CLYDE&CO

Insurance & Reinsurance

Quarterly Update 2/2018 Germany

Content

Dear Readers,

Welcome to our new Quarterly Update! We appreciate your interest. As always, we have prepared information on current developments for you in the area of insurance and reinsurance in Germany.

Our main focus is on the General Data Protection Regulation, which came into force on 25 May 2018. The new data protection provisions increase regulatory requirements on companies and bring new risks, and so have a direct effect on cyber, D&O, and other types of insurance. We addressed these issues closely in early June as part of our European FID&O Roadshow and the events in Madrid, Munich, Dusseldorf, and Paris. We were particularly gratified by the overwhelming interest in Germany, with more than 160 attendees.

This update contains news on the following topics:

- New developments in connection with introduction of a class action for declaratory judgment in Germany and at the European level
- Discussion on reducing liability for board members according to employment law principles
- DIS 2018 arbitration rules enter force
- Current case law, including from the Dusseldorf Higher Regional Court on the relationship between the claims series clause and extended reporting period under a D&O/E&O policy

There has once again been plenty of activity in our firm as well. We closed out our 2017/18 business year with a new record result. This is a reflection of our strategic partnership with the insurance industry and our steadily growing consulting services. In this context we are especially pleased to welcome two new partners:

- Nadja Darwazeh is an expert in international arbitration and also works for the German market from our Paris office
- Mandip Sagoo is a dynamic new member of our London office. Together with our Dusseldorf team and other international colleagues he is expanding our steadily growing consulting practice, particularly in the area of W&I insurance

Additional events are planned in the coming months which we would like to draw your attention to:

- 11 September 2018: Roundtable on supply chain risks together with FAZ and German Legal Publishers in Frankfurt
- 12 September 2018: InsurTech Legal Day together with InsurLab Germany in Cologne
- 11 October 2018: Casualty Day on product liability and product liability insurance in Dusseldorf

Please contact us if you are interested in these events.

We hope you enjoy the newsletter!

Dr Henning Schaloske

Dr Tanja Schramm

The new data protection law: a challenge for the insurance industry

Since 25 May 2018 the General Data Protection Regulation (GDPR) and the new Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) have been in effect. For the insurance industry the new data protection law is particularly relevant in two aspects. First, insurance companies themselves must conform to the data protection requirements. Second, challenges arise for insurance contracts; we will present selected aspects of this below.

In particular, the new data protection law presents new risks for cyber insurance and D&O insurance because of far-reaching possibilities for liability and sanctions.

GDPR Article 82 introduced a standard of liability under which any individual suffering tangible or intangible harm due to a violation of the GDPR is entitled to damages. Under the old BDSG it was disputed whether intangible damages would be compensated. This dispute is now settled, thanks to the unambiguous wording of GDPR Article 82. Liability is fundamentally directed at the company itself and not a responsible member of management, in accordance with the general principles of external liability. Such damage claims are relevant for cyber insurance as part of the third-party damages module. With regard to D&O insurance they become important when members of management bodies are sued by the company under Section 93 (2) sentence 1 of the German Stock Corporation Act (Aktiengesetz, AktG) and Section 43 (2) of the Law on Limited-Liability Companies (GmbHG) for violation of their data protection-specific organizational duties. Particularly with a view to data protection compliance, we may assume that D&O insurers will be increasingly confronted with claims in the future. The same can also be said on the subject of IT security. Linking back to compliance topics on all aspects of antitrust law and corruption, these are two legal areas that will increasingly come to the fore in claims operations, further intensifying the trend toward claims based on allegedly inadequate measures to ensure compliant corporate behavior.

Through the mechanism of liability for damages, GDPR Art. 83 and BDSG Sections 41ff. contain a far-reaching tool for imposing fines as a sanction. While the old BDSG only permitted fines up to a maximum of 300,000 Euro, in the future fines of up to 20 million Euro or 4 percent of total worldwide annual sales from a company's prior fiscal year will be possible. Here, too, GDPR Art. 83 and BDSG Sections 41ff. are primarily directed at companies that are to be held directly liable for data protection violations.

With respect to such fines, cyber insurance policies generally include clauses providing insurance coverage for fines paid by insured parties due to data protection violations, unless there is a legal insurance prohibition. In the future this will increasingly raise the question of the insurability of monetary fines. While there is no clarity on this point either from legislation or a decision by the highest court, and while it is also largely assumed that corresponding insurance coverage is contrary to public policy, there are certainly good reasons for nuanced solutions.

With respect to monetary fines in the context of D&O insurance, the question also arises in the area of data protection law of whether recovery of a monetary fine imposed on a company is completely permissible, permissible with restrictions, or impossible by asserting a claim for damages against a member of management under GmbHG Section 43 (2) or AktG Section 93 (2) sentence 1. Clearly no decision on this question has been issued to date by the highest court. We will have to wait for further clarification, proceeding from the much-discussed antitrust decision by the Dusseldorf State Labor Court (Landesarbeitsgericht). Proceeding from this, the

question arises from the legal coverage aspect as to whether such recovery claims are insurable. Unlike the debatable question of legal liability recovery, its insurability is beyond doubt.

