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The transfer of employer's liability insurance according to sec. 102 para. 2 Insurance Contract Act

1. INTRODUCTION

Companies are subject to various liability risks resulting from their business. They insure these risks through an employer's liability insurance. The company owner is policy holder of the employer's liability insurance and bears the liability risk. Company owners may be natural persons or legally responsible forms of organization.

If a company owner sells his business to a third party or a third party becomes owner for any other reason, the question of consequences for the employer's liability insurance arises. The Insurance Contract Act contains a special provision for this case in sec. 102 para. 2. The provision raises questions about special cases and may inherit risks both for the original company owner and the third party the company is transferred to.

2. THE PROVISION OF SEC. 102 PARAGRAPH 2 VVG AT A GLANCE

2.1 Wording of the provision

Sec. 102 paragraph 2 Insurance Contract Act determines:

„Should the business enterprise be sold to a third party or taken over by a third party on account of usufruct, a lease contract or a similar agreement, the policyholder shall assign to the third party the rights and obligations resulting from the insurance agreement throughout the period of his entitlement. Section 95 (2) and (3), as well as section 96 and section 97 shall apply mutatis mutandis.“

2.2 Intention of sec. 102 para. 2 Insurance Contract Act

Sec. 102 para. 2 Insurance Contract Act aims at the avoidance of cover gaps in case of a company sale. The insurance cover shall continue uninterruptedly. Liability risk and insurance cover shall not fall apart¹. For this, the buyer shall take the place of the transferor. The buyer becomes policy

¹ Cf. Federal Court of Justice about prior regulations of sec. 151 para. 2 Insurance Contract Act prior version in VersR 1966, 353 et seqq.

holder of the current employer's liability insurance by legal transfer of contract. If an owner sells a company, the existing insurance does not expire because the insured interest ceases to exist (cf. sec. 80 para. 2 Insurance Contract Act), but it is transferred to the buyer by the special provision of sec. 102 para. 2 Insurance Contract Act.

Sec. 102 para. 2 Insurance Contract Act covers the sale of a business as such - that is mainly the transfer of ownership to the buyer in fulfilment of a contract. The norm also regulates the take-over of the company by a third party in the event that the third party does not become the owner of the company, but takes over the management of the company resulting from another legal relationship (such as a lease). Sec. 102 para. 2 Insurance Contract Act treats both constellations equally since the third party takes over the liability risk.

2.3 Legal consequences according to sec. 102 para. 2 Insurance Contract Act

2.3.1 Transfer of insurance

According to sec. 102 para. 2 Insurance Contract Act, the employer's liability insurance is transferred to those taking over a company. According to the respectively applicable regulation of sec. 95 para. 3 Insurance Contract Act, the insurer "must not accept the assignment against him until he has learned thereof".

2.3.2 Obligation to disclose

The seller and the buyer have to disclose the sale resp. the take-over to the insurer. This is regulated in sec. 102 para. 2 Insurance Contract Act with reference to sec. 97 Insurance Contract Act. The disclosure has to be made immediately – thus without undue delay.

2.3.3 Possible release from payment of the insurer in case of a violation of the obligation to disclose

There is a risk both for the seller and the buyer if the disclosure to the insurer is not made or if it is not made in time. The insurer is not obligated to effect payment if the insured event occurs later than one month after the time when the insurer should have received the disclosure, and if the insurer had not concluded the contract which existed with the seller with the buyer (cf. sec. 97 para.1 s. 2 Insurance Contract Act). If the insurer knew of the sale, an omitted or delayed disclosure does no harm.

The obligation to disclose applies both for the seller and the buyer.

The consequences of a breach, however, hit only the buyer who may possibly be without insurance cover. Therefore, the buyer should ensure by contractual provisions with the seller that the parties fulfill the obligation to disclose.

2.3.4 Possibilities to terminate for insurer and buyer

The contract transfer by law limits the participating parties' personal autonomy. The law therefore provides the possibility for the insurer and the buyer to terminate the contract. There is a notice period of one month. For the insurer the notice period starts as soon as he learns of the sale. For the buyer, who is equally entitled to terminate the insurance agreement with immediate effect, the notice period depends on the sale (cf. sec. 96 Insurance Contract Act).

