Insurance - Switzerland

General insurance terms integral to insurance agreement

Contributed by **BADERTSCHER Rechtsanwälte AG**

October 28 2014

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Introduction

In a recent decision(1) the Federal Supreme Court held that general terms and conditions can be included in an insurance contract, even if the application makes no reference to the date of the terms and conditions and it remains unclear which version is applicable. However, this applies only if the application form refers specifically to the inclusion of the general terms and conditions. In such case, the general terms and conditions in force at the time of signing the application will apply.

Facts

On January 1 1999 Company A and insurance company B concluded a group insurance agreement, allowing A's employees to sign up to individual insurance packages to be governed by the Federal Insurance Contracts Act, the general terms and conditions and the special terms and conditions. B offered, among other things, insurance packages in case of an inability to work, whereby any employee was free to choose the waiting period before B would start paying out benefits.

Article 20(2) of the general terms and conditions in the 1999 version and the 2001 version stated that B would provide insurance benefits only as a complement to the benefits from state insurance (eg, mandatory health insurance or accident insurance) up to the actual loss of earnings, subject to the maximum amount (ie, daily allowance) defined in the respective policy.

On December 7 2001 X, an employee of A, signed up to insurance which granted loss of earning benefits of Sfr198 per day after the 61st day of absence from work. However, several boxes had been left blank on the application form – in particular, there was no reference to the date of the applicable general terms and conditions. The application stated that the insured "[herewith] confirms to have received a copy of the [general terms and conditions] and [special terms and conditions] which form an integral part of the insurance contract".

X was subsequently unable to work from January 1 2002 and B began to pay out insurance benefits as contractually agreed.

Due to a change in the law, X's employer was obliged to continue salary payments for 12 months in spite of X's inability to work. In July 2004 X asked B to extend the waiting period to 360 days to prevent over-insurance. As a result, B issued a new insurance policy for inability to work in November 2004, referring to the 1999 general terms and conditions. The policy included benefit payments of Sfr198 per day after the 361st day of inability to work. However, X claimed that she had never received the new insurance policy. Nevertheless, the court established that X had received two insurance certificates on January 1 2003 and January 1 2004, which referred to:

- the 1999 general terms and conditions;
- coverage for inability to work;
- daily benefit payments of Sfr198;
- a 60-day waiting period; and
- a monthly premium of Sfr269.

In addition, X had also obtained two insurance certificates on January 1 2004 and January 1 2005, stipulating a 360-day waiting period and a reduced premium – without, however, specifying the applicable general terms and conditions at the time.

X was again unable to work from May 20 2008 until March 31 2009. Thereafter she was partially unable to work until February 28 2013, the date of her retirement. B started to pay out insurance

benefits from May 15 2009, after the expiration of the 360-day waiting period.

Because X also received insurance benefits from two state insurances, B halted its benefit payments from February 23 2010 based on Clause 20(2) of the applicable general terms and conditions.

On November 1 2010 X brought an action against B and demanded a payment of Sfr132,632, corresponding to compensation allegedly owed until the date of her retirement.

The first-instance court and the Vaud Court of Appeal ordered B to reimburse X approximately Sfr45,000. However, both courts held that X was bound by the applicable general terms and conditions and special terms and conditions and consequently X had to accept a reduction in insurance benefits because she had also received benefit payments from state social security insurers. X subsequently appealed to the Federal Supreme Court.

X asserted a violation of Article 1 of the Code of Obligations and Article 3 of the Federal Insurance Contracts Act and claimed that the general terms and conditions and special terms and conditions had not been validly incorporated into the insurance contract. Because the insurance application offer of December 7 2001 (which contained all necessary contract elements) did not refer to a particular edition of general terms and conditions since the respective box had been left blank, X concluded that the insurance contract consisted only of the content contained in the application. In addition, X argued that she had never received any general terms and conditions and that the reference to the general terms and conditions at the bottom of the application could not be held against her.

Further, X claimed that the fact that B had not immediately reacted and stopped paying out benefits as soon as it had learned that she was receiving social security benefits demonstrates B's acknowledgement that the 1999 general terms and conditions and the 1999 special terms and conditions would not apply during her absence from work in 2002. Additionally, X alleged that the daily amount of Sfr198 was agreed as a lump sum based on a calculation of loss of income and taking into consideration potential social security.

Decision

The Federal Supreme Court found that X had clearly filled in and signed the insurance application on December 7 2001, which had been accepted by B. The insurance contract was thus validly concluded and the contentious issue was limited to its precise content. Pursuant to the principle of reliance, the judge had to determine how the parties, at the time of concluding the contract, must have understood in good faith the terms used and the mutual acts (BGE 136 III 186). According to established jurisprudence and doctrine, a party which signs a contract referring to general terms and conditions is bound by such terms. The same applies to a party which signs the general terms and conditions without having read them.

In this case, the application referred to the general terms and conditions and the fact that they formed an integral part of the insurance contract; however, it did not indicate a date or particular edition. By signing the application X further confirmed that she had received a copy of the general terms and conditions. The court therefore held that they had become part of the insurance contract. The court stressed that the incorporation of the general terms and conditions and the special terms and conditions into the insurance contract had been expressly pointed out at the bottom of the application signed by X. The lack of reference to a particular date or edition of the general terms and conditions could not, according to the principle of reliance, be interpreted as non-incorporation of the general terms and conditions. In consideration of the principle of reliance, it must be assumed that reference was made to the general terms and conditions in force at the time that the insurance agreement was concluded. The Federal Supreme Court thus concluded that the first-instance court and the Court of Appeal had not violated federal law by holding that the applied general terms and conditions and the special terms and conditions had become an integral part of the insurance contract.

Because X had become bound by the general terms and conditions that were in force at the time, and since the respective general terms and conditions and special terms and conditions stated that B would reduce its benefits if an insured received payments from any other insurance, the Federal Supreme Court rejected X's argument that the reference in the application form represented a lump sum and implied an exclusion of any reduction in case of social security payments. Rather, the amount stipulated represented a maximum amount.

Comment

The Federal Supreme Court made it clear that general terms and conditions can be validly included in an insurance contract even if no reference is made to a particular version or edition, provided that the reference to the general terms and conditions is made expressly in the application form. An insurer can therefore rely on its general terms and conditions provided that it has made the insured aware of the incorporation into the insurance contract before its conclusion. An insured, on the other hand, must pay close attention with regard to the precise version of general terms and conditions. Under the partially revised Insurance Contract Act (Article 3, effective since January 1 2007) additional information duties have been introduced for insurers. Insurers are obliged to inform the insured about the essential content of the insurance agreement before its conclusion. In case the insurer does not fulfil its pre-contractual information duty, the insured is entitled to terminate the insurance agreement (Article 3a). The insurer's duty to provide the insured with the general insurance terms before the conclusion of the insurance agreement has been maintained (Article 3(2)).

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Endnotes

(1) 4A_213/2014, June 26 2014.