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RVP Bulletin

Planned Changes of Swiss Insurance Contract Law in a Nutshell

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Zurich, November 2011, Nr. 7

Contents

Draft Swiss Insurance Contract Act

The official commentary („Botschaft“) and the draft of the fully revised Swiss Insurance Contract Act (“ICA”) have been published in September 2011. The draft of the Insurance Contract Act (the “Draft Act” or “Draft ICA”) shall be deliberated in Parliament in 2012. It will enter into force at the beginning of 2013 at the earliest. Some provisions of the Swiss Insurance Supervision Act (“ISA”) are planned to be amended as well. It makes sense at this point in time to provide a first overview of the most important legal revisions that are planned.

Mandatory, semi-mandatory and non-mandatory provisions

The Draft ICA (like present law) distinguishes between mandatory, semi-mandatory and non-mandatory provisions. Whereas mandatory provisions may not be changed and semi-mandatory provisions may not be changed to the detriment of the insured or the entitled person, the parties are free to deviate from non-mandatory provisions.

The mandatory as well as the semi-mandatory provisions are specified by section number in the current Insurance Contract Act. In the Draft Act, however, such specification applies to semi-mandatory provisions only (Art. 2 D-ICA). It is not necessary according to the official commentary that mandatory provisions are specified by section. The mandatory nature results by implication from the public interest (e.g. bankruptcy of insurance company, place of execution, temporary provisions) or results from the fact that the parties are not able to decide on third party rights (e.g. direct claim of injured party in liability insurance) or from the fact that a provision is not subject to parties' arrangements (e.g. scope of the act).

Protection of insured persons

The new Insurance Contract Act shall ensure an appropriate level of protection for the insured persons. For such purpose, various provisions are semi-mandatory provisions that may not be changed to the detriment of the insured or the entitled person. Such provisions' scope of protection covers contracts with consumers as well as contracts with small and mid-size companies. It does, however, not cover credit and suretyship insurance and large risks. In these areas the relevant provisions are non-mandatory. A company that looks for large risk insurance generally does not need any protection. It has sufficient know how and resources to protection its own interests (Art. 2 D-ICA).

Introduction of general right of withdrawal

It is suggested to introduce a general biweekly right of withdrawal. Such right of withdrawal is excluded only for collective personal insurance, provisional cover notes and insurance contracts with a policy period of less than one month. The insurance company must inform the policyholder about the right of withdrawal before entering into the contract (pre-contractual duty to inform; Art. 7-8 and Art. 12 D-ICA). The suggested rules go beyond the relevant insurance directives of the EU that provide such a right of withdrawal only for life insurance and for non-life insurance contracts if entered into in distance selling. The general right of withdrawal is criticized in the Swiss insurance industry to be too extensive.

Entitlement to benefits

As in the current law and in most European legal systems, the Draft ICA adopts the so called „interest theory" in the context of the entitlement to benefits: The interested person is the person who would need to pay the loss, should there be no insurance contract. The insurance may be entered into in the interest of the policyholder (insurance for own account) or in the interest of a third party (insurance for the account of a third party).

It is assumed that the insurance is entered into for the account of the insured person and, if applicable, that such insured person is entitled to the insurance claim. The insured person (the person, his or her goods or his or her assets) may be the policyholder (self-insurance) or a third party (third party-insurance). The direct claim of the insured third party may not be deviated from in the event of collective health and accident insurance or any specific statutory direction (Art. 9-10 D-ICA).

No simulated approval based on policy wording

According to the Draft ICA the insurance company may not any longer refer to the policy if the policy wording contradicts a deviating actual agreement. It follows that the insurance company will be forced to act more diligently when entering into an agreement: The insurance company must ensure in the future that the broker or agent does not commit to more than what is actually stated in the policy afterwards (Art. 11 D-ICA versus Art. 12 ICA).

It is in this context that the policyholder shall be entitled to ask for a copy of the application or other written declarations of the applicant based on which the contract was concluded. The insurance company must pre-contractually inform the policyholder about such right of delivery (Art. 11 and 12 D-ICA).

Duty to inform about gender based insurance premium

The current pre-contractual duty to inform shall be extended to also cover possible premium deviation based on gender. Other than EU law the Draft ICA does not prohibit premium based on gender. Rather, it requires transparency (Art. 12 D-ICA).

Pre-contractual information well in advance

The pre-contractual information as well as the general insurance conditions must be presented in writing, in comprehensible form and well in advance so that the policyholder can be aware of them at the time of contract application or contract acceptance (Art. 13 D-ICA). The Draft Act makes it clear that the policyholder must be provided with sufficient time for appropriate notice of the information. Therefore, pre-contractual information must take place well in advance.

Collective insurance

The Draft ICA includes various provisions that take into consideration the particularities of collective insurance.

