WILHELM

RECHTSANWÄLTE

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Claims settlement

The expert proceeding pursuant to insurance law

1. INTRODUCTION

The out-of-court expert proceeding pursuant to insurance law is aimed at the simplification of the claims settlement. If the parties to the proceeding (insurer, policy holder and experts) play by the rules of the proceeding, the damage settlement will often be very quick. This does not always succeed.

The following article deals with the process, the legal impacts and the advantages and disadvantages of the expert proceeding.

2. PROCESS

The out-of-court expert proceeding pursuant to insurance law according to sec. 84 VVG is a procedure to determine the preconditions of an insurance claim and/or the amount of the insured damage.[1]

An expert proceeding requires the agreement between the insurer and the policy holder about the execution of this proceeding. This agreement about the determination of the amount of the insurance claim is often already included in the general terms of insurance („AVB“, cf. among others part A sec. 10 AFB 2010, part A § sec. AMB 2011). The policy holder and the insurer may agree on the subject of expert assessment by supplementary agreement. By this, the parties may have individual preconditions assessed

[1] Halbach in Münchener Kommentar Insurance Contract Act „VVG“, sections 1 to 99 about sec. 84 VVG recital 2

which are relevant for the insurance claim on the merits. Experts may among others clarify whether the damage was caused by an insured event (such as fire) or by an excluded risk (such as civil commotion).

The general terms on insurance usually regulate that the policy holder may initiate an expert proceeding about the amount of the claim without agreement of the insurer. The insurer though needs the agreement of the policy holder to initiate an expert proceeding. Consequently, an expert proceeding will not take place against the policy holder's will.

The policy holder and the insurer each designate an expert who shall answer the question in dispute. The designation of the respective expert principally needs to be in text form (sec. 126b BGB, paper, USB stick, CD-ROM, memory card, hard drive, emails, computer faxes etc.).

The suggestion of the expert is principally binding for the respective other party and may only be amended in agreement between the two parties[2].

Even before preparation of their reports (or their common report), the experts will designate an umpire. In case of divergent expert reports, the umpire shall take a binding umpire decision. In doing so, he may only examine those aspects of the two reports which are not consistent.

The experts (including the umpire) shall only answer factual issues (such as the amount of the damage) and are not entitled to answer any legal questions (such as the question of existence of underinsurance or breach of an obligation). If one of the experts exceeds these powers, the respective expert report is not usable.

3. IMPACTS OF THE EXPERT REPORT

The findings from the expert proceeding have a materially-legal impact for the insurer and the policy holder. The result of the expert proceeding (e.g. the determination of the precise amount of the damage) is binding for the parties for the further settlement of the insured event.

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[2] cf. Higher Regional Court Hamm in r+s 1994, 184

The findings of the expert proceeding are exceptionally not binding if they obviously substantially deviate from the facts of the matter. This also applies if the experts do not reach findings, do not want to reach findings or delay them (cf. sec. 84 para. 1 VVG).

Example 1: The expert assigned by the machinery insurer calculates the amount of the insured reinstatement costs considering discounts of 30 percent. The policy holder would get these discounts due to its special relationship with a repair company. The insurer shall though not profit from these discounts. The expert thus has to calculate the restoration costs on the basis of market prices and not on the basis of discounted special prices. The result of the expert report is obviously wrong.

The obvious incorrectness (defectiveness) of the result of the expert needs not have an impact on individually determined damage positions, but on the overall result of the expert report[3]. Otherwise the expert report will be effective despite factual mistakes. Mistakes of individual damage positions may even be offset by mistakes at other positions, if the overall result was coincidentally correct.

Example 2: The expert correctly calculates the total damage to be EUR 100,000.00. This total damage comprises four damage positions of EUR 25,000.00 each if it was calculated correctly. The expert assesses the four damage positions with EUR 20,000.00, EUR 30,000.00, EUR 25,000.00 and EUR 25,000.00. Despite the wrongly calculated individual positions, the total result has been coincidentally calculated correctly and thus the expert report is binding for the parties.

Not every deviation from the actual facts will make the result of the expert report non-binding. Only a substantial deviation will cause the expert report to become non-binding. It is neither regulated by law nor often by contract (e.g. in the general terms of insurance) in what case a substantial deviation is given. The Federal Court of Justice considers a deviation from the correct result of the damage amount of less than 15 percent still acceptable and as no substantial deviation[4]. A deviation of 25 percent or more will usually constitute a substantial deviation. The higher the determined amount in absolute numbers, the more likely a substantial deviation will be assumed.

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[3] Halbach, reference as above, recital 21, BGH VersR 1987, 601

[4] BGH VersR 1987, 601

Example 3: In two expert proceedings, the amount of the insured damage has to be calculated. In case of correct calculation, damage 1 would be calculated as EUR 100 million and damage 2 as EUR 1 million. The expert evaluated damage 1 at EUR 85 million and damage 2 at EUR 850,000.00. Damage 1 was evaluated too low by EUR 15 million and damage 2 was evaluated too low by EUR 150,000.00, thus both deviate relatively around 15 percent from the correct result (EUR 100 million and EUR 1 million). The absolute deviation of EUR 150,000 will though eventually constitute no significant deviation, the deviation of EUR 15 million though will.

