

CMS Insurance Sector Group webinar programme

Professional indemnity

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What we will cover

01 Third parties' right to take action against insurers (directly or indirectly)

02 Insureds' right to join insurers into proceedings

03 Insureds defence costs exposure in addition to the limit of liability of the policy

Jurisdictions

- Germany
- UK
- The Netherlands
- CEE Countries

- Spain
- France
- Italy

Your speakers today



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Germany

Third parties' right to take action against insurers (directly or indirectly)

Germany

- General principle: **no direct claim** against insurer
- **Exemption:** direct claim in **mandatory liability insurance** in case of:
 - motor liability insurance
 - insolvency of insured
 - unknown residence of insured
- **(Indirect) claims** of injured party against insurer for any liability insurances in case of **assignment** of coverage claim by insured
 - **no non-assignment clauses** in general terms of insurance (disputed for large risks)
 - assignment should be based on thoughtful decision (in particular relevant in D&O insurance)

Insureds' right to join insurers into proceedings

Germany

- Liability relationship and coverage relationship are to be strictly separated from each other (**principle of separation**)
 - General principle: court ruling is only **binding between parties of the proceedings**
- Need for insured to join insurers into proceedings?
- No.** As a consequence of the principle of separation, the proceedings between the injured party and the insured have a **binding effect** on any coverage proceedings between the insured and the insurer.

Insureds' right to join insurers into proceedings

Germany

- Scope of the binding effect
 - Only **findings** that are **of the same relevance for coverage and liability**
Example: negligent or intentional behaviour are often not of the same relevance
 - No binding effect without **knowledge of the insurer**
 - Due to agreements within the policy the **insurer is authorised to make all declarations** on behalf of the insured regarding the settlement or defence of the claim, including decisions on the court proceedings. Where insurer is not aware of the claim / proceedings he cannot make use of this authorisation.
 - Consequently, there is a binding effect where insurer decides to deny coverage from the very beginning and does not manage or monitor liability proceedings at all.

Insureds defence costs exposure in addition to the limit of liability of the policy

Germany

- General statutory principle: **Costs in addition** policy
 - defence costs caused by insurer only
 - no general/statutory limit
- **Typical provisions in liability policies:**
 - Defence costs are not deducted from the sum insured.
 - But if the justified claim against the insured exceeds the policy's limit of liability, defence costs are only covered in that same proportion.
- **Cost inclusive clauses** need to comply with German law on general terms of conditions, which is **highly disputed**
 - problematic for **mandatory third party insurance**
 - common for claims abroad, especially US / Canada
 - common in D&O and Cyber

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UK

Third parties' right to take action against insurers (directly or indirectly)

UK

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- **The Third Parties (Rights against Insurers) Act 2010 - Key points:**
 - Scope – insolvency/bankruptcy
 - Establishing the insurer's liability
 - Claimants determine quickly and cheaply whether have a claim against an insurer
 - Request for insurance details
 - insurers face several information requests/ short time to deal = administrative burden
 - Notifying insurer of proceedings
 - Removal of the need to restore entities to the Companies Register
 - Limitation periods may not stop running at the point of liquidation of a company
 - Limited ambit (at present) especially for long-tail disease claims

Insureds' right to join insurers into proceedings

UK

- Defendant insured could join an insurer as a co-defendant under CPR 19 or 20, but in practice this is rare and complex.
- CPR 19.2 - The court may order a person to be added as a new party if –
 - (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
 - (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.
- CPR 20 – additional claims for contribution or indemnity
- Likely, in any event, that an insured would be unable to join insurers if there was an arbitration clause in the policy

Insureds defence costs exposure in addition to the limit of liability of the policy

UK

- **Policy wording**
 - Costs inclusive – the limit of indemnity includes cover for defence costs, defence costs erode the limit of indemnity
 - Defence costs in addition – defence costs will not erode the limit of indemnity
- **When does liability arise?**
 - When is payment triggered? Consider policy wording.
- **Allocation – Insured and Uninsured losses**
- **Section 51 of the Senior Courts Act 1981**

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The Netherlands

Third parties' right to take action against insurers (directly or indirectly)

The Netherlands

- Motorvehicle insurance article 6 WAM
- Personal injury/ death: half-baked direct action (7: 954 BW)
 - Liability insurance; and
 - Insured must have notified insurer;
 - Insurer provides cover
- 2 bottlenecks:
 - Did insured notify insurer?
 - Policy defences ?

