THE INSURANCE DISPUTES LAW REVIEW

Fifth Edition

Editors
Joanna Page and Russell Butland

THE LAWREVIEWS

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CONTENTS

PREFACE

We are delighted that this is now the fifth edition of *The Insurance Disputes Law Review*. It is a privilege to be the editors of this excellent and succinct overview of recent developments in insurance disputes across 18 important insurance jurisdictions.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private spheres. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured, and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (concepts almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As editors, we have been impressed by the erudition of each author and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction.

An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and, therefore, had to rely on the duties of disclosure of the policyholder). With the increasing use of artificial intelligence to assess data and more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example, in relation to healthcare insurance, policyholders are not denied insurance for historical matters. In light of the ongoing scourge of covid-19, and the complexity of its effects across the world's economies, this issue continues to be at the forefront of debate.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The past year has been tumultuous. The conflict under way in Ukraine, together with its impact on energy security and global supply chains, comes as a further shock on top of climate events and continued disruption from covid-19. This conflict is having a substantial effect on the aviation insurance market, particularly in relation to providing cover for war and contingency coverage. Business interruption issues, meanwhile, continue to be worked through across the affected legal systems; key areas of coverage have been addressed, but there are now more bespoke issues to deal with; for example, relating to application of policy limits.

There has in the past year been particular focus on directors' and officers' policies. These are under increasing pressure as directors are in the spotlight following strategic climate change litigation being conducted, particularly relating to greenwashing and transparency in the process of the transition to net zero. Similarly, cyber risks are ever increasing and again place directors and officers under scrutiny.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany) is likely to be an important factor.

We would like to express our gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. On a personal note, we must also thank Lucia Craft-Marquez at our firm, who has done much of the hard work in this edition.

Finally, we would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in ensuring both a professional look and consistency in the contributions.

Joanna Page and Russell Butland
Allen & Overy LLP
London
October 2022

Chapter 9

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 €226 billion in premium income in 2021, 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 2021, 465 million insurance contracts were taken out.[5]

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 and regulation

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 2022, p. 32, https://www.gdv.de/resource/blob/102130/49e263c463432c30569147bc26f55030/download-fakten-zur-versicherungswirtschaft-2022-data.pdf.

4 ibid., pp. 43, 45.

5 GDV, *Fakten zur Versicherungswirtschaft*, 31 August 2022, p. 10, https://www.gdv.de/resource/blob/102130/49e263c463432c30569147bc26f55030/download-fakten-zur-versicherungswirtschaft-2022-data.pdf.

reinsurance and maritime insurance contracts.[6] It came into force in 1908 and remained largely unchanged until a major reform in 2008.[7] The objective of the reform was to modernise German insurance law and improve the position of the insured person.[8]

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;[9]

b the introduction of certain advisory, documentation and information duties of the insurer;[10]

c the abolition of the 'all-or-nothing' principle in favour of the 'more-or-less' principle;[11]

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.[12]

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.[13] Large risks insurance includes some transportation and liability insurance (such as insurance for railway vehicles, aircraft or the transportation of large goods); some credit and suretyship insurance; and 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.[14] 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.

6 Section 209 VVG.

7 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.

8 Entwurf eines Gesetzes zur Reform des Versicherungsvertragsrechts of 20 December 2006, Bundestagsdrucksache 16/3945, p. 1.

9 Section 8 VVG.

10 Section 6 *et seq*. VVG.

11 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.

12 Section 215(1) VVG.

13 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.

14 Section 210(2) VVG enumerates all large risks conclusively.

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,[15] 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).[16] 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 has 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.[17]

15 Section 195 BGB.

16 Section 199(1) BGB.

17 Rixecker in Langheid/Rixecker, *VVG*, 7th edition 2022, Section 31 [1].

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 third-party vehicle insurance is concerned; the policyholder has become insolvent; or 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,[18] the place of performance of the contract[19] or the place of the insurer's branch office.[20] 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.[21] The purpose of this change was to guarantee the policyholder access to a court near his or her domicile.[22] This was supposed to compensate for the subject-specific and economic advantages of the insurer.

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.[23] It enables the supervision of insurance companies in their legal and financial operations[24] 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

18 Section 17 ZPO.

19 Section 29 ZPO.

20 Section 21(1) ZPO.

21 Section 38(3) ZPO; Section 215(3) VVG.

22 Klimke in Prölss/Martin, *VVG*, 31st edition 2021, Section 215 [1].

23 Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast).