The current law generally requires for collective contracts granting persons other than the policyholder a direct claim for benefits that the policyholder informs such persons about the important content of the contract as well as its changes and termination (Art. 2 ICA). Under the Draft Act, however, such information duty applies only to life insurance and business related collective insurance (Art. 111 and 116 D-ICA).

Contract termination after a breach of the disclosure duty is limited to the concerned part of the contract according to both new law and current law (Art. 21 D-ICA). Upon request by the policyholder, the same applies to contract termination after a change of risk (Art. 21 and 47 D-ICA).

Furthermore, the following applies to collective insurance: The right of withdrawal of the policyholder is excluded for collective personal insurances. Direct claims of insured third parties may not be excluded for collective health and accident insurance. Also there are additional restrictions for the processing of sensitive personal data in collective personal insurance (Art. 7, 10 and 71 D-ICA).

Disclosure duties before and during the contract

Insurance contract law includes on the one hand provisions on the pre-contractual disclosure duty and on the other hand provisions on the disclosure duty after a risk increase during the contract. The Draft ICA deals with the temporal delimitation between these two types of disclosure duties: The pre-contractual disclosure duty applies before the delivery or posting of the information to the insurance company. Afterwards, there is a risk increase subject to disclosure (Art. 17 D-ICA).

Provisional cover note

Based on a provisional cover note, the policyholder may obtain insurance coverage already before entering into the final contract. The provisional cover note qualifies as independent insurance contract that is subject to the Insurance Contract Act. Despite a broad use in practice, there are no statutory provisions dealing with the provisional cover note, which shall be changed in the future. According to the Draft ICA the pre-contractual information duty shall apply to the provisional cover note to a limited extent only. Also particular formal requirements shall not apply to provisional cover notes (Art. 23 D-ICA).

Possibility of retroactive insurance

A contract is generally void according to current law if at the time of the conclusion of the insurance the risk has already fallen away or the suspected event has already occurred. Under the new Act the parties shall be able to decide whether they wish to enter into a retroactive insurance. The bringing forward of the cover shall be permitted even if the parties already know of the early occurrence of the suspected event or if the parties are unaware of a possibly already occurred event. However, retroactive insurance is void based on the principle of utmost good faith if only the policyholder knew (or must have known) that an insured event has occurred before contract conclusion (Art. 24 D-ICA).

Consequence of omission of duties

In the event of omission of a statutory or contractual duty the insurance company is able to refuse payment according to the Draft Act if the omission is intentional and reduce payment corresponding to the level of fault if the omission is indirectly intended or negligent. There is no reduction of payment, however, if the omission of duty has no effect on the payment duty of the insurance company (principle of causality). It is therefore a requirement for the reduction of payment that the occurrence of a loss is fa-

voured or the extent of the loss is increased by the omission of duty (Art. 41 D-ICA).

Part payments

The Draft ICA expressly provides for the duty of part payments: If the insurance company contests its payment duty only as regards the payment amount the person entitled to benefits may ask for the payment of the amount that is not contested (Art. 39 D-ICA).

Premium adjustment clause

According to the Draft ICA any premium adjustment clause shall be allowed only if the circumstances relevant for the premium calculation substantially change after contract conclusion. A substantial change must be justified from an objective perspective. The policyholder shall be entitled to terminate the contract or the relevant part of the contract if the insurance company applies a premium adjustment clause (Art. 48 D-ICA).

New termination rules

The Draft ICA provides for a general right of termination (semi-mandatory provision). Pursuant to the new provision the contract may generally be terminated after the end of the third year or the end of each following year respecting a termination period of three months. The parties may agree on shorter termination periods (Art. 52 D-ICA). Life insurance is subject to an exception where the contract may be terminated after one year (Art. 106 D-ICA). As a consequence of the introduction of a general termination right, the current right to terminate the contract after an event of loss will be eliminated.

The insurance contract like many other contracts shall be able to be terminated for cause at any time. There is cause if the person who terminates cannot any longer be expected to continue the contract based on the principle of utmost good faith. This may apply for example in the event of insurance fraud or unfair treatment (Art. 53 D-ICA).

Moreover, the policyholder shall (like in the current law) be entitled to terminate the contract if the license of the insurance company is revoked. The same shall apply in the new law if an insurance company subject to license requirement does not hold the necessary license (Art. 54 D-ICA). The Draft ICA expressly includes various other special termination cases: The termination right is expressly stated in the law in the case of a breach of the information duty or the disclosure duty (Art. 14 and 18 D-ICA), the provisional cover note (Art. 23 D-ICA), a delay in premium payment (Art. 30 D-ICA), the increase and reduction of risk (Art. 45-45 D-ICA), a premium adjustment (Art. 48 D-ICA), a change of ownership (Art. 51 D-ICA), multiple insurance (Art. 79 D-ICA) and the transfer of a Swiss insurance portfolio (Art. 62 ISA).

