

The Swedish Insurance Contracts Act 2005

– an overview

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On 1 January 2006 a new Insurance Contracts Act (Försäkringsavtalslag (SFS 2005:104)) entered into force in Sweden, replacing the Insurance Contracts Act 1927 and the Consumer Insurance Act 1980.¹ The Act is in many ways a modern and interesting product and merits an introduction in English, in the context of the current process of reform undertaken by the Law Commissions of England & Wales and Scotland as well as in the context of expected European initiatives for insurance contract law reform.²

I. Reform process

Prior to the entry into force of the new Insurance Contracts Act (SFS 2005:104) on 1 January 2006, the Insurance Contracts Act 1927 had been under scrutiny for several decades. The most important milestone was the Consumer Insurance Act 1980, which went on to serve as an important beacon in the work on the new Act, not least due to the stature of its author, the late Professor Jan Hellner who is perhaps best described as a Sir Mackenzie Chalmers of Swedish insurance law. Many of the key concepts of that Act have in the new legislation been retained, refined and expanded to apply to consumer and business insurance alike.³

The currently ongoing work in the European Union on a harmonised insurance contract law is noted in the preparatory works to the new Act; however, the option of waiting for its conclusion is summarily dismissed – reform of the 1927 Act is said to be an urgent matter, and reference is made to the harmonisation of the private law of the Nordic countries in progress since 1901, pointing out that the other Nordic countries have either already enacted new legislation or are about to do so. From comments made in the Parliamentary proceedings, it is clear that an Act in force with strong protective features for consumers

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is considered a valuable bargaining chip, should the EU work acquire more momentum.

The twin purposes of the enactment are to provide stronger protection for consumer assureds, while satisfying commercial sector requirements of freedom of contract. The perpetual conundrum for successive Swedish governments is the equilibrium between the need for a healthy business climate and the policy of strong protection of consumers, employees and other vulnerable interests – a particularly delicate one with insurance which by definition involves some description of interest at risk.

Following over 30 years of deliberations, the phase of enactment and entry into force was rather hurried, allowing insurers just over nine months to adapt standard terms and conditions to the new Act.

2. Applicability, structure and character

2.1 Applicability

The new Act takes the form of a single code applicable to all insurance contracts, including consumer contracts which were previously regulated by a separate Act, as well as to contracts for collective and group insurance, an area previously unregulated in Swedish law. Specialised insurance acts – eg on traffic insurance and patient injury insurance – remain in force. The new Act is not applicable to reinsurance. It is prospectively applicable and begins to apply to an existing insurance contract upon renewal. In addition, the Act was amended before it entered into force to apply retroactively to collective agreement insurance. This amendment was introduced at the insistence of both employers' associations and trade unions, to save costly renegotiations of existing contracts.

2.2 Structure and scope

In spite of the ambition to reunite most rules on insurance contracts under a single Act, the Act contains very few generally applicable provisions. The initial chapter contains a mere eight sections. The following chapters contain rules on insurance of goods (with a further subdivision into consumer and business insurance) and persons (that is life, accident and health insurance). These chapters contain many identical reiterated provisions, a drafting technique which while conceded to be both repetitive and inelegant was thought capable of making the Act more accessible to those in the insurance industry who will be applying it. The final chapter deals with the previously unregulated collective agreement and group insurances as applicable to goods and persons respectively.

2.3 Mandatory character and derogation

The provisions of the Act are mandatory to the extent that derogation to the detriment of the assured is not permitted where the assured is a consumer. Derogation is permitted in the context of marine or transport insurance (unless the assured is a consumer); credit insurance; group goods insurance where the assured is a group of business persons; and insurance based on collective agreements, provided that the insurance is based on an agreement between employers' and employees' unions.