24 Section 294(2) VAG.

any federal state.[25] 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.[26]

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.[27] Social insurance institutions[28] are not supervised under the VAG but regulated by other government agencies.[29]

The primary objective of the VAG is the protection of policyholders and beneficiaries.[30] To ensure that only regulated companies offer insurance services, insurance companies must acquire a licence before commencing business operations.[31] 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;[32]

b has its legal seat in Germany;[33]

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);[34]

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;[35]

e demonstrates that it has a sufficient amount of own funds[36] as well as sufficient resources to develop the business and sales organisation;[37] and

f has at least two members of the management board that are fit and proper persons.[38]

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).[39] In accordance with the Solvency II Directive, it also supervises the company's solvency, in particular the fulfilment of certain capital requirements.

25 Section 320 VAG.

26 www.bafin.de/dok/7859578.

27 www.bafin.de/dok/7859578.

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

29 www.bafin.de/dok/7859578.

30 Section 294(1) VAG.

31 Section 8(1) VAG.

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

33 Section 8(3) VAG.

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

35 Section 9(1)–(3) VAG.

36 Section 9(2) No. 4 VAG.

37 Section 9(2) No. 5 VAG.

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

39 Section 294 VAG.

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.[40] For consumers, it is also possible to file a complaint against an insurance company with the BaFin.[41] 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.

ii 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 choose 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).[42] 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.[43] In 2018, about 83 per cent of German households had taken out private liability insurance and 81 per cent third-party vehicle insurance.[44] 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.[45] 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.

40 Section 298 VAG.

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

42 Looschelders in Langheid/Wandt, *Münchener Kommentar zum VVG*, 3rd edition 2022, Section 1 [148a].

43 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].

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

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

iii Fora and dispute resolution mechanisms

In general, arbitration and other alternative dispute resolution (ADR) mechanisms have experienced an expansion in recent years.[46] 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.[47] 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 ADR mechanisms, especially arbitration.[48] 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.[49]

In German insurance contracts concerning mass risks, arbitration clauses are basically non-existent.[50] 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 conditions and, therefore, have to fulfil the requirements set out in Section 305 *et seq*. of the BGB (see 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.

46 Wolf, NJW 2015, 1656 (1659).

47 Gal in Langheid/Wandt, *Münchener Kommentar zum VVG*, 2nd edition 2017, chapter 130 [5]–[8].

48 ibid., [9]–[10].

49 ibid., [11].

50 ibid., [15]–[17].

Because of these difficulties with arbitration proceedings against consumers, the German Insurance Association formed 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'.[51] Under this mechanism, consumers may file a complaint against an insurance company (or an insurance broker) with the ombudsman.[52] To be able to refer an insurance dispute to the ombudsman, the insurer needs to be a member of the Insurance Ombudsman Association,[53] which almost all insurance companies in Germany are.[54] 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.[55] The ombudsman cannot decide on complaints that:

a have a value of more than €100,000;
b concern healthcare or nursing care insurance;
c 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
d are obviously unfounded.[56]

The proceedings shall take no longer than 90 days.[57] The insured party may refer the dispute to an ordinary court at any time.[58] 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.[59] Dispute settlement before the insurance ombudsman has proven to be quite successful. In 2021, the Insurance Ombudsman Association received 18,344 complaints, of which 14,106 were admissible and 13,732 disputes settled.[60]

III RECENT CASES

i Judgment of the Federal Court of Justice dated 26 January 2022, case No. IV ZR 144/21, regarding insurance coverage for business closures due to the covid-19 pandemic

With a judgment of 26 January 2022, the Federal Court of Justice (BGH) has now decided on the controversial question of insurance coverage for business closures due to the covid-19 pandemic. In the previous edition of this chapter, a ruling was discussed in which the Higher Regional Court (OLG) of Karlsruhe deviated from the prevailing case law and granted

51 www.versicherungsombudsmann.de/welcome/.
52 Section 2(1) Code of Procedure of the Insurance Ombudsman (VomVO).
53 Section 1 VomVO.
54 www.versicherungsombudsmann.de/der-verein/mitglieder/.
55 Section 2(3) VomVO.
56 Section 2(4) VomVO.
57 Section 7(6) VomVO.
58 Section 11(2) VomVO.
59 Sections 10(3), 11(1) VomVO.
60 Annual report of the Insurance Ombudsman Association, pp. 104–106, https://www.versicherungsombudsmann.de/wp-content/uploads/Jahresbericht_2021.pdf.

