

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

Answerer: Satoshi NAKAIDE (Waseda University)

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. The Insurance Act (2008) obliges the policyholder or the insured to disclose the insurer of the facts on the material matter which the insurer requested to disclose concerning risks (Articles 4, 37 and 66 of the Insurance Act). This is a unilateral mandatory provision that does not permit adverse changes for policyholders, insured or beneficiary, with the exceptions of insurance in the business field, such as marine insurance (Articles 7, 41 and 70 of the Insurance Act).

The Insurance Act is a statutory law that stipulates rules on the insurance contracts.

Matters not regulated by the Insurance Act are covered by the Civil Code.

The Insurance Act constitutes a special law under the Civil Code.

Because the Insurance Act has separate regulations for non-life insurance contracts, life-insurance contracts, and accident and illness insurance, regulations concerning obligations regarding notification etc. for these types of insurance are separately stipulated. However, because there are no major differences in the obligations regarding disclosure etc. for these three different types of insurance, while there are some variations in the wording of the provisions, there is no substantial difference in their content.

- 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. However, it must be noted that the provisions in the Insurance Act are not unilateral mandatory. Parties to the business insurance are allowed to contract out from the rules in the Insurance Act. For marine insurance, the provisions of the Commercial Code are applied in addition to the Insurance Act. Although the provisions on marine insurance in the current Commercial Code do not state the duty of disclosure, revision of the Code is being considered. It is planned to make a provision on a duty of disclosure on a voluntary basis, reflecting on the necessity in marine insurance contract. However, even in that case, an insurer is only allowed to cancel a contract where the policyholder or the insured violates the duty intentionally or by gross negligence.

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 Insurance Act has no provision on this, and so the issue is the interpretation of the Act's text. It is generally held to be sufficient to disclose what the policyholder or the insured actually knows when questioned about important matters.

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. Under the Insurance Act, no obligation is imposed on the insurer to investigate a customer's business operations in the information-gathering process; nor is any such obligation stipulated in other laws.

- 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 Insurance Act has no related provisions. However, the Insurance Business Act, which is the regulatory law for supervision of the insurance industry, stipulates the obligation for insurance company to provide important information and explain material matters to policyholders, to understand the intent of the policyholders, and to obtain confirmation from the policyholders if the offered in insurance contract matches the intent of the policyholders.

Incidentally, in Japan, aside from insurance companies, there are insurance systems structured on an association basis (as well as small amounts and short-term insurance providers). The latter functions similarly to insurance, but on a different system known as "mutual aid," and the system is managed on the basis of laws covering each of the mutual aid associations. The Insurance Business Act contains no stipulations on mutual aid. Accordingly, the obligations regarding explanation under the Insurance Business Act discussed above do not directly apply to the contracts with the mutual aids.

As a general law, the Civil Code stipulates the principle of good faith, and this is a mandatory provision. Principle of good faith apply to any type of contract. Where there is a disparity in access to important information between the parties to a contract, the insurer is required to provide information to the policyholder as an obligation under the principle of good faith.

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 Insurance Act does not have any provision which stipulates that the policyholder or the insured has an obligation to notify the insurer in the event of major change in risk. However, most insurance contracts oblige the policyholder or the insured to make a notice in the case of increasing risk. Therefore, the Insurance Act has regulations on the validity of such provisions. The Insurance Act stipulates that if there are changes in the content of notification items in an insurance contract, and the policyholder or the insured party is required to notify the insurer to such effect without delay, and if the policyholder or the insured fails to give notice either intentionally or by gross negligence, the insurer may terminate the insurance contract even if it is possible to continue the insurance contract by adjusting the insurance premium proportionately to the relevant increase in danger (Articles 29, 56 and 85 of the Insurance Act)

This is a unilateral mandatory provision that does not permit adverse changes for policyholders or insured, with the exceptions of insurance for business risks (Articles 33, 65 and 94 of the Insurance Act).

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

The range of the above stipulations is limited to cases where there are changes in the facts requested to disclose at the time of making a contract.

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 Insurance Act does not state such an obligation. However, in the Insurance Business Act, insurance firms are required to conduct their business in a proper manner; in concrete terms, in cases where an insured party has notified an insured event to an insurance company. The authorities require the firm to provide an explanation to the insured party regarding the approval or denial of insurance claims.

There is no legal obligation is stated for insurance company to provide explanation after the occurrence of an insured event. However, insurance companies are required under the Insurance Business Act to conduct their business in a proper manner, and part of this is an obligation to handle matters appropriately after the occurrence of an insured event.

In the past, in Japan, the omission of payment of incident charge became a serious social issue. Some insurance policy provided a payment of incidental expenses in addition to the main insurance claims. Sometimes, the insured did not know its right to claim such an additional and incidental payment of small amount and did not ask payment as well. Mass media argued that the insurance company must investigate if there is any payment possible for the insured in addition to the main claim. Financial Services Agency, the regulatory body, eventually took administrative sanctions against the insurance companies concerned on the grounds that they had failed to proactively inform the insured party on the right to claim incidental expenses as well. As a result of such administrative sanctions, insurance companies now try to pay all the insurance money available for the claimant for the accident without failure.

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 is entitled to cancel a contract if the policyholder or the insured violates their obligation to provide disclosure. However, such cancellation is permitted only in cases of intentional act or gross negligence on the part of the policyholder or the insured (Articles 28, 55 and 84 of the Insurance Act). The cancellation is effective only for the future, in principle. However, in case of the cancellation based on the failure of disclosure, the insurer is not liable to make insurance payment for insured events that have already occurred before the cancellation. However, the insurer is not exempt from responsibility in cases where events have occurred that require insurance payments and that bear no relation to the breach of obligation to provide notification (Articles 31, 59 and 88).

These regulations are unilateral mandatory provisions (Articles 33, 65 and 94). Beneficial changes are permitted for the policyholder and the insured party, and so it is legally possible to change the regulations of the Insurance Act to partial discharge. For example, to state partial discharge in the case of gross negligence. However, such contracts are not in de-facto use.

The partial discharge approach has not been adopted in Japan; the all or nothing approach is taken. It is necessary to pay attention to the fact that cancellation is permitted only in cases of intentional act or gross negligence (and the insurer will not receive relief in cases of simple negligence in regard to obligation to provide notification).

- 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 Insurance Act stipulates that the insurer has the right to cancel a contract, and the all or nothing approach is adopted. Partial discharge is not adopted (Articles 29, 56 and 85 of the Insurance Act). Even in this case, the insurer can receive relief only if the policyholder or the insured has committed acts of intentional act or gross negligence.

This provision is also a unilateral mandatory provision that does not permit adverse changes for policyholders or insured, with the exception of insurance for business risk (Articles 33, 65 and 94 of the Insurance Act).

Beneficial changes are permitted for the policyholder and the insured party, and so it is legally permitted to stipulate partial discharge in the contract. However, such contracts are not in de-facto use.