"D&O" INSURANCE IN FRENCH LAW

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Abstract:
In French Law the management members of the companies can limit the civil liability if they cause damage to the company or third party. In most cases the volume of the damage caused to the company or third party far exceeds the volume of their private property. We appreciate that the financial ruin of the governing bodies can not be the appropriate sanction because it may lead to indifference on their part, knowing from the beginning that will not cover damage.
A limitation of civil liability in this context clearly corresponds to a modern law. "D&O"(Directors and Officers Liability Insurance) is a liability insurance that protects the personal assets of the management members of the company. Its object is to cover the damage that members of governing bodies, would cause to the company or third parties, who knowingly breach of their obligations.
Although all parties have interests in concluding the insurance there is no legal obligation in this sense.

Key words: *French Law, civil liability, management members, insurance, limitation*

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The French law consists of a balanced system of the managers' civil liability for the prejudices caused to the company or to third parties, which allows them to limit their liability to certain extent. The volume of the prejudice caused exceeds the managers' private equity in the majority of the cases of personal equity civil liability of company directors, and the civil liability function must not represent their financial ruin, but a manner of efficient sanction[1].

The financial ruin of the company managers cannot be the adequate sanction because this thing may lead to certain indifference from their part, knowing from the beginning that they shall not be able to settle the prejudice.

We believe that the sanction functions efficiently if the managers can estimate the extent of their liability from the beginning, given the fact that they do not cover the prejudice occurred through the faulty breach of their obligations and the fact that the prejudice frequently exceeds their equity. An underestimated problem is found in the fact that through a system of total prejudice recovery, proper managers shall not be able to be recruited, because they shall not want to undertake the risk that may derive from the civil liability. A limitation of the civil liability clearly corresponds to the standards of a modern right of managers to civil liability.

The limitation of civil liability of the managers may take place through the means of the civil insurance called "D&O". The "D&O" insurance ("Directors and Officers Liability Insurance") is a civil liability insurance which protects the personal equity of the managers.

[1] Redenius-Hoevermann,J: *La responsabilité des dirigeants dans les sociétés anonymes en droit français et droit allemand*, LGDJ, 2010, p.356

The object of this insurance is to cover the equity damages that the managers would cause to the company or to third parties by the faulty breach of their obligations[2].

The "D&O" insurance finds its origin in the Anglo-American legal environments. In France, this insurance model is offered by the American and English insurance companies starting with the middle of the eighties and, for a shorter time, by the French insurance companies as well[3]. The need for such an insurance in France has been explained by the fact that the French lawgiver has strengthened the exigencies referring to the managers' behaviour through a series of reforms and that the jurisprudence has become more strict referring to the managers' civil liability.

We find this insurance stipulated by art. L. 112-1 paragraph 2 from the French insurance code. Based on the insurance called "D&O", the managers may insure themselves against the risks connected to civil liability. Such insurance is legal when referring to the company's law, as well as to the parties' interests[4].

The French law stipulates that the "D&O" insurance is legal from the point of view of the companies' law. There are two arguments against the legal character of this type of insurance: on the one hand, this thing would lead to the waiver of the right to request the recovery of the prejudice, and, on the other hand, the preventive effect regarding the risk of civil liability would be lost.

If the German law has certain conditions for the waiver of the right to request the recovery of the prejudice by concluding a "D&O" insurance[5], the French law strictly forbids such a waiver.

The question has been whether the "D&O" insurance is not equivalent to an exemption from the civil liability or to a waiver of the right to proceed to prejudice recovery. The general opinion does not understand any tacit or express exoneration of civil liability, or a waiver of the right to proceed to prejudice recovery in the "D&O" insurance. With the "D&O" insurance, the company and its creditors receive a solvable additional debtor, so that the civil liability is strengthened.

The second argument against the "D&O" insurance tries to prove that this leads to the loss of the preventive function of civil liability[6]. Thus, a part of the doctrine does not consider the "D&O" insurance as being legal unless this stipulates a reasonable franchise that shall be the obligation of the manager[7]. As it shall be described below, no legal obligation regarding the subscription of a franchise can be understood from the articles L 225-252 C.com

The managers have an interest regarding the conclusion of the "D&O" insurance, because they are insured for damages, which they could cause during their activity. The company may also benefit from the insurance of the managers. Finally, even the shareholders and the third parties may also want to have a "D&O" insurance concluded for the managers of their company.

