

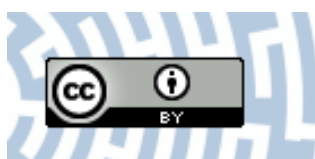


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Author: Mariusz Fras

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Contemporary European Normative Tendencies Regarding the Essence and Typology of Insurance Contracts

Mariusz Fras¹

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Abstract

In the light of different approaches to the question of regulating economic insurance law in specific legal systems, formulation of a model definition of the insurance contract, although necessary for further investigations, is merely theoretical. Specific lawmakers approach the question of specification of the content of the insurance contract at the statutory level with varying degree of consequence. Insurance relationships are a heterogeneous category, and attempts to develop uniform systematics with the use of comparative legal methods are still hindered by differences between individual legal systems. There is a lack of consistence between the distinctions adopted in private law systems and solutions characteristic of public law, which exert much influence on the market of insurance services as a part of insurance supervision.

Keywords Damage insurance · Fixed-sum insurance · Insurance contract · Insurance risk · Principles of good faith

Introductory Remarks

An analysis of the concept of insurance contract should start by pointing to characteristic features of this agreement. For this purpose, determinations on the social and economic function of insurance contracts will be meaningful. This function is played by the insurer's obligation to render the insurance benefit in case of occurrence of an insurance accident, i.e. event specified in the contract causing negative consequences to the insured party's property situation. In consequence of the above, characteristic features of an insurance contract include insurance risk, insurance accident and insurance benefit.

✉ Mariusz Fras
kancelaria-fras@o2.pl

¹ Department of Civil Law and Private International Law, Law Faculty of Silesian University, ul. Bankowa 11B, 40-007 Katowice, Poland

The social and economic functions of an insurance contract may obviously be duly performed when the contract is concluded by the insurer in the course of its business activity consisting in lawful planning of risks relating to large sums and rendition of benefits in case of occurrence of insurance accidents.¹ An agreement which admittedly bears the features of an insurance contract but is concluded outside such activity assumes the nature of a speculative act (game), in which speculation of the risk takes place of its calculation.² For the above reason, as far as substantive law qualification of an insurance contract is concerned, such features are indicated as mass or planned character. However, the mass or planned character are the features of insurance understood collectively (insurance activity, concept of insurance in the law of insurance supervision)³ and not characteristics of insurance in its individual dimension, i.e. insurance contract. Neither the mass nor planned character of insurance contracts follows from the analysis of the content of such contract.⁴ A central role among the abovementioned features of insurance contract is played by insurance risk, understood as the possibility of occurrence of an event provided for in the contract which has negative consequences to the property situation of the insured party (fortuitous event). The purpose of clarification of the insurance character of risk is fulfilled, in large measure, by the concept of insurance interest. Insurance risk and insurance interest account for the essence of insurance as an instrument of protection. Within the framework of such protection, the insurer assumes the obligation to render a financial benefit specified in the insurance contract in case of occurrence of an insurance accident. Insurance risk gives meaning to the concept of insurance accident, it works as a basis for the determination of the amount of benefit rendered by the insurer,⁵ and accounts for the conditional character of such benefit. In the same way, insurance risk explains and mutually binds the remaining characteristic features of an insurance contract.⁶ The conditional claim⁷ for a benefit is acquired by the insured party in consideration of the payment of premium.⁸ Protection of the insurance interest is realized by transfer (assumption) of insurance risk. For the above reason, the concepts of insurance risk and insurance interest account for the role of insurance as a method of transferring risk.

A contract under which insurance risk is taken over by the insurer (commercial type of insurance) is generally referred to as insurance contract.⁹ The insurance character of the transferred risk allows to distinguish such contract from other contracts under which risk is transferred.¹⁰

¹ Eichler (1966: 6–7).

² Dickstein (1995: 51).

³ Präve (2005: 40–41).

⁴ Dreher (1991: 35–36).

⁵ Dickstein (1995: 51).

⁶ Nicolas (1996: 30, 65).

⁷ Eichler (1966: 12, 24–26).

⁸ Dickstein (1995: 155).

⁹ Birds (1984: 99).

¹⁰ Dickstein (1995: 47–52, 67).

