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OBLIGATION OF THE INSURED TO COOPERATE WITH THE INSURER IN ESTABLISHING THE OCCURRENCE OF AN INSURED EVENT IN MODERN LAW OF EUROPEAN COUNTRIES

(PART I)

REVIEW ARTICLE

Abstract

Considering the differences in legal sources of continental European countries reformed in the last 16 years regulating non-marine insurance contracts, which before all relate to the manner of creation and core of the insured's obligation to cooperate with the insurer in establishing the occurrence of an insured event and the amount of the insurer's obligation to indemnify, the author of this paper discusses several important issues relevant for the modern regulation of this obligation in the future Civil Code of the Republic of Serbia. Third draft of the said piece of legislation was issued by the Serbian Government Committee for drafting the Civil Code on 29th May 2015. One of the main issues discussed herein pertains to these differences: should this obligation, not regulated as insured's legal contractual obligation under the applicable Law on Contracts and Torts from 1978 i.e. under the Insurance Contract Law of Serbia, be regulated as a legal

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contractual obligation or a stipulated obligation and to what extent, that is, to what extent should it be regulated by the insurer under the insurance conditions? In addition, should this obligation, which is recognized in all insurance lines, be regulated as a single obligation incorporating insured's obligation to notify the insurer of the occurrence of an insured event, or as an independent one, separated from the latter? If it is regulated as an independent one, does it and to what extent does it form a legal entirety with the insured's obligation to notify the insurer of the occurrence of an insured event? How to create this obligation in terms of its effect: should it arise at insurer's request or without it, as a legal contractual obligation or a stipulated one incurred by the insured *ex lege,* i.e, based on a stipulation in a contract?

Also, the author discusses the issue as to how many elements this obligation should contain and the extent to which it should be regulated under the law, as well as the details, i.e. elements the said obligation should comprize in terms of the duties of the insured towards the insurer so that it is in line with the modern insurance needs in Serbia. Also, should these duties, which are part of the obligation to cooperate, be limited by law or contract? Which persons in insurance, other than the insured, should be defined as persons under this obligation? How should the insurer sanction the insured who has breached the obligation? Finally, how should the type and severity of fault of the insured who breached the said obligation affect the type of right the insurer has and in what way? The author also discusses the issue of adequate terminology applied to this obligation in our domestic law, for which legal systems of European continental countries analysed in this paper used different expressions or did not name at all.

The analysis of these issues is carried out, on the one hand, in view of the solutions adopted in the reformed laws of European countries that are, from the aspect of non-marine insurance, finances and economy in general, considered one of the most developed European countries with the most progressive non-marine insurance contract law (Germany, Austria, Switzerland and France), and on the other hand, in the reformed laws applicable in peripheral European countries, in order to establish the extent and areas in which they follow the modern legislation in the most developed countries, bearing in mind the non-marine insurance contract law in particular (The Czech Republic, Bulgaria and Romania). The paper also analyses solutions contained in the international document that should serve as a basis for drafting the future directive on the European (non-marine) Insurance Contract Law, adopted on 1st of November 2015, under the title the Principles of the European Insurance Contract Law. As regards this document, even when it was in a form of the Draft in 2007, i.e.

2009, the European academic community generally considered it a progressive and balanced protection system of the insured and the insurer.

Key words: *the insured, the insurer, obligation, cooperation, notification, submission of documentation, breach of obligation, consequences.*

1. THE COOPERATION OBLIGATION ACCORDING TO THE PRINCIPLES OF THE EUROPEAN INSURANCE CONTRACT LAW AND LEGAL SOURCES OF EUROPEAN COUNTRIES

For easier observation of differences between issues mentioned in the abstract, the discussion in this section will be carried out according to the following plan and on the following issues: a) persons in insurance contract to which the cooperation obligation applies, b) subject or aim of the cooperation obligation, c) duties of the insured towards the insurer in the performance of the cooperation obligation that are part of the cooperation obligation, d) manner in which duties the insured is obliged to meet in performance of the cooperation obligation arise (at or without insured's request), e) period and place within and at which the duties which comprize the cooperation obligation are to be performed, f) modes of breach of cooperation obligation, i.e. duties that are part of it (delay in fulfilment and other modes) and g) the grounds of liability for breach of duties that are part of the cooperation obligation and the insurer's rights to sanction the insured in such case. Beside these issues, in legal systems where they exist, the author will address the issues of form in which duties that are part of the cooperation obligation have to or can be fulfiled, and a special case of a breach of cooperation obligation by filing a false insurance claim.

Shortcomings in the analysis of the mentioned legal issues that are part of the cooperation obligation and, in general, a legal institute in reformed national laws or new legal sources on insurance contract, such as the Principles, lay in the fact that, due to an insufficient period of time from adoption and coming into force of these sources, there has not been much court practice about the institutes they govern nor have there been many academic papers with critical analysis and broader interpretation of the regulatory norms, in respect of which an author of a paper of this kind, which is mostly based on the use of normative comparative legal method of analysis, would check his viewpoints in the interpretation and application of the provisions of the said

regulation. This is why the author of this paper takes full blame for all mistakes in viewpoints presented in this paper.[2] [3]

In the analysis of the cooperation obligation, the solutions of the Principles will be used as a reference point in the comparative legal analysis of this obligation. This is so because they thoroughly regulate it ensuring at the same time there is a balanced protection of the interests of the insurer, policyholder and other persons who are subjects of that obligation.[4] This explains why the analysis of this obligation in that document is crucial for practical and theoretical comprehension of the essence of elements of this obligation and the related prior obligations of the insured to notify the insurer of the occurrence of an insured event. Likewise, it is also crucial for the understanding of the essence of the insurer's obligation to provide insurance indemnity to the insured, provided that the insured previously met his obligation to cooperate with the insurer in establishing the occurrence of an insured event or the amount of the insurer's obligation to indemnify. The interrelatedness of the two obligations implies they are correlated. It explains why the cooperation obligation, even if it was not thoroughly regulated by this international document, had to be investigated more thoroughly in this paper than it had been in the national legal sources in certain European countries. Therefore,

[2] The scheme that contains all main elements of the cooperation obligation does not include the designation of the person to whom information on causes and consequences of the occurrence and supporting documentation thereof is submitted beside the addressee of these duties who is mostly specified in all legal sources, namely, the insurer. This is because the mentioned duties in all national sources of law can be discharged through the insurer's representative who is obliged to accept the said information and documentation, since it falls within the scope of prescribed obligations of the said representative. Regardless of whether the representative acting on behalf of the insurer is only authorized to act as the insurer's broker in concluding an insurance contract, or to conclude it.The acceptance of information and documentation on the causes and consequences of the occurrence is ensured based on a lawfully provided authorisation, i.e. proxy of the insurer's representative, which is the case in German law (para 69 and para 71 of the German Insurance Contract Act), or a special legal authorisation given to the insurer's representative, which is the case in Swiss law (Article 40, para 3 of the Swiss Insurance Contract Act).

[3] There are duties that the insured has to perform under the cooperation obligation, which are part of the cooperation obligation, as stated in the above mentioned scheme, and it is common for all sources where it will be analysed - if not prescribed by law, to be regulated under the insurance contract / insurance terms and conditions which form an integral part thereof or are established in the documents prepared and issued by the insurer as a result of his established business practice, in which case they do not have to be formulated in the insurance terms and conditions to be binding upon the insured. This is the case with the insured's obligation to notify the insurer of the causes and consequences of an occurred insured event when the insured has such obligation and when it is established in the insurer's questionnaire the insured is obliged to fill in when submitting a claim notification (an affidavit of claim).

