

Comparison on insurance contract law in the light of six cases

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There is a number of differences between insurance contract legislation in different countries in the European Economic Area. Yet unequal treatment of consumers is merely theoretical, because the freedom to provide services across borders has not been used much in consumer insurance. The authors have recently worked out a comparative study about the matter.

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Introduction

The problems arising from unharmonized insurance contract legislation in the European Union have been widely discussed on various occasions. These discussions have usually resulted in the conclusion that insurers and consumers alike need to be aware of the differences and legal complexities involved in cross border trade in insurance services. That is why we thought it would be interesting to make a small comparison of insurance contract legislation in different countries in the European Economic Area. The other reason for our interest was the fact that an entirely new insurance contract law came into force in Finland at the beginning of July 1995.

In order to make the comparison more con-

crete we worked out six cases which would cover some important aspects of insurance contract law. The cases were built around issues that caused the most active discussion when the Finnish insurance contract law was drafted.

The questionnaire was sent to ten countries and answers were received from seven: *Great Britain* (British Insurers' International Committee), *France* (Fédération Française des Sociétés d'Assurances), *Germany* (Gesamtverband der Deutschen Versicherungswirtschaft e.V.), *Iceland* (Vátryggingaæftirlitid), *Denmark* (Ankenævnet for forsikring), *Norway* (Forbrukernes Forsikringskontor) and *Sweden* (Konsumenternas försäkringsbyrå). It should be stressed that what we asked was the opinion on what the probable outcome of

these cases would be, on the basis of insurance contract legislation and practice. We did not of course expect that those answering the questions could be certain of how their Supreme Court would solve the cases.

The following reflects the questions asked and summaries of the answers received. Many of the answers went into details and provided excellent legal analyses of the problems. Unfortunately, the summaries allow only a broad outline of the outcome without going into the reasons provided in the answers.

Case 1 (misinformation from insurance company)

An insurance company employee sold a policyholder a travel insurance for a two-week journey to the Canary Islands. On that occasion, the policyholder was accompanied by his common-law wife, who intended to take out a travel insurance for herself at the same time, but the employee of the company asserted that the first insurance also covered medical treatment expenses and other costs incurred by the policyholder's common-law spouse living in the same household. According to the terms and conditions of the travel insurance, this was however not the case.

The common-law wife of the policyholder fell acutely ill during the holiday. Her medical treatment expenses incurred on the Canaries, as well as costs for her transport home on a special flight, totalled ECU 50,000. Had she taken out a travel insurance of her own, all these costs would have been covered.

Question:

If this case is taken up how would it probably be settled in view of insurance legislation and precedents?

a) Would the insurance of the policyholder cover the costs of ECU 50,000? And why?

b) Would the insurance company be liable to pay damages for the costs in question, because the employee had misinformed the client, and what would the amount of damages be in that case?

Answers:

Although there were differences between individual answers across the board, this was the only case in which the outcome was the same in all the eight countries. If the insurer's representative had provenly misinformed the customer, the insurance company would be liable to compensate for the medical treatment expenses and transport costs incurred by the policyholder's common-law wife.

Case 2 (insufficient information from insurance company)

A policyholder took out an individual pension insurance in June 1992. Before taking out the insurance, the policyholder received a brochure from the insurance company, which stated that the capital to be paid to the policyholder would yield an annual profit of 4.5 per cent. They failed, however, to mention in the brochure that part of the insurance premium would be used for covering the operating expenses of the insurance company in question, and that the whole sum would not yield profit. During the first years in particular, the proportion of the operating expenses is high. The policyholder was given the terms and conditions of the insurance after having signed the contract, but without any mention of the fact that the whole sum would not yield profit.

In June 1994, having received the insurance company's report on the amount of the pension insurance savings, the policyholder was informed that part of the sum she had paid had been used for covering the operating expenses of the company. The policyholder

wants the contract to be either cancelled or operated in the form that she, on grounds of the information from the company, could justifiably believe.

Question:

If this case is taken up, how would it probably be settled in view of the insurance legislation and precedents?

- a) Is the policyholder entitled to cancel the contract and recover her money?
- b) Is the policyholder entitled to have the contract operated in the form she could justifiably understand from the information given by the insurance company?
- c) Other consequences, what?

Answers:

Under *Swedish, Norwegian, French, German* and *Finnish* legislation, the policyholder would apparently be given an option to cancel the contract and receive refund of the premiums paid for the policy because the information given had been insufficient.

In *Great Britain*, the pension insurance contract could not be cancelled because of the tax relief given. However, if misleading information has been given, the company could be required to pay compensation in order to bring the amount up to the level the policyholder was entitled to expect.

In *Germany* and *Finland*, the policyholder would be entitled to either cancel the contract or keep it in force in the form she could justifiably understand from the information received from the insurance company. In *Finland*, the latter is a more probable outcome, because the tax consequences of cancellation would be unfavourable to the policyholder and because the new insurance contract law includes an express provision to the effect that in cases like this, the insurance contract would be considered to be in effect in the form justifiably expected by the policy-

holder on the basis of the information received.