Legal Definitions of Insurance Contracts in Specific Legal Systems

In the light of different approaches to the question of regulating economic insurance law in specific legal systems, formulation of a model definition of the insurance contract, although necessary for further investigations, is merely theoretical.¹¹ Specific lawmakers approach the question of specification of the content of the insurance contract at the statutory level with varying degree of consequence. Some legislators resign over legal definitions. For instance, definitions of an insurance contract have not been introduced in Portugal, Swedish or Finnish law.¹² Other lawmakers enact provisions limited exclusively to the general specification of the essential obligations of the parties. In German law, under § 1 VVG¹³ “by concluding an insurance contract, the insurer undertakes to cover a specific risk of the policyholder or a third party by paying a monetary benefit in case of occurrence of an insurance accident. The policyholder is obliged to pay the agreed insurance premium.” In Polish law, under Art. 805 of the Civil Code (CC), “by an insurance contract, the insurer commits, within the scope of operations of its enterprise, to make a specific performance if an event provided for in the contract occurs, and the policyholder commits to pay a premium.” A sizable group of lawmakers attempt to create a casuistic definition, accounting for the dissimilarities between specific insurance contracts. In Italian law, under Art. 1882 of the Italian CC,¹⁴ “insurance is a contract under which the insurer, in consideration of the payment of premium, undertakes to cover the loss within the agreed range in case of occurrence of an insurance accident, [or—M.F.] to pay a specific sum of money or pension in respect of events relating to human life.” In Belgian law, under Art. 1 letter a of the Belgian LCA,¹⁵ insurance contract is a contract under which, in consideration of the payment of a fixed or variable premium, one party, the insurer, undertakes to the other party, the policyholder, to render the benefit specified in the contract in case of occurrence of an uncertain event in the avoidance of which the insured party or beneficiary is interested.

In Spanish law, the definition of insurance contract is extensive and considers the typology of insurance contracts. Under Art. 1 LCS,¹⁶ insurance contract is a contract under which the insurer agrees in consideration of specific premium and in case of occurrence of an event (whose risk of occurrence is the subject of insurance) to pay compensation, within the agreed limits, for a damage sustained by the insured party or to pay a capitalized sum or pension or other agreed benefit.

A similar approach, reconnecting to the differentiation between and typology of insurance contracts is included in Art. 6:439 of the Hungarian Civil Code.¹⁷ According to its paragraph 1, under an insurance contract, the insurer undertakes to cover a

¹¹ Fras (2013: 559).

¹² Basedow et al. (2016: 51).

¹³ *Versicherungsvertragsgesetz*: 2631.

¹⁴ *Il Codice Civile Italiano*; Regio decreto del 16 marzo (1942).

¹⁵ The Belgian Act on the insurance contract (1992: 18283).

¹⁶ The Spanish Act on the insurance contract (2005).

¹⁷ Hungarian Civil Code (2013).

risk specified in the contract and pay a benefit or remedy the damage following from a specific future event occurring after the initial date as of which the risk is subject to the cover, and the policyholder undertakes to pay the agreed insurance premium.

In the light of the diversity of insurance activity forms, an attempt to create a specific definition involves the risk of too narrow specification of the concept of insurance contract. On the other hand, the absence of definition may lead to arbitrary and random resolutions. The parties, until the time when the dispute arises and its resolution by an entity from outside the legal relationship (court or authority appointed for the resolution of disputes arising from insurance relationships) may remain uncertain about the character of the contract they concluded.

The result of comparative studies leads to the conclusion that the content of an insurance contract is the obligation of the person receiving the premium (insurer) to render a specific performance in case of occurrence of a fortuitous event subject to the insurance. The entity entering into the contract is referred to as policyholder and the person entitled to receive the benefit is the person referred to as the insured party or beneficiary. A situation is also permitted in which the policyholder acts in a double role—both as the party to the contract (policyholder), and the person entitled to receive benefit from the insurer.¹⁸

Insurance contracts are characterized by specific motivation of the parties who decide to cover a specific interest or good by insurance protection.¹⁹ On top of that, the literature indicates that insurance contract is a contract in performance of which the parties are obliged to follow, in the highest degree, the principles of good faith (“*contrat d’extrême bonne foi*”).²⁰ The mechanism under which insurance operates is, in large measure, based on mutual loyalty of the contractual parties.²¹ For that reason, insurance contract is referred to as a contract of highest confidence (*contractus uberrimae fides*). The insurer, as the economically stronger party, having experience and being professionally prepared to provide insurance services, should take all steps having regard to the interest of the contractual counterparty. On the other hand, the policyholder is obliged to act loyally vis-a-vis the insurer, which obligation is manifest in the honest provision of information to the insurer on the circumstances known to the policyholder, which are related to the risk subjected to insurance protection, or adoption of preventive measures intended to mitigate both the probability of damage in itself and reduction of such damage after the occurrence of an insurance accident.

In newer literary studies, more attention is paid to the examination of the legal character of the insurance contract. The subject of controversy is, in the first place, the qualification of the insurance contract as reciprocal agreement, which follows from the difference in understanding of the main provision of the insurer.²² Currently the opinion which should be considered dominant is that the insurer’s performance

¹⁸ Fras (2013: 560).

¹⁹ Koenig (1942: 39).

²⁰ Picard and Besson (1938: 132).

²¹ Reichert-Facilides (2011: 144–146).

