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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 II)

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 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

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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 entitety 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.*

Swiss law. In Swiss Law on Insurance Contract (hereinafter:SLIC)[2], the obligation of cooperation with the insurer upon the occurrence, as named in the Principles,

[2] Loi fédérale sur le contrat d'assurance du 2 avril 1908, *Etat* le 1er janvier 2011, FF 1904, 267 (Swiss Law on Insurance Contract as of 2 April 1908, became effective on 1 January 2011 in a reformed form).

i.e. the obligation to provide the insurer with the information upon the insured event as named in the German Law and as could be named as such in the Austrian Law, is named the obligation to prove the claim. It is regulated under Article 39 as independent of the insured's obligation to notify the insurer of the occurrence, which is regulated under Article 38 I and in the Principles, and together with the obligation to notify of the insured event it does not make a legal whole, considering the differences between these two obligations regarding the manner of occurrence, insurer's rights in case of violation and other elements. Its subject is the insured, and when a representative acts on behalf of the insured, then he is the subject. It is expressly stated in the provision of Art. 40 of the SLIC which sanctions one specific kind of violation of the obligation to prove claim by submitting a false claim. In difference from previously analysed legal sources where the insured's i.e. the policyholder's representative is not mentioned but is implied that he can act on behalf of the insured / policyholder in performance of this obligation, i.e. the obligation to notify on behalf of the insured / policyholder, bearing in mind the authorisations he is granted under an insurance contract in concluding and performing an insurance contract or based on powers granted to him under the insured's/policyholder's authorisation. Third party entitled to indemnity, in difference from all other previously analysed legal sources, is not obliged to prove claim under the SLIC.

In Swiss legislation, proving a claim is an expression synonymous with proving an insured event. And the terms loss and consequence thereof are synonymous with indemnity and consequence of an insured event. Under the SLIC, the insured's obligation to prove a claim to the insurer upon the occurrence is regulated under two articles. On the level of subjective default, i.e. guilt for default as a manner of violation of this obligation, which is, as we will see, universally accepted in Swiss legislation as a form of obligation for violation by non-performance or late performance of legal and contractual obligations of the policyholder or the insured and for the application of any contracted sanction in case of their breach. It is envisaged in Art. 45 par. 1 of this law. In this Article, par. 3 stipulates that, for the better protection of interests of the policyholder and the insured who are not guilty for non-performance or late performance of contracted obligations i.e. in case of their objective default, the policyholder or the insured can preserve the right under insurance terms and conditions (to indemnity – author's note) if they immediately (upon defaulting – author's note) perform the obligation in question. Otherwise, the insurer may deny indemnity to the insured, as if he was guilty for non-performance or late performance. In the first of the two articles regulating the considered obligation, Art. 39 of SLIC entitled "Proving of claim", prescribes the manner of occurrence and the contents of the obligation to prove claim in the part that relates to the insured's duty to deliver information to the insurer on the facts based on which he can establish circumstances that gave rise to the loss or to estimate the consequences thereof, the (mentioned) goal of delivering these information, the manner of occurrence of this obligation in respect

of the insured's duty to provide the insurer with the evidence for establishing facts that gave rise to the loss or for the estimation of consequences thereof, the manner of occurrence of the insurer's right to refuse / deny indemnity to the insured due to late delivery of information and documentation, and in respect of default the manner of establishing the period within which information and evidence must be delivered to the insurer and the moment from which the period for their delivery starts to run. Also, the insurer's duty to warn the insured of the consequences of default in delivery of information and documentation. Within the meaning of this Article, it is deemed that the insured has fallen into default of proving claim when he failed to perform the obligation to deliver information and/or evidence or has been late in delivery thereof to the insurer.

The second article, Art. 40 entitled "False claim", regulates one special form of violation of proving claim, which is also considered a default and is sanctioned in a way different from the basic form of violation of obligation to prove claim from Art. 39. In its nature, it is an attempt or a completed act of a form of fraud performed by the insured to the detriment of the insurer in order to exercise his right to indemnity based on the occurrence in cases when the insurer's obligation to provide indemnity would be excluded or less than what the insured has presented to the insurer in the delivered facts. A provision of this Article defines acts that are considered fraudulent in performance of obligation to prove claim, that is, are considered acts of submission of false claim, and determines a goal of such premeditated act or drawing on civil-law terminology, the insured's intent in submitting fraudulent or false information based on which the insurer cannot establish real circumstances that gave rise to the loss or the extent of occurred loss and prescribes that the insured is not legally obliged under an insurance contract towards the insurer but not towards a third party when it exercises a right under an insurance contract. A false claim and the sanction prescribed for filing a false claim is, beside others that we will analyse further on in a text, a peculiarity of SLIC unrecognized in the previously analysed legal sources that regulate insurance contract.

The insurer's right to deem that, when filed a false claim, he is not obliged under an insurance contract, is a *sui generis* sanction just like a sanction of insurance right forfeiture, which is just like this one, peculiar to contractual insurance law. It is different from the sanction of the insured's forfeiture because in this sanction the insured is denied of the basic right from an insurance contract – right to indemnity, whereas he still has all the obligations towards the insurer, such as the obligation to pay outstanding and future premiums, obligation to notify the insurer of the increase or decrease of risk, obligation to notify and prove the following insured events and so on.

Just like the insurer retains the obligation towards the insured to pay insurance indemnity for the following insured events. Forfeiture of insurance rights,

therefore, relates to the right from one specific insured event in respect of which the insured does not have the right to insurance indemnity, whilst insurance contract continues to be legally effective. The insurer's right to deem he is not bound by the contract does not mean that the contract is null and void, because it can only be considered null and void due to the reasons that existed in the moment of contract conclusion.Voidness has a retroactive effect and in this case it is considered that the insurer has never agreed to insure the risk. In filing a false claim, the reasons for emergence of the insurer's right to deem he is not bound by the contract occur in the moment of contract violation by the insured upon the occurrence and the insurer's obligation to provide indemnity is activated although it has still not been established. Therefore, they occur subsequently, in the moment of filing a false claim. The insurer's right to deem he is not bound by the contract anymore is a sanction that cannot be equated with a contract termination, since by a contract termination each contracting party has to return what it has received from the other party based on a concluded contract (restitution of giving of contractual parties), which is not the case here. A party that is guilty of termination is obliged to compensate the loss resulting therefrom to the other party.When the insurer is not bound by the contract he retains paid premiums, but is not entitled to the future ones. He is exempt from all further obligations without the right to indemnity against the insurer, because the contract ceased to exist in that, special, way and in one specific case of breach of obligation to prove claim.

In the previously analysed legal sources, submission of false information to the insurer which, were they true, would be relevant for establishing the occurrence of an insured event or the extent of the insurer's liability to pay indemnity, is not considered a special case of the violation of the obligation to cooperate or to notify the insurer upon the occurrence. It is neither separately set forth in an article or para of the law nor a special sanction is prescribed in these legal sources. Therein, submission of a false claim is subsumed under a general concept of the violation of the obligation of cooperation i.e. notification which comprises, as we have seen, failure to notify, late notification, incorrect or false presentation of facts or information relevant for establishing the occurrence of an insured event or the extent of the insurer's liability to pay indemnity, submission of false evidence thereof and the like. It is sanctioned under the insurer's rights that are the same for all these cases or forms of violation of this obligation which these legal sources consider a delay. For example, the obligation is violated by a failed or late submission of information. The separate regulation and sanction of false claims within the concept of delay, which is the case in the Swiss law according to which the insurer has the right to deem the contract no more binding, is justified for this legislator considering the fact that there is a huge number of false claims filed to the insurer and an immense amount of money taken from insurance funds for the settlement or discovery of these claims

in all European countries. It turned out that insurance funds are not sufficiently protected even after incriminating false claims as a separate kind of fraud – fraud in insurance, and that protection of insurers and insurance funds against false claims needs to be reinforced by the measures of civil protection, by classifying false claims as a particularly severe form of breach of insurance contract and penalizing them under a specific sanction within a legal institute of the insured's delay.[3]

According to Article 40 of SLIC, a claim is deemed false when the insured or his representative conceals or incorrectly presents facts for establishing circumstances that gave rise to a loss or for assessing consequences of a loss that, if they were correctly presented, i.e. were they not concealed or misrepresented, they would make the insurer think his obligation to pay indemnity exists, and that there are no grounds for reduced indemnity.

