CLYDE&CO

Insurance & Reinsurance

Quarterly Update 3/2018 Germany

Contents

Dear Reader,

Welcome to the third issue of our Quarterly Update 2018. Thank you for your interest.

This new issue of our newsletter again offers concise summaries of important developments in case law and legislation, as well as other topics and issues. Of particular interest are:

- The decision by the Dusseldorf Higher Regional Court (Oberlandesgericht, OLG) on insuring compensation claims due to improper payments after factual insolvency (Law on Limited-Liability Companies [GmbHG] Section 64)
- The decision by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) on internal investigations and seizure of documents
- The decision by the Federal Court of Justice (Bundesgerichtshof, BGH) on the limitation period for damage compensation claims after antitrust violations

There is currently much discussion of whether arbitration produces benefits for insurance disputes. In this context we have prepared questions for you concerning the effectiveness of venue clauses in the relationship with co-insured companies and individuals. This may conceivably be an area where arbitration can result in greater legal certainty.

In June we held our Financial Lines Days 2018 in Munich and Dusseldorf as part of our European FID&O Roadshow, with additional events in Madrid and Paris, together with staff from the offices there, London and New York. We were particularly gratified by the overwhelming interest, with more than 160 attendees at the German events. You will find a summary of the events in this issue of our newsletter.

After the summer break we are now looking forward to the upcoming events:

- 11 October 2018: Casualty Day on all aspects of product liability, insurance questions, autonomous driving and climate change litigation, in Dusseldorf
- 20 November 2018: Professional liability and financial damage liability insurance event in Munich (through DAV insurance law working group)

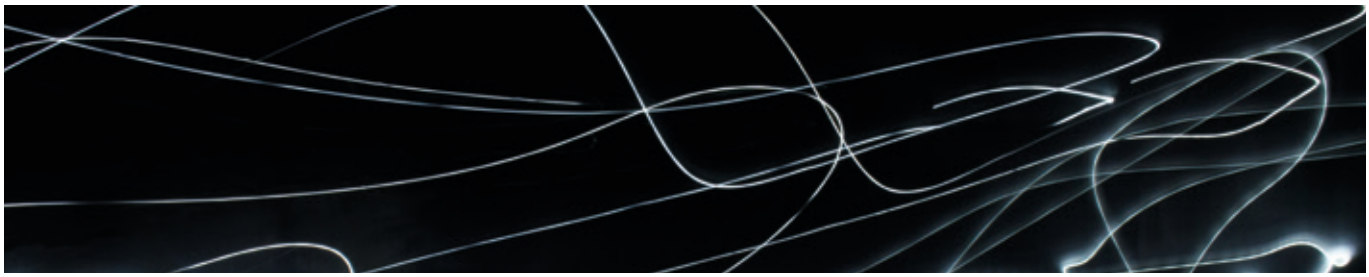
Please contact us if you are interested in these events.

There's been plenty of activity on our team again as well. In particular we would like to welcome two new advisors, Christina Thiele and Lukas Wagner.

Happy reading!

Dr Tanja Schramm

Dr Henning Schaloske



Dusseldorf OLG: No D&O insurance coverage for claims under GmbHG Section 64

In a ruling of 20 July 2018[1] the Dusseldorf Higher Regional Court (Oberlandesgericht, OLG), apparently as the first OLG to do so, staked out a clear position on the question of whether D&O insurance offers protection against reimbursement claims by bankruptcy administrators for payments following factual insolvency under Section 64 of the Law on Limited-Liability Companies (GmbHG). The insurance panel of the OLG essentially answered this question in the negative. While the Celle OLG had previously already leaned in the same direction in its ruling of 1 April 2016 (file number 8 W 20/16), it did not provide detailed reasoning in the cost decision in that case. The background of the discussions is that, as liability insurance, D&O insurance comes into play only when a claim for damages is asserted against an insured person.

In the underlying case, the bankruptcy court opened bankruptcy proceedings on the assets of a limited-liability company. The bankruptcy administrator then successfully asserted a claim against the plaintiff, the managing director of the limited-liability company, under GmbHG Section 64 since the company made payments totaling more than €200,000 even after the time of factual insolvency. The bankruptcy administrator obtained a final and unappealable payment judgment against the managing director, who reported this adjudicated claim to the company's D&O insurer, demanding insurance cover in the form of indemnification from this liability. When her complaint was unsuccessful in the first instance at the Mönchengladbach Regional Court (Landgericht, LG), she pursued her claim on appeal at the Dusseldorf OLG.