²² Malinowska (2009: 22–32).

consists in the obligation to incur the risk of payment of a specific monetary amount in case of occurrence of an event specified in the contract.²³ However, against the backdrop of the provision of § 1 VVG, certain German authors are of the opinion that one may speak of performance only in case of occurrence of the insurance accident, whereas others recognize as performance the bearing of risk in itself.²⁴

The insurance contract is, by definition, a contract for remuneration because the policyholder is obliged to pay the premium. The parties are both debtors and creditors vis-a-vis one another, which is why in legal systems based on Roman law tradition it must be regarded as a mutually obliging contract. On the other hand, in *common law* systems, the insurance contract is referred to as a unilaterally obliging contract since only the policyholder may take legal action to have the performance owed to him compulsorily enforced. Timely payment of the premium is only a precondition of subsistence of the insurance protection and the insurer has no claim for its payment.²⁵

Insurance contract is at the same time an aleatory contract because both the content and the need to render the agreed performance depend to a greater or lesser extent on chance.²⁶

The insurance contract is a causal agreement although specific legal systems provide for different consequences of non-existence of a *causa*²⁷ which will be subject to a wider analysis in the considerations on the performance of insurance contracts itself. However, the principle of causality of obligations, following from the Roman law tradition, is unknown to *common law* systems.

According to the provisions of substantive law in most countries, the insurer must be a professional, which furnishes the insurance contract with a character of subjectively qualified contract. That is why even a contract of similar content should not be subject to the legal regime governing insurance contracts when concluded with a party not engaged in insurance activities.²⁸ Because of the method of reaching agreement by the parties in respect of their mutual rights and obligations, the insurance contract is considered a contract of adhesion.²⁹ Most of the time, contract terms are unilaterally specified by the insurer.

Since the characteristics outlined above are present in the normative acts of most legal systems, from the point of view of international commercial law, the discussed contract must be considered a nominate contract.

The social and economic function of the insurance contract boils down to the protection granted to the policyholder against the consequences of a specific fortuitous event (insurance accident). Insurance protection is realized due to the so called “transfer of risk mechanism.” The insurer, so to say, takes over the risk of

²³ Supreme Court (SC) of 20 October 2006, IV CSK 125/06 Supreme Court (SC) of 20 October 2006, IV CSK 125/06.

²⁴ Krajewski (2013: 135–144).

²⁵ Rejda (2002: 185).

²⁶ Czachórski et al. (2019: 14), Mayaux (2011: 21–23).

²⁷ Orlicki (2004: 813).

²⁸ Dz. U. 2015, item 1844, art. 4(1).

²⁹ Henrot and Talbourdet (2012:132).

negative events in the area of the insured party's (policyholder's) interests and their consequences.

However, the concept of risk is usually not defined at the statutory level, and its doctrinal understanding is not free from ambiguity. One can differentiate three principal meanings of the term "risk." Risk is treated either as threat or the subject of protection in itself in whose intact preservation the policyholder (insured party) is interested, or, finally, as probability of occurrence of an insurance accident.³⁰ The common element of the cited definitions is uncertainty conditioning the abovementioned aleatory character of the insurance contract. As a result, it is undoubted that risk is a key concept for economic insurance law, which, for the purposes of further deliberations in the international economic context, will be understood as the possibility of occurrence of a fortuitous event provided for in the contract and having negative consequences to the policyholder's property situation,³¹ or will be used to specify the object of protection in the conflict of laws context (large risks, mass risks).

In the French literature, it was proposed to define insurance risk as a possibility, the very threat of occurrence of a certain fortuitous event against the consequences of which a given person is insured.³² French authors distinguish the accepted meaning of insurance risk, which is used to characterize the insurance contract (French *l'opération individuelle*), and other meanings of the same term, especially those which serve to describe the concept of insurance as entirety of an insurer's operations (French *l'opération d'assurance*), understood as the degree of probability of occurrence of a given event and the costs of liquidation of insurance accidents.³³

Insurance risk gives meaning to the concept of insurance accident, serves as basis for the determination of the amount of benefit payable by the insurer and justifies the conditional character of such benefit.³⁴

A notion strictly connected to the concept of risk is the notion of "insurance interest." "Insurance interest" should be understood as the relation due to which the insured party—in consequence of the event provided for in the contract—may sustain damage. The concept of insurance interest was adopted in most substantive law regimes in reference to insurance of such goods whose value can be expressed in money terms. In the understanding of Art. 821 CC, insurance interest is every proprietary interest which is not unlawful and may be assessed in terms of money. The admissibility to conclude an insurance contract under French law depends on having an interest in a proprietary interest being secured (Art. 121-6 *Code des assurances*). In German law, subsistence of interest on the part of the policyholder is a precondition to the effectiveness of a contract and its enforceability. The provision of § 80(1) VVG stipulates that non-existence of the insured party's interest as on the starting

³⁰ Reichert-Facilides (2011: 111–112).

