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DISCLOSURE DUTIES IN INSURANCE

QUESTIONNAIRE- CHILEAN REPORT

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The comments provided in this text are party of the Insurance Transparency Book (yet unpublished). The directors are Kyriaki Nousia and Pierpaolo Marano.

BACKGROUND

The modification introduced by law number 20.667 of 2013 has the following relevant changes: on the one hand, new rules about the form and content of the pre-contractual duties of information, and on the other, the new system of defect in the way consent (to a contract) centered on the contract conservation, and the nullity proceeds only in the cases of the bad faith.

Below, the pre-contractual duties of information of insurer and assured will be analyzed. In both cases, firstly, the form and content will be seen followed by the effect of the breach. In the case of duties of disclosure during the contract validity period –it is the duty of communication about the increase of risk- also there are relevant changes.

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?

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?

Answer:

Pre-contractual information duty of the assured

Regarding the pre-contractual information duty of the assured, which has an objective to provide information to the insurer about risk, the Chilean law contemplates rules that are substantially different from the valid norms before the modifications

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introduced in 2013, in the form, the content and the effects of the breach of the duty. Articles 524 number 1, 525 and 539 regulate the pre-contractual duty of the assured.

These articles establish the following:

Art. 524. Obligations of the insured. *The insured shall be obligated to:*
1º Sincerely declare all circumstances that the insurer request in order to identify the object insured and to appreciate the extension of the risks

Art 525. Statement on the state of risk. *In order to provide a statement as to what number 1° of the previous article refers to, it is sufficient that the contractor provides information in accordance to that which is requested by the insurer about the facts or circumstances that are known or can serve to identify the insured object and to appreciate the risk extension.*
Once the insurance contract is agreed upon and without the insurer requesting the statement on the risk state, he cannot complain about the errors, reticences or the inaccuracies of the contract holder and even those facts or circumstances that are not understood in such request.
If the loss has not occured and the contract holder had inexcusably incurred determining errors, reticences or inaccuracies of the assured's risk in the information requested by the insurer in accordance with number 1° of the previous article, the insurer can rescind the contract. If the errors, reticence or inaccuracies about the contract holder does not cover the said characteristics, the insurer can propose a modification to the contract terms in order to adjust the premium or the coverage conditions to the uninformed circumstances. If the policy holder rejects the proposal of the insurer or does not answer within a period of ten days from the date of sending the same, the latter can rescind the contract. In the final case, the rescission will happen at the expiry of the thirty-day period from the date of sending the same communication.
If the loss has occured, the insurer shall be exonorated of his obligation to pay the compensation if the loss comes from a risk that would have given place to a rescission of the contract in accordance to the previous paragraph and, on the contrary, shall have the right to reduce the compensation in proportion to the difference between the agreed upon premium and that which would have been agreed upon in the case of knowing the true risk state.
These sanctions will not be applied if the insurer, prior to executing the contract, has known about the errors, reticence or inaccuracies of the statement or should have known them; or if upon the execution, it paves the way to rectification or they are accepted expressedly or tacitly.

Art 539. Other causes of the inefficacy of the contract. *The insurance contract is null if the insured, knowing fully well, provides substantially false information to the insurer which is what is referred to in number 1° of article 524 and is resolved if such conduct is incurred upon complaining for the compensation for a loss.*
In the cases of pronouncing of nullity or insurance resolution, the insurer shall retain the premium or demand the payment and cover the expenses that have been demanded to get accredited even though no risk has been run, without prejudice to a criminal action.

Form and content of the pre-contractual duty of the assured

Regarding the form of the duty of information, the Chilean Law takes the use of the questionnaire, **leaving the spontaneous system of declaration**, by virtue of which the insurer could invoke the breach of the duty when he, in his judgment, deems that the policyholder infringes the demands of good faith by not giving the information that is known or that has to be known and relevant about the risk.[1]

The modern practice of insurance where the questionnaire or other means of the knowledge about the risk – especially technological -[2] are commonly used by the insurer have made the obligation obsolete from being exact and precise in what is declared or said, on the one hand, and on the other hand, to say or declare all that is known about the risk.[3] On the contrary according to the Chilean Law, it is sufficient that the assured responds the questionnaire that has been elaborated and given by the insurer. As a result, it deals with a duty to respond as has been categorized by Spanish doctrine.[4] Article 524 number 1 states that the assured shall be obligated to sincerely declare all the circumstances that the insurer **requests** for the identification of goods insured and for the appreciation of the extent of the risks, on the one hand, and article 525 states that "[…] it is **sufficient** that the assured give the information **required** by the insurer […]", allows us to conclude that the Chilean Law adopts the questionnaire system.

