



# Breach of the obligation to declare risk in Algerian insurance law

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## **Abstract:**

Risk is considered the essential element in the insurance contract, and it plays a role in determining the insurer's position regarding insurance, whether acceptance or refusal. The nature and severity of the risk also have a direct impact on determining the amount of the premium that the insured is obliged to pay. Therefore, the Algerian legislator has required the insured, at the time of concluding the contract, to declare all data and circumstances, and has also obliged them to declare any change or aggravation of the risk. The legislator has established specific and exceptional sanctions for violating these obligations, which differ depending on whether the insured acts in good faith or bad faith.

**Keywords:** declaration of risk – nullity of the insurance contract – good faith – Algerian insurance law.

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## **Introduction:**

Insurance is a form of cooperation among the insured based on technical foundations, organized by the insurer, who undertakes to cover the risk. This takes place within the framework of an insurance contract, whereby the insurer undertakes to pay the insured or the beneficiary a sum of money or any other performance, even in kind, in the event of the occurrence of the risk specified in the contract, in exchange for premiums paid by the insured at the conclusion of the contract. However, the existence of insurance may sometimes lead insured individuals to become negligent and not exert sufficient effort to avoid the occurrence of the risk, due to their reassurance from having insurance. In some cases, certain beneficiaries may deliberately cause the occurrence of the risk in order to benefit from the insurance compensation. Insurance companies are often unable to prove such abuses.

Considering that the insurance contract is based on the principle of good faith, and is also founded on legal, economic, and technical bases that distinguish it from other contracts, the Algerian legislator has established a set of specific and exceptional obligations that differ from those found in general contract rules. Among these is the obligation to declare all circumstances and data related to the insured risk, as well as the obligation to declare all circumstances stipulated in the insurance contract that may result in the aggravation or change of the risk. The legislator has attached a set of sanctions to the breach of these obligations.

This leads to the following research problem:

What is the concept of the obligation to declare risk and to declare the aggravation or change of risk, and how has the Algerian legislator addressed cases of breach of these obligations under Algerian insurance law?

Accordingly, this topic will be addressed according to the following plan:

**First requirement:** The obligation to declare risk and the obligation to declare the aggravation or change of risk.

**Second requirement:** The sanction for breaching the obligation to declare risk and the obligation to declare the aggravation or change of risk.

### **First Requirement: The obligation to declare risk and the obligation to declare the aggravation or change of risk**

#### **First Section: The obligation to declare risk**

The main purpose of insurance in general is to cover damages affecting the financial liability of the insured as a result of third-party claims and the harm suffered by the injured party. It is a collective process aimed at distributing the harmful effects of a risk affecting one member of the group among all its members, so that the risk ultimately dissipates<sup>1</sup>.

The applicant for insurance must declare to the insurer, at the time of concluding the contract, the circumstances and data related to the risk that they are aware of, through which the insurer can form an understanding of the risk, determine whether to accept or refuse the contract, and set the premium appropriate to the nature of the insured risk<sup>2</sup>.

The obligation to declare is limited to providing data and circumstances that influence the risk, that is, those that affect the insurer's decision regarding the principle of insurance or the amount of the premium. It does not include data that do not affect the nature or severity of the risk. Essential data are divided into<sup>3</sup>:

\_Objective data related to the subject of the insured risk and the objective circumstances surrounding it, such as age, health condition, and previous illnesses in life insurance. In property insurance, the insured must provide data related to the nature of the insured object, its material, purpose of use, and location. In liability insurance, data related to the object causing the liability and the manner of its use must be provided.

\_Personal data related to the insured, such as civil status, the degree of care exercised toward property, judgment and assessment of matters, previous dealings with insurance companies, and any accidents or violations previously committed.

If objective data help in determining the premium necessary to cover the risk, personal data enable the insurer to decide whether to accept or refuse the conclusion of the insurance contract. Therefore, the insured must provide the insurer with all circumstances known to them, whether personal or objective. This obligation also extends to information that the insured does not actually know but could have known had they exercised the diligence of an ordinary person, provided that they ascertain the importance of this information for the insurer<sup>4</sup>. The Algerian legislator does not require the insured to investigate data related to the risk, but rather obliges them to declare the data they know, not those they could have known. This is done by declaring, at the time of concluding the contract, all data and circumstances known to them<sup>5</sup> through a questionnaire form that allows the insurer to assess the risks they undertake<sup>6</sup>.

