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Last trends in D&O policies and bail cover in Spain

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In the last years, it can be perceived in Spain an important increase of the corporate crimes, such as fraud, improper management, misappropriation, etc., which are attributed to the directors and officers of listed companies or financial entities with a huge media impact. These criminal offences result in the civil direct liability of the D&O insurers within the criminal proceedings, so some scholars even talk about the “criminalization” of the D&O insurance. But one of the most important consequences of this situation is that an accessory cover of this kind of policies, which is the bail cover, is right now the most problematic one and the cover that gives rise to more queries in the insurers operating in the Spanish D&O market, especially after two recent judgments.

One of the main reasons (probably the most important one) when taking out D&O policies worldwide is to get an insurance cover of the legal defense expenses that the insured can face in case that any claim is filed against them.

In Spain, apart from the legal defense costs cover, it is also very important, and broadly offered by the insurance companies in the market, the bail cover. In practical terms, when a criminal proceeding is started in order to investigate the commission of a crime by one of the insured, the Examining Criminal Court usually requests the insured/indicted person to guarantee the civil liability that can derive from the crime allegedly committed. The bail cover implies that the insurer shall grant a civil bond, as a kind of guarantee of the insured’s civil liability.

This cover has raised many problems when the insured has been indicted due to the possible commission of an intentional or wrongful act. The D&O policies usually state that they do not cover claims deriving from intentional, wrongful or fraudulent acts committed by an insured person, so when those crimes/offences the directors and officers are accused of (i.e., dishonest and fraudulent management, fraud and illegal taxation and corruption) can only be committed intentionally (the Criminal Code does not foresee the commission of these crimes negligently), the exclusion would be theoretically applicable.

Nevertheless, the exclusion of intentional or wrongful acts cannot be opposed to the third prejudiced party on the grounds of section 76 of the Spanish Insurance Contract Act, so until now the insurer has been usually required to grant the civil bond, even when the insured is accused of a crime that can only be committed intentionally and/or when the policyholder has been harmed by the acts of its indicted director or officer.

Last 11 January 2016 Central Examining Court no. 3 (“*Juzgado Central de Instrucción nº 3*”) issued a judgment in the so called “Abengoa case” that has caused a bit of uncertainty in the D&O market. This judgment says that in case of crimes that can only be committed intentionally, the D&O policy could guarantee the indemnities to be paid to



third parties, but it could never guarantee the damages suffered by the own policyholder due to the acts of its directors and officers. Consequently, the Examining Court concluded that the policy that was taken out by the policyholder could not be used as a guarantee to cover the eventual civil liability of the insured (indicted directors or officers).

This decision was appealed by the indicted insured arguing that the D&O policy does cover civil and criminal bails, even when the crimes investigated can only be committed intentionally. Besides, the insured said that the policyholder was not the only prejudiced party (there were third parties that could have been harmed by the acts of the insured, such as shareholders and bondholders, so the policy would guarantee the indemnities that would have to pay to them in case of a condemn in the criminal proceedings). Finally, it was also argued by the insured that the filing of the policy by the insurers (as the bail requested by the Court) is a clear acceptance of cover.

On 19 February 2016 the Section 3rd of the Criminal Chamber of the National High Court (“*Sección Tercera de la Sala de lo Penal de la Audiencia Nacional*”) issued a judgment rejecting the appeal and confirming the first instance decision.

The National High Court concluded that the purpose of the precautionary measures, such as civil bails requested to the indicted person to guarantee the civil liability that can derive from the crime allegedly committed, is to restrict the free disposal of the insured’s assets in order to guarantee the economic liability that could be declared in a criminal proceedings (including civil liability, legal costs, fines, etc.). Although it is not expressly said, it can be deducted that the Court understands that this purpose of the precautionary measures

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could not be reached if someone different from the indicted person (i.e. the D&O insurer) grants the bail.

Furthermore, the Court said that the D&O policy shall only benefit the indicted director or officer and the insurance companies, not the policyholder, who could be forced to pay twice: to the indicted officer who received a millionaire indemnity when he left the company (which is the fact that motivates the criminal indictment) and to the insurer, that, in case of an adverse decision and the enforcement of the bail, could recover from the policyholder the indemnities paid as a consequence of the acts of the disloyal director, according to the insurance contract at hand

These decisions caused a kind of turmoil in the market, although they have not been reproduced in subsequent judgments. Anyway, should they become widespread, it could mean that, even when it is expressly foreseen in the policy, the bail cover could not be used in criminal proceedings to guarantee the civil liability of indicted insured of D&O policies in those cases where the company itself can be considered as a prejudiced party by the acts of its directors and officers. Therefore, insured, brokers and insurers can have queries about the bail cover, which could be eventually useless in some cases, so this could have an important impact on current trends in the D&O Spanish market.