ABOUT SANCTIONS AND THE HYBRID NATURE OF MODERN INSURANCE CONTRACT LAW

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Abstract

Traditionally, insurance contract law was characterised by radical punitive sanctions, governed by an 'all-or-nothing' logic. This logic has changed as a result of an incorporation of a consumerist approach: more and more, punitive sanctions have been replaced by more proportionate ones, misbehaviour is only sanctioned insofar as it has caused the insured event to happen, duties and sanctions have been bilateralised, and sanctions are now limited to those instances where a high degree of intention or culpability can be detected. Ultimately, these changes have accounted for the hybrid nature of modern insurance contract law as a move away from business law towards consumer law.

Keywords: Sanctions; insurance contract law

One of the themes that were dealt with in the 2010 Congress of the *International Academy of Comparative Law* in Washington was the topic 'Insurance Law between Business- and Insurance Law'.[1] In the Belgian report on this theme[2] I have submitted the idea that the relation was in reality a dynamic one, moving from business law to consumer law. I have tried to illustrate the ways and manners in which the numerous legislative reforms that took place during the last 20 years, in many EU Member States, have indeed introduced several elements of consumer protection into the existing insurance contract law, so as to impart a 'consumerist' flavour to the traditional insurance law.[3]

In the same contribution I have also upheld the theory that in the course of this process, modern insurance law has been contaminated with some light degree of 'schizophrenia', or at least with a kind of 'hybridity', which may give rise to uncertainties in its interpretation, its application and its implementation. Modern insurance law and legislation increasingly tend to protect the insurance consumer (i.e. the policyholder, the insured and the third beneficiary) by introducing several protective devices that draw their inspiration from the sphere and the logic of consumer law. But while so doing, legistators have not abandoned the basic principles of traditional insurance law, which were and are clearly inspired by a different logic and goal, namely the will to protect the insurer and to support and promote the insurance business.

This way in which traditional insurance contract law has been and is being transformed is highlighted inter alia by the way in which the 'sanctions' have been changed, and 'sanctions' refer to the ways in which the shortcomings and misbehaviour of the insurance consumer (the policyholder, the insured, the beneficiary)[4] are implemented. Illustrating this is the main subject of the present contribution.

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[1] All the reports on this theme, including the Belgian report, were published in *Insurance Between Commercial Law and Consumer Protection* (2011).

[2] The various Belgian reports on this and the other themes of the Washington Conference were published in E. Dirix & Y.H. Leleu (eds.), *The Belgian Reports at the Congress of Washington of the International Academy of Comparative Law* (2011), at 950. The Belgian report on the insurance theme, 'Insurance Law between Business- and Consumer Law', is at 515-552 (cited hereafter as Cousy (2011)).

[3] For a by now already dated, and thus incomplete overview of the many recent modifications of the law of insurance contracts that were carried out in many countries, see my article on 'Le Spleen de Paris, and the Art of Harmonisation and Restatement', in H. Tiberg (ed.), *Essays in Tort, Insurance, Law and Society in Honour of Bill W. Dufwa* (2006), at 355-365.

[4] About the double meaning of consumer (consumer in the restrictive sense of the person acting outside the professional context and consumer in the wider sense of the recipient who is not in the business of the goods or services that are delivered to him), see Cousy (2011), above n. 1, nr. 4, at 519.

While doing so, to make my life (and that of the reader) easier, I will as a rule try not to cite the various national laws and legislations that are referred to. Rather, I will take advantage of the existence of the *Principles of European Insurance Contract Law* (*PEICL*), which, as the reader knows, were drafted as part of the EU Commission's 'Common Frame of Reference' project, in the form of a 'restatement of insurance contract law'. It is true that the PEICL cannot be considered a common denomination of the national legal systems, but they certainly reflect the main tendencies and orientations that are common to the EU Member States,[5] and can therefore be used as a codification of the European 'ius commune' in insurance.

