Subsidiary clauses in mandatory vehicle insurance contracts

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Introduction

On 4 July 2018 the Federal Court of Justice held that a subsidiary clause contained in the general conditions of a truck trailer's motor vehicle insurance policy, which excluded the insurer from paying internal liability claims for compensation to the liability insurer of the drawing vehicle after payment in the event of damage, was unlawful (IV ZR 121/17).

Motor vehicle liability insurance is mandatory for vehicles admitted to travel on public roads in Germany (the same applies to non-motorised trailers and semi-trailers) and covers damages caused by the policyholder to third parties or their vehicles.

However, in practice, problems can arise. For example, if an owner of a drawing vehicle used the truck trailer of another company, the drawing vehicle and the truck trailer would be insured with separate motor vehicle liability insurers. If the truck trailer combination was involved in an accident, both motor vehicle liability insurers would have to compensate the damages of third parties.

In this regard, Section 78(1) of the Insurance Contract Act stipulates that in case of multiple insurance, both insurers are liable to damaged third parties as joint debtors at the level of insurance agreed by each of them. The insurer that settles the claim then has a claim for compensation pursuant to Section 78(2) of the Insurance Contract Act as towards the second insurer on a *pro rata* basis (which usually means in equal shares).

Facts

The driver of a truck and trailer damaged a parking car with the trailer, which swung out when the driver made a turn. The drawing vehicle and the truck trailer were insured with different motor vehicle liability insurers at the time of the accident. The liability insurer of the drawing vehicle settled the claim in full with the third-party owner of the damaged vehicle and subsequently requested reimbursement for half of the damages from the motor insurer of the truck trailer.

However, the truck trailer motor insurer denied payment with reference to its general conditions of insurance. One such condition was that the insurer had no contractual obligation to pay in cases where a drawing vehicle connected to a truck trailer is insured with a different motor vehicle liability insurer and this other insurer settles a third-party claim. These conditions of insurance were agreed between the insured and the motor vehicle liability insurer of the truck trailer at the time of the contract's conclusion, without the liability insurer of the drawing vehicle's involvement.

Decision

According to the Federal Court of Justice, the motor vehicle liability insurer of the drawing vehicle had a claim for compensation against the insurer of the trailer pursuant to the statutory provisions regarding multiple insurance (Section 78(2) of the Insurance Contract Act).

A subsidiary clause in the general conditions of the motor vehicle liability insurance contracts for a trailer does not lead to full liability of the motor vehicle liability insurer of the drawing vehicle; the insurance of the trailer is mandatory and cannot be excluded where the trailer is still attached to the drawing vehicle as the German legislature has decided against such limitation of insurance cover. Therefore, the subsidiary clause used in this case did not negate the compensation claim available in

case of multiple insurance pursuant to Section 78(2) of the Insurance Contract Act.

An insurer cannot by way of an agreement with the insured exclude its liability to another insurer that did not participate in this agreement. According to the Federal Court of Justice, any such agreement is an unlawful contract at the expense of a third party.

Although the court stated that the settlement provided for by legislation between insurers in case of multiple insurance can generally be excluded, an agreement deviating from the law is valid only if agreed on by both insurers concerned.

Comment

This decision emphasises that subsidiary clauses in mandatory insurance contracts which limit liability are void unless such exemptions are legally permitted or agreed on by the insurers. Therefore, insurers – especially motor vehicle liability insurers – should engage other insurers in case of subsidiary clauses. However, this may be difficult in practice as policyholders might be unaware of every relevant partner in advance; thus, subsidiary clauses in motor vehicle liability insurances should be avoided.

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