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*The International Conference „Current Challenges
of Estonian and European Insurance Law”*

**Does Estonian insurance contract law
need a change according to the
example of PEICL?**

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The essence of the problem

- In the European Union no harmonisation has been achieved in the area of insurance contract law.
- Cross-border insurance services is problematic since 28 different contract laws make cross-border activities very difficult and expensive.
- Cross-border insurance sales, on the basis of freedom to provide services and branches represented only 4-5% of total gross premiums written in the EU.



The essence of the problem

- Specialists say that European Commission policy to create a single market in insurance, has failed due to a legal framework not having been developed within which standardised insurance contracts can be bought and sold across national boundaries.
- The European Commission finds that a separate legal framework might be the best way to increase choice of product while decreasing costs for business and ensuring that consumers are adequately protected.



The essence of the problem

- Specialists in European insurance law have found that the 29th (or 2nd) regime idea should be guided from within the field of insurance law.
- The Project Group “Restatement of European Insurance Contract Law”, whose chairman is the honorable co-speaker Prof. Dr. Helmut Heiss, has compiled Principles of European Insurance Contract Law (hereinafter: PEICL).
- PEICL was drafted by leading European insurance law specialists and therefore it can be taken as „*the best possible standard*“.
- Unfortunately PEICL hasn't been enforced yet. Therefore one possibility to protect local policyholders is to compare local law with PEICL and take from the that best ideas and draft it to local law.



The essence of the problem – PEICL and Estonian law of obligation act

- This speaker limits the scope of this research comparing the PEICL with regard to the insurance law of Estonia to the following issues:
- (a) pre-contractual relations in the context of the information duty;
- (b) contractual relations in the context of aggravation of risk;
- (c) compliance of precautionary measures;
- In the speaker's opinion, these problems affect the performance of insurers' obligations the most.



Research questions:

Is the method, which we use in Estonia, where the policyholder is required to inform the insurer about all relevant circumstances in accordance with his precontractual information duty and where the insurer does not present a questionnaire to the policyholder, reasonable in modern insurance law?



Two potential regulations:

There are two ways to address pre-contractual information duty in case of insurance contracts: the insurer presents a questionnaire to the policyholder who proceeds to answer all of the questions (i), or the policyholder is required to inform the insurer about all relevant circumstances (ii).



Two potential regulations:

According to the PEICL, the policyholder has the obligation to notify the insurer during the conclusion of a contract of any circumstances that he or she is aware of or should be aware of and regarding which the insurer has asked clear and precise questions.

The LOA has rather chosen a middle ground between the two extreme regulations: on the one hand, policyholders have to inform insurers of all important facts relevant to concluding an insurance contract known to them at their own initiative; on the other hand, they should in any case submit information on any other matters upon the insurers' request.



Example from Estonian insurer insurance terms and conditions:

“the policyholder has the obligation upon entering into the insurance contract, to supply to the insurer the correct and complete data in any matter concerning the insurance contract and to inform the insurer of all significant circumstances affecting the insurable risk. Significant factors affecting the insurable risk mainly include the information requested by the insurer before entering into the insurance contract. Significant factors affecting the insurable risk also include the failure to comply with the special conditions, additional conditions or agreements set out in the insurance contract or its annexes in relation to the insurable risk”.



Research questions:

Is PEICL's requirement that aggravation can only occur *vis-à-vis* risks that are clearly defined in the insurance contract, reasonable?



But in Estonia?

Example from Estonian insurer insurance terms and conditions:

“the policyholder must immediately notify insurer of any possibility of an increase of the insured risk, unless the increase of the possibility of the insured risk was caused by a generally known circumstance, which does not affect the insured risk of only this policyholder“.



Research questions:

Does the situation where the law provides a separate definition of precautionary measures and special provisions upon violation of precautionary measures provide more sufficient protection to the policyholders than without it (as it is in Estonia)?

Precautionary measures



- By laying down precautionary measures, the insurer defines for itself a principle of what reasonably can, and cannot, be expected.
- The LOA of Estonia does not provide a separate definition of precautionary measures; therefore, the respective law do not contain special provisions on violation of precautionary measures.
- At the same time, Estonian insurers insurance terms and conditions, include precautionary measures. The insurers rely on norms that regulate general contractual obligations and consequences of the violation thereof.

Precautionary measures



- The biggest Estonian insurer, If P&C Insurance AS, home insurance terms:

Temporary electrical conductors

112. When leaving the insurance location, temporary electrical conductors must not be left energised.

Leaving a source of fire hazard unsupervised

113. It is prohibited to leave a burning hearth, a blow heater, burning candles or other sources of fire hazard unsupervised or leave minors responsible for them.

Smoking in a fire-risk zone

114. It is prohibited to smoke in rooms containing highly flammable items or materials, as well as in places where combustible liquids, gases or other flammable or explosive substances are kept.

