The Influence of Public and Corporate Insurance Law on the Application of Private International Law: Selected Issues

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Abstract The regime of obligations arising under insurance relationships, as expressed in Art. 7 of the Rome I Regulation is, however, relatively complex. The criticism seems legitimate of academic authors who quite clearly express their negative attitude to the wording of that provision, calling it a "labyrinth" or even "pandemonium of international law." As a result of the not particularly transparent nature of that regime, it can be doubted if in all situations the "weaker party" was afforded due protection. Negative answer to that question prompts a search for other solutions which allow to achieve the effect of conflict of laws designation of a law giving effect to the postulate of protecting the weaker party to the insurance relationship. The purpose of the study is to indicate, in the first place, the existing criteria of the division into public law and private law in the context of private international law. The second purpose is to analyze the phenomenon of mutual interpenetration of private and public law in the private international law of insurance contracts. The purpose of considerations was to indicate the mutual interpenetration between EU provisions of public and corporate law, as well as the impact of national provisions of the same type on private international law.

1 Introduction

The specificity of insurance contracts was noticed already in the applicability period of the Rome Convention.[1] Already at that time, it was proposed to introduce a special conflict of laws rule for direct insurance contracts.[2] These intentions,

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[1] Convention on the Law Applicable to Contractual Obligations, open for signature in Rome on 19 June 1980 (Dz.U. 2008, No. 10, item 57).

[2] Seatzu (2003), pp. 128–129.

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however, were not put into practice. This did not follow from any revision of the assumptions made by the authors of the Convention at an early stage of legislative works. The absence of rules offering protection to the non-professional party of an insurance contract in the Convention itself was a consequence of exclusion of insurance relationships from its material scope. The relevant conflict of laws provisions were included in subsequent insurance directives.[3] On the entry into force of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[4] this state of affairs was underwent a major change. The endeavor to afford special protection to the "weaker party" found manifestation already in Recital 23 of the Regulation, in which it was stipulated that "[a]s regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favorable to their interests than the general rules." This thought was developed in Recital 32 sentence 1 of the Regulation, where it is emphasized that "[o]wing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders." It should be noted that the EU legislator avoids using the term consumer in relation to parties of insurance transactions.[5] However, private international law offers a special treatment both to insurance agreements and already mentioned consumer contracts. Bearing the above in mind, the legislator decided to apply different protection mechanisms. While in the case of consumer contracts (Art. 6) protection is afforded by means of alternative corrective connectors, in the event of insurance agreements the legislator adopted a less complex solution based on a limited choice of law (Art. 7).

When making a holistic analysis of the Rome I Regulation, one may differentiate between four insurance categories, which are covered by the scope of application of different conflict of laws rules.[6] The mutual differences among them are significant enough that one may speak of several separate conflict of laws mechanisms.[7] It is even indicated that in Art. 7 of the Rome I Regulation there are various "subsystems" of conflict of laws rules,[8] which some refer to as "sets of conflict of laws rules,"[9] while others call them "situation groups."[10]

The first category in this classification system are insurance contracts relating to large risks, the second one—insurance contracts involving other risks, referred to as mass ones, which are situated in the territory of the Member States of the European Union, the third one—compulsory insurance contracts. The last of the categories for

[3] Fras (2008), pp. 59–61.

[4] OJ EU L 177 of 4 July 2008.

[5] Wojewoda (2007a, b), pp. 91–92.

[6] Kramer (2008), p. 37; Lando and Nielsen (2009), p. 1711.

[7] See Basedow (1991), p. 785.

[8] See Pilich (2012), pp. 332–334.

[9] Bělohlávek (2010), p. 1192.

[10] Kropka (2015), p. 301.

which the EU legislator provided special conflict of laws rules are insurances relating to mass risks situated in the territory of third countries and reinsurance contracts.

Pinpointing the appropriate conflict of laws rules for a given insurance agreement requires, in the first place, to determine the character of the insured risk. Such procedure allows to ascertain if the agreement is a large risk contract or a mass risk contract. As far as agreements belonging to the latter category are concerned, it also becomes necessary to identify the legal area in which the risk is situated. As a part of the qualification procedures, one must not overlook the special character of compulsory insurances. In a situation where the obligation to enter into the insurance contract is imposed by a Member State of the European Union, a distinct "subsystem" of conflict of laws rules applies.[11]

The regime of obligations arising under insurance relationships, as expressed in Art. 7 of the Rome I Regulation is, however, relatively complex. The criticism seems legitimate of academic authors[12] who quite clearly express their negative attitude to the wording of that provision, calling it a "labyrinth"[13] or even "pandemonium of international law."[14] As a result of the not particularly transparent nature of that regime, it can be doubted if in all situations the "weaker party" was afforded due protection. Negative answer to that question prompts a search for other solutions which allow to achieve the effect of conflict of laws designation of a law giving effect to the postulate of protecting the weaker party to the insurance relationship. The purpose of the study is to indicate, in the first place, the existing criteria of the division into public law and private law in the context of private international law. The second purpose is to analyze the phenomenon of mutual interpenetration of private and public law in the private international law of insurance contracts.

2 The Legal Qualification of the Concept of Insurance Contract and the Concept of Insurer in Private International Law

Analysis of the concept of insurance contract in the understanding of Art. 7 should start with identification of such contract's characteristic features.[15]

Protection of the insurance interest is realized by a transfer (assumption) of the insurance risk. For that reason, the concepts of insurance risk and insurance interest account for the essence of insurance as a method of transferring risk.[16] The transfer of risk, approached through the prism of collectively understood insurance, is

[11] More on that in Fras and Pacuła (2014), p. 141 et seq.

[12] Heiss (2008), p. 261; Gruber (2009), p. 110.

[13] Kramer (2008), p. 41.

[14] Heiss (2008), p. 261.

[15] Fras (2019a), pp. 131–148; Fras (2020), pp. 1–49.

[16] Kowalewski (1997), p. 73.

uniformly regarded as distribution of risk between parties participating in an insurance fund.[17] On the other hand, the analysis of the risk transfer through the prism of contents of the insurance obligational relationship allows to conclude that such transfer may generally take place in two ways, according to the dichotomous division of insurance into its economic types. Under the commercial type, the insurer takes over the risk from each insured party separately.[18] Under the mutual type—within the relation between the mutual insurance institution and its members (*Mitgliederversicherung*)[19]—the insurer does not take over the insurance risk, which is distributed among insured parties.[20]

Contracts under which the insurance risk is assumed by the insurer (commercial insurance type), are generally referred to as insurance contracts. The insurance nature of the assumed risk allows to distinguish that contract from other ones under which risk is transferred.[21] On the other hand, the source of the insurance relationship between a mutual insurance institution and its member may be a contract named otherwise than insurance contract. Examples are provided by German and French law. Under the second sentence of § 2 of the German VAG,[22] member of a mutual insurance society (*Versicherungsverein auf Gegenseitigkeit*) "may only be a person establishing an insurance relationship with the society." Therefore, it is assumed that, on such occasions, the source of the insurance relationship is an agreement for the accession or admission to the mutual society (*Beitritts- oder Aufnahmevertrag zum Gegenseitigkeitsverein*).[23] Such contract is also the source of the membership relationship.[24] By contrast, *institutions de prévoyance* (prudence institutions) incorporated under the French law[25] establish insurance relationships by collective acts with compulsory adhesion (*opérations collectives ŕ adhésion*

[17] See Präve (2005), pp. 38, 40.

[18] Dickstein (1995), pp. 118, 152, 155 (comments on the insurance relationship concept *sensu stricto*).

[19] Dickstein (1995), pp. 116–117.

[20] Dickstein (1995), p. 117.

[21] See in: Dickstein (1995), pp. 47–52 i 67–115. This author, using the examples of contracts which show similarity with specific insurance types (guarantee agreement—*Garantievertrag*, proper factoring—*echte Factoring*, financial leasing—*Finanzierungsleasing*), concluded that mere assumption of risk does not amount to the characteristic feature of the insurance contract (p. 51) and that such feature is the insurance interest. This is the case since—in that author's opinion—transfer of risk is only a means to achieve the purpose of the contract, that is, protection of the insurance interest (pp. 84–85).

[22] Versicherungsaufsichtsgesetz (accessed: 15.09.2020). https://www.gesetze-im-internet.de/vag_2016/VAG.pdf.

[23] Dickstein (1995), p. 123 and the literature cited therein.

[24] Roth (1999), p. 2290.

[25] *Institutions de prévoyance* are one of legal organizational forms prescribed in French law for insurance undertakings. Article L. 931-1 (Code de la sécurité sociale, accessed 15.09.2020). http://www.ilo.org/dyn/travail/docs/2315/Code%20de%20la%20Securite%20Sociale%201.pdf.

obligatoire),[26] collective acts with optional adhesion (*opérations collectives ŕ adhésion facultative*)[27] or individual acts (*opérations individuelles*).[28] The source of an insurance relationship may not be only a contract but also declarations of adhesion to the terms and conditions applied by *institution de prévoyance*.[29]

The contract establishing an insurance relationship between the mutual insurance institution and such institution's member may be qualified from the conflict of laws perspective as an insurance contract in the understanding of Art. 7.[30]

National legal systems require that insurance activity, which consists in the conclusion and performance of insurance contracts, be pursued by entities authorized under licenses granted by public authorities. This requirement is one of the aspects of legal regulation of the insurance activity. However, the requirement does not have to come in pair with recognition of an insurance contract as subjectively qualified agreement. In German law, the status of insurance contract is also

[26] In case of *opérations collectives ŕ adhésion obligatoire,* the undertaking (*entreprise*), understood as employer, joins the prudence institution (*adhésion*) by signing a declaration of adhesion to its terms and conditions (*adhésion par signature d'un bulletin au rčglement*) or by concluding with the institution an agreement for its employees (*contrat au profit de ses salariés*), who compulsorily become member participants (*membres participants*—art. L. 932-2 Code de la sécurité sociale). The terms and conditions, the declaration or the agreement specify the rights and obligations of the entity joining the institution and member participants.

[27] In case of *opérations collectives ŕ adhésion facultative,* employees have the right to decide to associate with the prudence institution (*affiliation*). Upon such decision, the employee becomes a member participant (Art. L. 932-14 k. Code de la sécurité sociale).

[28] In case of *opérations individuelles,* employees themselves join the prudence institution by signing the declaration of adhesion to the terms and conditions or by concluding the agreement with that institution (Art. L. 932-14 Code de la sécurité sociale).

[29] Under Aer. L-932-23 Code de la sécurité sociale, the concepts of bulletin of adhesion to the terms and conditions (*bulletin d'adhésion ŕ un rčglement*), collective acts with compulsory adhesion and participant (*participant*) correspond, respectively, to the terms: insurance contract (*contrat d'assurance*), group insurance contract (*contrat d'assurance de groupe*) and insured party (*assuré*). This terminology is reflected in conflict of laws provisions on the law applicable to acts with the participation of *institutions de prévoyance* and reciprocity institutions (*mutuelles*), implementing the conflict of laws provisions of insurance directives (in respect to *institutions de prévoyance* regulated in Arts. L. 932-25–L. 932-34 Code de la sécurité sociale, wherein those provisions apply also to *institutions de prévoyance* regulated in C*ode rural*, under Art. L. 727-2(2) of that Code; as regards *mutuelles*, the basis are Arts. L. 225-1–L. 225-10 Code de la mutualité (http://codes.droit.org/CodV3/mutualite.pdf). Those provisions were *leges speciales* in relation to the same conflict of laws provisions of the French Insurance Code (http://codes.droit.org/CodV3/assurances.pdf) on the law applicable to insurance contracts concluded by insurance companies (*entreprises d'assurance*). In those provisions—on *institutions de prévoyance*—the term "contract," present in conflict of laws rules of the Community insurance directives, refers also to the expression "declaration of adhesion to the terms and conditions" (see, e.g., Art. L.932-26(1) Code de la sécurité sociale, according to which, when the risk is located in France and the person making the declaration of adhesion to the terms and conditions of an *institution de prévoyance* or concluding an insurance contract with the *institution de prévoyance* has their habitual residence or seat of the management board in France, the applicable law shall be French law, to the exclusion of any other country's law), and the term "policyholder"—refers to the expressions "acceding party" and "participant."

