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Legal (Un)Certainty in (the Application of) German Private Accident Insurance Law**

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Informative contribution

Abstract

When the discussion with lawyers from outside Germany comes to the issue of legal certainty, you often get to hear that in Germany everything is well structured and totally clear: We do not have any problems. And it is true: The legal and judicial system generally work well. But of course in details there are a lot of problems which – in the individual case – have a great impact on the parties of the contract / of a law suit.

To exemplify this the field of Private Accident Insurance Law is very suitable. In the following six selected major problems will be outlined.

Key words: Private Accident Insurance Law, Legal (Un)Certainty

1. BASIC CONDITIONS FOR THE CLAIM

To understand the problems the basic conditions for a claim of the insuree / insured person / the policyholder against the insurer can be listed as follows:

1.1. Formal preconditions

On the one hand the insuree / insured person / the policyholder needs to comply with formal preconditions.

Pursuant to No. 2.1.1.2 and 2.1.1.3 of the General Terms and Conditions of the Invalidity Insurance 2014 (Allgemeine Unfallversicherungsbedingungen, 2014, thereafter: General Terms and Conditions) of the German Insurance Association (GDV) the invalidity must be ascertained by a physician in writing and

be claimed by the insuree / the insured person / the policyholder against the insurer within e. g. 15 months after the accident.

The failure to meet the deadline to claim the invalidity against the insurer is justifiable (Grimm, 2013, AUB 2010 No. 2, Para. 9; nowadays also governed by No. 2.1.1.3 of the General Terms and Conditions 2014)¹, other than the failure to provide a confirmation by a physician (Knappmann, in: Prölss/Martin, 2015, No. 2 AUB 2010, Para. 10).² At least this confirmation only needs to be made within the 15 months and to be provided to the insurer and the court until the last oral proceedings. The confirmation does not need to be correct and to fulfill high demands (Knappmann, in: Prölss/Martin, 2015, No. 2 AUB 2010, Para. 10).³

To further safeguard the rights of the insuree / insured person Sec. 186 of the Insurance Contract Act 2008⁴ provides that if the policyholder gives notice of the occurrence of an insured event, the insurer shall provide him with information in writing regarding the contractual preconditions for a claim and due dates, as well as deadlines which must be adhered to. Should this information not be provided, the insurer may not refer to any failure to meet a deadline.

1.2. Substantive preconditions

On the other hand the following substantive preconditions, which the insuree / the insured person / the policyholder needs to prove, must be fulfilled:

¹ See *BGH*, 05.07.1995, IV ZR 43/94, juris, No. 5, VersR 1995, 1179; *OLG Hamm*, 08.01.1992, 20 U 309/91, juris, No. 13, VersR 1992, 1255.

² See *BGH*, 07.03.2007, IV ZR 137/06, juris, No. 10, VersR 2007, 1114.

³ See *BGH*, 01.04.2015, IV ZR 104/13, juris, No. 21 f., VersR 2015, 617; *BGH*, 07.03.2007, IV ZR 137/06, juris, No. 10, VersR 2007, 1114.

⁴ See: https://www.gesetze-im-internet.de/englisch_vvg/index.html, 20. 2. 2017.

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- accident
- first health impairment
- causality between accident and first health impairment
- invalidity and its degree
- causality between first health impairment and invalidity

Pursuant to No. 1.3 of the General Terms and Conditions of the Invalidity Insurance 2014 and to Sec. 178 Para. 2 S. 1 of the Insurance Contract Act 2008 an **accident** shall be deemed to have occurred where the insured person involuntarily suffers a health impairment on account of a sudden event having an external impact on his body. Sec. 178 Para. 2 S. 2 of the Insurance Contract Act 2008 says that involuntariness shall be assumed until such time as the opposite is proven (i. e. by the insurer). No. 1.4 of the General Terms and Conditions of the Invalidity Insurance 2014 extends the insurance cover to consequence of increased physical exertion to limbs or extremities or the spine for certain injuries.

Invalidity is a permanent impairment of physical or mental capacity (No. 2.1.1.1 of the General Terms and Conditions of the Invalidity Insurance 2014 / Sec. 178 Para. S. 1 of the Insurance Contract Act 2008).

The insurer has the possibility to prove

- exclusion clauses, e. g. in cases of mental reactions, of cognitive disorders (No. 5.1 of the General Terms and Conditions of the Invalidity Insurance 2014).

