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NEKA PITANJA U VEZI S REFORMOM ENGLSKOG POMORSKOG OSIGURANJA IZ 2015. GODINE

NAUČNI RAD

Apstrakt

U članku se autor bavi promjenama izvršenim u engleskom Zakonu o pomorskom osiguranju iz 1906. godine, kao i Zakonom o osiguranju iz 2015. godine, to jest napuštanjem načela maksimalne dobre vjere i njegove zajmene načelom poštenog (fer) prikazivanja rizika, kao i izmjenama instituta jemstva (warranty) engleskog prava onako kako je bio stipulisan Zakonom iz 1906. godine. Istovremeno se daje prikaz rješenja slovenačkog, hrvatskog, crnogorskog i srpskog prava, koja se razmatraju u kontekstu kontinentalnog (promena težine rizika) i anglosaksonskog prava (uticaja warranty-a na sudbinu ugovora).

Ključne reči: *maksimalna dobra vjera (outmost good faith, uberrimae fidei); pošteno (fer) prikazivanje (fair presentation); posebno ugovoreni uslovi; warranty i suspensory warranty.*

Uvod

Kada je riječ o pomorskom osiguranju, dvije činjenice su u stručnim krugovima opštepoznate. Prvo, pomorsko osiguranje, kao vrsta imovinskog osiguranja, jeste prvo koje je nastalo, i iz njega su se razvijala ostala osiguranja. Drugo, savremeno pomorsko osiguranje u svijetu vezuje se za Londonsko tržište osiguranja i pogotovo za Londonski „Lojd“.

U vezi s prethodnim, naročiti značaj i uticaj ima engleski zakon o pomorskom osiguranju, Marine Insurance Act iz 1906. godine, sa dopunom iz 1909, poznat kao MIA, 1906. Taj zakon bazira se na preko sto godina dugoj praksi engleskih sudova u tumačenju poznate „Lojdove“ SG polise iz 1779. godine, tako da je smatran jednim od najuspješnijih zakona koji je sublimirao sudske presedane iz te oblasti, a koji su zakoni u engleskom pravnom sistemu poznati kao tzv. *consolidatum acts*.²

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² Više o „Lojdu“ i SG polisi vidi: W. Dover; Brown H. R., A Handbook to Marine Insurance, London, 1979, str. 76–90 i 227–238; D. Pavić, Pomorsko osiguranje (pravo i praksa), Split, 2012, str. 42, 44 (sa slikom nove zgrade „Lojda“ u Londonu) i str. 134–137; B. Ivošević, Transportno osiguranje, Beograd, 2009, str. 34–36 i 104–105.

MIA i SG polisa izvršile su veliki uticaj na anglosaksonskom pravnom području, ali i šire i od toga. Poseban uticaj izvršen je na jugoslovensko pravo i praksu nakon završetka II svjetskog rata, kada je u Jugoslaviji osnovan Državni osiguravajući zavod – DOZ (cijela privreda u to vrijeme bila je podržavljena i centralizovana) za teritoriju cijele države. Kadrovi koji su tada u Zavodu vodili sektor za pomorsko osiguranje odlučili su da za svoju (DOZ-ovu) polisu osiguranja prihvate „Lojdovu“ SG polisu, čime su, prirodno, optirali i za primjenu u osnovi engleskog prava i prakse, tj. engleskih uslova osiguranja.³

Ugovor o pomorskom (plovidbenom, budući da su zakonom regulisane pomorska i unutrašnja plovidba) osiguranju zakonski je uređen mnogo kasnije, donošenjem Zakona o pomorskoj i unutrašnjoj plovidbi 1977. (dalje u tekstu: ZPUP).⁴ Kako je te godine donijet i Zakon o obligacionim odnosima, prilikom regulisanja ugovora o osiguranju naglašeno je da se on ne primjenjuje na pomorsko, odnosno plovidbeno osiguranje.

