The #MeToo movement: Effects on D&O insurers

The US-based #MeToo movement has led to an increase in allegations and claims related to sexual harassment in several countries and an increased awareness of gender pay gaps in all sectors of the economy, media and political life.

#MeToo is a hashtag that has been spread on social networks since mid-October 2017 in the wake of the "Weinstein Scandal". The Hashtag was made popular by actress Alyssa Milano, who encouraged affected women to draw attention to sexual harassment through its use. Since then, this hashtag has been used millions of times.

Compensation claims by victims can have a wide range and can also lead to claims against board members and companies that have made the alleged misconduct possible, concealed it or not prevented it. Particular economic risks for companies, board members and their insurers exist in those countries where there is the possibility of filing class actions.

Current #MeToo cases

In the Canadian province of Quebec, police complaints rose 61 percent in the first three months after the #MeToo movement began. In the United States, a major insurer reported a 50 percent increase in sexual malpractice claims since October 2017.

The extent of cases of alleged sexual harassment can be seen in the following current cases from the USA and Great Britain.

According to press reports, former film producer Harvey Weinstein reached a preliminary agreement in May 2019 to avert legal proceedings in the USA for sexual harassment of numerous women. Apparently, Weinstein has agreed to pay compensation to alleged victims in the total amount of USD 44 million. Several insurers are said to have been involved in the Weinstein scandal.

A US lawsuit filed by shareholders against the board of directors of Google's parent company Alphabet has also received broad media attention because of the company's handling of sexual harassment. The company is accused of practicing a "culture of concealment". It is said to have protected executives who have been accused of sexual harassment or coercion. Board members are accused of having played a direct role in these cover-ups in 2014 and 2016. Among other things, the damage was due to severance payments in the millions paid to managers accused of sexual harassment of employees.

Another spectacular case became known in the USA in 2018. Nike shareholders have submitted a derivative action against board members following a sexual harassment scandal. The shareholders claim that the board members are responsible for the loss in value of the company's shares by promoting a culture of sexual harassment and bullying. This lawsuit was preceded by a lawsuit filed by two former female employees alleging wage inequality and gender discrimination. Among other things, the plaintiffs complained about the corporate culture, which they found humiliating. Nike has also been accused of maintaining gender pay gaps for years.

The #MeToo movement is linked to another case in the UK that has been covered in the media. Sir Philip Green, CEO of the Arcadia Group, which includes the well-known fashion chains Topshop and Miss Selfridge, is accused of sexual harassment, racism and bullying. According to a report in the British daily Guardian, Green paid seven-figure sums for silence agreements. The headline of an article in the Guardian reads: "Is it time to stop shopping at Green's Topshop or Topman?" This case also shows the potential reputational damage that can be caused by allegations of misconduct.

Affected insurance lines

The multiple claims related to sexual harassment incidents can affect different insurance products.

EPL covers

The Employment Practice Liability Insurance ("EPL insurance") can be regularly triggered. An EPL insurance policy generally provides insurance cover for claims for damages by former, present and future employees in connection with discrimination, sexual harassment, unlawful dismissal and other claims arising during the employment or application process. EPL policies signed in Germany primarily offer protection in connection with claims arising from the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz - AGG), which came into force in 2006. The extent to which risks abroad, such as Canada and the USA, are covered depends on the structure of the policies in the individual case.

D&O covers

As some of the above examples show, cases of sexual harassment and discrimination often involve claims (for damages) made by potential victims against the company or its agent. Since such claims are usually not aimed at compensation of financial loss, the majority of cases will not be covered by D&O policies.

However, a risk for D&O insurers may arise in particular from internal recourse cases in which companies claim damages from the acting board members, e.g. for breach of organisational or supervisory duties, with regard to payments to injured employees or fines. In individual cases, the question may then arise as to whether such cases are covered under the extended concept of pecuniary loss. Furthermore, the scope of coverage exclusions, for example with regard to claims in the USA or under US law, or of coverage exclusions in connection with penalties and fines may become an issue.

From the perspective of D&O insurers, further risks are associated with shareholder lawsuits against companies and their board members in which it is alleged that the share price has fallen as a result of negative publicity following a scandal about sexual misconduct. If a so-called "Side-C-coverage" (coverage for the company) has been agreed upon in the individual case in connection with securities lawsuits, board members as well as companies will approach the D&O insurer. Individual extensions of coverage which have found their way into D&O wordings in recent years may also be affected. For example, D&O insurers could receive requests for compensation for PR costs in order to minimize damage to their reputation.

The above examples show that D&O insurers should bear the possibility of claims arising from sexual harassment and discrimination in mind when drafting conditions and assessing risks.

Dr. Tanja Schramm (Düsseldorf)

Carolyn Malo (Montreal)

The changing face of environmental regulation: a challenge for multi-national business

Environmental regulation is changing at an exponential rate. Around the world there has been a significant strengthening of regulation, consisting not only of tighter new rules but also more rigorous, consistent enforcement. For multi-national organisations the consequences of not being prepared locally and the impact of an environmental incident can be severe.

In this article Neil Beresford and Daniel Kassing of global law firm Clyde & Co provide an overview of the latest regulatory changes across leading regional markets in Europe, Asia and South America. They explain how traditional risk management techniques may also leave companies exposed to financial and reputational risk.

Europe

Within the European Union, environmental regulation comprises a mixture of EU and domestic laws.

