Validity of conditions precedent confirmed by Supreme Court

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The Swiss Federal Act on the Insurance Contract entered into force more than 100 years ago. Since then, there have been only very few changes in its wording. Article 38 deals with the assured's duty to notify the insurer of the occurrence of an insured event, and has remained unchanged since the entering into force of the Act.

Pursuant to article 38, the assured is obliged to notify the insurer as soon as possible on the occurrence of an insured event. If the assured violates the duty to notify by fault, the insurer is entitled to reduce the indemnification by the the amount it would have been reduced in case of a notice in time. However, article 38 does not belong to the mandatory provisions of the law and can therefore be contractually modified by the parties to the insurance contract. Indeed, Swiss and foreign insurers doing business in Switzerland have always made use of this possibility in various respects. In the last two decades provisions in Swiss policy wordings pursuant to which the notification duty of the assured shall work as a condition precedent to coverage have become more and more common. In wordings drafted in the English language the term "condition precedent" is often explicitly used. Since this technical term does not exist in German, French, Italian and Rumantsch (Switzerland's four official languages), the wordings in these languages usually circumscribe the mode of operation of a condition precedent by stating that there shall be no coverage if no written notice of loss or claim will be made within the period of time specified in the policy.

It has been undisputed in Swiss legal literature that it can be validly agreed in an insurance contract that the violation of a contractual condition by the assured can lead to a release of the insurer of its payment obligations under the policy even if, contrary to what is stated in article 38, there was no causal connection between the violation of the condition and the loss. It has, however, been strongly disputed among academics what the situation is if the policy remains silent on the question of causality. Pursuant to one part of the doctrine, silence on this point had to be interpreted as an implicit waiver of the necessity of a causal connection whereas the other part called for an explicit contractual agreement to this end.

This question has now been decided by the Federal Supreme Court, in a judgment dated September 29, 2010. The Court had to deal with a forfeiture clause in a vehicle insurance for legal costs. The assured had suffered two road accidents and requested coverage for his legal costs. With reference to the policy's general terms and conditions which entitled the insurer to refuse indemnification in case the assured did not comply with his obligations under the policy, the insurer denied coverage because the assured had given late notice of the two accidents and had further not fulfilled his duties of information, disclosure and cooperation. The insurer concluded that the assured had forfeited all his rights under the policy. The assured on his part alleged that the insurer did not have the right to deny coverage because the non-fulfillment of the contractual obligations by the assured had no influence on the occurrence of the insured events and of the losses caused thereby.

THE INSURER IS ENTITLED TO REFUSE INDEMNIFICATION EVEN IF THE NON-COMPLIANCE WITH THE OBLIGATION HAD NO NEGATIVE IMPACT ON THE LOSS

The policy did not contain any explicit provision on the question whether or not a causal connection between the violation of the assured's obligations and the loss was needed for the insurer to be entitled to deny coverage.

The Federal Supreme Court confirmed the validity of the insurer's denial of coverage, and its statements on this issue could not have been clearer. The Court explicitly stated that a contractual agreement is valid according to which the insurer is entitled to refuse indemnification in case of a culpable violation by the assured of his obligations under the

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insurance contract even if the non-compliance with the obligation had no negative impact on the loss. It also stated that "the same applies in case the policy remains silent on this issue".

Thus, conditions precedent can be validly agreed upon as a matter of Swiss law. The insurer has only to make sure that the condition is drafted clearly enough. It must be clear for a reasonable policyholder that the condition is meant to work as a condition precedent even if the technical term "condition precedent" is not used in the policy wording. If this is the case, the insurer can deny coverage subject only to the further legal condition of article 45 of the Act, namely that the violation of the condition must not have taken place without the assured's fault. However, the Federal Supreme Court made it also clear in its decision of September 29, 2010 that lack of causal connection between the violation of a contractual obligation and the loss does not render the violation blameless within the meaning of article 45.