The manager should be very interested in concluding a "D&O" insurance. The manager may, thus, protect his equity against any invocation of a right to recover the prejudice caused by him. The release obtained through the "D&O" insurance can protect the manager against the right invoked by the company, the shareholders or the

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[2] Buchta, J: *Die Haftung des Vorstands einer Aktiengesellschaft – aktuelle Entwicklungen in Gesetzgebung und Rechtsprechung*, DStR, 2003, p.740

[3] Constantin, A: *De quelques aspects de l assurance de responsabilité civile des dirigeants sociaux*, RJDA, 2003, p.595

[4] Freyria, C : *L'assurance de responsabilité civile du management*, D.1995, p.120

[5] See Habetha, JW: *Direktorenhaftung und gesellschaftsfinanzierte Haftpflichtversicherung. Ein deutsch-englisher REchtsvergleich vor dem Hintergrund des Binnenmarktes fur Versicherungsleistungen*, Heidelberg 1995, p.173

[6] See Didier, P: *Les fonctions de la responsabilité civile des dirigeants sociaux*, RTD com., 2003, p.238

[7] Conte, P; Germain, M; Gutman, D: *Le dirigeant de société: risques&responsabilités*, Paris, 2002, p.341

third parties up to the insured sum. Obviously, the equity of the manager is insured up to the limits of the insurance agreement clauses.

Besides the managers, the company may also want the manager insured by a "D&O" insurance. On the one hand, the "D&O" insurance allows the guarantee to a certain extent of the manager's freedom of action. An excessive liability risk may have negative repercussions over the manager's behaviour. Thus, the manager's behaviour may be directed towards an attitude that is focused on very defensive strategies. The "D&O" insurance may partially guarantee the safety of the manager's actions, this thing meaning that the existence of a "D&O" insurance does not determine the manager to unfold his activity within a "total careless sphere".

A manager may decide not to take over the functions in a company if the "D&O" insurance has not been concluded. The "D&O" insurance may become a decisive factor in the competition to find the right candidate. This is the reason why the companies may also have an interest in the subscription of such insurance.

The "D&O" insurance may also insure the company if the manager is sued for the recovery of a prejudice by a third party. If the company owes a third party for the prejudice caused by the manager, the prejudice covered by the insurance shall be reimbursed to the company.

The third parties may also want that the managers should be covered by the "D&O" insurance, because it protects them according to the insured sum. In case the managers stop the payments, a part of or the entire prejudice may be reimbursed with the help of the "D&O" insurance.

There are different interests in the favour of concluding such insurance. The fact that one should know if an obligation to conclude such insurance must be legally set forth has been debated.

The French law does not contain any legal obligations to conclude a "D&O" insurance. A part of the doctrine pleads in favour of such a legal obligation because of the interests that must be protected. The ones who are protected by a "D&O" insurance are the beneficiaries of the trial against the managers. Of course, through the means of such insurance, the manager's solvency according to the insured sum is guaranteed.

The follow-up of this position may be recommended because within the civil liability of the managers against the company, as victim and beneficiary, this must be free to decide and to conclude such insurance in its favour. If the company does not conclude an insurance, the manager may then insure himself/herself. No reason can be mentioned in the sense of a legal obligation to conclude a "D&O" insurance.

The insurance offers only an additional protection. The protection of the third parties and of the shareholders could be guided towards the introduction of a legal obligation to conclude such insurance. If the introduction of a lump sum of the damages is considered necessary, the manager shall take preventive measures for the case in which a prejudice occurs and shall guarantee the fact that at least a part of the prejudice would be reimbursed to the shareholders. However, a total protection in case of prejudice cannot be taken into consideration because we refer to the rightful problems of the companies and of the capital markets. These fields contain a certain entrepreneurial risk. Generally, the protection of the shareholders cannot justify a legal obligation to conclude a "D&O" insurance[8].

