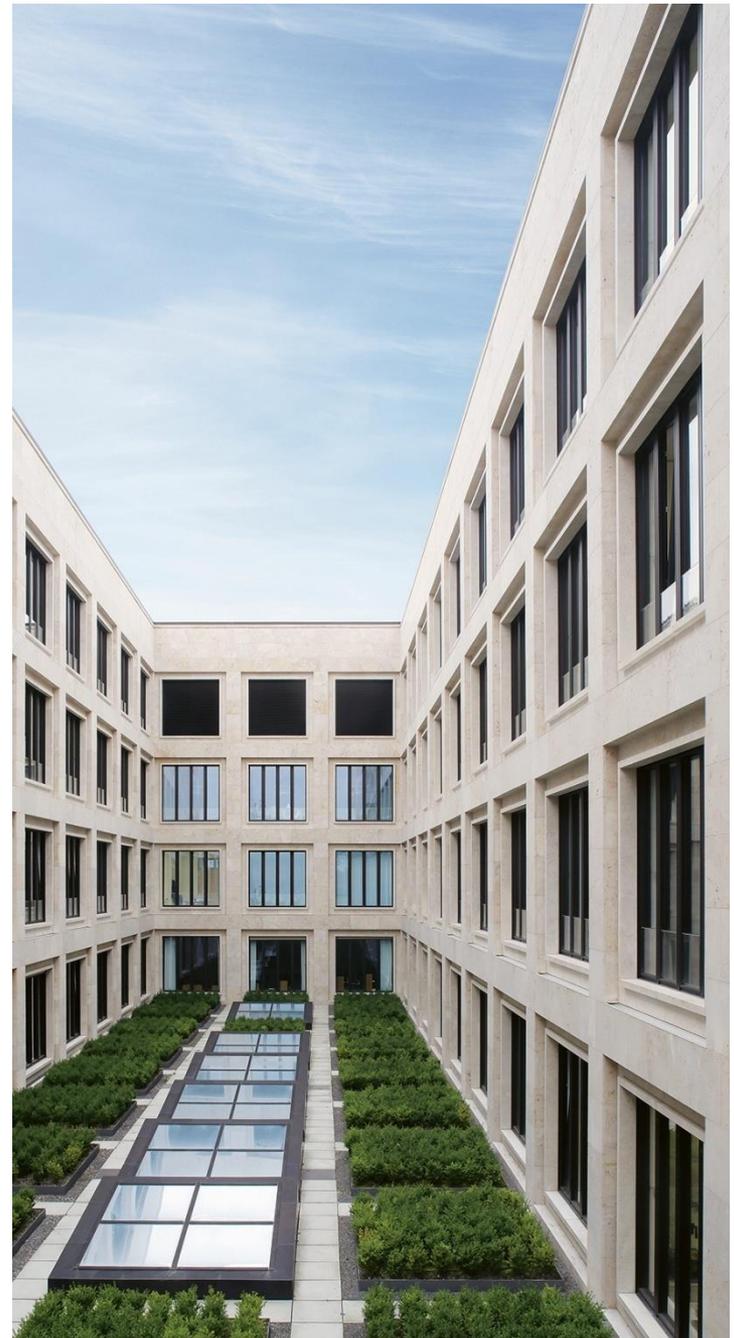


Prof. Dr. Manfred Wandt
Goethe Universität, Frankfurt

Transparency of insurance contract terms

AIDA XIVth World Congress
Rome, 30.9.2014



Agenda

1. Introduction
2. Requirement of a regulatory ex-ante approval of GCI
3. Mandatory contract terms
4. Formal requirements
5. Standard terms as part of the contract (esp. date of issuing the written GCI)
6. Interpretation of GCI
7. Requirements on transparency of GCI
8. Conclusion