Let me first dwell a little further on the observation that at the time of the early origins of insurance law the lawmakers did not take a neutral stand (as does the civil law) toward the contracting parties, but clearly intended to protect the one party that was considered to need protection. In the above cited report, I have tried to explain what I mean by the 'neutrality' of the '*droit civil*'. Civil Codes (used to) aim at offering a fair and efficient set of rules for the relationships between creditors and debtors, without – as a rule – making any further distinctions according to whom these creditors are '*in concreto*'. That is precisely what economic law does. Here the concrete position of the parties concerned (economically powerful or weak, professional or not, well informed or less well informed, etc.) is taken into account. To us, members of a generation that is familiar with consumer law, the astonishing fact is that under traditional insurance law it was the insurer who was considered to be the party in need of protection. Traditional insurance law can therefore be said to be a business law in the sense that it is supportive of the business of insurance.

The phenomenon has been explained in different ways. Whereas some thought that the explanation is to be found in the perhaps unspoken desire of the lawmakers of that time to help an infant industry come slowly off the ground, the common explanation is that early legislators frankly distrusted the activity of insurance as being a speculative activity that came dangerously close to a game of chance. And as I observed in my Washington report: 'In insurance law this attitude was translated into an attitude of systematic suspicion toward the policyholder and the insured. In fact, nearly all of the traditional basic principles of insurance contract law can (only) be understood and explained as originating in this basic suspicion of "fear and abuse" '[6]. Think of the principle of an 'insurable interest' as a requirement of validity that distinguishes the valid insurance contract from the legally unenforceable game of chance; think also of the 'indemnity principle' that was created to encounter the legislator's fear of the danger of so-called 'voluntary claims' (the indemnity principle discourages insureds by avoiding all possible enrichment because of the insurance); think of the good faith requirement (insurance, as says the famous Section 17 of the British Marine Insurance Act, is 'uberrimae fidei' and a contract of the utmost good faith) that imposes upon the policyholder and insured additional duties of care, i.e. duties of taking care of the interests of the insurer on top of what general contract law would expect them to do.[7]

Starting approximately from the beginning of the last quarter of the past century, judges, and especially legislators (read: national parliamentary assemblies), have started, in most if not all of the EU Member States, to inject elements of the logic and philosophy of consumer law into the existing insurance contract law. One avenue for doing so went by imposing extensive 'Nebenpflichten', such as information and warning duties, upon the insurer in his capacity of professional and as the specialist of risk handling. Under traditional insurance law the flow of information between the parties was organised on the basis of a clear insurance logic, i.e. the idea that in an insurance contract the risk is transferred from the person who has knowledge of the risk (the applicant, the policyholder, the insured) to another entity (the insurer) who does not know the risk, and that therefore a duty is imposed upon the first one to transfer all relevant information

[5] The English text of the PEICL, with comments and notes, together with a number of translated versions of them, were published under the title *Principles of European Insurance Contract Law (PEICL)* (2009), (hereafter cited as *Principles*).

[6] Cousy (2011), above n. 1, at 516; See also my contribution 'Les différents cadres juridiques de l'assurance', in F. Ewald & J.H. Lorenzi (eds.), *Encyclopédie de l'Assurance* (1998), at 210-212.

[7] See further Cousy (2011), above n. 1, at 517.

on the nature and extent of the risk to the second one. The logic of modern consumer law is quite different. Here the basic idea is that the insurer, being the professional, is responsible for acquiring relevant knowledge of the risk, so as to put information and warning obligations rather on his shoulders. Under a consumer law approach, it is up to the insurer to take an active part in collecting the information he needs, e.g. by getting information about the precise insurance need of the applicant and by asking precise questions on the actual risk. Another technique that is illustrative of the new consumer law-oriented approach consisted in applying the 'unlawful clauses approach', which came into being in general contract law as regards standard contracts (for more about this, see hereafter, under nr. 13). A third technique consists of a systematic rethinking of the way in which violations and breaches of contractual duties should be dealt with and of the corresponding efforts to bring sanctions more in line with the logic of the modern civil law and of consumer law.