- Notification insurer: what if insured did not notify ?

Insurer not obliged to pay claimant directly

Claimant must sue both insured and insurer (usually by naming both parties as defendant, but claimant may sue only insured and have the court order the insurer to appear as well in the pending litigation)

Claimant can place arrest under the insurer !

Third parties' right to take action against insurers (directly or indirectly)

The Netherlands

- In practise, insured usually notifies insurer and insurer takes over claims management
- Exceptions: insured feel that they are not liable and do not notify insurers
- Claimant put pressure on insured to notify insurer (by placing arrests, holding D&O personally liable for lack of notification, etc)

Insureds' right to join insurers into proceedings

The Netherlands

- Hypothetical issue:
- Claimants start proceedings against the insured, not against the insurers
- Except for claims in motorvehicle accidents
- Insureds are allowed to join insurers
- Petition to the court to join in pending litigation

Insureds defence costs exposure in addition to the limit of liability of the policy

The Netherlands

- Motor vehicle claims: Insurer shall pay legal interest in excess of limit
- We assume that same will apply for pre trial legal costs of the claimant
- Policy limit prevails

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Czechia / CEE

Third parties' right to take action against insurers (directly or indirectly)

CZECHIA / CEE

CZECHIA

- Such right must either stem from an insurance policy, or be granted by law
 - Statute - only in the Czech MTPL Act*
 - Very rare or non existent in policies
 - Insurer is not entitled to compensate without the consent or against the will of the insured

CEE Countries

- The same generally applies in other CEE countries (Poland, Hungary)
- Bulgaria
 - Mandatory PI Insurance – Direct Claims possible

Third parties' right to take action against insurers (directly or indirectly)

CZECHIA / CEE

CZECHIA

- Interactions between the Injured and the insurer
 - The insurer becomes the representative of the insured and is entitled to negotiate the claim on the insured's behalf.
- Stalemate situations in legal PI Insurance
- Statutory limitation
 - The insured's right to indemnification under PI policy is barred at the latest when the right to compensation for damage or injury covered by the insurance is time-barred.

Insureds' right to join insurers into proceedings

CZECHIA / CEE

CZECHIA

- No Insurance specific regulation
- Legal relationship only between
 - Insurer & Insured
 - Insured & Injured
- Law of civil procedure requires a „legitimate interest“
- „Insurer's right to join insureds into proceedings” - a standard clause of the PI GTCs

CEE

- The same generally applies in other CEE countries

Insureds defence costs exposure in addition to the limit of liability of the policy

CZECHIA / CEE

CZECHIA

- Statute:
 - if spent effectively, legal expenses must not reduce the sum insured or the limit
 - In PI Insurance: costs of any „proceedings“ are always covered
- Frequent issues re deductible

CEE

- Hungary - the Civil Code declares that the defence costs should be covered even if these legal expenses (along with the claim payment) exceed the liability limit
- In Poland or Bulgaria - Defence costs are covered by professional insurance if they are specifically included in a policy

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Spain

Third parties' right to take action against insurers (directly or indirectly)

Spain

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- Law 50/1980 Of 8 October, On Insurance Contract: Section 76
 - Right recognized expressly by law
 - Without prejudice to the insurer's right to repeat against the insured
 - Immune to exceptions that may correspond to the insurer against the insured
 - Obligation of communicating the existence of the policy

Third parties' right to take action against insurers (directly or indirectly)

Spain

– Relevant and recent Case Law:

- Judgment of the Spanish Supreme Court (First Chamber, Civil) of 14 December 2022 (LA LEY 316220/2022)
 - a legal title of imputation
 - a valid coverage, subscribed between the tortfeasor and the insurer, which includes his civil liability
- Judgment of the Supreme Court (First Chamber for Civil Matters, Plenary Section) of 5 June 2019 (LA LEY 71480/2019):
 - autonomous and independent action
 - an own right - substantive and procedural - of the injured party against the insurer
 - The right of the third party to demand from the insurer the obligation to compensate is not the same as the right of the third party to demand compensation

Insureds' right to join insurers into proceedings

Spain

- Injured party has 3 options: (i) sue the insurer directly and only, (ii) sue the tortfeasor (the insured) and (iii) sue both.
- In case (ii), Judgment of the Supreme Court (First Chamber for Civil Matters, Plenary Section) of 20 December 2011 (LA LEY 260781/2011)
 - In civil proceedings, the status of defendant corresponds to the subject against whom the plaintiff seeks protection before the courts.
 - The third party whose intervention has been agreed only acquires the status of a defendant if the plaintiff decides to address the claim to the third party
 - the insurer intervening as a third party does not have the status of a defendant in the proceedings because the claim is not directed against it.

