

2024 Insurance Sector Group Webinar Programme

Main trends and traps when handling professional indemnity claims

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What we will cover

01 Notification requirements

02 Duty to disclose and misrepresentation

03 Insurers' duty to pay claim

04 Duty to defend



1

Notification requirements

- **Claim or Circumstance:**
 - **Claim** – a demand for something as due or an assertion of a right to something
 - **Circumstance** – a situation that “may”, “might”, “could” or is “likely to” result in a claim under the policy
- **Notification requirements** are generally express terms of the policy
- Notice must be given **within the time set out in the insurance policy**. If the contract is silent on this, it is prudent to give notice within a reasonable time
- **Consequences of late notification**
 - If the notification provision is a condition precedent: coverage denial
 - If the notification provision is a simple condition: insurer can claim damages to the extent that the insurer's position has been prejudiced by the late notification

Notification requirements

Singapore

- Contained in **policy wording**, rather than in statute
- Will require insured to give notice of “**claims**”
- “**Claim**” likely to be defined in policy wording
- **Time limits vary** – e.g. “*within 30 days*”, “*as soon as reasonably practicable*”, “*within policy period*”
- If the provision is a “**condition**” then breach entitles insurer to claim damages for prejudice
- If it is a “**condition precedent**” to insurers’ liability then breach entitles insurer to deny liability
- Policy may also permit / require insured to give **notice of circumstances** which may / might etc give rise to a claim
- **Subsequent claims** arising from those circumstances then deemed made when circumstance notified
- “**Continuous cover**” clauses may “*forgive*” late notification

Notification requirements

Brazil

- Nearly all policies are written on a **claims-made basis**
- “**Claim**”: any written request (judicial or not) of compensation made by a third-party against the insured based on the liability of the latter
 - **Non-judicial claims**: no time-limit for insureds to report them to the insurer.
 - **Judicial/Arbitration claims**: insureds must report them to the insurer within 1-year (statute of limitations) from service of process or from when the insured formally became aware of the dispute

- **Notification requirements** (Art. 7:941 DCC)
 - Notify the Insurer of the occurrence of the insured risk as soon as reasonable possible.
 - Provide all relevant information and documentation necessary for the Insurer to assess the damage.
- **Consequence of late notification** (Art. 7:941 DCC):
 - Reduction of the claim payout or a complete forfeiture of the right to payment, but only if the Insurer can prove it has been reasonably harmed by the failure or delay in notification and/or disclosure.
 - If the Insured intentionally misleads the Insurer, the right to any payment is forfeited entirely, regardless of whether the Insurer has been harmed by the failure or delay to notify or disclose information.

Notification requirements

Germany

- Depending on policy wording policyholder **shall notify**
 - the **occurrence of the insured event** within one week
 - a **claim made** within one week
 - **judicial or official measures** without undue delay
- No **statutory penalty** for breach of the obligation of notification
- Notification obligations and consequences of non-compliance must be explicitly **stated in the policy terms**

Consequences of late notification

- German insurance contract act provides for a **graduated system of legal consequences**:
 - **simple negligence**: no consequences
 - **gross negligence** or **intent**: (partial) release from insurer's liability
- Insurer **remains liable** to the extent the breach had **no influence** on the insurer's benefits or the insurer's ability to determine the facts of the insured event.
 - Full liability where insurer gained **knowledge through other sources**.

Notification requirements

Italy

- Notification requirements provided **by the law** (3 days)
- Notification requirements provided **by the Policy contracts** (between 30 and 90 days)
- **Consequences of late notification**
 - **wilful / intentional delay:** coverage denial
 - **negligent delay:** reduction of indemnity if a prejudice has been suffered due to the late notification
- **Claims time** barred in 2 years (suspension after claim notification)

2

Duty to disclose and
misrepresentation

- Positive duty on insureds to tell underwriters all material facts so they can make an informed assessment of the risk
 - Disclosure of every material circumstance that the insured knows or ought to know; or
 - Disclosure providing sufficient information to put a prudent insurer on notice it needs to make further enquiries.
- Breach of Duty of Fair Presentation:
 - Deliberate or reckless: avoidance of the policy (policy never existed)
 - Negligent or innocent: proportionate remedies:
 - Apply a new exclusion (if you can prove this is what you would have done with full disclosure); or
 - Reduce the amount of the claim payable (if you can prove you would have charged a higher premium)

- Insurance contracts based on “*utmost good faith*” which imposes duties of disclosure
- Insured required to make full disclosure of all material facts
- Insurer can “avoid” the policy if insured fails to disclose / misrepresents a material fact
- “Materiality” – would it influence the judgment of a prudent insurer in fixing the terms of the policy or determining whether they will take the risk?
- The non-disclosure must have subjectively induced the particular insurer to enter into the contract
- Common for insurer to waive right to avoid for innocent or non-fraudulent failure to disclose
- Onus on insurer to prove insured breached duty of disclosure

