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 applicant/insured has such a duty according to Turkish Commercial Code (hereafter "TCC"). Pre-contractual disclose duty is regulated in Art. 1435-1443 TCC. The TCC has adopted the combined method that consists of the list method and the declaration method in fulfillment of pre-contractual duty of disclose. In this context, according to the Art. 1436 headed "Written Questions" of TCC, if the insurer gives a list of questions in writing while concluding the insurance contract applicant/insured has to answer these questions.

In other respects, the insurer may also ask questions about points not included in the list that the insurer needs to learn. These questions must be in writing and clear. If the insurer asks questions to applicant/insured not included in the list, the applicant/insured has to answer these questions to be considered as duly performed the duty of disclosure (Art. 1436/II TCC).

It is necessary to emphasize, if the insurer gives a question list to the insured/applicant and the contract concludes even if the insured/applicant does not reply some questions; the applicant/insured is supposed as he duly perform the disclosure duty (Art. 1442/I-c TCC).

As known, "age" is a very important particular in life insurance[1]. Therefore, in Art. 1497 TCC the Turkish legislator inserted a special provision relating to the disclosure duty about "age" in life insurance contracts. According to Art.1497, the wrongful declaration of the applicant/insured's age at the conclusion of a life insurance contract has a special sanction. (See the special sanction in the answer of the question 6 (a) of this Questionnaire)

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?

According to Art. 1435 TCC, the applicant/insured has to inform the insurer of all important points that applicant/insured knows or ought to be aware of at the time of conclusion of the insurance contract. "Important points" means the points which in case they are not disclosed at all or disclosed insufficiently or wrongly to the insurer, the insurer could have decided not to conclude the contract or to conclude the contract with different terms. If the insurer put questions to applicant/insured in writing or verbally while concluding the contract, until proven otherwise, the points relating to questions are supposed as important. If a point that has not been included in the questions directed to the applicant/insured in writing/verbally is considered as "important" the applicant/insured shall inform the insurer of these points as well on his own initiative.

On the other hand, according to Art. 1436 (I), if the insurer has given to the applicant/insured a list of questions to answer, the applicant/insured shouldn't hide any important information remaining out of the scope of the question list in bad faith. In other words, the applicant/insured has a duty to disclose information upon the applicant's own initiative about points that if the applicant/insured hide these points he shall be deemed in bad faith.

Another rule that should be mentioned in this regard is Art. 1443 TCC. According to the mentioned Article, the provisions relating to the duty of disclosure shall be enforced to changes that have occurred in between the proposal and the acceptance. In other words, the applicant/insured has to inform the insurer on its own initiative about the changes that have occurred after performing of the duty of disclosure but before the conclusion of the contract despite the fact that the applicant/insured performed the duty of disclosure. In this respect, in order to state that the applicant/insured has a duty of disclosure on his own initiative, in addition to the fulfillment of the standard

[1] Samim ÜNAN, Hayat Sigortası Sözleşmesi (Life Insurance Contract), (Beta 1998), p. 156.

pre-contractual duty to disclose information, it is necessary that an important situation occurred which would affect the insurer's decision, that the situation at the time of disclosure changed or that a point which was not important at the time of disclosure became important[2]. As a consequence, the answer to the question is affirmative.

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?

As a rule, the applicant shall inform the insurer of all important points that is effective on the decision of the insurer about making the contract or making the contract with other terms and conditions according to the Art. 1435 TCC. Aforesaid points in the Article include the points that are in the applicant's actual knowledge and also points that applicant should have been aware of. Hence the applicant shall inform the insurer the points that he/she knows and as well as he/she does not know but he/she could know. Within this scope, the applicant shall inform the insurer about points he/she has to know but he/she does not know carelessly or keep away from knowing with on purpose.

In this context it must be specified that the applicant is not imposed a duty to inform points that of the insurer is aware (Art. 1438 TCC). In other words, the applicant can not be supposed breaching the duty of disclose if the insurer knows the point that was not informed. In the present case, the party with the burden of proof is the applicant (Art. 1438 TCC).

