

Column

EAR insurance: dubious settlement practice

Recently, German insurers rejected cover for a number of claims under EAR insurance. Although the only condition for a claim under EAR insurance is property damage to the erected object, insurers ask for the detailed cause of damage before settling a claim. In major projects with many participants, ascertaining the cause of the damage usually takes several months or even years. Furthermore, many insurers reject any compensation for damage resulting from a defect in workmanship.

Those who construct an industrial object – for example a gas power plant – will conclude an erection all risks (EAR) insurance contract in advance. Such EAR policy covers damages occurring during the construction of the erection object or – depending on the insurance terms – during or after its first operation. A cover claim only requires the occurrence of unforeseeable damage to the insured property within the insured period.

In recent years, some German insurers denied a settlement of major damages arguing that the cause of damage needs to be determined first. This legal interpretation is wrong: the determination of the cause of damage is no requirement for the settlement of an insured event under EAR insurance.

Otherwise, the erection insurance could not fulfill its function: at first, one would have to determine which of the many companies involved in the construction (general contractor, subcontractor, service companies) possibly made a mistake and in how far this mistake affected the occurrence of damage.

An insurance claim though has to exist prior to the determination of the cause of damage. Ascertaining the cause of the damage often can take a long time, several months or

even years. Sometimes it is impossible to determine the cause of damage with absolute certainty. Thus, if the settlement of the insured event depended on the prior determination of the cause of damage, EAR insurance for industrial major projects would practically be worthless.

Against this background, the above described settlement practice of many insurers has startled the German industry. And there is another problem: depending on how the individual EAR insurance terms are drafted, also those damages are covered that result from a defect in the process of erection.

Example: The building shell of a gas power plant is constructed with concrete which is not sufficiently sustainable and thus collapses. Depending on the policy wording, the insurer is obliged to refund costs incurring for the new construction of the collapsed concrete construction. Only additional costs arising with the new construction using an adequate concrete are not covered by the EAR policy.

Insurers increasingly deny that insurance coverage exists for defects resulting from an incorrect erection process. This inappropriate legal concept was opposed by the Regional Court Essen in a decision which is not yet legally effective. It has ruled that the determination of the cause of damage is no requirement for the insured event in EAR insurance.

Moreover, the Regional Court Essen ruled that in case of a respective wording of the insurance contract (e.g.: "Insurance cover also exists for damages resulting from a defect."), insurance cover exists also for damages which are caused by defects in workmanship or other defects.

We advise policy holders and insurance brokers to include damages resulting from defects when underwriting an EAR policy.

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