Direct action against the liability insurer denied for pre-2022 insurance contracts

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Following its interpretation of the transitional provision set out in art. 103a of the Swiss Federal act on Insurance Contracts (SICA), the Federal Supreme Court held that the direct right of action introduced by art. 60 para. 1bis SICA does not apply retroactively to insurance contracts concluded prior to the amendment's entry into force on January 1, 2022.

Judgment of the Federal Supreme Court of 27 January 2025
Case Reference : ATF 151 III 35 (4A_189/2024)

Facts

On February 6, 2014, A. (the "Patient") was examined by Professor C. (the "Doctor") due to pain in her hand. The Doctor was covered by liability insurance with Insurance Company B. (the "Insurance Company"). On February 26, 2014, following the diagnosis, the Doctor performed surgery on the Patient's hand.

The Patient left the clinic on February 28, 2014. The discharge report noted that the post-operative period "was marked by extremely severe pain on the first day". Further examinations, expert reports and surgical interventions followed over the subsequent years.

By a request dated April 27, 2023, the Patient filed a claim to the Commercial Court of the Canton of Berne, for careless medical treatment by the Doctor. Said claim was directed against the Doctor's Insurance Company, on the basis of art. 60 para. 1bis of the SICA. Substantively, the Patient sought an order requiring the Insurance Company to pay CHF 35,000 as compensation for non-material damage resulting from the surgery performed on February 26, 2014, together with interest at 5% from that date. The claim was filed as a partial action, with a reservation of future damages.[1]

By a decision dated March 6, 2024, the Commercial Court denied the claim, considering that the Insurance Company had no passive legitimation. The Patient challenged this ruling before the Federal Supreme Court.

Issue

In the case at hand, the liability contract between the Doctor and the Insurance Company had been concluded before art. 60 para. 1bis SICA, the provision granting an injured third party a direct right of action against the insurer, had entered into force.

According to art. 103a SICA, only two categories of provisions of the SICA apply to contracts concluded before its June 19, 2020 amendment:

1. Formal provisions;
2. The right of termination of the contract under 35a and 35b SICA.

The central question before the Federal Supreme Court was whether this transitional provision allowed art. 60 para. 1bis SICA to apply to such pre-existing contracts.

Decision

The Federal Supreme Court began by reviewing the divergent doctrinal positions on this matter.

According to one part of the doctrine, art. 103a SICA only refers to "contracts"[2] and thus exclusively to the contractual relationship between the policyholder and the insurer. Since, the direct right of action under art. 60 para. 1bis SICA is statutory rather than contractual, it should fall outside the scope of art. 103a SICA and therefore apply even to contracts concluded before its entry into force.

Another doctrinal view considers that art. 103a SICA explicitly declares only the formal requirements and the right of termination under articles 35a and 35b to be applicable, implying *a contrario* that all other provisions of the revised SICA (including art. 60 para. 1bis SICA) should not be considered applicable to contracts concluded before their entry into force.

To resolve this doctrinal conflict, the Federal Supreme Court interpreted art. 103a SICA using its 4 methods of interpretation:

1. Literal interpretation, based on the wording of the provision and its direct meaning;
2. Systematic interpretation, considering the law as a coherent system and deducing the role that the interpreted provision plays into it;
3. Teleological interpretation, based on the finality that the provision was meant to achieve;
4. Historical interpretation, based on the preparatory legislative documents, to deduce the intention of the legislator at the time the provision was written.

Starting with literal interpretation, the Federal Supreme Court considered that the word "contract" could be understood as limiting the scope of art. 103a SICA to the contractual relationship between the policyholder and the Insurance Company. However, the contract could also be understood more broadly as a temporal reference point for the applicability of all provisions of the SICA, since they all presuppose the existence of an insurance contract. Additionally, the title of the provision, "Transitional provision to the amendment of June 19, 2020"[3], was not found to limit the scope of art. 103a SICA to strictly contractual matters but rather to plead for a wider scope of application.

From a systematic standpoint, the Federal Supreme Court reminded that the SICA regulates not only the contractual relationship between policyholders and insurance companies but also all legal relationships involving third parties. All of these third-party legal relationships require an insurance contract to exist and could hence be regarded as "insurance-contractual". Therefore, the word "contract" in art. 103a SICA should be interpreted in a broad sense. The limited number of provisions designated by art. 103a SICA as retroactively applicable to contracts concluded under the old law should also be a sign that the legislators intended retroactivity to remain exceptional.