In the context of the way in which the sanctions have been subject to redesign, several evolutions or tendencies can be briefly described. In what follows I will limit myself to the following ones: a tendency towards making sanctions more rational by making them more *proportional* to the shortcoming of the policyholder or insured; a tendency towards extending the freedom of action of the insured by restricting sanctions to serious cases, i.e. the cases where the policyholder or insured is guilty of fraud or of some gross misbehaviour; a tendency towards a more fundamental rethinking of the sanctions by introducing the requirement of *causality*; and a tendency towards restoring more equality of treatment of insurer and insured by introducing *reciprocity*.[8]

Generally speaking, it can be stated that in this branch, as in other branches of private law, the apparatus of sanctions for violations of legal and contractual duties has become more 'humane'. The severity and the frequency of radical sanctions have been reduced and the more radical sanctions such as the 'nullity or avoidability of the contract', or the radical sanction of total exclusion from cover, have been limited to a restricted area, which is mainly the area of fraud, 'mala fides', and intentional behaviour. An interesting side comment to this evolution is the following. Paradoxically enough, the consequence of the tendency towards alleviation and scaling down of sanctions has been to bring the hypotheses of fraud, mala fides, intentional wrongdoing, etc. more close by. Being deprived of the possibility of invoking legal or contractual sanctions in cases of violations or breaches of duty of a minor degree, i.e. violations with a lower degree of culpability, the insurer will almost automatically be inclined to refer to allegations of the heavier sorts of misbehaviour in his quest for finding defences against a suspicious claim. A consequence thereof is that courts have been induced to give more precise definitions of those concepts. It is not fortuitous that, for instance, in several countries, courts and legislators have in the recent past been invited to specify, in some cases to modify, their working definitions of e.g. intentional wrongdoing.[9]

1 Proportionality of the Sanction

Typical of the law of insurance contracts is the pre-contractual information duty of the applicant, a duty that originally stems from the implications of the good faith requirement and obliges the applicant to accurately disclose all information that can be of relevance to the insurer's appreciation and calculus of the risk. Early insurance legislators appear to have considered violations of this duty of disclosure and of correct representation as causes of a flawed consensus, like an error, a 'vice du consentement', impairing the validity of the insurer's consent, and thus of the contract. This explains why early

[8] For another (and wider) overview, see J. Bataller-Grau, 'Policyholder Protection in the Reform of Insurance Contract Law', in C. Van Schoubroeck, et al. (eds.), *Over Grenzen. Liber Amicorum Herman Cousy* (2011), at 31-45 (hereafter cited as *Over Grenzen. Liber Amicorum Herman Cousy*).

[9] For a recent overview of the situation in Belgium, Germany, France, the Netherlands, Switzerland and the PEICL, see M. Hendrikse, 'Een rechtsvergelijkende analyse aangaande de verzekerbaarheid van opzet in het schadeverzekeringsrecht', in *Over Grenzen. Liber Amicorum Herman Cousy* (2011), at 465-474. See also with respect to Dutch Law P. Clausing & H. Wansink, *Bijzondere Overeenkomsten*, *De Verzekeringsovereenkomst* (2007), 2nd edn, at 350-370.

legislators referred to the sanction of the nullity or avoidability of the contract as a sanction for any shortcoming by the applicant in his information duty, which included cases where no fraudulent intention was involved.

One of the downsides of this radical approach and sanction is that the avoidance of the contract puts an end to the relationship between insurer and policyholder. Therefore, policy clauses have soon replaced the sanction of nullity or avoidability by one that gives the insurer the right to propose a continuation (under modified conditions) while refusing cover for claims that have arisen before the termination or adaptation of the contract. But in this last hypothesis too, the sanction of loss or forfeiture of right to cover remains a radical one, because in both cases the 'Alles oder nichts' principle is applied. Indeed the sanction results in a radical refusal of coverage, irrespective of the degree of culpability of the applicant or of the relationship between the breach or violation and the occurrence of the insured event.

