FREE AT LAST? A CONTRACT FOR THE 'PROFESSIONAL INSURED'

As part of a raft of changes to the Swiss Insurance Contract Act, a new amendment bill makes a vital distinction between consumer cases and large commercial risks

By Dr Gion Christian Casanova, partner

The statutory law pertaining to Swiss insurance contracts, as incorporated in the Insurance Contract Act (ICA), has been under intense scrutiny since the beginning of this century. While originally designed as a modern law oriented towards consumer protection, the current act dates in essence from 1908. With the evolution of concepts of consumer protection as well as the general legal and economic environment, a need to modernise the ICA has arisen.

After the implementation of minor adjustments in 2006, a major overhaul of the ICA failed to pass parliament in 2013. Following this, on 28 June this year the Swiss Federal Council proposed a new bill ('Botschaft') to the parliament, based on those parts of the failed amendment project that had remained largely uncontested.

Particular changes

Besides incorporating changes to the formal structure of the ICA, the bill addresses several issues, of which only a few can be highlighted below.

As with current law, the insurer will have to provide the insured with certain pre-contractual information. These information duties are slightly expanded. As far as the pre-contractual disclosure of the insured is concerned, disclosure requests and declarations will now be possible not only in writing, but in "any way exhibited by text", i.e. including emails etc. Whether the disclosure has been complete will be assessed with regard to the moment of the declaration by the insured, and not of the policy inception any more.

In addition to providing statutory rules for preliminary coverage, the bill also accepts the concept of backward insurance. Such a policy will be null and void only in cases where the insured alone knew, or should have known, that the insured event already occurred.

The bill rejects the concept of condition precedent, i.e. conditions that lead to the loss of insurance benefits if violated will not be enforceable, unless the insurer is prejudiced by the violation. Another change is the extension of the statute of limitation from two to five years.

Under current law, the insurer's subrogation and recourse rights are rather limited. This will be changed markedly by introducing a full subrogation right for the insurer.

Distinction between consumer risks and large risks

The most important change from the viewpoint of an attorney regularly representing insurers in large risk cases is, however, the introduction of a distinction between consumer cases and large commercial risks. While continuing to declare a large number of provisions as mandatory or semi-mandatory, the bill allows the parties to freely amend or delete the provisions of the ICA in the latter cases.

This freedom, which is new in Swiss insurance law, applies as a matter of principle to credit risk insurance, surety bonds and transport insurance (as far as commercial risks are insured). Furthermore, the bill makes the above-mentioned distinction by exempting certain insureds who typically seek cover for large risks, i.e. the so-called 'professional insureds', from the mandatory regime. The notion of professional insured extends in essence to companies with a professional risk management, or to policyholders which surpass two of three thresholds (balance sheet total of CHF 20m; net turnover of CHF 40m; own funds CHF 2m).

This new exemption will enable contractual issues that have proven impracticable in a large risk environment to be addressed. The current law, for example, allows the insurer to terminate a policy in case of violation of the insured's pre-contractual disclosure duties, but only within a non-extendable forfeiture deadline of four weeks running from the insurer's 'knowledge' of such violation. In complex cases, this short deadline and the uncertainty about its start can lead to either a premature termination of the policy, or on the other hand to the insurer losing its termination rights.

Outlook

The draft ICA still has to pass parliament, and it remains to be seen to what extent it will be subject to changes. Nevertheless, insurers may be well advised to monitor this process, as the amendments, if uncontested, may come into force as soon as 2019.

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