AIDA – RIO CONGRESS 2018.

1. Insured´s duty of pre-contractual disclosure

a) Does your national law impose on insured the duty of answering questions asked by insurance company?

Answer – In Brazil, the insurance law in force is the Decree-Law No. 73, of 1966, which provides on the National System of Private Insurances and regulates the insurance operations, especially within the administrative scope. The system is composed of the National Council of Private Insurance - CNSP and the Superintendence of Private Insurance - SUSEP. The National Council of Private Insurances is responsible for establishing guidelines and standards of the national policy of private insurances and the Superintendence of Private Insurance - SUSEP for the regulation and inspection of the guidelines of the CNSP.

Within the contractual scope, insurances are regulated by Law No. 10.406, of 2002, commonly referred to as Brazilian Civil Code. The insurance operations that have the participation of a consumer are regulated by Law No. 8.078, of 1990, the Consumer´s Protection and Defense Code. For the Brazilian Consumer´s Protection Law, consumer is defined as the final recipient, which means the one that contracts for own use, without any gain incentive. It is also consumer´s characteristics for the Brazilian law its vulnerability (*poor party or weak party)* and lack of sufficiency.

The Decree-Law 73, of 1966, establishes that:

> Article 9 - Insurances shall be contracted **upon proposals signed by insured, its legal representative or by**

qualified broker, with issuance of the respective policies, except for the provision of the following article.

Article 10. It is authorized the contracting of insurances by simple issuance of insurance cover note, upon oral request from the interested party.

Insurances in Brazil may be contracted by policy or by issuance of cover notes. In the case of policies, it is mandatory the prior completion of **insurance proposal by insured,** which moment shall be provided all data on risks that is intended to be covered in the agreement.

For mass insurances, proposals are previously prepared by the insurance companies. For insurances not in mass, the proposals are accompanied with a **questionnaire of risks,** through which insureds provide higher detailing of the risks that intend to cover in the insurance agreements.

Law No. 10.406, of 2002, the Brazilian Civil Code, establishes that the insured **must provide all essential data, so that insurance company assesses the risk**. Such establishment is contained in articles 759, 765 and 766 of the Civil Code, written as follows:

- Article 759 – The issuance of the policy should be preceded of written proposal with representation of the elements of interest to be guaranteed and the risk.

- Article 765 – Insured and insurer are obliged to guard in the conclusion and in the execution of the agreement, **the strictest good-faith and accuracy, both as to the object, and the circumstances and representations related thereof.**

- Article 766 – **If the insured, by itself or by its representative, makes misrepresentations or omits circumstances** that

may affect the acceptance of the proposal or premium rate, it shall lose the right to warranty, in addition to be obliged to the due premium.

Sole paragraph - If the inaccuracy or omission in the representation does not result in bad-faith of the insured, insurer shall be entitled to resolve the agreement, or collect, even after loss, the difference of the premium.

The Newsletter No. 256 of the Superintendence of Private Insurance - SUSEP, of June 16, 2004, that provides on the minimum structure of the Contractual Conditions and of the Actuarial Technical Notes of the Loss Insurance Agreements, in article 2 establishes that:

Article 2 - Proposal and General Conditions of the plan should contain the following information:

I - "The insurance acceptance shall be subject to the risk analysis";

Thus, in Brazil, insured should provide all data on risks that intends to insure, especially because this is what characterize the strictest good-faith and accuracy.

b) **Does your national law impose to applicant/insured the duty of disclosing information by own initiative? If so, in which circumstances.**

Answer - The establishments of articles 765 and 766 of the Brazilian Civil Code are in the objective sense that the insured always undertakes to make representations of good-faith, that is, true and containing all risk circumstances that may affect the acceptance of the proposal.

2. **Scope of the duty of disclosure by applicant of the insurance - objective or subjective?**

Is the applicant´s right of disclosure limited to the actual knowledge that it has, or also includes information on which it should have been aware of?