³¹ Kropka (2010: 35).

³² Nicolas (1996: 60).

³³ Nicolas (1996: 55–58).

³⁴ Eichler (1976: 24–26).

date of the insurance protection relieves the policyholder from the obligation to pay premium.

It must be added that international economic insurance law knows also the construction of “temporary protection,” which is afforded on the basis of agreement between the insurer and the policyholder prior to formal conclusion of the principal insurance contract (see: § 49–52 VVG; Art. L 112-2 Code des assurances (note de couverture)). This allows to embrace a specific interest by the insurer’s liability even prior to the formulation of contractual terms, which means *de facto* before the conclusion of the contract itself. In case of an insurance accident occurring in the period when such temporary protection is afforded, the general terms and conditions used by the given insurer should apply in relation to the specific object of protection.³⁵ “Temporary protection” has also an essential practical advantage. The document certifying the existence of temporary protection constitutes a proof for insurance protection even prior to the delivery of the insurance policy, which may be important for compulsory insurance contracts.

Consequently, the insurance contract is also a source of so-called temporary protection (in German law: *vorläufige Deckung*, in French law: *note de couverture*; in English law: *cover note*).³⁶

Temporary protection, at the stage preceding precise formulation of the content of the contract itself, must be distinguished from insurance contracts amounting to “current” protection (also known as framework insurances), i.e. agreements in case of which on the date of conclusion of the contract the insurance interest is specified only generally, and the specific risk becomes covered by the protection at the time of its emergence.³⁷

A subject of controversy, however, is the subsistence of insurance interest when the insurance protection relates to life or health of the insured party in which case authors much more often use the term “subject of insurance protection.” In the doctrine, a position is expressed according to which the concept of “insurance interest” is incompatible with such values as health or life of the insured party.³⁸ Currently, this issue does not raise doubts only in *common law* systems and certain countries of continental Europe, where the legislator uses the concept of insurance interest in relation to all types of insurance contracts. The provision of Art. 48 of the Belgian Act on the insurance contract reads that “the beneficiary must have a personal and lawful interest in the avoidance of the insurance accident.” In Art. 2418 of the Civil Code of the Quebec province,³⁹ it was stipulated that an insurance contract is invalid if, at the time of its conclusion, the policyholder has no interest in insuring the life or health of the insured party, unless the latter consents to such insurance in writing. In other cases, doubts arise both from doctrinal uncertainties concerning the possibility to approach “life or health” in terms of an interest and from silence of the legislator,

³⁵ Cass. Civ. I, 7 Mars (1989: 546).

³⁶ Stroiński (2002: 139).

³⁷ Weigel (2008: 110), Dz. U. 2001 No. 138, item 1545, art. 311–313.

³⁸ Orlicki (2004: 669–671).

³⁹ Code civil du Québec, LRQ, c C-1991.

who does not use the term “insurance interest” in reference to values which cannot be assessed in terms of money, but replaces the expression with a technical-legal term “object of protection.”

The definitions of the insurance contract as presented above fully grasp the essence of so-called individual insurance contracts. This concept is referred to such obligational relationships which are established upon conclusion of a contract between the policyholder and insurer for the purpose of guaranteeing to the policyholder or another person a specific benefit in case of occurrence of an insurance accident specified in the contract. This hypothesis, however, is not always in line with the needs and expectations of parties to legal transactions. Oftentimes, it may prove much more beneficial to the interested parties to conclude an insurance contract allowing the protection to cover a wider range of subjects than in the case of individual insurance contracts.

The answer to the expectations of trading participants was the construction, which developed in practice, of an insurance contract covering a specific group of insured parties. Initially, this category of contracts was interchangeably referred to as collective, aggregate or group insurance. Such contracts allow to afford insurance protection on the same terms to a certain collectivity, exposed to similar risks. This idea is expressed in the definition proposed by the doctrine according to which the concept of group insurance covers contracts concluded by one person with an insurer or group of insurers for the purpose of affording protection against specific risks to a collectivity of natural or legal persons.⁴⁰

As compared to individual insurance, where all risks, in principle, concentrate on one subject, in group insurance contracts the risk is dispersed over a certain population (group) of insured parties. As a result, a group insurance contract is an example of multiplication of the number of persons participating in the insurance relationship.

This thought is reflected in Polish literature.⁴¹ The opinion that insurance relations are divided according to the number of subjects covered by the insurance protection into individual and group insurance contracts is met with general approval.