[30] Dörner (1997), pp. 39–40.

recognized in relation to contracts whose party is an insurer not undergoing insurance supervision.[31] Moreover, an agreement having objective features of an insurance contract, concluded by an insurer which does not hold the required license for the pursuance of insurance activities, may be qualified from the substantive law perspective as insurance contract.[32] In the conflict of laws context, insurance contract should, in principle, be denied the status of subjectively qualified agreement.

The reasons of public law also justify the non-inclusion, within the scope of application of the EU insurance directives, of insurance undertakings seated in a third country which do not pursue insurance activities in the Member States in the form of agency or branch. This follows from a *ratione materiae* restriction of the scope of application of EU law. Also, this restriction should be ignored in the conflict of laws context.[33] There are apparent influences of commercial and public law on the interpretation of the concept of insurer.

Policyholder's counterparty in the insurance contract, in the understanding of the Rome I Regulation, may be any person. Art. 7(2), second indent, mentions "insurers" (German *Versicherer*, French *assureur*, Italian *assicuratore*, Spanish *asegurador*). The concept of "insurer" may be treated as superordinate to the terms "insurance undertaking" and "organisation other than undertaking." The approved qualification result allows to include as insurance contracts, within the meaning of the Rome I Regulation, contracts having the characteristics of insurance contracts concluded by entities claiming to be an insurance undertaking, pursuing insurance activities but, in fact, unauthorized to undertake such activities or acting in violation of the basic principles of pursuing such activities.[34] In the conflict of laws context, insurance contract should be denied the status of subjectively qualified contract. There are exceptions to this principle. One example can be provided by the insurance guarantee agreement. To delimitate the insurance guarantee agreement from the bank guarantee agreement, it is necessary to use the subjective criterion relating to the status of the insurer as policyholder's counterparty.[35] The question of the insurer's qualified status boils down to whether and to what extent a given entity is authorized to pursue insurance activities. This question forms a part of the law applicable to the insurance contract. Provisions of such law will be given effect, including in space, within the limits of their applicability. The will of being applied may be attributed to the rules specifying the policyholder's status from outside the law applicable to contractual obligations, either of the forum or a third country. Examples of substantive law qualification of insurance acts, which are interesting

[31] Prölls and Martin (2010), p. 72 ("die Unterstellung eines Unternehmens unter die Aufsicht impliziert also nicht die Anwendung des VVG und umgekehrt").

[32] Example is provided by Polish law where such contracts qualify as invalid insurance contracts, see Malinowska (2003), pp. 138–139.

[33] Gruber (1999), pp. 18–19.

[34] Dickstein (1995), pp. 43–45 (*Scheinversicherer*).

[35] Kropka (2010), pp. 39–42.

from the point of view of the discussed subject matter, are provided by the case law of the German Federal Administrative Court (Bundesverwaltungsgericht).[36]

3 Reinsurance and Co-Insurance Contracts

The reinsurance contract plays the same social and economic function and has the same characteristic features as the insurance contract.[37] However, this conclusion must give way to the effect of the qualification based on the provisions of the Rome I Regulation explaining the term insurance contract. It follows from Art. 7(1), second sentence, in conjunction with Recital 32, that reinsurance contracts do not amount to insurance contracts. By reinsurance contract, one should also understand the retrocession contract and further reinsurance contracts. Such position is in line with the definition of reinsurance as included in Art. 13(7) letter (a) of the Directive 2009/138/EC (Slovency II)[38] ("the activity consisting in accepting risks ceded by an insurance undertaking or third-country insurance undertaking, or by another reinsurance undertaking or third-country reinsurance undertaking"). Reinsurance is also the subject of an agreement under which the risks assumed by the insurer or reinsurer are further taken over by a so-called insurance special purpose vehicle (*Versicherungs- Zweckgesellschaft*, *véhicule de titrisation*). German law permits the establishment of special purpose vehicles.[39] Operation of a special purpose vehicle involves the transfer of insurance risks to the capital market.

An insurance type interesting for the subject matter of these considerations is insurance of additional contributions (*Nachschussversicherung*). Its parties are the reinsurer and the mutual insurance institution acting on behalf of its members. Such insurance makes an alternative to obligating the mutual insurance institution's

[36] The following were recognized as insurance operations in the understanding of § 1 of the German VAG: guarantee of maintaining (*Wartungsgarantie*) technical equipment if it is exhausted by the obligation to assume the relevant maintenance costs and unrelated in any way to other operations (Präve 2005, p. 45); permanent guarantee (*Dauergarantie*) granted for technical equipment involving non-gratuitous coverage of costs of any repairs necessary as a result of wear and tear if the guarantor restricts himself only to such promise of performance and does not sell any equipment covered by the guarantee (Präve 2005, p. 45).

[37] Eichler (1966), pp. 324–325.

[38] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (Text with EEA relevance) (Official Journal of the European Union, L 335/1, 17 December 2011).

[39] Paragraph 121g(1), first sentence, VAG defines *Versicherungs-Zweckgesellschaft* as company or partnership with a seat or central management in Germany which, being neither insurance undertaking nor reinsurer, assumes risks from insurance undertakings or reinsurers, wherein the risks of materialization of damage are secured by such partnership or company in full by issuing debt instruments or by another financing mechanism, and whereby recourse monetary claims under loans or other financial mechanisms give way to the entity's liabilities under reinsurance.

members to make additional contributions.[40] It comes in two forms. Under the former, the mutual insurance institution acts in its own name as the insurer, dedicating the funds received from the reinsurer to cover its losses;[41] under the latter, the mutual insurance institution acts in the name of its members as policyholders, collecting for that purpose additional premiums and transferring them to the reinsurer who, in exchange, makes the required additional contributions.[42] In German literature, the latter of the discussed *Nachschussversicherung* forms is compared to civil liability insurance.[43]

The above effect of qualification of the concept of insurance contract should extend to co-insurance contracts. The co-insurance contract—bearing in mind its social and economic function and characteristic features—is an insurance contract. This conclusion is in line with the provisions of the Rome I Regulation and the provisions of EU insurance directives. They do not contain any qualification guidelines to the contrary.[44] An opinion expressed in the doctrine is illegitimate that the law applicable to co-insurance contracts is regulated by the Council and European Parliament Directive 2009/138. That Directive does not include any conflict of laws provisions. One should also evaluate critically the opinion that it is ungrounded to apply, to co-insurance contracts, the conflict of laws norms implementing the conflict of laws provisions of the insurance directives since protection of the policyholder is unnecessary in case of such contracts.[45]

4 "Insurance Contracts" Covered by the Exclusion Under Art. 1(2) Letter (j) of the Rome I Regulation

4.1 Initial Comments on Art. 1(2) Letter (j)

Article 1(2) letter (j) reads that the following shall be excluded from the scope of the Regulation: "insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2009/138 of the European Parliament and of the Council of 25 November 2009 concerning life assurance the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work." This provision contains a description of specific risks relating to employed and self-employed persons. That

[40] Dickstein (1995), p. 31.
[41] Ibid.
[42] Ibid., pp. 31–32.
[43] Ibid., p. 32 and the literature cited therein.
[44] Schnyder (2004), p. 1025.
[45] Fuchs (1999), p. 20.

is why "insurance the object of which is to provide benefits for employed [...] persons," concluded by an "undertaking" or "group of undertakings" is a contract for account of a third party. The same apparently refers to situations when an "insurance contract the object of which is to provide benefits for [...] self-employed persons" is concluded, in his or her own name, by a representative of their "trade" of "group of trades." Presently, this issue is regulated by Art. 9(2) of Directive 2009/138/EC (Solvency II).[46]

A characteristic feature of insurance contracts for account of a third party is that only the third party may take advantage of such insurance.[47] The way in which the third party takes such advantage depends on whether the insurance for account of the third party is direct or indirect.[48] In the former case, the subjective law claim against the insurer for the payment of benefit is vested in the third party, whereas in the latter in the policyholder, who is legally bound to deliver the benefit received from the insurer to the third party. This distinction is of secondary importance from the point of view of the conflict of laws qualification.[49]

Textual interpretation of Art. 1(2) letter (j) in conjunction with Art. 2 of the Directive 2009/138/EC of 25 November 2009 concerning life insurance, leads to the conclusion that Art. 1(2) letter (j) does not refer to insurance undertakings pursuing in the EU business of direct insurance in the life assurance branch. Such undertakings are both insurance undertakings seated in a Member State of the EU and insurance undertakings seated outside the EU.

Reasoning *a contrario* from Art. 1(2) letter (j) in conjunction with Art. 2 of Directive 2002/83/EC (currently Article 2 of the Directive 2009/138/EC) allows to include among "organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC" (currently Article 2 of the Directive 2009/138/EC): (1) insurance undertakings engaging in re-insurance activities, (2) insurance undertakings engaging in insurance activities of direct insurance other than life assurance, (3) insurance undertakings pursuing outside the EU insurance activities of direct insurance in the life assurance branch, (4) organisations other than insurance undertakings. However, such reasoning—in my opinion—is illegitimate. The prototype of Art. 1(2) letter (j) is Art. 9 item 2 of the Directive 2009/138/EC. Nevertheless, when drafting Art. 1(2) letter (j), the legislator overlooked that the Directive 2009/138/EC, according to its general provisions, does not refer to any of the four abovementioned groups of entities. One should interpret the expression: "organisations other than undertakings referred to in Art. 2 of the Directive 2002/83/EC" (currently Art. 2 of

[46] "In regard to life insurance, this Directive shall not apply to the following operations and activities operations carried out by organisations, other than undertakings referred to in Article 2, whose object is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, whether or not the commitments arising from such operations are fully covered at all times by mathematical provisions."

[47] Hełczyński (1927), p. 95; Maixner and Steinbeck (2008), p. 48.

[48] Hełczyński (1927), p. 82.

[49] Cf. Basedow and Fock (2002), p. 104.

the Directive 2009/138/EC), in the understanding of Art. 3(3) of the Directive 2002/83/EC (currently Art. 9(2) of the Directive 2009/138/EC), in the context of those general provisions. The same expression used in Art. 1(2) letter (j) is affected by a legislative error. In consequence, establishment of the scope of the subjective exclusion under Art. 1(2) letter (j) requires further investigations.

The expression: "organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC" (currently Art. 2 of the Directive 2009/138/EC) in the understanding of Art. 1(2) letter (j) refers to one of the parties to the insurance contracts specified in that provision. As a result, this expression should be distinguished from the concept of "undertaking," used here in its subjective meaning to denote employer.

The formulation: "the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work" must be referred to the expression "insurance." As far as Art. 1(2) letter (j) mentions benefits in the event of sickness related to work or accidents at work, this provision relates both to the insurance of risk of invalidity caused by accident or sickness as a type of additional insurance in the understanding of Art. 2(3) letter (a) point (iii) of the Directive 2009/138/EC (I insurance group in the life assurance branch) and insurance against accidents at work and occupational diseases (I insurance group from the branch of insurance other than life assurance). Consequently, it must be concluded that "insurance undertakings" in the expression "organisations other than insurance undertakings" are all insurance undertakings pursuing in the European Union (including in Denmark) activities in the area of direct insurance. This means, at the same time, that the expression "organisations other than insurance undertakings referred to in Art. 2 of the Directive 2002/83/EC" (currently Art. 2 of the Directive 2009/138/EC) covers organizations other than insurance undertakings operating in the EU.

