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EUROPEAN D&O LITIGATION TRENDS



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Coverholder at **LLOYD'S**

EU D&O TRENDS

- European companies more exposed than ever to regulatory scrutiny and litigation
- European culture growing more litigious
- Difficult and rapidly evolving global economic and social environment driving demand for coverage



DEMAND DRIVERS

- Shareholder actions
- Regulatory enforcement
- Heavily increased transparency & accountability
- Increased company suits against Ds & Os
- Criminal proceedings
- Bankruptcy / insolvency claims
- Data protection violations (CYBER)



EU D&O MILESTONE CASES



DEUTSCHE TELEKOM

- DT shareholder litigation case triggered new class / collective action law in Germany
- Investors purchased shares from 1999 to 2000 when the company floated on stock exchange through an IPO
- The performance of shares was poor



DEUTSCHE TELEKOM

- This triggered the filing of:
 - 2,500 individual lawsuits against DT
 - by 754 law firms
 - On behalf of 14,447 investors
- Lawsuits alleged the listing prospectus contained mis-statements about the value of DT's real estate



DEUTSCHE TELEKOM

Two main problems came about:

- District Court unable to deal with the volume of filings
- The decisive factual question, the value of the real estate, is a highly complex one which needs to be determined by an expert, the cost of which amounted to €17m : but German law lacked a mechanism to share costs



DEUTSCHE TELEKOM

- As a result a new Capital Act came in force in Nov 2005 to enable multiple plaintiffs to have common questions of fact or law decided in one court proceeding
- The decision would be binding on all parties
- Case was settled for USD 120m through a combination of company and insurance funds



ROYAL DUTCH SHELL

- 2007 Dutch court ruling is likely to materially impact European law
- A settlement between Royal Dutch Shell and groups representing individuals and institutional holders in 9 European countries
 - Amongst others investors from UK, Germany, Netherlands, Sweden
- “Global settlements” do not exist as US judgments are not binding in Europe



ROYAL DUTCH SHELL

- Original litigation source: US investors in New Jersey
- Investors allegations: miss-statements of proven oil & gas reserves
- Damages sought: cash flows were overstated which resulted in restatement of accounts



ROYAL DUTCH SHELL

- Settlement achieved under changes in Dutch law :
The Collective Act which allows Representative actions (class actions).
- European Settlement: agreed at US\$ 450m + lawyers fees
- Dutch Court of Appeal: is reviewing the settlement & approval is pending
- US settlement: US\$ 89.508.000



EU COLLECTIVE REDRESS



Source: The Growth of Collective Redress in the EU, U-S- CHAMBER, Institute for Legal Reform, March 2017



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EU COLLECTIVE REDRESS

- Majority of EU Member States now have some form of claimants combining their claims
- All EU Member States to report on collective redress by July 2017
- EU Commission to evaluate if further action is required
- Member States' systems have been developing organically and at a fast pace



EU COLLECTIVE REDRESS

- Systems preventing litigation abuse:
 - Implementing Stringent Class Certification Standards
 - Preserving the Loser Pays Principle
 - Favoring Opt-In Over Opt-Out Mechanisms
 - Promoting Strict Standing Requirements

Source: The Growth of Collective Redress in the EU, U-S- CHAMBER, Institute for Legal Reform, March 2017



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EU COLLECTIVE REDRESS

- Systems preventing litigation abuse:
 - Mandating Closure for Defendants
 - Restricting Contingency Fees and Regulating TPLF for Collective Actions
 - Banning Punitive Damages
 - Curbing Jurisdictional Overreach/ Forum Shopping

Source: The Growth of Collective Redress in the EU, U-S- CHAMBER, Institute for Legal Reform, March 2017



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POLISH CLASS ACTION

Law: came in force on 19th July 2010 – The Act on Pursuing Claims in Group Proceedings (Journal of Laws 2010 No. 7, item 44)

Procedure: “Opt-in”; “Opt-out” currently under consideration



POLISH CLASS ACTION

Article 1 of the Act, defining group proceedings, specifies that it is a judicial proceeding in civil cases in which **claims of one kind and based on the same or a similar factual basis** are pursued by at least 10 individuals. Anything related to group proceedings but not regulated by the Act is governed by the provisions of the Polish Code of Civil Procedure (hereinafter referred to as: the “CCP”).



POLISH CLASS ACTION

Who can bring claims:

The group representative has the sole power to bring a group action. The **representative** may be one of the members of the group or a district (municipal) consumer ombudsman in cases concerning the protection of consumer rights. The Act requires mandatory representation of the group representative by a professional (an attorney or legal counsel).



POLISH CLASS ACTION

Minimum threshold for bringing claims: at least 10 individuals

Judge or jury: panel of judges with no jury involved

Third party funding: Neither the Act nor the CCP refer to the issue of third party funding of claims in the proceedings.



POLISH CLASS ACTION

- **Frequency:** around 60 class actions brought since Act enforcement
- **Commercial Defendants:** banks, insurers, commercial companies
- **More to come:** websites (groupaction.com, sue-him.pl, suethegovernment.pl,...), law firms (contingency fees allowed up to 20%)
- **Loser pays principle**

Source: Dr. Magdalena Tulibacka, Class Actions in Poland: two years of tries, successes and failures of the Class Action Act



KEY COVERAGE ASPECTS



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INDEMNIFICATION

- PRESUMPTIVE INDEMNIFICATION
- EUROPEAN RESTRICTIONS / LEGAL APPLICABILITY
- COMPANY'S DISCRETION



COSTS ADVANCEMENT

- INDEMNITY VS PAYING ON BEHALF OF POLICY
- LEGAL AND “OTHER PROFESSIONAL FEES”



INSOLVENCY

- INSOLVENCY LIQUIDATOR CONTROLLING
THE POLICY
- DIRECT CREDITOR CLAIMS



ALLOCATION

- FAIR AND PROPER
- COVERED VS UNCOVERED MATTERS



Q&A



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