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, the Turkish law does not impose on the insurer such a duty. The applicant has a pre-contractual disclosure duty through which the insurer may define the risk and adjust the terms of the contract accordingly.

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?*

A pre-contractual information duty is imposed on the insurer by Art. 1423 TCC. Furthermore, The Regulation on the Information Duty in Insurance Contracts

[2] Zehra ŞEKER ÖĞÜZ, Türk Ticaret Kanunu ve Türk Ticaret Kanunu Tasarısına Göre Sigorta Sözleşmelerinde Sözleşme Öncesi İhbar Görevi (Pre-Contractual Disclosure Duty in Insurance Contracts According to Turkish Commercial Code and The Draft Turkish Commercial Code), (Filiz 2010), p. 91.

(RegInfo – Official Reporter Date: 28.10.2007, OR Nr.: 26684) contains detailed provisions on the particulars regarding the exercise of this duty. Therefore, the following answer to this question is completely based upon the legislation. Art. 1423 TCC is located among the general provisions of TCC, hence it is applicable to all insurance contracts.

Art. 1423 TCC draws a frame for insurer's pre-contractual information duty by regulating this duty in general. Therefore, the specifics in relation with ascertaining the insured's understanding of the scope of the insurance, and drawing the insured's attention to exclusions and limitations as in the question are not explicitly named there. But the expressions mentioned in Art. 1423 TCC such as "all the information regarding the insurance contract to be concluded", "the rights of the insured", and "the terms to which the insured should pay special attention" obviously cover the particulars in question. Besides, it is stipulated in Art. 8/I RegInfo that the insurer shall hand over an information form to the applicant before the conclusion of the contract. The content of the form is specified in the following paragraph. Accordingly, among other notices, it shall contain general warnings regarding the contract to be concluded, the remarks on the scope and the exclusions of the assurance to be provided. Consequently, the answer to the question is affirmative.

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?

The insured has such a duty in Turkish Law. According to Art. 1444 TCC, after the contract has been concluded, insured shall not act or transact that would lead to an increase of the amount of indemnity by aggravating of the risk or current status, without the insurer's prior consent. If the insured or another person authorized by the insured act or transact to increase the possibility of the realization of the risk or aggravate the current status or if a situation occurs that has been clearly counted as aggravation of the risk by the parties at the conclusion of the contract, the insured shall inform the insurer immediately; if these actions have been taken out of the insurer's knowledge the insured shall inform the insurer within ten days as of the date of awareness (Art. 1444/II TCC). As is also understood from the Art. 1444, primarily it is forbidden to act or transact that would lead to an increase of the amount of indemnity by aggravating of the risk or current status for the insured without the insurer's prior consent. Secondly the insured shall inform the insurer, if there is a material change no matter whether the insured or another person authorized by the insured has caused the material change. The material change that shall be informed is that increase the possibility of the occurrence of the risk or aggravate the current status or a change that counted as aggravation of the risk by the parties at the conclusion of the contract. Although not clearly emphasized under the TCC Art.

1444, a change must be settled as to counted as a material change and in the scope of the disclosure duty[3].

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

Material change means the change in peril situation which is not favorable for the insurer. This can occur by coming in view the new factors or disappearing the present favorable factors. For instance, using a building as a petrol depot which has been used as a pulse depot before is an example of coming in view a new unfavorable factor; dismantling the window bars of a flat that is on the first floor is an example of disappearing the present favorable factor. It is necessary for a change to be assumed as a material change to be an unforeseen one. For example, "aging" is not a material change as it is not an unforeseen situation. Finally, the change must be enduring to be supposed a change as a material change[4]. In this scope, the change the use of a transportation vehicle shall be considered as a material change, for instance changing the use of a vehicle that has been used to carry pulse in order to carry petrol, will be a material change.