Smoking in bed

115. Smoking in bed is prohibited.



Children, matches and incendiary equipment

116. It is prohibited to keep matches and other incendiary equipment in places accessible to minors.

Leaking gas supply systems

117. It is prohibited to exploit leaking gas supply systems.

118. In case of a gas leak gas valves must be closed and the rooms must be ventilated promptly. When so doing, one must not use naked flame, smoke, switch on or off electrical equipment.

Preventing piping from freezing

119. In a building or a room which is not heated in the heating period, or the air temperature of which falls below 0°C, water and heating systems must be emptied from water in order to prevent freezing.





Precautionary measures

- PEICL Article 4:101 (Precautionary Measures: Meaning) states: *A precautionary measure means a clause in the insurance contract, whether or not described as a condition precedent to the liability of the insurer, requiring the policyholder or the insured, before the insured event occurs, to perform or not to perform certain acts.*
- Article 4:101 of the PEICL is modeled on Article 31 Finland's Insurance Contract act.



Precautionary measures

- The occurrence of an insured event gives rise to the following questions:
 - What are the consequences if the policyholder breaches the precautionary measures included in the contract?
 - Does the insurer have the duty to indemnify and, if so, in what proportion?

Precautionary measures



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Cold winter morning and warming up the car engine



Having a training in small stadium which doesn't have secured lockers

Ordinary insurers have set for such examples precautionary measures:

- When leaving the vehicle, it must be locked, its windows, doors, sunroof, and other openings must be closed and security devices, if any, must be switched on.
- The keys to the vehicle shall be kept with care that ensures that no unauthorised persons can gain possession of these.



Precautionary measures

- In Estonia in both examples insurers have a right to refuse full amount of indemnity and court practice supports insurers.
- In Finland (*where from PEICL Article 4:101 is modeled*) in the case of warming up the car engine on a cold winter morning, insurers were allowed to reduce indemnity up to 50% and in the case of training, the insurer cannot refuse to pay an indemnity, as the policyholder's fault is minor and it is not even grounds to reduce the indemnity.

Precautionary measures

- In Finland (*from where PEICL Article 4:101 is modeled*) the reduction of indemnity or refusal to pay is allowed only where damages are causally linked to non-compliance with precautionary measures. The insurer must prove the existence of fault and its relationship to the damages. Only if such a relationship is proven and if the precautionary measures were upheld and if this was neither intentional nor grossly negligent may the indemnity be reduced by 25-33 percent.
 - Only in cases of gross negligence can the indemnity be reduced to a greater extent in Finland (refusal or 50 percent).
 - **In case of minor negligence, the damages are to be compensated in full.**
 - In cases of intent, circumstances such as age, illness, state of mind, or economic situation may determine whether partial compensation might be an option.



Precautionary measures

- Estonian insurance contract law is governed by an *‘all-or-nothing’* logic and this is questionable in modern insurance law terms of consumer protections.
- The changing of the *‘all-or-nothing’* principle was one of the most important reasons for the reform of the VVG (LOA insurance contract part is modelled from VVG).
- The speaker finds that the principle *‘all-or-nothing’* is contrary to the doctrine of reasonable expectations.



Precautionary measures

- The basic philosophy must be that insurance is taken out not just for accidental risk **but also for cases of negligent behavior** – the ‘*all-or-nothing*’ principle therefore doesn't „fit“ modern insurance law.
- The changing of the ‘*all-or-nothing*’ principle to the „*rule of proportionality*“ raises the question about policyholders’ reasonable care (critics say that policyholders do not apply reasonable care) – this is a subject for further discussion with the honorable opponent.



CONCLUSIONS

- This speaker arrived at the conclusion that compared with Estonian Law of Obligation Act, the relevant regulation provided in the PEICL is more favourable and consumer-friendly for policyholders.
- PEICL protect the policyholder's interests more widely than Estonian insurance contract law and it is reasonable.



CONCLUSIONS

- This speaker finds, that the reasonable standard, which protects the policyholder, as the weaker party in insurance contracts, concerning pre-contractual information duty, is where the law states that the insurer presents a questionnaire to the policyholder who proceeds to answer all of the questions about fundamental obligations of a policyholder to notify the insurer of all circumstances known to the policyholder which are relevant to the insurer in order to take over the risk. There is no place for the ‘own initiative’ method in modern insurance law.



CONCLUSIONS

- This speaker finds, that the reasonable standard, which protects the policyholder, as the weaker party in insurance contracts, concerning aggravation of risk and precautionary measures regulation, is where the law states that aggravation can only occur *vis-à-vis* risks that are clearly defined in the insurance contract and where the law states a separate definition of precautionary measures and special provisions on violation of precautionary measures. The speaker finds that the '*all-or-nothing*' approach is not acceptable in modern insurance law.



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Thank you