THE ISSUE OF THE INSURANCE TERMS IN THE LEGISLATURE OF THE COUNTRIES OF THE FORMER SFRY

Lidija ŠIMUNOVIĆ
PhD, Assistant at the Department of Commercial Law,
Faculty of Law Osijek,
University J. J. Strossmayer Osijek, Croatia
lisimun@gmail.com

Abstract
Insurance terms are general contract terms, which are drafted in advance for the majority of insurance contracts. In the legal systems of the countries of the former SFRY are not explicitly defined, and their meaning is drawn from the definition of general terms and conditions from the relevant Obligations Acts in Croatia, Slovenia, Serbia, Bosnia and Herzegovina, Macedonia and Montenegro (hereinafter, the national OAs). This paper starts with the definition and the analysis of the normative provisions for the insurance terms in the countries of the former SFRY. Afterward, the author addresses the grounds for the determination of the invalidity of insurance terms. The central part of the paper contains analysis of the case law regarding insurance terms. In the last part, the author concludes that since all the countries of the former SFRY have the same normative regulation and same or very similar market conditions of insurance terms, in those countries the insurance terms should be treated and interpreted in the same manner.

***Key words**: general business terms, insurance terms, insurance contract, the principle of conscionability and fairness.*

Introduction

In a broader sense, based on their legal nature, insurance terms are considered general contract terms which are drafted in advance for the majority of contracts, and they are used in almost every insurance contract in the contemporary legal transactions.[1] Their frequent use is a consequence of

[1] Germ. Allgemeine Versicherungsbedingungen (AVB). For more about legal nature of general contract terms see: Goldštajn, A., Trgovačko ugovorno pravo, Međunarodno i komparativno, Zagreb, 1991, p. 161; 6, Horak, H., Dumačić, K., Preložnjak, B., Šafranko, Z., Ubod u Trgovačko pravo, Zagreb, 2011, p. 63, MüKoBGB/Basedow, 8. izdanje 2019, BGB § 305 par. 1; HK-BGB/Hans

the practicality they provide, because they accelerate the business dealings and reduce the duration of the process of contract conclusion.[2] Despite the undeniable advantages of insurance terms, there were many case in practice which revealed their disadvantages as well. Their drafting and incorporation into the insurance contract is dominated by the underwriters as the stronger contracting party, as they unilaterally determine the insurance terms. The competence of the other side, i.e. the insured in such situations is reduced to the bare minimum. Therefore, insurance terms contravene the principle of conscionability and are thus invalid because the contracting parties were unable to fully negotiate the conclusion of the insurance contract, and they are often unaware of the fact that certain provisions of the insurance terms are unfair. This is not only an issue which occurs in highly developed countries, but in the countries of the former SFRY as well.[3]

Considering the fact that these countries share a common legal tradition, their provisions regulating the matter of insurance terms are very similar or only differ slightly in most cases. The term and the requirements

Schulte-Nölke, 10. izd., 2019., BGB § 305 para. 3; Stadler:Jauernig, Bürgerliches Gesetzbuch, 2018, para. 1. For EU see: Brömmelmeyer, C., Rüffer/Halbach/Schimikowski, Versicherungsvertragsgesetz, 3. Edition, 2015, para. 19-24.

[2] For Croatia see: Art 295 par 1 of the Croatian Obligations Act (hereinafter: COA), The Official Gazette (hereinafter: OG) 35/05, 41/08, 125/11, 78/15, 29/18. For Serbia see: Art 142 Serbian Obligations Act, OG SFRY 29/78, 39/85, 45/89, 31/93, 1/03 (hereinafter: SrbOA). For Bosnia and Herzegovina see: Art 142 of the Obligations Act of Bosnia and Herzegovina OG 29/78, 39/85, 45/89, 57/89, 31/93, 2/92, 13/93, 29/03, 42/11 (hereinafter: BHOA). For Montenegro see: Art 136 and 137 of the Obligations Act of Montenegro, OG 47/08 (hereinafter: MNOA). For Slovenia see Art 120 of the Obligations Act of Slovenia, OG 83/01 and 32/04 (hereinafter: SLOA). For Macedonia see Art 130 of the Obligations Act of Macedonia, OG 18 (hereinafter: MOA). Mentioned laws follows German legislative regarding general contract terms which also have broader definition of general contract terms. See §§ 305-309 Das Bürgerliche Gesetzbuch (hereinafter: BGB). For legislation on insurance terms in German Law see: German insurance Act from 1992 (Gesetz über die Beaufsichtigung der Versicherungsaufsichtsgesetz, BGBl.1993 I S. 2, hereinafter: VVG). For more on it see: Reiff: Langheid/Wandt, Münchener Kommentar zum VVG, 2. Edition, 2017, para. 1-6.