[4] On a more balanced protection of the interest of the policyholder i.e. the insured and insurer in this document, please refer to: Rokas, Joanis, „Principi Evropskog ugovornog prava osiguranja kao napredan i uravnotežen sistem zaštite ugovarača osiguranja", *European Insurance Law Review*, 1/2013, p. 32 37. The author is a member of the working group of the project Reform of the European Insurance Contract Law that made the Principles.

in order for the reader to be able to better understand solutions on the elements of the insured's obligation to cooperate with the insurer upon the occurrence of an insured event from the comparative legal sources, it is important to go into details in the analysed elements of this obligation in the Principles. However, it does not imply that the author deems the solutions from the Principles should in all respects be looked upon by the Serbian Government Committee for drafting the Civil Code in respect of redefinition of Article 1433 of the Civil Code Draft with the aim to prescribe the cooperation obligation in the said Article. The next chapter will point out the solutions of the Principles or the reformed national legal sources of particular European countries on insurance contracts which should be adopted in our new insurance contract law, and in particular, the elements thereof which should be adopted in regulating the cooperation obligation. After a short analysis of the solution stated in Article 1433 of the Draft Civil Code, we will make our own suggestion for the new wording of the said Article where the reader will be able to find the provisions which incorporate or were affected by the modern solutions in the Principles as well as those that are recognized in German, Austrian and Swiss insurance contract laws.[5] [6]

[5] However, it should be noted that under the infuence of arguments of our doctrine, numerous solutions of the Principles are included in the Draft Civil Code (hereinafter: Draft CC of the RS), most often with unchanged contents. Regardless of whether they refer to legal institues of insurance contracts unrecognized by the Law on Contracts and Torts (hereinafter: LCT) or whether they were regulated thereunder. Among those that were not regulated under the LCT are the ones referring to: language, interpretation of documentation and proof of the receipt of documentation (Article 1395 of Draft CC of the RS, that is, Article 1:203 and Article 1:204 of the Principles), an affidavit claim (Article 1396 of Draft CC of the RS, that is, Article 1:205 of the Principles), assumption of the familiarity with the facts (Article 1397 of Draft CC of the RS, that is, Article 1:206 of the Principles), prohibition of discrimination (Article 1398 of Draft CC of the RS, that is, Article 1:207 of the Principles), Clause on misuse (Article 1399 of Draft CC of the RS, that is, Article 2:304 of the Principles), when the policy contents is different from the contract (Article 1409 of Draft CC of the RS, that is, Article 2:502 of the Principles) (more about these institutes in: Slavnić, Jovan, „Zaključivanje ugovora o osiguranju prema Nacrtu Opšteg referentnog okvira za Evropsko ugovorno pravo osiguranja", Conference proceedings *„Integration of Serbian Insurance Law in the European insurance system",* Insurance Law Association of Serbia, Palić, 2009, p. 323-350 and „Nova područja i pravila tumačenja ugovora u korist jedne strane kod ugovora o osiguranju", Conference Proceedings *„Modern insurance law: current issues and trends",* Insurance Law Association of Serbia, Palić, 2014, p. 229-253). The ones regulated under the LCT are for example: duty to report circumstances relevant for risk assessment (Article 1419 of Draft CC of the RS, that is, Article 2:101 of the Principles), exclusions of sanctions in case of breach of this duty (Article 1421 of Draft CC of the RS, that is, Article 2:101 and Article 2:102 of the Principles) and fraudulent reporting of circumstances relevant for risk assessment (Article 1422 of Draft CC of the RS, that is, Article 2:104 of the Principles). More about this duty according to the Principles and Draft CC of the RS from 2014 in: Slavnić, Jovan, „Uticaj i značaj krivice osiguranika na posledice povrede obaveza koje ima u svim vrstama osiguranja - pogled na savremena rešenja u nekim evropskim državama i u Srbiji", Conference Proceedings *„Reforms and new challenges in insurance law",* Insurance Law Association of Serbia, Palić, 2015, p. 15-32).

[6] The Government of the Republic of Serbia, Committee for drafting the Civil Code (2015): *Civil Code of the Republic of Serbia – Draft*, 29. 5. 2015, Belgrade.

Legal sources analysed in this article use different approaches in respect of the manner of regulating the insured's obligation. Sometimes it is regulated by dispositive norms, sometimes by a mixed model. In this model, apart from dispositive norms, some elements of the obligation are regulated by relatively mandatory norms and some other by absolutely mandatory norms. That will be emphasized in the right places when analysing the cooperation obligation in certain national legal sources on insurance contract. Only seemingly, it appears that the Principles make an exception because all the provisions therein, including the provision on the insured's obligation to cooperate with the insurer upon the occurrence, are absolutely mandatory norms - although their application is voluntary, they are mandatory in application. That means that when the policyholder and the insurer agree to apply the Principles (voluntarity basis) on their contract, the provisions of the Principles are applied to the agreed insurance contract in full, other than exceptions prescribed in Article 1:103 where just few of the provisions are considered mandatory norms. Exclusion of any provision thereof from the application to the agreed contract is not allowed, nor the application of provisions of the national legal sources of contracting parties or any other national legal source governing an insurance contract. It is expressly provided for in Article 1:102.[7]

Before we move on to the analysis of the elements that are part of the cooperation obligation according to the Principles and certain national legal sources of European countries of our choice, it is useful to take notice of an issue that is often raised in the area of insurance contract law, which has a practical importance for defining and differentiating between the insured's obligation to notify the insurer of the occurrence and his obligation to cooperate with the insurer upon the occurrence in establishing the occurred insured event and the amount of the insurer's obligation to indemnify. Namely, there is a question whether the insured's obligation to notify the insurer of an occurred insured event and the obligation to cooperate are considered one legal entirety. An answer to this question is not provided. Also, in the description of the notification obligation there is a confusion of the two stated obligations as it states that upon occurrence the insured receives an insurer's form to specify the most important circumstances of the occurrence, especially circumstances relevant for the assessment of the scope and amount of loss as well as circumstances that gave rise to the occurrence relevant for the assessment of the insurer's liability for the loss. Stipulation of deductible, driving under the influence of

[7] For more about this and other properties of the Principles, refer ro: Đorđević, Slavko,„Principi Evropskog ugovornog prava osiguranja - budući opcionalni instrument prava EU"», *Insurance Law Review,* 2/2010, p. 19-28.

alcohol and driving without a driver's licence are mentioned as examples of circumstances based on which insurer's legal liability is established.[8]

Not just in theory but also in practice, it is possible for the insured, after notifying of the occurrence, not to incur the obligation to cooperate with the insurer in establishing the occurrence of an insured event and the amount of the insurer's obligation to indemnify. This happens when the insured notifies the insurer of the occurrence of an insured event after becoming aware of the loss and the right to claim indemnity (i.e. that there is an insurance coverage) thus performing the notification obligation, and the insurer is able, without insured's assistance, whether by himself or by help of his agent, to gather information on causes and consequences of the occurrence, as well as documentation and other pieces of evidence thereof necessary to meet his obligation to provide insurance indemnity, i.e. to pay sum insured. In addition, in insurance contract (a bilateral agreement), an obligation to pay sum insured is synallagmatic to the insured's obligation to pay insurance premium. Therefore, the obligation to cooperate with the insurer is not incurred by the insured, so a legal entirety of this obligation and the insured's obligation to notify of the occurrence is not created. That is why these two obligations are not to be considered a legal entirety nor to be confused. However, if the form of notice contains questions on causes and consequences of the occurrence to which the insured has to provide answers, which is not such a rare case in practice, it means that by posing such questions the insurer requests from the insured to, along with this obligation, perform duties that are part of cooperation obligation. In that case, these two obligations can be considered a single legal entirety or even a single obligation.

Also, the stated obligations cannot be considered a legal entirety since in case of their breach, legal systems sanction it differently. However, they form a legal entirety if they are seen as obligations that enable the insurer to perform his obligation to provide indemnity, i.e. pay sum insured. Therefore, both in theory and in practice, in order to draw a line between the two obligations, it is necessary to clearly establish where the insured's obligation to notify the insurer of the occurrence ends and where his obligation to cooperate with the insurer starts, as well as to establish the consequences the insured will suffer by breach of each obligation respectively.[9]

[8] Šulejić, Predrag, Comment Art. 917 of the LCT „Obaveza obaveštavnja o nastupanju osiguranog slučaja", in: *Komentar Zakona o obligacionim odnosima*, book II, copy editor Perović, Slobodan, Belgrade, 1995, p. 1494.

[9] For more about the interconnectedness of these two obligations and their differentiation, see: Slavnić, Jovan: Obaveza osiguranika da osiguravaču prijavi nastupanje osiguranog slučaja - pogled na savremena rešenja, *Legal life,* no. 11/2016, p. 175 and 180.

Principles of European Insurance Contract Law.[10] Article 6:102 of the Principles regulates the cooperation agreement as the obligation separate from the obligation to notify the insurer of the insured event which is regulated by Article 6:101.