#### **Second Section: The Obligation to Declare the Change or Aggravation of Risk**

The insured is not only obliged to declare the circumstances affecting the risk at the time of concluding the contract, but is also required to declare all circumstances stipulated in the contract that arise during its validity and that may lead to an increase in the risk. In this section, we will address the concept of change or aggravation of risk (first), its conditions (second), and the time limits for declaring it (third).

##### **First: Concept of Risk Aggravation or Change**

Risk aggravation refers to the occurrence of circumstances after the conclusion of the contract that lead to an increase in the probability of the occurrence of the risk or an increase in its severity, such that if the insurer had known about them, they would not have concluded the contract or would have done so for a higher premium<sup>7</sup>.

Risk aggravation is a change affecting the risk itself, not merely the insurer's perception of the risk resulting from knowledge of certain circumstances or data existing at the time of contracting that were unknown to them. Risk aggravation differs from an increase in its value; the increase in the value of the risk refers to the rise in the financial value of the insured property, such as an increase in the value of real estate due to improvement in its location or renovation. It also differs from exclusion, as in exclusion the insurer's intention is clear and explicit, making the excluded risk outside the scope of insurance. In contrast, aggravation may be accepted within coverage if the insurer is notified of it, enabling the contractual balance to be restored<sup>8</sup>.

### **Second: Conditions of the Obligation to Declare the Aggravation or Change of Risk**

Among the conditions for the obligation to declare the aggravation or change of risk is that the insured must be aware of the aggravating circumstances (A), and that the aggravation or change of risk must relate to a fact or circumstance stipulated in the insurance contract (B).

#### **A) The insured's knowledge of aggravating circumstances:**

The law does not require that the aggravation be continuous for the insured to be obliged to declare it; rather, they must declare any aggravation of the risk. According to the provisions of Article 15, paragraph 03, the legislator indicated that the precise declaration of the change or aggravation of the risk is made without limitation. Therefore, the obligation here is to declare any aggravation of the risk as long as it is aggravating. Moreover, the sanction for breaching the obligation to declare the risk in bad faith is nullity<sup>9</sup>. This indicates that any change in the risk must be declared, even if it is minor, as long as it may affect the insurer's perception of the risk.

With regard to the insured's knowledge of the change or aggravation of the risk, and according to the provisions of Article 05/03, it is necessary to distinguish whether the change in risk results from the act of the insured or from the act of a third party. When the aggravation results from the act of the insured, they are deemed aware of the circumstance and must declare it before undertaking the action that may aggravate the risk. When the aggravation is beyond the control of the insured, they must declare it within 7 days from the date they become aware of it. Thus, the condition of the insured's knowledge is essential when the circumstances are caused by a third party, even if the insured is unaware of the aggravating nature of the risk.

#### **B) That the aggravation relates to a fact or circumstance stipulated in the insurance contract:**

The insured must inform the insurer of all developments and circumstances that lead to an increase in the severity of the insured risk or the likelihood of its occurrence in a manner that affects the insurer's decision regarding acceptance, refusal, or determination of the premium, whether these circumstances are within their control or beyond it. The insured must notify the insurer of these circumstances so that the latter can reconsider the contract based on the new data, by declaring all facts and circumstances that may influence the insurer's decision to continue the insurance under new conditions or under the original conditions. Any use contrary to what is stipulated in the insurance policy must be declared by the insured. These circumstances and cases are often specified by the insurer, as it is in their interest to clearly and precisely define, within special conditions complementing the general conditions of the insurance policy, the risk and the cases of its aggravation. Only those cases mentioned in the policy are considered aggravation, and the insurer does not cover others<sup>10</sup>.

