WILHELM

RECHTSANWÄLTE

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Drafting of contract

Limitations to the content control of insurance terms

1. INTRODUCTION

If the policy holder and the insurer argue about coverage, the contractual agreements among the parties are of importance. Contractual agreements always include general terms on insurance ("AVB"). If it comes to general terms on insurance, the policy holder will in case of dispute often profit from the legal tool of the content control of general terms and conditions by the court. A clause in the general terms on insurance will be ineffective, if the content control shows that the clause puts a unilateral inappropriate disadvantage on the policy holder or that the clause is not sufficiently clearly formulated (intransparent). If a clause is ineffective, the content of the contract follows legal provisions, thus in particular the Insurance Contract Act. General terms on insurance applied towards a commercial policy holder might become subject to a clause control according to GTCB law, as well.

The clause control according to GTCB law will not always be possible for the policy holder.

1.1 Content control only towards the insurer as user of the general terms and conditions

A content control according to GTCB law will only be made towards the *user* of the general terms and conditions. If the insurer is not the user, a content control of the terms towards the insurer is excluded.

In practice, the question comes into focus, who has to be regarded as the user of the general terms on insurance resp. clauses in the individual case and therefore has to accept the control by courts.

1.2 Problem field complex broker conditions

In particular, if brokers draft terms or clauses or implement them and are involved in the conclusion of the contract between insurer and policy holder, it is problematic, under which conditions the possibility of a GTCB law control exists.

1.3 Requirements to content control controversial – in particular user characteristic

The requirements to a content control according to GTCB law of secs. 305 et seq. BGB are partially controversial.

The Federal Court of Justice decided already in 2009 (decision of 22 July 2009, IV ZR 75/08) that a clause control of D&O-terms was not to be considered in case an insurance broker drafted the terms and had them implemented into the contract between the D&O-insurer and the policy holder. The insurer was in that case not the user of the terms and the requirements for a clause control were therefore not fulfilled.

1.4 Current decision of the Federal Court of Justice: contract parties may not exclude GTCB law

A current decision of the Federal Court of Justice of 20 March 2014 (File: VII ZR 248/13) is associated with the requirements to a clause control.[1]. In this decision the Federal Court of Justice came to the conclusion that contract parties cannot make effective agreements about the question whether the GTCB law of secs. 305 et seq. BGB applies for the contract and the here included clauses or not.

The decision comprises all general terms and conditions, thus in particular general terms on insurance. Their appraisal thus applies for insurance contract law as well.

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[1] NJW 2014, 1725.

The line of jurisdiction makes clear that both from the policy holder's and the broker's point of view there are risks concerning the usage of broker terms if the clause control by court in favor of the policy holder does not apply.

The following hints indicate what policy holder and broker should consider in order to avoid risks during the initiation and documentation of contract.

2. NO CONTRACTUAL AGREEMENT ABOUT USER CHARACTER

2.1 Contractual agreements about use character as a reaction to the Federal Court of Justice

The above (1.) mentioned decision of the Federal Court of Justice of 22 July 2009 leads to an uncertainty of market participants. Brokers fear liability risks, policy holders fear coverage gaps and the continued existence of inappropriate or unclear clauses.

In order to avoid risks and reach clarity, policy holder and broker sometimes try to regulate by contract with the insurer that the insurer is the user of the terms underlying the contract.

2.2 Current decision of the Federal Court of Justice: agreement on user characteristic not possible

With the initially mentioned current decision of 20 March 2014, the Federal Court of Justice clarified that the legal GTCB law of sections 305 et seqs. BGB will even in business legal transactions not be subject to the contract parties but is mandatory law.

The decision had the following background: a content control is ruled out in so far as terms are agreed among the contract parties individually (cf. sec. 305 para. 1 s. 3 BGB). According to the law, no general terms and conditions are existent in that case. In the case decided, an entrepreneur argued that general terms and conditions formulated by himself were not controllable since he made an individual agreement with his contract partner, according to which, the clauses were "sincerely and extensively negotiated".

