Measures Taken in Relation to the COVID-19 Pandemic Ruled as One Event for Insurance Purposes

by Lucile Bonaz (as Guest Contributor)

Through the application of an interpretation based on the principle of trust, the Swiss Federal Supreme Court clarified that all measures adopted during the COVID-19 pandemic formed a single insured event under an "All Risks Business Insurance" policy.

Judgment of the Federal Supreme Court of 10 September 2024
Case Reference : 4A_7/2024

Facts

A. (the "Insured Company") is a company specialized in the production and trade of foods and beverages, the management of restaurants, and the sale of products in catering. The Insured Company concluded an "All Risks Business Insurance" (the "Insurance Contract") with B. (the "Insurance Company") which took effect on July 1, 2017.

The Insurance Contract included a so-called hygiene insurance, that covered loss of earnings resulting from (unofficial translations from German into English): "business closure, partial closure, quarantine or restriction of business activities"[1] due to official measures to prevent "risks to human health".[2] The maximum sum insured by the said hygiene insurance was CHF 1,000,000.

On February 28, 2020, due to the global COVID-19 pandemic, the Federal Council issued an ordinance that widely restricted public and private events until March 15, 2020, and banned large-scale events involving more than 1,000 people. On March 2, 2020, the Insured Company notified the Insurance Company of an important loss of earnings following the cancellation of most of the events it had organized because of the COVID-19 pandemic.

On March 16, 2020, in a continued effort to combat the COVID-19 pandemic, the Federal Council closed all stores, restaurants, bars, entertainment and leisure facilities. These strict measures started to ease around May of the same year. The ban on events of more than 1,000 people was only lifted on October 1, 2020. However, an increase in infections and hospitalizations led to the introduction of another ban on October 29, 2020, which targeted events of more than 50 people.

On October 30, 2020, the Insured Company notified the Insurance Company of another loss of earnings in relation to the latest ban. The Insurance Company, however, did not consider the new measure a separate loss event and that the insured sum of CHF 1,000,000 applied to all losses related to the COVID-19 pandemic.

On September 14, 2021, the Insured Company filed a lawsuit before the Commercial Court of the Canton of St. Gallen (the "Cantonal court"). The Insurance Company had already agreed to pay a total of CHF 1,000,000 in relation to all loss of earnings related to the COVID-19 pandemic, but the Insured Company asked for an extra sum of CHF 684,930 plus interest. It justified this claim by the fact that, according to them, the second ban on events ordered on October 29, 2020, constituted a new and separate loss event that should be eligible for coverage up to CHF 1,000,000.

On November 8, 2023, the Cantonal court dismissed the claim of the Insured Company who then appealed to the Federal Supreme Court.

Issue

The question that the Federal Supreme Court had to address was whether the ban on events ordered on October 29, 2020 should be considered a new and separate insured loss event, or whether all the measures taken by the Federal Council in relation to the COVID-19 pandemic constituted one single insured loss event.

Decision

Under Swiss law, general terms and conditions must be interpreted like any other contractual clause. Thus, first, the judge must ascertain the true and common intent of the parties (art. 18 para. 1 of the Swiss Code of Obligations [SCO]). This is a matter of fact, that the Federal Supreme Court cannot review as a matter of principle (art. 105 of the Federal Supreme Court Act (FSCA). If such true and common intent of the parties cannot be determined, the judge has to resort to the principle of trust to interpret the contract, meaning that the declarations of the parties are to be interpreted in the way that they could and had to be understood based on their wording and on the context as well as the overall circumstances.

In the case at hand, the Cantonal court ruled that no true and common intention of the parties could be found, so the Insurance Contract had to be interpreted according to the principle of trust.

According to the Federal Supreme Court, the Federal Council adapted the above-mentioned measures and restrictions throughout the pandemic to align with the developments and knowledge on the situation and, by doing so, has complied with the principle of proportionality. As such, the measures ordered by the Federal Council constituted a single uniform package, although the severity of the restrictions varied. The Federal Supreme Court further noted that it would be contrary to the principle of proportionality if an insurance company had to pay out multiple times in the event of proportionate behavior from the authorities but only had to pay out once in the event of disproportionate behavior.

The Federal Supreme Court also considered that the Insured Company failed to demonstrate the arbitrary nature of the Cantonal court's finding according to which the Insured Company's operations were constantly restricted (although in different ways) from the ban on events of February 28, 2020, up to and including the reinforcement of the measures of October 29, 2020. The Federal Supreme Court therefore ruled that the Insured Company had failed to demonstrate a breach of art. 18 SCO, thereby leaving no room for the application of art. 33 of the Swiss Federal Act on Insurance Contracts (SICA), also known as the ambiguity rule.

In short, the Federal Supreme Court considered that the second ban on public events ordered on October 29, 2020, could not be interpreted as a new and separate insured loss event and hence dismissed the Insured Company's appeal.

Key takeaway

Under Swiss law, the interpretation of insurance contracts, including their general terms and conditions, follows a three-step approach:

1. The first step is to ascertain the true and common intention of the parties, in accordance with 18 SCO.
2. When it is impossible to determine a true and common intention, an objective interpretation based on the principle of trust must be applied. This approach seeks to determine how a reasonable and good-faith party would have understood the clause, considering all relevant circumstances.
3. Finally, if ambiguity persists despite these two steps, 33 SICA may be invoked. This rule applies only as a last resort, when a clause can reasonably be understood in multiple ways and the doubt cannot be resolved through other interpretative means.