2.3.5 Seller and buyer liable for premium payments

According to sec. 95 para. 2 Insurance Contract Act, the seller and the buyer shall be liable as joint debtors for the premium payable during the current period of insurance at the time the seller assigns the rights to the buyer.

3. TRANSFER OF THE COMPANY AS REQUIREMENT FOR THE TRANSFER OF INSURANCE

The transfer of the employer's liability insurance according to sec. 102 para. 2 Insurance Contract Act requires that the company is taken over by a third party.

It is questionable under what conditions and at what point of time a transfer in the meaning of sec. 102 para. 2 Insurance Contract Act has been performed. This is a question of the individual case and should be agreed upon by contract if possible (see below 5.). Literature and jurisdiction do not provide a consistent answer to the question of requirements and scope of sec. 102 para. 2 Insurance Contract Act.

3.1 Actual takeover of the company decisive

According to the purpose of sec. 102 para. 2 Insurance Contract Act, liability risk and insurance cover must not fall apart. The employer's liability insurance therefore relates to the company as such. The liability risk hits the respective owner of the company.

For the question, whether and when a transfer of insurance happens, *the actual takeover* of a company by a third party is decisive. Therefore, it is decisive at which point of time the liability risk is devolved upon the buyer or the transferee. The terms sale and takeover must in so far not be understood technically. For example it is not a company sale in the meaning of sec. 102 para. 2 Insurance Contract Act, if the seller sells a leased company but the lessee does not change. Then there is no actual takeover of the company. On the other hand, a takeover happens if a change of the lessee takes place but the underlying lease contract is invalid.

3.2 Continuation of business required

To meet the protective purpose, sec. 102 para. 2 Insurance Contract Act requires that the third party takes over the business operation of the company. The third party entering into the business needs protection only if an employer's liability risk exists and remains which devolves upon him.

According to a widely held opinion, there must be a sufficient connection to the sold business. A continuation of the complete business is not necessary. It is decisive whether the liability risk of the company continues to exist and now hits the buyer. Even without a sale, a company owner might interrupt his business (e.g. the production) and this would have no impact on the insurance cover under the employer's liability insurance either. Liability risks might also in an interruption of the business (e.g. resulting from operating equipment or real property). The same applies if the buyer enters into the insurance contract following sec. 102 para. 2 Insurance Contract Act.

The business is for example not continued if the third party liquidates the company or if the business is not continued as before but incorporated into another company of the buyer. The same applies for a closure or reorganization.

3.3 Determination of the company owner

The liability risk of a company hits the company owner. If there are problems to determine the company owner, one can take recourse to evidence. Important evidence is the company name as stated on the name plate and the company letterhead² as well as the appearance as company owner to the outside in the course of business.

² Cf. *Littbarski* in Münchener Kommentar to Insurance Contract Act VVG, 1. edition 2011 sec. 102 VVG, no. 101 m.w.N.

Not every change in management is a transfer of the company. If, for example, only the executive management changes, but the owner remains the same, this implicates no transfer in the meaning of sec. 102 para. 2 Insurance Contract Act; the liability risk is not devolved upon another company owner. The new management is co-insured according to sec. 102 para. 1 Insurance Contract Act.

4. SPECIAL CASES AND DISTINCTION

4.1 Examples for the sale of a business

4.1.1 Inclusion of a co-shareholder by individual entrepreneur

If an individual entrepreneur brings in a co-shareholder, this results in a partnership under civil law (GbR). According to the jurisdiction of the Federal Court of Justice, the partnership under civil law must be regarded as (partly) having legal capacity³. The partnership becomes owner of the company and thus policy holder. The inclusion of a co-shareholder leads to a sale in the meaning of sec. 102 para. 2 Insurance Contract Act, a separation of the previous company owner is not necessary.⁴

4.1.2 Business transfer from a partnership under civil law to limited liability company

If a partnership under civil law operates a business and transfers it to a limited liability company with the purpose of continuing the business, this constitutes a transfer in accordance with sec. 102 para. 2 Insurance Contract Act, because another company becomes the owner of the business.