Regarding teleological interpretation, the Patient argued that the new provisions of the SICA regarding liability insurance (in particular art. 60 para. 1bis SICA) were intended to strengthen the position of the injured third party and should therefore apply immediately, even to earlier contracts. The Federal Supreme Court rejected this argument. It considered that the main reason for the partial amendment of the SICA was to strengthen the position of the policyholder, and that it would be inconsistent if contractual provisions designed to achieve this objective were not retroactively applicable under art. 103a SICA while art. 60 para. 1bis SICA was. Additionally, the Federal Supreme Court noted that the risk of a direct right of action from the injured third party had an influence on premium calculations, demonstrating that art. 60 para. 1bis SICA cannot be considered entirely independent from contract law provisions.

Finally, historical interpretation revealed that preparatory documents regarding the amendment of the SICA, particularly the Federal Council's message, mentioned the transitional provision of art. 103a SICA as only applying to formal requirements to the exclusion of "all other provisions". The Federal Supreme Court added that, even in an early, ultimately abandoned amendment project from 2011 where the direct right of action was included in the transitional provision, it was not distinguished from "direct contractual law".

In light of these considerations, the Federal Supreme Court ruled that only the provisions exhaustively listed in art. 103a SICA apply retroactively to insurance contracts concluded before the 2020 SICA amendment entered into force. Consequently, art. 60 para. 1bis SICA was inapplicable in the case at hand, and the Patient's appeal to the Federal Supreme Court was dismissed.

Key Takeaways

This decision provides a welcome clarification regarding the transitional regime applicable to art. 60 para. 1bis SICA, which had previously been a source of uncertainty. The Federal Supreme Court confirms that this provision **does not apply** to liability insurance contracts concluded before January 1, 2022.

Comments

1. **A key provision of the SICA reform: the generalized direct right of action**

Art. 60 para. 1bis SICA, which entered into force on January 1, 2022, establishes a generalized direct right of action in the field of liability insurance. Under the new legal regime, any injured party – or their heirs in the event of death – may bring a direct claim against the insurer of the party liable for the damage, in the context of a liability action[4].

This mechanism strengthens victim protection by allowing claims to be brought directly against the insurer – either alone or alongside the liable party – thereby offering greater financial security, especially in cases where the liable party is insolvent.

2. **A doctrinal controversy over the transitional law**

The temporal applicability of art. 60 para. 1bis SICA has divided legal scholars, due to the ambiguous wording of art. 103a SICA.

Article 103a SICA reads as follows:

"The following provisions of the new law shall apply to contracts concluded before the entry into force of the amendment of June 19, 2020:

(a) the formal requirements;

(b) the right of termination under Articles 35a and 35b."

Based on this article, two interpretative approaches are possible:

- According to the first view, art. 103a SICA refers only to contractual provisions governing the relationship between the insurer and the policyholder. Since the direct right of action is a statutory (rather than contractual) right, this interpretation supports the immediate applicability of art. 60 para. 1bis SICA to any event occurring after January 1, 2022, regardless of when the insurance contract was concluded.
- Conversely, a second interpretation, grounded in a literal reading of art.103a SICA, considers that only the provisions expressly mentioned in that article – i.e., those relating to form and the right of termination – apply retroactively. As a result, art. 60 para. 1bis SICA would be excluded from the scope of retroactive application.

3. **The scope of the Federal Supreme Court's decision**

With this decision, the Federal Supreme Court resolves the debate:

- It holds that art. 103a SICA constitutes a *lex specialis* that takes precedence over the general transitional rules contained in the Final Title of the Swiss Civil Code.
- As a result, only the provisions expressly listed in art. 103a SICA have retroactive effect. Since the direct right of action is not among them, it does not apply to insurance contracts concluded before January 1, 2022.
- Furthermore, the Court adopts a broad interpretation of the term "contracts": the transitional regime applies not only to the internal relationship between the insurer and the policyholder, but also to relationships involving third parties, provided they are based on the existence of an insurance contract.

Accordingly, for a victim to benefit from the direct right of action, the liability insurance contract between the person responsible and its insurer must have been concluded after January 1, 2022.