a claim for insurance coverage.[61] The appeal against this judgment is still pending before the BGH.[62] In the case at hand, the BGH has now denied insurance coverage under the relevant business closure insurance in line with recent case law.[63]

The insurance conditions in dispute granted compensation for business closures in the event of reportable diseases or pathogens as listed in Section 2 No. 2 of the policy.[64] The applicable section listed a number of diseases 'according to Sections 6 and 7 of the Infection Protection Act' (IfSG). The subsequent catalogue of diseases did not mention covid-19, SARS-CoV or SARS-CoV-2.[65]

Therefore, the BGH held that the plaintiff could not claim insurance coverage for his covid-19-related business closure. It set out that insurance conditions are to be interpreted from the point of view of an average policyholder without any special knowledge of insurance law.[66] In the case at hand, an average policyholder would find that the insurance conditions provided a conclusive definition of reportable diseases and pathogens by stating that 'the following' diseases and pathogens are insured.[67] Furthermore, an average policyholder could not understand the clause to contain a dynamic reference to the IfSG. Otherwise, the conditions would not have included such a detailed list of the insured diseases and pathogens.[68] Lastly, the average policyholder could not assume that the insurer wanted to be liable for diseases and pathogens that only appeared years after taking out the insurance contract and, thus, represented an unpredictable risk.[69]

Furthermore, the BGH came to the conclusion that Section 2 No. 2 of the insurance conditions did not violate the requirements for standard business terms and was, therefore, valid. It was sufficiently transparent for the average policyholder[70] and did not put the plaintiff at an unreasonable disadvantage.[71]

Experts speak of a landmark decision for covid-19-related business closures.[72] The BGH used basic legal methodology to show the standards according to which insurance contracts are to be interpreted. This shows once again the importance of a precise wording in the insurance conditions.

61 OLG Karlsruhe, judgment dated 30 June 2021, 12 U 4/21.

62 BGH, IV 205/21.

63 BGH, judgment dated 26 January 2022, IV ZR 144/21; OLG Celle, judgment dated 8 July 2021, 8 U 61/21; OLG Bremen, judgment dated 16 September 2021, 3 U 9/21; OLG Nürnberg, judgment dated 15 November 2021, 8 U 322/21.

64 BGH, judgment dated 26 January 2022, IV ZR 144/21 [2].

65 ibid., [3].

66 ibid., [10].

67 ibid., [16 *et seq*.].

68 ibid., [19].

69 ibid.,[21].

70 ibid., [28 *et seq*.].

71 ibid., [38].

72 Schneider/Mennemann, COVuR 2022, 157, 165; Fortmann, r+s 2022, 135, 142; Günther, FD-VersR 2022, 445101; Grams, FD-VersR 2022, 445424.

ii Decision of OLG Nuremberg dated 11 April 2022, case No. 5 W 2855/20, regarding the admissibility of a third-party intervention of a liability insurer on the side of the injured person

In a decision of 11 April 2022, OLG Nuremberg had to decide whether a liability insurer had a legal interest to join the claimant in liability proceedings against the insured person pursuant to Section 66(1) of the ZPO.[73] According to this provision, a third party may join either party to a legal proceeding if it has a legal interest in the victory of the party concerned.

OLG Nuremberg confirmed that the liability insurer had a legal interest to join the injured party in the case at hand as it claimed an intentional damage by the insured person.[74] A finding to this effect by the court would be binding on a following coverage proceeding and, hence, the insurer would be able to deny indemnification of the insured person according to Section 103 of the VVG. OLG Nuremberg further held that a third-party intervention of the insurer on the side of the injured party did not violate the insurer's contractual duty of loyalty towards the insured person as it was its only option to influence the decision in the liability proceedings regarding an intentional breach of duty.[75] Additionally, the admissibility of a third-party intervention was determined by procedural law only and not by a potential breach of duty of the insurer.[76]

The decision of OLG Nuremberg was highly criticised in German legal literature and contradicts a similar judgment of OLG Munich of 5 February 2009.[77] The latter denied a legal interest of the insurer to join the proceedings on the side of the insured's opponent because of a breach of the duty of loyalty by the insurer. OLG Nuremberg allowed the appeal to the BGH. Therefore, it remains to be seen if and how the BGH will decide on this matter.

iii Judgment of OLG Nuremberg dated 14 March 2022, case No. 8 U 2907/21, regarding information claims of the insured person against a health insurance company

Legal proceedings concerning the adjustment of health insurance premiums are still prevalent German courts.[78] In this context, a recent decision of OLG Nuremberg gives relevant guidance with regard to information claims of the insured person against its insurer.

