Insurance - Greece

Supreme Court interprets 'claims made' clauses

Contributed by **KG Law Firm**

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Introduction

In international insurance practice, 'claims made' policies are those which pay only claims that are notified to the insurer during a specified period of time. The claims made policy clause operates as a standard exclusion of liability clause and is often used by insurers, especially in insurance contracts covering professional risks.

A claims made policy clause obliges the insured to either:

- claim the insurance compensation from the insurer within the term of the insurance policy; or
- (in a less stringent variation of the clause) notify the insurer about the actual occurrence of the insured event.

Thus, the occurrence of the risk must be both discovered and announced (to the insurer) within the duration of the insurance policy – otherwise the insurer is not liable to cover the risk and pay compensation to the insured.

It is vital to have absolute clarity regarding the way these and similar clauses operate by law: not only do they set the framework of rights and obligations for insureds and insurers alike and determine which risks are covered under the policies, they also greatly affect the duties of insurance companies to maintain adequate reserve funds.

Two recent judgments of the Supreme Court focused on the operation of claims made policy clauses in insurance contracts: Supreme Court Judgment (Plenary Session) 14/2013 and Supreme Court Judgment (Ordinary Session) 854/2014. The latter judgment referred the case to the plenary session of the same court, which will now consider issues related to a claims made policy clause for a second time in two years.

The legality of claims made clauses was at stake in these cases, particularly for insurance policies covering professional risks, although their validity was not disputed in its entirety. From a practical point of view, the plenary session examined which types of professional risk qualify for a discharge of liability of the insurer by operation of the clause.

Insurance Law

The Insurance Law (2496/1997) consists mainly of 'semi-compulsory' provisions. This concept means that in order to safeguard the interests of the weaker contracting party in an insurance policy, deviations from specific provisions of the law (those of a semi-compulsory nature), are allowed only if the rights of the insured/beneficiary are extended and the overall level of protection awarded to them by law is increased.

Article 33(1) of the Insurance Law provides that:

> "*any and all acts which are to the detriment of the policyholder, the insured or the beneficiary, shall be null and void unless otherwise specifically stipulated in this law. This shall not apply to insurance for the carriage of goods, credit insurance or guarantee insurance or marine or air insurance*."

This provision therefore introduces two sets of exceptions where the parties are free to regulate their mutual rights and obligations in cases where the insurance is taken out in order to cover professional risks:

- exceptions imposed by specific provisions of the Insurance Law – for example:

Authors

Konstantinos S Issaias

Ioanna Chotzoglou

Paraskevi Kalogerakou

- Articles 7(3),(5) and (6) regarding the coverage of costs for the avoidance or mitigation of the loss and the discharge of liability of the insurer in the event of occurrence of the insured event intentionally or due to gross negligence of the insured;
- Article 14(4) regarding the loss of substitution actions of the insurer against third parties due to fault of the insured;
- Article 18(4) regarding open cover; and
- Article 19(5) regarding fire insurance; and

- the five typical commercial insurance policies set out in Article 33(1) concerning the so-called 'major' professional risks (eg, insurance for the carriage of goods, credit insurance, guarantee insurance, marine insurance and air insurance).

Articles 7(1) and (2) (Occurrence of an Insured Event – Payment of the Insurance Money) provide as follows:

> "*1) The policyholder shall notify the insurer of the materialisation of the risk within eight days as from the date on which the policyholder acquired knowledge thereof. The policyholder shall be obliged at the insurer's request to supply all necessary information, details and documents relating to the circumstances and the consequences of the occurrence of the insured event. The policyholder cannot rely on his ignorance of the occurrence of the insured event, should the ignorance be imputable to the policyholder's gross negligence.*
>
> *2) The negligent breach by the policyholder of the duties set out in paragraph 1 of this Article shall grant the insurer the right to claim damages*."

