New German regulatory regime almost completed

Now that the Federal Parliament has passed the bill to modernise financial regulation of insurance companies, only the approval of the German Federal Council is outstanding. Solvency II will then become national law 16 years after the beginning of negotiations at European level. The final stage of implementation of Solvency II has therefore commenced. The major sections of the new regulatory regime will come into effect as planned on 1 January 2016.

The main changes caused by the new Insurance Supervision Act relate to the implementation of the three pillars of Solvency II, i.e. quantitative regulation (pillar 1), governance (pillar 2) and reporting and disclosure obligations (pillar 3).

The change to principle-based regulatory regime is a further major part of Solvency II. In principle-based regulation, the legislator or the BaFin will no longer impose specific requirements on the insurers but establish general principles which the insurers must observe. How these principles are to be implemented is the responsibility of the individual insurer. The latter can, however, in future increasingly take account of their own individual characteristics and risks.

Market value risk oriented risk assessment – standard model or internal model?

Under the first pillar, in future a risk and market value oriented risk assessment of their capital and liabilities will be demanded of insurers. By a variety of measures, the long-term guarantees of the insurance industry are intended to be secured. Insurers can now use an internal model to calculate their solvency requirements. The internal model differs significantly from the standard model. The risks and special conditions of each insurer or insurance group can thereby be taken into account. The standard model and internal model of the insurers constitute an essential element of Solvency II. The balance sheet of the company is, however, depending on market value, subject to considerable fluctuations in the valuation of the capital investments. The capital requirement of the insurer is determined by an assumed maximum loss. In order to limit the effort on risk assessment to a reasonable degree, Solvency II offers the use of a standard model. The internal model is significantly more

Dear Reader,

On 5 February 2015, the German Federal Parliament (Bundestag) passed the bill to modernise financial regulation of insurance companies. The German Federal Council (Bundesrat) will most likely on 6 March 2015 pass the legislation which in particular amends the Insurance Supervisiory Act (VAG). The practical implementation which is already pending will thereby be approaching completion. By the new regulatory regime, it is intended to establish uniform competition standards in the insurance sector by consistent regulatory practice in Europe. In particular, however, the solvency of the insurance industry to fulfill their contractual duties even in times of low interest, shall be secured for the long-term and thereby protection for the insured shall be improved. However, the many new requirements and the transition to principle-based regulation is an enormous challenge in particular for smaller and medium-sized insurers.

In our leading article, we inform you of selected amendments to the VAG and explain their effects on the insurance industry.

We trust you will enjoy reading this newsletter!

Thomas Heitzer Daniel Kreienkamp

complicated, the standard model is not, however, in its strict form adequate for many insurers. The risk profile of the individual companies will therefore be substantially incorrectly assessed. The internal model, on the other hand, demands immense personnel and material resources for its implementation and maintenance. The individual risk model also has to be approved by the BaFin which thereby requires evidence of actual use of the model in the management of the company. In addition, many insurers will for reasons of caution most likely operate the standard model at least for a foreseeable period, parallel to the internal model.

Governance structure according to Solvency II

By the 9th VAG amendment of 2007, with the introduction of Sec. 64a VAG, the first requirements on the organisation of the business of insurers were codified. In the second pillar of Solvency II, these requirements are now extended and further specified. According to Sec. 23 ss. 1 VAG-E, a reasonable transparent organisational structure is to be introduced with clear attribution and reasonable separation of responsibilities and with an effective internal communication system. Such an organisational structure includes four key functions (risk management, compliance, internal audit and actuarial function).

The BaFin will in the future review not only the reliability and professionality ("fit and proper") of the management and supervisory board members but also the reliability and professionality of the holders of key functions. Even if in Sec. 24 VAG-E only managers and holders of special functions are named, these criteria are also applicable, according to the explanatory memorandum to the Act, to members of the supervisory board. According to the explanatory memorandum, no identical absolute requirements on their professionality are intended to be imposed on all persons affected. The actual circumstances of the individual insurer are rather to be taken into account.

Comprehensive transparency – practical limits?

The third pillar of Solvency II includes mainly the reporting obligations of the companies both to the regulatory authorities and the public. The annual solvency and financial report is subject mainly to qualitative requirements, in addition further reporting forms are intended which regulate the quantitative content. Due to the extent and quality of the information required from the companies, many insurers will clearly be unable to meet the organisational and personnel demands arising from the many obligations. Small and medium-sized insurers are therefore reliant on the BaFin interpreting the requirements reasonably and appropriately to the risk.

Smaller insurance companies unable to meet the demands – proportionality to the rescue?