The Dusseldorf OLG thus had to decide the question of whether a reimbursement claim under GmbHG Section 64 qualifies as a claim for damages within the meaning of the D&O policy. In explaining its rejection the court employs an interpretation of the insurance policy, determining that a reimbursement claim under GmbHG Section 64 is significantly different from a claim for damages under insurance law. After all, a bankruptcy administrator's reimbursement claims qualify as "sui generis claims," clearly differing from claims for damages, particularly when it comes to the legal consequences. Specifically, the company suffers no damage from the payments after factual insolvency since the payment is regularly balanced by the removal of a company liability which is discharged thereby. The company's assets, in other words, remain the same. Furthermore, the manager against whom the claim is made cannot assert there was no damage or only small damage, as liability under GmbHG Section 64 is based solely on the payment. Nor can contributory negligence or possibly joint and several debt on the part of multiple actors be asserted. Establishing D&O insurance coverage for such reimbursement claims would thus result in a much further-reaching protection goal than is found in the promised performance of D&O insurance.

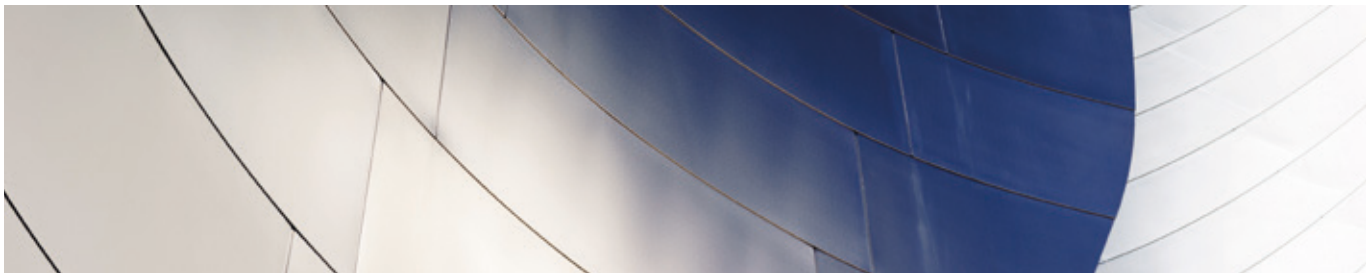
While the Dusseldorf OLG expressly underscores the fact that the managers have a fundamental interest in having the broadest possible insurance protection and thus in equating the bankruptcy administrator's reimbursement claims with a claim for damages, nevertheless the reimbursement claims for payments made after the time of factual insolvency are by their nature not even similar to damages, in the court's opinion, and therefore did not comport with the promised performance of the D&O policy. A policyholder and insured person with business experience cannot remain unaware of this after carefully reading the insurance terms and conditions as required.

The OLG did not permit the appeal. It remains to be seen whether a complaint against the decision denying leave to appeal will be filed with the Federal Court of Justice (Bundesgerichtshof, BGH) or whether the decision will become final and unappealable.

[1] Dusseldorf OLG, decision of 20 July 2018 – 4 U 93/16.

In light of its high degree of practical relevance, the decision by the Dusseldorf OLG produces uncertainty for policyholders and insured persons. If they haven't already, each D&O insurer must decide how they wish to handle this decision when it comes to policy wording and claims.

Dr Daniel Kassing, LL.M.



BVerfG rules on search and seizure of documents at law firm

In a widely observed ruling[1], the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) has ruled on the lawfulness of the search and seizure at the Jones Day law firm in connection with the internal investigation at Volkswagen AG following the "diesel scandal." In the end the court has no constitutional reservations against the search and seizure of the documents and, as a result, rejected the constitutional complaints by Volkswagen AG, AUDI AG, the Jones Day law firm, and the attorneys working for Jones Day.

Jones Day as internal investigator hired by Volkswagen AG

In September 2015 Volkswagen AG hired the American law firm Jones Day to conduct an internal investigation in connection with the so-called diesel scandal. Specifically, they were hired against the backdrop of the criminal investigation being conducted in the United States. Volkswagen cooperated completely with law enforcement agencies in the US. No final report was published by Jones Day, contrary to the original announcement. The reason given for this was that the results of the investigation had been incorporated in the factual summary of the published agreement with the US Justice Department.

The Braunschweig and Munich II public prosecutor's offices are conducting investigations of various defendants on suspicion of fraud and criminal advertising. In March 2017 the Munich II public prosecutor's office ordered the search of Jones Day's Munich offices, seizing a large number of files and electronic data containing the results of the internal investigation. The Munich Local Court confirmed the seizure. The complaints filed in protest were unsuccessful.

Search and seizure constitutionally justified

As part of a temporary legal protection process, the BVerfG initially ordered the Munich II public prosecutor's office to deposit the seized documents under seal with the Munich Local Court.

The BVerfG has now fairly clearly rejected all constitutional objections. Regarding Volkswagen AG, the court ruled that its basic right to inviolability of the home was not violated since it was the law firm's offices that were searched and not its own. Seizure of the documents and electronic files found at Jones Day was constitutionally justified and the court's use of criminal procedural regulations was not objectionable. Furthermore, Volkswagen AG is not put into a defendant or quasi-defendant position in the criminal case pursued by the Munich II public prosecutor's office. The quasi-defendant position in the parallel case pursued by the Braunschweig public prosecutor's office is irrelevant. The quasi-defendant position of the subsidiary AUDI AG in the Munich II public prosecutor's office's criminal investigation is likewise immaterial.