### **Third: Time limits for declaring the aggravation or change of risk**

Given the importance of the obligation to declare the change or aggravation of risk, the Algerian legislator has linked it to legal time limits that the insured must respect. The change or aggravation may occur by the will of the insured, in which case they must declare it in advance to the insurer before undertaking the action that leads to the increase in risk, such as when the insured changes their profession to a more dangerous one. The risk may also be aggravated due to an external cause or the act of a third party; in this case, the insured has a period of 7 days to declare it, starting from the day they become aware of the change

or aggravation of the risk, unless there is a case of force majeure or exceptional circumstances, in which case the time limit is extended until the end of such circumstances.

Whether the risk is aggravated or changed by the will of the insured or without it, the insured must submit their declaration in a registered letter with acknowledgment of receipt<sup>11</sup>.

The obligation to declare the aggravation or change of risk is matched by the possibility of declaring a reduction in risk or the cessation of its aggravation. In this case, the legislator has allowed the insured to request a reduction in the premium corresponding to the new situation from the date of notifying the insurer, in application of the principle of proportionality between the premium and the risk<sup>12</sup>.

### **The second requirement: the penalty for failure to declare the risk**

The Algerian legislator, when addressing the penalties resulting from failure to comply with the declared information, distinguished between the policyholder acting in good faith (first section) and the policyholder acting in bad faith (second section).

#### **First section: the penalty for failure to comply with the obligation to declare the risk in the case of good faith**

The policyholder may be aware of certain circumstances or certain information and nevertheless fail to declare them or declare them incorrectly. In this case, we are faced with a failure to declare the risk in good faith (first), and the insurer's position in the event of failure to declare the risk in good faith differs depending on whether the discovery of the violation occurs before the realization of the risk (second) or after the realization of the risk (third).

##### **First: the concept of failure to declare the risk in good faith**

If the policyholder's failure to comply with the obligation to provide information occurs without intent and without the intention to mislead the insurer in order to induce him to conclude the insurance contract or to reduce the premium amount, or if he was unaware of the importance of the information or circumstance and its effect on the assessment of the insured risk, and if the insurer is unable to prove the bad faith of the policyholder, then, according to the general rule, he is considered to be in good faith.

The policyholder is considered to be in good faith if he proves that the failure to comply with the obligation of declaration or the aggravation of the risk was caused by force majeure or a sudden event, or that he caused the aggravation of the risk in order to achieve the interest of the insurer or out of a humanitarian duty,

or if he, on his own initiative, corrected the incorrect or incomplete information that he had declared or concealed from the insurer before the realization of the risk, and the same applies if the circumstance or information was declared to the broker or agent who made an error in transmitting it<sup>13</sup>.

The policyholder cannot be obliged to provide information that he does not know, and it is not required that the policyholder have actual knowledge of these circumstances; it is sufficient that he could have known them by exercising the diligence of an ordinary person. If he did not know them, he is considered to be in good faith. The insurer may—according to the general rules—request the annulment of the contract for error if he proves that he fell into a fundamental error and that, had he been aware of the information or circumstance not declared by the policyholder, he would not have entered into the contract<sup>14</sup>. It must not be confused between the good faith of the policyholder and his ignorance of a circumstance that must be declared, as penalties are applied only if the omitted circumstance was known to the policyholder. If he was unaware of it, then he has not committed any fault, and the risk remains fully covered despite the imbalance in the insurance contract. He is also not subject to any penalty in the case of aggravation of the risk related to a circumstance not stipulated in the insurance contract, as well as in the case of aggravation caused by a third party, and a fortiori when he provides his declarations regularly and the disaster occurs before any new agreement or termination of the insurance contract. The policyholder has the right to obtain full

coverage within the limits of the contract, while the insurer retains the right to deduct the appropriate increase in the premium from the full compensation<sup>15</sup>.

### **Second: the case of discovering the violation before the realization of the risk**

When the insurer discovers the violation before the occurrence of the accident, the Algerian legislator has given him the choice between maintaining the insurance contract with an acceptable increase agreed upon by the policyholder (a) or terminating the contract (b).

