Direct action moves will alter German situation

CHRISTIAN PISANI, of Bach Langheid and Dallmayr, considers German Federal Court proposals to introduce direct action against insurers that would significantly change the framework for all insurers of German risks

The current Bill for a new German insurance contract act foresees the introduction of direct action against the insurer in the case of compulsory insurance.

German law stipulates the need for such compulsory insurance in about 100 instances, including, for example, professionals such as accountants, lawyers, or medical doctors, the aviation or pharmaceuticals industry.

Significant importance

A recent motion by the German Federal Court (BGH) to the European Court of Justice (ECJ) to give a ruling on the scope of Art. 11 (2) and 9 (1) lit. b) of the Brussels Regulation gains significant importance against this background.

Art. 9 (1) lit. b) of the regulation provides that an insurer domiciled in a member state may be sued, at the discretion of the claimant, in another member state, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled.

Under Art. 11 (2) of the regulation the injured party may directly claim against the insurer, where such direct actions are permitted. In light of the proposed amendments to the German Insurance Contract Act, insurers may face higher risks of being involved in litigation directly with the injured.

In the underlying case the question arose whether a German claimant could sue in Germany directly against the Dutch motor vehicle insurer for damages caused by a traffic accident in the Netherlands.

The injured argued that the court at its domicile (*Wohnsitz*) had jurisdiction as it was to be considered to be a beneficiary within the meaning of Art. 9 (1) lit. b) of the regulation. Whereas the court of first instance did not follow this reasoning, the second instance agreed.

On appeal, the case is currently pending before the BGH, which referred to the ECJ for a respective preliminary ruling pursuant to Art. 234 EC. In its motion, the BGH explicitly held that it was of the opinion that the court at the injured's domicile (*Wohnsitz*) had jurisdiction. It based its assessment namely on the rationale of the Regulation to enhance the injured's position as stated in recital 16a) of the regulation.

Should the ECJ follow this line of argument, insurers will face significant higher risks to be involved in complex litigation with the injured in the future. This would be the case for both German and foreign insurers.

In the future, German insurers may end up before foreign courts if the injured party is not domiciled in Germany and foreign insurers may face action in Germany if a German is injured.

Unexpected problems

As a matter of course, such German proceedings will involve unexpected problems for a foreign insurer. The insecurities a foreign insurer will face are twofold:

(1) Most likely it will lack experience in defending the claim before a German court. Therefore, and due to German rules on civil procedure, a foreign insurer will have to instruct legal counsel admitted to the German bar. In order to ensure the due process of the proceedings, German courts only give short periods for the insurer to notify its willingness to defend the claim. Hence, it will have to find an expert lawyer within a comparatively short amount of time.

(2) In defending the claim itself, questions will arise if and to what extent the insurer can rely on limitation language stipulated in the underlying policy. Under the applicable rules of German private international law it is, however, not settled whether this question shall be governed by the law of the delict (*lex loci delicti*) or the law governing the insurance contract (*lex contractus*). Hence, in the case of a wrongdoing triggering insurance cover bought in Germany, German law may apply notwithstanding a choice-of-law clause to the contrary.

In any event, such choice-of-law clause may be invalid should it violate Art. 12 of the Introductory Code to the Insurance Contract Act (EGVVG). This article stipulates that a contract of compulsory insurance shall be subject to German law if the statutory obligation to insure is based upon German law.

Moreover, if the insurance contract provides coverage for risks located in several member states of which at least one provides for an obligation to insure, the contract is to be treated as if consisting of several contracts, each of which relating to one member state. In practical terms, this means that the part of the risk relating to German-based risks would be governed by German law, irrespective of the choice-of-law clause.

Further insecurities

Should German law apply, further insecurities may arise as the question to what extent an insurer can rely on limitation language vis-à-vis the claimant in a direct action. This is the case as the respective acts stipulating for compulsory insurance are in general widely drafted and do not provide for hard and fast rules in this respect.

Whereas s. 158c of the German Insurance Contract Act stipulates for compulsory insurance that in cases where the insurer is relieved from its obligation in relation to the policyholder, its obligation shall nevertheless continue in respect of the third party, the BGH held that the insurer was liable only within the territorial, timely and material scope of coverage as provided under the respective compulsory insurance.

As the underlying rationale, the BGH put forward that third-party claims could not go beyond the respective indemnity of the insured as circumscribed by the insurance contract. Therefore, the difference between provisions on objective risk limitation and contractual obligations on the insured (*Obliegenheiten*) gains vital importance in determining the (potential) exposure in a direct action an insurer may face.

Falls beyond scope

This is the case as the insurer cannot rely on the violation of *Obliegenheiten* in order to exclude coverage vis-à-vis third parties whereas the insurer may indeed put forward the argument that the claim made by an injured party falls beyond the scope of the insurance coverage. Whether an *Obliegenheit* or a risk limitation is given is a matter of construction of the policy and hence to be determined on a case-by-case basis. As a matter of course, such interpretations always imply uncertainties.

In light of this, the German insurance industry is rather sceptical whether the introduction of direct action is indeed viable. It argues that by introducing direct action the abovementioned legal uncertainties would be further aggravated.

Whereas current market practice has demonstrated that insurers and the respective insured industries have reached feasible solutions in spite of the absence of clear-cut rules, it is likely that the participation of the injured third party will endanger the risk calculation leading ultimately to an increase in premiums.

Against this background, the industry has been urging the legislator to abstain from introducing direct action.

It remains to be seen whether the doubts put forward by the industry will be considered. The introduction of direct action would indeed change significantly the framework for all insurers doing business related to German risks.

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