As an American law firm, Jones Day does not have standing to file a complaint. The attorneys acting for Jones Day did not adequately argue that their own basic rights had been violated, so the constitutional complaint was rejected on that point, as well.

Effects of the ruling on insurers

What consequences will the ruling have for insurance companies? It seems clear that insurers, too, will have to order internal investigations and take into account the effects of the BVerfG's ruling when making this decision.

The ruling is also likely to heat up discussions about providing documents or requesting a personal meeting if

[1] BVerfG, ruling of 27 June 2018 – 2 BvR 1405/17, 2 BvR 1780/17.

criminal investigations are also running parallel to civil claims. In many cases parties initially refuse to provide documents or agree to a personal meeting (despite existing duties) on the grounds that they fear law enforcement agencies will obtain access to the documents or meeting notes. Given this background, in their own interest and in the interest of the policyholder/insured persons, insurers should make the rules governing cooperation duties in the event of a claim as comprehensive and clear as possible in order to avoid discussions in case of a claim and create legal certainty for everyone involved.

Outlook

The ruling by the BVerfG has generated a broad media response. It remains to be seen whether lawmakers will see the ruling as an occasion to create clear rules for searching and seizing documents at law firms hired to perform internal investigations. This seems appropriate in connection with current discussions on introducing criminal law for companies, particularly as some proposals envision outside law firms working as internal investigators or monitors.

Daniel Kreienkamp

Jurisdiction agreements in insurance matters in the case law of the European Court of Justice

In a widely-observed ruling by the London High Court in Woodford v. AIG Europe Ltd of 2 March 2018[1], the High Court ordered a D&O insurer, AIG Europe Ltd, to provide insurance cover to the insured persons, Michael Woodford and Paul Hillman. Interestingly, the London court had to apply German law when deciding about coverage under an insurance policy.

It is possible for the legal venue and the applicable law to diverge in insurance disputes like Woodford v. AIG Europe Ltd, based on the interpretation of European regulations on jurisdiction in insurance matters by the European Court of Justice (ECJ). In two landmark rulings the ECJ severely restricted the ability to choose the court with jurisdiction to decide a dispute, particularly with regard to jurisdiction over disputes between the insurer and third parties not involved in the insurance contract. Specifically, both rulings were concerned with the extent to which an agreement contained in an insurance policy concerning jurisdiction is binding on a third party who did not consent to that agreement.

In its ruling of 12 May 2005[2], the ECJ decided that a venue clause cannot be put forward against a third-party beneficiary under an insurance policy, in this case an insured subsidiary, if the latter did not explicitly agree to the venue clause. In its reasoning the ECJ said that parties have limited autonomy with respect to venue agreements in insurance matters. This serves to protect the insured as the economically weaker party. This goal would be disregarded by a venue agreement that takes away from the economically weaker party, such as the insured beneficiary, the possibility of filing suit or defending itself in the courts at the location of its own domicile.

The ECJ again in 2017 had to deal with the effect of venue agreements contained in insurance policies. This time the matter was not a complaint by an insured beneficiary but rather a direct complaint against the insurer by the third party harmed by the policyholder. The ECJ clarified in its ruling of 13 July 2017[3] that a venue agreement between the insurer and policyholder also cannot be used against an injured party who has suffered an insured harm if the injured party brings suit directly against the insurer at the location where the harm occurred or where his domicile is located. In this decision, too, protecting the economically weaker party was the ECJ's key consideration. The ECJ declared supplementally that an injured third party is even further removed from the insurance contract containing the venue agreement than a third-party beneficiary.

In the decisions described, the ECJ severely restricted insurers' ability to obtain certainty about the competent court in the event of a claim in case of disputes with insured companies or individuals by way of a venue agreement with the policyholder. It is still unclear whether insurers can create certainty and predictability regarding decision-making authority in the event of a claim using an arbitration clause agreed with the policyholder in the insurance contract.

[1] Court of Appeal - Queen's Bench Division, ruling of 2 March 2018, [2018] EWHC 358 (QB).

[2] ECJ, ruling of 12 March 2005, C-112/03. The decision was based on the then-applicable Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968.

[3] ECJ, ruling of 13 July 2017, C-368/16. The decision was based on the then-applicable Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 22 December 2000 (Regulation [EC] 44/2001, "Brussels I Regulation").

International jurisdiction in insurance matters is fundamentally based on the Brussels Ia Regulation[4]. While an arbitration agreement represents a departure from those rules of jurisdiction in a manner similar to a venue agreement, there is a critical difference in that arbitration is expressly carved out from the scope of the Brussels Ia Regulation[5]. The Brussels Ia Regulation is not intended to prevent courts in member countries from referring parties to arbitration if they have made an arbitration agreement concerning the subject matter of the dispute.[6] Fundamentally this may also include disputes between insurers and third parties not involved in the insurance contract who assert rights under an insurance contract containing an arbitration clause. In these cases it is a matter for the national court to decide whether there is a valid arbitration agreement that is also binding on third parties not involved in the insurance contract.

