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DUŽNOST OBAVEŠTAVANJA OSIGURAVAČA O PROMENI RIZIKA PO ZAKLJUČENJU UGOVORA O OSIGURANJU[2]

PREGLEDNI NAUČNI RAD

Apstrakt

Okolnosti koje su od značaja za ocenu rizika mogu se promeniti nakon zaključenja ugovora o osiguranju. Kako ugovarač osiguranja jedini ima potpuni uvid u sve okolnosti relevantne za procenu rizika, on je dužan da o takvim promenama obavesti osiguravača. U radu će se govoriti o prirodi dužnosti informisanja saugovornika kao konkretizaciji načela savesnosti i poštenja, bliže odrediti relevantan rizik čije smanjenje ili povećanje konstituiše dužnost obaveštavanja, analizirati prava osiguravača nakon što je obavešten o promeni okolnosti, kao i pravne posledice povrede ove dužnosti. Dužnost obaveštavanja osiguravača o povećanju ili smanjenju rizika uređena je u čl. 914–916 ZOO. Osim analize srpskog prava, autorka će analizirati relevantne odredbe francuskog i nemačkog prava, kao i Principe evropskog ugovornog prava osiguranja (PEICL).

Ključne reči: *ugovor o osiguranju, rizik, povećanje rizika, smanjenje rizika, dužnost obaveštavanja*

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I Uvod

Ugovor o osiguranju jeste sporazum kojim se ugovarač osiguranja obavezuje da plati određeni iznos osiguravaču, a osiguravač se obavezuje da osiguraniku ili nekom trećem licu, ako se desi događaj koji predstavlja osigurani slučaj, isplati naknadu ili učini nešto drugo. Novčani iznos koji ugovarač osiguranja plaća naziva se premija, a iznos koji po nastupanju osiguranog slučaja plaća osiguravač naziva se ugovorena svota ili osiguranina. Drugim rečima, osiguravač, u zamenu za premiju koju mu plaća ugovarač osiguranja, isplaćuje ugovorenu svotu ili pruža drugu vrstu naknade u slučaju nastupanja osiguranog slučaja.

Prilikom zaključenja ugovora, osiguravač procenjuje koliki je rizik da osigurani slučaj nastupi. Imajući u vidu sam rizik, tj. verovatnoću njegovog nastupanja, on utvrđuje visinu premije koju naplaćuje od ugovarača osiguranja. Kako bi pravilno odredio visinu premije, za osiguravača je važno da zna sve relevantne okolnosti, prvenstveno prilikom zaključenja ugovora, ali i tokom njegovog trajanja. Važno je naglasiti da se radi o ugovoru u kome, po prirodi stvari, postoji asimetrija informacija u pogledu relevantnih okolnosti koje se tiču imovine odnosno lica koje se osigurava. Osiguravač je ovde „informacijski slabija strana“, budući da on takve informacije ne poseduje, već do njih može doći isključivo na osnovu izjave ugovarača osiguranja.[3] Ugovarač osiguranja je dužan da prijavi sve okolnosti koje su važne za ocenu rizika, a to čini najčešće popunjavajući formular, tj. odgovarajući na konkretna pitanja osiguravača.[4] Osiguravač računa na lojalnost svog saugovornika i oslanja se na njegove izjave, a pritom ne proverava njihovu potpunost i istinitost.[5]

Nakon što izda polisu, osiguravač se nada da neće doći do značajnog povećanja rizika.[6] Važno je, međutim, imati u vidu da je ugovor o osiguranju ugovor s trajnim izvršenjem, koji konstituiše obaveze čije se ispunjenje prostire u vremenu.[7] Kako je rizik promenljiva kategorija, a za ispunjenje obaveze osiguravača je po prirodi stvari potrebno da protekne određeno vreme, u periodu od izvršenja ugovora do nastupanja osiguranog slučaja može doći do oscilacije rizika. Sa stanovišta osiguranika, postoji

[3] Marijan Ćurković, „Obaveza ugovaratelja osiguranja, odnosno osiguranika, prijaviti osiguratelju okolnosti značajne za ocjenu rizika“, *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse* br. 15/2017, 103.

[4] Ranije je ugovarač osiguranja samostalno odlučivao koje okolnosti smatra važnim i koje će prijaviti osiguravaču i spontano mu je govorio o njima. Takav pristup se pokazao kao prevelik teret za ugovarača, te je postepeno zamenjen sistemom u kojem osiguravač postavlja konkretna pitanja u formi upitnika (vid. Herman Cousy, „The Principles of European Insurance Contract Law: the Duty of Disclosure and the Aggravation of Risk“, *ERA Forum* no. 9/2008, 120).

[5] M. Ćurković (2017), 102.

[6] Project Group Restatement of European Insurance Contract Law, Fritz Reichert-Facilides, Jürgen Basedow, *Principles of European Insurance Contract Law: (PEICL)*, München, 2009, 181.

[7] Više o ugovorima sa trajnim izvršenjem vid. u Marija Karanikić Mirić, *Obligaciono pravo*, Beograd, 2024, 186–187.

razumljiva težnja da nastave sa uobičajenim aktivnostima koje su praktikovali pre zaključenja ugovora o osiguranju, da svoje postupanje ne ograničavaju radi održavanja osiguranog rizika. Takođe, društvo u celini ima legitiman interes da osiguravajući sektor funkcioniše efikasno i ostane finansijski stabilan, ali i da se ne sputavaju delatnosti koje donose ekonomski razvoj i inovacije.[8] Samim tim, razumljivo je što tokom perioda osiguranja može doći do značajne oscilacije rizika, bilo da se radi o njegovom povećanju ili smanjenju. Ipak, ukoliko dođe do značajnije promene rizika, ugovarač osiguranja je dužan da o tome obavesti osiguravača, kako bi ovaj mogao adekvatno da proceni novonastalu situaciju i, ako je to potrebno, prilagodi uslove ugovora tim prilikama.

Dužnost obaveštavanja propisana je s ciljem da smanji asimetriju u pogledu informisanosti ugovornih strana. Za osiguravača je važno da sazna svaku okolnost koja može dovesti do povećanja ili smanjenja rizika.[9] Iza te dužnosti stoje dva razloga. Prvo, sprečava se da osiguranik profitira od osiguranog slučaja.[10] Drugim rečima, radi se o primeni principa integralne naknade – oštećeni ima pravo da mu se nadoknadi celokupna šteta, ali ništa preko toga. Ukoliko ne prijavi naknadne promene rizika, ugovarač osiguranja plaća nižu premiju nego što bi trebalo, odnosno dobija veću naknadu štete nego što bi je dobio da su sve relevantne okolnosti bile prijavljene – osiguranje za njega postaje izvor sticanja dobiti umesto naknade štete. Drugo, takva dužnost doprinosi smanjenju moralnog hazarda.[11] Da ona nije propisana, osiguranik bi nakon zaključenja ugovora mogao uticati na promenu rizika po svom nahođenju, oslanjajući se na činjenicu da će mu, po nastupanju osiguranog slučaja, unapred ugovorena svota svakako pripasti.

Kako dužnost obaveštavanja ne postoji u svim pravnim sistemima, u radu će najpre biti izloženi pristupi u uporednom pravu u pogledu te obaveze, kao i teorijska objašnjenja kojim su takva rešenja potkrepljena. Centralni deo rada posvećen je analizi same dužnosti informisanja – koga ona obavezuje, u čemu se tačno sastoji i do kojih pravnih posledica dovodi promena rizika za vreme trajanja ugovora, bilo da se radi o njegovom uvećanju ili smanjenju, kada ugovarač osiguranja blagovremeno obavesti osiguravača o promeni ili mu takvu informaciju prećuti. Najzad, prikazano je rešenje koje Principi evropskog ugovornog prava osiguranja (PEICL) propisuju u pogledu promene rizika za vreme trajanja osiguranja.

II Dužnosti obaveštavanja tokom ugovora u uporednom pravu

Dok svi pravni sistemi predviđaju dužnost ugovarača osiguranja da prijavi sve relevantne okolnosti u vreme zaključenja ugovora, o dužnosti informisanja

[8] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181.

[9] Predrag Šulejić, *Pravo osiguranja*, Beograd, 2005, 233.

[10] Irma Nozadze, „Duty to inform as a Specifity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance", *Journal of Law (TSU)* no. 1/2017, 137.

[11] *Ibidem*.

o oscilaciji rizika tokom ugovora nailazimo na različita rešenja u uporednom pravu.[12] Naime, u zemljama tzv. „pomorske tradicije osiguranja" ugovarač osiguranja načelno nema obavezu da po zaključenju ugovora prijavljuje okolnosti koje dovode do povećanja ili smanjenja rizika.[13] To je slučaj u Engleskoj i Holandiji. Dužnost obaveštavanja osiguravača može biti nametnuta osiguraniku jedino posebnom klauzulom. Međutim, engleski i holandski sudovi takve klauzule obično tumače restriktivno, u korist osiguranika, i retko ih prihvataju kao obavezujuće.[14] S druge strane, u državama tzv. „alpske tradicije osiguranja",[15] ugovarač osiguranja je dužan da informiše osiguravača o svim relevantnim okolnostima tokom ugovora o osiguranju. Takvu dužnost zakonodavci izričito propisuju. Francuski Zakonik o osiguranju (*Code des assurances*; dalje u tekstu: CA)[16] predviđa da je ugovarač osiguranja dužan da tokom ugovora prijavi nove okolnosti koje imaju za posledicu ili povećanje rizika, ili nastanak novih rizika, i koje time čine neistinitim ili zastarelim ranije date odgovore osiguravaču.[17] Nemački Zakon o ugovoru o osiguranju (*Gesetz über den Versicherungsvertrag* ili *Versicherungsvertragsgesetz*; dalje u tekstu: VVG)[18] obavezuje ugovarača koji je povećao rizik ili dozvolio njegovo povećanje bez pristanka osiguravača da bez odlaganja obavesti osiguravača o takvom povećanju, odnosno da o povećanju rizika koje je nastupilo nezavisno od njegove volje obavesti osiguravača čim je za povećanje rizika saznao.[19] Sličnu obavezu na strani ugovarača osiguranja predviđa i srpski Zakon o obligacionim odnosima (dalje u tekstu ZOO).[20] Zašto pravni sistemi tom pitanju pristupaju različito?

[12] Takođe, ugovarač osiguranja je dužan da prijavi sve relevantne okolnosti koje su se izmenile u periodu od slanja ponude osiguravaču za zaključenje ugovora o osiguranju do zaključenja ugovora (H. Cousy, 127). To je osobito važno kod auto-odgovornosti, budući da vozilo između prijave, kada je osiguranik dao izjavu o tome da je vozilo ispravno, i zaključenja ugovora, može preći u tehnički neispravno stanje (Dirk Looschelders *et al.*, *Versicherungsvertragsgesetz Mit Nebengesetzen Und Systematischen Erläuterungen. 4. Auflage*, Hürth, 2023, 510).

[13] H. Cousy, 131. To potvrđuju i presude kao što su *Pim v Reid* (1843) i *Kausar v Eagle Star Insurance Co Ltd.* (1997) (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181).

[14] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 183. Važno je naglasiti da ni u tim državama zakonodavac ne odobrava namerno ili krajnje nepažljivo ponašanje osiguranika kojim se izaziva nastupanje osiguranog slučaja (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181).

[15] H. Cousy, 131.

[16] Zakonik o osiguranju (CA), konsolidovana verzija od 3. maja 2025, dostupno na: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006073984/ (poslednji pristup 30. maj 2025. godine).

[17] CA, čl. L113-2 tačka 3.

[18] Zakon o ugovoru o osiguranju (VVG), verzija od 23. novembra 2007. godine (*Savezni službeni list I*, str. 2631), poslednji put izmenjen članom 15 Zakona od 20. decembra 2022. godine (*Savezni službeni list I*, str. 2793), dostupno na: *https://www.gesetze-im-internet.de/vvg_2008/* (poslednji pristup 30. maj 2025. godine).

[19] VVG, čl. 23 st. 2 i 3.

[20] Zakon o obligacionim odnosima, *Sl. list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Sl. list SRJ*, br. 31/93, *Sl. list SCG*, br. 1/2003 – Ustavna povelja i *Sl. glasnik RS*, br. 18/2020, dostupno na: *https://www.paragraf.rs/propisi/zakon_o_obligacionim_odnosima.html* (poslednji pristup 30. maj 2025). Vid. ZOO, čl. 914.

Najpre, radi se o pitanju koje „zadire u samu srž osiguranja".[21] S jedne strane, ugovor o osiguranju je aleatorni ugovor – njegovo pravno dejstvo u času zaključenja nije poznato, već zavisi od buduće neizvesne okolnosti, to jest okolnosti koja je ugovornim stranama nepoznata.[22] U vreme zaključenja ugovora ne zna se da li će nastupiti osigurani slučaj. Od osiguravača se može očekivati da, prilikom zaključenja ugovora, prihvati ne samo rizik koji postoji u tom trenutku već i njegove promene tokom ugovora.[23] Upravo je računanje na rizik svojstveno ugovoru o osiguranju kao aleatornom ugovoru, te se može braniti stanovište da pravo ne bi trebalo da štiti osiguravače od loše procene rizika.