In an effort, inspired by the desire to protect consumers, to rationalise sanctions, legislators conceived and imposed a type of sanction that is *more proportional* to (the said) parameters such as the degree of culpability (innocent, negligent or intentional violation of the duty) and the influence of the breach of duty on the insurer's decision to subscribe to the risk. The precise formulas in which these 'more proportional' sanctions have been introduced differ from one national legal system to another, but generally speaking, the rules run along the lines that are formulated in the PEICL. Article 2.102 (5) of the PEICL states: 'If an insured event is caused by an element of the risk, which is the subject of negligent non-disclosure or misrepresentation by the policyholder, and occurs before termination or variation takes effect, no insurance money shall be payable if the insurer would not have concluded the contract had he known the information concerned. If, however, the insurer would have concluded the contract at a higher premium or on different terms, the insurance money shall be payable proportionately or in accordance with such terms.'

Another striking illustration of the way in which more proportionality is being introduced into the traditional insurance sanctions is found in the context of violations of the duties of the insured in the aftermath of the occurrence of an insured event (duty to give notice of the insured event, duty of mitigating the damages, duty to cooperate with the insurer in fighting off claims). Under traditional insurance law also shortcomings to these duties often gave rise to the severe and radical sanction of loss (forfeiture) of entitlement without any view to the degree of the shortcoming or to its influence on the insurer's position. The severity of the sanction was all the more remarkable since the so-called 'duties' that were thus sanctioned were not enforceable duties, but only 'Obliegenheiten' (see hereafter, under nr. 8). Here again recent legislative reforms have replaced the radical sanctions by the simple and straightforward obligation of the policyholder or insured to pay damages to the insurer, i.e. to compensate for the damage that the insurer proves to have actually suffered by reason of the insured's shortcoming. An example is found in the Principles of European Insurance Law, stating that the insurance money payable shall be reduced to the extent that the insurer proves that he has been prejudiced by undue delay (Article 6:101 (3) of the PEICL).

2 Enlarged Insurability

As is often described and discussed in the economic theory of insurance, insurers will do everything to avoid *moral hazard* problems, i.e. to avoid the risk that insured persons will behave less carefully than normal because of the fact that they are, and are aware of being, covered by insurance. On the other hand, the legal rule appears to be (generally) that the insurance contract does not require the insured to live up to a higher standard of care than the one to which he is subject in the absence of insurance. One can thus conclude that, generally speaking, insurance protects the insured against certain specified risks without unduly restricting his freedom of action. This is, by the way, a very positive aspect of insurance law, which contributes to what we may call 'part of beauty' of the system. The central purpose of insurance is not only to cover what Shakespeare called: 'the slings and arrows of outrageous fortune', but also 'the foolishness and carelessness

of men and women'.[10] People can go on with their lives while being insured and some shortcomings are inevitable. There are, however, limits to this freedom: the insured will not be entitled to indemnity when he or she has contributed to the causation of the (insured) loss by (a specified) faulty behaviour or when he did not live up to certain *specific duties of precaution*.

The tendency of the law has been to widen and enlarge the area of the freedom of action of the insured. Cover should not be refused for every single shortcoming or lack of care but only in cases of qualified or specific misbehaviour from the side of the policyholder or insured such as the voluntary or intentional causation of the insured event.

Whereas in the past the uninsurability of intentional causation of the insured event was often extended to gross negligence (cfr. the French 'faute grave') according to the Latin proverb 'culpa lata dolo equiparatur', the insurability of gross negligence appears now to be widely accepted.[11] The Belgian Insurance Contract Act of 25 June 1992 offers a good illustration. Under the old Insurance Contract Act, the uninsurability of the 'culpa lata' (the 'faute grave') was considered by the highest court (Cour de Cassation) as being a rule of public order ('ordre public'). The 1992 Insurance Contract Act has radically changed the rule. Article 8 of this Act not only declares gross misbehaviour to be insurable, but goes even further by stating in a mandatory way that such cases are 'ex lege' covered, unless the policy has excluded certain grossly negligent acts by precisely and specifically describing them in the policy. Article 8(2) of the Belgian Insurance Contract Act says: 'The insurer shall answer for claims caused by misconduct, including serious misconduct, by the policy-holder, the insured or the beneficiary. However, the insurer may be exempted from his obligations in the cases of serious misconduct which are expressly and exhaustively listed in the contract'.

