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DUTY TO INFORM CONSUMER OF INSURANCE SERVICES IN GERMAN LAW

The author deals with the analysis of information duty in German law. Having in mind that German Insurance Contract Law adopts the so-called informative paradigm of protection of consumers of insurance services, one of the essential issues is which information should be given to the consumer before concluding the insurance contract as well as during validity of insurance contract. Apart from the provision of the Insurance Contract Law, the author analyses the Decree on duty to inform, which specified the contents of the mentioned duty. The author advocates for the adoption of a very similar approach in Serbian law and adoption of the bylaw which would introduce the so-called list of information on insurance product and precisely define the volume and the contents of information which should be given to the consumer of insurance services.

Key words: *Protection of consumers of insurance services, Information duty, German law.*

1. Duty to Inform Consumer of Insurance Services

Insurer's obligation before conclusion of an insurance contract to inform the policyholder, until adoption of the new Insurance Contract Law, was regulated by the Law on Insurance Supervision.² In the new Insurance

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² Placing of duty to inform from the Supervision Law into the Insurance Contract law undoubtedly confirms its civil-law character.

Contract Law, pre-contractual advising and informing of the policyholder was set as a central segment of protection. Duty to inform is applicable for all insurance contracts regardless of the insurance line. Duty includes information that all insurers, regardless of the insurance lines they are dealing with, should communicate to policyholders before conclusion of insurance contracts.³ Insurers are obliged to inform all policyholders regardless of the fact whether they are consumers of insurance services or not. For the purpose of application of protection standards, the legislator does not differentiate natural persons and legal entities. Difference is reduced only in case of large risks insurance. There is an obligation to inform policyholders of large risks insurance only if they are natural persons. Insurer is obliged to inform them in writing only about applicable law and competent supervision authorities.⁴

Emphasis is put on comprehension of information by an average consumer of insurance services (German: *mündige Verbraucher*). Consumer should be able to decide, based on information provided before giving the contractual statement, whether to conclude an insurance contract, i.e. keep the existing insurance protection.⁵ During that process it is not denied that many consumers due to various reasons do not take into account information provided to them by insurers, which are legally bound to provide such information.⁶ From the consumers point of view, what is important is the fact that they are provided with all information that is legally defined as consumer information (whether they would want to and be able to use them in lawfully prescribed manner or not) and that they are in charge of deciding on conclusion of a contract.⁷ In that manner, on one hand, consumers of insurance services get information required for overcoming information asymmetry, and on the other hand, they seem to be the only responsible party for making a decision based on studying and taking into account all such information.

Communications provided to the policyholder by the insurer must be clear and understandable (German: *klar und verständlich zu übermitteln*). In theory it is emphasized that this provision has a formal component and a component of the language and contents.⁸ Officially, the insurer must ensure that policyholder understood own contracting position from a certain manner of communicating data. Information must be formulated so as not

³ In fact, Article 7 contains consolidated all information duties that arise from the EU Directives for all insurance lines.

⁴ Insurance Contract Law, Article 7.

⁵ Roland Michael Beckmann, Annemarie Matusche-Beckmann, *Versicherungshandbuch*, Verlag C. H. Beck, München 2009, 915.

⁶ Roland Michael Beckmann, Annemarie Matusche-Beckmann, 915.

⁷ Roland Michael Beckmann, Annemarie Matusche-Beckmann, 915.

⁸ Ana Keglević, *Građanskopravni aspekti obveze obavještanja kod potrošačkog ugovora o osiguranju*, doktorski rad, Pravni fakultet Univerziteta u Zagrebu, Zagreb 2012, 418.

to leave any dilemma regarding its meaning: insurer must avoid inaccurate statements, complex formulations, excessive use of technical terminology, etc.⁹ If communicated information is not in accordance with the request for clarity and comprehension, then the transparency request is violated. Applied to the insurance law, the transparency request means that legal position of contracting partners must be regulated in a clear and transparent manner.¹⁰ Clear and precise legislation ensure certainty about the scope of their rights and obligations.¹¹ The point is to interpret the transparency request in context of capabilities of an average consumer of insurance services. Consumer must be capable to, based on average attention, reasonably assess and consider all communicated information without specific knowledge about insurance industry.¹² If an average consumer finds information to be unclear or understandable, that is contrary to the transparency request.

