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THE PRECONTRACTUAL INFORMATION DUTY OF THE POLICY HOLDER ACCORDING TO THE PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW (PEICL)

Abstract. *– Author considers duties of the policyholder to provide precontractual information according to the Principles of European Insurance Contract Law. He speaks about development of the insurance contract law and the said principles through legal regulation from the angle of a policyholder, scope of duty to disclose circumstances essential for risk assessment and sanctions for breach of that duty.*

Key words: Principles, protection of the policyholder, disclosure duty, breach of disclosure, sanctions

I A REGULATION FROM THE POINT OF VIEW OF THE PROTECTION OF THE POLICYHOLDER

A. The evolution of the European Insurance Contract Laws and the PEICL

a. The traditional continental European Insurance Contract Acts (ICA) that regulate the obligation of the insured (and the applicant) to **inform the insurer of circumstances which he knows or ought to know,** in particular when concluding the contract (the precontractual duty to inform) but also during the life of the insurance contract and after the occurrence of the insured event, was under critic the last years. The critics and the skepticism originated from the theory and the academics but has also influence in a certain grade the nomology. **The critic was focused in particular on the extent of the sanctions** which were allowed by the law to be stipulated against the policyholder for the breach of its obligation, but also on the extent of the disclosure duties and the circumstances which such duty should be fulfilled. The old rule according to which the breach of the obligation leads to lose all insurance money was particularly under heavy critic and lastly new national European ICA's has abandoned this rule. So, the new Greek ICA enacted on May 1997 which totally replaced the till that time existing law originating from Condice civile of 1882 and lastly the new German ICA(VVG) enacted on January 2008 which in turn replaced the one originating from1908 have abolished this rule known as The All-or-Nothing Principle. Also new tendencies in European private laws **distinguish more and more between consumer and not consumer policyholder** as regards to the extent of the sanctions provided for breach of their contractual obligation. In addition European third generation Insurance Directives introduce increasing **information duties to the insurer** towards the policyholder which is also an expression of the consumer protection principle.

b. The Project Group “Restatement of the European Insurance Contract Law”, is a project of academics from several EU countries. It was established by late Professor Fritz Reichart-Facilides in September 1999 and has joined the European Network of Excellence on European Contract Law which was set up by the European Commission 2005 and was drafted as a contribution to the Common Frame of Reference of European Contract Law. The Project Group has published the first part of its work on December 2007. The work contains the Principle of Euro-

pean Insurance Contract Law and is intended to provide a Draft Optional Instrument of European Insurance Contract Law. The appropriate Instrument is an opt-in EU Regulation. The first part of PEICL contains provisions

Common to All Contracts Included in PEICL, Provisions Common to Indemnity Insurance and Provision Common to Insurance of Fixed Sums, the forth part contains the Special Provision For Specific Branches of Insurance and is at the moment under preparation.

B. The breach of the information duty of the policyholder under the Principles of European Insurance Contract Law (PEICL)

The PEICL **regulates only the mandatory rules** and covers the **consumer policyholder** and the **policyholder for risks other than the so called "large risks".** It takes into consideration the modern European insurance contract law, which includes the new tendencies for a more efficient protection of the policy holders. It introduces rules which cover the traditional three main categories of the **policyholder information duties,** (i.e. when concluding the contract- duty to disclose- during the life of the contract and after the occurrence of the insured event) and furthermore the extent of **the precautionary measures** and the sanctions for their breach which the insurer is allowed to stipulate within the policy.

The rules concerning the information duties and the precautionary measures are introduced in order to set up a framework restricting the insurer to introduce heavy and draconian sanctions for their breach by the policy holder. So **their ratio is the protection of the policyholder.**

C. The breach of performance imposed by the insurance contract to the policyholder under the PEICL

To be noted that the precaution measures under the PEICL are the **clauses requiring to perform or not to perform certain acts.** These clauses appear under Anglo - Saxon Law usually as "warranties" while under Continental Law from time to time appear as "exclusion of the coverage". The result in both cases is that the policyholder loses its coverage by (non) performance of the act either because it is a breach of warranty or because it appears as an exception. PEICL choice is that all such clauses (i.e. the clauses that require to perform or not perform certain act) disregarding that they are named warranties or exceptions, can not lead to discharge the insurer's liability except if the policyholder has acted with the intent to cause the loss or recklessly and with knowledge that the loss would probably result.