The EU Environmental Liability Directive (ELD) took effect across Europe in 2009. Its purpose is to establish a framework of environmental liability based upon the "polluter pays" principle. Liability under the ELD has little in common with standard civil liability rules. It does not give private parties a right to claim compensation. Instead, it puts environmental protection in the hands of competent national authorities.

There are three categories of environmental damage under the ELD:

- Damage which significantly affects the conservation status of habitats or species
- Damage which significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of water
- Land contamination which creates a significant risk to human health as a result of substances, preparations, organisms or micro-organisms being introduced

The ELD provides for two liability regimes. Under the first, operators of activities posing a higher environmental risk may be held liable in the event of damage to protected species and natural habitats, water damage, and land damage. There is no requirement of fault or negligence, and relatively few defences are available. The second regime applies to the operators of other activities and imposes obligations in the event of fault or negligence.

The ELD gives power to prevent and remediate environmental damage at the operator's cost. The remediation of water, protected species and natural habitats is achieved by physically reinstating the environment to its baseline condition. Such reinstatement may take the form of replacing the damaged resources, acquiring or creating new natural components or taking complementary measures on a different site. In order to remediate land damage, measures can be taken to ensure that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land no longer poses a significant risk to human health.

The ELD requires Member States to encourage the development of financial provision, with the aim that operators should use financial products to guarantee their environmental responsibilities.

Inconsistent enforcement

Enforcement of the ELD has proven to be inconsistent: rates of enforcement in the east of Europe far exceed rates of enforcement in the west. Most western states rely upon an extensive patchwork of national environmental protection laws. In France, for example, the scope of the ELD is limited to cases of 'serious' environmental harm. In 2016, the French Civil Code was amended to impose strict liability on any person causing environmental damage. Claims may be brought by affected persons, governments or certified environmental associations, and the court has the power to impose a wide variety of compensatary and remedial measures.

Different approaches to financial provision

Nor have member states adopted a consistent approach towards financial provision in order to guarantee the obligations of operators under the ELD. At the date of writing, eight member states have implemented or proposed general financial provision. Ireland and Spain have been at the forefront.

Ireland

In 2015, the Irish Environmental Protection Agency (EPA) published extensive Guidance on Financial Provision for Environmental Liabilities.[1] The guidance applies to more than 700 operators undertaking licensed activities. It sets out the EPA's general approach to financial provisions, the process for putting a financial provision in place and the types of financial provision which are considered appropriate.

Financial provision must extend to the full cost of responding to incidents during the lifetime of the facility and decommissioning when the facility is eventually closed. To calculate the required provision the license holder must commission an Environmental Liabilities Risk Assessment and a Closure, Restoration & Aftercare Management Plan.

The EPA's approval must be sought for all costings. Without approved financial provision in place, companies may not be granted the relevant authorisation to operate a facility.

Spain

In Spain the rules on financial provision were significantly tightened in 2017.[2]

From 31 October 2018, so-called 'Priority One' sites were required to be protected by compulsory financial provision. Such sites include locations where hazardous 'Seveso' chemicals are handled, hazardous waste is treated or largescale combustion activities take place.

From 31 October 2019, compulsory financial provision will be extended to so-called 'Priority Two' sites. Such sites include oil and gas refineries, facilities for the refining of petroleum or crude oil, coking plants, large iron and steel plants, large ferrous metal foundries, chemical facilities for the manufacture of salts (such as ammonium chloride, potassium carbonate (potash), sodium carbonate (soda), perborates and argentic nitrate), medicine production facilities, explosives manufacturing facilities, and large landfills.

'Priority Three' activities will be regulated in due course.

Affected operators must perform an Environmental Risk Assessment. If they satisfy published criteria they must take out financial provision consisting of insurance, a financial guarantee or a technical reserve held in a fund of public sector-backed financial investments. The amount guaranteed shall be strictly ring-fenced to cover the operator's environmental liabilities, with separate provision being made for defence expenses, ELD liabilities and other related exposures.

Failure to arrange financial security may result in a fine of up to EUR 2m and the withdrawal or suspension of an operator's licence for up to two years.

Greater European harmonisation?

In 2014, the European Environment Agency (EEA) commenced a Multi-Annual Work Programme, structured around the four strategic areas of: informing policy implementation (SA1), assessing systemic challenges (SA2), knowledge co-creation, sharing and use (SA3) and EEA management (SA4). Among the programme's stated aims are to promote the more frequent and consistent use of the ELD and to consider mandating financial provision across the European Union.

Pending reform, environmental regulation in the European Union will remain a patchwork of national laws.

Asia

Across Asia, environmental law and regulation are undergoing profound reform. In this section we consider two leading examples: China and South Korea.

China

In China, the principle of "polluter pays" has been enshrined in law since the 1980s. As part of a recent "war on pollution", however, the Environmental Protection Law was amended in 2014 to provide a significantly enhanced framework for pollution prevention and control. The framework includes extensive penalties for polluters, often imposed on a daily basis, and personal liability attaching to directors and officers. It also creates a new regime of public interest lawsuits.

Since the enactment of the EPA, numerous specific pieces of legislation have been brought into effect, including:

- The Law on Prevention and Control of Atmospheric Pollution
- The Environmental Impact Assessment Law
- The Law on Prevention and Control of Environmental Pollution Caused by Solid Waste
- The Marine Environmental Protection Law
- The Law on Prevention and Control of Water Pollution
- The Law on Prevention of Environmental Noise Pollution
- The Law on Prevention and Control of Radioactive Pollution

[1] https://www.epa.ie/pubs/advice/licensee/financiaprovisionsreport.pdf
[2] Order APM/1040/2017.

