Underwriters' Handbook

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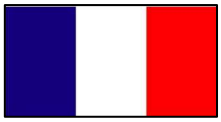
A quick reference guide to:

1. Insurance law in eight jurisdictions


Australia


Canada


England


France


Israel


New York


Russia


Switzerland

2. LCIA, ICC and AAA Arbitrations

Switzerland

Dr. Christoph K. Graber and Christian Lang, LL.M.
Prager Dreifuss, Zurich

1. Non-disclosure / misrepresentation

What is the assured's duty?

The proposer has to answer the written questions of the insurer truthfully. Case law has found that he must disclose all information which will reasonably come to his mind if he seriously thinks about the question.

Is the insurer required to ask questions?

Yes. The proposer is only obligated to disclose material risk factors upon written request from the insurer.

Facts are considered as material for the insurer's assessment of risk if *specifically* asked for in a clear and unambiguous way in writing (see article 4 of the Swiss Federal Act on the Insurance Contract, "ICA"). However, the assured can avoid the consequences of a material misrepresentation or non-disclosure if he is able to prove that the answer to the respective question had no influence on the conclusion of the insurance contract and/or the terms and conditions under which it was entered into. However, such proof will usually be very difficult for an insured to bring forward. Having said this, the Federal Supreme Court just recently (in July 2010) decided that a negative response of the applicant to the question whether or not he had ever consumed drugs, although he had consumed marihuana ten years ago, did not influence the insurer's decision to enter into a life insurance contract with the applicant and was therefore not material.

What is the effect of a material non-disclosure or misrepresentation?

Based on article 4 *et sec*. ICA an insurance company may terminate an insurance contract if the assured misrepresented or concealed a material fact in a proposal form. An insurer must unconditionally declare the termination of the insurance contract four weeks after discovery of the misrepresentation or non-disclosure, otherwise the insurer's right of termination is forfeited.

The four week period is triggered as soon as the insurer obtains knowledge of reliable information regarding such misrepresentation or non-disclosure. A mere suspicion does not suffice to trigger the running of the four week period. On the other hand, an insurer may not remain passive in the case of indications for a misrepresentation or non-disclosure, but rather must make inquiries regarding the relevant facts in due course. A new deadline of 28 days starts to run independently from earlier triggered deadlines for every new case of a material misrepresentation or non-disclosure.

Insurance benefits can be denied if the misrepresented or concealed fact had an impact on the occurrence or extent of the loss. Insurance benefits for losses which are unrelated to the misrepresentation remain due. All premiums paid up to the termination of the contract may be retained by the insurance company. Premiums paid in relation to future periods must (with some exceptions) be returned pro rata.

An insurer is estopped from terminating a policy based on misrepresentation or omission of a material risk factor, if he knew or should have known the true facts that were misrepresented or not disclosed. Actual knowledge from prior years' proposal forms or gained in connection with prior losses is taken into account as well.

In the absence of willful deceit, incorrect or incomplete information contained in materials which the proposer submitted voluntarily, i.e. not in response to a written question from the insurer, does generally not entitle the insurer to cancel the policy. However, under certain circumstances the assured can become liable vis-à-vis the insurers for damages if he deliberately provided such incorrect information.

2. Warranties / fundamental terms

Are warranties recognized and upheld under Swiss law?

The strict concept of insurance warranties is unknown to Swiss insurance law. However, representations and warranties may be of importance under general contract law and with regard to risk control. In practice, warranties have not been a major issue is Swiss insurance litigation.

General contract law is partly derogated by the ICA, which is - *inter alia* - the case with regard to non-disclosure or misrepresentation of material risk factors. Therefore, the legal consequences of such non-disclosures or misrepresentations are exclusively governed by the ICA.

With regard to risk control, a breach of an assured's obligation in this regard can only be held against the assured if such breach had an impact on the occurrence or extent of a loss.

With regard to prior known losses, the general rules of rescission of a contract apply if the assured had ample reasons to believe that a loss which would be covered under the policy had already occurred prior to the conclusion of the contract.

3. Conditions precedent

Are conditions precedent (CP) upheld and recognized?

In general, the parties to an insurance contract are free to agree upon contractual conditions, provided they are not in contradiction to mandatory law. It is therefore possible to draft a clause as a condition precedent.

However, the freedom to contractually agree on conditions to work as conditions precedent is partly restricted. Certain conditions and the effects of a breach thereof are subject to mandatory law, which excludes the possibility to construct them as a CP.

How do you know if a clause is a CP?

The effect of a condition has to be determined by contract interpretation. If a condition is intended to operate as a CP, this should be specifically mentioned the clause itself.

What is the effect of a breach of a CP?

Breach of a CP gives the insurer the rights as set out in the respective insurance contract. This includes the possibility to deny coverage and/or to terminate the policy with immediate effect.

Until recently, it was unclear whether a CP can take effect without a causal link between the breach and the loss in the absence of specific contractual language to this end. In a decision of September 2010, the Federal Supreme Court eventually confirmed the validity of a CP in a case, where the breach of the CP had no negative impact on the loss, although the policy did not stipulate that no causal link between the breach of the CP and the loss was required.

