The Insurance Disputes Law Review

Fourth Edition

Editors
Joanna Page and Russell Butland

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Chapter 6

GERMANY

Marc Zimmerling and Angélique Pfeiffelmann[1]

I OVERVIEW

The German insurance market contributes substantially to Germany's prosperity and economic growth.[2] With over €221 billion in premium income in 2020, the insurance industry is one of the highest turnover sectors in Germany.[3] It is one of the 10 biggest insurance markets worldwide and the second biggest reinsurance market after the US.[4] In 2020, 454 million insurance contracts were taken out.[5] As the coronavirus pandemic did not lead to the heavy losses in the insurance market predicted for 2020,[6] with insurers even expecting a major rise in income of 2 per cent for 2021, the long-term trend of growth is expected to continue.[7]

In this context, the effective and cost-efficient settlement of insurance disputes remains an important driver for the industry's success. It ensures legal certainty and fosters trust in the sector. The following chapter gives an overview of the legal framework for insurance disputes in Germany and highlights the current jurisprudence of German courts.

II THE LEGAL FRAMEWORK

i Sources of insurance law

The Insurance Contract Act

The main source of insurance law in Germany is the Insurance Contract Act (VVG). It sets out the general rules for insurance contracts as well as the statutory provisions for specific insurance branches. The VVG applies to all types of insurance contracts, except for

1 Marc Zimmerling is a partner and Angélique Pfeiffelmann is a senior associate at Allen & Overy LLP.

2 According to a study conducted by the association for economic research and consulting Prognos, https://www.prognos.com/sites/default/files/2021-01/20170330_prognos_gdv_bedeutung_der_versicherungswirtschaft_aktualisierung_komplett.pdf.

3 GDV, Fakten zur Versicherungswirtschaft, 31 August 2021, p. 32, https://www.gdv.de/resource/blob/24006/c161f408c5bb9505e03440df468f1f53/keyfact-booklet---die-versicherungswirtschaft-fakten-im-ueberblick-download-data.pdf.

4 ibid., pp. 43, 45.

5 GDV, Fakten zur Versicherungswirtschaft, 31 August 2021, p. 10, https://www.gdv.de/resource/blob/24006/c161f408c5bb9505e03440df468f1f53/keyfact-booklet---die-versicherungswirtschaft-fakten-im-ueberblick-download-data.pdf.

6 www.oecd.org/daf/fin/insurance/Insurance-Markets-in-Figures-2020.pdf, p. 1; Aon Marktreport 2021, p. 5, https://info.aon.de/publikationen/marktreport-2021/.

7 https://www.en.gdv.de/en/issues/our-news/insurers-looking-ahead--with-cautious-optimism-----very-happy--with-slight-growth-in-2020-66006.

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reinsurance and maritime insurance contracts.[8] It came into force in 1908 and remained largely unchanged until a major reform in 2008.[9] The objective of the reform was to modernise German insurance law and improve the position of the insured person.[10]

Important changes included:

a the introduction of a right to revoke the insurance contract by the policyholder within 14 days of the conclusion of the contract;[11]
b the introduction of certain advisory, documentation and information duties of the insurer;[12]
c the abolition of the 'all-or-nothing' principle in favour of the 'more-or-less' principle;[13]
d the abolition of insurance-specific limitation periods, rendering applicable the general limitation period of three years pursuant to Section 195 of the German Civil Code (BGB); and
e the introduction of a new place of jurisdiction at the place of the policyholder's residence.[14]

The overarching purpose of the reform was to provide greater protection to the insured person by setting out restrictions on the freedom of contract. However, these restrictions shall not apply to large risks and open policies.[15] Large risks insurance includes: (1) some transportation and liability insurance (such as insurance for railway vehicles, aircraft or the transportation of large goods); (2) some credit and suretyship insurance; and (3) some property, liability and other indemnity insurance where the policyholder has a balance sheet total in excess of €6.2 million, a net turnover of €12.8 million or an average of 250 employees per fiscal year.[16] These insurance policies are typically taken out by big companies that do not need protection by the VVG. All other risks are deemed 'mass risks', to which the freedom of contract restrictions apply without limitation.

BGB

The BGB is another source of German insurance law and is applicable insofar as no specific provisions of the VVG apply. The area of most relevance for insurance contracts is its section on the use of standard business terms. Almost all insurance contracts contain standard business terms of the insurer, especially insurance contracts concluded with a consumer.

8 Section 209 VVG.
9 It is therefore important to consider carefully whether decisions and publications on insurance law refer to the current or the old rules of the VVG.
10 Entwurf eines Gesetzes zur Reform des Versicherungsvertragsrechts of 20 December 2006, Bundestagsdrucksache 16/3945, p. 1.
11 Section 8 VVG.
12 Section 6 et seq. VVG.
13 The all-or-nothing principle allowed the insurer to refuse payment for the insured event if it was caused by the insured person, regardless of the degree of misconduct, whereas the more-or-less principle stipulates that the insurer may only refuse payment in full if the insured person caused the insured event intentionally; in cases of gross negligence, the insurer may refuse payment only partly depending on the degree of negligence; Sections 26(1), 28(2), 81(2) VVG.
14 Section 215(1) VVG.
15 Section 210(1) VVG; an open policy is a contract made in such a manner that, at the time when the contract is concluded, only the class of insured interest is designated and it is only specified to the insurer in detail once the contract has been concluded, Section 53 VVG.
16 Section 210(2) VVG enumerates all large risks conclusively.