Subjective aggravation of the risk means that the aggravating situation has been caused by the insured's actions[5]. On the other hand, objective aggravation of the risk means the situation aggravated as a result of a third person's action or by itself (without any outer effect) where the insured has not involved[6]. According to the TCC, as the change that could be considered as risk aggravation may occur both by the insured or without the insured's knowledge, the TCC considers both objective and subjective risk aggravation subject to the duty of disclosure. Hence, for instance the deactivation of the alarm system in a factory is part of the disclosure duty within the scope of subjective risk aggravation; also it is part of the disclosure duty within the scope of objective risk aggravation for a cold storage depot if the depot next to it is started to be used for explosive material storage.

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.)?

No, the Turkish law does not impose on the insurer such a duty. However, in practice, it is seen that the insurers serve a reply regarding the coverage position and clarify the reasons if the insured's request has been declined.

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[3] Rayegan KENDER, Türkiye'de Hususi Sigorta Hukuku (Private Insurance Law In Turkey), (On İki Levha 2015), p. 271

[4] KENDER, p. 271.

[5] Merih Kemal OMAĞ, Türk Sigorta Hukukunda Rizikonun Ağırlaşması Sorunu (Issue of Aggravation of The Risk in Turkish Insurance Law), (AIDA Turkey 1985), p. 65; KENDER, p. 272.

[6] OMAĞ, p. 66-67; KENDER, p.272.

On the other hand, there are two provisions worth to mention here, which do not directly impose such a duty, but are relatively relevant to this subject. In that, according to Art. 12/I RegInfo, the insurer shall answer all the information requests of the insured submitted in writing or by electronic means in 15 working days starting to run from the date that the request has been arrived.
In addition to that, pursuant to Art. 30/XIII of the Insurance Business Act (Act Nr.: 5684, Date: 3.6.2007, OR Date: 14.6.2007, OR Nr.: 26552), unless it is evidenced that the insured's request addressed to the insurer has been totally or partially declined by the insurer, the insured shall not be entitled to apply to the Insurance Arbitral Commission relating to the concerned dispute. Nevertheless, provided that the insurer did not give a written answer in 15 working days starting to run from the date of the request, the insured yet may apply to the Insurance Arbitral Commission in relation to the concerned dispute.
These abovementioned regulations may not be deemed as directly imposing on the insurer such a duty as in the question. Anyhow, as it is seen, the first one imposes on the insurer a duty to answer all the information requests of the insured in a certain time limit. The second one provides that not answering insured's request within a certain time limit results that the insured is entitled to apply to the Insurance Arbitral Commission regarding the concerned dispute as if his/her request has been declined.

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)?

The insurer's remedies in case an insured breached his/her pre-contractual disclosure duty are regulated in TCC in detail. Therefore, the following answer to this question is completely based upon the legislation. These remedies dealt with below are regulated among the general provisions of TCC, thus they are applicable to all insurance contracts. However, there are two special provisions regarding the pre-contractual disclosure duty of the insured in life insurance which will be mentioned at the end of the answer.
First of all, it has to be pointed out that the time the insurer has become aware of the insured's breach of pre-contractual disclosure duty is determining on the enforceable remedy. Provided that the insurer finds out the breach before the materialization of the risk, the insurer may avoid the contract or request additional premium within 15 days starting to run from the date that the insurer has become aware of the breach of the duty (Art. 1439/I TCC). If the insured has not accepted the request of additional premium within 10 days, the contract shall be deemed to be avoided (Art. 1439/I TCC). It has to be mentioned here that the insurer shall not be entitled to avoid the contract if the insurer has waived its right of avoidance explicitly or implicitly, if the insurer itself caused the breach of the pre-contractual disclosure duty or if the insurer

has concluded the insurance contract despite the fact that some of its questions were not answered (Art. 1442 TCC). Besides that, in case the insurer has knowledge about the matters being disclosured falsely or not at all, the insurer is not permitted to avoid the contract (Art. 1438 TCC). The burden of proof in this regard lies upon the insured (Art. 1438 TCC). The insurer must declare its will of avoidance to the insured (Art. 1440/I TCC). Provided that the insured has breached his/her pre-contractual disclosure duty intentionally, the insurer who has avoided the contract shall be entitled to claim the part of the premium which is related to the time period during which it has carried the risk (Art. 1441 TCC). Accordingly, in other cases the insurer shall not be entitled to claim the relevant premium.