In addition to the major European and worldwide insurance groups, the German market is characterised by many smaller and medium-sized insurers often organised as mutual insurance associations. Overall, these insurers are faced with particular challenges of complying with and implementing the new regulations in spite of their relatively limited personnel and financial capacities. In order to take account of these differences between insurance companies, according to the European provisions the principle of proportionality is intended to assist. According thereto, the regulatory requirements are to be complied with always taking account of the individual risks of the company, the nature and extent of the business and the complexity of the business model. The risk profile and complexity of the business model often correlate to the size of the insurance company, even though this must not necessarily be the case. The principle of proportionality is linked rather to the individual risk profile of each company and therefore demands individual consideration. The principle of proportionality does not help, however, on the question of whether the applicable requirements are to be complied with, but only as to the manner and method by which they must be reflected or not.

Effects on transaction business

A possibility for smaller and medium-sized insurers to be able to satisfy the requirements of the new regulatory regime in general or at least cost efficiently consists in mergers to form greater units but also restructuring the portfolio. It remains, however, to be seen whether the frequently anticipated consolidation of the German insurance market including further run-off transactions come about or whether the individual insurers will find solutions to guarantee their existing independence.

In the case of the transfer of insurance portfolios to foreign insurers, policyholders have, from 1 January 2016, a special right of termination if the regulatory authority changes by the transfer. This increases the risk and costs for a transfer of insurance portfolios to foreign bidders and could in future render such transactions considerably more difficult.

Prospects

The VAG amendment to implement Solvency II is almost complete. From 2016, it will be shown whether and to what extent the new regulatory regime

will pass the test in practice. Solvency II and the VAG amendment will, in particular on issues such as capital sufficiency and governance, be comprehensible instruments, appropriate in accordance with international standards, to manage the insurance industry. How the BaFin deals with small and medium-sized insurers individually and appropriately to their risk will, however, be decisive. This applies in particular with regard to the disclosure and reporting obligations. It remains to be seen whether the future regulatory regime with many uncertain legal terms remains predictable and calculable for the companies. A longer period of uncertainty and possible increase in disputes with the regulatory authorities can be expected. Even though the consultations on Solvency II have lasted for 16 years, it is not to be expected either that the legislator will refrain from further amendments affecting the insurance industry in general and the insurance regulatory regime in particular. Because of the significance of the insurance industry and the risks posed by the continuing long period of low interest, the insurers will remain in the focus of politicians and the public. Further regulation of the insurance industry is to be expected.

Recent judgements

ECJ, final submission of the Advocate General in C-507/13 of 20 November 2014 – legality of the limitation of banker bonuses by CRD-IV package

In the CRD-IV package (consisting of Directive 2013/36/EU and Regulation 575/2013), a comprehensive package regulating the banking sector at European level was issued in 2013. This package includes provisions under which variable remuneration of bank managers should be indexed to their fixed remuneration. Concretely, it was provided that the variable remuneration may not exceed the fixed remuneration unless shareholders of a financial institution vote by qualified majority for a higher variable remuneration in an individual case. In that case, however, the variable remuneration can be at most be double the fixed remuneration.

The United Kingdom objects in its claim submitted to the ECJ in September 2013 in particular to the maximum variable remuneration set. It was of the view that the limitation of variable remuneration should not have been issued on the basis of treaty provisions on the right of establishment and free movement of services. They are said to fall within the area of social policy and therefore within the jurisdiction of the Member States. In addition, it claimed that the provisions breach the principles of proportionality and subsidiarity.

The responsible Advocate General at the ECJ, Jääskinen, in his final opinion, rejected the opinion of the United Kingdom. While the provisions on the amount of remuneration are alone within the jurisdiction of the Member States, since the variable remuneration elements are in turn linked to a fixed salary which can be freely negotiated, the overall remuneration of bankers is not capped by the CRD-IV regulations. In addition, the payment of the variable remuneration elements directly affects the risk profile of the financial institution so that thereby its stability and the stability of the financial markets in the EU could be adversely affected. This fact justifies a uniform European provision.

BGH (Federal Court of Justice), judgement of 17 December 2014 – IV ZR 90/13 – burden of proof on exclusion due to deliberate breach of duty

The plaintiff insolvency administrator was ordered with legal effect to pay approximately EUR 830,000 due to breach of duty in the course of his work as insolvency administrator. His liability insurer, however, refused to pay since the plaintiff committed a deliberate breach of duty in the meaning of Sec. 4 No. 6 General Insurance Conditions.

The plaintiff appealed against this judgement and sought a declaration that the insurer was liable. The claim was unsuccessful in first and second instances. The BGH, however, set aside the appeal judgement and referred the matter back.

Firstly, the BGH found that, with regard to the breach ascertained, the liability judgement and the decisions made therein had binding effect. In the insurance proceedings, it is no longer possible to affirm a breach of duty by the policyholder for causing the damage other than that found in the liability proceedings. With regard to the awareness of the breach, there was, however, no binding effect. This exclusion should rather have been separately reviewed in the insurance proceedings.