Regulatory regime

Among the most radical aspects of China's new regulatory regime is the mechanism for enforcing breaches of environmental law. In 2017, a vigorous enforcement campaign was launched. At the date of writing, almost 40,000 companies and 10,000 directors have been prosecuted for breaches of environmental law.

The central authority is the Ministry of Environmental Protection, which has responsibility for establishing the basic environmental protection system, imposing and coordinating national pollution targets, and supervising the prevention and control of pollution.

Local governments have their own Environmental Protection Agencies (EPAs) which work under the Minister's supervision. Local EPAs are responsible for conducting on-site inspections and they have extensive powers of enforcement. They may impose fines aggregating on a daily basis, seize facilities and equipment, restrict operation, suspend production, impose control-targets, and order the detention of directors and officers.

The work of local EPAs is supervised by central government inspectors, who make regular visits to ensure that national environmental policy is being consistently and effectively imposed.

Local EPAs are also subject to the scrutiny of private citizens and NGOs, which may use the Administrative Review Law to compel local EPAs to enforce environmental rules.

Last but not least, public security bureaux have the power to enforce Chinese criminal law, which contains a wide range of environmental offences. Such offences include the impairment of environmental protection, the dereliction of environmental administration and the illegal importation or dumping of waste.

Civil liability for environmental harm

The Chinese Tort Liability Law imposes strict liability upon polluters, subject to the limited defences of force majeure, contributory negligence and a right of contribution from third parties. In cases of environmental harm the burden of proving causation is reversed, so that the polluter is required to prove that the pollution did not cause the alleged damage.

Chinese law also allows established environmental organisations, such as the China Environmental Protection Federation and Friends of Nature, to bring civil actions against polluters in the public interest.

Compulsory insurance regime

Consistent with the national policy to tighten environmental regulation, on 7 May 2018, the Chinese legislature enacted the Compulsory Environmental Pollution Liability Insurance Regulation.

The regulation applies to the operators of high-risk activities, such as those involved in the processing of hazardous waste, tailing reservoirs, petroleum products, coal mining, metal ores, chemical raw materials, chemical products and other industries defined by the government as representing a major environmental risk.

Operators in those sectors are required to insure against the risks of personal injury, third party property damage, ecological damage and possible clean-up costs. Policy wordings are strictly controlled. They must cover both sudden and accidental, and gradually occurring pollution, with coverage to be written on a losses occurring basis with a 3-year notification period. They must contain terms requiring the adoption of emergency investigation and remedial measures.

The compulsory insurance regime is designed not only to transfer risk, but also to transfer responsibility for risk management. Rates and premiums are standardised according to government-published criteria, and no underwriter may refuse to issue a policy without reasonable cause. Before issuing a policy, and at least once a year, underwriters are required to audit the insured premises. Underwriters must assess the environmental risk, help the insured to develop risk assessment systems and advise on the remediation of impairments.

Future developments

The rate of change of environmental law in China shows no sign of abatement. Future legislative projects include a Draft Law for the Prevention and Control of Soil Pollution, and a Reform Plan for the Ecological Environmental Damage Compensation System. Specialised environmental courts will also be created to hear civil cases involving environmental damage.

South Korea

Improved environmental regulation is a key priority of the Moon Jae-In government in South Korea. A policy agenda introduced in July 2017 vowed to promote a society free from pollution, with improved air quality and a sustainable land environment.

South Korea already has an extensive regime of environmental regulation. The environmental rights of citizens are contained in the Korean Constitution and there is a detailed framework of laws applicable to specific high-risk sectors, such as chemicals and waste. Penalties are strict and can include aggravated penalties of up to ten times the polluter's financial gain.

In 2014, a no-fault civil liability regime was introduced whereby, as in China, the polluter bears the burden of proving that the pollution did not cause the alleged damage.

Also in 2014, a compulsory insurance regime was brought into effect. Compulsory insurance applies to high-risk facilities: those which emit chemical or organic pollutants, handle hazardous chemicals, emit noise or vibration, or affect the marine environment. Policies must cover both sudden and accidental, and gradually occurring pollution, but they may exclude costs arising from regular business operations and the costs of cleaning the insured's own land.

Environmental regulation in South Korea is expected to tighten further still in the coming years.

South America

For many years, South American environmental law has been characterised by extensive regulation and inconsistent enforcement. Mexico is a good example, with four federal agencies plus various state and municipal agencies all tasked with the enforcement of environmental law. Each agency has a rigorous and complex inspection regime and the power to impose heavy administrative sanctions. There is, however, little coordination and businesses are often pulled in several directions to satisfy the requirements of their regulators.

Many jurisdictions contain advanced group action laws, and in recent years both the frequency and severity of environmental claims has increased across the region.

As in other parts of the world, compulsory insurance is now growing in importance. In Mexico, for example, all businesses involved in the extraction, treatment, storage and sale of hydrocarbons, including petrol stations, must now carry third party environmental liability cover.

Businesses must require their contractors, subcontractors, suppliers or service providers to maintain similar insurance. Policies may only be issued by authorised insurers and policy wordings must be registered and approved by the relevant regulator. As in China, insurers are expected to undertake environmental risk management activities: their reports and audits must be delivered to the regulator within 30 days.

Conclusions

Around the world, environmental regulation is tightening at an unprecedented rate. Governments committed to a clean and safe environment are passing increasingly strict laws on the prevention and control of pollution, underpinned by strict "polluter pays" compensation regimes. In Europe there is an increasing emphasis on mandatory financial provision for environmental harm, while states in Asia and South America are enacting new compulsory insurance regimes.