Therefore, key elements of information duty: 1) refer to all types of insurance contracts; 2) include all information stipulated by the European InsuranceContractLaw; 3) this is information significant for the policyholder when making a decision on concluding a contract; 4) information is communicated in writing (only permitted are paper documents and electronic documents such as *email*, floppy disks, *CD-ROM*). However, information contained on electronic data carrier or *website* of the insurer are considered as written form only when printed and given to the policyholder or when downloaded from the *website* or

9 Since the policyholder cannot influence contents of information, observance of the transparency request is important not only in order to enable making an informed decision. The point of clear and precise communication of information in the pre-contractual phase is to prevent use of the fairness test on them, stated in the Directive 93/13. If such information is not communicated in sufficiently clear and precise manner – since they are not negotiable, but prepared only by an insurer – information could be disputed because of unfair character. On arising consequences V.: Ana Keglević, "Pre-contractual Information Duty and Unfair Contract Terms – Open questions and dilemmas – *Insurer's Pre-contractual Information Duty*", Turkish Chapter of AIDA, Istanbul 2013, 89.

10 Roland Michael Beckmann, Annemarie Matusche-Beckmann, 916.

11 Roland Michael Beckmann, Annemarie Matusche-Beckmann, 916.

12 Roland Michael Beckmann, Annemarie Matusche-Beckmann, 916. There are two situations when question is posed whether information duty can really be performed. The first one refers to the policyholder that is not ready to get acquainted with given material (not ready to read all given documents in context of performance of information duty). Such approach in practice is present with persons that are complete laymen regarding insurance and with persons with elementary knowledge of insurance, but that lack the culture of getting acquainted with material which is the source of their future obligations. The second situation involves persons who lack capabilities and knowledge required for getting acquainted with legal terms. In practice, the second situation is more frequent and should be taken into account when assessing whether information duty is performed or not. Details: Christoph Brömmelmeyer, "Vorvertragliche Informationspflichten des Versicherers – insbesondere in der Lebensversicherung", *VersicherungsRecht*, Heft 13, 2009, 586.

in any other manner placed at disposal for written reproduction);¹³ 5) for failure to perform this duty both an insurance agent and a broker may be responsible; 6) information must be communicated to the policyholder in a timely manner, i.e. before his/her contractual statement.¹⁴

2. Decree on Information Duty

Unlike advisory duty – that is an obligation of both insurer and insurance broker, information duty is an exclusive obligation of the insurer. Therefore, even when insurance contract is concluded by an insurance broker, the insurer is obliged to ensure performance of information duty. Insurer should deliver insurance terms and conditions, proposal of a contract, and all information from Article 7. Significance attributed to information duty in German law is confirmed by adoption of the Decree on Information Duty,¹⁵ which in detail explains insurer's obligation from Article 7. It is a regulation that amends the Insurance Contract Law and ensures that the insurer in an orderly manner fulfils pre-contractual and contractual obligations regarding information duty.¹⁶ Insurer has clear guidelines and specific data regarding information that should be delivered to the policyholder (the decree contains seven detailed paragraphs).

The stated decree contains detailed rules referring to type of information that should be communicated to the policyholder for all insurance lines (paragraph 1: *Informationspflichten bei allen Versicherungszweigen*); and special provisions relating to all life assurance lines, insurance against incapacity to work and accident insurance (paragraph 2: *Informationspflichten*

¹³ According to a dominant opinion, information placed on insurer's homepage does not fulfil the condition of a written form because it does not guarantee that information would actually reach the policyholder. Details: Christoph Brömmelmeyer, "Vorvertragliche Informationspflichten des Versicherers – insbesondere in der Lebensversicherung", *VersicherungsRecht*, Heft 13, 2009, 585; Ana Keglević, *Gradanskopravni aspekti...*, 415.