The wording of Art. 1(2) letter (j) suggests that the provision relates only to intra-Union situations, i.e., insurance contracts referred to in that norm concluded by organizations other than insurance undertakings as a part of their activities in the European Union. Nevertheless, this question must be finally resolved by purposive interpretation based on the final conclusions as to what "insurance contracts" the discussed provision refers to.

4.2 The European Law of Occupational Pension Schemes

Article 1(2) letter (j) makes a conflict of laws section of the EU regime of occupational pension schemes. This is indicated by the connection of that norm with Art. 9 item 2 of the Directive 2009/138/EC. The Directive's provision was adopted with a view to the works harmonizing the laws of the EU Member States in the

occupational pension schemes.[50] The effect of those works was the Directive 2016/2341/EU.[51] It contains a comprehensive substantive law regime of occupational pension schemes. Its provisions are helpful in the interpretation of Art. 1(2) letter (j). This refers, in particular, to the definition of institution for occupational retirement provision (Art. 6(1) of the Directive 2016/2341/EU) and definition of retirement benefits (Art. 6(4)) of the Directive 2016/2341/EU), showing similarity to that provision. For that reason, it is legitimate to determine—in interpreting Art. 1 (2) letter (j)—the circle of institutions for occupational retirement provision to which the provisions of the Directive 2016/2341/EU apply. For that purpose, one should, in the first place, consider the catalogue of subjective exclusions under Art. 2 (2) of the Directive 2016/2341/EU.

The principle of separateness of institutions for occupational retirement provision, as expressed in their definition (Art. 6(1) of the Directive 2016/2341/EU), from financial institutions (as defined in Art. 6(3) of the Directive 2016/2341/EU) relates to the exclusion of companies using book-reserve schemes with a view to paying out retirement benefits to their employees (Art. 2(2) letter (e) of the Directive 2016/2341/EU). This exclusion refers to employers performing the obligations incurred vis-a-vis their employees under occupational pension schemes by establishing reserves with a view to paying out future benefits. The source of such obligations may, for instance, be direct promise (*Direktzusage*) under German law, direct promise of benefit (*direkte Leistungszusage*) under Austrian law[52] or—by all appearances—self-administered pension scheme under the law of the United Kingdom[53] or individual pension obligations (*engagements individuels de pension/individuele pensioentoezeggingen*) under Belgian law.[54] In connection with Art. 2(2) letter

[50] Dickstein (1995), p. 28.

[51] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (Text with EEA relevance) (Official Journal of the European Union L 354/37, 23.12.2016).

[52] The essence of both the direct promise (*Direktzusage*, *unmittelbare Leistungszusage*) under German law and direct promise of performance (*direkte Leistungszusage*) under Austrian law is employer's obligation vis-a-vis employee to pay benefits within the framework of occupational pension provision (German Law—Blomeyer and Otto 2006, p. 113; Kemper 2003, p. 49) following from the given promise (*Zusage*) as the source of legal relationship of occupational pension provision (Blomeyer and Otto 2006, pp. 80–81). The employer may choose the form of fulfilling that promise. It may be fulfilled by the employer itself, in the form of *Direktzusage* or *direkte Leistungszusage,* or through an authorized institution. Regardless of the chosen form, the employer remains obliged against the employee under the *Zusage* to satisfy claims under that *Zusage* (*Einstandspflicht*—Kemper 2003, p. 51).

[53] It is a pension plan organized and managed by the employer whose agents (*directors*) play at the same time the role of the plan's *trustees* (Harpen 1991).

[54] See Art. 75 of the Belgian Act on the control of occupational retirement institutions (Loi relative au contrôle des institutions de retraite professionnelle/Wet betreffende het toezicht op de instellingen voor bedrijfspensioenvoorzieningen, of 27 October 2006, Moniteur Belge/Belgisch Staatsblad, 10 November 2006, p. 60162), http://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=fr&nm=2006023149&la=F (Last accessed: 22.12.2020).

(e) of the Directive 2016/2341/EU, attention should also be drawn to the Italian law construction known as *trattamento di fine rapporto*.[55]

Just as insurance undertakings ensure benefits in accordance with insurance contracts, institutions for occupational retirement provision, in the understanding of the Directive 2016/2341/EU, ensure pension benefits in accordance with the pension scheme, defined as "contract, an agreement, a trust deed or rules stipulating which retirement benefits are granted and under which conditions" (Art. 6(2) of that Directive). On the other hand, the concept of pension scheme does not refer to contracts relating to the occupational pension scheme regime but having as their subject obligations other than the obligation to provide pension benefits. This relates, among others, to contracts the object of which is investment of the entrusted funds on capital markets. Such contracts form a part of the activities of entities covered by the exclusion under Art. 2(2) letter (b) of the Directive 2016/2341/EU. This refers to investment firms as well as undertakings for collective investment in transferable securities (UCITS) and companies managing UCITSs.

The customers of "investment firms" may be, according to section I point 1 letter (f) of Annex II to the Directive 2014/65/EU,[56] "pension funds and management companies of such funds." Furthermore, under Art. 6(3) letter (a) of the Directive 2009/65/EC,[57] management companies may, by operation of national law of a given Member State, be entitled to manage investment portfolios belonging to pension funds.

An institution for occupational retirement provision covered by the norms of the Directive 2016/2341/EU may only be such entity against which the financing institution's employees have a claim for the provision of benefit (argument *a contrario* from Art. 2(2) letter (d) of the Directive 2016/2341/EU). Such entity is not the institution for occupational retirement provision known to German and Austrian laws under the name *Unterstützungskasse* (provident society). In German law, *Unterstützungskasse* provides benefits within the framework of occupational retirement provision under the contract concluded with the employer or under the institution's statute.[58] Under that relationship, *Unterstützungskasse* acquires against

[55] *Trattamento di fine rapporto* is, under Art. 2120 of the Italian Civil Code (CC) a special monetary provision owed to the employee (*il prestatore di lavoro*) from the employer because of termination of the employment relationship (*il rapporto di lavoro subordinato*). In practice, *Trattamento di fine rapporto* plays the function of an obligatory form of occupational pension provision (Wesselmann 2007, p. 49). https://noipa.mef.gov.it/web/mypa/tfr-e-tfs-dei-dipendenti-previdenziale (Last accessed: 27.01.2021).

[56] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance (*Dz.U. L 173 z 12.6.2014*).

[57] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (Text with EEA relevance) (Dz.U. L 302 z 17.11.2009).

[58] Blomeyer and Otto (2004), p. 521.

the employer a claim for the return of the funds expended on benefits.[59] As a result, the contract is not accompanied by the transfer of risk.[60] As a rule, employees do not acquire any claims against *Unterstützungskasse* for the payment of pension benefits.

Unterstützungskasse must be distinguished from *Contractual Trust Arrangement*, i.e., special purpose vehicle established by the employer in performance of obligations under *Direktzusage* with a view to managing the funds provided in trust within the framework of occupational retirement provision.[61] *Contractual Trust Arrangement* undertakes to manage those funds under a contract with the employer by the same name. This model is encountered, among others, in German practice.[62]

Pension benefits may be ensured by institutions managing social security schemes. Such institutions ("institutions managing social-security schemes which are covered by Regulation (EEC) No 1408/71(5) and Regulation (EC) No 987/2009 (6)") are covered by the subjective exclusion under Art. 2(2) letter (a) of the Directive 2016/2341.[63] The concept of social security schemes is explained in Art. 4(2) of the Regulation 1408/71.

The ensuring of pension benefits within the framework of social security schemes subject to the provisions of the Regulation 1408/71 may be grounded not only in the provisions of law. This is indicated by Art. 1 letter (j), second indent, of the Regulation 1408/71. A notification mentioned in that provision was made by France.[64] Under that notification, the Regulation 1408/71 applies to the operation of pension funds (*caisses de retraite*[65]—II pillar of the pension system, *régime complémentaire*) forming a supplementary pension scheme for hired labourers

[59] Ibid, p. 520.

[60] For this reason, no analogy can be drawn between that contract and so-called external self-insurance (*Externe Selbstversicherung*), consisting in the transfer by an entrepreneur of its own risks to an insurance undertaking specially created by the entrepreneur (or with its participation), known as *captive insurance company* (Präve 2005, p. 44).

[61] Weigel (2005), p. 1144.

[62] Ibid, pp. 1864–1865.

[63] This exclusion refers to national institutions of individual Member States of the EU, as defined in Art. 1 letter (n) of the Regulation 1408/71. Such institutions are listed in Annex II to the Regulation 574/72.

[64] Notification of the Government of the French Republic to the Commission of 29 March 1999, OJ EC C 215, 28 July 1999, p. 1.

[65] *Caisses de retraite* are covered by Arts. L-922-1–L-922-3 and Art. L-922-6–L-922-14 Code de la sécurité sociale. Under the first sentence of Art. L-922-1, first indent, of that Code, the institutions paying out supplementary pensions (*complémentaires*) are non-profit private law entities fulfilling the social mission, administered on parity basis by their members and participants (defined in Art. L. 922-2 Code de la sécurité sociale) or by their agents.

(ARRCO[66]) and supplementary pension scheme for management staff (AGIRC[67]). The source of each such scheme is a collective agreement.[68] In addition, *Caisses de retraite* pay benefits in respect of accidents at work or occupational diseases. Collective agreements are also a source of supplementary pension benefits under Danish law.[69]

The exclusion of institutions managing social security schemes tallies, in principle, with the exclusion relating to institutions which operate on a pay-as-you-go basis (Art. 2(2) letter (c) of the Directive 2016/2341/EU). The essence of pay-as-you-go financing (*Umlageverfahren*, *répartition*) is the financing of pension benefits from contributions paid on an ongoing basis by persons currently professionally active.[70] This principle, in specific situations, may be subject to modifications. The abovementioned *caisses de retraite* operate on pay-as-you-go basis. However, that modus is accompanied by a system of points (*systéme de points*) based on such criteria as the duration of the contributory period and the amount of contributions.

4.3 *Article 1(2) Letter (j) of the Rome I Regulation as a Fragment of the Conflict of Laws Issue of Occupational Pension Schemes*

The above considerations allow to consider the exclusion under Art. 1(2) letter (j) in the context of conflict of laws problems of protection against pension risk.

Nowadays, the legal instruments of protection against pension risk have ceased to be a domain of social security.[71] This issue is subject to legal provisions of different type.[72] As a result, it is necessary to demarcate—both in the substantive law and conflict of laws dimension—diverse relationships, including in the area of social security, employment law, financial markets law, private insurance law[73] or law of

[66] ARRCO is a federation of 33 institutions supplementing the pension system of the total of employees in the private sector of industry, commerce, services, and agriculture, including managerial staff. ARRCO's tasks comprise provision of information to, coordination and control of the institutions grouped within ARRCO, as well as collecting statistical and financial data (see www.agirc-arrco.fr).

[67] The AGIRC federation supplements the pension system of the managerial staff in the private sector of industry, commerce, services, and agriculture. It unites 21 pension funds (see www.agirc-arrco.fr, accessed: 15.09.2020).

[68] ARRCO—collective agreement of 8 December 1961 on supplementary pensions, concluded by national representative organizations of employers and employees.

[69] Bittner (2000), p. 7.

[70] Szubert (1987), pp. 228–229.

[71] Jędrasik-Jankowska (2004), p. 69.

[72] Muszalski (2007), pp. 13–15.