Although the style and subject of regulation conforms to a broad pattern, significant differences exist between jurisdictions. Content and implementation differ widely. Even within Europe the ELD has yet to succeed in harmonising the patchwork of national laws and regulations and it remains to be seen whether the Multi Annual Work Programme will result in closer alignment.

For businesses with environmental exposures in multiple jurisdictions, multi-national environmental programmes are an attractive solution. They offer a minimum standard of international coverage combined with local policies which reflect the requirements of national laws.

Whether or not a multi-national environmental programme is taken out, in this fast-moving area it is essential for risk managers, brokers and insurers alike to remain aware of developments.

Dr. Daniel Kassing, LL.M.

Neil Beresford (London)

Glyphosate: a new toxic tort time-bomb?

The global spotlight on glyphosate continues following a third successive US court case finding that the world's most popular pesticide is carcinogenic. Despite unresolved uncertainties in the scientific evidence, the case resulted in the highest damages award to date, highlighting the burgeoning risk in this developing litigation. Indeed, this may be the beginning of a new toxic tort that has the potential to prompt a raft of claims globally and should be watched closely by insurers and risk managers alike.

A California jury recently found that glyphosate (branded as 'Roundup') was the likely cause of two married plaintiffs' lymphoma and awarded the couple USD 55 million in damages and a staggering USD 1 billion each in punitive damages. Bayer (who purchased the Monsanto and the Roundup brand last year) was found to have failed to adequately warn consumers of the risks associated with its product and to have suppressed scientific evidence of the cancer link.

As with the previous two cases, Bayer has stated it intends to appeal the decision, which will allow key aspects of legal rulings to be reviewed. Whilst this appeal may not reverse the finding of fault, it seems likely the punitive damages award will be reduced as rulings by the US Supreme Court limits the ratio of punitive to compensatory damages to 9:1.

However, the company faces similar US lawsuits from more than 13,400 plaintiffs, with a federal 'bellwether' trial of 900 consolidated cases is expected take place shortly to help determine likely damages entitlement and settlement options for the cohort of claims. Shareholder actions are also becoming increasingly likely after the recent verdicts wiped 40% from Bayer's market value. The agrochemical giant's present predicament highlights the dangers of hidden legacy risks in M&A and insurance business transfers, emphasising the need for robust due diligence to be undertaken as part of the transaction.

The case underlines the apparent disconnect between scientific understanding and the law. Lawsuits are largely based on a 2015 World Health Organization's International Agency for Research on Cancer finding which classified glyphosate as "probably carcinogenic to humans". However, a subsequent Reuters investigation found the WHO had removed "non-carcinogenic" findings that were inconsistent with its final conclusion. Indeed, the US Environmental Protection Agency, the European Chemicals Agency and other international regulators, including Canada and Australia, all found that glyphosate is not likely to be carcinogenic to humans. Research around this compound is also becoming increasingly politicised, with focus shifting to the resultant reduction in crop yields and impact on international trade if a ban is implemented.

Bayer's defence was that Roundup is safe when used as direction, citing a recent EPA study and 40 years of scientific data noting rates of lymphoma remain consistent despite an increase in glyphosate use. It accused the plaintiffs' lawyers of selecting evidence, particularly the WHO assessment, which it alleged conflicted with scientific consensus. The case was unique in its structure, with limitations placed on the evidence the plaintiffs could present in the first trial phase. Bayer no doubt intended this would focus jurors on the scientific evidence showing the safety of Roundup, rather than on particular company actions. However, allegations of Monsanto's foul play seem to have trumped the cogency of scientific evidence and the interplay with legal causation tests.

As in this case, allegations of failing to adequately warn of the risks are likely to be central to plaintiffs' future claims. Similar allegations were made in the 'big tobacco' litigation and most recently against Johnson & Johnson in the ongoing asbestos talc litigation, which has resulted in a spate of high profile cases in which significant punitive damages were awarded by juries despite uncertainties in the scientific evidence.

What is unique about the recent glyphosate litigation when compared with asbestos is that the risks are not yet universally accepted and still largely open for debate. Indeed Roundup still remains on sale internationally utilising the same packaging and advertising. Currently the US litigation has focused on product liability claims against a sole defendant, Bayer, which is unlikely given its size to succumb to litigation burnout that resulted in the bankruptcy of smaller companies in the asbestos context. However, this is only likely to be start of litigation internationally, which can be expected to extend to the occupational disease context, with claims made under general and employee liability policies.

Glyphosate typifies the problems associated with research and regulation of pesticides, particularly in relation to the significant split opinion between regulators, manufacturers and scientists on glyphosate's health effects. What is perhaps clear from this conflicting position is that further research is needed to properly understand the risks of glyphosate use. In the meantime, corporates and their insurers must be mindful of this developing risk and take appropriate action to prevent any unwanted side effects.

David Wynn (Manchester)

Peter Dinunzio (New York)

GTC Law and Arbitration in Corporate Business Transactions

Unlike consumers, traders do not act for private purposes, but within the framework of their professional or commercial activity. They take part in business transactions in order to promote their entrepreneurial activity.