N.B. Careful consideration needed when wording proposal form questions

Duty to disclose and misrepresentation

Brazil

- Insureds have a pre-contractual duty to disclose any material facts that may give rise to future claims
 - Material misrepresentation or non-disclosure of facts that would presumably impact the insurer's acceptance of the risk or premium rating shall forfeit the insured's right to indemnification
 - Policies provide for prior knowledge exclusion
- It lies on the insurer the burden to prove the insured's actual awareness of the fact that might lead to a claim under the policy

- Duty to disclose before concluding an insurance contract (Art. 7:928 DCC):
 - Policyholder must disclose to the Insurer all information which he knows or ought to know and which may be material to the decision of Insurer to underwrite the risk or to underwrite it on particular terms.
- Two month-period for Insurer to invoke the consequences of non-disclosure (Art. 7:929 DCC) !
 - Insurer may only invoke the consequences of non-disclosure if Insurer has informed the policyholder of the breach within two months after the discovery thereof, including the possible consequences of non-disclosure.
- Consequences of non-disclosure (Art. 7:929 and 7:930 DCC):
 - Termination of the insurance contract:
 - non-disclosure with the intent to mislead Insurer (Art. 7:929 (2) DCC).
 - If Insurer would not have concluded insurance contract if had been aware of true state of affairs (Art. 7:929 (2) DCC)

Duty to disclose and misrepresentation

The Netherlands

- No payment, limited payment or full payment:
 - Insured deliberately withholds information with the intent to mislead insurer: No payment is due (Art. 7:930 (5) DCC).
 - If non-disclosure concerns facts that are irrelevant to the risk that materialized: Insured retains the right to full payment (Art. 7:930 (2) DCC).
 - If undisclosed facts would have led Insurer to charge a higher premium or impose stricter conditions: Payment may be reduced proportionally (Art. 7:930 (3) DCC).
 - If Insurer can prove that it would not have accepted the risk, had it known the undisclosed information: No payment is due (Art. 7:930 (4) DCC).
- Questionnaire

Duty to disclose and misrepresentation

Germany

- Policyholder shall inform the insurer of **all known circumstances which are relevant for the insurer's decision to underwrite the risk and which the insurer has expressly asked for in text form**
 - No duty to disclose any circumstances the insurer did not ask for, **except for fraud.**
- The **broker's questions** to the policyholder are only those of the insurer if he makes this clear in advance → insurers shall provide brokers with their own question forms

- Consequences of misrepresentation:
 - **simple negligence** or innocent misrepresentation: **cancellation** with future effect only
 - **gross negligence** or **intent**: **withdrawal** (except for grossly negligence if insurer would have underwritten under different conditions).
 - Withdrawal releases insurer from liability for insured events already occurred (exemption: misrepresentation did not affect the insured event, insurer's benefits or the insurer's ability to determine the facts of the insured event)
 - **Information of the policyholder** in text form required when answering the questions, except for fraud
 - Insurer may not insist on any consequences, if he knew the non-disclosed fact by other means.

Duty to disclose and misrepresentation

Italy

- Duty of the Insured to disclose spontaneously all circumstances that can affect the Insurer's assessment of the risk (Art. 1892 and 1893)
- Misrepresentation -> two different scenarios:
 - wilful or grossly negligent non-disclosure: annulment of the insurance contract, no indemnity
 - no wilful or gross negligent non-disclosure: the insurer may terminate the contract within three months from the day on which it becomes aware of the misrepresentation or reduction of the indemnity

3

Insurers' duty to pay claim

Insurers' duty to pay claim

England & Wales

- S.13A of the Insurance Act 2015. Applies from 4 May 2017
- Implied term in all insurance policies that if an Insured makes a claim under a policy the Insurer must pay the sums due in respect of the claim within a reasonable time
- Damages are payable in addition to any sums due under the policy for the insurance (even if a policy's limit of indemnity has been exhausted)
- Damages will be assessed by reference to whether the loss was reasonably foreseeable at the time the policy was entered into
- Limitation: One year from when underlying insurance claim was paid

Insurers' duty to pay claim

Singapore

- Insured must have sustained a crystallised loss
- “Loss” likely to include awards of damages / judgments, defence costs, settlements
- Statute does not set out a timescale for payment by insurers
- However, Monetary Authority of Singapore sets out licensing conditions requiring insurers to treat policyholders fairly
- Law Reform Committee of Singapore Academy of Law published proposals in 2020 referring to section 13A of the UK Insurance Act and proposing introduction of similar statutory language

Insurers' duty to pay claim

Brazil

- Many policies are still written on a reimbursement basis
- Liability claims are payable upon:
 - The award against the Insured becoming unappealable
 - The Insured settling the claim with the third-party claimant on an amicable basis (with the prior approval of the Insurer)
- Claims must be settled by the Insurer within 30 days from the receipt of the basic documentation listed in the policy
- Unless the policy states otherwise, delay to settle the claim shall subject the insurer to delinquent interest under the official government rate (so-called “Selic”) less the IPCA (inflation) rate variation

Insurers' duty to pay claim

The Netherlands

- Insurers can be held liable for damages caused by late payment of a valid claim.
- Damages for delayed payment: statutory interest (Art. 6:119 DCC), and in exceptional cases also additional damages (high threshold).

