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Higher Regional Court Cologne: Nullity of old general terms of insurance (AVB) not adapted to the new Insurance Contract Act (VVG)

(Continuation of the article by Fahl/Kassing, VP 2009, 320-325)

1. INTRODUCTION

Penalties for breaches against obligations agreed in old contracts become ineffective, if the insurer ("VR") does not adapt the general terms of insurance to the new Insurance Contract Act.[1]

The nullity results from the incompatibility of unadjusted general terms of insurance with sec. 28 para. 2 VVG. Sec. 28 para. 2 VVG regulates penalties for breaches against obligations. According to sec. 32 VVG a penalty diverging from sec. 28 para. 2 VVG will be ineffective.

The insurer cannot overcome the nullity by an interpretation of the non-adapted general terms of insurance, though this is often assumed in literature[2].

The insurer can therefore not refer to a penalty based of a non-adapted clause because it is ineffective. The insurer though still has rights and may refer to the penalties regulated in the VVG. Here, the insurer carries the burden of proof.

The Higher Regional Court Cologne had to decide in appellate proceedings (File 9 U 41/10) about the effectiveness of a contract clause which was not adapted to the new VVG. After the introduction of the new VVG, it was the insurer's obligation to adapt the contracts.

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[1] OLG Köln, R+S 2010 S. 406; das OLG Köln folgt mit seiner Entscheidung dem Aufsatz von *Fahl/Kassing*, VP 2009, 323.

[2] OLG Köln, R+S 2010 S. 406; *Fahl/Kassing*, VP 2009, 323.

In the following, we present the decision of the Higher Regional Court Cologne and show its practical consequences.

2. FACTS OF THE CASE

The claimant in front of the Higher Regional Court Cologne was a sequestrator of a building. The owner of the property had concluded a residential building insurance with the defendant before the the new VVG came into force. The residential building insurance was based on VGB 88. The insurer did not adjust the General Terms of Insurance (AVB) to the new VVG.

The vacant property was intended for renting. On January 8th, 2009, a tap water damage was discovered in the building. The tap water damage resulted from a frozen pipe after the breakdown of the heating system. On January 13th, 2009, the claimant announced the damage to the defendant.

The claimant arranged for urgently necessary repair and informed the defendant about the cost by letter of 20th February 2009. The defendant did at first not pay for the repair.

The claimant demanded from the defendant by letter of 17th June, 2009, to commission the remaining plumber work to be done. Furthermore, the defendant informed the claimant that the defendant will pay for 50% of the total repair costs after receipt of the invoice. The defendant explained the 50% reduction in a letter of 17th June 2009 and claimed a violation of obligations committed by the claimant. The violation against obligations was committed in form of an insufficient control of vacant buildings or parts of buildings.

The claimant had the damage repaired by a plumber. The defendant did not pay.

The Regional Court Cologne decided with decision of 21st January 2010 (File 24 O 458/09) in favor of the claimant for the defendant to pay for the total repair costs. The Higher Regional Court Cologne dismissed the defendant's appeal on facts and law. The Higher Regional Court Cologne accepted an appeal on law. The legal case had an importance going beyond the specific case concerning the question whether an agreed penalty for violations of obligations in old contracts becomes ineffective, if the terms of insurance are not in accordance with sec. 28 VVG. The appeal has the file number IV ZR 199/10 at the Federal Court of Justice.

3. DECISION OF THE HIGHER REGIONAL COURT COLOGNE

The Higher Regional Court Cologne decided that the claimant was entitled to indemnification for the loss of 8th January 2009 according to secs. 4 No. 2, 7 No. 1b, 15 No. 1b VGB (Residential Building Insurance) 88. The defendant could refer to a violation of an obligation according to sec. 1 No. 2 VGB 88.

3.1. Nullity of sec. 11 no. 2 VGB 88

The obligation regulation of sec. 11 no. 2 VGB 88 is incompatible with sec. 28 VVG. The incompatibility results in nullity according to sec. 32 VVG.