A main driving force in the production of the Act was the need to provide for solid consumer protection. Simultaneously, the need to cater for the needs of commercial insurers for freedom to develop new insurance products and the needs of commercial entities for flexibility in commissioning and negotiating insurance was clear to the legislator. The attempted solution was to stipulate that derogation from the Act is not permitted to the

detriment of the assured. The list of exceptions from the mandatory nature of the Act comprises on the one hand various types of commercial insurance and on the other, insurance contracts typically negotiated on behalf of consumers by larger entities. The Act as a whole is therefore not mandatory to some types of insurance where proposal forms are not commonly used, such as marine and transport insurance. By way of example, the revised Swedish Marine Insurance Terms 2006⁴ contain contractual stipulation on the duty of disclosure based on the language of the repealed Insurance Contracts Act rather than the revised language. In addition to these sectoral exclusions, exceptions have been made throughout the Act in each provision where the legislator has judged derogation permissible.

3. Duty of disclosure

The ICA is divided into rules for consumer insurance (damage to property, liability and economic loss), business insurance (covering the same types of insurance) and insurance of persons (commercial life, accident and health insurance). In each of these chapters, there is separate regulation of the duty of disclosure of the assured.

The focus in the elaboration of the Act was on other matters than disclosure rules. The new provisions therefore owe much to the previously applicable framework but have perhaps drawn most upon the Consumer Insurance Act. The provisions on the duty of disclosure of the assured are framed as limitations of the liability of the insurer.

The law on duty of disclosure is typically of a mandatory nature. Provisions concerning consumer insurance and insurance of persons are mandatory. For business insurance, the scope of the duty of disclosure is mandatory, but derogation is specifically permissible in the assessment of the remedy, which may be

calculated in one of two ways, pursuant to stipulation in the contract. Both methods of calculation are familiar to insurers from previous law – the default *pro rata* method as well as the causality rule. Moreover, the assumption underlying the new Act is that proposal forms will be used, particularly in relation to the insurance of small and medium-size businesses. This has permitted an overall narrowing of the scope of the duty of spontaneous disclosure.

3.1 The duty of the assured in contracting for insurance

For consumer insurance as well as insurance of persons, the proponent is under a duty to provide *'information that may be of importance to the question whether insurance should be provided'* (ICA 4:1 and 12:1). For insurance of persons, the duty applies to the contracting assured (the person contracting for insurance, for himself or for other parties) as well as the assured (the person enjoying insurance). Critically, the Act goes on to specify that the duty to disclose is limited to responding to questions from the insurer; in spite of the quoted language, the assured is under no independent duty to volunteer information. It is up to the insurance company to ensure that the proposal forms are complete.

In contrast, in business insurance the assured must, in addition to responding to the questions of the insurer, also volunteer information *'whose importance to the assessment of the risk is evident'* (ICA 8:8). The obligation had been present in earlier legislation but the information to be provided was such of whose importance the assured *'knew or should have known'* (repealed Insurance Contracts Act, s 7); the new language is narrower in scope.

The duty to disclose applies equally when insurance is renewed or expanded. In consumer and business insurance (but not in relation to insurance of persons), an assured who

discovers that information previously provided by any party was erroneous is under a duty to correct that information, where the importance of the information is *'evident'*. For insurance of persons, there is no statutory duty to amend information, but the preparatory works (a key source of interpretation of Swedish enactments) state the openness of the legislator to contractual stipulations to that effect. The duty to correct is not directly related to any specific remedy but it is clear that it will operate in connection with renewals.

3.2 Remedies

In Swedish insurance law, general law on breach of contract as embodied in the Contracts Act (SFS 1915:218) finds application in relation only to the main obligations under the insurance contract, namely the acceptance of the risk and the payment of the premium. For auxiliary obligations, including the duty of disclosure, remedies are stipulated in relation to each type of breach. The subjective element determines what remedy is available to the insurer.

3.2.1 Fraud and innocence

By way of exception to the rule, the Act refers to the Contracts Act in relation to fraudulent failure to disclose. For consumer insurance, business insurance as well as insurance of persons, fraud entails the consequence that the insurance agreement is null and void *ab initio*. In addition, the insurer is entitled to keep premiums paid. There is no remedy at all for innocent non-disclosure.