The bottom line is that insurers will face new challenges and tasks when assessing risk. Wherever possible, appropriate precautions should be taken through corresponding underwriting processes and wording design. This also specifically applies to delineating cyber, forward, and D&O policies. Compliance with data protection regulations is sure to quickly become a relevant topic in claims operations.

Dr Henning Schaloske

Amrei Zürn, LL.M.

Plaintiff industry on the home stretch in Germany and Europe?

On 14 June 2018 the Bundestag passed the Law on Introduction of a Class Action for Civil Declaratory Judgment (Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage). In the coalition agreement the governing coalition had agreed to introduce a class action for declaratory judgment to enforce consumer rights. Given the background of the "diesel scandal" that has now occupied the media's attention for almost three years, the federal government has worked to speed up the process. The Ministry of Justice (Bundesjustizministerium) had published a bill to introduce a class action for civil declaratory judgment on 9 May 2018, about eight weeks after the coalition agreement was signed. The law is to take effect on 1 November 2018 so that diesel drivers, in particular, can profit from the supposed benefits of the class action for declaratory judgment before the end of this year.

Draft legislation

The bill to introduce a class action for civil declaratory judgment is based on the previous administration's originally unpublished draft. It allows qualified bodies, such as consumer associations, to request a declaratory judgment to ascertain the presence or absence of central claim-relevant conditions for the benefit of at least ten affected consumers. The class action for declaratory judgment is litigated exclusively between the association and the responding party. However, any consumer has the opportunity to register their claims with the Federal Office of Justice (Bundesamt für Justiz) in a complaints index without the need for an attorney, with the effect of inhibiting the limitation period. Any decision in the class action for declaratory judgment then creates a binding effect for the registered consumers for any subsequent actions brought by the consumer. If the association and the responding party reach a settlement, the court must first approve it. Registered consumers subsequently have the opportunity to leave the settlement within one month.

In the notes on the draft legislation, the federal government assumes that roughly 450 class actions for declaratory judgment will be submitted annually, and it forecasts a success rate of about 50 percent. Factoring in these assumptions, the federal government estimates the net relief to the economy will come to about 1.5 million Euro.

Current developments in Germany

The draft legislation was criticized by the opposition, at times severely, in the Bundestag's first debate on the bill on 8 June 2018. Opposition to the bill was also seen from businesses. One main critique is that the federal government did not consider the consequences for consumers or for businesses when drafting the bill. Among other things, the notion was criticized that consumers might be overburdened when registering their claims and the registration might ultimately not create the effect of inhibiting the limitation period. The idea that only consumers should profit from the law and not also (small) businesses is also viewed critically. There are also fears of a dog race between the associations with standing to sue, since the association that files the first complaint can litigate the class action for a declaratory judgment.

But there were also differences of opinion within the coalition, particularly about which associations should have standing to sue. The CDU/CSU wants to make the ability to sue as

restrictive as possible in order to reduce the risk of abuse. It bases this position on the criticism expressed by business associations.

The Federal Justice Minister conceded during the debate that she had no knowledge of how many potentially harmed consumers would join a possible suit in connection with this "diesel scandal." Beforehand, the figure of potentially two million consumers who might profit from a class action for declaratory judgment in the "diesel scandal" floated through the press. The Federal Office of Justice is to manually maintain the complaints index initially. It remains to be seen how the office will handle the potential flood of applications.

Despite the criticism, the bill was quickly whipped through the parliament and relevant committees with minor changes within six days.

New deal for consumers

The signs are also indicating a storm at the European level. The European Commission recently announced a "New Deal for Consumers." This also includes introducing a directive concerning legal actions by associations to protect the collective interests of consumers. Based on this directive, associations should have the opportunity to enforce consumer interests. The draft proposal also goes further than the class action for declaratory judgment planned in Germany since, subject to certain circumstances, the associations are supposed to be fundamentally able to sue for concrete damages and not just for the ascertainment of facts. If harm is so small that compensation does not make sense, the awarded damages are to be paid to not-for-profit bodies. The associations are to have the ability to bring action even without the consent of the concerned consumers in some circumstances. It remains to be seen what changes will yet be made in the course of the legislative procedure.

Outlook

The possibility of litigating a mass case for consumers will come. German and European legislators have made up their minds. The "diesel scandal" is a major catalyst for this development and the spirit of a potential plaintiff industry is finally out of the bottle. This is fueled by the entry on the market of a number of litigation funders who will find "fitting" targets and lawsuits in their search for investment opportunities.

Whether class actions for declaratory judgment will become established as a way of channeling mass litigation will largely depend on how they are accepted in practice and how the individual actors are positioned. Insurance companies should continue observing the situation in any case since, for one thing, they themselves are actors in mass markets and are thus potential defendants in class actions for declaratory judgment. Furthermore, the possibility of a class action for declaratory judgment results in a heightened risk landscape since we can expect litigious attitudes to increase and therefore considerable costs and possibly also settlements to be in store for businesses.