The Principles set forth that except the insured, the policyholder and the insurance beneficiary are also obliged to cooperate under an insurance contract. The Principles do not treat them as solidary persons under the obligation to cooperate, i.e. as solidary obliged parties in terms of compulsory law, but as separate obliged parties. According to the Principles, depending on the type of insurance contract, i.e. his role in the insurance contract, the policyholder is a person under the said obligation when he is in a capacity of a contracting party and when his interest or himself is covered under insurance. The same is also the insured by being a person who has not just concluded a contract by himself or through an agent, but by having his interest or himself covered under an insurance contract concluded by some other person (policyholder). The obliged party is also an insurance beneficiary, in case when insurance contract is concluded on behalf of a third party, regardless of whether he has already been determined in the concluded insurance contract or that he is to be determined as the beneficiary. The beneficiary is determinable *par exelans* in insurance contracts on behalf of who it may concern to (usually in liability insurance lines). It can also be a successor of the policyholder or the insured, a legatee or e.g. an insurance indemnity pledgee. Still, the manner in which the Principles have determined the person under the cooperation obligation can provoke dilemmas and disputes between the insurer and the policyholder, the insured and the insurance indemnity beneficiary regarding the capacity they have in an insurance contract, their (un)solidarity in fulfiling the cooperation obligation or the form of an insurance contract in which each of them can be considered an independent obliged party with respect to the cooperation obligation. This is why the German legislator provided a clearer and better solution on determining the subject of the cooperation obligation, according to which a third party is obliged to fulfil the obligation if he is entitled to the agreed indemnity. In the further discussion of the stated obligation according to the Principles, in order to avoid reiteration by repeating all the mentioned parties, we will use the expression insured to refer to the person with the obligation of cooperation. It is in line with the most national legal systems which, in the process of regulation of the obligation, use the expression insured to refer to a party in insurance who is a holder of the obligation, regardless of whether he is defined so as an exclusive or just as a primary obliged party.

[10] Project Group „Restatement of European Insurance Contract Law", Principles of European Insurance Contract Law (PEICL), Status: 1 November 2015 (available at: *https://www.uibk.ac.at/zivilrecht/forschung/evip/restatement/sprachfassungen/peicl-en.pdf*, 5. 9. 2016).

As stipulated in Article 6:102 para 1, the subject matter of the obligation to cooperate is the establishment of (the occurrence of) an insured event. However, based on indent 1 of the para hereof that regulates in this area the insurer's rights against the insured, which are at the same time duties of the insured and instruments that form the obligation to cooperate, it can be concluded that, in addition to establishing the occurrence of an insured event, the subject matter also includes the establishment of the amount of insurance indemnity the insurer is obliged to pay based on the established insured event. Namely, the said indent stipulates that the insurer is entitled to request information from the insured on the causes and *"consequences of an insured event".* However, regulation of insurer's right to request from the insured to submit documents and other evidence does not include determination of the scope of indemnity, since indent 2 of the mentioned para 1, Article 6:102 simply states that the insurer may request from the insured to deliver documents or other evidence on an insured event. If we are to interpret this indent, it means that the insurer is not entitled to request from the insured delivery of documentation and other evidence on the consequences of an insured event, i.e. evidence on the scope of insurance indemnity, but that he is to obtain adequate documents and other evidence on his own if he is to establish that legal fact. Indent 3, para 3 of the Article hereof prescribes one more duty for the insured – to enable access to damaged property to the insurer. It is understandable, since if the insurer is to establish whether a risk covered under an insurance contract has occurred and resulted in the insured event sustained on the insured property/object, he previously has to be enabled access to the insured property/object by the insured or a third party on behalf of the insured.

The Principles do not limit insured's obligation of cooperation with the fulfilment of the three above mentioned duties, as the insured is obliged to fulfil all other duties that are reasonably requested by the insurer. This solution is good, because depending on the type and character of an occurred insured event and its consequences, the insurer may need the insured's assistance to establish causes and consequences of the insured event, so he may also fulfil some other duties that cannot be forseen and specified in the insurance terms and conditions. If these other duties are not forseen and specified therein, the insurer may request from the insured their fulfilment as long as such requests are reasonable. National legislations of the countries analysed herein prescribe two obligations for the insured, namely, indent 1, para 1, Article 6:102 of the Principles (obligation of notifying the insurer on the causes and consequences of an insured event) and indent 2 of the same para and Article (obligation of delivering documentation and other evidence on an insured event and the amount of the insurer's obligation to indemnify). However, since the provisions of these national legislations related to the duties the insured has to perform as part of the obligation to cooperate

with the insurer in establishing an insured event and the amount of the insurer's obligation to indemnify are dispositive norms, practically speaking, the same effect like the one in the Principles can be produced in these legislations by extending the insured's obligations to include the duty of enabling access to the insurer to the damaged property, as well as other duties as long as they are reasonably requested by the insurer and have the purpose to establish an insured event and the consequences thereof. In these legal systems, the insurer may prescribe in the insurance contract or insurance terms and conditions for the insured, apart from the obligation to notify the insurer of the causes and consequnces of an insured event and of delivering evidence thereof, other duties the fulfilment of which will have the same goal. In addition, he may extend insurance terms and conditions to include all (unnamed) duties which prove to be appropriate in a given situation for achieving the aim for which the obligation of the insured to cooperate has been legally prescribed. As we have already mentioned, in that case it is necessary to prescribe the appropriateness or other legal standard as a condition to make such demands from the insured. The considered solutions provided by the Principles are practically speaking more convenient for the insurer, since they envisage the insured, at the insurer's request, to perform all duties in a given situation to establish an insured event and the amount of the insurer's obligation to indemnify, as long as they are reasonably requested by the insurer and aimed at establishing the cause and consequences of an insured event.

Thus, the Principles deem the obligation of cooperation as a fluid concept, limiting it to the fulfilment of all duties of the insured which, in a given situation, may be considered resonable requests of the insurer. This is a factual issue. What links the Principles with the most national laws that we are going to analyse, such as German and Austrian Insurance Contract Act, is that the obligation of cooperation and other duties the insured has to perform along the way become effective or due the moment the insurer has requested any of them to be performed. Another property that links them is the condition of validity of such request – it has to be reasonable (or adequate as termed in German and Austrian law) so that the insured can fulfil it in a given case with the aim to establish the cause and consequences of an occurred insured event. Reasonableness and adequacy are terms that do not explicitly mean that the insurer could request from the insured to inform him of the causes and consequences of an insured event, deliver documentation and other evidence thereof and perform other duties envisaged according to the law or insurance terms and conditions or duties which are consequential in certain situations (situational duties of the insured), if these information and evidence or subject matters of other duties of the insured the insurer may provide by himself or through relevant public services, without excessive costs compared to the costs the insured would have had if he had had to provide them.

In the text above, we have explained when certain duties of the insured that make the cooperation obligation become due, through which performance the insured also meets the obligation to cooperate with the insurer in establishing the cause and consequences of an insured event. However, we did not mention the period within which a duty, starting from a due date, has to be discharged (a period of time within which the insured is to perform a duty starting from the receipt of the insurer's form, e.g. to deliver evidence on the occurrence of an insured event) and the place where it has to be met. It means that the period and place within and at which duties included in the obligation of cooperation have to be fulfiled, are the period and place determined in an insurance contract or insurance terms and conditions according to which an insurance contract has been concluded (Art. 2:501 – Insurance policy contents). If an insurance contract or insurance terms and conditions do not contain such stipulation, the insured would have to perform specified duties within a period and at a place envisaged by the Principles for fulfiling the considered duties. The application of the Principles to the particular insurance contract is necessary for the regulation of mutual relations of contracting parties.[11] If the period of time and place of fulfilment of these duties are not envisaged under the contract or insurance terms and conditions or the application of the Principles to an insurance contract is not agreed, legal gaps in respect thereof in a concluded insurance contract and the Principles shall be filled by applying the rules from the provisions of Principles on the period and place of fulfilment of a similar duty – the obligation of the insured, i.e. policyholder and insurance beneficiary to notify the insurer of the insured event. As we mentioned, it is prescribed in Article 6:102, para 1 and 2, which state that if a period of time for fulfiling this obligation is specified in an insurance contract, it has to be reasonable and in no case shorter than five days. If the period of time is not specified, it is assumed that the will of the contracting parties is to provide notice of an occurrence within a legal standard "without undue delay" counting from the moment of becoming familiar with the occurrence when this obligation becomes due and when this presumed period for its fulfilment starts running. In respect of the obligation of cooperation that is met by performing the mentioned duties, the period for their fulfilment is calculated from the date the insurer has sent the request to the insured to perform some of the

