Revamp of Insurance Act gives Swiss much to do

CHRISTOPH GRABER and **CHRISTIAN LANG** consider the forthcoming revision of the Swiss Insurance Contract Act and the implications this will have for firms

THE SWISS Federal Act on the Insurance Contract (ICA) has celebrated its 100th anniversary this year. Although some revisions have been made over the last decades, a total overhaul appeared necessary in recent years.

Therefore, the Swiss government appointed a group of experts in April 2003 which submitted its report with recommendations for a new ICA in July 2006. After consultations with the interested parties, which are expected to commence soon, the federal government will work out a legislative proposal, which then will have to be passed by the parliament. This process will take several more years before the new law will finally be brought into effect.

Although 70 years younger than the ICA, the total revision of the insurance supervisory law was completed earlier. On January 1, 2006, a completely revised Federal Statute on the Supervision of Insurance Entities (ISA) entered into force.

In the course of this revision, some of the most urgent modifications to the ICA were enacted in advance. Probably the most important change was article 6 of the ICA, which deals with the consequences of pre-contractual non-disclosure and misrepresentation. The old article 6 allowed an insurance company to avoid a policy *ab initio*, even after the occurrence of an insured event, if any material fact were not properly disclosed by the insurance applicant in the proposal form.

Under the new article 6 of the ICA the insurance contract can only be terminated with immediate but no retrospective effect. Furthermore, the payment of losses under the policy can only be refused in case of a causal link between the non-disclosure or misrepresentation and the loss.

If, for example, an insured under a life insurance policy failed to answer honestly the question of whether he had ever suffered from heart problems and later was injured or killed in a car accident caused by a bursting tyre, the insurance company was entitled under the old law to avoid the policy and reclaim all benefits already paid out under the policy while retaining all premiums paid by the insured.

Under the new law the insurance company would only be released from its obligations if the non-disclosure regarding the insured's earlier heart problems had an impact on the risk that materialised, eg, if the accident resulted from the insured suffering a heart attack.

Although intensively discussed among legal experts for years, the four-week time period within which an insurer must declare the termination of an insurance contract after discovery of a misrepresentation or non-disclosure remained unchanged in the 2006 revision.

The government's expert commission now proposes to extend this period to eight weeks. It is triggered as soon as the insurer is in possession of reliable information on the non-disclosure or misrepresentation, ie, has come to know the violation of the disclosure obligations. Mere suspicions are not sufficient.

The extension of the four-week deadline to eight weeks is obviously not the only relevant modification which the expert commission proposes. Its report includes a draft of an en-tirely new ICA with 113 articles, as well as proposals for various amendments to the ISA and a new provision on general terms and conditions to be included in the Code of Obligations.

The latter provision is aimed at introducing into Swiss law a control of the contents of standard contract terms; terms and conditions which unfairly discriminate against the counterparty shall be invalid.

The idea of consumer protection which is reflected in this provision is also contained in numerous other articles of the proposed new ICA which are either absolutely mandatory or at least "relatively mandatory", ie, which cannot contractually be modified to the disadvantage of the policyholder or the insured person. Also the existing ICA contains numerous such provisions.

What is new, however, is that so-called large risks – among them are liability risks with insureds which exceed two of the following three criteria: (i) total assets of €6.2m; (ii)net turnover of €12.8m and (iii) 250 full time employees on average – shall be exempted from these restrictions on contractual freedom. Thus, quite differently from the existing law, the proposed new ICA distinguishes between consumer contracts and industrial risks.

As already is the case in the field of automobile liability insurance, the expert commission suggests giving an injured party a right to claim its damages directly from the tortfeasor's liability insurer.

If the damages caused by a tortious act exceed the limits of the tortfeasor's liability insurance, the insurance proceeds will be divided among the damaged parties *pro rata*. In this connection, an entirely new feature is proposed to be included in the ICA: an involved party (or the competent court in its own discretion) can invite all injured parties to participate in legal proceedings initiated against the tortfeasor's insurer.