[73] Pacud (2006), pp. 46–47.

obligations.[74] On the level of private international law, the total of norms delimiting—in the relations within the framework of legal protection against pension risk—the impact spheres of different national legal systems by designating which of them should apply may be referred to as conflict of laws law of pension security. Such norms comprise both conflict of laws rules of private international law and conflict of laws rules of social security law or, in a wider perspective, of social law.[75]

The subject of demarcation by means of so understood conflict of laws law of social security are miscellaneous sets of public law and private law norms. Their delimitation is a difficult task. It has been noticed in literature that "public law and private law border one another in a distinguishable but inseparable manner."[76]

The justification of the exclusion under Art. 1(2) letter (j) is the fact that the contractual obligations in question make a source of pension benefits supplementary to the basic pension under the statutory system of pension security (I pillar of the pension system). Non-inclusion in that exclusion of contractual obligations under *Direktzusage,* as prescribed in German law, or similar legal constructions is an effect of a strict connection of such obligations with the basic relationship. This connection is reflected in the conflict of laws qualification of the obligations. However, one may wonder why Art. 1(2) letter (j) does not refer to insurance contracts concluded with insurance undertakings within the framework of occupational pension insurance. Such contracts are also intended to supplement the basic pension from the statutory pension security system. The ensuing insurance relationship (cover relationship) is, in large measure, determined by the cash relationship, as in the case of the cover relationship involving occupational pension funds. Insurance contracts concluded with insurance undertakings within the framework of occupational pension insurance were, however, treated in the Rome I Regulation in the same way as other insurance contracts.

[74] See the judgment of the French Cassation Court (Cour de cassation) of 24 February 2004 in the case République fédérative du Brésil c. Mme L. de Azevedo Werneck—Revue Critique de Droit International Prive 2005, pp. 62–64. The Court acknowledged compensatory liability of the Brazilian state as employer for the losses incurred by an employee delegated to work in France because of failure to register the employee for statutory social insurance. See also the glossator's comments on the interpenetration in the area of social insurance between relationships of public (vertical dimension) and private law (horizontal dimension)—d'Avout (2005), pp. 65–67. https://journals.openedition.org/nuevomundo/66375 (Last accessed: 27.01.2021).

[75] Eichenhofer (1994), p. 2. This means that the conflict of laws law of pension insurance belongs neither exclusively to private international law nor exclusively to international social law.

[76] Eichenhofer (1987), p. 22.

4.4 *Article 1(2) Letter (j) as Fragment of the Conflict of Laws Regime of Protection Against Accidents at Work and Occupational Diseases*

Article 1(2) letter (j), to the extent it refers to benefits in respect of occupational disease or accident at work, reaches beyond the conflict of laws issue of occupational pension schemes.

Accident at work or occupational disease may cause interruption or limitation of gainful activity, resulting not only in the acquisition of the right to benefits from occupational pension schemes but also of the right to benefits on other grounds. It is the case since accident at work or occupational disease may lead to an increase of financial needs which is unrelated to pension risk.

As in case of pension risks, risks of accidents at work or occupational diseases are governed by legal norms of various type. In consequence, it becomes necessary to demarcate diverse relationships, including relationships in the area of private insurance law,[77] social security,[78] employment law and law of obligations. In the conflict of laws context, the total of norms delimitating—in relationships within the framework of legal protection against the risks of accidents at work and occupational diseases—the impact spheres of different national legal systems, by designating which system should apply, may be referred to as conflict of laws law of protection against accidents at work and occupational diseases.

4.5 *The National Conflict of Laws Rule on the Law Applicable to the Contractual Obligations Covered by the Exclusion Under Art. 1(2) Letter (j)*

In the conflict of laws law of the insurance contract, the insured party's claim against the insurer is, as a rule, subject to the law applicable to the insurance contract. The same guideline should be followed in relation to employee claims against institutions for occupational retirement provision under the "insurance contract" in the understanding of Art. 1(2) letter (j). According to the position expressed in German doctrine, the relation between the entitled employee and *Pensionsfonds* is subject, as "subordinate legal relationship" (*dienendes Rechtsverhältnis*), to the law applicable to the "principal legal relationship" (*hauptsächliches Rechtsverhältnis*), i.e.,

[77] Risks of accidents at work or occupational diseases may be covered a voluntary or compulsory insurance contract concluded with an insurance undertaking (Gasińska 2003, pp. 212–213, 218–219).

[78] Risks of accidents at work or occupational diseases may also be covered by the objective scope of the social security system.

relationship forming the basis of occupational pension (*Recht der Betriebsrentenbeziehung*).[79]

Legitimacy of that position raises doubts. It must be admitted that the contract concluded by the employer with *Pensionsfonds* remains in connection with the principal contract between the employer and the employee. In German and Austrian laws this connection is stronger because the choice by the employer of the implementation of an occupational pension scheme in the form of *Pensionsfonds* does not relieve the employee from its obligations vis-a-vis employees under the employer's own promise of benefit (*Einstandspflicht*). The employer's promise to employees forms a constituent element of every form of occupational pension scheme.[80]

The terms "employed person" and "undertaking" ("employer"—in the subjective sense) used in Art. 1(2) letter (j) constitute primary (entry) questions.[81] The law relevant to their evaluation is the law designated by the national conflict of laws norm on the law applicable to life situations covered by Art. 1(2) letter (j). Provisions that may be given effect in such manner are norms clarifying the term "employed person," deviating from its meaning in employment law and in social security law.

Example is provided by German law. Under § 17(1) BetrAVG, first sentence,[82] employees (*Arbeitnehmer*) are blue collar workers (*Arbeiter*) and white-collar workers (*Angestellte*), including persons hired for professional training (*die zu ihrer Berufsausbildung Beschäftigten*).[83] Under the second sentence of that provision, BetrAVG norms apply respectively to persons other than employees if they have been promised benefits in consideration of their activities for the undertaking. The group of such persons includes, among others, *Geschäftsführer* in a limited liability company (GmbH).[84]

5 General Rules of the Definition of the Country in Which the Risk Is Situated (Art. 13(8) Letter d(i) and Art. 13(14) of the Directive 2009/138 in Connection with Art. 7(6) Rome I

The concept of legal person in the understanding of Art. 13(8) letter d(i) and Art. 13 (14) of the Directive 2009/138 with the expression: "companies and other bodies, corporate or unincorporated" in the understanding of Art. 19(1) Rome I, first indent.

[79] Bohne (2004), p. 158.

[80] Blomeyer and Otto (2006), p. 80.

[81] On primary (entry questions)—Pazdan (2008), p. 63.

[82] Gesetz zur Verbesserung der betrieblichen Altersversorgung (https://www.gesetze-im-internet.de/betravg access:15 September 2020; hereinafter also BetrAVG).

[83] Kemper (2003), p. 43.

[84] Bohne (2004), p. 96.

In autonomous qualification of that concept, one should use the experience of judicial practice against the background of Art. 4(2) of the Rome Convention.[85]

One should address critically the proposal of clarifying the concept of "establishment, to which the contract relates" in the understanding of Art. 13(8) letter d(i) of the Directive 2009/138 by the definition of "establishment" in Art. 13(12) of the Directive 2009/138.[86] Such interpretation is illegitimate since that definition refers *expressis verbis* to the insurer's establishment. This was confirmed by the CJEU in the judgment in the case Kvaerner.[87] "Establishment to which the contract relates" should be understood as organizational unit of the policyholder to whose activities the risk covered by the insurance contract relates.[88] The seat of the establishment to which the insurance contract relates is the place where such unit has its centre of activities.[89] At the same time, it is not required that such unit have its own agents or the capacity to conclude contracts.[90]

For conflict of laws rules under Art. 7, the term "establishment" should also cover a daughter company, i.e., legal entity separate from the mother company in a situation when the mother company insures the risks relating to operations of the daughter company. This conclusion is grounded in the justification of the CJEU judgment in the Kvaerner case. The CJEU included in the concept of establishment, in the understanding of the last indent of Art. 2 letter (d) of the Directive 88/357 (Present: Art. 13(13) letter d of the Directive 2009/138), all companies belonging to a given capital group if one of those companies concludes an insurance contract for the others.[91] The CJEU inferred that the purpose of the Directive's provision is, in particular, to establish a general rule specifying the place in which a given economic risk is situated when the risk does not relate to a building, vehicle or travel (specific rules of the definition). In the same way, the provision, in CJEU's opinion, refers to the place where the activities are pursued to which the risk covered by the contract relates. Therefore, in the Court's opinion, the provision uses the criterion of

[85] Spickhoff (2003), p. 2464 ("gemeint ist jede Personenvereinigung oder Vermögensmasse, die sich vertraglich verpflichten kann").

[86] Gruber (1999), p. 49.

[87] Case C-191/99. According to paragraph 35 of the justification of that judgment, "the definition of 'establishment' in Article 2(c) of the Directive therefore relates only to the establishment of an insurance company."

[88] In German: *risikoträchtige Teilorganisation*—Kramer (1995), p. 161.

[89] Broad understanding of the term "undertaking" (within the meaning associated above with the term "establishment") of the policyholder in the definition of the country where the risk is situated, was adopted by the law of the United Kingdom. Regulations 2001 (The Financial Services and Markets Act 2000: https://www.legislation.gov.uk/ukpga/2000/8/contents), by defining A's *establishment* as: (a) seat of A's management; (b) each of A's agencies; (c) each of A's branches; (d) any permanent presence of A in a member state of the EEA, which does not have to take the form of agency or branch and which may consist in having an office managed by A's personnel or by a person independent of A who, however, has been permanently authorized to act on A's behalf as though he was A's agent (Dicey et al. 2006, p. 1718).

[90] Cf. Martiny (2004), p. 133.

[91] Kropka (2010), p. 112.

policyholder's habitual residence and the criterion of domicile of the policyholder's establishment to which the contract relates (paragraph 46). Moreover, The CJEU pointed out (paragraph 54) that the presented interpretation of the term "establishment" in the understanding of the last indent of Art. 2 letter (d) of the Directive 88/357 (Present: Art. 13(13) letter d od the Directive 2009/138) is confirmed by the statement of the Insurance Committee on the interpretation of that rule. The statement reads that "if a single insurance contract covers risks relating to the policyholder's daughter companies or establishments, the location of different risks covered by the contract must be established individually for each risk, according to the provisions of Art. 2 letter (d) of the Directive 88/357 (Present: Art. 13(13) letter d of the Directive 2009/138), especially the last indent of that provision, and norms of Art. 2 letter (e) of the Directive 90/619 (Present: Art. 13 (14) of the Directive 2009/138)."

Article 19 may also be of help in the evaluation of situations where the insurance contract relates to a legal person as a whole or where it is impossible to unambiguously associate the contract with the legal person's specific establishments.[92] In such cases, the criterion of the place of policyholder's central administration should apply.[93]

6 Law Applicable in the Absence of Choice of Law (Art. 7(2), Second Indent Rome I)

The impact of corporate law is apparent in the establishment of the law applicable to the insurance contract in the absence of choice of law. Much importance for the delimitation of scopes of the abovementioned conflict of laws rules attaches to the determination if, as a part of qualification of the expression "in the course of the operations of a branch, agency or any other establishment of the insurer," one should consider Art. 145 of the Directive 2009/138 clarifying the concept of establishment of an insurance undertaking. Under that provision, "any permanent presence of an undertaking in the territory of a Member State shall be treated in the same way as a branch, even where that presence does not take the form of a branch, but consists merely of an office managed by the own staff of the undertaking or by a person who is independent but has permanent authority to act for the undertaking as an agency would."[94]

Consideration of Art. 145 of the Directive 2009/138 requires to assume that in the absence of choice of law an insurance contract concluded by an insurer present in the territory of a given Member State not in the form of agency or branch but in "an

[92] As an example, one can take a D&O (Directors & Officers) insurance contract concluded by a company for a member of its management board.

[93] Bull (2019), pp. 23–27.