Concerning the legal consequences the following points need to be examined:

- reduction of invalidity: no pre-invalidity
- reduction of claim: no contribution of illness / ailment

Pursuant to No. 2.1.2.2.3 General Terms and Conditions of the Invalidity Insurance 2014 the degree of invalidity is reduced by a **pre-invalidity** of the impaired body part or sense or their function. The burden of proof lies on the insurer (Knappmann, in: Prölss/Martin, 2015, § 182, No. 1).⁵

Furthermore No. 3 General Terms and Conditions of the Invalidity Insurance 2010⁶ rules: As your accident insurer we pay for the consequences of an accident. If **illness or ailment contributed** to the health impairments or their consequences following an insured event, the claim⁷ is reduced according to

⁵ See *OLG Karlsruhe*, 30.12.2016, 12 U 97/16, juris, No. 57, zfs 2017, 223.

⁶ No. 3 General Terms and Conditions of the Invalidity Insurance 2014 is formulated slightly different. The text refers to the version 2010, because there is hardly any case law on the new version 2014.

⁷ Or sometimes: the degree of invalidity.

the weight of the illness or the ailment. Sec. 182 of the Insurance Contract Act 2008 rules that the burden of proof lies on the insurer.

2. STANDARD OF PROOF

The standard of proof for the accident, for the first health impairment, for the causality between accident and first health impairment as well as for the invalidity is **practical certainty, commanding silence to doubt** (Sec. 286 Code of Civil Procedure⁸), while the standard of proof for the causality between first health impairment and invalidity as well as for the degree of invalidity is **prevailing probability** (Sec. 287 Code of Civil Procedure) (Leverenz, in: Bruck/Möller, 2010, § 180, No. 43; Knappmann, in: Prölss/Martin, 2015, § 178, No. 24; Rixecker, in: Langheid/Rixecker, 2016, § 178, No. 21).⁹

The standard of proof for an exclusion clause, for a pre-invalidity and for a contribution of an illness or an ailment is also practical certainty, commanding silence to doubt (Sec. 286 Code of Civil Procedure). But just as for the insuree / the insured person / the policy holder on the other side the insurer just needs to prove prevailing probability (Sec. 287 Code of Civil Procedure) of the degree of pre-invalidity and of the degree of contribution.¹⁰

3. SELECTED MAJOR PROBLEMS

As usual everyday problems exist in the application of the basic conditions and the standard of proof, e. g. disputed factual claims and problems in fact-finding with the help of witnesses or experts. But besides that insured persons, insurers, lawyers and judges for years fought and for quite some time will fight with major problems in the application of German Private Accident Insurance Law, even though the problems come up in almost every case.

But recent past brought clarity, in part for real, in part only the eye of the sympathetic beholder

⁸ See: https://www.gesetze-im-internet.de/englisch_zpo/index.html, 20. 2. 2017.

⁹ See *BGH*, 21.07.2011, IV ZR 216/09, juris, No. 9, VersR 2011, 1384; *BGH*, 23.06.2004, IV ZR 130/03, juris, No. 31, VersR 2004, 1039.

¹⁰ *BGH*, 23.11.2011, IV ZR 70/11, juris, No. 15, VersR 2012, 92; closely looking the insurer needs to prove a contribution of – depending on the General Terms and Conditions of the Invalidity Insurance – 25 % pursuant to Sec. 286 Code of Civil Procedure and a further contribution only pursuant to Sec. 286 Code of Civil Procedure.

3.1. Legal certainty finally accomplished

Legal certainty is finally accomplished in three major areas.

3.1.1. Relevant Date for the Assessment

The first concerns the relevant date for the assessment of the invalidity.

As mentioned before invalidity is defined as a permanent impairment of physical or mental capacity. Obviously first of all the relevant date for assessing whether a damage is permanent must be clarified.