Regarding the competence to conclude an agreement, the French law must clarify if a "D&O" insurance must be qualified as a remuneration supplement (a.), as a regulated convention (b.) or as a current operation (c.).

a. The „D&O" insurance - a remuneration supplement?

To acknowledge the remuneration supplement quality of the insurance premium would mean that the subscription of the insurance is subjected to the administration

[8] Freyria, C: *op.cit*, p.127

board or the members of the supervision board for the insurance concluded for managers or the members of the managing board according the articles L. 225-53, L. 225-62 C.com. The general meeting would be competent for the insurance subscribed for the members of the administration board or of the supervision council, taking into account the articles L. 225-44, L. 225-83 C.com. Given the qualification, the decision must be taken by the competent bodies and must grant certain remuneration to the respective managers[9].

Given the fact the insurance is subscribed in the benefit of the managers, as well as of the company, which pays the insurance premium, one cannot claim that the paid premium is exclusively an advantage in-kind for the benefit of the managers. The "D&O" insurance should not be qualified as a remuneration supplement. Therefore, the relevant bodies for the setting of the managers' remuneration must not subscribe such insurance.

b. The „D&O" insurance – a regulated convention?

The problem is that the French law should know if the subscription of the "D&O" insurance by the company falls under the incidence of the regulated conventions stipulated by article L. 225-38 C.com.

According to the strict lecture of the legislative stipulations, these might support the fact that the procedure referring to the regulated conventions is not applicable, because it is about the insurance concluded between the trading company and the insurance company, but not with the manager. According to the company, the insurance company is a third party that has no connection stipulated in articles L. 225-38, L. 225-38 C.com. with the social authorised person in question.

Such a lecture must be nuanced especially according to art. 225-38 paragraph 2 C.com. according to which the procedure is applied to the convention where one of the persons aimed at in paragraph 1 has an indirect interest. The jurisprudence gives quite a broad interpretation of the indirect interest. Therefore, the conclusion of the "D&O" insurance should be subscribed for the indirect interest of the manager. This thing would correspond without restriction to the interests of the "D&O" insurance described above.[10]

Therefore, the doctrine[11] recommends the compliance with the regulated conventions procedure. The convention must be authorised by the managing board in the monistic model of joint-stock company according to art. L. 225-38 paragraph 1 C.com. and by the supervision board for the dualist model of a company according to art. L. 225-86 paragraph 1 C.com.

A qualified convention as a regulated procedure, which is either unapproved or improperly approved, is not null, except for the fraud case. In such a case, only the wrongful consequences of the convention for the company are the responsibility of the managers. Regarding the insurance agreement, the wrongful consequences cannot be higher than the amount of the premiums paid by the company[12].

The "D&O" insurance is not expressly regulated in the legal texts , when talking about the insurance performed from the account of another person, based on art. 112-2 paragraph 2 C.as.

The "D&O" insurance is generally concluded as a group insurance for all the managers of the same company. This does not correspond with the group insurance concept as it is defined in art. 140-1 C.as. On the contrary, it is admitted that this should be considered as a group insurance in the broad meaning.

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[9] Cozian, M; Viandier, A; Deboissy, F: *Droit des sociétés*, Ed. 22 eme Édition, Paris, 2009, n.289

[10] Lienhard, A: *Code des sociétés*, Paris, 2005, p.679

[11] Redenius-Hoevermann, J:*op.cit.*,p.358

[12] Germain, M: *Rémunération des dirigeants: évolution ou révolution*, JCP E 2009, p.1576

The advantage of such a group insurance is that the deficits in insurances that may exist in the case of individual policies are thus avoided. Moreover, the group insurance seems to take into account the stipulations of the companies' law on the joint civil liability. The majority of the insurance companies does not offer any individual policy in the case of the "D&O" insurance now. This thing may trigger a problem referring to the limitation of the civil liability in the future, which is not evaluated according to a fix amount, but in percentages from the remuneration paid to the manager. A different amount for insurance coverage based on the annual remuneration should be negotiated for each manager. It seems that an individual policy designed after each model for all the managers of a company should not present deficits. The joint civil liability may also find applications if each manager is individually insured. The individual policies should prevail in the future especially in order to ease the limitation of the joint civil liability[13].