This gives rise to the expectation that entrepreneurs are experienced in business. They are responsible for their own actions, as they have the necessary knowledge and business acumen. They are therefore in a better position to exploit market opportunities and market potential. General terms and conditions primarily meet the needs of business transactions for rationalisation and simplification of mass contracts. Their use is widespread in the entrepreneurial sector, as they help to promote the speedy, uncomplicated and flexible conduct of entrepreneurial business. The choice of arbitration also meets the needs of entrepreneurs. Arbitration offers the parties a wide range of options, which is why it is particularly popular with entrepreneurs. Against this background, the question arises on how to combine general terms and conditions, which intervene with private autonomy in order to guarantee the appropriateness of the general terms and conditions used and the fairness of the contract with arbitration. This is particularly relevant since the latter is based on the broad principle of private autonomy of the parties, which, in business transactions have their own peculiarities.

The relationship between arbitration and GTC-law in business transactions is dealt with in detail in the newly published work “The GTC law in national and international arbitration in business transactions” by Dr. Styliani Ampatzi, LL.M. The dissertation refers to German and Greek law and concentrates on two aspects of the problem identified which are interrelated: First, the relevance of national GTC law in national and international arbitration proceedings based in Germany and Greece is examined. In particular, the question arises as to when the GTC law is applicable to the various statutes that apply within the framework of arbitration and whether parties to arbitration who are entrepreneurs have a possibility to vote out the GTC law. Subsequently, the agreement of arbitration clauses in general terms and conditions will be discussed when applying German or Greek law. Only contracts between entrepreneurs are considered. It is worth noting that the work represents a new approach with regard to the control subjection of GTC arbitration clauses.

As far as the problems identified are concerned, the legal systems of the two countries examined are very similar. Nevertheless, the approach of the national legislator differs in individual points. This is an ideal starting point for analysing the different solutions to the same problem and for achieving the objective of the study in the best possible way. In particular, the work aims to determine, through the analysis and comparison of two similar legal systems, how law best serves entrepreneurs and how arbitration clauses in contracts between entrepreneurs can fulfil their function. In the course of the study, problems as well as dogmatic or practical shortcomings of the two legal systems are identified and solutions are proposed which correspond to the circumstances of each identified legal system. Finally, the aim of the work is to find out whether the legal treatment of arbitration clauses in business contracts justifies the need to reform the law on general terms and conditions. This last question relates in particular to German law, where the need for reform of GTC law is currently the subject of controversial debate in academia and between arbitrators. In this respect, the work deals with questions and problems which had not been dealt with monographically either in Germany or in Greece and thus makes an important contribution to the scientific research of two legal systems.

Dr. Styliani Ampatzi. LL.M.

Court Decisions

German Federal Supreme Court: Liability of a lawyer in the event of reliance on the client's statements

In its ruling of 14 February 2019, the German Federal Supreme Court dealt with the question of the extent to which a lawyer may rely on the information provided by his client regarding the time of receipt of a termination letter.[1] The Court decided that the lawyer must obtain clarity about the time of receipt himself, since the time of receipt is determined by the legal evaluation of an actual event.

The case in question was based on a termination notice by the plaintiff's employer dated 22.12.2011 and marked "by messenger". It was delivered into the plaintiff's mailbox by a messenger on the same day in the morning. The action for dismissal protection which was filed by the defendant, the lawyer acting on behalf of the plaintiff, on 13 January 2012, was dismissed due to the expiration of the time limit for filing suit. The plaintiff's husband had previously informed the lawyer that the letter of termination had only been delivered on 23 December 2011.

In accordance with established case law, the German Federal Supreme Court held that the lawyer's duty to provide correct and complete advice requires clarification on the facts of the case. An attorney in general may rely on the accuracy of information provided by his client without having to carry out his own review, provided that he does not or need not know the inaccuracy of such information. However, in the case of information provided by his client containing a legal assessment, a lawyer must expect that the client may not evaluate these facts correctly. In this respect, the lawyer is obliged to independently further clarify legal facts communicated by the client.

In the present case, the German Federal Supreme Court decided that information on receipt (in this case receipt of the termination letter) concerned legal facts that had to be clarified further. Here, because of the addition "by messenger", a possible receipt of the letter of had to be assumed on 22.12.2011 and the lawyer was therefore obliged to clarify the actual factual background for the legal evaluation.

German Federal Supreme Court: client-lawyer relationship in liability insurance / conflict of interest and its consequences for multiple engagements in the same case

In its decision of 10 January 2019, the German Federal Supreme Court ruled on the client-lawyer relationship in cases when lawyers are representing a person covered by third-party liability insurance and on the prohibition to represent conflicting interests in these cases.[2]

The background to this legal dispute was a claim for lawyer's fees for the representation of several planning associations acting as third parties following a third party notice in independent proceedings for the taking of evidence. These proceedings were conducted to gather evidence on an incident involving water and soil entry during a construction project in a long-distance railway tunnel.

Two of the three planning associations had held a project-related liability and construction insurance with, among others, the sued insurer, as part of a consortium. The insurance contract contained a clause according to which the policyholder, in the event of a lawsuit concerning the liability claim, had to leave the litigation to the insurers and grant power of attorney to the lawyer appointed or designated by the insurers. The planning associations in the case at hand chose the lawyer and concluded a fee agreement, then informed the insurers and recommended to appoint this lawyer. The insurer (defendant) agreed to appoint the lawyer and paid an advance invoice in full and a further invoice in part. Later, the planning associations assigned their claims against the insurer to the lawyer.

The German Federal Supreme Court dismissed the lawyer's claim for compensation just like the previous instances had done before.

[1] German Federal Supreme Court, decision of 14 February 2019, case ref.:IX ZR 181/17.
[2] German Federal Supreme Court, decision of 10 January 2019, case ref.: IX ZR 89/18.