Concealment or misrepresentation of facts is the first condition to deem a claim false. Second condition is that the insured has concealed or misrepresented facts in a claim with intention to mislead the insurer into making a mistake or omission in establishing the insured event in order to pay indemnity he is not liable to pay or to pay a reduced amount thereof. Therefore, a false claim is any one case that meets the mentioned conditions, regardless of whether it resulted in the consequences due to which it was filed to the insurer: payment of indemnity that should not have been paid or that should have been paid in a reduced amount.

The obligation of the insured to prove the claim, regulated under Article 39 of the SLIC is incurred based on a mixed system, characteristic of the Swiss law. This obligation to deliver information on facts that can be used for establishing circumstances that lead to the loss (the occurrence) or for estimating the loss (establishing the extent of the insurer's liability to indemnify, according to the terminology used in GICA and ALIC) is regulated as a legal obligation assumed by the insured at the request of the insurer. This obligation is prescribed under par. 1, which states that the insured's obligation to provide the insurer with the information on facts for the stated purpose arises at the request of the insurer and it includes "all information on facts…". The second condition regarding the information the insured "must" provide to the insurer is that, according to the insured's knowledge, these information are relevant for establishing the circumstances that gave rise to the loss or for estimating the consequences thereof. Therefore, the assessment of quantity (all information on facts) and importance or quality of information on facts (that can be used for establishing circumstances that gave rise to the loss or for establishing the consequences thereof) that the insured must deliver to the insurer upon occurrence, the Swiss Insurance Contract Act leaves to the insured, i.e. to the insured's subjective

[3] About the extent of discovered and undiscovered false claims in some European countries, refer to: Ilkić, Zoran, MTPL Insurance Frauds, in: *Reforms and new challenges in insurance law,* Association for Insurance Law of Serbia, 2016, p. 216-218.

assessment. This means that if the insured fails to report all facts or all the facts that were familiar to him and which are significant for establishing circumstances that gave rise to the loss or for estimating the consequences thereof, by expiry of the period within which he was obliged to inform the insurer, he defaults and becomes liable to the insurer. This is one possible interpretation that is not in the insured's interest and if applied, due to the wrong estimation of the quantity and quality of facts to be delivered to the insurer, the insured can default. It is not in the interest of the insurer either, because he has to prove that the insured was aware of certain facts he did not report, as a result of which the insured is liable for default. Thus, we think that another interpretation that takes into account the protection of interests of both parties is better. This interpretation implies that the insured has to provide the insurer with the information on all the facts familiar to him that can be used for establishing the circumstances that gave rise to the loss or for estimating the consequences thereof, in respect of which the insurer posed questions to the insured in the insurance proposal or annex thereto to perform the obligation to prove the claim. We think this is the right way to interpret the insured's obligation to inform the insurer of the facts relevant for establishing the insured event or the extent of insurer's liability to indemnify at the insurer's request in the previously examined legal sources. For example, regarding delivery of information which according to GICA have to include all the information relevant for establishing the insured event or the extent of the insurer's liability to indemnify (Article 31, par. 1, item 1).

In difference from the obligation to provide information for the purpose of proving the claim or estimating the consequences of loss which is incurred by the insured by the force of law, the insured is obliged to provide the insurer with certain documents/evidence, including medical findings according to the SLIC, which can be used for establishing the insured event or estimating the consequences of loss, only if such an obligation is established by mutual agreement of the parties. This means when this obligation of the insured is established either in the insurance contract or the terms and conditions, or within a separately concluded agreement that solely relates to the satisfaction of that obligation. This is why Swiss legislation provides another interpretation of the mixed system, regarding the way in which two duties that are part of the insured's obligation to prove the claim are established. Item 1, par. 2, Article 39 regulates it as well as the agreement of the parties that the insured must provide the insurer with the evidence he can obtain at no great costs. That means that if there are no stipulations in respect of evidence the insured has to deliver to the insurer and that the insured's obligation relates to submission of only those evidence that he can obtain at no great costs, then the insurer has to obtain evidence by himself. Or, the insured as well, within the wider interpretation of the legislator's norm ("the insured has to deliver documents stipulated in the contract, including medical findings, provided that they can be obtained at no great costs"),

if the insurer provides him with the advance for the costs related to obtaining certain evidence and agrees to, upon obtaining and delivering these evidence, if the expenses are bigger than the advance, reimburse all other expenses that he incurred if they exceeded the amount of smaller ones. In other words, to reimburse to the insured all the expenses which are part of bigger expenses.

Swiss legislator does not limit rights available to the insurer in case of a violation of a legally established obligation of the insured to deliver information to the insurer and a violation of contractual obligation to furnish the insurer with certain evidence relevant for determining circumstances that gave rise to the loss or for estimating the consequences thereof. In respect of these rights, Swiss legislator prescribes for the parties to agree that the insured, under the threat of losing the right to indemnity, has to furnish the insurer with these information and evidence within the period specified in the agreement of the parties which is long enough for the information and evidence to be gathered (item 2, par. 2, Article 39). In other words, the period stipulated in the agreement has to be long enough to allow the insured to duly perform his obligation of obtaining and delivering information to the insurer, i.e. poofs that can be used for establishing circumstances that gave rise to the loss or for estimating the consequences thereof.

Since the above analysed provisions on the insured's obligation to prove the claim are dispositive, it is understood that the agreement of the parties may also envisage other obligations the insured has to meet to enable the insurer to establish the circumstances that gave rise to the loss or for estimating the consequences thereof, apart from legally prescribed obligation of delivery of information and contractual obligation of furnishing the insurer with evidence. For example, to enable the insurer an access to damaged property which is a separate obligation of the insured envisaged under the Principles and/or obligations our insurers prescribe in their insurance terms and conditions which will be discussed hereinafter. Also, having in mind the mentioned dispositive character of norms analysed so far about the obligation of the insured to prove the claim and that Swiss legislator does not limit the rights available for the insurer in case of a violation of duties that are part of the obligation to prove claim, in respect of rights of the insurer in case of default on the part of the insured in delivering stated information and evidence to the insurer, it can be agreed that instead of denying indemnity to the insured, the insurer is entitled to reduce an insurance indemnity by the amount he should have paid if the information or evidence were delivered in timely manner, i.e. to reduce an indemnity by an amount of damage inflicted to the insurer due to non-performance or late performance of obligation. This right is envisaged under Article 39, par. 2 of the SLIC and it involves the cases where the insured violates the obligation to timely report the occurrence to the insurer, right to termination or contract cancellation, but it does not include to consider a contract null and void for the previously stated

reasons. We think that the right to contract cancellation can be agreed since Swiss legislator, in difference from German or Austrian, does not forbid its stipulation. When talking about false claims, based on dispositive norms that regulate them, insurance contract, insurance terms and conditions or special agreement of the parties can define them differently than the law, and if filed to the insurer, instead of the right referred to in Article 40 of the SLIC, different right for the insurer can be stipulated. Dispositivity of these norms is stipulated in Articles 97 and 98 of the SLIC which expressly specify articles and paragraphs of that Law which provisions cannot be altered or cannot be altered to the detriment of the policyholder and the insured.

In order for the insurer to exercise any of the contractual rights against the insured who violates the obligation to prove claim (or some other legal or contractual obligation), first of the two conditions that has to be met is that circumstances indicate that breach of this obligation due to default can be ascribed to the insured. This means that the insured, as we mentioned earlier, is guilty of breaching the obligation to prove claim. It is expressly envisaged in Article 45, par. 1 of the SLIC which provisions according to Article 98 par. 1, which makes no sense to the author of this paper, are considered a relatively-coercive norm and cannot be altered to the detriment of the insured. Second condition is that there is a causality between the violation of obligation to prove claim in timely manner and establishment of the existence of the insured's obligation to pay indemnity or its extent. Thus, if the breach of the obligation to prove claim, i.e. duties that are part of this obligation regarding the term the insured is responsible for did not affect the establishment of the existence of the insured's liability to pay indemnity/loss or its extent, the insurer is obliged to pay indemnity (in full or in a respective amount). It stems from the general rule of the contractual relations that there has to be a causality between the guilt for breaching the obligation by defaulting and the consequence. We have seen that the Principles, GICA and ALIC, in difference from SLIC, expressly prescribe the condition of causality between the insured's guilt for breaching the cooperation obligation upon an occurrence, i.e. the obligation to notify the insurer thereof and the consequences related to establishing the existence of the insurer's obligation or its extent. However, when filing a false claim, the condition of causality according to the SLIC is irrelevant for emergence of the insurer's right to deem he is not bound by the contract. Lack of causality in the stated meaning, when filing a false claim, indicates that the insurer's right to deem that he is not bound by contract is punishment for the insured. In difference from the previously analysed legal sources, the SLIC does not prescribe the burden of proving the insured's guilt for breaching the obligation to prove claim. So this matter is regulated by the previously mentioned general rules of procedural law on the burden of proof. Also, neither the SLIC, the Principles, GICA nor ALIC do not prescribe the burden of proof of a causality between the violation of obligation to prove claim and consequences for establishing the existence of the

obligation to pay indemnity by the insurer/loss or its extent, so the general rules on burden of proof are also applied to proving this fact.