The BGH stated that only a policyholder who was positively aware of the breach acts with intent. Conditional intent, in which he only considered the obligation in question to be possible, and negligence are not adequate. The insurer bears the burden of substantiation and proof for the satisfaction of the subjective conditions for the application of the exclusion. It must therefore establish that the policyholder was aware of how he should have behaved. It follows therefrom that the insurer must initially make factual submissions which at least indicate awareness of the policyholder of the breach of duty. The submission of further indications may then be dispensed with if a breach of elementary professional duties is concerned, knowledge of which by any member of such a profession could be assumed from experience (fundamental obligations).

Apart from breaches of professional fundamental obligations in which internal processes can be assumed from external acts and the extent of the objective breach of duty, it is, however, the task of the insurer to submit circumstances which can be considered

as compelling indications for a deliberate breach of duty. Only if that is done, does the secondary burden of refuting these indications become the obligation of the policyholder.

BGH, judgement of 5 November 2014 – IV ZR 8/13 – exclusion of retroactive insurance due to knowledge of breach of duty

The plaintiff claimed against the insurer under a liability insurance which also covered damage caused by co-insured. In 2006, the co-insured intervener was instructed to plan a building. In 2007, the parties agreed on retroactive insurance cover with an exclusion "known breaches excluded". The planning of the intervener was defective and the Plaintiff stated that this constituted an insured breach.

It was decisive in the case whether the Plaintiff already knew of the defectiveness of the planning of the intervener at the time of the conclusion of the insurance policy. The BGH disapproved of the criterion on which the OLG Celle had replied to this question. Both the clause "known breaches excluded" and also Sec. 2 ss. 2 sentence 2 VVG old version required positive knowledge by the policyholder of claims which have already arisen or a breach of duty giving rise to such claims. The fact that the policyholder has to have known of the facts leading to a claim cannot be the reason for this exclusion because it constitutes only an accusation of negligence.

The policyholder in the opinion of the BGH when agreeing a retroactive insurance, is intended to be prevented from engaging in manipulation. Even lack of knowledge because of gross negligence does not, however, include that risk. It is therefore not adequate if the policyholder is only aware of facts which indicate that an insurance claim could have already arisen. As long as a policyholder does not himself draw such conclusion, for example because he assumes other causes for the damage known to it, or does not adequately consider the cause of the damage, he still has no positive knowledge of an insurance claim.

It would be different only if the judge of facts on the basis of the circumstances of the individual case was convinced that an average policyholder drew the obvious conclusion of apparent cause of the damage and therefore was aware that the damage was based on facts which would correspond to an insured event.

BGH, judgement of 22 November 2014 – IV ZR 243/13, IV ZR 242/13, IV ZR 303/13 – extent of the policyholder's disclosure obligation

The plaintiff, a statutory health insurer, claims against the defendant for payment under a liability insurance which also covered damage suffered by the policyholder "as a result of a negligently induced breach by its organs, officials and employees in the course of its business according to its Articles of Association (self-damage)".

According to Sec. 5 No. 3a) of the agreed General Insurance Conditions (AVB), the policyholder is, inter alia, obliged, while "observing the instructions of the insurer, to do everything to clarify the claim insofar as thereby nothing inequitable is expected from it" and "to disclose all facts which relate to the claim".

The case concerned an error of a clerk of the plaintiff which led to higher payments by the plaintiff. The losses were reported by the plaintiff to the lead insurer which then requested further data and a statement from the relevant official. The plaintiff, while it answered, failed to provide the requested statement of the official. In fact, it noted that the relevant employee "will not be able to provide any information about an individual notification after more than five years". The lead insurer then informed the plaintiff that it insisted on this statement and requested further information. The plaintiff did not react further.

In its judgement, the BGH emphasized that, in the course of the obligation of investigation according to Sec. 6 ss. 3 VVG old version, the insurer in principle decides what data it deems to be required to investigate the facts. According to the BGH, this includes all circumstances which could provide even indications for or against the existence of a claim. It follows that the policyholder can be required at the request of the insurer to obtain a personal statement from the employee who, due to defective negligent work, caused the claim. The purpose of the investigation obligation is the criterion for the admissibility of the request of the insurer for information and the resulting obligation of the policyholder to provide such information. This is intended to facilitate the insurer in professionally reviewing its obligation to pay. The information obligation therefore extends to all circumstances which can be helpful to clarify the facts provided that thereby nothing unreasonable is expected from the policyholder.

After reviewing the information received – the BGH continued – it must not necessarily be found that the information was also significant for the assessment of the payment obligation. The question of the necessity of the information requested is rather to be assessed solely ex ante, the insurer having thereby considerable room for assessment. If the relevant official is no longer working for the insurer or has been absent for a long period, at least the attempt must be made to contact him. If this is not done, the obligation of Sec. 6 ss. 6 VVG old version (in the present case together with Sec. 5 No. 3a AVB) is breached and the insurer is not obliged to pay. The BGH justified this on the ground that, for assessing the claim, it is not only the external acts alone which are decisive but the question of fault of the official can also be significant because only negligent breach of duty is insured and not, for example, intentional or blameless acts. It cannot be excluded in advance that, after so many years, no concrete recollection of the events exists any more.

