

AIDA - RIO CONGRESS 2018

DISCLOSURE DUTIES IN INSURANCE

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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?

Although not expressly it can be deduced from articles 5 and 6 of the Insurance Contract Act (LCS) that the insured has the obligation to answer the questions if he wants the insurer to issue the policy.

- 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?

Our legislation establishes that the insurer provides the request (Art. 6 LCS), but Art. 8 establishes that 'the reluctance and / or inaccurate declaration of circumstances known by the contracting party and / or insured, which would have prevented the contract or modified its conditions if the insurer had been informed of the true state of the risk, nullifies the contract if half intent or inexcusable fault of the contractor and / or insured. Article 13 states that 'If the reluctance and / or inaccurate declaration is not due to intent or inexcusable fault of the contractor and / or insured and is verified before the loss occurs, the insurer must offer the contracting party the revision of the contract in a term of thirty (30) days computed from the referred verification. The offer must contain an adjustment of premiums and / or coverage and grant a term of ten (10) days for the contracting party to pronounce on acceptance or rejection. If the revision is accepted, the readjustment of the premium is paid as agreed. In the absence of acceptance, the insurer may terminate the

contract by means of a communication addressed to the contracting party, within a period of thirty (30) days computed from the expiration of the ten (10) day period established in the previous paragraph. The premiums accrued pro rata correspond to the insurer, up to the moment in which the resolution was made.

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 can be seen from the aforementioned articles, there is no express norm that establishes that there is information that the insured should know, so we can conclude that a situation of this type will be subject to the judge's discretion.

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?

Article 15 of the LCS states that: In cases of reluctance and / or inaccurate declaration, the nullity, revision or termination of the contract is not applicable when:

- a) At the time of completion of the contract, the insurer knows or must know the true state of the risk.
- b) The circumstances omitted or declared inaccurately stopped before the accident occurred or when the reluctance or inaccurate declaration not malicious, did not influence the production of the incident or the extent of compensation or benefit due.
- c) The omitted circumstances were content of an express question not answered in the questionnaire and the insurer also entered into the contract.
- d) Circumstances omitted or declared inaccurately reduce the risk.

Consequently, we consider that a situation of this kind will also be resolved at the discretion of the judge on a case-by-case basis.

- 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?

The answer is no, but the LCS establishes some rules that we transcribe below:

Article 28. Clauses in well-known characters

The clauses that establish expiration dates of the insured's rights, suspensions or exclusions of coverage contained in general or particular predisposed conditions or in annexes, that are not printed in notorious characters, are understood to be those that stand out from the rest. of the

text. In the event that guarantee clauses are imposed that condition the coverage of the risk to the insured, that is, additional and special charges, its existence should be highlighted, in the front part of the policy.

Article 29. Differences between the proposal and the policy

When the text of the policy differs from the content of the proposal or offer, the difference is considered tacitly accepted by the contracting party if it does not claim within thirty (30) days of having received the policy. This acceptance is presumed only when the insurer warns the contracting party, in detail and by means of an additional and different document to the policy, that these differences exist and that he has thirty (30) days to reject them. If the aforementioned warning is omitted by the insurer, the differences will be considered as unwritten unless they are more beneficial for the insured.

To produce effects before 30 days, the acceptance of the differences by the contracting party must be express.

The elimination or rejection of the differences does not affect the effectiveness of the contract in the rest, unless they jeopardize the economic-legal purpose of the contract.

Article 30. Change in contractual conditions

During the term of the Contract, the insurer cannot modify the agreed contractual terms without the prior written approval of the contracting party, who has the right to analyze the proposal and make a decision within thirty (30) days from the date it was communicated. The lack of acceptance of the new terms does not generate the termination of the contract, in which case the terms in which the contract was agreed must be respected.

Article 31. Differences between advertising and the policy

When there are differences between the insurance conditions offered through advertising systems and the content of the policy, relating to the same insurance, the most favorable conditions prevail for the insured

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?

AGGRAVATION AND DECREASE OF RISK

Article 60. Aggravation of risk

The insured or the contracting party, as the case may be, must notify the insurer in writing of the facts or circumstances that aggravate the risk and are of such magnitude that, if they are known by the latter at the time of the contract's conclusion, he or she would not celebrate it. in more burdensome conditions.

Article 61. Effects of the aggravation of risk

Notification to the insurer of the aggravation of the state of the risk, the latter must inform the contractor within fifteen (15) days, its willingness to maintain the terms of the contract, modify or resolve it.

While the insurer does not state its position in the face of the aggravation, the conditions of the original contract continue. When the insurer chooses to terminate the contract, he has the right to receive the premium proportional to the time elapsed.

If you are not informed in a timely manner, you are entitled to receive the premium for the period of insurance in progress.

Article 62. Effects in case of accidents

If the contracting party or, where appropriate, the insured, fails to report the aggravation, the insurer is released from its benefit if the loss occurs while the aggravation of the risk subsists, except that:

- a) The contracting party or, as the case may be, the insured, incurs the omission or delay without inexcusable fault;
- b) If the aggravation of the risk does not affect the occurrence of the loss or the measure of the benefit borne by the insurer;
- c) If he does not exercise the right to resolve or propose the modification of the contract within the term provided in article 61;
- d) The insurer is aware of the aggravation, at the time when the complaint should be made.

In the cases mentioned in subparagraphs a, b and c of this article, the insurer has the right to deduct from the amount of compensation the proportional amount equivalent to the extra premium that it had charged to the contracting party, if it had been informed in a timely manner of the aggravation of the risk contracted .