The SLIC does not specify place in which duties that are part of the obligation to prove claim have to be met, nor does it prescribe that insurance contract envisages a written form the insured needs to fill out in order to meet his obligation of information submission. However, it is prescribed in respect of the obligation of occurrence notification, i.e. insured event in Article 38, par. 1 of the SLIC. It neither regulates an issue of bearing the costs of proving claim. It means that these details in the interest of legal safety of the parties should be regulated under the contract or insurance terms and conditions.

Another matter regulated in the SLIC in respect of the elements of the obligation to prove claim, under relatively-coercive norms that, as is known, cannot be changed under the insurance contract or terms and conditions to the detriment of the insured, is that the term for meeting a duty to deliver information and evidence that can be used for establishing circumstances that gave rise to the loss or for establishing the consequences thereof, starts to run from the day when the insurer identified a holder of the right to insured indemnity, instead from the date the insured has been provided with the request to perform these duties as in previously analysed legal sources, in case the parties did not otherwise contract the inception date of this term. Also, that the insurer must remind the insured (prior to or during this term- author's comment) of the consequences of late submission of information and evidence. These provisions are set forth in Article 39, par. 2, item 2, sentence two.

Finally, it should be said that from normative perspective, the obligation analysed herein is regulated in a much more complex manner under the SLIC, before all, through differences from previously analysed legal sources in the manner of establishing certain duties (under the law and contract) which are part of this obligation. Also, that it affects clarity and comprehension, as well as operationalization of this obligation in insurance practice, but that by the application of normative solutions established in the SLIC the same effects can be achieved in insurance practice that can be achieved by applying solutions from the Principles, GICA and ALIC.

French law. In the Insurance Code of France, Book I – Contract (hereinafter: COF)[4] the insured's obligation to inform the insurer of the loss that can trigger insurance coverage, which in the majority of analysed legal sources is named an obligation to notify the insurer of the occurrence, is fully regulated by dispositive norms in loss insurance lines. Regarding this notification, its due date and period which can be determined under the contract, insurer's right to deny indemnity to the insured due to default in performing notification obligation (loss of right to indem-

[4] Code des assurances 1930, version consolidée au 17 mai 2015 (Insurance Code of France) (available at: *https://www.legifrance.gouv.fr/affi chCode.do?cidTexte=LEGITEXT000006073984&dateTexte=20160312*).

nity) and regulating exceptions from the insurer's right to deny indemnity (Article 113-11, par. 1, item 2 of COF). All other elements that are part of this obligation, as well as some of the mentioned elements that are roughly determined in COF, are regulated under insurance contract or terms and conditions, with some limitations envisaged in this Code that also relate to the insured's obligation to cooperate with the insurer in establishing the occurrence or the extent of the insurer's liability and other contractual obligations.[5] It shows that these two obligations of the insured upon the occurrence are deemed and partly regulated in the French law as separate and independent obligations, instead of one legal whole made of a set of obligations then incurred by the insured.

COF contains just one provision on the obligation of the insured to cooperate with the insurer upon the occurrence. We have named it as in the Principles since it bears no name nor its name can be derived from its contents as in the Austrian Insurance Contract Act, since this and other provisions of this Code do not prescribe the duties it is comprised of, incurred by the insured upon the occurrence, if envisaged under the contract, in order to establish that an insured event occurred or the extent of the insured's obligation to pay indemnity/loss. Article 113-11, par. 1, item 2, of that provision only prescribes that all clauses in the insurance contract and terms and conditions which envisage loss of right of the insured due to the breach of obligation which relate to the notification of loss to the authorities and to *submission of documentation* (to the relevant state authorities and insurer – author's note) are null and void, but bearing in mind that the insurer reserves the right to demand indemnity from the insured of the loss inflicted to him by such violation.

This means that, in order to actualize the cooperation obligation in the French practice, the insurance contract and insurance terms and conditions must prescribe the insured's duties which shall enable the insurer to establish that the risk / insured event occurred or to establish the extent of his obligation to indemnify. The examples are the duty to provide the insurer with the information and the duty to deliver evidence relevant for establishing the occurrence of risk or for establishing the extent of obligation to pay indemnity. It should stipulate the information he is obliged to deliver, all of them or just the ones necessary for the mentioned stipulations, the evidence he can obtain, then to obtain them without at no great costs etc. as regulated in the previously analysed legal sources. Also, an insurance contract should regulate how these duties are incurred, at the insurer's request or without it, the term within which these duties are to be performed, the event that is considered the start date of the term, the place of fulfilment of duties and what is considered

[5] For more about the insured's obligation to notify the insurer of the occurrence of an insured event in French legislation, please refer to our article in the footnote 5, p. 183-184 (Insured's obligation to notify the insurer of an occurrence – insight into modern solutions).

the violation thereof. In particular, the consequences of the violation of duty of the insured / the rights of the insurer when the insured has violated his duties, except as in loss of insurance rights in case of insured's default in delivering documentation, cases or exceptions when the insurer is not allowed to exercise these rights (lack of causality between the insured's subjective default due to breach of duty and establishing the insured risk or the extent of the insured's obligation to indemnify)[6], burden of proof and other elements of duties that form the obligation considered herein, which we elaborated when analysing the Principles, the GICA, ALIC and SLIC.

However, there are some other provisions of general importance in the COF, which can be applied to the violation of the insured's duty to provide the insurer with the information upon the occurrence and the duty to provide the insurer with the documentation relevant for establishing the occurrence of the insured risk or the extent of the insurer's obligation to provide the indemnity to the insured due to the occurrence. They establish the limitations in stipulating some of the elements of these duties that make the cooperation obligation after the occurrence. One of them is especially important as it envisages the consequences that can be provided for under insurance terms and conditions due to the breach of contractual duties. It also prescribes the condition that has to be met in order for the clauses of the insurance terms and conditions which stipulate the consequences of the violation of contractual obligations to have full legal effect. It is a concise provision stating: "Insurance terms and conditions shall have full legal effect if they envisage invalidity, forfeiture or exclusions from insurance, but only if set forth in a clear way." (Article 112-4, par. 4). This condition is also contained in yet another provision relating to policy clauses which, when signed off by both contractual parties, make an insurance contract in a written form and give an insurance contract full legal effect: "Contract clause must be clearly printed in a policy". (Article 113-15, par. 1). Beside this, the COF contains two short provisions that are applied in case of consequences that can be envisaged under the contract for the violation of the insured's contractual obligations and the form for validity of proving a right that the insurer can stipulate and exercise in case of a violation of duty. One provision sets forth that the policy must state conditions for breach of contract (Article 113-12, par. 1), and it would be unclear whether the stipulation of this clause is allowed for the breach of duties that form the cooperation obligation upon the occurrence unlike an express stipulation in the GICA (par. 28, item 5) or in ALIC (par. 6, item 5). Another provision sets forth that the cancellation of insurance contract concluded by a physical person outside his professional activity must be proved by the insurer by way of registered letter

[6] Liability for default of the debtor on account of guilt in French law is not, in difference from German law, expressly proscribed anywhere, but upon interpreting rules on inability to perform contract and indemnity and some other rules from the French law, a position is taken in French doctrine and court practice that guilt is relevant for the debtor's default (Perović, Slobodan, *Obligaciono pravo*, Beograd, 1968, p. 262-274)

(Article 113-12-1). We deem that, according to the French legislation, the invalidity of the contract could not be agreed due to the breach of the insured's duties that form his obligation to cooperate with the insurer upon the occurrence. Because, as we previously mentioned, the reason of invalidity must exist at the time of contract conclusion and it is universally accepted in all European legal systems.

Therefore, according to COF, it is certain that the insurer may envisage sanctions in the contract or insurance terms and conditions for violation of duties by default, and these sanctions may range from payment of indemnity and cancellation, to the forfeiture of the insured's right to insurance indemnity. The exception is the category that relates to the insured's duty to notify the competent authority of the occurrence and the duty to deliver documentation when due to the insured's default in performing these duties insurer's right to deny indemnity to the insured cannot be agreed.