BGH, judgement of 30 January 2014 – I ZR 19/13 – Insurance mediation by tied insurance broker without trading permit

The plaintiff insurance broker objected to the sales practice of the defendant VVaG, which has 450 insurance agents. The plaintiff held the opinion that the sale of insurance for the cooperation partners by "trust persons" of the defendant is irreconcilable with Sec. 34

d GewO (Trading Regulation). She claimed that the insurance agents in fact require their own liability insurance or that provided by the cooperation partners.

The BGH dismissed the claim as unfounded. The plaintiff was not entitled to the claims based on Sec. 8 ss. 1 sentences 1 and 3 No. 1, 3, 4 No. 11 Act Against Unfair Competition, Sec. 34 d ss. 1 sentence 1 GewO because the insurance agents acting for the defendant are exempt in accordance with Sec. 34 d ss. 4 GewO from the general permit obligation in Sec. 34 d ss. 1 sentence 1 GewO.

It was disputed whether the condition in Sec. 34 d ss. 4 No. 1 GewO that the insurance agent exercises his function exclusively on behalf of an insurance company licensed to trade in Germany is satisfied even if the tied insurance agent, with the consent of the insurance company for which he exclusively works, introduces competing products of other insurance companies. The BGH stated that this is admissible if this constitutes only a minor part of the work of the agent and the agreement between the insurance company and the tied agent is adequately specific. The wording supports this as well as the fact that the legislator in 2007 with the issue of Sec. 34 d GewO did not intend to prohibit this conduct of tied agents. This opinion is not in conflict with EU law either.

Equally unclear was the question whether the requirement of accepting liability under Sec. 34 d ss. 4 No. 2 GewO is satisfied even if only the insurance company for which the agent primarily acts accepts unlimited liability even for his other agency work. The BGH has now found this to be adequate. The aim of consumer protection is thereby adequately taken into account and it corresponds to the intention of the legislator which regards the acceptance of liability by an insurance company as decisive for the exemption from the obligation to obtain a permit. In addition, this is also reconcilable with Directive 2002/92/EC.

BGH, judgement of 18 November 2014 – II ZR 231/13 – Making good a payment which reduced the estate after insolvency can cancel the organ's liability for compensation

In this case, on the basis of a loan agreement of an insolvent GmbH & Co. KG with its parent company, the managing director of the sole general partner of the KG caused a payment to be made by the insolvent debtor to a lawyer's client account. A few days later, the identical amount was transferred from the lawyer's client account to the account of the insolvent debtor.

The BGH decided that the organ's obligation to pay compensation for payments after the happening of insolvency according to Sec. 130a ss. 1 together with Sec. 177a sentence 1 Commercial Code does not apply if the reduction of the estate caused by the payment is made good within a direct context. Sec. 130a ss. 1 Commercial Code is intended to provide for making good a reduction of the estate after the happening of insolvency in the interests of equal treatment of the creditors. The reimbursement claim against the organ can therefore logically no longer apply not only in the case of reimbursement by the organ himself but even if the reduction in the estate is otherwise made good and the purpose of the obligation is therefore achieved. For this reason, there is no longer any compensation claim against the organ to the extent that the insolvency administrator succeeds, by an insolvency challenge, in achieving reimbursement and thereby making good the reduction in the estate or if the reduction in the estate is made good by a payment of equal value into the company's assets so that in fact only an exchange of assets arises. Since, however, the "damage" occurs already with the outflow of the funds from the estate of the insolvent company which is to be maintained in favour of all its creditors, not every inflow of funds can be regarded as making good the reduction in the estate. In fact, a direct connection with the payment is required in order that the inflow of funds can be attributed to the reduction in the estate. The BGH decided that in this case payment and repayment were directly connected and thereby ultimately no reduction in the insolvency estate took place. The BGH thereby confirms its previous judgements on liability for reducing the estate which also apply for the parallel provisions of Sec. 64 sentence 1 GmbHG and Sec. 93 ss. 3 No. 6 Stock Corporation Act.

The asset received as compensation (here: the repayment from the lawyer's client account) need not, in the view of the BGH, still be available on the opening of the insolvency proceedings. The time at which the reduction in the estate was made good by the inflow of funds is decisive for the assessment. Previous judgements from which a different view was derived were expressly no longer upheld.

BGH, judgement of 9 December 2014 – II ZR 360/13 – Liability of the managing director of the general partner GmbH for prohibited payments from the assets of the KG

A GmbH & Co. KG which is meanwhile insolvent had in the decisive situation two general partners, a natural person and a GmbH. The sole shareholder

in the general partner GmbH who, at the same time, had a decisive interest in the sole limited partner in the KG, made significant drawings for private purposes from the KG. Repayment of these drawings was now demanded by the insolvency administrator of the KG from the managing director of the general partner GmbH as compensation.