[11] Rules on the time and place of fulfilment of stipulated obligations are contained in the first book of the Principles of the European Insurance Contract Law and it includes rules on fulfilment and failure to fulfill the contract as well as sanctions for breach of contract. It was published in 1995. Second book was published in 1999. It contains rules on the creation of a contract, representation, validity, interpretation and its effect. Third book, published in 2003, specifies rules on the plurality of subjects in a contract, transfer of receivables, assumption of debt, assignment of contract, settlement, aging of receivables, forbidden contracts, condition in a contract and interests (O. Lando and H. Beale (eds) *Principles of European Contract Law: Parts I and II, Combined and Revised. Prepared by the European Commission on Contract Law (2000);* O. Lando et al (eds), *Principles of European Contract Law: Part III (2003)* – available at: *httpl://frontpage.cbs.dk/law/commission_on_european_contract_law.*

duties. The notification of an insured event is performed in a place of residence or domicile of a physical person and a place of registered office of the insured who is a legal entity. It is deemed that the notification becomes effective from the moment of its sending, so the risk of failed delivery of a duly sent notification is upon the insurer. *Mutatis mutandis* these rules can be applied both to the place and effect of the insured's duty to provide the insurer with the information on the causes and consequences of an insured event, to furnish him with documentation and other evidence on the occurrence and to submission of the insured's statement that he is willing to enable the insurer to access damaged property and to perform actual actions that will enable insurer to access the insured property.

Main drawback of the Principles is that they lack instructive provision prescribing, when the cooperation refers to the duty to inform the insurer of the causes and consequences of an insured event, the agreement of a written or textual form for this obligation, just like in German or Austrian Insurance Contract Act. In addition, the Principles do not specify who bears the burden of proof, i.e. the insurer or the insured, or that the insurer accepted documentation and other evidence on an insured event and information that the insured should have submitted on the causes and consequences of an insured event. In case of this legal gap, if the issue of burden of proof is not agreed, by applying the known and often applied logical rule of inference *argumentum a contratio* to the term from Article 1:204 (Admission of documentation: Evidence) of the Principles, which states that "the burden of proof that the policyholder accepted documentation the insurer was obliged to deliver shall be borne by the insurer", our view is that the burden of proof that the insurer received documents and other evidence on an insured event and information on the causes and consequences of an insured event is borne by the insured, i.e. other person under such obligation. In difference from the insured and other persons who are obliged to notify the insurer of the occurrence of an insured event and are liable for the breach of this obligation only if they are unreasonably belated with its performance, they are liable not just for the breach of the provision defining their obligation of cooperation with the insurer upon the occurrence due to an unreasonable delay in its performance but for any other type of breach whatsoever. It is understandable since the nature of the duties which are part of the obligation of cooperation is such that they can be violated otherwise, not just by delayed notification of the insurer of the occurrence. Drawing on the terminology from the Law on Contracts and Torts that is used to describe breach of the duty from bilateral agreements which is not delayed notification, an expression defaulting fulfilment could be used, and as regards the related liability, an expression obliged party's liability for defaulting fulfilment could be applied. Such form of breach for which the insured is liable includes an unreasonable, unfair or wrongful presentation of information to the insurer on the causes and consequences of an insured event,

delivery of false documentation and other evidence on an insured event to the insurer or the insured's misrepresentation of property (of others) or his own as covered by insurance, which the insurer needs to access in order to investigate the causes and consequences of an occurred insured event.

The Principles do not explicitly stipulate the insured's fault for being overdue and other breaches of duties which form part of his obligation to cooperate with the insurer upon occurrence. Provisions of para 2 and para 3 in Article 6:102 imply that the insured is liable for the breach of these duties on the basis of subjective liability (subjective delay and other subjective breaches) and that fault is the basis of his liability for the breach of these duties. These provisions prescribe two repercussions for a possible breach of insured's duties. The first one is the insurer's right (para 2) to reduce insurance indemnity payable to the insured in case of breach (any breach and in any way) of a duty. Thus, according to general and universally accepted rules, right to indemnity is exercized only if a claimant/insured is liable for the breach, at least in a form of negligence and minor neglect (ordinary negligence). It should be underlined that reduction of insurance indemnity is conditioned by the insurer's evidence that he suffered loss due to the breach of obligation of cooperation and on the scope thereof. The agreed indemnity can be reduced proportionally to the amount of the loss that was sustained. Under this rule of the Principles, the issue of burden of proof of the occurrence and scope of loss is resolved and it is in the interest of the insured, that is, of the other person who is entitled to indemnity since it builds up his legal security in the phase that comes after the occurrence of an insured event.

The insurer can exercize another right in case of a qualified type of fault of the insured for breach of cooperation obligation, which is, in difference from a type and severity of fault as legal grounds for exercising the first available right, explicitly defined (para 3). That right envisages refusing/denying payment of insurance indemnity to the insured due to an occurred insured event. The insurer is entitled to this right when the insured has breached a duty that is a part of cooperation obligation with intention to cause damage to the insurer or acting in negligence and being aware that by breaching duties the insurer will sustain loss. Under this solution provided in the Principles, which could, according to the categories of our law, be categorized as the obliged party's liability for contracted loss, the insured's intent and gross negligence are sanctioned. The insurer cannot exercise right to deny insurance indemnity to the insured due to an occurred insured event, regardless of a type and severity of fault, in case of delayed notification of an insured event. This makes sense since by delayed notification of the insurer of an insured event, the insured cannot cause a loss to the insurer that is much bigger than the one arising from the breach of cooperation obligation as a consequence of submitting incorrect information, false presentation of causes and

consequences of an occurred insured event or of submitting false documentation and other evidence on an insured event.

Therefore, a peculiarity of the prescribed sanctions for the breach of cooperation obligation is that they can be adjusted according to the type and severity of the insured's fault. In that way, better and more adequate protection of the insurer is achieved against disloyal behavior of the insured in fulfilment of the cooperation obligation, and the insured is "punished" proportionally to the fault arising from the breach of duty.

German law. In Article 31 of the recitals (title reference) of the Insurance Contract Act, the German legislator calls the obligation of policyholders and of the third parties entitled to insurance benefits : „Policyholder's duty to disclose information" (according to the Principles: the cooperation after the occurrence of the insured event). This expression is incomplete since after the occurrence of the insured event, as stipulated in this paragraph, in addition to policyhoder's duty to disclose to the insurer a particular information, he is also obliged to submit the proof of particular circumstances. Abbreviated title of this obligation, which is stipulated in a particular paragraph, that is, in the Article of the Act, is justified from the perspective of nomotechnics. However, the approach of the German legislator when naming the obligation considered in this paper supports our view that, in order to include all main duties of the policyholder and not just one, the name of this obligation should be entitled more generally and comprehensively, both in the Serbian Civil Code and the Principles (e.g.: *Obligation to Cooperate after the Occurrence of the Insured Event*, or for short, *Cooperation upon the Occurrence of the Insured Event*). In the German Insurance Contract Act and under the Principles, this obligation and/or duties of the policyholder arise at the request of the insurers.

According to the German Insurance Contract Act (hereinafter:„GICA")[12], the duty to disclose information includes the duty of the policyholder to disclose to the insurer any information (therefore, any and all) which is necessary to establish the occurrence of the insured event or the extent of the insurer's liability. In addition, this also includes his duty to submit to the insurer the proof thereof, but only provided that this is reasonable in a particular case. Simply put, the policyholder must meet the duty to disclose information to the insurer *ex lege* when and if, according to the circumstances of the case, it can be reasonably expected that such information is necessary to establish the insured event or scope of insurer's liability to pay indemnity. The policyholder shall present the proof if, in a particular case, this is reasonable, that is to say, if it can be reasonably expected that in such

[12] Versicherungsvertragsgesetz vom 23. November 2007, BGBl. I S. 2631, das zuletzt durch Artikel 8 Absatz 21 des Gesetzes vom 17. Juli 2015, BGBl. I S. 1245, geändert worden ist (German Insurance Contract Act of 23 November 2007, with the latest amendments as of 2013 and 2015).

particular case the policyholder is able to obtain the proof without too much efforts and excessive expenses.

