Directors and officers liability insurance – abstract

The essence of limited liability companies as well as joint stock companies is that any liability arising from running the company's business is limited to the assets of the company. Therefore, members, shareholders or members of the board should be exempt from such liability. An increasing number of regulations imposing various obligations on directors and officers of companies leads to exacerbation of their responsibilities and, at the same time, increases the risk of the company, which incurs consequences of any wrong decisions made by members of its board.

Directors and officers liability insurance is an insurance product, which is considered to be an optimal solution to the problems described above. However, from a juridical point of view it is an extremely complex legal institution. The insurance contract is usually concluded between the insurer (an insurance company) and the insuring company (policyholder), represented by members of its board, in favour of directors and officers designated in the contract or policy. What is more, protection performed by the insurer covers only those damages, which are caused in connection with acting as a director or officer.

According to the preliminary analysis, in case of the D&O insurance, it can be observed, that there is a very close relation between its main protective purposes – protection of interests of the policyholder as well as interests of its directors and officers. This applies in particular to situations in which a director or an officer causes a damage to the represented company.

At this point a question rises, whether D&O insurance contracts are really concluded in favour of the directors and officers or maybe in favour of the policyholder. What is more, it is also possible that such contracts are concluded in favour of all of these entities. A similar question applies to whose interest is being insured. In order to resolve the following problem it is required to refer to theories of insurable interest. What is more, it is necessary to distinguish between legal and economic interest of the entities involved in a D&O liability insurance contract.

The main controversy relates to admissibility of treating the insuring company (policyholder) as the aggrieved third party in terms of article 822 § 1 of the Polish civil code. According to the following article, the aggrieved party cannot be a party of the insurance contract, according to which the insurer is obliged to perform in her favour. On the other hand, it should be emphasized that, despite a very similar provision set out in the German Insurance Contracts Act (Versicherungsvertragsgesetz), the German widely present a view, that the insuring company (policyholder) can be considered as a third party in such contracts.

The close link between the company and members of its board can also generate a higher risk of implicit cooperation between perpetrator, which in this case is a director or officer, and the aggrieved company, in order to obtain the compensation in an unlawful way. It becomes even more probable, when the company, acting through its board members, participates in shaping the content of the insurance contract.

In order to fully understand the essence of D&O liability insurance as well as to clarify the doubts described above, it will be necessary to use various research methods. Priority should be given to the comparative approach. The examined legal institution derives from the United Kingdom but is most commonly used in the United States. What is more, according to the preliminary analysis, it has also been successfully deployed by various civil law systems, especially German and (to some extent) French.

Next to the comparative method, a case law studies method will be used. It is based on analysis provisions and legal institutions from the perspective of their practical application. It is particularly important in the study of any common law systems, which are based on precedents. Furthermore, the dogmatic approach will be applied. The use of the following method will enable to analyse Polish regulations in force as well as draw conclusions form the comparisons made.

The results of the undertaken research, with a particular regard to the adaptation of an American structure to German law, will lead to elaboration of a theoretical model of D&O insurance which will be suitable for Polish legal system. The model is intended to show an optimal shape of the examined legal institution in order to enhance its attractiveness in trade.

Issues of the D&O liability insurance have not yet been fully elaborated by Polish civil law doctrine. From a scientific point of view, ongoing research will be original and innovative. It will lead to clarify the precise mechanism of action of the examined legal institution. This will definitely help to increase its popularity in Poland and will contribute to ensure better protection of interests of commercial entities.