According to the replies received from *Denmark* and *Iceland*, the case would be difficult to assess from the legal point of view. The *Danes* were not at all sure that the contract could be cancelled or compensation recovered, unless operating costs in the insurance company concerned were significantly higher than in other companies.

Case 3
(policyholder's failure
to give relevant information)

The policyholder had a life insurance policy payable upon death. The sum insured was ECU 200,000. The insurance was applied for and granted in April 1993. In June 1994 the policyholder was killed when he was run over by a car at a pedestrian crossing. The road accident was the sole cause of his death.

In the subsequent claims settlement it was discovered that the policyholder had given the insurance company false information when applying for the insurance. He had answered the company's question concerning his state of health by asserting that he was healthy and he failed to inform them that he had cancer since March 1993.

Question:

If this case is taken up, how would it probably be settled in view of the insurance legislation and precedents?

- a) What will be paid out as indemnity to the policyholder's family from the life insurance?
- b) What would have been the outcome if the policyholder had died of cancer in June 1994? What would probably have been paid to the family in that case?

Answers:

(a) No benefits would be paid to the family of the policyholder who was killed in the road accident in any other country than *Germany* and *France*. In *Germany*, the insurance company would be liable to pay the death benefit to the family, because it would not be possible to appeal to the policyholder's failure to meet the disclosure requirement unless any of the circumstances not disclosed by the policyholder had a causal connection with the loss. However, the insurer may try to cancel the contract on account of deceit. But, for this purpose, it will not be considered sufficient that the policyholder has knowingly given false information: the insurer has to prove that the policyholder has deceived the insurer. In this case (which will often be a problem of proof) only the premiums paid until that date would be refunded, but the sum insured would not be paid out.

If deceit could be proved, *German* insurance companies would not be liable to pay out the sum insured but they would have to refund the premiums paid by the policyholder. The practice in *Denmark* is also the same: premiums would have to be refunded whenever a contract is cancelled, also in cases of fraud. *Finnish* insurers, instead, would not be required to return premiums, if there were evidence that the policyholder had acted in bad faith. This does not, however, apply to cases where the insurer's right to retain the premiums collected is considered unreasonable. In any other cases of contract cancellation in *Finland* the insurer would always be liable to return the premiums received.

In *France*, compensability is in no way dependent on whether the misinformation given by the policyholder has a causal connection to the loss or not. If the insurance company could prove the policyholder's fraud, the insurer would not be liable to pay any indemnity. Nor would the insurer have to return the premiums to the policyholder in

that case. If the policyholder's fraud could not be proved, the insurer would reduce the indemnity amount.

b) In *Sweden, Norway, Denmark, Iceland, Finland, Germany* and *Great Britain*, the insurance contract would not be binding on the insurance company in this case. In *Germany* and *Denmark*, however, the insurer would be liable to return the premiums paid for the insurance. *Finnish* insurers would also have to return the premiums unless they were able to prove that the policyholder had acted fraudulently. Even then the insurer might be considered liable to return the premiums in some exceptional cases where the insurer's right to retain the premiums received would have led to manifest unreasonableness from the standpoint of the insured or another party entitled to compensation.

In *France*, there were no differences between cases 3 a) and b). Both cases would thus be assessed on the basis of whether it was possible to prove that the policyholder had acted in bad faith.

Case 4 (open window, theft)

Thieves broke into the policyholder's detached house through an open ventilation window of the ground floor kitchen. The ventilation window was 23 cm wide and 1.4 m high. There was no grating or any other protection.

The spouse of the policyholder, the mother of the family, had left the window open while out shopping for two hours.

The thieves stole brand new goods worth ECU 25,000.

Question:

How will this case probably be settled?

Will a householder's comprehensive insurance cover the theft damage? What will be the amount of the indemnity?

Answers:

According to the replies received from *Iceland* and *Germany*, the insurer would probably not be liable to compensate for the loss caused by the theft. The arguments given on the *German* practice suggested that the loss is to be considered to have been caused by gross negligence and the spouse's action is considered equal to the policyholder's action for this purpose. In *Iceland*, the case would also be assessed as having been caused by gross negligence.

In *Sweden*, the probable outcome would be that the insurer would compensate 75% of the value of the goods stolen. Full compensation might also be possible in some cases depending e.g. on whether the theft took place in a city or in the country, how valuable property had been left in a place easily accessible to thieves, etc. In *Norway*, the insurer would pay compensation at 60% of the amount of the loss suffered. The case would be viewed against the failure to comply with the safety regulations, as it would in *Finland* too. Compensation could be paid out of householder's comprehensive insurance at a rate e.g. 25% to 50% lower than full compensation. If the theft had taken place in the countryside, the loss might be compensated even in full. Since the introduction of the new insurance contract law in July 1995, no cases have come up yet.

In *Great Britain*, *France*, and *Denmark*, compensation depends on the wording of the policy terms. In *Great Britain* and *France*, compensation either might or might not be paid under householder's insurance. In *Denmark*, instead, the most likely outcome would be that no compensation is paid for certain objects (e.g. gold, cash, radios, televisions, etc.) while some losses would qualify for full compensation (e.g. sofa).