The Court first held that no agreement had been concluded between the lawyer and the insurer (or the consortium). Whether a lawyer represents a liable insured person on his behalf or on behalf of the liability insurer depends on the circumstances of the case. The insurer's obligation to grant legal protection to the insured person by appointing a lawyer does not make the insurer a contracting party. Payments made by the liability insurer to the lawyer representing the interests of the policyholder against an injured party are generally regarded as performance of the insurer's contractual obligations to bear such costs.

The Court found the contract between the lawyer and the planning associations to be null and void due to representing conflicting interests. A lawyer violates this rule by representing a number of joint and several debtors if the scope is not limited to defending the claim in the joint interest of the debtors and a conflict of interest actually arises according to the specific circumstances of the case. Like in the case at hand, a lawyer usually is deemed to represent conflicting interests when he, in independent evidence proceedings for damages between the builder-owner and the construction company, advises with an unlimited scope several experts who have joined the proceeding as third parties and who acted both with respect to planning and construction supervision.

Finally, the Court ruled out a compensation claim based on unlawful enrichment in cases in which the conclusion of the client-attorney contract violates the prohibition of representing conflicting interests, if the lawyer deliberately violated this rule or recklessly failed to acknowledge such violation.

German Federal Supreme Court: Requirements for effective allocation of responsibilities at management level

In its decision of 6 November 2018, the German Federal Supreme Court ruled on the allocation of responsibilities within the management board. The Court decided that a clear and unambiguous allocation of management tasks which have previously been assigned and are supported by all board members is required. The allocation of responsibilities must ensure the comprehensive performance of management tasks by professionally and personally suitable persons and, irrespective of the responsibility of an individual managing director, maintain the responsibility of the entire board, in particular for key management duties which cannot be delegated.[3] An allocation of responsibilities that meets these standards does not necessarily require written documentation.

The plaintiff as insolvency administrator demanded reimbursement of payments made by one of the two managing directors of the company after factual insolvency. According to the internal allocation of responsibilities, the managing director and defendant in this case was the so called "artistic" managing director, while the other managing director was responsible for the commercial, organisational and financial side of the business. The artistic director indicated that he had no knowledge of the factual insolvency. He claimed that the other managing director had deliberately concealed this from him.

The German Federal Supreme Court with this decision has confirmed its settled case-law that the obligations arising from section 64 of the German Limited Liability Companies Act (here dealt with in its previous version) constitute personal obligations of all managing directors of a limited company which cannot be transferred to individual managing directors by way of allocation of responsibilities. Each managing director is individually obliged to ensure an organisation which enables him at any time to have the necessary overview of the company's economic and financial situation in order to fulfil his duties. Although an allocation of responsibilities is generally possible and depending on the size of the company even necessary, this allocation will not excuse any managing director of his own responsibility for the proper management of the company's business.

The recognisability of the factual insolvency is generally difficult to assess in cases in which a responsible managing director does not provide or deliberately withholds the information required by the other managing directors to assess the factual insolvency. Nevertheless, the recognisability of factual insolvency can only be denied if it would not have been noticeable when exercising proper care and supervision. Regular monitoring of account balances or holding regular (weekly) meetings is not sufficient in this regard. Rather, a plausibility check of all information provided by the responsible -managing director, followed by necessary inquiries by each of the managing directors and tailored to the actual economic situation of the company is necessary.

[3] German Federal Supreme Court, decision of 6 November 2018, case ref.: II ZR 11/17.

Higher Regional Court of Cologne: Multiple insurance with equivalent subsidiarity clauses

The Higher Regional Court of Cologne decided on 26 February 2019 that in cases of multiple insurance with identical secondary liability clauses, reimbursements between the insurers would take place in accordance with section 78 of the German Insurance Contract Act.[4]

Two travel cancellation cost insurers argued about the internal reimbursement in a case of multiple insurance contracts. Both contracts contained a secondary liability clause. The conditions applicable between the policyholder and the insurer as defendant in this case contained a clause according to which this insurance contract was to be applied "strictly secondarily". This would also apply if other insurance contracts in turn contained a secondary liability clause. With regard to these other insurance contracts, the insurance coverage under these (other) conditions had to be considered as the more specific one, unless the services provided by third parties were insufficient to cover the costs. In this case, an insurance contract would be assumed for the remaining costs.

The previous instance had sustained the claim of the other insurer for compensation of costs pursuant to section 78 subsection 2 of the Insurance Contract Act. The defendant withdrew its appeal after a preliminary ruling ("Hinweisbeschluss") of the Higher Regional Court of Cologne.

The Higher Regional Court of Cologne stated that the clause in the defendant's terms and conditions was not a "qualified" but a simple secondary liability clause. Simple secondary liability clauses are characterized by the fact that the user is not liable if the policyholder received refunds from another insurance contract which covered the same risk. In contrast, for so called "qualified" secondary liability clauses, it is irrelevant, whether the insured actually has the benefit of coverage under the other insurance contract. It is only decisive whether another insurance contract exists at all. In the Court's view, in the case at hand, the defendant's clause merely affirmed the validity of the secondary liability clause in relation to conflicting clauses.

The fact that two simple secondary liability clauses level each other out and in consequence section 78 of the Insurance Contract Act is applicable has already been decided by the German Federal Supreme Court in its judgment of 19 February 2014 (case ref.: IV ZR 389/12).