¹⁴ Regulation of information duty as a pre-contractual obligation influences change of models of contracting insurance contracts. Until adoption of the Insurance Contract Law, the contract was concluded by delivery of the insurance policy (German: *Policenmodell*), and general and special terms and conditions were delivered only after conclusion of a contract. That was unfair for the policyholder who did not have insight into significant data before final commitment. Since information duty is defined today as a pre-contractual obligation, practice of concluding a contract by provision of the proposal (German: *Antragsmodell*) or invitation to proposal (German: *Invitatiomodell*) and delivery of legally prescribed volume of data before declaration of will is developing. V.: Roland Michael Beckmann, Annemarie Matusche-Beckmann, 918; Ana Keglević, *Gradanskopravni aspekti...*, 341-342.

¹⁵ Verordnung über Informationspflichten bei Versicherungsverträgen; abbreviated VVG-InfoV.

¹⁶ Since information duty is regulated by the mandatory and the semi-mandatory provisions of these two regulations, its contents, i.e. any changes cannot be affected by OUO.

bei der Lebensversicherung, der Berufsunfähigkeitsversicherung und der Unfallversicherung mit Prämienrückgewähr); health insurance (paragraph 3: Informationspflichten bei der Krankenversicherung); obligation to inform through delivery of the so-called list of information on insurance product (paragraph 4: Produktinformationsblatt); providing information with contracts concluded over the phone (paragraph 5: Informationspflichten bei Telefongesprächen); providing information during the contract (paragraph 6: Informationspflichten während der Laufzeit des Vertrages) and transitory and final provisions (paragraph 7: Übergangsvorschrift, Inkrafttreten).

According to the Decree, insurer is liable to put at disposal of the policyholder the list of information on insurance product. This list of information on insurance product is created as a means for orientation of the policyholder.¹⁷ Therefore, the list does not contain final and complete information, but only the most important information so that the policyholder can get acquainted with the contract.¹⁸ They have a clear and understandable insight into information which the insurer is obliged to deliver. Such information is important for conclusion of the contract or fulfilment of contractual obligations. However, the policyholder is pointed to insurance contract provisions as well as insurance terms and conditions with which he/she has to get acquainted.

Information that should be at disposal of the policyholder for *all insurance lines* can be divided in the following manner: 1) information on the insurer; 2) information on proposed deal; 3) information on the contract and 4) information on legal protection. Information:

1. on identity of the insurer, i.e. branch office in which the contract was concluded, the address, the registry in which the insurer is registered and the registration number;
2. on identity of the insurer's representative in the EU member state where the policyholder has registered seat, when the policyholder contacts the representative;
3. on insurer's regulations and other regulations relevant for relation between the insurer, its representative or any other person and the policyholder;
4. on insurer's business capacity;
5. on existence of the Guarantee Fund or any other form of indemnity that is not stipulated by the Directives 94/19 and 97/9;
6. on applicable general insurance terms and conditions, and especially premium tariffs;
7. on important characteristics of insurer's obligations, especially on type, scope and occurrence of insurer's obligation;

¹⁷ Mangred Wandt, *Versicherungsrecht*, 5. Auflage, Carl Heymanns Verlag, Köln 2010, 110.

¹⁸ Hubert W. van Bühren, *Handbuch Versicherungsrecht*, 4. Auflage, Deutscher-AnwaltVerlag, Köln 2009, 1637.