Although the group insurance formula makes a widespread solution in insurance practices, only in few legal systems it has been specifically regulated. Instances of defining the very concept of group or collective insurance contract are even rarer.⁴²

It is noteworthy that despite the absence of definition of the insurance contract itself, the French legislator introduced the definition of group insurance. It should be mentioned that in Belgian insurance law, which was developed under strong inspiration of French law, there is no general definition of insurance contracts. However, the provision of Art. 138 bis-1 § 2 of the Belgian LCA defines the contract for the insurance of risks relating to health of the insured parties as contract concluded by

⁴⁰ Bigot (2002: 129).

⁴¹ Olszewik (1995: 94), Handschke (2007: 3), Łyskawa (2007: 153–156).

⁴² Heiss (2014: 14).

one or a number of policyholders on behalf of persons with professional ties to the policyholder at the time of concluding the contract.⁴³

Complex regulation of group insurance contracts was introduced in French law, where they were covered by Title IV of Book I CA.⁴⁴ The few legal systems in which the lawmaker decided to introduce extensive definition of a group insurance contracts include, as already mentioned above, the French law. The definition, in its currently applicable form, was introduced under the provisions of the Act No. 89-1014 of 31 December 1989, in Art. L. 140-1 CA,⁴⁵ renamed by the Act of 26 July 2005⁴⁶ to Art. L. 141-1 CA.⁴⁷ According to Art. L. 141-1(1) CA, a group insurance contract is an agreement concluded by a legal or natural person in charge of a business for the purpose of accession to such contract of persons meeting the criteria set forth therein. Insurance protection may involve risks relating to the length of human life, violation of bodily integrity or maternity, risks relating to incapacity to work, invalidity or unemployment. Under Art. L. 141-1(2) CA, all persons acceding to the group insurance contract must have the same ties with the policyholder.

The few legal systems in which the lawmaker decided to introduce a definition of the group insurance contract include also Scandinavian countries. In Swedish law, it is defined as an insurance contract under which protection is granted to a group of persons.⁴⁸ The provision of § 2 item 6 of the Finnish Act defines the group insurance contract as an insurance agreement in which the protection is or may be afforded to members of the group specified therein. In Norwegian law, a group insurance contract is defined as insurance in which the rights and obligations of the group members are set forth in the contract concluded by the policyholder in the name or on behalf of such group members (§ 1–2 letter d of the Norwegian Act on the insurance contract).⁴⁹

Typology of Insurance Contracts

Insurance relationships are a heterogeneous category, and attempts to develop uniform systematics with the use of comparative legal methods are still hindered by differences between individual legal systems. There is a lack of consistence between the distinctions adopted in private law systems and solutions characteristic of public law, which exert much influence on the market of insurance services as a part of insurance supervision.

⁴³ Devoet (2008: 119), Lamens (1994: 409–422).

⁴⁴ Code des assurances, JO (1978, p. 1088, CA).

⁴⁵ Loi no 89-1014 du 31 décembre 1989 portant adaptation du code des assurances à l'ouverture du marché européen, JO no 2 du 03/01/1990.

⁴⁶ La loi no 2005-842 du 26 juillet (2005: 12160).

⁴⁷ Boumédiène (2003: 397–398).

⁴⁸ Hjalmarsson (2008: 91–92).

⁴⁹ The Norwegian Act on the insurance contract No. 69 of 16.6.1989 r., Norsk Lovtidend No 12, 5.7.1989.

In private law, basic significance is attributed to the division of insurance contracts according to the differences regarding the object of insurance protection which determines the content of the insurer's obligation. This criterion allows to make a distinction, in European legislations, between damage insurance and fixed-sum insurance.⁵⁰

As far as damage insurance is concerned, the value of the benefit rendered by the insurer upon occurrence of the insurance accident corresponds to the value of the financial detriment (compensation). The actual value of the object of insurance protection is referred to as insurable value.⁵¹ This should be an objective value reached by specific assets in market conditions. The sum insured, on the other hand, is the upper limit, as agreed by the parties, of the insurer's liability. In civil liability insurance, the upper limit of the insurer's liability is referred to as the limit of liability.⁵² In such situations, there is no individualized asset whose value could be assessed in terms of money at the time when the contract is concluded. The term "insurable value" is of no use in this case.

In fixed-sum insurance, the object of protection cannot be expressed in money terms, and the insurer is obliged to pay a monetary amount which is stipulated in advance. In reference to damage insurance, in German law, the term *Schadenversicherung* has been used. In Belgian law, Art. 1 letters i and j of the Belgian LCA and in Luxembourgish law, Art. 1 letter h and Art. 1 letter j of the Luxembourgish LCA, the legislator used the distinction between damage insurance (*assurances à caractère indemnitaire*) and fixed-sum insurance (*assurance à caractère forfaitaire*). In most legal systems, fixed-sum insurance contracts may be concluded only in reference to specific objects of protection, such as life or health. On such occasions, the amount of money paid by the insurer is not compensatory in nature. The insurer's obligation to render its provision does not depend on the occurrence of damage.

