

Contract drafting

Risk of ineffectiveness

The question of clause control characterizes coverage disputes in commercial insurance

According to standard business conditions law (sections 305 et. seq. German Civil Code (“BGB”)), standard insurance conditions shall be subject to clause control. Consequently clauses in standard insurance conditions surprising the counterparty (section 305c paragraph 1 BGB) or placing the counterparty at an inappropriate disadvantage (section 307 paragraph 1 BGB) may be ineffective.¹ Anyone who “uses” standard insurance conditions bears the risk of their ineffectiveness. Even if a clause in standard insurance conditions is not ineffective, the user nevertheless bears a risk according to section 305c paragraph 2 BGB: doubts concerning the clause’s interpretation shall be at his expense.

Furthermore, clause control according to standard business conditions law cannot be excluded by contract. In a more recent decision², the Federal Supreme Court declared that contracting parties cannot make an effective agreement on whether the legal standard business conditions law of sections 305 et seq. BGB for the contract and the clauses therein is valid or invalid. The decision covers all standard business conditions including particularly standard insurance conditions. In this context, the question, who is the user of standard insurance conditions, is moving more into the foreground.

¹ cf. e.g. for the control of standard business conditions of the claims-made-principle in D&O insurance: German Higher Regional Court Munich, judgement of 8 May 2009, 25 U 5136/08, NZG 2009, 714

² German Federal Supreme Court, decision of 20 March 2014, VII ZR 248/13, NJW 2014, 1725

No negotiation in open procedure

According to jurisdiction, user is the one on whose behalf the incorporation of pre-worded terms or clauses reverts to³. User of standard insurance conditions can not only be the insurer but also the policy holder or broker if particular clauses will be included in the contract on his behalf.⁴

As a consequence, it can, under certain circumstances, depend on chance who will be the user of a clause. When initially the insurer refers to standard insurance conditions or a particular current clause, he can become its user. He then bears the risk of the clause's ineffectiveness. In case of doubt, the clause will be interpreted at his expense. When the clause was initially included in the contract upon request of the policy holder or his broker, the policy holder could potentially bear the effectiveness and interpretation risk. This principle can lead to coincidental results.

Special problem: tendering of insurance conditions

From the policy holder's and insurance broker's point of view, a particular problem regarding the user's characteristic can arise following the tendering of insurance conditions. Under certain circumstances, statutory regulations oblige companies to put insurance contracts out to tender. If in these tenders it is referred to particular insurance conditions, the tenderer becomes the user of these conditions even though he possibly has not pre-formulated or created them. The tenderer then bears the risk of ineffectiveness after clause control.

This result is inappropriate because the tendering is often regulated by law or necessary for compliance reasons. As the case may be, the tenderer would be punished for his lawful behaviour. However, there are many forms of tendering. In the open procedure negotiations are prohibited by law (cf. section 24 No. 2 German Construction Tendering and Contract Regulation– part A). After tendering, the insurance shall be concluded as tendered before.

³ German Federal Supreme Court, decision of 22 July 2009, IV ZR 74/08, NJW-RR 2010, 39

⁴ German Federal Supreme Court, at the place stated

Besides, there is the so-called negotiated procedure according to section 101 paragraph 4 German Act Against Restraints of Competition. According to the negotiated procedure, the tenderer shall be entitled to “*initiate deviations of the tendered insurance contract’s wording*”. If possible, the tenderer should therefore tender in the negotiated procedure in order to avoid being the user of the negotiated conditions.

Risk of clause control is omitted after negotiation

A clause’s user shall not bear the risk of ineffectiveness according to the law of standard business terms or the risk of doubts in interpretation at his expense (under section 305c paragraph 2 German Civil Code) when the conditions are negotiated in detail (cf. section 305c paragraph 1 German Civil Code). In the commercial intercourse between contractors such negotiation is already given if the user gives the other party a reasonable possibility to negotiate and one or more contract conditions are possibly negotiated.⁵

Thus, if someone is obligated to tender insurance conditions and wants to prevent becoming user of the tendered conditions should – if legally possible – tender insurance conditions in the negotiated procedure. Furthermore, the tenderer should ensure that a negotiation on insurance conditions takes place and that at least one or a few clauses will be changed in the course of this procedure.

In this case, not only the negotiated clauses but the complete insurance conditions are “negotiated in detail” according to section 305 paragraph 1 sentence 3 German Civil Code. Consequently there is no longer the danger of ineffectiveness of the tendered insurance conditions according to standard business conditions law. Also the rule concerning doubts in the interpretation of standard business conditions under section 305c paragraph 2 General Terms and Conditions does not apply at the expense of the user.

Courts will have to decide in individual cases

Therefore, due to the unusual legal assessment the one who tenders insurance conditions should incorporate the one or other clause into this conditions which, with

⁵ cf. Palandt-Grüneberg, section 305 German Civil Code recital 22

certainty, is not acceptable for the counterparty. Thereby, the tenderer ensures that it comes to a negotiation and an amendment of the tendered insurance conditions and that he is under no circumstances regarded as their user.

Both for tendered insurance contracts and for insurance contracts concluded by brokers, it has to be noted: courts will have to decide if standard insurance conditions or individual clauses are attributable to the insurer or to the policy holder as the user in the individual case. However, the question of clause control will in any case characterize coverage disputes in the commercial insurance in the future.

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