Case 5
(liability damage,
gross negligence)

A 20-year old policyholder, who had consumed a bottle of wine, rode his bicycle at high speed through a red traffic light and bumped into a pedestrian at a pedestrian crossing. The pedestrian was injured. His medical treatment expenses, loss of income and other damages amounted to ECU 10,000.

The cyclist had a liability insurance.

Question:

What will be the probable settlement of the case?

- a) Will the damages be covered by the liability insurance of the policyholder? If not, what are the grounds for refusal?
- b) Is it an established practice in your country that a householder's comprehensive insurance automatically includes a liability insurance which, among other things, covers damages caused by a cyclist?

Answers:

a) According to the answers received from *Norway*, *Sweden*, *Germany* and *France*, liability insurance would cover injuries suffered by the cyclist. In *Denmark*, it would be likely that the insurance company would appeal to an exclusion under which no compensation is paid for bodily injuries caused by a person under the influence of alcohol ("selvforskyldt beruselse"). If the injury has been caused by gross negligence alone, compensation is paid under liability insurance. In *Iceland*, instead, no compensation would be paid out of liability insurance. In *Finland*, liability insurance would not cover injuries caused by gross negligence in any other cases than those where the injured has not been able to recover compensation from the insured. As a result, insurers' liability for the compensation is secondary in the case of injuries which have

been caused by gross negligence. In *Great Britain*, liability insurance will normally exclude injury resulting from a deliberate act or omission of policyholder and which could reasonably have been expected having regard to the nature and circumstances of such act or omission. The insurer could therefore argue in this case that the injury was foreseeable and not accidental and reject the claim.

b) Householder's comprehensive insurance includes liability insurance in all the countries surveyed other than *Germany*.

Case 6

If the insurance company refuses indemnity in the cases described above, what are the various channels of appeal available to the policyholder or another insured against the company's decision?

We would be grateful, if you would answer each case individually, because there may be differences between the various lines of insurances in respect of the channels of appeal. As for case 6, we would also like to know where the claimant can appeal against a decision made by the insurance company.

Answers:

In all of the countries surveyed, the customer was entitled to have an insurer's decision submitted for the consideration of a court. The *French* also had another alternative, arbitration. The arbitrator could be either an independent arbitrator working for an individual insurer or a professional arbitrator representing the French insurance industry. An arbitrator gives a statement with relevant arguments in three months from the date of receipt of the request for such statement. Irrespective of the statement, the insured may have the case submitted for processing by a court.

Sweden, *Norway* and *Finland* all have an insurance consumers' complaints organ

equivalent to an insurance ombudsman office. The organ provides customers with advisory services and aid in the investigation of losses sustained.

What in *Finland* is called the Finnish Insurance Complaints Board exists also in *Sweden*, *Norway*, *Denmark* and *Iceland*. The board issues statements and recommendations on the cases submitted to it. Another organ issuing similar statements in *Finland* is the Consumer Complaints Board. The *Swedish* equivalent would have offered a channel of appeal for the customer in cases numbers 1, 4 and 5 above. The *Danish* complaints board gives no statements to third parties on cases arising from liability insurance.

In *Great Britain*, the policyholder can approach either the Insurance Ombudsman Bureau or the Personal Insurance Arbitration Service depending on which one of the two systems the insurer subscribes to. In the case of complaints concerning a broker, the policyholder can approach the Insurance Brokers Registration Council. These channels of appeal are only available to policyholders, not third parties.

In addition to the mentioned channels of appeal, customers may approach the association of insurance companies for general advice in many of the countries covered by the survey (e.g. *Germany*, *Denmark* and *Norway*). In some countries, dissatisfied insurance consumers may turn to insurance company's customer ombudsman or board set up by some insurers. Insurance supervisory authorities may also be approached for help in many countries.

Summary

Not unlike our expectations, the answers received to the six fictitious cases from the seven countries indicate that there were a number of differences between nearly all replies, although the small number of the ques-

tions asked did not make it possible to outline more than a limited field of insurance contract law.

Judging by information available at present, it does not look very likely that insurance contract legislation is harmonized in the European Union. The prospect hardly serves to promote the creation of a single market in consumer insurance. As a result, potential buyers of household or personal insurance may feel insecure about a foreign insurer. Seen from insurers' perspective, the situation does not leave much scope for devising e.g. a EURO household insurance with equal policy conditions across the European Economic Area. Insurance consumers' confidence in the single market might strengthen if the parties could agree on common minimum requirements for insurance contracts. From the insurers' point of view, instead, minimum requirements would not be a solution to the problem, because even if a directive on com-

mon minimum requirements were adopted, national insurance contract laws would still differ from each other. Maximum requirements do not look like a realistic solution either, because unanimity between the member states would not be easy to reach at least in the near future.

In any event it is obvious that legal insecurity is reality in the present situation where insurance contract legislation is unharmonized. Furthermore, the articles of insurance directives regarding the law applicable to the contract, complex as they are, have been implemented in different ways in different member states. For the moment legal uncertainty is merely theoretical, because the freedom to provide services across borders has not been used much in consumer insurance. On the other hand, legal insecurity may be one of the reasons why cross-border business will remain modest also in the future.