3.2.2 Negligent and intentional failure to disclose

For instances of non-disclosure that are negligent or intentional – which is to say that they are neither fraudulent, nor innocent – there are subtle differences in the remedies for consumer insurance, business insurance and insurance of persons respectively. For consumer insur-

ance (ICA 4:2), the reforms of the Consumer Insurance Act have been perpetuated. The remedy remains proportional adjustment of the indemnity – the insurer is entitled to reduce the indemnity, taking into account such factors as the negligence or intent of the assured and the importance of the information to the risk.

For business insurance (ICA 8:9) and insurance of persons (ICA 12:2), the regulatory framework is based on the previous Insurance Contracts Act. The role of insurance of persons in Swedish society is to supplement national insurance for assureds desiring additional cover, which may help explain why the disclosure rules bear an overall resemblance to business insurance rather than to consumer insurance. Thus, if the assured intentionally or negligently has provided incorrect or incomplete information that is material to the assessment of the risk, and the insurer can show that the risk would not have been insured, had full disclosure been made, liability for the loss does not attach. In relation to insurance of persons, a *de minimis* threshold applies to the negligence of the assured.

Furthermore, if the insurer can show that the insurance would have been made on different terms or at a different premium, liability attaches on the hypothetical terms of this alternative contract. If full disclosure would have led to the insurer seeking reinsurance, the liability is adapted accordingly. A framework to the same effect had been in force by virtue of the repealed Insurance Contracts Act; it may be deduced that any perceived problems of *'underwriting at the claims stage'* will have been negligible. These remedies are collectively known as the *pro rata* rule.

In addition, for business insurance the ICA allows for contractual stipulation for an alternative resolution, whereby liability attaches only to the extent that the assured can show that the non-disclosure was immaterial to the loss or to the extent of the loss (ICA 8:9,

second paragraph, final sentence). This is known as the causality rule.

In relation to insurance of persons, a provision has been introduced precluding the application of the rule where the overall result would be unreasonable. The preparatory works elaborate on this provision, specifying that the fact that its application would lead the assured into impecuniosity or other dire straits is not in itself a factor; nevertheless, the catalogue of examples provided in the preparatory works clearly shows that the reasoning behind the rule is to provide a safety valve for deserving cases.⁵ It is indicated that the rule could feasibly serve as an equivalent to the rule in consumer insurance on erroneous information from minors or persons with reduced mental capacity. A further example provided is that where there is more than one assured, this rule may provide opportunity for exception to the general rule that the non-disclosure of one affects the insurance of all assureds. By way of guidance for the application of the rule, the preparatory works further refer to situations *'where the effect of the negligence of the assured is not reasonable in relation to the scope of the negligence and the character of the information in question'*.⁶

Considering the *de minimis* threshold on the negligence referred to above, an assured wishing to rely on this new rule may expect vigorous resistance from insurers aiming to stave off excessively generous precedent.

3.2.3 Termination

Finally, the insurer has a right to terminate business insurance under a general provision relating to serious misconduct by the assured (ICA 8:6). This provision is not limited to instances of non-disclosure but applies generally to misconduct on the part of the assured. The right arises when the insurer is informed of serious neglect on the part of the assured of the duties under the contract, is lost unless exercised without undue delay and allows the

insurer to terminate the insurance giving 14 days' notice. A corresponding provision exists for consumer insurance (ICA 3:7) but although in principle the provision applies to cases of non-disclosure,⁷ the breach of contract must be of a gross nature and should therefore find only infrequent application in practice, since such gross breaches of the duty of disclosure are fairly likely to also fall under the fraud provision.

In respect of insurance of persons, the insurer has a right to terminate the insurance or amend its terms giving three months' notice. Alternatively, where the failure to disclose was not such that the insurer would have declined the risk, the assured has a right to continued insurance at the same premium and on amended terms but with the indemnity reduced accordingly.