8. on total insurance price, including all taxes and special parts of premium, whereby premium is separately shown if insurance relation includes several individual insurance contracts, or if precisely determined price cannot be given then data on basis for premium calculation that enable policyholder to check the premium;
9. on expenses and amounts which are not debited to the insurer and which the insurer does not take into account, such as expenses for use of communication means;
10. on particulars regarding payment and fulfilment of premium;
11. on deadlines regarding validity of given information, especially on deadline regarding validity of the offer and premiums;
12. on financial instruments;
13. on time of conclusion of the contract, especially on inception of insurance and insurance cover, and on period when the offer is binding for the offeror;
14. on (non)existence of the right to waive the contract, and on conditions and particulars regarding exercise of this right, especially names and addresses of persons exercising this right, and on legal consequences of exercise of right to waiver when the policyholder had already executed payment;
15. on type of proposed insurance contract: whether it is a life assurance or a property insurance line;
16. on the contract validity, i.e. the shortest period of contract validity;
17. on the method of termination of the contract, especially on conditions for termination of the contract;
18. on the right of the member state that is applied to insurance terms and conditions;
19. on applicable contract law, i.e. on contract clause about applicable law and the competent court;
20. on language of the insurance terms and conditions and consumer information, and on language on which the insurer will communicate with the policyholder, with his/her consent, during contract validity;
21. on policyholder's option to initiate extrajudicial settlement of disputes and on assumptions for that, with a note that this does not obstruct his/her right to court protection;
22. on the name and address of the supervisory body and on options to file a complaint.

If life *assurance* is concluded, then there is an obligation, apart from usually delivered information (based on Article 1), to deliver the following information:

1. the amount of costs included in insurance premium, with total calculated final and other costs that are part of annual premium;
2. other possible costs that only can arise due to extraordinary or specific reasons;
3. bases for calculation or measures to declare surplus, profit or profit share;
4. possible surrender values;
5. minimum amount of insurance for conversion into insurance without premium or insurance with reduced premium and on effects of such insurance;
6. funds that are foundation of insurance, in case of life assurance, and on types of property values contained in them.

We believe that the volume of information given by the insurer to the insured person (unnecessarily) is too extensive and that consumer does not need such information. The European insurance law requires the insurer to inform the policyholder on all insurance contract elements. Whether such information is really necessary for the consumer or not is not taken into account, as well as whether the consumer is capable of using them or not.¹⁹ Apart from that, imposing obligation to the insurer to deliver unlimited volume of information leads to increase of their prices, which – again – is reflected on availability of insurance services to consumers.²⁰

3. List of Information on Insurance Product

The Decree stipulates that if the policyholder is a consumer, the insurer is liable to provide the consumer with the list of information on product that contains information relevant for conclusion or exercise of insurance contract (actually, this is description of characteristics of an insurance contract!). Therefore, the legislator not only obliges the insurer, but with mandatory standards defines information relating to insurer's obligation. This creates a *legal minimum* of protection of consumers of insurance services in terms of information in the list.²¹ The point of mandatory definition of minimum

¹⁹ Due to such reasons we have a phenomenon of *information overload*. Therefore, many policyholders skip reading entire parts of offers or do not read them at all, including those parts referring to contractual obligations. That results in making uninformed decisions on concluding the insurance contract and disputes. V.: Nataša Petrović Tomić, *Zaštita potrošača usluga osiguranja – Analiza i predlog unapređenja regulatornog okvira*, Pravni fakultet Univerziteta u Beogradu, 2015, 171-190.

²⁰ Martin Ebers, "Information and advising requirements in the financial services sector: Principles and Peculiarities in the EC Law", *EJCL*, Vol. 8.2., 2004, 4.

²¹ Insurer does not have many options since the legislator clearly defined which information on insurance product the insurer must enter in the list of information.

information is a clear and concise presentation of a future insurance contract to the policyholder.²² In order to easily make a decision, a consumer of insurance services must not be overloaded with information that are difficult to understand and that take a lot of time for consideration.²³ Modern transactions do not tolerate such delays in conclusion of a contract.²⁴

If we analyse more carefully information from the list (starting from the insurance contract inception and its duration to insurer's obligations or the method of termination of a contract), we conclude that such information only eases client's decision for or against a specific insurance contract.²⁵ Insurer that does not want to reduce contents of the list to the most important information violates duty stated in the Decree.²⁶ If a policyholder suffered a loss because the list was not transparent and he/she "did not see the wood for the trees", he/she can file a claim.²⁷ In accordance with request for reduction of information to the most important ones, so that a consumer could make a decision, is also a request that information is presented in a clear and understandable manner. Also, the insurer should point out to the consumer that the list of information is not final and that it does not contain all information. It is necessary that the consumer gets acquainted with the contract referred to by such information as well as with insurance terms and conditions, which make integral part of the contract, so that the consumer could learn about the contents of the entire contract.