Insurance cover after contract termination

The Draft Act introduces a general extended liability period of ten years: According to such principle there is a payment duty of the insurer even if the insured risk and the insured loss do not both occur during the contract term. It is sufficient that the insured risk occurs during the term of the contract. Any losses resulting thereof (e.g. medical expenses, loss of income) are still covered if they occur within ten years after termination of the contract. Professional and commercial liability insurance is excluded from the semi-mandatory rule so that the claims-made principle may still be agreed upon between the parties for these types of insurance (Art. 55 D-ICA).

Furthermore, the Draft Act makes it clear for pending insurance claims that a contract provision shall be void according to which the insurance company may unilaterally modify or cancel existing payment duties as regards payment duration and amount after the occurrence of the suspected event (Art. 56 D-ICA).

Extension of limitation period

The current short limitation period of two years is not up to date any more. Therefore, the Draft ICA suggests that claims for insurance benefits are subject to a limitation period of ten years from the suspected event and that premium claims are subject to a limitation period of five years from the due date (Art. 64 D-ICA).

Indemnity insurance and fixed-benefit insurance

The criticised distinction between indemnity insurance and personal insurance shall be replaced in the revised law. Instead, it shall be distinguished be-

tween indemnity insurance and fixed-benefit insurance. It is thereby distinguished as regards the conditions of payment whether or not the suspected event must be based on the occurrence of a loss. According to the current concept personal as well as property and financial insurance may be formed as indemnity or fixed-benefit insurance.

There is *indemnity insurance* if the suspected event is caused by a loss in the legal sense (e.g. cure and hospital cost insurance). The indemnity insurance follows the principle of one-time compensation of the suffered loss. The injured must credit all payments for the purpose of loss compensation against insurance benefits. The accumulation of claims is not permitted (Art. 75 D-ICA).

There is *fixed-benefit insurance* if the suspected event must not be based on the occurrence of a loss (e.g. (risk-) life insurance). The criterion of loss occurrence is not relevant in fixed-benefit insurance. In the event of fixed-benefit insurance, the insurance company must make its payments in addition to possible other claims (Art. 84 D-ICA).

The clear allocation to indemnity insurance or fixed-benefit insurance is often difficult. Therefore, the parties shall be able to determine themselves in the contract whether or not payments must be credited against insurance benefits. The insurance company must inform the policyholder about the type of insurance payment in the sense of indemnity or fixed-benefit insurance before entering into the contract (Art. 12 D-ICA).

Multiple insurance in the indemnity insurance

Cases of today's double insurance in the indemnity insurance are dealt with in a new and modern way under the heading of "multiple insurance" in the Draft Act. Only such multiple insurances are covered that are entered into by one and the same policyholder with several insurance companies.

Stated in a simplified way, the following applies: First, the policyholder is obliged to inform the insurance company about the fact of multiple insurance in writing and without delay. Each insurance company is then entitled to terminate the contact, since multiple insurance causes a change of the content of the contract independent from what the insurance company wants. If the information duty is breached the insurance company may terminate the contract after becoming aware of the breach. Insurance sum and insurance premium are adapted for those contracts that have not been terminated (Art. 78-83 D-ICA).

Direct entitlement in the liability insurance

The Draft ICA provides for a direct entitlement to insurance benefits instead of the present lien in the liability insurance. The direct entitlement of the injured person against the liability insurer of the harming person shall ensure that the insurance benefits are in fact paid out to the injured person and may not be used by the liable person or his creditors for purposes other than intended. The direct entitlement is limited to bodily injury and damage to property in the Draft Act. It does not apply to non-mandatory liability insurance for pure financial loss, however, may be agreed upon between the parties due to the non-mandatory nature of the provision (Art. 91 D-ICA).

Legal representative in the legal protection insurance

Presently, it is generally assumed that legal representation may be mandated either by the insurance company or the insured person. The Draft Act makes it clear for the future that exclusively the insured person may mandate legal representation. As contracting body the insured person is able to independently enforce claims based on the mandate. The insured person has the instruction right and may decide on the termination of the contract. It follows that the insured person controls the proceeding from a formal perspective (Art. 97 D-ICA).

Concept of medical consultants

The Draft Act takes over the concept of medical consultants for the additional health insurance and daily allowance insurance to the extent it is necessary for the protection of the data of the insured persons. According to such concept the insured person may ask that the care provider discloses medical information only to the medical consultant of the insurance company in situations where the insured person is insured against sickness with the same insurance company under both Health Insurance Act and Private Insurance Act. Afterwards, the medical consult-

ant forwards information to the insurance company in a filtered way to the extent necessary for the decision and determination of the insurance benefits (Art. 72 D-ICA).