Generally, the "D&O" insurance is extended to all the managers. The insured persons should not be appointed nominally in the insurance policy. The former managers, as well as the future managers sometimes, may enjoy the protection of the insurance. The official receiver is also insured by certain policies.

The insurance premium represents the responsibility of the company. This is freely negotiable, but depends on the coverage amount, on the risk exclusions and on the franchise undertaken by the insured manager. The size of the company, the total of the balance sheet, the object of the company, as well as the damages are other factors based on which the premium shall be calculated. A "D&O" insurance model does not exist in France, but the general structure, that is the object, the material, the temporal and the geographical length, as well as the risks excluded from an insurance policy may be also described.

The French law sets the problem of knowing if the prejudice suffered by the company may be reimbursed by the "D&O" insurance. According to art. L. 112-1 paragraph 2.C.as, the insurance contracted in somebody else's account is valid as an insurance for the profit of the subscriber as well as a stipulation for another one. Thus, the subscriber of the insurance, the victim of the wrongful acts that can cause prejudices triggered by the one whose account he/she has subscribed, benefits personally from the subscribed guarantee. Taking into account that art. L.112-1 C.as. is not imperative, the parties may freely determine the length and the application of the insurance agreement. If the contrary intent of the parties is absent, art. L. 112-1 C. as. is applied[14].

According to the "D&O" insurance agreements in France, one may notice the great diversity of their stipulations. Therefore, certain agreements have stipulated the exclusion of the subscribing company from the benefit of the guarantee; others do not touch this subject at all. Part of the doctrine considers that a prejudice suffered by the company cannot be covered by the insurance, because the insurance, excluding the guarantee, is afraid of the risk of collusion between the victim company and the guilty manager. As mentioned before, the company may be insured against its own risk.

The problem of knowing if the "D&O" insurance is applied in the case of the collective procedure of the company is also important. The insurance company may have a termination right of the insurance agreement with one-month notice in case a collective procedure is started. The company that has subscribed the insurance must inform the insurance company about the start of the collective procedure. The greatest part of the insurance agreements covers only the prejudices occurred from the wrongful acts of the manager, occurred before the date of the start of the collective procedure. The wrongful acts of the managers that have taken place after this date are not generally covered by the "D&O" insurance.

[13] Lienhard, A: *Loi de sécurité financière: quoi de neuf pour les sociétés?*, D.2003, p.1996

[14] Lucas, F-X: *La responsabilité civile des dirigeants d'entreprise*, RLDC 2004, p.48

According to the general conditions applicable to the "D&O" insurance, the French doctrine[15] stipulates that the protection aims at a judicial defence as well as at an extra-judicial one upon the requests for the justified or unjustified prejudice recovery. The fees for lawyers, experts, the expenses with witnesses and the court fees are listed among the expenses associated to this defence.

The "D&O" insurance is a type of insurance that guarantees the amount stipulated in the agreement. The fixed amount as a quantum of insurance limits the performance of the insurance company. This limitation is not generally valid only for the prejudice, but also for all the prejudices occurred during a year in the entire world. Thus, the frequent risk of prejudice for the insurance company must be reduced.

The French law has accepted the fact that the "D&O" insurance covers the *ut singuli* and *ut universi* social actions. According to the current jurisprudence, the manager is not liable to third parties unless a fault separable from the functions may be qualified. The problem of knowing if the fault separable from functions is also covered by the insurance is still open[16]. In the case of the fault separable from the functions, it is not about an act performed in the private sphere of the manager. It is not about a personal fault. Indeed, in the case of the personal fault, the "D&O" insurance is not applicable because there is no connection with the management function. In the case of the fault separable from the functions, the coverage through the "D&O" insurance may not be admitted because the action must be qualified as intentional according to the jurisprudence. The intentional fault or the deceit may not be covered by the insurance in the French law either. In conclusion, the request for damages founded on a fault separable from the functions may not be covered by a "D&O" insurance.