The BGH firstly found that, in the case of a GmbH & Co. KG, a payment from the assets of the KG to a shareholder of the general partner GmbH or a limited partner is a forbidden payment according to Sec. 30 ss. 1 GmbHG if thereby the assets of the GmbH are reduced below the basic capital or over-indebtedness on the balance sheet is deepened. This view is the logical conclusion from the fact that the general partner GmbH as the personally liable shareholder in the KG is liable for these obligations and must accordingly show liabilities in its balance sheet. If a payment by the KG to one of the said persons leads to the exhaustion of the assets of the KG, the right of the GmbH to indemnity is no longer enforceable and cannot be shown as an asset in the balance sheet so that a deficit on the balance sheet or over-indebtedness could arise or be deepened.

Contrary to the opinion of the appeal court, in the view of the BGH, liability for payments prohibited by Sec. 30 ss. 1 GmbHG is not discharged if, apart from the GmbH, a natural person has unlimited liability as a general partner. If the recipient of the payment as in this case is also a shareholder in the general partner GmbH, it is without relevance in principle for his liability according to Sec. 30 ss. 1 GmbHG whether in addition a natural person also has unlimited liability. The participation of a natural person as general partner together with the general partner GmbH could, however, influence the liability for other reasons. If the KG, as in this case, has an additional general partner, an indemnity claim under Sec. 426 ss. 1 Civil Code against the co-general partner is to be shown as an asset in the course of the review of whether on the balance sheet of the general partner GmbH a deficit will arise or will be increased. Between a number of personally liable partners externally according to Sec. 128 Commercial Code, there is joint and several liability to which Sec. 426 ss. 1 Civil Code applies. Whether a right to indemnity arises therefrom depends on the liability share of the general partners. In addition, a legally existing right to indemnity could be shown as an asset of the GmbH if it is also enforceable. This was questionable in the present case since, between the parties to the litigation, it was disputed whether the other general partner had any assets.

The BGH also clarified that the managing director of the general partner GmbH, according to Sec. 43 ss. 3 GmbHG, is liable to the KG for payments prohibited according to Sec. 30 ss. 1 GmbHG from the assets of the KG to a shareholder in the general partner GmbH. The KG is entitled to the repayment under Sec. 30 ss. 1 GmbH according to the judgement of the BGH if payments flow from its assets. Due to the company law connection to the GmbH & Co. KG, the general partner GmbH cannot derive any advantage at the expense of the assets of the KG from the breach of the prohibition in Sec. 30 GmbHG and therefore pay itself, but only demand repayment into the assets of the KG to restore its basic capital. For this reason, the KG is entitled to the claim against the managing director under Sec. 43 Abs. 3 GmbHG corresponding to the claim against the shareholder according to Sec. 30, 31 GmbHG. The protection of the organ capacity existing between the general partner GmbH and its managing director thereby extends to the KG.

BGH, judgement of 1 July 2014 – XI ZR 247/12 – No duty of disclosure of kickbacks in the sale by a bank of life insurance for financing purposes

The plaintiff claimed for compensation against the defendant bank for defective advice in connection with the financing of a property. The appeal court then validly restricted the permission to appeal on a point of law to the plaintiff's damages claim for failure of disclosure of the commission received by the defendant for the introduction of a life insurance.

The BGH decided that there is a duty to disclose kickbacks only in case of advice on capital investments. The principles applicable thereto cannot, however, be transferred to a contract for financing advice by the bank. The advice of the defendant requested by the plaintiff, however, concerned financing and not the investment of a sum of money.

Even if the judgements on a bank providing investment advice applied, the bank would not, according to the BGH, be liable. The duty of disclosure applies only to commission related to the amount paid from openly shown commission, for example supplements on outlay and administration fees, the reimbursement of which to the bank is not disclosed but takes place behind the investor's back. Commission of that kind has not been ascertained here.

There is no general obligation on the bank to disclose commission received. The defendant's right to commission as an insurance broker against the insurer is obvious and a generally known trade practice even to be regarded as customary law. This applies not only to the right to commission of the insurance agent who is on the side of the insurer, but also to the right of an insurance broker, although he is a trustee and representative of the interests of the policyholder.

BAG, decision of 22 October 2014 – 10 AZB 46/14 – Recourse to the labour courts after removal of a managing director

The parties to this case, a GmbH and its former managing director, are in dispute inter alia about the jurisdiction of the labour courts. According to established judgements of the Federal Labour Court, the conditions for the application of the fiction of Sec. 5 ss. 1 sentence 3 ArbGG, according to which inter alia the managing director of a GmbH is not deemed to be an employee, are satisfied at the time of the service of the claim. If a managing director was not yet been validly removed at that time, it was and remains the case that the only recourse was to the ordinary courts and not the labour courts. The BAG has now expressly changed this position in its judgements. It now also takes account of circumstances after the service of the claim establishing jurisdiction if, for example as in the present case, a managing director not yet removed at the time of the filing of

the claim with the labour court is removed prior to a legally effective decision on jurisdiction. With the removal, the fiction of Sec. 5 ss. 1 sentence 3 ArbGG is lost with the result that the jurisdiction of the labour courts is established.