Higher Regional Court of Saarbrücken: Relevant point in time for the insured event

The Higher Regional Court of Saarbrücken decided on 19 December 2018 on the relevant point in time for the insured event in case of a water pipe burst.[5] The insured event within the framework of a residential property insurance providing insurance coverage in the event of a pipe burst is set to the point in time of the damage to the pipe which led to the water leakage and not to the point in time when the water damage caused by the pipe burst becomes obvious. The policyholder bears the burden of proof that the insured event falls within the liability period if there are indications that the damage to the pipe already existed at the time the insurance contract was concluded.

In contrast to damage caused by water leakage, which is characterised by the fact that it regularly extends over a longer period of time and in which the damage increases with increasing duration as a result of the constantly running water, a pipe burst is usually a punctual event. The insured event occurs with the pipe burst as such and not with the consequence of a visible damage. The fact that the insured event falls within the contract period must be proved by the policyholder in accordance with the general principles. In the specific case at hand, the policyholder was not able to provide proof, which is why the Higher Regional Court of Saarbrücken dismissed the claim against the insurer.

Higher Regional Court of Düsseldorf: Broker's liability – False information on coverage

If an insurance broker before taking out a patent legal protection insurance declares that the defence against patent invalidity suits is also covered, even though this is actually not the case, he is liable to pay damages if the policyholder, trusting in the existence of a corresponding legal protection, files a patent infringement claim and then, as is common practice, is sued in return within an action of annulment of the patent. It is irrelevant whether the defense against patent invalidity actions is insurable at all." This was decided by the Higher Regional Court of Düsseldorf in its decision of 16 November 2018.[6]

The patent owner and policy holder filed suit against the broker who had arranged a patent legal protection insurance for him. Upon the plaintiff's specific inquiry, the broker had stated that the defense against actions for invalidity of industrial property rights was insured under the premium policy, although this was not actually the case. In connection with judicial patent infringement proceedings, the opposing party filed an action for annulment against the plaintiff before the Federal Patent Court. In the case at hand, the plaintiff claimed the costs of these proceedings as damages against the broker.

[4] Higher Regional Court of Cologne, decision of 26 February 2019 – case ref.: 9 U 18/19.
[5] Higher Regional Court of Saarbrücken, decision of 19 December 2018 – case ref.: 5 U 4/18.
[6] Higher Regional Court of Düsseldorf, decision of 16 November 2018, case ref.: I-4 U 210/17.

The Higher Regional Court of Düsseldorf accepted a claim for damages for breach of an obligation resulting from the brokerage agreement concluded between the parties. The decisive factor was not the obligation to provide advice under section 61 Subsection 1 of the Insurance Contract Act, but the contractual secondary obligation not to make any incorrect statements, the basis for the claim consequently being section 280 Subsection 1 of the German Civil Code.

Higher Regional Court of Hamburg: Underwriting agent's right to conduct legal proceedings; suspension of statute of limitations by bringing an action

In its decision of 25 October 2018, the Higher Regional Court of Hamburg ruled on the power of the underwriting agent ("Assekuradeur") to conduct legal proceedings and, in this context, on the suspension of the statute of limitations due to the filing of an action by the underwriting agent.[7]

The plaintiff was the underwriting agent of the transport insurer of the policyholder. The policyholder had commissioned the defendant to transport a container loaded with handbags from the port of Hamburg to the policyholder's warehouse. The container was burgled into on a motorway rest area and parts of the cargo were stolen. The Court dismissed the claim for compensation brought forward by the underwriting agent in authorization to pursue a claim in a law suit on behalf of another person on the grounds that it was statute-barred, just as the previous instance had ruled earlier.

The Higher Regional Court Hamburg stated that the filing of a claim by an underwriting agent is generally permissible. The right to file a lawsuit is the right of a party to initiate court proceedings in one's own name on the basis of the alleged right, without there being a need for a substantive legal relationship to the subject-matter of the dispute. The underwriting agent also had an own economic interest in conducting the lawsuit for the insurers.

However, to suspend the statute of limitations according to section 204 subsection 1, no. 1 of the German Civil Code, it is necessary that the claim is filed by the initially entitled party. This can also be the arbitrary litigant, but only if his role as arbitrary litigant is disclosed. A disclosure at a later point would not have retroactive effect.

Higher Regional Court of Düsseldorf: No protection against indirect reduction of the enterprise value

The Higher Regional Court of Düsseldorf ruled on 21 September 2018 that there is no protection under a fidelity insurance for a reduction in the company value caused by a confidant by transferring poached employees and business secrets of the insured company to a competitor.[8] The concept of indirect loss, which constitutes an effective exclusion of risk in the context of a fidelity insurance for companies, has to be distinguished by assessing which financial interests were negatively impacted by the actions of the confidant. The plaintiff, in this case the insolvency administrator of the policyholder, sued for performance under a fidelity insurance policy after two members of the policyholder's management board poached a large number of the policyholder's employees and together with individual former employees stole data with and finally opened a competitor company together with these former employees.

The Higher Regional Court of Düsseldorf classified the damage as indirect damage within the scope of the risk exclusion. The reduction in the value of the company as a result of the departure of the key employees was directly only caused by the employees' own will and only indirectly by the influence of the members of the Management Board as insured confidants. The loss of manpower and know-how is the direct damage, while the effects on the value of the enterprise (as presented as damage in the lawsuit) are only indirect in nature.