As to the possibility that the insurer becomes aware of the breach after the materialization of the risk, TCC introduces a sanction system based upon the negligence and the causal relation. The enforceable remedy varies by the degree of the negligence and by the existence of the casual relation. In that, if the breach of the duty affected the amount of the insurance indemnity or the insurance sum to be paid, or if the breach was relevant to the materialization of the risk, and therewithal if the insured was negligent by breaching his/her duty, a deduction of the insurance indemnity or insurance sum shall be made in compliance with the degree of the negligence. In case the insured breached the pre-contractual disclosure duty intentionally and therewithal there was a connection between the breach and the materialization of the risk, the insurer shall be relieved of its obligation to pay the insurance indemnity or the insurance sum. If there is no such connection, the insurer shall pay the insurance indemnity or the insurance sum in accordance with the proportion between the premium which was actually paid and the premium which ought to be paid.

Apparently, there is no enforceable remedy for the insurer to pursue, if the insured has violated his/her pre-contractual disclosure duty without negligence, or in cases he/she is negligent not reaching the degree of intent, if there is no connection between the violation and the materialization of the risk.

It appears that this legal framework establishes the solution of partial discharge rather than the “all or nothing” rule.

Finally, two special provisions regarding the pre-contractual disclosure duty of the insured in life insurance have to be mentioned in this context. One of them imposes a restriction to the insurer’s right of avoidance of the contract. In that, the insurer shall not be entitled to avoid the contract on the grounds that the insured has breached his/her pre-contractual disclosure duty provided that the insurance policy had been in effect for five years including the renewals thereof, unless the insured breached his/her duty intentionally. In cases where there is no intentional violation, the insurer may avoid the contract only if the increase of the risk in consequence of the insured’s breach of his/her duty fell outside the limits determined pursuant to the technical principles. If the insurer has no right of avoidance of the contract, the only enforceable remedy the insurer may pursue is requesting additional premium.

Supposing that the insured has not accepted to pay the additional premium, the insurer shall pay the insurance sum in accordance with the proportion between the premium actually paid and the premium needed to be paid (Art. 1498 TCC).
Another special provision worth to mention here is Art. 1497 TCC, which specifically regulates the false declaration of age in life insurance. Accordingly, provided that the false declaration of age made before the conclusion of the contract has led the premium to be fixed lower than it should be, the insurer shall be entitled to pay the insurance sum in accordance with the proportion between premium which was actually paid and the premium which ought to be paid. In cases the risk materialized already and the insurance sum was paid, the insurer may claim the repayment of the surplus with the interest accrued thereon (Art. 1497/I TCC). If the false declaration of age has led the premium to be fixed higher than it should be, then the situation is symmetrical. In that case, the insurance sum shall be increased in compliance with the premium actually paid. If the insurance sum was paid already, the deficient amount shall be paid by the insurer (Art. 1497/II TCC). The insurer shall not be entitled to avoid the contract on the grounds that the age has been falsely declared, unless the real age is outside the limits determined pursuant to the technical principles at the time of the conclusion of the contract (Art. 1497/III TCC).

