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 ambit of disclosure under Swiss law for an applicant is set out in Article 4 (I) of the Swiss Federal Contract Act (hereafter **"ICA"**). According to that provision, the applicant has a duty to notify the insurer in writing, based on a questionnaire or upon any other form of written enquiry, of all facts relevant to the assessment of the risk to be insured.

Relevant risk factors are circumstances which may influence the insurer's decision to conclude the contract at all or on the basis of the agreed terms (Article 4 (II) ICA). The risk factors which the insurer addresses by written, precise

and unambiguous questions in a questionnaire prior to the conclusion of the insurance contract are assumed to be material (Article 4 (III) ICA).

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?

Swiss law does not provide for a duty to disclose information upon the insured's own initiative.

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?

According to Article 4 ICA the applicant must disclose all facts he is or acting in good faith should be aware of at the time of the conclusion of the contract.

As a result, the scope of disclosure relates to both a subjective and to some extent also an objective test. On the one hand, the applicant must disclose all relevant risk factors he knows at the time of the conclusion of the contract even if he would not be required to have knowledge of such facts, from an objective viewpoint (*subjective element)*. On the other hand, Article 4 ICA states an *objective element* such that the applicant is required to inform the insurer of those relevant factors that he should know on the basis of his personal circumstances (eg intelligence, degree of education, background experience). Hence, put in *simplified* terms, Swiss law follows a mixed regime regarding the existence of subjective or objective disclosure duties (cf Swiss Federal Supreme Court decision, reported at BGE 118 II 333, p 337)).

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?

Before concluding the insurance contract, the insurer is obliged to inform the policyholder about its identity and the essential elements of the insurance such as:

- the insured risk,
- the insurance coverage,
- the premiums due and the policyholder's obligations,
- the term and termination of the insurance contract.

The ICA does, however, not provide for a standalone norm that requires insurers to draw the insured's attention to exclusions and limitations.

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?

Two scenarios are to be distinguished:

1) *Aggravation of risk by acts of the policyholder*.

If the policyholder provokes a significant aggravation of risk during the insurance, the insurer generally ceases to be bound by the contract for the future. Subject to an agreed duty in that respect, there is no actual duty to inform the insurer of such increase. However, with a view to the below possibility to avoid loss of coverage (cf. the remarks regarding Article 32 ICA), the insured is well advised to inform the insurer.

2) *Aggravation of risk without acts of the policyholder.*

If the significant aggravation of risk is not due to acts of the policyholder, the consequences set forth under item 1) only apply if the policyholder did not notify this aggravation to the insurer in writing and without delay after having come to know it.

Regardless of item 1) and 2) *above* the aggravation of risk remains without legal consequences under the conditions as provided in Article 32 ICA, the most important of which are:

- If the aggravation of risk had no bearing on the insured event and on the extent of the insurer's obligation to indemnify.
- If the insurer expressly or tacitly renounced the right to withdraw from the contract, particularly if the insurer did not notify its withdrawal from the contract to the policyholder within 14 days after the policyholder had informed the insurer of the aggravation of the risk by written notice.

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

The aggravation of risk is material if it affects a fact which is important for the assessment of the risk (cf. Question 1 regarding our remarks on Article 4 ICA) and whose scope the parties determined when concluding the contract.

5. **<u>The Insurer's Post Contractual Duty</u>**

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.)?

Swiss law does not provide for disclosure provisions. However, as any person the insurer must adhere to and is bound by the principle to act in good faith (Article 2 of the Swiss Civil Code). The unjustified refusal of the insurer to give its view

on coverage questions may lead to legal sanctions, such as liability to pay for procedural costs in a later coverage dispute. To the extent an insurer comments, he should make appropriate reservations so as to give not the wrong impression of any sort of unwanted consent, eg regarding the acknowledgement to provide coverage.

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, when concluding the insurance contract, the person who is obliged to notify omits to notify or incorrectly notifies a material risk factor the insurer is entitled to terminate the contract as a whole by written notice. If the contract is terminated, the insurer's obligation to indemnify damages already occurred terminates, provided that the omitted or incorrect notification of the significant risk factor has influenced the occurrence or extent of damages. If the obligation has already been fulfilled, the insurer is entitled to restitution (Article 6 ICA).

However, according to Article 8 ICA the insurer may not terminate the contract despite the violation of the notification obligation for a number of exemptions of which the most relevant are:

- if the non-disclosed or incorrectly notified fact had ceased to exist before the insured event occurred,
- if the insurer knew or must have known the incorrectly disclosed fact,
- as general rule, if the person who is obliged to notify did not answer one of the questions asked and the insurer nevertheless concluded the contract.

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

Swiss law follows an all or nothing principle in the sense that, provided that no exception as per Article 32 ICA applies (cf question 4.a *above*), the insurer owes no coverage.