Daniel Kreienkamp

The new 2018 DIS arbitration rules

The new arbitration rules of Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS) took effect on 1 March 2018. The new 2018 DIS arbitration rules (DIS-SchiedsO 2018) replace the DIS arbitration rules from 1998 previously in effect (DIS-SchiedsO 1998). The new DIS-SchiedsO 2018 applies for all proceedings commencing on or after 1 March 2018.

The new rules contain a series of changes, particularly aimed at making proceedings more efficient and faster. Furthermore, new institutional structures are intended to improve the integrity and transparency of the arbitration process.

The stated goal of procedural efficiency and acceleration is expressed in DIS-SchiedsO 2018 by significantly reduced time periods as compared to DIS-SchiedsO 1998. The respondent, for instance, now has 21 days from delivery of the request for arbitration to appoint an associate arbitrator, instead of the previous 30 days. In the same way, the associate arbitrators now have just 21 days instead of 30 to appoint the chairman.

Under the new DIS-SchiedsO 2018 the (extendable) response period is 45 days from delivery of the request for arbitration to the respondent. DIS-SchiedsO 1998 did not provide for any fixed response period. Rather, after it was impaneled the arbitration tribunal in the past would set a response period for the respondent, which in practice often resulted in considerable delays in the proceedings.

The principle of procedural efficiency is also promoted by the fact that DIS-SchiedsO 2018 creates incentives for efficient conduct of proceedings. According to the new rules the arbitration tribunal can include the efficiency of how the parties conduct the proceedings as part of the cost decision.

It is not only the parties but also the arbitrators who are required to conduct proceedings speedily according to the new rules. In order to ensure efficient conduct of proceedings from the beginning, the new DIS-SchiedsO 2018 generally requires the arbitration tribunal to hold a conference with the parties within 21 days after it is impaneled. The applicable procedural rules, calendar, and the efficient design of the proceedings are the required (minimum) content of this case management conference, as it is called. Among other things, the arbitration tribunal is supposed to discuss with the parties concrete steps to increase procedural efficiency and the possibility of conducting accelerated proceedings or settling the dispute by mutual agreement.

After conducting the proceedings, the arbitration tribunal is supposed to send the arbitration decision to the DIS for review, generally within three months after the last hearing or the last permitted brief. In case of delays in sending the arbitration decision, the newly established DIS Council may reduce the arbitrators' fee at its discretion. The DIS's review is limited to formal errors and nonbinding change suggestions. The arbitration tribunal bears responsibility for the content of the arbitration decision, as was previously the case.

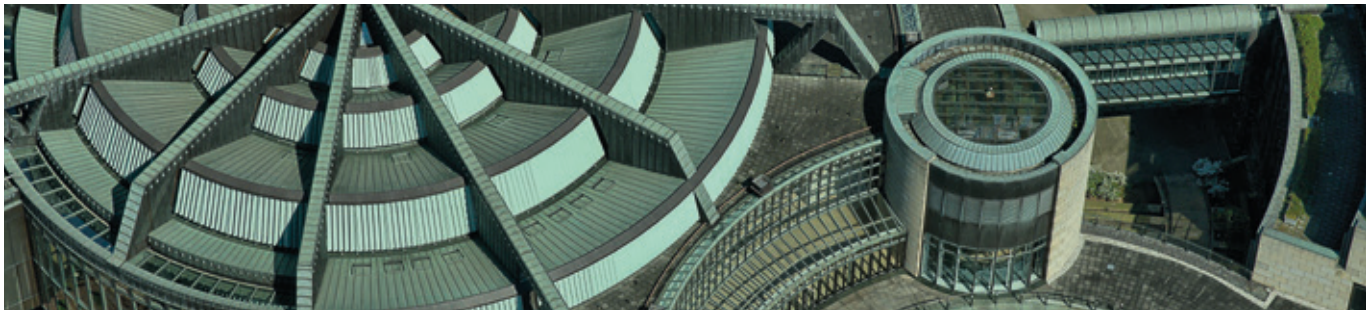
The integrity and transparency of the arbitration proceedings is ensured in particular by the introduction of the DIS Council

according to DIS-SchiedsO 2018. According to the new rules, the DIS Council now decides on requests to reject an arbitrator, a task performed by the arbitration tribunal itself under the old rules. In addition the DIS Council may oust an arbitrator if in its opinion the arbitrator is not performing their responsibilities or will not do so in the future.

Another major change in the new DIS-SchiedsO 2018 is the more detailed rules on conducting multiparty and multi-contract proceedings, involving additional parties in the arbitration process, and combining cases. In addition, DIS-SchiedsO 2018 takes some of the burden off arbitrators, for instance by putting DIS in charge of the setting and requirement of cost certainty for arbitrators' fees and expenses from now on. Furthermore, the new DIS-SchiedsO 2018 explicitly requires the confidentiality of arbitration proceedings.

The result is that DIS has created a modern and up-to-date set of rules for arbitration proceedings that promises time- and cost-effective proceedings in the interest of the parties.

Dr Michael Pocsay, LL.M.