Insurers' duty to pay claim

Germany

- German liability insurance not only **indemnifies the policyholder against legitimate claims** for damages, but also provides **defense against unjustified claims**
 - **Duty of defense is due** when third party claimed against insured.
- If insurer is obliged to **indemnify defense costs**, payment is due **2 weeks from information on the calculation of those costs**.
- Where a third party claim is determined with binding effect for insurer (e.g. judgment or settlement with insurer's approval), insurer shall make **payment on the liability claim within 2 weeks**.
- If insurer is in **default through fault**, insurer is **liable for all resulting damages**. With regard to payments, at least, the insured can claim **default interest** which cannot be less than the amount foreseen by law.

Insurers' duty to pay claim

Italy

- General principles regarding late payments (reimbursement for the suffered damages)
- Delay attributable to the Insurers -> reimbursement might exceed policy limits
- Motor claims: 60 days or 90 days (injuries)





4

Duty to defend

- Typically, the Insured and not the Insurer has the duty to defend claims. The Insurer usually, however, has the discretion to take over the defence, negotiation or settlement of the Claim (and, in practice, usually does)
- Defence costs can either erode the policy limit or be in addition to it
- Disputes between the Insurer and Insured as to whether to contest legal proceedings are often resolved by a ‘KC clause’
- Insurers often have the right to pay the applicable policy (sub) limit, or any lesser amount for which a claim can be settled and are then entitled to relinquish the control and conduct of the defence. The Insurer is then under no further liability (including for defence costs)

- Insured usually has duty to defend claims
- However, insurer usually has right to participate in and/or “effectively associate” with and/or take control over the defence
- Insurer’s written consent to settlement, incurring defence costs and admitting liability is likely to be required
- Policy normally requires insured to agree to provide insurer with all information, assistance and co-operation reasonably required by insurer
- Many insurers will have a panel of law firms, charging panel rates
- Cover normally for “reasonable” costs only
- Insured obliged to repay defence costs if costs later determined not to be covered
- Insured often agrees not to do anything to prejudice insurer’s rights of recovery

Duty to defend

Brazil

- Is not a mandatory cover under the policy, but is typically sold as an integral part of the policy
- Policyholders have the right to either choose their own counsel or pick from among law firms accredited by the insurer
 - Insurers may reject the policyholder's choice of counsel (thereby refusing to pay its fees) if the attorney's fees are held as excessive vis-à-vis market rates or the counsel's expertise is grossly unfit for the dispute
 - Policyholders may be required to present an alternate attorney's fee proposal upon the insurer's justified rejection of a previous fee proposal

- Defence costs Professional Indemnity claims:
 - The principle of freedom of contract: “prior (written) consent of the Insurer” (lawyer and rate)
 - In practice: by mutual agreement

- As already mentioned: insurer has the **duty to defend** when he deems the claim unjustified.
 - The insurer has a certain amount of discretion here, but must safeguard the interests of the insured person.
- The duty of defense requires a comprehensive **power of attorney to act on behalf of the insured person**. This is agreed in the terms and conditions of insurance.
- That includes the **choice of the lawyer by the insurer**.
 - The **terms of insurance may differ** and grant the insured person the right to choose a lawyer.
- Standard terms provide for **necessary costs of defence**
 - Generally, costs for lawyers on the basis of **statutory remuneration only, no remuneration based on hourly rates**. Again, policy terms may differ.

Duty to defend

Italy

- Free choice of the Insured (unless the policy provides for the direct defense)
- Limits to the fee awarded to the counsel chosen by the Insured
- Defence costs on top of the policy limit (25%)



5 Questions?

Upcoming webinars

PI Construction

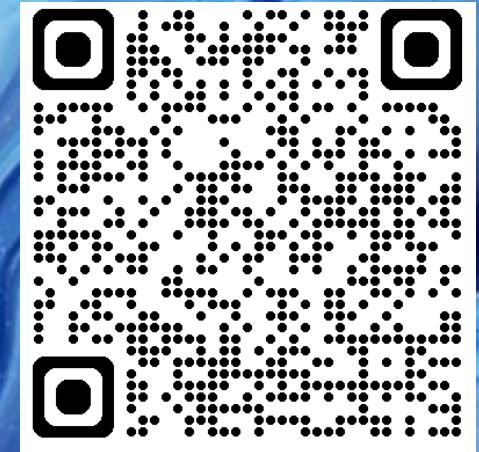
Thursday 17 October, 11.00 CET/12:00 UK

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