Further, Article 7(6) provides that:

> "*the terms of the policy may provide an increased number of cases in which the insurer's liability shall be excluded if the policyholder or the insured concludes the policy with the view to covering professional risks.*"

The two Supreme Court decisions under consideration focus on Articles 7(2) and (6) of the Insurance Law and the exclusion of liability agreed through claims made clauses in case of professional risks.

Supreme Court Judgment (Plenary Session 14/2013)

Facts
A sole-member limited liability company engaged in the marketing of fishery products had entered into a credit insurance policy with an insurance company. Among other risks, the policy covered the possibility of insolvency of the insured's clients in cases of protracted default due to delayed payments of invoices issued. The policy set out the technical and procedural details regarding the invoicing of clients and accepted delays in payments by clients. The insured was required to notify the insurer (through a statement of non-payment) each time there was a delay in the payment of an invoice by a client within three months of the agreed date of payment. The policy stated that any event suggesting non-compliance with the terms and provisions of the insurance policy and/or the law (including the above obligation of the insured to proceed to statements of non-payment) would result in the discharge of the insurer from the obligation to indemnify the insured.

Decision
The Supreme Court ruled that the credit insurance in the case in hand was a form of professional insurance falling within the scope of Article 33(1) of the Insurance Law. In this type of insurance, the policy can legally oblige the insured to notify the insurance company in writing of the occurrence of the insured risk within a defined time period and, in the event of non-compliance with such obligation, the insurer is discharged from paying compensation. The Supreme Court elaborated and ruled that Article 7(2) – which provides that the failure of the insured to notify the insurer of the occurrence of risk grants the insurer the right to claim damages (and does not discharge the insurer from paying the insurance compensation) – did not apply to the claims made policy clause of the insurance contract under consideration.

Supreme Court Judgment (Ordinary Session 854/2014)

Facts
An insured bank had entered into an insurance policy with an insurance company, pursuant to which the insurer undertook to provide insurance for any financial loss which the insured could possibly suffer as a result of eventual dishonest or fraudulent acts of the insured's employees. The policy, which included a variation of the claims made clause, covered only losses that:

- had occurred within the duration of the policy and before the date of retroactive effect stipulated in it; and
- had been discovered and announced by the insured to the insurer.

Where these conditions were not met, the insurer was discharged from paying the insurance compensation.

In this case, the insured was informed about the occurrence of the insured risk, but did not announce it to the insurer within the effective period of duration of the insurance contract.

Decision

First, the Supreme Court ruled that the claims made policy clause in the present case has been lawfully incorporated in the insurance policy. Next, it ruled that a policy may provide that an insured risk is not covered where the insured has not discovered and reported the occurrence of the risk within the terms of the policy. In this context, the obligation of the insured to notify the insurer of the occurrence of the insured event constitutes not only an insurance burden – with which the insured should comply in order to claim insurance compensation – but also a prerequisite for compensation. However, part of the legal theory supports that, according to Article 7(2) of the Insurance Law, in cases where the insured fails to make a claim within the duration of the policy, the insurer is entitled only to request restitution for the damage caused by this omission; a full discharge of the insurer's liability in all cases is not allowed.

The court unanimously referred the matter to its plenary session in order to decide whether the claims made policy clause is valid not only for the 'major' professional risks provided in Article 33(1) of the Insurance Law (as already ruled by Decision 14/2003 with regard to credit risk insurance), but also (by application of Article 7(6) of the law) for other forms of professional insurance in general.

Awaited plenary assembly decision

The relevant hearing finally took place before the plenary session on March 19 2015. The ruling is awaited with interest, since significant consequences may arise from it – particularly in relation to the vast majority of insurance policies in all types of professional cover, which contain a claims made clause.

For further information on this topic please contact Konstantinos S Issaias, Ioanna Chotzoglou or Paraskevi Kalogerakou at KG Law Firm by telephone (+30 210 8171 500) or email (k.issaias@kglawfirm.gr, i.chotzoglou@kglawfirm.gr or p.kalogerakou@kglawfirm.gr). The KG Law Firm website can be accessed at www.kglawfirm.gr.