THE INSURANCE DISPUTES LAW REVIEW

Third Edition

Editor
Joanna Page

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THIRD EDITION

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PREFACE

This is now the third edition of *The Insurance Disputes Law Review*. I am delighted to be the editor of this excellent and succinct overview of recent developments in insurance disputes across 16 important insurance jurisdictions.

The first two editions were very well received. They demonstrated both the need and the very active interest, evident across the globe, in the legal frameworks for insurance and, in particular, in the insight that the developing disputes arena provides into this fascinating area.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private worlds. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (that are almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As editor, I have been impressed by the erudition of each author and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction. An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and therefore had to rely on the duties of disclosure of the policyholder). With the increasing use of artificial intelligence to assess data and more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example in relation to healthcare insurance, policyholders are not denied insurance for historical matters. In the light of the ongoing

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scourge of covid-19, and its latent effects on those who contracted it (which have yet to be fully understood), this issue continues to be at the forefront of debate.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The effect of covid-19 on economies, and particularly on business interruption insurance, has been a significant theme in the past months. The consequences for credit insurance will no doubt follow through as well. In my home jurisdiction of England and Wales, the courts have faced this challenge to seek to provide urgent guidance on whether such policies respond to a pandemic. The courts in other jurisdictions are also seeking to provide guidance.

It is also fascinating to see how global concerns around climate change and cyber risk are working their way through the legal systems, with jurisdictions, particularly the United States, leading the way in assessing how existing insurance products might respond to these risks.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany) is likely to be an important factor.

I would like to express my gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. I must also thank Russell Butland, who is a senior associate with my firm and a highly talented lawyer (and now a judge). He has done much of the hard work in this project, together with Shahab Uddin and Charlotte Page, who have helped enormously in the research.

Finally, I would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in adding a professional look and more coherent finish to the contributions.

Joanna Page
Allen & Overy LLP
London
September 2020

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Chapter 15

SWITZERLAND

Christian Casanova[1]

I OVERVIEW

The insurance industry is a major pillar of the Swiss financial industry. An important element in the provision of insurance services in Switzerland and out of Switzerland is the presence of international insurers.[2] A consequence of the international nature of the insurance market is that wordings are often not specifically developed for the Swiss market, but rather are adoptions from foreign, often UK wordings, which regularly leads to conflicts with mandatory law and results in a construction that may not have been expected when drafting the wordings.

To provide the necessary certainty for the provision of insurance services, a functioning and reliable system for dispute resolution, which allows foreseeable results of the drafting of insurance contracts, is essential. This chapter intends to provide an overview on topics and developments that have an impact on insurance disputes. In addition to the evolution of the jurisprudence by the courts, a major development in Switzerland will be triggered by the entry into force of the bill on the amendment of the Insurance Contracts Act, which is expected in 2021 or 2022.

II THE LEGAL FRAMEWORK

i Sources of insurance law and regulation

The main body of the law applicable to insurance contracts is found in the Insurance Contracts Act (ICA).[3] In addition, general contract law (i.e., the Swiss Code of Obligations (CO),[4] is applicable where the ICA has no specific provisions).

The regulatory framework for private insurance carriers is governed by the Insurance Supervisory Act (ISA),[5] with important additional rules in the Insurance Supervisory Ordinance.[6] The Swiss regulator is the Financial Market Supervisory Authority (FINMA).

As the ICA dates in essence from 1908, various attempts to modernise the act have been made in past years with one of the aims being to strengthen rights of the insured. In

1 Christian Casanova is a partner at Prager Dreifuss Ltd.

2 Of the 144 insurers admitted for business in Switzerland in 2018, 70 were domiciled in Switzerland, whereas 44 insurers were branches of foreign insurers; see FINMA Insurance Market Report 2018 (https://www.finma.ch/en/documentation/finma-publications/reports/insurance-reports/).

3 Swiss Federal Act on Insurance Contracts of 2 April 1908, SR 221.229.1.

4 Swiss Code of Obligations of 30 March 1911, SR 220.

5 Swiss Federal Act on the Supervision of Insurance Entities of 17 December 2004, SR 961.01.

6 Ordinance on the Supervision of Private Insurance Entities of 9 December 2005, SR 961.011.

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summer 2020, a bill was finally presented by the parliament. Although it is not yet fully clear when the amendments to the ICA will enter into force, this change of the landscape will without doubt also impact on insurance disputes.[7]

ii Insurable risk

Switzerland does not follow a strict concept of insurable interest in insurance contracts. To date, there is no case law defining the essential elements of an insurance contract, and no consensus in the academic opinions. Consequently, in the absence of any existing definition, there are no clear restrictions to the insurable risk that might be deduced.

