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SOME ISSUES REGARDING REFORM OF THE ENGLISH MARINE INSURANCE FROM 2015

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Abstract

The article deals with changes to the English Marine Insurance Act 1906 by the Insurance Act 2015 such as abandoning the principle of utmost good faith and replacing it with the principle of fair presentation of risk, as well as amendments to the warranty in the English Law as stipulated by the 1906 Act. At the same time, versions of Slovenian, Croatian, Montenegrin and Serbian civil law are presented, considering them in the context of the civil law (change of risk severity) and the Anglo-Saxon law (influence of warranty on the contract).

***Keywords**: utmost good faith (uberrimae fidei); fair presentation; specially agreed conditions; warranty and suspensory warranty.*

Introduction

When it comes to marine insurance, two facts are well known in the professional community. Firstly, marine insurance, as a type of property insurance, was the first to be developed and other insurance types followed. Secondly, the world's modern marine insurance is connected to the London insurance market and especially to the Lloyd's of London.

With regard to the above stated, the English Marine Insurance Act (MIA) 1906, as amended in 1909, had a particular significance and influence. This law is based on over 100 years old practice of English courts in interpreting the famous Lloyd's SG policy of 1779, so it was considered one of the most successful laws that sublimated judicial precedents in the field, and such laws in the English legal system were known as the so-called *consolidatium acts*.[2]

MIA and SG policy had a major impact on the Anglo-Saxon legal field and beyond. Special influence was exerted on Yugoslav civil law and practice after the end of the World War II, when the State Insurance Institution was established in

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[2] More on Lloyd's and SG policy: W. Dover; Brown H. R., A Handbook to Marine Insurance, London, 1979, p. 76-90 and 227-238; D. Pavić, Pomorsko osiguranje (pravo i praksa), Split, 2012, p. 42, 44 (with a photo of a new building of the Lloyd's of London) and p. 134-137; B. Ivošević, Transportno osiguranje, Beograd, 2009, p. 34-36 and 104-105.

Yugoslavia – SII (the entire economy at that time was nationalised and centralized) for the whole country. The personnel who were in charge of the Marine Insurance Division at the Institution decided to accept Lloyd's SG policy as their (SII) insurance policy, and thus naturally opted for the implementation of the English law and practice, i.e. English insurance conditions.[3]

The contract on marine insurance (navigation, since the law regulated marine and inland navigation) was regulated much later with the adoption of the Law on Marine and Inland Navigation in 1977.[4] As the Law on Contracts and Torts was adopted that year, when regulating the insurance contract, it was emphasized that it did not apply to marine or navigation insurance.

After the Law on Marine and Inland Navigation regulated the marine (navigation) insurance contract, it can be said that the Yugoslav legislator became somewhat independent in relation to the English marine insurance, i.e. SG policy as SII policy. Later domestic insurance companies started to draw own policies, especially after SG policy was abandoned in the London insurance market. However, this does not mean that the English marine insurance can be left out. No global insurer can do this, because, as a rule, each business is linked to the London insurance market and the insurance conditions defined by that market, and again, it regularly bound them to the implementation of the English law and practice.

Impact of the English Insurance Act 2015 on Some Resolutions Contained in MIA 1906

There are two basic principles that are foundation of the marine insurance contract, in accordance with provisions of MIA: the principle of full indemnification and the principle of utmost good faith or *uberrimae fidei*.

While the first principle is characteristic for all property insurance, including marine, with some variations in insurance of ships, the second principle of utmost good faith in case law was formulated as extremely strict. The creator of this concept was the Chief Justice of the House of Lords, Lord Mansfield in the second half of the 18th century.[5] Such understanding was embedded in section 17 of MIA, where it is stated that if one party failed to observe the principle of utmost faith, referred here as *uberrimae fidei*, the other party is entitled to terminate the contract.

[3] When it comes to Yugoslav law, because of the entirety and younger generations of insurance personnel, it should be emphasized that, between the two world wars, Yugoslavia did not regulate marine insurance by the law, and insurance companies regularly applied Italian insurance terms and conditions. During that period Rijeka belonged to Italy and Yugoslav marine insurers were mostly located in Sušak - a city that is separated from Rijeka by only one small bridge.