In the case at hand, the plaintiff demanded information on all past premium adjustments and presentation of the relevant documents from his health insurer. OLG Nuremberg denied the claim.

It held that the claimant could not rely on an information claim based on the principles of good faith according to Section 242 of the BGB. This would require that the claimant had no knowledge of the requested information through no fault of his own, that the respondent could easily provide the requested information and that there was sufficient probability that a claim arising from the requested information existed.[79] According to the court, the claimant had failed to prove these requirements as he had only asserted to rely on

73 OLG Nuremberg, decision dated 11 April 2022, case No. 5 W 2855/20.

74 ibid., [15], [16].

75 ibid., [21], [22].

76 ibid., [20].

77 OLG Munich, judgment of 5 February 2009, 1 U 1984/08.

78 Grote/Finkel in NJW 2022, 2445 [14].

79 OLG Nuremberg, judgment dated 14 March 2022, 8 U 2907 /21 [23], with reference to BGH, judgment dated 8 February 2018, III ZR 65/17 [23] with further references.

the requested information and could no longer find the relevant documents.[80] For the same reasons, the OLG denied a right to information according to Section 3(3) and (4) of the VVG, which provides a right of the insured to request lost or destroyed insurance certificates from the insurer.[81]

The court further denied a right to information according to Section 810 of the BGB; first, because it only grants a right to inspect certain documents, and secondly, because such a claim could not serve for a fishing expedition only to gain evidence to establish a claim in the first place.[82]

Finally, and most importantly, the court also denied a claim under Article 15(1) of the General Data Protection Regulation (GDPR). The court held that the insurer had a right of refusal according to Article 12(5) second sentence, letter (b) of the GDPR because of an abusive request for information. According to the court, this was given as the claimant clearly did not intend to use the requested information to review the use of his personal data but, rather, only to access information for a potential claim against his insurer.[83] This was not covered by the protective purpose of the GDPR.

OLG Nuremberg hereby set clear boundaries especially for information claims following from the GDPR, which had recently been used excessively to gain information from the opponent.[84] This is particularly interesting as it also emphasises one of the main principles of German civil procedural law: that each party has to present the facts and prove the case upon which its claim or defence is based. As there is no pretrial discovery or document production in German civil procedural law, the requirements for information claims are high. A party should not be able to investigate the other party with a claim for information based on vague allegations. This was clarified once again in the decision of OLG Nuremberg.

iv Judgment of OLG Frankfurt dated 7 July 2021, case No. 7 U 19/21, regarding preliminary coverage of defence costs under directors' and officers' insurance

In an injunction proceeding regarding the former director of now insolvent Wirecard AG, OLG Frankfurt had to decide in 2021 whether the former director could claim preliminary defence costs from his directors' and officers' (D&O) insurer regardless of the fact that the relevant liability proceedings involved claims for an intentional breach of duty (i.e., accounting fraud and market manipulation).[85]

The applicable D&O insurance conditions contained common exclusion clauses for fraudulent misrepresentation at the time of contract extension as well as for an intentional breach of duty, whereas in the case of the latter, preliminary coverage of defence costs was provided until an intentional breach of duty had been established in a legally binding manner.[86] The D&O insurer refused (preliminary) coverage of defence costs based on the alleged non-disclosure of risk-aggravating factors and, therefore, fraudulent misrepresentation.[87]

80 ibid., [23], [25].

81 ibid., [25].

82 OLG Nuremberg, judgment dated 14 March 2022, 8 U 2907 /21 [26], with reference to BGH, judgment dated 8 February 2018, III ZR 65/17 [24] with further references.

83 OLG Nuremberg, judgment dated 14 March 2022, 8 U 2907/21 [28].

84 Spittka, GRUR-Prax 2022, 322.

85 OLG Frankfurt, judgment dated 7 July 2021, 7 U 19/21.

86 ibid., [58], [59].

87 ibid., [35], [36].