To this end the Federal Supreme Court¹¹ just recently ruled that the relevant date for the **first-assessment** for the terms of reason and amount of the invalidity is – depending on the contract (e. g. No. 2.1.1.1 General Terms and Conditions of the Invalidity Insurance 2010) – mostly one year¹² after the accident.¹³ Further the Senate decided that new findings coming up before the last oral proceeding can be taken into account in the assessment.¹⁴

This is according to the understanding of the vast majority¹⁵ contrary to an earlier judgment of the Federal Supreme Court: Here it held that the insuree / the insured person / the policy holder can plead every circumstance coming up before the last oral proceeding for the assessment of the invalidity.¹⁶

At least the later decision is in line with earlier decisions of the Federal Supreme Court and most likely a reaction to criticism to the “first-April-decision”.¹⁷

Nonetheless legal certainty is not totally accomplished, because it remains unclear, what the Federal Supreme Court meant by “new findings”. A generally well informed former college said that new findings relates only to new scientific evaluation possibilities. That is most probable because otherwise

¹¹ Federal Supreme Court, in German “Bundesgerichtshof” (BGH).

¹² Pursuant No. 2.1.1.2 General Terms and Conditions of the Invalidity Insurance 2014 fifteen month.

¹³ See *BGH*, 18.11.2015, IV ZR 124/15, juris, No. 19, VersR 2016, 185; compare *OLG Hamm*, 25.06.2014, 20 U 61/14, juris, No. 24, VersR 2015, 881.

¹⁴ See *BGH*, 18.11.2015, IV ZR 124/15, juris, No. 21, VersR 2016, 185.

¹⁵ E. g. *Jacob*, jurisPR-VersR 2/2016 comment 1.

¹⁶ See *BGH*, 01.04.2015, IV ZR 104/13, juris, No. 27, VersR 2015, 617; compare *OLG Düsseldorf*, 06.08.2013, 4 U 221/11, VersR 2013, 1573; Brockmüller (Member of the IV. Civil Senate of the Federal Supreme Court), RuS 2012, 313.

¹⁷ See *Rixecker*, zfs 2015, 458, 459; *Jacob*, RuS 2015, 330, 331 f.; *Kloth/Tschersich*, RuS 2015, 321, 325; *Völker/Wolf*, VersR 2015, 1358, 1359.

the one-year-rule would be undermined (again). Unfortunately the Federal Supreme Court did not explicitly say so (yet).

To round up: In the case of a **re-assessment** the relevant date is – depending on the individual contract – mostly 3 years after the accident. The same applies if the insuree / the insured person / the policyholder files suit within the re-assessment period and does not only claim first-assessment explicitly.¹⁸

3.1.2. No Alternative Causality

Generally the necessary causality between the accident and the health impairment is given, if the accident is *conditio sine qua non* for the impairment (“equivalence”) and if the event of the accident is generally and not just in special, highly unlikely circumstances suitable to cause the impairment (“adequacy”).¹⁹

This adequacy was – as a kind of an alternative causality – also partly negated in Literature and by some Court of Appeals²⁰, if any other event could have caused the impairment just as well (in due time) (Mangen, in: Beckmann/Matusche-Beckmann, 2015, § 47, No. 28; Kloth, 2014, E No. 80, J No. 13; Leverenz, in: Bruck/Möller, 2010, § 178, No. 157; Knappmann, in: Prölss/Martin, 2015, AUB 2010, No. 2, Para. 3; Grimm, 2013, AUB 2010 No. 1, Para. 52).²¹

The Federal Supreme Court finally rejected this opinion, because under the contractual rules – other than in statutory social security law – this is only a question of pre-invalidity and / or contribution of illness and ailment.²²

3.1.3. Relationship Pre-invalidity / Contribution

The Federal Supreme Court also lately ruled, that the question, whether the reduction of the degree of invalidity because of pre-invalidity can be combined

¹⁸ See *BGH*, 18.11.2015, IV ZR 124/15, juris, No. 14, VersR 2016, 185.

¹⁹ See *BGH*, 19.10.2016, IV ZR 521/14, juris, No. 14 f., VersR 2016, 1492.

²⁰ Court of Appeals, in German “Oberlandesgericht” (OLG).

²¹ See *OLG Dresden*, 18.10.2007, 4 U 1046/07, juris, No. 6, RuS 2008, 432; *OLG Celle*, 20.08.2009, 8 U 10/09, juris, No. 5, 17, VersR 2010, 205; *KG Berlin*, 22.06.2001, 6 U 8445/99, juris, No. 7 ff., RuS 2002, 525; *OLG Köln*, 20.12.2006, 5 U 34/04, juris, No. 15, VersR 2007, 1689; *OLG Köln*, 12.10.2012, 20 U 16/11, juris, No. 16, RuS 2013, 619.