Nakon pravnog uređenja ugovora o pomorskom (plovidbenom) osiguranju ZPUP-om, može se reći da se jugoslovenski zakonodavac donekle osamostalio u odnosu na englesko pomorsko osiguranje, odnosno SG polisu, kao DOZ-ovu polisu, te su kasnije domaće osiguravajuće kuće započele donositi sopstvene polise, a pogotovo nakon što je SG polisa napuštena i na Londonskom tržištu osiguranja. Međutim, to ne znači da se može prenebregnuti englesko pomorsko osiguranje. To ne može da uradi nijedan svjetski osiguratelj jer je, po pravilu, svaki svojim poslovanjem vezan za Londonsko tržište osiguranja i uslove osiguranja koje donosi to tržište, a ono ih, opet, redovno vezuje za primjenu engleskog prava i prakse.

Uticaj engleskog Zakona o osiguranju iz 2015. na neka rešenja sadržana u MIA, 1906.

Dva su osnovna načela na kojima u skladu s odredbama MIA počiva ugovor o pomorskom osiguranju: načelo potpunog obeštećenja i načelo maksimalne dobre vjere (*outmost good faith* ili *uberrimae fidei*).

Dok je prvo načelo karakteristično za sva imovinska osiguranja, pa i pomorsko, doduše uz neka odstupanja kod osiguranja brodova, drugo načelo o maksimalnoj dobroj vjeri u sudskoj praksi oblikovano je kao izuzetno strogo. Tvorac tog koncepta bio je u drugoj polovini XVIII vijeka tada vrhovni sudija Doma

³ Kada se radi o jugoslovenskom pravu, onda zbog cjeline, a i zbog mladih generacija kadrova u oblasti osiguranja, treba naglasiti da između dva svjetska rata Jugoslavija nije putem zakona regulisala pomorsko osiguranje, a da su tadašnja osiguravajuća društva redovno primjenjivala italijanske uslove osiguranja. U tom periodu Rijeka je pripadala Italiji, a jugoslovenski pomorski osiguratelji bili su u najvećem broju smješteni u Sušaku – gradu koji samo jedan mali most dijeli od Rijeke.

⁴ Zakon je stupio na snagu 1. januara 1978. godine.

lordova (*House of Lords*) lord Mansfield.⁵ Takvo shvatanje ugrađeno je u sekciji 17 MIA, gdje se navodi sledeće: ako jedna od stranaka ne poštuje načelo maksimalnog povjerenja, koje se ovdje označava kao *uberime fidei*, druga strana ima pravo na raskid zaključenog ugovora.

Pored načela maksimalnog povjerenja, i možda više od toga, za englesko pomorsko osiguranje, u vezi s punovažnosti zaključenog ugovora, od značaja su razni posebni uslovi koji se unose u ugovor i od njihovog ispunjenja ili neispunjenja zavisi sudbina ugovora. Takvi uslovi u engleskoj doktrini i praksi poznati su kao „*warranties*“. Poznati su generalno kod mnogih ugovora i pravnih odnosa, ali se njihovom ugovaranju u pomorskom osiguranju daje poseban značaj. Lord Mansfield odlučno je uticao i na dejstvo *warranty*-a u pomorskom osiguranju Engleske nizom presuda da je neispunjenje ugovorenog *warranty*-a, bez obzira na to da li je bio od uticaja na ispunjenje samog ugovora ili ne (da li je bio kauza neispunjenja, odnosno od materijalnog značaja za povredu ugovora), dovodi do raskida ugovora. Prema zauzetom stanovištu sudske prakse, a i odredbe MIA u tom dijelu su precizne, ugovor se automatski raskida *ex nunc*, uz pravo osiguratelja da zadrži cijelu premiju.⁶

U novijoj engleskoj sudskoj praksi, kako se ističe, od sredine XX vijeka, ovakvi stavovi izloženi su kritici i eroziji uticaja na stavove suda, a u literaturi su označavani i kao drakonski.⁷

Zbog prethodnih, a vjerovatno i drugih značajnih pitanja u oblasti osiguranja, Velika Britanija početkom XXI vijeka pokreće pitanje reforme svog osiguranja, pa i prethodnih spornih pitanja u vezi sa MIA 1906, te 2015. godine donosi reformski Insurance Act.⁸