Insurance intermediation

In current practice it is not always clear who is insurance broker and who is insurance agent, as there are hybrid forms. The new law shall ensure a clear separation between insurance brokers and insurance agents. In the future insurance intermediaries must either be connected to an insurance company or to a policyholder under both private and supervision law. The insurance broker has a fiduciary relationship with the clients and acts in their interest, whereas the insurance agent is mandated by one or several insurance companies to place insurance contracts and thereby represents the respective insurance company. The double entry into the intermediary register as tight agent and broker which is currently possible in supervision law, shall not be allowed any longer (Art. 65, 67 and 68 D-ICA and Art. 41 D-ISA).

Today's brokerage system is intended to be maintained for the insurance brokers despite the inherent conflict of interest. The conflict of interest situation shall be mitigated by means of extensive information duties on compensation. The information duty shall ensure that the client is able to assess the significance of the conflict of interest and take the conflict of interest into consideration when selecting the insurance company and the insurance product. Furthermore, additional compensation such as an overriding commission or a contingent commission shall not be permitted any more (Art. 65 and 66 D-ICA; Art. 45a D-ISA). Other than the insurance broker, the insurance agent is not subject to a disclosure duty as regards his compensation. It should be noted, however, that in life insurance there is disclosure of the acquisition costs (including commission payments) directly by the insurance company in the context of pre-contractual information duties (Art. 12 D-ICA).

The insurance broker advises and explains the products of various insurance companies to the client, whereas the insurance agent informs the client about the products of his respective insurance company. Both types of insurance intermediaries are subject to a documentation duty and a duty to inform about the activity as an intermediary (Art. 65, 67 and 69 D-ICA).

The Draft Act refers to the liability rules applicable to legal representation under the Swiss Code of Obligations in the event of a breach of private-law duties by the intermediary (Art. 70 D-ICA). As the enforcement of private-law duties is sometimes difficult, the Insurance Supervision Act is intended to refer to certain critical private-law duties in the Insurance Contract Act. This is how it is ensured that in addition to private-law sanctions administration-law sanctions are also possible against the insurance intermediary. Accordingly, protection is reinforced. This applies for example to the disclosure of compensation pursuant to Art. 66 D-ICA and the information duty pursuant to Art. 69 D-ICA (Art. 45 D-ISA). The provision regarding the information on insurance intermediation is presently integrated in supervision law; it shall be transferred to contract law, as it concerns private-law duties to the policyholder.

Ombuds office

Licenced direct insurers and independent insurance intermediaries are obliged to set up and join an independent private-law organized ombuds office. The membership must be established. As regards insurance companies, evidence must be included in the business plan. Both insurance companies and independent insurance intermediaries must indicate in their contracts the possibility of approaching the ombuds office in the event of dissension (Art. 4, 44 and 85a D-ICA).

Abusive insurance conditions

The Draft ICA does not include any provision on the abusive content of general terms and conditions. However, it shall be reminded in this context that Art. 117 ISO includes (among other things) a provision about abusive general insurance conditions. Pursuant to this provision the insurance company acts in an abusive way if he uses (standard) contract conditions that provide for a materially disproportioned allocation of rights and duties.

Furthermore, according to the revised Unfair Competition Act (Art. 8; entering into force on 1 April 2012) a person acts in an unfair way if he uses general terms and conditions that provide for a material and unjusti-

fied disproportion between contractual rights and contractual duties to the detriment of the consumers in a way contradictory to the principle of utmost good faith.

Transitional rules

The revised Insurance Contract Act shall apply to all contracts that are concluded after its entering into force in accordance with general law principles. It shall also apply the amendments to pre-existing contracts that are agreed upon after the entering into force of the revised law. The new law applies to the amended parts of the contract. A contract renewal qualifies as contract amendment as well: If a contract as a whole is prolonged the new law applies extensively (Art. 130 D-ICA).

Various provisions of the revised law apply to pre-existing contracts for reasons of the protection of insured persons. This applies for example to the right of withdrawal, entitlement to benefits in collective health and accident insurance, notices and compliance with deadlines, rules applicable to the delay in premium payments, duties after the occurrence of a loss, insurance benefits, contract changes, extraordinary contract termination, additional liability, and rules on indemnity and fixed-benefit insurance (Art. 130 D-ICA).

Abbreviations

D-ICA:	Draft Insurance Contract Act of 2011
D-ISA:	Draft Insurance Supervision Act of 2011
ICA:	Insurance Contract Act of 1908
ISA:	Insurance Supervision Act of 2004
ISO:	Insurance Supervision Ordinance of 2005

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