Answer - In Brazil, in the contracting of insurances not in mass, the Civil Code establishes that the candidate (applicant) provides all data on the risks, with strictest good-faith and accuracy, which includes, objectively and subjectively, all risks on which it has any type of knowledge or experience. It is expected that the person contracting corporate insurances that has extended knowledge on the own risks of its field of activity.

In the contracting of insurances in mass, carried out by non-professional applicant, that is, consumers, what law establishes is that they also act in good-faith and provide all objective data on the risks that they intend to insure. Consumers are not imposed to provide subjective data on risks, because it is not expected to have thorough knowledge on the types of risks and their occurrences.

3. **<u>Insurance companies´pre-contractual duties</u>.**

a) **Does your law impose to an insurance company the pre-contractual duty to investigate the business of the applicant, in order to obtain relevant information?**

Answer - Within the scope of the insurances contracted by consumers, that is, insurances in mass, the law does not impose insurance companies the duty to investigate insureds to obtain relevant information. In insurances not in mass, insurance companies take care to obtain all relevant information on insureds, especially when referring to major risk. For prevention of money laundering, Newsletter No. 445, of July 2, 2012, the Superintendence of Private Insurance - SUSEP provides

on the specific internal controls for prevention and combat crimes of "laundering" or concealment of goods, rights and values, or crimes that they may relate to, the follow-up of the performed operations and the operation proposals with persons politically exposed, as well as the prevention and restraint of terrorism financing.

For such events, in compliance with article 6 of Newsletter No. 445, of 2012:

Article. 6- Internal control procedures mentioned in article 5 of this Newsletter should comprise, at least, the following items:

I – establishment of a policy of prevention and combat to money laundering and terrorism financing, which includes guidelines on risk assessment in the subscription of operations, in the contracting of third-parties or other related parties, in the development of products, in the private negotiations and in the operations with assets;

II – preparation of criteria and implementation of procedures of identification of customers, beneficiaries, third-parties and other related parties, and of maintenance of records related to products and procedures exposed to risk of serving money laundering and terrorism;

III - documenting and implementation of the identification, monitoring, risk analysis and operations communication procedures that may be constituted in indications of money laundering or terrorism financing, or if engaged with them;

IV - preparation and execution of specific training program of qualification of the employees for the compliance with the

provision of Law No. 9.613/98, in this Newsletter and other regulations related to money laundering and prevention and combat to terrorism financing;

V - preparation and execution of annual program of internal audit that verifies the compliance with the procedures of this Newsletter, in all their aspects, and such verification may, at the discretion of the company, re-insurer or broker be conducted by their internal audit department or by independent auditors.

Thus, for prevention of laundering money crimes, the Brazilian insurance companies must act pro-actively to investigate applicant´s business and obtain relevant information, although it is not related to the insurable risk.

b) **Does your law impose to insurance company the duty of verifying the understanding of the insured regarding the coverage of the insurance and warn insured for limitations and exclusions?**

Answer - For insurances in mass, in which there is a consumer as contracting party/insured, Law No. 8.078, of 1990, establishes in article 6, item III, that providers of products and services (insurance companies, for example) are responsible for informing consumer clearly and appropriately on the characteristics of the products and services. It also establishes, in article 54, paragraph 4, that the contractual clauses that result in the limitation of consumer´s right should be drafted with emphasis, in order to permit its immediate and easy understanding.

There is no express and objective legal provision so that insurer verifies if insured understood the coverage of the insurance and its limitations and exclusions.

4. **Insured´s right of post-contractual disclosure**

a) **Does insurer have the duty to inform insurance company on an important change on the risk? If yes - what is the coverage of the duty?**

Answer - Article 769 of Law No. 10.402, of 2002, Brazilian Civil Code, establishes that:

Article 769 - Insured must inform insurer, as soon as it knows, all incident liable to aggravate significantly the covered risk, under the penalty of losing the right to warranty, if proved the omission by bad-faith.