Comments

This decision highlights a recurring issue in insurance law: interpreting the scope of the insured risk. The Swiss Federal Act on Insurance Contracts (SICA) is a general law applicable to all types of private insurance contracts, but it does not define the concept of "risk". Under Swiss law, contractual freedom prevails, meaning the insured risk is defined solely by the terms of the contract, – specifically the policy or general terms and conditions, – which must be interpreted in the event of a dispute.

In this regard, art. 33 SICA, entitled "Scope of Risk," is often misunderstood by practitioners. This provision states that (unofficial translation from French into English): "the insurer is liable for all events that constitute the risk against which the insurance was concluded, unless the contract excludes certain events in a precise and unambiguous manner". It reflects the principle of *in dubio contra stipulatorem*, which dictates that any ambiguity in a contractual clause must be interpreted against the drafter. However, the wording of art. 33 SICA can be misleading, as its scope is highly limited: it applies only when ambiguity persists after all standard methods of interpretation, – particularly those based on the principle of trust, – have been fully applied. This rule does not automatically require interpreting ambiguity against the

insurer (see e.g. ATF 122 III 118, para. 2.d; 4A_92/2020, para. 3.2.2; 5C.208/2006, para. 3).

In practice, a party advocating for a specific interpretation must first demonstrate that it reflects the true and common intent of the parties (step 1). Failing that, they must show that their interpretation aligns with the principle of trust (step 2). Only as a last resort, if ambiguity persists, can the insured party invoke art. 33 SICA to have the clause interpreted against the insurer who drafted it (step 3).

The 4A_7/2024 decision illustrates the typical process for interpreting a contractual clause defining insured risk. In this case, the disputed clause was analyzed in accordance with art. 18 SCO, rendering unnecessary a recourse to art. 33 SICA. The courts first found no common intent between the parties, a common issue with standardized clauses in general insurance terms. Consequently, to determine whether the COVID-19 measures constituted one or several distinct events, they applied the principle of trust. This method of interpretation grants courts significant discretion which leads to a degree of legal uncertainty.

In exercising their discretion, courts often consider the economic efficiency of insurance in a general sense, and this decision is no exception. In this case, the Federal Supreme Court adopted an approach aligned with the principle of proportionality, finding that the measures enacted by the Federal Council to combat the COVID-19 pandemic formed a uniform set, despite variations in its intensity over time. It rejected the notion that each change applied to the restrictions could be interpreted as a new insured event. This reasoning favors an interpretation that limits the financial risks for the insurer by avoiding multiple payouts for events stemming from the same cause. It reflects a concern for the economic viability of the insurance system and highlights the inherent tension between the insurer's interest in cost control and the insured's expectation of effective protection for their activities during complex crises such as a pandemic.

These issues are not unique to Swiss insurance law and have also been at the center of international disputes. The collapse of the Twin Towers of the World Trade Center during the tragic events of September 11, 2001, led to several court decisions involving the insured, – the owner of the towers – and numerous insurance companies providing coverage for the properties. The central question in these cases was whether the events of September 11 constituted one or two "insured events".[3] U.S. courts issued divergent rulings depending on the insurance policies involved. Some policies (WilProp Form) defined an occurrence as any loss or damage arising directly or indirectly from one cause or a series of similar causes. Based on good faith interpretation, courts have concluded that the attacks constituted a single event, given that the definition encompasses a series of similar causes. In contrast, other policies (Travelers Form) did not provide a precise definition of the insured risk. In these cases, the lack of clarity and resulting ambiguity led courts to interpret the two impacts as separate events ultimately holding insurers liable for two distinct occurrences.[4] This comparison highlights the complexity of interpreting the concept of an "insured event", a question often critical for determining coverage and one that depends heavily on the specifics of each case.

The 4A_7/2024 decision aligns with other insurance law rulings related to the COVID-19 pandemic. In several recent cases, the Federal Supreme Court has held that losses resulting from public health measures were not covered unless explicitly tied to a risk specified in the contract. For instance, in two recent decisions (4A_203/2024 and 4A_498/2023), the Court ruled that losses due to COVID-19 closures were not covered under general insurance terms, as the measures were unrelated to risks "arising from food or consumer goods". Similarly, in a highly debated published decision (ATF 148 III 57)[5], later confirmed in a comparable case (4A_467/2023), the Federal Supreme Court found that insurance covering loss of income due to an epidemic – but excluding coverage for WHO pandemic levels 5 and 6 – did not extend to losses caused by the COVID-19 pandemic.

In conclusion, this decision, like similar precedents, highlights the discretion afforded to courts and the resulting uncertainty when interpreting insurance contracts. This uncertainty can be particularly challenging when it concerns fundamental notions such as the definition of the insured risk. For practitioners, it serves as a reminder that the ambiguity rule under art. 33 SICA remains a last-resort solution that is rarely applied in practice.

[1] The relevant contract excerpt reads as follow in the original German version: "*Betriebsschliessung, Teilschliessung, Quarantäne oder Einschränkung der betrieblichen Tätigkeit.*"

[2] The relevant contract excerpt reads as follow in the original German version: "*Gefährdung der menschlichen Gesundheit.*"

[3] World Trade Center Properties, L.L.C. v. Hartford Fire Insurance Co., 345 F.3d 154 (2d Cir. 2003). See also Rémi Moreau, La plus grande catastrophe dans l'histoire de l'assurance, Assurances, 69(4), 2002.

[4] See the press summary by Didier Burg, L'Argus de l'Assurance, October 27, 2006.

[5] For doctrinal critiques of the decision, see, for example, Andrea Eisner-Kiefer, in Pratique Juridique Actuelle (PJA) 2022 p. 643; Stephan Fuhrer, WHO-Pandemiestufen, in Responsabilité et Assurances (REAS) 2022 p. 169.