Insurance Act, 2015, napušta princip *utmost good faith* i time mijenja sekciju 17 MIA na način što princip, odnosno načelo *utmost good faith* zamjenjuje načelom, odnosno principom „poštenog prikazivanja“ (*fair presentation*). Taj novi koncept engleskog prava bliži je poznatom načelu savjesnosti i poštenja kontinentalnog prava (i jugoslovenskog, odnosno danas prava novonastalih država), jer uvodi

⁵ U Marine Insurance Digest, H.A. Mulins, Cornel Maritime Press, 1959 navodi se da zahtjev za postojanje „*utmost good faith*“: goes beyond the ordinary requirement that there shall be no actual fraud which is implied in all contracts. It demands the disclosure of all information that may possibly influence the judgement of the underwriter when he is considering risk. Taj princip ustanovio je lord Mansfield u presudi Carter v. Boehm, 1766, kao „*good faith*“, da bi 1798. godine u presudi Wolff v. Homcastle dodatno precizirao da se radi o „*utmost good faith*“. Inače, lord Mansfield ostao je upamćen kao rodonačelnik modernog engleskog trgovačkog prava koje je svojim pravnim stavovima oslobodio suvišnog formalizma common law-a.

⁶ Vidi R. H. Brown, Marine Insurance, Vol. 1, The Principles, 3rd. ed, London, 1975, str. 63–66; D. Pavić, Pomorsko osiguranje, knjiga prva, Zagreb, 1986, str. 136–139; B. Ivošević, Transportno osiguranje, Beograd, 2009, str. 152–157; B. Ivošević – Č. Pejović, Pomorsko pravo, Beograd, 2019, str. 785–787. Izloženo stanovište lord Mansfield precizirao je u sporu De Hahu v. Hartley 1786. godine.

⁷ Tako Rob Merkins i Ozlem Gurses, The Insurance Act 2015: Rebalancing the interest of Insurer and Assured, The Modern Law Reviews (2015) 78 (6MLR 1004–1027), i B. Ivošević – Č. Pejović, op. cit. str. 745–746.

⁸ Prethodno 2012. godine donijet je Zakon o potrošačkom osiguranju (Consumer Insurance – Disclosure and Representation Act).

subjektivni element realne dostupnosti određenih činjenica i okolnosti ugovornim stranama, što nije bio poznat princip u *common law*-u.⁹

Pored izostavljanja sekcije 17, izmjene, i to vrlo iscrpne, sadržane su u drugom dijelu Zakona iz 2015. godine, i to u sekciji 3 povezano sa sekcijama od 4 do 8, sa taksativnim nabrojanjem koje se sve činjenice i okolnosti prilikom zaključivanja ugovora moraju prikazati, kao i onih slučajeva kada takva obaveza ne postoji.

Drugo pitanje koje je izmijenjeno Zakonom iz 2015. godine tiče se posebnih uslova (*warranty*-a). U tom domenu, barem kada se radi o kontinentalnim pravnicima, svakako se očekivalo da izmjene budu vezane za promjenu posebno ugovorenih uslova (*express warranties*) kao strogo formalnih uslova čija povreda, nevezano za to da li je bila bitna, odnosno materijalna ili ne, za rizik (i štetu) u pitanju, treba da bude pretvorena u uslov za čije se dejstvo takva materijalnost traži. Umjesto toga, fokus reforme u krajnjem rezultatu bio je usmjeren prema napuštanju, do tada važećeg, automatskog raskida ugovora sa dejstvom *ex nunc*, čime je raskidni uslov iz odredbi sekcije 33 MIA pretvoren u suspenzivni uslov (*suspensory warranty*). Po usvojenom rješenju (odredba tač.1 sekcije 10 Zakona iz 2015. godine), osiguratelj i dalje ima pravo da odbije odgovornost i naknadu štete ako je osiguranik prekršio ugovoreni *warranty* bez obzira na njegovu suštinsku vezu sa događajem koji je posrijedi, ali nakon takvog odbitka ugovor se ne raskida, već produžava svoje dejstvo.¹⁰ Izmjena je izvršena na način što je izostavljena druga rečenica sekcije 33 tač.3 MIA, koja u odsustvu izričitog (suprotnog) ugovaranja predviđa da se osiguratelj oslobodi odgovornosti od dana prekršaja *warranty*-a, ali bez uticaja na bilo koju odgovornost osiguratelja podnijetu prije tog datuma.¹¹