For this reason, an individual contract exempt from a GTCB control is given. The Federal Court of Justice denied this argumentation and pointed out that GTCB law applies mandatorily. The parties may not make an effective agreement about the criterion "negotia-

tion". With this assessment it is also clear that the insurance contract parties may not make agreements on *who is the user* of the terms[2].

3. INSURER AS USER OF THE GENERAL TERMS ON INSURANCE?

In the individual case, the question comes into focus, who shall be regarded as user of general terms on insurance or individual clauses.

3.1 User criterion according to sec. 305 para. 1 s. 1 BGB

According to sec. 305 para. 1 s. 1 BGB, that contract party is regarded as user that sets the general terms and conditions during the conclusion of the contract. The question at what point terms are "pre-formulated for a majority of contracts" and thus general terms and conditions is one of the disputed questions. In the following, the focus is on the problematic question at what point one contract party "sets" the terms and uses them according to sec. 305 para. 1 s. 1 BGB.

As soon as it is determined that insurer and policy holder are not able to agree on who will be the user of terms, legal provisions and the actual sequences in the individual case are decisive.

3.2 Setting terms within the problematic context of broker terms

Especially in case brokers are involved in the initiation of contract, the actual sequences and the legal assertion might have the effect that it is not the insurer who is deemed to be the user of the agreed terms and thus the GTCB law content control for the protection of the policy holder is ruled out.

3.2.1 „Setting" of broker terms by the insurer?

According to jurisdiction the question which contract party will set a contract term as user to the other party depends on which party offers the inclusion of the contract term resp. requests it from the opposing party[3].

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[2] Cf. VP-Praxistipp November 2009, page 223 et seq., Dr. Stefan Steinkühler, Dr. Daniel Kassing

[3] Settled case law, cf. e.g. BGH, NJW 2014, 1725, TZ 23, NJW 2010, 1131, TZ 10

It is not decisive who has actually drafted the terms. Brokers may be involved in the initiation of the insurance contract in different constellations. If a broker for example drafts terms and the insurer agrees to the broker offering insurance coverage/capacities on the basis of such terms to policy holders in the market, this does not mandatorily exclude a clause control. It shall rather be assumed that the insurer sets terms in this constellation and is thus the user. From his sphere comes the (economic) basic decision, to offer insurance coverage at these terms. In so far there is at first an intention and an economic interest of the insurer in the inclusion of terms into the (still to be concluded) insurance contract with the policy holder. According to our view, it is against this background principally not decisive whether the policy holder assigned the insurance broker with the drafting of terms. In this case it might be questionable whether the broker terms attributed to the insurer are to be regarded as pre-formulated terms for a plurality of contracts. This seems problematic and has to be examined for the individual case.

The insurer finds himself confronted with this interest situation and initial situation. If a policy holder intends to insure a specific risk, the insurer takes his contract decision on the basis of the risk information given by the policy holder and on the basis of the terms (created by the broker). The contract is concluded between policy holder and insurer. "At conclusion" (cf. Sec. 305 para. 1 s. 1 BGB), the insurer sets the terms. It is in so far acknowledged that pre-formulated terms might eventually be attributed to the insurer as contract party by a third party – the broker.[4]

3.2.1.1 No presumption of conformity of „formal inclusion"

An involved broker might possibly revert to the general terms on insurance which the insurer usually applies, such as for examples the terms in the field of liability insurance or the recommendations of the German Insurance Association. It is possible that the broker includes such terms for the policy holder within the context of his contract offer towards the insurer. From a formal perspective, the offer of the policy holder will then contain terms at which the insurer usually concludes contracts. This does though not eliminate the problematic that the insurer sets the terms and thus remains the user of the terms.

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[4] Cf. e.g. Thiel, R+S 2011, 3 et al.

The fact that one contract party brought in the applied contract form does according to jurisdiction not justify the assumption that this party is also the user.[5] This at least applies if – as in the field of the commercial insurance – policy holder and insurer are entrepreneurs.

In so far it is not decisive which contract party „formally" takes the initiative to include the terms into the contract. There is no presumption of conformity about the question which party shall legally be regarded as user of the terms.