The parameters of transparency have a double perspective on the questionnaire system. The correlative duty of the insurer is to obtain information about the risk through the elaboration of a questionnaire or form with clear and precise questions that permit clear and accurate answer and to deliver it to the assured.

The Chilean law as seen previously adopted a closed questionnaire system, as the insurer has to give the form and the policyholder meets his duty to inform upon responding to the questions. In this sense, the second paragraph of article 525 states that **Once agreed upon, without the insurer having requested the declaration about the state of risk, the insurer will not be able to complain about the errors, non disclosure, inaccuracies of the policyholder, including those facts and circumstances that are not comprehended in the form.**

Notwithstanding the aforementioned, the rigidity of the regime of articles 524 number 1 and 525 of the Commerce Code seems to be moderate in the case of the major risk. In these types of insurance, the demands of good faith *in contrahendo* goes beyond that stated in the cited articles. The reason being that the assured, operating in a specific industry, is well informed or better informed about the risk.

[1] RÍOS (2014) pp. 41 y ss.
[2] They are instruments that permit the insurer to anticipate the knowledge of the information that integrates the risk.
[3] As VIVANTE said: *Il codice impone all'assicurato due obblighi: 1° di dire esattamente tutto quello che dice; 2° di dire tutto quello che sa*. VIVANTE (1922) p. 176.
[4] See SÁNCHEZ CALERO (2010) p. 282.

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?

Answer:

It is objective, in the cases of insurance with consumer. As said, the Chilean law adopted a closed questionnaire system, as the insurer has to give the form and the policyholder meets his duty to inform upon responding to the questions. In this sense, the second paragraph of article 525 states that **Once agreed upon, without the insurer having requested the declaration about the state of risk, the insurer will not be able to complain about the errors, non disclosure, inaccuracies of the policyholder, including those facts and circumstances that are not comprehended in the form.**

Nevertheless, in the case of major risks –non-consumer– the questionnaire, as a closed system whose objective is to give protection to the assured is not necessary. In these cases, the assured must give all the information about the risk even though it is not contained in the questionnaire. This is a requirement of good faith.

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?

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?

Answer:

Pre-contractual information duty of the insurer

In the Chilean law, the pre-contractual duties of the insurer is regulated in the second paragraph of article 514 and in article 529 number 1, both of the Commerce Code and article 17B of the Consumer Law.[5] The modifications introduced by law number 20.667, in 2013, to the Commerce Code recognized demands of good faith on the pre-contractual duties of information. For the first time, in Chile, the insurer is subject to special legal demands of information. These articles regulate the form and content of the pre-contractual duty of information, but they do not regulate the effects of the breach of duty.

In this sense, it is necessary to pinpoint the form and content of the duty to verify if it is a breach. This will be seen in the following paragraph.

[5] See Ríos *et al* (2013) p. 32.

Form and content of the pre-contractual duty of the insurer

The second paragraph of Art. 514 and art. 529 number 1 allow the determining of the form and content of the duty, and the texts are as follows:

> ***Art. 514. Proposal.*** *The proposal to execute the insurance contract shall express the coverage, the background and the necessary circumstances to appreciate the extension of the risks.*
> *For these, the insurer shall give the policyholder, in writing, all the information relative to the content of the contract that shall be entered into agreement. This shall contain, at least, the contract type, the risks covered and the exclusions; the insurance amount, the manner to determine it and the deductibles; the prime or the method of calculation; the duration of the contract, and the explicit indication of the start and end date of the coverage.*
>
> ***Art 529. Obligation of the insurer.*** *Additional to the obligation of article 519, the insurer assumes the following obligation: 1) When the insurance is directly contracted, without an insurance broker: giving advice to the assured, offering the most convenient coverage to his needs and interests, illustrating the conditions of the contract, and providing assistance along the duration of the contract, modification and renewal of the contract, and the claim. When the insurance is contracted in this form, the insurer shall be liable of breach, mistakes and omissions committed and the damage caused to the assured.*

