The New Insurance Legislation of the Netherlands is on its Way!

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According to the most recent reports, the new insurance legislation of The Netherlands will be introduced as of 1 January 2006, but this is not yet completely certain. First the bill has to be approved by the First Chamber of the Netherlands Parliament. (The Second Chamber has already approved it.)

Why New Insurance Legislation?

The current rules on insurance law are set out in the Netherlands Commercial Code and date from 1838. In addition to rules for insurance in general (which to a great extent are aligned with marine insurance), it contains rules for a few special branches of insurance, such as fire insurance. The rules on marine insurance are very detailed; the provisions on life insurance, on the other hand, are very brief and can safely be called "useless", (Dorhout Mees, *Kort begrip van het Nederlands handels- en faillissementsrecht* [1971], no. 7.B). This imbalance is explained by the fact that about a century and a half ago insurance was "the domain of the merchant", with transport insurance being the most important form. Consumer insurance did not yet exist, (see J.H. Wansink in *Het nieuwe verzekeringsrecht een eerste verkenning van 7.17 NBW* (2000), p. 20). It will be clear that these rules no longer suffice today. Over the years rules have been developed in the case law of the Supreme Court regarding various issues for which the law made no provision or no longer gave scope to the social function which insurance should have according to current views. How dated the current insurance legislation truly is can be seen in, for example, Art. 618 of the Commercial Code, that even now still includes a provision for insurance against slavery. Furthermore, the adaptation of the statutory insurance legislation to social developments and changing insights in practice was primarily given form in the policy conditions.

The preparation for new insurance legislation started in 1972 with the preliminary draft (the "Green Paper"), which was written by Prof. T.J. Dorhout Mees and which led to the submission of the bill of 1986. It was not until some fourteen years later, after the submission of an amendment in 2000, that the parliamentary discussion of the issue commenced. This led to a second amendment of 16 April 2002 and then to the altered bill of 23 April 2003, which has in the meantime been approved by the Second Chamber and is not expected to undergo any further changes during the discussion in the First Chamber.

Structure of the New Rules

The legislature has opted for a set-up whereby a distinction is made between non-life insurance and life insurance, each of which have been placed in their own section. These will be preceded by a section of general provisions which apply to both non-life insurance and life insurance. If you were to look for separate rules for fire and marine insurance or any other branch of insurance, you would be looking in vain – they have disappeared. The most important reason for this is that these insurance forms in practice are arranged in policies and therefore need not be included in the legislation. Section 2 (non-life insurance) has two provisions which only relate to liability insurance: Art. 7.17.2.9b arranges the consequences of the acknowledgement of liability by the insured; Art. 17.7.2.9c introduces the direct claim of the injured party vis-à-vis the liability insurers with regard to damage caused by death or personal injury, also referred to as direct action. Until now, direct action has only been possible with insurance relating to the Motor Insurance Liability Act and the Hunting and Shooting Act. The increasing interest for consumer protection was the reason to expand the number of mandatory law provisions, from which no deviation is allowed. Mandatory provisions are set out at the end of each section. There are three variations: (i) no deviation whatsoever is allowed; (ii) deviation which would be to the detriment of the policyholder or the person entitled to the pay-out is not permitted and (iii) deviation which would be to the detriment of the policyholder or the person entitled to the pay-out if the policyholder is a natural person who is not taking out the insurance in the course of a profession or business, is not permitted. The provisions on the policyholder's duty of disclosure in Art. 17.7.1.4-6 are an example of the last variation.

Most Important Changes

The new insurance legislation consists in part of a codification of rules which the Netherlands Supreme Court has laid down in various judgments in the last few years. To this extent there are in essence no changes. In addition, however, there are changes compared to the "old" legislation. What are the most importance changes in the new legislation?

- The most noteworthy point is that, as set out above, the fire and marine insurance, and the insurance "against the dangers of carriage by land and on inland waters" are no longer discussed in the legislation. These types of insurance are naturally still subject to the general provisions of Section 1 and the rules of non-life insurance in Section 2, such as Art. 7.17.2.13 which stipulates that a building must be insured for its reconstruction value, and other

goods for their replacement value. Nevertheless, it is possible to deviate from such a provision in a policy, a fact which applies to all provisions which have not been declared to be mandatory law.

- Other than in Art. 246 of the Commercial Code, the element "fortuitous event" no longer occurs in the description of the term "insurance" in Art. 7.17.1.1. In any event, this does not mean that uncertainty is no longer a feature of the insurance contract. Insurance remains an "aleatory" contract.
- The rules relating to what is simply referred to as non-disclosure (Art. 251 of the Commercial Code), i.e. the duty of disclosure of the policyholder when taking out the insurance, has changed, particularly with regard to the consequences of the non-performance of this obligation (Art. 7.17.1.4-6).
- According to Art. 276 of the Commercial Code, under the current legislation there is no duty of compensation in the event damage is caused by an insured's own fault (unless this provision has been renounced). Under the new legislation, own fault is not sufficient to exclude cover but there must have been intent or recklessness, although the parties may agree otherwise (Art. 7.17.2.9).
- In liability insurance, the injured party will have a direct right of claim against the insurer but only in the event of personal injury (Art. 7.17.2.9c).
- Upon the transfer of the interest, in principle, the insurance will only continue on behalf of the buyer for one month, unless the buyer states to the insurer that he is continuing the insurance. However, the insurer has the right to terminate the insurance, with a notice period of one month (Art. 7.17.2.5).
- The party valuation of Art. 274 of the Commercial Code is not included as such, but the indemnity principle is maintained. "Excess value of the insured value" is now referred to as "to be in a clearly more advantageous position". The expert valuation of Art. 275 of the Commercial Code has been retained (Art. 7.17.2.24).
- The statutory term for time-barring of claims against insurers is three years (Art. 7.17.1.15). The general term of five years for claims under contract (Art. 3:307 of the Civil Code) thus does not apply here. It is not permitted to deviate from this rule to the detriment of the insured (Art. 7.17.1.16 Paragraph 2). For example, limitation to one year in the policy conditions is not permitted. Once the insurer has rejected the claim, there is only six months to bring a claim before it becomes time-barred.

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