Uticaj na stav zakonodavca o tom pitanju ima i period osiguranja. Što je takav period kraći, manje je opravdano zahtevati od ugovarača osiguranja da prijavljuje okolnosti koje doprinose povećanju odnosno smanjenju rizika. U zemljama gde osiguranje obično traje godinu dana ili kraće, zakon najčešće ide u korist osiguranika, te ne predviđa pravne mehanizme koji bi osiguravačima omogućili da izmene uslove polise u slučaju značajnog povećanja rizika.[24] U većini evropskih zemalja, međutim, osiguravajući periodi obično traju duže od jedne godine, pa zakon dopušta izmenu ugovora u slučaju značajnog povećanja rizika tokom tog perioda.[25]

Najzad, (ne)postojanje dužnosti obaveštavanja o promeni relevantnih okolnosti nakon zaključenja ugovora umnogome zavisi od načina na koji se shvata načelo savesnosti i poštenja u konkretnom pravnom sistemu. Ugovor o osiguranju temelji se na načelu krajnje savesnosti i poštenja (*principle of utmost good faith*), koji podrazumeva viši stepen poverenja među ugovornicima nego što se zahteva u drugim ugovorima.[26] Reč je o ugovoru *uberrimae fidei*.[27] Kontinentalni pravni sistemi, utemeljeni na tradiciji rimskog prava, propisuju to načelo i konkretizuju ga nizom posebnih pravila. Primenjuje se ne samo prilikom zaključenja ugovora već i prilikom izvršenja ugovornih obaveza.[28] Između ostalog, princip savesnosti i poštenja manifestuje se u obavezi ugovarača osiguranja da informiše osiguravača o relevantnim okolnostima koje se tiču osiguranog dobra tokom važenja ugovora.[29] Ekvivalent načelu savesnosti

[21] H. Cousy, 131.

[22] Vid. M. Karanikić Mirić, 188–189.

[23] H. Cousy, 131.

[24] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181.

[25] *Ibidem*.

[26] I. Nozdaze, 131. Načelo krajnje savesnosti i poštenja vodi poreklo iz pomorskog osiguranja. Kod ove vrste osiguranja osiguravač je morao imati poverenje u izjave ugovarača osiguranja o brodu i robi koja se prevozi, budući da se ugovor često zaključivao u mestu koje je veoma udaljeno od tereta i broda (I. Nozadze, 131).

[27] Hein Kötz, Gill Mertens, Tony Weir, *European Contract Law: Second edition*, Oxford, 2017, 181.

[28] Hugh Collins, „Implied Duty to Give Information during Performance of Contracts", *The Modern Law Review* Vol. 5, No 4/1992, 557.

[29] I. Nozdaze, 135. Primera radi, čl. 1104 *Code Civil* propisuje da se o ugovorima mora pregovarati i, da se moraju zaključivati i izvršavati u dobroj veri. BGB u čl. 241 st. 2 propisuje da obligacioni odnos može, prema

i poštenja u *common law* jeste princip dobre vere, postupanje u dobroj veri (*good faith principle*). Međutim, *good faith principle* nema opšti karakter kao što je to slučaj s načelom savesnosti i poštenja. Naprotiv, primenjuje se samo u malobrojnim situacijama kada je to izričito propisano, sveden na konkretne dužnosti.[30] Ugovor o osiguranju, kao *uberrimae fidei* ugovor, jeste upravo jedan od izuzetaka gde je princip našao svoju primenu, ali isključivo u fazi zaključenja ugovora.[31] Nakon što ugovor bude zaključen, obaveza postupanja u dobroj veri, preciznije obaveza ugovarača osiguranja da otkriva informacije prestaje.[32] Takva obaveza ne bi ni imala smisla, budući da od trenutka kada je vezan ugovorom, osiguravač više ne može menjati ugovorene uslove pokrića rizika iz straha da je zaključio nepovoljan ugovor.[33] Ukoliko se radi o značajnom povećanju rizika, takav rizik prestaje da bude pokriven polisom, a osiguranik je primoran da novi rizik osigura kod istog ili drugog osiguravača, gde će prilikom zaključenja ugovora imati obavezu da ga podrobno informiše.[34] Zbog toga je u engleskom pravu praksa da ugovori o osiguranju sadrže izričitu klauzulu o dužnosti ugovarača osiguranja da obavesti osiguravača o svakoj promeni okolnosti koje utiču na rizik.[35]

III O dužnosti obaveštavanja o promenama rizika tokom trajanja ugovora o osiguranju

U pravnim sistemima koji predviđaju dužnost obaveštavanja o promenama rizika tokom ugovora o osiguranju, postavlja se pitanje kome se takva dužnost nameće

svojoj sadržini, obavezivati svaku stranu da vodi računa o pravima, pravnim dobrima i interesima druge strane. Iz citiranih odredbi proizlazi dužnost ugovornika da obaveštava svog saugovornika o činjenicama koje su od uticaja na njihov međusobni odnos. U srpskom pravu takva dužnost izričito je propisana u čl. 268 ZOO, a kao sankcija za njeno nepoštovanje predviđena je naknada štete.

30 Radi se o principu koji „odiše robustnim viktorijanskim individualizmom" da se svaki ugovornik sam mora informisati o činjenicama koje su mu relevantne za zaključenje ugovora i da se ne može uzdati u svog saugovornika da će mu servirati takve informacije (H. Kötz, G. Mertens, T. Weir, 180–181).

31 H. Kötz, G. Mertens, T. Weir, 181.

32 U slučaju *New Hampshire Insurance Company v MGN Ltd*, postavilo se pitanje u kom trenutku je postojala obaveza osiguranika da otkrije relevantne činjenice osiguravaču. Trgovački sud je smatrao nespornim da je osiguranik imao obavezu otkrivanja informacija u trenutku: (a) zaključenja osiguranja, (b) obnove osiguranja (što zapravo predstavlja sklapanje novog ugovora), i (c) davanja i prezentacije zahteva za naknadu štete, iako je ova poslednja tačka bila odbačena. Istaknuto je da „obaveza postupanja u dobroj veri... ne podrazumeva pozitivne obaveze otkrivanja činjenica koje utiču na rizik tokom pokrića, osim u vezi sa nekim događajem ili situacijom predviđenom polisom na koju se obaveza dobre vere odnosi" (vid. Peter Eggers MacDonald, Simon Picken, Patrick Foss, *Good Faith and Insurance Contracts. 3. ed.*, London, 2010, 56).

33 P. Eggers MacDonald, S. Picken, P. Foss, 53.

34 *Ibid*., 56–57. Najbliža doktrina koja se ovde može primeniti, a koju englesko pravo poznaje jeste neka vrsta estopela, poput estopela po osnovu konvencije ili promisornog estopela kao oblika izmene ugovora, ali bi i on mogao biti onemogućen zbog izostanka bilo kakve izričite izjave osiguravača (H. Collins, 557).

35 H. Collins, 557.

i u čemu se ona tačno sastoji. Drugim rečima, ko, u kom roku, na koji način i u kakvim okolnostima ima obavezu da informiše osiguravača nakon što je ugovor zaključen?

Dužnost prijave relevantnih okolnosti za ocenu rizika po slovu srpskog i nemačkog zakona ima ugovarač osiguranja (*Versicherungsnehmer*).[36] Rešenje je logično, budući da je on strana u ugovoru, te ga ugovor može obavezati. Najčešće on zaključuje ugovor u svoje ime i za svoj račun, te je istovremeno i osiguranik. Međutim, ukoliko to nije slučaj, nema prepreke da osiguravača obaveste osiguranik (lice za čiji račun ugovarač osiguranja zaključuje ugovor sa osiguravačem), kao i korisnik osiguranja (lice u čiju korist je ugovoreno osiguranje). Ukoliko osiguranik ili korisnik osiguranja prijave osiguravaču da je došlo do promene relevantnih okolnosti, oni na taj način otklanjaju opasnost da osigurani slučaj nastupi „u međuvremenu", tj. nakon što su se okolnosti izmenile, a pre nego što osiguravač o tome bude obavešten.[37] Francuski zakonodavac, s druge strane, propisuje takvu dužnost za osiguranika (*l'assuré*).[38]

Kakve se okolnosti mogu smatrati relevantnim? Načelno posmatrano, radi se o svim onim okolnostima o kojima bi ugovarač osiguranja bio dužan da informiše osiguravača da su postojale u vreme zaključenja ugovora o osiguranju.[39] Ćurković ističe da je osiguravač jedini koji zna koje su mu okolnosti relevantne za ocenu rizika.[40] To su one okolnosti koje on percipira i kalkuliše u iznos premije, od kojih zavisi iznos premije.[41] Kako se takve okolnosti nakon zaključenja ugovora mogu izmeniti, informacije koje je ugovarač saopštio osiguravaču prilikom zaključenja ugovora mogu postati netačne i zastarele.[42] Ipak, dužnost informisanja postoji samo u odnosu na one okolnosti koje značajno menjaju percepciju o riziku. VVG izričito propisuje da se obaveza prijave ne odnosi na neznatno povećanje rizika.[43] Osim toga, potrebno je da promene budu trajnog karaktera, budući da se dužnost prijavljivanja ne odnosi na one okolnosti koje su samo kratkotrajno povećale ili umanjile rizik.[44] Radi se, prema tome, o okolnostima koje stvaraju stanje povećane ili umanjene opasnosti, te dugoročno povećavaju ili umanjuju verovatnoću nastanka osiguranog slučaja, dok

[36] ZOO, čl. 914 st. 1; VVG, čl. 23.

[37] Ivica Jankovec, „Čl. 901–923", *Komentar Zakona o obligacionim odnosima* (urednici Borislav T. Blagojević, Vrleta Krulj), Beograd, 1980, 475.

[38] CA, L113-2 tačka 3.

[39] I. Jankovec, 475.

[40] M. Ćurković (2019), 41.

[41] Nataša Petrović Tomić, *Osnovi prava osiguranja: treće izmenjeno i dopunjeno izdanje*, Beograd, 2024, 312.

[42] Claude J. Berr, Hubert Groutel, Code Des Assurances: 9. éd., Paris, 2003, 31.

[43] Nije relevantno ni ono uvećanje rizika za koje se može smatrati da je ugovoreno da se povećani rizik takođe pokriva (VVG, čl. 27).

[44] I. Jankovec, 475. Može se dogoditi da u isto vreme nastupe okolnosti koje povećavaju opasnost i one koje je smanjuju, kada je neophodno razmatranje celokupnog slučaja i ispitati da li su okolnosti koje povećavaju opasnost možda uravnotežene sa onima koje je smanjuju (tzv. kompenzacija opasnosti) – npr. iseljenje stanara iz zgrade u okviru osiguranja od požara umanjuje rizik usled nepažnje stanara, ali povećava rizik usled požara koji mogu izazvati beskućnici ukoliko se tu nastane (D. Looschelders *et. al*, 508).

se jednokratno rizično ponašanje ne uzima u obzir.[45] Takođe, ponašanje osiguranika ili neka druga okolnost koja je još uvek u ranoj fazi, ali potencijalno može dovesti do povećanja odnosno umanjenja rizika u budućnosti se ne uzima u obzir – relevantne su samo one okolnosti usled kojih je povećanje odnosno umanjenje rizika već nastupilo.[46] Razlikuju se u slučaju osiguranja imovine i osiguranja lica.

Kada je reč o osiguranju lica, jedina relevantna okolnost u srpskom pravu jeste promena zanimanja lica, u pravcu povećanja rizika. To ZOO izričito propisuje.[47] Ostale okolnosti, poput pogoršanja zdravstvenog stanja osiguranika, osiguravač svakako kalkuliše u iznos premije prilikom zaključenja ugovora, imajući u vidu prvenstveno njegove godine života i zdravstveno stanje.[48] Pod zanimanjem se podrazumeva redovno zaposlenje ili poziv, a ne privremena aktivnost koju osiguranik može obavljati, niti rekreacija.[49] Primera radi, činjenica da je osiguranik bio angažovan na lomljenju betona u već iskopanom tunelu ili na natkrivenom iskopu ne znači nužno da je njegovo zanimanje kopanje tunela.[50] Samim tim, osiguranik nije dužan da prijavi jednokratne ili kratkotrajne poslove koje obavlja tokom osiguranja.[51] Nemački zakonodavac takođe oprezno pristupa dužnosti informisanja kod osiguranja života, navodeći da se povećanjem rizika smatra se samo ona promena koja je izričitim pisanim sporazumom definisana kao povećanje rizika, a osiguravač se ne može pozvati na povećanje rizika nakon što je proteklo pet godina od tog povećanja.[52] Isto važi i za okolnosti koje dovode do smanjenja rizika.[53] Francuski CA propisuje da osiguranikova obaveza prijave novih okolnosti ne važi za ugovor o osiguranju života.[54]

Kada se radi o osiguranju imovine, relevantne okolnosti se tiču same imovine koja se osigurava. Primera radi, to su promena namene stvari, njeno premeštanje s mesta koje je označeno u ispravi osiguranja na neko drugo mesto,[55] izloženost

[45] D. Looschelders *et al*., 507.
[46] *Ibid*, 509.
[47] ZOO, čl. 914 st. 1.
[48] Vid. N. Petrović Tomić, 310–311, 312 fn. 651.
[49] George James Couch, Ronald Aberdeen Anderson, *Couch Cyclopedia of Insurance Law (2. ed.): sections 35:1 – 37:420*, New York, 1961, 685, 693.
[50] *Ibid*, 686.
[51] Takođe, promena samo naziva zanimanja, dok osiguranik nastavlja da radi iste poslove, ne predstavlja promenu zanimanja (G. Coach, R. Anderson, 691). Međutim, obavljanje sezonskog posla koji je drugačiji od stalnog zaposlenja može predstavljati relevantnu okolnost koju je ugovarač dužan da prijavi (npr. direktor škole koji je tokom letnjeg raspusta radio kao čuvar šuma), pogotovo ukoliko je takav posao opasniji, odnosno povezan s većim rizikom od nezgode (vid. G. Coach, R. Anderson, 693).
[52] Vid. čl. 158 VVG. Ako je ugovarač osiguranja namerno ili prevarom prekršio svoju obavezu, rok iznosi deset godina.
[53] VVG, čl. 158 st. 3.
[54] CA, čl. L113-2 st. 5.
[55] P. Šulejić, 234; I. Jankovec, 475.