This decision illustrates a characteristic feature of Swiss insurance law: it prioritizes legal certainty and predictability for insurers, including due consideration of the economic realities specific to the sector, such as long-term portfolio management and premium setting. It also highlights the autonomy of insurance law, which in certain respects departs from the general principles of the legal system, including those typically governing transitional provisions.

From the perspective of injured parties, however, this position raises significant concerns:

- It creates legal uncertainty for victims, who generally have neither knowledge of nor control over the date on which the liable party's liability insurance contract was concluded.
- It risks unnecessarily complicating liability proceedings, which are already complex, by introducing questions of insurance law interpretation that are largely disconnected from the substantive assessment of liability.
- It may also give rise to practical difficulties. Indeed, liability insurance contracts are usually concluded for extended periods and are frequently amended, particularly with respect to premium adjustments. However, the judgment does not address the legal consequences of such amendments. It remains unclear, for now, whether a

policy amendment or the tacit renewal of a contract may be considered equivalent to the conclusion of a new contract within the meaning of art. 103a SICA.

In our view, when a premium adjustment occurs, insurers must take into account the potential applicability of the revised SICA, including the direct right of action. Accordingly, such circumstances should, in our opinion, allow victims to invoke art. 60 para. 1bis SICA. These issues, however, remain unresolved to date, and it is likely that the Federal Supreme Court will eventually be called upon to clarify them.

By comparison, other legal systems – such as French or German law – adopt a more victim-friendly approach:

- In France, the direct right of action in matters of civil liability has traditionally been recognized even for ongoing contracts, on the basis of the direct effect of art. L.124-3 and L.124-5 of the Insurance Code.
- In Germany, § 115 of the German Insurance Contract Act also allows injured parties to bring a direct claim against the liability insurer, irrespective of the date on which the insurance contract was concluded.

These comparisons reveal a distinct Swiss approach, characterized by a restrictive interpretation of transitional provisions and a strong emphasis on preserving the technical balance of the insurance market.

Practitioners will therefore need to exercise heightened vigilance regarding the date on which the insurance contract was concluded, which has now become a decisive factor in determining the admissibility of a direct action.

Finally, practitioners should bear in mind that the implications of this decision may extend beyond art. 60 para. 1bis SICA. One particularly significant implication for practice concerns the new prescription regime introduced by art. 46 SICA as part of the January 1, 2022 reform, which extends the limitation period for claims arising from insurance contracts from two to five years. If the reasoning adopted by the Federal Supreme Court were to apply to all provisions of the revised SICA – as the decision appears to suggest – only insurance contracts concluded after January 1, 2022 would benefit from the extended limitation period. Such an interpretation would have far-reaching practical consequences, especially for claims that had not yet become time-barred when the reform entered into force. This means that claims arising from insurance contracts concluded before January 1, 2022 would remain subject to the former two-year limitation period – even those that were not yet time-barred when the reform entered into force – thus departing from the principle laid down in art. 49 para. 1 of the Final Title of the Swiss Civil Code.

Other sources presenting the case

Benedikt Saupe, Keine Rückwirkung des direkten Forderungsrechts nach VVG bei Versicherungsverträgen vor 2022, in REAS 2025 p. 48-52

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[1] Art. 86 of the Swiss Civil Procedure Code.

[2] The relevant part of this provision reads as follows in the official French version : "*Les dispositions suivantes du nouveau droit s'appliquent aux contrats qui ont été conclus avant l'entrée en vigueur de la modification du 19 juin 2020*".

[3] The title reads as follows in the official French version: "Disposition transitoire relative à la modification du 19 juin 2020".

[4] Previously, the direct right of action was limited to cases explicitly provided for by special statutes, the most well-known being the right to bring a direct claim against the motor vehicle's liability insurer (art. 65 of the Swiss Federal Act on Road Traffic). Direct actions are also provided for under the Hunting Act (art. 16 para. 2 HA), the Nuclear Liability Act (art. 17 para. 1 NLA), the Pipeline Transportation Facilities Act (art. 37 para. 1 PTFA), the Inland Navigation Act (art. 33 INA), the Ordinance on Clinical Trials (art. 14 para. 2 ClinO) and the Ordinance on Human Research (art. 13 para. 4 HRO).

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