

Pre-contractual information duties in insurance contract law

**- European Regulation, Comparison of Laws
and Challenges for Croatia -**

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INTRODUCTION

- ▶ important topic - contract formation
- ▶ Pre-contractual information duties - balance
 - ▶ Knowledge of policyholder - consumer
 - ▶ Knowledge of insurer
 - ▶ Information asymmetry
- ▶ in practice non-disclosure was often used as defence mechanism of insurer against payment of claims
- ▶ tendency - **development of new laws concerning better protection of consumers** in insurance contracts =

TOPIC DISCUSSION



CHOICE OF LEGAL ORDERS

1. EU law and proposals

- 3 generations of EU life and non-life insurance Directives
- PEICL

2. Comparison of laws Germany - England

- prominent representatives of common law and civil law traditions
- more than 30% EU insurance market
- good examples of changing legal environment:
(Germany - new VVG 2008 and VVG-InfoV, England - proposal reform 2009)

3. Croatia - candidate country for the EU

- example of changing legal environment on the doorstep of the European single market



...changing legal environment

▶ Germany

- ▶ Law reform, new Insurance Contract Act (VVG), 1 Jan 2008, Information ordinance in consumer insurance contracts (VVG-InfoV)
- ▶ major changes - adopting law to market requests for better consumer protection - especially duty to inform

▶ England

- ▶ Law in force: MIA 1906 - *ubberima fidei*
- ▶ Self-regulatory instruments (ABI Statement, ICOBS Rules, practice of the FOS)
- ▶ Law Commission recommendations and draft Bill, Dec 2009
Consumer Insurance Law: Pre-contractual Disclosure and Misrepresentation



Pre-contractual duty to inform as
consumer protection mechanism

- main tendencies-

1. INSURER DUTY TO INFORM

- ▶ duty: insurer must provide consumer - policyholder with all **relevant information** concerning the insurance contract under negotiation
- ▶ form: in writing - **INFORMATION DOCUMENT**
(Produktinformationsblatt)
- ▶ purpose: better protection of consumer - policyholders
- ▶ strong impact of the EU *acquis*
- ▶ recognised in all regulation under survey
 - ▶ (2:201 PEICL, Germany: §7 VVG, §5 VVG-InfoV, England: not under Section 17 MIA but accepted in practice Rule 6. ICOBS, Croatia: Art 89 IA)



Function

SECURING



TRANSPARENCY

- ▶ info-document will uphold transparency of data
- ▶ consumer will be in position to check facts and make informed decision about contract
- ▶ omission to read is not excusable

PARTY PROTECTION

- ▶ protects consumer from non-disclosure of insurer
 - ▶ protects insurer from complaints of consumer that some facts were not disclosed (also from withdrawal)
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2. SPONTANEOUS DISCLOSURE - QUESTIONNAIRE

- ▶ major change
- ▶ traditional regimes required from the policyholder to **spontaneously inform - to volunteer facts** material to risk
- ▶ many systems **replaced** this rule by a system of **questionnaire**
- ▶ **NOW** policyholder is obliged to disclose facts only in response to questions put by the insurer
- ▶ recognised almost in all regulation under survey:
 - ▶ 2:101 PEICL
 - ▶ Germany: § 19(1) VVG
 - ▶ England: *not* under Section 18 MIA, but accepted in practice: ABI Statement, ICOBS Rules, practice of FOS, draft Bill Cl. 2
 - ▶ Croatia: *no questionnaire* -but spontaneous disclosure Art 931 CO



CONSEQUENCES

1. policyholder duty to inform refers only to the circumstances he was specifically asked for in writing (fully and honestly)
2. modifying the test of materiality
 - ▶ insurer decides what information is material to the risk
 - ▶ initiative - with the insurer
 - ▶ information is deemed to be material without further inquiry, if the insurer asked clear question about it
3. economic reasoning
 - ▶ eliminating negative consequences of information asymmetry, adverse selection and cost reduction



3. NEW SYSTEM OF LEGAL REMEDIES

- ▶ **All-or-nothing principle**

- ▶ even a minor violation of a duty to inform may lead to the loss of the entire cover
- ▶ based on the defect of the consent of the parties
- ▶ validity of contract approach

REPLACED WITH

- ▶ **Principle of proportionality**

- ▶ reduction of the insurance premium or claim proportionally to the breach of information duty
- ▶ based on the culpability of breach and causal link between breach and possible reduction of the claim



...new system

- ▶ recognised almost in all legislation under survey:
 - ▶ EU: Directives - no provision
 - ▶ 2:102 PEICL
 - ▶ Germany: §19(2-4) VVG
 - ▶ England: *not* under Section 18(2) MIA, but accepted in practice: Rule 2(6)(2)(a) COB and FOS practice, Clause 5 draft Bill
 - ▶ Croatia: *no principle of proportionality* under Art 933 CO (all-or-nothing)



PATTERN

- ▶ **INNOCENT** breach
 - ▶ no right to avoid or to terminate contract
- ▶ **NEGLIGENT** (Engl: careless) breach
 - ▶ right to a proportionate reduction of the premium or variation of contract
- ▶ **FRAUDALENT** (Engl: deliberate or reckless) breach
 - ▶ never justifiable - right to terminate or avoid contract

- ▶ under condition:
 - ▶ there is causal link
 - ▶ exception - facts known to the insurer
 - ▶ prohibition - special regulation



CONSEQUENCES

- ▶ better consumer protection
- ▶ more security: policyholder-insurer relationship
- ▶ psychological relief for policyholder - innocent breach will not lead to avoidance of contract
- ▶ economic reasoning
 - ▶ security is strong incentive to conclude contracts, thus
 - ▶ more consumers will enter into market
 - ▶ principle of proportionality leads to cost reduction
 - (insurer do not have to spend time and money for the pre-contractual investigations about relevant facts in order to escape the avoidance of the contract)



CHALLENGES FOR CROATIA

- ▶ candidate country for the EU
- ▶ example of combination between traditional and new system developed as consequence of harm. process
- ▶ Challenges:
 - ▶ spontaneous disclosure to questionnaire
 - ▶ modifying the test of materiality
 - ▶ replacing all-or-nothing principle with the principle of proportionality
 - ▶ insurer duty to inform - no change needed - fully harmonised with the EU *acquis*



Thank you for your attention!