Nevertheless, it is largely uncontested that the contract of insurance is a contract for the transfer of a risk for a consideration, a concept that entails an element of fortuity. There must be some uncertainty as to whether, or at least when, the risk might realise. That the risk must lay in the future is clarified in the ICA, which provides that an insurance contract is void if at the inception the risk has already materialised. Although this has generated discussion in particular in the context of third-party liability policies with a claims-made trigger, where a liability has often already risen long before the claim is actually made, the claims-made cover is now generally accepted, at least as long as the insured had no prior knowledge of the claim in relation to the manifestation of the insured risk. A clarification of this matter will be introduced into Swiss law with the amendments to the ICA.[8]

A point to be noted is that the validity of the insurance contract is, according to the predominant legal doctrine, not dependent on the regulatory status of the insurer. Arguably, also, a contract that is to be qualified as non-admitted business in Switzerland may thus be valid and enforceable.[9]

iii Fora and dispute resolution mechanisms

Although Switzerland has had a unified Civil Procedure Code (CPC) since 1 January 2011, its federal system and history has left its mark on the court system, not only by providing different competent courts depending on the canton in which a claim is lodged, but also by distinguishing between the cantonal and the federal level within the stages of a court proceeding, applying different rules to each stage.

In general, there is an obligation for the parties to enter into a mandatory conciliation procedure before being allowed to submit a claim to court. If no settlement can be found, the claimant can lodge the claim with the cantonal first instance court. A judgment from this first instance court can be appealed to the supreme court of the canton concerned. This appeal court is entitled to a full review of the first instance judgment on all legal and factual grounds. Following a judgment of the canton's supreme court, a further appeal is possible to the Federal Supreme Court; however, only on limited grounds. In particular, while the Federal Supreme Court will in most circumstances undertake a full review of the legal issues, only manifestly wrong factual findings can be challenged in the Federal Supreme Court.

In addition to this court system, four cantons provide for commercial courts,[10] which are competent to hear commercial claims if at least the defendant is registered in a commercial registry, the value of the claim (in insurance matters) amounts to 30,000 Swiss francs and the

7 A more detailed outlook on relevant changes is presented at the end of this chapter.

8 Art. 10 rev ICA.

9 Cf. BSK VAG-Gerspacher/Stauffer von May, Art. 3 n 8 seq.

10 Zurich, Bern, Aargau and St Gallen.

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claim concerns the professional activity of at least one of the parties.[11] Distinguishing features of the commercial courts are firstly an acceleration of the proceedings, as there is no prior conciliation hearing, and no appeal at the cantonal level. Also, the bench in the commercial courts include 'commercial' judges, who have particular experience in the industry (e.g., in insurance and reinsurance matters).

In addition to the court system, alternative dispute resolution (ADR) mechanisms are also widely accepted in Switzerland. While mediation plays virtually no role in insurance disputes, arbitration is a commonly used ADR mechanism, and is even predominant in the handling of reinsurance claims. In particular, in both domestic and international arbitration, the Federal Supreme Court as sole instance of appeal exhibits an arbitration friendly jurisprudence.

III RECENT CASES

i Recourse and subrogation

Swiss law on subrogation has historically been tailored to restrict the recourse of the insurer to specific circumstances. In particular, case law had established a mandatory liability hierarchy in scenarios where different persons are liable for the same damage on different legal grounds. In a recourse, the loss should ultimately be borne by the party liable based on tort, subsidiarily by the party liable based on contract, and only as a last resort based on strict liability. The recourse of a first-party insurer was restricted in this system by treating its obligation to pay a loss similarly to contractual liability for damages, and therefore only granting the recourse against third parties liable for tort, or in the case of contractual liability, if the third party had acted grossly negligently. However, no recourse of the first-party insurer was possible against a third party strictly liable without fault.[12] Although this practice was heavily contested in legal literature, the Federal Supreme Court had upheld it for more than 100 years.

In a recent decision, the Federal Supreme Court has, however, started to move away from this practice.[13] The Court had to decide the case of a private health insurer who tried to obtain recourse against the operator of a bus line following an accident, although the bus operator was subject only to strict liability. The Federal Supreme Court made two findings that developed the law. First, it abandoned its practice of treating the insurer like a party contractually liable for damages, thereby removing it from the liability hierarchy. Second, it provided an extended basis for recourse by recognising a subrogation right of the insurer also against third parties who are responsible for the loss only based on strict liability, thereby enabling the recourse of the insurer in the case at hand.