[4] The law entered into force on January 1, 1978.

[5] Marine Insurance Digest, H. A. Mulins, Cornel Maritime Press, 1959 states that the requirement for the existence of "utmost good faith" goes beyond the ordinary requirement that there will be no actual fraud which is implied in all contracts. It demands the disclosure of all information that may potentially affect the judgment of the underwriter when he is considering the risk. Lord Mansfield established this principle in the case Carter v. Boehm, 1766, as "good faith". In 1798, in the case Wolff v. Homcastle he further specified that it was "utmost good faith". Lord Mansfield is known as the founder of a modern English commercial law, which freed its legal views from the superfluous formalism of common law.

In addition to the principle of utmost faith, and perhaps more than that, for the English marine insurance regarding the validity of a concluded contract, various special conditions entered into the contract are important, and the fate of the contract depends on their fulfilment. Such conditions in the English doctrine and practice are known as warranties. They are generally present in many contracts and legal relations, but their contracting in marine insurance is of particular importance. Lord Mansfield decisively influenced the effect of warranty in England's marine insurance by a series of judgments that non-observance of the contractual warranty, whether it had an effect on fulfilment of the contract itself or not (whether it was the cause of non-performance or materially relevant for the breach of contract), caused its termination. According to the case law, and precise provisions of MIA in this part, the contract is automatically terminated *ex nunc*, with the insurer's right to retain the entire premium.[6]

In recent English case law, as it is emphasised, since the mid-twentieth century, such views were exposed to criticism and erosion of influence on the court's views, and were marked in the literature as draconian.[7]

Due to the above stated and probably other significant issues in insurance, the Great Britain raised the issue of reforming its insurance sector at the beginning of the 21st century, and even the most controversial issues related to MIA 1906, and passed the reformed Insurance Act in 2015.[8]

The Insurance Act 2015 abandons the principle of utmost good faith thereby changing the section 17 of MIA in such a manner as to replace the principle of utmost good faith with the fair presentation principle. This new concept of the English law is closer to the well-known principle of conscientiousness and fairness of the civil law (and Yugoslav, i.e. nowadays the laws of newly created states), since it introduced a subjective element of real availability of certain facts and circumstances to contracting parties, which was not a known principle in common law.[9]

In addition to the omission of section 17, the extensive amendments are contained in the second part of the Law from 2015 in section 3 related to sections 4 to 8, with a list of all facts and circumstances that must be stated when concluding a contract, as well as in cases where no such obligation existed.

The second issue amended by the Law from 2015, concerns special conditions - warranties. In that domain, at least in case of continental attorneys at law, it was certainly expected that the changes would be related to conversion of specially contracted conditions (express warranties) from strictly formal conditions whose violation, whether it be material to the risk (and damage) or not, into

[6] See R. H. Brown, Marine Insurance, Vol. 1, The Principles, 3rd. ed, London, 1975, p. 63- 66; D. Pavić, Pomorsko osiguranje, knjiga prva, Zagreb, 1986, p. 136-139: B. Ivošević, Transportno osiguranje, Beograd, 2009, p. 152-157; B. Ivošević – Č. Pejović, Pomorsko pravo, Beograd, 2019., p. 785-787. Lord Mansfield stated the opinion above in the case of De Hahu v. Hartley 1786.

[7] Tako Rob Merkins and Ozlem Gurses, The Insurance Act 2015; Rebalasing the interest of Insurer and Assured, The Modern Law Review (2015) 78 (6MLR 1004-1027), and B. Ivošević-Č. Pejović, op.cit. p. 745-746.

[8] In 2012, the Law on Consumer Insurance was passed (Consumer Insurance – Disclosure and Representation Act).