22 The idea is to concisely present the most necessary information, i.e. on one sheet of paper so that the insured person could quickly and simply check whether characteristics of a contract are in accordance with his/her wishes and expectations. This document is conceived as a method for overcoming information overload of the consumer. As in: Ana Keglević, *Građanskopravni aspekti...*, 399.

23 It is noticed in theory that a consumer with too much information is just like an uninformed consumer. Introduction of the list of information on insurance product created a filter mechanism for separation of relevant from less relevant information from the consumer's point of view. V.: Oliver Brand, "Verbraucherschutz im Versicherungsrecht", *Karlsruher Forum 2011: Verbraucherschutz – Entwicklungen und Grenzen*, Egon Lorenz (Hrsg.), *Versicherungsrecht, Schriften 47*, 2012, 77-78.

24 Therefore, the list of information on insurance product is conceived as a reduction of information to the most important ones. Roland Michael Beckmann, Annemarie Matusche-Beckmann, *VersicherungsHandbuch*, 949.

25 Roland Michael Beckmann, Annemarie Matusche-Beckmann, 949.

26 The Decree does not stipulate the exact form of the list, i.e. method for formulating information. Since it refers to a great number of very different insurance contracts it is not surprising that the legislator decided to leave upon the insurers to decide on the form of the list. We expect that insurers will adjust form of the list to a specific consumer of insurance services (e.g. if a person uses an email, then the list will be delivered by email; many policyholders will prefer the list to be delivered in paper).

27 Details: Roland Michael Beckmann, Annemarie Matusche-Beckmann, 950.

4. Information from the List

The list of information on insurance product contains the following data:

1. the type of proposed insurance contract;²⁸
2. the insured risk: description of risks covered by insurance and excluded risks;²⁹
3. premium level in Euros, due date and period for which payment is effected, and consequences due to failure to pay premium or delay;³⁰
4. exclusions regarding behaviour;³¹
5. contractual obligations at the moment of conclusion of the contract and consequences of their default;³²
6. contractual obligations during insurance validity and consequences of their default;³³
7. obligations at the moment of occurrence of the insured event and consequences of their default;³⁴
8. the inception and end of insurance cover;³⁵
9. options for termination of insurance cover.³⁶

²⁸ The insurance line concluded in a contract should be clearly specified, whether it is property or liability or personal insurance.

²⁹ It is not enough just to take formulation of insurance terms and condition, but it is necessary to state specific examples which clearly show risks covered with insurance and risks that are excluded from insurance cover. It is desirable to describe the positive and negative aspects of the insured risk.

³⁰ These are basic elements for presentation of a future obligation to the policyholder. Based on data on insurance premium, the consumer of insurance services should after first reading get impression on period of payment as well as on duration of insurance cover. At the same time the consumer is introduced with consequences arising from default or delay.

³¹ This is especially significant provision for clarification of contractual rights, and even more of expectations of the consumer of insurance services. They mostly do not understand that buying insurance does not mean a total insurance cover.

³² Insurer informs the consumer clearly and concisely about his/her obligations arising from insurance contract. It is rather useful to emphasise here that the policyholder is obliged to report any circumstances relevant for risk assessment. Also, the insurer warns about any consequences due to default, which can cause the policyholder numerous inconvenient problems.

³³ Here the policyholder gets acquainted with obligation, during validity of insurance contract, to take measures for reduction of insured risk and notify the insurer on increase of risk. Insurer informs the policyholder on any consequences arising from default.

³⁴ Insurer informs the policyholder that in case of occurrence of insured event the policyholder should notify the insurer, and inform the insurer on performance of this obligation and on consequences due to default.

³⁵ The insured person must be informed in a clear and understandable manner about the inception date of insurance cover, i.e. insurance duration. This is valid when material and official inception dates do not match.