Weakness of French legislator in the regulation of the insured's obligation to cooperate with the insurer upon the occurrence is obvious, since there are very few dispositive norms in the COF that regulate it and the general ones that can be applied to it which are set forth in the chapter on the standardization of the conclusion and proving of the insurance contract. Considering the lack of the majority of these norms, in difference from the previously analysed legal sources that are applied to it as the source of presumed will of contractual parties, the insurer is particularly responsible for the regulation of this obligation in insurance terms and conditions. On the one side, if it is not adequately regulated in insurance terms and conditions, contractual parties are in uncertain legal situation that arises due to the need to stipulate missing norms and the uncertain results whether the missing norm created in the process of filling in legal gaps by analogy with the solutions contained in the norms adequately regulating similar obligation, such as norms governing the insured's obligation to notify the insurer of the occurrence, meets the purpose of the cooperation obligation and the character/nature of the agreed duties against the insurer in meeting that obligation. On the other side, if insurance terms and conditions contain sufficient number of provisions/clauses that fulfil legal gaps in the COF on cooperation obligation, which have not been specially negotiated, due to their violation, and the fact that they are clauses on the insured's duties and insurer's rights, they are exposed to the control of permissibility by courts that will implement them by the application of appropriate general principles that are applied to the conclusion and execution of the contractual obligations (the principle of public order protection, fair practice, legal abuse ban, conscientious and fair business practice etc.) and according to established criteria for assessing validity of standard clauses of general conditions in the contract envisaged in the Civil Code and the special law on standard contracts (general conditions of form contracts). One of the criteria based on the fairness and conscientiousness principle based on which assessment

of effectiveness of these clauses in general terms and conditions can be carried out is envisaged in Directive 93/13/EEC on unfair / unjust clauses in consumer contracts which solutions France incorporated in its legislature.[7] Uncertainties that arise for the contractual parties in both situations indicate that for their legal safety, certainty that is achieved by full regulation is always better solution that can be offered by legislator. This has been confirmed many times in the legal sources analysed so far.

Czech law. In difference from the legal sources analysed so far, in the Czech Civil Code (hereinafter: CCC)[8], the obligation to report the insured event and the obligation to cooperate upon the occurrence, or as it is named the obligation to provide information or the obligation to prove claim are made a single obligation. Together with some other obligations, they form a legal whole and a single obligation of the policyholder, insured or the third party entitled to insurance indemnity upon the occurrence. Technically speaking, these obligations, since the purpose of the majority of them is to provide the insurer with the information on certain facts related to the occurrence, whereas one of them is aimed at delivering documentary evidence, are carried out as envisaged in Article 2797, par. 1 of CCC, by submitting a single claim to the insurer. This provision determines the period from the reception of this claim within which the insurer is obliged to start with assessment/establishment of the existence and extent of his liability to pay indemnity. It also illustrates the statement that all these obligations of the policyholder, insured or the third party beneficiary make a legal whole. Therefore, this legal whole which is not properly named by the Czech legislator, if observed as a single obligation, would be best to name the cooperation obligation of the policyholder, insured or the third party that is entitled to insurance indemnity against the insurer upon the occurrence, i.e. the insured event according to terminology used by the Czech legislator for the insured event.

According to Article 2796, par. 1 of CCC, this obligation is composed of: 1) obligation of notifying the insurer of the occurrence of an insured event that includes the duty to truthfully describe the occurrence and the consequences of an insured event to the insurer, 2) obligation to inform the insurer of the third party's rights i.e. obligation to inform the insurer that certain third parties have certain rights to insurance indemnity upon the occurrence, 3) obligation to inform the insurer in case there is multiple insurance and 4) obligation to deliver *necessary* documentation to the insurer. We arrive at the logical conclusion that the obligation to deliver documentation means submission of documentary evidence based on

[7] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ("Council Directive 93/13/EEC from 5 April 1993 on unfair terms in consumer contracts"), *Official Journal of the European Communities*, *L 95, 21. 4. 1993, 29–34.*

[8] Zákon ze dne 3. února 2012 občanský zákoník, zákon č. 89/2012, *Sbírky zákonů ČR*, No. 89/2012 Coll. (Czech Civil Code, effective from 1. 1. 2014). Insurance contract is regulated in Article 2758-2872 (115 Articles).

which he can establish all the facts that make the subject matter of the obligation of notification/information stated under 1)-3). The provision in par. 2 of the same Article extends the number of persons who can (but do not have to!) perform the obligation of (just) notifying the insured event and includes any person who has a legal interest in insurance indemnity. Thus, differently than as envisaged in the Principles: that the notification of an insured event is effective when done by any third party. Since the provision from par. 2, Article 2796 of CCC only regulates the issue of subject of the obligation from par. 1 of that Article in respect of notifying the insurer of the occurrence, it is reasonable to conclude that the Czech legislator is ambivalent about standardizing obligations that are incurred after and as a result of the occurrence. Also, at one point they are considered as a set of obligations i.e. a legal whole, and yet at another point they are considered separately. With such an ambivalent approach to standardizing obligations of the policyholder, insured or the third party entitled to insurance indemnity against the insurer upon the occurrence, Czech legislator puts insurers in a dilemma on how to regulate these obligations in insurance terms and conditions. Should they be regulated as separate obligations or as a single obligation composed of more obligations and consequently, if they are considered separate, in case of violation of insurance terms and conditions, can the insurer prescribe different sanctions? It can be done by means of adequate rights of the insurer depending on the obligation in case, assuming that the norms referred to in Article 2800, par. 2 of CCC regulating the consequences of the breach of obligations (legal and contractual – author's note) by the policyholder, insured or "any other third person entitled to insurance indemnity" are dispositive ones.

Fulfillment of all those obligations becomes due at the same moment, regardless of whether they are interpreted as a single obligation or as separate ones. That means, as we will see from the provision of Article 2800, par. 2 of CCC, that the breach of any one, several or all of them is sanctioned under the same sanction. They become due upon the occurrence of an insured event and they have to be discharged within the period expressed in a legal standard "without undue delay". In insurance practice, although there isn't a more precise definition in the wording of Article 2796, par. 1 of CCC, it means right after the occurrence. Thus, all of them are incurred at the same time, on the day of occurrence and the period for their discharge expressed in the stated legal standard runs thereafter. It is another argument to observe the analysed obligations as a single obligation. In difference from the previously analysed legal sources, e.g. German or Austrian legislator (par. 30, item 1 of the GICA and par. 33, item 1 of the ALIC), the Czech legislator does not connect the due date of these obligations with the moment of becoming aware of the occurrence of an insured event or with the condition that the person who is obliged to report the occurrence of an insured event was aware or should have been aware of the occurrence, as envisaged under the Principles (Article 6:101, par. 1). Certainly,

the effectiveness cannot be calculated from the objective fact of occurrence, instead of the moment of becoming aware of the occurrence as a subjective fact. Because of that, this provision in terms of the solution accepted in comparative law must be more broadly interpreted.

Obligations arise by the force of law, regardless of whether the insurer requested from the insurer, insured or third party entitled to insurance indemnity to perform one, several or all of them. The expiry of the deadline for performance of these obligations results in default and liability for default if the insured or some other subject obliged to discharge them is guilty for missing the deadline, at least in the form of ordinary negligence. It is not explicitly provided for by the CCC provisions regulating the analysed obligations, but it arises from the general rules of the Civil Code on the liability for debtor's default. Some of them, however, can be violated otherwise: by providing application with false or distorted important facts on the consequences of the insured event or by (a false or distorted presentation) of information about it, but only when violated by a qualified form of guilt: intent or gross negligence.

In the previously analysed legal sources, the first obligation of the insured out of those mentioned by the Czech legislator is the obligation to notify the insurer of the occurrence, and it includes duty of the insured to inform the insurer of the incurred loss i.e. of the occurrence and duty to inform the insurer of the existence of insurance coverage and the right to indemnity. Second obligation, analysed herein, as we have seen, consists of the insured's duty to provide the insurer with the information he needs for establishing the insured event or the extent of obligation to provide indemnity and duty to deliver evidence thereof, but only at the insurer's request. In Czech legislation, it arises by the force of law, which means without insurer's request.

The beneficiary is designated as the main subject of the obligations, and it is a person entitled to insurance indemnity. If that person is not at the same time the policyholder or the insured, then the policyholder and the insured shall also incur these obligations. The policyholder shall incur these obligations when he has concluded an insurance contract with the insurer in his name and on his behalf, and the insured shall incur these obligations when an insurance contract has been concluded on behalf of a third party.

