

Column

## What needs to be considered when tendering insurance

Companies should be careful when tendering insurance contracts in Germany. As they hereby define insurance terms they may be regarded as “users” of these terms. Doubts concerning the interpretation of clauses will then be at their expenses. To avoid this risk, companies should tender in the so-called negotiation procedure – and subsequently discuss one or another clause with the insurer.

General terms on insurance (Allgemeine Versicherungsbedingungen, AVB) are subject to clause control under the law on general terms and conditions. Consequently, clauses in AVB that may surprise or unreasonably disadvantage the opposing party, may be ineffective. Those who “use” AVB bear the risk of their ineffectiveness. Even if a clause is not ineffective, the user will still bear a risk pursuant to section 305c para. 2 German Civil Code (Bürgerliches Gesetzbuch, BGB): doubts concerning the interpretation of the clause are at the user’s expense.

It is thus relevant to clarify the question who is user of the AVB in individual case. According to jurisdiction, those who arrange for the inclusion of pre-formulated terms or clauses are assumed to be the user of the terms. User of AVB may thus not only be the insurer but also the policy holder or broker, if specific clauses are included into the contract at their instigation.

Consequently it may depend on chance who becomes user of a clause. If at first the insurer refers to the AVB or to a specific market-standard term, the insurer may become the user of the AVB respectively the clause. The insurer will then bear the risk of the clause’s ineffectiveness, in case of doubt the clause has to be interpreted at the insurer’s expense.

If the clause had at first been included into the contract at the inducement of the policy holder or its broker, the policy holder eventually has to bear the risk of ineffectiveness and interpretation.

A particular problem with regard to the user quality may arise from the policy holder's or broker's point of view through the tendering of insurance terms.

Under certain conditions, legal provisions oblige companies to publicly tender insurance contracts. If these tenders refer to specific insurance terms, the tendering party may thereby become user of these terms. The clause control would be at the tendering party's expense.

This result is inappropriate since the tendering is often mandatory or required for compliance reasons. The tendering party would eventually be punished for lawful conduct.

### **Pay attention to the kind of tender**

There are different kinds of tenders. In the so-called open procedure, it is prohibited to negotiate. After termination of the tender, the insurance has to be concluded as it was tendered.

The second option is the so-called negotiation procedure. Here, the tenderer is entitled "to suggest deviations from the wording of the tendered insurance contract". If possible, the tendering party should therefore tender in a negotiation procedure in order not to become user of terms later agreed upon.

The user of a clause does not bear the risk of ineffectiveness according to the law on general terms and conditions if such terms were individually negotiated. In business transactions, such negotiation is already given if the user gives the opposing party a possibility to negotiate and possibly one or more contract terms are discussed.

That is, those who are obliged to tender insurance terms and wish to avoid becoming user of the tendered terms should tender – as far as legally possible – in a negotiation procedure. Further, the tendering party should make sure that insurance terms are actually discussed and that at least one or more clauses are edited in the course of negotiations.

As a consequence, there will be no longer the risk of ineffectiveness of the tendered insurance terms; also the rule of doubt does not apply at the policy holder's expense.

Those who tender the insurance contract may include some clauses into the terms which will certainly not be acceptable for any tenderer. Hereby, the tendering party ensures that negotiation arises and the tendered terms will be amended the tendering party will thus not become user of the terms.

Whether general terms on insurance or individual clauses have to be attributed to the insurer or to the policy holder has to be decided by courts in the individual case. The question of clause control will characterize coverage disputes under commercial insurance in Germany in the future.

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