If a party does not follow such invitation, it will be excluded from the distribution of the insurance proceeds and forfeits its claim against the tortfeasor's insurer. However, its direct claim against the tortfeasor remains intact.

This new procedural concept has already been called a mild form of class action by some commentators. It remains to be seen how this concept of direct claims and compelled participation in legal proceedings will be received in the consultation proceedings and the debate in parliament.

The following further proposals of the expert committee's report are also worth mentioning:

- Prohibition of compensation of the broker by the insurer;
- A duty of the insured to take steps to avoid losses when a threat to the insured property becomes clear (in addition to the existing mitigation duties), with a corresponding duty of the insurer to cover the costs involved;
- The breach of a contractual obligation by the insured may only lead to a reduction of insurance benefits if there is a causal link between such breach and the loss;
- The right of the insurer to demand information about the loss from the insured is restricted to information that is "necessary" to assess the loss rather than "useful", as is presently the case; and
- Extension of the limitation period for claims under the ICA from two to five years.

As under the existing law, the new ICA would only be applied to reinsurance contracts by analogy, where considered appropriate by a court.

The hills are alive: to the sounds of change in Swiss insurance law

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LEGAL BRIEF

BARLOW LYDE & GILBERT

TUPE: taking on transfer teams

ONE of your broking teams is celebrating winning a tender for a book of business from a new client. It will bring in good revenues.

It may be that you have won the business because the client has become disgruntled with the competitor's broking team. Perhaps your competitor became uncompetitive because of the salaries and bonuses it had to pay its team. In any event, you are looking forward to commencing work afresh on the new business.

At that point, your competitor telephones. The message is that when you take over the work, you will inherit the team that handled the business at your competitor. Apparently the team members will automatically become your employees and there is nothing you can do about this. How can this be?

Perhaps one of the most complicated pieces of employment legislation is known as TUPE. This stands for Transfer of Undertakings (Protection of Employment) Regulations 2006. As the name suggests, TUPE protects employees when an undertaking, business or activity transfers from one entity to another.

TUPE's three key consequences

What does TUPE actually do to protect employees? There are three key consequences:

1) TUPE transfers the employees who are assigned to the transferring activity with that activity. This means that when the activity transfers, the employees go with it and the new entity steps into the old entity's shoes as the employer. This includes taking on all liabilities and obligations in relation to those employees.
2) TUPE protects the employees from being dismissed and from having their terms and conditions changed. Unless there is a change in the numbers or functions of the workforce, any dismissals in connection with the transfer will be unfair and any changes to terms and conditions will be void.
3) TUPE imposes certain information and consultation obligations on employers. If these are not complied with the affected employees may be awarded up to 13 weeks' pay each – and the liability for this can be shared between the new and old employer.

TUPE matters when you win a book of business from a competitor because if there was a dedicated team handling the business at your competitor, the resulting transfer of broking activities may well amount to a transfer of an "activity" for the purposes of TUPE. If so, TUPE will then apply to transfer the employees.

Disgruntled with competitor's team

This will be particularly unwelcome if the reason the client has moved the business to you is because they were disgruntled with your competitor's team. Additionally, what looked like a profitable piece of new business may be less attractive when saddled with the costs of the old team.

So how can you deal with this? Unfortunately, there is no way of contracting out of TUPE, so it is a case of being aware of it and going into the tendering for new business with your eyes open to the risks.

You should consider whether TUPE will apply and if so what employees you may receive (being alert to the competitor trying to add additional people to the team). You can then consider what the likely expense (ie, employment cost) of the employees may be.

TUPE does help to some degree in this regard – your competitor will have to provide you with certain details regarding the employees who will come across to you but this information will by no means be comprehensive. Given this, you may want to build in some headroom in your tender to allow for unexpected expenses.

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