Insurance & Reinsurance - Austria

Court considers insurer's awareness of substantial risk

Contributed by **DORDA BRUGGER JORDIS**

October 02 2012

In a recent decision(1) the Supreme Court found that an insurer's awareness of a substantial risk - and its omission to enlighten the insured about this issue - might be taken into account not only in the context of damages claims, but also when interpreting the contractual provision in question.

Facts

The plaintiff, who ran a car dealership and workshop, concluded a car dealer partial coverage insurance contract and a company insurance policy with the defendant, an insurer. Both contracts were procured and brokered by an insurance agent attributed to the insurer. The car dealer partial coverage insurance contract stipulated that as a prerequisite for coverage, the car keys must be stored in a locked key safe. The specific clause stated: "Prerequisite for granting coverage is storage of the keys in locked key safe!"

Before the contract was concluded, the insurance agent inspected the premises. During the inspection, he asked the insured about the key storage facilities. He was shown the key box where the car keys were stored. However, he did not comment on the key box and did not notify the insured that the key box did not in fact comply with the prerequisites of the insurance contract. Some time later, burglars broke into the insured's premises, cracked the key box and stole the keys to seven cars.

Subsequently, the insurer denied coverage under the car dealer partial coverage insurance contract, arguing that the insured had not fulfilled the contractual condition to store the car keys in a locked key safe.

First instance decision

The court of first instance ruled that the insurance agent's failure to notify the insured about the insufficient key storage could not be seen as an implied deviation of the provision of the insurance policy. The minimum requirements for a locked key safe resulted from the customary descriptions of such a commercial product. A locked key safe must provide at least a minimum level of security, although the defendant could not demand a higher level of security than that provided by the lowest class of key safe. The court of first instance held that the key box used by the insured did not fulfil even this minimum level of security. Therefore, violation of the obligation could be attributed to the insured's fault. The insured appealed this decision.

Second instance decision

The court of second instance overruled the first instance decision and held that knowledge gained by the insurance agent during the conclusion of the contract was attributable to the insurer, as provided by Section 43 of the Insurance Act. The insurer further had a duty to consult and inform its contracting partner of any potential ambiguities. The provision concerning the key storage facility stated "storage in locked key safe" - namely, the same box known to the insured. When taking into account the insured's insight as a good-faith offeree, the insured could assume that the insurer knew about the key box used by the insured (by attributing the knowledge of its agent), when it formulated the particular contractual provision.

The court further stated that applying the ambiguity rule stipulated by Section 915 of the Civil Code, which provides that ambiguous clauses must be interpreted against the interests of the contracting partner using them (ie, the insurer), would lead to the same

Authors

Felix Hörlsberger

Marguerita Sedrati-Müller

result. Hence, the insured was safe in assuming that it had fulfilled the requirements (ie, provided a sufficient key box), as set out by the insurance contract.

The insurer appealed to the Supreme Court.

Supreme Court decision

The Supreme Court first drew attention to Supreme Court case law(2) regarding the insurer's obligation (and that of its agent) to instruct the insured. Based on this case law, the court found that an insurer's agent is not obligated to verify whether the insurance terms and conditions fully cover the insurance needs of the insured. The insured, on the other hand, must clearly point out those terms and conditions on which he or she needs further information or finds erroneous. The agent is also obligated to verify erroneous assertions of the insured with regards to the scope of cover.

The insured must be informed about risk exclusion, where it has been recognised that the insured aims to cover a certain risk that is excluded by the policy. Pre-contractual obligations are violated if an inaccurate legal interpretation by the insured is either confirmed or evoked by the behaviour of the insurance agent. The insurer must offer professional advice and clarification and the other contracting partner may reasonably expect such behaviour from the insurer.

As the insured claimed for cover that was outwith the insurance contract, the Supreme Court further dealt with the question of whether the contractual provision in question contained a risk exclusion clause or an obligation. Since the provision contained a requirement for granting coverage, the Supreme Court held that the relevant provision must be assessed as a risk exclusion clause. Therefore, the provision must be interpreted according to the principles of contractual interpretation, as set out by Sections 914 and 915 of the Civil Code. Consequently, the interpretation must be guided by the standard of an average informed policy holder, while taking into account the discernible purpose of the provision in question.

Based on this, the Supreme Court confirmed the decision of the court of second instance, once again stating that all knowledge of the insurance agent must be directly attributed to the insurer. Furthermore, the Supreme Court pointed out that by interpreting the term 'locked key safe', the average receiver's (ie, insured's) perspective in the relevant situation must be taken into account. As the insurance agent had inspected the key box himself and did not inform the insured that the box did not comply with the prerequisites of the insurance contract, his knowledge of the inefficiency of the box was directly attributable to the insurer; the insured was of the understanding that he had fulfilled his obligation under the insurance contract.

For further information on this topic please contact Felix Hörlsberger or Marguerita Sedrati-Müller at DORDA BRUGGER JORDIS by telephone (+43 1 533 4795), fax (+43 1 533 4797) or email (felix.hoerlsberger@dbj.at or marguerita.sedrati-mueller@dbj.at).

Endnotes

(1) Austrian Supreme Court, March 28 2012, 7 Ob 100/11 y.

(2) 7 Ob 190/11 h, 7 Ob 72/11 f and 7 Ob 34/11 t.