The provisions on the duty of the policyholder to disclose to the insurer the information necessary to establish the insured event or the scope of insurer's liability to pay indemnity are non-mandatory provisions. According to such nature of the regulations which, in the GICA, govern the duty of the policyholder to disclose the information relating to the establishment of the occurrence of the insured event or the scope of insurer's liability (if stipulated under the contract), the insurer may demand from the policyholder to disclose such information even when such disclosure is not necessary for the achievement of the said aim but, for example, the insurer may find such information useful. However, the provisions on the duty to provide proof are of a relatively compulsory nature (Art. 32). This means that the insurer cannot demand from the policyholder to provide the proof for establishing the occurrence of the insured event and the scope of insurer's liability if he can obtain such proof by himself or through a competent authority, in a faster and easier manner, or yet, in a manner that does not entail considerable expenses. On the other hand, if in this and similar cases stipulated by insurance terms and conditions the insurer could demand from the policyholder to obtain and submit the proof, his request for meeting this duty would not be appropriate, that is, it would be to the detriment of the policyholder.

Owing to the freedom of contract principle, which is governed by the Civil Code and is not limited by the provisions of Article 31 of the GICA (relating to the duty of the policyholder to disclose information to the insurer), and by the provisions of Article 28, paragraphs 2 through 4 of this Act (governing the non-observance of contractual duties of the policyholder after the occurrence of the insured event), which shall be analysed in more detail further in the text, the policyholder may be bound by the insurance contract and insurance terms and conditions to meet other duties relevant for the establishment of the insured event or the scope of insurer's liability to pay indemnity. For example, this may be the duty to ensure that the insurer has the access to insured property (which is stipulated in the Principles), or to meet other duties aimed at meeting reasonable demands of the insurers in the establishment of the insured event or scope of insurer's liability.

The period (within which the policyholder is to perform the duty of disclosing the information or submitting the proof, along with other stipulated duties) and the place (where such duties are to be met) are not stipulated in Article 31. These elements of the considered duty (time and place of meeting the obligation) are regulated by the contract and insurance terms and conditions. If, regarding these elements, there is a legal gap in the insurance contract or insurance terms and conditions, the policyholder is obliged to meet his duties within the period and/or at the place stipulated for such situations by the provisions on time

and place where the contractual obligations of the obligor are to be fulfilled, and which provisions are not stipulated in the contract. It is a common knowledge that such rules are prescribed in the Civil Code. Nevertheless, Article 31 stipulates the time when these duties fall due, i.e., when the period for their due fulfilment starts running. These duties fall due after the insurer delivers to the policyholder a request that particular duty(ies) are to be met. Since, depending on the circumstances, in the course of investigation of the insured event and scope of insurer's liability, the insurer can make and submit the request to the policyholder regarding the fulfilment of his duties at different times, this means that the periods when particular duties of the policyholder fall due for fulfilment can also differ.

According to Article 32, paragraph 2, the submission of information necessary to establish the insured event and scope of insurer's liability to pay indemnity may be agreed in writing or in the text form. In such case, the information sent to the insurer by the policyholder becomes easily proveable, which is clearly in the interest of both contracting parties. When it comes to third parties, however, the rule stipulating the duty to submit a written or text form of the information after the occurrence of the insured event does not apply. As we have seen, the third parties are not parties to the insurance contract and therefore cannot be bound by a written or text form in which the information is sent and which is agreed between the insurer and the policyholder. Notifications, which are relevant for the establishment of the insured event or scope of insurer's liability, can be subsequently orally communicated to the insurer by third parties. It can be observed that the German legislator does not mention the policyholder as the holder of the obligation to notify, because he considers the insured and policyholder as the same person, that is, accepts the concept that the insured is also the policyholder. This is also inherent to some other legal sources which we will analyse (e.g. Swiss or French law).

In German law, the aim and the subject of the considered obligation and/or duty is equivalent to the aim stipulated in the Principles regarding the obligation of the policyholder and insurer to cooperate after the occurrence of the insured event (establishment of the occurrence of the insured event and/or the scope of insurer's liability to pay indemnity, that is, establishment of the consequences of the insured event). There are also other legal sources that have the same aim, and they will be analysed further in the text. This identical aim is the backbone for standardising the considered obligation, regardless of the definitions that particular legal systems use for it, and regardless of the differences arising from the standardisation of its content.

The GICA stipulates the policyholder as the subject of these duties, whereas a third party is included when it is entitled to the contracted insurance indemnity. A third party entitled to the agreed indemnity is considered the party

on the account of whom the policyholder concluded with the insurer a so-called „contract for the account of a third party". Namely, this is the person who is known in advance when concluding the insurance contract or the person who can be determined and is known upon the occurrence of the insured event. This is also the person to whose property or personality the insured event is to occur in order for the insurer to be liable to pay the indemnity. For such person, a technical term is „insured person". Third party is also insurance beneficiary i.e. the person designated as the beneficiary of insurance benefits by the insured person who concluded the insurance contract (insurance contract for the account of a third party). These are, for example, insured's hairs, successors and assigns of insurance benefits.

A peculiarity of the German law, which is also accepted in the Austrian law, is that if legal consequences, that is, the rights of the insurer arising from non-observance of legal obligations of the policyholder are not prescribed, they shall be subject to the consequences stipulated for the non-observance of contractual /agreed duties of the policyholder.[13] This means that the sanctions for the breach of contractual and legal obligations of the insured differ only in the legal basis of their occurrence. Because of such approach of the German legislator, and despite the fact that Article 31 governing this duty does not prescribe legal consequences arising from its breach, we can comment on the rights of the insurer in connection with the policyholder due to the breach of duty to notify the insurer after the occurrence of the insured event. The same applies to the duty of the policyholder to notify the insurer of the occurrence of the insured event, because Article

[13] In the provisions on the insurance contract of majority of national laws, as well as in the Serbian Law of Contract and Torts and the Draft Civil Code, there is a difference between the terms „obligations and duties of the insured" and „obligations and duties of the insurer", as is the case with the GICA. This can be seen in the title of Subsection 3 Section 1 „Obligation of an Insured or of a Negotiator of Insurance"„ which stands before Article 907 of the Law of Contracts and Torts „Duty of Reporting"„ (circumstances relevant for risk assessment - author's comment) and the title of Subsection 4 Section 1 „Obligation of the Insured or of the Policyholder" of the Draft Civil Code which stands before Article1419 „Duty to Report". Even the obligation to pay the premium is dubbed duty (refer to the title before Article 912 of the Law of Contracts and Torts and Article 1426 of the Draft Civil Code). Therefore, in this paper, the author often uses the terms „obligation" and „duty" as synonimous terms. In the GICA, duties of the policyholder and insurer are only those which arise from the insurance contract as a synallagmatic contract - obligation of the policyholder to pay the premium and of the insurer to pay out the insurance indemnity, and a so-called incidental duties of the policyholder and insurer stipulated by the law, such as the duty of the policyholder to notify after the occurrence of the insured event. The obligations defined in the contract and stipulated in Article 28, which will be further anlysed, are defined as „duties" (*obliegenheiten*). In legal and technical sense of the word, and in practice, they differ from the obligations (synallagmatic and incidental) because they are not actionable and because the policyholder cannot be requested to pay indemnity due to their breach. By their nature, they also include criteria (conditions) to be met for the policyholder to qualify for, or if failed to act, lose (fully or partly) the right to insurance indemnity from the insurer (Marlow, Sven, § 13 in *Versicherungsrechts-Handbuch* – Hg: Beckmann, R. Michael, Matusche-Beckmann, Annemarie, Munchen, 2008: Verlag C. H. Beck; Đorđević, Slavko / , *Nemačko ugovorno pravo osiguranja sa prevodom zakona (VVG*), Beograd, 2014, pp. 72–73).

30 stipulating it does not provide for legal consequences for the breach of this policyholder's legal obligation. However, the national laws (which will be further analysed) provide for the same solution as in the Principles, namely, Article /Articles of these laws, which stipulate a particular legal obligation of the policyholder after the occurrence of the insured event, also define legal consequences i.e. rights of the insurer due to the breach of such obligation. This also applies to the obligation of the policyholder which is analysed in this paper. Even when it comes to legal obligations which are of a similar nature, the approach of these national laws to stipulating legal consequences for the policyholder who is in breach thereof often results in stipulating different sanctions or rights of the insurer, depending on the nature of legal obligation, level of fault of the policyholder, and the consequences of the breach.