Discussion of reducing liability for board members according to principles of employment law

Traditionally, reducing liability for board members according to principles of employment law is rejected. In its decision from 1975, still cited as a landmark ruling today, the Federal Court of Justice (Bundesgerichtshof, BGH) found that there can be no question of applying employment law principles about restriction of liability to a representative body of a legal entity against which a claim is asserted for violation of its normal managing board obligations. However, more and more authors in the literature are raising the question of why there should be no question of this. The matter of whether and how a limitation of liability should be introduced for board members was already intensively discussed at the 70th German Legal Congress in 2014. Such a limitation of liability, for instance through further development of the law or legal reform, would also be relevant with respect to D&O insurance.

Principles concerning intra-company loss compensation and current opinion

According to the principles developed by the Federal Labor Court (Bundesarbeitsgericht, BAG) for intra-company loss compensation, employees have only limited liability toward their employers for at-fault damages, depending on the degree of culpability. The BAG classifies employee responsibility in four categories: slight negligence, medium negligence, gross negligence, and intentional misconduct. For gross negligence employees must pay the entire damage as a rule though they are not liable for slight negligence, while in case of normal negligence the damage must as a rule be divided proportionally between the employer and employee. There is no question of dividing damages in case of intentional misconduct. A requirement for intra-company loss compensation is that the damaging conduct was "business-related." It is not necessary for the action to be particularly hazard-prone.

Considering the large number of board liability cases, a growing number of authors in the literature are speaking out for lessening the liability of board members according to employment law principles. While few authors favor direct application of these principles, there is a desire to limit or preclude liability for slight negligence using the fiduciary and loyalty duty as leverage to achieve results that are hardly different from the direct application of employment law principles. There are even liability-reduction sympathizers among commentators of the German Stock Corporation Act (Aktiengesetz, AktG). In fact permissibility is already considered the prevailing opinion in the area of recovering monetary fines. Numerous authors, however, oppose any transfer of employment law valuations and do not wish to apply intra-company loss compensation to board members either directly or indirectly.

Court rulings have so far not dealt with this question in depth. In the 1975 ruling mentioned above, the BGH rejected the application of employment law principles. In a second landmark decision from 1983, too, the BGH stated that "the precise purpose of hiring and appointing a member of the managing board or a managing director is to transfer the problems and risks of managing the association or a company to a person who has control of them." Accordingly, limiting liability was neither "justified nor required." To date the BAG has not yet taken a position on the question, as far as we can tell.

Arguments for reducing liability according to employment law principles

When examining the question of whether and how intra-company loss compensation might be applicable to board members, proponents generally argue using the reasons for intra-company loss compensation and raise the question of whether they can be transferred to board members. Intra-company loss compensation is based essentially on the business risk, protection from destruction of the economic basis, fairness considerations, and the employer's fiduciary duty.

Business risk

With respect to the business risk, it is argued that it is crucially based not on the employer's organizational authority emphasized by the BAG but rather on the fact that the employer takes in the company's profits (symmetry concept) and can more easily cushion the harm caused by their employees (absorption concept). Understood in this way, the division of risk could also be applied to board members.

Protection from destruction of economic basis

Supplementally, intra-company loss compensation is justified by the fact that it serves to provide protection from the destruction of the economic basis, required as a fundamental right. In this regard the BAG states that unlimited liability touches both on Art. 2 (1) of the Basic Law (Grundgesetz, GG) and on GG Art. 12 (1). Proponents of reducing liability for board members argue that, while it is not beyond doubt whether a prohibition of liability that destroys the economic basis going beyond granting a discharge of residual debt can actually be found in the Basic Law, nevertheless, if such a prohibition is recognized, it is not evident why it should not also apply for board members.

Fairness considerations

The fairness considerations underlying intra-company loss compensation are also not of a specifically employment law nature and fundamentally transferable to board members. Accordingly, it is perceived as unfair that someone might be burdened with ruinous liability for a minor error if the harmed party must reckon with such errors and can cope with the consequences thereof.

Fiduciary duty

Finally, proponents of limiting liability also make use of the approach of the employer's fiduciary duty in order to achieve a valuation transfer from employment law to company law without having to explicitly support applying intra-company loss compensation. They refer to the duty of loyalty that is recognized in the relationship between the company and board member.

Synchronized valuation with executives

In addition, proponents also insist on synchronized valuation with the executive. While the BAG to date has not explicitly affirmed such a limitation of liability, it does appear to tend in that direction if the damaging action does not occur while performing an activity that is characteristic for the executive's position. By contrast, the BGH's decision of 25 June 2001 would also limit executives' liability, unless they are managing directors.

An outside managing director, at any rate, should not differ de facto from an executive. Furthermore, the distinction can lead to unusual results in compliance incidents, for instance if the executive who is directly responsible for a violation of antitrust law is not held liable while the board member that merely supervised events with slight negligence bears full liability.

Arguments against reducing liability according to employment law principles

The dominant opinion is opposed to reducing liability for board members under employment law principles, referring to contrary precedents from the BGH. For board-specific and other activities at the corporate level, it is further argued that a limitation of liability is not possible since board members directly represent the corporation in this area and act as entrepreneurs themselves in this regard. It is further stated that a reduction of liability for boards has no basis in the law and the legislature also indirectly sought to preclude any legal development in that direction with Section 31 (a) of the German Civil Code (Bürgerliches Gesetzbuch, BGB), which was introduced in 2009, since liability was to be limited only for an association's voluntary directors. Moreover, it is assumed that there is no regulatory loophole for a privileged liability position for board members, and for this reason there can be no analogous application of employment law principles. Reference is also made in this regard to the conclusive character of board liability in GmbHG Section 43 and AktG Section 93.