3.1.1 Legal situation according to the new VVG

The insured event occurred in the year 2009. According to Art. 1 para. 1 EGVVG the new VVG is effective:

Sec. 28 VVG regulates the insured's obligations. Sec. 28 para. 2 VVG says:

"If the contract determines that an insurer must not perform in case the insured violated a contractual obligation, the insurer is not liable to pay if the insured violated the obligation with intent. In case of a gross negligent violation of the obligation, the insurer is entitled to shorten the indemnification proportionally with the severity of the insured's violation; the insured has the burden of proof for the non-existence of gross negligence."

A deviance from this obligation regulation to the insured's disadvantage is not possible according to sec. 32 s. 1 VVG.

3.1.2 Incompatibility of sec. 11 VGB 88 with sec. 28 VVG

Sec. 11 No. 2 VGB 88 is, compared to sec. 28 VVG, in two ways unfavorable for the insured. On the one hand, the insurer is according to sec. 11 No. 2 s. 1 VGB 88 released from payment in case of a gross negligent violation of an obligation. On the other hand, sec. 28 para. 3 VVG has precise requirements on causality for the results of a violation of an obligation, which the VGB-regulation does not contain.

3.1.2.1 No release from the obligation to perform of the insurer in case of the insured's gross negligence

The insured would be disadvantaged in case sec. 11 No. 2 s. 1 VGB 88 is applied. This is because according to sec. 28 para. 2 s. 1 VVG, the insurer's release from the obligation to perform requires intent instead of gross negligence.

3.1.2.2 Causality requirements specified in sec. 28 para. 3 VVG

In opposite to the former legislation, sec. 28 para. 2 s. 1 VVG makes causality requirements. Sec. 28 para. 3 s. 1 VVG says:

> *„Aberrant from para. 2 the insurer is obliged to make the indemnification payment if the violation of the obligation neither caused the occurence nor the determination of the insured event nor the determination or the scope of the insurer's duty to indemnify."*

According to prior legislation, the theory of relevancy had to be observed in case of an intended violation of an obligation. According to the theory of relevancy, the insurer's release from the obligation to perform would not occur if the violation of the obligation had no consequences. In which cases a violation of an obligation would have no consequences, was though not determined consistently.

The legally undefined causality requirements in prior legislation are disadvantageous for the insured compared to the causality requirements of sec. 28 para. 3 s. 1 VVG.

3.2 No validity sustaining reduction

The Higher Regional Court Cologne disagreed with a validity sustaining reduction according to sec. 11 VGB 88.

3.2.1 General prohibition of a validity sustaining reduction

The validity sustaining reduction is generally forbidden according to the interpretation of the general terms and conditions[3]. The validity sustaining reduction sustains the validity of a contract clause by reducing the contract clause to a content which is legally still valid[4].

VGB 88 contains general terms and conditions. Therefore, the validity sustaining reduction is also forbidden with the interpretation of the VGB 88.

3.2.2 No exemption from the prohibition of a validity sustaining reduction

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[3] Grdlg. BGHZ 84, 109, 115 f. = NJW 1982, 2309 m. Anm. Bunte 2298; seither st. Rspr. BGH NJW 2001, 1419, 1421; 2005, 1275; 2005, 1574, 1576.

[4] *Basedow* in: Münchener Kommentar zum BGB, 5. Auflage 2007, § 306 Rn. 12; *Fahl/Kassing*, VP 2009, 323.

The prohibition of the validity sustaining reduction might have exemptions. An exemption of the prohibition could be based on special circumstances. In the underlying case, this circumstance could be the retrospective invalidity of initially valid contract terms.

According to the Higher Regional Court Cologne, the retrospective nullity does not justify an exemption from the prohibition of the validity sustaining reduction. The legislator was aware of the special circumstances of the retrospective nullity and regarded the retrospective nullity of prior contracts as necessary for the following reasons:

- The particularity of long-term insurance agreements must be considered. A parallel application of the old and the new VVG (German insurance contract law) was to be avoided. The parallel application could only be avoided by the nullity of unadjusted clauses.