The distinction presented above, between damage insurance and fixed-sum insurance, has not been, however, adopted in Polish and French systems. In French law the legislator introduced a dichotomous division of insurance into personal insurance contracts (*assurances de personnes*) and damage insurance contracts (*assurances de dommages*), which is close to the distinction known under Polish law into personal and property insurance contracts.

Thus, the mutual relation between the concepts "fixed-sum insurance" and "personal insurance" is that each fixed-sum insurance should be considered personal insurance. However, the reverse is not the case since not every personal insurance may be classified as fixed-sum insurance. Insurance contracts enabling reimbursement of therapy costs are treated as personal but not fixed-sum insurances. Rather than that, they constitute damage insurance in the abovementioned meaning.⁵³

In insurance law, one should accept, as the currently leading division, the dichotomous distinction of economic insurance contracts according to the criterion of

⁵⁰ Fras (2013: 565–566).

⁵¹ Orlicki (2004: 712–713).

⁵² Orlicki (2004: 712–714).

⁵³ Basedow et al. (2016: 286).

scale and type of the activity pursued by the policyholder (large risk insurance, mass risk insurance). This division is a manifestation of the belief that certain types of risk (large risks) are characteristic of professional transactions, where the need to protect the “weaker party” to the insurance contract is limited.

It is vital to follow this distinction in insurance relationships which have a link to the jurisdiction of two or more countries.⁵⁴ The differentiation between the above risks is of key importance for the establishment of the law applicable to the insurance contract under Art. 7 of the Rome I Regulation on the law applicable to contractual obligations.⁵⁵

This distinction is based on the assumption that certain types of risk are insured only by professionals who, bearing in mind the means at their disposal and their experience, are to a lesser degree exposed to threats related to the participation in insurance transactions than other market participants. Consequently, in the legislator’s opinion, there is no need for any special protection of that group in the conflict of laws context.⁵⁶

The concept of large risks was introduced in the *acquis communautaire* under the Second Council Directive 88/357/EEC. As in the case of the place where the risk is situated, no legal definition of large risk insurance was introduced in the Rome I Regulation. The Regulation refers in this respect to Art. 5 letter d of the First Council Directive 73/239/EEC (Art. 7(2) of the Regulation). This reference should be read in consideration of the principle under the second sentence of Art. 310 of the Directive 2009/138/EC, according to which as of 1 January 2016, the definition of “large risks” should be sought in the provisions of that Directive.⁵⁷

In anticipation of further considerations, it should be stressed that, contrary to the lawmaker’s intention, the distinction between “large risk” insurance and mass risk insurance does not coincide with the distinction between consumer contracts and contracts concluded by professionals.⁵⁸

The norm encapsulated in the provision of Art. 5 letter d remains functionally tied to Part A of Annex to the Directive in which particular insurance risks have been specified. Under Art. 5 letter d item (i) “large risk” comes into play in the insurance of rail vehicles, aircraft, sea, lake and river and canal vessels, insurance of goods in transit and civil liability insurance of aircraft and vessel users.⁵⁹

In other cases, the EU legislator made the character of the insured risk dependent on its relation to the business activity conducted by the policyholder. Under Art. 5 letter d item (ii), insurances of credits, sureties and guarantees constitute “large risks” when the risk relates to business activity, industrial activity or liberal profession pursued by the policyholder.⁶⁰ In the literature of the subject, doubts are

⁵⁴ Kowalewski, Bzdyń (2012: 74–82), Seatzu (2003: 133).

⁵⁵ OJ EU L 177 of 4.07.2008:6 as amended.

⁵⁶ Heuzé (2002: 1458–1461).

⁵⁷ Directive 2009/138/EC, art. 13 item 27.

⁵⁸ Pilich (2012: 336–339).

⁵⁹ Judgment of the Oberlandesgericht (2004: 419864/04).

⁶⁰ Kropka (2010:129).

raised in respect of proper interpretation of that precondition. The lack of unanimity is especially apparent against the background of cases involving insurance contracts concluded by artisans. A part of the authors have no doubts that a contract concluded in connection with such type of activity constitutes insurance of “large risks,”⁶¹ whereas others firmly reject that position.⁶² It seems, however, that there are no sufficient grounds that the risk relating to activities conducted by artisans be treated differently from the risk relating to other types of business activity. This provision does not differentiate the character of risk depending on the size of the business initiative undertaken by the policyholder.