The insurer's rights against the policyholder when the latter in any way breaches any duty that is part of the duty to disclose (unreasonable delay in submission of information and evidence, submission of wrong or incomplete information, fraudulent evidence and alike) shall be regulated by the paragraphs 2 – 5, Art. 28 of the GICA, that regulate the legal consequences of the breach of contractual obligations of the policyholder upon occurrence of the insured event, whereas the paragraph 1 regulates the consequences of the breach of contractual obligations that the policyholder must fulfil towards the insurer prior to the occurrence of the insured event. Breach of the contractual obligation prior to the occurrence of the insured event gives the insurer the right to legally terminate the insurance contract whereas the breach of the contractual obligation upon occurrence of the insured event gives the right to the insurer to completely refuse to pay the indemnity to the policyholder, but only if the latter has deliberately breached the contractual obligation. In the event of the breach of obligation in gross negligence, the insurer shall only be entitled to reduce the insurance indemnity, in accordance with the pro rata principle, to the amount that corresponds with the severity of policyholder's fault for the breach of duty.[14] If the duty of disclosure is breached in common negligence, it does not imply these legal consequences. The burden of proof that the breach of the duty of disclosure is deliberate is on the insurer, while the burden of proof of the existence of gross negligence is on

[14] In German literature there is the opinion regarding the breach of legal obligations and contractual duties of the policyholder, where in the event of gross negligence GICA provides the reduction of insurance indemnity to the amount that corresponds to the severity of the policyholder's fault and that, as a rule, one should not start form half the indemnity amount i.e. that the reduction of the indemnity due to gross negligence should not be schemed in this or other percentage way, but he should rather observe the entire policyholder's behaviour during the breach of duty and determine the quota of the indemnity reduction based on the objective severity of the breached duty (to the extent that in the case of a severe gross negligence of the policyholder, the indemnity should not be paid at all) (Rixecker, Roland,„Quotelung bei Obliegenheitsverletzung: Alles, Nichts oder die Hälfte", *Zeitschrift für die gesamte Versicherungswissenschaft*, 1/2009, p. 8-9).

the policyholder. In order to exercise the right to full or partial exemption from the insurance indemnity under the stated conditions, the insurer has to inform the policyholder of the legal consequences of the breach of duty to disclose prior to the occurrence of the insured event by a special written notice.

However, the insurer may sanction the breach of the policyholder's duty of disclosure due to common negligence as well, by providing (in the contract or insurance terms and conditions) that in such a case he shall have the right to reduce the insurance indemnity by the amount of damage inflicted by the breach of such duty. Such right of the insurer is in accordance with the freedom of contract principle. The insurer would be entitled to damage compensation and its offsetting with the insurance indemnity in the observed situation of common negligence of the insured in the fulfilment of his duty to disclose the information even if this was not specially contracted, but only on the basis of general rules of the German Civil Code on default of the debtor in the fulfilment of contractual obligation[15].

The insurer may exercise the right to full or partial exemption from indemnity only if the breach of duty (as defined in the insurance contract) is in a causal connection with the occurrence of the insured event and his liability to pay the insurance indemnity or with the amount of such indemnity. *A contrario*, the insurer is obliged to pay the insurance indemnity if the breach of contractual obligation does not influence the occurrence or establishment of the insured event, nor the determination of the existence or amount of the obligation to indemnify. Such solution corresponds with the general rules of the law of contract regarding the liabilities of the debtor towards the claimant for the actual breach of the contractual obligation if such a breach results in the occurrence of the damage to the claimant. However, the insurer is entitled to refuse to pay the insurance indemnity although there is no causal connection between the policyholder's breach of the contractual obligation (duty of disclosure as well) and occurrence or establishment of the insured event or the existence of the obligation to indemnify or the amount of indemnity. Such is the case when the policyholder has breached his duty in an insidious way (maliciously). By nature, this is the penalty for the policyholder for his severe disloyalty to the insurer, i.e. severe fault for the breached duty.

For the breach of contractual obligations, including the breach of legal obligations for which the legislator did not prescribe legal consequences (such as the duty of the policyholder to disclose information to the insurer that are necessary for establishing the insured event or the amount of the insurer's obligation to indemnify), the insurer is not allowed by the German legislator to provide the possibility of contract termination in the insurance contract, for the possible severe consequences of this (Art.28, par. 5). This is understandable, having in mind that the

[15] That is specified by rules form Art.285 of the Civil Code with the title "No default without the fault".

consequence of the contract termination is the restitution of benefits (insurance indemnity) which is difficult for the policyholder, especially if the insurer discovers the breach after the occurrence of the insured event and payment of the indemnity to the policyholder. This limitation of the freedom of contract regarding the right to contract termination, as any other limitation of the freedom of contract that is provided by the GICA, according to the Art. 210 of the Act, shall not be applied to the insurance of major risks stated in that Article and the so-called actual insurance coverages defined under the Article 53.

By notifying the insurer of the required information necessary for the establishment of the insured event or the amount of insurer's obligation to indemnify, as well as for the submission of evidence when appropriate, the insurer incurs the liability that is in a correlation with these policyholder's duties, i.e. with the "duty of policyholder to disclose information". Within one month from the date of policyholder's fulfilment of the obligation to notify of the occurrence of the insured event, the insurer is obliged to perform and complete the investigation regarding the determination of the occurrence of the event insured against and the amount of his obligation to indemnify, and pay indemnity to the policyholder, i.e. to a third party beneficiary (Art.14, par.1 GICA). If the insurer fails to complete all the required investigations within the stated period, he is obliged to pay (upon request of the insured) minimum amount stipulated under the contract, i.e. insurance terms and conditions. Since the regulated period of one month for the completion of the insurer's investigations and indemnity payment assumes that the policyholder has timely fulfilled his obligation of the notification and submission of evidence to the insurer any delay, i.e. default of the policyholder or other breach of this obligation (incorrect or inaccurate notification, i.e. submission of incomplete, fraudulent or irrelevant evidence) by fault of the policyholder results in a suspension during the stated period (Art.14, par.2 GICA). During the suspension, the insurer may complete the investigations (regarding the determination of the insured event and the amount of the insurance indemnity), which leads to the justifiable delay in payment of the insurance indemnity and the lack of insurer's obligation to pay the accrued interest on the unpaid indemnity; moreover, the insurer shall be entitled to use the foregoing rights[16].

[16] In a decision of the District Court in Koln in 2015, it was stated that the investigation (regarding the determination of the occurrence of the insured event and the amount of the insurer's obligation) includes the verification of the existence of the merits for the insurer to terminate or cancel the insurance contract (by application of the Art.19, par. 1-3 of GICA - author's comment) due to the policyholder's breach of duty to notify the insurer about all known risk circumstances relevant for his decision to conclude the contract of a particular wording, especially when, during the investigation, it turns out that there is the reason for assumption that this obligation has been breached. In this decision, the Court also holds a view that insurance indemnity payment shall not be due if within one month from the date of notification of the insured event, the insurer could not investigate into all the circumstances (regarding the establishing of the occurrence of the insured event and the amount of his obligation

It is not irrelevant to note that in the casualty insurance lines, GICA does not regulate the insurer's obligation to reimburse for the costs (by paying out certain pecuniary amount) the policyholder incurred while fulfilling the duties of (prior collection and) submission of information, (prior collection and) submission of evidence and fulfilment of other contractual obligations relevant for establishing the occurrence of the insured event or the amount of the insurer's obligation to indemnify.

Under GICA, the reimbursement of these costs shall be regulated amongst the contracting parties and/or under the insurance terms and conditions. GICA regulates the obligation of the insurer to indemnify the policyholder for the costs incurred in gaining knowledge of i.e. identification of the occurrence of insured event and loss notification, as well as the costs incurred if, in the process of identification and/or enquiry, the policyholder had to determine the damage caused to be able to notify it (Article 85). In both cases, the Principles stipulate that the issue of obligations of the insurer to reimburse the costs to the policyholder shall be regulated by contract and/or the insurance terms and conditions.