The BAG justifies its revised view in particular with the fact that the exclusive reliance on the time of the filing of the claim provides the possibility of manipulation. If only this time is relied on, the shareholders would, after a termination, be able by delaying the removal decision to exclude the jurisdiction of the labour courts even in cases in which employment existed without doubt. Since the dismissed plaintiff must in such a case file a dismissal protection claim according to Sec. 4 sentence 1 Dismissal Protection Act within three weeks after service of the termination notice in order to prevent the application of the fiction of Sec. 7 Dismissal Protection Act. The subsequent taking account of circumstances justifying the admissibility of the legal recourse disputed, also usually prevented – according to the BAG – in the case of a number of successively issued terminations a splitting of the jurisdiction depending on the time of the removal of the managing director.

OLG Nürnberg, decision of 28 October 2014 – 12 U 567/13 – Burden of proof in compensation claims against a management board member of a public company (AG)

The plaintiff, an AG, claims damages against the defendant as founder, shareholder and former management board member of the AG due to reimbursement of travelling expenses related to his work as a management board member. The OLG Nürnberg dismissed the appeal against the first instance dismissal by the LG Nürnberg.

The OLG Nürnberg clarified that in principle in spite of the burden of proof on the management board member, according to Sec. 93 ss. 2, 116 Stock Corporation Act, "that the care of a prudent and conscientious manager was applied", initially the company bears the burden of proof that a breach of duty can at all be considered for the alleged loss and its cause by the conduct of the manager in the area of his responsibility. The conduct of the manager must thereby be established as "possibly" in breach of duty. If the company discharges the burden of proof, it is then a matter for the defendant management board member to provide evidence that his conduct was not in breach of duty or culpable or that the loss would have occurred even with conduct in compliance with his duty.

These principles – according to the OLG Nürnberg – are not, however, to be understood to the effect that any act within the duties of the organ member may "possibly" be a breach. The fact that the requirement expressly established by the BGH that conduct of the organ member which "can at all be regarded as a breach of duty" must be concerned would be superfluous, indicates the contrary. In the case of a neutral act – as in this case the reimbursement of travelling expenses for a business trip – which as such provides no adequate indication that the management board member even "possibly" breached his duties as manager by the act in question, the company must prove further circumstances and indications which at least justify the appearance that the conduct of the management board member could have been in breach of duty. Otherwise, there would be the danger that the management board member could be claimed against arbitrarily in retrospect without perceptible indications for conduct in breach of duty. Even in cases of neutral conduct, there would then be, to his disadvantage, comprehensive requirements placed on the discharge of the management board member which could not in many cases be subsequently satisfied.

OLG Stuttgart, judgement of 17 April 2014 – 7 U 253/13 – Requirements for instruction according to Sec. 19 ss. 5 VVG

The OLG Stuttgart had to consider the formal requirements for instruction according to Sec. 19 ss. 5 VVG. The plaintiff submitted a proposal to the defendant for an accident life insurance with additional occupational incapacity insurance. The proposal under the heading "Risk and health declaration of the insured person" before the health questions contained a short instruction on the consequences of falsely answering the questions posed. The "conditions and information" of the defendant were also integrated into the insurance policy in the form of a schedule of conditions in which comprehensive reference was made to the consequences of breaching a disclosure obligation. The plaintiff provided incorrect data in the proposal whereupon the defendant initially demanded amendment of the policy and further rescinded the policy.

The OLG Stuttgart found that the insurance policy continued because it was not effectively ended by the rescission declaration since the instructions on the disclosure obligation according to Sec. 19 ss. 5 sentence 1 VVG were formerly invalid and therefore the defendant was not entitled to the rights under Sec. 19 VVG. The instruction should rather have been emphasised in technically adequate print. It should also have been so distinctive from the rest of the text that it could not be ignored by the policyholder. The proposal form used by the defendant, while it contained a warning in bold print about the consequences of breach of disclosure obligations and was in the necessary spatial connection with the "risk and health declaration of the insured person" on the same page, it was not, however, adequate under substantive law. The further reference to the instruction in the conditions schedule which is likely to have been adequate under substantive law was, however, formally invalid because it did not state the precise source. This cannot be regarded as a separate notification. Reference to the contents does not change this. In general, the references must – according to the OLG Stuttgart – satisfy high requirements due to the serious legal consequences of breach of the duty of disclosure.

LAG Düsseldorf, partial judgement and decision of 20 January 2015 – 16 Sa 458/14, 16 Sa 459/14, 16 Sa 460/14 – No unlimited organ liability for company fines

A company against which the Federal Cartel Office had imposed a fine for participation in the "railway tracks cartel", claimed against a managing director of the subsidiary company which

was involved for compensation, according to the statement of facts of the judgement of the Labour Court Essen.