opasnim materijama, značajno povećanje njene vrednosti i slično. S druge strane, davanje stvari u zakup može ali ne mora biti relevantna okolnost, u zavisnosti od toga da li zakup povećava opasnost koju osiguranje pokriva.[56] Kod osiguranja od odgovornosti za štetu uzrokovanom upotrebom motornog vozila (tzv. auto-osiguranje), relevantne okolnosti čiju promenu ugovarač mora prijaviti jesu, primera radi, promena namene vozila, kretanje po području na kome je rizik od nezgode povećan, promena vrste pogonskog goriva, značajno povećana pređena kilometraža.[57]

Zakonodavci predviđaju različite rokove u kojima je ugovarač osiguranja dužan obavestiti osiguravača o povećanju rizika. ZOO i VVG propisuju da je on dužan da to učini bez odlaganja ako se rizik povećao nekim njegovim postupkom, odnosno postupkom osiguranika koji je on dozvolio.[58] Primera radi, u podrum unese zapaljiv materijal,[59] pretvori kuću u radionicu, postavi solarne panele bez odgovarajućih odobrenja i slično. Suprotno, ako se povećanje rizika dogodilo bez njegovog učešća, on je dužan da ga, prema odredbama našeg prava, obavesti u roku od četrnaest dana od kad je za to saznao.[60] Na primer, može doći do povećanja vodostaja usled poplava i pojave podzemnih voda u podrumu, oštećenja na krovu usled zemljotresa, opterećenja električnih instalacija usled komšijinih radnji… Ako ugovarač nije saznao za takve okolnosti i sve dok ne sazna, nema ni dužnosti obaveštavanja.[61] Nemački zakonodavac ugovarača osiguranja i za slučaj povećanja rizika nezavisno od njegove volje obavezuje da odmah po saznanju obavesti osiguravača.[62] Francusko pravo propisuje rok od petnaest dana, koji se računa od saznanja, nezavisno od toga kako je do promene rizika došlo.[63]

Najzad, kada je reč o načinu na koji se osiguravač obaveštava, jedino francuski zakonodavac propisuje da se obaveštenje mora poslati preporučenim pismom ili preporučenom elektronskom poštom.[64] Sledi da u nemačkom i srpskom pravu važe opšta pravila o izjavi volje, što znači da takva obaveštenja mogu biti data usmeno, u prostorijama osiguravača. Svakako, ugovarač osiguranja će u slučaju eventualnog spora lakše dokazati da je obavestio osigurača ukoliko to učini pismom ili elektronskom poštom.

[56] P. Šulejić, 234. Vrhovni privredni sud istakao je da davanje osigurane stvari u zakup ne mora samo po sebi biti povećanje rizika o kojem je ugovarač osiguranja dužan da obavesti osiguravača (Sl. 732/68 od 8. avgusta 1988. godine) (navedeno prema Jankovec 1980, 475).

[57] M. Ćurković (2019), 42.

[58] ZOO, čl. 914 st. 2. U pojedinim pravnim sistemima, poput švajcarskog prava, pravne posledice koje nastupaju usled promene okolnosti koje su značajne za ocenu rizika zavise od toga da li je do promene došlo radnjom ugovarača osiguranja ili ne (vid. I. Jankovec, 475–476).

[59] P. Šulejić, 235.

[60] ZOO, čl. 914 st. 2; VVG čl. 23 st. 2.

[61] I. Jankovec, 476.

[62] VVG čl. 23 st. 3.

[63] CA, čl. L113-2 st. 2.

[64] CA, čl. L113-2 st. 2.

IV Pravne posledice obaveštavanja osiguravača o promeni rizika

1. Povećanje rizika

Nakon što je obavešten o povećanju rizika, osiguravač ima dve opcije – da raskine ugovor ili da ugovaraču osiguranja predloži novu (višu) stopu premije. Po svojoj prirodi, navedene opcije osiguravača predstavljaju pravne moći (preobražajna prava). ZOO ne ostavlja sasvim slobodan izbor osiguravaču između optiranja za jedno od preobražajnih prava, već njegova odluka mora biti srazmerna povećanom riziku – ako je rizik povećan tako da ugovor ne bi ni zaključio, može optirati za raskid; ako je rizik povećan da bi ugovor ipak zaključio ali pod drugačijim uslovima, može povećati premiju. Čini se da naš zakonodavac vodio načelom *favori contractus*, dopuštajući raskid samo kao krajnje sredstvo. Tako rezonuje i francuski zakonodavac.[65] Suprotno, VVG propisuje da osiguravač može raskinuti ugovor ili *umesto toga* (naglašava autorka) povećati premiju.[66] Sledi da je jednako povećanje rizika dovoljno za raskid i povećanje premije, što znači da je osiguravač potpuno slobodan da bira između alternativno postavljenih ovlašćenja.

Pritom, nakon što sazna za povećanje rizika, osiguravač ima rok od mesec dana da odluči o tome kako će postupiti. Takav rok predviđaju srpsko i nemačko pravo.[67] Ukoliko se ponaša pasivno, tj. ne ponudi ugovaraču osiguranja novu premiju niti mu saopšti da raskida ugovor, ugovor ostaje na snazi pod istim uslovima, a osiguravač se ne može naknadno koristiti svojim ovlašćenjima.[68] Isto važi i u slučajevima kada izričito ili konkludentno pokaže da prihvata produženje ugovora pod istim uslovima (primi premiju, isplati naknadu za osigurani slučaj koji se desio posle tog povećanja i sl.). [69] Nemački zakonodavac dodaje da osiguravačeva prava prestaju i ukoliko se okolnosti nanovo promene, tako da se uspostavi stanje koje je postojalo pre povećanja rizika.[70] Pritom, odredbu ne bi trebalo tumačiti restriktivno te zahtevati obnovu identičnog stanja koje je postojalo ranije, nego je dovoljno da se uspostavi odnos koji je pretpostavljen ugovorom u pogledu odnosa rizika i premije.[71]

Ako je povećanje toliko da on ne bi zaključio ugovor da je takvo stanje postojalo u trenutku njegovog zaključenja, može raskinuti ugovor. Dejstvo ugovora

[65] Vid. CA, čl. L113-4 st. 1.
[66] Vid. VVG, čl. 24 i 25.
[67] ZOO, čl. 914 st. 6; VVG čl. 24 st. 2.
[68] ZOO, čl. 914 st. 6.
[69] ZOO, čl. 914 st. 6. Slično je i u francuskom pravu, vid. čl. L113-4 st. 4 CA.
[70] VVG čl. 24 st. 3.
[71] D. Looschelders *et al*., 527. Ako, s druge strane, do obnove ranijeg stanja dođe tek nakon što je ugovor raskinut, takva izmena okolnosti nema pravnih dejstava, raskid ostaje na snazi (D. Looschelders *et al*. 2023, 527).

prestaje u trenutku kada osiguravač saopšti ugovaraču osiguranja svoju odluku o raskidu.[72] Izuzetno, u francuskom pravu, pravne posledice raskida se odlažu za deset dana od časa obaveštavanja ugovarača.[73] U tom roku ugovarač može da razmisli, informiše se i promeni osiguranje.[74] Pritom, raskid dejstvuje *ex nunc* – od tog trenutka osiguravajuće pokriće prestaje, a ugovarač ima pravo na povraćaj dela premije koji odgovara preostalom delu perioda osiguranja.[75] Prema tome, nastupanje osiguranog slučaja pre nego što je odluka o raskidu saopštena ugovaraču osiguranja rađa obavezu za osiguravača da isplati osiguranu svotu.

Ukoliko je povećanje rizika toliko da bi osiguravač zaključio ugovor samo uz veću premiju da je takvo stanje postojalo u času zaključenja ugovora, on ugovaraču osiguranja može predložiti novu stopu premije.[76] Povećanje premije, ako ugovarač osiguranja pristane, proizvodi pravno dejstvo od dana kada je on dao svoj pristanak.[77] Ako ugovarač osiguranja odbije osiguravačev predlog ili se o njemu ne izjasni u roku od četrnaest dana od prijema predloga, ugovor prestaje po samom zakonu u srpskom pravu.[78] Slično je i u francuskom pravu, s tim što je predviđen rok od trideset dana, a ugovor raskida osiguravač jednostranom izjavom volje.[79] Pritom, pravne posledice (o eventualnom raskidu u slučaju ćutanja) moraju biti naznačene u samom predlogu. Smatram da bi to rešenje bilo korisno uneti i u srpsko pravo *de lege ferenda*. Nemački zakonodavac ovlašćuje osiguravača da jednostrano poveća premiju i o tome samo obavesti ugovarača osiguranja, ali istovremeno daje pravo ugovaraču osiguranja da ugovor raskine u roku od mesec dana od prijema obaveštenja, pod uslovom da je premija povećana za više od deset procenata, odnosno ako je osiguravač isključio pokriće za povećani rizik.[80] Takvo jednostrano ovlašćenje osiguravača opravdava se institutom promenjenih okolnosti iz čl. 313 BGB (*Störung der Geschäftsgrundlage*).[81]

72 I. Jankovec, 476.
73 CA, čl. L113-4 st. 2.
74 Slične odredbe mogu se naći u zakoni(ci)ma širom Evrope. Rok nakon kojeg raskid proizvodi pravno dejstvo iznosi 7 dana u Danskoj (čl. 47 danskog Zakona o osiguranju), 15 dana u Grčkoj (čl. 4 st. 2 i prva rečenica čl. 3 st. 7 grčkog Zakona o osiguranju), jedan mesec u Belgiji (čl. 26 st. 1(2) belgijskog Zakona o osiguranju) i Luksemburgu (čl. 34 st. 1(3) luksemburškog Zakona o osiguranju), dok u Italiji, raskid proizvodi dejstvo odmah ili nakon 15 dana, u zavisnosti od stepena povećanja rizika (čl. 1898 st. 3 italijanskog Građanskog zakonika) (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 187).
75 I. Jankovec, 476; D. Looschelders *et al*., 523. Isto i u čl. L113-4 st. 2 CA.
76 ZOO, čl. 914 st. 4.
77 I. Jankovec, 476.
78 ZOO, čl. 914 st. 5.
79 CA, čl. L113-4 st. 3.
80 VVG, čl. 25.
81 D. Looschelders *et al*., 528. BGB, čl. 313 st. 1: Ako se okolnosti koje su postale osnova ugovora značajno promene nakon zaključenja ugovora, i ako bi strane, da su predvidele ovu promenu, zaključile ugovor sa drugačijim sadržajem ili ga uopšte ne bi zaključile, strana koja je pogođena promenom može zahtevati izmenu ugovora, ukoliko se, uzimajući u obzir sve okolnosti konkretnog slučaja, pogotovo raspodelu

2. Smanjenje rizika

Okolnosti se nakon zaključenja ugovora mogu i izmeniti u pravcu umanjenja rizika. Moguća je i situacija da okolnosti koje značajno uvećavaju rizik prestanu da postoje, npr. prostoru se promeni namena (umesto radionice za zavarivanje postane garaža), uklone se opasne materije koje su se do tada tu skladištile, primenjuje se protivpožarna zaštita ili zaštita od krađe. U tom slučaju ugovarač osiguranja ima pravo da zahteva srazmerno umanjenje premije. Takvo rešenje je predviđeno odredbama srpskog, nemačkog i francuskog prava.[82] Predlog ugovarača ne podleže bilo kakvoj formi, niti se ograničava rokovima. Naime, ovde je njemu u interesu da prijavi takve okolnosti, tako da će razuman ugovarač osiguranja svakako to učiniti odmah po saznanju. Pravo na odgovarajuće umanjenje premije ugovarač osiguranja ima od dana kada je obavestio osiguravača. VVG dodaje da iste pravne posledice nastupaju u slučaju da je povećana premija bila utvrđena na osnovu netačnih navoda ugovarača, nastalih usled zablude u vezi s tim okolnostima.[83]

Nakon što ugovarač osiguranja obavesti ugovarača o promeni okolnosti i zahteva adekvatno umanjenje premije, moguće su dve situacije. Osiguravač može pristati na umanjenje premije, koje će dejstvovati od dana kada je obavešten. Međutim, on može i odbiti da redukuje premiju koju plaća ugovarač.[84] Tada ZOO predviđa pravo ugovarača osiguranja da raskine ugovor.[85] Pritom, srpski zakonodavac ne propisuje otkazni rok.[86] Smatram da raskid i u ovom slučaju dejstvuje po saopštavanju osiguravaču, prema opštim pravilima. Drugačije je u francuskom pravu, gde raskid proizvodi dejstvo trideset dana nakon obaveštenja.[87] Takođe, po analogiji s pravilima gde je osiguravač taj koji raskida ugovor usled povećanja rizika, ugovaraču osiguranja sleduje pravo na povraćaj dela premije koji odgovara preostalom delu perioda osiguranja.

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rizika po ugovoru ili zakonu, ne može razumno očekivati da ostane vezana ugovorom u njegovom izvornom obliku.

[82] Vid. čl. 916 ZOO, čl. 41 VVG i čl. L113-4 st. 4.

[83] VVG, čl. 41.

[84] VVG ne reguliše pravne posledice odbijanja osiguravača da redukuje iznos premije. Tada ugovarač osiguranja ima pravo na prigovor *exceptio non adimpleti contractus* prema čl. 320 BGB, pravo na raskid ugovora po osnovu čl. 323 BGB i, ukoliko su ispunjeni uslovi, pravo na naknadu štete iz čl. 280 BGB (Looschelders et al. 2023, 693).

[85] ZOO, čl. 916 st. 2.

[86] Slobodan Jovanović, „Uticaj povećanja osiguranog rizika na prava i obaveze iz ugovora o osiguranju u nemačkom, francuskom, češkom i srpskom pravu", *Strani pravni život* Vol. 53 no. 3/2013, 215.