There are important restrictions related to the temporal and geographical extent of the "D&O" insurance.

On a temporal level, the insurance coverage is limited. The coverage request that the wrongful acts constituting the basis of manager's civil liability, as well as the first claim of the right to recover the prejudice, should take place during the agreement duration.

The insurance policy is generally concluded for a limited duration that should correspond to the duration of functions of the insured body.

The sphere of application is thus limited in two directions. The practice of insurances contains the widening of the protection sphere imposed on the profit of the insured manager.

On the one hand, a retroactive clause is also agreed, guaranteeing the coverage of a fault that has taken place before the conclusion of the agreement.

On the other hand, a large number of "D&O" insurances stipulate a ten-year coverage if the request for damages is exercised after the agreement termination, but only during the mentioned ten-year coverage.

In the case of the collective procedure, generally, the protection of the insurance is not applied to the requests for the recovery of the prejudice founded on the faulty breach that has taken place before the start of the insolvency procedure. It remains to be decided whether the faults that have lead to the payments stop or to the overindebtedness are covered by the "D&O" insurance or not. The insolvency procedure implies the proof of management fault. The management fault is covered by the "D&O" insurance. The insurance agreements accept the coverage of a special liability in the majority of the cases, at least when the due prejudices are founded on a fault committed before the start of the collective procedure or leading to this procedure.

The insurance companies happen not to trust certain jurisdictions, especially regarding countries from the Common law that favour the request for damages against

[15] Redenius-Hoevermann, J.: *op.cit.*, p.358
[16] Constantin, A: *op.cit.*, p.615

their managers. It may happen that the insurance policy excludes a territory on which the insurance shall not be able to guarantee the insured risk. Such exclusion may be set forth under general conditions or may be a clause introduced from case to case. The American law, for example, stipulates that the insurances generally exclude the claims deriving from the breach of the Employment Retirement Income Security 1974, such as the wrongful acts committed in relation with the pension funds[17].

The "D&O" insurances cannot protect the managers against the risks connected to their liability. The insurance coverage is limited by an entire series of coverage exclusions that may still vary from one agreement to another.

According to the French law, the deceit and the intentional fault are always excluded[18].

The French law stipulates that the insurance cover the liability of social managers based on the "any risk, except for..." type agreements. This means that, referring to the risks expressly excluded from the insurance agreement, all the legal, regulated and jurisprudent hypotheses of civil liability are guaranteed by the "D&O" insurance. Besides the clauses that expressly exclude certain insurance risks, the law stipulates some behaviours as uninsurable. Thus, article L. 113-1 C.as. stipulates that the insurance company shall not be liable for the losses and the damages, which are derived from an intentional or deceitful wrongful act of the insured person. This legal stipulation is applied to the insured person in whose account the insurance has been made, that is the social managers. Also, the pecuniary fiscal or customs sentences[19], but also the claims whose existence, imminence or possible nature has been known by the subscribing company, before the agreement subscription date, are generally excluded by a clause. The requests for the recovery of the prejudice submitted after the start of the insolvency procedure related to the equity of the company who has subscribed the insurance agreement are also excluded from the insurance coverage. Generally, in France, the "D&O" insurance does not stipulate any franchise or a very low quantum one.

Although a reasonable franchise may guarantee the preventive and recovery functions of the civil liability even if a "D&O" insurance has been concluded, the legal practice remains very critical related to the stipulation of a franchise.

The majority of the managers' civil liability insurances do not stipulate a franchise related to the managers. Thus, the insurance company reimburses the victims up to the limit of the insured amount.

The reasons of the hostility towards the stipulation of a franchise reside in the fact that for a group insurance like the "D&O" insurance concluded for a large number of higher-class people of the company, a differentiation seems improper. Moreover, the payment obligations of the managers to the company should replace the franchise agreed with the insurance company. A franchise should not have any influence on the manager's behaviour and the insurance protects mainly the company. At last, the franchise has been considered inadequate for every international standard.