The Czech legislator (not as diluted by categories of obligations and rights of Insurers in case of violation of such rights according to the gravity of guilt, as German and Austrian legislation) in par. 28 of the GICA and par. 6 ALIC, has special provisions regulating the consequences of violating the obligations of the policyholder, the Insured or a third party beneficiary. This is also the title that denotes the content of the mentioned provisions, of the Art. 2800 GZC ("Consequences of a breach of obligations"). These (as well as such special provisions under GICA and ALIC) apply both to the legal liabilities of the said persons and to the contracted obligations.

One group of liabilities for the violation of which sanctions are prescribed under the Check Civil Code (CCC) comprises the liabilities maintained or taken over during the negotiations on the contract conclusion or amendments by the policyholder or the insured. They are regulated under the paragraph 1, Art. 2800. The other group comprises all other liabilities, which refer to the third party beneficiary as the subject of liability and a person responsible for inflicting the injury, in addition to the policyholder and contracting party. This group includes the obligation to disclose information to the Insurer and submit documents and information necessary for the Insurer to determine whether the insured event occurred and/or establish the indemnity size/amount. The consequences of the violation and the preconditions for liability for violation are regulated under the Art. 2800, para. 2 GZČ. For violating this obligation, according to the wording of the Czech legislator, the Insurer shall be entitled to reduce their obligation to indemnify in proportion to the impact of the violation on the size/amount of the Insurer's obligation to pay indemnity. This right is more precisely expressed, as we have seen, in the Principles, Art. 6:102, par. 2, in the statement that the Insurer has the right to reduce indemnity to the extent that he can prove to have suffered the damage through the violation of the obligation. The difference from the Principle, as regards prescribing this right for an Insurer, is that in the Art. 2800, paragraph 2 of the CCC the legislator does not state that the violation of the considered obligation presupposes that there is the violation liability. Although, as we have already said, this stems from the general clauses of the CCC, which regulate the liability of debtors for late payment. Unlike the Principles, under the CCC it is not determined who shall bear the burden of proof that the breach of the obligation caused damage to the Insurer, i.e. that the volume of insurance benefits may be reduced to the extent that the Insurer can prove that he suffered damage due to the breach of obligation. Moreover, as opposed to Principles, the Insurer is granted the right to reject to pay out the insurance indemnity in the event of a breach of the obligation deliberately or by gross negligence. Under the CCC, the Insurer shall be entitled to reduce the indemnity only if the violation of the obligation to inform and deliver the evidence *significantly* influenced the establishment of the insured event or the assessment of the amount of indemnity.

It should be emphasized that, unlike the Swiss Law on Insurance Contract (SLIC) (Article 40), in which a much more severe sanction is prescribed for filing a false claim than for the insured's violation of the obligation to duly inform and deliver the documents to the Insurer, which the Insurer can use to determine the insured event/damage or assess the consequences of the damage (as the Insurer's right to consider that he is not bound by the contract), this special form of violation of obligation has not been prescribed under the CCC. Regardless of whether it is a matter of delay as a form of violation of this obligation or a breach of the obligation by filing a false claim, the Czech legislator prescribes the same sanction: the right of

the Insurer to reduce the indemnity. Otherwise, by a false claim, the Czech legislator considers filling a claim in which the relevant facts are distorted deliberately or by gross negligence, as regards the consequences of the claimed insured event or which conceals the information of the event (Article 2797, paragraph 2 of the CCC)[9] . By this gentle sanction for filing false claims - instead of prescribing a more severe one just like in Swiss law, thus providing better protection to the Insurer against unloyal acts of the policyholder, insured and third party beneficiary and acting preventively and/or deterring from filing false claims - the Czech legislator actually encourages the submission of such false claims[10]. In the first case, the Insurer, in addition to his right to reduce the indemnity, shall be entitled to demand that he be compensated for the proven expenses incurred in order to establish the truthful facts as to the information submitted to him or concealed from him. This Insurer's right was established by Art. 2797, para. 2 of the CCC. In general terms, the right to the reimbursement of the Insurer's expenses was established, under para. 3 of this Article, for all other cases in which the contractor, insured or a third party beneficiary incurs the costs of the investigation or increases such costs by violating some of their obligations.

In the conclusion of our examination of the Czech law, a few conclusions of a general character can be emphasized. Specific statements were highlighted during the previous exposition on the solutions under the Czech law. The Czech legislator, as we have seen, is inconsistent in the standardization of the obligation/s of the policyholder, the insured or a third party beneficiary upon the insured occurrence. In some places, as in Article 2796, para. 1 CCC, it norms them as a legal whole within a single/unique obligation to notify the Insurer. This is done in the Art. 2797, para. 1

[9] If we compare this definition of a false claim of the Czech legislator with the one of the Swiss legislator in the Art. 40 in conjunction with Art. 39, para. 1 SLIC, we will notice that they differ in qualification. According to the SLIC, for the claim (by filling which, the insured person fulfills his obligation) to be actually false or qualified as such, it should contain the covert or misrepresented facts that can be used to determine the circumstances of the occurrence or assess its consequences, with the intention to mislead the Insurer into making an error or omission and pay indemnity, which would otherwise be rejected or reduced if the filled claim had shown true facts under the actual circumstances. Under the Czech law, however, for the Insurer to be considered to have been filled a false claim, it is sufficient that the claim filled by the policyholder, the insured or a third party beneficiary (claim referred to in Article 2796, paragraph 1 of the CCG) contains an intentional misrepresentation or by a gross negligence distorted material facts about the consequences of the reported claim or conceals the information about the occurrence. Therefore, according to the CCC, it is not required (unlike under the SLIC) to prove that, when filing a "false claim", there was an actual or alleged subjective relationship between the claimant and the filed claim - the Insurer pays out the damage that is excluded from the insurance coverage or exceeds the indemnity amount granted under the insurance coverage.

[10] An exception to the severity of sanctions for filing a false claim was made by the Czech legislator in compulsory insurance lines. "In the case of compulsory insurance, an Insurer may refuse to fulfill his obligation only if the injured person or a third party, with the knowledge of the injured person, solely by his own guilt or gross negligence provided an incomplete response to the written questions, or false or substantially distorted information." (Article 2780 of the CCC).

of the CCC, in which all the liabilities of these persons upon the insured occurrence are treated as (essential) elements (information - for example, author's note.) of the notification delivered to the Insurer. On the other hand, for example, in para. 2, Art. 2796 of the CCC, which stipulates that the occurrence of an insured event can be notified by any person with a legitimate interest in insurance indemnity, this obligation is set out of the context of all other information that is, according to para. 1 of the relevant Article, required to be delivered to the Insurer by the policyholder, insured or the insurance beneficiary and treated as a separate, independent obligation.

In practice, this inconsistency can lead to various interpretations, especially as regards the manner of sanctioning the breach of obligations. Should the sanctions be determined depending on the level of each and every breach of obligations or when the breach is cumulative? The next drawback of the Czech legislature in regulating the obligation to cooperate, or notify the Insurer, is incomplete regulation. This opens the problem of filling in the legal gaps in the cases when it has been omitted to regulate the wording of the element of liability under the contract or the insurance terms and conditions; for example, as regards the location of fulfilling the obligation or burden of proof that the violation of the obligation significantly affected the occurrence of the insured event. Moreover, there are no specific provisions in the CCC regarding the articles and provisions of particular articles of this Code relating to the insurance contract, predetermined to constitute absolute and relatively compulsory norms (or (only) absolutely compulsory), from which it would be concluded that the remaining provisions are dispositive norms and can always be modified by the will of the contracting parties. The opposite is the case of determining such nature of particular norms regulating the obligation to notify the Insurer upon occurrence of the insured event and/or the obligation to prove the damages: in par. 32 GICA, para. 34a ALICA and Art. 97- 98 SLIC. For this reason, for example, in the provision of Art. 2800, para. 2 of the CCC, which provides that, in the event of violation of the obligation by the policyholder, the insured or a third party beneficiary, which significantly influences the determination or assessment of the amount of insurance indemnity (we have seen that this violation also refers to the breach of the obligation to notify upon occurrence of the insured event referred to in Art. 2797, para. 1 GZČ), the Insurer shall be entitled to reduce its obligation to indemnify in proportion to the impact of the breach of obligation to the amount of his liability to indemnify, it is unclear whether it is a relatively forcible or disproportionate norm, and if instead of this right (provided this provision is dispositive), the Insurer under the contract or the insurance terms and conditions may, due to a breach of obligation, use some other right with substantially more significant consequences for the policyholder, the insured or a third party beneficiary, such as the right to cancel or terminate the contract, or refuse to pay indemnity. The use of these rights is related to the appropriate form or degree of guilt expressed in breach of the obligation by

the policyholder, the insured or a third party beneficiary[11]. All these defects cause the court to intervene in interpreting the ambiguities in the CCC which regulate the obligation to notify and fill in the legal gaps; in such interventions of finding the meaning of vague and missing GZC norms, the courts can take different attitudes. Therefore, instead of simply and comprehensively regulating all the issues concerning the submission of claims to the Insurer upon the insured occurrence, the Czech legislator, by the omissions in regulation, raises doubts about the certainty and legal safety in the relations of the parties under the insurance contract in this specially significant contract stage for the policyholder, insured and a third party beneficiary.

