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.

FRENCH REPORT

Jérôme Kullmann

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. Article L.113-2 Insurance Code : "The insured shall be obligated to: (…) : truthfully answer questions put by the insurer ».

- "Questions" :
  - A question must be clear : if it is not clear, then it is not a "question" according to Article L.113-2. Thus, if the answer is wrong, no sanction.
  - the "clarity" of the question is determined case-by-case : the same question can be clear for an applicant and not for another one. Again, the judge will

analyse the own competence of the applicant. A funny case : the judge said that the applicant could not understand the question because he was totally stupid, with a low-average intelligence. And French Cour de cassation approved this judge[1].

- French Cour de cassation : a "question" is a sentence with a question mark (?), and not a sentence by which the applicant "declares that… and that…", with his signature below. It has been a big problem in France, because 60% of declaration forms do not put questions with a "?", but contain only pure affirmations. In that case, there is legally no "question"… and there is no sanction even it's obvious that the applicant lied.

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. The applicant has only a legal duty to answer questions put by the insurer. BUT French Supreme Court (Cour de cassation) : the applicant can take the initiative tof sending other informations to the insurer (for instance, to obtain a lower premium) : these informations must be true. If not, legal sanctions will apply, as they apply to the answers to the questions put by the insurer.

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 applicant's disclosure duty is limited to the applicant's actual knowledge. BUT this knowledge has to be weighed on the basis of the own competence of the applicant (example : questions about the condition of the insured building : the knowledge of an old lady is not the same as the knowledge of a mason).

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?

[1] Cass. 1re civ., 20 October 1993, n°91-17.112, RGAT 1994, p. 111, note J.Kullmann

NO. The insurer is allowed to put questions, but he has not the duty to control the answers, and he has not the duty to investigate[2]. Same solution for insurances intermediaires (broker[3], …).

French Cour de cassation :

- of course, the insurer **may** investigate (for technical risks : factories, etc.) : if he does, he will not be entitled, later, to criticize a wrong answer if he has been aware of the reality of the risk thanks to this investigation;
- if the answer given by the applicant shows, obvioulsy, an inconsistency, the insurance intermediairy has to fulfill his duty to warn. He must just draw the applicant's attention on this problem.

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?

- Insured's understanding of the scope of the insurance :
  - Yes, the insurer has 3 duties : duty to deliver clear informations (definition of the risk,…) + duty to advise (better to take this coverage, etc.) + duty to warn (this insurance is not good for you, there is a lack in the coverage, …). See UE Directive 2002/92/CE of 9 December 2002, implemented in french law for Insurance Intermediaries : Article L.520-1 French Insurance Code :

II –"Before concluding any contract, the intermediary must:

...

*2° **Specify the requirements and needs of the possible policyholder** and the reasons for the advice provided in respect of a specific insurance product. This information, which is based in particular on information communicated by the possible policyholder, is adapted to the complexity of the insurance contract offered".*

- Problem : what if it is obvious that the applicant cannot understand the scope of the insurance ? Common example : the applicant is a foreigner, and does not understand french language. It means that this applicant will pay a premium without understanding the content of the insurance contract. French

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[2] Cass. 1re civ., 30 September 1997, nº 95-20.519, Resp. civ. et assur. 1997, comm. nº 382, RGDA 1997, p. 1072, note Favre-Rochex

[3] Cass. 1re civ., 14 november 2001, nº 99-10.528, RGDA 2002, p. 59, note Ph.Rémy

Cour de cassation : the insurer has not the duty to provide a written or oral translation[4]. But, going back to the applicant's duty to disclose, as the applicant could not understand the questionnaire, there is no sanction in case of a wrong answer[5]

- Exclusion : Article L.112-4 Insurance Code : "The policy clauses that stipulate nullities, forfeitures or **exclusions** shall be valid only if they appear in very clear print » (bold, colour, etc. : the clause must « jump out » at the applicant). Something is shocking : the rule can be understood for consumers and small professional insureds, but it applies to Large risks as well. It means that if the exclusion clause has been negociated between the insurer and the insured (imagine Total Company), with a broker, and if the clause is not written in bold characters, the exclusion simply does not exist : the loss will be covered, and the insurer has not got any premium for that.