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Section 305 et seq. of the BGB set out the rules for the incorporation of standard business terms into the contract, the assessment of their effectiveness and the interpretation of their content. These rules apply regardless of whether the other party is a consumer or not. However, stricter requirements apply where a consumer is concerned.

Other provisions applicable to insurance law are the rules on the statute of limitations. As the special limitation periods for insurance claims were abrogated with the VVG reform in 2008, the general rules in Section 195 et seq. of the BGB apply. The limitation period is three years,[17] commencing at the end of the year in which the claim arose and the insured party obtained knowledge of the circumstances giving rise to the claim (or would have obtained this knowledge if it had not shown gross negligence).[18] An exception applies if the limitation period is suspended. For insurance contracts, Section 15 of the VVG provides an insurance-specific suspension rule. Where a claim arising from an insurance contract has been registered with the insurer, the limitation period shall be suspended until such time as the applicant has received the insurer's decision in writing. All other rules for suspension are set out in Section 203 et seq. of the BGB.

German Code of Civil Procedure

A further source of German law that is especially relevant for insurance disputes is the German Code of Civil Procedure (ZPO). It sets out the general rules for litigation proceedings and is also applicable to insurance disputes as far as no specific rules are set out in the VVG.

One of the main principles of German civil procedural law is that each party has to present the facts and prove the case upon which its claim or defence is based. Unlike in common law jurisdictions, there is no pretrial discovery or document production. In general, no party to litigation proceedings is therefore obligated to deliver to the other party the documents or evidence necessary for its case. However, there are exceptions to this principle. One example is Section 142 of the ZPO, which sets out that the court may direct one of the parties or a third party to produce records or documents, as well as any other material in its possession if one of the parties made reference to it. Another example is Section 422 of the ZPO, which stipulates the obligation of a party to produce certain documents favourable for its opponent if its opponent is entitled to demand the surrender or production of the relevant documents pursuant to civil law stipulations.

With regard to insurance disputes, the VVG stipulates specific disclosure obligations of the insured person. According to Section 31(1), the insurer may, after the occurrence of an insured event, demand that the policyholder or the beneficiary shall disclose all the information necessary to establish the occurrence of the insured event or the extent of the insurer's liability. In addition, the insurer may demand supporting documents to the extent that the policyholder may be reasonably expected to obtain them. The policyholder is even obligated to disclose facts unfavourable to him or her. The VVG therefore sets out more extensive disclosure obligations of the insured person than it would have under the rules of the ZPO. However, Section 31 of the VVG does not set out any consequences for cases of non-compliance. Therefore, the insurer will usually incorporate the policyholder's disclosure duties in its general terms and conditions and stipulate contractual consequences for non-compliance.[19]

17 Section 195 BGB.
18 Section 199(1) BGB.
19 Rixecker in Römer/Langheid, VVG, 6th edition 2019, Section 31 [1].

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Another specific aspect of insurance disputes concerns direct claims by third parties against the insurer. This issue typically arises in relation to liability insurance that covers damage claims made by third parties against the policyholder. In general, a third party cannot make direct claims under the insurance contract against the insurer of the damaging party. Therefore, the third party may only enforce its damage claim against the policyholder (a liability claim), who may then raise a claim against his or her insurer (a coverage claim). However, there are exceptions to this rule. One is set out in Section 115 of the VVG, which provides for a direct claim by the third party against the insurer if: (1) third-party vehicle insurance is concerned; (2) the policyholder has become insolvent; or (3) the policyholder's whereabouts are unknown. If one of these requirements is fulfilled, the third party may claim payment directly from the insurer and initiate court proceedings against it without having to proceed against the policyholder first.

The ZPO also stipulates the place of jurisdiction for litigation proceedings regarding claims in connection with the insurance contract. Optional places of jurisdiction are the place of the insurer's registered seat,[20] the place of performance of the contract[21] or the place of the insurer's branch office.[22] In general, all these venues favour the insurer. With the introduction of Section 215 into the VVG in 2008, the legislature established a new place of jurisdiction that favours the insured person. The policyholder can now also choose to proceed against the insurer at the court in whose district he or she has his or her place of residence. For actions brought against the policyholder, only this court shall have jurisdiction. The parties can only deviate from this place of jurisdiction to the detriment of the policyholder after the dispute has arisen or if the policyholder moves his or her domicile to a different country after signing the contract or if his or her domicile is unknown at the time the action is filed.[23] The purpose of this change was to guarantee the policyholder access to a court near his or her domicile.[24] This was supposed to compensate for the subject-specific and economic advantages of the insurer.

ii Insurance regulation

German Insurance Supervision Act

The main legal source for insurance regulation is the German Insurance Supervision Act (VAG), which implemented in 2015 the European Solvency II Directive.[25] It enables the supervision of insurance companies in their legal and financial operations[26] by the German Federal Financial Supervisory Authority (BaFin) and the supervisory authorities of the federal states. The BaFin is the competent supervisory authority for private insurance companies that operate in Germany and are of material economic significance as well as for public insurance companies that participate in free competition and operate across the borders of

20 Section 17 ZPO.
21 Section 29 ZPO.
22 Section 21(1) ZPO.
23 Section 38(3) ZPO; Section 215(3) VVG.
24 Klimke in Prölss/Martin, VVG, 31st edition 2021, Section 215 [1].
25 Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast).
26 Section 294(2) VAG.

