TOPIC n. 1

PREVENTIVE MEASURES: SOURCE AND EXTENT OF INSURED'S OBBLIGATION TO AVOID THE OCCURRENCE OF THE RISK

1. Analysing the data collected: guidelines

After analysing the data collected, I thought it possible to draw some guidelines or common approaches for a number of Countries, to be subsequently subdivided into homogenous groups.

I will therefore proceed to list them, even if the same Country might appear in two different groups.

GROUP I

This group lists all the Countries providing mandatory preventive measures against the occurrence of the risk and its regulation:

1. France.

In this case, if I have well understood, mandatory preventive measures are only provided in maritime insurance, while for other types of risks, as we will see below, it is the contract that imposes diligent behaviours with a view to preventing the risk;

2. Hungary.

The Civil Code sets forth that, before the occurrence of the risk, the ensured must abstain from performing behaviours that could cause it;

3. Serbia.

The law provides for preventive measures aimed at avoiding the occurrence of the risk only in non-life contracts;

4. Korea.

Korea's Commercial Act lays down the obligation, in non-life policies, for the ensured to prevent the occurrence of the insured event.

GROUP II

This group includes the Countries whose legislation does not prescribe ad hoc measures to avoid the occurrence of the insured event.

Obligations thus conceived are however regulated by *bona fide* principles.

1. Australia.
2. Belgium.
3. Greece.

In addition to the application of general *bona fide* principles, insurance contracts may provide the adoption of specific preventive measures.

4. France.

It is the insurance contract that obliges the ensured to act diligently in order to prevent the occurrence of the insured event.

5. Portugal.

After having signed the policy, the contracting party, whether it be the ensured or the beneficiary, must act with the diligence of a reasonable and prudent man.

GROUP III

The cases listed in this group are less homogeneous.

They deal with “bone-fixing” contractual measures because, should there be a change in the insured risk – which must mandatorily be notified to the insurer – the insurer has the option of cancelling the contract or proportionately limiting the size of compensation, according to the new level of risk and the premium originally paid.

On the basis of this common denominator, in my opinion, the cases at hand are not only less uniform but also more extended.

In my opinion, their extension also impacts the very concept of preventive measure.

In this phase, I will limit myself to illustrating the range of measures and come back to the issue for a more in-depth analysis later on.

Focusing now on the contents of the measures, there is a group of Countries in which the risk is initially assessed on the basis of the contracting party’s pre-contractual risk appraisal or statements.

This is true in Italy, Mexico, Germany, Poland and Switzerland.

In most cases, the contract is “fixed” if the insured risk becomes higher.

This is provided for by law in:

1. Switzerland
2. Austria

3. Italy
4. Germany
5. Mexico

Furthermore, I think that ex ante preventive and/or risk occurrence downsizing measures, include the so-called exclusion clauses and/or insurability conditions, which are so widespread in Italy and, judging from the data collected, also applied in the United States, Australia, Great Britain, Denmark, Serbia, France, Hungary, Greece, Brazil, Bolivia, Belgium, Switzerland and Mexico.

GROUP IV

Lastly, there is a group of Countries, which is considerably significant in terms of the dimension and relevance of its components, in which there is a prevalence of ex post measures destined to reduce the losses deriving from the insured event.

These are:

1. The UK
2. The U.S.
3. Hong Kong
4. Japan
5. Colombia
6. Spain
7. Uruguay
8. Turkey

2. Transparency and prevention: two sides of the same coin?

The heterogeneous nature of the sizable material collected suggests to proceed by macro thematic areas that are transversal to both Common Law and Civil Law countries.

With a view to making a systematic classification, I would like to begin by dwelling on the extension of the notion of risk prevention measures.

It is clear that these include all the clauses, whether contractual or mandatory by law, expressly obliging the ensured to “do” or “not do” something, precisely in order to avoid the occurrence of the insured event.

However, this wording is explicitly used only in Group I countries, even if the issue is not neglected in other countries, although these take a different systematic and methodological approach to the issue.

The ensured is required to adopt a number of indirect measures aimed at avoiding the conditions foreboding the occurrence of the event.