The LAG Düsseldorf confirmed the opinion of the Labour Court Essen to the effect that the fine imposed by the Federal Cartel Office on the company is not eligible for reimbursement vis-à-vis the defendant organ member as a natural person. Like the Labour Court, the LAG Düsseldorf based its decision on the fact that the legislator has made a different provision for the amount of a fine in the case of natural persons and companies. Fines against natural persons are limited to EUR 1 million, while the fine imposed on a company can amount to ten per cent of the turnover. This differentiation would in the opinion of the LAG be thwarted if a company could claim against its organ member for the fine against the company in the full amount.

KG Berlin, judgement of 23 May 2014 – 6 U 210/13 – Answers on the laptop of an insurance broker are not in text form

The parties are in dispute about the validity of a rescission of a health insurance policy declared by the defendant. The defendant bases the rescission on fraudulent, false and incomplete answering of health questions by the plaintiff. The plaintiff answered the questions whether he had been examined or treated in the past three years in the negative, which was untrue.

The KG Berlin found that, while the policyholder answered the health questions falsely, the circumstances were not adequate for an accusation of fraud against the plaintiff. Firstly, it cannot be proved that the plaintiff intended to influence the decision of the defendant and was therefore aware that the defendant would possibly not accept his proposal if he stated the truth. Secondly, the KG Berlin also relied on the fact that the plaintiff itself gave the defendant the idea of rescission because he, as a reaction to possible termination of the insurance policy because of incomplete data, gave all data on the treatment frankly to the management board of the defendant. This letter was an indication of fraud on the part of the plaintiff.

The court also reviewed a rescission according to Sec. 19 ss. 1 to 5 VVG. In the opinion of the Senate for this purpose, it must be established that the health questions relate to risks which are obviously significant for the conclusion of the contract by the defendant with the agreed content. For this purpose, the defendant must set out the questions in text form and the instruction must also satisfy that form requirement. The health questions were, however, completed only on the laptop of the insurance broker and the policy holder was subsequently enabled to review the questions on the laptop. This does not satisfy the requirements of text form in the view of the KG Berlin. While the legislator in the new version of Sec. 19 VVG is concerned to remove from the policyholder the risk of false assessment of the risk as to whether the facts are significant for the risk and therefore must be disclosed and not primarily the form requirement. However, the policyholder must receive the questions in legible permanent form. Reading the wording is not adequate for this. The policy holder must receive the text form of the instruction at the latest in any event prior to signing with the opportunity to again review the accuracy of his data. Receipt of the instruction in text form cannot be assumed if the policyholder only had the opportunity to read his answers on the laptop. In such a case, neither the information or the documentation function of the text form is satisfied.

KG Berlin, judgement of 29 April 2014 – 6 U 172/13 – Pre-contractual disclosure obligation in a broker's questionnaire

The parties dispute the continuance of a health insurance policy. The policy was challenged by the defendant insurer which rescinded the policy because the plaintiff objectively incorrectly answered a health question on previous treatments with "no" in the proposal form.

The KG Berlin came to the conclusion that the insurance policy was ended in any event on the basis of the alternatively declared rescission. The defendant insurer was entitled to a right of rescission according to Sec. 19 ss. 1 sentence 1, ss. 2 VVG because the plaintiff breached his pre-contractual disclosure obligation. While the proposal form was not a proposal form of the defendant insurer, as was evident from the logo online, the fact that the insurance broker prepared it did not, however, mean in principle that the health questions contained therein could not be those of the insurer. From the new provision on the pre-contractual disclosure obligation, it is not established that it, according to the intention of the legislator or the wording, generally intended to be inadmissible that the questionnaire is prepared by a third party. With the pre-contractual disclosure obligation, it is namely intended that the risk of false assessment of the significance for the risk of certain circumstances is imposed on the policyholder. This purpose would still be achieved if the questions from the decisive point of view of an average intelligent policyholder are in an individual case those which the insurer would either prescribe or adopt as its own. The latter was the case here. This is shown by various indications in the proposal form, for example that the insurer's decision to accept would be made on the basis of the following data. These references are adequate for the policyholder to recognise that in providing the data a pre-contractual disclosure obligation should be complied with vis-à-vis the insurer.

Against this background, the KG Berlin affirmed fraud by the policyholder because he did not submit any other explanation for non-disclosure of the treatments. It follows that the plaintiff recognised and accepted that the insurer would not have accepted the proposal with knowledge of the true facts or would only have accepted it on different conditions.

New legislation

EU publishes delegated legal act

On 17 January 2015, the delegated Regulation (EU) 2015/35 of the Commission of 10 October 2014 supplemented Directive 2009/138/EC of the European Parliament and the Council on the taking up and pursuit of the business of insurance and reinsurance (Solvency II) was published in the Office Journal. This is a further published element of the new European regulatory regime Solvency II.

PRIIP Regulation comes into effect

On 29 December 2014, the PRIIP Regulation came into effect, the European Regulation on key information documents for packaged retail and insurance-based investment products. It introduces uniform rules for the key information documents for packaged investment products throughout the EU. The new provisions on the key information documents apply from 31 December 2016. From that time, the provider of life insurance based on capital and funds must provide such key documents.