²² See *BGH*, 19.10.2016, IV ZR 521/14, juris, No. 16-19, VersR 2016, 1492.

with the reduction of the claim (or the invalidity) because of contribution of illness and ailment, is already sufficiently clarified by a judgment of December, 15th 1999. Thereafter a cumulative reduction is possible.²³

This decision calls for a cheeky comment: Very good to know, because the question was highly disputed in Literature and between Court of Appeals (Leverenz, in: Bruck/Möller, 2010, AUB No. 2.1, Para. 238; Grimm, 2013, AUB 2010, No. 3, Para. 6; Knappmann, in: Prölss/Martin, 2015, AUB 2010, No. 3, Para. 3; Rixecker, zfs 2004, 575.)^{24, 25}, and hardly anyone²⁶ had known, that the decision of December, 15th 1999 was the solution.

At least a broader argumentation by the Federal Supreme Court would have been warmly welcomed.

3.2. Alleged legal certainty

Other than in the aforementioned cases recent judgments of the Federal Supreme Court brought light but not the clarity necessary to decide other cases than the ones brought before the Federal Supreme Court, which is of course not part of the function of the Federal Supreme Court.

3.2.1. Contribution of Illness and Ailment

The remaining problems as to contribution of illness and ailment have their origin in the following contract clause, mentioned above:

The claim is reduced according to the weight of the illness or the ailment if illness or ailment contributed to the health impairments or their consequences following an insured event.

To subsume under that contract clause the basic definitions were for years set out as follows²⁷, and again set out in the latest judgment of the Federal Supreme Court:²⁸

- An **illness** is an irregular body condition, that requires medical treatment.

- An **ailment** is an abnormal health condition, which (in part) does not allow a proper exercise of normal body functions.

In spite of this the definition and preconditions of an ailment²⁹ are disputed or at least unclear:

a) Problems 1:

The first problems concern the question of medical norm:

The Federal Supreme Court said several times, that conditions, which fall within the medical norm, are no ailment, even if they result in a certain disposition for health problems.³⁰

But this does not answer the question whether that means what the majority in Literature and the majority of Courts of Appeals conclude from the contract clause? That is: Wear-out and preexisting degenerative damage, which are typical for the age (and the gender) of the insuree / the insured person, are no ailment (Rixecker, in: Langheid/Rixecker, 2016, § 182, No. 2; Leverenz, in: Bruck/Möller, 2010, § 182, No. 7; Knappmann, in: Prölss/Martin, 2015, AUB 2010, § 3, No. 5; Mangen, in: Beckmann/Matusche-Beckmann, 2015, § 47, No. 213; Grimm, 2013, AUB 2010, No. 3, Para. 3; to the contrary e. g. Marlow, RuS 2011, 453, because age is a non-accidental factor).³¹

In consequence the Federal Supreme Court – just as the Courts of Appeals – has not yet dealt with the question up to which percentage wear-out and preexisting degenerative damage are typical for the age (and the gender) of the insuree / the insured person?

b) Problem 2:

What if the condition is abnormal and untypical for the age (and gender) of the insuree / the insured person, but causes no physical complaints? Asked differently: Are “silent ailments” ailments in the sense of contract?

Literature and Courts of Appeals, most recently the Court of Appeals Schleswig, voted that a physical

²³ *BGH*, 18.01.2017, IV ZR 481/15, juris, No. 2.

²⁴ Like the Federal Supreme Court already e. g. *OLG Frankfurt*, 16.06.2013, 7 U 98/12, juris, No. 48, zfs 2014, 404; *OLG Schleswig*, 02.03.2006, 16 U 55/05, juris, No. 9, *OLGR Schleswig* 2006, 396.

²⁵ To the contrary e. g. until recently *OLG Karlsruhe*, 30.12.2016, 12 U 97/16, juris, No. 54, zfs 2017, 223; *LG Dortmund*, 27.10.2011, 2 O 299/10, juris, No. 17, zfs 2012, 100.

²⁶ In fact *OLG Frankfurt*, 16.06.2013, 7 U 98/12, juris, No. 48, zfs 2014, 404, and *Grimm*, 2013, AUB 2010, No. 3, Para. 6., already cited the decision as well.

²⁷ See *BGH*, 08.07.2009, IV ZR 216/07, juris, No. 14, VersR 2009, 1525.

²⁸ See *BGH*, 19.10.2016, IV ZR 521/14, juris, No. 22, VersR 2016, 1492.