The question then arises of whether the scope of the arbitration agreement also extends to the third party who is not involved in the arbitration agreement. Only then would the dispute be removed from the scope of the Brussels Ia Regulation. Protecting the economically weaker party will surely also play a role in this evaluation.

Dr Michael Pocsay, LL.M.

[4] Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 12 December 2012, Regulation (EU) 1215/2012.

[5] Article 1 (2) d) Brussels Ia Regulation.

[6] Recital No. 12 of Brussels Ia Regulation.

Financial Lines Days 2018

With around 160 participants, this year's Financial Lines Days in Munich and Düsseldorf were fully booked and we thoroughly enjoyed the strong interest and lively discussions. Again this year, the Financial Lines Days were part of the European roadshow, with further stations in Paris and Madrid.

At both events, the morning session was focused on the topics of D&O insurance and compliance. To begin with, Dr. Henning Schaloske and Amrei Zürn provided an overview of executive liability for breaches of organizational duties, especially in light of the current developments in data protection, IT compliance and cyber. They also discussed the relationship between D&O insurance and cyber insurance. After that, Dr. Helmut Krenek, the Presiding Judge of the Munich I Regional Court, spoke in Munich on the subject of D&O liability for compliance violations, especially in view of the Siemens judgment. In this connection, he also shared his assessment of the recoverability of monetary fines. In Düsseldorf, Dr. Frank Hülsberg explained how a public auditor reviews the appropriateness and effectiveness of a compliance management system. In this context, he particularly emphasized the point that a compliance management system cannot be regarded in isolation from the overall governance structure and risk situation of the company in question.

The Financial Lines Days also featured an overview of current legal developments in the various countries, provided by our Mandip Sagoo (United Kingdom), Edward Kirk (USA), Pablo Guillén (Spain) and David Méheut (France). Just like last year, it was exciting and informative to learn about the commonalities and differences in various areas of the law and the conclusions that can be drawn from other legal systems and applied to problems in one's own legal system.

Another highlight was the guest presentation of Mr. Martin Wohlrabe, who illumined the importance of litigation PR in the context of executive liability and other claims. He also provided a preview of the recent study conducted by CONSILIUM Rechtskommunikation GmbH and Mainz University on the media's influence on courts and public prosecutors. The study concludes that the vast majority of judges and public prosecutors follow the media reports about their proceedings and at least consider the echo of publicity in making their decisions.

The events were rounded out with presentations by Dr Tanja Schramm, Dr Daniel Kassing and Daniel Kreienkamp on the subject of new developments in insolvency law and the corresponding ramifications for D&O insurance, recent relevant judicial rulings in insurance law, and the "open space" session in which we discussed the topics suggested by you.

A Rhineland saying has it that everything that happens more than twice is a tradition. With this in mind, we are pleased to announce the reprisal of our traditional Financial Lines Days next year, tentatively on 4 June 2019 in Dusseldorf and on 5 June 2019 in Munich. We hope you will mark these dates on your calendar and we would be very pleased to see you again next year. In view of these coming events, we encourage you again to submit suggestions and discussion topics, especially for our open space session, by e-mail to dusseldorf.office@clydeco.com or speak with us personally at any time.

Daniel Kreienkamp

Legal decisions

BGH: Consent from insured person not necessary on change of policyholder

Transferring policyholder or beneficiary status in case of survivorship does not require consent from the insured in a whole life policy on the death of another person by analogous application of Section 150 (2) sentence 1 half-sentence 1 of the Law on Insurance Contracts (Versicherungsvertragsgesetz,VVG). This was decided by the Federal Court of Justice (Bundesgerichtshof, BGH) in its ruling of 27 June 2018.[1]

The grandfather of the plaintiffs purchased two cash-value life insurance policies with a term of 20 years from the defendant insurance company in the 1990s. The insured person was the daughter-in-law of the grandfather, the mother of the plaintiffs. In the event of the death of the plaintiffs' mother, her two children, the grandchildren of the grandfather, were beneficiaries. When the grandfather died, his wife was his heir. She initially continued to pay the premiums but after just under a year she had the policy made non-contributory. She later applied to the insurer to change the policyholder for both contracts. The new policyholder and beneficiary in case of survivorship was to be an uncle of the grandchildren, and in case of death each of his children was to be the beneficiary for one of the policies. The insurer sent the uncle corresponding addenda to the insurance certificates.

Shortly thereafter, the uncle canceled the policies, one of which had already expired. The aforementioned grandchildren then sued for the insurance benefits or damages from the insurer and the inheritor of the policies.