Rješenja prihvaćena u ZPUP-u i u pravu Slovenije, Hrvatske, Crne Gore i Srbije

ZPUP ugovor o pomorskom (plovidbenom) osiguranju regulisan je u glavi 4 četvrtog dijela (članovi 689–752) Zakona. Zakon ne definiše pitanje posebnog povjerenja, odnosno maksimalne dobre vjere, jer se naslanja na poznate pravne standarde prihvaćene u tom pravcu u jugoslovenskom pravu kao što su pomenuto načelo savjesnosti i poštenja, te pažnje dobrog privrednika itd. Polazeći od toga, u čl. 694 zahtjeva se da ugovarač osiguranja pri sklapanju ugovora prijavi sve okolnosti koje je znao ili ih je morao znati a koje su od uticaja za ocjenu težine rizika. Ako ih ne prijavi ili netačno prijavi, ugovor ipak ostaje na snazi, a osiguratelj stiče pravo na naplatu veće premije u skladu s novom utvrđenom težinom rizika. Pravo na

⁹ O ovome vidi A. Jovanović, Ključne razlike engleskog i srpskog ugovornog prava, Beograd, 2008, str. 55–56.

¹⁰ Tako Rob Merkin i Ozlen Gruses, op. cit. str.1018. i B. Ivošević – Č. Pejović, op. cit. str.787.

¹¹ Originalni tekst tač. 3 sekcije 33 MIA glasi: „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“ (rešenje je postignuto izostavljanjem druge rečenice, dok je prva ostala na snazi).

poništenje ugovora stiče samo za slučaj neprijavljivanja ili netačnog prijavljivanja namjerno ili usljed krajnje nepažnje, kada i zadržava primljenu premiju (član 695, st.1 ZPUP-a).

Takav pristup koji je maksimalno naklonjen održavanju ugovora na snazi u svemu je zadržan i u aktuelnim zakonima Slovenije, Hrvatske i Srbije, te u pravu Crne Gore, gdje je još uvijek na snazi ZPUP iz 1998. godine. Takođe, može se reći da je usvajanjem principa „*fair presentation*“ inovirano englesko pravo u tom dijelu bliže pravnim rješenjima sadržanim u zakonima ovih država i uopšte kontinentalnog prava u odnosu na obavezu prikazivanja rizika i njegove težine prilikom sklapanja ugovora.¹²

Nešto je drugačija situacija s institutom „posebno ugovoreni uslova“, odnosno *warranty*-a engleskog prava.

Države kontinentalnog prava (*civile law contruies*) kao što su skandinavske zemlje, Nemačka, Belgija, Holandija, Italija i Francuska, te neke vanevropske države kao npr. Japan, ili uopšte ne poznaju koncept koji bi korenspondirao *warranty*-u, ili pak takve slučajeve rešavaju u okviru pravila o obavezi prijavljivanja svih okolnosti od kojih zavisi postojanje i težina rizika i promjena u težini rizika (*alternation of the risk*).¹³

Jugoslovensko pravo, kako je prethodno rečeno, takođe je sadržalo pravila o obavezi prijave rizika, ali ZPUP je u članu 722 sadržao i odredbe o tome koje su pravne posledice u slučaju da „nije udovoljeno posebno ugovorenim uslovima“. Te posledice u ovom članu podijeljene su u dvije grupe, odnosno u dva stava člana 722. Zakonodavac razlikovanje zasniva na podjeli posebno ugovoreni uslova na one što su bili bitni uopšte za pružanje pokrića od strane osiguratelja, kada on stiče pravo da traži poništenje ugovora, i na uslove što su bili značajni samo za težinu pojedinih rizika i veličinu šteta, kada osiguratelj stiče pravo da iz drugačije naknade po osnovu osiguranja odbije onu štetu (zakon kaže „dio štete“) koja je vjerovatno nastala zbog neudovoljenja tim uslovima.