Paragraph 1 - Insurer, provided that, within the fifteen days following the receipt of the aggravation notice of the risk, without insured´s fault, may give knowledge, in writing, on its decision to resolve the agreement.

Paragraph 2 - The resolution shall only be efficient thirty days after the notification, and insurer should refund the difference of the premium.

Thus, **insured must immediate inform the incident capable of generating significant aggravation of the risk.** If it does not do it so, and proved the omission by bad-faith, it shall lose the right to warranty. If it does not do it so, and proved it did not omit by bad-faith, that is, in the cases of negligent aggravation, there is no legal provision in the Brazilian law for the loss of warranty, but in compliance with the principle of the contractual balance adopted by

the Brazilian law, is legal to insurer to claim for the difference of the amount of the premium, to be subtracted from the indemnity amount, to be paid to insured, in the event of occurrence of risk.

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

Answer - There is no legal definition for material change in the Brazilian legal order.

5. **Insurance company´s post-contracting duty**

Does your law impose on the rights of collection of an insurance company after occurrence of an insured event (as the duty to provide coverage, in writing, within a limit term, the duty to disclose all reasons for declination, etc.)?

Answer - In the insurances in mass, which contracting party/insured is a consumer, Law No. 8.078, of 1990, establishes that consumer is entitled to information and it includes reasons of the negative of coverage, justified in a form that consumer may discuss its grounds and require the change of the decision. In the insurances not in mass, the duty of good-faith established by Law No. 10.406, of 2002, the Civil Code includes the obligation of insurer to explain the reasons that establish the lack of coverage of damage fact, so that insured may challenge the decision, in case there is elements for that. In both events, the maximum term should be the term of payment of the indemnity value established by the Superintendence of Private Insurance - SUSEP within thirty (30) days.

6. **Remedies in the event of failure of insured´s duties of disclosure**

a) **What is the remedy of an insured, in the event it breaches its duty of pre-contractual disclosure ("all or nothing" rule or partial settlement?)**

Answer - As established by article 766. of Law No. 10.406, of 2002, the Brazilian Civil Code,

> **Article 766 – If the insured, by itself or by its representative, makes misrepresentations or omits circumstances that may affect the acceptance of the proposal or premium rate, it shall lose the right to warranty, in addition to be obliged to the due premium.**
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> **Sole paragraph - If the inaccuracy or omission in the representation does not result in bad-faith of the insured, insurer shall be entitled to resolve the agreement, or collect, even after loss, the difference of the premium.**

Thus, in the cases in which representations are false or omitted by bad-faith, insured shall not have any right resulted from the agreement, in addition to be entitled to the payment of the premium amount.

Should representations be false or omitted without proved bad-faith, then insurer may terminate the agreement or, after the loss, collect the difference of the premium and indemnify the insured.
This rule is valid for all agreements entered into by consumers, whenever they are correctly informed, prior contracting, on the consequences of the omission or the lack of correct information on the risk.

b) **What is the case of insurance companies, should an insured breach its duty of post-contractual disclosure ("all or nothing" rule or partial settlement?)**

Answer - Article 771 of Law No. 10.402, of 2002, Brazilian Civil Code, establishes that:

> **Article 771 - Under the penalty of losing the right to indemnity, insured shall participate the loss to insurer, as soon as it knows, and shall take the immediate measures to reduce the consequences.**
> **Sole paragraph - Insurer is responsible, until the limit established in the agreement, for the expenses of safeguard consequent to loss.**

Insured must inform the loss to insurer, as soon as it knows on its occurrence, and provide data necessary, so that insurer may perform its regulation work of the loss. Insured must also take measures to prevent that the results of the loss get worse.

If the insured does not inform the loss by bad-faith, it shall lose the right to indemnity, totally. Should the lack of communication result from reasons that do not characterize bad-faith, insured shall be entitled to full indemnity for the damages that may prove, provided that evidence shall always be its obligation in compliance with the good faith and the mutualism.

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