- The legislator justifies the nullity of unadjusted old contracts with the new VVG's aim to strengthen the legal position of the insured towards the insurer. The strengthening of the insured's legal position could only be reached if the new legislation applies also for existing contracts.[5] Otherwise, most insured would not have profited from the improved legal position.

- The VVG allows for the particularities of the retrospective nullity. The legislator grants the insurer a transition period of one year after the VVG came into force, sec. 1 para. 3 EGVVG. Accordingly, the insurers could adjust their general terms of insurance to the new VVG until 1st January 2009. Furthermore, the legislator excluded the retrospective nullity for particular regulations. The exemptions are regulated in Art. 1 para. 2 and para. 2 to 6.

3.2.3 „Blue-Pencil-Test" may not be applied to sec. 11 No. 2 VGB 88

The interpretation possibilities of the „Blue-Pencil-Test" cannot be applied to sec. 11 No. 2 VGB 88. According to the "Blue-Pencil-Test", the invalid part of the contract clause is deleted. The part of the contract clause which is not affected by the nullity remains. The "Blue-Pencil-Test" requires a divisible clause. The part of the clause which is not affected by the nullity must in itself be comprehensible. The Higher Regional Court Cologne disapproved in its judgment of the divisibility of the clause of sec. 11 No. 2 VGB 88.

3.3 No supplementary contract interpretation

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[5] vgl. amtliche Begründung BT-Druck S. 16/3945 S. 118 linke Spalte, 1. Absatz.

The Higher Regional Court Cologne determined that the requirements for a supplementary contract interpretation are not on hand in the legal dispute to be assessed. Basically, the supplementary contract interpretation may be applied for general terms and conditions, especially if a clause becomes invalid after the change of the law.

A precondition for the supplementary contract interpretation is, among others, that a deletion of the invalid clause is not attending to legitimate interests[6]. Hereby, the protection of confidence must be particularly considered[7].

3.3.1 No protection of confidence for the insurer

According to the perception of the Higher Regional Court Cologne, the defendant enjoys no protection of confidence. The legislator provided for legitimate adaption regulations in Art. 1 para. 3 EGVVG. According to Art. 1 para. 3 EGVVG the insurer had to adapt old contracts to the new VVG. The insurer could have avoided the nullity of regulations by adaption[8]. A regulation gap would have been avoided by the adaption.

The legislator discussed a regulation alternative to the one in Art. 1 para. 3 EGVVG. The Federal Council of Germany suggested a regulation as an alternative to Art. 1 para. 3 EGVVG, according to which an interpretation should be allowed[9]. The alternative adaption regulation did not get through the process of legislation.

3.3.2 Adequate adaption period

The Higher Regional Court Cologne determined that the adaption period of one year as in Art. 1 para. 3 EGVVG is sufficient.

The defendant objected that the adaption period was not adequate, because an EDP-technical adaption could not be reached with reasonable effort. Each individual old contract would have to be examined. The defendant had to mail every adaption via registered mail with return receipt. Therefore, the defendant did not adapt the contract for cost efficiency reasons.

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[6] BGHZ 137 S. 153; BGH in: NJW 2008, S. 3422; BGH in: VersR 2005, S. 1565.

[7] BGHZ 137, S. 353; BAG in: NJW 2005, S. 1829.

[8] *Fahl/Kassing*, VP 2009, 323; *Wandt* in: MünchKomm.-VVG, 2010, § 28 Rn. 22; *Maier*, VW 2008, S. 986 (988); a.A. *Muschner* in: HK-VVG, Art. 1 EGVVG, Rn. 24.

[9] BR-DruckS (B) 707/06 S. 10.

The Higher Regional Court Cologne did not regard the defendant's objection as justified. The legislator regarded the one-year transition period, despite the objections of the German Federal Council[10] as sufficient and adequate[11]. The legislator especially did not accept economic reasons as justification for a non-adaption[12].

