

Tough renewal season will trigger a rise in liability coverage disputes in the Netherlands

Insurers and policyholders should act to limit this potential side-effect of a hardening market



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The Dutch commercial insurance market is hardening, in line with the global insurance market. After quite a few years with a soft insurance market, change has been afoot for some time. This was already the case before Covid-19 disrupted the world and had a significant effect on the insurance market.

The current renewal season in the Netherlands has been described as tough by all parties involved, with insureds confronted with significant premium increases, changes to coverage and no certainty of automatic renewal. After the smoke clears on this renewal season, it is expected new claims for coverage on liability insurance policies on a claims-made basis will trigger a rise in coverage disputes.

The writing has been on the wall for some time. The last time the insurance market was considered to be a hard market was in the period 2001 to 2004. After years and years of a soft commercial insurance market with decreasing premiums, the first signs of the market hardening were seen in the final quarter of 2018.

The hardening of the market that started relatively slowly at the end of 2018 has significantly picked up speed in 2020 as a result of the pandemic. The effects of these developments have been strongly felt across the Dutch commercial insurance market and seem to be culminating in a difficult renewal season for 2021.

In the Netherlands, almost all liability insurance policies are concluded on a claims-made basis. The claims-made principle has become the market standard, since the introduction of claims-made liability policies in the Netherlands in the 1990s. The essence of a liability policy concluded on a claims-made basis is the timing of the liability claim is the trigger for coverage.

Scope of coverage

More specifically, if a claim is made against an insured and reported to the insurer for the first time during the policy period, this claim falls within the scope of coverage. This principle results in two specific characteristics.

First of all, a liability policy on a claims-made basis in principle offers coverage for claims, irrespective of the timing of the underlying act.

Second, as soon as the policy period ends, there is a hard cut-off. After the policy period ends, it is no longer possible to claim coverage for claims received. This is only different if the policy contains specific rules to notify circumstances or an additional reporting period for claims.

While this is how liability insurance policies on a claims made basis work in theory, the Dutch practice of handling liability

insurance claims has shown a different, somewhat softer approach. In practice, the claims-made principle has not been strictly applied. This is especially the case with respect to the hard cut-off after a policy period ends. The hard cut-off has, in general, not been applied as strictly as the characteristics of the claims-made principle would suggest.

The reason for this seems to be that in the Dutch insurance market not every new policy year is automatically considered as a separate, new insurance agreement. In the Dutch insurance market, a tacit renewal of a claims-made policy is not uncommon. Additionally, in the Dutch insurance market, the English word “renewal” can refer to a new contract, as well as to the continuation of an existing one.

In the case of a continuation, it is less likely for an insurer to rely on the effects of a hard cut-

off. In other words, the idea that, because of the claims-made principle, a hard cut-off follows after each policy year is not standard in the Dutch insurance market.

The current market developments seem to provide the perfect breeding ground for a change from the existing softer approach to one in which each policy year contains a hard cut-off.

Because of the hardening of the insurance market, fewer policies will automatically qualify for renewal. In the present circumstances, insurers are increasingly looking for a system that allows a clean start each policy year and that means a renewal season where the word “renewal” is more likely to mean an actual new insurance agreement.

Under these circumstances, continuations of existing liability insurance policies are less likely and more new liability insurance

policies are expected to be concluded. Under Dutch law, concluding a new insurance contract has two serious implications.

In the first place, a new insurance contract means the policyholder and insured(s) have a duty to disclose relevant information to the insurer. Second, a new insurance contract on a claims-made basis will almost always exclude from coverage claims that follow from previously known circumstances.

When the smoke clears on this renewal season and claims for coverage come up, it is expected these new claims could trigger a rise in coverage disputes. If claims for coverage come up on newly concluded insurance policies, the duty to disclose and the exclusion for prior known circumstances are expected to take centre stage during claims handling – possibly resulting in a sharp rise in coverage disputes.

This development can be seen in the Dutch professional liability insurance market. For years, the Dutch professional liability insurance market was a very stable, uneventful market. A few years ago, this market underwent a significant change when one insurer with a large market share withdrew entirely from that market. As a result, new insurers entered the market and more new insurance contracts were concluded.

When new claims for coverage came up on these new contracts, the implications of concluding new contracts in a market that was used to continuations became clear. It resulted in a rise in coverage disputes concerning the duty to disclose and the exclusion for prior known circumstances.

It is expected a similar rise in coverage disputes will follow this tough renewal season. Both insurers and policyholders are advised to take necessary precautions and try to limit this potential side-effect of a hardening Dutch insurance market. ■

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