Insureds' right to join insurers into proceedings

Spain

- Which is then the worst scenario for the insurer in these situations?
- Which are the possible solutions?

Insureds defence costs exposure in addition to the limit of liability of the policy

Spain

- No doubts in relation to the Insured, if the policy clearly states it.
- The problem is: in case of payment to a third prejudiced party, the defence cost reduce the limit? No clear criteria:
 - The policy must include it (limitation in respect of the insured)
 - Judgement of the Supreme Court (First Chamber, Civil) of 11 September 2018 (LA LEY 109952/2018)

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France

Third parties' right to take action against insurers (directly or indirectly)

France

- Article L. 124-3 of the French insurance code:

“The injured third party has a direct right of to take action against the insurer covering the civil liability of the person responsible.

The insurer may not pay to a party other than the injured third party all or part of the sum owed by the latter, as long as the third party has not been reimbursed, up to the amount of the said sum, for the pecuniary consequences of the harmful event which gave rise to the insured's liability.”

- Since a decision of the French High Court (the *Cour de cassation*) from 2000, it is established that the presence of the insured is not required any more: the admissibility of the direct action does not depend on the victim calling the insured into the procedure.
- The third party will have to demonstrate that:
 - the insured is responsible for the damage he suffered and for which he claims compensation
 - the insurance contract exists, is valid, and enforceable.
- Policy exceptions are enforceable against the victim

Insureds' right to join insurers into proceedings

France

- C.Cass., Civ. 1ère, 7 November 2000, n° 97-22.582 : *"the admissibility of a direct action is not conditional on the victim bringing an action against the insured"*.
- Pursuant to article L. 113-17 of the French Insurance Code:
"The insurer which takes charge of the lawsuit brought against the insured is also deemed to waive all exceptions of which he was aware when he took charge of the lawsuit".
- In practice, liability insurance policies very often contain detailed clauses relating to the management of the lawsuit.
 - the lawyer appointed by the insurer is in principle in sole charge of the trial;
 - It does not prevent the insured to have his own personally appointed lawyer but the insured must have an interest in such interference. As the law does not define the notion of interest, it may be subject to different interpretations by the courts.

Insureds defence costs exposure
in addition to the limit of liability of the policy

France

In general, most contracts have a clause stipulating that the insurer will only cover, except in emergencies, those defense costs to which it has expressly agreed in writing on the basis of a draft fee agreement.

Insurance contracts have a maximum threshold for defense cost coverage when the insured takes care of its own defense

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Italy

Third parties' right to take action against insurers (directly or indirectly)

Italy

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- General rule: third parties are not entitled to take action against insurers
 - Exceptions:
 - Motor liability insurance
 - Hunting liability insurance
 - Medical malpractice insurance (Legge Gelli, entry into force of the rule subject to the issuance of the government decrees)
 - New emerging possibility: third parties can exercise rights arising from the insurance policy through subrogation when the insured remains inactive and there is a risk to jeopardize the right to indemnification

Insureds' right to join insurers into proceedings

Italy

- The insured person is always entitled to join the insurers into proceedings in order to be held harmless from the claims made against him (article 106 of the Civile Procedure Code)
- Within the time limit to appear in the proceeding (70 days before the first hearing), the insured must ask the court for authorization to join the insurers. Once obtained, the third-party joinder must be served to insurers (Article 269 of the Code of Civil Procedure)
- Disputes related to the insurance contract/coverage: the insured, before suing the insurers, must necessarily initiate the mediation procedure
- Comfort letter and direct defense to avoid doubling defense costs
- The losing plaintiff pays also the insurer's defense costs

Insureds defence costs exposure in addition to the limit of liability of the policy

Italy

- Insurers must cover the insured's defence cost
- Defence costs up to 25% of the policy limit are compulsory. The clause cannot be derogated by the parties.
- Legal protection policies cover at second risk or different costs.
- Positive outcome of the claim: insurers are entitled to recover the defence costs should the insured fail to obtain from the losing party the reimbursement of the sums



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