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

The insurer's remedies in case an insured breached his/her post-contractual disclosure duty are regulated in TCC in detail. Therefore, the following answer to this question is completely based upon the legislation. These remedies dealt with below are regulated among the general provisions of TCC, thus they are applicable to all insurance contracts. However, there is a special provision regarding the post-contractual disclosure duty of the insured in life insurance which will be mentioned at the end of the answer.
First of all, it has to be pointed out that the time the insurer has become aware of the insured's breach of post-contractual disclosure duty is determining on the enforceable remedy. Provided that the insurer finds out the breach before the materialization of the risk, the insurer may terminate the contract or request additional premium within 1 month starting to run from the date that the insurer has become aware of the breach of the duty (Art. 1445/I TCC). If the insured has not accepted the request of additional premium within 10 days, the contract shall be deemed to be terminated (Art. 1445/I TCC). It has to be mentioned here that the insurer shall not have the right of terminating the contract if the situation existed before the aggravation of the risk has been re-established (Art. 1445/II TCC). Besides that, the insurer shall not be entitled to terminate the contract or to request additional premium provided for the

circumstance giving rise to the aggravation of the risk is either a situation related with the insurer's interest, or an event the insurer is responsible for, or performance of humanitarian duties, or in life insurances, the alterations in the insured's medical condition (Art. 1445/IV TCC).

As to the possibility that the insurer becomes aware of the breach after the materialization of the risk, TCC introduces a sanction system based upon the negligence and the causal relation. The enforceable remedy varies by the degree of the negligence and by the existence of the casual relation. In that, if the breach of the duty affected the amount of the insurance indemnity or the insurance sum to be paid, or if the breach was relevant to the materialization of the risk, and therewithal if the insured was negligent by breaching his/her duty, a deduction of the insurance indemnity or insurance sum shall be made in compliance with the degree of the negligence. In case the insured breached the post-contractual disclosure duty intentionally and therewithal there was a connection between the breach and the materialization of the risk, the insurer shall be entitled to terminate the contract. In that case, the insurer shall be relieved of its obligation to pay the insurance indemnity or the insurance sum. If there is no such connection, the insurer shall pay the insurance indemnity or the insurance sum in accordance with the proportion between the premium which was actually paid and the premium which ought to be paid (Art. 1445/V TCC). In cases the risk materialized in connection with the aggravation during the time period provided for the notification of the termination of the contract or the time limit set for the termination being effective, the insurance indemnity or the insurance sum shall be calculated in compliance with the proportion between the premium actually paid and the premium which should be paid (Art. 1445/VII TCC).

Apparently, an enforceable remedy for the insurer to pursue is absent, if the insured has violated his/her post-contractual disclosure duty without negligence, or in cases he/she is negligent not reaching the degree of intent, if there is no connection between the violation and the materialization of the risk.

It appears that this legal framework establishes the solution of partial discharge rather than the "all or nothing" rule.

Provided that the insured has breached his/her post-contractual disclosure duty intentionally, the insurer who has terminated the contract shall be entitled to claim the premium of the current premium period (Art. 1445/VI TCC). Accordingly, in other cases the insurer shall not be entitled to claim the concerned premium. As it is seen, this provision is a replication of the relevant regulation relating the insured's pre-contractual disclosure duty. However, considering that the relevant remedies are different, it is questionable whether or not this outcome is fit for the remedy of the *termination* of the contract.

Finally, a special provision regarding the post-contractual disclosure duty of the insured in life insurance has to be mentioned. It imposes a restriction to the insurer's right to terminate the contract. In that, the insurer shall not be entitled to terminate the contract on the grounds that the insured has breached his/her post-contractual

disclosure duty provided that five years including the renewals have been passed since the aggravation of the risk, unless the insured breached his/her duty intentionally. In cases where there is no intentional violation, the insurer may terminate the contract only if the increase of the risk in consequence of the insured's breach of his/her duty fell outside the limits determined pursuant to the technical principles. If the insurer has no right to terminate the contract, the only enforceable remedy the insurer may pursue is requesting additional premium. Supposing that the insured has not accepted to pay the additional premium, the insurer shall pay the insurance sum in accordance with the proportion between the premium actually paid and the premium needed to be paid (Art. 1498 TCC).