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any federal state.[27] The supervisory authorities of the federal states are mainly responsible for overseeing public insurers whose activities are limited to the federal state in question and private insurance companies of lesser economic significance.[28]

Therefore, all private and public insurance companies, pension funds and reinsurers carrying out private insurance businesses within the scope of the VAG and that have their registered office in Germany are subject to supervision.[29] Social insurance institutions[30] are not supervised under the VAG but regulated by other government agencies.[31]

The primary objective of the VAG is the protection of policyholders and beneficiaries.[32] To ensure that only regulated companies offer insurance services, insurance companies must acquire a licence before commencing business operations.[33] To be granted authorisation to operate, the insurance company must fulfil a number of requirements. This includes, inter alia, that the company:

a operates in the legal form of a public limited company;[34]

b has its legal seat in Germany;[35]

c engages only in insurance businesses and directly related businesses and observes the principle of business segregation (e.g., a life insurance company may not at the same time provide health or property insurance);[36]

d submits a detailed business plan that contains the company's charter and sets out the insurance segments in which it will operate, as well as the risks that are intended to be covered;[37]

e demonstrates that it has a sufficient amount of its own funds[38] as well as sufficient resources to develop the business and sales organisation;[39] and

f has at least two members of the management board that are 'fit and proper' persons.[40]

In its ongoing supervision, the BaFin monitors, among other things, whether the insurance company complies with all statutory and regulatory requirements, whether it is capable of fulfilling its insurance contracts and whether it observes the principle of good business practice (e.g., keeping proper accounting records and rendering proper accounts).[41] In accordance with the Solvency II Directive, it also supervises the company's solvency, in particular the fulfilment of certain capital requirements.

27 Section 320 VAG.

28 www.bafin.de/dok/7859578.

29 www.bafin.de/dok/7859578.

30 i.e., statutory health insurance funds, statutory pension insurance fund, statutory accident insurance institutions and unemployment insurance institutions.

31 www.bafin.de/dok/7859578.

32 Section 294(1) VAG.

33 Section 8(1) VAG.

34 This includes SEs, mutual societies or public-law institutions, Section 8(2) VAG.

35 Section 8(3) VAG.

36 Section 8(4) VAG; see also www.bafin.de/dok/7859578.

37 Section 9(1)–(3) VAG.

38 Section 9(2) No. 4 VAG.

39 Section 9(2) No. 5 VAG.

40 Section 9(4) No. 1 Lit a) VAG.

41 Section 294 VAG.

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In the event of any undesirable conduct by an insurance company, especially non-compliance with legal requirements, the BaFin may take any appropriate and necessary measures to prevent or eliminate this conduct.[42] For consumers, it is also possible to file a complaint against an insurance company with the BaFin.[43] The BaFin will review the complaint and issue a report with its legal opinion. If necessary, it may also take regulatory steps against the insurance company. However, it is not authorised to render a binding decision or give legal advice.

iii Insurable risk

German insurance law applies differently to two types of insurable risks: socially insured risks and privately insured risks. Socially insured risks are codified in the German Social Code (SGB), which distinguishes between health insurance, unemployment insurance, nursing care insurance, pension insurance and occupational accident insurance. These are statutory insurance contracts, which do not come into effect by agreement but are taken out by law when the insured person fulfils certain requirements.

The VVG only applies to privately insured risks. Because of the freedom of contract, the parties to an insurance contract may, in principle, insure any type of risk they chose to. They are only bound by the limitations applicable to any civil law contract (e.g., the prohibition of contracts that violate public policy or a statutory prohibition).[44] The VVG regulates the most common types of private insurance in Germany by stipulating the rules applicable to the different insurance segments. The most significant segment in Germany is that of liability insurance for third-party damage claims against the policyholder.[45] In 2018, about 83 per cent of German households had taken out private liability insurance and 81 per cent third-party vehicle insurance.[46] What is special about this area of insurance is that some liability insurance is taken out on a voluntary basis while others are compulsory insurance contracts. This is the case where the legislature has deemed it especially important to insure the risk of damage to a third party caused by the conduct of another party.[47] The most prominent example of compulsory liability insurance is third-party vehicle insurance, from which the other types of compulsory insurance evolved. Other insurance segments stipulated in the VVG are legal expenses insurance, transport insurance, fire insurance for buildings, life insurance, occupational disability insurance, accident insurance and private health insurance.

42 Section 298 VAG.

43 https://www.bafin.de/EN/Verbraucher/BeschwerdenStreitschlichtung/beschwerdenstreitschlichtung_node_en.html.

44 Looschelders in Langheid/Wandt, Münchener Kommentar zum VVG, 2nd edition 2016, Section 1 [144].

45 Littbarski in Langheid/Wandt, Münchener Kommentar zum VVG, 2nd edition 2017, before Section 100-112 [56]–[61]; Lücke in Prölss/Martin, VVG, 31st edition 2021, before Section 100 [5].

46 https://www.versicherungsforen.net/produkt/versicherungsmarkt-deutschland-vertraege-beitraege-leistungen/.

47 Klimke in Prölss/Martin, VVG, 31st edition 2021, introduction to Sections 113–124 [1].

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iv Fora and dispute resolution mechanisms

In general, arbitration and other alternative dispute resolution mechanisms (ADR) have experienced an expansion in recent years.[48] In Germany, however, the popularity of arbitration and ADR rather depends on the type of insurance contract concerned. A distinction can be drawn between reinsurance, insurance for commercial and industrial risks and insurance for mass risks.