[9] See A. Jovanović, Ključne razlike: engleskog i srpskog ugovornog prava, Beograd, 2008, p. 55-56.

conditions for which such materiality is sought for. Instead, the focus of the reform was ultimately driven towards abandonment of the hitherto applicable automatic termination of the contract with *ex nunc* effect, which converted the termination clause from provisions of section 33 of MIA into a suspensory warranty. According to the adopted resolution (provision of item 1 section 10 of the Law from 2015), the insurer still had the right to refuse liability and indemnity if the insured breached the contractual warranty regardless of its essential connection with the given event, but after such deduction the contract is not terminated, but its effect is extended.[10] The amendment was omission of the second sentence of the section 33, item 3 of MIA, which stipulated that in the absence of explicit (opposite) contracting the insurer is discharged from liability from the date of the breach of warranty, but without prejudice to any liability incurred by the insurer before that date.[11]

Resolutions Adopted in the Law on Marine and Inland Navigation and the Civil Law Systems of Slovenia, Croatia, Montenegro and Serbia

The Law on Marine and Inland Navigation regulates the marine (navigation) insurance in Chapter 4 of Part VI (Articles 689-752). The law does not define the issue of special trust, that is, utmost good faith, since it relies on known legal standards accepted in Yugoslav civil law, such as the said principle of conscientiousness and fairness, and the care of a prudent businessperson, etc. Starting from this, Article 694 stipulates that the insurer, when effecting the contract, is obliged to report all the circumstances relevant to the risk severity assessment that he knew or must have known. If the insurer failed to report them or incorrectly reported them, the contract shall remain in force and the insurer shall be entitled to collect higher premiums in accordance with the newly determined risk severity. The insurer is entitled to cancel the contract only in case of failure to report or incorrect reporting, intentionally or due to gross negligence, when it retained the received premium (Article 695, paragraph 1 of the Law on Marine and Inland Navigation).

This approach, which is maximally inclined to keep the contract in force, has been retained in the current civil laws of Slovenia, Croatia and Serbia, as well as in the civil law of Montenegro, where the Law on Marine and Inland Navigation 1998 is still in force. It can also be said that the adoption of the fair presentation principle innovated the English law in the part closer to legal resolutions contained in the laws of these countries and, in general, civil law, in relation to the obligation to

[10] Tako Rob Merkin and Ozlen Gruses, op.cit. p. 1018 and B.Ivošević-Č.Pejović, op.cit. p. 787.

[11] Original text item 3 of section 33 MIA: "A warranty, as above defined is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date" (resolution was achieved by omission of the second sentence, while the first one remained in force).

present the risk and its severity when effecting a contract.[12]

The situation with the specially contracted conditions, that is, the warranty of the English law, is somewhat different.

Civil law countries such as the Scandinavian countries, Germany, Belgium, the Netherlands, Italy and France, and some non-European countries such as Japan, either do not even know the concept that would correspond to warranty, or they resolve such cases within the rules on the obligation to report all the circumstances on which the existence and severity and change of the risk depend.[13]

Yugoslav civil law, as stated above, also contained rules on obligation to report risks, but Article 722 of the Law on Marine and Inland Navigation also contained provisions on the legal consequences in the event of "failure to comply with specifically agreed conditions". These consequences in this Article are divided in two groups, i.e. in two paragraphs of Article 722. The legislator based the distinction on the division of specially contracted conditions to those important in general for the insurer's provision of coverage, when he acquired the right to seek cancellation of the contract, and to conditions important only for the severity of individual risks and the loss amount, when the insurer acquired the right to deduct the loss from the debt owed under insurance (the law states "proportion of the loss") which is likely to have arisen because of the failure to meet these conditions.

Paragraph 1 of Article 722 did not contain a deadline for the cancellation of the contract. However, the annulment according to the Law on Marine and Inland Navigation is not automatic, but it may be sought. In such a situation where the law did not stipulate a deadline within which annulment can be claimed, it should be taken into account that the law had in mind a relative annulment and that a period of one year should apply when voidable contracts can be annulled in accordance with the Law on Contracts and Torts.

In a study published by CMI as a part of an analysis of similarities and differences between the English law warranty and the change of the risk as a base in the civil law countries, the author of the study viewed the concept of specially contracted conditions of the Law on Marine and Inland Navigation, and now in laws in Croatia and Slovenia, as more of a resolution similar to the concept of the change of the risk.[14] This is certainly acceptable and true for paragraph 2, Article 722; however, paragraph 1 of the same article expressed and sought cancellation of the contract if the specifically agreed condition was material to the decision to provide coverage in general, which is in a manner a broad and fairly fluid formulation that can, but does not have to be directly tied to any future risk. Hence, the view that Yugoslav law, in that part, which would today be the law of Slovenia, Croatia and Montenegro, is identical with the English law, i.e. that specifically agreed conditions

[12] It should be emphasized that after independence of Slovenia and Croatia they abandoned the concept of a single regulation of marine and inland navigation, so the stated matter was regulated in their marine codes.