In the remaining cases, proper specification of the character of risk requires analysis of certain elements pertaining to the scale of the business activity carried on by the policyholder. According to Art. 5 letter d item (iii), insurance against fire and damages caused by elements: fire, explosion, storm, elements other than storm, nuclear energy, land subsidence, insurance of other damages to property caused by hail, frost or attributable to other causes, including theft, general civil liability insurance other than liability insurance covering the use of self-propelled land vehicles, aircraft and vessel, as well as insurance against different types of financial loss) constitute contracts involving “large risk” if the thresholds have been exceeded in respect of at least two of the three criteria set out in the Directive, namely:

balance sheet total over 6.2 million euros. The balance sheet total must be determined according to *lex causae*. Only where the law governing the policyholder’s balance sheet is not the law applicable to the contract, should the provisions of the balance sheet law be taken into account⁶³;

- 1) net turnover over 12.8 million euros. In this case, problems may arise with the calculation of the turnover when the provisions of a given domestic legal system impose on an entity the obligation to keep accounts in the national currency other than euro;

average number of employees in a budget year in excess of 250. The number of employees should be determined according to the workforce per full time employees. In the intention of the authors of the Regulation, this solution is to enable preservation of the same character of the insurance risk regardless of the actual number of employees.⁶⁴

The concept of the mass risk insurance contract (French *risques de masse*, German *Massenrisikos*) is not to be found in the Rome I Regulation. In the doctrine, however, it is used in reference to such direct insurance contracts which do not constitute large risks insurance.⁶⁵ The legislator refers to them in a description as

⁶¹ Heuzé (2002: 1459).

⁶² Berr (1988: 655).

⁶³ Kropka (2010: 136).

⁶⁴ Gruber (1999: 80).

⁶⁵ Ludwischowska and Thiede (2009: 63).

“insurance contracts other than ones involving large risk” (art. 7(2) and (3) of the Rome I Regulation).

In this group, one must include both contracts concluded by consumers and smaller economic operators, as long as they do not involve transport-related risks. Mass risk insurance includes as well insurance contracts covering credits or guarantees, which are unrelated to the policyholder’s business activity.⁶⁶ Moreover, each life insurance contract constitutes, *de lege lata*, a mass risk insurance.⁶⁷ As a result, most group insurance contracts amount to mass risk insurance.

This distinction is also present in the substantive law of specific Member States. The French legislator uses the distinction between large risk insurance (*grands risques*) and mass risk insurance (Art. L. 111-6 CA and Art. R. 111-1 CA). An analogous solution was adopted by the Polish lawmaker, who decided to regulate this issue within the framework of the Act of 11 September 2015 on insurance and reinsurance activities.⁶⁸

In German law, under § 210 VVG, the legal provisions restricting the freedom of contract do not apply to contracts of large risk insurance.⁶⁹

Conclusions: Summary of the Considerations

In the face of differences in the substantive law of particular Member States, since several decades the question of unification of national legal systems with regard to contract law has been subject to lively discussion. This thought inspired the activities leading to the establishment of the Single European Insurance Market (French: *le Marché unique des assurances*).⁷⁰

A special manifestation of the tendency for unification of international contract law, which preceded the actions of the Commission, are the model rules on the insurance contract, better known as the Principles of European Insurance Contract Law (PEICL), developed by members of the Project Group on a Restatement of European Insurance Contract Law.⁷¹ As a part of the project, which initially was a typically academic undertaking, an effort was taken to create uniform rules on the insurance contract, which would make a set of solutions positively evaluated by the representatives of legal science and market participants. It was intended to reach that objective taking into account the conclusions following from comparative law analysis. Because of the supranational character of the prepared rules, precedence in interpretation of its provisions was afforded to the conception of autonomous construction.⁷²

⁶⁶ Gruber (1999:115–116).

⁶⁷ Kropka (2010: 129).

⁶⁸ Dz. U. 2015, item 1844, art. 3(1) item 6.

⁶⁹ Prölss/Martin (2010: 1110–1111).

⁷⁰ Basedow (2008: 111–112).

⁷¹ Lakhan and Heiss (2010: 1–11).

⁷² Fuchs (2010: 132), (2012: 27).

The discussed initiative was met with approval of the European Commission, which allowed to take into consideration the effects of work of the expert group preparing the Insurance Restatement within the framework of the Draft Common Frame of Reference (DCFR) project.⁷³ In effect, it seems that the solutions proposed by the authors of the PEICL will not only define the directions for development of the substantive law in particular Member States,⁷⁴ but may also have a real impact on the shape of the uniform rules on the insurance contract in the entire European Union.⁷⁵

In 2016, the full text of the PEICL with commentary was published.

The essence of the insurance contract was expressed in Art. 1:201 PEICL, where the insurance contract is defined as contract in which “one party, the insurer, promises another party, the policyholder, cover against a specified risk in exchange for a premium (art. 1:201(1) PEICL). The wording of that provision leaves no doubt as to the nature of the performance to which the insurer is obliged and, in consequence, as to the reciprocal character of the insurance contract.