OLG Frankfurt denied the invocation of such an exclusion as the insurer had only presented such facts as would also constitute an intentional breach of duty.[88] Hence, the provision on the preliminary coverage of defence costs in the case of an intentional breach of duty took precedence over the general exclusion clause of fraudulent misrepresentation.[89] In addition, the court found alternatively that the D&O insurer had also failed to prove a fraudulent misrepresentation of the former director to the satisfaction of the court.[90] Therefore, the insurer had to provide preliminary coverage until an intentional breach of duty had been established in a legally binding manner.[91] The court stated that this case could only be made in the relevant liability proceedings.[92]

This latter finding is particularly interesting as it seemingly deviates from an earlier decision of OLG Frankfurt of 17 March 2021 in case No. 7 U 33/19.[93] In this decision, the court held *obiter dictum* that a legally binding decision on an intentional breach of duty could not be made in the liability proceedings, as the insurer was not a party hereto, and would, therefore, have to be established in a separate coverage proceeding.[94] This is also in line with settled case law according to which the binding effects of the liability proceedings on the coverage proceedings only applied to legal assessments that were decisive for both proceedings.[95] As a decision on the degree of negligence is usually not required to establish a breach of duty in the liability proceedings, the question of intent will (in most cases) have to be decided in the coverage proceedings.[96] Hence, the case law is so far non-consistent regarding the question of whether an intentional breach of duty may be legally binding established in the liability or coverage proceedings.

Another interesting aspect of this case is that the court granted preliminary defence costs in an injunction proceeding. This will probably remain an exception as it requires an existential emergency of the applicant and a high probability that the applicant will also prevail in the main proceedings.[97]

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

88 ibid., [64].

89 ibid., [60].

90 ibid., [79 *et seq*.].

91 ibid., [76], [77].

92 ibid., [65].

93 OLG Frankfurt, judgment dated 17 March 2021, 7 U 33/19.

94 ibid., [134].

95 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 8 November 2019, I-4 U 182/17 [164]; 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].

96 See, e.g., OLG Düsseldorf, judgment dated 8 November 2019, I-4 U 182/17; Orlikowski-Wolf, r+s 2021, 502, 511.

97 Orlikowski-Wolf, r+s 2021, 502, 511; Fortmann, jurisPR-VersR 6/2021, Comment No. 2.

12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation)[98] 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 of Rome I sets out specific rules for insurance contracts covering large risks as well as insurance contracts covering mass risks situated inside 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 of Rome I apply.[99]

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[100] 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.[101] However, the Recast Brussels Regulation does not apply to the enforcement of arbitral awards.[102] 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.[103] Regarding the recognition and enforcement of domestic awards, the rules of the ZPO apply.

V TRENDS AND OUTLOOK

The war of Russia against Ukraine is one of the major issues that is currently concerning the insurance industry. Nonetheless, direct impacts of the war are so far expected to be small.[104]

98 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).

99 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.

100 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.

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

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

103 Section 1061 ZPO.

104 https://www.gdv.de/de/themen/news/die-folgen-des-kriegs-fuer-deutsche-versicherer-83304; https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/insurance-impact-ukraine-war.html.

Insurance contracts usually include war exclusion clauses meaning that most insurance will not cover war-related damages.[105] An exception applies to political risk insurance as well as insurance that also partly covers war risks, such as transportation, marine, aviation or credit insurance.[106] However, those insurance conditions often contain a right to terminate war risks cover, which insurers could invoke to minimise their risk exposure.[107]

Equally deemed to be of low impact for German insurance companies are government-imposed sanctions against Russia as most insurance sectors operate on a national level only.[108]

Furthermore, insurance companies so far do not expect to be affected by the looming gas shortage in the event of a potential gas cut-off by Russia.[109] Although this could significantly weaken Germany's industry, it is unlikely to cause a large number of insurance claims as the resulting damage is usually not covered by insurance. In particular, business interruption insurance will most likely not apply in the case of production losses due to a gas shortage. Similarly to covid-19-related business closures, the lack of physical damage will usually exclude an insurance claim (general war exclusion clauses may also apply).[110] In addition, most of these types of insurance contain an exclusion for scheduled shutdowns, which could apply in the case of state-ordered gas rationing.[111]

Nonetheless, the Ukrainian war will indirectly affect the insurance industry. The risk of cyberattacks will rise because of Russia's actions, and equally claims under cyber risk insurance will increase.[112] Further indirect effects – such as the plummeting of markets, poor growth prospects and high inflation – will also take their toll on the insurance market.[113] Business

105 https://versicherungswirtschaft-heute.de/politik-und-regulierung/2022-04-04/wann-der-kriegsausschluss-in-der-ukraine-greift-und-wo-versicherer-trotzdem-haften-muessen/; https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/insurance-impact-ukraine-war.html.

