

# **Pre-contractual information duties in insurance contract law**

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

Ana Keglević, LL.M.

Zagreb Faculty of Law, Croatia



# 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)
- 



## 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!