[87] Jovanović (*Ibidem*) govori o otkaznom roku.

V Propuštanje ugovarača osiguranja da obavesti osiguravača o promenama rizika

U praksi neretko dolazi do situacija u kojima se ugovarač osiguranja ogluši o svoju dužnost prijave relevantnih okolnosti za ocenu rizika, te ne prijavi uvećanje ili umanjenje rizika do koga je u međuvremenu došlo. Razlozi za takvo postupanje mogu biti različiti – nepažnja odnosno nemar ugovarača osiguranja, pogrešna ocena da se ne radi o relevantnoj izmeni koja bi trebalo da bude prijavljena ili namerno prećutkivanje kako bi izbegao raskid ugovora ili povećanje premije. Takođe, moguće je da ugovarač osiguranja nije znao niti je mogao saznati da je došlo do oscilacije. Osiguravač za promenu okolnosti tada saznaje *post festum*, nakon nastupanja osiguranog slučaja, a prilikom odmeravanja štete koja je nastupila. Koje pravne posledice nastupaju u tom slučaju? Najčešće se radi o slučajevima gde je rizik nakon zaključenja ugovora o osiguranju uvećan, budući da tada ugovarač osiguranja, svestan po njega nepovoljnih posledica, nije podstaknut da blagovremeno obavesti osiguravača o promeni.

Domaći zakonodavac govori o situaciji kada se osigurani slučaj dogodi „u međuvremenu", imajući u vidu period od pogoršanja rizika do preduzimanja pravnih posledica od strane osiguravača povodom tog pogoršanja.[88] Tada se naknada koju osiguravač isplaćuje smanjuje u srazmeri između plaćenih premija i premija koje bi trebalo platiti prema povećanom riziku.[89] Štaviše, ukoliko srazmeru nije moguće izračunati jer je promena okolnosti tolika da osiguravač ne bi ni zaključio ugovor da su takve okolnosti postojale u vreme njegovog zaključenja, odnosno raskinuo bi ga da je o njima blagovremeno obavešten, on ne duguje nikakvu naknadu ugovaraču – obaveza isplate ugovorene svote prestaje.[90] Odredba se primenjuje kako na onog ugovarača koji je namerno prećutao pogoršanje rizika, tako i na onog ugovarača koji za pogoršanje nije mogao da sazna. Odredba se primenjuje i na onog ugovarača koji je saznao za uvećanje rizika, ali je neposredno nakon tog saznanja nastupio osigurani slučaj, te nije stigao da izvrši svoju dužnost obaveštavanja. Srpski zakonodavac, dakle, ne propisuje strože posledice za ugovarača koji je namerno prećutao o pogoršanju rizika. Takođe, čini se da zakonodavac nije imao u vidu situacije kada je osigurani slučaj nastupio ne zbog povećanog rizika nego iz nekog drugog razloga. Domaća teorija smatra da se pravne posledice iz čl. 915 primenjuju i u tom slučaju.[91]

Nemačko pravo, s druge strane, uzima u obzir više faktora: stepen krivice ugovarača osiguranja, vreme nastupanja osiguranog slučaja i uzročnu vezu između

[88] ZOO ne pravi razliku između slučajeva kada on o pogoršanju nije obavešten ili jeste obavešten ali još uvek nije raskinuo ugovor, odnosno izmenio uslove ugovora u sporazumu sa ugovaračem osiguranja. Svakako, predmet analize jeste prva situacija.

[89] ZOO, čl. 915.

[90] I. Jankovec, 477.

[91] *Ibidem.*

povećanja rizika i nastanka štete. Osiguravač se može u potpunosti osloboditi obaveze plaćanja naknade pod tri uslova. VVG predviđa da osiguravač nije dužan izvršiti isplatu ako osigurani slučaj nastupi nakon jednog meseca od trenutka kada je osiguravač trebalo da bude obavešten, osim ako je u tom trenutku već znao za povećanje rizika.[92] Prvi uslov jeste da povećanje rizika nije na vreme prijavljeno. Zakonodavac vezuje otpočinjanje roka za trenutak kada je osiguravač o promeni rizika trebalo da bude obavešten (tzv. fiktivni prijem obaveštenja).[93] Od tog trenutka mora proći mesec dana. Rok od mesec dana propisan je zato što osiguravač, i kada dobije obaveštenje o promeni rizika, svakako ima mesec dana da odluči želi li da raskine ugovor (vid. gore). Fingiranje prijema obaveštenja ima za cilj da obezbedi to da osiguravač ne bude u lošijoj poziciji nego što bi bio da je uredno obavešten.[94] Drugi uslov jeste da osiguravač nije znao (npr. iz drugog izvora) za povećanje rizika u trenutku kada je trebalo da bude obavešten. Teret dokazivanja da je osiguravač ipak znao za povećan rizik snosi ugovarač osiguranja.[95] Treći uslov jeste da je ugovarač osiguranja postupao s namerom kao najtežim stepenom krivice. U pravnoj teoriji je sporno na kome je teret dokazivanja krivice.[96] Naime, iako se to ne kaže izričito, takav zaključak se nameće budući da zakonodavac u narednim stavovima propisuje druge pravne posledice za postupanje s grubom i običnom nepažnjom. U slučaju grube nepažnje ugovarača osiguranja, osiguravač ima pravo da umanji svoja ugovorna davanja u skladu s težinom krivice osiguranika, pri čemu teret dokazivanja da nije bilo grube nepažnje snosi ugovarač osiguranja.[97] Najzad, osiguravač ipak odgovara (plaća ugovorenu svotu) ako povreda obaveze obaveštavanja nije bila namerna.[98] Takođe, osiguravač ostaje dužan da izvrši isplatu ako: povećanje osiguranog rizika nije bilo uzrok nastanka osiguranog slučaja, niti je uticalo na obim odgovornosti osiguravača, ili je u trenutku nastanka osiguranog slučaja već istekao rok za raskid ugovora od strane osiguravača, a ugovor nije bio raskinut.[99] Radi se o situacijama gde nedostaje uzročna veza između povećanog rizika i nastupanja osiguranog slučaja.

Francuski zakonodavac propisuje različite pravne posledice u zavisnosti od krivice ugovarača osiguranja. Ukoliko je on prećutao (zatajio) ili namerno lažno predstavio činjenice koje utiču na rizik, bilo da se radi o izmeni predmeta rizika bilo o uopšteno osiguravačevoj oceni rizika, ugovor o osiguranju će biti ništav,

[92] VVG, čl. 26 st. 2 (prva rečenica).

[93] D. Looschelders, 533.

[94] *Ibidem*.

[95] *Ibidem*.

[96] Iz formulacije čl. 26 VVG sledi da ugovarač osiguranja snosi teret dokazivanja da nije postupao s namerom, što odstupa od opšteg pravila po kome teret dokazivanja za postojanje namere snosi osiguravač, a u literaturi se smatra da je u pitanju greška u formulaciji (D. Looschelders, 534).

[97] VVG, čl. 26 st. 2 (druga rečenica) u vezi sa čl. 26 st. 1.

[98] VVG, čl. 26 st. 2.

[99] VVG, čl. 26 st. 3.

čak i ako zatajeni ili iskrivljeni rizik nije imao uticaja na nastali osigurani slučaj.[100] Štaviše, uplaćene premije tada ostaju osiguravaču, koji ima pravo i na plaćanje svih dospelih premija, kao naknadu štete.[101] Suprotno, propust ili netačna izjava osiguranika, ako nije dokazana njegova loša vera, ne povlači ništavost ugovora o osiguranju.[102] Ako se takav propust ili netačnost utvrdi pre nastanka osiguranog slučaja, osiguravač ima pravo da optira između povećanja premije koje prihvata osiguranik i raskida ugovora deset dana nakon što osiguraniku uputi obaveštenje preporučenim pismom, uz povraćaj dela premije koji se odnosi na period u kojem osiguranje više ne važi.[103] Ukoliko se propust ili netačna izjava otkriju tek nakon nastanka osiguranog slučaja, naknada se umanjuje srazmerno odnosu između plaćenih premija i premija koje bi bile plaćene da su rizici bili u potpunosti i tačno prijavljeni.[104]

VI Promena rizika u principima Evropskog ugovornog prava osiguranja (PEICL)

Principi evropskog ugovornog prava osiguranja (dalje u tekstu: PEICL) predstavljaju alternativni, jedinstveni pravni okvir namenjen ugovorima o osiguranju unutar Evropske unije, koji strane mogu izabrati da primene na svoj ugovor umesto nacionalnog prava. Svrha PEICL jeste da omoguće osiguravačima ponudu istovetnih osiguravajućih usluga u različitim državama članicama, čime se smanjuju troškovi, prevazilaze pravne razlike i povećava pravna sigurnost u prekograničnoj trgovini.[105] Prema čl. 4:201 PEICL, ako ugovor o osiguranju sadrži odredbu koja se odnosi na povećanje osiguranog rizika, ta odredba nema dejstvo, osim ako je povećanje rizika suštinsko i vrsta tog povećanja je navedena u ugovoru o osiguranju.

PEICL se, dakle, ograničavaju na one slučajeve u kojima polise sadrže klauzule koje predviđaju dužnost ugovarača da informiše osiguravača o relevantnim okolnostima za vreme ugovora. Pravilo nastoji da pronađe kompromis između autonomije volje i zaštite osiguranika.[106] Radna grupa se odlučila za takvo rešenje jer je posredi pitanje koje je uporednopravno različito uređeno (vid. gore).[107] PEICL

[100] CA, čl. L113-8 st. 1.
[101] CA, čl. L113-8 st. 2.
[102] CA, čl. L113-9 st. 1.
[103] CA, čl. L113-9 st. 2.
[104] CA, čl. L113-9 st. 3.
[105] Christoph Brömmelmeyer, „Principles of European Insurance Contract Law", *European Review of Contract Law*, vol. 7 no. 3/2011, 446.
[106] H. Cousy, 130.
[107] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181–182. Pritom, odredbe PEICL se ne primenjuju na lično osiguranje, poput zdravstvenog osiguranja ili osiguranja života (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 182).

ostavljaju ugovornicima slobodu (pre svega osiguravaču, budući da se radi o ugovoru po pristupu) da u ugovor umetnu klauzulu o promeni rizika.[108] Međutim, ukoliko se osiguravač odluči za takvu klauzulu, on mora poštovati ograničenja koja mu čl. 4:201 nameće. Prvo, povećanje rizika mora biti suštinsko (*material*). Pridev „suštinsko" bi trebalo tumačiti u vezi sa članom 2:103(b) PEICL, što znači da se je relevantna samo ona okolnost koja utiče na ponašanje osiguravača, u smislu da bi osigurač, da je za nju znao, zaključio ugovor pod drugačijim uslovima ili ga ne bi zaključio uopšte.[109] Kouzi ističe da ono mora biti suštinsko po veličini i/ili po verovatnoći.[110] Povećanje koje je posledica amortizacije (u osiguranju imovine) ili starenja lica (u životnom osiguranju), ne smatra se suštinskim.[111] Drugo, vrsta takvog povećanja mora biti navedena u samom ugovoru. Propisivanjem tog ograničenja, radna grupa je nastojala obezbediti da osiguranik bude upoznat sa svojom obavezom tokom ugovora, polazeći od pretpostavke da razuman i pažljiv osiguranik čita svoju polisu.[112]

Ako klauzula zahteva da osiguravač bude obavešten o povećanju rizika, dužnost obaveštavanja je na ugovaraču osiguranja, osiguraniku ili korisniku osiguranja, u zavisnosti od slučaja, pod uslovom da je lice koje je dužno da obavesti znalo ili je moralo znati za postojanje osiguranja i za povećanje rizika.[113] Posebna pravila u pogledu načina obaveštavanja nisu propisana. Zatim, ukoliko klauzula zahteva da osiguravač bude obavešten u određenom roku, propisano je da taj rok mora biti razuman.[114] Radi se o faktičkom pitanju koje zavisi od okolnosti slučaja, pogotovo od toga da li je do promene rizika došlo radnjom dužnika ili ne. Obaveštenje proizvodi dejstvo u trenutku slanja.[115] Naime, radna grupa se za takvo rešenje odlučila budući da je slanje jednostavnije dokazati nego prijem.[116] Koje pravne posledice nastupaju ukoliko ugovarač osiguranja povredi svoju obavezu, odnosno ne obavesti osiguravača u razumnom roku? Propisano je da u tom slučaju osiguravač nema pravo da, samo zbog toga, odbije isplatu ugovorene svote, osim ako je šteta nastala upravo zbog tog povećanog rizika.[117]

[108] H. Cousy, 131.

[109] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 86, 182. Čl. 2:103 PEICL predviđaju izuzetke kada osiguravač nema pravo da sankcioniše osiguranika za netačne ili nepotpune informacije. Između ostalog, osiguravač nema pravo na pravni lek ukoliko te informacije nisu bile bitne za njegovu razumnu odluku da zaključi ugovor pod ugovorenim uslovima (čl. 2:103 (b)). Sledi da je ugovarač osiguranja dužan da otkrije samo one informacije koje su objektivno bitne za konkretan rizik (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 86).

[110] H. Cousy, 131.

[111] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 182.

[112] *Ibidem*.

[113] PEICL, čl. 4:402 st. 1.

[114] PEICL, čl. 4:402 st. 2.

[115] PEICL, čl. 4:402 st. 2.

[116] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 184.

[117] PEICL, čl. 4:402 st. 3.