[3] Term countries of the former SFRY refers to the Socialist Federal Republic of Yugoslavia (SFRY), also known as Yugoslavia, which was made made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. For i.g. Germany see: Brömmelmeyer, C., Rüffer/Halbach/Schimikowski, Versicherungsvertragsgesetz, 3. Edition, 2015, para. 19-24.

for the invalidity of insurance terms in the national laws of the countries of the former SFRY are primarily drawn from the term and requirements for the invalidity of general contract terms. Therefore, the starting point for the analysis of insurance terms are the national laws regulating this subject matter in the countries of the former SFRY. These are the Laws on Obligations which are in force today in Croatia, Slovenia, Serbia, Bosnia and Herzegovina, Macedonia and Montenegro (hereinafter, the national OAs). Aside from the contract terms, the national OAs and the relevant insurance contract contain a special provision whereby the insurance terms providing that the insured loses the right to their insurance claim if they do not fulfill some of the statutory or contractual requirements are invalid.[4]

In light of the above, the aim of this paper is to provide the first systematic analysis of the issue of insurance terms, which is manifested in the same or very similar manner in almost all the countries of the former SFRY. The paper primarily analyzes the provisions of the Croatian OA, and any discrepancies in the regulation of this subject matter in the other national OAs will be highlighted separately. Thereby, the analysis in this paper is limited only to the national provisions of the OAs of the countries of the former SFRY, and not the special provisions of the EU consumer law regulating this subject matter.

This paper starts with the definitions of insurance terms and the analysis of the normative provisions of the insurance terms in the legislatures of all the countries of the former SFRY.[5] The central part of the paper contains analysis of the *case law* regarding insurance terms. In the last part, the author concludes that all the countries of the former SFRY had and still have the same or very similar market conditions and normative regulation of insurance terms. Therefore, in those countries the insurance terms should be treated and interpreted in the same manner.

[4] In that sense see for Croatia art. 942 COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA. For German law see Art 28. Par. 2. VVG

[5] For more about that matters see: Mišćenić, E., Nepoštene odredbe u ugovorima o kreditu, Nepoštene ugovorne odredbe: europski standardi i hrvatska provedba, Zbornik radova, Tomljenović, V., Petrić, S., Mišćenić, E.(edt.), Rijeka, 2013, pp. 113¸ Brömmelmeyer, C., Rüffer/Halbach/Schimikowski, Versicherungsvertragsgesetz, 3. Edition, 2015, para. 19-24.

1. The definition and types of insurance terms

Although the national OAs do not expressly define insurance terms,[6] their meaning is derived from their legal nature, so in a broader sense, they can be considered as contractual provisions which are drafted for multiple insurance contracts and which the underwriter offers the insured prior to, or at the time of the conclusion of the contract, whether they are contained in a standard agreement or the insurance contract explicitly refers to them.[7] Insurance terms are, thus, legal sources which are of a contractual nature and become a part of the contract under the condition that they are incorporated into the contract in the appropriate manner and they are applicable right after the cogent norms.[8]

Insurance terms in the narrow sense, based on the specificities of insurance law can be defined as a list of contractual provisions which the underwriter adopts for in the course of concluding insurance contracts, which govern the basic questions of the contractual relationship.[9]

[6]There is no universal approach in the literature regarding the time of the origin of standard terms. Some authors state they originate from 15th century Italy, and others claim they first appeared in England at the beginning of the 17th century. For more on this, see: Ledić, D., Kontrola općih uvjeta poslovanja kod ugovora o prodaji, Banja Luka, 1983, p. 34. For comparative laws beyond the former SFRY countries see: Brömmelmeyer, C., Rüffer/Halbach/Schimikowski, Versicherungsvertragsgesetz, 3. Edition, 2015, para. 19-24.

[7]Art 295 par 1 of the COA, for more details see Gorenc, V., Komentar Zakona o obveznim odnosima, Opća redakcija, Zagreb, 2014, p. 460-461. For Serbia see: Art 142 of the SrbOA, for Bosnia and Herzegovina see: Art 142 of the BHOA, for Montenegro see: Art 136 and 137 of the MNOA, for Slovenia see Art 120 of the SLOA, for Macedonia see Art 130 of the MOA. Under EU law, standard terms are contractual provisions which are prepared in advance and which relate to the conclusion a higher number of contracts of the same type, whose provisions were not previously negotiated by the parties. Miladin, P., Ugovaranje klauzula s paušaliziranim zahtjevima za naknadom štete i klauzula u ugovornoj kazni (Pld-klauzule) putem općih uvjeta poslovanja i među trgovcima, Zbornik Pravnog fakulteta u Zagrebu, Vol. 52, (2002), no. 6; p. 1290. For German Law see: See §§ 305-309 BGB.