This gives us the right, we believe, to conclude that the Czech legislator, when it comes to regulating the obligation to deliver the Insurer the information and documents for determining the occurrence of the insured event and the amount of the Insurer's obligation to indemnify, despite the fact that he has observed the German and Austrian legislators, has remained only at the level of the attempt to

[11] It should, however, be noted that there is one general provision in the CCC, which is related to all areas of regulation in this Code, from which it would be possible to draw the conclusion that this Code regulates the areas that are subject to its standardization by absolutely compulsory and dispositive norms. Moreover, that the existence of relatively compulsory norms is unknown to the Code (norms that can be changed, but not to the detriment of the Insured – author's note), in regulating insurance contracts as well. This is expressed in Art. 1, para. 2 of the CCC as follows: "Unless explicitly prohibited by law (by law and other laws - author's note), contracting parties may agree on rights and obligations by excluding statutory rules, but prohibited contractual provisions are contrary to good customs, public order or law related to the status of a person, including the entitlement to the protection of personal rights. "However, this provision is not sufficiently precise to be entirely included in the insurance contract - the Insurer's obligations that we considered were, in any case, considered dispositive, using a personal estimate of the person applying them and their language stylization, above all. A more reliable method of deriving conclusions is from the nature of the norms by which this obligation is regulated in the laws of the countries that we examined before the CCC and on the model of which the Czech legislator formulated these provisions. These are, as we have seen, the GICA and ALIC, which incorporated the mixed method of regulation (the dispositive norms prevailing, a certain number of relatively compulsory and few absolutely compulsory norms). By applying this comparative-legal method of the norms regulating the insurance contract, for example, it could be argued that the provisions of Art. 2800 CCC, para. 2 on the consequences of the violation of obligations (contractual and legal, for which no specific sanctions are prescribed) are relatively compulsory, such as those provisions regulate the consequences of the violation of these obligations in the par. 28, para. 1-4 GICA, par. 6, para. 1-3 and 5 ALIC and Art. 39, paras. 2, point. 2, second sentence and Art. 45 SLIC. The possibility for the Czech court to consider these and other provisions relating to the insurance contract as such that they can be changed by contract but not at the expense of the policyholder, insured or third party beneficiary, has a valid base in the cited article 1, para. 2, calling for the application of good practice. When it comes to the method of norms governing the provisions in the CCI which regulate the insurance contract, one of them certainly contains a rule of a dispositive nature: that a written form of notification between the parties is obligatory only if agreed (article 2773, paragraph 2). Thus, in Czech law, as in German, Austrian or Swiss law, the obligation to notify the insured of the circumstances of relevance for determining the insured event and the extent of obligation may be agreed in written form, as well as the notification of the rights of the Insurer for the breach of obligations by the policyholder, insured and third party beneficiary.

follow the modern solutions included in the laws of these countries and the Swiss Law on Insurance Contract, as regards the false claim. It could have been expected that the Czech legislator would observe the solutions from these three insurance contracts laws, as the Czech law is related to these laws under the same (Central European) civil law system.

The Bulgarian law. In the Bulgarian Insurance Code (hereinafter: BIC[12]), the part that regulates the insurance contract, Art. 183-248 (66 articles), there is only one provision that directly relates to the topic that is the subject of our examination in this paper. It is covered in Art. 207, entitled "Prevention and Limitation of Damage", para. 3. It is located, like the next one to be discussed and which can be named – like in the Principles - the obligation of cooperation of the Insured with the Insurer upon the insured occurrence. In this provision, it is stipulated that, upon the insured occurrence (and fulfilled obligation to notify the Insurer thereof, regulated under the Article 206 – author's note), the insured shall allow the Insurer to inspect the damaged property (access to the damaged item, according to the Principles). This would be his first legally established duty of the Insured, within the obligation that we are considering, which was not govern the appropriate title neither by the Bulgarian nor by the Czech or Austrian legislators. Another duty of the Insured is to deliver the Insurer, upon the Insurer's request, the documents which directly relate to determining the occurrence of the insured event and the amount of indemnity. This is, otherwise, the duty established for the Insured by all previously investigated sources of rights as one of the elements of the content of the obligation to cooperate, the obligation to notify or the obligation to prove the claim, depending on how it is named in certain sources of law. The duty of the Insured not mentioned under the Bulgarian law but known to all investigated sources of law, refers to providing the Insurer with the information that is necessary / required / all information that he knows can be used to determine the insured occurrence and the extent of the damage. In order for the insured to have this duty, this legal vacuum, as well as all the others related to the BIC-unregulated elements of the content of the Insurer's obligation that we are examining, may be filled in by an appropriate provision in the general terms and conditions of insurance as one of the permitted, prescribed clauses in the BIC that can be envisaged in these conditions. The provision allowing to contract the liability of the Insured to provide the Insurer with the information is contained in para. 7, Art. 186 BIC, entitled "General Conditions". It specifies which conditions for the insured and obligations for the insured cannot be established under the insurance terms and conditions; these unallowed conditions and obligations / clauses do not include the duty to provide information to the Insurer and

[12] **Кодекс за застраховането, Обн. ДВ. бр.103 от 23 Декември 2005г. (Bulgarian Insurance Code). Condi**tion as amended on 28 February 2013.

prescribe the conditions for the information which the Insurer may require of the Insured in order to determine that the insured event occurred and the amount of damage caused by this event.

The next (second) provision of the BIC refers to all obligations established for the Insured under the law or insurance contract. It therefore indirectly refers to the obligation to provide information and documents to determine the occurrence of the insured event and the extent of damage. It governs the conditions and obligations where the Insurer may refuse to pay indemnity to the insured because of the non-fulfilment. This is the provision of para. 1, item. 2, Art. 211 BIC entitled "Refusal to pay insurance indemnity". According to this provision, the Insurer may refuse to pay the indemnity "only" if the Insured has not fulfilled obligations which is important from the perspective of the interests of the Insurer[13]. "It is beyond doubt that the obligation to submit the said information and documents is essential in meeting the interests of Insurers, because it is a condition that the Insurer, correlative to the fulfilment of this obligation by the Insured, can fulfil his obligation to pay indemnity. However, it is on the Bulgarian courts to assess whether it is justified that the Insured be refused indemnity by the Insurer whenever the Insured fails to fulfil his obligation to provide information and documents, regardless of the form and degree of guilt manifested in such failure and whether it is justified that, due to the failure by gross negligence, the indemnity bee not reduced to the extent that corresponds to a degree of guilt of the Insured, or whether it is justified that the Insurer refuses to pay indemnity when the non-fulfilment of the obligation to submit information and documents did not primarily affect the determination of the existence of the obligation to pay indemnity or to its scope, as is provided, for example, under the Principles and SLIC. The uncertainty that arises from this assessment for Bulgarian insured and Insurer equals all those other uncertainties that arise from the BIC's incomplete (legal) regulation of the insured's obligation to deliver to the Insurer information and documents from which he can determine the occurrence of the insured event or the amount of his the obligation to pay indemnity that we have already explained in detail when considering the fragmentary regulation of this obligation under the French law. Therefore, it can be said that, when it comes to modern regulation of this obligation, the Bulgarian law lags behind German, Austrian and Swiss law, as well as Czech law or Principles. But, it also legs behind the French law that fragmentally regulates this obligation, since it has a number of solutions of general importance which can be applied to all the obligations of the insured towards the Insurer.

[13] In this Article, para 2 Item 1 and Item 3, it is stipulated that the Insurer may refuse to pay indemnity if the insured incident was intentionally caused by the Insured or beneficiary and in (other cases) as prescribed by law.

Romanian law. The author decided to systematize the right of Rumania after the examination of the Bulgarian insurance contract law, not because it regulates, in a similar way, the obligation of the Insured to provide the Insurer with the information and documents on the basis of which the Insurer can determine that the notified incurred event actually occurred or what his scope of obligation to pay indemnity to the Insured is (which obligation, as well as the obligation to notify of the loss event, remains unregulated under the said law), but because Romania, as well as Bulgaria, is to join a group of European member states with underdeveloped insurance industry, and consequentially the expectations from such a state and underdeveloped contractual insurance law.