The BGH upheld the decisions of the lower courts, all of which had rejected the complaint. In the BGH's view there is no analogous application of VVG Section 150 (2) sentence 1 half-sentence 2. According to the regulation, the other person's written consent is required if the insurance is "taken" for the event of his or her death. With a view to the wording, the regulation is directly applicable only for the conclusion of the insurance contract.

In other cases, such as the present one, the analogous application is disputed. In its decision the BGH mentions lawmakers' idea of protection of the insured person.[2]

The consent requirement seeks to prevent speculation on other people's lives. It is intended to neutralize the risk of possible instigation of the insured event by the policyholder or a third party. This should be clear to the person to be insured. Any corresponding application of the regulation to subsequent changes to the policy or eligibility for benefits goes only so far as the policyholder is affected. The regulation is applicable by analogy only if the protection goal demands it. In particular, this is the case for changes affecting who profits from the insured event and in what amount.

Accordingly, transferring eligibility for benefits in case of survivorship does not require consent. A change in policyholder does not require consent since it does not entail any increase in risk for the insured person as long as the policyholder is not advantaged in case of death. The same applies accordingly for changing eligibility for benefits in case of survivorship.

Because of all this, the heir was permitted to validly transfer the policyholder and beneficiary status in case of survivorship to the plaintiffs' uncle. However, the change in eligibility for benefits in case of death was invalid since there was no consent from the insured. But those claims were not under discussion and had no effect on the decision in this case.

According to the BGH the plaintiffs are not entitled to any payment whatsoever since the policies were validly terminated by the uncle. The cover ratio between policyholder and insurer alone is significant here. The BGH remanded the case back to the appellate court to examine the requirements for a claim from a bequest.

[1] BGH, ruling of 27 June 2018 – IV ZR 222/16.

[2] See Bundestag publication 16/3945, p. 95.

By this decision the BGH took a clear position on the analogous application of VVG Section 150 (2) sentence 1 half-sentence 1.

BGH: Limitation period for damage claims after antitrust violations - Gray Cement Cartel II

In its ruling of 12 June 2018 the BGH affirmed that Section 33 (4) and (5) of the 2005 Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkung 2005, GWB 2005) applies to damage claims that were preceded by proceedings at antitrust regulators or courts before the seventh amendment to the GWB took effect, in the event such proceedings were initiated before the seventh amendment to the GWB took effect.[3]

The plaintiff asserted a claim against the defendant based on participation in a cartel and requested declaration of the defendant's requirement to pay damages. The plaintiff asserted that it had to pay inflated prices for cement in the years 1993 to 2002 because the defendant was involved in a cartel. The defendant had made territory and quota agreements with other cement manufacturers, contrary to antitrust law. The monetary fine set against the defendant in 2003 became final and unappealable in 2013 by a decision of the BGH of 26 February 2013.[4]

The parties argued before the BGH about whether possible damage claims by the plaintiff had become time-barred. In 2005 the seventh amendment to the GWB entered force with the rule in GWB 2005 Section 33 (5) (now GWB Section 33 [h] [6]), by which the limitation period for a damage claim due to an antitrust violation is inhibited by initiation of summary proceedings based on the same violation. The inhibition ends six months after the final and unappealable conclusion of the summary proceedings.

The question of the norm's applicability to cases of this type has been variously evaluated in the literature and case law. By its decision of 12 June 2018 the BGH definitively clarified this matter.

According to the BGH the regulation in GWB 2005 Section 33 (4) and (5) has primarily procedural significance and applies to all damage claims that were not yet concluded at the time it entered force. Lawmakers did not order any differently worded application. In the preamble to the law[5] on the legislative intent they did not merely limit the meaning and purpose of the regulation to the declaratory effect of decisions by antitrust regulators and courts on civil actions, but in particular they also gave thought to simplifying the process of asserting claims for damages. The norm helps to extract from the cartel member the benefits obtained through the antitrust violation. This should be achieved regardless of whether the antitrust violation was committed before or after the seventh amendment to the GWB took effect.

BGH: Liability of the liquidator of a limited-liability company

In a ruling of 13 March 2018 the BGH declared that Section 73 of the Law on Limited-Liability Companies (GmbHG) is not a protective law within the meaning of Section 823 (2) of the German Civil Code (Bürgerliches Gesetzbuch, BGB).[6]

However, it did affirm that the liquidator of a limited-liability company who failed to factor in one of the company's liabilities to a creditor when distributing the company's assets to the shareholders has direct liability to the creditor up to the total of the distributed amounts if the company has already been removed from the commercial register, by analogy with Sections 268 (2) sentence 1 and 93 (5) of the German Company Law (Aktiengesetz, AktG).

The defendant was the liquidator, sole shareholder, and managing director of F-GmbH, whose dissolution was entered in the commercial register and announced in the federal gazette (Bundesanzeiger) on 24 June 2010. On 24 January 2011 the limited-liability company was removed from the commercial register.

The plaintiff demands payment from the defendant of a bill from 2010 that was not factored in when liquidating and distributing the assets.

