COVID-19: Effect on insurance contracts and coverage

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The extraordinary measures taken by governments and authorities in response to the COVID-19 outbreak may also have significant impacts on insurance contracts and coverage. Parties to insurance contracts need to proactively assess potential implications for their contractual rights and obligations.

1. Are existing policies available?

There is no general answer to whether insurance coverage is affected by the extraordinary situation caused by the COVID-19 outbreak, or whether a need for immediate action under an insurance contract is triggered. Implications and any respective action need to be analysed on a case-by-case basis. They will mainly depend on the specific circumstances and, most importantly, the individual insurance policy.

Therefore, it is important to check if existing policies (including annexes) are available. If original policies are not available, now is the time to obtain copies from brokers or insurers.

2. Does the policy provide for specific duties of the policyholder?

Insurance contracts regularly provide for duties or action items including notification obligations, for example in case of an increased risk (see below). If the policyholder fails to comply, a reduction or loss of coverage may result. Therefore, in view of the extraordinary and dynamic situation which most enterprises face today, policyholders should proactively review their policies and consider and assess any applicable notification or mitigation obligations.

The duties of policyholders may also follow from statutory law. Pursuant to Art. 61 of the Swiss Insurance Contract Act, policyholders are obliged to mitigate damages. Otherwise, coverage may be reduced to the extent the damages could have reasonably been avoided. Also, insurers are entitled to give instructions to policyholders on how to limit damages. This may require close cooperation between the policyholder and the insurer.

3. Are relevant management members aware of these duties?

To avoid the risk of reduced insurance coverage, policyholders should not only review their policies in order to understand mitigation (or other) duties or the need to obtain instructions from the insurer. It is also important that all the relevant persons within a company know about these possible duties or restrictions.

For example, if legal costs are included in a policy, the engagement of legal counsel may be subject to the consent of the insurer in case the policyholder defends itself against a third-party claim. Or, for example with respect to event-cancellation insurances, given the uncertainties on when current restrictions on public meetings end, organising new events at this point in time may not be covered and may need to be coordinated with the insurer. Similarly, business interruption insurance may require compliance with safety regulations and cooperation with the authorities.

As these examples show, duties under individual policies may be relevant for operations today and going forward as well as for a company’s contingency planning. Therefore, relevant management attention is important.

4. Does the policy contain relevant exclusions?

Insurance contracts typically contain a list of exclusions, which limit risks and, therefore, allow the insurer to reduce the insurance premiums. However, to exclude coverage, exclusions must be sufficiently clear. In case of ambiguous wording, in accordance with Art. 33 of the Swiss Insurance Contract Act, courts may interpret unclear exclusions to the advantage of the policyholder. Whether coverage is excluded for damages due to the COVID-19 outbreak and its consequences will thus depend on the exact wording of the exclusion.

5. Does the policy allow the parties to terminate the contract in the event of damage?

The parties should consider whether there is a possibility to terminate insurance contracts in advance. For example, some insurance contracts entitle the parties to terminate the contract in the event of damage. Hence, there may be coverage for the (first) damage incurred at the beginning of insurance coverage, but the parties may be entitled to terminate the contract thereafter by way of an extraordinary termination.

6. Does the policy include provisions on risk increase?

In many instances, insurance contracts include specific rules regarding increase of risks, for example by obliging the policyholder to notify certain increases of risk to the insurer.

Pursuant to Art. 30 of the Swiss Insurance Contract Act, if a significant increase of risk is caused for reasons beyond the policyholder's control, the insurer may terminate the contract with 14 days’ notice, provided the contract clearly provides for such an extraordinary termination right. The threshold for a ‘significant increase of risk’ is, however, high. In each case, the parties will thus have to assess whether there is a ‘significant increase of risk’ considering the specific circumstances. Therefore, whether the current extraordinary situation and restrictions lead to a ‘significant increase of risk’ depends again on the particular circumstances and cannot be answered in general.

Policyholders should check whether their insurance contracts provide for rules on increase of risk and a relating extraordinary termination right of the insurer. Importantly, in the individual policy, the parties cannot deviate from the rules set forth in Art. 30 of the Swiss Insurance Contract Act to the disadvantage of the policyholder, except for transportation insurances. For example, for risk increases beyond the control of the policyholder, the parties cannot provide for a notice period shorter than 14 days or reduce the requirements for a ‘significant increase of risk’ giving rise to a termination right of the insurer.

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