Romania's insurance contract is standardized in 43 articles in the new 2009 Civil Code[14] from the art. 2199-art. 2241. This is one of the shortest codes regulating non-marine insurance contract in EU member states, after the Law on Insurance Contract of Greece, which standardizes this agreement in 33 articles, or 34 if we include the article stating the deadline for its entry in force[15]. By the nature of the matter, it could not be expected to have regulated, in such a short text, the obligation of the Insured to notify the Insurer of the insured event and the duty to cooperate with the Insurer after the insured occurrence, even in an incomplete way as in Bulgaria. Already, the number of legal articles that regulate insurance contract in the Civil Code of Romania (CCR), when compared to GICA, which has 216 paragraphs or ALIC, with 192 paragraphs, 114 articles of SLIC or 115 articles of the CCC, point to the conclusion that the Romanian legislator does not follow the tendency of the modern regulation of the insurance contract in most of the previously discussed European rights of EU Member States that have developed contractual insurance rights. Therefore, it leaves great freedom to regulate the obligations and other legal relationships under such contracts to the contracting parties (read: the Insurer) and causes uncertainty as the permissibility of the manner in which they are regulated in the contract and the insurance terms and conditions that are present in all legal systems in which obligations and other legal matters of the contracting parties are not regulated or incompletely regulated, due to the supervision of this freedom by the courts and the judicial correction of the solutions reached by such freedom, which such supervision confines. We have written about this sufficiently in the examination of incomplete solutions under the French Insurance Code as regards the obligation of the insured who is the subject of this work. And there's no need to repeat what has been said.

[14] Lege privind Codul civil, *Monitorul Oficial al României*, Partea I, Anul 177 (XXI) – Nr. 511/24.VII.2009. (Romanian Civil Code). Condition as of and ncluding 3 April 2015.

[15] For more on the features and some solutions of this law, see: Slavnić, Jovan, A view on regulation of insurance contract in Insurance Contract Law of Greece, *Journal of Insurance Law*, No. 4/2007, p. 37-43.

2. HOW TO REGULATE THE LIABILITY OF COOPERATION IN THE FUTURE CIVIL LAW OF SERBIA?

Our legislator does not appreciate the notorious fact that, as an Insurer is not necessarily aware (and most often not aware at all) that the insured event occurred and that his obligation to pay indemnity has materialised, he is neither necessarily capable, after the occurrence of the insured event, by himself or through an agent, to provide the information and evidence, or have access to other necessary facts for determining that the insured event occurred or the extent of his obligation to pay indemnity. On the contrary, the Insurer needs the assistance from the Insured, as a collaborate, to investigate the circumstances – therefore, this cooperation should be regulated by law as his legal obligation and appropriately sanctioned in case of violation, otherwise the Insurer will not be able to investigate the occurrence of the insured event and determine the extent of his obligation to indemnify and, in general or within the prescribed time limit, fulfil this obligation. For this reason, this obligation of the insured (as well as the obligation to notify the Insurer of the occurrence of the insured event) should be, if not completely, then partially regulated by law regarding the elements that make up its content, in including stipulating the rights of Insurers and terms and conditions under which they can be exercised if this obligation is breached, as it is, we have seen, arranged more or less in detail in modern European legal systems (in Principles, GICA, ALIC, SLIC, CCC, FIC and BIC).

The first fact was actually considered by our legislator in regulating an obligation for the Insured to notify the Insurer of the occurrence of the insured event in the art. 917 of the Insurance Law, which is incorporated in the unchanged form in the Draft Civic Law of the Republic of Serbia, art. 1432. He, however, ignored he second notorious fact, so that the obligation of cooperation remained unregulated. For this attitude of our legislator according to this obligation, there may have been justification at the time when the adoption of the Insurance Law started, 54 years ago, and when our insurance industry (insurance institutions) carried out insurance activities under the unique insurance terms and conditions (and single premium tariffs), prescribed by the method of administrative regulation by the Yugoslav and Republic Insurance Committees and when there was a large number of compulsory insurance policies covering the socially-owned property[16] [17] . At the time, there were, among

[16] This system of insurance and organization of insurance companies operations as established under the Law on Insurance Institutes and Communities of 1961. (*"Official Gazette of SFRJ"*, No. 27/61).

[17] More on the history of adopting the Law on Contracts and Torts and mistakes in operation of the Committee for drafting the Civil Code of the Government of the Republic of Slovenia, due to which many more or less generally accepted modern solutions from reformed European legal sources on the insurance contract did not find an appropriate place in the Draft CC, but have been kept and transferred from the La on Contracts and Torts, see: Slavnić, Jovan, "Association for Insurance Law of Serbia is the

other things, weak links with the international environment in insurance business and only domestic Insurers operated on the market of socially-owned assets. Today, when the largest share in the insurance market of Serbia is held by foreign-owned insurance companies, which are part of foreign holding companies, as subsidiaries belonging to the legal systems of the countries with developed contractual insurance rights, they introduce in their business the solutions of their insurance contract low, statutory regulating the obligation of the insured herein considered, it is clear that there is no justification for such a relationship in regulating this obligation in Serbia today. This is more so due to the fact that another source of the international insurance contract law (Principles) which also regulates this obligation was adopted and accepted in the insurance practice, and began to apply in the European area.

However, our Law on Contracts and Torts has one provision in the art. 918 that can be applied to the obligation of the Insured (established by the contract or terms and conditions) of the insured to cooperate with the Insurer in determining the occurrence of the insured event and the extent of his obligation to indemnify. The law on Contracts and Torts, in this provision, which has been incorporated unchanged into the art. 1433 of the Draft Civil Code, prohibits the contracting of a clause on the loss of insurance rights for the insured in the event of failure to meet any of the legal or contractual obligation of the insured upon occurrence of the insured event, declaring such clause null and void[18] [19].

home of a proposal for solutions that reform the insurance contract in the (pre) drafts of the Civil Code of the Republic of Serbia, *European Journal of Insurance Law*, No. 3/2016, p. 67-72.

[18] It should be noted that this provision, like the provision of Art. 1432 Draft CC, originates from the substantively identical provisions entered into the project for the drafting of the Law on Contracts and Torts, called the Draft Law on Contracts and Torts, by prof. M. Konstatinović, creator of this project. In the Draft, the provisions of Art. 917 of the Law on Contracts and Torts or 1432 draft CC were included in Art. 1 and 2, Art. 895, and the provisions of Art. 918 of the Law on Contracts and Torts or Art. 1433 Draft CC in para. 4 of the same Article. Paragraph 3, Art. 895 of the Drafts regulates filing a false claim to the Insurer – this has not been included and standardized in the Law on Contracts and Torts and Draft CC. The filing of a false claim is sanctioned by the loss of the right to an insurance indemnity. The draft with a number of amendments was published by the SFRY Assembly, under AC no. 388/1, as the Draft Law on Contracts and Torts in September 1976, and was later amended, so the new Draft was adopted and published on May 25, 1978 as the Law on Contracts and Torts (*"Official Gazette of SFRY",* No. 29/78). The draft was first published in 1969, edition of the Law Faculty in Belgrade, in the book of the above subtitle and the title: "Obligations and Contracts".

[19] According to some authors, the ban under Art. 918 LCT on contracting the clause on the loss of rights due to violation of the Insured's contractual obligations upon the occurrence of insured event was justified due to its severe consequences for the Insured. It should be kept in mind that this view is taken without reference to the solutions that, at the time of its publication, existed in the European continental law and to the possible conditions under which the contracting of loss of rights would nevertheless be justified, as already mentioned form and degree of the Insured's guilt for the violation contractual obligation and possible adverse consequences that may arise for an Insurer in breach of a contractual obligation if such a breach influenced the establishment of the existence of the obligation of the Insurer to indemnify or assessment of the scope of indemnity (Šulejić, Predrag, Commentary Article 918 LCT "Invalidity of

Our Insurers, in their insurance terms and conditions, establish and regulate more closely the Insured's obligation to cooperate with the Insurer in determining the occurrence of the insured event and the extent of the Insurer's obligation to indemnify. Some of them name it so, whereas the others use the synonymous term, assistance, to name certain duties that the Insured has within the given obligation. We will mention several examples of how this obligation is regulated under the insurance terms and conditions applied today. Under the Special Terms and Conditions for Insurance of Personal Property and Liability of 28 October 2009, Wiener Stadtishce, this obligation is designated by the term "Obligation to cooperate on claims clarification" (article 16, item C). It encompasses the "obligations" of the Insured to entrust the Insurer with the investigation of the causes and extent of the damage and the extent of his liability to pay insurance indemnity, cooperate with the Insurer in the investigation of the damage, and make available to the Insurer all the relevant documentation, in case of damage to objects, cadastre certified report, and not to alter the situation caused by the damage without the consent of the Insurer as long as the damage is being investigated.