As was observed above, the enlargement of the insurability paradoxically gave rise to a more frequent use by the defence drawn from more serious types of misconduct, namely *intentional misbehaviour*, *dolus* and *mala fides*. In reality, the various concepts have so far been left without a very precise definition and the terminology differs and remains often uncertain.

According to the new Article 952 of the Dutch Civil Code,'the insurer will not compensate any loss or damage to an insured who has caused the loss or the damage deliberately or recklessly'.[12] Previous case law of the Dutch Supreme Court, the 'Hoge Raad',[13] did not consider all shades or kinds of intent to be uninsurable. The Hoge Raad considered that 'conditional intent' (the perpetrator does not intend to cause the damage, but is prepared to put up with it) was insurable in liability insurance. Article 7.941 of the Dutch Civil Code now states that the insurer will not compensate the damage of the insured who caused the damage intentionally or recklessly. It is not entirely clear what is meant by 'recklessness' and whether it coincides with gross misconduct. The situation is comparable to the one in Germany under the new VVG,[14] where intention is excluded from coverage and gross negligence gives rise to a proportional reduction.

In Belgium, the highest court (Cour de Cassation), after having first enlarged the concept of what is an intentionally caused event,[15] returned shortly afterwards to a much narrower concept, stating that the conditions for the (excluded) 'intentional fault' are fulfilled if the act was done out of free will and if the insured was aware or ought to be aware that a damage might be caused.[16]

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[10] As nicely phrased in the Comments to Art. 9.101 of the PEICL, *Principles*, above n. 5, at 246.

[11] For a comparative overview, see G. Jocque, 'Grove fout en opzet in rechtsvergelijkend perspectief, in *Over Grenzen. Liber Amicorum Herman Cousy*, at 151.

[12] Here as elsewhere in this contribution, the translation is used that is found in the highly useful book *New Dutch Insurance Contract Law* (2006), with translations in English, French and German, and with introductory comments by J.H. Wansink, J.G.C. Kamphuisen, & W.M.A. Kalkman.

[13] Hoge Raad, 30 May 1975, *Nederlandse Jurisprudentie* (1976), at 572.

[14] Par. 81 Abs 1 of the VersicherungsVertrags Gesetz (VVG). *Cf.* Hendrikse (2011), above n. 9, at 467.

[15] Cass., 5 December 2000, *De Verzekering* (2001), at 256 met noot HOUBEN.

[16] Cass., 24 April 2009, *Tijdschrift voor Belgisch Handelsrecht* (2010), at 53, and the note by H. Cousy, 'Opzettelijke veroorzaking van het schadegeval. Orde op zaken?'

Article 9.101(1) of the PEICL (which is only applicable to indemnity insurance), states: 'Neither the policyholder nor the insured, as the case may be, shall be entitled to indemnity to the extent that the loss was caused by an act or omission on his part with intent to cause the loss or recklessly and with knowledge that the loss would probably result'. By using a formula borrowed from the law of international carriage, notably the 1999 Montreal Convention, the PEICL adheres to the older rule by assimilating recklessness to intention, while widening the insurability by providing that loss of entitlement will follow only if the loss was caused by an act or omission of the insured to cause the loss or 'recklessly and with the knowledge that the loss would probably result'. One will notice that the conditions for imposing the sanction are narrowed: there must not only be recklessness, but also awareness not only of the probability of *a* loss, but of the loss (i.e. the kind of loss that actually occurred).

The same reference to the concept of 'recklessness' is found in the PEICL's rules on precautionary measures. A precautionary measure means a clause in a contract, whether or not described as a condition precedent to the liability of the insurer, requiring the policyholder or the insured, before the insured event occurs, to perform or not certain acts (compare Article 4.101 PEICL). The concept is somewhat similar (though not identical) to that of 'promissory warranties' in English law and of 'Obliegenheiten' in German law. Characteristic of 'warranties' is that in case of breach the sanction will be loss of right to cover, irrespective of the degree of fault or culpability from the side of the policyholder or insured, and irrespective of any causal relation between the non-breach and the materialisation of the risk. The PEICL takes a rather hostile position towards precautionary measures and limits sanctions for non-compliance to restrictively circumscribed situations. Article 4.102(1) of the PEICL states: 'A clause which provides that in the event of non-compliance with a precautionary measure the insurer shall be entitled to terminate the contract, shall be without effect unless the policyholder or the insured has breached its obligation with intent to cause the loss or recklessly and with knowledge that the loss would probably result.'