In no case is there a reduction of the indemnity where the insurer knew or should have known of the information not disclosed; nor where the information was of no importance to the contract or has ceased to be of importance. As to the remedy for a refusal to complete the proposal form, there is none but the simple refusal of insurance.

3.3 The character of the test

English law applies the twofold objective and subjective test of materiality and inducement to the duty of disclosure. This difficulty is effectively bypassed in Swedish law by the requirement on the assured to answer fully and honestly the questions of the insurer. There is no general need for the assured to volunteer information; nor therefore to make any assessment as to its importance, generally or to the particular insurer. On the other hand, any information requested in the proposal form must be provided; it is no excuse that the assured did not realise its importance.

An objective test occurs in the making of business insurance, where the assured is required to volunteer information whose impor-

tance is 'evident'. According to the preparatory works,⁸ the new test is objective – the importance of the information to the assessment of the risk must be evident to the general assured, not the actual proposer. Nevertheless, the subjective element determines whether the remedy for negligent, intentional or fraudulent disclosure will be applied.

4. Insurable interest

4.1 The concept of insurable interest in the new Act

It is stated in the Government Proposal as well as in the first comprehensive commentary to appear on the Act, that the concept of insurable interest remains unchanged in the new Act, but that the importance of the concept is reduced.⁹ However, some changes to the concept itself may be detected. The Swedish concept of insurable interest is based on economic loss,¹⁰ but the recent modifications in some ways distance the concept from its origins.

In principle, any interest may be made the subject of insurance. However, third parties within a specific range of interests are entitled to claim under the insurance. The previous Insurance Contracts Act contained a provision to the effect that any legal interest, measurable in monies was capable of being insured.¹¹ Third parties were entitled to claim, provided they possessed a direct interest in the subject matter insured.¹² For the latter provision on direct interests has been substituted a provision listing the persons who have a right to claim under the insurance.¹³ The provisions are mandatory to the extent that they provide rights to the assured or a third party.

4.2 Prohibition of enrichment

In comparison with the more familiar common law jurisdictions, the Swedish reforms go further than Australian law, which abolished the requirement for insurable interest in

1984, in that the principle of the insurance contract as one of indemnity arguably is no longer strict. The prohibition of enrichment existing earlier has been consciously abandoned in the new Act.¹⁴ Furthermore, although superficially not unlike the English concept of insurable interest, the Swedish Act it is in no way intended to be limitative in the manner that English law has tended to be in the past. The parties are free to agree to insure any interest, with or without a real loss by the assured. It is therefore unlikely that the concept will ever find use in Swedish law as a tool to avoid undesirable losses. An obvious argument in favour of such relaxed regulation, is that the parties are given liberal scope to create new forms of insurance.

As a result of the present legislation, the concept of insurable interest is really little more than a convenient shorthand used in the provisions defining the assured, underinsurance and overinsurance.

5. Further reforms

A range of further reforms have been introduced, most designed to provide additional protection to the proposer or assured. A few principal ones are outlined in the following.

5.1 Information to assureds

In the rush to adapt the standard terms and conditions on offer ahead of the entry into force, the most immediate challenge was the new rules on information to assureds to be provided before and after the making of the contract. The new Act increases the burden on the insurer to provide post-purchase information compared to the previous Consumer Insurance Act. As soon as possible after the transaction, the insurer must provide the assured with written confirmation of the agreement and its terms. Particularly onerous contract terms and 'unexpected' limitations in the insurance cover must be specifically brought

to the attention of the assured. The categories of terms in question have been markedly extended in the new Act and the duty to inform has been extended to new categories of insurance.

Nevertheless, the most significant change is in the remedy. In the past, the consequences of failure to inform were purely regulatory under the Marketing Act; under the new Act, an additional contractual remedy is introduced. The offending terms will be disregarded or mitigated where an assured consumer is involved. For business insurance, the remedy remains regulatory.