Let us take a look at them, through the cases listed in Group II.

As I was saying, these are contract-fixing cases because the insurer accurately calibrates the risk on the basis of the information mandatorily provided by the ensured.

I think this has a "downsizing" effect on claims because if the obligation is not met, the insurer is legitimised to cancel the contract even before the risk occurs, thus also terminating his obligation to pay compensation.

This is what makes the preventive measure more effective – both in general terms and in view of an eventual mutual insurance fund scheme – because the insurer "expels" the risks that are not homogenous with his risk portfolio or that are essentially different from those that he had originally accepted to take.

Moreover, most of the legal systems analysed provide for constant risk control – throughout the performance of contract – by imposing upon the insured the obligation to notify any worsening in the risk.

Also in this case, contractual non-performance is punished with the cancellation of contract and/or with the reduction of compensation, as shall be illustrated in depth in the papers illustrating sanctioning measures.

Again, insurable risk or risk restriction clauses are very widespread.

In this case, contract fixing or the "restriction/prevention" of claims occurs ex ante because the policy can be stipulated and/or the indemnity paid only if the ensured falls within the pre-established parameters set in insurability clauses.

Among the many options available are the clauses subordinating the effectiveness of insurance coverage to age (health insurance) or the recurrence of particular conditions (e.g. the existence of an effective fire-extinguishing system in a fire insurance policy or of a good burglary alarm in theft insurance). Somewhat similar to these clauses are the conditions that subordinate the effectiveness of automobile liability insurance to the "state" of the driver, meaning thereby that he or she must not be a drug addict or alcoholic, or the typology of the area driven through. Some life insurance policies, for example, exclude HIV patients from the list of insurable people.

It is clear that, by including a "restrictive" clause, the insurer excludes from coverage people exposed to higher or abnormal risks.

The downsizing and/or preventive measures against the occurrence of the insured risk are grounded on a careful risk classification and management system.

In this respect, Italy has recently reformed its automobile liability insurance regulation.
If a car undergoes an inspection before stipulating the contract or is fitted with the so-called Event Data Recorder, the ensured is entitled to a significant premium reduction. These are measures aimed at preventing the risk because, by monitoring the automobile's road performance (average speed, average number of kilometres covered) – especially in the case of an Event Data Recorder – the insurer encourages the ensured to behave virtuously, thus preventing the risk, and even in the case in which the event occurs, he nonetheless avoids having to pay undue indemnities (because the Event Data Recorder can reconstruct the dynamic of the incident).
In drawing some conclusions, I think that there is a clear connection between information disclosure – which is the leitmotif of our Congress – and insurance preventive measures, intended as the correct ex ante screening and close monitoring of risks.
This approach is becoming increasingly widespread in Italy, especially in the field of automobile liability insurance.
It leads me to wonder if the same tendency is also present in other Countries: I am thinking of Germany, where pre-contractual information disclosure is quoted but is only considered a risk assessment instrument and not a preventive measure in its own right, and how it is evolving, also in view of its effect on the economic consequences of laws, and its effectiveness.

3. The *bona fide* principle as a preventive measure

Literature on the *bona fide* clause is vary vast, both in Italy and in other Countries.
As it meets the need to avoid an excessive discretionary power in its application because of its general and indefinite nature, it has ended up playing a role so important that it has now become essential. It is essential both in order to adapt the whole body of legislation to the new socio-economic needs, all of which cannot be readily taken into consideration by the legislator, and also to adjust the law to the circumstances, on a case-by-case basis.
In Italy, the *bona fide* principle in the regulation of insurance contracts appears to be marginal.
Broadly speaking, it should be preliminarily specified that the *bona fide* principle may be relevant in the following:

(I) in pre-contractual negotiations. For example, if the seller of a property omits to inform the buyer that he has filed a request for a mortgage but, at the same time, guarantees that the property is free from all claims, charges and encumbrances. The Supreme Court has identified evidence of fraud in such dealings and, in asserting the *bona fide* principle, specified that the source of the information disclosure duty may also lie in an «extra penal» norm, namely Art. 1377 of the Italian Civil Code, which imposes on the parties to a pre-contractual negotiation the obligation to behave according to the bona fide principle.