While the Federal Supreme Court has left open the question whether the first-party insurer can also subrogate against a third party liable for the same loss based on contract, the Commercial Court of Zurich has not hesitated also to affirm a recourse right of the insurer in these circumstances.[14]

Although many details remain open, it appears fair to say that this recent court practice provides for a subrogation and recourse right of the paying insurer in almost all constellations. The change of practice of the Federal Supreme Court and the apparent willingness of the

11 Cf. art. 6 CPC.

12 Cf. DFT 80 II 247; 4C.92/2007.

13 DFT 144 III 209 of 7 May 2018.

14 Comm. Court Zurich Decision No. HG160139 of 2 October 2018.

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lower courts to follow its lead have paved the way to a change of the subrogation landscape in Switzerland, transforming it from being a rather restrictive environment to being a subrogation-friendly one.

ii Late notification

The ICA provides for a notification obligation of the insured once the insured event has materialised. In the statutory concept, a late notification entitles the insurer to reduce its indemnity to the extent that the loss has been prejudiced by the late notification.[15] No sanctions attach to the late notification if the insured has no fault with regard to the delay.[16]

The parties to the insurance contract are free to modify the conditions of the notification and the consequences of a late notification,[17] and often the insurance contract includes provisions about the time and details of the notification, and on the consequences of a late notification. In particular, it is possible to agree that the timely notification is a condition precedent to the payment obligation of the insurer.

In a judgment of 26 May 2020[18] the Federal Supreme Court had the opportunity to clarify the workings of the notification provisions in a claims-made policy covering the liability of a group of companies, including the liability of directors and officers.

The policy for the period 2008–2009 (the 2008 Policy) defined that a claim was made, inter alia, when the assured 'becomes aware of any fact, circumstance or event which could reasonably be anticipated to give rise to such a demand at any future time'. The notification provision held that '[w]ritten notice of any such third party claims made shall be given by the Assured at the earliest practical moment, but in any event within 60 days of the expiration of the Policy Period'. The policy, as well as the widely identical policy for the following year (the 2009 Policy), had a prior knowledge exclusion.

During the 2008 Policy period, the insured in the case at issue was considering a transaction in the United States that included the assignment of an asset manager mandate. The insured was put on notice by the later US claimants that the transaction would infringe their rights, and that they would pursue claims against the insured if the transaction was executed. The insured nevertheless continued with the transaction. After the renewal, a claim was lodged during the 2009 Policy period against the insured in the United States, which ultimately led to payments of the insured in the amount of about US$10 million, and for which it requested coverage. While the insured had notified the court claim in the 2009 Policy period, it had not made a notification of circumstances for the prior notice received from the later claimants during the 2008 Policy period.

After confirming that the notice to the insured was to be considered a claim under the 2008 policy, the Federal Supreme Court turned to the core issue of late notification under the 2008 Policy. The insurer's position (which had been upheld by the lower instances) was that, although not expressly stipulated in the wording, a claims-made policy naturally requires that a claim is allocated clearly to a specific policy period. The necessary certainty in claims-made policies was provided first through the option to notify circumstances,

15 Art. 38 ICA.

16 Art. 38 sec. 2 ICA and art. 45 ICA.

17 A limit is the statutory provision that the insurance contract can only provide for loss of coverage in the case of fault of the insured when breaching a contractual obligation.

18 DFT 4A_490/2019.

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and second through the exclusion of known circumstances from subsequent policies. The specificity of the notification period under the 2008 Policy was therefore to be construed as an implied condition precedent.

The Federal Supreme Court rejected this view. While it recognised that the combination of a notification of circumstances and the prior knowledge exclusion under the subsequent policy served to clearly allocate a claim to a policy period, and also accepted that the insurer was interested in the certainty that no claim was made under the policy once the notification period had lapsed, the Federal Supreme Court held that such a deviation from the (non-mandatory) statutory notification regime was to be stipulated clearly by the insurer. The Court therefore rejected the concept on an implied term that the timely notification was a condition precedent to coverage for a claim, and referred the case back to the lower instances. As an additional point, the Federal Supreme Court also held that the burden of proof regarding the extent to which the late notification has had a negative impact on the loss lies with the insurer, thereby providing an additional barrier to the insurer's right to potentially reduce the indemnification.

In summary, the judgment clarifies that the insurer can actually draft a notification provision as condition precedent under Swiss law. To rely on this, however, the insurer should choose a wording that expressly declares the timely notification obligation as a condition precedent to coverage under the policy.