[8]For Croatia see Art 295 par 3 of the COA, for Serbia see: Art 142 par 2 of the SrbOA, for Bosnia and Herzegovina see: Art 142 par 2 of the BHOA, for Montenegro see: Art 137 par 2 of the MNOA, for Slovenia see Art 120 par 2 of the SLOA, for Macedonia see Art 130 par 2 of the MOA. Ćurković, M., Ugovor o osiguranju-Komentar odredaba Zakona o obveznim odnosima, Zagreb, 2017,, p. 52 (hereinafter: Ćurković, M.).

[9]Pravni leksikon, Leksikografski zavod Miroslav Krleža, Zagreb, 2007, p. 928; Ćurković, M., op. cit. note 7, p. 51.

Depending on their content and the type of insurance contracts they refer to, they can be divided into general, special and additional insurance terms.[10]

The content of the general insurance terms depends on the will of the underwriters, because they are drafted in advance by them.[11] They are universally applicable to all insurance contracts of a certain series and a certain type of underwriter.[12] Although the content of general insurance terms is not expressly provided, it has been standardized over time, and today the general insurance terms mostly consist of: the insured object, the exclusion of insurance, the obligations of the contracting parties, the provisions on the conduct in cases of the occurrence of the insured event and the provision on the competent court for potential disputes.[13]

The second type of insurance terms are the special insurance terms, or "special provisions" which usually refer to personalized risk.[14] If the contract contains special provisions, they have precedence over the general insurance terms and they apply even if there is no special clause indicating such application. This is due to the fact that the parties negotiated these terms separately during the conclusion of the insurance contract.[15] Therefore, the special provisions are the policy terms which are left blank in practice, with suggested answers prepared in advance. They usually refer to the insured risk, objects or persons, the name of the contracting parties or the insured, the amount of insurance and the premium which will be paid. These special provisions are selected and accepted by the insured from the offer of the underwriter.[16]

The third type of insurance terms are the additional terms. These are clauses which complement the general and special insurance terms and they are mostly used for non-typical insurances, such as very rare professions or the insurance of very rare machines.[17]

In case the general or special terms and a provision of the policy are in competition or in contradiction, the policy provision will prevail. In case a written and machine typed provisions are in collision, the written provision prevails, and in case such provisions collide with hand-written provisions,

[10]Ćurković, M., p. 51.

[11]Matijević, Berislav, Osiguranje u praksi, Zadar, 2007, p. 153; Reiff: Langheid/Wandt, Münchener Kommentar zum VVG, 2017, para. 1-2.

[12]Ćurković, M., p. 51.

[13] Ibid, p. 52.

[14] Ibid.

[15] See: MüKoBGB/Basedow, 8th Edition 2019, BGB § 305, para. 34.

[16] Ibid, p. 53. For German law see: Reiff: Langheid/Wandt, Münchener Kommentar zum VVG, para. 114.

[17] Ibid, p. 53.

hand-written provisions will prevail.[18] In that case, the burden of proof lies on the party raising such a claim.[19]

2. The incorporation of the insurance terms into insurance contracts

The national OAs uniformly provide that the insurance terms are binding only if they were known or should have been known to the other party at the time of the conclusion of the contract.[20] There are, however, doubts on how it is proven that the insurance terms were known or should have been known to the insured.[21]

This issue is addressed to a certain extent by the national OAs which provide that the contract terms have to be published in the appropriate manner in advance. However, considering the specificities of the insurance contract, this criteria for general contract terms is not sufficient. The first option is for the underwriter to warn the insured that the insurance terms are an integral part of the contract and to provide them with the text during the conclusion of the insurance contract.[22] Another option is that the underwriter prints the insurance terms on the policy.[23] Therefore, the insurance terms should not only be published by regular means through the web or at the premises of the underwriter, which is the practice for other contracts, but they must, in fact, be provided to the insured or printed in the insurance

[18] Art 926 par 5 of the COA. For German law see: Reiff: Langheid/Wandt, Münchener Kommentar zum VVG, para. 9.

[19] Šoljan, V., O konkurenciji općih uvjeta poslovanja dviju ugovornih strana, Zbornik Pravnog fakulteta u Zagrebu, Vol. 56 (2006), Special Edition number p. 218. For more on this see: Barbić, J., Sklapanje ugovora po Zakonu o obveznim odnosima (suglasnost volja), Zagreb, 1980, p.62. For burden of proof in Germany see: MüKoBGB/Basedow, 8th Edition 2019, BGB § 305, para. 100.

[20] Art 294 par 5 of the COA. Also see: Ćurković, M., op. cit. note 7, p. 55. For other former SFRY countries see: for Serbia see: Art 143 of the SrbOA, for Bosnia and Herzegovina see: Art 143 of the BHOA, for Montenegro see: Art 138 MNOA, for Slovenia see Art 121 of the SLOA, for Macedonia see Art 131 of the MOA.

[21] Ibid.

[22] Art 926 COA.