Furthermore, the Higher Regional Court of Düsseldorf stated, in distinguishing the German Federal Supreme Court ruling on the invalidity of the exclusion of cover for indirect losses in fidelity insurance policies of the chambers of notaries (German Federal Supreme Court, decision of 20 July 2011, case ref.: IV ZR 75/09), that the present exclusion was effective in the context of privately and autonomously concluded fidelity insurance policies. The ruling of the German Federal Supreme Court of Justice referred to the purpose of compulsory insurance (here: compulsory insurance for notaries), so that it does not apply to fidelity insurance outside the compulsory insurance.

[7] Higher Regional Court of Hamburg, decision of 25.10.2018, case ref.: 6 U 243/16.
[8] Higher Regional Court of Düsseldorf, decision of 21 September 2018, case ref.: I-4 U 101/17.

Current Developments

Data protection: one year GDPR and more

Data protection remains a central issue for the insurance industry. We publish a monthly overview of current data protection developments, trends and important case law in an international context. Here you can find comprehensive information on all important data protection topics. The current issue dated 17 May.2019 can be found **here**[1]. On the occasion of the Data Protection Day 2019 for the first birthday of the GDPR, the European Commission has published an **infographic**[2] which contains some interesting statistics about the GDPR since it came into force last year.

Among other things:

- The most common complaints reported to data protection authorities are telemarketing, email marketing and video surveillance;
- Investigations are usually initiated by data protection supervisors on the basis of a complaint;
- The total number of complaints to supervisors is more than twice as high as the number of notifications of data breaches;
- 5 EU Member States have not yet enacted national legislation setting out the permissible exceptions to the GDPR.

BaFin: New agreement with UK regulator on post-Brexit cooperation

On 15 April 2019, BaFin concluded an agreement with the British Prudential Regulatory Authority on cooperation after the Brexit. This agreement complements an existing multilateral Memorandum of Understanding between the national insurance supervisory authorities of the remaining 27 EU Member States and EIOPA (European Insurance and Occupational Pensions Authority) and the UK supervisory authorities.

The new agreement provides for the continuation of shared financial supervision and legal supervision of companies that no longer sign new business in the host country for a certain period after Brexit. Under the agreement, the current allocation will be maintained for a transitional period of 21 months after the Brexit. Complaints will continue to be handled by BaFin. BaFin will therefore continue to handle complaints about companies based in the UK which have contracts under performance in Germany. In the case of complaints about German companies that have concluded a contract in the United Kingdom, BaFin will continue to act within its legal possibilities.

European Cyber Security Act

On 17 April.2019, the European Union passed the regulation of the European Parliament and of the Council on ENISA (European Union Agency for Cyber Security) and on the certification of the cyber security of information and communication technologies and for the repeal of the regulation (EU) **No 526/2013**[3], the "Legal Act on Cyber Security".

This regulation establishes a European framework for the cyber security certification of products, processes and services. ENISA is mandated to develop such a framework for European cyber security certificates within the next twelve months. Initially, European cyber security certification schemes will be voluntary. The European Commission must determine by 2023 which European certificates will then be binding in the future. National certificates will retain their validity until there is an equivalent at European level. When the European certification comes into force, manufacturers, vendors and service providers will be able to use a uniform process in order to obtain a European certificate with validity in all member states. This would eliminate the need to apply for certificates in several member states.

The future categorization of the security levels "*basic*", "*substantial*" and "*high*" is intended to strengthen the confidence of EU citizens and companies in European cyber security standards. In addition, the Commission believes that this could give European companies a competitive advantage worldwide due to the growing demand for secure solutions.

The provisions of the regulation and the corresponding European Framework for Cyber Security are also aimed at ensuring that cyber security measures are taken into account at the product development stage (Security by Design).

[1] https://www.clydeco.com/insight/article/global-data-privacy-update-may-2019
[2] https://ec.europa.eu/commission/sites/beta-political/files/190125_gdpr_infographics_v4.pdf
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:PE_86_2018_REV_1

Insight: Clyde & Co

Veröffentlichungen

Business leaders face global economic challenges related to climate change. Our **Resilience Hub**[1] is the ideal platform to approach the issue of resilience and to regularly report on current developments, risk management and regulatory issues.

For example, the report "**Closing the protection gap through inclusive insurance**"[2] deals with the challenge of offering insurance cover in developing and emerging countries. As part of our "**A rising tide of litigation**"[3] report, we have examined global trends in litigation relating to climate change.

Team

We are also very happy to welcome **Eva-Maria Goergen**[4] and **Dr Styliani Ampatzi, LL.M.**[5] to our team since May! Eva-Maria Goergen is well known in the market and strengthens our practice especially in the areas of product liability, technical insurance and property insurance. Styliani Ampatzi focuses on liability law, litigation and arbitration.

We are also particularly pleased to have Dr Daniel Kassing, LL.M. promoted to Partner and Dr Kathrin Feldmann to Counsel - a nice way to express our steady growth and a reason to celebrate for the entire team!

Events

10 October 2019
Casualty Day in Düsseldorf

19 November 2019
DAV-conference on insurance law in Munich (organized by Dr Henning Schaloske)

12 February 2020
PI Risk Day in Düsseldorf

June 2020
Financial Lines Days in Düsseldorf and Munich

[1] https://resilience.clydeco.com/
[2] https://resilience.clydeco.com/articles/inclusive-insurance-report
[3] https://resilience.clydeco.com/articles/report-climate-change-liability-risks-1
[4] https://www.clydeco.com/people/profile/eva-maria-goergen
[5] https://www.clydeco.com/people/profile/dr.-styliani-ampatzi-ll.m

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