Draft of women's quota bill

On 11 December 2014, the Federal Cabinet approved the draft of a bill for equal entitlement of men and women to leading positions in the private economy and public service and thereby initiated the parliamentary procedure. The draft which prescribes a women's quota will now be sent to the Federal Council for comment.

Reduction of dependence on ratings

Following the passing by the Federal Parliament on 6 November 2014 of the bill reducing dependence on ratings in the second and third reading as amended by resolution of the financial committee, the Federal Council now passed the bill on 28 November 2014. The dependence of the financial sector on external ratings in assessing risks to investments held is intended thereby to be reduced.

LVRG comes fully into effect

On 6 August 2014, the Life Insurance Amendment Act was published in the Federal Gazette and the main parts of it thereby came into effect. Only the reduction in the highest interest rate and the highest zillmerisation rate and an amendment to the VVG-Info Regulation with regard to the stating of costs in life insurance apply only from 1 January 2015.

Notices

Personnel change at the BaFin

The previous executive director of insurance regulation Felix Hufeld will on 1 March 2015 succeed Elke König as president of the BaFin. Elke König changes to become executive director in the newly established bank resolution authority in Brussels. The succession to Felix Hufeld is still open. At the same time, it was announced that Elisabeth Roegele will succeed Karl-Burkhard Caspari as executive director for securities regulation.

Siemens general meeting approves Neubürger settlement

On 27 January 2015, Siemens AG general meeting approved the settlement with its former management board member Heinz-Joachim Neubürger concluded on 26 August 2014. Following the judgement of the Landgericht Munich I against Mr Neubürger for damages of EUR 15 million, he appealed and joined many former organ members of Siemens AG in the proceedings. According to the settlement published with the invitation to the general meeting, Mr Neubürger undertakes to pay Siemens AG EUR 2.5 million, a partial set-off of his claims against Siemens AG being taken into account. In return, all counterclaims of Siemens AG against Mr Neubürger are discharged and disposed of.

Guidelines on the use of the Legal Entity Identifier (LEI) come into force

On 31 December 2014, the guidelines for the use of the Legal Entity Identifier of EIOPA came into force. The national regulatory authorities are supposed to ensure that all regulated companies receive an LEI code. This is intended to serve clear identification of the companies and in future in particular the reporting to EIOPA.

Consultation paper for company pensions institutions

EIOPA has submitted a consultation paper relating to quantitative requirements for company pensions institutions. Pension funds and pension associatons are among those institutions in Germany.

EIOPA publishes guidelines to avoid crisis and resolution of insurance companies

On 24 November 2014, EIOPA published 14 guidelines which cover many aspects of modern crisis management. The areas extend from organisational establishment of regulatory authorities through emergency planning to the development of restructuring plans. With these guidelines, EIOPA intends to ensure that the member states of the EU prepare consistent and reasonable conditions for resolutions in the insurance sector.

The BaFin publishes circular on cooperation with insurance brokers and risk management in the course of sales

On 23 December 2014, the BaFin published circular 10/2014 (VA) with reference to cooperation with insurance brokers, sales-related activities and risk management in the course of sale of insurance products. According to this circular, insurers may only work with brokers regarded as reliable, who can prove proper financial stability and have adequate qualifications. The BaFin thereby summarises its expectations on sales-related activities containing particular risks and therefore requiring particular attention with regard to risk management according to Sec. 64a VAG. In addition, this circular contains references to cooperation with tip providers.

BaFin “survey of life insurers”

On 12 November 2014, the BaFin published a press release on a survey of German life insurers. The BaFin conducted a survey of all 87 German life insurance undertakings and their expected equity situation under Solvency II. On the basis thereof, the BaFin is of the opinion that German life insurers are well prepared to cope with the introduction of capital requirements under the future European regulatory regime Solvency II on the basis of the transitional measures and volatility adjustment.

List of financial conglomerates published

The EBA, EIOPA and ESMA published an updated list of the world-wide identified financial conglomerates. In the European Union, at present, there are 76 financial conglomerates.

Insurance Calendar :

BLP Insurance/Reinsurance Client Seminar 5 February 2015 in London	Lecturers include: Dr. Henning Schaloske Organiser: Berwin Leighton Paisner LLP
Noerr Insurance/Reinsurance Client Seminar 22 April 2015 in Munich	Lecturers include: Dr. Thomas Heitzer, Dr. Bärbel Sachs, Dr. Henning Schaloske Organiser: Noerr LLP
GDV information event D&O insurance 7 May 2015 in Bonn	Lecturers include: Dr. Henning Schaloske Organiser: Gesamtverband der Deutschen Versicherungswirtschaft e.V.

Publications:

Dr. Daniel Kassing, LL.M. and Dr. Patrick Richters	Der Deckungsanspruch in der Haftpflichtversicherung (soon to be published in VersR 2015, issue 3)

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