[23] Art 296 par 3 of the COA. Art 296 par 4 of the COA provides that the fulfilment of the mentioned art must be stated on the policy. For other former SFRY countries see: for Serbia see: Art 143 of the SrbOA, for Bosnia and Herzegovina see: Art 143 of the BHOA, for Montenegro see: Art 138 MNOA, for Slovenia see Art 121 of the SLOA, for Macedonia see Art 131 of the MOA.

policy or in the text of the contract.[24] Only if the insurance terms were incorporated in the insurance contract is such a way, it can be assumed that they were known or should have been known to the insured. In case the underwriter fails to incorporate them in the aforementioned way, the insurance contract would remain valid, but the insurance terms would not apply to the contract.[25]

In order to avoid subsequent doubts on whether or not the terms are indeed provided, the most practical option is to print them on the insurance policy. According to some authors, this is not a common practice, because it makes the text of the policy too long.[26] Thus, underwriters are more likely to indicate that the insurance terms are an integral part of the relevant contract, but they do not provide further details.[27] Therefore, there can be issues in determining the exact terms that were provided during the conclusion of the insurance contract and whether they were revised in the meantime.

The next question is whether persons who are not contracting parties, such as the damaged party and a non-signatory beneficiary of the insurance contract, can invoke the fact that the insurance terms were not provided to the insured at the time of the conclusion of the insurance contract. There is no doubt that the damaged person has the legal interest to raise this claim, but they have a subsidiary role in the insurance contract and they would not be able to raise such objections.[28]

The moment of the conclusion of the contract is considered as the time of the incorporation of the insurance terms, and all subsequent revisions and amendments must be consensually accepted. The only time that the potential revisions or amendments of the insurance terms could be incorporated into the contract without the consent of the insured is if such revised or amended terms would benefit the insured.[29]

An additional issue in the incorporation of insurance terms is their interpretation. There could be situations where the incorporated insurance terms are unclear or they are interpreted by the parties in different ways. The provisions of the national OAs indicate that in such cases these provisions

[24]Ćurković, M., op. cit. note 7, p. 55.

[25]Ibid. p. 54. See also: SCRC Rev-2517/96 from 26.3 1997.

[26]Čuveljak, J., Primjena općih uvjeta za osiguranje, Vol. 51, 2012/3, Pravo u gospodarstvu, p. 842.

[27]Ibid.

[28]This was confirmed by the Croatian judicial practice. See: SCRC, Rev 807/2006 from 29.8.2006 and Osiguranje, Instituti, zakonski tekstovi i EU regulativa, p. 239.

[29]SCRC, Rev 1711/1997 from 28.3.2000. Also see: Matijević, B., Osiguranje, instituti, zakonski tekstovi I EU regulative, Rijeka, 2017, p. 245.

should be interpreted as written.[30] The terminology of the insurance terms is not always clear. Therefore, in cases of doubt, the interpretation should be applied, as it aims to determine the actual intention of the parties and to adhere to the general principles of the law on obligations.[31] Considering the fact that the insured is the weaker contracting party, unclear insurance terms are interpreted against the underwriter.[32] This reasoning arises out of the provisions of the national OAs which provide that ambiguous terms of standard contracts or those which were unilaterally drafted and proposed by one party will be interpreted in favor of the other party.[33]

3. The grounds for the invalidity of the insurance terms

The invalidity of insurance terms can be determined in two ways: *ex ante* and *ex post*. The first idea refers to situations in which a competent state authority provides approval for the application of insurance terms.[34] This kind of oversight of insurance terms was abandoned in the former SFRY. The prohibition of *ex ante* review of insurance terms was re-affirmed jn Croatia and Slovenia upon their admission into the EU, due to the fact that the EU Directives of the Third Generation prohibit member states from conducting *ex ante* review of insurance terms.[35]

Another form of review is *ex post* review. It occurs in cases where the insurance terms are reviewed by a court based on a particular claim.[36] This approach is applied in all the legal systems in the countries of the former SFRY today. The right of the insured to invoke the invalidity of certain or all insurance terms arises out of the provisions of the national OAs based on the idea that contractual terms are invalid if they are contrary to the principle of conscionability and fairness, if they create an obvious inequity in the rights and obligations of the contracting parties (the insured, the underwriter or the insurance beneficiary) or if they would hinder the fulfillment of the purpose of the insurance contract, even if the general insurance terms which

[30] Art 319 par 1 of the COA. Also see: Ćurković, M., op. cit. note 7, p. 56.
[31] Art 319 par 2 of the COA. For interpretation of insurence terms in German Law see: Reiff: Langheid/Wandt, Münchener Kommentar zum VVG, para. 78.
[32] This is the so-called *contra preferentum* doctrine. For more on this see: Matijević, B., op. cit. note 27, p. 111; Ćurković, M., op. cit. note 7, p.59.
[33] Art 319 par 1 of the COA.
[34] Ćurković, M., op. cit. note 7, p. 58.
[35] Ibid. For more about EU regulation see: Nemeth, K., European Insurance Law, A Single Insurance Market?, EUI Working Paper LAW No. 2001/4, San Domenico, 2001, pp. 32.
[36] Ibid.

contain them were approved by the competent authority.[37] If the national courts determine the invalidity of insurance terms, even though they are an integral part of the insurance contract, the invalidity of specific provisions does not render the entire insurance contract invalid.[38] However, nothing prevents the insured from claiming the invalidity of all the provisions, and not only one or more of the provisions of the insurance terms.