Disputes regarding reinsurance are traditionally solved amicably between the parties.[49] The reason for this is a kind of 'gentlemen's agreement' to solve reinsurance disputes by negotiations for amicable settlement. However, arbitration proceedings have become more and more common in the past 30 years and most reinsurance contracts now also contain arbitration clauses. This may be attributed to an increased willingness in the Anglo-American reinsurance market to refer reinsurance disputes to arbitration, which also reflects on the German market. Another reason might be the increase of disputes regarding large risks that involve higher stakes for the parties. A third factor may be that more reinsurance companies withdraw from the reinsurance market, making it less necessary to solve disputes amicably to retain ongoing business relationships.

In insurance disputes concerning commercial and industrial risks there is a rather restrictive use of alternative dispute resolution mechanisms, especially arbitration.[50] This is a distinctive aspect of German insurance law in comparison to other jurisdictions. It might be owing to the still widely held perception by German insurers that German court proceedings are, when compared to other jurisdictions, more efficient, less time-consuming and less costly. Furthermore, German courts regularly have specialised chambers that will hear insurance law-related disputes. This ensures a qualified legal judgment that otherwise only specialised arbitral tribunals might be able provide. Benefits of this kind in German court proceedings apparently still outweigh the general advantages of arbitration for many insurance companies. However, there is reason to believe that the use of arbitration clauses in commercial or industrial insurance contracts will increase in the future. For contracts that are related to international law or written in a foreign language, or for contracts that contain unusual clauses or concern risks of a highly technical nature, arbitration proceedings may, in principle, be deemed more favourable.[51]

In German insurance contracts concerning mass risks, arbitration clauses are basically non-existent.[52] This is owing to the fact that they are often concluded with 'consumers' under German consumer protection law, which significantly raises the bar for a valid arbitration agreement. Section 1031(5) of the ZPO states that arbitration clauses involving consumers are only valid if they are contained in a separate record or document signed by both parties that shall not contain agreements other than those making reference to the arbitration proceedings. If the arbitration agreement is included in a contract, it is only valid if it has been recorded by a notary. Both requirements are rather difficult to fulfil in practice. In addition, arbitration clauses in insurance contracts are usually part of the insurer's general terms and

48 Wolf, NJW 2015, 1656 (1659).
49 Gal in Langheid/Wandt, Münchener Kommentar zum VVG, 2nd edition 2017, chapter 130 [5]–[8].
50 ibid., [9]–[10].
51 ibid., [11].
52 ibid., [15]–[17].

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conditions and therefore have to fulfil the requirements set out in Section 305 et seq. of the BGB (see above under Section II.i, 'BGB'). This leads to a high risk that an arbitration clause contained in an insurance contract for mass risks could be deemed invalid by a court.

Because of these difficulties with arbitration proceedings against consumers, the German Insurance Association formed the association Versicherungsombudsmann eV (the Insurance Ombudsman Association) in 2001 to establish a mechanism for out-of-court dispute settlement of insurance disputes with consumers before an 'insurance ombudsman'.[53] Under this mechanism, consumers may file a complaint against an insurance company (or an insurance broker) with the ombudsman.[54] To be able to refer an insurance dispute to the ombudsman, the insurer needs to be a member of the Insurance Ombudsman Association,[55] which almost all insurance companies in Germany are.[56] The complaint is only admissible if the insured person has made a complaint with the insurance company first and if at least six weeks have passed since then.[57] The ombudsman cannot decide on complaints that: (1) have a value of more than €100,000; (2) concern healthcare or nursing care insurance; (3) have already been filed with or decided by a court or another institution (unless the court has ordered, in accordance with Section 278a(2) of the ZPO, that court proceedings shall be stayed); or (4) are obviously unfounded.[58] The proceedings shall take no longer than 90 days.[59] The insured party may refer the dispute to an ordinary court at any time.[60] If the complaint is admissible and the value in dispute is no more than €10,000, the ombudsman can render a decision that is binding for the insurance company; otherwise, it can make a non-binding recommendation.[61] Dispute settlement before the insurance ombudsman has proven to be quite successful. In 2020, the Insurance Ombudsman Association received 18,133 complaints, of which 13,235 were admissible, and settled 13,341 disputes.[62]

III RECENT CASES

i Judgments of OLG Karlsruhe dated 30 June 2021, case Nos. 12 U 4/21 and 12 U 11/21, regarding insurance coverage for business closures due to the covid-19 pandemic

In two judgments of 2021, the Higher Regional Court (OLG) of Karlsruhe specified the requirements for insurance coverage under business closure insurance in relation to covid-19-related business closures. In the first case, the court affirmed a payment claim against the insurer while in the second case, it denied such a claim.

The first case, No. 12 U 4/21, concerned a business closure insurance policy that had been taken out on 1 January 2020 and stipulated in Section 1 No. 1 of its insurance conditions that compensation for business closures would be paid in the event of reportable diseases or

53 www.versicherungsombudsmann.de/welcome/.
54 Section 2(1) Code of Procedure of the Insurance Ombudsman (VomVO).
55 Section 1 VomVO.
56 www.versicherungsombudsmann.de/der-verein/mitglieder/.
57 Section 2(3) VomVO.
58 Section 2(4) VomVO.
59 Section 7(6) VomVO.
60 Section 11(2) VomVO.
61 Sections 10(3), 11(1) VomVO.
62 Annual report of the Insurance Ombudsman Association, pp. 116–118, https://www.versicherungsombudsmann.de/wp-content/uploads/Jahresbericht_2020.pdf.