5.2 Clauses limiting the risk

Another key feature is a reduction in the scope for the previously common practice of inserting clauses limiting the risk which in reality serve as loss prevention clauses. A policy might have contained the clause: *'Insured against burglary into premises possessing locks of approved standard.'* Accordingly, burglary by entry through the wall into premises without approved locks was not covered. The burden of proof was on the assured to show that the locks were of approved standard.

To an English insurance lawyer, warranties come to mind. These are clauses defining the risk which carry the remedy of automatic termination of the liability of the insurer from the moment of breach, with no requirement for a causal connection between the breach and the loss. There is however a key difference in the remedy – automatic termination from the moment of breach has never featured as a remedy in Swedish insurance law.

Under the new Act, the clause will in effect have to read *'The premises shall possess locks of approved standard'* and this circumstance must be material to the loss. The burden of proof is on the insurer to show that the approved standard was not complied with and that the indemnity therefore should be reduced.

5.3 Right to insurance

Under the Consumer Insurance Act 1980, consumers were vested with a right to insurance vis-à-vis the insurer, so that their application for insurance could not be rejected. The right is extended under the new Act, so that any person, except a business person procuring insurance with himself as beneficiary, has a right to insurance. The right is expressed as a duty on the insurer to contract; in other words, the insurance company does not have any right to decline to provide insurance on such terms as are generally on offer to the public, subject always to such material factors as, for instance, health as regards insurance of persons.

Nevertheless, it is specified in the preparatory works that the intention is not to force insurers into uncommercial terms. The idea is that rather than reject applications for insurance outright, insurers will modify terms and premiums to suit the individual assured – a feature commended by the national association of disabled persons.

5.4 Collective insurance

Group insurance (defined as insurance provided for a group of persons) and collective agreement insurance (provided by employers under a collective agreement) are for the first time regulated in Swedish law. Briefly, a so-called group agreement is made between the insurer and a representative of the group, and then gives rise to an individual insurance for the beneficiary who is – or becomes – a member of the group.

The new Act applies to the group agreement as well as to the resulting policy of the individual beneficiary. Particular features of group insurance are that it is often mandatory, for instance in the context of membership of trade unions or sports associations, and that the representative negotiating the policy terms may or may not be negotiating directly on behalf of individual beneficiaries. To compli-

cate matters further, the relationship between the representative and the beneficiary may variously be regulated by the law on associations or corporations or by labour law. An issue requiring some precision was the regulation of the intermediary position of the group representative in first negotiating with the insurer and then conveying the policy on the individual beneficiary. The impetus to now regulate these previously unregulated forms of insurance is a growing social importance of this type of insurance, combined with the fact that the beneficiaries of the insurance are more often than not entirely uninvolved in the negotiation of the terms.

Notes

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² For further information, see the Law Commission's website at http://www.lawcom.gov.uk/insurance_contract.htm (accessed on 23 November 2007).

³ For English language overviews of reforms, see Lundström, R-M, *Swedish Act Crystallises*, Insurance Day, 10 March 2006; Hjalmarsson, J, *Insurance contract law reform in Sweden*, InsLM 2006, 18(5), pp 1-3; Hjalmarsson, J, *Utmost good faith - Swedish Insurance Contracts Act 2005*, InsLM 2007, 19(2), pp 1-4. The latter two articles cover some of the same ground as the present text.

⁴ Available at <http://www.sjoass.se/> (30.11.2007)

⁵ Prop pp 519–520.

⁶ Prop p 520.

⁷ Prop p 401.

⁸ P 463.

⁹ Bengtsson, *Försäkringsavtalsrätt* (Stockholm: Norstedts Juridik 2006), p. 289.

¹⁰ Also sometimes referred to as pecuniary interest.

¹¹ Section 35.

¹² Section 54.

¹³ Section 9:1.

¹⁴ Bengtsson p. 289.

Das neue schwedische Versicherungsvertragsrecht

A review in German of the Swedish Insurance Contracts Act (Försäkringsavtalslagen) was published in *Nordisk Försäkringstidskrift* 2/2006, p 174.
Author: Professor *Bill W. Dufwa*.