³⁶ The policyholder must be informed that he/she, under certain conditions, has the

Therefore, German law precisely defines information the policyholder is entitled to. It is a wide range of data to be provided to the policyholder in order to eliminate the problem of information asymmetry in relation to the insurer. However, it is necessary to differentiate numerous rules regulating the information duty. Firstly, there is general information at disposal to the policyholder any time, i.e. regardless of the type of insurance contract. Secondly, if it is a life assurance or the contract is written in a special manner (e.g. by telephone, emails, etc.) then special rules apply. Finally, if the policyholder is a consumer, then the insurer is obliged to make for the policyholder a special list of information on insurance product. This list is limited and does not contain all information referred to in Article 1 of the Decree, but it presents some sort of an extract from such information.³⁷ This means that consumer's need to have information delivered in a manner that guarantees that the consumer will get acquainted with the most important data on the contract is met. We conclude that information duty exists in any case (except with explicit exclusion regarding so-called large risks), however, when it comes to consumers of insurance services the legislator ensures delivery of the list of information on insurance product to them.

The list of information on insurance product is a novelty in German law. Delivery of a document to the consumer, which contains particulars of the contract in a concise, precise and understandable manner, assumes that the consumer will not make a rash decision.³⁸ The list contains only information relevant for selection of an insurance product at the decision-making moment.³⁹ Information is supposed to assist the consumer of insurance services to get acquainted with other important rights and obligations from the insurance contract. If the consumer is really interested, then such information will give him/her grounds to learn about other relevant circumstances. The list of information on insurance product can become an efficient instrument for protection of consumer if its essence is not lost in practice. Thus informed consumers of insurance services get an opportunity, with the care of a prudent businessman, to acquire the type of insurance protection that represents the best relation between their wishes and needs and material capacity.⁴⁰

right to terminate the contract and insurance protection. VVG-InfoV, Article 4.

³⁷ In this manner needs of consumers of insurance services are met, i.e. they get information on product. Before deciding on a certain product, they must have an opportunity to get insight at the most important characteristics of the product, in one document, especially regarding costs and risks of such investment. Need for a special manner of informing arises from the complexity of insurance products, and average consumers find insurance terms and conditions long and difficult to understand. As in: Nataša Saserat Alberti, „Nove tendencije u oblasti zaštite potrošača u Evropi i Nemačkoj“, Zbornik radova Arandelovac 2013, 132.

³⁸ Roland Michael Beckmann, Annemarie Matusche-Beckmann, 931.

³⁹ Roland Michael Beckmann, Annemarie Matusche-Beckmann, 937.

⁴⁰ Protection of consumers of insurance services include many other issues that cannot be addressed here, due to spatial limits, such as the moment of communicating the information,

5. Sanctions for Failure to Perform Information Duty

If the insurer fails to deliver information to the policyholder in a legally prescribed period, then the sanction would be that deadline for waiver of cancellation of the contract does not start, in accordance with Article 8.⁴¹ Due to violation of information duty, the policyholder can – as in case of violation of advisory duty – require annulment of the contract.⁴² Condition for annulment is to prove that such information was significant for making a decision (such character undoubtedly has information contained in the list of information on insurance product). According to the insurance terms and conditions, it is believed that the insurer fulfilled the information duty even when a clause from insurance terms and conditions is not transparent or is invalid due to other reasons.⁴³ Violation of information duty in pre-contractual phase presents

consequence due to failure to perform information duty, etc. Details: Nataša Petrović Tomić, 180-190.

41 Clause on limits or exclusion of insurer's liability for providing false information or advice has no significance in the insurance law. It is invalid. Details: Roland Michael Beckmann, Annemarie Matusche-Beckmann, 915.