It is additionally stated that board members cannot be compared to employees. Unlike employees, board members act independent of instruction and regularly receive relatively large compensation. In addition, employees are supposed to be further down in the structure and more highly incorporated into the respective organization. The function of board liability, namely the compensation and prevention function, is also supposed to conflict. It is argued that applying intra-company loss compensation results in overcompensation since the board member also benefits from the D&O insurance and the business judgment rule and is ultimately in a better position than an employee.

Conclusion and possible effects on D&O insurers

The intense discussion in the literature shows that at least a blanket rejection of reduced liability for board members under employment law principles must be called into question. It does not appear impossible that trial courts will take up these arguments since the cited rulings from the BGH definitely contain handles for such argumentation and in some cases are based on outdated laws and facts.

When applying such reduced liability, D&O insurance might require adjustments as have already been made with regard to executives. Some wording, for instance, provides for first-party loss coverage in the event an insured person is exempted from liability based on the principles of intra-company loss compensation. But even at the level of defense against claims, the arguments for reduced liability certainly can be used in the settlement negotiations and thus affect the interests of the D&O insurer.

Amrei Zürn, LL.M.

Case law

BGH: Managing director's liability is like insolvency administrator's in case of self-administration

In its ruling of 26 April 2018 the Federal Court of Justice (Bundesgerichtshof, BGH) affirmed the liability of a business manager in self-administration, analogous to the liability of an insolvency administrator under Sections 60, 61 of the Bankruptcy Code (Insolvenzordnung, InsO). [1]

The defendant had worked as a restructuring expert for the "GmbH & Co. KG"-type limited partnership after it had gotten into economic difficulties. He was additionally appointed as managing director of the partnership's "Komplementär-GmbH"-type limited partner. In March 2014 insolvency proceedings were opened with respect to the company's assets and self-administration was ordered. In November 2014 the creditors approved an insolvency plan prepared by the defendant and other managing directors that sought to allow continuation of the company in addition to satisfying the creditors and preserving jobs. The Local Court subsequently set aside the insolvency proceedings.

In the meantime the company ordered merchandise from the plaintiff but did not pay the invoice. Afterwards new insolvency proceedings were opened at the company's own request. In this case the plaintiff seeks recourse from the defendant for the bad debt loss in the form of damages equal to the invoiced amount for the merchandise plus interest and pretrial costs. The complaint was dismissed in the lower courts.

The BGH, however, found that the defendant can bear liability to the plaintiff that is analogous to InsO Section 61. Even though the provisions of InsO Section 60, 61 are not directly applicable since the defendant was not appointed as insolvency administrator, the rules may be applied in case of self-administration of a legal entity that is analogous to the business managers with representation authority. In this case there is an unintended gap in the law with respect to the business manager's liability when self-administration is ordered with respect to the assets of the insolvent company, since the reference by InsO Section 270 (1) sentence 2 to InsO Sections 60, 61 does not directly cover the executive bodies of the debtor.

BGH: Internal compensation between liability insurers in case of multiple insurance with partially identical interest and risk

If the identical interest has multiple liability policies against the identical risk, then according to a ruling by the BGH this is a case of Section 78 (1) alternative 2 of the German Insurance Contract Act (Versicherungsvertragsgesetz, VVG).[2]

The liability insurer bringing suit seeks recourse from a physician for joint and several compensation under subrogated rights of a hospital it insures. The defendant is a neurosurgeon who is both in private practice as a specialist in his own office and works as a freelance physician in the hospital. According to the fee agreement between the defendant and the hospital and a corresponding coverage agreement between the insurer and the hospital, the liability insurance covers the doctor's freelance work. The defendant maintains liability insurance with another insurer for his work in private practice.

In October 2009 a patient presented with back pain in the defendant's office. The defendant ordered an MRT. He analyzed the result and explained the further course of treatment and a possible operation to the patient. After obtaining a second opinion the patient decided to undergo the operation. The indication was confirmed by a department at the hospital. The patient was admitted to hospital for treatment on 9 September 2010. The following day, the

[1] BGH, decision of 26 April 2018 – IX ZR 238/17.
[2] BGH, decision of 13 March 2018 – VI ZR 151/17.

defendant performed the operation in his function as freelance physician. Two days later there was a dislocation of the cage used, resulting in the defendant performing revision surgery. No complaint-free condition was achieved through this, a second intervention, and additional treatments.

A mediation process initiated by the patient came to the conclusion that the operation had not been indicated, or was only relatively indicated. The defendant caused permanent damage to the patient; damages were indicated on the merits.

The insurer subsequently made a settlement agreement with the patient and paid him €170,000 plus attorneys' costs. In return the patient waived all claims against the hospital and the defendant from the treatment. The liability insurer that filed suit also paid €24,500 to the patient's statutory health fund.