The BGH ruled that the plaintiff did not have a valid claim under BGB Section 823 (2) in conjunction with GmbHG Section 73 (2), contrary to the appellate court's view. Rather, it created an analogy with AktG Sections 268 (2) sentence 1 and 93 (5), producing a corresponding claim.

To view GmbHG Section 73 as a protective law within the meaning of BGB Section 823 (2) is contrary to the historical legislative intent and the purpose of the law, and cannot be

[3] BGH, ruling of 12 June 2018 – KZR 56/16.

[4] BGH, decision of 26 February 2013 – KRB 20/12.

[5] Bundestag publication 15/3640 p. 35.

[6] BGH, ruling of 13 March 2018 – II ZR 158/16.

assumed with regard to the reference to GmbHG Section 43 (3) and (4).

The historical creators of the law intentionally set out to establish only internal liability for violation of the liquidator's duties under GmbHG Section 73 with subsection (3) of the norm. While the norm also serves to protect creditors from the risk that their demands will be lost as a result of distribution of the solely liable company assets, nevertheless the liquidator only has a duty to the company under GmbHG Section 73 (2), which is considered sufficient in the preamble to today's GmbHG Section 73. Furthermore, deletion of subsection (3) was held to be necessary in order to classify GmbHG Section 73 as a protective law within the meaning of BGB Section 823 (2).

The legal purpose of GmbHG Section 73 is also inconsistent with classifying it as a protective law. As purely internal liability to the company, the purpose of GmbHG Section 73 corresponds to that of the capital increase regulations in GmbHG Sections 30 and 31. For those, the BGH already ruled that they are not protective laws within the meaning of BGB Section 823 (2), and that the intended protection for creditors could be achieved by the creditors having the company's compensation and damage claims resulting from the violation of GmbHG Section 30 seized and transferred to them for collection.

A further argument against classifying GmbHG Section 73 as a protective law is the reference to GmbHG Section 43 (3) and (4). According to GmbHG Section 43 (3) sentence 2, GmbHG Section 9b (1) applies accordingly, and its prohibitions against settlement and the waiver of compensation claims would be superfluous if creditors already had their own damage claim in tort. Also, this would undermine this special limitation rule in GmbHG Section 43 (4) since the regular limitation period of a claim might be shorter or also longer for individual creditors under BGB Section 823 (2).

A claim by the plaintiff against the defendant does result, however, from the corresponding application of AktG Sections 268 (2) and 93 (5). The conditions for an analogy are present, according to the BGH.

An unintentional loophole occurred after the fact. The GmbHG contains no provision giving creditors the right to assert the company's claim against the liquidator directly in their own name under GmbHG Section 73 (3). Historical lawmakers in 1891 still assumed it was sufficient if the compensation was paid to the limited-liability company. The possibility for the creditor to obtain a judgment against the company and to have the company's claim against the liquidator seized and paid to themselves under GmbHG Section 73 (3) through compulsory enforcement under Sections 829 and 835 of the Code of Civil Procedure (Zivilprozessordnung, ZPO) no longer meets the needs of economic development. It must also be noted that the improper distribution of company assets during liquidation regularly comes to light only after completion of the liquidation and termination of the limited-liability company. At that point all a creditor can do is to file for supplemental liquidation and the appointment of a supplemental liquidator so that the company can enforce its claim against the liquidator. But this would not provide adequate protection to the creditors, which is contrary to the regulatory intent of the GmbHG and of GmbHG Section 73. It should be possible to close this unintentional loophole through the corresponding application of AktG Section 268 (2) in conjunction with Section 93 (5), particularly in the cases where there is only one creditor.

Saarbrücken OLG: Responsibility for costs when filing suit before the end of the insurer's allotted review period

In its ruling of 25 September 2017 the Saarbrücken Higher Regional Court (Oberlandesgericht, OLG) affirmed the plaintiff's responsibility to pay costs when filing suit before the end of the insurer's allotted review period.[7]

The plaintiff claimed damages from the defendant based on a traffic accident that occurred on a French motorway in which the plaintiff's camper was damaged. She asked the defendant's claims adjuster to pay the damages, which she put at 30,124.90 Euro, in a letter of 11 August 2016. On 16 September 2016 the Plaintiff filed the complaint with the Saarbrücken Regional Court (Landgericht, LG).

The plaintiff stated that the complaint was discharged through 18 October 2016, initially in the amount of 12,000 Euro and then in the further amount of 15,698.90 Euro, as the defendant's claims adjuster had since transferred those amounts to the plaintiff. The complaint and discharge statements, however, were not served on the defendant until 7 November 2016. Thereafter a partial settlement was reached for an additional payment of 1,200 Euro from the defendant to the plaintiff. The Saarbrücken LG partially upheld the remainder of the complaint following an additional abandonment of the action in the amount of 1,226 Euro and with respect to the pretrial attorney fees. It imposed 44 percent of the cost of the dispute on the plaintiff and 56 percent on the defendant.