In addition to this rule, the national courts of the countries of the former SFRY apply the general rule on invalidity, which can also be applied to the review of the invalidity of insurance terms. According to this rule, insurance terms cannot be contrary to the Constitutions of the countries of the former SFRY, mandatory norms and social morality, in accordance with the general rules on invalidity.[39]

Furthermore, national OAs provide additional grounds for the invalidity specifically for the provisions of insurance contracts. These provisions provide that insurance terms which deny the insured's right to an insurance claim if they fail to fulfill some statutory or contractual obligation after the insured event occurs, are invalid.[40]

The insured must notify the insurer on the occurrence of the insured event, within three days of becoming aware of such an event, unless in cases of life insurance.[41] However, if the insured fails to do so within the deadline set forth by the insurance terms, the national OAs provide that this cannot result in the loss of the right to an insurance claim, but the insured must compensate the insurer for any damages incurred in such circumstances.[42]

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[37]Cf. Art 296 of the COA. For other former SFRY countries see: for Serbia see: Art 143 of the SrbOA, for Bosnia and Herzegovina see: Art 143 of the BHOA, for Montenegro see: Art 138 MNOA, for Slovenia see Art 121 of the SLOA, for Macedonia see Art 131 of the MOA.

[38]See i.g. 296 of the COA. For other former SFRY countries see: for Serbia see: Art 143 of the SrbOA, for Bosnia and Herzegovina see: Art 143 of the BHOA, for Montenegro see: Art 138 MNOA, for Slovenia see Art 121 of the SLOA, for Macedonia see Art 131 of the MOA. Also see: Perović, S.; Stojanović, D., Komentar zakona o obligacionim odnosima, 1. knjiga, Kragujevac, 1980, p. 462.

[39]See i.g. Art 10 of the COA.

[40]See i.g. Art 942 of the COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA.

[41]Art 941 par 2 of the COA.

[42]Art 942 of the COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA. For German law see Art 28. Par. 2. VVG.

The effects of the *ex post* review are limited. The determination of the invalidity of insurance terms related to private litigation only has *inter partes* effect and only relates to the specific contract which was concluded between the insured as the claimant and the insurer as the respondent.[43] The remaining insured persons who have concluded the same or similar insurance contracts under the same insurance terms with the same insurer cannot invoke the invalidity of the insurance terms which was determined by a court for other insured persons. They have the option to initiate their own litigation to determine once again whether the insurance terms are invalid, regardless of the previous determinations of invalidity for the same insurance terms determined by a court in another contractual relationship.[44]

Therefore, regardless of the fact that insurance terms are generally applied to all or multiple types of insurance contracts of a certain insurer, in the legal systems of the countries of the former SFRY, the invalidity of insurance terms has to be determined for each individual contract, because insurance terms are a part of a contracts between two parties.

Although such a position is in line with the legal nature of general business terms, it does merit some criticism. It leads to a situation where the more active insured persons, who are willing to engage in the unpredictable and long litigation in the countries of the former SFRY will enjoy legal protection for a legal transaction, while the less active will not enjoy this protection though they participated in the exact same legal transaction. The definition of insurance terms itself indicates that they apply to a larger number of insurance contracts, which usually have the same or similar content. Therefore, there is no logic behind not providing an *erga omnes* effect to the determination of invalidity.

On the other hand, it is a fact that each insurance contract is specific, and it relates only to the contracting parties. However, the issue of specificity is questionable for insurance contracts, because it is a typical contract with a standardized content for almost all insured persons. In light of the above, the culture of ethical conduct of the insurance companies should be strengthened, in order to amend insurance terms which were found to be invalid. Thus, conduct, which is contrary to the principle of conscionability and fairness, would be avoided at least *pro futuro*, and such insurance terms would no longer be contracted.

[43]For German Law see: Terno: Gerichtliche Inhaltskontrolle Allgemeiner Versicherungsbedingungen, 2004, para. 46.

[44] On the legal effects of invalidity, see: Blagojević, B., Krulj, V., Komentar Zakona o obligacionim odnosima, 2nd edition, Beograd, 1983., p. 431.