Najzad, PEICL predviđaju i „sankcije“, odnosno pravne posledice promene rizika. Ako je to ugovoreno, u slučaju povećanja osiguranog rizika osiguravač ima pravo da raskine ugovor. Razume se, raskid ugovora je moguć samo pod gorenavedenim uslovima u pogledu rizika iz čl. 4:201 PEICL. Takođe, predviđen je i uslov u pogledu načina obaveštavanja – osiguravač raskid mora učiniti pismenim obaveštenjem upućenim ugovaraču osiguranja u roku od jednog meseca od trenutka kada je saznao za povećanje rizika ili kada je postalo očigledno da je do povećanja došlo.[118] Ukoliko se osiguravač odluči na raskid, pokriće prestaje po proteku jednog meseca nakon od raskida.[119] Otkazni rok od mesec dana ostavljen je ugovaraču osiguranja kako bi imao vremena da pronađe novo pokriće.[120] Međutim, ako ugovarač osiguranja namerno nije obavestio osiguravača o povećanju rizika, tada nema otkaznog roka, već ugovor prestaje u času raskida.[121] Na taj način PEICL sankcionišu ugovarača osiguranja koji je o povećanju rizika prećutao kako bi izbegao uvećanje premije. U tom slučaju, ako je osigurani događaj prouzrokovan povećanim rizikom za koji je ugovarač osiguranja znao ili je morao znati, naknada se ne isplaćuje ako osiguravač ne bi inače uopšte prihvatio taj rizik. Međutim, ako bi osiguravač osigurao taj rizik pod višom premijom ili pod drugačijim uslovima, naknada se isplaćuje srazmerno ili u skladu sa tim uslovima.[122] Suprotno, ugovarač osiguranja koji ne zna niti je morao znati za povećanje rizika, ne snosi ni pravne posledice.[123]

Kada je reč o smanjenju rizika, u slučaju bitnog smanjenja osiguranik ima pravo da zatraži srazmerno smanjenje premije za preostali period ugovora.[124] Takvo rešenje nalažu razlozi pravičnosti. Budući da svaka pretplata premije za prethodni period predstavlja teret za osiguranika, na taj način mu se omogućava da zahteva izmenu uslova ugovora.[125] Ako se strane ne usaglase oko srazmernog smanjenja u roku od mesec dana od podnošenja zahteva, osiguranik ima pravo da raskine ugovor pismenim obaveštenjem u roku od dva meseca od dana podnošenja zahteva.[126]

VII Zaključak

Za razliku od dužnosti prijavljivanja relevantnih okolnosti koje određuju rizik prilikom zaključenja ugovora, koja kao takva postoji u svim pravnim sistemima, obaveza prijave takvih okolnosti tokom ugovora nije svuda prihvaćena. Glavni razlog

118 PEICL, čl. 4:403 st. 1.
119 PEICL, čl. 4:403 st. 2.
120 Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 186.
121 PEICL, čl. 4:403 st. 2.
122 PEICL, čl. 4:403 st. 3.
123 Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 186.
124 PEICL, čl. 4:301 st. 1.
125 Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 189.
126 PEICL, čl. 4:301 st. 2.

jeste što takva dužnost predstavlja konkretizaciju načela savesnosti i poštenja prilikom izvršenja ugovora, koju *common law* ne poznaje kao opšti princip koji prožima ugovor u svim njegovim fazama. Ipak, i tada se ona može izričito ugovoriti. Takvu mogućnost predviđa i PEICL, propisujući uslove pod kojima će klauzula o dužnosti ugovarača osiguranja da informiše osiguravača po zaključenju ugovora proizvoditi pravno dejstvo. U pravnim sistemima kontinentalnog prava, s druge strane, dužnost obaveštavanja je uobičajena i zakonodavci predviđaju pravne posledice promene rizika za vreme ugovora.

U svakom slučaju, bilo da je dužnost informisanja propisana ili ugovorena, ugovarač osiguranja dužan je da po zaključenju ugovora prijavi osiguravaču relevantne okolnosti koje vode oscilaciji rizika. Pitanje šta se u konkretnom slučaju smatra relevantnim okolnostima prepušteno je pravnoj teoriji i sudskoj praksi. Relevantnim se smatraju samo one okolnosti koje značajno i trajno menjaju rizik, na način da bi ugovarač osiguranja ugovor zaključio pod drugačijim uslovima da su takve okolnosti postojala u trenutku zaključenja ugovora, ili ga ne bi zaključio uopšte. Rokovi u kome obaveštenje mora biti učinjeno se u srpskom pravu razlikuju u zavisnosti od toga da li je sam ugovarač prouzrokovao umanjenje odnosno uvećanje rizika, ili je do njegove promene došlo na drugi način, nezavisno od njegove volje. S druge strane, nemački i francuski zakonodavac ne prave takvu razliku, propisujući dužnost obaveštavanja odmah po saznanju (nemačko pravo), odnosno petnaest dana od saznanja (francusko pravo). PEICL propisuje da ugovoreni rok za obaveštavanje mora biti razuman. Smatram da ne bi trebalo praviti razliku u pogledu rokova informisanja, kao što to čini naš zakonodavac, budući da je jedino važno da je ugovarač za izmenjene okolnosti saznao, nezavisno od toga kako je do tog saznanja došao. Francuski zakonodavac propisuje pisanu formu obaveštenja (preporučeno pismo ili imejl), što ne predstavlja dodatni teret za ugovarača osiguranja u današnjem tehnološkom okruženju, a doprinosi pravnoj sigurnosti.

Pravne posledice se razlikuju u zavisnosti od toga da li se rizik u međuvremenu povećao ili smanjio. U slučaju povećanja rizika, osiguravač može izmeniti uslove ugovora (povećati premiju) ili raskinuti ugovor. Srpsko i francusko pravo uslovljavaju raskid ugovora činjenicom da su se okolnosti toliko izmenile da on ugovor ne bi ni zaključio da su takve okolnosti postojale ranije. Takvo rešenje čini se opravdanim, budući da je raskid ugovora i u opštem ugovornom pravu predviđen kao krajnje sredstvo, kada interesi ugovornika ne mogu biti ostvareni na drugi način. Nemačko pravo, s druge strane, omogućuje osiguravaču da slobodno bira između raskida i povećanja premije. Dodatno, nemačko i francusko pravo predviđaju otkazni rok, koji omogućava ugovaraču osiguranja da se pripremi i pronađe drugo pokriće. To čine i PEICL. Mišljenja sam da bi otkazni rok trebalo predvideti i u srpskom pravu *de lege ferenda*. U svakom slučaju, premija se ne može povećati jednostrano, a pravni sistemi predviđaju različite mehanizme omogućavanja ugovaraču da se o izmenama ugovora saglasi u određenom roku. Ako ugovarač ne pristane na izmene, alternativa je raskid ugovora. Nasuprot tome, u slučaju smanjenja rizika ugovarač osiguranja je ovlašćen zahtevati izmenu uslova ugovora (smanjenje premije), a ukoliko se osiguravač s tim ne saglasi, on može da raskine ugovor.

Kada je reč o pravnim posledicama propuštanja ugovarača osiguranja da obavesti osiguravača o izmenjenom riziku, čini se da srpsko pravo zaostaje u pogledu nijansiranja pravnih posledica u poređenju s nemačkim i francuskim pravom. Prvo, ZOO ne pravi razliku u zavisnosti od stepena krivice ugovarača osiguranja. Situacije u kojima je ugovarač namerno prećutao izmenu okolnosti osiguravaču kako bi zadržao povoljnije uslove ugovora, ili svoju dužnost nije izvršio iz puke nepažnje, po slovu zakona vode istim posledicama. To je razumljivo, budući da je nameru teško dokazati. Drugo, moguća je i situacija da se rizik poveća usled okolnosti koje su opštepoznate, te bi trebalo predvideti izuzetak od dužnosti obaveštavanja u tom slučaju. Najzad, naročito je problematično to što srpski zakonodavac ne razmatra uzročnu vezu između uvećanja rizika i nastupanja osiguranog slučaja. Kada povećanje osiguranog rizika nije bilo uzrok nastanka osiguranog slučaja, već je do osiguranog slučaja došlo iz potpuno drugog razloga, osiguravaču ne bi trebalo omogućiti da srazmerno umanji iznos naknade.

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THE DUTY TO NOTIFY THE INSURER OF CHANGE IN RISK AFTER THE CONCLUSION OF THE INSURANCE CONTRACT[2]

REVIEW SCIENTIFIC PAPER

Summary

Circumstances relevant to the assessment of risk may change after the conclusion of an insurance contract. Since the policyholder is the only party with full insight into all circumstances relevant to the risk assessment, he has a duty to notify the insurer of any such changes. This paper will examine the nature of the duty to notify the other contracting party as a manifestation of the principle of good faith. It will further define the relevant risk, the aggravation or reduction of which constitutes the duty to notify, analyze the insurer's rights upon being informed of a change in circumstances, and examine the legal consequences of breaching this duty by the policyholder. The duty to notify the insurer of an aggravation or reduction of risk is regulated by Articles 914–916 of the Serbian Law on Contracts and Torts. In addition to the analysis of Serbian law, the author will examine the relevant provisions of French and German law, as well as the Principles of European Insurance Contract Law (PEICL).

Keywords: *insurance contract, risk, aggravation of risk, reduction of risk, duty to notify*

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I Introduction

An insurance contract is an agreement by which the policyholder agrees to pay a certain amount to the insurer, and the insurer undertakes to pay compensation or perform another action for the insured or a third party if an event defined as the insured event occurs. The monetary amount paid by the policyholder is called the premium, while the amount paid by the insurer upon the occurrence of the insured event is referred to as the insured sum or insured amount. In other words, in exchange for the premium paid by the policyholder, the insurer pays the agreed amount or provides another form of compensation if the insured event takes place.

At the time the contract is concluded, the insurer assesses the probability of the insured event occurring. Based on this risk assessment, i.e. the probability of its occurrence, the insurer determines the amount of the premium to be charged to the policyholder. In order to accurately determine the premium, it is crucial for the insurer to be aware of all relevant circumstances, primarily at the time of contract conclusion, but also throughout its duration. It is important to emphasize that this is a contract in which, by its very nature, there is an asymmetry of information regarding the relevant circumstances pertaining to the insured property or person. In this respect, the insurer is the "information-disadvantaged party" as it does not possess such information and can obtain it only based on the statements of the policyholder.[3] The policyholder is obliged to disclose all circumstances relevant to risk assessment, which is most commonly done by filling out a form or answering specific questions posed by the insurer.[4] The insurer relies on the loyalty of its contracting party and depends on their statements, without verifying their completeness or accuracy.[5]

Once the policy is issued, the insurer hopes there will be no significant aggravation of risk.[6] However, it must be borne in mind that the insurance contract is a contract of continuous performance, creating obligations whose fulfillment extends over time.[7] Given that risk is a variable category, and that the performance of the insurer's obligation, by its very nature, requires a certain passage of time, the

[3] Marijan Ćurković, "Obveza ugovaratelja osiguranja, odnosno osiguranika, prijaviti osiguratelju okolnosti značajne za ocjenu rizika", *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse* No. 15/2017, 103.

[4] In the past, the policyholder independently decided which circumstances were important and which to disclose to the insurer and voluntarily informed them. This approach proved too burdensome for the policyholder and was gradually replaced by a system in which the insurer asks specific questions in the form of a questionnaire (see Herman Cousy, "The Principles of European Insurance Contract Law: The Duty of Disclosure and the Aggravation of Risk", ERA Forum No. 9/2008, 120).

[5] M. Ćurković (2017), 102.

[6] Project Group Restatement of European Insurance Contract Law, Fritz Reichert-Facilides, Jürgen Basedow, *Principles of European Insurance Contract Law: (PEICL)*, München, 2009, 181.

[7] More on contracts with continuous performance, see Marija Karanikić Mirić, *Obligaciono pravo*, Belgrade, 2024, 186–187.

risk level may fluctuate between the conclusion of the contract and the occurrence of the insured event. From the insured's standpoint, there is an understandable tendency to continue their usual activities practiced prior to the conclusion of the insurance contract, without having to limit their conduct to maintain the insured risk. Additionally, there is a legitimate public interest to ensure that the insurance sector operates efficiently and remains financially stable, while not hindering activities that contribute to economic development and innovation.[8] Accordingly, it is understandable that during the insurance period, there may be significant fluctuations in risk, whether aggravations or reductions. Still, if a significant change in risk occurs, the policyholder is obligated to notify the insurer, so the latter can adequately assess the new situation and, if necessary, adjust the contract terms accordingly.

The duty to notify is prescribed with the aim of reducing the information asymmetry between the contracting parties. It is essential for the insurer to be aware of any circumstance that could lead to an aggravation or reduction of risk.[9] This duty is underpinned by two main reasons. First, it prevents the insured from profiting from the insured event.[10] In other words, it represents an application of the principle of full compensation – the injured party has the right to be compensated for the entire damage, but nothing beyond that. If the policyholder fails to report subsequent changes in risk, they may end up paying a lower premium than they should have or receiving greater compensation than they would have if all relevant circumstances had been disclosed – in effect, insurance becomes a source of profit rather than a means of compensation. Second, this duty contributes to reducing moral hazard.[11] Without such a duty, the insured could influence the risk after concluding the contract at their discretion, relying on the fact that the agreed sum would still be payable upon the occurrence of the insured event.

Since the duty to notify does not exist in all legal systems, this paper will first present comparative law approaches to this obligation, along with the theoretical rationales supporting those solutions. The central part of the paper is dedicated to the analysis of the duty to notify itself – who is bound by it, what exactly it entails, and what legal consequences result from a change in risk during the term of the contract, whether it be an aggravation or reduction of risk, depending on whether the policyholder informs the insurer in a timely manner or withholds such information. Finally, the paper presents the solution prescribed by the Principles of European Insurance Contract Law (PEICL) concerning changes in risk during the insurance period.

8 Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181.
9 Predrag Šulejić, *Pravo osiguranja*, Beograd, 2005, 233.
10 Irma Nozadze, "Duty to inform as a Specifity of Demonstration of Good Faith Principle in Voluntary and Compulsory Insurance", *Journal of Law (TSU)* No. 1/2017, 137.
11 *Ibidem*.