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pathogens as listed in Section 1 No. 2 of the policy.[63] The applicable section listed a number of diseases 'according to Sections 6 and 7 of the Infection Protection Act' (IfSG).[64] However, the subsequent catalogue of diseases was not equivalent to the referenced sections of the IfSG (neither at the time the insurance was taken out nor at the time of the judgment).[65] The insurance company denied an insurance claim on that basis, arguing that insurance coverage was limited to the catalogue of reportable diseases and pathogens listed in the insurance conditions, which did not mention covid-19, SARS-CoV-2 or the coronavirus.[66]

According to the judgment of the OLG, this limitation was not made adequately clear to the policyholder.[67] The repeated reference to the IfSG in the insurance conditions rather gave the average policyholder the impression that every business closure due to a disease listed in the IfSG was covered by insurance.[68] The policyholder could not be expected to compare the catalogue in the insurance conditions to the IfSG.[69] As a result, Section 1 No. 2 of the insurance conditions was deemed ineffective because of a violation of the legal transparency requirement for standard business terms, and coverage was granted as the covid-19 disease and the SARS-CoV-2 pathogens were covered under the general clauses of Sections 6 and 7 of the IfSG at the time of the insured event in March 2020.[70]

The Court has allowed an appeal to the Federal Court of Justice (BGH) because of the fundamental importance of the case and to ensure uniformity throughout the jurisdiction.[71] The case is currently pending before the BGH.[72] As the decision of the OLG Karlsruhe deviates from other judgments of higher regional courts, which have denied insurance coverage under similar insurance conditions,[73] a decision by the BGH will give much needed guidance on this issue.

In its second decision of 30 June 2021, No. 12 U 11/21, the OLG Karlsruhe denied insurance coverage under the disputed business closure insurance as the insurance policy conditions did not mention the IfSG but instead explicitly stated that 'only' those diseases and pathogens listed in a subsequent catalogue were covered under the insurance conditions.[74] According to the court, this clause was neither ambiguous nor surprising to the policyholder.[75] As the relevant catalogue did not contain the disease covid-19 or the pathogen SARS-CoV-2,

63 OLG Karlsruhe, judgment dated 30 June 2021, 12 U 4/21 [6].
64 ibid., [9].
65 ibid., [70].
66 ibid., [35], [46].
67 ibid., [64 et seq.].
68 ibid., [71].
69 ibid., [72].
70 ibid., [60], [80 et seq.].
71 ibid., [100].
72 BGH, IV 205/21.
73 See OLG Stuttgart, judgment dated 15 February 2021, 7 U 351/20; OLG Oldenburg, judgment dated 27 May 2021, 1 U 261/20; OLG Schleswig, judgment dated 10 May 2021, 16 U 25/21; OLG Munich, court order dated 12 May 2021, 25 U 5794/20; OLG Hamburg, court order dated 19 April 2021, 9 U 44/21; OLG Frankfurt am Main, court order dated 31 May 2021, 3 U 34/21; OLG Dresden, judgment dated 8 June 2021, 4 U 61/21; OLG Celle, judgment dated 1 July 2021, 8 U 5/21.
74 OLG Karlsruhe, judgment dated 30 June 2021, 12 U 11/21 [8], [55].
75 ibid., [54], [56].

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no coverage was granted under the insurance conditions.[76] The OLG did not allow the appeal in this case as no divergent views were to be expected in literature and jurisprudence.[77] The judgment is now final.

The two cases give an example of how different wording in the insurance policy conditions may be decisive in the applicability of business closure insurance in cases of covid-19-related business closures. As this has led to extensive discussion and divergent jurisprudence regarding insurance coverage, the German Insurance Association (GDV) has introduced model terms and conditions for business closure insurance to provide more clarity in the future.[78]

ii Judgment of BGH dated 11 November 2020, case No. IV ZR 217/19, regarding directors and officers insurance coverage for payments made after a company has become insolvent according to Section 64 of the Limited Liability Companies Act

In the judgment of 11 November 2020, the BGH decided on the long-standing controversial question of whether claims according to Section 64 Sentence 1 of the Limited Liability Companies Act (GmbHG)[79] are covered under a regular directors and officers (D&O) insurance policy, which only provides coverage for statutory liability claims for damages. This ruling is contrary to previous case law of higher regional courts, which have repeatedly decided that a claim according to Section 64 of the GmbHG does not represent a statutory liability claim for damages but rather a compensation claim *sui generis*, which is not covered under a regular D&O insurance policy.[80]

Section 64 of the GmbHG addresses an obligation for the director of a company to compensate the company for payments made after it has become illiquid or after it has been deemed to be over-indebted. In the case at hand, the insolvency administrator had made a claim under Section 64 of the GmbHG against the former director of the insolvent company and was then subsequently claiming insurance coverage under the company's D&O insurance after the former director had assigned his insurance claim to the administrator.[81] The insurance conditions in question stipulated that insurance coverage was provided for financial damage due to a breach of duty according to statutory liability provisions.[82]

The BGH ruled that a claim according to Section 64 of the GmbHG was such a statutory liability claim for damages according to the insurance conditions.[83] Although it confirmed that a claim under Section 64 of the GmbHG qualified as a compensation claim *sui generis*, which intends to indemnify the insolvent company's creditors and not the company itself, it also held that the average policyholder could not be expected to make such a complex legal assessment.[84] As there was no clear legal definition of the term 'damage'

76 ibid., [50].

77 ibid., [90].

78 https://www.gdv.de/de/themen/news/betriebsschliessungsversicherung-musterbedingungen-65002.

79 With effect from 1 January 2021, Section 64 Sentence 1 GmbHG was abolished and incorporated in Section 15b(4) Insolvency Code (InsO).