4. The criteria for the determination of the invalidity of insurance terms in the case law

There have been numerous case law in the countries of the former SFRY related to the *ex post* review of the invalidity of insurance terms. The aim of the analysis is to determine the criteria which can be used by the courts of the countries of the former SFRY in their *ex post* analysis of insurance terms. The same normative regulation and the similar market conditions allow the analogy and universal application of the findings of the Croatian judicial practice to other countries of the former SFRY.

4.1. Time limitation for the notice of the occurrence of the insured event

Article 942 of the Croatian OA provides that that insurance terms which deny the insured's right to an insurance claim if they fail to fulfill some statutory or contractual obligation after the insured event occurs, are invalid.[45] In one case, the insurer refused to pay the insurance premium to the insured because he did not report the occurrence of the insured event within three days.[46] The court found that the provision of the insurance terms which denied the right to an insurance claim to the insured due to the failure to notify the insurer of the occurrence of the insured event was invalid and had no effect on the right of the insured to the insurance premium.[47]

Therefore, the failure to provide notice on the insured event in the prescribed deadline is not a default of the insured which leads to the loss of ancillary rights from the insurance contract. In light of the above, any provision of the insurance terms which denies the right to the insurance premium to the insured due to a failure to provide notice of the occurrence of the insured event within a certain time limit, or which denies the right to the payment of interest, if the insurer failed to pay the insured amount in a timely manner, is invalid.[48]

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[45] All the countries of the former SFRY have the same o normative regulation of insurance terms and thus the rightful determinations of the Croatan judicial practice regarding insurance terms can be universally applied in the other national legal systems of the countries of the former SFRY. In that line see: for Serbia see: Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA. For German law see Art 28. Par. 2. VVG.

[46] The County Court in Koprivnica, Gž.917/98 from 6.5.1999. Cf. Ćurković.

[47] SCRC, Rev. 819/96 from 7.3.2000. Also see the County Court in Koprivnica, Gž.917/98 from 6.5.1999.

[48] SCRC Rev. 819/96 from 7.3.2000. Conclusion is based on: Art. 942. Of COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA,

4.2. Proof of the occurrence of the insured event

The judicial practice has also discussed the invalidity of insurance terms which provided the procedure and requirements for proving the insured event. The subject matter of the dispute was the claim for the payment of the insurance premium after the occurrence of the insured event, i.e. theft. The burglary theft occurred after an employee of the insured person left the door unlocked, and the thief stole a larger amount of sport equipment and other objects. A criminal charge was filed against the unknown perpetrator for the criminal offense of serious theft, but there were no signs of breaking and entering at the scene of the event. Aside from the director and employee of the claimant, keys to the warehouse were also in the possession of a friend, who was not an employee of the claimant.[49]

The court found that the insurer was not obliged to pay the insurance based on the relevant policy due to the fact that the insured did not prove the occurrence of the insured event, based on the special insurance terms, because there were no signs of breaking and entering at the scene of the event, nor was it made probable that the warehouse was opened by a false key, especially considering the fact that a third key was in the possession of a friend who was not an employee of the claimant, nor was this circumstance shared with the police when the crime was reported.[50]

In its reasoning, the court expressed its position that the provision of special terms defined the event which created an obligation of insurance payment by the insurer under the contract. As such, it only defines the type and scope of insurance and it is an integral part of the relevant insurance contract, whose application was expressly stipulated.[51] Therefore, the insured bore the burden of proving that the insured event indeed occurred. Considering the fact that the insured did not provide, nor attempted to provide, all the information and evidence which was needed for the establishment of the occurrence of the insured event The Supreme Court of the Republic of Croatia (hereinafter: SCRC) concluded that in this case the

for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA.

[49]SCRC, Rev-345/2008-2 from 15. 9. 2009. The first-instance decision of the The Municipal Civil court in in Zagreb Pn 3076/2000 from 24.3.2004, confirmed by the second-instance decision of the County Court in Zagreb Gžn 393/2005 from 30.5.2007. Also available at: www.osiguranje.hr, accessed on 12. 4. 2019.

[50] Ibid.

[51] Ibid.

provision of the special insurance terms was not invalid.[52] Thus, it can be concluded that the occurrence of the insured event has to be proven, but it is contrary to the principle of conscionability and fairness to oblige the insured to rely on the findings of the police inquiry as the only relevant evidence.[53]

4.3. The place of the occurrence of the insured event

The judicial practice also discussed whether the provision of the place where the insured event must occur in the insurance terms is contrary to the principle of conscionability and fairness, i.e. whether the payment of the insurance premium can be denied because the insured event occurred in another place, where the police refused to conduct an inquiry. In one case, the insured event occurred on the yard of the insured's business premises. In this case, a truck drove into a wall in order to avoid a collision with a forklift which was also driving in the yard, which caused material damage to the insured truck. [54]

[52] Ibid. Conclusion is based on: Art. 942. Of COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA.