²⁹ The definition of an illness does not make big problems.

³⁰ See *BGH*, 19.10.2016, IV ZR 521/14, juris, No. 22, VersR 2016, 1492; *BGH*, 08.07.2009, IV ZR 216/07, juris, No. 14, VersR 2009, 1525.

³¹ E. g. *OLG Hamm*, 06.07.2001, 20 U 200/99, juris, No. 15 ff., VersR 2002, 180; *OLG Hamm*, 25.01.2006, 20 U 89/05, juris, No. 34, VersR 2006, 1394; *OLG Celle*, 20.08.2009, 8 U 10/09, juris, No. 22, VersR 2010, 205; *OLG Karlsruhe*, 30.12.2016, 12 U 97/16, juris, No. 56, zfs 2017, 223; *OLG Saarbrücken*, 22.12.2010, 5 U 638/09, juris, No. 36, RuS 2013, 618; *OLG München*, 21.03.2006, 25 U 3483/04, juris, No. 19, NJW-RR 2006, 1326.

complaint before the accident is no requirement to find an ailment.³²

On the other hand some decisions of Courts of Appeals, most recently the Court of Appeals Stuttgart,³³ were understood³⁴ to the contrary, namely that a physical complaint is a necessary requirement to find an ailment.

The Federal Supreme Court in both of the recent cases rejected the non-admission-complaint against the judgments of the Court of Appeals Schleswig and Stuttgart without any statement to the matter.

In the eyes of the majority of commentators this was incomprehensible, because from their point of view now two directly contrary decisions of Court of Appeals existed and were accepted by the Federal Supreme Court, unless the Federal Supreme Court had only formal reasons for its decisions.³⁵

To solve the issue the Federal Supreme Court just recently clearly ruled with the Court of Appeals Schleswig, that clinically silent preexisting degenerative damages can be an ailment, if the preexisting damage increased the vulnerability or contributed to the effects resulting from the accident.³⁶

Despite that, this definition brings up the following (new) problem: Is it still necessary to have an abnormal health condition, which (in part) does not allow a proper exercise of normal body functions?

Even though this is still part of the basic definition of an ailment and the Federal Supreme Court repeated it in the preceding paragraph of the same judgment, some

³² E. g. *OLG Schleswig*, 06.03.2014, 16 U 95/13, juris, No. 27-42, VersR 2014, 1074; non-admission-complaint rejected by *BGH*, 10.12.2014, IV ZR 113/14 without statement.

³³ Allegedly *OLG Stuttgart*, 07.08.2014, 7 U 35/14, juris, No. 38-53, VersR 2015, 99; non-admission-complaint rejected by *BGH*, 27.01.2016, IV ZR 312/14 without statement; similar to Stuttgart already *OLG Hamm*, 05.08.2009, 20 U 57/09, juris, No. 19 ff., NJW-RR 2010, 764.

³⁴ E. g. *Kloth/Tschersich*, RuS 2015, 321, 328 f.; *Hoenicke*, RuS 2015, 148, 149.

³⁵ E. g. *Feldmann* (Judge, 6th Senate for Civil Law at the Higher Regional Court (Court of Appeals) in Hamm, North-Rhine-Westphalia, Germany), Gemeinsames Symposium mit den Versicherungssenaten des Oberlandesgerichts Hamm 15. März 2017: Unfallversicherung – Gibt es „stumme“ Gebrechen? (available at: <https://www.jura.uni-muenster.de/de/fakultaet/fakultaetsnahe-einrichtungen/forschungsstelle-fuer-versicherungswesen/veranstaltungen/gemeinsames-symposium-mit-den-versicherungssenaten-des-olg-hamm/>, 20. 2. 2017).

³⁶ *BGH*, 19.10.2016, IV ZR 521/14, juris, No. 23, VersR 2016, 1492.

try to reduce the significance of this basic definition to zero.³⁷

Rather than changing the long time basic definition one should ask, what this basic definition actually means? It could probably mean the same reduction of body function as in the case of pre-invalidity but without notable or just a small degree of pre-invalidity now responsible for a higher invalidity.³⁸

This view is supported by the outcome of the two non-admission-decisions, which in fact – looking closely at the judgment of the Court of Appeals Stuttgart – were not contradictory, because the Court of Appeals Stuttgart did already not find an abnormal health condition, which (in part) did not allow a proper exercise of a normal body function.³⁹ That means, that the Court of Appeals Stuttgart did already not touch on the question of “silent ailments”, what the Federal Supreme Court apparently took into account.

c) Exclusion Clause: Mental Reactions

Another question coming up regularly is what the contract clause

“Excluded from the insurance are pathological disorders as a result of mental reactions, even if caused by the accident,” means abstractly (and in the individual case)?