The suit and the appeal were unsuccessful. The BGH rejected the liability insurer's appeal, remarking that it could not demand reimbursement under the joint and several debt relationship existing between the defendant and the hospital for half the damages paid. It is true that the defendant and the hospital fundamentally owed damages to the harmed party as joint and several debtors. To the extent the defendant's alleged treatment culpability is allocated to his freelance medical work, the defendant is not required to pay compensation within the joint and several debtors' internal relationship, nor is he a "third party" within the meaning of VVG Section 86 (1) sentence 1. To the extent his alleged treatment and information culpability might be inseparably allocated to his private medical practice, the defendant does not have capacity to be sued, in any case. Therefore priority goes to compensation among the liability insurers when there are multiple policies, as provided for in VVG Section 78 (1) alternative 2, (2) sentence 1.

BGH: Duties of a real estate agent and how they relate to obligations of the policyholder

In its ruling of 30 November 2017 the BGH specified the duties of a real estate agent and how they relate to obligations of the policyholder.[3]

The plaintiff, a certified insurance specialist, seeks recourse from the defendants for alleged violations of duties under an agency agreement. The plaintiff, who worked for defendant #1 between 2008 and 2010, acted as agent for her own accident insurance policy in which her husband was an insured person. After the end of her employment she gave all documents to defendant #2, who worked for defendant #1 as a sales representative.

In 2012 the plaintiff's husband was in a serious traffic accident. Defendant #2 sent the completed accident report form and the discharge letter from the hospital to the insurance company, which refused to provide coverage for the stated reason that the disability was not medically certified within the 18-month period.

The plaintiff believes the defendants are responsible for the missed deadline. According to the agency agreement, they should have informed the plaintiff that the disability must be determined within 18 months, independent of the insurance company. Additionally, it had been agreed with defendant #2 that she would take care of the entire claims process. Therefore defendant #2 should have made sure that the disability was medically certified and reported to the insurance company within the 18-month period. The complaint seeking compensation for the insurance benefits was rejected in the lower courts.

[3] BGH, decision of 30 November 2017 – I ZR 143/16.

The BGH first determined that a policyholder's damage compensation claims that relate not to a violation of duties when creating the contract but rather during processing of the claim are based on the general rule set forth in Section 280 (1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB). In addition, an insurance agent's duties fundamentally also include providing assistance when adjusting an insured loss. The fact that it was among the policyholder's own responsibilities to be informed about exclusion periods after an insured event under the policy terms and conditions does not work in favor of the insurance agent. The policyholder's obligations relate solely to the relationship between the policyholder and the insurer. The policyholder tasks precisely the insurance agent as a subject matter expert to preserve and enforce the policyholder´s rights and claims. In the BGH's view there is an advisory duty even if the customer himself is an expert, as in the present case.

The BGH remanded the case back to the appeals court to be re-decided.

BGH: Risk exclusions in trade fair insurance

In a ruling on 22 February 2018 the BGH stressed that risk exclusions must be interpreted narrowly in transport insurance.[4]

The plaintiff, a furniture manufacturer, asserts a claim for benefits under a transport insurance policy. In 2011 it sent various exhibition pieces to a furniture show in Moscow by truck, purchasing transport insurance in the form of trade fair insurance from the defendant, an insurance company. The plaintiff alleges that the display pieces, which had been properly packed in crates specially built for the transport at the time of loading, arrived in damaged condition in Moscow after Russian customs agents had taken them out of the crates and then "tossed" them loosely into the transport crates for continuing transport with inadequate packing. The insurer refused to provide coverage, referring to the policy terms which stated that insurance does not cover the risk of confiscation, seizure, or other intervention by authorities, as well as damage caused by missing or defective packing. The Regional Court (Landgericht, LG) dismissed the complaint and the Higher Regional Court (Oberlandesgericht, OLG) upheld it.

The BGH rejected the insurer's appeal, stating that it was not sufficient for fundamental significance within the meaning of Section 543 (2) sentence 1 number1 of the Code of Civil Procedure (Zivilprozessordnung, ZPO) that the matter turned on the interpretation of general insurance terms and conditions. It was undisputed in the literature that transport insurance clauses providing for exclusions in case of confiscation, seizure, or other interventions by authorities were a catchall element in the last-named alternative that was intended to include other restrictive orders by public authorities, particularly sovereign actions such as blockades or closures that were not aimed directly at the transported goods. Therefore mere damage to goods during a customs inspection were not covered by the exclusion.

The catchall element follows solely from the point of whether the insured goods were properly packed when they were surrendered for transport.

BGH: Attorney's duty to verify correct performance of instructions

If the counsel of record gives an instruction to prepare a request to extend the appeal deadline, before signing the request they must verify that it is addressed to the competent court. So said the BGH in its ruling of 29 August 2017 [5]

The defendants were sued for damages in various courts for allegedly erroneous information in a prospectus. They lost the dispute in the LG and filed an appeal in a timely manner at the OLG. On a Friday afternoon their attorneys requested an extension of the briefing period which was set to expire the following Monday. This brief was accidentally addressed to the LG. It was forwarded to the OLG but did not arrive there until Tuesday. The OLG sent notification that it was not possible to extend the deadline as the extension request was not received by the court until after the appeal briefing deadline had expired. The defendants then requested that the case be reinstated, and provided the reasons for the appeal. They stated that the attorney in charge had verbally instructed the legal assistant to file requests for extension of the appeal briefing deadline in a total of 18 cases. She explicitly pointed out that the address field should contain the individual court where the appeal was being filed. For this reason she did not recheck the address when signing the request.