4.1.3 Conclusion of an insurance contract after takeover

It is debated whether sec. 102 para. 2 Insurance Contract Act is applicable if a lessor concluded an employer's liability insurance contract after leasing and transfer of the business (thus after the actual company takeover).

Here, clarification is required. In the lack of differing contractual agreements, the legal consequences of sec. 102 para. 2 Insurance Contract Act apply at the point of time of the actual takeover (see above), the lessee enters into the insurance contract. A later newly concluded (further) employer's liability insurance contract by the lessor or the lessee has no impact.

³ Cf. Judgement of the *Federal Court of Justice* of 29 January 2001 in: NJW 2001, 1065 et seqq.

⁴ With different reason, Federal Court of Justice in: NJW 1961, 2304 et seqq.

The conclusion of a new contract would result in multiple insurance. The participating parties can avoid an unwanted multiple insurance by contract or by using the existing termination possibilities.

As a requirement for the transfer of the insurance according to sec. 102 para. 2 Insurance Contract Act, the insurance must already exist. If a lessee takes over the business and the lessor does not conclude an employer's liability insurance contract until then, this is not a case in the sense of sec. 102 para. 2 Insurance Contract Act. There was no insurance when the company was taken over. The lessor who concludes the new insurance contract for the account of the lessee, becomes policy holder.⁵

4.2 Examples for the non-existence of a company sale

4.2.1 Sale of shares in stock corporations

A stock corporation is legally independent. It is itself owner of the company and thus policy holder. A change in the corporate structure by transfer of shares has no impact on this situation. The insurer may though agree on a contract provision with the policy holder according to sec. 102 para. 2 Insurance Contract Act– the stock corporation (so called “change of control-clause”).

4.2.2 Incorporation of a company into an existing company of the transferee

If a transferee incorporates the company into his own company, then sec. 102 para. 2 Insurance Contract Act cannot be applied because a continuation of the company is not given. A sufficient connection with the original, insured company is missing. The buyer's risk is possibly covered by an already existing employer's liability contract.⁶

4.2.3 Change of shareholder in commercial partnership

⁵ Vgl. zu diesem Fall *BGH* in: *NJW* 1965, 758.

⁶ Es kann sich insoweit um eine Erhöhung oder Erweiterung des versicherten Risikos nach Ziffer 3.1 Absatz 2 AHB 2008 beziehungsweise um eine Vorsorgeversicherung gemäß Ziffer 3 und 4 AHB 2008 handeln

A shareholder change in a commercial partnership is not a sale in the meaning of sec. 102 para. 2 Insurance Contract Act. The commercial partnership is policy holder and as such the risk carrier. The commercial partnership's position as policy holder is not changed if a shareholder enters into the partnership and is personally liable for the liabilities of the commercial partnership (cf. sec. 128 German Commercial Code). A transfer of contract does not take place. The shareholders can be co-insured according to sec. 102 para. 1 Insurance Contract Act.

5. CONTRACTUAL PROVISIONS RECOMMENDED

The participating parties should consider several aspects in connection with sec. 102 para. 2 Insurance Contract Act and – if necessary – provide for contractual provisions. This is basically possible as sec. 102 para. 2 Insurance Contract Act is alterable by mutual consent.

5.1 Seller and buyer

Seller and buyer can agree on the point of time and the modalities of the company sale by contract. Since a breach of the obligation to disclose only has negative consequences for the buyer, the buyer has to arrange for the disclosure or get the disclosure confirmed by the seller. The seller for his part is interested in not being liable for the payment of insurance premiums any longer.

5.2 Insurer and seller

Insurer and seller can principally exclude the regulation of sec. 102 para. 2 Insurance Contract Act. The regulation is alterable by mutual consent. The parties can avoid multiple insurance by means of subsidiarity clauses. If the former owner abandons his company, he should conclude a follow-up liability insurance to avoid cover gaps.

6. CONCLUSION

For the avoidance of cover gaps, sec. 102 para. 2 Insurance Contract Act regulates the legal transfer of the employer's liability insurance. An actual takeover of a company is decisive for the transfer. This is a matter of the individual case and may be problematic. The participating parties can exclude ambiguities or risks by contract.

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