80 OLG Düsseldorf, judgment dated 20 July 2018, 4 U 93/16; OLG Düsseldorf, judgment dated 26 June 2020. 4 U 134/18; also OLG Celle, court order dated 1 April 2016, 8 W 20/16.

81 BGH, judgment dated 11 November 2020, IV ZR 217/19 [1].

82 ibid., [2].

83 ibid., [10].

84 ibid., [11 et seq.].

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as used in the insurance conditions, the average policyholder would rather be expected to assume that a claim pursuant to Section 64 of the GmbHG was a damages claim within the meaning of the insurance conditions.[85]

In conclusion, this decision is important because it settles the disputed issue of insurance coverage for claims under Section 64 of the GmbHG in relation to the underlying insurance conditions. Nevertheless, it remains important to ensure that the coverage of claims according to Section 64 Sentence 1 of the GmbHG (now Section 15b(4) of the Insolvency Code) is clarified in the D&O insurance conditions to avoid unnecessary legal ambiguity.[86]

iii Judgment of OLG Düsseldorf dated 8 November 2019, case No. I-4 U 182/17, regarding the binding effects of liability proceedings on later coverage proceedings with regard to D&O insurance

In a judgment of 2019, the OLG Düsseldorf had to decide on the binding effects of liability proceedings against a director for breach of duty on subsequent coverage proceedings by the director against the D&O insurer for indemnification.

In the case at hand, the director of a limited liability company had been ordered to pay damages for a breach of duty according to Section 43(2) of the GmbHG.[87] In the subsequent coverage proceedings, the D&O insurer had refused insurance coverage on the basis that the director had committed an intentional breach of duty and, therefore, a contractual exclusion from insurance coverage applied.[88] The first-instance judgment had accepted this argumentation, holding that the legal assessments in the liability proceedings had been sufficient to establish an intentional breach of duty and were binding on the coverage proceedings.[89] The OLG Düsseldorf, however, denied that an intentional breach of duty had been proven by the insurer.[90] In line with settled case law,[91] it held that the binding effects of the liability proceedings on the coverage proceedings only applied to legal assessments that were decisive for both proceedings.[92] As a decision on the degree of negligence had not been required in the liability proceedings to establish a breach of duty under Section 43(2) of the GmbHG, the assessments had not been decisive for both proceedings in this case.[93] The OLG Düsseldorf further stated that a breach of cardinal duties could constitute a strong indication for an intentional breach of duty, but that the insured person had rebutted the intentional breach.[94] Hence, the OLG Düsseldorf denied an exclusion of insurance coverage as the insurer had failed to prove an intentional breach of duty and ordered the D&O insurer to grant the requested indemnification.[95]

85 ibid., [12]–[16].

86 Cf. Kiesel, FD-InsR 2020, 434718; Köster, GWR 2021, 80.

87 KG Berlin, judgment dated 3 March 2015, 14 U 69/13.

88 OLG Düsseldorf, judgment dated 8 November 2019, I-4 U 182/17 [93 et seq.].

89 ibid., [75].

90 ibid., [208].

91 BGH, judgment dated 18 February 2004, IV ZR 126/02;¸BGH, judgment dated 8 December 2010, IV ZR 211/07 [11]; OLG Düsseldorf, judgment dated 30 November 2018, 4 U 5/18 [36]; OLG Düsseldorf, judgment dated 2 November 2004, I-4 U 16/04 [50].

92 OLG Düsseldorf, judgment dated 8 November 2019, I-4 U 182/17 [164].

93 ibid., [170].

94 ibid., [146]-[149].

95 ibid., 182/17 [210].

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This ruling is not only of relevance for future D&O insurance cases as it shows the limitations on the binding effects of liability proceedings on subsequent coverage proceedings, but also because it emphasises the indicative effects the former may have on the latter.[96] This is regularly misjudged in D&O insurance disputes.

The insurer has filed a complaint with the BGH against the non-admission of the appeal.[97] It remains to be seen whether the BGH will accept it and if so, how it will decide on this issue.

iv Judgment of BGH dated 20 May 2021, case No. IV ZR 324/19, regarding the requirements for an exclusion of coverage due to an intentional criminal offence committed by the insured person with regard to legal expenses insurance

In a judgment of May 2021, the BGH decided the controversial question of whether a legal expenses insurer may refuse provisional insurance coverage on the basis of an alleged intentional criminal offence committed by the insured person.

In the case at hand, the insurance conditions stipulated an exclusion of coverage in the event of a causal connection between the proceedings for which the insured person demanded coverage (the main proceedings) and an intentional criminal act committed by the insured person.[98] The requirements for such an exclusion of coverage and whether the insurer was obliged to provide provisional insurance coverage until the requirements were met had been disputed in jurisprudence and legal literature up to this point.[99] One view argued that the insurer could refuse insurance coverage until an intentional criminal offence had been determined in the main proceedings,[100] whereas another view held that the insurer had to provide provisional insurance coverage until this had been determined.[101] Both views concurred that whether an exclusion of insurance coverage applied depended on whether an intentional criminal offence was proven in the main proceedings.[102]

The BGH, however, followed a third view, according to which the existence of an intentional criminal act had to be assessed in the coverage proceedings.[103] It held that there was no binding effect of the findings in the main proceedings (or, for instance, a corresponding criminal investigation) on the coverage proceedings.[104] A comparison with liability insurance

96 Fiedler, VersR 2020, 976, 979.

97 Fiedler, VersR 2020, 976, 980, case No. IV ZR 316/19.

98 BGH, judgment dated 20 May 2021, IV ZR 324/19 [2].

99 See also Grams, FD-VersR 2021, 439755.

100 See BGH, judgment dated 20 May 2021, IV ZR 324/19 [17], with reference to LG Duisburg ZfS 1989, 309 [1 c]; ZfS 1985, 302; LG Heidelberg ZfS 1984, 17; AG Lingen ZfS 1985, 19 [20]; Böhme, ARB 12th edition, Section 4(2)a [50].