IV THE INTERNATIONAL ARENA

Swiss international private law is generally open for a choice of law and of jurisdiction by the parties, and the courts have adopted a favourable approach towards the agreements of the parties in these matters.

i Choice of law

The general principles for determining the law applicable to an insurance contract are found in the Federal Act on Private International Law (PILA). For non-consumer contracts, the parties are free to choose the applicable law in the insurance contract. It should be noted that, although the determination needs to be clear and unequivocal, there is no requirement to make an express choice. Rather, the choice of law can also be implied.[19] In the absence of a definite choice, the applicable law is determined by selecting the law of the country with the closest connection to the contract. This closest connection is represented by the characteristic services (i.e., in the case of insurance contracts, the services of the insurer). The Federal Supreme Court thus applies the law of the seat of the insurer to the insurance contract.[20]

The above principles may not apply to insurance contracts with consumers (i.e., contracts intended for the personal use of the consumer and not taken out in a professional capacity). In a nutshell, such contracts are governed by the law at the residence of the consumer if the contract has been marketed or sold at that place. A choice of law is excluded for consumer contracts.[21]

19 Art. 116 PILA.

20 DFT 4A_58/2010 cons. 2.2; art. 117 PILA.

21 Art. 120 PILA.

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ii Place of jurisdiction

The place of jurisdiction is determined at the national level by the CPC, and at the international level by the PILA or, in a European context, the Lugano Convention.[22]

The PILA has only one specific provision pertaining to insurance contracts in the case of a direct claim against the insurer.[23] In general, the PILA allows for a choice of jurisdiction unless a contract is to be qualified as a consumer contract.[24] The parties to an insurance contract may therefore submit to a Swiss jurisdiction even though no party is resident in Switzerland. A sufficient connection allowing a Swiss court to accept the jurisdiction may in that case be created by the choice of Swiss law as the law applicable to the insurance contract.[25]

A somewhat different approach applies under the Lugano Convention, which provides for specific places of jurisdiction for disputes under insurance contracts and restricts in particular the venues available to the insurer.[26] The Lugano Convention, however, allows for a choice of the jurisdiction under certain circumstances, the most important carve-out being in cases of the insurance of large risks[27] (i.e., if the insurer fulfils two of the following three criteria: minimum total assets of €6.2 million, minimum net turnover of €12.8 million and 250 employees on average during the business year).

V TRENDS AND OUTLOOK

As in past years, there remains strong claims activity under professional indemnity and directors and officers liability policies, but also, for example, under banker's blanket bonds. In spite of being a main growth line of business, claims under cyber insurance policies remain scarce so far, but these may increase in the future.

Recently, coverage litigation has started to rise under epidemic and pandemic insurance policies, as insureds try to find coverage for business interruption as a consequence of lockdown measures following the spread of the covid-19 virus.

Apart from market developments, a major impact on insurance disputes is to be expected through the adoption of the amendments to the ICA. Relevant amendments include:

a limitation of conditions precedent[28] – the breach of an obligation by the insured will have no consequence if the insured can establish that no negative impact has risen from the breach;

b extension of the prescription period for insurance claims from two to five years;[29]

c limitation of the insurer's right to rely on exclusions in relation to a damaged third party in cases of mandatory third-party liability insurance;[30]

22 Lugano Convention 2007, SR 0.275.12.

23 Art. 131 PILA.

24 Art. 5 PILA, art. 114 PILA.

25 Art. 5 PILA; DFT 119 II 167.

26 Art. 8 et seqq. Lugano Convention.

27 Art. 14 No. 5 Lugano Convention.

28 Art. 45 rev ICA.

29 Art. 46 rev ICA.

30 Art. 49 rev ICA.

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d direct claims of the damaged party against the third-party liability insurer[31] – such a direct claims right exists only in a very few insurance lines at present, the most important being motor insurance; and

e full subrogation right of the insurer to the claims of the insured.[32]

The amended ICA consists to a large extent of mandatory provisions that may not be changed to the detriment of the insured. Nevertheless, the ICA recognises that not all insureds need the same level of protection. The provisions of the amended ICA are therefore not mandatory for some types of large risks defined in the ICA. This concerns not only credit insurance, but also, and more importantly, the 'professional insured'. This notion includes, inter alia, regulated financial intermediaries, pension funds, entities with a professional risk management function and also entities that fulfil two of the following three criteria: total assets of 20 million francs, net turnover of 40 million francs and net assets or equity of 2 million francs.[33] As a consequence, insurers may now gain the option to structure their policies in a much more flexible way than before but will need to do so carefully. The extent to which the insurers will apply the new possibilities remains to be seen.

The entry into force of the amended ICA has not yet been determined by the Federal Council. A realistic option, however, seems to be an entry into force as soon as 2021.

31 Art. 60 rev ICA.

32 Art. 95 rev ICA.

33 Art. 98a rev ICA.

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Appendix 1

ABOUT THE AUTHORS

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Prager Dreifuss Ltd

Christian Casanova is a partner in the dispute resolution, and insurance and reinsurance teams at Prager Dreifuss. He has particular experience in the area of complex insurance and reinsurance cases, as well as in liability and real estate matters. Christian acts for clients in a broad range of civil and commercial disputes before courts and arbitration tribunals, as well as in the protection and recovery of assets in insolvency and attachment proceedings.

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