In the provision under d) of the same item "Failure to comply with obligations", which also applies to other obligations that are provided in these insurance terms and conditions for the Insured after the occurrence of the insured event, such as the obligation to reduce the damage (item 16, a) and to notify of the damage (Item 16, b), this Insurer reserves the right, in the event that the Insured intentionally or by gross negligence (an obvious mistake in the text - instead of the term gross negligence, they used the term gross carelessness) fails to fulfil or in some other way violates these obligations and when this is considered harmful to the Insurer, to reasonably reduce the insurance premium that would otherwise be paid off, or to completely exempt himself from the obligation to pay the insured indemnity, depending on the particular circumstances. Notwithstanding that in this provision of the special insurance terms and conditions of this Insurer (which is a subsidiary of the Austrian holding company of the same name) on non-compliance with obligations, provisions on sanctions due to violation of the above-mentioned and other obligations of the insured /policyholder upon occurrence of the insured event under par. 6, para. 3-5 ALIC are only roughly or approximately included, two things are clear: that this Insurer does not consider it acceptable that he cannot, under his conditions of insurance under which he operates in Serbia, because of violation of the contractual (legal and contractual) obligations of the insured upon occurrence of the insured event, contract with the insured the loss of rights in case of violation of these obligations. Secondly, that the sanctions envisaged under the insurance terms and conditions of this Insurer for violation of these obligations are contrary

provisions on loss of rights" in the book *"Commentary on the Law on Contracts and Torts"*, Book II, Perović, Slobodan, Belgrade, 1995, pp. 1995-1496).

to art. 917, which regulates the sole right of the Insurer to indemnity and art. 918 of the La on contrast and torts, or art. 1432 and 1433 of the Draft Civil Code. The loss of the right to indemnity is more explicitly stated in the General Terms and Conditions for Medical, Dental, Pharmaceutical and Biochemical Liability Insurance of May 13, 2014, by Uniqa insurance company (also the daughter company of an international Austria-based holding). These provisions, among other things, envisage a set of obligations for the policyholder and the insured in case that, upon the insured occurrence, the third party claimant submits a claim or initiates a procedure for damages under professional error liability cover against the policyholder or insured. All of them are designated as the duty to provide the necessary assistance and help to the Insurer in determining, resolving or removing a third party's claim for damages (paragraph 10.3) and where, in the cases when the third party claimant submits the policyholder or the insured a claim for out-of court settlement, it is regulated that the Insurer shall not be liable to indemnify if the policyholder and/or Insured have fully or partially acknowledged the claim without the prior consent of the Insurer, or without the Insurer's approval concluded settlement agreement with a third party(item 10.3.5). The loss of rights is also foreseen in the event the insured person, against whom a third party has initiated a procedure for damages, pleads (on the lawsuit) on the claim for damages, admitting it fully or partially, or making any settlements or payments to a third party according to the filled claim (item 11.2).

In the Property Insurance General Terms and Conditions of Generali Insurance Company dated 1 November 2010, the Insured shall, upon occurrence of insured event, immediately or as soon as circumstances allow, submit the Insurer a list of destroyed or damaged items, with an approximate indication of their value, and until the arrival of the Insurer's representative to the place of the insured event not to change the condition of the destroyed or damaged objects, and the policyholder shall provide the representative of the Insurer, without any special requests of the representative, with all the information and evidence for determining the causes, the scope and the amount of damage, and, at his request, obtain other reasonable and justified evidence. If the Insured and the policyholder fail to fulfil these obligations and in this way prevent the Insurer from determining the merits and scope of damage, it is stipulated that the Insurer will deny the Insured right to indemnity or reduce the paid indemnity amount (article 18). Both Uniqa and Generali, as we see, have not consistently included into their insurance terms and conditions the effects of the breach of the obligation to notify the Insurer upon occurrence of the Insured event from par. 28, par. 2-4 GICA or pair. 6, para. 3-4 GICA. But, therefore, like the Wiener Stadtishce, they are consistent not to accept a ban on contracting a clause on the loss of insurance rights in case the Insured violates a contractual obligation upon the occurrence of an insured event as regulated in Art. 918 of the Law on Contracts and Torts. Thus, they risk that the domestic courts will refuse to

apply this clause to their disputed relationships with the insured persons, due to its nullity in their insurance terms and conditions. At this point where we discuss solutions from the terms and conditions of domestic Insurers, we should mention that all of them stipulate that the Insured, that is, the policyholder shall bear the costs of obtaining and delivering information and evidence and of fulfilling all other duties to cooperate with the Insurer.

At the end of this extensive survey of the Insured's obligation to cooperate with the Insurer in determining the insured occurrence and the extent of the Insurer's obligation to indemnify, in Principles and most of all in the reformed developed European continental legal systems (most of which are among the most developed), this author is even more strongly convinced that the obligation of cooperation should be established as a legal obligation of the Insured in our law as well, and that by such a regulation, modelled in the manner in which it is regulated in the Principles and in the countries belonging to the system of Central European law (to which Serbia's law belongs, as well) has led to the establishment of balance and transparency of sanctions for its violation in protecting the interests of Insurers together with the interests of the Insured. In the light of the above, we propose, further below, the text of the rephrased article 1433 of the Draft Civil Code in which: 1) para 1 stipulates that the obligation to cooperate arises at the request of the Insurer and establishes a certain unlimited number of duties for the Insured included in that cooperation, and for some of them also the conditions under which their fulfilment may be required by the Insurer; moreover, it stipulates the term within which duties must be fulfilled and the moment from which the term starts to run, as well as the obligation of the Insurer to warn the Insured of the consequences of a delay or other violation of duty, including the filing of a false claim; 2) para 2 stipulates the rights of the Insurer when the Insured violates the duties comprising the obligation of cooperation, conditioned by the level of the Insured's fault for the violation and the nature of the possible consequences of the violation; 3) para 3 extends the obligation to cooperate to third party beneficiaries; 4) para 4 envisages that a written or textual form may be agreed for the submission of information and also a deadline arranged for the fulfilment of duties for realizing the cooperation and a place where the duty to deliver the information is deemed to have been fulfilled, and 5) para 5 stipulates that the sanctions referred to in paragraph 2 also apply to violation of other contractual or legal liabilities of the Insured upon occurrence of the insured event; this provision incorporates into our proposal a part of the existing wording of art. 1433 of Draft Civil Code in compliance with the proposed new paragraphs 1-4 in order to regulate, in general terms, the consequences of the violation of the contractual and legal obligations of the Insured upon occurrence of the insured event for which no specific sanctions are prescribed under the Law on Contracts and Torts and Draft Civil Code.

Obligation to Cooperate upon Occurrence of Insured Event Article 1433

Upon occurrence of the insured event, the Insurer may require that the Insured cooperate with him in determining the insured event and the extent of obligations of the Insurer to pay the agreed indemnity, by fulfilling, in due time, the reasonable requirements of the Insurer, in particular those relating to the fulfilment of his duty to provide all the information he knows about the causes and consequences of the insured event and deliver particular evidence if justified in the particular case and obtainable without any major cost and by access to the damaged item. An appropriate or contractual period begins from the date when the Insurer identifies the person entitled to receive indemnity and, in the cases when that person is named in the Insured's notification of the occurrence of the insured event, from the date when the Insurer has sent his request to the Insured, to remind him of the consequences of the delay or another violation in the performance of duties.

In the event of violation of the duty referred to in para 1 of this article with the intention to influence the determination of the existence of the obligation of the Insurer to indemnify and the extent of such obligation or in negligence and knowing that this will probably affect the determination of the existence of the obligation to pay indemnity or the extent thereof, the Insurer shall not be obliged to pay the insurance indemnity. Otherwise, the indemnity shall be reduced to the extent that the Insurer proves that he has sustained damage due to such violation. The burden of proving ordinary negligence is borne by the Insured.

If the right to a contracted indemnity belongs to a third party, he is obliged to fulfil his duties in accordance with par. 1 and 2 of this Article.

The duty to provide information may be contracted in writing or in a text form, and if the contract provides for a deadline for the fulfilment of the duty to provide information and evidence, the time limit must be reasonable and in no case shorter than five days. Delivery is considered to have been made when the documents are sent.

If, upon occurrence of the insured event, the Insured or a third party beneficiary fails to execute a contractual or legal liability for the violation of which the law does not impose a special sanction, the provisions of the preceding paragraphs apply.

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