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. Article L.113-2 : the insured has the duty to "declare during the contract the new circumstances that have the effect of either increasing the risk or of creating new risks and which on this account render the answers, notably, in the form referred to in paragraph 2 above, made to the insurer either untrue or lapsed ».

Conditions :

- there has been an answer to a question put by the insurer, or an information sent by the applicant at his own initiative,
- during the contract, a new circumstance appears ;
- due to this new circumstance, an answer becomes wrong : there is an aggravation of the risk ;

Then the insured has the legal duty to declare this new circumstance to the insurer.

[4] Cass. 2e civ., 22 November 2007, no 06-19.852, RGDA 2008, p. 63, note J.Kullmann
[5] Cass. 2e civ., 13 June 2013, no 12-10.260

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

There is no legal definition of the material change (see above for legal conditions). Of course, the new circumstance must have an influence on the coverage : an aggravation. It can be:

- the probability of the realisation of the risk (ex.1 : fire insurance : a new gas station just under the insured flat; a new ammunition depot besides the insured factory; ex.2 : civil liability insurance of a company : initial declaration of 200 employees; 2 years after, 300 employees),
- or the intensity of the risk (ex.1 : jeweller and theft insurance : initial declaration of the value of the jewels in the shop : 100; 2 years later, new value : 200 ; ex. 2 : D&O : the insured is the CEO of one company; 2 years later, of 3 companies);
- or both probability and intensity.

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.

6. Remedies in Case of Breach of the Insured's Disclosure Duties

General rule : Condition of any sanction of the uncorrect information provided by the applicant (or the insured during the insurance contract) : this information must be relevant. That means that the insurer must prove that, if he had known the truth, he would have, either not conclude the contract at all, or established an exclusion, or requested a higher premium.

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

French Law : distinction based on the behaviour of the applicant (or of the insured during the insurance contract): objectively, there is a wrong information. Then:

- **either the applicant behaved in good faith** (he made a simple mistake) : the insurance contract will continue to be valid (special rule for insurance contrat,

because for any othe contract, a substantial mistake means that the contrat is void).

Sanction : Article L.113-9 Insurance Code :

- Regarding the contract : the insurer is entitled to terminate the insurance contract

- Regarding the occurrence of the loss : the insurer must pay the insurance money, BUT with a reduction : amount of the loss x (paid premium/premium which would have been asked if the declaration of the risk had been correct)

(see Article L.113-9 : "In the event that the recording took place only after the loss has occurred, the compensation shall be reduced in proportion to the rate of the premiums paid in relation to the rate of premiums that would be owed if the risks had been truthfully and exhaustively declared »).

- or the applicant behaved in bad faith (deliberate lie)

Sanction : Article L.113-8 Insurance Code :

The insurance contrat is null and void. The insurer keeps the paid premium (this is a special rule for insurance contract), and, as the case may be, the insured must reimburse all the insurance proceeds he could have got between the conclusion of the contrat and the cancellation.

Special solution given by the French Cour de cassation : when an insurance contract covers several risks (ex. : for a consumer, theft, fire and fload: the cancellation does not hit the whole contract, but only the cover of the risk concerned by the applicant's lie).

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 same rules apply (good faith / bad faith).

Precision in case of bad faith :

- bad faith when the contract has been concluded (initial declaration of the risk) : with the cancellation, the insurance contract is deemed to have no existence at all;
- bad faith during the insurance contrat (the insured, deliberately, did not declare the aggravation of the risk) : the insurance contract remains valid beetween its conclusion and the day he had to declare); and it is cancelled for the period following this day.