However, the ICA in any event prohibits any conditions, including CPs, which are detrimental to the assured's rights, from taking effect if no fault for the breach is attributable to the assured.

What is the effect of the breach of other (ordinary) conditions?

The effect of the breach of other conditions is defined either by law or by contract. Possible effects range from the avoidance of the contract to the reduction of insurance benefits or the recalculation of the premium. However, it should be noted that the effect of contractual conditions may be restricted or completely lifted by mandatory provisions of the ICA.

4. Measure of indemnity

What is the usual measure of indemnity?

In Swiss insurance law the insurance contract is typically construed as indemnity insurance. The assured shall be compensated for a loss but must not benefit from the insured event (prohibition of over-compensation).

Nevertheless, the ICA recognizes the possibility of accumulation of benefits when the assured concludes a stated benefit insurance (mainly in life or personal injury insurance contracts).

What is the measure of indemnity in valued and unvalued policies?

Generally, the indemnity owed under an insurance contract is the actual loss suffered as a consequence of the insured event.

In most types of insurance, a contractual agreement on a defined sum payable in the case of a loss or on the method of calculation of the insurance benefits is possible. Such agreements can even override the general prohibition of over-compensation (the classic example hereto is the collision insurance for motor vehicles, where the original purchase price can be insured, without taking into account the depreciation in value of the vehicle).

In unvalued policies the burden of proof for the actual amount of loss lies with the assured.

What is the principle of "underinsurance"/average?

If the policy limit is lower than the actual insured subject matter, the indemnification of a partial loss will be reduced accordingly (i.e. if the policy limit only reaches 80% of the insured subject matter, only 80% of a partial loss has to be indemnified under the policy). Obviously, the full policy limit is due in the case of a total loss. The application of the concept of underinsurance can be excluded by explicit contractual agreement to this end.

Are punitive damages available against insurers?

No. Swiss law does not recognize the principle of punitive, multiplied or exemplary damages, and such damages contained in a foreign judgment would not be enforceable in Switzerland, either.

5. Subrogation

Do insurers have automatic rights of subrogation or must the contract provide for this?

The term "subrogation" in Swiss insurance law refers only to the subrogation which applies by operation of law. This "automatic" subrogation, only applies in the case where an assured has a claim against a third party based in tort.

In addition to this subrogation by operation of law, where the insurer fully assumes the assured's rights and hence stands in the assured's shoes, the insurer has an independent, generic claim of recourse against third parties where the claim against such third parties is not based in tort but on contract. This generic right of recourse is based on the concept of recourse amongst parties which are jointly liable for a loss. However, it is not fully clear under which circumstances a claim of independent recourse can be made by the insurer against a third party. In particular, it is disputed whether insurer's recourse against a third party who is liable for breach of contract is generally admissible, or only in cases where the third party has acted with gross negligence. The latter is the more traditional position.

Is an insurer able to act in the name of the assured, or must it use its own name?

In the case of subrogation as well as in the case of an independent recourse, the insurer will act in its own name. In the case of subrogation, the insurer assumes the assured's claim, including all ancillary rights and possible defenses which were available to the third party vis-à-vis the assured. In the case of an independent recourse, the insurer has an independent, generic claim against the third party, and a new limitation period starts to run.

Any other noteworthy features?

An assured who has not been fully compensated for his loss has a right to a “preferential quota of damages” against a third party who is liable for the loss. The insurer should not have a claim against the third party that could encumber the assured’s right to claim his remaining loss from the third party. Such an encumbrance of insurer’s rights of recovery can be avoided if the assured also assigns to the insurer the rights and claims arising from its remaining loss, thus any and all of its rights against a third party.

6. Statue of limitations

Claims deriving from an insurance contract are time barred after two years. This limitation period is to be calculated from the date when the fact that triggers the obligation to provide indemnification materialized. When this is the case depends on the type of insurance. In liability insurance, for instance, the date when the assured's liability is established by a court or when a respective settlement agreement is made is considered the starting point of the limitation period; in insurance for defence costs, it is the date when legal advice becomes necessary; and in property insurance (in the case of theft) the date of the theft, not the date when the assured discovered the theft.

The running of the statute of limitations can only be interrupted by (i) filing a request for a conciliation hearing, (ii) filing a claim in a court or before an arbitration tribunal, (iii) initiating proceedings of debt enforcement. Further, an acknowledgment of the obligation by the insurer does also interrupt the running of the statute of limitations, and it is possible to sign a waiver to plead the statute of limitations in order to avoid measure to interrupt the running of the statute of limitations.

7. Other noteworthy issues in Swiss insurance law

A probably unusual feature of Swiss insurance law is that reasonable loss mitigation costs are to be indemnified by the insurer even if the insured's loss and the loss mitigation costs combined exceed policy limits. This provision, however, is non-mandatory law and it is therefore advisable to explicitly state in the insurance contract that the policy limit is the maximum indemnification owed by insurers, including any and all loss mitigation costs, and that article 70 ICA is amended accordingly.