II The duty to notify during the term of the contract in comparative law

While all legal systems recognize the policyholder's duty to disclose all relevant circumstances at the time the insurance contract is concluded, comparative law reveals differing approaches regarding the duty to notify about fluctuations in risk during the term of the contract.[12] Specifically, in countries with a so-called "maritime insurance tradition", the policyholder is generally not obligated to report circumstances that lead to an aggravation or reduction of risk after the contract has been concluded.[13] This is the case in England and the Netherlands. In these jurisdictions, the duty to notify the insurer may only be imposed on the insured through a specific contractual clause. However, English and Dutch courts typically interpret such clauses restrictively, in favour of the insured, and rarely treat them as binding obligations.[14] On the other hand, in the countries of the so-called "Alpine insurance tradition",[15] the policyholder is obliged to notify the insurer of all relevant circumstances throughout the duration of the insurance contract. This duty is expressly stipulated by law. The French Insurance Code (*Code des assurances*; hereinafter: CA)[16] stipulates that the policyholder must notify the insurer during the contract period of any new circumstances that result in either an increase in risk or the emergence of new risks, and that thereby render previously provided answers to the insurer untrue or outdated.[17] The German Insurance Contract Act (*Gesetz über den Versicherungsvertrag* or *Versicherungsvertragsgesetz*; hereinafter: VVG)[18] obliges the policyholder who has

[12] Also, the insurance contracting party is obliged to report all relevant circumstances that have changed in the period from sending the offer to the insurer to conclude the insurance contract until the conclusion of the contract (H. Cousy, 127). This is particularly important in motor liability insurance, since the vehicle between the declaration, when the insured stated that the vehicle was in proper condition, and the conclusion of the contract may become technically defective (Dirk Looschelders *et al*., *Versicherungsvertragsgesetz Mit Nebengesetzen Und Systematischen Erläuterungen. 4. Auflage*, Hürth, 2023, 510).

[13] H. Cousy, 131. This is confirmed by judgments such as *Pim v Reid* (1843) and *Kausar v Eagle Star Insurance Co Ltd.* (1997) (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181).

[14] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 183. It is important to emphasize that even in those countries the legislature does not allow deliberate or grossly negligent behavior by the insured that causes the occurrence of the insured event (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181).

[15] H. Cousy, 131.

[16] Insurance Code (CA), consolidated version of May 3, 2025, available at: *https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006073984/* (last accessed May 30, 2025).

[17] CA, art. L113-2 point 3.

[18] Insurance Contract Act (VVG), version of November 23, 2007 (*Federal Law Gazette I,* 2631), last amended by Article 15 of the Act of December 20, 2022 (*Federal Law Gazette I*, 2793), available at: *https://www.gesetze-im-internet.de/vvg_2008/* (last accessed May 30, 2025).

increased the risk or allowed it to be increased without the insurer's consent to immediately inform the insurer of such an increase, or, in cases where the risk increase has occurred independently of the policyholder's will, to notify the insurer as soon as they become aware of the increased risk.[19]A similar obligation on the part of the policyholder is prescribed by the Serbian Law on Contracts and Torts (hereinafter: ZOO).[20] Why do legal systems approach this issue so differently?

First and foremost, this is a matter that "touches the very essence of insurance".[21] On one hand, an insurance contract is an aleatory contract, its legal effect at the time of conclusion is unknown and depends on an uncertain future event, that is, a circumstance unknown to the contracting parties.[22] At the time the contract is concluded, it is not known whether the insured event will occur. It may be expected of the insurer to accept, at the moment of contract conclusion, not only the existing risk but also any changes to that risk during the contract period.[23] Indeed, the very calculation of risk is inherent to the insurance contract as an aleatory agreement, and it can be argued that the law should not protect insurers from a poor risk assessment.

The legislator's stance on this issue is also influenced by the duration of the insurance period. The shorter the period, the less justified it is to require the policyholder to report circumstances that contribute to an increase or decrease in risk. In countries where insurance typically lasts one year or less, the law usually favours the insured and does not provide legal mechanisms for insurers to adjust policy terms in the event of a significant increase in risk.[24] In most European countries, however, insurance periods usually exceed one year, so the law permits the contract to be modified in case of a significant increase in risk during that time.[25]

Finally, the (non-)existence of the duty to inform about changes in relevant circumstances after the contract is concluded largely depends on how the principle of good faith and fair dealing is understood within a particular legal system. The insurance contract is based on the *principle of utmost good faith,* which entails a higher level of trust between the parties than is required in other contracts.[26]

[19] VVG, art. 23 para. 2 and 3.

[20] Law on Contracts and Torts, *Official Gazette of SFRY*, No. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of SRJ*, No. 31/93, *Official Gazette of SCG*, No. 1/2003 – Constitutional Charter and *Official Gazette of RS*, No. 18/2020, available at: *https://www.paragraf.rs/propisi/zakon_o_obligacionim_odnosima.html* (last accessed May 30, 2025). See Law on Contracts and Torts, art. 914.

[21] H. Cousy, 131. H. Cousy, 131.

[22] See M. Karanikić Mirić, 188–189.

[23] H. Cousy, 131.

[24] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181.

[25] *Ibidem*.

[26] I. Nozadze, 131. The principle of utmost good faith originates from marine insurance. In this type of insurance, the insurer had to trust the statements of the contracting party about the ship and the cargo, since the contract was often concluded far from the cargo and the ship (I. Nozadze, 131).

It is a contract of *uberrimae fidei*.[27] Continental legal systems, rooted in Roman law tradition, prescribe this principle and give it concrete expression through several specific rules. It applies not only at the time of contract conclusion but also during the performance of contractual obligations.[28] Among other things, the principle of good faith and fair dealing is reflected in the policyholder's obligation to inform the insurer of relevant circumstances concerning the insured object throughout the term of the contract.[29] The equivalent of the principle of good faith and fair dealing in *common law* is the *good faith principle*. However, the *good faith principle* does not have the general character it holds in continental systems. On the contrary, it is applied only in a limited number of cases where it is explicitly stipulated and is reduced to specific duties.[30] The insurance contract, as a *uberrimae fidei* contract, is one of the few exceptions where the principle finds application, but only at the stage of contract formation.[31] Once the contract is concluded, the duty to act in good faith, more precisely, the policyholder's duty to disclose information, ceases to exist.[32] Such a duty would serve no purpose, as from the moment the contract is binding, the insurer can no longer change the agreed terms of risk coverage out of fear that an unfavourable contract has been concluded.[33] In the case of a significant increase in risk, such a risk is no longer covered by the policy, and the insured is required to insure the new risk with the same or a different insurer, where at the time of entering into the contract, they will once again have the obligation to fully inform the insurer.[34]

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[27] Hein Kötz, Gill Mertens, Tony Weir, *European Contract Law: Second edition*, Oxford, 2017, 181.

[28] Hugh Collins, "Implied Duty to Give Information during Performance of Contracts", *The Modern Law Review* Vol. 5, No 4/1992, 557.

[29] I. Nozadze, 135. For example, art. 1104 *Code Civil* provides that contracts must be negotiated, concluded, and performed in good faith. BGB art. 241 para. 2 stipulates that an obligation relationship may, by its content, require each party to consider the rights, legal goods, and interests of the other party. From these provisions derives the obligation of contracting parties to inform their counterpart about facts affecting their mutual relationship. In Serbian law, such obligation is explicitly prescribed in art. 268 Law on Contracts and Torts, with damages provided as a sanction for its breach.

[30] This is a principle that "exudes robust Victorian individualism," that each contracting party must inform themselves about facts relevant for contract conclusion and cannot rely on the counterparty to provide such information (H. Kötz, G. Mertens, T. Weir, 180–181).

[31] H. Kötz, G. Mertens, T. Weir, 181.

[32] In *New Hampshire Insurance Company v MGN Ltd*, the issue was when the insured's obligation to disclose relevant facts to the insurer. The Commercial Court considered it indisputable that the insured had the duty to disclose information at (a) conclusion of insurance, (b) renewal of insurance (which actually constitutes concluding a new contract), and (c) submission and presentation of claims, although the last point was rejected. It was emphasized that "the duty to act in good faith... does not imply positive obligations to disclose facts affecting risk during coverage, except regarding some event or situation foreseen by the policy to which the duty of good faith relates" (see Peter Eggers MacDonald, Simon Picken, Patrick Foss, *Good Faith and Insurance Contracts. 3. ed.,* London, 2010, 56).

[33] P. Eggers MacDonald, S. Picken, P. Foss, 53.

[34] *Ibid*., 56–57. The closest doctrine applicable here under English law is some form of estoppel, such as estoppel by convention or promissory estoppel as a form of contract modification, but even that could be precluded by the absence of any express statement by the insurer (H. Collins, 557).

For this reason, in English law, it is common for insurance contracts to contain an explicit clause obliging the policyholder to inform the insurer of any change in circumstances that affect the risk.[35]

III On the duty to notify about changes in risk during the term of the insurance contract

In legal systems that provide for a duty to notify about changes in risk during the term of the insurance contract, the question arises as to whom this duty is imposed upon and what exactly it entails. In other words, who is obligated, within what period, in what manner, and under what circumstances, to inform the insurer after the contract has been concluded?

According to both Serbian and German law, the duty to notify relevant circumstances for risk assessment lies with the policyholder (*Versicherungsnehmer*).[36] This solution is logical, given that the policyholder is a contracting party and thus can be bound by the contract. Most often, the policyholder concludes the contract in their own name and for their own account and is also the insured person. However, if that is not the case, there is nothing preventing the insured (the person on whose behalf the policyholder concludes the contract with the insurer), as well as the beneficiary of the insurance (the person in whose favour the insurance has been agreed), from notifying the insurer. If the insured or the insurance beneficiary notifies the insurer that there has been a change in relevant circumstances, they thereby eliminate the risk of the insured event occurring "in the meantime", i.e. after the change in circumstances but before the insurer has been notified.[37] The French legislator, on the other hand, imposes this duty on the insured (*l'assuré*).[38]

What kinds of circumstances can be considered relevant? Generally speaking, these are all the circumstances that the policyholder would have been obliged to disclose to the insurer had they existed at the time of concluding the insurance contract.[39] Ćurković points out that the insurer alone determines which circumstances are relevant for assessing the risk.[40] These are the circumstances the insurer takes into account and uses to calculate the premium amount.[41] Since such circumstances may change after the contract is concluded, the information the policyholder

[35] H. Collins, 557.

[36] Law on Contracts and Torts, Art. 914 para. 1; VVG, Art. 23.

[37] Ivica Jankovec, "Articles 901–923", *Komentar Zakona o obligacionim odnosima* (eds. Borislav T. Blagojević, Vrleta Krulj), Belgrade, 1980, 475.

[38] CA, L113-2 point 3.

[39] I. Jankovec, 475.

[40] M. Ćurković (2019), 41.

[41] Nataša Petrović Tomić, *Osnovi prava osiguranja: treće izmenjeno i dopunjeno izdanje*, Belgrade, 2024, 312.

provided to the insurer at the time of contract formation may become inaccurate or outdated.[42] However, the duty to notify applies only to those circumstances that significantly alter the perception of risk. The **VVG** (German Insurance Contract Act) explicitly states that the duty to notify does not apply to a *minor* increase in risk.[43] Moreover, the changes must be of a *permanent* nature, since the duty to report does not extend to circumstances that temporarily increase or reduce the risk.[44] Therefore, it concerns circumstances that create a *state* of increased or reduced danger, those that, over the long term, raise or lower the probability of the insured event occurring, whereas isolated instances of risky behaviour are not taken into account.[45] Furthermore, conduct by the insured or other circumstances that are still in an early stage but may potentially lead to an increase or decrease in risk in the future are not considered relevant – the only relevant circumstances are those which have *already* resulted in a material increase or reduction of risk.[46] This distinction differs between property insurance and personal insurance.