3.3.3 Legal consequences of sec. 28 para. 2 S. 2 VVG not applicable to § 11 Nr. 2 VGB 88

The insurer cannot directly refer to a proportional right to reduce the indemnification in case of a gross negligent violation of an obligation according to sec. 28 para. 2 s. 2 VVG. Sec. 28 para. 2 s. 2 VVG does not represent a direct legal consequence[13], which replaces the invalid legal consequence of sec. 11 No. 2 VGB 88[14]. Sec. 28 para. 2 VVG requires a valid contract agreement for intended or gross negligent violations of obligations combined with the release from the obligation to perform[15].

3.3.4 Transparency requirement sec. § 307 para. 1 s. 2 BGB

The inapplicability of the legal consequence of sec. 28 VVG to sec. 11 No. 2 VGB 88 further demands the transparency requirement according to sec. 307 para. 1 s. 2 BGB. The transparency requirement demands to avoid ambiguities or non-transparencies.

The insured would not know about the legal consequences of a violation of an obligation if he had to combine and adapt sec. 11 No. 2 VGB 88 with sec. 28 VVG. This adaption must be done by the insurer (art. 2 para. 3 EGVVG). The insurer can avoid the insured's ambiguity.

3.3.5 No unbalanced contractual relationship

The contractual relationship will also not be unilaterally changed at the expense of the insurer in case of the inapplicability of sec. 28 para. 2 VVG. The insurer can refer to sec. 81 VVG[16]. Sec.§ 81

[10] BR-DruckS. (B) 707/06, S. 10.

[11] BT-DruckS. 16/9345, S. 118.

[12] vgl. *Maier*, VW 2008, 986; *Wagner*, VersR 2008, S. 1490; kritisch *Weidner* in Juris PR-VersR 6/2010 Anm. 2.

[13] so *Armbrüster* in: Prölls/Martin VVG-Kommentar, 29. Aufl. 2010, Art. 1 EGVVG, Rn. 37; *Brandt* in: Loschelders/Pohlmann, 2010, Art. 1 EGVVG, Rn. 18.

[14] Vgl. *Fitzau*, VW 2008, 448; *Fahl/Kassing*, VP 2009, 323.

[15] *Schimikowski*, Anm. zu LG Göttigen R+S 2010, 194; *Fahl/Kassing*, VP 2009, 323.

[16] *Fahl/Kassing*, VP 2009, 323.

VVG must be applied in case of invalid contract terms and conditions according to sec. 306 para. 2 BGB[17]. Sec. 81 VVG is – opposite to sec. 28 para. 2 VVG a right to shorten indemnifications and does not require a contractual agreement about an obligation and about the shortening of the indemnification. The insurer is according to sec. 81 VVG released from payment, in total in case of the intended causation of the insured event, and in proportion in case of a gross negligent causation of the insured event.

Sec. 81 VVG is more favorable for the insured than sec. 28 para. 2 VVG. Namely, the insurer must prove the intended/gross negligent causation of the insured event and the causality according to sec. 81 VVG[18]. If sec. 28 para. 2 VVG had to be applied, the insured would have to prove that he did not act with intent/gross negligent.

In the case at hand, the defendant did not sufficiently prove the gross negligent causation of the insured event.

4. CONSEQUENCES FOR THE PRACTICE

The Higher Regional Court Cologne rejected with its decision the possibility to interpret unadjusted contract terms and conditions. The insurer could still use the penalties of sec. 81 para. 2 VVG in case he did not adjust the terms and conditions. In this case the insurer must though prove the preconditions of sec. 81 para. 2 VVG.

The Higher Regional Court Cologne provided with its judgment for the new VVG's aim to strengthen the insured's position towards the insurer. Unadjusted clauses with penalties for violations of obligations are omitted without replacement. The insured can – latest after the decision by the Federal Court of Justice (BGH) – benefit from the advantages of an omitted adaption of the general terms of insurance.

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[17] *Fahl/Kassing*, VP 2009, 323.

[18] *Looschelders* in: MünchKomm.-VVG, § 81 Rn. 22.

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