3 The Introduction of the Concept of Causation

In my view, a highly remarkable change in the typical insurance sanctions occurred when legislators started to introduce into insurance contract law the *causality* requirement as a condition for implementing the sanction of loss of right to cover for a given event. What is meant here is that, in order to deny cover for a given insured event and claim, a number of pieces of modern insurance legislation require that a causal relationship exists between the alleged shortcoming of the policyholder/insured and the said event.

Traditional insurance law did not have this requirement. Take the example of the policyholder's breach of his or her pre-contractual duty of disclosure. Traditional insurance law did not, as a condition for denying cover for an intervening insured event, require that the non- or ill-disclosed circumstance had anything to do with the event as it actually occurred. The logic was that by failing to adequately describe the risk, the risk calculus of the insurer had been flawed and that a probably incorrect premium had been charged. Sanctions were therefore imposed even in the absence of a causal relationship between the ill- (or non-)disclosed circumstance and the specific insured event. A clear expression of the traditional rule is found in the law of England and of some other countries. As mentioned in the notes under Article 2.102 of the PEICL: 'The most severe sanction is foreseen in the insurance law of England, Wales, Ireland, Scotland and Switzerland. In the law of these countries, the insured loses all insurance cover for the insured event even if the non-disclosure was innocent or the non-disclosure had no relation to the insured event (all or nothing approach).'[17]

In what amounts to a quite revolutionary change of perspective, several countries have introduced a new 'causality' rule.[18] Article 7.930 of the new Dutch Insurance Act

[17] *Principles*, above n. 5, at 83.

[18] M.L. Hendrikse & J.G.Y. Rinkes, 'De mededelingsplicht bij het aangaan van verzekeringen', in *Verzekeringsrecht praktisch belicht* (2008), at 183.

did so by stating that 'If the facts that were not disclosed or which were inaccurately disclosed are not material to the assessment of the risk as it has materialised, the agreed payment will be made in full.' The new German *Versicherungsvertragsgesetz* followed the trend. And so did the PEICL by saying that 'if an insured event is caused by an element of the risk, which is the subject of negligent non-disclosure and misrepresentation by the policyholder and occurs before termination or variation takes effect, no insurance money shall be payable if the insurer would not have concluded the contract had it known the information concerned. If, however, the insurer would have concluded the contract at a higher premium or on different terms, the insurance money shall be payable proportionately and in accordance with such terms' (Article 2.102(5) of the PEICL).

Belgian (like French) law did not introduce the new rule but here also the requirement of causality did somehow find its way into the 1992 Insurance Contract Act at another place, which concerns the issue of warranties and precautionary measures. Article 11 of the Insurance Contract Act states: 'The insurance contract may provide for the partial or total forfeiture of the right to the insurance benefit only by reason of the non-fulfilment of a specific obligation imposed by the contract and subject to the condition that the failure to fulfill the obligation has a causal connection with the occurrence of the insured event.'

This article is the answer of the Belgian Insurance Act to the issue of the validity of 'warranties' in the English Law sense of the word. The prescription imposes a double limitation, the first of which (the requirement that there has been a breach of a specific contractual duty) is a reaction against the traditional policy clauses sanctioning vaguely or generally described shortcomings (like the violation of any contractual or legal obligation or duty) with loss of right. The requirement that the duties and obligations must be clearly and specifically defined is also found in other places in the Insurance Contract Act, such as in Article 8 where the rule is that only cases of gross negligence that are expressly and exclusively listed in the contract can give rise to sanctions. The second limitation is that violation of the specific duty can be sanctioned only by loss of the right to entitlement if there is this causal relationship. The measure is inspired by the desire to alleviate the severity and 'all or nothing' approach of the sanction of forfeiture of right, but the introduction of the causality requirement expresses the same change of logic that we encountered in the new rules of the duty of disclosure. When an insured event occurs, the insured (or beneficiary) can only be deprived of his right to cover if he committed some shortcoming that contributed to the occurrence of the insured event.