In the case of **personal insurance**, the only relevant circumstance under Serbian law is a change in the insured person's occupation that results in an increased risk. This is explicitly stipulated by the Law on Contracts and Torts (ZOO).[47] Other circumstances, such as a deterioration in the insured's health, are typically already accounted for by the insurer when calculating the premium at the time the contract is concluded, particularly considering the insured's age and general health condition.[48] The term "occupation" refers to regular employment or a professional calling, not to temporary activities the insured might undertake, nor to recreational activities.[49] For example, the fact that the insured was temporarily engaged in breaking concrete in an already excavated tunnel or in a covered trench does not necessarily mean their occupation is tunnel excavation.[50] Accordingly, the insured is not obliged to report one-off or short-term jobs performed during the insurance period.[51] The **German**

[42] Claude J. Berr, Hubert Groutel, Code Des Assurances: 9. éd., Paris, 2003, 31.
[43] Not relevant is also the increase in risk that may be considered agreed to be covered (VVG, Art. 27).
[44] I. Jankovec, 475. It may happen that circumstances increasing and those reducing risk occur simultaneously, requiring examination of the entire case to see if circumstances increasing risk may be balanced by those reducing risk (so-called risk compensation) – e.g., eviction of tenants from a building under fire insurance reduces risk due to tenants' negligence but increases risk of fire caused by homeless persons occupying it (D. Looschelders *et al*., 508).
[45] D. Looschelders *et al*., 507.
[46] *Ibid*, 509.
[47] ZOO, Art. 914 para. 1.
[48] See N. Petrović Tomić, 310–311, 312 fn. 651.
[49] George James Couch, Ronald Aberdeen Anderson, *Couch Cyclopedia of Insurance Law (2. ed.): sections 35:1 – 37:420*, New York, 1961, 685, 693.
[50] *Ibid*, 686.
[51] Also, merely changing the job title, while the insured continues performing the same work, does not constitute a change of occupation (G. Couch, R. Anderson, 691). However, taking up seasonal work different

legislator also takes a cautious approach to the duty of disclosure in the context of life insurance, stating that an increase in risk is recognized only when such a change has been explicitly defined as a risk increase by written agreement, and the insurer cannot invoke an increase in risk after more than five years have passed since that increase occurred.[52] The same applies to circumstances that result in a **reduction** of risk.[53] The **French Insurance Code (CA)** provides that the insured's obligation to report new circumstances does *not* apply to life insurance contracts.[54]

When it comes to **property insurance**, the relevant circumstances concern the insured property itself. For example, these include a change in the intended use of the item, relocation of the item from the location specified in the insurance contract,[55] exposure to hazardous materials, a significant increase in its value, and similar changes. On the other hand, leasing the property may or may not be considered a relevant circumstance, depending on whether the lease increases the risk covered by the insurance.[56] In **motor vehicle liability insurance** (commonly referred to as auto insurance), relevant circumstances that the policyholder is required to report include, for instance, a change in the use of the vehicle, operating the vehicle in a higher-risk area of accidents, a change in the type of fuel used, or a significant increase in mileage.[57]

Legislators prescribe different timeframe within which the policyholder must notify the insurer of an increased risk. The **Serbian Law** on Contracts and Torts **(ZOO)** and the **German Insurance Contract Act (VVG)** stipulate that the policyholder is required to notify the insurer *without delay* if the increase in risk occurred as a result of their own action or of the insured's action that the policyholder permitted.[58] For example, if they bring flammable material into a basement,[59] convert a house into a workshop, install solar panels without appropriate permits, etc. Conversely, if the increase in risk occurred **without their involvement,** then according to Serbian

from the regular employment may be a relevant circumstance the contracting party must report (e.g. a school principal working as a forest ranger during summer vacation), especially if such work is more dangerous or linked to higher accident risk (see G. Couch, R. Anderson, 693).

52 See Art. 158 VVG. If the contracting party intentionally or fraudulently breaches their obligation, the limitation period is ten years.

53 VVG, Art. 158 para. 3.

54 CA, Art. L113-2 para. 5.

55 P. Šulejić, 234; I. Jankovec, 475.

56 P. Šulejić, 234. *The Supreme Commercial Court emphasized that leasing the insured item does not in itself constitute an increase in risk which the policyholder is obliged to notify to the insurer (Official Gazette 732/68 of August 8, 1988)* (cited in **I. Jankovec,** 1980, 475).

57 M. Ćurković (2019), 42.

58 ZOO, art. 914 para. 2. In some legal systems, such as Swiss law, the legal consequences arising from a change in circumstances significant for risk assessment depend on whether the change was caused by the policyholder or not (see I. Jankovec, 475–476).

59 P. Šulejić, 235.

law, they are obliged to notify the insurer **within fourteen days** from the moment they became aware of the change.[60] For instance, the water level may rise due to flooding or groundwater entering the basement, the roof may be damaged due to an earthquake, or electrical wiring may become overloaded as a result of a neighbour's actions… If the policyholder is unaware of such changes, there is no duty to notify the insurer.[61] Under German law, even in cases where the increase in risk occurred independently of the policyholder's will, they are still obliged to notify the insurer **immediately upon becoming aware** of it.[62] **French law** prescribes a period of **fifteen days**, counted from the moment of awareness, regardless of how the change in risk occurred.[63]

Finally, regarding the **method of notifying** the insurer, **only French law** requires that the notice be sent by **registered letter or registered electronic mail**.[64] Consequently, in both German and Serbian law, the general rules on declarations of intent apply, meaning such notifications may be made orally, at the insurer's premises. Nevertheless, in the event of a legal dispute, the policyholder will find it easier to prove that the insurer was notified if the notice was provided in writing or via electronic mail.

IV Legal consequences of notifying the insurer about a change in risk

1. Increase in Risk

Once the insurer has been notified of an increase in risk, they have two options: to terminate the contract or to propose a new (higher) premium rate to the policyholder. By their nature, these options constitute **the potestative rights (powers).** The **Law on** Contracts and Torts **(ZOO)** does not grant the insurer complete discretion to freely choose between these transformative rights, rather, their decision must be **proportional** to the increased risk. If the risk has increased to such an extent that the insurer would not have entered into the contract at all, they may choose to **terminate** it. If the risk has increased, but the insurer would still have agreed to the contract but under different terms, they may **adjust the premium** accordingly. It appears that the Serbian legislator followed the principle of ***favori contractus***, allowing termination only as a last resort. The **French legislator** reasons similarly.[65]

[60] **ZOO**, art. 914 para. 2; German Insurance Contract Act (VVG), art. 23 para. 2.
[61] I. Jankovec, 476.
[62] **VVG**, art. 23 para. 3.
[63] French Insurance Code (CA), art. L 113-2 para. 2.
[64] CA, art. L 113-2 para. 2
[65] *See* CA, art. L 113-4 para. 1;

In contrast, the **German Insurance Contract Act (VVG)** stipulates that the insurer may **terminate the contract or *instead*** (as the author emphasizes) increase the premium.[66] This means that the same increase in risk is sufficient for either termination or premium adjustment, giving the insurer full freedom to choose between these alternative rights.

After being informed of the increased risk, the insurer has **one month** to decide how to proceed. This deadline is stipulated under both **Serbian and German law**.[67] If the insurer remains passive i.e. does not offer the policyholder a new premium or declare the contract terminated, the contract remains in force **under the original terms**, and the insurer **cannot later exercise its rights**.[68] The same applies in cases where the insurer **explicitly or implicitly** demonstrates acceptance of the extension of the contract under the same terms (e.g. by accepting payment of the premium or paying compensation for an insured event that occurred after the risk increased, etc.).[69] The **German legislator** also adds that the insurer's rights cease if the circumstances change again, thereby reestablishing the prior risk aggravation.[70] This provision should not be interpreted restrictively to require the **exact** reinstatement of the former state, but rather it is sufficient that the **relationship between risk and premium** assumed under the contract is restored.[71]

If the increase in risk is such that the insurer would not have concluded the contract had that condition existed at the time of contracting, the insurer may terminate the contract. The effect of the contract ceases at the moment when the insurer notifies the policyholder of their decision to terminate.[72] Exceptionally, in **French law**, the legal consequences of termination are deferred for **ten days** from the time of notification to the policyholder.[73] During this period, the policyholder may reconsider, seek information, and change the insurance.[74] The termination operates ***ex nunc***, from that moment, the insurance coverage ceases, and the

[66] See VVG, arts. 24 and 25.

[67] ZOO, art. 914 para. 6; VVG, art. 24 para. 2.

[68] ZOO, art. 914 para. 6.

[69] ZOO, art. 914 para. 6. A similar provision exists in French law, see CA, art. L 113-4 para. 4.

[70] VVG, art. 24 para. 3.

[71] D. Looschelders *et al.,* 527. If, however, the restoration of the prior state occurs only after the contract has been terminated, such a change in circumstances has no legal effect and the termination remains valid (D. Looschelders *et al.* 2023, 527).

[72] I. Jankovec, 476.

[73] CA, art. L 113-4 para. 2.

[74] *Similar provisions can be found in laws across Europe. The effective notice period after which termination takes effect is 7 days in Denmark (art. 47 of the Danish Insurance Act), 15 days in Greece (art. 4 para. 2 and first sentence of art. 3 para. 7 of the Greek Insurance Act), one month in Belgium (art. 26 para. 1(2) of the Belgian Insurance Act) and Luxembourg (art. 34 para. 1(3) of the Luxembourg Insurance Act), while in Italy termination takes effect immediately or after 15 days depending on the degree of risk increase (art. 1898 para. 3 of the Italian Civil Code) (*Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 187*).*

policyholder is entitled to a refund of the portion of the premium corresponding to the remaining insurance period.[75] Therefore, if the insured event occurs before the termination notice is communicated to the policyholder, the insurer is obligated to pay the insured amount.

If the increase in risk is such that the insurer would have entered into the contract **only with a higher premium** had such a condition existed at the time of contracting, the insurer may propose a new premium rate to the policyholder.[76] If the policyholder agrees, the premium increase produces legal effect from the day they give their consent.[77] If the policyholder rejects the insurer's proposal or fails to respond within **fourteen days** of receiving the proposal, the contract terminates **by operation of law** under Serbian law.[78] The situation is similar under French law, except the deadline is **thirty days,** and termination occurs through a **unilateral declaration of will by the insurer**.[79] The legal consequences (especially the possibility of termination in case of silence) must be explicitly stated in the proposal. I believe that this solution would be useful to introduce into Serbian law ***de lege ferenda***. The German legislator authorizes the insurer to unilaterally increase the premium and merely notify the policyholder of this, but simultaneously grants the policyholder the right to terminate the contract within **one month** from receiving the notification, provided the premium increase exceeds **ten percent** or if the insurer excluded coverage for the increased risk.[80] This unilateral authority of the insurer is justified by the doctrine of **changed circumstances** under Article 313 of the German Civil Code (BGB) (*Störung der Geschäftsgrundlage*).[81]

2. Reduction of Risk

After the contract has been concluded, circumstances may also change in a way that reduces the risk. It is also possible that circumstances significantly increasing the risk cease to exist, e.g. the purpose of a premise changes (from a welding workshop becomes a garage), hazardous materials previously stored there are removed, fire protection or theft protection measures are implemented. In such cases, the policyholder has the right to request a proportional reduction of the premium.

[75] I. Jankovec, 476; D. Looschelders *et al*., 523. *Same also in CA, art. L 113-4 para. 2.*
[76] ZOO, art. 914 para. 4.
[77] I. Jankovec, 476.
[78] ZOO, art. 914 para. 5.
[79] CA, art. L 113-4 para. 3.
[80] VVG, art. 25.
[81] D. Looschelders *et al.,* 528. German Civil Code (BGB), art. 313 para. 1: If circumstances forming the basis of the contract significantly change after contract conclusion, and if the parties, had they foreseen this change, would have entered into a contract with different content or not at all, the affected party may request contract modification, provided that, considering all pertinent circumstances, especially distribution of risk under contract or law, it cannot reasonably be expected to remain bound by the original contract.

This solution is provided for by the provisions of Serbian, German, and French law.[82] The policyholder's request is not subject to any formal requirements or time limits. Indeed, it is in their interest to report such changes, so a reasonable policyholder will notify the insurer immediately upon becoming aware. The right to a corresponding premium reduction applies from the day the insurer is notified. The German Insurance Contract Act (VVG) adds that the same legal consequences apply if the increased premium was based on incorrect statements made by the policyholder, which arose from a mistake concerning those circumstances.[83]

After the policyholder notifies the insurer about the change in circumstances and requests an adequate premium reduction, two scenarios are possible. The insurer may agree to reduce the premium, which will take effect from the day of notification. However, the insurer may refuse to reduce the premium paid by the policyholder.[84] In that case, the **Serbian Law** on Contracts and Tort (ZOO) grants the policyholder the right to terminate the contract.[85] The Serbian legislator does not prescribe a notice period for termination.[86] I believe that termination in this case takes effect upon notification to the insurer, according to general rules. The situation is different under French law, where termination becomes effective thirty days after notification.[87] Also, by analogy with the rules where the insurer terminates the contract due to an increase in risk, the policyholder is entitled to a refund of the portion of the premium corresponding to the remaining insurance period.

V Failure of the policyholder to notify the insurer about changes in risk

In practice, situations often arise where the policyholder ignores their duty to notify relevant circumstances for risk assessment and thus fails to notify the insurer of an aggravation or reduction of risk that has occurred in the meantime. The reasons for such conduct may vary, carelessness or negligence of the policyholder, mistaken belief that the change is not relevant and therefore does not require notification, or intentional concealment to avoid contract termination or a premium increase. It is also possible that the policyholder did not know and could not have known that

[82] *See* ZOO, art. 916 para. 2; VVG, art. 41; CA, art. L 113-4 para. 4.

[83] VVG, art. 41.

[84] *The VVG does not regulate the legal consequences if the insurer refuses to reduce the premium. In that case the policyholder has the right to raise the defense of exceptio non adimpleti contractus under BGB art. 320, the right to terminate the contract under BGB art. 323, and, if conditions are met, the the right to comepnsation under BGB art. 280 (*Looschelders *et al.,* 2023, 693*).*

[85] ZOO, art. 916 para. 2.

[86] Slobodan Jovanović, "Uticaj povećanja osiguranog rizika na prava i obaveze iz ugovora o osiguranju u nemačkom, francuskom, češkom i srpskom pravu", *Strani pravni život,* Vol. 53 No. 3/2013, 215.

[87] Jovanović (*Ibidem*) discusses the termination period.

a change in risk had occurred. The insurer then learns of the changed circumstances *post festum*, after the insured event has occurred, during the damage assessment process. What legal consequences arise in such cases? Most often, these are cases where the risk increased after the insurance contract was concluded, since in such cases the policyholder, aware of the unfavourable consequences for themselves, is not motivated to timely notify the insurer about the change.

