AIDA - RIO CONGRESS 2018

DISCLOSURE DUTIES IN INSURANCE

General Reporter: Peggy SHARON

Please answer the questions and clarify whether your response is based on legislation, court judgments or directives of any regulatory/supervisory authority.
Finally, your remarks and comments from your point of view will be appreciated.

QUESTIONNAIRE

1. The Insured's Pre-Contractual Disclose Duty

a. Does your National Law impose a duty to answer questions put to the applicant/insured by the insurer?

The Austrian Insurance Contract Act (österreichisches Versicherungsvertragsgesetz - VersVG) imposes a duty upon the applicant to reply to questions put to the applicant/insured by the insurer, if the insurer asks for circumstances expressly and in written form. This results from § 16 (1) VersVG, which says, that circumstances are significant, if the insurer asks for these circumstances expressly and in written form.

b. Does your National Law impose upon the applicant/insured a duty to disclose information upon the applicant's own initiative? If so - under what circumstances?

According to § 16 (1) VersVG the applicant/insured has to disclose all significant circumstances known to him to the insurer, which are significant for the takeover of the risk, upon the conclusion of contract. Significant circumstances are according to the legal definition of § 16 (1) VersVG those circumstances, which are appropriate to wield influence to the conclusion of the insurer to generally make the contract or make the contract under the agreed provisions.

2. Scope of the Applicant's Disclosure Duty – Subjective or Objective?

Is the applicant's disclosure duty limited to the applicant's actual knowledge or includes also information which he or she should have been aware of?

The applicant/insured has to notify all of his actually known circumstances according to § 16 (1) VersVG. The requirement of the disclosure duty of the insured is the

positive knowledge about the significant circumstances[1]. It is not enough if he only would have to know the significant circumstances. Only the registrable circumstances itself has to be known to the insured, not its significance (§ 16 (2) S 2 VersVG). It is for the insurer to judge the significance of the circumstances, because the risk check is his task.

There is no duty of investigation to the applicant if he has never known the circumstance.[2] If there should be circumstances which the applicant has forgotten, the insured has to persevere to be reminiscent of all circumstances. If he doesn't, this is to judge as knowledge.[3]

3. The Insurers' Pre-Contractual Duties

a. Does your law impose on an insurer a pre-contractual duty to investigate the applicant's business in order to obtain the relevant information?

Literally the insurer is not obliged to verify the disclosures from the insured. The insurer can rely that the insured has discharged his obligations.

According to statements from *Heiss/Lorenz*[4] there may be an obligation request of the insurer in exceptional cases. If the insured didn't answer questions or has answered questions incompletely or incorrectly, the insurer can't sustain about the significance of the circumstance if he has neglected to check back and has accepted the claim without any reservations.

b. Does your law impose on an insurer a duty to ascertain the insured's understanding of the scope of the insurance, and to draw the insured's attention to exclusions and limitations?

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[1] OGH 7 Ob 21/92 = JBl 1993, 460 = SZ 65/142; OGH 7 Ob 131/15p; *Heiss/Lorenz* in Fenyves/Schauer, VersVG §§ 16, 17 Rz 19.
[2] *Heiss/Lorenz* in Fenyves/Schauer, VersVG §§ 16, 17 Rz 20; *Schauer*, Das österreichische Versicherungsvertragsrecht[3] 108.
[3] *Heiss/Lorenz* in Fenyves/Schauer, VersVG §§ 16, 17 Rz 19.
[4] *Heiss/Lorenz* in Fenyves/Schauer, VersVG §§ 16, 17 Rz 17; § 22 Rz 10.

In the Austrian Insurance Contract Law unwritten protective responsibilities and due diligence, which are part of the information of the insured, are an issue.

The insurer has no duty of validation if the offered insurance product completely covers the needs of protection of the insured.

However, the insurer has to correct misconception of the insured with regard to the coverage if the insured speaks out about that.

There is a duty of clarification of the insurer about the risk exclusion if it is recognizable that the insured wants the insurance protection for a risk, which in fact is not covered.[5]

If a pre-contractual duty is culpably hurt by the insurer, he has to compensate all losses of the insured which occurred by the violation of duty. The loss of the insured frequently will consist of an unexpected coverage gap. In fact the insured has to be treated as if he would have been insured according to his expectations from the beginning[6].[7]

4. The Insured's Post-Contractual Disclosure Duty

a. Does an insured have the duty to notify the insurer of a material change in risk? If so - what is the scope of the duty?

An increase of risk is regulated by §§ 23 – 31 Austrian Insurance Contract Law (VersVG). The insured has to fulfil two duties. He has to observe a certain behavior, which is called in Austria "GEFAHRSTANDSPFLICHT" and he has the obligation of disclosure. "GEFAHRSTANDSPFLICHT" means that the insured is obliged to cause no increase of risk, nor to admit performance by a third party.

The obligation of disclosure (§ 23 (2) VersVG) means that the insured has to give notice immediately of an increase of risk to the insurer.

For the presence of a risk increase is to consider the relevance and the potential duration of the risk. Presence exists if the occurrence of the insurance case or the

[5] OGH 7 Ob 2224/96a = RS0106980; *Gruber* in Fenyves/Schauer, VersVG § 43 Rz 103.
[6] OGH 7 Ob 2224/96a = SZ 70/15 = RS0106981.
[7] OGH 7 Ob 33/15a.

increase of damage becomes more likely. Benchmark is the appropriately dealing insurer. This implies to rescind the insurance or continue only with a higher insurance rate, if this is reasonable in the regular business of the insurance branch.[8]

Apart from "relevance", there has to be a certain duration of risk increase. This affords a longer lasting condition, in which the situation of danger stabilizes on a new higher level and builds the basis for a new natural run of damage.[9]

b. What is defined in your jurisdiction as a material change?