As a starting point one needs to know that the Federal Supreme Court declared this and equivalent exclusion clauses valid, especially sufficiently clear for the average insuree / the average insured person.⁴⁰

The basis to this is the following interpretation: The exclusion clause governs health impairments due to mental reactions, stemming from both shock, fright, fear or equivalents and accident-related misconception. Besides that the clause makes clear that the insurer does not want to take coverage, if there is no physical trauma or if the impairment can only be explained by its

³⁷ E. g. *Feldmann* (Judge, 6th Senate for Civil Law at the Higher Regional Court (Court of Appeals) in Hamm, North-Rhine-Westphalia, Germany), Gemeinsames Symposium mit den Versicherungssenaten des Oberlandesgerichts Hamm 15. März 2017: Unfallversicherung – Gibt es „stumme“ Gebrechen? (<https://www.jura.uni-muenster.de/de/fakultaet/fakultaetsnahe-einrichtungen/forschungsstelle-fuer-versicherungswesen/veranstaltungen/gemeinsames-symposium-mit-den-versicherungssenaten-des-olg-hamm/>, 20. 2. 2017).

³⁸ See *OLG Karlsruhe*, 30.12.2016, 12 U 97/16, juris, No. 53 f., zfs 2017, 223; partly – but not for the question at stake here – obsolete due to *BGH*, 18.01.2017, IV ZR 481/15, juris, No. 2 (see above at footnote 21).

³⁹ *OLG Stuttgart*, 07.08.2014, 7 U 35/14, juris, No. 43, VersR 2015, 99.

⁴⁰ See e. g. *BGH*, 23.06.2004, IV ZR 130/03, juris, No. 20 ff., VersR 2004, 1039.

psychogenic nature. To the contrary coverage must be given, if e. g. the insuree / the insured person is cerebro-damaged, which also leads to mental suffering.⁴¹

What that actually means is highly disputed in general (Leverenz, in: Bruck/Möller, 2010, AUB No. 5.2.6, Para. 27; Knappmann, in: Festschrift Lorenz, 2014, 175)⁴² and in cases coming before the Courts⁴³, for example: The insuree / the insured person suffers from a tinnitus: Do you need to find an organic impairment in the ear? At least, if there is a organic impairment, the insurer must prove that in spite of that there is only an mental reaction.⁴⁴

Is it sufficient for the insuree / the insured person to see and fear a heavy injury, which (adequately) causes the mental reaction? This question should be answered in the affirmative⁴⁵, because otherwise the contract clause would be – contrary to the general finding of the Federal Supreme Court – unclear.

Is it sufficient for the insuree / the insured person to see and fear the accident, which (adequately) causes the mental reaction?⁴⁶ This question should be denied⁴⁷, because a health impairment in this case is only the outcome of a mental reaction, most probably shock, fright, fear or an accident-related misconception.⁴⁸

d) Is the Shoulder Part of the Arm?

Last but not least the question whether the shoulder is part of the arm is often relevant and highly disputed despite – or rather due to – recurrent judgments of the Federal Supreme Court.

Under the contractual rules impairments of certain body parts have a set-degree of invalidity, e. g. “arm (in shoulder joint)” with 70 %. In case of a partly impairment of that body part the invalidity

is determined in accordance to the percentage of impairment.

In early contracts for that matter it said “arm in shoulder joint”: The Federal Supreme Court ruled that in case of an impairment of the shoulder under that contract clause – from the decisive perspective of the insuree / the insured person – any remaining function in the arm or the hand is not be taken into consideration, if that interpretation of the clause is to the benefit of the insuree / the insured person.⁴⁹

Insurers then changed the contract clause to just “arm”. Now the vast majority (including the insurers) thought that the shoulder falls under the contract clause “arm”, but in case of an impairment of the shoulder any remaining function in the arm or the hand is to be taken into consideration (Knappmann, in: Pröls/Martin, 2015, No. 2, AUB 2010, Para. 33).