In the PEICL the causality requirement is also (and 'even') introduced with respect to the sanctions for fraud. According to Article 2.104, the insurer shall be entitled to avoid the contract if he has been led to conclude the contract by the policyholder's fraudulent breach of Article 2.101. Fraud, the Comments state, that has no effect on an insurer's decision to conclude the contract, whether because the false information was inherently immaterial or because the insurer was aware that the information was false, does not carry consequences adverse to the policyholder. The Comments to the said Article 2.104 clearly explain what is going on: 'the requirement of causation reflects the widespread view that it is not the primary role of insurance contract law to uphold social morality with rules that are punitive' (Comment C4 to Article 2.104 of the PEICL[19]).

4 Sanctions for Non-payment of Premium

In accordance with what amounts to the very essence of the insurance contract, characterised by what economists call 'the inversion of the production cycle', the traditional rule is that in insurance the price is paid in advance, before the delivery of the service. According to some, the word 'premium' would refer to this requirement of pre-payment. Under those circumstances the mere non-payment of the premium should lead to absence or forfeiture of cover and even to the non-formation of the contract. Nevertheless, the harshness of this consequence was among the first to draw the attention of those wanting to alleviate the severity of the treatment of the policyholder. Even

[19] *Principles*, above n. 5, at 90.

before legal constraints obliged them to, insurers started to include clauses providing for a formal warning procedure and in some cases for a period of grace. The standard practice appears to be one in two stages: the policyholder is first to pay the premium on the normal expiry day, but non-payment only gives rise to suspension of cover after the policyholder has been formerly reminded and warned about the consequences of non-payment within a specified period of grace. As is usual, life insurance has its own rules on (non-)payment of premium.

Most European legal systems now stipulate requirements to that effect,[20] and so do the Principles of European Insurance Contract Law. A couple of aspects of the new rules deserve some more attention. One question is, What are the consequences if no payment has been made within the period of grace? The answer that is given in the PEICL is that 'if the policyholder does not pay premium within the period of grace, cover will be suspended with effect from the end of the period of grace.'[21]

5 Restoring 'One-sidedness'

A well-known and highly popular method to enhance consumer protection in standard contracts is the 'unlawful clauses' approach, whereby the legislator declares in more general or more specific terms certain 'unlawful' clauses to be forbidden and void. Clauses in such contracts are unlawful when they disturb the contractual equilibrium by bestowing advantages upon one party.

Unlawful clauses are or were, it must be admitted, rather frequent in insurance contracts, and forbidding them is definitely one way in which legislators can and do pursue their goal of enhancing the protection of the consumer. The 'unlawful clauses approach' is a laudable method insofar as by using this method the law does pay a maximum of respect to the freedom of the parties and limits itself to setting out non-transgressable boundaries to this freedom. However, it appears that in most of the continental European legal systems, legislation appears to have preferred another method, namely the method of directly deciding on the content of the contract by prescribing mandatory rules.

To distinguish these two methods, I have in my Washington report (see here above under nr. 1) used the terminology of horizontal and vertical methods. 'When the need for protecting the insurance consumer was finally felt, the legislator had a choice between (mainly) two legislative methods, which we will call the vertical-prescribing method, on the one hand, and the horizontal-prohibiting one, on the other hand. The vertical-prescribing method is the one that has been used in most of the present day insurance contract laws: they are "vertical" while being limited to the insurance contract and "prescribing" while mandatorily imposing the contents of the insurance clauses. The horizontal-prohibiting method is used in the unfair terms laws: they are "horizontal" while cutting across different types of contracts, and "prohibiting" while limiting themselves to "forbidding unfair or unlawful clauses".'[22]

A typical illustration of the way in which the 'unlawful clauses' approach has derogated from the traditional insurance logic is found in the matter of the insurer's right to unilaterally terminate the contract. A good example is the clause that gives the insurer the right to terminate the contract for no other reason than the mere fact that an insured event has occurred. The typical insurance logic behind this rule is that the insured event is to the insurer the moment of truth that allows him to finally appreciate the risk. The typical consumer law logic requires a comparable treatment of the policyholder since to him the way in which the insurer has treated him after a claim arose constitutes vital information.