42 Roland Michael Beckmann, Annemarie Matusche-Beckmann, 952. In German law the insured person actually has the right to choose whether to annul the contract (which automatically leads to loss of insurance cover) or to maintain the enforceability of the contract in which case the right to waiver becomes infinite. In French law the insured person can also require annulment of the contract or maintain the enforceability of the contract, with imposition of certain sanctions to the insurer or the broker that did not provide certain information. Regarding the first option, if the insured person decides to require annulment of the contract he/she can refer to deficiencies of will. Failure to communicate some of legally prescribed information is equalised in French court practice with misleading or deceiving the insured person. Also, presenting the insurance terms and conditions as extremely favourable ones, without providing information on real cover conditions, is deemed as deceiving the insured person. Since insurance terms and conditions are false and do not correspond to promised obligations, the contract signed under such conditions should be annulled due to deficiencies of will of the insured person. The court practice shows that failure to communicate only one important piece of information can be deemed as a fraud. There is a case when the insurer, after termination of the automobile insurance contract, proposed to the insured person a new policy with premium that was so increased that the insured person could justifiably believe that new insurance cover was at least equal to the old insurance cover. The new contract did not contain equivalent cover, but the insurer even excluded the clause relating to the theft risk. Obviously the insured person would not have concluded the contract had he knew that, apart from premium increase, the key clause regarding hull insurance had been excluded, whereby neither the insurer nor the agent could not prove that the insured person was informed of such change. The Court of Appeal emphasised the following: "Silence of one contracting party regarding crucial contract elements can be deemed as fraud according to Article 1116 of the Civil Code; this rule is applied all the more when the contracting party is an expert that concludes the adhesion contract with a non-expert person." Similar would happen if the insured person was misled regarding some important insurance contract element, e.g. premium amount. Of course, this is possible only if misapprehension can be linked with insurer's failure to communicate legally prescribed information. Details: Hichem Khoury, *L'Information et le Conseil dus au Preneur d'Assurance*, Collection de l'Institut de Droit des Assurances, Press Universitaires d'Aix-Marseille, Aix-en-Provence, 2011, 169-170.

43 Mangred Wandt, *Versicherungsrecht*, 5. Auflage, Carl Heymanns Verlag, Köln 2010, 115.

grounds for filing of a claim against the insurer.⁴⁴ However, even if there were no special grounds, the policyholder would have to address the insurer regarding indemnity because of violation of pre-contractual information duty according to general rules of contract law. However, if the information duty was violated during insurance period, the policyholder is entitled to indemnity due to such violation.⁴⁵

6. Waiver of the Right to Information

As the policyholder can, in writing, waive own right to advice from the insurer regarding conclusion of the contract, the same right is valid for the right to information. However, theorists greatly criticised waiver of the right to information. They believe that introduction of such option is not in accordance with principles of protection of consumers of insurance services.⁴⁶ Policyholder's waiver of the right to information is contrary to provisions of the directive in which it is explicitly stated that the consumer cannot waive the rights recognised by the provisions of the directive.⁴⁷ Such rights present the legal minimum of consumers' protection.⁴⁸ Therefore, German law is somewhat contrary to the European Law in the part relating to the information duty. Such regulation, they say, corrupts the purpose of the information duty. How to know that the consumer made an informed decision on waiver of the right to information?

Recognition of this law enables the policyholder to do something for which he/she cannot know consequences with certainty.⁴⁹ The policyholder

44 Nataša Saserat Alberti, „Nove tendencije u oblasti zaštite potrošača u Evropi i Nemačkoj“, Zbornik radova Arandelovac 2013, 129.

45 Meinrad Dreher, „Versicherungsaufsichtsrecht und Verbraucherschutz im Solvency-II-und EIOPA-System“, VersicherungsRecht, Heft 10/2013, 403; Roland Michael Beckmann, Annemarie Matusche-Beckmann, 952.

46 Mangred Wandt, *Versicherungsrecht*, 5. Auflage, Carl Heymanns Verlag, Köln 2010, 113.

47 Roland Michael Beckmann, Annemarie Matusche-Beckmann, 923.

48 Apart from that, restriction of waiver results from the principle of semi-mandatory character of the rules to contractual consumer law. This principle stipulates that regulations of consumer protection can be waived only if it is not contrary to the consumer's interests, i.e. if such changes provide greater degree of protection compared to the ones stipulated by the directives. Significance of protection rules is confirmed by the rule whose application began in the 1980s stating that choice of applicable law cannot result in deprivation of protection of the consumer, which is provided by the directives. This rule does not exclude the option to choose applicable law with consumer contracts. It merely prevents choice of the applicable law to be used, i.e. misused as a means for deprivation of the guaranteed degree of protection. If it were not for such rule, then protection provided by the directives would in great number of cases be senseless due to choice of the applicable law by the experts. V.: Marko Baretić „Zaštita potrošača u Republici Hrvatskoj – trenutno stanje i perspektive“, *Ođ caveat emptor do caveat venditor*, Kragujevac 2009, 98-99.