4. POSSIBILITY TO REFUSE EXPERT

It is neither regulated by law nor by contract whether the parties to an expert proceeding may refuse an expert on suspect of partiality. The expert proceeding is no private arbitration proceeding in the meaning of secs. 1025 et seqq. Code of Civil Procedure "ZPO", thus a direct refusal is not possible according to legal provisions (secs. 1036 et seqq. ZPO in conjunction with sec. 42 ZPO). The predominant view is that also in an out-of-court, insurance law expert proceeding, the refusal of an expert should be possible by analogy with sec. 1036 ZPO. For this, justified doubts about the impartiality or independency of the expert must arise. Such suspect of partiality might for example be given if the expert was subject to instructions by the ordering party (employment relationship).

In so far as one party is suspected of partiality, this party (insurer or policy holder) should disclose this suspicion within two weeks and refuse the expert. Otherwise, the party may lose its right to refusal.

According to prevailing opinion, an expert may be in constant business relationship with the ordering party (e.g. automotive expert regularly assigned by insurer). An expert being in a dependent relationship with the orderer (e.g. insurer's employee subject to instructions) is not acceptable as expert in an expert proceeding[5].

[5] cf. Federal Court of Justice (Bundesgerichtshof „BGH") of 10 Dezember 2014 file No. IV ZR 281/14 in r+s 2015, 129

It shall though be unproblematic if a party assigns a person as expert who has already before given its view on the subject to the expert report, and is thus preconceived. By this, it shall be possible that an expert evaluates the amount of a damage though he had already determined the amount of the damage outside the expert proceeding for the insurer. The expert of the insurer will confirm its amount of damage as determined before, which had not been convincing for the policy holder already before initiating the expert proceeding. The insurer should avoid assigning preconceived experts in order to avoid frustration of their customers.

5. ADVANTAGES AND DISADVANTAGES OF EXPERT PROCEEDING

The out-of-court insurance law expert proceeding offers advantages and disadvantages compared to an ordinary litigation (lawsuit).

If all participants (insurers, policy holders and experts) are experienced in the execution of an expert proceeding and set their own interests aside, an expert proceeding may offer far quitter response to a contentious question than an ordinary litigation (such as for example the amount of the insurance claim).

For lack of differentiated provisions (such as the procedural provisions in the ZPO for the execution of a proper litigation), the expert proceeding though offers numerous possibilities for undue taking of influence on the experts. Thus, not only few policy holders doubt whether an expert assigned by the insurer will answer the question subject to the expert report without consideration of the insurer's economic interests. In an orderly litigation, this suspicion will usually not be given due to an independent legal judge managing the litigation. For this reason, the acceptance of a court decision will usually be higher than those of an expert proceeding performed out-of-court.

The expert proceeding may only be examined by court if a substantial deviation from the correct legal position is given. This means that the expert proceeding tolerates inexact and wrong results up to the materiality threshold. This "tolerance" facilitates the decision making compared to the way through the instances (sometimes taking a decade) of a proper litigation (Regional Court, Higher Regional Court, Federal Court of Justice). The exactness of court decisions though promotes the acceptance of the decision by the parties and thus legal peace.

The expert proceeding sometimes costs less than a court proceeding. This is on the one hand due to the expert proceeding being quicker than a proper litigation. On the other

hand, the involvement of lawyers in an expert proceeding makes sense, but is not required by law. In a proper litigation, a lawyer is required starting with the Regional Court and there is an obligation to pay court costs.

On the other hand, the costs of an expert proceeding (mainly the costs for the expert) will be shared by the parties to the expert proceeding without taking the result of the expert proceeding into account. Thus a policy holder may total succeed with its perception of the amount of the insurance claim already announced before the expert proceeding and will still have to be bear half of the costs for the umpire.

6. CONCLUSION

The advantages and disadvantages of an expert proceeding have to be assessed in every individual case compared to a proper litigation. In particular in case trust between policy holder and insurer is high (e.g. due to longstanding business relationship), an expert proceeding may prove advantageous in order to shorten the matter and to keep costs low. If the policy holder or the insurer's person in charge are inexperienced in executing an expert proceeding, the expert proceeding will cause a very complex situation for the parties involved. Since in case of a proper litigation, the legal judge simplifies complex situations for the parties (e.g. by formulating the questions of evidence), thus a proper litigation may prove advantageous.

In so far as the parties only wish to get a quick binding expert result, they may initiate (instead of an expert proceeding and a court lawsuit) an independent taking of evidence lead by court according to secs. 485 of the Code of Civil Procedure.

If you have any further questions, please do not hesitate to contact

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