As we can see the articles cited impose, on the insurer, the obligation to provide information on contract[6] terms to the insured in **writing**.[7] For better comprehensibility and certainty of the contract[8], the information must contain the type of insurance, risk coverage and exclusions, amount insured, deductible, premium, duration of the contract, and the other relevant topics.[9] On the other hand, these demands of written information must be adjusted to article 17 of the LPC that states that **Adhesion contracts referring to the activities regulated by the current law must be written in a clear and legible way, with a letter size not smaller than 2,5 millimeters and in Spanish, except those words in another language that has been incorporated into the vocabulary** […].

It seems the content of the duty is clear, but when Commerce Code art. 529 number 1 is read, the content of the duty is more extensive.[10] Indeed, the article establishes that the insurer must provide advice on the insurance contract and that the

[6] It deals with the duty of information that attenuates the asymmetry that exists during the contract formation process. CONTRERAS denominates it as "informed proposal", that is defined as the offer to contract insurance which the policyholder sends to the insurer only when the policyholder receives complete information from the insurance contract in terms of the article 514 of the Commerce Code. See CONTRERAS, (2014) pp. 152-153.
[7] The insurer, through any technological means, shall provide information to the assured to make sure that the contract has been received, Article 12ª of the Consumer Protection Law permits this. See BARRIENTOS (2015) p. 339; CONTRERAS (2014) p. 266.
[8] See CONTRERAS (2014) pp. 19-20.
[9] See BARRIENTOS *et al* (2015) p. 194.
[10] BARRIENTOS *et al* (2015) pp. 338 y ss.

conditions of the coverage adjust to the interests and needs of the assured. As a result, the limit of the content of the duty depends on good faith. Perhaps, the judge must determine the final content of the duty.[11]

To close, in my opinion, the duty of information content of the insurer aims to protect the assured facing the issue of excess of information, which paradoxically provokes the adverse effect of misinforming.

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?

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

Answer:

Yes. In this case the article 526 of the Commerce Code applies.

The text of this article is the following:

> Art. 524. Obligations of the assured. The assured is obligated to:
> 5° *Not increase of risk and provide information to the insurer about the circumstances that came to his/her knowledge and to gather the characteristics indicated in article number 526.*
>
> ***Art. 526. Increase of the insured risks****. The assured, or the policyholder in this case, shall inform to the insurer of the facts and circumstances that substantially increased the declared risk, and that happened suddenly after the execution of the contract, after five days of having known it, if and always when by nature, it was not able to be known in any other way by the insurer. It is presumed that the assured knows the risk aggravation that arises from the occurred facts with his direct participation.*
> *If the loss has not been produced, the insurer, within a period of thirty days from the moment of knowledge of the risk aggravation, shall communicate the decision of rescinding the contract or proposing a modification to the terms of the same in order to adjust the prime or the policy coverage conditions to the assured.*
> *If the assured rejects the insurer's proposition or does not answer within a period of ten days from the date of sending the same, the latter shall rescind the contract. In this case, the rescission shall occur at the expiry of the thirty-day period from the date of the sending of the communication.*
> *If the loss occurred without the assured, or the policyholder in this case, having made the statement of the risk aggravation indicated in the first paragraph, the insurer shall be exonerated of its obligation to pay indemnification with respect to the insurance coverage affected because of*

[11] RÍOS *et al* (2013) p. 36.

> *the pejoration. Nevertheless, in the case that the risk aggravation would have caused the insurer to execute the contract in arduous conditions for the insured, the indemnification shall reduce proportionally to the difference between the agreed upon prime and that which would have been applied when the true entity of the risk were known.*
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> *These sanctions shall not be applied if the assured, because of the nature of the risks, ought to have known and ought to have expressly or tacitly accepted.*
> *Except in the case of willful aggravation of the risks, in all the situations that, in accordance with the previous paragraphs, there is a place for the contract termination, the insurer must return the proportion of the prime corresponding to the period in which, as a result of it, is free of all risks.*
> *Except in the modality of personal accidents, the risk aggravation norms shall not have an application in personal insurance.*

The Chilean legislator, with the objective of guaranteeing the principle premium-risk proportionality, through article 524 number 5 of the Commerce Code imposes upon the assured or policyholder the duty of communicating the occurrence of all circumstances that increase the risk substantially. The cited norm gives a period of five days to meet this duty. Additionally, article 526 reiterates the same rule.[12]

Effects of the breach of the duty of communicating the increase of the risk

In this case we can follow the same system of analysis of article 525 of the C.com: the law considers a basic unit of fact represented by the breach of the duty and then, a chronological factor represented by the verification of the risk (loss).