#### **(a) Maintaining the contract with an increase in the premium:**

If the insurer discovers that the information provided by the policyholder is incomplete or incorrect, he has the right to request an increase in the premium so that it corresponds to the risk assessed based on the true information, provided that this proposal is made within a period of 15 days starting from the day he becomes aware of the truth, in accordance with the provisions of Article 19 paragraphs 1 and 2 of Ordinance 95-07. The policyholder has the choice to accept or refuse the insurance with the added increase, and the insurer cannot force the policyholder to continue the contract. He has only the right to claim the premium necessary to restore the balance between the premium and the risk. This is optional, as the insurer may choose immediate termination. As for the policyholder, the legislator has granted him the possibility of acceptance or refusal, since his consent is necessary for the increase in the premium. If he refuses the proposed increase by the insurer, the latter has no option but either to maintain the contract without increase or to terminate the contract.

#### **(b) Termination of the insurance contract:**

The contract is terminated at the will of the insurer in the case of concealment or incorrect declaration in good faith (1) and in the case of aggravation or change of the risk (2).

##### **1- In the case of concealment or incorrect declaration in good faith:**

If the insurer discovers silence or an incorrect declaration, he has the right to terminate the contract if the policyholder refuses the increase in the premium. This is done by means of a registered letter sent to the policyholder, and it takes effect after 15 days from the date of notification<sup>16</sup>, provided that the insurer refunds to the policyholder the premiums he has paid which cover the remaining period of the insurance during which the contract is no longer in force<sup>17</sup>, the termination of the contract does not have retroactive effect; therefore, the insurer retains the premiums that cover the period prior to the termination.

##### **2- In the case of aggravation or change of the risk:**

The declaration of the aggravation or change of the risk entails the obligation of the insurer to cover the aggravated risk until he determines his final position. He may propose a new premium rate within a period not exceeding 30 days starting from the day he becomes aware of the change or aggravation of the risk. In this case, an obligation arises on the part of the policyholder to pay the proposed increase within this period, which begins from the date the policyholder receives the insurer's proposal for this increase. However, if the period expires without the insurer proposing a new premium rate, he is obliged to cover the change or aggravation without obliging the policyholder to pay any increase<sup>18</sup>.

If the policyholder accepts the insurer's proposal, an endorsement including the modification of the premium is drafted and added to the insurance policy. If the policyholder refuses to continue the insurance under the new premium rate or if the period expires without determining his position, the insurer may, in this case and in accordance with the general rules, terminate the contract. The termination is carried out by means of a registered letter with acknowledgment of receipt, and the insurer may resort to claiming compensation if the aggravation of the risk is attributable to the will of the policyholder. This results in the extinction of both the insurer's obligation to provide coverage and the policyholder's obligation to pay premiums from the time of termination of the contract.

### **Third: discovery of the violation after the realization of the risk**

If the insurer discovers the violation only after the realization of the risk, he cannot invoke the termination of the contract because the risk has already materialized, and thus he must perform his obligation to cover it. He may, however, resort to reducing the amount of insurance so that it corresponds to the premiums actually paid. The insurer covers the risk according to the information he was aware of before the realization of the risk, and not the correct and new information<sup>19</sup>, the aggravation of the risk is not taken into account as long as the premiums due for this aggravation have not been paid, with the contract being adjusted for the remaining period of its validity.

By calculating this according to the proportional rule, the compensation is equal to the value of the damage in proportion to the premium paid relative to the premium due. This is done by multiplying the paid premium by the insured amount (the sum insured) and dividing the result by the actual premium, thus obtaining the reduced compensation amount. As for contracts in which premiums are calculated based on wages, the number of persons, or the number of items, the insurer is entitled only to the omitted premium and to recover the unpaid portion of the premiums if the policyholder has omitted something or made an error in good faith in the declarations<sup>20</sup>.

### **Second section: the penalty for failure to declare in bad faith**

The insurance contract is void if the policyholder, in bad faith, fails to fulfill his obligation to provide information, whether at the time of concluding the contract or during its validity. Bad faith consists in deliberately concealing certain information despite knowing its importance, or deliberately failing to report circumstances that arise during the validity of the contract and that may affect the insured risk. It also includes making false statements regarding the information or the new circumstances<sup>21</sup>.