Many pieces of legislation have therefore 'bilateralised' the rule by giving *ex lege* the policyholder the same right of termination that the contract bestows upon the insurer.[23]

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[20] For an enumeration, *see* Note N3 under Art. 5:102 of the PEICL.
[21] Comment C8 under Art. 5:102 PEICL (*Principles*, above n. 5, at 198).
[22] Cousy (2011), above n. 1, at 541.
[23] *Cf.* Art. 7.940 (3) of the Dutch Civil Code and Art. 31 of the Belgian Insurance Contract Act.

The PEICL has more or less followed the same path by stating in Article 2.604 (1) that a clause providing for termination of the contract after an insured event has occurred shall not be valid unless (a) it grants the right to terminate to *both* parties, and (b) the policy is not one of personal insurance. Whether such reciprocity really puts the insurance consumer on an equal footing with the insurer remains questionable.

6 A Prudent Conclusion

In the logic that was characteristic of traditional insurance contract law, sanctions for shortcomings of the policyholder and the insured were punitive in nature, while inspired by the objective of moralizing the behaviour of the insurance consumer. With such inspiration, insurance sanctions were radical (*alles oder nichts*) and severe. In addition, they looked only in one direction, i.e. punishing shortcomings from the side of the policyholder or insured, but not from the other side.

Modern insurance law has brought fundamental changes, namely by replacing the previously punitive sanctions by more proportionate sanctions, by sanctioning misbehaviour only insofar as such misbehaviour has caused the insured event to happen, by bilateralising the duties and the sanctions, and especially by limiting sanctions to the serious cases where some high degree of intention or culpability is involved. We have seen that even those sanctions are influenced by the same spirit.

Can one therefore conclude that insurance law has become entirely 'consumerist law'? Professor Luc Mayaux, in his highly interesting recent book 'Les grandes questions de l'assurance',[24] is inclined to think so, and so are many other authors. However the old traditions did not disappear. To paraphrase Oliver Wendel Holmes Jr.,[25] the old insurance law traditions 'rule us from their graves'. The typical insurance law sanction of forfeiture of right to cover ('la déchéance de la garantie') is still alive, and so is the insurer's right to unilaterally terminate the contract after the occurrence of a claim. The causation requirement is not recognised in every legal system and in some systems (like Belgian law), the applicant still has the duty to *spontaneously* disclose all relevant data about the risk. And what is more, bringing in a consumerist approach into so delicate a construction as the insurance operation must be done with utmost care. Even Luc Mayaux appears to think that this has not been done so: 'L'exigence consumeriste est floue dans ses pratiques, incertaine dans ses objectifs et dangereuse dans ses résultats.'[26] Under a specific insurance logic and approach, the preservation of the interests of the insured as a collectivity gains precedence over the fine-tuned justice towards the individual policyholder or insured. Insurers traditionally defend the occasional harshness of insurance law and of its sanctions by claiming that they are justified by the need to protect the collectivity of 'the other 'insureds''.

This insurance logic (precedence of the collective interests over the interests of an individual insured) is still very much present in the law. At the same time the consumer law logic, which rejects this collective approach, is introduced by recent legislative reforms. Modern insurance contract law remains hybrid.

[24] L. Mayaux, *Les grandes questions de l'assurance* (2011), lextenso edn., at 242.
[25] Holmes said that the old 'forms of actions rule from their grave'.
[26] Mayaux (2011), above n. 24, at 251: 'The Requirements of Consumerism are Vague in Practice, Unclear to Their Objectives and Lead to Dangerous Results.'