Stav 1 člana 722 nije sadržao rok u kome se može zatražiti poništenje ugovora. Međutim, ništavost po ZPUP-u ne nastupa automatski, već se određuje da se može tražiti poništenje. U takvoj situaciji, kada zakon ne propisuje rok u kome se poništenje može zatražiti, treba uzeti da se imala u vidu relativna ništavost i da treba primjeniti rok od jedne godine u kome se, saglasno Zakonu o obligacionim odnosima, mogu poništiti rušljivi ugovori.

U studiji koju je objavio CMI u okviru analize sličnosti i razlika između *warranty*-a engleskog prava i koncepta o promjeni rizika (*alternation of the risk*) kao bazičnog u državama civilnog prava, autor studije koncept posebno ugovoreni uslova iz ZPUP-a, a sada u pravu Hrvatske i Slovenije, vidi više kao rješenje slično

¹² Treba naglasiti da su Slovenija i Hrvatska, nakon osamostaljenja, napustile koncepciju jedinstvenog uređenja pomorske i unutrašnje plovidbe, pa je materija koja je u pitanju regulisana u njihovim pomorskim zakonima.

¹³ O ovome vidi B. Ivošević – Č. Pejović, op. cit. str. 786.

konceptu promjene rizika.¹⁴ Ovo je svakako prihvatljivo i tačno za stav 2 člana 722, međutim, stav 1 istog 6. člana izražava i traži poništenje ugovora ako je posebno ugovoreni uslov bio *bitan* za odluku o pružanju pokrića uopšte, što je na izvjestan način široka i dosta fluidna formulacija koja se može ali i ne mora direktno vezivati za buduću povredu rizika koji je posrijedi. Otuda i stav da je u tom dijelu jugoslovensko pravo, a to bi danas bilo pravo Slovenije i Hrvatske, te Crne Gore, identično sa engleskim pravom, odnosno da su posebno ugovoreni uslovi identični sa *warranty*-em engleskog prava.¹⁵ Ovaj problem svakako ostaje u neku ruku nerešen, jer su Slovenija i Hrvatska u svoje nove zakonike član 722 ZPUP-a u cjelosti prenijele. Takođe, to se odnosi i na Crnu Goru, budući da ona nije donijela novi zakon, a u primjeni je ZPUP iz 1998. godine. Ovim se, u nedostatku sudske prakse, te države izlažu riziku da njihovi posebno ugovoreni uslovi, u eventualnim budućim sporovima, budu izjednačavani sa stavom engleskog prava.

Srbija je ugovor o plovidbenom osiguranju uredila Zakonom o trgovačkom brodarstvu (skraćeno ZTB) 2015. godine i takođe zadržala najveći broj rješenja iz ZPUP-a, pogotovo kada se radi o obavezi prijavljivanja postojanja i težine rizika prilikom sklapanja ugovora. Međutim, kada se radi o posebno ugovorenim uslovima, srpsko pravo (član 529 ZTB-a), određuje u st. 1 tog člana da tako ugovoreni uslovi mogu dovesti do poništenja ugovora samo ako su ugovoreni uslovi razlog povrede ugovora, dakle ako postoji uzročna veza između uslova i ostvarenog štetnog događaja. U tom slučaju osiguratelj može da zatraži poništenje ugovora u roku od 30 dana, ali i da ugovor održi na snazi povećanjem premije, ako tako povećanu premiju osiguranik prihvati. Zakonodavac je zadržao st. 2 člana 722 ZPUP-a, omogućavajući na taj način strankama da nastalu štetu, ukoliko je nje bilo, likvidiraju i na način što bi se izvršio odbitak od premije osiguranja.