Domestic legislator refers to situations in which the insured event occurs "in the meantime", considering the period from the risk deterioration to the insurer taking legal action in response to that deterioration.[88] In such a cases, the compensation paid by the insurer is reduced proportionally between the premiums actually paid and the premiums that should have been paid according to the increased risk.[89] Moreover, if such proportionality cannot be calculated because the change in circumstances is so significant that the insurer would not have entered into the contract had such circumstances existed at the time of conclusion, or would have terminated the contract if timely informed, the insurer owes no compensation to the policyholder; the obligation to pay the agreed sum ceases.[90] This provision applies equally to a policyholder who intentionally concealed the increased risk and to one who could not have known about the deterioration. It also applies to a policyholder who became aware of the increased risk, but the insured event occurred immediately after that knowledge, so the policyholder did not have time to fulfil the duty of notification. The Serbian legislator, therefore, does not prescribe stricter consequences for a policyholder who deliberately failed to report the increase. Furthermore, it appears that the legislator did not consider situations where the insured event occurred not because of the increased risk but for some other reason. Serbian legal theory holds that the legal consequences under Article 915 apply even in such cases.[91]

German law, on the other hand, takes into account several factors: the policyholder's level of fault, the time of occurrence of the insured event, and the causal link between the increase in risk and the occurrence of damage. The insurer can be fully released from the obligation to pay compensation under three conditions. The VVG provides that the insurer is not obligated to pay if the insured event occurs after one month from the moment the insurer should have been informed, unless the insurer was already aware of the risk increase at that time.[92] The first condition is that the increase in risk was not reported on time. The legislator ties the start of the deadline to the moment the insurer should have been informed about the change

[88] Under ZOO there is no distinction between cases where the policyholder was not notified of deterioration and cases where they were notified but have not yet terminated or amended the contract in agreement with the insurer. The primary focus of analysis remains the former scenario.

[89] ZOO, art. 915.

[90] I. Jankovec, 477.

[91] *Ibidem*.

[92] VVG, art. 26 para. 2 (first sentence).

in risk (the so-called fictional receipt of notification).[93] One month must pass from that moment. The one-month period is prescribed because the insurer, even when it receives notification about the change in risk, has one month to decide whether to terminate the contract (see above). The purpose of fictional receipt is to ensure that the insurer is not in a worse position than if it had been properly notified.[94] The second condition is that the insurer did not know (e.g. from another source) about the increased risk at the time they should have been notified. The burden of proving that the insurer did know about the increased risk lies with the policyholder.[95] The third condition is that the policyholder acted intentionally, as the most serious degree of fault. Legal theory debates who bears the burden of proving intent.[96] Although not explicitly stated, such a conclusion is suggested since the legislator in subsequent paragraphs prescribes different legal consequences for conduct characterized by gross and ordinary negligence. In the case of gross negligence of the policyholder, the insurer has the right to reduce its contractual obligations in proportion to the severity of the insured's fault, and the burden of proving the absence of gross negligence lies with the policyholder.[97] Finally, the insurer is still liable (must pay the agreed sum) if the breach of the duty to notify was not intentional.[98] The insurer is also required to pay if the increased risk did not cause the insured event or affect the extent of the insurer's liability, or if the insurer's right to terminate had already expired when the insured event occurred and the contract had not been terminated.[99] These are cases where the causal link between the increased risk and the insured event's occurrence is missing.

The French legislator prescribes different legal consequences depending on the policyholder's fault. If the policyholder concealed (withheld) or intentionally misrepresented facts affecting the risk, whether regarding a change in the risk object or the insurer's general risk assessment, the insurance contract will be void, even if the concealed or distorted risk had no effect on the insured event that occurred.[100] Moreover, the premiums paid remain with the insurer, who is entitled to payment of all due premiums as compensation for damages.[101] Conversely, an omission or inaccurate statement by the insured, if bad faith is not proven, does not lead to the nullity of the insurance contract.[102] If such omission or inaccuracy is discovered before

[93] D. Looschelders, 533.
[94] *Ibidem*.
[95] *Ibidem*.
[96] From the wording of VVG art. 26 it follows that the policyholder bears the burden of proof that they did not act intentionally, which deviates from the general rule that the burden of proving intent lies with the insurer; literature suggests this is a drafting error. (D. Looschelders, 534).
[97] VVG, art. 26 para. 2 (second sentence) in conjunction with art. 26 para. 1.
[98] VVG, art. 26 para. 2.
[99] VVG, art. 26 para. 3.
[100] CA, art. L 113-8 para. 1.
[101] CA, art. L 113-8 para. 2.
[102] CA, art. L 113-9 para. 1.

the insured event occurs, the insurer has the right to choose between increasing the premium accepted by the insured or terminating the contract ten days after sending notification to the insured by registered mail, with a refund of the portion of the premium corresponding to the period during which the insurance no longer applies.[103] If the omission or inaccurate statement is discovered only after the insured event, the compensation is reduced proportionally between the premiums paid and the premiums that would have been paid if the risks had been fully and accurately declared.[104]

VI Change of risk in the principles of european insurance contract law (peicl)

The Principles of European Insurance Contract Law (hereinafter: PEICL) represent an alternative, unified legal framework intended for insurance contracts within the European Union, which parties may choose to apply to their contract instead of national law. The purpose of the PEICL is to enable insurers to offer identical insurance services in different member states, thereby reducing costs, overcoming legal differences, and increasing legal certainty in cross-border trade.[105] According to Article 4:201 of the PEICL, if an insurance contract contains a provision pertaining to an increase in the insured risk, that provision shall have no effect unless the increase in risk is substantial and the type of such increase is specified in the insurance contract.

The PEICL, therefore, limit themselves to cases where policies contain clauses that impose on the policyholder the duty to notify the insurer about relevant circumstances during the term of the contract. This rule aims to find a compromise between the autonomy of the will and the protection of the insured.[106] The working group opted for this solution because the issue is regulated differently across jurisdictions (see above).[107] The PEICL leave the contracting parties free (primarily the insurer, since this is an adhesion contract) to include a clause on change of risk in the contract.[108] However, if the insurer opts for such a clause, they must respect the limitations imposed by Article 4:201. First, the increase in risk must be substantial (*material*). The adjective "substantial" should be interpreted in connection with Article 2:103(b) PEICL, meaning that only circumstances that influence the insurer's behaviour

[103] CA, art. L 113-9 para. 2.
[104] CA, Art. L113-9, para. 3.
[105] Christoph Brömmelmeyer, "Principles of European Insurance Contract Law", *European Review of Contract Law*, Vol. 7 No. 3/2011, 446.
[106] H. Cousy, 130.
[107] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 181–182. The provisions of the PEICL do not apply to personal insurance, such as health insurance or life insurance (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 182).
[108] H. Cousy, 131.

are relevant, in the sense that the insurer would have concluded the contract under different terms, or would not have concluded it at all, had they known about it.[109] Cousy emphasizes that the increase must be substantial either in magnitude and/or in probability.[110] An increase resulting from depreciation (in property insurance) or aging of the person (in life insurance) is not considered substantial.[111] Second, the type of such increase must be specified in the contract itself. By prescribing this limitation, the working group aimed to ensure that the insured is aware of their obligation during the contract, based on the assumption that a reasonable and careful insured reads their policy.[112]

If the clause requires the insurer to be informed about an increase in risk, the duty to notify lies with the policyholder, the insured, or the beneficiary, depending on the case, provided that the person obliged to notify knew or ought to have known about the existence of the insurance and the increase in risk.[113] No special rules on the method of notification are prescribed. Furthermore, if the clause requires that the insurer be notified within a certain period, that period must be reasonable.[114] This is a question of fact depending on the circumstances of the case, especially whether the change in risk occurred due to the action of the obligated party or not. The notification takes effect upon dispatch.[115] The working group chose this solution because sending is easier to prove than receipt.[116] What legal consequences arise if the policyholder breaches their obligation and fails to notify the insurer within a reasonable time? It is prescribed that, in that case, the insurer does not have the right to refuse payment of the agreed sum solely on that ground, unless the damage occurred precisely because of that increased risk.[117]

Finally, the PEICL also provide for "sanctions", i.e. legal consequences of a change in risk. If agreed upon, in the event of an increase in the insured risk, the insurer has the right to terminate the contract. It is understood that contract termination is possible only under the conditions regarding risk set out in Article 4:201 PEICL.

[109] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 86, 182. Article 2:103 of the PEICL sets out exceptions under which the insurer has no right to sanction the policyholder for providing inaccurate or incomplete information. Among other things, the insurer is not entitled to any legal remedy if such information was not material to its reasonable decision to enter into the contract under the agreed terms (Art. 2:103(b)). It follows that the policyholder is only obliged to disclose information that is objectively material to the specific risk (Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 86).

[110] H. Cousy, 131.

[111] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 182.

[112] *Ibidem*.

[113] PEICL, art. 4:402(1).

[114] PEICL, art. 4:402(2).

[115] PEICL, art. 4:402(2).

[116] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 184.

[117] PEICL, art. 4:402(3).

Also, there is a requirement regarding the manner of notification - the insurer must terminate the contract by means of written notice sent to the policyholder within one month from the moment the insurer became aware of the increase in risk or when it became apparent that the increase occurred.[118] If the insurer decides to terminate, coverage ceases one month after the termination notice.[119] The one-month termination period is left to the policyholder to allow time to find new coverage.[120] However, if the policyholder intentionally failed to notify the insurer about the increase in risk, there is no termination period, and the contract ends immediately upon termination.[121] In this way, the PEICL sanction the policyholder who concealed the increase in risk to avoid a premium increase. In such a case, if the insured event was caused by the increased risk that the policyholder knew or ought to have known about, no compensation is paid if the insurer would not have accepted the risk at all otherwise. However, if the insurer would have accepted the risk under a higher premium or different terms, compensation is paid proportionally or in accordance with those terms.[122] Conversely, a policyholder who neither knew nor was required to know about the increase in risk does not bear legal consequences.[123]

Regarding a reduction in risk, in the case of a substantial decrease, the insured has the right to request a proportional reduction of the premium for the remaining term of the contract.[124] Such a solution is justified by reasons of fairness. Since each premium overpayment for the previous period is a burden for the insured, this allows them to request a change in the contract terms.[125] If the parties do not agree on the proportional reduction within one month from the submission of the request, the insured has the right to terminate the contract by written notice within two months from the date of the request.[126]

VII Conclusion

Unlike the duty to report relevant circumstances that determine risk at the time of contract conclusion which, as such, exists in all legal systems, the obligation to report such circumstances during the term of the contract is not universally accepted. The main reason is that this duty represents a concretization of the principle of good faith and fair dealing in contract performance, which *common law* does not

[118] PEICL, art. 4:403(1).
[119] PEICL, art. 4:403(2).
[120] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 186.
[121] PEICL, art. 4:403(2).
[122] PEICL, art. 4:403(3).
[123] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 186.
[124] PEICL, art. 4:301(1).
[125] Project Group Restatement of European Insurance Contract Law, F. Reichert-Facilides, J. Basedow, 189.
[126] PEICL, art. 4:301(2).

recognize as a general principle permeating the contract at all its stages. Still, even in common law systems, this duty can be explicitly agreed upon. This possibility is also provided by the PEICL, which prescribes the conditions under which a clause imposing on the policyholder a duty to inform the insurer after contract conclusion will produce legal effect. In contrast, in continental law systems, the duty of notification is common, and legislators provide legal consequences for changes in risk during the term of the contract.

In any case, whether the duty to inform is prescribed or agreed upon, the policyholder is obligated after contract conclusion to report to the insurer relevant circumstances that lead to risk fluctuation. The question of what is considered relevant in a specific case is left to legal theory and judicial practice. Only those circumstances that significantly and permanently change the risk are considered relevant, such that the policyholder would have concluded the contract under different terms had these circumstances existed at the time of contract conclusion or would not have concluded it at all. The deadlines for providing notification under Serbian law differ depending on whether the policyholder caused the increase or decrease in risk, or whether the change occurred in another way, independent of their will. On the other hand, German and French legislators do not make such distinctions, prescribing the duty to notify immediately upon knowledge (German law) or within fifteen days of becoming aware (French law). The PEICL prescribe that the agreed deadline for notification must be reasonable. I believe that no distinction should be made regarding notification deadlines, as the Serbian legislator does, since what matters is only that the policyholder became aware of the changed circumstances, regardless of how such awareness was obtained. The French legislator prescribes written form for the notification (registered letter or email), which does not constitute an additional burden for the policyholder in today's technological environment, and it contributes to legal certainty.

The legal consequences differ depending on whether the risk has increased or decreased in the meantime. In the case of an increase in risk, the insurer may amend the contract terms (increase the premium) or terminate the contract. Serbian and French law condition contract termination on the fact that the circumstances have changed so significantly that the contract would not have been concluded had those circumstances existed earlier. Such a solution appears justified, as contract termination is generally regarded in contract law as a last resort, when the interests of the contracting parties cannot be achieved in any other way. German law, on the other hand, allows the insurer free choice between termination and premium increase. Additionally, German and French law provide for a notice period, enabling the policyholder to prepare and find alternative coverage. PEICL also adopt this approach. I believe that a notice period should be introduced in Serbian law ***de lege ferenda*** (as a legislative proposal). In any case, the premium cannot be unilaterally increased, and legal systems prescribe different mechanisms allowing the policyholder to consent to contract amendments within a specified deadline. If the policyholder does not agree to the changes, termination of the contract is the alternative. Conversely, in the case of a risk reduction, the policyholder is entitled to request a modification of the contract terms (premium reduction), and if the insurer does not agree, the policyholder may terminate the contract.

Regarding the legal consequences of the policyholder's failure to notify the insurer of the changed risk, Serbian law seems to lag behind in terms of nuanced legal consequences compared to German and French law. First, the **Serbian Law** on Contracts and Tort (ZOO) does not differentiate based on the degree of fault of the policyholder. Situations where the policyholder intentionally concealed the change in circumstances from the insurer to retain favourable contract terms, or where the duty was breached through mere negligence, lead to the same consequences under the law. This is understandable as the intent is difficult to prove. Second, there may be situations where the risk increases due to generally known circumstances, and in such cases, an exception to the duty to notify should be foreseen. Finally, it is especially problematic that the Serbian legislator does not consider the causal link between the increased risk and the occurrence of the insured event. When the increase in insured risk was not the cause of the insured event, but the insured event occurred for an entirely different reason, the insurer should not be allowed to proportionally reduce the compensation amount.

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