[94] See Bigot (1989), pp. 25–27, 34; de Meireles (2020), pp. 141–152.

office managed by the undertaking's own staff or by a person who is independent but has permanent authority to act for the undertaking as an agency would" shall be subject to the law of that Member State. This means that the law applicable to the contract will generally be the law of the country to which the policyholder's vital interests are connected. By contract, a contrary conclusion leads to the submission of the contract to the law of the country where the insurer's central administration is domiciled, or the insurer's establishment to whose activities the contract relates. Such qualification result will generally favor, in the discussed situations, the conflict of laws interests of the insurer. The argument for considering Art. 145 of the Directive 2009/138 as a part of qualification of the expression "in the course of the operations of a branch, agency or any other establishment of the insurer" is the CJEU judgment in the case Kvaerner (C-191/99). The Court, by invoking its previous findings in paragraph 21 of the judgment in the case Commission v. Germany (205/84), concluded that Art. 3 of the Directive 88/357 (Present: Art. 145 of the Directive 2009/138) expands the scope of the concept "agency and branch" in the understanding of Art. 2 letter (c) of that Directive (paragraph 39) (Present: Art. 13 (12) of the Directive 2009/138). It must be noted that transposition of that finding to the qualification of the expression "branch, agency or any other establishment of the insurer" opens a breach in the uniform understanding of the term "establishment" in the provisions of the Rome I Regulation.[95]

The status of the insurer's establishment should not be referred to daughter companies. The same position was assumed by the CJEU in the judgment in the case Kvaerner in respect of interpretation of the term establishment in the understanding of Art. 2(c) of the Directive 88/357 (paragraph 41) (Present: Art. 13(12) of the Directive 2009/138).

The above opinion is confirmed by a judgement of CJEU in the case A Ltd,[96] the first subparagraph of Article 157 (1) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), as amended by Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013, read in conjunction with Article 13 (13) of Directive 2009/138, must be interpreted as meaning that, when an insurance company established in a Member State offers insurance covering the contractual risks associated with the value of the shares and the fairness of the purchase price paid by the buyer in the acquisition of an undertaking, an insurance contract concluded in that context is subject exclusively to the indirect taxes and parafiscal charges on insurance premiums in the Member State where the policyholder is established.

[95] Bull (2019), pp. 23–27.

[96] Judgment of the Court (Sixth Chamber) 17 January 2019, C-74/18.

7 The Model Regime of Applicable Law

Lege non distinguende, the connector of domicile of a branch, agency or other establishment of the insurer will apply when no law has been chosen, regardless of whether the activities of the establishment are separated from the operation of the headquarters or if they fit into the latter's operation. However, in each of those two situations, the connector of seat of the insurer's establishment leads to different consequences. Description of such consequences calls for a discussion of the doctrine of the law applicable to the place of pursuing insurance activities (*Betriebsstatut*).

The doctrine of law applicable to the place of pursuing insurance activities was created and developed within Savigny's classical school, centring the objectives of private international law around designation of a legal relationship's "seat." In academic literature, it was explained why in case of insurance contracts the place to be considered the "obligation's seat" (*Sitz der Obligation*) should be the place of pursuing insurance activities (*Ort des Betriebs der Versicherung*).[97] This conception gained the dominant status.[98] It requires treating the total of identical insurance contracts concluded by the same insurer as an economic whole.[99] A necessary condition is to legally frame, in a uniform manner, all insurance contracts covering a specific type of risk. Otherwise, the insurer will not have a uniform operating plan as the basis for the insurer's insurance activities.[100] As a result, the "seat" of the legal relationship is the country of pursuing insurance activities, as the place in which many individual legal relationships are integrated into one insurance portfolio (*Versicherungsbestand*[101]), into a single community of risks (*Gefahrengemeinschaft*[102]). Uniform legal assessment of the total of contracts concluded by a given insurer allows the insurer to pursue activities, which is not without impact on the protection of insurance interests.

The place where insurance activities are pursued is, generally, the insurer's seat (*Sitz des Versicherers*).[103] However, if the insurer has opened an establishment abroad (*Niederlassung*), the "seat" of legal relationship for contracts concluded as a part of operation of that establishment is its seat. The law applicable to the establishment's seat (*Statut der Niederlassung*) supersedes, on such occasions, the law applicable to the place of pursuing insurance activities (*Betriebsstatut*).[104] It was argued in literature that, in such context, establishment is understood as an

[97] Bruck (1924), p. 11.
[98] Reichert-Facilides (1976), p. 1028.
[99] Richter (1980), p. 70.
[100] Bruck (1924), p. 10.
[101] Keller (1962), pp. 16–17.
[102] See Sieg (1971), pp. 45–46.
[103] Richter (1980), p. 79.
[104] Bruck (1924), p. 12.

organizational unit appointed to handle a national insurance portfolio.[105] Authors indicate that the designation of law relevant to the seat of an insurer's establishment is not substantiated by the nature of insurance activities as such.[106] If an establishment may undertake activities under (as a part of) the operating plan of the headquarters, it is not necessary to deviate from the principle of applying the law of the country of the insurer's domicile.[107] These are the requirements of insurance supervision legislation that may necessitate deviations from the rule designating the law of domicile of the insurer's headquarters in favour of the law applicable in the country of the insurer's establishment.[108] *De lege lata,* operations of an establishment created in one Member State of the European Union by an insurer whose central administration is seated in another Member State are subject to supervision of the Member State of origin. The operating plan of such establishment may, but does not have to, make that establishment an enterprise separated in technical and organizational means from the headquarters.

In the light of the above, relevance of the law of the country of the insurer's establishment (Art. 7(2), second indent, in conjunction with Art. 19(2)) is not in conformity with the doctrine of the law applicable to the place of pursuing insurance activities inasmuch as the law of the country of the insurer's establishment will apply in situations when the establishment has not been separated in technical and organizational terms from the headquarters. Correction of the result of designation of applicable law is possible only within the limits of the second sentence of Art. 7(2), second indent.[109]

The abovementioned inconformity affects the insurer's cross-border activities pursued in the form of establishment which has not been separated from the headquarters in technical and organizational terms.[110] From the point of view of such insurer, significance attaches to the unlimited choice of law. Taking advantage of such possibility, the insurer may submit insurance contracts concluded by an establishment to the law of the same country which governs identical contracts concluded as a part of the headquarters. Without offering such possibility, private international law would lead to an actual separation of the establishment from its headquarters.

[105] Richter (1980), p. 80.
[106] Roth (1985), p. 343.
[107] Cf. Richter (1980), p. 72.
[108] Prölls and Martin (2010), p. 204.
[109] Roth (2004).
[110] Sodolska (2005), pp. 1282–1283.

8 The Influence of Corporate Law and Public Law on the *Ratio Legis* of the Regime Under Art. 7(3), First and Third Indents, of the Rome I Regulation

It must be noted that the contemporary private international law of the insurance contract, to the exclusion of insurance contracts covering a large risk, is intended to offer twofold protection: of the policyholder by applying the law of the country in which the centre of the policyholder's activities is situated (*Umweltrecht*),[111] and of insurers' equal chances in their efforts to attract customers. The need for conflict of laws protection of such interests is a consequence of current market conditions in the European Union. Such conditions are determined, first, by the missing harmonization of law on the insurance contract and, second, by the harmonized terms of pursuing insurance activities in the Community. Under the model approach, the need for such protection is directly proportional to the level of policyholders' (and insured parties') protection, as provided in the given national legislation and, in consequence, to the level of costs of pursuing insurance activities in that national market. This statement supports a compromise in the conflict of laws context, which would consider, on one hand, the need to protect policyholders and the need to protect insurers from undue distortions of competition and, on the other one, the need to realize the Community freedoms, especially the freedom to provide services. The uniform market lies, in particular, in the interest of insurers domiciled in those Member States whose law offers a relatively low level of policyholder protection. Such insurers would aspire—in the conditions of uniform market—to submit the total of their insurance contracts concluded by their foreign establishments to the law of one country, i.e., the country of their domicile.[112]

9 Overriding Mandatory Provisions as Instrument Protecting the "Weaker Party" to an Insurance Contract

It is argued in the doctrine that insurance law is "indeed a textbook example of a legal discipline in which legislators use mandatory provisions." It should be no surprise that legislators are accustomed to treating the norms they enact as mandatory rules also with regard to relationships involving a foreign element. Their expectation was partly met by the Community lawmaker at the stage of drawing up the Rome I Regulation. The discussed piece of legislation envisaged the possibility to give effect to legal provisions from outside the contract statute, which may derive from the law of the *forum* (Art. 9(2)) or from the country of performance of the contract (Art. 9(3)), as long, however, as such provisions make an important

[111] Roth (1985), p. 357.

[112] See Roth (1985), p. 365.

element of public interests protection.[113] The two most important (so far) European court decisions relating to the discussed subject matter are the cases: C-369 and 376/96 Arblade[114] and C-381/98 Ingmar.[115] The difference in terms of *rationes decidendi* of those judgments of the Court of Justice illustrates the difference between approaching mandatory rules merely as norms serving the protection of public interests of the state, such as political social or economic organization (Arblade), and a wider conception covering also norms intended to protect private interests (Ingmar). At this point, it is worth noting that the difference between specific norms whose application was considered in both factual situations was not huge. In the Ingmar case, the rule at stake was the provision granting an agent the right to receive commission on a contract concluded after the termination of the agency agreement where the proposal of concluding the contract was received by the principal or the agent prior to the termination of the agency agreement. On the other hand, the Arblade case related to non-application of the provisions of Belgian employment law in respect of: retaining employment records, payment of minimum wage, monitoring of labor conditions, including occupational health and safety. Protection of employee and agent has a common axiological source in the concept of so-called weaker party to contractual relationships. Undoubtedly, the Ingmar case referred to norms giving rise to a private law claim and the Arblade case to public (employment) law norms, both sanctioned and sanctioning ones. However, I consider it disputable if the norms are important enough, from the point of view of the Belgian state, to fulfil the demanding normative pattern under Art. 9(1) of the Rome I Regulation. It seems that in examining if a given provision of the Member State is intended to protect public interests in the understanding of Art. 9(1) of the Rome I Regulation, it will be possible to apply by analogy the methods of interpretation developed in German science in the context of § 823(2) Bürgerliches Gesetzbuch,[116] allowing to establish if a given norm is protective and, secondarily, what type of interests (public or only private) it protects.[117] Overriding mandatory provisions not only have to realize the abovementioned public interests but also apply to factual situations covered by their scope regardless of what law is applicable to a given legal relationship. The question if overriding mandatory provisions are to be applied irrespective of the proper law is generally decided by *lex fori* (it is different in case of so-called foreign rules). The fact if they are indeed overriding follows either from the express wording of the provision (textual interpretation) or from other interpretation methods. That said, the former type of situations will be rare.[118] Since this is a matter of other interpretation methods, a question arises—according to what criteria

[113] More on overriding mandatory provisions Pilich (2012), pp. 374–380.

[114] Case C-376/96 Arblade and Leloup. ECR 1999 Page I-08453.

[115] Case C-381/98 Ingmar versus Eaton. ECR 2000, p. I-9305.

[116] See http://www.gesetze-im-internet.de/bgb/ [Accessed: 2.10.2019].

[117] C.f. broadly on the subject: Mataczyński (2011), pp. 97–104 and the ample German literature cited therein against the background of § 823(2) BGB.

[118] C.f. Mataczyński (2005), p. 50.

interpretation should proceed. At this point, a significant scope of discretion is open for interpreters.