Transparency of standard terms: economic importance and legal development

- » ***terms which have not been individually negotiated***« (PEICL) are the legal heart of an insurance contract within a b2c transaction
- **economic importance:** standard terms define the main subject matter of the contract (insured event / extent of coverage)
- transparency of GSI is an important aspect of strengthening consumer protection
 - EU: the standard of transparency has been continuously enlarged
 - common law countries:
 - general contract law applies;
 - specific rules are subject to the Insurance Supervision Law

The overall legal framework concerning transparency of contract

Transparency of contract is mainly achieved by:

- pre-contractual duties of the insurer to give **information and advise**;
- **formal** requirements (constitutive for the conclusion of the contract);
- requirements on the **design** of information and of GCI;
- transparency requirements for the **content** of GCI;
- requirements for the **inclusion** of GCI in the contract (esp. date of issuing);
- duties to **inform** after the conclusion of the contract;
- the methods of **interpreting** GCI, esp.:
 - principle of restriction; *contra proferentem* rule
- **judicial control**

Requirement of a regulatory ex-ante approval of GCI

- Worldwide, many countries: **regulatory ex-ante approval**
 - all GCI (e.g. Japan, Singapore, Turkey)
 - only GCI for **certain insurance contracts** (e.g. Switzerland: occupational pension schemes or supplementary health insurance)
- EU
 - requirement of ex-ante approval of GCI has been abolished since the deregulation of the insurance sector in 1994
 - Member States may impose an obligation on the insurer to submit the GCI for health insurance and compulsory insurances to the supervisory authority before using them

Mandatory policy provisions / contract terms

- directly by mandatory provisions (e. g. Belgian law requires that life insurances must contain a large number of mandatory policy provisions)
- indirectly by mandatory provisions, according to which a definite legal consequence / a specific issue is not agreed upon, except it is clearly said in the contract / policy (e.g. France, Greece, Switzerland).
- insurance supervision law often provides for mandatory provisions on the content of general contract terms (e.g. Germany, Poland).

Formal requirements

There are significant **differences in detail** between the national legal systems:

- only a few countries require a written form for the **conclusion of the contract** (e.g. Bulgaria; Hungary relating to life insurance contracts)
- some jurisdictions require written form only as **part of the law of evidence** (e.g. Austria, Belgium, France, Greece, Italy)
- some jurisdictions explicitly require that the **terms of consumer contracts** must be in writing (e.g. Brazil, South Korea, Turkey)
- **Article 2:301 PEICL (Manner of Conclusion)** expressly states that an insurance contract shall not be required to be concluded or evidenced in writing nor subject to any other requirement as to form. The contract may be proved by any means, including oral testimony.

Standard terms as part of the contract (esp. date of issuing the written GCI)

- most countries require that GCI are issued **before** the conclusion of the contract
- some countries allow to transmit GCI **together with the policy** to the policyholder during **or after the conclusion of the contract**, esp.
 - in case of an oral agreement
 - waiver of pre-contractual information
 - waiver of issuing the GCI on concluding the contract
- **New Zealand**: it is assumed that both parties contract on the basis of the insurer's standard policy terms.
- **Taiwan**: a period of no less than 30 days must be given to consumers to review the contents of all terms and conditions before the conclusion of the contract. Otherwise GSI shall not be part of the contract, but consumers may propose that the terms and conditions make up the content of the standard contract.

Standard terms as part of the contract (esp. date of issuing the written GCI)

Unexpected terms:

- a surprising (unexpected) term do not form part of the contract (e.g. France, Germany, Hong Kong, Switzerland)
- Sec. 305c para. 1 German BGB
 - if the clause is unexpected from the point of view of a reasonable contractual partner, in particular with regard to all the circumstances attending the conclusion of the contract
 - According to case law: if the particular term is “hidden” between the terms and conditions

Interpretation of GCI

Interpretation is generally based on the **intention of the contracting parties**.
However:

- Most common-law jurisdictions start contractual interpretation from an objective point of view.
- In contrast, many EU member states follow a subjective standard of interpretation.
- It is rightly stated in scholarly literature that the results are regularly identical.
- standard terms are construed from the **view of an average policyholder** without any legal knowledge (e.g. Belgium, Germany, Greece).
 - Brazilian Consumer Code : **a prompt and easy understanding**
 - German case law: a policyholder who carefully reads and reasonably assesses GCI and considers the apparent contextual meaning
- ***contra proferentem* rule** applies almost worldwide for consumer contracts

Judicial control of GCI

- **control of the material validity:**
 - a particular term is ineffective if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
- **control of transparency**
 - only minimum harmonization by the 1993 EC directive on unfair terms in consumer contracts
- **scope of judicial control**
 - many countries: without restrictions
 - English law exempts any description of the insured event and any exclusions
 - German law exempts only the **core terms** of the contract without which the contract cannot be performed

Statutory requirements concerning the language to be used

- contract terms must be drafted in the **official national language** (e.g. Greece, Hungary (life assurance contract), New Zealand, South Korea, Turkey).
 - **Turkey:** “Foreign words shall not be used in insurance contracts. Principally, the translation of foreign words shall be used as determined by the Turkish Language Institute.” (Article 11 para. 5 Insurance Activities Act)
 - **Taiwan:** „The wording in the sales material must contain Mandarin Chinese English terminologies and notes should be added if necessary.“ (Article 2 (3) of the Guidelines on Disclosing Information of Investment-linked Insurance)
- many countries alternatively permit the use of the **language agreed by the contracting parties** (e.g. Belgium, France, Germany, Taiwan)

Statutory requirements concerning font-design

- **general provisions:** e.g. standard terms “to be printed in a clear and legible manner” (Greece) or “written ... with noticeable and readable characters” (Brazil).
- **specific provisions** for font design: **font size, bold print, block letters**
 - **Turkey:** consumer contracts must be written in bold print and not less than **12 points** (Consumer Protection Law).
 - **N.Y.:** policy ... not less than **10 point type** (Insurance LAW § 3102 (1) (E))
 - **France:** a policy clause that stipulates exclusions shall be valid only if it appears in **very clear print** (bold, block letters, etc) [Insurance Code]
 - **South Korea:** contract terms shall be written in Korean using plain and standardized terminology, indicating the material sections **marked in alternative colors, bold and large fonts** (Standard Terms Act)

Statutory requirements concerning document- design

contract law:

some laws provide for specific requirements concerning document-design.

Greece: GCI must be printed not only in a clear and legible manner but also **in a prominent position** on the contract document (Law 2251/1994)

Insurance supervision law, e. g.

Hungaria: the format of documents (including GCI) must be **easy-to-read format** and **well structured**, and include a table of contents (nonbinding guideline of the Supervisory Authority on the consumer information to be provided by financial service providers).

Hong Kong: the policy / contract should be designed and presented with the aim of aiding comprehension by the individual private insured (Code of Conduct for Insurers).

Comprehensibility: legal provisions and case law

- **Intelligibility of language, esp. terminology**
 - plain, intelligible language (e. g. Denmark, France, South Korea, South Africa, Turkey).
 - specific provisions on the intelligibility of exclusion clauses (e. g. Brazil: „clauses ... shall bear easily visible characters thus allowing a **prompt and easy understanding**)
- **Comprehensibility within the context**

It is only rarely that provisions explicitly address the contextual meaning.

- Israel: any condition or exclusion to the liability of the insurer shall be specified in the policy **close to the subject to which it relates** (or be indicated therein with special emphasis) [sec. 3 ICA] .

definiteness, unambiguity and completeness of GCI

▪ ***Unambiguity***

- priority of the *contra proferentem* rule
- supplementary control of transparency
- An unambiguous rule may be considered unclear and *vice versa*.

France: exclusions must be “formal”, which means that they must be perfectly clear (Insurance Code)

Switzerland: any restriction must be expressed in “precise, unequivocal” language (ICA 1908)

▪ ***completeness***

- German Federal Court of Justice: an understandable term has to be complete insofar as it should reveal the economic disadvantages and burdens as far as it is reasonable.

Thank you for your attention