Article 63. Termination of the right to resolve

The right to resolve referred to in article 61 expires, if it is not exercised within the prescribed period or if the aggravation has disappeared.

Article 64. Exceptions to the aggravation of risk

The provisions on aggravation of risk do not apply when provoked to avoid the loss or to mitigate its consequences, for a generally accepted duty of humanity, for self-defense, a state of necessity or for compliance with a legal duty.

Article 65. Aggravation between the proposal and acceptance

The provisions of this section are also applicable to the aggravation produced between the proposal and the acceptance of the insurer.

Article 66. Plurality of interests or persons

When the contract includes plurality of interests or persons, the provisions of this section apply only to the party that incurs in the risk aggravation.

Article 67. Decreased risk

If the risk decreases in the course of execution of the contract, the contracting party may request a proportional reduction of the premium from the moment he reported the decrease. In the absence of agreement regarding the reduction or its amount, the contracting party may terminate the contract.

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

It is the one indicated in the aforementioned article 60 of the LCS: 'the facts or circumstances that aggravate the risk and are of such magnitude that, if

they are known by the latter when the contract is perfected, they would not celebrate it or would do so in more burdensome 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 norms are contained in Art. 74 and following of the LCS that to the letter say:

Article 74. Statement by the Insurer

The payment of compensation or the insured capital that is made directly to the insured, beneficiaries and / or endorsees, must be made within a period no longer than thirty (30) days following the consent of the loss.

The claim is construed as consent, when the insurance company approves or has not rejected the adjustment agreement duly signed by the insured within a period not exceeding ten (10) days counted from its subscription and notification to the insurer. In the event that the insurer does not agree with the adjustment indicated in the agreement, it may demand a new adjustment within a term not exceeding thirty (30) days, to consent or reject the claim, determine a new amount or propose to go to the clause of arbitration or the judicial way.

In cases where, objectively, there is no adjustment agreement, either because the adjuster has not been required to participate or it has not yet finalized its report, the loss shall be considered as consented when the insurer has not ruled on the amount claimed. within a period that does not exceed thirty (30) days from the date of completion of all the documentation required in the policy for the payment of the loss, except as indicated in the following paragraph.

When the adjuster requires a longer period to complete their report, they may present a duly substantiated request to the Superintendency, specifying the technical reasons and the time required, under responsibility. The Superintendency will pronounce itself in a motivated manner on said request within a maximum term of thirty (30) days, under responsibility.

Also, when the insurer requires a longer period to carry out additional investigations or obtain sufficient evidence on the origin of the claim or for the appropriate determination of its amount, and the insured does not approve, in the specific case, the extension of said term, The insurer may submit a request duly justified only once and, requiring a period no longer than the original, to the Superintendence within the aforementioned thirty days.

The Superintendency will pronounce itself in a motivated manner on said request within a maximum term of thirty (30) days, under responsibility. In the absence of a ruling within that period, the request is deemed approved.

In case of default of the insurance company, it will pay the insured an annual moratorium interest equivalent to one point five (1.5) times the average rate for active operations in Peru, of the currency in which the insurance contract is expressed for all the time of the default.

Article 75. Participation of the adjuster or expert

The claims adjuster or the expert must be appointed by mutual agreement of the parties.

The opinion of the adjuster does not bind the parties and is independent of them. The adjuster's reports must be provided simultaneously to both parties. In case any of the parties does not agree, they may designate another adjuster to prepare a new adjustment of the loss, otherwise they may resort to the appropriate means of dispute resolution.

Article 76. Payment on account

When the insurer decides favorably against the estimated loss, the insured has the right to request a payment on account if the procedure to determine the benefit due is not yet completed.

Article 77. Loads of the parties

It corresponds to the insured to demonstrate the occurrence of the loss, as well as the amount of the loss if it were the case, and the insurer the burden of demonstrating the causes that release him from his indemnity benefit.

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 LCS establishes:

Article 13. Reluctance and / or inaccurate declaration not malicious

If the reluctance and / or inaccurate declaration is not due to fraud or inexcusable fault of the contractor and / or insured and is verified before the loss occurs, the insurer must offer the contracting party the revision of the contract within a period of thirty (30) days computed from the referred verification. The offer must contain an adjustment of premiums and / or coverage and grant a term of ten (10) days for the contracting party to pronounce on acceptance or rejection. If the revision is accepted, the readjustment of the premium is paid as agreed.

In the absence of acceptance, the insurer may terminate the contract by means of a communication addressed to the contracting party, within a period of thirty (30) days computed from the expiration of the ten (10) day period established in the previous paragraph.

The premiums accrued pro rata correspond to the insurer, up to the moment in which the resolution was made.

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

In this case, the following applies:

Article 14. Review not accepted

If the verification of the reluctance and / or inaccurate declaration indicated in the preceding article is subsequent to the production of a claim, the compensation due is reduced in proportion to the difference between the agreed premium and that which would have been applied had the real risk status

Article 15. Subsistence of the contract

In cases of reluctance and / or inaccurate declaration, the nullity, revision or termination of the contract does not apply when:

- a) At the time of completion of the contract, the insurer knows or must know the true state of the risk.
- b) The circumstances omitted or declared inaccurately stopped before the accident occurred or when the reluctance or inaccurate declaration not malicious, did not influence the production of the incident or the extent of compensation or benefit due.
- c) The omitted circumstances were content of an express question not answered in the questionnaire and the insurer also entered into the contract.
- d) Circumstances omitted or declared inaccurately reduce the risk