In summary presentation of the GICA solutions for regulating the legal obligations of the policyholder to notify the insurer of the occurrence of insured event, it can be concluded that there are similarities, but also significant differences with solutions of the Principles in regulating these "legal" obligations (the Principles are not a law – author's notice) therein named the cooperation of the policyholder with the insurer upon occurrence of the insured event. The similarity is that in both legal sources, the obliged party are the same persons, only differently named: according to the Principles, those are the policyholder, the insured and the beneficiary, whereas according to the GICA, the policyholder and a third party beneficiary. Another similarity is that this obligation i.e. duties comprising it, according to both legal sources, arises upon request of the insurer. However, under GICA, the duty of the policyholder to disclose information is limited to two obligations – to disclose the information

to indemnify) because the policyholder's physician who is excused from the obligation of secrecy did not submit (upon insurer's multiple requests) all the policyholder's health details (Langheid, Theo und Muller-Frank, Cristoph. Richtsprechungsubersicht zum Versicherungsvertragsrecht im ersten Halbjahr 2015, *Versicherungsvertragsrecht*, NJW 32/2015, p.2311). In this case, the Court assumed that the policyholder's physician is the third party for whose actions the policyholder was not responsible, thus the policyholder was not guilty for tarrying in submission of health details (relevant for the establishment of the occurrence of the insured event and the obligation of the insurer to pay the indemnity), and due to that occurred the delay during the term of one month within which the insurer was obliged to end his investigations (for establishment of the insured event and the amount of his liability), as per Art.14, par 2 of GICA. This view of the German Court corresponds with the universally accepted rules of the law of contract that the debtor is not guilty for tarrying in the execution of obligation if it results from the act of the third party he is not responsible for.

and deliver the evidence for establishing the occurrence of the insured event or the amount of the insurer's obligation to indemnify; moreover, their fulfilment may be required only under strictly stipulated terms, i.e. if the information is necessary and the evidence appropriate in a particular case. As opposed to this, the Principles do not limit obligations of the insured to cooperate with the insurer in establishing the occurrence of the insured event and its consequences. As an example of these obligations, they define two duties prescribed by GICA, as well as the duty of the policyholder to allow the insurer the access to the damaged property while, in respect of other duties that the insurer may require of the policyholder for establishment of the existence of an insured event and its consequences, they prescribe only one fluid condition - that they fall under the category of reasonable insurer's demands. This is a significant difference between these two legal sources. It means that, when the insurance contract is regulated by the Principles, the insurer may, without precise definitions in the contract or terms and conditions, require of the policyholder to fulfill other duties that are reasonably necessary for his enquiry into the causes and consequences of the insured event. On the other hand, if GICA applies to the contract, such duties must be predefined under the contract or the insurance terms and conditions.

The main difference is in the method of regulating the results of the breach of obligations comprising the duty of the policyholder to disclose information or to cooperate. While the Principles define the legal consequences of the breach of duties to cooperate as the rights of the policyholder against the insured arising from such breach, binding them, on the one hand, to ordinary negligence, and, on the other hand, to the intention and gross negligence, GICA regulates the application of the rules on consequences of the breach of contractual obligations of the policyholder (Article 28), which, depending on the level of guilt of the policyholder, predicts the extent to which the insurer may use the law to refuse to pay indemnity to the insured - fully when the duty of the policyholder to disclose information is violated deliberately and proportionally less depending on the degree of guilt if the violation was committed by gross negligence. In practice, as regards the legal consequences of this legal obligation of the policyholder, the same effects may be achieved by applying both the Principles and GICA. If the insurer to which this law applies, using the freedom of contracting, contracts the right to reduced indemnity to the policyholder in breach of the duty to disclose information by ordinary negligence and to the extent of the proven loss, the Principles shall stipulate the same law in case the policyholder breaches the duty by ordinary negligence.

From the above it can be observed that the insurer's rights arising from the breach of the obligations of the policyholder can only basically have the same effect under the Principles and the GICA, since the Principles stipulate

the loss of the policyholder's rights to indemnity due to breach of duty, both intentionally and by gross negligence, whereas the GICA stipulates the total loss of indemnity in case of intentional breach and partial in case of breach by gross negligence. Therefore, GICA is certainly more righteous since it takes more care of the protection of the policyholder's interests, whereas the Principles are simpler for application since they are more clear and understandable in practice. In order to achieve similar practical effects in applying GICA as when applying the Principles (as regards the rights of the insurer and the protection of the policyholder's interests in the breach of duty to disclose information), it is necessary to know in greater detail its complex solutions, which is very demanding for the insurance practitioners.

Austrian law. The Austrian Law on Insurance Contract (hereinafter: ALIC)[17] does not use titles above paragraphs to indicate (more or less) the contents of the expressed norm; however, from the wording of the obligation stipulated under the Article 34, it can be concluded that the short title used in GICA would be appropriate: "Duty of the Policyholder to Disclose Information". This Article, paragraph 1, stipulates that the insurer may, upon occurrence of the insured event, require of the policyholder to deliver the information needed to establish the occurrence of the insured event or the amount of the insurer's obligation to indemnify. Therefore, as opposed to the Article 31, paragraph 1 of GICA, it is not required that the information is necessary for the insurer to establish the occurrence of the insured event or the amount of the insurer's obligation to indemnify. The insurer may deliver the request for submitting documents to the policyholder if this way would be more favorable, as set out under the paragraph 2 of the named Article. This basically means that the insurer may require of the policyholder to deliver the documents needed to establish the occurrence of the insured event or the amount of the insurer's obligation to indemnify under the same terms as mentioned when considering the duty of the policyholder under the Article 31, paragraph 2 of GICA.

As in GICA, in AICA as well the duty of the policyholder to disclose information is fulfilled by the fulfilment of the two identical duties, whereas the insurance contract and terms and conditions may also stipulate other duties of the policyholder (they may be specially agreed, as per the Article 31 of the GICA) – hereby, the same purpose is fulfiller as by the fulfilment of the duty defined under the Principles.

The manner of incurring these duties is obviously identical under the GICA, Principles and AICA – they arise only if so required by the insurer. At

[17] Bundesgesetz vom 2. Dezember 1958 über den Versicherungsvertrag – Versicherungsvertragsgesetz – VersVG, StF: BGBl. Nr. 2/1959 – Dostupno na*: http://ris.bka.gv.at/Bundesrecht/*, The Austrian Law on Insurance Contract of 2nd Decmber 1958. (last amendments from 2015).

the first glance, there is a difference between GICA and AICA as regards the definition of the party obliged by the duty to disclose information, since the first law defines it as a policyholder and the second, as the insured. However, since the AICA considers the policyholder to be the insured, there is no practical difference in this regard between GICA and AICA. The only difference is in the used terminology. On the other hand, the major difference (as regards the obliged party, again) is that AICA does not extend the party obliged by duty to disclose to other third parties-beneficiaries, as has been the case in GICA and the Principles (the duty extended to insurance beneficiaries and the insured, when they are not the same person).

Paragraph 1, Article 34 of AICA, which stipulates the duty of the policyholder to disclose to the insurer the information needed to establish the occurrence of the insured event or the amount of the insurer's obligation to indemnify is a dispositive norm, whereas the provision of the paragraph 2 of the same Article, which stipulates the duty of the policyholder to deliver to the insurer the documents for establishing the occurence of the insured event or the amount of his oblligation to indemnify is, according to the Article 34a, a relatively obligatory norm. This has the same consequences as described when considering the German law, since these two duties are regulated identically under the norms of different legal nature, in both the paragraph 1 and paragraph 2 of the Article 31 of GICA.

As regards the due date for fulfilment of the duty of the policyhodler to disclose information to the insurer (the period during which the policyholder is required to fulfil duties by his insurer, at the location where such duties need to be fulfilled), the applied rules are the same as described when we analysed the German law. For the duty of the policyhoder to disclose to the insurer the information needed for establishing the occurrence of the insured event and the amont of he insurer's obligation to indemnify, the written form may be stipulted (but not the wording, as under the german law). In casualty insurance lines, the Austrian legislator (like the german) does not stipulate the obligation of the insurer to pay the apropriate cash amount to the policyholder by way of compensation for expenses incurred by the policyholder in the fulfilment of his duty to disclose information, deliver evidence and fulfil other contractual obligations important for establishng the ocurrence of the insured event or the amount of the insurer's obligation to indemnify. The Austrian legislator also stipulates that the issue of reimbursement of such expenses shall be governed by the contract and/or the insurance terms and conditions, in the same way as under the sources of law which we shall elaborate on hereinafter. However, in case of duty of the policyholder to notify of the occurrence of the insured event, the German legislator also stipulates that the costs shall be reimbursed by the policyholder (Articles 66 and 68a of the AICA).

All the above mentioned with regard to the breach of the policyholder's duty to disclose information to the insurer upon occurrence of the insured event under the German law shall also apply here. The breaches arise from the failure of the policyholder to perform his duties, false or wrong representation of information on the circumstances of occurrence, submission of false documentation important for establishing the occurrence of the insured event or the amount of the insurer's obligation to indemnify etc.