It was against the cost decision that the plaintiff's unsuccessful immediate appeal was directed. It was not justified on the merits since the cost ratio did not deviate from the legal norm to the plaintiff's disadvantage.

[7] Saarbrücken OLG, ruling of 25 September 2017 – 4 W 18/17.

According to ZPO Section 269 (3) sentence 2, in the event of abandonment of the action the plaintiff is fundamentally required to pay the costs of the dispute, unless a final and unappealable finding was already made regarding them or they are imposed on the defendant for another reason. But if the cause for filing the complaint ceases to apply before the matter is pending, then in case the action is later abandoned the responsibility for costs is determined using equitable discretion in light of the current status of the facts and the dispute (ZPO Section 269 [3] sentence 3). If the action is partially abandoned the rule in ZPO Section 92 should be used accordingly, so that there is regularly a distribution according to ratios.

When making a decision using equitable discretion, the costs of the abandoned portion must fundamentally be paid by the party who would likely have lost in the further course of the dispute. However, the legal principle in ZPO Section 93 should also be applied and the question of whether the defendant gave cause for the complaint through their behavior should also be examined. But at the time the complaint was filed the defendant had given no cause for the complaint. According to the court's consistent legal practice the defendant should have been given a period for review, which starts upon receipt of a specified claim letter and prior to the end of which there is no default and no cause for a complaint. The review period to be granted depends on the individual case, though the majority of case law views a period of four to six weeks to be reasonable for an average traffic accident. In certain circumstances this period may be longer, particularly if the accident has a complex course of events or in cases with international aspects.

In the present case the OLG assumed the review period of six weeks due to the not-inconsiderable level of damage, a somewhat unusual set of accident circumstances including involvement of a camper, and also the international angle which involves linguistic complications and special legal aspects; the six weeks were not yet up at the time the complaint was filed.

In addition, the plaintiff could not assume she would not get her due without filing suit since the defendant's conduct gave no cause whatsoever to make that assumption. In this regard the costs should be imposed on the plaintiff regardless of the likely outcome of the dispute. Factors against changing the cost ratio to the plaintiff's disadvantage are the prohibition against reformatio in peius and the fact that the defendant did not appeal the cost decision.

Karlsruhe LG (Pforzheim field office): CEO fraud – Crooked payments are the bank's responsibility

In a ruling of 5 July 2018 the Karlsruhe LG (Pforzheim field office) declared that a bank is liable to its customer for fraudulent funds transfers sent abroad.[8]

The plaintiff, a medium-sized company, demanded compensation from the defendant, its bank, for money transfers fraudulently ordered by a third party and carried out by the defendant at the plaintiff's expense.

The parties agreed to the defendant's terms and conditions for money transfers in May 2016. Accordingly, transfer requests by the plaintiff were to be authorized by signature or PIN/TAN. In case of unauthorized transfers the defendant was required to compensate the plaintiff for the transfer amount. In October 2016 the managing director of the plaintiff ostensibly contacted an employee in the plaintiff's accounting department from China by e-mail, who regularly processed the plaintiff's transfer orders with the defendant, though she did not have general power of attorney for banking. The unknown third party told the employee there was an urgent transaction in China that had to be treated as secret.

The alleged managing director instructed the employee to make multiple transfers to China totaling 1,655,000 Euro. He sent her a forged e-mail address for the Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin), to which the employee was to send a signature sample of the real managing director for alleged authentication by BaFin. Using the signature sample the alleged managing director forged transfer forms and sent them to the employee to initiate a transfer by the bank, which was ultimately successful after the bank received the transfer forms by fax and e-mail.

When the deception came to light the transferred funds had already been withdrawn in China, the unknown third party could no longer be located by the State Office of Criminal Investigation (Landeskriminalamt), and it was no longer possible to reverse the transaction. The plaintiff then filed a claim against its bank for reimbursement of the unauthorized transfers totaling 1,650,000 Euro referring to the terms and conditions for money transfers.

The Commercial Department of the Karlsruhe LG (Pforzheim field office) ruled that the transfers were unauthorized transfers according to the parties' terms and conditions and

[8] Karlsruhe LG (Pforzheim field office), ruling of 5 July 2018 – 15 O 50/17 KfH.

that the defendant is required to pay compensation. The court based its decision on the fact that an interpretation of the terms and conditions meant that the managing director's original signature had to be presented, not by fax or e-mail. Since the transfer forms were submitted to the defendant by fax and e-mail, it should not have carried out the transfers. Even though the processing method was conservative, the transaction would not have occurred in this way if the defendant had insisted on the original signature.

In the court's view the employee's (apparent) legal authority was also not a significant factor since according to the outward appearance the transaction was not one of agency or representation but rather the forwarding of a statement by the supposed managing director by way of a messenger.