49 Waiver of the information duty as a consumer's right should not be mixed with

does not actually know what type of information he/she waived! Thus, the policyholder waives information that could ensure learned decision on whether to take or not a certain insurance product.⁵⁰ Authors emphasise that the decision on waiver of the right to information can be result of incorrect influence from the insurer. By using unfair methods, such as misinformation or deceit of the policyholder, they can deliberately cause his/her waiver of the right to information.⁵¹

Opposed to such understanding is the opinion that supports waiver of the right to information. Key argument is that the waiver of the right to information is part of regulations for protection of consumers of insurance services. Since the policyholder can waive the right to information only under precisely defined conditions – which guarantee that the policyholder will make a decision aware and acquainted with own rights – in that manner it is prevented that the policyholder becomes a victim of misuse of information duty by the insurer.⁵² In that manner principle of autonomous will of parties in pre-contractual phase is observed.

We are inclined toward those that criticise the information duty. We are especially against introduction of such right for our consumers of insurance services. Insurance is still underdeveloped in our country and average consumer definitely is not in position to waive the right to information on the proposed contract by the insurer. Our consumers of insurance services need more complete protection that would reduce possibilities of turning them into victims of misuse by proportionally stronger and more informed insurers. Substantiating of the statement of waiver of the right to information means at the same time absence of any written evidence on wishes and needs of a consumer of insurance services, which could have great significance in disputes with the insurer regarding the cover or responsibility.⁵³

We are convinced that the average consumer of insurance services does not know what he/she is doing, i.e. how waiver of the right to information makes difficult his/her position with regard to the insurer. We believe that the same is not valid for the advisory duty. We can assume that certain policyholders will not have the need to get advice from the insurer, but we cannot assume that policyholders, who believe they are consumers of insurance services,

exclusion of information duty according to directives of the law. This particularly happens when it is assessed that information duty, instead of contributing to better consumer protection, leads to slowing down of transactions. Directive 2011/83 stipulates that the expert is relieved of information duty with contracts concluded on everyday basis, as well as with contracts realised at the moment of conclusion (Article 5 Paragraph 3).

50 Mangred Wandt, 113.

51 Mangred Wandt, 115.

52 Mangred Wandt, 113.

53 Roland Michael Beckmann, Annemarie Matusche-Beckmann, 923.

do not have the need to be informed. For protection of the policyholder's position as a weaker party more significant protection is the one provided by the information duty. Informed consumer becomes less weak party and enters contractual relation after detailed examination of the contract and after getting acquainted with all issues important for his/her protection. It is undoubtedly best for the consumer to rely on advice from the insurer, but in case of a person who is capable to assess his/her best interests, based on obtained information, there is no reason for the legal system to deny that option.

7. Conclusion

Manner in which information duty is regulated in German law can serve as a role model for the EU member states, and not only for countries like Serbia that have just started working on regulatory framework for insurance services. Since the Status Law was adopted last year and the Civil Code is still under construction, an issue arises on how we can apply German experience. Although the Insurance Law regulates information duty in a quite acceptable manner, the fact that it was done by the status regulation presents a step back. Namely, since adoption of the new Insurance Contract Law in Germany, all civil and legal issues regarding insurance services were regulated by this law, while supervision was regulated by a special law. Regulation of information duty by the law that regulates supervision now is in the past. Therefore, relocation of the information duty should be done. Also, great advantage of German law compared to our law, but also compared to *Acquis Communautaire*, lies in the fact that two regulations uniquely and in detail define issues which have been regulated by provisions of greater number of directives at the EU level.

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