In the same way as the Article 31 of GICA does not regulate the rights of the insurer against the policyholder arising from the breach of duty of disclosing the information to the insurer upon occurrence of the insured event and the duty to notify the insurer of the occurrence of the insured event, these rights are neither regulated in the case of the breach of duties of the policyholder under the Articles 33 and 34 of the AICA. This means that, like in the German law, the rights of the insurer against policyholder arising from the breach of legal duty to disclose information important for establishing the occurrence of the insured event or the amount of the obligation to pay the agreed indemnity shall be regulated under the provisions on the breach of contractual duties. The Article 6 of the AICA categorizes the rights of the insurer arising from the breach of contractual duties of the policyholder in three categories, according to the type of the breached contractual duty. The rights arising from the breach of the contractual obligation which the policyholder had to fulfil prior to the occurrence of the insured event are stipulated under the paragraph 1 of the mentioned Article. Moreover, the rights of the insurer arising from the breach of contractual obligations of the policyholder, which secure the adequacy of the insured risk/s and insurance premium, have been stipulated under the paragraph 1a and 2 of the Article 6. The rights of the insurer arising from the breach of contractual obligations against the policyholder upon occurrence of the insured event are stipulated in the paragraph 3 of the same Article. The limitations in contracting particular rights arising from the breach of all three types of contractual obligations by the policyholder are stipulated, as common, under the paragraphs 4 and 5 of the Article 6. Having in mind the subject matter of this paper, we shall logically focus only on testing the rights of the insurer arising from the breach of contractual obligations of the policyholder upon occurrence of the insured event, i.e. the rights stipulated under paragraphs 3 and 5 of the Article 6.

As in the GICA, the insurer cannot agree with the policyholder on the right to terminate the contract due to the breach of contractual obligation by the policyholder (any type – author's comment), because of the foregoing reasons, but can only have such rights and limitations in line with the degree of fault prescribed by the legislator. Such rights and limitations of their use are

defined according to the type of the policyholder's obligation in the section 6, paragraph 1, 1a, 2, 3 and 5 of AICA. They are regulated by non-mandatory provisions, unlike prohibition of contracting the right to terminate that is absolutely a compulsory provision (item 4, paragraph 6 of the AICA). The provision allowing the insurer to request documentation from the policyholder, if he can obtain it in a more favourable manner, just like in the GICA, is a relatively compulsory provision (section 34a of the AICA and section 32 of the GICA).

The AICA and GICA accept the concept of a subjective responsibility of the policyholder for breach of contractual obligations. It is only stricter in the application of such concept because it has one principal provision that does not exist in the GICA, which stipulates that in case of breach of the contractual obligation due to negligence (of any type, before occurrence of the insured event, after occurrence of an insured event and other), the insurer can exercise the right he contracted with the policyholder (termination of the contract or the right to deduce the amount of claim incurred by breach of obligation from the contractual compensation) only if the policyholder was previously (from conclusion of the contract until the breach of the obligation – author's comment) handed over the insurance terms and conditions or any other document (insurance policy, cover note or other – author's comment) including the contractual obligation for whose breach he is responsible due to common negligence (section 6, paragraph 5). Therefore, that is a rigorous condition that the insurer must meet in order to exercise his contractual right against the policyholder who breached a certain contractual obligation by acting in negligence. If that condition is not met, the policyholder shall not be responsible for breach of the contractual obligation caused by common negligence. This condition is grounded, because the policyholder has been warned in advance that the insurer could use the contracted right if the policyholder breached the contractual obligation by acting in common negligence. Without any doubt, apart from insurance terms and conditions or any other insurance documents given by the insurer, it is in the policyholder's interest to get acquainted with potential consequences (i.e. the insurer's rights) if the contractual obligation is breached by common negligence. As we have seen, a similar solution providing a better protection to the policyholder exists in the German law (which is even more rigorous and refers exclusively to the policyholder's breach of obligation to notify the insurer upon occurrence of the insured event), for which it stipulates that the insurer can exercise the right to refuse to pay indemnity if the policyholder intentionally breached the obligation, and in case of breach due to gross negligence the insurer can reduce the indemnity in line with the severity of the policyholder's fault. As we have said, in order to exercise the stated right, the insurer must warn the policyholder of those consequences by delivering a special written notice (section 28, paragraph 4 of the GICA).

The next restriction in the AICA, in the event that the policyholder breaches any of contractual obligations after occurrence of the insured event, refers to the insurer's right to refuse/deny payment of insurance indemnity. As in the GICA, the insurer can exercise this right only if breach of the contractual obligation is caused by acting with a premeditated or gross negligence. Unlike the GICA, the AICA does not stipulate reduction of compensation, i.e. partial relief of the insurer from payment of compensation commensurate with the severity of the policyholder's gross negligence. Therefore, the AICA is more unfavourable for the policyholder than the GICA for the insured. It does not take into account the severity of the policyholder's fault and the need to differentiate consequences of breach of the policyholder's obligation when applying the insurer's right to refuse to pay the compensation. Regarding the insurer's right to refuse to pay the compensation to the policyholder due to breach of the contractual obligation after occurrence of the insured event, the AICA regulates it uniformly, whether the contractual obligation was breached intentionally or by gross negligence or not. Unlike the GICA, the AICA does not have a provision regulating which party shall bear the burden of proof that the breach of the contractual obligation was premeditated or grossly negligent - the insurer or the policyholder. That means that this issue shall be regulated by the Civil Procedure Law regarding the burden of proof. According to these universally adopted rules, the burden of proof shall be on the insurer since him, due to the fact that the contractual obligation was breached intentionally or by gross negligence, is entitled to refuse to pay the policyholder the insurance indemnity.

The GICA and the AICA stipulate that the insurer can exercise the right to refuse to pay the compensation to the policyholder due to intentional or grossly negligent breach of the contractual obligation after occurrence of the insured event only if such breach of obligation affected determination of existence and scope of obligation to pay compensation. If there is no connection between the intentional or grossly negligent breach of the contractual obligation and these consequences - which means that if the breach of the obligation had no effect on occurrence of the insurer's obligation to indemnify or the amount of this obligation, the insurer shall not be relieved from the obligation to indemnify to the policyholder even if such obligation was breached intentionally or by acting in gross negligence. As in the GICA, there is an exception in case when the policyholder breached the obligation intentionally in order to influence the establishment of circumstances regarding the insurer's obligation to indemnify or circumstances relevant for establishing the amount of the insurer's obligation to indemnify.[18]

[18] The Supreme Court in Austria declared several times that intentional breach of the obligation exists if it is caused by intentional conduct regardless of awareness of the existing behaviour standards (see the explanation in the verdict of the Supreme Court in Austria, Ob. 27/07 that is published in the magazine *Versicherungsrundschau,* 1-2/2010, p. 48-49).

The conclusion regarding presentation of the Austrian law contains great number of observations. Firstly, both the Austrian and the German law apply legal consequences prescribed by the AICA, regarding breach of the obligation under the contract or insurance terms and conditions, to the breach of the policyholder's legal duty to disclose information to the insurer upon occurrence of the insured event, i.e. the requirements comprising this legal obligation of the policyholder, considering the fact that the GICA and the AICA do not stipulate any special consequences/rights of the insurer regarding the breach of legally defined obligation. Secondly, regarding breach of these (contractual) obligations by the policyholder acting in common negligence, the insurer can contract the right to terminate the contract and reduce the contractual compensation by the amount of claim that the policyholder caused to the insurer by breaching the obligation. The insurer can exercise the right stipulated by the AICA to deny the policyholder payment of the contractual indemnity under the condition that the policyholder breached the contractual obligation intentionally or by acting in gross negligence in order to influence the insurer's obligation to indemnify or establish circumstances relevant for assessing the amount of the insurer's indemnity. Thirdly, differences between the GICA and the AICA are insignificant in regulation of consequences of breach of contractual obligations of the policyholder upon occurrence of the insured event, which refers also to the policyholder's legal duty to disclose information to the insurer upon occurrence of the insured event. Reason for that is a known tendency in the international law that the Austrian legislator, regarding regulation of obligation and other legal relations, traditionally refers to the German legislator. Fourthly, regulation of the policyholder's legal duty upon occurrence of the insured event to disclose the information to the insurer contains mostly the same similarities and differences between the AICA and the Principles that exist between the GICA and the Principles.

(II part of the article will be published in the next issue of the journal)

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