The starting point for the considerations on the scope of application of the law of a given country is the principle of territorial application of the country's law.[119] In purely general terms, it boils down to the recognition of the legislative competence of the state within the area of its sovereignty, understood as actual dominion. Private international law is an exception to that principle, justified at the *ratio legis* level by the aspiration to ensure protection to rights acquired under foreign legal systems, to ensure fair resolutions or to maintain good international cooperation (comity),[120] or even by an international law obligation of the state.[121] This exception—which is indisputable—is thetically justified by the binding force of proper regimes of national conflict of laws statutes, unifying legislation, in particular, bi- and multilateral international treaties or secondary legislation of regional integration organizations, especially ones which are crucial from our perspective of EU regulations. According to the opinion dominant in European doctrine, the mechanism of applying mandatory norms was explained by the conception of so-called latent conflict of laws rule.[122] In the light of that opinion, the basis for operation of overarching mandatory rules is an unwritten, hidden in the contents of substantive law provisions, unilateral conflict of laws norm which makes *lex specialis* in relation to the complete conflict of laws norm relevant to a given type of situation.[123] This conception is based on the universalist assumption of application of private international law (i.e., every act of applying law relies on a conflict of laws rule, however, in purely internal matters this procedure is unconscious). I have been of the opinion[124] that the problem of international mandatory rules may be approached as if from the other side, without the need to always rely on the latent conflict of laws rule, by regarding the application of substantive law norms of a given state as "return" to the basic territorial principle.[125]

By definition, overriding mandatory provisions stand in opposition to the proper law. This is the case since they are provisions which are effective beside the statute relevant for the evaluation of a given obligation.[126] Any decision concerning recognition of a given norm as an overriding mandatory provision necessitates a case-to case evaluation of the particular state of affairs, and the analysis of legal provisions should, as such, have a "functional" character.[127]

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[119] Brownlie (1998), p. 301. So, Mann (1984), p. 20.

[120] Dicey et al. (2015), pp. 4–11.

[121] Wolff (1933), p. 7.

[122] Mataczyński (2005), pp. 113–116.

[123] Zachariasiewicz (2014), pp. 433–469.

[124] Mataczyński (2005), p. 116.

[125] Baker and Logue (2015), pp. 1–31.

[126] Fuchs (2003), p. 70 et seq.

[127] Zachariasiewicz (2010), p. 12; Zachariasiewicz (2014), pp. 443–444, 468; Baker and Logue (2015), pp. 1–31.

It is settled case law of the Court that it is, in that context, for the national court, in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a "mandatory rule," to consider not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted to determine whether it is mandatory in nature in so far as it appears that the legislature adopted in it order to protect an interest judged to be essential by the Member State concerned.[128] This opinion corresponds with the position taken by the CJEU according to which article 16 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) must be interpreted as meaning that a national provision, such as that at issue in the main proceedings, which provides that the limitation period for actions seeking compensation for damage resulting from an accident is three years, cannot be considered to be an overriding mandatory provision, within the meaning of that article, unless the court hearing the case finds, based on a detailed analysis of the wording, general scheme, objectives and the context in which that provisions was adopted, that it is of such importance in the national legal order that it justifies a departure from the law applicable, designed pursuant to Article 4 of that regulation. Article 27 of Regulation No 864/2007 must be interpreted as meaning that Article 28 of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, as transposed into national law, does not constitute a provision of EU law which lays down a conflict-of-law rule relating to non-contractual obligations, within the meaning of Article 27 of that regulation.[129]

At this point, it should be noted that the doctrine of private international law makes a consequent distinction between *lois de police "de direction"* and *lois de police "de protection"* (*lois de police protectrice*),[130] the equivalents of which in the German-language literature are *Eingriffsnormens* i *Parteischutzvorschriften.* The former protect public interests of the state. These may include provisions regulating supervision over insurance activities or imposing the requirement of compulsory insurance of a business. The latter restore the equilibrium between the parties to the contract and protect the weaker party (policyholder, insured party, injured person).[131] It is legitimate to treat both groups of situations separately, i.e., apply widely the construction of overriding mandatory rules in relation to consumer insurance; on the other hand, in case of entrepreneurs possible refusal to apply foreign norms compromising the protective principles of German insurance law should be based on the public policy clause. The proposed division into norms protecting public

[128] Judgment of 17 October 2013, Unamar, C-184/12, EU:C:2013:663, paragraph 50.

[129] CJEU Judgement 31 January 2019, C-149/18, Agostinho da Silva Martins v. Dekra Claims Services Portugal SA.

[130] Piroddi (2008), p. 606.

[131] Zachariasiewicz (2010), p. 22; Zachariasiewicz (2013), pp. 266–267.

interests (being the content of "overriding mandatory rules") and norms protecting merely individual interests (which should be eliminated *a priori* from the scope of the discussed concept) seems very attractive from the point of view of European law. It is supported especially by the quite rigorous wording of Art. 9(1) of the Rome Regulation, referring to state interests. It is not excluded that the status of "overriding mandatory provisions" can be assigned to national law norms intended to protect collective policyholder interests under Art. 9 of the Rome I Regulation.[132]

In French judicial practice, a liberal approach is outlined on overriding mandatory provisions in cross-border relationships. It is assumed that both provisions enacted in the interest of the state (*lois de police de diréction*) and provisions which protect individual interests (*lois de police protectrice*) may potentially amount to overriding mandatory provisions. By way of example, norms governing the language of an insurance contract are perceived as such overriding mandatory rules. It is indicated that provisions which implement the principle prohibiting the insured party's enrichment (rules on the consequences of over-insurance or "multiple" insurance) may also count as overriding provisions.[133] The status of overriding mandatory provisions may also be granted to rules which prohibit insurance of certain specific types of risk. The function of such provisions may be performed by norms containing general clauses to be applied by national insurance supervision authorities while permitting introduction of new insurance types on the domestic insurance market.[134] As a result, if a given norm protects both public and private interests, it may be recognized in a particular case—as long as the other prerequisites are met—as an overriding mandatory provision in the understanding of Art. 9 of the Rome I Regulation. Moreover, in the case law of the Court of Justice, one may speak of liberal interpretation of overriding mandatory provisions. It is pointed out that provisions protecting the weaker party from abusive contractual clauses are enacted in the public interest.[135]

A good illustration of the application of the discussed type of provisions is the decision by the French Court of Cassation of 2 October 2009,[136] based on a state of affairs in which a company incorporated under the laws of France entrusted the execution of maintenance works to an entity using materials supplied by their Belgian manufacturer. As a result of detachment of one of the structural elements, the orderer was injured. The ordering party brought the case before a French court

[132] Baker and Logue (2015); or Pilich (2012).

[133] Auclair (2003), pp. 64–67.

[134] Kropka (2007), p. 147. The author discusses the general clause of protection of insured persons' interests (*Belange der Versicherten*) in German law.

[135] In the judgment of 26 October 2006 in the case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, ECR 2006, p. I-10421, the Court admitted that provisions of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ EU L 95 of 21.04.1993, p. 29) concerning unfair contract clauses form a component of the public order.

[136] Cass., Chambre civile 2, 8 octobre 2009, N° de pourvoi: 08-13149. Available in the Internet: http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT00002114 1550 [last accessed: 10 October 2017].

for compensation against the contractor. The defendant requested that the manufacturer and the latter's insurer be called on to join the proceedings as entities against which the defendant had a guarantee claim.[137] In the course of the process, the insurer invoked a clause limiting its liability which had been stipulated in the civil liability insurance concluded between the insurer and the manufacturer. That solution was in conformity with Belgian law, which governed the insurance contract. The essence of the dispute brought before the Court of Cassation boiled down to the decision if in the depicted state of affairs Art. 113-1 of the French Insurance Code[138] could be given effect as an overriding mandatory provision. According to the interpretation line adopted in case law with regard to the relatively unfortunately formulated first sentence of Art. 113-1 of the Insurance Code,[139] the insurer is liable for damages caused by mishap or reasons attributable to the insured person unless the insurance agreement expressly provides for exemptions of the insurer's liability which are rendered precisely enough to permit their understanding without any special interpretative endeavors[140] and which are of "exceptional" character in the sense that they may not result in excessively far-reaching limitation of the scope of insurance protection or affording protection which is merely illusory.[141] The Court of Cassation reached the conclusion that in the examined case Art. 113-1 of the Insurance Code should have been applied as an overriding mandatory provision, and on that basis the insurer should have been refused the right to invoke the contractual clause limiting the its liability. Such recourse to French legislation was considered justified although the insurance contract was concluded in the territory of Belgium by a company incorporated under Belgian law with an insurer of the same domicile and the liability of the contracting parties was derivative from the liability of the contractor. It is symptomatic that the Court of Cassation did not accept the argument raised by the insurer that an obstacle to the application of Art. 113-1 of the Insurance Code was the fact that the provision was intended only to protect individual interests and did not strive to protect the public interest in any way. In the justification of the discussed judgment, it was highlighted that the exclusion of liability stipulated in the insurance agreement amounted to an excessively far-reaching restriction of insurance protection as compared to the principal function which was to be fulfilled by the insurance contract.[142]

In a judgment, dated 5 March 2013, the Periguex Court of First Instance held that the provisions of Article L121-10 of the French Insurance Code relating to the

[137] This institution of French procedural law is discussed in more detail in Herzog (1967), pp. 292–293.

[138] Code des assurances. "Journal Officiel de la République française" 1978, p. 1088, modifié.

[139] The provision of Art. 113-1 first sentence of the Insurance Code reads: "Save formal (formelle) and limited (limitée) exclusions contained in the policy, the insurer shall bear the losses and damage caused by unforeseen accident or caused by the insured's fault."

[140] Cass., civ. 2e, 8 octobre 2009, n° 08-19646. Available on the Internet: http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000021140120 [last accessed: 23 October 2017].

[141] Cass., civ. 3e, 8 juin 2010, n° 09-12968. Available on the Internet: http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000022342519 [last accessed: 23 October 2017].

[142] Pacuła (2014), p. 44.

automatic transfer of property insurance in case of sale of the covered good amounted to an overriding provision of French insurance law. The court therefore disregarded English law, which was provided for in the insurance policy underwritten between an English national and an English insurer to cover a building in France, which provides that the policy is automatically terminated in case of sale of the covered good.[143]

An analysis of the written justification of the ruling gives rise to the conclusion that the application of the conception of overriding mandatory provisions was to produce the desired substantive law outcome. Following the conclusions of such analysis, it seems that that provisions with the features of *lois de police protectrices* which could be potentially recognized as overriding mandatory provisions include insurance law rules intended to protect the policyholder and the insured party and to prevent negative consequences of the inequivalent position of the parties to an insurance contract. However, a reservation should be made that the foregoing refers to provisions which serve the purpose of preserving the essence of the insurance contract or its principal functions, including predominantly the function of insurance protection. Overriding mandatory provisions, by defending specific legislative objectives, are to ensure the substantive law outcome desired from the point of view of *lex fori*, and not to level the differences between particular systems of national law. Consequently, an intervention is probable by provisions which express the fundamental principles of insurance law, including the good faith principle based on mutual loyalty between the parties to an insurance agreement[144] and the principle of compensation[145] in a situation where these are not cherished by *lex causae*. Parties to an insurance contract should consider the possibility of effect being given to legal provisions imposing the requirement of the insured person's consent to the commencement of insurance protection granted under a life insurance. In case of artificial intelligence, we may have to do with provisions which should apply regardless of the law applicable to a given relationship. One example are traffic accidents caused by autonomous vehicles. Such provisions are given effect beside the law relevant to the relationship. Those are overriding mandatory provisions.[146] For example, some French scholars declare that only the following provisions should be considered as overriding mandatory provisions: (a) Article L310-2 of the French Insurance Code, which provides that insurance contracts with insurers not licensed in France are null and void; (b) Article L113-1 of the French Insurance Code, which condemns willful misconduct; (c) the general rule, which prohibits criminal liability insurance; (d) Article L113-6 of the French Insurance Code, which prohibits the unilateral termination of policy in the event of bankruptcy od liquidation of the insured; (e) the principle that benefits of the policy cannot exceed the insured's loss.[147] Part of the

[143] Study on the law applicable to insurance contracts, Final Report, https://op.europa.eu/s/olTo.

[144] More on that in Auclair (2003), pp. 64–67.

[145] Dubuisson (2004), pp. 742–743.

[146] Świerczyński (2019).

[147] Study on the law applicable to insurance contracts, Final Report, https://op.europa.eu/s/olTu.