106 https://www.gdv.de/de/themen/news/die-folgen-des-kriegs-fuer-deutsche-versicherer-83304; https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/insurance-impact-ukraine-war.html.

107 https://www.gdv.de/de/themen/news/die-folgen-des-kriegs-fuer-deutsche-versicherer-83304.

108 https://www.gdv.de/de/themen/news/die-folgen-des-kriegs-fuer-deutsche-versicherer-83304.

109 https://www.gdv.de/de/themen/news/was-ein-gas-lieferstopp-fuer-die-wirtschaft-und-die-assekuranz-bedeuten-wuerde-85716; https://www.fitchratings.com/research/insurance/business-interruption-insurance-would-not-cover-gas-cut-off-20-07-2022; https://www.asscompact.de/nachrichten/welche-folgen-hat-ein-gaslieferstopp-f%C3%BCr-die-assekuranz?page=1.

110 https://versicherungswirtschaft-heute.de/politik-und-regulierung/2022-04-04/wann-der-kriegsausschluss-in-der-ukraine-greift-und-wo-versicherer-trotzdem-haften-muessen/; https://www.gdv.de/de/themen/news/was-ein-gas-lieferstopp-fuer-die-wirtschaft-und-die-assekuranz-bedeuten-wuerde-85716; https://www.fitchratings.com/research/insurance/business-interruption-insurance-would-not-cover-gas-cut-off-20-07-2022; https://www.asscompact.de/nachrichten/welche-folgen-hat-ein-gaslieferstopp-f%C3%BCr-die-assekuranz?page=1; https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/insurance-impact-ukraine-war.html.

111 https://www.gdv.de/de/themen/news/was-ein-gas-lieferstopp-fuer-die-wirtschaft-und-die-assekuranz-bedeuten-wuerde-85716.

112 https://www.gdv.de/de/themen/news/versicherer-rechnen-mit-hoeherem-risiko-durch-cyberangriffe-83580; https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/insurance-impact-ukraine-war.html.

113 https://www.gdv.de/de/themen/news/inflation-bereitet-versicherern-sorgen--84230; https://www.fitchratings.com/research/insurance/business-interruption-insurance-would-not-cover-gas-cut-off-20-07-2022; https://www.procontra-online.de/artikel/date/2022/06/versicherer-blicken-sorgenvoll-in-die-zukunft/.

forecasts of German insurers are at the lowest level since the beginning of the pandemic.[114] For the life insurance industry, for example, GDV, the German Insurance Association, currently expects a premium increase of just under 1 per cent compared to up to 2 per cent before the start of the war.[115]

Hence, the effects of the war in Ukraine are also reaching the insurance industry. One reason is the dampened business climate caused by increasing insecurities relating to the war, which could also result in fewer insurance contracts being taken out.[116] Another is that coverage claims resulting from war-related damage – whether justified or not – will most likely increase and also lead to a proliferation of corresponding insurance disputes.[117]

114 https://www.gdv.de/de/medien/aktuell/geschaeftserwartungen-auf-the%20tiefstem-stand-seit-pandemie-beginn-86508.

115 https://www.gdv.de/de/themen/news/die-folgen-des-kriegs-fuer-deutsche-versicherer-83304.

116 https://www.fitchratings.com/research/insurance/business-interruption-insurance-would-not-cover-gas-cut-off-20-07-2022; https://www.asscompact.de/nachrichten/welche-folgen-hat-ein-gaslieferstopp-f%C3%BCr-die-assekuranz?page=1.

117 https://www.fitchratings.com/research/insurance/business-interruption-insurance-would-not-cover-gas-cut-off-20-07-2022.

Appendix 1

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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.

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The Legal 500: Germany 2022 points out about the Allen & Overy disputes team that 'all members of the team we deal with are experts', that they 'have in-depth knowledge of both substantive law and procedural matters' and 'in addition, they also . . . are able to understand the underlying economic context and the disputed proceedings . . . to defend the client's position in the best possible way'.

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