Then the Federal Supreme Court ruled that, if the word “shoulder joint” is not to be found in the contractual clauses governing the set-degree of invalidity, the invalidity must be determined outside these clauses.⁵⁰

Following that confusion is great, because on the first view this is contrary to settled case law. Literature and Court of Appeals now offer different solutions:

The determination of the invalidity outside the clause “arm” must be brought into line with invalidity calculated on the basis of the set-degree “arm”.⁵¹

It is not possible to use the set-degree of “arm” at all. In the determination of the degree of invalidity the impairment of arm-function cannot be taken into account.⁵²

Correctly, from the decisive view of the average insuree / the average insured person the impairment of the arm due to a damage of the shoulder must at least be calculated on the basis of the set-degree “arm” plus any further impairment outside the “arm”.⁵³

This view is again supported by a close look at the judgment of the Federal Supreme Court itself, because it dealt just with the second question, using an

⁴¹ *BGH*, 23.06.2004, IV ZR 130/03, juris, No. 18 f., VersR 2004, 1039; see also *BGH*, 15.07.2009, IV ZR 229/06, juris, VersR 2010, 60; compare *Kessal-Wulf*, RuS 2008, 313, 315.

⁴² *Burmann/Heß*, RuS 2010, 403.

⁴³ *OLG Hamm*, 07.07.2016, 6 U 4/16, zfs 2016, 701; *OLG Brandenburg*, 04.02.2015, 11 U 78/14, juris, zfs 2015, 576; *OLG Hamm*, 18.03.2011, 20 U 96/10, juris, RuS 2013, 88; *OLG Oldenburg*, 17.11.2010, 5 U 108/09, juris, VersR 2011, 520.

⁴⁴ See *BGH*, 29.09.2004, IV ZR 233/03, juris, No. 18, VersR 2004, 1449.

⁴⁵ See *OLG Celle*, 25.05.2015, 8 U 199/14, juris, No. 55-60, VersR 2015, 1499; *OLG Hamm*, 25.01.2006, 20 U 89/05, juris, No. 59, VersR 2006, 1394.

⁴⁶ Towards that direction: *OLG Hamm*, 25.01.2006, 20 U 89/05, juris, No. 59, VersR 2006, 1394.

⁴⁷ *OLG Koblenz*, 28.01.2011, 10 U 109/10, juris, No. 35, RuS 2013, 89.

⁴⁸ *BGH*, 23.06.2004, IV ZR 130/03, juris, No. 18, VersR 2004, 1039.

⁴⁹ See *BGH*, 11.12.2013, IV ZR 320/12, juris, No. 7 f., 3, VersR 2014, 365; *BGH*, 12.12.2007, IV ZR 178/06, juris, No. 4, VersR 2008, 483; *BGH*, 24.05.2006, IV ZR 203/03, juris, No. 14-20, VersR 2006, 1117.

⁵⁰ See *BGH*, 01.04.2015, IV ZR 104/13, juris, No. 17 S. 2, VersR 2015, 617.

⁵¹ See *OLG Karlsruhe*, 30.12.2016, 12 U 97/16, juris, No. 42 f., zfs 2017, 223.

⁵² See *Kloth*, jurisPR-VersR 3/2017, comment 1; *Ludolph/Schröter*, MED Sach 2016, 46.

⁵³ Yet to come *Gundlach*, VersR 2017; like that in the case of a damaged spine with a causal impairment of the arm already *BGH*, 15.12.1999, IV ZR 264/98, juris, No. 8, VersR 2000, 444.

interpretation of the clause which was in this individual case to the benefit of the insuree / the insured person.⁵⁴

4. CONCLUSION

Even if the legal and judicial system generally work well legal certainty is not guaranteed, but a process. In Private Accident Insurance Law a lot of work lies ahead.

For this the judiciary needs to respect the general motto “Judging is only possible with a guilty conscience”⁵⁵ closely, in the following sense: Guilty conscience does not mean to consider your decisions to be wrong, but to be aware, not to be the holder of eternal truth, not to be infallible and to judge, because it needs a responsible decision, even if it could be undetected wrong.

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⁵⁴ See *BGH*, 01.04.2015, IV ZR 104/13, juris, No. 7 ff., VersR 2015, 617.

⁵⁵ „Richten lässt sich nur mit schlechtem Gewissen“ (Prof. Dr. Roland Rixecker, Former President of the Higher Regional Court in Saarbrücken).