Italian legal literature pointed out examples. At first example might be rules states have adopted to assure the preservation of the "indemnity character" of insurance contracts. The need to avoid that insurance contracts can change from a private system of indemnity from risks to a mean for profit seems to fall with the definition of those rules that define the social and economics shapes of a country. If insurance contracts were—for the policyholder or the beneficiary—to become means for profits, it could be believed policyholders and beneficiaries would be induced to somehow favour the occurrence of the event they seek relief from, with negative and detrimental consequences, for example, in the field of life insurance. A second example, already discussed in the legal literature, might concern those substantive insurance law rules limiting the insurer's dominating position in the insurance contract.[148]

10 The Application of "Specific Provisions" Relating to a Given Compulsory Insurance (Art. 7(4) Letter (a) of the Rome I Regulation)—Public Law Aspects

Key importance for the understanding of the normative content the first sentence of Art. 7(4) letter (a) of the Rome I Regulation attaches to the question if the "specific provisions" mentioned in that provision are rules mandatorily applied in the conflict of laws sense or overriding mandatory provisions. At this point, one should be guided by the criterion of the conflict of laws basis for application of the provisions given effect beside the law generally applicable to the contract.

The answer to that question is problematic. The source of doubts is the structure of Art. 7(4) letter (a), first sentence. The hypothesis of first sentence of Art. 7(4) letter (a) is that the law of a Member State of the European Union imposes in reference to a specific type of insurance the obligation to insure. The disposition is the requirement that the parties to the insurance contract follow "specific provisions" on that compulsory insurance type as provided for in the EU Member State whose law prescribes the obligation to insure. In addition, the discussed norm has a sanction in the form of finding an insurance contract which does not comply with the "specific provisions" as non-complying with the insurance obligation. This makes the norm a blanket provision, introducing negative legal consequences of acts which do not comply with very generally named provisions of law. Such rules are "specific provisions relating to that insurance."

It must be resolved if the first sentence of Art. 7(4) letter (a) contains, beside a norm of unified substantive law, a conflict of laws rule requiring to apply "specific provisions relating to that insurance" as provisions mandatorily applied in the conflict of laws sense or if the expression "specific provisions relating to that insurance" should be referred to overriding mandatory rules.

[148] Dominelli (2016).

The source of problems in the establishment of the conflict of laws nature of the "specific provisions" referred to in the first sentence of Art. 7(4) letter (a) is also the relation of the discussed norm with the provisions of the Directive 88/357 (Present: Directive 2009/138). Namely, Art. 8(2) of the Directive 88/357 (Present: Art. 179 (2) of the Directive 88/357) is supplemented by Art. 8(5) letter (a), first indent, of the Directive 88/357 (Present: Art. 179(5) letter a of the Directive 2009/138). Under that provision, "Member State shall communicate to the Commission the specific legal provisions relating to that insurance." It follows that in the provisions of the Directive 2009/138 the concept of "specific provisions relating to a given compulsory insurance" is explained by the contents of notifications made by the Member States introducing the insurance obligation.

Article 179(2) letter (a) of the Directive 2009/138 does not contain any conflict of laws norm. In the same way, it does not belong to "provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations" in the understanding of Art. 23 Rome I. This does not mean, however, that the provision of the Directive is considered as a part of interpretation of the first sentence of Art. 7(4) letter (a). The concept of "specific provisions" in the understanding of the first sentence of Art. 7(4) letter (a) should be assigned autonomous meaning. First, this is supported by the absence in Art. 7 of a norm referring to Art. 179(2) letter (a) of the Directive 2009/138 for the sake of clarifying of the term "specific provisions." Second, the acceptance as authoritative for the clarification of the term "specific provisions" of the contents of notifications made by Member States under Art. 179(2) letter (a) of the Directive 2009/138 would contradict the idea of harmonization of private international law. The content of the notification is arbitrarily decided by each Member State. This may lead to an excessively wide definition of the range of "specific provisions," e.g., by inclusion among them of general provisions on contractual obligations. Moreover, the contents of notification may be decided by such factors as legislative technique or tradition adhered to in the national legal system of a specific Member State. The sources of law on a given type of compulsory insurance may comprise either comprehensive regimes, including in the area of substantive law on the insurance contract, or rules referring to general legal provisions on the insurance contract or to the law of contractual obligations.

The analysis of Art. 7(4) letter (a), first sentence, leads to the conclusion that "specific provisions" belong to the category of rules mandatorily applied in the conflict of laws sense, and not to the category of overriding mandatory provisions.

The requirement of compliance by the parties to insurance contracts with "specific provisions" of a given Member State relating to specific types of compulsory insurance points to the conclusion that the first sentence of Art. 7(4) letter (a) contains the requirement of applying "specific provisions" beside the law generally applicable to the contract. This statement leads to the conclusion that the discussed provision contains the following conflict of laws norm: to insurance contracts in respect of which insurance obligation is introduced by the law of an EU Member State specific provisions of the Member State governing that compulsory insurance shall apply. Further specification of the content of that conflict of laws

rule necessitates interpretation of the term "specific provisions." The provision of Art. 7(4) letter (a), first sentence, allows, in my opinion, to make the two following conclusions in his regard. First, "specific provisions" may only be mandatory provisions (*ius cogens*). This follows from the fact that non-compliance with the "special provisions" under the first sentence of Art. 7(4) letter (a) gives rise to the consequence of non-compliance with the insurance obligation. Second, the formulation "the insurance contract shall not satisfy the obligation to take out insurance" suggests that "specific provisions relating to that insurance" are not all mandatory provisions governing a specific type of compulsory insurance but only such norms that form the contents of the statutory insurance obligation. Such provisions will be, e.g., norms on the minimum guarantee cover. Their application does not depend on whether they relate to two or more compulsory insurance types introduced in a given Member State. It is essential that "specific provisions" are rules forming the content of the statutory insurance obligation, which allows to narrow down the designation scope of the analyzed conflict of laws rule, characteristic of a conflict of laws rules designating mandatorily applied provisions in the conflict-of-law sense. At the same time, not every norm forming the content of the statutory insurance obligation will be recognized, under Art. 9, as overriding mandatory rule.

It must be concluded that from the first sentence of Art. 7(4) letter (a) the following conflict of laws rule can be derived: to the insurance contract in respect of which the insurance obligation has been introduced in the law of a Member State of the EU, mandatory rules of that Member State shall apply specifying the content of the insurance obligation relating to that compulsory insurance (specific provisions). This norm is a complete norm. It applies mandatorily. It curtails the consequences of designation of the law generally applicable to the contract either by a conflict of laws rule on the choice of law or conflict of laws rule in the absence of choice of law. Its application does not depend on the comparison of the provisions of the law generally applicable to the contract with the specific legal provisions of the Member State introducing the insurance obligation.

There are also other arguments against recognising the first sentence of Art. 7 (4) letter (a) as overriding mandatory provision. First, if the legislator, when drafting Art. 7(4) letter (a), first sentence, had that category of norms in mind, the legislator would use the expression "overriding mandatory provisions" instead of the term "specific provisions." Second, Art. 7(4) letter (a) refers both to "specific provisions" of the conflict-of-law *lex fori* and to "specific provisions" of a Member State other than the conflict-of-law *lex fori*. However, under Art. 9(3), overriding mandatory provisions of a Member State different from the conflict of laws *lex fori* are given effect only if in that Member State "the obligations arising out of the contract have to be or have been performed." The place where the obligations arising out of the contract have to be or have been performed is not identifiable as regards the fulfilment of a public law obligation to conclude a compulsory insurance contract.[149]

[149] Kropka (2010), p. 231.

The first sentence of Art. 7(4) letter (a) is supplemented by the second sentence of that provision. The disposition of that sentence contains the requirement to apply the "specific provisions" referred to in Art. 7(4) letter (a), first sentence, prior to the law of the Member State in which the risk is situated, designated as the relevant law under the applicable conflict of laws rules under Art. 7(3), first indent, letter lit. (a) (choice of law) or Art. 7(3), third indent (where the applicable law has not been chosen). Such conclusion assumes that Art. 7(4) letter (a), second sentence, shall not apply to situations when the legal provisions of the Member State introducing the obligation to insure and/or legal provisions of the Member State where the risk is situated are given effect as overriding mandatory provisions.[150]

In the same way, Art. 7(4) letter (a), second sentence, contains a conflict of laws rule demarcating the application spheres of "specific provisions" of law of the Member State introducing the insurance obligation and the law of the Member State where the risk is situated, designated as the relevant law. This norm is not a conflict of laws rule of second degree, demarcating the areas of application of other conflict of laws rules under the Rome I Regulation. It does not provide that the conflict of laws rule designating as relevant the law of the Member State where the risk is situated shall not apply when another conflict of laws rule applies under which effect is given, beside the law relevant to the contract, to "specific provisions" on a given compulsory insurance of the country imposing the insurance obligation. The conflict of laws rule encapsulated in Art. 7(4) letter (a), second sentence, resolves only about the course of action when the provisions of law of the Member State where the risk is situated, as the generally applicable law, contradict the "specific provisions" relating to a given type of compulsory insurance of the Member State introducing the insurance obligation, by deciding that the latter norms shall prevail.

A contradiction between the law of the Member State where the risk is situated and norms of the Member State introducing the insurance obligation comes into play only when the application of law of the Member State where the risk is situated and of the "special provisions" of the Member State imposing the obligation leads to different consequences.[151]

It follows from the above considerations that the public law insurance obligation affects the problems of establishing the applicable law.

[150] Kropka (2010), p. 228.

[151] Kropka (2010), p. 234.

11 GDPR in Insurance and Private International Law

Important changes in the insurance business were introduced by IDD[152] and GDPR.[153] It seems that, in practice, application of IDD and GDPR may give rise to certain problems since both legislative acts seem to be based on different assumptions. In case of IDD, one of the most crucial elements is the obligation to identify the customer's demands and needs. On the other hand, the Regulation requires that the least possible amount of personal data be collected to protect rights and freedoms of natural persons.[154]

Disputes concerning personal data breaches on international scale are complex. Despite the application of new, harmonized UE provisions on the protection of personal data (GDPR), the European Union has not filled the gap in the Rome II Regulation[155] relating to the protection of privacy (Art. 1(2) letter (g)). GDPR contains only rules in the area of international civil procedure (Art. 79 and following). On the other hand, there is no complementary conflict of laws regime of liability for violating the terms of personal data protection.

It is not an easy task to designate the law applicable to specific questions relating to personal data protection. Difficulties follow form the following reasons: (1) exterritorial applicability of GDPR (Art. 3 GDPR), wherein doubts relate both to the specification of the exterritoriality scope and its impact on the process of designating the applicable law; (2) mixed, public and private nature of GDPR provisions; (3) use in GDPR of new criteria (establishment, targeting of activities, monitoring of the behaviour of data subjects) in establishing the scope of GDPR's application, which gives rise to a question about concurrence of such criteria with connectors (e.g., breaching party's domicile, place of violation) found in conflict of laws rules on non-contractual liability; (4) introduction in GDPR of rules in the area of international civil procedure, especially on national jurisdiction, favourable to persons asserting claims against data controllers, which, in conjunction with a missing clear conflict of laws regime, increases the risk of forum shopping (manipulations of the applicable law) by data subjects (injured parties); (5) the abovementioned lack of harmonized conflict of laws rules for privacy commitments, whereby in case of Member States of the European Union, privacy commitments were expressly exempted from the scope of application of the Rome II Regulation;[156] this means

[152] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, p. 19, as amended).

[153] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 199, p. 1).

[154] Pokrzywniak (2018), p. 150.

[155] Pazdan (2009), p. 23.

[156] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, pp. 40–49).

that depending on the body examining the case, different national law may apply (regarding matters not expressly regulated in GDPR, e.g., amount of compensation for violation of privacy);[157] (6) the need to assess which of GDPR's provisions are mandatory overriding rules.

There is no doubt that private international law aspects were seriously neglected in the works on GDPR.[158] Emphasis was put on specifying GDPR's exterritorial applicability (Art. 3).

