

# MARKET BULLETIN

**From** Director, Worldwide Markets

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**Subject** **Switzerland: Revision of Swiss Insurance Contract Law  
Precontractual Information**

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**Attachments** Appendix 1

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**Action points** Managing agents, underwriters and Lloyd's brokers to note

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**Deadlines** 1 January 2007

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Market bulletin Y3781, dated 3 April 2006 advised the Lloyd's market of changes to Swiss insurance law that entered into force on 1 January 2006. Reference was made therein (Appendix 1, page 6, point 2.1) to a change that will only enter into force on 1 January 2007.

This change concerns Articles 3 and 3a of the Swiss Federal Law on the Insurance Contract of 2 April 1908, which requires insurers to provide their insureds with precontractual information.

**Details of the new provisions and their effects are set out in Appendix 1.**

## Further information

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## APPENDIX 1: THE INSURER'S DUTY TO INFORM

### 1. The legal provisions

The new Articles 3 and 3a of the Swiss Federal Law on the Insurance Contract of 2 April 1908 ("Insurance Contract Law" or "ICL"; SR 221.229.1) have the wording stated below; (unofficial English translation).

1.1 Article 3 is titled "The insurer's duty to inform" and provides the following:

"<sup>1</sup> Before concluding the insurance contract, the insurer is obliged to inform the policyholder about its identity and the essential elements of the insurance contract in a comprehensible way. The insurer has to provide information about:

- a. the insured risks;
- b. the insurance coverage;
- c. the premiums due and the policyholder's other obligations;
- d. the term and termination of the insurance contract;
- e. the methods, principles and bases for calculating and distributing the surplus profits;
- f. the surrender and transformation values;
- g. the handling of personal data, including purpose and type of data collections as well as data recipients and data storage.

<sup>2</sup> This information must be communicated to the policyholder in a manner which enables the policyholder to be aware of them when applying for or accepting the insurance contract. The Policyholder must at all events be in possession of the general insurance conditions and the information according to para. 1 letter g at such time.

<sup>3</sup> In cases where the insurance contract is a collective contract granting a direct claim for performance on persons other than the policyholder, the policyholder is obliged to inform these persons about the essential elements, the modification and termination of the contract. The insurer must provide the policyholder with the documentation necessary to provide such information.

1.2 Article 3a is titled "Violation of the duty to inform" and provides the following:

"<sup>1</sup> If the insurer violates the duty to inform according to Article 3, the policyholder is entitled to terminate the insurance contract by giving written notice. The termination becomes effective upon delivery of the notice to the insurer.

<sup>2</sup> The termination right expires four weeks after the policyholder has come to know of the breach of duty and the information according to Article 3 and, in any case, one year after the breach of duty at the latest".

## **2. Date of implementation**

As the new legal provisions will become applicable from 1 January 2007, precontractual information has to be provided with respect to those insurance contracts which are concluded on or after 1 January 2007. Therefore, the date on which the accepting party (usually the insurer) declares its agreement is the relevant date, not the inception date. If, for example, the parties reach before the end of 2006 a final agreement to enter into or renew an insurance contract for the period 1 January to 31 December 2007, Articles 3 and 3a ICL are not applicable.

In cases of collective or group insurance and as an exception to the above rule, the insurer has to provide the policyholder with the documentation stipulated in Article 3 para. 3 ICL from 1 January 2007.

## **3. Knowledge of the broker**

It has been stated in pertinent legal literature that there is no need to give the policyholder that information which has been given already to his broker; the knowledge of the latter will be imputed to the former. However, it is uncertain at this stage whether that opinion will be followed by the courts. In addition, that rule will not apply in cases in which the intermediary is deemed to be an agent.

## **4. Compulsory nature of Articles 3 and 3a ICL**

Articles 3 and 3a ICL are compulsory, which means that the policyholder cannot validly waive his rights. The only exception to this exists with regard to transport insurance; here, the parties may agree on the non-applicability of the provisions mentioned.

## **5. General information**

There is some precontractual information (such as information on the insurer's identity or on data protection) that is standard and can be provided comprehensively for all contracts and branches of insurance. This general information has been included in the new wording NMA2242 (contained in NMA2241) which should be made part of every contract of Lloyd's Swiss business. The wording contains nine basic provisions which are stated as having overriding power over any other contractual provisions unless explicitly stated otherwise.

The bulk of precontractual information, however, concerns aspects that are different for each contract and for each product or branch of insurance.

## 6. Contract-specific information

Contract-specific information has to be provided concerning a number of aspects as follows; (this list is non-exhaustive):

- 6.1 The insured risk(s) and the scope of coverage (as well as the main exclusions from coverage) have to be described briefly.
- 6.2 Maximum limits (or sum(s) insured, daily allowances etc.) as well as the deductible or self-insured retention must be mentioned.
- 6.3 In property insurance, a short description or explanation of such terms as replacement value, time value, market value etc. should be given and it should also be mentioned whether the insurance is on first risk or on full value basis. As regards the latter, it should be explained how the indemnity will be calculated in cases of under-insurance.
- 6.4 Special clauses dealing with double insurance (particularly subsidiarity clauses) should be mentioned.
- 6.5 With regard to the premium, its total amount (inclusive of stamp duty) and the time and manner of payment (one-off or periodic) should be indicated as well as a possible premium grade system (i.e. fixing of the premium according to the claims record or bonus/malus system). In the case of combined products in regard to which the policyholder may select certain types of coverage, the premium has to be stated for each type.
- 6.6 Major conditions and warranties must be included (such as the need for periodic control of the oil-tank in a homeowner's third party liability insurance; the need to heat a holiday home in winter to avoid the freezing of water pipes; a safe clause or a personal conveyance clause in All Risks insurance; the precept not to accept the third party's claim in liability insurance; the need to provide the insurer with certain documents in the event of a loss). In addition, special clauses dealing with an aggravation of risk should be described.
- 6.7 The period of insurance and an automatic renewal (with the possibility of cancelling the policy in such a case) should be indicated. In matters of third party liability insurance it must be mentioned whether the policy is on a claims made, on a loss occurrence or on an action committed basis.
- 6.8 An outline of the geographical limits must be given.
- 6.9 Additional information in collective or group insurance comprise a description of who is insured (e.g. the directors and officers in D & O insurance, the members of the family in comprehensive household insurance) and of the start and the end of coverage for the individual insureds.

## **7. Documentation and acknowledgment by the policyholder**

The precontractual information may be contained in a separate document (in electronic or hard copy form) or in a separate section or first part of the general or special contract conditions. The information as well as the contract conditions have to be given before the contract is concluded. The information must be readily comprehensible which is why it is not sufficient if the policyholder merely receives the contract conditions. On the other hand, precontractual information does not form part of the insurance contract (which should nevertheless be made clear somewhere in the information).

For the purpose of establishing sufficient proof the policyholder should be requested to confirm in writing that he was given sufficient and timely information. Such a statement, can for example, be contained in the questionnaire (ideally in bold script, and signed by the policyholder). The statement should refer to and cover the Precontractual Information and the General Conditions in the new wording NMA2242.

## **8. Lack of certainty - Disclaimer**

It must be stressed, finally, that Articles 3 and 3a ICL are new and rather broadly worded provisions. In addition, no case law exists yet so that considerable uncertainty results as regards the type and extent of the precontractual information that has to be provided in a particular case. It may well take a few years until the boundaries between sufficient and insufficient information will become clear. In this situation, no guarantee can be given that the above comments are correct or complete in every respect. They are meant to be guidelines only which do not and cannot replace expert advice in a given case.