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Competence to conclude a D&O-insurance in favour of members of the supervisory board

1. INTRODUCTION

In practice, usually the executive board concludes D&O-insurance contracts. Here not every company is aware of the fact that the question of competence to conclude a D&O-insurance has been discussed in literature for a long time. Quite recently, the Federal Court of Justice (BGH) commented on this question. With this article we will clarify, whether the executive board is still allowed to conclude D&O-insurance contracts in favour of members of the supervisory board.

2. LEGAL REGULATIONS CONCERNING THE COMPETENCE TO CONCLUDE A D&O-INSURANCE

There is no explicit legal regulation which deals with the competence to conclude a D&O-insurance. Thus, the general regulations in the Companies Act (AktG) are applicable in order to determine the competence. These are sec. 78 AktG which deals with the representaion of corporations as well as § 87 AktG which deals with the determination of the remuneration of board members and § 113 which deals with the remuneration of the members of the supervisory board.

2.1 The executive board's competence to represent corporation

According to sec. 78 para. 1 s. 1 AktG the executive board represents the corporation in and out of court and is thus the sole representative of the corporation. As the sole representative, the executive board is entitled to conclude contracts on behalf of the corporation.

2.2 The general assembly's and supervisory board's competence for certain tasks

In certain cases the power of representation of the executive board is not sufficient, but some decisions must be taken in cooperation with the supervisory board or the general assembly of the corporation.

According to sec. 87 para. 1 s. 1 AktG the supervisory board is responsible for the determination of the total remuneration of the individual board member.

According to sec. 113 para. 1 s. 1 AktG the general assembly must agree with the remuneration of the supervisory board members if the remuneration is not determined within the articles of incorporation.

2.3 Relevance of sec. 87, 113 AktG for the competence to conclude a D&O-insurance

The corporation takes over the premiums for a D&O-insurance covering the liability of supervisory board members and concludes the D&O-insurance contract by the name of the corporation and in favour of the supervisory board members. Since the conclusion of the D&O-insurance is at the corporation's expenses, the payment of the premiums could be regarded as a remuneration to the supervisory board members according to sec. 113 para. 1 s. 1 AktG.

3. PAYMENT OF D&O-INSURANCE PREMIUM AS PART OF THE REMUNERATION

In the following, we shortly present the general opinion in literature and legislation concerning the legal nature of the payment of the D&O-insurance premiums by the corporation. If the premium payments can be regarded as a remuneration in accordance with sec. 113 para. 1 s. 1 AktG, the general assembly of a corporation must agree to the conclusion of a D&O-insurance, if the articles do not contain a corresponding regulation.

3.1 The conclusion of a D&O-insurance contract in practice

Common practice with regard to the D&O-insurance of corporations is that the corporation pays the premiums for the D&O-insurance covering liability of the members of the supervisory board. In most cases this is realised by concluding a contract by the name of the corporation and in favour of the member of the supervisory board.

3.2 Legal nature of the premium payments

The qualification of the D&O-insurance premium payments has been discussed in literature for a long time. Legislation does not provide nameable decisions. In March 2009, the Federal Court of justice remarked in one of its judgements concerning the interdiction of payment in case of insolvency, doubts about the competency of the board of a corporation to conclude a D&O-insurance.[1]

3.2.1 Views in literature

The former prevailing opinion regarded the premium payments for a D&O-insurance as a remuneration of board members.[2] This was valid both for premium payments for board members and for members of the supervisory board. Consistently, according to this view, the agreement of the general assembly or a regulation within the articles according to sec. 113 para. 1 s. 1 AktG would be required in connection with the conclusion of a D&O-insurance in favour of members of the supervisory board. The former prevailing opinion argued that according to sec. 87 para. 1 s. 1 AktG insurance fees are part of the board members remuneration. This principle should be applied respectively for the remuneration of members of the supervisory board according to sec. 113 AktG. Further, the purpose of sec. 113 AktG shall be for shareholders to know all material benefits of the member of the supervisory board, in order to prevent excessive remunerations. Besides, insurance fees are included in the balance sheet accounting of the total remuneration of members of the supervisory board according to sec. 285 No. 9 lit. a HGB.[3]