If the loss has not occurred and there is a non-communication of the substantial increase of the risk, the assurer can rescind the contract (it deals with an abandonment of the contract) or can propose the conservation of the contract through an adjustment of the premium or the coverage conditions.

If the loss has occurred and there is a non-communication of the substantial increase of the risk, the assurer shall be liberated from the indemnity obligation. If the assurer had known about the increase of the risk before the celebration of the contract, he would have contracted in these conditions. And so, the assured would have the reduced indemnity.

[12] See CONTERAS (2014) pp. 223 y ss.; RUIZ-TAGLE (2015) pp. 308 y ss.

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.)?

Answer:

Yes, the article 529 of the Commercial Code establish that: "providing assistance along the duration of the contract, modification and renewal of the contract, and the claim. When the insurance is contracted in this form, the insurer shall be liable of breach, mistakes and omissions committed and the damage caused to the assured". In this case, the general rules about contract law apply (Civil liability).

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)?

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

Answer:

Effect of the breach of duty of information of the assured or policyholder

The effects derived from the breach of the duty of information about the risk are regulated in articles 525 and 539 of the Commerce Code. These legal texts consider two types of breach of the pre-contractual duty of the risk: erroneous, non disclosing or inaccurate statement (article 525) and the statement of bad faith or substantially false (article 539).

These types of defective statements are qualified as a basic unit of fact that allows for the falling back on the system of remedies. Only in the case of article 525 of the Commerce Code, it is important to identify a chronological factor –the occurrence or non-occurrence of loss - and a negligence factor.

Basic unit of fact: erroneous, non-erroneous, non-disclosing or inaccurate statement (article 525)

The erroneous statement is that which contains information not corresponding to the actuality. The non-disclosure is the supply of information that is not true. Both statements are similar. Thus, these statements are the same, separating them from the traditional system of consent defect that is obligatory to distinguish between essential,

substantial or accidental error with the objective of determining the existence of nullity and further if such is relative or absolute.

Regarding the breach of the duty, if a loss has not occurred and the conduct of the assured is negligent, the insurer can rescind the contract. The rescission[13] is a faculty of withdrawal of the contract. In the case that the assured is non-negligent, the contract remains in effect, if and when the policyholder accepts the changes to the contract whether an increase in the premium or changes in the coverage conditions. If the policyholder refuses, the insurer can rescind the contract.

In the case that the loss did occur and the conduct of the assured is negligent, the insurer can rescind the contract. If the policyholder's conduct is non-negligent, he has the right to seek indemnification, although limited to the proportion between the actual risk and the premium agreed on.

Basic unit of fact: declaration of bad faith or substantially false of article 539

The substantially false declaration of article 539 contemplates conducts of bad faith that includes guile. For this declaration, the law maintains the remedy of nullity, with the exception of the faculty of the insurer to retain the prime.

Effect of the breach of duty of information of the assurer

In the case of a breach, the Chilean Commerce Code does not contain norms that regulate the effects of the breach. In this scenario, distinguishing between the insurance contract of major risk and the consumer insurance contract is an obligation.

In the case of major risk, the solution is in the Civil Code, specifically in arts. 1.462 and those that follow that regulate the problems of consent defect (to a contract) and norms about the invalidity of arts. 1.680 and those that follow of the same code. In this case, the only solution is the nullity of the contract.

In the case of the consumer insurance contract, the solution is different. The law, specifically in article 17B of the Consumer Law, establishes the possibility of maintaining the contract through a modification of the contract conditions.[14]

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[13] The word rescission in the Chilean Law means to be without effect, and it does not always refer to nullity or resolution.

[14] See RÍOS *et al* (2013) p. 32.

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