(II) in the execution of contract. For example, a nine-year lease contract is stipulated for a lot of land on which the lessee is to build a car-rental facility: the contract is subordinated to the issue of the necessary authorisations to build the facility; the authorisation is not issued because of the lessor's refusal to sign the application form. The *bona fide* principle laid down in Art. 1358 of the Italian Civil Code also applies to this case. The Court, in investigating the cause of the lessee, specified that «if the obligor or seller sells a property under the condition precedent of the prior issue of the administrative authorisations required for the performance of the economic activities that the counterparty proposes, he has the duty to perform, for his cause to be kept intact, and acting in good faith (Art. 1358 of the Civil Code), all the activities that depend on him for the realization of the condition and not impede the Public Administration from issuing the authorizations». This implies that the seller is responsible of the consequences of the non-performance of the contractual obligation undertaken vis-à-vis the other party, who is entitled to request the cancellation of contract and compensation for the losses suffered, to be ascertained according to the criterion of the rightfulness of cause, thus acknowledging the loss in the case in which, in consideration of the de facto situation at the time of non-performance, it is deemed that the condition could have been realized, because it was possible to obtain the legitimate issue of authorizations in compliance with applicable laws (Court of Cassation ruling n. 6676 of 2 June 1992).

Lastly,

(III) in the interpretation of the contract (Art. 1366 of the Civil Code).

However, as previously stated, the *bona fide* principle only marginally applies to insurance contracts, both in pre-contractual negotiations and in their execution.

It can be reasonably claimed that this derives from the clauses on pre-contractual statements, the worsening of the risk and the conditions of insurability. It is scarcely

useful to apply a general principle where the Civil Code specifically establishes the main obligations in order to act in good faith. Instead, the *bona fide* principle finds a broader application in the interpretation of the clauses contained in insurance policies.

For example, in a not too recent case, the customer underwrote an insurance policy against damages to his home deriving from “tornadoes, storms and hurricanes”. However, the damage was ultimately caused by a heavy snowstorm.

A court was seized to interpret the meaning of the clause and the Judge, relying on Civil Code Articles 1366 (bona fide interpretation) and 1370 (*interpretatio contra stipulato rem*), found the guarantee to be enforceable.

An interesting use is made of the *bona fide* clause in the failure to file a claim according to the procedures specified in the policy.

In this case, court rulings state that it is necessary to rely on the *bona fide* principle in assessing whether the different form of notification adopted can be considered equivalent to those established in the contract.

In any case, it is quite customary to have these clauses – considered to be restrictive – specifically approved in compliance to Articles 1341 and 1342 of the Civil Code, in order to have the certainty that they are enforceable vis-à-vis the insured.

The use made of this principle in the joint sittings of the Court of Cassation divisions is even more significant. They relied on the principle in settling a dispute arising from the violation of premium regulations and, more specifically, the clause obliging the ensured to pay an initial minimum premium and a final premium, depending on the risks guaranteed during the insurance period. This occurs in professional liability policies, in which the final premium is established on the basis of the invoice volume during the period under observation.

According to the Supreme Court, in settling controversies relative to the so-called premium regulation clause in insurance contracts, trial judges must rely on general rules regulating contractual obligations (Articles 1218, 1366 and 1375 of the Civil Code) in qualifying the policy-holder’s violation of the contractual obligation to disclose information as non-performance or not.

If general rules are applied, the failure to notify a change in the variable elements requiring the obligation to pay the balance of a sizable portion of the variable premium, can be considered contrary to the *bona fide* principle and therefore legally relevant.

Consequently, the insurer will be (legitimately) enabled to refuse to enforce the contract if the relevance of the policy-holder's non-performance has altered the balance of the synallagmatic contract.

Otherwise, the non-performance claimed by the insurer will be considered to be a pretext and therefore contrary to the *bona fide* principle, even if it was consequent to the failure to notify a change in the variable elements, and in case the change is not considered to be relevant.

This said, when I analysed the questionnaires, it was not clear to me how the *bona fide* clause is used as a risk prevention measure.

I would therefore like to open the debate on its effective role.