The now prevailing opinion regards the payment of the D&O-insurance fee as an official provision in accordance with sec. 618 para. 1 BGB and thus not as part of the remuneration.[4] The payment of the premium is no reward for the board resp. supervisory board work.[5] Also, a D&O-insurance is not comparable with the typical insurances coverd by sec. 87 para. 1 s. 1 AktG, sec. 285 No. 9 lit. a HGB. The term “total remuneration” used within these regulations is different from the term „remuneration“ used in sec. 113 AktG. a corporation does not conclude a D&O-insurance only for the benefit of the board members, but also in the interest of the corporation.[6] A D&O-insurance has the purpose to recruit qualified executives for the supervisory board and the executive board of corporations, since many candidates are not willing to take the risk involved with this kind of position.[7]

3.2.2 BGH judgement of March 16, 2009 - II ZR 280/09

Until now, the BGH has not decided on the question, whether insurance premiums paid by the corporation must be regarded as part of the remuneration.

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1 BGH VersR 2009, 1635.

2 Vgl. *Hüffer* in: Kommentar zum Aktiengesetz, 9. Aufl. 2010, § 113 Rn. 2 m.w.N.

3 Vgl. *Sieg* in: Münchener Anwaltshandbuch Versicherungsrecht, 2. Aufl. 2008, § 17 Rn. 44; Olbrich, Die D&O-Versicherung, 2. Aufl. 2007, S. 201, 206 m.w.N.

4 *Habersack* in: Münchener Kommentar zum AktG, 3. Aufl. 2008, § 113 Rn. 13; Sieg, a.a.O., § 17 Rn. 44 m.w.N.; Notthoff, NJW 2003, 1350, 1354.

5 *Habersack* a.a.O.

6 *Habersack* a.a.O.; Notthoff NJW 2003, 1350, 1354.; Lange DStR 2002, 1626, 1629.

7 Notthoff NJW 2003, 1350, 1354; Olbrich, a.a.O., 201, 208.

In its judgement of March 16th, 2009 – II ZR 280/09 – the BGH indicates doubts whether the board is responsible for the conclusion of a D&O-insurance in favour of members of the supervisory board or whether the premium payment must be qualified as part of the remuneration. The latter would according to sec. 113 para. 1 s. 2 AktG – in case of missing articles – justify the responsibility of the general assembly to conclude a D&O-insurance.

3.3 Comment

Even despite the doubts mentioned by the BGH, there are important reasons to keep the insurance premiums paid by the corporation on behalf of the members of the supervisory board independent from the remuneration in accordance with sec. 113 AktG. A good reason for this argument is that sec. 87 AktG only comprises insurance fees which concern the private sphere of the board members, which is not the case with the D&O-insurance that shall protect the working sphere. Besides, sec. 285 No. 9 lit. a HGB shall only comprise insurances which protect within the private sphere. There is also no infringement against the intention of sec. 113 AktG to protect shareholders from excessive remunerations. The D&O-insurance is no reward for the work of a member of the supervisory board. The conclusion of a D&O-insurance is of interest for the corporation, especially in order to have a more solvent debtor for the internal liability than the board member himself.

3.4 Practical relevance of the BGH judgement of March 16th 2009 – II ZR 280/09

Even though the BGH raises with its above mentioned decision concerns about the competence of the board to conclude a D&O insurance, this does not necessarily mean that the BGH will always declare the board as not competent. The BGH solely raises general doubts on the competence of the board without a legal evaluation of literature or even a justification of its remark. The above mentioned decision of the BGH is though relevant in insurance practice, since this is the first step to qualify the D&O-insurance as a remuneration in accordance with sec. 113 AktG by the BGH. Nevertheless, we assume that there is no reason to abandon from the usual insurance practice and to include the general assembly in the process to conclude a D&O-insurance.

4. CONCLUSION

It is still reasonable to regard a D&O-insurance paid for by the corporation as being no part of the remuneration in accordance with sec. 113 AktG. Thus, we are of the opinion that the board of a corporation is still competent to conclude a D&O insurance, despite the afore mentioned decision of the BGH.

Should the BGH in the future classify the premium payments made by the corporation as remuneration, general assembly decisions resp. changes of the articles will be required for the conclusion of a D&O-insurance.

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