3.2.1.2 Controversial: presumption of conformity about the content of terms?

If terms are disadvantageous for one contract party (to be determined by interpretation), this will, according to the current decision of the VII. Civil Chamber of the Federal Court of Justice suggest that terms/the clause have been set by the other contract party.[6] This impression of the content of the clause may be decisive in case of dispute. The insurer has to disprove to have set the most unfavorable clause.[7] This presumption of conformity was differently assessed by the VIII. Civil Chamber of the Federal Court of Justice with its decision of 17 February 2010[8]. The content of disadvantageously preformulated clauses would not imply the user capacity but just specific market strength of one of the contract parties.

From the point of view of the contract parties there is thus no unambiguous line of jurisdiction about the user capacity.

3.3 Decisive: Protective function of the GTCB law

The protection purpose of the GTCB law is decisive. The purpose of the content control of general terms and conditions according to sec. 305 et seq. BGB is to compensate unjust negotiation positions and thus to grant protection and defense against unilateral drafting power of the user (jurisdiction of the Federal Court of Justice).

[5] BGH NJW 2010, 1131, marginal note 11.

[6] Cf. BGH NJW 2014, 1725, 1727, marginal note 24.

[7] CF. BGH reference as above

[8] Cf. BGH, NJW 2010, 1131, marginal note 14.

If one contract partner is far stronger than the other and is de facto able to set a contractual provision unilaterally, this implies heteronomy for the other contract party. Where a balance of forces of the participating parties is missing, no appropriate balance of interests is possible.

The application of law of general terms and conditions can therefore only be excluded in fact by negotiating in the meaning of sec. 305 para. 1 s. 3 BGB. Further, the protection of the content control according to the general terms and condition law – in accordance with the jurisdiction of the Federal Court of Justice – has to be maintained.[9]

3.3.1 De facto enforcement regularly on the side of the insurer

In fact, it is not primarily decisive for the user character, which contract party possibly has the stronger economic position. What is decisive is the drafting power concerning the content of the contract. As real circumstances in the commercial insurance show, the economic (market) power on the side of the insurer results in its drafting power.

In this connection, channelizing influences have a special importance. Policy holders – even if they have a certain economic strength – do not see themselves opposed to an insurer as a possible contract partner. There are for example association recommendations about terms and conditions or clauses which factually lay claim to importance similar to law (e.g. insured event definitions). The policy holder receives no insurance coverage at these terms on the market. Thus there is de facto a far-reaching drafting power which is in favor of the individual insurer.

According to its aim, the GTCB-law shall not apply only in case the user of the terms is in fact willing to change these terms and make it available for disposition. This is though also not the case for broker terms if the informed market participant include from the beginning the specifications as regard content de facto given by the insurer.

[9] Cf. BGH, NJW 2014, 1725, 1727, marginal note 31.

Based on the described protective purpose and on the factual circumstances and procedures in the commercial insurance practice, a rule-exception-relationship may be assumed according to our view:

As a rule, the insurer will be seen as the user of the GTCB clauses. This will usually also apply if the policy holder and the insurer include broker terms into the insurance contract. As a rule, the policy holder will in case of a coverage dispute also profit from the legal tool of the content control.

3.3.2 Possible exceptions

Possible exceptions might for example exist if, in the field of commercial major risks, a policy holder or an insurance broker on behalf of a policy holder, tenders risks for coverage. If an insurer quotes there upon and if an insurance contract is concluded on the tendered terms/clauses, those may not be attributed to the insurer, he is not the user.

4. CONCLUSION

Policy holders usually profit from the GTCB clause control by the courts. Whether the general terms of insurance or individual clauses may be attributed to the insurer as user, has to be decided in the individual case on the basis of facts. The circumstances regularly suggest that the insurer has to be regarded as the user. The fact that broker terms are applied for an insurance contract does not mean that the insurer may not be the user of the terms. The factual circumstances of the contract conclusion and the initiation of contract are decisive. The requirements of a content control have to be examined for every clause in dispute individually.

For the constellation discussed here, the policy holder has to consider the risk, that the tool of the content control will not be available to him in every case. Policy holders should – just as brokers – ensure a detailed documentation and note from which sphere the clauses derive and if /in how far clauses were actually at disposal.

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