101 See BGH, judgment dated 20 May 2021, IV ZR 324/19 [18], with reference to OLG Frankfurt, judgment dated 21 July 1993, 23 U 200/91; OLG Frankfurt, judgment dated 24 November 1988, 16 U 143/87; LG Berlin, judgment dated 7 February 1989, 7 O 272/88; Obarowski in Beckmann/Matusche-Beckmann, Versicherungsrechts-Handbuch, 3rd edition 2015. Section 37 [376]; Maier in Harbauer, ARB 2010, 9th edition 2018, Section 3 [229], [243]; Looschelders in Looschelders/Paffenholz, ARB, 2nd edition 2019. Section 3 ARB 2010 [192]; Brünger in Staudinger/Halm/Wendt, Versicherungsrecht, 2nd edition 2017, Section 3 ARB 2010 [93]; Plote in van Bühren/Plote, ARB, 3rd edition 2013, Section 3 ARB 2010, [136].

102 BGH, judgment dated 20 May 2021, IV ZR 324/19 [17], [18].

103 ibid., [20].

104 See BGH, judgment dated 20 May 2021, IV ZR 324/19 [19 et seq.] with reference to Schneider in van Bühren, Handbuch Versicherungsrecht, 7th edition 2017, Section 13 [238]; Piontek in Prölss/Martin, VVG, 31st edition 2021, ARB 2010, Section 3 [2], [110].

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(such as D&O insurance), in which the insurer is bound by the legal assessments of the liability proceedings insofar as they are decisive for both proceedings, was not adequate.[105] The average insured person could not be expected to draw such a comparison.[106] Therefore, the court had to make its own legal assessments as to whether there was a causal connection between the insured event and an intentional criminal offence committed by the insured person.[107]

The BGH further held that there was no obligation on the insurer to provide provisional insurance coverage if it relied on such an exclusion.[108] As the insurance conditions in this case did not explicitly provide for provisional insurance coverage, the average insured person could not expect to be entitled to such coverage.[109] However, the insurer had to prove that an exclusion of coverage applied and could not deny coverage on the basis of an alleged intentional criminal act.[110]

The BGH decision is of considerable importance as the predominant opinion in legal literature and jurisprudence to date had been that the insurer in a legal expenses insurance contract was obliged to provide provisional insurance coverage until the requirements for a contractual exclusion of coverage had been met in the main proceedings.[111]

IV THE INTERNATIONAL ARENA

Cross-border insurance contracts have proliferated in recent years, putting insurance disputes increasingly into a more international context. Questions frequently arise in cross-border insurance disputes regarding the correct place of jurisdiction and the applicable law. For German courts, EU Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and EU Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Recast Brussels Regulation)[112] set out the relevant rules for these questions.

Rome I applies to insurance contracts concluded after 17 December 2009 and provides the rules to identify the applicable law to contractual obligations in civil and commercial matters involving a conflict of laws. Article 7 Rome I sets out specific rules for insurance contracts covering large risks as well as insurance contracts covering mass risks situated inside

105 BGH, judgment dated 20 May 2021, IV ZR 324/19 [36].
106 ibid., [36].
107 ibid., [38].
108 ibid., 324/19 [20].
109 ibid., [28].
110 ibid., [20], [35].
111 Schneider, NJW 2021, 2173 [2174].
112 As well as its predecessor, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which still applies to legal proceedings instituted before 10 January 2015 as well as to judgments given or court settlements concluded before that date (Article 66 of the Recast Brussels Regulation).

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the territory of the Member States. To all other insurance contracts, especially regarding mass risks situated outside the territory of a Member State as well as reinsurance contracts, the general rules of Article 3–6 Rome I apply.[113]

Regarding the question of jurisdiction, the Recast Brussels Regulation provides the relevant rules for legal proceedings instituted on or after 10 January 2010 against a defendant that has its domicile[114] in a Member State and concern a dispute that is not located solely in one Member State (e.g., one of the parties has its residence or place of business in one Member State and the other party in another Member State or a third state). It contains specific rules for insurance disputes in Articles 10–16. The rules are similar to those under German law (see Section II.i, 'German Code of Civil Procedure'). If the defendant has its residence in Switzerland, Norway or Iceland, the Lugano Convention (2007) applies with corresponding rules.

The Recast Brussels Regulation also applies to the enforcement of judgments rendered by a court of a different Member State. In general, such judgments shall be recognised and enforceable in the other Member State without any special procedure or declaration of enforceability being required.[115] However, the Recast Brussels Regulation does not apply to the enforcement of arbitral awards.[116] Regarding the recognition and enforcement of foreign awards by a German court, the rules of the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) apply.[117] Regarding the recognition and enforcement of domestic awards, the rules of the ZPO apply.

V TRENDS AND OUTLOOK

The heavy floods in Germany of July 2021 will make this year historically the most damaging yet, with estimated insurance claims of approximately €7 billion.[118] As this marks a record in damage caused by natural disasters, climate change has undeniably begun to affect the insurance industry.

