

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?

Yes. Sub-Articles 1 and 3 of Article 944 of the Civil Code provide for an obligation of the insured to provide the insurer with the information that is necessary for concluding a contract and evaluating the insured risk, as well as the consequences of breaching such obligation:

“1. Upon entering into an insurance contract, the insured (or policyholder) must inform the insurer about the circumstances known to him that have material significance for determining the probability of occurrence of the insurable event and the amount of possible damage (insurance risk) if the insurer is not or should have not been aware of such circumstances.

Material circumstances are, in any case, those circumstances that are expressly defined by the insurer in his standard insurance contract form (insurance policy) or in his written request."

The expression, "in any case", which is used in Article 944 of the Civil Code, means that the insured must also disclose any other information that is material (or important) for the purposes of evaluating the insurance risk. However, the courts apply this provision in a narrow way. First, the courts interpret the policyholder's disclosure obligation as applying only to the information expressly requested by the insurer. Second, in the absence of any provisions to this effect in the law, the courts oblige the insurer to verify the information provided by the insured. Third, the courts extend the rule of Article 948 of the Civil Code that limits the insurer's right to challenge the insurance value of the insured property in case he did not check it at the inception. They apply this estoppel to any disputes regarding the breaches of the disclosure obligations by the insured. Finally, the courts take a very strict approach and set a very high bar for an insurer that wants to demonstrate the insured party's intent to mislead him.

- 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?

No.

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 scope of the disclosure duty is limited to the applicant's actual duty by Article 944 of the Civil Code:

1. *Upon entering into an insurance contract, the insured (or policyholder) must inform the insurer about the circumstances known to him that have material significance for determining the probability of occurrence of the insurable event and the amount of possible damage (insurance risk) if the insurer is not or should have not been aware of such circumstances.*

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?

Legislation does not impose such duty on the insurer but the court practice has developed such implied duty. For example, Resolution of the Court of Saratov Region (case No 33-1473) provides:

“As long as the burden of requesting and collecting of information about the risk is on the insurer it is the insurer who bears the risk of entering into the contract without a proper check of the state of health of the insured and without establishing circumstances affecting the risk insured”.

A similar argument was used by the Moscow City Court (case No 33-49083/2016) which supported the insured: *“the insurer did not use its right to check the risk insured, did not request medical documents from the insured, did not offer the insured to pass medical check-up. The court arrived at the conclusion that the insurer did not exercise due diligence when entering into the contract”*

“The insurer relied on the good faith of the insured and did not check the provided information.”

“The insurer could check and should have checked (emphasis added) the information provided by the liquidator before entering into the contract or within reasonable time forthwith.”

“Obtaining information is not a burdensome process. The information about the claims and lawsuits against the insured can be found on the official website of the Supreme Commercial Court of the Russian Federation on the Internet, the information on the disciplinary sanctions imposed on the liquidator can be found on the website of the self-regulatory body.”

Therefore, the highest courts establish a rule, “trust but verify”, and discourage the insurer from relying on good faith of the insured and require him to check all the facts provided by the insured under the risk of losing his defence under Sub-Article 3 of Article 944 of the Civil Code (invalidation of the policy *ab initio*).

- 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?

No, but the Central Bank (the regulator) is working on introducing such duty by promulgating compulsory industry standards.

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?

Yes. According to Article 959 of the Civil Code, the insured must inform the insurer about the increase of the risk insured:

Article 959. Consequences of the increase of the risk insured during the term of the insurance contract

1. During the term of the non-life insurance contract the insured (the beneficiary) must notify the insurer about any significant changes in the circumstances disclosed at the inception of the contract immediately upon becoming aware of them provided such changes can materially influence on the increase of the risk insured.

Significant are in any case those changes that were expressly mentioned in the insurance contract (the policy) and in the Rules of insurance delivered to the insured.

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

According to Article 959 of the Civil Code, significant are in any case those changes that were expressly mentioned in the insurance contract (the policy) and in the Rules of insurance (general terms and conditions) delivered to the insured. However, the courts tend to interpret this provision in a narrow way by limiting such circumstances only to those expressly mentioned in the policy and in the general terms and conditions.

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 on Organisation of Insurance Industry requires the insurer to agree with the insured the deadline for the insured providing all necessary documents regarding the insured event and for the insurer responding on the coverage position. Usually, this term is 30 calendar days from the date when all necessary documents were provided.

The policy and/or the general terms and conditions must provide for an exhaustive list of reasons for declination and the insurer must disclose them in the declination letter.

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)?

According to Article 944 of the Civil Code, if it is established after the conclusion of an insurance contract that the insured has breached his/her pre-contractual disclosure duty, the insurer has the right to demand that the contract be invalidated in full *ab initio* and to claim damages.

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

According to Article 959 of the Civil Code, in case the insured breached his/her post-contractual disclosure duty, the insured is entitled to demand termination of the insurance contract and compensation of damages caused by termination of the contract.