[13] See B. Ivošević-Č. Pejović, op.cit. p. 786.

[14] See Trine – Lise – Wilhelmsen, Duty of Disclosure of Good Faith, Alternation of Risk and Warranties, Marine Insurance the CMI Review Iniative, SMI, Year Book, 2000, p. 101.

are identical with the warranty of the English law.[15] This problem certainly remains unresolved, since Slovenia and Croatia have fully transposed Article 722 of the Law on Marine and Inland Navigation into their new codes. In addition, this applies to Montenegro, since Montenegro did not pass a new law, and the Law on Marine and Inland Navigation 1998 is applicable. In the absence of case law, these countries are at risk that their specially contracted conditions could be equated with that of the English law in any future disputes.

Serbia regulated the marine insurance contract by the Merchant Shipping Act in 2015, and retained the largest number of resolutions from the Law on Marine and Inland Navigation, especially regarding the obligation of reporting the existence and risk severity when effecting a contract. However, when it comes to specially contracted conditions, the Serbian civil law (Article 529 of the Merchant Shipping Act) stipulated in paragraph 1 of that Article that such agreed conditions could lead to the cancellation of the contract only if contracted conditions were the reason for the breach of the contract, that is, if there was a causal link between the conditions and the occurrence. In this case, the insurer may request the cancellation of the contract within 30 days, but also maintain the contract in force by increasing the premium, if the insured accepts such increased premium. The legislator kept paragraph 2 of Article 722 of the Law on Marine and Inland Navigation, thus allowing the parties to liquidate the damage, if any, in a manner as to deduct the insurance premium.

Serbian civil law chooses the concept of the change of risk, as assessed in the CMI study for Slovenian and Croatian law, but also leaves the insurer an option to terminate the contract if the breach is such as to jeopardize materially the contract as a whole.

Conclusion

The English Insurance Act was passed in 2015, so it can be said that it is too early to state views about the actual scope of the changes, since it is a new regulation of two highly significant institutes on which the essence of the English law and marine insurance practice largely rests.

When it comes to adopted change related to warranties, it can be without any doubt said that the most expected result, as already emphasized at least by continental attorneys at law, did not happen – that the conditions explicitly agreed

[15] Veljko Tomašić, PhD, author of a part of the Law on Marine and Inland Navigation regarding the navigation insurance, explained the right to request the cancellation of a contract in his Transportno osiguranje, Belgrade, 1987, p. 137 with the fact that "insurers agreed to take certain risks in insurance only under specified conditions so it is irrelevant whether the failure to observe such conditions was the fault of the insured or not", which would make paragraph 1 of Article 722 of the Law on Marine and Inland Navigation closer to the English understanding of warranty. In addition, the respondent presented the view on identical features in this part of Yugoslav law (not yet amended Serbian law agreed in this arbitration) and the English law in ad hoc arbitration between Dunav Re and Dutch Marine Insurance, Belgrade, 2012-2014. It was ruled in favour of Dunav Re, but the empire did not make a statement on such position taken by the respondent Dutch Marine Insurance.

upon were materially related to the risk and the consequent damage. Thus, the substance of Lord Mansfield's views from the second half of the 18th century remained fundamentally preserved at the beginning of the 21st century in the English law of marine insurance.

As for abandoning the principle of utmost good faith (*uberrimae fidei*), despite the legislator's great effort to explain the newly adopted fair presentation as clearly and precisely in the law by circumstances and manners in which reporting should be made, in order to be treated as fair, and certainly, conscientiously, it should be borne in mind that, despite the English doctrine's interpretation of the law, the courts should interpret them literally by following the words used in the law. Therefore, the courts will refer to the previously held views of the higher courts which oblige them, therefore, on the principles of precedent law, as the supreme postulate of the application of law in the Anglo-Saxon legal system, which is also true of the future interpretation and application of the adopted amendments in question.

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