The Algerian legislator has defined intentional false declaration or concealment as the deliberate omission by the policyholder to declare any fact that may change the insurer's opinion regarding the risk or reduce its importance at the time of concluding the contract or during its validity in the case of aggravation of the risk<sup>22</sup>.

Nullity in the insurance contract applies even in the case of error in secondary characteristics of the object if it is likely to change the insurer's perception of the risk. It is not merely nullity for fraud, as it also applies in the case of incidental fraud, under stricter conditions. It also applies in the case of omission, that is, when the policyholder remains silent about circumstances without engaging in positive fraudulent acts, and it also applies in the case of aggravation of the risk, that is, when the violation relates to a contract that was concluded correctly<sup>23</sup>.

Therefore, the application of penalties, whatever they may be, occurs at the time of the violation, whether the policyholder provides the required information at the outset or during the validity of the contract when he provides new circumstances that increase the risk, which in reality constitutes only an extension of his initial obligation of declaration<sup>24</sup>.

In this case, nullity has a special nature, as it is established for the benefit of the insurer. Its effect consists in the extinction of the insurer's obligation to cover the insured risk upon its occurrence, while the premiums paid remain an acquired right of the insurer, who is also entitled to the premiums that have fallen due as compensation for the damage. The insurer also has the right to claim from the policyholder the reimbursement of the amounts he has paid as compensation<sup>25</sup>, Bad faith of the policyholder in declaring information or new circumstances may be proven by all means of evidence, and the trial judge has discretionary power to assess the existence or absence of bad faith. Thus, nullity in this case is considered a special nullity specific to the insurance contract, departing from the general rules established by the Algerian legislator.

### **Conclusion:**

Through Algerian insurance law, it is clear that the legislator has established a set of obligations incumbent upon the policyholder, namely the obligation to declare the risk at the time of contracting and the obligation

to declare the aggravation and change of the risk after contracting, in order to clarify the situation for the insurer and to achieve a balance between the insured risk and the premium paid at any stage of the contract. The legislator has provided for penalties in case of breach of these obligations, which vary depending on the good or bad faith of the policyholder. This leads us to draw the following results and proposals:

#### **First: Results**

- The obligation to declare the risk and to declare the aggravation and change of the risk is an exceptional obligation specific to the insurance contract, unlike the general rules of contracting.
- The obligation to declare the risk and the aggravation and change of the risk constitutes a difficulty for the policyholder, as it requires him to take into account the assessment of risks in all circumstances, whether objective or personal, such as his financial situation and degree of diligence.
- Nullity in the insurance contract, contrary to the general rules, is considered a specific sanction for the obligation to declare the risk in bad faith. It leads to the release of the insurer from all obligations and allows him to retain the premiums and recover all compensations previously paid to the policyholder acting in bad faith.
- The determination of the sanction in case of failure to declare the risk takes into account the intention of the policyholder; if he acts in good faith, the sanction is the proportional reduction of compensation, and if he acts in bad faith, the sanction is the nullity of the insurance contract.
- The nullity of the insurance contract applies even in the case of aggravation of the risk, although the contract was concluded correctly; therefore, the contract is considered void from the moment of omission or intentional false declaration.

#### **Second: Proposals**

Based on the above results, the following can be proposed:

- Precisely defining the information and circumstances that clarify the concept of risk and formulating them in the form of specific questions, so that the policyholder is only obliged to answer the questions posed by the insurer.
- In the case of aggravation of the risk or change of circumstances, limiting this to the circumstances related to the answers given at the time of contracting, and distinguishing between changes occurring after the conclusion of the contract and risks excluded from the contract in order to protect the policyholder.
- In the event that the policyholder refuses to remain in the contract with an increased premium, the policyholder who regularly declared the aggravation of the risk should not be treated in the same way as the one who declared the risk incorrectly.
- The Algerian legislator should explicitly and precisely provide for nullity in the case of aggravation or change of the risk, and also determine the moment of termination of the contract or the increase in the premium by the insurer.

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