The defendant's counterclaims founder on the conclusive rules of BGB Sections 675 ff in the court's view. They create a blocking effect in the event payment instruments that are contrary to the agreement are used. By way of a fortiori reasoning the court argues that the blocking effect likewise applies if no payment instrument at all was used, as in the present case.

The decision is likely not yet final and unappealable.

Current developments

BaFin: Updated circular on collaboration with agents

In its new circular 11/2018 of 17 July 2018 on collaboration with insurance agents and risk management in sales, the Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) provides information on implementing the new EU Insurance Distribution Directive (IDD) in German law. This replaced circular 10/2014.

The BaFin circular first addresses sales and the organization of the business and of risk management. In particular, adequate control systems should protect insured parties from harm. Implementation of the EU Insurance Distribution Directive (IDD) includes requiring all persons having to do with sales to complete at least 15 hours of continuing education. BaFin clarifies that this is verified as needed.

In addition, BaFin makes it clear that insurance brokers must prove a reliability test and adequate qualifications or that insurance companies must ensure that insurance brokers satisfy the requirements before commencing collaboration.

In the notes of the circular BaFin also states that it does not expect any further changes with respect to the Insurance Brokerage Regulation (Versicherungsvermittlungs-Verordnung, VersVermV) even though it had not yet been adopted at the time of the circular's publication.

BaFin: Eligibility requirements for operating a reinsurance business

In an interpretation decision of 17 July 2018 BaFin defined the eligibility requirements for German primary insurers to conduct reinsurance operations in the European Union and the European Economic Area as well as third countries.

According to the decision BaFin makes a distinction whether the primary insurer wishes to conduct reinsurance business in a third country or in the EU or EEA. Reinsurance business can be conducted in the EU or EEA either through a branch office or by way of trade in services (analogous to the primary insurance business). If the primary insurer holds a permit from BaFin, that permit is valid for the entire territory of the member or signatory states. The reporting requirement applies for every EU/EEA country in which the company wishes to conduct reinsurance business. If there is an all-clear report, BaFin then notifies the supervisory agency in the EU/EEA country through the so-called notification process.

Primary insurers wishing to conduct reinsurance business in a third country require permission from the third country's supervisory agency.

This reporting requirement and the notification requirement also apply for conducting reinsurance operations.

BaFin: IT requirements for the insurance industry

On 2 July 2018 BaFin published a circular on insurance supervisory requirements for IT ("VAIT"). The circular contains notes on interpreting the regulations regarding business organization in the Insurance Supervisory Law (VAG) with respect to technical and organizational facilities in the company.

In particular, the VAIT requirements are intended to create a flexible and understandable framework so that executives can manage IT resources and information risk and information security. They are also intended to increase risk awareness within companies and vis-à-vis their IT service providers.

Fortis case: Amsterdam appeals court approves settlement

The Amsterdam appeals court has largely approved a 1.3 billion Euro settlement negotiated by the parties in the Fortis case.

The class action saw the legal successor of the Fortis financial company, the Aegeas Group, and the Dutch shareholders' association VEB, the shareholder protection association Deminor, and Stiftung FortisEffect arguing about compensation for

former shareholders of the financial company Fortis, which had to be bailed out by the Benelux countries in 2008 in the wake of the financial crisis. The shareholder plaintiffs felt unfairly dispossessed by the restructuring.

The Amsterdam appeals court affirmed its jurisdiction in advance, based on the Brussels I Regulation, the Lugano Convention, and Dutch national law, specifically the law on conducting class-action lawsuits (WCAM). The parties then agreed on the sum of 1.3 billion Euro to settle the dispute and to arrange a 25-percent bonus for active plaintiffs to cover their costs.

Insight: Clyde & Co

News

Clyde & Co Insurance Growth Report

Clyde & Co published its Insurance Growth Report on 1 August 2018. Among other findings, the study noted in particular an increase in the number of mergers and acquisitions. Worldwide, there were 186 mergers and acquisitions in the insurance industry in the first half of 2018, as compared to only 180 in the second half of 2017. The transaction volume rose for the second consecutive time since the low in the first half of 2017.

Another positive finding is that the repercussions of the upcoming Brexit are less severe than originally feared. Despite an increase in mergers and acquisitions in Europe in the second half of 2017, the transaction declined in the first half of 2018; nevertheless, Europe is still the second strongest region for M&A activity after the United States.

Overall, the forecasts for worldwide M&A activity are as positive as they have been for a long time. Besides fresh deals in Bermuda and Europe, increased transaction activity is also predicted for China, the United States and the Middle East.

New Joiners

We are pleased to announce that two new advisors, Lukas Wagner and Christina Thiele, have joined our team in Dusseldorf.

Events

- 11 October 2018: Casualty Day on topics related to product liability, insurance questions, autonomous driving and climate change litigation in Dusseldorf
- 20 November 2018: Event on professional liability and public liability insurance (by way of DAV Arge Versicherungsrecht) in Munich

50+

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