The question is how the industry will react to this. In the past, governmental support for damage caused by natural disasters, as well as the policy of some insurers to deny insurance in certain 'uninsurable' areas have led to an insurance gap for natural hazards.[119] Although nearly all residential buildings in Germany are insured for wind, storm and hail, only 46 per cent of

113 Rome I, however, does not apply to insurance contracts providing benefits for employed or self-employed persons in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work, excluding life assurance according to Article 9 No. 2 of the Solvency II Directive.

114 For a company, this would be the place where it has its statutory seat, central administration or principal place of business, Article 63 of the Recast Brussels Regulation.

115 Articles 36(1), 39 of the Recast Brussels Regulation.

116 Article 1(2)(d) of the Recast Brussels Regulation.

117 Section 1061 ZPO.

118 https://www.tagesschau.de/wirtschaft/unternehmen/flut-katastrophe-versicherungsschaeden-kosten-101.html.

119 Ergebnisbericht des Ausschusses Schadenversicherung Klimawandel – aktuarielle Implikationen in der Schadenversicherung, 14 April 2021, p. 52, https://aktuar.de/unsere-themen/fachgrundsaetze-oeffentlich/Ergebnisbericht%20AG%20Klimawandel.pdf.

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homeowners have protection against further natural hazards, such as heavy rain and floods.[120] Therefore, closing the insurance protection gap for climate change risks poses one of the main challenges for the insurance industry in the future.[121]

Some call now for compulsory insurance against natural hazards.[122] The GDV, however, points out that adapting an industry-wide concept to the effects of climate change would be better suited for this purpose as mandatory insurance alone would not be sufficient to shoulder the costs of climate impacts.[123] Instead, the GDV suggests an overall concept based on raising risk awareness, taking compulsory preventive measures in the private and public sector and fostering increased insurance density.[124]

However, if, when and how the insurance industry, and those in politics, will take effective action to close the insurance gap for climate change risks remains to be seen.

120 https://www.en.gdv.de/en/issues/our-news/insured-flood-losses-in-north-rhine-westphalia-and-rhineland-palatinate-in-the-range-of-4-to-5-billion-euros-69006.

121 https://www.spglobal.com/en/research-insights/featured/how-covid-19-has-changed-insurance.

122 Ergebnisbericht des Ausschusses Schadenversicherung Klimawandel – aktuarielle Implikationen in der Schadenversicherung, 14 April 2021, p. 52, https://aktuar.de/unsere-themen/fachgrundsaetze-oeffentlich/Ergebnisbericht%20AG%20Klimawandel.pdf; https://www.en.gdv.de/en/issues/our-news/insured-flood-losses-in-north-rhine-westphalia-and-rhineland-palatinate-in-the-range-of-4-to-5-billion-euros-69006.

123 https://www.en.gdv.de/en/issues/our-news/insured-flood-losses-in-north-rhine-westphalia-and-rhineland-palatinate-in-the-range-of-4-to-5-billion-euros-69006.

124 https://www.gdv.de/de/medien/aktuell/versicherungsschaeden-durch-flutkatastrophe-bei-rund-sieben-milliarden-euro-69800; Ergebnisbericht des Ausschusses Schadenversicherung Klimawandel – aktuarielle Implikationen in der Schadenversicherung, 14 April 2021, p. 52 et seq., https://aktuar.de/unsere-themen/fachgrundsaetze-oeffentlich/Ergebnisbericht%20AG%20Klimawandel.pdf.

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Appendix 1

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Marc Zimmerling is a partner in the German dispute resolution practice group at Allen & Overy and has over 20 years of experience in the insurance industry.

He is regularly instructed by insurance companies, financial institutions and national and international clients from key industry sectors to act as adviser on a broad range of insurance-related issues. This includes advising on policy interpretation and insurance-related risk issues, as well as monitoring and defence work. Marc also has significant experience in representing his clients in all types of national and cross-border disputes before state and arbitration courts, often with multiple parties and complex issues of fact and law.

A particular focus of his work is on professional indemnity, directors' liability and insolvency-related insurance litigation, including coverage disputes and recourse claims. Furthermore, he has broad experience in the area of risk prevention and risk management, as well as in various fields of alternative dispute resolution.

The Legal 500: Germany 2021 points out that Marc has 'notable expertise in insurance law disputes'. *Chambers Europe* 2018 highlights that Marc 'is particularly well known for his adeptness in D&O liability cases'. He holds a Doctor of Laws degree from Goethe University, Frankfurt, Germany and has repeatedly been named by German legal directory *JUVE* as a frequently recommended lawyer for insurance law, as well as for commercial, liability and corporate litigation; in the 2020/2021 edition, *JUVE* cites clients who describe Marc as 'very qualified', 'absolutely fast, reliable and thorough', 'of excellent professional and personal competence' and 'from our point of view the best lawyer in this field, especially for professional liability'.

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Angélique Pfeiffelmann is a senior associate in Allen & Overy's Frankfurt office, where she represents national and international companies from different industries in commercial and corporate disputes.

One of her main areas of practice is insurance litigation, often with cross-jurisdictional elements and complex issues of fact and law. In this regard, she advises large insurance companies, as well as major international corporations, on all questions concerning insurance law, mostly in relation to D&O insurance.

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Angélique also has significant experience in professional liability disputes, which includes the representation of her clients in complex, high-value court proceedings, as well as in relation to their professional liability insurers. She holds a Master of Laws degree from the University of Sydney and is admitted to the German Bar Association.

The Legal 500: Germany 2021 describes the Allen & Overy disputes team as 'extremely thorough and effective in working together' and 'exceptionally well prepared regarding commercial and legal questions'.

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