

Arbitrations on Business Interruption Issues

In the present situation of COVID-19-lockdowns in many countries (including Switzerland), the affected companies strive to rely on their insurance policies that cover risks of business interruption. Where insured companies and their insurers disagree on the specific cover (e.g. based on cover limitations or pandemic exclusions) the question about appropriate dispute resolution arises.

International insurance programs often provide for arbitration agreements which presently results in an increasing number of arbitrations on business interruption issues. Here is our one-page check list what should in any event be analyzed when starting arbitration proceedings:

1. Substantive Issues

The question of the substantive policy cover must be analyzed in the first place and the following items appear as particularly relevant in the present situation:

- (i) *What is the applicable substantive law?* The applicable law may contain mandatory provisions which supersede the contractual provisions of the policy.
- (ii) *Does the policy require a so-called "property damage" to cover business interruption or is e.g. an authoritatively ordered closure of business or quarantine due to COVID-19 sufficient for cover?* In the former instance, it may be difficult to establish "property damage", if no tangible property is directly affected. In the latter instance, the specific definitions must be observed.
- (iii) *What is the precise definition of "epidemic" or "pandemic"?* Sometimes specific or general conditions provide for exclusions or further explanations on the understanding of the terms in the policy. Under Swiss law, the entire contractual framework must be interpreted in the eyes of a reasonable third person in the relevant circumstances. Standardized contractual documents (e.g. general insurance conditions) which are unclearly phrased are usually interpreted against the position of the party providing such documents (often the insurer).
- (iv) *Did the insured event cause the business interruption?* If a business is open, but customers are more reluctant to make purchases, it is questionable whether any decrease of turnover is caused by an insured event.
- (v) *Is there a case of contingent business interruption?* Depending on the policy, also business interruptions due to the closure of the business of a supplier or a customer can be covered.
- (vi) *What are the notification requirements and potential waiting periods?* Insured companies should timely analyze contractual documents, in order to avoid formal mistakes.

2. Procedural Issues

Also procedural issues should be timely analyzed:

- (i) *What is the competent court or arbitral tribunal?* The type and place of the competent court or arbitral tribunal may have an impact on the procedural instruments available (e.g. for emergency relief).
- (ii) *What must be observed, if unclear or contradictory arbitration agreements exist?* In situations of so-called pathological arbitration agreement, the advice of a specialized arbitration lawyer should be sought. Initiation of proceedings before the wrong judicial instance may lead to a rejection of the entire case after months or years of legal proceedings – which is, needless to say, very unsatisfying.
- (iii) *Is there a possibility to request for emergency relief?* If (a) a company is threatened with insolvency as a result of a dispute on compensation for business interruption and (b) *prima facie* cover exists, it is not excluded that a certain first payment could be requested instantly before an emergency arbitrator in the sense of a provisional measure.