There is no legal definition of the terms "risk" or "increase of risk". The Supreme Court of Justice (Oberster Gerichtshof - OGH) defines an increase of risk as a risk process, which by his nature may build a new shape of risk through a longer period of time and may encourage the occurrence of the insurance case.[10]

An increase of risk for the purpose of § 23 VersVG means that the circumstances subsequently change after the conclusion of the contract. This change is making the occurrence of the insurance case or an enlargement of damage more likely and can therefore induce the insurer to overrule the contract or continue only with a higher insurance rate.[11]

The increase of risk is always the result of a permanent condition. The insured has to be conscious that his behavior is appropriate to increase the danger of the occurrence of the insurance case.[12]

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[8] OGH RS0080194.
[9] OGH 7 Ob 136/05h; OGH 7 Ob 2205/96g.
[10] OGH RS0080491.
[11] OGH 7 Ob 129/10m; RS0080357, RS0080237.
[12] OGH 7 Ob 129/10m.

5. The Insurer's Post Contractual Duty

Does your law impose on an insurer disclosure duties after the occurrence of an insured event (such as, the duty to provide coverage position in writing within a limited period, duty to disclose all reasons for declination etc.)?

§ 11 (1) VersVG determines that payments of the insurer are payable with the finalization of the necessary survey of the insurance case and the dimensions of the insurance benefit. That implies that § 11 (1) S 1 VersVG links the maturity to the finalization of the necessary survey. Necessary are surveys which an average insurer of these class of insurance needs to finally determine and proof the insurance case. Added to this is the determination of the scope of the insurance benefit duty and to whom it is opposed.[13] In addition, the insured can, according to § 11 (1) S 2 VersVG, claim an explanation of the insurer after two months, for which reason the survey have not yet been completed.

Furthermore it is mentioned in § 12 (2) VersVG, that at registration of the claim of the insured at the insurer the receiving of a written decision plays a role. If the insured registers his claim at the insured the prescription is stopped until the receiving of the written decision of the insured. A decision is a final positive or negative answer of the insured with the reason and scope of the claim.[14] The decision must be made in writing.[15]

[13] *Gruber* in Fenyves/Schauer, VersVG § 11 Rz 13.
[14] OGH 7 Ob 206/02y.
[15] *Gruber* in Fenyves/Schauer, VersVG § 12 Rz 27.

6. Remedies in Case of Breach of the Insured's Disclosure Duties

a. What is the insurers' remedy in case an insured breached his/her pre-contractual disclosure duty ("all or nothing" rule or partial discharge)?

If the insured has infringed his disclosure duty according to § 16 VersVG the insurer has certain legal remedies. It depends on the fault of the insured which legal remedy may be used by the insurer.

The insurer can rescind from the contract according to §§ 16 (2), 17 (1), 18 VersVG, if the disclosure duty is culpably infringed by the insured. Thereby it is to distinguish between the breach of spontaneous disclosure obligation and the breach of instructed disclosure obligation.

The insurer can rescind from the contract according to §§ 16 (2), 17 (1), 18 VersVG, if the disclosure duty is culpably breached by the insured. Thereby it is to differentiate between concealed circumstances and wrong disclosure. For to wrong disclosure neither § 16 (3) S 2 HS 2 VersVG nor § 18 VersVG is applicable, so that even slight negligence will harm.

A spontaneous violation of disclosure duties concerning concealed circumstances will occur, if the insurer has asked explicitly and distinctly about these circumstances neither orally nor in writing. For the grade of culpability neither § 16 (3) S 2 HS 2 VersVG, which requires culpable negligence, nor § 18, which demands malicious behavior, are relevant.

Apart from the spontaneous duty of disclosure there is the instructed disclosure duty. The latter requires the questions to be put explicitly and distinctly orally or in writing. In this case § 16 (2) VersVG respectively § 17 (1) VersVG are sanctioning non-disclosure respectively wrong disclosure already in case of slight negligence.

In addition to the right of withdrawal the insurer, in case of violation of disclosure duties according to § 41 VersVG, has the right to adapt the insurance rate, or to cancel the insurance contract. The insurer may not choose between these rights, but has to adapt the insurance rate ahead of cancelling the contract. Only if the higher risk,

according to the principles governing insurances, would not have been insured at all, the insurer may cancel the contract.

Another remedy in case of violation of disclosure duties by the insured consists of rescission because of malicious deception according to § 22 VersVG and § 870 ABGB (Austrian General Civil Code). In contrast to that a rescission because of error according to § 871 ABGB is not permitted.

b. What is the insurers' remedy in case an insured breached his/her post-contractual disclosure duty ("all or nothing" rule or partial discharge)?

The insurer may cancel the contract according to § 24 (1) VersVG in case of breach of § 23 (1) VersVG by the insured. Furthermore the insurer is free of duty, if the insurance case occurs after an increase of risk. However, the insurer still has to pay insurance benefits, if the violation is not based on fault of the insured, except the insured does not fulfil his duty of disclosure immediately, according to § 24 (2) VersVG.