II. THE EXTENT OF THE DUTY TO DISCLOSE CIRCUMSTANCES OF THE RISK: THE GENERAL RULE

In order the PEICL to impose the maximum possible sanctions which the insurer can stipulate by the policy against the policyholder who breaches the well-known and fundamental obligation to disclose the circumstances of the risk, it was necessary to define the content and the extent of such precontractual duty. Not all kinds of circumstances of the risk must be disclosed, but:

1. The applicant has to disclose **only the circumstances which he knows or he should know.**

2. The applicant has to disclose **only the circumstances which are the subject of a) clear and b) precise questions put to him by the insurer** The rule applies to the circumstances which the applicant i.e. the person to be insured was or should have been aware of. So, in case the applicant intended to stipulate

the contract for the account of another person a breach of the duty also exists if that other person (the insured) was aware even if the applicant was not. Also it should be noted that actually the sanctions can only be set after the conclusion of the contract, when the applicant becomes insured.

III. BREACH OF THE DUTY TO DISCLOSE

A. Innocent breach

1. The rule: no sanctions

If the applicant who became policyholder after concluding the contract is in breach of the duty to disclose as described above, that means if he has no negligence for that breach, this is not a reason for the insurer to terminate the contract (i.e. **his is not allowed to terminate the contract).**

2. The exception: sanctions

If the insurer can give evidence that it would not have concluded the contract had it known the information concern, then he can terminate the contract according to the proceedings provided below.

B. Negligent breach

1. The rule: sanctions are provided as follows

a. **Termination or variation of the contract:**

The insurer can terminate the contract following a procedure which protects the insured with coherent information regarding the legal consequences of this termination and giving enough time to the policyholder to find coverage by someone else. The insurer has the choice to continue the contract proposing different conditions to the policyholder if the latter accepts them as follows:

If the reason of the termination is **that the insurer would cover under different condition the risk** had it known the non disclosed circumstances of the risk, it is reasonable to give in this case to the insured the possibility to accept reasonable variation proposed by the insurer and the latter to terminate the contract only if the insured disagrees with those reasonable variations. That is the choice of the rule of the PEICL.

b. **The time limit for the insurer to react**

As soon as the insurer becomes known or the breach becomes apparent, he can «react» within a month, otherwise it is deemed to accept the risk although its circumstances were not disclosed properly.

c. **The procedure: written notice & information**

The "**reaction"** of the insurer provided in the PEICL is to send a **written notice** to the policyholder **giving information** on the legal consequences of its decisions to do the following:

d. **The insurer can:**

i. **Terminate the contract**

or

ii. **Propose a reasonable variation of the contract**

To be noted that following of «what is expected to be the rule within the

market», the PEICL accepts as presumption (prima facie) that the contract **will continue on the basis of the variation proposed** by the insurer. But the policyholder will always have the right to **reject the proposal,** «which is expected not to be the rule within the market», only if he does it **within one month of the receipt of the relevant written notice of the insurer.** In that case the insurer can **terminate** the contract but only **within a month** from the written rejection of the policyholder.

iii. **The insured event occurs before the termination or the variation effect.**

In that case the insurer **is released of his obligation to pay the insurance money** if he can give evidence that **he would not conclude the contract had it known** the information **under the condition that the insured event is caused by an element of the risk which is subject to negligent breach of disclosure obligation.** Under same conditions if the insurer would conclude the contract at a higher premium or different terms, the insurance money shall be paid **proportionately** or **in accordance with such terms.**

Two important rules are included in the above choice of PEICL i)the release of the obligation of the policyholder presupposes the existence of causal relation between the non disclosed information and the occurrence of the risk and ii) the **proportional rule** which effects only the extent of the insurance money in relation with the premium and which is already known by many European ICA's, includes also the terms, i.e. the insurer can apply different terms as condition for the payment of the insurance money, which can however not exclude the possibility to lead to avoidance of the payment.

2. The exceptions: no sanctions in the following cases

a. The **questions** of the insurer posed to the applicant were obviously **incomplete** or **incorrect.**

b. The non disclosed or inaccurately supplied information had no materially effect

to the insurer's reasonable decision to enter into the contract at all or to do so in agreed terms.

c. The **insurer led the policyholder to believe** that the non disclosed information was not necessary to be disclosed.

d. The non disclosed information was or **should have been known to the insurer.**

C. Fraudulent Breach

1. The rule:

a. Avoidance of the contract.

b. Retain the right to any premium due, or

c. Right of termination and/ or reasonable variation of the contract.

2. Condition for la & **1b:**

a. That the insurer has been led to conclude the contract by the policyholder fraudulent breach.

b. That two months have not been lapsed since the insurer became aware of the fraud without giving notice to the policyholder of the avoidance of the contract.

3. Exceptions: no one.

SUMMARY

Sanctions for breach of the disclosure duties that were regulated by old provisions on insurance contract in large measure were considered unjustifiedly heavy. Therefore, legal initiatives in many member states were started in order to change such state of affairs. On the EU level, preconditions for harmonisation of the rules on insurance contract and achievemtn of the desired level of consumer protection were created by formation of the Project Group for Restatement of the European Insurance Contract Law that adopted optional legal instrument for insurance legal relations.