From a practical point of view, the franchise would lead to a rise of the insurance price, which would be completely useless. The managers would thus insure the franchise themselves. The expense that results from the conclusion of individual policies shall be directly or indirectly reimbursed to the managers by the company. This thing would lead to an increase in remunerations.

Certain insurance policies refuse the possibility to insure the franchise. The insurance companies, especially within a period of increase in the civil liability activities, are interested in the action of the managers according to their obligations.

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[17] Bandle, D: *L'assurance D&O,* Zurich, 1999, p.23

[18] Marly, P-G: *La faute dans l assurance de responsabilité des dirigeants*, JCP E 2006, p.568

[19] See Delmas-Marty, M ; Guidicelli-Delage, G : *Droit pénal des affaires*, Paris 2000, p.171

With the help of the franchise, an insurance company may, to a limited extent, have a certain influence on the manager's behaviour and thus avoid the use of the insurance. Without the franchise, the insurance premium would be higher, but the insurance company has, on a long term, a higher interest to foresee a franchise for the quoted preventive reasons.

The French law does not acknowledge a faulty breach of the obligations qualifying the right to recover the prejudice if the franchise has not been stipulated in connection with the members of the supervision board or the directors[20].
Article L. 225-251 C. com. and the Insurance code do not stipulate a franchise for the "D&O" insurances.

We believe that the franchise constitutes a proper tool regarding the civil liability, having a certain influence on the prevention of damages because the manager knows the risk to see the civil liability used and the size of the damages that could become his/her responsibility.

A reasonable franchise may restore the repairing function of civil liability, which has been reduced through the conclusion of a "D&O" insurance. This thing may in the end have as consequence a prudent behaviour from the part of the manager. By this mechanism, the company, the shareholders and the third parties would also be protected.

The question is to know what their exigencies are in order to use the correct franchise. The franchise must re-establish the repairing function of the prejudice, which has been reduced when the "D&O" insurance has been concluded. Consequently, the quantum of the franchise must be an amount through which the company may truly profit from the reduction of the insurance premiums. Thus, a reasonable franchise must be comparable with the objective of the damage settlement.

The franchise preserves the normative and repairing functions of the manager's civil liability. The result is that the reasonable aspect of the franchise must also be measured in comparison with the effect it would have on the manager's behaviour. We believe that a lump quantum must be rejected because of the very different remunerations of the members of the managing board and of the supervision board. A fix amount could not take into account the different financial situations of the managers. Indeed, the stipulation of a reasonable franchise must not mean at the same time the financial ruin of the manager[21].

We do not believe necessary to take into account the fault degree in connection with the reasonable nature of the franchise, because, in case of the simple fault, the civil liability shall not be generally able to be qualified for the application in "Business Judgment Rule" and the "D&O" insurance is not applicable in case of deceit.

A fix quantum of the franchise may not be defined because the insurance premiums vary very much according to their size, object and company's risks. In order to render the reasonable aspect of the franchise, a decisive criterion should be the economic situation of the manager. Thus, the civil liability function referring to the manager's behaviour should correspond to the individually calculated franchise while considering the equity of the manager. One may argue that the manager is not obligated to publish his/her personal equity. The franchise, as well as the civil liability, must not influence the private sphere of the manager. Thus, the criterion to qualify the reasonable franchise must be developed in comparison with the remuneration of the manager through the company.

The franchise must not be connected to the fix remuneration, but to the global remuneration, because it may be reflected very well in the financial situation of the

[20] Redenius-Hoevermann, J: *op.cit*., p.361
[21] Constantin, A: *op.cit*., p.618

manager in this way.[22] The doctrine has set forth that franchises should be set at 25% of the annual remunerations. The French law admits the fact that the franchise itself may be insured[23].

The franchise may not be considered as a negative aspect within the international concert, meaning that it would determine qualified managers to hesitate between coming to Germany or France or not. Such a franchise should be qualified as a sign of good company government, especially related to the civil liability condition which has a real practical significance. The managers shall compensate a reasonable franchise through investment decisions on the international market of capitals.

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[22] Redenius-Hoevermann,J.: *op.cit*., p.362
[23] Constantin, A: *op.cit*., p.618