[53] The Croatian courts have concluded that, if the insurance terms provide that the driver of a motor vehicle must have a valid driver's licence, and that if in the moment of the occurrence of the insured event the driver does not, the insurer is not obliged to pay the insurance premium. Considering the fact that the contracting parties determine their relationship based on dispositive rules, such a provision is a consequence of the principle of freedom of contracting and defining obligations, and thus it was not invalid. Furthermore, the courts stated that the provision demanding the possession of a driver's licence is not particularly burdensome for the insured, because it is also an obligation under the traffic laws. (SCRCRev-410/13 from 15.12.2015; SCRC Rev 378/13-2 from 7.12.2016, SCRC Rev 2836/14 from 6.11.2018, SCRC Rev 87/2015-2 from 5.12.2018). On the other hand, if the driver was under the influence of alcohol at the time of the occurrence of the insured event, the Croatian courts held that there should be a determination of the causal link between the fact that the insured vehicle was driven by a driver without the appropriate licence under the influence of alcohol and the occurrence of the damaging event. (SCRCRev-1018/10 from 19.1.2011.). Therefore, the courts recommend that the key issue related to whether or not the driver was in possession of a driver's licence should be whether or not he passed the driving exam, and not whether he was in physical possession of it at the moment the insured event occurred. (Split, 17.4.2014).

[54] See the decision of the Municipal court in Varaždin P.3715/04-31 from 16. 11. 2005. Partially confirmed by the Decision of the County Court in Varaždin Gž156/06-2 from 13.2.2006.

The legal grounds for the insurance claim by the insured was the all-risk insurance contract along with the accompanying insurance terms of the motor vehicles of the insurer. Although the relevant vehicle was covered by the insurer's all-risk motor vehicle insurance, the insurer refused to make the payment due to, among other things, the insured event having occurred at the yard of the business premises and not in a public space, as provided by the insurance terms. For this reason, the police refused to come and conduct an inquiry, which was one of the prerequisites for the payment of the insurance premium.[55]

In this specific case, the court found that the insurer was erroneously invoking the provisions of its insurance terms which exclude the payment obligation towards the insured if he does not call the police to conduct and inquiry after the occurrence of the insured event. In the relevant insurance terms, there was an obligation to conduct an inquiry only if the insured event, or the accident occurs due to a theft, robbery, burglary, illegal confiscation of a vehicle, fire and explosion. In such situations, the insured was obliged to report the occurrence of the insured event to the police, and the police should then file an official report on this event.[56]

Considering the fact that in this case none of the abovementioned circumstances occurred, the court concluded that, although the insured event occurred on the business premises and not a public space, there was no need to call the police to conduct an inquiry, because the police is not obliged to do so if an accident does not occur in a public space. Although this is not an invalidity case, it is worth mentioning in the context of the invalidity of insurance terms, because it deals with the issue of stipulating additional obligations for the insured after the occurrence of the insured event.[57]

There are no obstacles for insurers from the territory of the former SFRY to determine where the insured event has to occur. It is their inherent right as insurers. However, they cannot oblige the insured to ensure an inquiry of the event if it is beyond their capability. If the occurrence of the insured event was determined beyond any doubt through other evidence, there are no obstacles to the payment of the insurance premium. Making the payment conditional on the presence of the police in places where it is known that they will not be able to come is contrary to the provisions of the OA, and it is an imposition of additional obligations after the occurrence of

[55] Ibid.

[56] Ibid.

[57] Ibid. Conclusion is based on: Art. 942. Of COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA.

the insured event. Whether or not the police will conduct an inquiry is outside of the scope of influence of the insured.[58]

4.4. The mandatory measurement of alcohol levels of the driver after the occurrence of the insured event

The judicial practice has extensively dealt with the mandatory breathalyzer test following the occurrence of the insured event. The issue in one case was whether the insured was obliged to ensure a breathalyzer test at his own expense because the police refused to come to the scene.[59] The insurance terms provided that the insured was obliged to have his alcohol levels measured either by the police or by a doctor, unless if it would be harmful to his health.[60]

The subject matter of the dispute was the request of the insured for the payment for the material damage which was sustained by his automobile which was insured by a all risks policy of the insurer.[61] The insurer invoked a provision of the insurance terms which denies the insured's rights to payment if they do not ensure their alcohol levels immediately after the traffic accident.[62] The court found that the insurer was in fact obliged to compensate the total material damage sustained by the insured on his car due to the occurrence of the insured event.[63]

Therefore, the insured has the right to the insurance payment if the driver covered by all-risk insurance conducts a breathalyzer test after a car accident, reports the damage sustained on the vehicle and if the police comes to the scene of the accident. The stipulation of such an obligation is contrary

[58]The conclusion was drawn based on the determinations in the previously mentioned decisions.

[59]See the Decision of The Municipal Civil court in Osijek, P-276/02 from 23.4.2002.

[60] Ibid.