Srpsko pravo na prethodni način u osnovi se priklanja konceptu promjene rizika, kao što se to procenjuje u studiji CMI-a za slovenačko i hrvatsko pravo, ali ujedno ostavlja mogućnost osiguratelju da raskine ugovor ako je povreda takva da materijalno ugrožava ugovor u cjelini.

Zaključak

Engleski zakon o osiguranju (*Insurance Act*) donijet je 2015. godine, pa se može reći da je još rano izricati sudove o stvarnom domašaju izvršenih promjena,

¹⁴ Vidi Trine – Lise – Wilhelmsen, *Duty of Disclosure of Good Faith, Alternation of Risk and Warranties*, *Marine Insurance the CMI Review Initiative*, SMI, Year Book, 2000, str.101.

¹⁵ Pravo da se može tražiti poništenje ugovora dr Veljko Tomašić, autor dijela ZPUP-a o ugovoru o plovidbenom osiguranju, u svom *Transportnom osiguranju*, Beograd, 1987, str.137 obrazlaže činjenicom „što su osiguratelji pristali da prime određene rizike u pokriće samo pod određenim uslovima, pa je irelevantno da li je do neispunjenja tih uslova došlo krivicom osiguranika ili ne“, čime bi se ovako obrazloženi st. 1 člana 722 ZPUP-a približavao engleskom shvatanju *warranti*-a. Takođe, stav prema identičnosti u ovom pogledu jugoslovenskog prava (još neizmjenjenog srpskog prava koje je u ovoj arbitraži bilo ugovoreno) i engleskog prava iznio je tuženi u ad hoc arbitraži između „Dunava Re“ i „Dutch Marine Insurance“, Beograd, 2012–2014. Presuđeno je u korist „Dunava Re“, ali se empirije nije izjasnio o zauzetom takvom stavu tuženog „Dutch Marine Insurance“.

budući da se radi o novom regulisanju dva izuzetno značajna instituta na kojima je u velikoj mjeri počivala suština engleskog prava i prakse pomorskog osiguranja.

Kada je riječ o usvojenoj promjeni u vezi sa *warranties*, nesporno je da se nije dogodilo ono što su najviše očekivali kontinentalni pravnici – da izričito ugovoreni uslovi budu materijalno vezani za rizik i štetu koja otuda nastaje. Time, suština stavova lorda Mansfielda iz druge polovine XVIII vijeka u osnovi ostaje sačuvana i na početku XXI stoljeća u engleskom pravu pomorskog osiguranja.

Što se tiče odustajanja od načela maksimalne dobre vjere (*outmost good faith* ili *uberrimae fidei*), i pored velikog nastojanja zakonodavca da novousvojeni institut „*fair presentation*“ što jasnije i preciznije u samom zakonu objasni nizom taksativnih nabiranja okolnosti i načina kako prijavljivanje treba izvršiti da bi se tretiralo kao pošteno (*fair*) i svakako, savjesno, ipak treba imati na umu da i pored zahtjeva engleske doktrine tumačenja zakona da sudovi treba da ih tumače doslovno, slijedeći upotrebljene riječi u zakonu, dakle, onako kako je napisano, u konkretnoj primjeni sudovi će se pozivati na prethodno zauzeta stanovišta viših sudova koja ih obavezuju, dakle po načelima precedentnog prava kao vrhovnog postulata primjene prava u anglosaksonskom pravnom sistemu, što u svemu važi i za buduće tumačenje i primjenu usvojenih izmjena koje su u pitanju.

Literatura

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- Insurance Act, 2015
- Zakon o pomorskoj i unutrašnjoj plovidbi, 1977
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- Pomorski zakonik Hrvatske, 2004
- Zakon o trgovačkom brodarstvu Srbije, 2015

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SOME ISSUES REGARDING REFORM OF THE ENGLISH MARINE INSURANCE FROM 2015

SCIENTIFIC PAPER

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 *consolidatum 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 Initiative, 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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