The defendants' appeal was unsuccessful. The BGH found that the missed deadline for providing the reasons for appeal

[4] BGH, decision of 22 February 2018 – IV ZR 318/16.
[5] BGH, decision of 29 August 2017 – VI ZB 49/16.

was due to the attorney's fault, which under ZPO Section 85 (2) was attributable to the defendants. The attorney is responsible for making sure that a procedural action to preserve a deadline is performed at the competent court. The defendants' attorney did not satisfy these requirements. If an attorney gives instructions in advance regarding the content of the brief, such instruction regularly does not release them from the duty to check the product submitted to them before signing it to verify that the requirements were followed correctly and completely.

BGH: Reimursement of travel expenses for attorney not based at the trial court

In a ruling of 4 July 2017 the BGH continued its previous practice regarding reimbursement of travel expenses for attorneys.[6]

The plaintiffs unsuccessfully sued an airline company headquartered in Spain for 500 Euro for a canceled flight. The plaintiffs objected to the costs set by the Local Court, including travel expenses for the defendant's attorney, who was not based in the trial location. The LG likewise dismissed the plaintiffs' immediate appeal, stating that a party headquartered in another country was not required to hire an attorney based at the trial court but rather was free to hire an attorney in whom they had confidence.

The BGH upheld the appeals court's opinion. According to case law at the BGH a foreign party fundamentally cannot be expected to base their selection of their German attorney on the location of the trial court.

Nor is this negated by the fact that the company has its own legal department. In the BGH's opinion, even if there is a legal department one cannot automatically assume that its employees are capable of litigating a civil case in Germany without calling in a German attorney.

Dusseldorf OLG: Claims on and precautionary reporting to D&O/E&O insurance

In a ruling of 12 July 2017 the Dusseldorf OLG dealt with the relationship between a claims series clause with the extended reporting period and a combined D&O/E&O policy.[7]

The plaintiff asserts claims against the defendant, an insurance company, from a combined D&O/E&O policy. The policy began on 1 September 2007 and ended on 1 September 2009. The plaintiff had already been sued by investors during the term of the insurance policy for allegedly unexplained currency hedging transactions in the prospectus of a mutual fund and related violations of pre-contractual notification duties. The insurer confirmed coverage for these claims according to the terms in the form of cover for legal defense costs, subject to any exclusions. After the end of the extended reporting period additional complaints were filed against the plaintiff for the same alleged violation of duties; for these the insurer did not provide cover for legal defense costs due to expiration of the extended reporting period. The plaintiff then sued the insurance company directly. The LG dismissed the suit.

The plaintiff states that all claims through the claims series clause should form a single series claim that is considered to have occurred at the time of the first claim, i.e., during the term of the insurance policy. Expiration of the extended reporting period should not produce any different assessment. Furthermore, the report of the first claim during the insured period represents a report of circumstances, so that all further claims are also covered and ensured by it. In this regard the insurer committed itself through its declaration of cover for legal defense costs.

In its ruling the OLG pointed out that the appeal has no chance of success. First, the court found that no insured

[6] BGH, decision of 4 July 2017 – X ZB 11/15.
[7] Dusseldorf OLG, decision, of 12 July 2017 – 4 U 61/17.

event per the terms had occurred since the investors asserted their claims against the plaintiff only after the end of the extended reporting period. Furthermore, merely a claim by one investor for alleged prospectus errors does not represent a claim for the benefit of all investors.

In addition, the claims series clause is a risk limiting clause for the benefit of the insurer. No statement can be found in it as to whether an insured event is considered to have occurred during the insured period. The clause merely determines when multiple liability claims are considered one insured event and not when an insured event exists at all. Also, the claims series clause does not establish perpetual liability beyond the end of the extended reporting period.

In addition, the OLG emphasized that granting cover for legal costs is no indicator that the policyholder actually has a claim to coverage. The insurer can even provide cover for legal defense costs merely as a goodwill gesture, without committing itself with respect to indemnification.

Munich LG II: Liability for actions of a managing director who is sole shareholder

In a decision of 26 January 2017 the Munich LG II dealt with the liability of a managing director who was a sole shareholder.[8]

The plaintiff seeks damages and claims based on unjust enrichment from the defendant. The defendant was sole shareholder and managing director of A-GmbH, which in turn was the sole shareholder of B-GmbH, whose managing director was likewise the defendant. The plaintiff alleges that the defendant made a number of payments without legal grounds.

The LG dismissed the complaint. A claim for damages under Section 43 (2) of the Law on Limited-Liability Companies (GmbHG) is not possible because the defendant was the direct or indirect sole shareholder of both companies during the period in dispute. There is fundamentally no violation of duties when the shareholders' meeting issues instructions to the managing director. The managing director must follow those instructions and therefore is not liable under GmbHG Section 43 (2). This principle applies all the more when the company has just one shareholder, even if the managing director knowingly makes decisions and takes actions that are detrimental to the company's assets. No formal shareholders' resolution is necessary for instructions from the sole shareholder of a one-person company.