[61] Ibid. Conclusion is based on: Art. 942. Of COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA.

[62] Ibid. Croatian courts have generally adopted the position that the insurer does not have to make the insurance payment, if the insured is under the influence of alcohol when the insured event occurs. However, if the insured leaves the scene of the accident that does not automatically imply that he refused the breathalyser test and that he was under the influence of alcohol. (The County Court in Split, Gžo-119/11 from 2.8.2013, the County Court in Split, Gžnš-18/12 from 17.7.2013, SCRC, Rev-1209/10-2 from 28.12.2011)

[63]See SCRC, Rev 1067/2004 from 16.11.2005. Also see Matijević, B., op. cit. note 27, p. 255.

to the provision of the Croatian Law on Road Traffic Security which provides that there are no legal obligations of the participants of a traffic accident.[64]

4.5. The duty to present the car keys, ownership documents and driver's license after the theft of an automobile

There were cases before the courts where the issue was the validity of the insurance terms which provided that the owner of a vehicle loses the right to the insurance payment if he is unable to present the original keys, ownership documents and driver's license after reporting the theft of the vehicle to the insurer.[65] These were situations where the insured were unable to present the mentioned items, because they were left in the stolen automobile.[66]

In those cases, the courts took the position that the insurer was obliged to compensate the damage sustained by the insured, because the insured did not cause the insured event intentionally, fraudulently or by gross negligence.[67] The courts concluded that that the insured acted with the care of an average driver if he locked the insured automobile, and that leaving the documents in the automobile does not affect the occurrence of the insured event.[68] Therefore, it would be unjust to deprive the insured the payment of the insurance premium for the theft of the insured automobile because of his inability to present the ownership documents and license to the insurer.[69]

[64]The Decision of the Commercial Court in Split, P 3553/01 from 11.3.2003, confirmed by the decision of the High Commercial Court of the Republic of Croatia, Pž 7102/03 from 19.9.2006, County Court in Bjelovar, Gž 1158/2004 from 23.9.2004. Also available at: www.hjk.hr. Accessed on: 14.4.2019.

[65] Ibid.

[66] The Decision of the County Court in Bjelovar, Gž 1158/2004 from 23.9.2004

[67] Ibid. Conclusion is based on: Art. 942. Of COA, Art 918 of the SrbOA, for Bosnia and Herzegovina see: Art 918 of the BHOA, for Montenegro see: Art 1105 of the MNOA, for Slovenia see Art 942 of the SLOA, for Macedonia see Art 974 of the MOA.

[68] Ibid.

[69]See the decision of the High Commercial Court of the Republic of Croatia, Pž 7102/03 from 19.9.2006; The Decision of the County Court in Bjelovar, Gž 1158/2004 from 23.9.2004. Also see: Šimac, Srđan, The Invalidity of Certain General Terms of All-Risk Insurance Contracts for Motor Vehicles, The Journal of The Faculty of Law of the University of Rijeka, 1991., v. 28, no. 1., 2007, pp. 16-17.

Conclusion

Insurance terms are contractual provisions drafted for a larger number of insurance contracts which the insurer proposes to the insured prior to or at the time of the conclusion of the contract, whether they are contained in the standard contract, or if the insurance contract expressly refers to them (i.g. Article 295 COA, Article 142 SrbOA, Article 142 BHOA, Article 136 MNOA, Article 120 SLOA and Article 130 MOA). Despite the undeniable advantages of insurance terms, there were many cases in practice which revealed their disadvantages.

At the moment of incorporation of the insurance terms into the insurance contract, the other side does not have much negotiating leverage. Such an approach results in the acceleration of the transaction, but it often leads to the invalidity of the insurance terms, and the insured are often unaware of this fact. This not only occurs in highly developed countries, but also in the countries of the former SFRY.

Insurance terms are interpreted in the same manner in the countries of the former SFRY, since these countries share a common legal tradition and similar market conditions related to insurance terms. Despite this fact, there has been scarce discussion of this and similar open legal issues in the legal literature in the countries of the former SFRY, especially those related to the invalidity of insurance terms under the national laws of these countries. This paper started with the definition and the analysis of the normative provisions for the invalidity of insurance terms in these countries. Thereafter, there was an analysis of the judicial practice with conclusions on the situations in which the invalidity of insurance terms exists.

Based on this analysis and case law, it can be concluded that, in the countries of the former SFRY, the provisions by which the insurer denies the insured payment rights if the occurrence of the insured event was not notified to the insurer within a certain period are invalid. Furthermore, it is not prohibited to provide for the place where the insured event should occur or to specify the insured risks (theft, collision, and flood). However, the police cannot make the insurance payment conditional to the conduct of an inquiry. The insured bears the burden of proving the occurrence of the insured event, but the provisions, which limit the evidence to the actions of the public authorities, such as conducting a police inquiry or a breathalyzer test, are invalid.

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