The basic conflict of laws rule under the Rome II Regulation is the principle of applying the law of the country in which the damage was sustained regardless of the country where the harmful event took place or the country or countries in which the event's incidental consequences occurred (Art. 4(1)). Application of that rule in relation to GDPR violations should not raise any major doubts. Moreover, the Rome II Regulation contains additional supplementary rules. In the first place, the court should check if the parties made a valid choice of applicable law, according to the preconditions under Art. 14 of the Rome II Regulation. Also, that solution has advantages in case of claims for violating the rules on personal data protection. It accounts for party autonomy. In the lack of a valid choice of law, it must be checked if there are preconditions to applying rules on separately addressed torts/delicts (Art. 5-9 of the Rome II Regulation). When the answer is negative, and it is so in case of violating the principles of personal data protection, it becomes legitimate to recourse to the general norms under Art. 4 of the Rome II Regulation, starting from the rule under (2) (applicability of the parties' common personal law which, by the way, will be a solution consistent with the rules of jurisdiction under Art. 79 and following GDPR). Only in the absence of a common personal law, one should apply the basic norm under Art. 4(1) providing for applicability of the law of the country where the direct damage occurred. In both above situations, it is expedient that the court establishes if it is possible to correct the designation of law under Art. 4(3) of the Rome II regulation.[159]

12 Conclusions

The purpose of the above considerations was to indicate the mutual interpenetration between EU provisions of public and corporate law, as well as the impact of national provisions of the same type on private international law. The meeting point between public and private insurance law is characterized by the fact that the traditional distinction between private law norms (as law protecting predominantly the private interests of individuals—parties to civil law relationships) and public law norms (as law of the state protecting common interests), originating from nineteenth

[157] Nagy (2012), pp. 251–296.
[158] Czepelak (2010), p. 705 et seq.
[159] Świerczyński (2020), p. 53.

century liberalism, becomes increasingly problematic. Public law regimes increasingly often penetrate the areas of legal insurance relationships previously considered an exclusive domain of private law.[160] In doing so, they are intended both to protect general interests (social and economic or political)[161] and to protect "private" interests. Among others, this refers to: antitrust, administrative sanctions, insurance supervision, information duties,[162] supervision of insurance activities through public law, protection of insured in group insurance,[163] artificial intelligence in insurance, rules specifying the criteria of admission to specific professions (brokers, agents, insurance distributors).[164] At the same time, there is a growing awareness that those areas (as, for example: contractual relationships, delicts (torts)) have a "public" significance. Private law, more and more clearly, also realizes "public" interests[165] because norms protecting "private" interests are also relevant to the social or economic organization of the state.[166] At this point, one should point especially to the rules protecting "weaker" parties to civil law relationships, both in contractual and other relations (delictual tortious).[167] This is the case since private law also fulfils "public" functions—by provisions forcing the parties of civil law transactions to also consider cross-community or general economic interests. As a result, it becomes increasingly difficult to clearly set a demarcation line between public and private interests and, in the same way, between public and private law rules,[168] especially that legislators relatively rarely invoke that distinction expressly and do not introduce its clear criteria.[169]

It must be noted that the division between public and private law provisions, fading in certain legal systems, retains its importance in the context of international relationships. Whereas in purely "national" relationships, the generally formal qualification of a legal norm is irrelevant to the establishment of its preconditions, in international relations the problem of a norm's nature becomes of utmost importance. Derogation of mandatory private law rules of a legal system connected with a given relationship is, one way or another, effected through conflict of laws choice of law or objective designation of the applicable law according to the criterion applied by the judge of the forum.[170] However, such result does not have to be the case in regard to public law norms. This follows from a different "level" of public interest reflected in private law norms and public law norms. Therefore, a public law norm

[160] Merryman (1969), p. 3 et seq.
[161] Zachariasiewicz (2014), p. 447.
[162] Fras (2019b), pp. 113–143.
[163] Fras (2019c), pp. 1–23.
[164] See, e.g., Zachariasiewicz (2014), p. 446 et seq.
[165] See, e.g., Baade (2015), p. 435.
[166] Blessing (1999), p. 46 et seq.
[167] Martiny (2006), p. 87 et seq.
[168] Salomon (2008), p. 1738.
[169] See, e.g., Nowacki (1992), p. 30; Szczepaniak (2015), p. 4.
[170] Philip (1982), p. 92.

may "force" its application, regardless of the law governing the legal relationship. It was assumed that norms protecting public policy have a territorial effect.[171] A similar consequence attaches to the observation that a given public law rule has an "overriding" nature if its application involves a criminal or administrative sanction, which is always strictly "territorial."[172]

Moreover, insurance contact law is harmonized to a certain degree by directives on consumer contract law covering consumer insurances. Mention is to be made of Directive 2002/65/EC (Distance Marketing of Financial Services)[173] and Council Directive 93/13/EEC (Unfair Contract Terms).[174] Council Directive 93/13/EEC (see article 4 para. 2), Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution provide EU minimum standards of client protection and allow Member States to adopt more protective measures. Other directives outside the scope of client protection, such as the Directive 2000/31/EC (Electronic Commerce),[175] Directive 2011/7/EU (Late Payment)[176] and Directive 2004/113/EC (Gender Equality)[177] also have an impact on insurance contract law. The provisions of these directives often have mixture nature—public and private.

As opposed to Art. 7 Rome I, in EU legislation the insurance customer is considered a protected party under sectoral directives and regulations. 2016/97 IDD is inconsistent in the specification of the group of parties covered by the protective regime. In Recital (3), the party indicated as protected is the customer, whereas Recital (10) uses interchangeably the terms 'consumer' and 'customer:' "Current and recent financial turbulence has underlined the importance of ensuring effective consumer protection across all financial sectors. It is appropriate, therefore, to strengthen the confidence of customers and to make regulatory treatment of the distribution of insurance products more uniform in order to ensure an adequate level of customer protection across the Union." However, the Directive does not contain any legal definitions of those terms.

[171] von Hoffmann and Thorn (2007), p. 61.

[172] Ellger (2012), p. 1231.

[173] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC, OJ 2002 L 271/16.

[174] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

[175] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178/1.

[176] Directive 2011/7/EU of 16 February of the European Parliament and of the Council on combating late payment in commercial transactions (recast), OJ 2011 L 48/1.

[177] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

Since insurance contracts may have an investment element, one should also address the concept of investor. The legal definition of retail investor was included in Regulation 1286/2014[178] (hereinafter PRIIP), whereby that legislative act refers to legal definitions of clients as provided in other directives, depending on whose clients they are and what kind of services (goods) they buy, i.e., whether that is a packaged retail or insurance-based investment product. Under Art. 4 item 6, "retail investor" means:

- a retail client as defined in point (11) of Article 4 (1) of Directive 2014/65/EU
- a customer within the meaning of Directive 2002/92/EC, where that customer would not qualify as a professional client as defined in point (10) of Article 4 (1) of Directive 2014/65/EU

At the time being, consistency is missing, both of the EU and national legislators, in the specification of the subject of public law protection. In the provisions on the insurance market, the EU legislator does not introduce the customer's legal definition although that term is used, which is a serious shortcoming and gives rise to interpretative doubts about the scope of protective measures. In Regulation 1094/2010,[179] the terms customer and consumer can be found; also, IDD contains both terms and only once uses the concept of professional or retail customer (Art. 30 (6) item (c)).

An exception in this regard is the PRIIP Regulation devoted to a narrow aspect of insurance activities—insurance contracts with an investment element. For that reason, the Regulation contains a legal definition of retail investor, meaning a "customer within the meaning of Directive 2002/92/EC (currently Directive 2016/97), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of Directive 2014/65/EU."[180]

Bearing in mind the indicated terminological differences, the existing legislative framework needs straightening. It seems legitimate to introduce, for the EU legislation concerning the entire financial market, a uniform customer definition, introducing a dichotomous division between professional and non-professional customers. This is especially substantiated by the existence of so-called hybrid products, covering services of different financial market sectors and the related systemic threat.

[178] Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents (OJ L 2017.100.1).

[179] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) (OJ L 331, 15.12.2010, pp. 48–83).

[180] Art. 4(1) item 10 of the Directive 2014/65/EU: 'professional client' means a client meeting the criteria laid down in Annex II.

On legal relationships which are especially "susceptible" to public law regimes, the delimitation of the spheres of influence between private and public law is—in the opinion of certain authors—becoming groundless.[181] At the same time, it is argued that nowadays the distinction between private and public law is still of great importance[182]—especially for the law applied in practice—because of the need to demarcate between the spheres of application (among others, with a view to the competences of appropriate authorities) of rules belonging to the former or the latter branch of the legal system.[183] When considering this issue, it should be noted, in the first place, that the distinction between private and public law norms is not consequently followed in all legal systems, and the sense of introducing such division is often put into question.[184] It must be noted that the differentiation between public and private law provisions, although blurred in certain legal systems, retains its validity in reference to international relationships. While in purely "national" legal relationships the formal qualification of a legal norm is generally irrelevant to the establishment of preconditions to its application, in international relations the question of the norm's nature assumes greater significance. Derogation from mandatory private law provisions forming a part of the legal system connected with a given relationship is, one way or another, effected by conflict of laws designation of law or by objective designation of the applicable law according to the criterion applied by the judge of the forum.[185] However, such consequence does not have to be the case with regard to public law norms. This follows from a different "level" of public interest reflected in private and public law norms. As a result, a public law norm may "force" its application regardless of the law governing the legal relationship. Therefore, it was assumed that norms protecting the public policy have a territorial effect.[186]

Nowadays, the most popular criterion is that of interest (public/private) realized through the norm, however, even this criterion is criticized,[187] for example, because the demarcation between such interests—as mentioned above—is sometimes difficult.[188] Besides, more importantly, even if it were possible to distinguish public law provisions on that basis, all of them are a manifestation of certain "common" interests and are intended to protect such interests. The criterion of "interests," in reference to "overriding" mandatory rules of private or public law, implies drawing attention to the purposes realized by the state through specific legal regimes. Consequently, this refers to provisions which are so important to ensure consistence

[181] See, e.g., Harlow (1980), p. 241 et seq.

[182] Its importance even grew in places where it had not been recognized before, see Jurgens and van Ommeren (2012), p. 172 et seq.

[183] See Szczepaniak (2015), p. 13.

[184] Szczepaniak (2015), p. 6.

[185] See, e.g., Philip (1982), p. 92; von Biberstein (1981), p. 96.

[186] See, e.g., von Hoffmann and Thorn (2007), p. 55.

[187] Maier (1982), p. 289; Lowenfeld (1979), p. 335.

[188] See, e.g., Kominos (2002), p. 477 et seq.

of the state organization that they must apply, regardless of the law governing the given legal relationship under "ordinary" conflict of laws rules. Therefore, not every purpose of a "mandatory" provision (including public law rules) necessitates its "overriding" application. This refers to special purposes, of great political, social, economic, or moral significance, that is, purposes which are also protected by public order clauses. In this connection, it is pointed out that it is useful to consider, in the process of establishing "importance" of a given provision, such purposes (values) that may be considered an expression of the principles of international public policy. Therefore, attribution to any specific rule of the "overriding" mandatory nature is a consequence of concluding that the values realized by the provision reflect the principles of transnational *ordre public* or of the European public policy.[189] Such solution was adopted in Art. 9(1) of the Rome I Regulation I.[190]

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[189] See Zachariasiewicz (2014), p. 442.

[190] C.f. judgment of the Court of Justice of 23.11.1999, C-369/96, in the case Arblade. ECR 1999, p. I-8453.

Court of Justice of the European Union, judgment of 23.11.1999 in cases C-369/96 and C-376/96 (Arblade). ECR 1999, I-8453
Court of Justice of the European Union, Case C-381/98 Ingmar versus Eaton. ECR 2000, I-9305
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