

Are the effects of the COVID-19 pandemic insured? Ombudsman commissions legal expert's opinion

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Introduction

Distinction between epidemic and pandemic

Legal examination of GCI

COVID-19

Comment

Introduction

After spreading from Wuhan to Switzerland in less than three months, the COVID-19 crisis is creating major challenges for Swiss insurers, particularly with regard to whether insurance coverage for the effects of an epidemic also apply to a pandemic.

On 11 March 2020 the World Health Organisation (WHO) declared the spread of COVID-19 a transnational and continental pandemic. Two days later, the Swiss Federal Council ordered measures to combat COVID-19. On 17 March 2020 the lockdown of publicly accessible facilities was ordered and restaurants and bars had to close. Many restaurant operators' property insurance policies include coverage for business interruption due to an epidemic. However, most insurers operating in Switzerland have refused to grant coverage for business interruption losses due to COVID-19, arguing that epidemic insurance protects holdings in the event of a localised outbreak of a pathogen. In contrast, the financial effects of a 'pandemic' (ie, a disease affecting several continents) is not calculable. Therefore, the risk is not insurable according to Swiss insurers. This position prompted GastroSuisse, the trade association for the hotel and restaurant industry in Switzerland, to intervene and call in the Swiss Ombudsman of Private Insurance. The ombudsman commissioned Law Professor Dr Walter Fellmann to issue a legal opinion regarding selected epidemic insurance wordings. This article discusses the conclusions of Fellmann's legal opinion.

Distinction between epidemic and pandemic

The distinction between an epidemic and a pandemic in insurance is not just sophistry, but rather the limit of insurability:

- An 'epidemic' is defined as a high incidence of an infectious disease, which spreads locally and is temporally limited.
- A 'pandemic' is defined as an infectious disease that is spreading in many countries or even across continents.

The risk of a region-specific epidemic can be globally diversified and insured by means of reinsurance. This is no longer possible in the event of a global pandemic. Therefore, many insurers exclude insurance coverage in their general conditions of insurance (GCI) in the event of a pandemic.

However, from a legal point of view, whether a pandemic is really a specific risk that can be distinguished from the insured risk of an epidemic is questionable. According to Fellmann, 'epidemic' is a generic term (ie, a pandemic is the application of an epidemic). Moreover, the Epidemics Act defines only 'epidemic' as the outbreak of a communicable disease which, due to its spread, poses a threat to public health in Switzerland. Thus, a 'national pandemic' does not exist.

According to Fellmann, the WHO's declaration that an infectious disease is classified as a pandemic has no legal implications in Switzerland. Only the WHO's declaration that a health emergency of international significance exists has legal impact in Switzerland. In such cases, and if the international health emergency poses a real threat to public health in Switzerland, Article 6(1)(b) of the Epidemics Act provides grounds for:

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- a so-called 'special situation'; and
- the Swiss Federal Council to pass laws regarding the special situation.

In consideration of the above, the exclusion of a pandemic risk in the GCI contains a dynamic component (ie, a hidden mechanism which allows insurers to refuse insurance benefits depending on the severity and spread of an epidemic). According to Fellmann, such dynamic component could be considered:

- an infringement of good morals within the meaning of Article 19 of the Code of Obligations; and
- a violation of Article 8 of the Federal Law on Unfair Competition (if the insured is a consumer).

However, in the absence of an independent legislation for the review of the content of the GCI (ie, a GCI review) and with a view to the principle of contractual freedom, the validity of a GCI provision must always be individually reviewed.

Legal examination of GCI

Pursuant to case law, a GCI review is based on the following control mechanisms:

- Consensus check – the validity of the GCI is limited by the rule of abnormality (ie, unusual clauses which the insured could not or did not have to expect were invalid). In insurance policies, exclusions which considerably reduce the expected coverage and exclude the most frequent risks are also considered invalid.
- Contract interpretation check – ambiguous clauses in the GCI must be interpreted to the disadvantage of the party that drafted the clause.
- Validity check – provisions that violate public order, good morals or the right of personality within the meaning of Articles 19 and 20 of the Code of Obligations are also invalid.
- Unfair competition law review (only if insured is a consumer) – if a consumer proves that a contractual clause unjustifiably results in a significant disparity between the contractual rights and obligations and that this imbalance has been unfairly formulated to the detriment of the consumer, the clause is invalid.

In addition, pursuant to Article 33 of the Insurance Contract Act, exclusions of coverage are valid only if they are formulated in "a specific, unambiguous wording". If in the course of the interpretation check of a clause it turns out that this requirement is not met, the exclusion is invalid.

COVID-19

In view of the control mechanisms for the GCI, Fellmann concluded the following for certain GCI clauses with regard to COVID-19:

- The explicit exclusion of the consequences of an epidemic or a pandemic is valid.
- The inclusion of damages caused by an epidemic and the exclusion of damages caused by a pandemic violate the good morals within the meaning of Article 19 of the Code of Obligations and possibly Article 8 of the Federal Law on Unfair Competition. Such clause is likely invalid.
- If the insurance includes damages caused by an epidemic but does not explicitly exclude damages caused by a pandemic, the pandemic is also covered as part of the generic term 'epidemic'.
- The exclusion of damages caused by pathogens for which the WHO Pandemic Level 5 or 6 applies nationally or internationally will most likely not pass a legal examination of the GCI because such clause would violate Article 33 of the Insurance Contract Act and Article 19 of the Code of Obligations (ie, unusual, ambiguous clause). Since Switzerland has no regulation on pandemic levels, the objective meaning and purpose of such clause is unclear. Further, such clause – as in the case of the inclusion of an epidemic and exclusion of a pandemic – allows a hidden, dynamic mechanism which is not admissible.
- If the insurance excludes damages caused by influenza but does not explicitly exclude damages caused by an epidemic or a pandemic, damages caused by an epidemic and a pandemic are to be covered. From a medical point of view, COVID-19 is a different disease than an influenza. Therefore, in line with the principle on interpretation of the GCI, damages caused by COVID-19 are to be covered.

Comment

There is considerable legal uncertainty regarding the handling of the effects of COVID-19 under various insurance contracts. By obtaining an expert opinion, the ombudsman has made a mediating contribution to resolving the conflicts between insurers and insureds affected by the COVID-19 crisis. However, the disputed clauses must be examined on a case-by-case basis and the courts will likely eventually have to assess individual refusals of cover and provide guidance in this regard.

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