

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?
- 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?

Policy holder and/or insured shall, prior to signing the contract, take the initiative to inform the insurer *«with exactitude all circumstances that he may consider relevant to the assessment of the risk by the insurer»*. This goes beyond the information expressly requested by the questionnaires previously prepared by the insurer (art. 24 Insurance Law). This is considered the choice of a system of “*open questionnaire*” whereby the policyholder / insured may be considered in breach of the duty to inform /duty of disclosure even when he answered accurately all the questions in the questionnaire, but omitted other information that may be considered relevant to the assessment of the insured risk. This is locally criticized for giving an unfair advantage to the insurer mostly in matters of health and life insurance.

This is discussed as a matter of “asymmetry of information”. Insurers claim that the policy holder and/or insured has better information about

his own life, health and circumstances; policy holders and/or insureds claim that the insurers know more about the insurance relevant risks.

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?

See prior answer: duty to disclose includes facts and circumstances that the policy holder and/or insured actually knew and should have known.

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?

No.

- 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?

In accordance with the Portuguese Insurance Law (art. 22) the insurar is obliged to inform the policy holder / insured of all matters relevant, including, cover, exclusions, etc. If the insurer offers several insurance solutions or modalities in principle adequate to the policy holder / insured, he must inform the advantages / disadvantages of each one.

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?

Both insurer and insured have the duty to inform each other of all aggravation and reduction of the insured risk (arts. 91-93 of the Insurance Law).

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

Aggravation of risk is considered relevant when it would alter or influence the decision to contract the insurance or the terms of the

contract (premium, exclusions, etc.), i.e., the contract would not be signed or would be drafted differently.

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.)?

The law concerning mandatory automobile insurance (DL 291/art. 36-39) the insurer, besides assisting the insured with all the information necessary, must inform the insured, within 30 days, of his decision to provide or to refuse coverage, explaining the reasons to, and to make a «reasonable proposal» of compensation.

This is expressly foreseen in this specific law, but is followed in general in all insurance based on the general theory of contract.

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)?

In case of breach by the insured of the duty to inform the insurer, the consequence depends on whether the breach was intentional (*dolosa*), or negligent. (arts. 25-26 of the Law of Insurance Contract).

In case of intentional breach, the insurer is entitled to avoid the contract by unilateral declaration to the insured.

In case of negligent breach, the insurer may propose to the insured a modification of the contract in accordance with what he would have proposed if he had the relevant information at the time of the initial contract; or to avoid the contract after proving that he would never make the insurance if he was fully informed of the relevant information.

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

It depends on the circumstances:

- The insurer shall give full coverage, if the aggravation of risk was informed before the insured event (sinistro) or within 14 days after the insured had knowledge of circumstances of aggravation;
- If the insurer has knowledge of the undisclosed aggravation, after the insured event, the insurer is entitled to reduce the amount to be paid in proportion to the difference between the amount of premium paid and amount of the premium that would have been paid if the aggravation of risk was fully disclosed.
- In case of intentional undisclosed with the purpose of gaining an advantage, the insurer is entitled to refuse payment, and can keep the premiums already due.