The key element of the definition is the question of transfer of economic consequences of the risk to the insurer and the obligation of the policyholder to pay premium in consideration of the bearing of risk by the insurer. Analogically, it was concluded that an insurance accident refers to occurrence of the event within the range of the insurance risk specified in the contract (Art. 1:201(1) PEICL).

The distinction between large risk insurance and mass risk insurance is referred to in Art. 1:103 PEICL, which provides that the provisions of the PEICL are semi-mandatory, with the exception of large risk insurance contracts in respect of which the provisions of the model rules are default.

The systematics of the PEICL version published in 2016 was based on the division into six parts, out of which the first one includes provisions common to all types of insurance, the second—rules on damage insurance, the third is devoted to fixed-sum insurance. The fourth part of the instrument covers provisions on civil liability insurance, the fifth one relates to life insurance, the sixth one to group insurance.⁷⁶

As a result, the authors of the PEICL did not adopt the distinction characteristic of the Polish and French legal systems into personal and property insurance contracts, leaning towards the distinction characteristic of German law into damage insurance and fixed-sum insurance. The differences between those constructions determine at the same time the content of the insurer’s obligation. The value of the benefit paid by the insurer in case of occurrence of an insurance accident within the framework of damage insurance corresponds to the amount of financial detriment (compensation). On the other hand, within the framework of fixed-sum insurance, the object of protection cannot be expressed in terms of money and the insurer is obliged to pay an amount specified in advance. Consequently, the monetary sum paid by the insurer does not have a strictly compensatory character. In most legal systems, fixed-sum

⁷³ Fuchs (2010: 125–133), Bataller Grau (2014: 171–172).

⁷⁴ Norio-Timonen (2012: 58).

⁷⁵ Kunkiel-Kryńska (2013: 233).

⁷⁶ Fuchs (2009: 125–142).

insurance contracts may be concluded only in reference to specific objects of protection, such as life or health. Art. 13:101 PEICL provides that only accident, health, life, marriage, birth or other personal insurance may be taken out as insurances of fixed sums. As a result, the occurrence of damage is not a precondition to the insurer's rendition of its performance.

Those assumptions were accepted also by the authors of the PEICL. In the provision of Art. 1:201(3) PEICL "damage insurance" was defined as insurance under which the insurer is obliged to pay compensation in case of a damage arising from the occurrence of an insurance accident. On the other hand, "insurance for fixed sums" refers to insurance as a part of which the insurer is obliged to pay a monetary sum specified in advance in case of occurrence of an insurance accident.

However, the distinction between damage insurance and fixed-sum insurance becomes less clear when the parties agree *ex ante* the amount of benefit rendered by the insurer in case of instantiation of the agreed risk even though the agreement has all the remaining features of damage insurance. The authors of PEICL have expressly provided for the possibility to adopt such construction in Art. 8:101(2). Under this provision, a clause which provides for the agreed value of the subject-matter insured shall be valid even if the said value exceeds the actual value of the subject-matter, provided that there was no operative fraud or misrepresentation on the part of the policyholder or insured at the time the value was agreed.⁷⁷ Such contract should still be treated as damage insurance because a fixed-sum contract may be concluded only with regard to the statutorily specified goods or interests. As a consequence, proper classification of a given contract is always decided by the nature of the good or interest in respect of which the insurance protection is afforded.

However, clear the classification of insurance contracts according to the distinction presented above may sometimes raise doubts. One should consider admissible conclusion of a contract under which the insurer undertakes to cover the costs of therapy in case of occurrence of a specific fortuitous event in the insured party's life. Despite close connection of such contractual construction with the life or health of the insured party, such contract will still have the nature of damage insurance and not fixed-sum insurance. Such is the case because the protection covers the insured party's property interest relating to the need for independent payment of therapy costs, and not to the insured party's health or life.

This observation leads to the conclusion that the differentiation between damage insurance contracts and fixed-sum insurance contracts must be made also at the level of insurance interest. "Insurance interest" must be understood as a relation due to which the insured party—in consequence of an event provided for in the contract—may suffer damage. The conception of insurance interest has been adopted in most substantive law regimes in reference to insurance covering such goods whose value can be expressed in money terms. An opinion has been voiced in the doctrine according to which the concept of "insurance interest" is incompatible with such goods as health or life of the insured party. According to such assumptions, one may

⁷⁷ Basedow et al. (2016: 51).

speak of an insurance interest only in the case of damage insurances. Abstaining at this point from the decision if such view is legitimate, it should be noted that this distinction was also followed in the PEICL. Under Art. 1:202(1) PEICL the insured party is the person whose “interest” is protected against damage within the framework of damage insurance. On the other hand, within the framework of personal insurance, the contractual party is the person on whose life, health, integrity or status “insurance is taken” (art. 1:202 pkt 3 PEICL).

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