[8] Munich LG II, decision of 26 January 2017 – 3 O 3420/15.

Recent developments

EU Commission wants better protection for whistleblowers

Dieselgate, Luxleaks, Panama Papers, Cambridge Analytica... the "scandals" of recent times show that whistleblowers can play a vital role in exposing illegal activities. Whistleblower protections are not uniformly regulated within the EU, however. In fact, whistleblowers currently have special protection in only ten countries.

This is why on 23 April 2018 the EU Commission published a proposal for new EU-wide standards for protecting whistleblowers, for instance from intimidation and retaliation and the concomitant loss of reputation. The standards provide for a three-part reporting system. To begin with, companies with more than 50 employees or annual sales in excess of €10 million should set up confidential internal communication channels for whistleblowers. If the company does not react to a complaint, whistleblowers should be able to contact government regulatory agencies. As a final step, the proposal provides for access to the public, for instance through journalists and the media.

If whistleblowers suffer retaliatory action, they should have access to free advice and reasonable corrective measures, for instance to avoid being fired or harassed in the workplace. The burden of proof is reversed in these cases. The individual or organization that is the subject of the whistleblower's report must therefore show that they have taken no retaliatory action against the whistleblower. Furthermore, whistleblowers are protected in court proceedings.

Note, however, that only whistleblowers acting in the public interest are to receive protection. This is intended to discourage smear campaigns or abusive reports.

Insurance regulation highlights for 2018

The Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) has set its main insurance supervisory goals for 2018. The focus this year will particularly include cyber security, insurers' handling of Economic Scenario Generators (ESGs) when valuing insurance provisions under Solvency II, sustainability of capital investments by insurers and pension funds, loss reserves, premiums, loss and result development in non-life insurance, and analysis of regular reporting (Regular Supervisory Regime – RSR).

BaFin specifies IT requirements for the insurance industry

In mid-March BaFin submitted for consultation the draft circular, "Insurance Supervisory Requirements for IT" (Versicherungsaufsichtsrechtliche Anforderungen an die IT, VAIT). Like BAIT for the banking sector, VAIT is intended to represent the future central component of IT supervision over all insurance companies and pension funds in Germany.

For companies subject to the Solvency II directive, the rules contained in the "minimum requirements for company organization" (MaGo) will remain unchanged.

In particular, VAIT should create a flexible and understandable framework for management teams to manage IT resources and information risk and information security. It should also increase risk awareness in companies and vis-à-vis their service providers in the area of IT. One central focus is on the company's management levels.

VAIT is divided into eight major categories of requirements, including IT governance, IT strategy, information risk management, and outsourcing. With regard to IT strategy, management must regularly deal with the strategic implications of IT for their business strategy. In the area of IT governance, VAIT ties in with that and requires the management to define the rules for IT structure and process organization on the basis of the IT strategy and to adapt them promptly in case of process and activity changes.

Infrastructure investment: BaFin publishes interpretation decision on risk treatment under Solvency II.

On 28 March 2018 BaFin published an interpretation decision on the treatment of infrastructure investments in the context of the prudent person principle. The interpretation decision is

addressed to all direct insurers and reinsurers subject to the Solvency II Directive.

Infrastructure investments differ significantly from many other capital investments, primarily through their high degree of complexity and heterogeneity. They require intensive study not only of the investment and risk itself but also of the market position and growth potential. Even though infrastructure investments are not classified as "non-ordinary investments" per se in the view of BaFin according to EIOPA Guideline 28 on the governance system, a large number of companies will classify them as non-ordinary due to their complexity or volume.

Insight: Clyde & Co

News

New office opened in Bristol

On 1 May 2018 Clyde & Co opened an office in Bristol. The three new partners, Ian Peacock, John Eastlake, and Peter O'Brien, strengthen the teams in Great Britain in the areas of professional and financial disputes and global projects and construction. With the new office in Bristol, Clyde & Co is now represented at ten locations in Great Britain.

Financial Year 2017/18

Clyde & Co had a sales volume of approximately GBP 550 million in the last financial year ending 30 April 2018. This represents an approximately ten-percent increase in companywide sales over the previous year.

Events

- 11 September 2018: Roundtable on supply chain risks, together with FAZ and German Legal Publishers in Frankfurt
- 12 September 2018: InsurTech Legal Day, together with InsurLab Germany in Cologne
- 11 October 2018: Casualty Day on product liability and product liability insurance in Dusseldorf

50+

Offices*

3,800

Total staff

415

Partners

1,800

Lawyers

www.clydeco.com

*includes associated offices

Clyde & Co (Deutschland) LLP trades as Clyde & Co and is a limited liability partnership registered in England and Wales under number OC413029 and with its registered office at The St Botolph Building, 138 Houndsditch, London, EC3A 7AR, United Kingdom. Clyde & Co (Deutschland) LLP is registered in the partnership register of the Amtsgericht Essen under number PR 3857.

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